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CMJA, Uganda House, 58-59 Trafalgar Square, London WC2N 5DX, U-K. Tel: +44 (0)207 976 1007

Fax: +44 (0)207 976 2394 Email: [info@cmja.org](mailto:info@cmja.org) website: [www.cmja.org](http://www.cmja.org)

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It was a privilege to read recently an address given by the Chief Justice of one Commonwealth country at the opening of the legal year. Predictable enough – though surely well deserved – was his tribute to the judges for ‘their fierce independence, unassailable integrity and above all unswerving commitment to justice for all’. Less predictable were his sobering descriptions of society in his country. He spoke of senseless killings, well-targeted kidnappings, rapes and robberies, and of the insidious damage done to the minds of the people over the years. What was once regarded as abhorrent and unacceptable had become commonplace, part of daily life. No wonder there was a widespread feeling of desperation and despair.

Not every Chief Justice would see his or her society in those terms, but there is a sense in which judges and magistrates are in a front line with a painfully clear view of the troubles in their nations and communities. In every part of the Commonwealth, judges need to cling to the high ideals of their judicial calling and be vigilant in protecting their independence: in Canada, a new *Judges’ Handbook* addresses judicial independence and judicial governance in the provincial courts. Equally, judges everywhere must recognise the realities of the societies in which they work.

This issue of the *Journal* reflects that mix of high ideals and realism. There are a number of references to the Latimer House Guidelines on the relationship between the three branches of Government. Richard Nzerem sets out some of the background with especial reference to Commonwealth Africa. The Guidelines were the subject of a conference in Nairobi last April, and Karen Brewer’s paper on judicial ethics was written for that occasion.

James Allan asked his audience at the Commonwealth Law Conference whether we could afford to leave human rights to the judges. He argues, in a lively paper, for a negative answer. His assertion that Australia is one of the most desirable places in which to live will be applauded by those who know and love that country, but it is more surprising to discover that he attributes that desirability to the absence of a bill of rights. There is no

denying that bills of rights add to judicial power. They also leave the judges exposed to criticism, sometimes unfair and politically motivated, as they determine highly controversial issues.

Criticism of the courts system for its delays is often entirely fair. Carl Barr analyses the causes of delay, and his diagnosis is relevant to the conditions in too many Commonwealth member countries. He argues that the colonial inheritance gave not only the blessings of the common law but also a court system with built-in weaknesses, still to be found where reforms have not been introduced.

Four shorter items complete what we hope is a full and very interesting issue. Keith Hollis writes on judicial education, perceiving some changes in the way the courts are used. We can often learn from others’ successes and failures; in that spirit we print Lord Justice Brooke’s account of how computers were introduced to the lives of judges (outside the court room) in England. The affairs of Tonga may attract little attention in the world’s press, but readers will be interested in Samiu Palu’s account of the recent national strike and the stance of the Judiciary. Finally, a note is included of a decision in South Africa on the judicial independence enjoyed by magistrates and its implications.

This editorial would not be complete without mention of two significant meetings. One was the triennial meeting of Commonwealth Law Ministers, held (like the CMJA’s conference earlier in the year) in Accra. The range of issues discussed was notable: juvenile justice, law reform agencies, the regulation of broadcasting, gender issues and human rights, the law of the sea, improved co-operation in dealing with transnational crime, and legal education are just a few of the items. The whole occasion was a striking sign of the importance of Commonwealth activity in the legal field, including of course the judiciaries of its member countries – and also the non-common law countries such as Cameroun, Mozambique and Sri Lanka. And the other meeting is still to come: the CMJA’s own Toronto conference next year, which promises to be both relevant and enjoyable.

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

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## OBITUARY: SOLON NIKITAS

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*We regret to report the recent death of Solon Nikitas, a distinguished Cypriot judge and a supporter for many years of the work of the CMJA.*

Solon Nikitas was born in Limassol, Cyprus in October 1937. He worked for the Nicosia Chamber of Commerce before deciding to study law in England and qualifying as a barrister. From 1961 to 1971 he maintained a private practice as a lawyer in Nicosia. He was appointed as a District Judge on 1 January 1971. He was promoted to Senior District Judge on 10 October 1980, and to President of the District Court on 1 January 1982. On 19 November 1988 he was elevated to the Supreme Court, where he served until 27 March 2003 when he was appointed Attorney General of the Republic of Cyprus, a post from which he resigned in April 2005.

He was elected as a member of the Council of the CMJA in 1994 and as Regional Vice President for the North Atlantic and Mediterranean Region of the CMJA in 1997. He resigned from this position on his appointment as Attorney General of the Republic of Cyprus but continued to support the aims of the CMJA. As Regional Vice President, he organised the very successful follow-up conference on the Latimer House Guidelines in

Larnaca, in October 1998 on “The Role of the Judiciary in Developing and maintaining a vibrant human rights environment in the Commonwealth”. He participated in many conferences all over the world and gave lectures and speeches on several legal subjects during his long and distinguished legal and judicial career.

Solon had been battling cancer for some years now, a little-known fact outside an intimate circle. He passed away on 23 October 2005. At his funeral service, held on 24 October, the President of the Supreme Court, Justice Christos Artemidis, said of Solon “You will be remembered by our society for your excellent attributes: your honesty, independent judgement and unique integrity.”

Justice Petros Artemis, Council Member of the CMJA said of Solon

*“Solon was one of the most cultured persons I have ever met. I have known him since 1972 and I can testify as to his qualities. He was a lover of the Arts and a regular visitor of museums and galleries, both at home and abroad. He was a ‘student’ of philosophy and literature, and his wide knowledge of the subjects was evident in all his public speeches and addresses. As a judge, he was characterized by his independence of mind and his integrity. The rule of law was uppermost in his conscience and in his mission he was never ‘a respecter of persons’ but always a servant of the law.”*

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# HUMAN RIGHTS – CAN WE AFFORD TO LEAVE THEM TO THE JUDGES?

Professor James Allan

Garrick Professor of Law, University of Queensland. A paper delivered at the Commonwealth Law Conference, September 2005 and reproduced with the kind permission of the Commonwealth Lawyers Association.

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All, or almost all, defences of judicial review under a bill of rights, (be it a strong, entrenched, constitutionalised model like Canada's or a weak, statutory version like New Zealand's or the U.K.'s) rest on some sort of thinking as follows:

*It is one thing to turn to majority rules and voting and letting the numbers count to decide questions of appropriate marginal tax rates or how much to spend on defence or whether to build a new highway or bridge. Majoritarianism is even acceptable, perhaps, as a method of determining whether to spend limited resources on schools or on hospitals or whether to go to war or what percentage of gross national product should be given in foreign aid. But on contested moral issues, issues having to do with the treatment of minorities or the resolution of issues of principle and of right – such as what equality demands for incarcerated prisoners or those wishing to marry or what freedom of religion dictates when it comes to funding schools or what to wear at school or what may be ingested as part of rite and ritual – majoritarian decision-making will not do. We, as a society, must decide these matters on moral grounds. We need a non-elective process. We need impartiality. We need sensitivity to the best elements of the competing moral positions, not judgments based on self-interest and calculations fuelled by the concerns of pocketbook and prejudice. In short, we need judges and judicial review not elections and letting the numbers count.*

I think that paragraph not unfairly sums up the views of many, probably most, self-styled human rights advocates – lawyers, legal academics, N.G.O. officials, judges, what have you. It conveys the widespread belief that

elective majoritarian institutions cannot be trusted to take rights seriously, but that non-elective institutions, more particularly committees of ex-lawyers, can be so trusted. I hope, too, that it conveys just a hint of the moral self-righteousness that almost always attaches to those who proclaim their steadfast attachment to holding politicians accountable to human rights standards and norms. Disdain for democratic decision-making and a sort of noblesse oblige elitism are never too far below the surface.

Certainly the various human rights conferences and sessions I have attended over the years have all had one thing in common. Every single one of them has had the feel of a Salvation Army revivalist meeting, the air being thick with a strong sense of self-satisfaction and the doing of God's work (though that comparison is probably unfair to the Salvation Army, which clearly does accomplish much good works).

Some writers clearly pre-suppose some sort of a division between those who care not a whit for rights and those whose entire beings are passionately focused on upholding and advancing them. But in the democratic world such a division is patent nonsense. No one professes to be wholly against rights or to say rights are unaffordable.

## Why rights?

True, some people understand rights instrumentally, as a means to some further good such as equality or liberty or justice. For them, the right to free speech, say, or to freedom of religion is very much something that is desirable and important and, yes, affordable, but its value lies in the good consequences that flow from living in a society that allows one to criticize the government or to practice the requirements of one's religion. These rights, and others, are not goods-in-themselves; they

are goods because they lead on to greater human happiness or welfare or equality or freedom. From that instrumental grounding, however, it simply does not follow that rights are not valued or not valued very much.

Of course for some other people rights *are* seen as inherently good, as goods-in-themselves whatever the consequences they may engender. The idea here is that each human being simply has basic rights. Regardless of other aims, goals, duties or even fairly horrendous long-term consequences to the cumulative welfare of society, certain basic entitlements or protections just are mandated. On this non-instrumental view, rights rest on some sort of political morality that simply, and absolutely, refuses to look behind the claim to rights. The basic currency of these sort of moralities is rights themselves; they are the starting point. Adherents will not, or logically cannot, answer the question ‘Why are certain rights good or desirable?’ in terms of some other end as to do so would be to collapse their goods-in-themselves or strong rights thinking into an instrumental or weak rights sort of thinking as outlined above.

My point here, however, is simply that both sorts of thinking about rights – the non-instrumentalist, Kantian, Dworkinian, natural law varieties *and* the instrumentalist, Benthamite, anti-natural law varieties – take rights seriously. They both do. Talk of not being able to afford rights seriously distorts where the main debate is occurring. That debate is *not* between some group that says we can afford rights (no doubt while being portrayed in angelic dress and on the correct side of some unfolding Whiggish history) and some other group that says we cannot afford rights.

Rather, the live and active debate about rights is occurring between, on the one hand, those who seek (or who have successfully sought) to have the interpretation and elaboration of rights and what they do and don’t demand handed over to unelected judges (let’s be honest, to committees of ex-lawyers) and, on the other, those who resist this trend – those who believe rights are important but that their enumeration and elaboration should rest with the democratically elected representatives of the people.

## Why judges?

The real, live, important debate about rights is between those who favour some sort of bill of rights (and the judicial review of legislation it drags with it, whether a statutory or constitutionalised model) and those who oppose bills of rights (in the context of a functioning democracy). Of course, someone who is adamantly opposed to a bill of rights in, say, Australia or New Zealand or Canada may nevertheless favour one in Hong Kong. Context is never irrelevant and if the choice is between social policy-making by unelected Hong Kong judges and social policy-making by unelected members of the National People’s Congress of the PRC, following the orders of some politburo, few would seriously prefer the latter.

Hence the title to my paper. No one, I take it, will be surprised to hear that my answer to ‘Human Rights – Can We Afford to Leave Them to Judges?’ is ‘no’. I am a strong critic of bills of rights and have argued that judges do not do a noticeably better job protecting rights. That is, on a consequentialist or utilitarian measure of best outcomes, there is no persuasive evidence for thinking unelected judges do a better job than do elected legislators in drawing the contested and debatable social policy lines down in the quagmire of detail that rights demand.

Meanwhile Jeremy Waldron has spent the last decade making the strong argument that rights themselves, or at least strong, non-instrumental understandings of rights, demand that we leave these decisions with elected parliaments and not with committees of 7 or 9 or 10 ex-lawyers. The ‘right to participate’, he thinks, demands that a system whereby the votes of 30 million electors beat those of 25 million or those of 325 MPs beat those of 290 MPs is preferable to one where the votes of 5 judges beat those of 4. The former treats your fellow citizens as equals and as autonomous agents. The latter does not.

## Abstract rights and social realities

Make no mistake. However much a bill of rights might be sold to the public up in the Olympian heights of moral abstractions (‘equality’, ‘due process’, ‘no unreasonable searches’ ‘freedom of religion’ etc.), it inevitably plays out down in the quagmire of social policy-making detail. Up in the

Olympian heights there is consensus or near consensus. (Hands up everyone against free speech!) Down in the quagmire of drawing contested lines when it comes to hate speech regulations and defamation provisions and campaign finance rules there is only ever disagreement and dissensus – disagreement between sincere, reasonable, smart, even nice people. And repeat the mantra ‘free speech, free speech, free speech’ as often as you like, it will not help one iota in drawing those contested, debatable lines.

So we must never forget this fact of social life, namely that other people will disagree with us about the implications of equality vis-à-vis marriage or free speech vis-à-vis campaign finance rules or freedom of religion vis-à-vis religious headscarves or even what constitutes an unreasonable search. And that disagreement will be between people who all value rights and who all think we can afford them. It will be between smart, sincere, well-intentioned, even nice people. The question bills of rights supporters must answer is why, on all these sort of intensely debated moral issues, the views of judges should be made the presumptively correct ones. Even that great supporter of unelected judges, Ronald Dworkin, concedes that under such instruments on ‘intractable, controversial, and profound questions of political morality that philosophers, statesmen, and citizens have debated for many centuries [all of the rest of us non-judges will just have to] accept the deliverances of a majority of the justices, whose insights into these great issues is not spectacularly special’.

### A case study: New Zealand

Now this being a law conference I am only too conscious that I need soon to start mentioning some cases and the more the better, if for no other reason than to make most of you comfortable. So here goes. Here’s a brief survey that I hope will give a flavour or hint of what’s wrong with bill of rights adjudication.

Let’s start with statutory bills of rights. I’m extremely familiar with New Zealand’s so I’ll begin there. It is beyond dispute that in 1990 New Zealand opted for an enervated, statutory Bill of Rights Act that on its face even lost out to past inconsistent statutes. Section 4 of the Act provides:

*‘No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights), -*

- (a) hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or*
- (b) decline to apply any provision of the enactment*

*by reason only that the provision is inconsistent with any provision of this Bill of Rights.’*

In fact it is hard to imagine a more gutted or enervated instrument. In order to have any sort of bill of rights at all its main sponsor, Sir Geoffrey Palmer, had had to capitulate on its being an entrenched, constitutionalised model. Then he had had to remove the remedies clause and insert a new operative provision that said, explicitly, that this new statute would lose out to all other statutes, whenever enacted, should they be mutually inconsistent in any way. Sir Geoffrey was even forced to say, in moving the Bill’s second reading that: ‘[This] Bill creates no new legal remedies for courts to grant. The judges will continue to have the same legal remedies as they have now, irrespective of whether the Bill of Rights is an issue.’ ((1990) 510 *New Zealand Parliamentary Debates* 3449, 3450). And even then it only passed through Parliament on a party political basis.

From that humble starting point the New Zealand judges quickly re-made this statutory bill of rights in an image more suited to what they thought it should say. They read back in a remedies provision (*Simpson v Attorney – General [Baigent’s Case]* [1994] 3 N.Z.L.R. 667); they virtually ignored the operative provision that said other statutes would prevail against the Bill of Rights Act in the event of inconsistency (in the same case); they simply gave themselves the power to issue declarations of inconsistency (*Moonen v. Film and Literature Board of Review* [2003] 2 N.Z.L.R. 9); they put great weight on the reading down operative provision (see, for example, *Hopkinson v. Police* [2004] 3 N.Z.L.R. 704) where the judge reads a ban on destroying the New Zealand flag in a way that ‘dishonours’ it as allowing the burning of the flag, so long as it is not done in a way that ‘defiles’ it. In short,

in a mere dozen years they moved New Zealand a noticeable distance towards what judges do under an American or Canadian-style entrenched, constitutionalised bill of rights.

### Reading down provisions

It is important to pause for a moment and realize where the main potential lies for transmogrifying weak judicial review (under a statutory bill of rights) into something that looks not unrecognizably like strong judicial review (under an entrenched, constitutionalised bill of rights). That potential lies in reading down provisions, which both the New Zealand and UK bills of rights contain. The New Zealand version, section 6, reads:

Whenever an enactment *can be given a meaning* that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning *shall be preferred* to any other meaning. (*italics mine*)

The U.K. version, section 3(1), reads to start:

So far as *it is possible to do so*, primary legislation and subordinate legislation *must be read* and given effect in a way which is compatible with Convention rights. (*italics mine*)

Leave aside the somewhat scholastic – and in all likelihood moot or otiose – question of whether ‘can be given’ is more, or less, commanding than ‘so far as is possible’, and whether ‘shall’ is more, or less, peremptory than ‘must’, I take it that everyone can at least see the potential danger with reading down provisions such as these. That danger is that just about any statutory language – however clear in wording and intent – might possibly be given (by the judges) some other meaning or reading. In other words, there is not all that much beyond the wit of man when it comes to being directed to give the words of a statute a meaning you, the point-of-application interpreter, think more moral and more in keeping with what you believe to be fundamental human rights. What you ‘can’ do, what it is ‘possible’ to do, may prove to be a very great deal indeed. It may come close to what the disinterested observer would characterize as an out-and-out re-writing or re-drafting of the offending statute.

These reading down provisions, then, appear largely to leave it to the unelected judges to constrain themselves, to decide how far they can go in reading ‘black’ to mean ‘white’ while keeping a straight face. The farther they go, of course – the straighter the faces they can keep – the more this exercise in statutory interpretation begins to collapse into an exercise in redrafting statutes to make them read as the judges would prefer them to read (or, more punctiliously put, as those unelected judges happen to believe is in keeping with how rather abstract, indeterminate rights guarantees should play out down in the quagmire of social policy line-drawing).

There is at least the chance, moreover, that a particular set of judges in a particular jurisdiction would choose to keep a particularly straight set of faces. At that point there would seem to me, as I said, not to be all that much difference between openly striking down a statute (for its claimed inconsistency with a constitutionalised bill of rights) and rewriting that same statute (to be consistent and compatible with a statutory bill of rights). True, in the latter case the legislature can respond with even clearer words indicating its intention. But those new, clearer, amended words would also have to be read by the judges as consistent and compatible with the bill of rights, if possible. (Moreover, reading down analyses can encourage judges to use global jurisprudence as a kind of smorgasbord, picking here and there what they need to reach the conclusion they want. So in *Hopkinson* the judge uses the US flag burning cases as the basis for saying she should read the provision at issue as narrowly as possible, despite the fact that US free speech jurisprudence is so different to New Zealand’s. And notice, too, that there are two distinct methods of judicial creativity: (a) giving words new meanings and (b) supplementing the words, with implications, unenumerated rights, unwritten principles and more. The latter, (b), is often the most effective weapon in the activist judge’s armoury.)

I have already indicated that judges in New Zealand have started down this road. Indeed, and astonishingly, three of seven judges on their highest domestic court only four years ago were prepared to say that because of the New Zealand Bill of Rights Act 1990 it was no longer the case that later statutes impliedly prevail over earlier, inconsistent statutes (*R v*

*Pora* [2001] 2 N.Z.L.R. 37). They were of the view that you could use the bill of rights to prefer the earlier statute if you thought it more in keeping with a rights-respecting outcome.

## United Kingdom

What about here in the UK, though, with its very recent Human Rights Act? Too little time has passed since that Act has come into force to do more than signal possibilities, indications of how the reading down provision might be used there. Consider the case of *Ghaidan v. Godin-Mendoza* ([2004] 3 All E.R. 411). In that case the House of Lords (Lord Millett dissenting) held that the section 3 reading down provision in the Human Rights Act enabled a court to depart from the unambiguous meaning that a piece of legislation would otherwise bear. (That is their characterisation, by the way, not mine).

Lord Nicholls of Birkenhead made the claim in these words:

*‘It is now generally accepted that the application of s. 3 does not depend upon the presence of ambiguity in the legislation being interpreted. Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, s. 3 may none the less require the legislation to be given a different meaning ... Section 3 may require the court to ... depart from the intention of the Parliament which enacted the legislation .... It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it convention-compliant [meaning bill of rights compliant].’*

Lord Steyn’s view was that the reading down provision applies even if there is no ambiguity. ‘The word “possible” in s. 3(1) is used in a different and much stronger sense’. He suggested in clear terms that the interpretation adopted need not even be a reasonable one. He also strongly urged that the English courts opt to use this reading down provision – in blunter terms, to interpret away any judicially perceived flaws in legislation – as the prime remedial remedy and resort to s. 4 Declarations of Incompatibility only in exceptional circumstances. Meanwhile Lord Rodger adopted a sort of ‘judicial vandalism’ test, the

implication being that anything short of drastic rewriting of legislation is acceptable.

And just to give you the full flavour of the potential power of these reading down provisions, it is crucial to realize that in reaching this result their Lordships overruled one of their own House of Lords authorities – a case on the meaning of exactly this same statutory provision, an authority only five years old, and one that had held the meaning to be clear. Their Lordships relied implicitly, and arguably explicitly, on changing social values (or their perception of them) and the notion of holding the legislature to a standard that ‘keeps pace with civilization’, a sort of judicial reasonableness test stopping short only at the doorstep of vandalism, as they put it.

Even Lord Millett, in dissent I remind you, agreed that ‘even if, construed in accordance with ordinary principles of construction, the meaning of the legislation admits of no doubt, s. 3 may require it to be given a different meaning’. The only constraint Lord Millett would have the judges impose on themselves is that the meaning they give the statutory provision be ‘intellectually defensible’. And be clear that he means this *not* as any very high hurdle to be got over – the judge, Lord Millett thinks, ‘can read in and read down...[he can] supply missing words, so long as they are consistent with the fundamental features of the legislative scheme [as determined by the judge himself] ... [the judge even] can do considerable violence to the language and stretch it almost (but not quite) to breaking point’.

On this sort of degraded standard, four of their Lordships thought what they were doing was intellectually defensible; one did not.

## Canada

What about strong judicial review, as happens under a constitutionalised bill of rights? That takes us to my native Canada. Now some Canadians might be tempted to object, to say that the s. 33 notwithstanding clause makes Canada’s *Charter of Rights* one that delivers a form of weak judicial review. In my view, that is nonsense, not least because in the two dozen years of the *Charter’s* existence the s. 33 notwithstanding clause has never been used – *not one single time* – by the federal Canadian Parliament. Note, too, that this override provision applies only to some, not all, of the

enumerated rights, that it lasts for only five years (though is renewable), that it cannot be used retrospectively (say the judges), and that its wording implies elected legislators have to be against rights rather than that they are taking a different view of what some amorphous right requires down in the quagmire of social policy line drawing – which to my mind is the accurate, non-question begging way to describe what would be happening.

Be that as it may, let us recall some of the decisions of the Supreme Court of Canada. The judges there have decided that free speech concerns trump health and safety concerns in the context of tobacco and commercial advertising (*RJR MacDonald Inc v Canada* (1995) 127 DLR (4th) 1); they have decided what campaign finance rules are acceptable (*Harper v Canada (Attorney General)* [2004] 1 SCR 827), that each and every refugee claimant to Canada must be given an oral hearing (*Singh v Canada (Minister of Employment and Immigration)* [1985] 1 SCR 177), and that the legislature's ban on private health insurance was unconstitutional (*Chaoulli v Quebec (Attorney General)* 2005 SCC 35), as was its confining of marriage to heterosexuals (*Halpern v Canada (AG)* [2003] OJ No. 2268). They have twice over-ruled the federal Parliament on whether convicted and incarcerated prisoners must in all cases be allowed to vote (*Sauve v Canada (Attorney General)* [1993] 2 SCR 438 and *Sauve v Canada (Chief Electoral Officer)* [2002] 3 SCR 519), indeed in the latter of those cases the Chief Justice of Canada has referred obliquely to countries that disagree with her court's 5-4 ruling, including Australia, the U.K., the U.S. and New Zealand, as 'self-proclaimed democracies'. (Perhaps I should pause for a moment and allow fully to sink in the staggering self-assuredness – no, the out and out moral sanctimoniousness and self-righteousness – of a Canadian judge calling New Zealand, Australia, the US and the UK 'self-proclaimed democracies'?)

I could go on and mention other Canadian cases, say the one striking down the compromise abortion legislation (*R v Morgentaler* [1988] 1 SCR 30) or others. However, let it suffice simply to recall the case of *Reference Re Remuneration of Provincial Court Judges* ([1997] 3 SCR 3), a scandalous decision in which the Canadian Supreme Court struck

down legislation reducing the salaries of provincial judges as part of a general province wide reduction of public servants' pay. The court, using the Preamble to invent a sweeping new constitutional principle, held that even freezing pay (not reducing, but freezing and in the context, recall, of freezing *all* public servants' pay) would be unconstitutional in the absence of some sort of commission or tribunal being established to set judges' pay. As Goldsworthy describes it: '[F]irst year law students [are] taught to clear their heads of 'mush' and think like lawyers. In [this] case, the Supreme Court seems to have undergone something like the same process in reverse. But there is a difference: the Supreme Court's mush is calculated – it is mush in the service of an agenda .... [it is] a disingenuous rationalization of a result strongly desired by the judges on policy grounds.'

And of course in this case, because no explicit rights were referred to but only the Preamble, the s.33 notwithstanding clause was not even nominally in play. There was no way even in theory to countermand the judiciary. (The same is true in the prisoner voting case of *Sauve* mentioned above because this involved one of the rights not subject to the s.33 override.)

### The growth of judicial power

My basic point is this. I do not think it likely that any legal academic could, with a straight face, argue that the power of the judiciary has not increased – and increased markedly – across the common law world. And much, though not all, of that increase is directly related to the effects of bills of rights. By articulating rights in amorphous, indeterminate but also emotively attractive terms, these instruments certainly finesse disagreement down in the quagmire of contentious and disputed line-drawing, but they finesse disagreement by abdicating it to an unelected judiciary. This, though, is not the only way, or indeed the best way, of dealing with rights. One can prefer to leave the articulation of rights to the elected legislature via more detailed and specific statutes. That preference in no way amounts to a view that rights cannot be afforded. As I said, it amounts to thinking that what we cannot afford is leaving rights to unelected judges.

Morality tales can seldom be resisted. For many it is comforting to think some ultimate

saviour exists to remedy breaches of rights. Rather than rely on fallible politicians and the voters who elect them, they find it a great solace to know (well, to imagine) one's rights might be securely protected in some more powerful and effective way, and so upheld by trustworthy, wise and infallible beings. That can be an attraction of bills of rights; it is one that can be strong enough to push from view the fact these instruments elevate the importance of judges, lawyers, yea even law professors, by letting them decide, argue about and critique where to draw fundamental social policy lines down in the quagmire of reasonable disagreement over tough moral choices – what immigration procedures to have, say, or whether to extend legal recognition to gay marriage. It drives resolution of important social issues from the political arena into the courts and gives these judges, lawyers and puffed up law professors a say that non-lawyers are denied. Heck, it even allows them to travel the world to conferences to meet with

other judges, lawyers and legal academics who are drawing the same sort of lines.

The real surprise, I suppose, is that there is not more support than there is from judges, lawyers and law professors for bills of rights.

To conclude, of course we can afford rights. Down where I teach in Australia there are many legally enforceable rights. It is one of the most desirable places on earth in which to live. The UN's ranking of countries with the best quality of life – admittedly a subjective exercise – has put Australia top the time but last and in the top three last time. All Australia lacks is a bill of rights. I certainly hope it stays that way.

For further reading see J. Allan, *Sympathy and Antipathy: Essays Legal and Philosophical* (Ashgate, 2002); 'The Effect of a Statutory Bill of Rights Where Parliament is Sovereign: The Lesson from New Zealand' in (eds. Campbell, Ewing and Tomkins) *Sceptical Essays on the Human Rights Act 1998* (OUP, 2001); 'A Defence of the Status Quo' in (eds. Campbell, Goldsworthy and Stone) *Protecting Human Rights* (OUP, 2003).

## DOROTHY WINTON TRAVEL BURSARIES FUND CONTRIBUTIONS WELCOME

This fund was set up in the name of the first Secretary of the Association who died in October 2003. Dorothy's time as the first Secretary of the Association was a very happy one and she was very concerned that justice (and support for justices) should be available to poor and rich nations alike.

*"She had considerable knowledge of the Commonwealth, a genuine interest in its people and she was prepared to travel extensively to promote the Association, being especially concerned that people from the less well developed countries should be able to play a full part."* stated Brenda Hindley, former Editor of the CJJ.

**The CMJA and the family of Dorothy Winton want to thank those who have already contributed to the this fund which currently stands at £4,974.82.**

The Bursary will be used to assist participation of judicial officers to attend the Triennial Conferences of the Association.

**Contributions to the Bursaries should be made** (by cheques drawn on a UK bank, bank transfers – making clear what the transfer is related to or bankers draft **made payable to CMJA**) and should be sent to the Commonwealth Magistrates and Judges Association at Uganda House, 58 Trafalgar Square, London WC2N 5DX, UK.

Please remember that as a registered charity, the CMJA can reclaim tax paid by UK tax payers. If you include your name and address (eg on the back of the cheque), we can send you the form to fill in for gift aid purposes – a simple declaration and signature.

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# DELAYS IN THE ADMINISTRATION OF JUSTICE

*Professor Carl Barr*

Professor Emeritus, Brock University, St. Catharines, Ontario, Canada; Adjunct Professor of Political Science, York University, Toronto, Ontario, Canada; and Principal, Justice Development International Ltd. An edited version of a paper delivered at the CMJA Conference in Accra.

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Most speeches on court delay begin by reminding their audience that delay has always been with us. I will make no exception to this rule, as my courses in court administration always begin by asking students to read verses 13-27 of chapter 18 of the Book of Exodus, where Moses, having brought the Ten Commandments to the people of Israel, finds his people exhausted after spending all day waiting to bring their cases before him. It is Moses' father-in-law Jethro who recommends that others be trained in the law so that they can handle the simple cases and reserve only the difficult ones for Moses.

I recount this story to court administrators as a reminder that their field did not spring fresh from the mind of American law professor Roscoe Pound in 1906. I recount it here to remind you not only of the long history of court delay, but of the long history of successful efforts to reduce delay. And to remind you as well of Jethro's words, for even as Moses was applying the Ten Commandments, Jethro told him that he was not doing justice if the effort was exhausting the very people it was supposed to benefit.

## Colonial inheritance

If court delay is neither inevitable nor universal, its existence is a result of human action — and in particular over the past 200 years, the result of policy decisions made by public authorities. In the context of the Commonwealth, these were policy decisions of British colonial authorities who, historical legend tells us, bequeathed to their colonies the blessings of the English common law.

These authorities also created a colonial court system and legal process that combined elements of home-country legal practice with elements of colonial administration. Thus High Courts of Justice were established in far-flung outposts of empire, emulating the cathedral of justice in the metropolis. But the bulk of the everyday work of the courts would be done by a sprawling network of so-called subordinate courts, staffed not by the lay volunteers found

back home, but by a new generation of law-trained civil servants. Supervision of subordinate judges would be made the responsibility of the High Courts themselves. This step did reflect an awareness that the principle of judicial independence requires that supervision of individual judges be done within the judiciary and not by government. However, it also built into Commonwealth court systems some of the characteristics that still plague today's postcolonial courts.

First, the judicial hierarchy has become an administrative hierarchy, so too few subordinate courts have developed the managerial skills, personnel and institutions to govern their own affairs.

Second, the subordinate judiciary remains too much in a civil service mould and mindset. Thus a predominantly youthful corps of judges is constantly mindful of impressing their superiors to curry favour for future assignments and promotions. And reporting and recordkeeping has transformed court statistics gathering into a form of balance sheets, work weighting and managerial accounting, rather than a way of improving performance and expediting justice.

Third, the elaborate nineteenth-century adversary process still visible in postcolonial trial courts—but removed from the discipline of lay decision-making provided by temporary bodies of citizens assembled into juries—has fragmented the trial process to the point where trials have become a deconstructed sequence of discrete events that continue for months and years. Twentieth-century innovations in court procedure (e.g. pre-trial disclosure of evidence and pre-trial examination for discovery) are largely missing, so judges find themselves playing a continuing role in a discontinuous and lengthy process.

Fourth, the principle of party control of litigation, seen by the English as the central characteristic of common law procedure, places the bar in a position of strength and

discourages reform initiatives from the judiciary. While the English closed out the twentieth-century by abandoning the principle of party control in favour of Lord Woolf's approach to civil procedure, the bar in many Commonwealth countries has reached levels of organization unknown in the mother country, retarding appropriate and needed change.

Fifth, the desire to establish what the British understood as the rule of law meant that the excesses of law enforcement were accepted as long as they took place within the "ordinary courts" of the colonial civil establishment. Thus long periods of pre-trial incarceration existed in colonial times despite principles of the presumption of innocence, because judicial review—however open-ended and generous to government—was in theory still available.

Taken together, these characteristics of the British colonial legal system produced results substantially different from what occurred back in England. They have left too many postcolonial countries with a procedurally elaborate system that relies too much on hierarchical and bureaucratic control mechanisms and finds change very difficult. As a result, systems that should have transformed themselves in the years after independence now operate in a manner that combines an abandoned colonial regime with an abandoned model of British justice. [Latin America countries provide an interesting historical parallel. They achieved independence from 1810-25, so their civil law systems missed the major changes in continental European procedure in the 19<sup>th</sup> century, and remain excessively paper-based. A major exception is Cuba, which remained a colony until 1898. As a result, the current Cuban regime is pressing its Latin American neighbours to add more oral proceedings—the same recommendations that come from U.S. consultants funded by USAID and the World Bank, and have been attacked by bar associations claiming that American reformers do not adequately understand civil law traditions.] Court delay is only one symptom of the malaise.

Given the mixed motives of many post-independence regimes, it is perhaps fortunate that the courts survived with as much of their dignity and independence intact as they have. But even so, the time for reform and improvement is well overdue in too many Commonwealth countries. Fortunately, the

current generation of court reform, buoyed by rule-of-law initiatives in the development community, provides a basis for thoughtful and sustainable reform. But is it worth the effort? The next section argues that it is.

### Consequences of Extreme Delay

What happens when court delay and related defects in case processing become so serious that trial courts can no longer perform many of their basic functions? While reformers everywhere lament that justice delayed is justice denied, the time for taking cases to trial or other disposition is typically within parameters sufficiently manageable that courts can still effectively assess evidence and apply principles of law. However, court systems today often struggle with such extreme delay and large backlogs that their best efforts to maintain judicial independence and the rule of law have gone hand in hand with criminal processes that punish the innocent and acquit the guilty, and civil processes mobilised by those without valid claims in order to pressure adversaries to abandon legitimate claims.

### Effects on criminal justice

On the criminal side, extreme delay has undermined the operation of what is now termed "the criminal justice system" to the point that it cannot achieve either of its fundamental objectives. Some 40 years ago, American legal scholar Herbert Packer laid out what he saw as two competing purposes of the criminal process: crime control and due process. Rather than tilting the system in one direction or another, extreme delay in criminal courts has undermined both of these objectives. Accused persons' rights are jeopardized because they often spend long periods of time in pre-trial detention. In turn, crime control objectives are jeopardized because by the time these accused are brought to trial, witnesses are unavailable and acquittals are entered.

While it is difficult to obtain court case statistics that can be validly compared across jurisdictions, especially from one national legal system to another, it appears on the basis of available data that conviction rates are much lower in countries with longer periods of pre-trial delay. I have seen figures of 25% and 30% conviction rates at trial in courts in which cases average as many as 100 appearances before a disposition is entered. Where there is less delay, conviction rates may fall below 50% but gener-

ally rise to 60% or more following trial. Obviously, conviction rates are higher when prosecutors are more diligent in screening cases, and when guilty plea dispositions are added to trial dispositions. But even with these factors taken into account (and some of them actually make the differences in trial dispositions appear smaller than they are), it is clear that extreme delay makes it less probable that an accused will be found guilty at trial.

Because extreme delay undermines both due process rights of the accused and crime control objectives of law enforcement, it is not surprising that the greater the delay in criminal cases, the higher the percentage of those in custody who have not been convicted. The highest estimate I am aware of is 80%, provided by a senior corrections official in Ethiopia (which has an inquisitorial system based on the Indian Penal Code of 1907). Thus it would not be unfair to characterize the resulting process as “punishment before trial.”

### Effects on civil justice

On the civil side, extreme delays provide an incentive for individuals to bring invalid claims. Those without valid claims can prevent individuals with valid claims from securing a court order vindicating those claims. As the litigation drags on, pressure builds for the parties to settle. If the litigation involves members of the same family, someone with a valid claim may be pressured to abandon her claim or (more commonly) her defence in order to re-establish peace within the family. Settlement, perhaps facilitated by a mediator (a process that should be welcome in a well-functioning legal system), becomes yet another tool for continuing dominance of the stronger party regardless of what the law provides.

Extreme delays not only encourage litigants with invalid claims, but also discourage litigants with valid claims. Redress of wrongs is then sought through extra-legal means, and private enterprises emerge to serve individuals who seek “justice” outside the legal system. Some of these means may involve peaceful processes, such as the settlement of auto accident claims through an agreement in which the injured party’s car is repaired by an agent of the party who takes responsibility for the damages. But other means may be more coercive and neither consensual nor legal.

As a result, civil litigation becomes largely a symbolic exercise for those litigants who truly believe they are pursuing valid claims. As all parties go on with their lives several years after the conflict from which litigation arose, the case drags on until the claimant can tell his story to the judge and obtain satisfaction knowing that however matters turned out in reality, the judge agreed that his claim was valid. When I first visited a New Delhi lawyer who had recently disposed of a 42-year-old case, he termed the whole matter “luxury litigation,” because the disposition no longer had any impact on the lives of those involved.

### Backlogs

Courts with extreme delay often suffer more from their past sins and omissions than from their present level of activity. They are often—even typically—able to keep up with their heavy caseloads. But the elapsed time for cases to move from initiation to disposition is excessively long, because delays in past years result in current numbers of adjourned cases being so high that the judges are constantly focusing on matters from previous years before new litigants can expect attention to be given to their matters.

Too often, these backlogs increase more quickly than courts can respond to them. This may be a function of increased demand, as large numbers of new cases overwhelm the current complement of judges, and by the time help arrives, a new higher level of adjourned cases has been established. Or it may be a function of decreased resources, as individual judges are shifted and promoted, and their court workload is temporarily redistributed to colleagues who are often in a position to do little more than maintain the status quo until the next recruitment cycle brings some relief.

In some respects, backlog reflects well on the judges themselves. In Pakistan, for example, subordinate judges serve as elections officials, a credit to the respect in which they are held by the public. Every time the national regime decides to hold an election (even one challenged as unconstitutional by bar associations throughout the country), numerous judges are called away for training and for election duties as returning officers. Courts adjourn early and courtrooms stand empty for the day. By the time the courts return to normal, newly-instituted cases further outnumber case dispositions, and the ability of the courts to do justice in future cases is further undermined.

## Merits and Feasibility of Reducing Delay

Before recommending the steps in a strategy to reduce delay, it is necessary to address a prior question: is there any evidence that delay can be reduced? An expert's prescriptions can sound reasonable and even persuasive, but have they ever worked? Are there any court systems without delay, especially among former British colonies? If so, what conditions have facilitated expeditious justice? And finally, at what cost? Can we ensure that a fair and just legal system emerges from a delay-free court?

## Singapore's experience

The best-known success story in the post-colonial court world is the Republic of Singapore. Its Subordinate Courts have been recognized internationally for their innovations in management and legal processes, and the Courts have extended their leadership across the Asia-Pacific region.

The key to their success is that the Subordinate Courts have taken responsibility for managing the pace and quality of their adjudication. Judicial leaders constantly monitor what is happening within and around the Courts, so they can respond before problems become visible to the public. As a result, these courts have a manageable inventory of cases that can be (and typically is) dealt with so expeditiously that backlog rarely if ever develops.

To the extent that the Singapore courts are used to bolster an argument that delay can be reduced, a counter argument could be made that their success is a reflection of that country's wealth, and particularly the human, material and technological resources that have been secured by the Subordinate Courts.

## Experience elsewhere

There are two responses to this counter argument. The first is that while resources are a key element of the Singapore success story, resources alone do not reduce delay. If they did, courts in the United States and Canada would be delay-free; instead, some of the most prosperous metropolitan areas struggle with accumulated backlogs. While courts in prosperous countries are rarely subject to the ills arising from extreme delays, they often have difficulty keeping up with incoming cases, because they fail to anticipate changes in their immediate environment. In contrast, the Singapore courts have the ability to scan their

environment, identify their resource needs, build a case for these needs, and effectively mobilize their new resources. The combination of managerial skill and judicial leadership that makes this possible is what sets them apart and produces a court system committed to establishing and maintaining high standards of performance.

The second response would consider whether in fact backlog and delay can be reduced in countries with a less prosperous and even impoverished public sector. Available evidence suggests a surprisingly strong positive answer. On the backlog reduction side, courts in three countries with resource constraints and extreme delays have all reported examples of successful backlog reduction: Pakistan, India and Ethiopia. Over several months in Pakistan in 2001-02, subordinate courts in Karachi (especially in District Central, after the District Judge returned from a study tour to Singapore) showed an impressive reduction in adjourned cases during an Asian Development Bank pilot project. While pilot courts in Lahore were less successful, a number of District Judges in other centres in Punjab Province had strong records of effectively managing their caseloads. In Bangalore, India, a thoughtfully-organized local initiative was able to eliminate over 100,000 pending cases in the subordinate courts. In Ethiopia, easily the poorest of the three countries, a pilot project in the populous Amhara Region could by 2005 report continuing annual reductions in pending cases.

There are other examples of court systems with limited resources but strong traditions of expeditious case processing. Courts in Russia and former Soviet republics typically take cases from initiation to disposition in a matter of weeks or at most months—not years. Even in Moldova, reputedly the poorest country in Europe, trial courts have little backlog, with no more than 10-15% of civil and criminal cases carried over from one year to the next. Courts in Cuba report prompt disposition of cases as well.

While cross-national data on the pace of litigation are not available in a form that allows systematic comparison and ranking of court systems on that dimension, the accumulating evidence shows widespread variation among courts in how fast cases move from initiation to disposition. At the same time, however, it appears that some of the most expeditious systems are ones that critics would identify as

having powerful governments less constrained by an active and independent judiciary. Is fast-paced delay-free adjudication therefore associated with regimes that are less rights-based and democratic?

In fact, this is not the case. Two of the countries mentioned above with extreme delay, Pakistan and Ethiopia, have had military regimes and less well-established democratic traditions. The successes that have been achieved with backlog reduction in those two countries are associated not with particular regimes or ideologies but with the commitment of judicial leaders and their understanding of how they can effectively monitor and control the movement of cases in the face of complex local community and professional pressures.

### Critique

Still, given the countries that have successfully reduced court delay and maintained a more expeditious pace of litigation, does court delay reduction represent the triumph of justice values, or the successful mobilization by strong governments of the coercive power of judiciaries? Have we moved from the maxim of “justice delayed is justice denied” to a new principle that “justice rushed is justice crushed”?

Observation of the Subordinate Courts in Singapore several years ago suggests that a well-managed court accommodates the competing values of due process and crime control. While the absence of judicial review authority in Singapore limits the ability of the Singapore judiciary to use constitutional standards to nullify legislative action, and the courts’ swift processing of large numbers of civil and criminal matters reinforces the government’s crime control and social control agenda, the pace of litigation can be and has been modulated to ensure fairness. Thus for example, capital offences do not proceed to disposition as expeditiously as non-capital offences of similar complexity. Additional time is given for persons accused of capital offences to obtain counsel, and for their counsel to discuss charges with the Director of Public Prosecutions (an appointed official serving on good-behaviour tenure). Given the lack of judicial discretion in sentencing for capital offences, these built-in delays allow the DPP to consider reducing capital charges to non-capital ones. Thus it is the administrative apparatus and practices of the Singapore Subordinate Courts that allow expeditious

justice to proceed under strong judicial leadership across a wide range of cases, while slowing the pace when the interests of justice suggest doing so.

### Strategies for Reducing Backlog and Delay

The previous section, in examining how it has been possible to reduce backlog and delay, has already referred to some of the key principles, usually associated with the concepts of case management and caseload management, that are prerequisites for successful use of particular strategies and techniques. Thus for example the courts’ responsibility for the pace of litigation was emphasized, along with the need for judicial leadership to reduce backlog and delay. Given the widespread deterioration of court systems under the assumption of party control, the alternative of court control is no longer optional—it is mandatory. The debate over court control versus party control has little meaning when the adjudication process is out of control.

This does not mean that the concept of control requires draconian or unilateral action. The term “control” should not be used in the coercive sense associated with authoritarian institutions or dictatorial individuals (what my friends back home would label “control freaks”). The term is most effectively used in the tradition and meaning of Mary Parker Follett, from her 1930s essay, “The Process of Control”. Follett, saw control not as a superior directing a subordinate, but as the product of the interaction of all elements in a situation (i.e. an organizational setting or a social setting). To Follett, control emerges from the reciprocal relationship of all the elements in a situation. As a result, it follows that control is a continuing process, and is more effective when it occurs in the early stages.

Follett’s essay reads like a handbook for case and caseload management. We know that effective case management normally requires a common understanding of how litigation will proceed right from the initiation of a case. In a complex case, control in the early stages is reflected in a case conference or directions hearing to establish ground rules and expectations so that later difficulties can be anticipated and addressed. Control must be continuous in the sense that there is always a date set for future action. All participants, including

parties and counsel, need to be aware of these expectations as well.

Conversely, judicial attempts to exercise control from the bench in a traditional more coercive manner, but without the understanding of control as a process or the development of a caseload control system, are doomed to failure. As my Canadian co-author Judge Perry Millar used to say years ago, “I only give an adjournment when it is necessary, but the problem is that adjournments are always necessary by the time I’m on the bench, and I can’t do anything about them.” In the same way, I have seen resolute, determined and independent judges in Asia and Africa issue orders suspending the pay of police officers who do not appear as witnesses in court—a step unheard of in Canada or the United States. It usually results in the particular witness appearing, but does not address the continuing administrative difficulties that lead to this happening again and again in the future.

Once we move beyond general concepts of responsibility, leadership and control, we need to consider how to develop a management strategy for a court and a court system. This requires first that we distinguish between backlog reduction and delay reduction. They are not the same. If the cases pending in a court are too numerous for them to be disposed of within a prompt and appropriate period of time, those cases make up that part of the court’s inventory that is termed the backlog. Before a court can set up a case management system that monitors cases from their initiation, a court must reduce its backlog so that new cases can be dealt with when they are in fact still new.

Most of the so-called delay reduction efforts applying caseload management principles in development projects have in fact focused on backlog reduction, but they do not focus on delay reduction itself. That is why it is ironic that a valuable backlog reduction initiative undertaken by the Government of India in recent years has been labelled “Fast Track Courts” even though these courts only work on resolving old cases that went off any fast track months or years before. Unless we move from backlog reduction to delay reduction, we are simply clearing the dockets of stale cases so that we can apply the same all-too-stale approach to the fresh cases. What is needed is a fresh approach as well.

What I propose is that as case backlog is brought under control, an individual pilot court or courts should be set up and given an inventory of cases but no backlog. In other words, rather than establishing a new court and then divided the existing caseload (for example) six ways instead of five, the new court should have only enough cases to fill its time but not so many that it is unable to hear new matters according to a set of optimal time standards and adjournment policies. Lawyers and litigants would need to understand that this court is operating under a new set of assumptions and policies, and has been designed so that it can put those assumptions and policies into practice. It is therefore what could be termed a Best Practices Court.

Implementing a Best Practices Court is a major challenge, but its benefits could be substantial. It would mean that new cases going to this court would be dealt with while issues were still fresh. Adjournments would be held to a minimum under new expectations spelled out to all participants. As a result, dispositions would occur earlier in the process with fewer appearances, reducing the average amount of judge and staff time spent per case.

### Administrative Supports

Neither backlog reduction nor delay reduction occurs without substantial effort and organization. That is why the strategy paper cited above is put forward as a checklist lest those developing a program miss a key component needed to ensure that a new and effective control system emerges.

For example, in keeping with Follett’s concept of control and with the practical experience of backlog and delay reduction initiatives around the world, a committee or committees should be struck with membership representing all participants in the litigation process. On the criminal side, this is likely to include sessions judges and magistrates (or their counterparts), court administration, prosecution, defence, legal aid, police and corrections. On the civil side, representation is likely to reflect the judiciary, court administration, the private bar and major litigant groups.

The committees should be used to mobilize the knowledge and build the commitment of participants. The plan that emerges from committee discussions may not be the ideal solution envisioned at the outset, but it is likely

to be a more feasible and sustainable one. I recall when one of the Karachi District Judges assembled such a committee to explore problems in handling criminal cases. No comprehensive plan had yet evolved to address backlog, but the problems that interfered with case processing were well known. So for example, police officials were asked why prisoners did not appear in court as scheduled. In response, the police complained that sufficient vehicles were not available, but then suggested that if appearances of accused held in custody could be scheduled in both the morning and the afternoon—and not only in the morning as had been the practice for many years—transportation of more prisoners could be arranged even with the existing vehicles. It is these simple operational solutions that can only arise when knowledgeable participants are part of a continuous problem-solving process.

In the same way, lawyer participation is essential to ensure that the practicing bar can adjust to the demands of a new system. While some lawyers may resist change, most simply need to voice their concerns and make suggestions that facilitate effective implementation of proposed changes. Too often, we treat the local legal culture as if it represents centuries of art and wisdom, rather than decades of ingrained habits. Part of the necessary adjustments may reflect something potentially more onerous—the impact of backlog and delay reduction on legal fees and lawyers’ incomes. But while backlog and delay reduction may reduce the income of lawyers who rely on billing for multiple appearances in protracted cases, it may increase the income of lawyers whose clients can obtain more expeditious resolution of their cases. “Don’t call it case flow management,” said a successful Canadian plaintiff’s lawyer 15 years ago, “call it cash flow management.”

One of the key technical supports for backlog and delay reduction is the statistical information necessary to monitor and evaluate the effectiveness of reform efforts. Analysis of statistical data in fact serves multiple purposes. It allows court leadership to monitor current progress and identify potential problems. For example, a backlog reduction program may be successfully reducing the number of older cases, but new cases may be entering the courts in larger numbers than before, obscuring or even jeopardizing real progress. By having the data to make valid assessments of the courts’ progress, court leaders can also identify and inspire those

who are successful. Finally, these statistical assessments provide the kind of evidence that funding authorities, both within the country and internationally, have come to expect when they evaluate performance in the public sector.

For backlog reduction, it is possible to use the balance sheets traditionally found and still maintained in many trial courts, showing uncompleted cases at the beginning of a month, new institutions, disposals, and uncompleted cases at the month’s end. I have found it effective to compare the performance of individual courts against their performance one year before. In that way, there is an incentive not only to reduce adjourned cases but also to maintain or increase dispositions in comparison with the previous year. Furthermore, judges are not competing against each other’s records, but can focus on the continuous improvement of their own performance. These figures can be aggregated to cover a number of criminal courts in a district, or a number of civil courts.

For delay reduction, I recommend a new but simple statistic that Bob Hann has labelled the “time-specific disposition rate”. It is simply the percentage of cases disposed of within a particular period of time. For example, what percentage of the cases commenced within a specific period of time has been disposed of within 3 months of initiation? Within 6 months? Within 12 months? How does this compare with the percentages for the same periods one year or two years ago?

There are a number of advantages to using these time-specific disposition rates. They provide a measure of case progress that is not only more accurate, but is also more immediate and timely. If a new case management process is put in place on January 1, 2006, one can calculate a 6-month disposition rate (that is, the percentage of cases disposed of within 6 months of initiation) by December 31, 2006, that will cover half of the total cases for 2006 (that is, all cases initiated from January 1 until June 30). In the meantime, one can sample a comparable group of cases (that is, the same case types) initiated in the first half of 2005, and calculate what percentage of those cases were disposed of within 6 months. It is therefore possible for example to evaluate the impact of a Best Practices Court very early in its development.

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# MECHANISMS FOR ETHICAL CONDUCT IN THE ADMINISTRATION OF JUSTICE

*Dr Karen Brewer*

Secretary General of the CMJA. An edited version of a paper given at the Pan-African Forum on the Commonwealth (Latimer House) Principles on the Accountability of and the Relationship between the Three Branches of Government, Nairobi, April 2005. Reproduced with the kind permission of the Commonwealth Secretariat.

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The over-arching principle of judicial independence has been enshrined in the Constitutions of Member Countries of the Commonwealth as well as international instruments such as the Universal Declaration of Human Rights (Article 10) and the UN Basic Principles on the Independence of the Judiciary and the Role of Lawyers endorsed by the UN General Assembly in 1985 and 1990 respectively. This principle has been reaffirmed by the Governments of the Commonwealth in the Declarations since the Singapore Heads of Government Meeting held in 1971 and by their endorsement of the Commonwealth Principles (Latimer House) of the Three Branches of Government in Abuja in December 2003.

‘The independence and integrity of the judiciary is...’ to quote the Communiqué of the last meeting Senior Officials of Law Ministries held in October 2004, ‘... a right of every Commonwealth citizen.’ ‘Judicial officers have a duty to uphold and defend judicial independence, not as a privilege of judicial office but as the constitutional right of everyone to have disputes heard and decided by impartial judges’ (Principle 3, of the Lesotho Ethical Principles for the Judiciary, 2004). As the former CJ of Zimbabwe, Justice Anthony Gubbay, said in a speech in June 1998, ‘The independence of the judiciary should be balanced with responsible professional conduct, competence and integrity’.

The extraordinary power invested in the judicial office demands a high standard of behaviour. Perhaps the earliest affirmation of the essential values for judicial officers, particularly relevant to Commonwealth judicial officers, can be found in a 1346 statute, 20 Edw.III, c.1:

*‘we have commanded all our justices that they shall from henceforth do equal law and execution of right to all our subjects,*

*rich or poor, without having regard to any person and without omitting to do right for any letters or commandments which may come to them from us, or from any other, or by any other cause’.*

For six hundred years judicial officers have been guided by these principles: the commitment to uphold the law and to do so impartially and in an unbiased manner. These fundamental principles are affirmed in the Oaths of Office which are required of all new judicial officers throughout the Commonwealth. For example, the Magistrates of South Africa, Oath of Office declares:

*‘I, ... do hereby swear [or solemnly affirm], that in my capacity as a judicial officer, I will be faithful to the Republic of South Africa, will uphold and protect the Constitution and the Human Rights entrenched in it and will administer justice to all persons alike, without fear, favour or prejudice in accordance with the Constitution and the law’.*

Cicero, in his letter on the duties of a magistrate *De Officiis*, identified the following values: affability, dignity, diligence, deliberation, integrity, impartiality, propriety, moderation and self restraint. These values have been seen as part and parcel of judicial tradition. The ideal being for judicial officers (and by this term I mean both judges and magistrates carrying out a judicial function) to base their behaviour on a strong moral code developed through their professional background and through their own social context. However this has always been an ideal, and the argument has to be repeated for each succeeding generation of judges (and indeed administrators) to ensure that a moral code, which includes independence from political pressure and social norms, is never forgotten. As Plato pointed out justice and

morality are 'inseparable companions.... the bonds of society'.

## Judicial officers

Clearly the qualities required of judicial officers can be put in danger if judicial officers are not protected from political, economic or other pressures. They cannot however, be completely isolated from society and kept cocooned from the realities of life.

Recognising the pressures which judicial officers face today, the problems and issues that they might be confronted with, a number of countries have in the past 10 years, developed mechanisms to inform judicial officers of what is required of them in the exercise of their functions but also to protect the profession from disrepute.

Any mechanism ensuring integrity and high standards must bear in mind the following main objectives:

- To uphold public confidence in the administration of justice;
- To enhance public respect for the institution of the judiciary; and
- To protect the reputation of individual judicial officers and of the judiciary.

Different jurisdictions have adopted differing methods, in addition to the constitutional provisions, to assist in ensuring that the principles of impartiality, independence and integrity are applied by judicial officers. Some have drafted codes or guidelines, others have sought to provide training in this area, some have provided complaints and disciplinary systems to ensure ethical standards are complied with.

## Codes and guidelines

The idea of Codes of Conduct or Guidelines for Ethical Behaviour are a relatively recent phenomenon. Over the last 20 years or so, the conduct of judges has come increasingly under public scrutiny, with a growing interest in standards of judicial conduct. Currently the CMJA is aware of documents in 21 countries of the Commonwealth which set out the ethical standards expected of judicial officers.

There has been much debate as to whether or not these standards are codes of conduct or codes of ethics. According to Justice Clifford Wallace, 'Codes of Conduct merely identify

acceptable conduct. They constitute the floor of judicial activity and if a judge goes below the base line, the judge is subject to sanction. Ethical goals - they are aspirational - they cause the judge to look up and reach out to make the judicial career more effective and more satisfying. For example: not being as diligent as a judge should be would not be considered in a code of conduct the violation of which could result in a sanction'

In the original Latimer House Guidelines, reference was made to the CMJA developing a 'Model Code of Conduct'. However, experience has taught us that we should be wary of an off-the-shelf model which could be used without due consideration being taken of national circumstances and which might be used to discourage more vulnerable judicial officers from exercising their independent judgment.

Some jurisdictions, such as Canada and Australia have developed guidelines rather than codes as they feel that they have no authority to impose 'prescriptive standards' upon judges. In other jurisdictions judicial conduct has been set out in a parliamentary Act. In Zambia, for example, the Judicial Code of Conduct Act 1999 for officers of the judiciary elaborates on the provisions set out in Article 91 of the Constitution ('The Judges, members, magistrates and justices shall be independent, impartial and subject only to this Constitution and the law and shall conduct themselves in accordance with a code of conduct promulgated by Parliament') and deals with issues relating to the adjudicative responsibilities, extra-judicial activities, financial, political and employment matters as well as setting out a detailed procedure for complaints against the judiciary and breaches of the Act are 'construed as misconduct to be reported to the [Complaints] Committee for action' (s.33(2) of the Judicial Code of Conduct Act 1999).

So what should these Codes or Guidelines contain? Most Codes or Guidelines include references to the basic principles fundamental to the judicial functions:

- *Independence*: integrity in both public and private life through the respect of the law, prudence in managing financial affairs, openness in declaring financial, family, social connections

- *Impartiality*: this means giving careful consideration to close relationships and how these are perceived. Just like the culture of celebrity scrutiny which is prevalent around the world today, judges are in the public eye and they must be careful about public statements made in or out of court, involvement in extra-curricula activities such as charitable organisations, community or educational endeavours and of course special care must be taken when it comes to political activity. A number of guides expect judicial officers, to sever on appointment all ties with political parties (Australia), counsel against making contributions to political causes (Canada), or public participation in political discussions (Lesotho), unless of course these relate to the independence of the judiciary and the fundamental aspects of the administration of justice or personal integrity of the judge. Even participation in commissions of enquiries can be seen to be controversial (South Africa).

In relation to the functions of the judicial officer, due diligence, a respect for the law and evidence presented, awareness of cultural and other special requirements of those seeking justice, and constant vigilance that justice delayed is justice denied need to be taken into account. In relation to respect for the law although most codes make reference to national laws, it is interesting to note that only two Codes, those of Belize and the Guyana Code suggests that judges should keep themselves ‘informed about relevant developments in international law, including international conventions and other instruments establishing human rights norms and within any applicable limits of constitutional or other law, shall conform to such norms as far as is feasible.’ (Article 6.4 of each Code).

So who should develop these Codes? There is a delicate balance which needs to be exercised between accusations of judicial unaccountability and guaranteeing judicial independence. Self-regulation, in some countries has received a bad name. However, it is difficult in any profession, and in particular the judicial profession, to accept a set of norms for its behaviour, if it does not have ownership of these norms. For this to happen there must be involvement in the formulation of the set of

standards. An imposed code can be construed as eroding the constitutional and internationally recognised fundamental principle of an independent judiciary. The Latimer House Guidelines state that: ‘A Code of Ethics and Conduct should be developed and adopted by each judiciary is a means of ensuring the accountability of judges’ (Ch.V(1))

The Commonwealth Secretariat’s Judicial Colloquium held in Limassol in 2002 recommended the adoption of guidelines on judicial ethics as a means of underpinning the integrity of the judiciary and promoting better public awareness of the requisite ethical standards. Such guidelines should be formulated by judicial officers and kept under constant review by them. Judicial officers should take responsibility for ensuring compliance with those guidelines. The constant review of the ethical codes is essential as society is in constant change.

### Training

The CMJA believes that training in judicial conduct and behaviour is essential to maintaining and developing standards in the judiciary. Through our training programmes we supply a structure in which the local judicial officers can consider, and on occasion revisit the issue of judicial ethics and conduct, exchange information and experiences as although they must remain independent of mind, the supportive nature of such exchanges is essential to the integrity of judicial officers. In particular systematic training should be available for the newly appointed judge or magistrate with a view to providing the means to resist that first, perhaps minor, unsuspected trap of the corrupt approach.

Commonwealth countries have the advantage of sharing similar legal systems and despite the differences that exist, interaction with judicial officers of all ranks on a national, regional or international level is essential to help break down the tendency for judicial officers to be isolated and to help guard against the self delusion that can arise in a weak man or woman who is occupying a position of trust in society. In short every opportunity should be taken to promote a greater degree of collegiality amongst the whole body of a country’s judiciary.

## Mentoring and the promotion of collegiality

The importance of leadership cannot be overemphasized. The CMJA believes mentoring and other ways of promoting collegiality amongst judicial officers especially for those who are newly appointed in order to ensure that they avoid becoming too isolated and to ensure that they have a colleague to turn to for advice and guidance at times when they are subject to an approach which may be equivocal. In performing judicial duties, however, the judge should remain independent of judicial colleagues and solely responsible for his or her decisions. The exchange of knowledge and experience is done in order to better serve justice.

## Complaint and discipline mechanisms

It is the nature of litigation throughout the world that one party must be disappointed at the end of any case. Some disappointed parties complain about the conduct of the judicial officer. Although the Appeals system may be used when the judge does not apply the law or follow procedure, what happens if the judicial officer does not behave in court as would be expected?

Most Constitutions in the Commonwealth provide for the removal of judicial officers at the higher level and constitutional or parliamentary processes (whether through investigation by tribunal, the judicial services commission, or other mechanism) must be completed before the removal of a judge.

The judiciary, being the third branch of government, is accountable. However, whenever I raise the issue of safeguarding the independence of the judiciary, the question of accountability of the judiciary is always thrown back at me as if these two principles nullify each other.

In the words of the former UN Special Rapporteur, Dato Param Cumaraswamy, in a speech in Sri Lanka in 2003, ‘judicial independence and judicial accountability must be sufficiently balanced so as to strengthen judicial integrity for effective judicial impartiality’

Both judicial independence and judicial accountability are the sine qua non of democracy. However, judicial accountability cannot, especially in Commonwealth countries, be

compared to the accountability of the Executive or Legislative branches of Government or for that matter other governmental institutional as judicial officers are required to be independent and discharge their duties without fear of reprisals or in expectation of any reward and judicial independence cannot be subject to political whim therefore accountability cannot be of a political nature or to be seen to be of a political nature.

The UN Basic Principles urge judicial bodies to develop their own mechanisms for dealing with complaints and a number of the Codes or Guidelines include mechanisms of dealing with breaches of the code. Kenya for example provides that ‘Where an officer has committed a breach of this Code, appropriate action will be taken in accordance with the provisions of the Public Officer Ethics Act 2003, Judicial Service Commission Regulations or the Constitution, as the case may be’ (Rule 22).

## The case of the lower judiciary

The process for the removal of the lower judiciary is not necessarily guaranteed in the Constitution despite the fact that in most Commonwealth countries, members of the lower judiciary are those that deal with the majority of cases. And yet they are placed in a more precarious situation. Their security of tenure is not always interpreted as guaranteed by the Constitution and therefore they are open to ad hoc removal from office by a member of the Executive without due process being followed. In addition, their career development is not always undertaken through a transparent system. Judicial officers at this level are more prone to be subjects of de facto ‘demotions’ due to the decisions they might take. Their salaries and terms and conditions may be such that they are made more vulnerable to corruption.

In the development of Principles for the judiciary neither the Commonwealth nor the UN distinguish between these two categories of judicial officer. It is interesting to note that Uganda in their recent constitutional case on taxation of judges at the lower level, have at last recognised the importance of support for the lower judiciary in order to assure judicial independence. In England and Wales, the terms registrar and magistrate have now been abolished for professional judges in favour of the term District Court Judge, which more

readily reflects their role and indeed the need to be bound into the judicial ethos.

It is also interesting to note that the performance of judicial officers at the lower level is assessed more rigorously than those at a higher level of the judiciary as their judgments are subject to the appeals system. As one goes higher up the judicial echelon one finds that the Appeal Court judges are not subject to such assessment except perhaps in cases referred to Regional Courts such as the European Court of Human Rights or the East African Court, or in cases referred to the Privy Council but the latter are fast diminishing. Not all cases brought before the Court of Appeal however carry a right of appeal to such regional courts.

Ethical standards apply to all members of the judiciary. Support for the lower judiciary by the higher judiciary and true leadership from the highest ranks ensures high ethical standards throughout.

### **Other players: court staff**

In a number of Commonwealth countries there is a widespread perception that the legal system is corrupt. Transparency International's Index lists many of the Commonwealth countries as being those perceived to be worst offenders. There are particular problems in approaching complaints against judicial officers. Firstly the allegation may not in fact relate to the judicial officer, but to a clerk or advocate, perhaps wrongly, claiming to be acting on his behalf, secondly the allegation itself may be mischievous, designed to undermine the integrity of an honest public servant. The very making of the allegation neutralises the judicial officer and makes it impossible for him or her to preside over any relevant case, possibly bringing about the result sought by the complainant.

In a number of instances, judicial officers and court staff may come under separate departments and ministries and judicial officers may not always be aware of the pressures to which court staff are subject. It is sometimes difficult to separate out the administrative and judicial functions. In a number of jurisdictions, court administrators are taking on more judicial functions (such as how much should be paid of on fines and what sanctions should imposed for non-observance of court rules) or judicial

officers, especially those at a more senior level are being required to take on more administrative functions. There needs to be a clear separation of what is considered to be an administrative function as opposed to a judicial function. The Commonwealth Colloquium held in Limassol in 2002, concluded that more emphasis needed to be placed on liaison with court staff and others involved in the administration of justice.

It is therefore essential that a holistic approach be adopted in implementing mechanisms to strengthen ethical conduct and that all those involved in the administration of justice are subject to the same scrutiny as far as ethical behaviour is concerned. A number of jurisdictions now have codes of conduct for public servants and apply these to court staff. In some jurisdictions, for example some parts of the USA, court employees have been given their own codes of conduct.

The CMJA has recognised that court administrators are have an important role to play in supporting judicial independence and it is currently considering setting up a Court Administrators Section and has volunteered to assist the Commonwealth Secretariat with a code of conduct for court administrators.

### **Lawyers**

Dato Dr Cyrus Das, former President of the CLA pointed out in an address in 1998 that 'lawyers are vital cogs in the machinery of justice and unless there is an independent Bar ready and willing to defend the right so that are guaranteed in society, there cannot truly be said to be freedom and the rule of law'.

In the same way that there should be ethical guidelines for judicial officers, the legal profession needs to be aware that their independence and impartiality is based on ethical conduct. Just as codes of conduct now exist for judicial officers, the last 50 years have seen the development of codes of conduct for lawyers which set out the basic principles of accepted behaviour. The International Bar Association's International Code of Ethics for Lawyers, although applying to the relationship between lawyers working in different jurisdictions, is as applicable domestically as internationally. For example, Rule 2: 'Lawyers shall at all times maintain the honour and dignity of their profession. They shall in practice as well as in

private life, abstain from any behaviour which may lead to discrediting the profession of which they are a member...’ and Rule 6: ‘Lawyers shall always maintain due respect towards the court’.

It is said that a strong legal profession makes a strong bench, A legal profession that behaves with honour and dignity can support judicial officers in dispensing justice in a fair and independent way.

### The media

Sometimes public comment on judicial conduct has been influenced by false notions of judicial accountability which fail to recognise that a judge is primarily accountable to the law, which he or she must administer, in accordance with the terms of the judicial oath , ‘without fear or favour, affection or ill-will’.

This does not mean that judicial officers are therefore entitled to use contempt of court as a means of fighting the media. Justice Belgore of Nigeria stated in 1989:

*‘Contempt of court is a very powerful weapon in the hand of the courts and that is why care must be taken in publishing what is regarded as public interest so as not to fall into the ambush of contempt of court. There should be no judgement by general acclaim of the public whipped up by the press. The Judge should be allowed to judge solely on the evidence before him and the law applicable.’.*

At the same time he does stress the importance of the rule of sub-judice which seems to be being eroded in some parts of the Commonwealth including England and Wales:

‘The function of the press as the watchdog is honourable and demands the highest degree of responsibility. The function of finding guilt of crime against a citizen is that of the courts.

When the courts are available and functioning, no citizen shall be tried on the pages of newspapers. Court is the forum for trying a person and once a matter is before the court, care must be taken so as not to prejudge the Issue on pages of newspapers.’

### Conclusion

The international principles of human rights may promise that the judge shall *be* competent, independent and impartial. But in many countries, especially in the lower judiciary, ethical behaviour may leave a great deal to be desired.

The primary responsibility for deciding whether a particular activity or course of conduct is appropriate rests with the individual judicial officer. When they accept the appointment, they accept the restraints imposed on them. As we have seen there are numerous ways of ensuring ethical conduct in the administration of justice whether through judicial codes or guidelines, training or other mechanisms. Ensuring that the appointments systems are transparent and based on merit not improper considerations, that the terms and conditions of service are adequate to avoid exposure to corrupt practices, that judicial officers and court staff are aware of their respective roles, these are the essentials for good justice.

The Commonwealth (Latimer House) Principles state that ‘An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice’. It is our right as citizens to ensure that the judiciary is not only *de jure* but also *de facto* the respected third pillar of democracy.

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# SUSTAINING AND ENHANCING THE DEMOCRATIC DIVIDEND IN COMMONWEALTH AFRICA

*Richard Nzerem*

LLB, LLM (Director, Sir William Dale Centre for Legislative Studies, Institute of Advanced Legal Studies, University of London; former Director, Legal and Constitutional Affairs Division, Commonwealth Secretariat).

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The aim of this paper is to consider some of the ways in which the Commonwealth has contributed to the cause of good governance and human rights. It will also consider what role it would be reasonable to expect the judiciary can play in advancing the cause of good governance in Commonwealth Africa in the bumpy years that lie ahead. As will become evident, any such expectation could be misplaced. This is so especially against the background of the complex milieu of developments now taking place and likely to continue to take place in global governance.

The profound array of changes that have followed in the wake of globalisation has made it imperative that policy makers and governments reconfigure their calculations of the way society should be governed. Faced with these same changes the judiciary, as the acknowledged custodians of the law, have a compelling duty and a special responsibility that challenge it to find effective responses, within the parameters of the law, to the perceived excesses of globalisation.

The issue is not whether, because of the events that have taken place especially over the last 50 years or so, Commonwealth Africa should be written off as beyond the pale. Rather the question should be whether because of the same events, there is a perception that Commonwealth Africa is, indeed, beyond the pale and therefore requiring 'special' treatment? Good governance purists would argue that there are ample grounds to justify such a perception but that argument could only be sustained if one took a short term view of the historical and political matrices that have driven events during this period.

## **Democratic balance sheet**

On the one hand, there is a significant, if not compelling, matrix of living historical fact to consider - eighteen of the 53 countries that

constitute the Commonwealth Association are from the African region and all of them, except South Africa, gained their sovereign independence during the last fifty years. (This excludes Zimbabwe which withdrew from membership at the Commonwealth Heads of Government Meeting held in Abuja, Nigeria in December 2003.) The democratic balance sheet for many of these countries over this period, however one defines democratic governance, is not something to be particularly proud of and in large measure has been, at best, a mixed one.

For a greater part of the 50 year period, from about the middle of the 1960s until about the middle of the 1990s, the Commonwealth was under sustained criticism, some would say justified, for turning a blind eye to the poor human rights record of some of its members and for being soft on the dictatorships among them.

The truth of the matter, however, is that far from the principles and declarations being mere rhetoric, the Commonwealth, when persuasion seemed to have failed, has acted when necessary. It has acted to isolate or to exclude its unrepentant or recalcitrant member countries. Examples that immediately spring to mind include South Africa and Nigeria both of which, after many years in the international political wilderness, are again playing prominent roles in Commonwealth affairs.

Evidence, if any was required, of the measure of success that the Commonwealth can claim it has achieved in remaining relevant to a modern world is that in the last decade of the 20th Century, when there were growing doubts about the usefulness of the Commonwealth, no fewer than nine of its member countries were either one party states or were ruled by military dictatorships. The Commonwealth was then criticised for inaction and not being faithful to its principles by ignoring the poor human rights record of some of its members. Regimes that represented essentially only

narrow 'minority' rights and interests and had usurped the power of the state to suppress the rights and interests of other groups who often constituted the majority were allowed to remain as members.

In the event, before the turn of the century, the one party states and military regimes had all but disappeared. The Commonwealth demonstrated its ability to redeem itself. The relentless chant of the mantra of good governance, of the need for open, just and accountable government began to strike a more responsive chord among its membership. Government by decree began to be seen as no more than an unfortunate aberration and a mere footnote in the history of the countries concerned in particular and for the Commonwealth in general. The Commonwealth proved that it has the capacity to renew itself not only by bringing to bear sustained pressure on countries where there have been substantial breaches of human rights but also by making itself a sufficiently attractive organization to new members who saw the benefits of membership. In 1995 the Commonwealth broke new ground by admitting two new members even though they did not even have the usual traditional ties with the Commonwealth to qualify for membership: Cameroon, largely French speaking and a member of '*La Francophonie*' and Mozambique, a Portuguese colony until its independence. Ironically, the two new members were admitted at the same meeting at which Nigeria was suspended from membership.

Much of the Commonwealth's commitment to democracy and the practice of democratic traditions can trace its origins to the Harare Commonwealth Declaration of 1991 and its less well known and less often cited and precursor – the Singapore Declaration (1971). The later Declaration set the tone for the principles that underpin the Commonwealth, acceptance of, and commitment to, which have come to be recognized as the main conditions for admission to membership and to remain as a member.

### Harare Commonwealth Declaration

We would do well to remind ourselves of the essential message of the Harare Declaration. At Harare in 1991, Commonwealth Heads of Government reaffirmed their commitment to the Declaration of Commonwealth Principles first set out by their predecessors some 20

years earlier in Singapore. But in the Harare Declaration they went further to set out new Commonwealth priorities for implementing their commitment to the principles of democracy, good governance and human rights, sometimes referred to as the fundamental political values of the Commonwealth. For the first time, adherence to these principles became a requirement for admission to membership as well as a potential reason for invoking sanctions or suspension if they are breached.

Among the principles to which the Commonwealth Heads rededicated themselves are:

- acceptance of the liberty of the individual under the law, equal rights for all citizens regardless of race gender, colour, creed or political belief, and in the individual's inalienable right to participate by means of free and democratic political processes in framing the society in which they live;
- recognition of racial prejudice and intolerance as dangerous threats to healthy development, and that racial discrimination is an unmitigated evil; and
- opposition to all forms of racial oppression, and a commitment to the principles of human dignity and equality.

Following the reaffirmation of these principles, Governments pledged themselves to 'work with renewed vigour in the area of the protection and promotion of the fundamental and political values of the Commonwealth'. These fundamental values embrace democracy, democratic processes and institutions without which the values become empty slogans.

### Milbrook Action Programme

By 1995, however, it became apparent that notwithstanding the strengthened fundamental principles reaffirmed by the Harare Declaration, there was no monitoring or enforcement mechanism in place to ensure compliance. At their Auckland, New Zealand, meeting in 1995, Commonwealth Heads of Government decided to strengthen further the fundamental principles by adopting the Commonwealth Millbrook Action Programme in order to fulfill more effectively the commitments restated and reaffirmed in the Harare Declaration. The programme placed a continuing obligation on the Commonwealth

Secretariat and member countries in a number of important areas. More importantly it established the Commonwealth Ministerial Action Group (CMAG) which it charged with assessing the nature of any infringement of any of the principles. The Group was empowered to recommend measures for collective action thus making the principles a veritable benchmark against which the activities of governments are to be measured and to ensure that they are Harare principles compliant.

Notwithstanding these developments, criticisms continued to be made that the monitoring arrangements were inadequate to address the issues that confront the Commonwealth, that the Commonwealth fundamental principles are merely aspirational and vague and that the values they entrench are not universal. However, these criticisms overlooked a very important fact. They overlooked the fact that the principles and declarations were never intended to codify human rights standards for the Commonwealth or to replace the main international conventions to which most Commonwealth members have already subscribed. These include the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights as well as a number of other regional instruments such as the African Charter on Human and Peoples Rights

The Harare Commonwealth Declaration was therefore, in a sense at least, a way of the Association giving notice to all its members that it means business. By attaching human rights conditions to membership, the Commonwealth showed the seriousness of its intention to act on its principles and to expect members to be Harare Declaration compliant at all times. It was for this reason that after Fiji's withdrawal from membership in 1987, it was not allowed to rejoin until it had amended its Constitution to remove the discriminatory provisions against Fijians of Indian descent. Similarly, South Africa was readmitted only after it voluntarily agreed to dismantle apartheid and to end minority rule.

The clear message of the Declaration was that if democracy means anything it is essentially about choice - choice of political parties, choice of policies, and choice of personalities. The meaning of the message was that freedom of choice would be empty and meaningless

without free elections. Free elections in turn entailed freedom of speech and of association. Without freedom of speech, the appeal to reason cannot be made. Without freedom of association, meaningful political parties are practically inconceivable. This is because in the absence of freedom of association it would be difficult for people to band together into parties that would be able to formulate policies to pursue common ends. It would be farcical in such a situation to speak of people participating freely in national elections for the purpose of electing their leaders. It would not be too presumptuous to claim that none of these freedoms can be secured without the rule of law and the independence of the judiciary.

### **Election monitoring**

To demonstrate the earnestness of its intention to follow up on its good governance pronouncements the Commonwealth through the Commonwealth Secretariat, the most visible symbol of its existence as an organisation, put its money where its mouth lay. It did so by putting substantial resources into sending election observer missions to many Commonwealth countries that wished to put their democratic credentials beyond doubt. That there is a prevailing perception that international election observers only go to countries that cannot be trusted to organize 'free and fair' elections may come as no surprise to anyone. This perception has developed around it a ring of authenticity which seems to have worked to good effect. In recent times, any developing country that fails to open its electoral process to especially outside observers is automatically suspected of having something to hide. There can be little doubt that between 1990 and 2003, the Commonwealth has gained from its record of having sent many observer missions to observe elections, both national and local elections in many parts of the Commonwealth including practically all the member countries in the African region. By 2003, no fewer than 20 such observer missions had been sent by the Secretary General, always at the request of the government of the country concerned and after appropriate consultations. The mandate of the observers makes it clear that they serve in their individual capacities and not as representatives of their governments or the Secretary General.

## Commonwealth Secretary General's role

The main objective of the Millbrook Action Programme is to ensure that when a member country violates the Commonwealth's fundamental political values as elaborated in the Harare Declaration, and in particular in the event of an unconstitutional overthrow of a democratically elected government, appropriate steps can be taken by the Secretary General. Millbrook empowered the Secretary General to express the collective concern of the Commonwealth countries and to encourage the restoration of democracy in the country concerned within a reasonable time frame. The raft of steps that the Secretary General can take include:

1. the immediate public expression by the Secretary-General of the Commonwealth's collective disapproval of any such infringement of the Harare principles;
2. early contact by the Secretary-General with the *de facto* government followed by continued good offices and appropriate technical assistance to facilitate an early restoration of democracy;
3. encouragement of bilateral measures by Member countries, especially those within the region, both to express disapproval and to support early restoration of democracy;
4. appointment of an envoy or a group of eminent Commonwealth representatives where, following the Secretary-General's contacts with the authorities concerned, such a mission would be beneficial in re-enforcing the Commonwealth's good offices role;
5. stipulation of up to two years as the time frame for restoration of democracy where the institutions are not in place to permit the holding of elections within a maximum of six months afterwards;
6. pending restoration of democracy, exclusion of the government concerned from participation at ministerial-level meetings of the Commonwealth, including CHOGMs;
7. suspension of participation at all Commonwealth meetings and of Commonwealth technical assistance if acceptable progress is not recorded after a period of two years; and

8. consideration of appropriate further bilateral and multilateral measures by all Member states (such as limitation of government-to-government contacts and people-to-people measures; trade restrictions; and, in exceptional cases, suspension from the association), to reinforce the need for change in the event that the government concerned chooses to leave the Commonwealth and/or persists in violating the principles of the Harare Commonwealth Declaration even after two years.

There can be little doubt that the imposition of any of these measures or a combination of them would cause considerable disruption to their political, diplomatic and economic relations of any member state that finds itself at the receiving end of any of these measures as member states that, for whatever reason, have experienced suspension of their membership would testify.

## The CMAG

At the heart of the mechanism for the implementation of the measures just listed is the CMAG described above. It operates, in effect, as the Commonwealth's 'trouble shooter' to deal with serious or persistent violations of the Harare principles. The Group is convened by the Secretary-General and comprises the Foreign Ministers of eight countries, supplemented as appropriate by one or two additional ministerial representatives from the region concerned. The Group's task is to assess the nature of the infringement and recommend measures for collective Commonwealth action for the speedy restoration of democracy and constitutional rule.

For entirely understandably reasons, CMAG confined its remit to Commonwealth countries that were under military rule at the time of its creation in 1995, namely Nigeria, the Gambia and Sierra Leone. Nigeria was suspended from the Commonwealth by Heads of Government following the execution of Ken Saro-Wiwa and his associates by the military government. The suspension was maintained by Heads of Government at their meeting in Edinburgh in October 1997, 'pending the completion of a credible transition to democratic civilian government and compliance with the Harare Declaration'.

At a very practical level in addition to the election observer missions and the activities of CMAG, the Commonwealth Secretariat also organised or funded parallel programmes that were designed to promote, consolidate and deepen the democratic process in member countries. It held a series of regional workshops on access to justice in which representatives of many NGOs active in the field of human rights were funded by it to participate. At another level, it collaborated with the judiciary and other Commonwealth NGOs in organizing judicial colloquia to promote the domestic application of international human rights norms. It also actively supported the launching of what has come to be known as the Latimer House Guidelines the main thrust of which is to promote peaceful coexistence between the institutions of governance within the state in particular the three main branches of government namely parliament, the executive and the judiciary, and to encourage mutual respect for each other's constitutional position in their sometimes frosty relations.

The judicial colloquia and the programme of workshops on access to justice spawned a raft of statements and restatements of principles widely acknowledged within the Commonwealth as underpinning democracy and good governance. Commencing in 1988 with the Bangalore Principles developed at the colloquium held that year in Bangalore and which have been elaborated, refined and restated at subsequent colloquia in different parts of the Commonwealth, these principles together with the 1992 Lusaka Statement on Government under the Law and their restatements at subsequent workshops collectively have had the effect of extending the traditional boundaries of the rule of law in many developing Commonwealth countries.

In practical terms, what has been achieved is a more purposeful intervention of administrative law in governance issues. It has also resulted in a much wider use of the process of judicial review to check the more flagrant excesses in the use of executive power in many commonwealth countries.<sup>1</sup> The Lusaka Statement on Government under the Law itself has been endorsed by Commonwealth Law Ministers as encapsulating the hallmarks of democratic governance, which the citizens of any democratic society are entitled to expect and which they pledged to encourage their govern-

ments to put into practice.<sup>2</sup> This has been a particularly welcome development, perhaps nowhere more than in Commonwealth Africa where the unconstitutional overthrow of democratically elected governments especially by the military is no longer considered to be the fashionable alternative to bad civilian government that it once used to be.

### The Latimer House Guidelines

In typical Commonwealth fashion, the Latimer House Guidelines have been the subject of consultation within the various stakeholder organs and organizations in the state and between them collectively. Recently in April 2005 representatives from the Executive, the Judiciary, the Legislature and Commonwealth civil society organizations from all the 18 Commonwealth countries in Africa met in a forum held in Nairobi, Kenya, under the auspices of the Commonwealth Secretariat and the Kenya Government to consider ways and means of promoting and advancing the Latimer House Principles. Significantly, among the topics that the Forum considered as possible ways and means of promoting and advancing the Principles were the following:

1. examining ways of strengthening and reforming the institutions for fighting corruption
2. encouraging and exploring new ideas for sustaining (good) governance in order to reduce poverty and promote human rights and gender equality
3. encouraging strategic partnerships between government and non-governmental organisations and civil society in promoting and protecting ethical governance, accountability and the rule of law.

The Forum noted that the effective implementation of the Principles calls for commitment of the relevant national institutions, in particular the Executive, the Parliament and the Judiciary, to the essential principles of good governance, fundamental human rights and the rule of law so that the legitimate aspirations of the people can be satisfied. It welcomed wholeheartedly alternatives to formal procedures and agreed that Commonwealth Africa needs to construct new ways of pursuing a human vision of justice. The Forum welcomed such alternatives because of the failure of the old traditional approaches that were designed to guarantee effective access

to justice. In this regard, the Forum addressed the issue of the cost and delay of justice within the formal legal system and suggested that courts which use simple, informal and speedy procedures should be established to reduce delay and costs. The establishment of such courts and adoption of such procedures would in no way be an exceptional development. On the contrary, it would be borrowing a leaf from developments in other parts of the Commonwealth, notably the Indian subcontinent where the Indian Supreme Court, through its epistolary jurisdiction was able to temper the hardships suffered by indigent and helpless litigants in a way that is reminiscent of the way that equity tempered the harshness of common law during the early years of the development of the English legal system.

### The judicial role

Earlier in this article, I suggested that, faced with the array of challenges inherent in globalization, the judiciary have, as the acknowledged custodians of the law, a compelling duty and a special responsibility to find effective responses to today's problems within the parameters of the law.

The judiciary, in most of Commonwealth Africa which subscribes to the common law tradition, has in its armoury a vast array of remedies that, with creative construction and boldness, it could deploy to promote the cause of good governance. An activist, independent and fearless judiciary supported by an equally independent and fearless legal profession could, between them, ensure that the democratic dividend that has been painfully won during the last decade is sustained and, unquestionably, could contribute to enhancing it.

One area of profound concern in Commonwealth Africa that has not only damaged the integrity of the institutions of governance but also their ability to contribute meaningfully to development is rampant corruption within their ranks. Unfortunately, the judiciary cannot claim that it is exempt

from this damning indictment. Governments and Legislatures, if they show the will to seriously commit themselves to their respective duties, have it within their constitutional powers to enact appropriate legislation to deal effectively with corruption. This could include reversing the onus of proof where, for instance, a public official has acquired property that cannot be accounted for and that is demonstrably way beyond the means that the official's known legitimate sources of income can support.

Governments have it within their legitimate powers to establish effective mechanisms that are capable of bringing to book especially those who perpetrate grand corruption and inflict serious fraud on the public treasury. The judiciary, for its part, would do well to undertake or to instigate the institution of wholesale judicial reform that would inspire attitudinal changes so that it can have the courage to hold the scales of justice between the citizen and the state and be able to dispense justice without fear or favour.

Study after study has established that there is a direct causal link between corruption and bad governance and that one of the most damaging and debilitating consequences of corruption is that it distorts development and prevents society from reaping its just rewards from the democratic dividend. A fearless and independent judiciary that deals harshly with the perpetrators of such crimes against the public weal would have the full weight of public support behind it.

### Endnotes

- 1 For an examination of the role of administrative law in government see *Good Government and Administrative Law – An Introductory Guide (1996)*, by Professor Bradley and Mr Himsforth published by the Commonwealth Secretariat, pp. 1-10.
- 2 For the text of the Lusaka Statement on Government under the Law see *Good Government and Administrative Law – An Introductory Guide (1996)*, p. 36 et seq.

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# CONTINUAL JUDICIAL EDUCATION AND JUDICIAL REFORM

*His Honour Judge Keith Hollis*

Director of Studies, CMJA; a paper at the Accra conference

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Although everyone may agree as to what judicial education is, I am not sure that there would be the same level of agreement in respect of judicial reform. I would define judicial education as being a programme or series of programmes for judicial officers which has the aim and purpose of improving their abilities to carry out their independent constitutional role. In my view, everything builds from my judicial oath and any effective judicial education has to be such as to improve my ability to carry out my role in accordance with that oath. But “reform”, and especially “judicial reform”, is a more slippery and subjective term – what to some may be a judicial reform may seem to others to be a step in the wrong direction. The Oxford English Dictionary’s definition of “reform” is “the amendment or altering for the better of some faulty state of things, esp. of a corrupt or oppressive political institution or practice”. The definition carries an implication of the rectification or improvement of something that is wrong. Without being complacent there may not always be a need for reform in a particular area. There is no point in reform just for the sake of reform, something which politicians seem to be often keen on.

Judicial reform can be a difficult area, and it seems to me that before identifying any such reform, it is doubly important that we first identify what needs to be amended or improved, then decide on the nature of the necessary reform, and whether the reform and the problems that it may bring about are proportionate to the problem it addresses, and if so finally identify how judicial education can be used to promote that reform. We should also ask how far it is right to keep judicial reform to ourselves. This is difficult: but why shouldn’t a representative of the people we serve, and whose taxes pay our wages, democratically elected, not have a voice in our reforms processes? If so, how loud a voice? I pose these as questions for discussion.

Whatever the answers I hope that we can agree that judges should be the “driving force”.

## Judicial education

Judicial education itself is the central judicial reform that has taken place over the last few years. This is certainly an area where I can say with confidence that reform was needed in England 25 years ago. The establishment and acceptance of residential judicial education programmes, both for newly appointed judges and magistrates, and refresher courses for those already on the bench, through our Judicial Studies Board has been a very important reform. Although England cannot claim to have been in the vanguard, this has been the central judicial reform of the last twenty five years throughout the Commonwealth.

I note looking back at the programme on the CMJA’s first full conference, in Bermuda in 1972, that it included papers and discussion sessions on family law, sentencing, delays, drug problems, and judicial independence. It was quite novel then to have had such programmes and such discussions.

The CMJA was at the front of the field in promoting the judicial reform that has been judicial education. Judicial education is one of our constitutional aims, and the aim with which it has had the greatest success. If a fundamental object of a judicial education programme is to give judicial officers an opportunity to get together to learn about some aspect or another of their craft, then this Association has been in the fore in demonstrating how this can best be done. It has been our aim throughout our history to give opportunities for groups of judicial officers of differing rank and from different Commonwealth regions to discuss common issues together, without regard, save that of proper respect, for judicial rank. This can be difficult to achieve. We now try it at the Judicial Studies Board in England, but not always successfully. I am sure that we are not

alone in finding that on occasions the more junior can be too coy, whereas the more senior can be overbearing (although there are times when the converse is true, although it may be hard to imagine; even Lords Justices of Appeal can on occasions be shy and retiring, and even District Judges or magistrates can be overbearing and truculent).

This has been a fundamental judicial reform. The previous unsatisfactory, often non-existent, training of judicial officers both in the law itself and in what I would call “judgecraft” has been “improved or altered for the better” by the establishment of judicial training programmes. I would add that a recent aspect of judicial education has been the working together of judicial education institutes of different countries, to share experiences and promote best practices internationally. This is an exciting development which I believe we will be seeing more of in the coming years and, as with the CMJA’s work, help each of us to have a global perspective on our role, however modest it may seem locally.

### **The nature of judicial education**

Some form of judicial training is now accepted – I hope universally – as something that is of value to both judges and magistrates, to all those who carry out some form of judicial role. Not long ago, certainly in my time as a lawyer, it would have been thought a rather odd idea that judges may need to be taught law. Even now some of my neighbours seem surprised when I tell them that this happens. I am not sure that it was originally intended that a central purpose of judicial education would be the learning of the law: but we cannot rely on the cases we hear being conducted by well qualified and experienced advocates who can ensure that we have the law clearly set before us. I doubt if this was ever really the case save in the more refined areas of the superior courts in metropolitan centres. It has become increasingly the case in the United Kingdom (and I have no doubt elsewhere) that judicial officers, at every level, have to rely on their own knowledge and researches of the law in coming to their decisions. In our civil courts now, as I believe in yours, many of the litigants are unrepresented and rely on the judicial officer to know the law that is applicable to the case. The law by its nature becomes more complicated.

I quite recently heard a claim between two businesses. Neither party was represented or had sought any legal advice. Both were represented by directors, few facts were at issue, but there were some knotty legal points to decide. The whole hearing was remarkably amiable. At its conclusion I was thanked by both directors who then told me that they had brought the case to court to get a decision on the legal points as this would be much easier and cheaper than them both separately taking legal advice, it would also, at least they had hoped, be conclusive and to the point. Increasingly judges find themselves being put in this position. We have to know our stuff, have confidence in our knowledge, and not rely on our appeal courts to put us right when we get it wrong.

The Judicial Studies Board in England and Wales is now facing the challenge of taking on responsibility for the training of our lay magistrates. For the first time it will be helping judicial officers without the advantage of a legal background. In other countries, such as those of West Africa, there are also junior judicial officers who have the need to build on what may be quite limited basic training. Whatever our background, we share in common a need for lectures on “black letter” law, on new laws as they are introduced and refreshers on developments in the law generally (which may well include developments from other common law jurisdictions and in international law). We should involve in this our academic colleagues. Their efforts in the U.K. are greatly appreciated. They have a great deal to contribute, especially in the development of the common law, in drawing our attention to flaws & inconsistencies in judicial reasoning.

Also judicial training helps to develop a degree of consistency in the application of the law: this is especially so when the training may be in procedural matters, or where politicians, ducking the nuts and bolts of their declared policies, pass legislation that relies greatly on judicial discretion. This is best achieved by having dummy scenarios of cases discussed by groups in syndicates. The recent progress in many jurisdictions, including my own, in judicial case management both in civil and criminal jurisdictions could not have effectively happened without such training. The establishment of judicial case management has

been the second great judicial reform, after judicial training, that I have seen in my own judicial career to date.

### Contextual education for judicial officers

A recent aspect of judicial reform and judicial education relates to work being done to promote awareness amongst judicial officers of “social context”, of an awareness of the approaches to life of people whose background and ways of life may be different to that of judges and magistrates generally. This is a more difficult area, the purist may say (indeed I have said it), that as judges we need go no further than our judicial oaths. I can understand, although wouldn't agree with, the reasons why that argument would have had more force in England 50 years ago when diversity in society was almost exclusively defined in terms of social class. But the U.K. has had to follow jurisdictions that have had a greater experience of being a melting pot of different races and religions, in promoting amongst its judges knowledge of the differing ways of and approaches to life by different groups in the societies that we serve. In the U.K., we have made a tentative (and in my view halting) start, with training on racial awareness issues, and it is not a big step from that to having training on other social context issues, for example on the position of women in society, minority groups, sexuality.

Other jurisdictions give a lead in this. Just to give one example from many, I know of the “Jurisprudence of Equality” programme that has been run in Tanzania on gender issues, specifically domestic violence, and there are very many others. In a paper she gave last year Chief Justice Beverley MacLachlin of Canada, describing the steps that were being taken in her jurisdiction to promote social context training for judges, said that such training was vital as the “judge must be the one who understands every voice”, and at the same meeting Justice Claire L'Heureux-Dube made the point that “contextual enquiry is an attempt to attack the problem of privilege and to understand the diversity of people's experiences”, a more radical take on the same issue.

But we must be cautious. Judicial training is only a part of the solution to these problems, it is too heavy a burden for judicial training alone to take on. It is more important to ensure that our appointments procedures do not exclude

men and women from unexpected backgrounds who are otherwise qualified. Anyway it may be impossible for any judge, however well trained, to understand every voice, and we should beware of engendering false confidence, a great problem in the past. There is a limit to what judicial training in this area can do, although I accept that it can help the judicial officer have a better awareness of the limits of his or her own knowledge, and thus has a role in putting our humanity better in touch with the humanity of those who are in court before us. This helps us to better fulfil our judicial role in accordance with our oath and to play our part in ensuring that groups in society, traditionally marginalised by legal or social structures, are not victimised and further marginalised as a result of judicial ignorance or insensitivity. It has been said that democracy is the least worst system of government that there is. The statement too, that there has never been a famine in a universal democracy is, surprisingly, true. But democracies need to protect and nurture minority voices, and social context training can help us play our role in this.

There is another “contextual” area where there has been judicial reform and where there may be a need for more judicial training. The establishment of specialist courts has been a welcome reform, for example drug treatment courts, commercial, employment, and environmental courts. How far does this reform carry with it a need to have specialist training, and how far should that training go? As an example, commercial courts are now common, but judicial experience in commercial matters is not. Should judges be encouraged to acquire this? I suspect that some of the difficulties we have experienced in England over civil procedure reforms arise from judicial misunderstanding of why many commercial enterprises, especially insurance companies, litigate. Should we go as far as appointing M.B.A.s to such courts? How would this be funded? Such training is contextual training too, perhaps no less valid than social context training. If the economic progress and stability of our communities are dependant on the success of our commerce then the judicial officers who enforce the rules of commerce need to understand the realities of the commercial world in order to make their contribution to that success – “the judge must be the one who understands every voice”.

Particular caution is needed to ensure that any contextual training is not promoting some political or other “agenda”. But providing it is kept under the control of the judiciary, its limitations are understood, and it is not allowed to be used as a means for outside groups to promote special interests, then contextual training, as I am widely defining it, should be a valuable help in our work. It can help bring about a better informed judiciary of a more consistent quality, which is more sensitive to the social milieu of those they are judging.

### Conclusion

We should always bear in mind that judicial training of any sort comes at a price. Not just in the provision of the training itself but in the cost of taking judicial officers away from courts, causing delays. While it takes place, the accused are languishing in prison longer awaiting trial, witnesses are forgetting what happened, our courts are empty. Both the direct financial cost, and the indirect cost in its contribution to delay are areas which give potential levers to others to exert pressures on our independence. We should always bear this in mind and ensure that our programmes are worthwhile in content and that the costs are not extravagant. Judicial training can and should be kept simple, without expensive

premises and large and unnecessary bureaucracies to support it.

This note of caution, and the mention of the more controversial contextual training, brings me back to the original main concern about judicial education – the risk that it may undermine our judicial independence. We must always be alert to those concerns. Succeeding generations of judicial officers have to pass on the torch of independence and ensure that succeeding generations of politicians and administrators are aware that it is being passed on and that it still burns brightly. The promotion of judicial reform through judicial education underscores the importance of all such matters being under the leadership of the Chief Judge, or his or her senior judicial nominee. He or she should be seen to be taking a lead and where possible participating, to take responsibility for ensuring that every programme passes the basic test: does it do anything to undermine judicial independence? And if the answer is yes to ensure that the programme be changed or abandoned. He or she, the Chief Judge, should have the unstinting support of the rest of us in the difficult area. If there is any suggestion of the executive taking some sort of control, then a united and supportive front behind our judicial leaders is vital.

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# COMPUTERS FOR THE ENGLISH JUDICIARY

*The Rt Hon. Lord Justice Brooke*

Court of Appeal for England and Wales. A contribution to the CMJA's Accra conference.

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The history of the use of computers by judges in England and Wales falls into three main phases. The first lasted between 1992 and 1999. In this period about a third of our full-time judges were supplied with lap-top computers, along with word-processing and communications software. No money was provided for training, and judges did their best to learn how to use the equipment, often with the help of other judges (usually the younger ones) at their court centre who had IT know-how.

This second phase began in January 1999 and will end in 2006. Until June 2004 I was the senior judge in charge of modernisation, with a place on the Government Board charged with introducing a £200 million IT investment programme into our courts. In mid-2002 none of our courts were networked. By April 2006 all our Crown Courts and most of our county courts will have a basic IT network. This links the courtrooms and the judges' chambers not only into the local area network but also into a wider national network which embraces all judges, court staff and court administrators.

Work has also been progressing to develop a one-stop Judicial Portal (for easy access of a judge's information needs on the Internet, including modern communications software), and also an electronic on-line legal information service ('ELIS'), which makes available to the judiciary most of the law reports and statutory material that are now in digital form. This is particularly valuable for judges in country areas with poor local library facilities.

During this period a second generation of freestanding laptops were supplied, this time to every full-time judge (unless they said they didn't want one). Initially a three-day training course was provided for each judge (except those already proficient in the use of computers) when the laptop was supplied. But there was no other training help other than through a local IT liaison judge at the court centre, who did his or her best to assist.

When what was called the LINK installation arrived at a court centre from about 2003 onwards, the judges were also provided with a networked desktop PC (in addition to their judicial laptop) and received training on its use, usually alongside the court staff at the centre. The provision of two PCs was inconvenient, but security considerations meant that the judges' freestanding laptops could not 'plug in' to the Government Secure Intranet, and we were very keen that they should not lose the benefits of the court centre network until such time a new generation of secure laptops were delivered.

This is happening now, and by April 2006 most of our judges will have been supplied with a third generation laptop, of a superior specification, which they can use for all purposes, and can take from court to court (so long as the LINK network has been installed there) and 'plug into' their private files through the network. We have done our best to ensure that nobody may have unauthorised access to a judge's files.

## Meeting training needs

The Judicial Studies Board ('JSB'), which is responsible for all aspects of judicial training, took over responsibility for judicial IT training, and created its first IT Strategy Group at the end of 2000. When the JSB took over responsibility for judicial IT training, a judge was appointed the co-ordinator of judicial IT training, with back-up from skilled staff at the JSB. In July 2002 a set of 'basic competences' was established, and a Training Needs Analysis was sent to every judge, in order that the JSB could assess the scale of the training need. About a quarter of our judges were assessed as being sufficiently skilled to have no training needs at all. On the other hand, 45% fell so far below the required competences that they needed to be retrained from scratch. The others fell somewhere between these extremes.

Resources were then concentrated on providing two-day training courses for what were called the Legacy Groups (being the

legacy of a past in which no training was provided), and the arrangements for liaison judges at each court centre were strengthened. Every residential civil, criminal and family law continuation seminar since mid-2002 also had an hour set by for training on some aspect of IT skills, dependent on each judge's particular needs.

The JSB reviews the progress of its IT training strategy every 12 months. At its November 2003 meeting, the Board approved the following strategy:

- Training for part-time judges (to support the LINK, Judicial Portal and Legal Information On-line programmes and the IT-driven case management elements of the criminal justice reforms);
- Review and revision of the IT competence framework (to raise levels of proficiency once the majority of judges reached minimum competence following the Legacy and basic skills CD package)
- Development of a multi-media distance learning strategy, involving: (a) development of the JSB's websites; and (b) evaluation of the JSB's public and training websites:
- Training and/or information needs analyses (TNAs) of judges, magistrates/legal advisers; and tribunals judiciary;
- Review and revision of the web-user requirements (a) to meet the needs identified in the TNAs in relation to training and knowledge management and (b) to ensure that the functionality exists to keep the JSB abreast of changes in technology *e.g.*, electronic submission of travel and subsistence claims

In January 2004 an excellent training CD-Rom for basic IT skills was sent to every judge.

A second IT Training Needs Analysis was sent to all judges in the summer of 2004. This revealed the success of the training strategy to date. Nearly half the judiciary were now assessed as having no further training need, and a further 30% were now in the intermediate category. Most of the remaining 20% were in the most advanced 'Legacy Group', and only a tiny minority were classified as 'Won't'. The co-ordinating judge said that it

could now be said that 63% of the judiciary were now making effective daily use of the IT equipment provided to them.

In addition to the CD-Rom, a two-volume IT Bench Book has been supplied to all judges, to help them when they get into a muddle.

In 2003-4 the JSB's strategy advanced along six parallel lines. They:

- Issued the training CD-ROM on basic IT skills. They later issued an XP version, incorporating features associated with the new laptop build.
- Reviewed the IT competence framework.
- Developed an outline distance learning strategy, designed to lead to recommendations for a project to develop a full training needs analysis (which will include IT skills and knowledge management needs) in 2005.
- Launched their private training website in April 2004 (to which all judges have access).
- Undertook a review of their public website<sup>1</sup>. This review recommended short-term changes to the site to make it more easily navigable and more relevant to the magistracy and tribunals judiciary. The public website has now been re-built and has been available since the beginning of November 2004.
- Prepared an outline communications strategy, which includes recommendations for development of an e-business strategy.

At the annual review in December 2004 the Board decided that they would:

- Develop a training programme to
  - (a) bring judges who, despite the Legacy programme, still fell below the threshold of minimum competence set out in the existing framework (via a series of Legacy-type seminars); and
  - (b) achieve compliance with the new level of minimum competence expressed in the draft competence framework (probably by means of local, IT Liaison Judge-led support in using the training CD-ROMs);

- Develop a project to identify judicial training and knowledge management needs which would feed into the Training Needs Analysis project proposed in the distance learning paper;
- Develop a project to identify the communication and information management needs of the tribunals judiciary and the magistracy;

So far as IT training was concerned, it was proposed that there should be the continued provision of training to achieve a level of minimum competence in relation to current, and successive competence frameworks; and the continued provision of induction training in the use of IT equipment to new judges as soon as they were appointed. Experience is showing that new appointees to the Bench are generally much more familiar with IT skills than their predecessors!

I chaired the English Bar's first Computer Committee 19 years ago, and I took a leading

part in all these developments with judicial IT between 1991 and 2004. Today's scene is now totally different from what I remember in those early days. Although I have often been frustrated by the slow pace of change - and I am still spearheading the demand for modern software systems that will be of more help to judges who have the responsibility of managing cases - the great progress that has been made in developing and implementing the training strategy over the last three years means that more and more of our judges will be adept at using these working tools when at long last they are delivered.

In this paper I have concentrated on training. I have often spoken and written about the development of the use of technological aids in English courtrooms, and this is a much vaster subject.

### Endnote

- <sup>1</sup> <http://www.jsboard.co.uk/>. This contains a massive amount of helpful information, available to all.

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## TONGA: THE STRIKE AND THE JUDICIARY

*Samiu Palu*

Chief Magistrate of Tonga

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Tonga is an Island Kingdom in the South Pacific with a population of about 100,000. Politically, Tonga has been a kingdom since about 910 AD. The first King was of the God 'Aho'eitu and he derived his authority from his divine origin. All things in Tonga belonged to him, the land, the seas and all the people. His rule was absolute. His wishes were the law. As time went on and on the population grew, subsequent Kings appointed some of his closest relatives to be Chiefs and put them in charge of certain areas of the Kingdom but under his overall rule. That was still the position in the 1700s and 1800s when there was first contact with western and other civilization. The King had absolute power. The Chiefs had some power but subject to the wishes of the King. The commoner has no rights and no powers and they existed only to serve the King and Chiefs.

All this changed within the lifetime of one man King George Tupou I (1845-1893). He had to wage war against some of the Chiefs who resisted his authority and reunited Tonga under his rule. He advocated Christianity and with advice from some missionaries he had a written Constitution made in 1875, which declared:

*Since it appears to be the will of God that man should be free and He has made all men of one blood therefore shall the people of Tonga and all who sojourn or may sojourn in the Kingdom be free for ever. All men may use their lives and persons and time to acquire and possess property and to dispose of their labour and the fruit of their hands and to use their own property as they will.*

He also put into place a Westminster type of Government. Further, he subjected himself and his future heirs to the Constitution.

Tonga is not an industrial Country. Most people earn their living from the land and sea nevertheless the Government, which is the biggest employer, employs about 9,000 people including the Magistrates in its civil service.

### **The Strike**

On 22 July 2005, about 8,000 civil servants went on strike, the first of its kind in the Kingdom in which most of the staff of the Ministry of Justice joined. The immediate cause of the strike was dissatisfaction over a salary restructuring project that the Government had just put into effect on 1 July 2005. This salary restructure program was based essentially on a job description basis. The strikers said that the gap between the Ministers and Head of Departments at one end and the rest of the workers were too big.

The strikers formed an Interim Committee that represented their side and the Government had their own negotiation team. The strike went on for six weeks. Most of the services of major Government Ministries were paralyzed and community as a whole was also affected. Politicians and local business offered their full support of the strike. It only ended when the Government finally accepted the terms of the strikers with an assistance of an invited facilitator and a Memorandum of Understanding was signed.

### **The Judiciary**

Out of a total of about 125 employees of the Ministry of Justice including the judiciary, about 100 people joined the strike. However the two judges of the Supreme Court and the eight Magistrates of Tonga remained on the

job and provide the service of the Court in emergency matters so as to maintain the independence of the Judiciary. The Chief Registrar also remained and served the two Judges of the Supreme Court.

The judiciary saw their stance as a matter of principle. They believed that Tonga needs an independent judiciary which holds the respect of the public. To demonstrate that it was impartial, members of the judiciary had to suppress personal views and only express views on matters that came to Court, and in accordance with the evidence and the law.

Now that the strike is over the judges and magistrates are pleased that they had remained on the job and did not take sides, because there are cases related to the strike that are starting to come in and they can deal with them independently.

It was a great experience because the strike was so sudden without any forewarning given. All the Judges and the magistrates stood firm in spite of all sorts of pressures of the strike. For example, one husband is a magistrate (civil servant) who remained on the job while his wife, also a civil servant, joined the strike, and some of the court support staffs that went on strike publicly attacked individual magistrates.

### **Conclusion**

Each jurisdiction within the Commonwealth family has its own oath of office, setting for their respective Judicial Officers the main guiding principles. As for Tonga magistrates, it says, 'I ... Swear by Almighty God that I will well and truly serve His Majesty King Taufa'ahau Tupou IV in the office of Magistrate and will righteously and impartially administer justice in accordance with the Constitution and Laws of this country without fear or favour. So help me God'.

# LAW REPORTS

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## TRAVERS V. NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

IN THE HIGH COURT OF SOUTH AFRICA, TRANSVAAL PROVINCIAL DIVISION

Ismail A.J.

18 August 2005

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Graham Noel Travers is a magistrate at the Regional Magistrates Court, Pretoria. He challenged three decisions by the National Director of Public Prosecutions, by a Senior State Prosecutor at the Pretoria Magistrates Court, and by the Director of Public Prosecutions for the Transvaal Provincial Division, to prevent any new matters to be heard by the applicant. They sought to justify their decisions by reference to the productivity and performance of the applicant as a magistrate. Mr Travers presided in court 12 at Pretoria, which was one of three courts which dealt exclusively with sexual offence cases where victims were minors. He suffers from muscular dystrophy which affects his fine motor core co-ordination and in turn affects his ability to write speedily, and had disclosed his condition to the Department of Justice in 1986.

In October 2003, the Chief Prosecutor sent a letter to the Regional Court President, complaining about “the performance in court 12 particularly when regard is had to the finalisation rate and the court hours”. Mr Travers had many part heard cases from the ordinary Regional Courts and, as a result thereof, he is not always available for court 12. Mr Travers learned a few days later that the regular meeting of prosecutors had been told that he was to be re-assigned away from court 12, and that no new trials were to be placed before him. Mr Travers had an inconclusive meeting with the Regional Court President and subsequently sought to resolve the matter by approaching the International Commission of Justice and the Association of Regional Magistrates of South Africa. After the President of the latter body has raised the matter with the Chief Justice, the Chief Justice recommended that the matter be referred to the Magistrates Commission.

In his application to the High Court, Mr Travers contended that there was a history of opposition to him by the prosecution authorities. He gave a number of examples. He submitted that as early as 2001 or 2002 one of the senior prosecutors openly stated that if a Regional Magistrate chose not to give a decision she and the defence agreed upon during plea bargain negotiations, she would take the matter before another magistrate in order to obtain the desired result. Another prosecutor was said to have threatened “to close [Mr Travers’] court permanently” because he was dissatisfied with Mr Travers retaining charge sheets and the court book rather than returning them to the Clerk of the Court.

In November 2004 the Magistrates Commission considered the report of the ethics committee and recommended that a clerk/stenographer be assigned to Mr Travers’ court; that the authorities ensure that Mr Travers’ court was well ventilated and air-conditioned because its current condition exacerbated Mr Travers health problem; that the Regional Court President should ensure that matters are allocated to Mr Travers in the same way that they are allocated to other regional magistrates and assist in case flow managements in Mr Travers’ court to ensure maximum productivity and utilisation of court time. All should acknowledge that Mr Travers had a disability, and that part as the equality plan for the courts in general, each concerned party must ensure that Mr Travers’ disability was accommodated and responded to in terms of the demands of his work.

Mr Travers also argued in the High Court that the prosecuting authority by controlling the trial allocation effectively manipulated the allocation of trials to magistrates. It was

argued that the allocation of cases to magistrates is not a function of the prosecuting authority as they were a party to the dispute in each instance. The allocation of cases it was submitted should be the function of the President of the Regional Court.

Ismail A.J. observed that the alleged practice of the allocation of trials by the prosecuting authority impacted upon the independence of the judiciary. He referred to the guarantee of judicial independence in section 165 of the Constitution of the Republic of South Africa. In *Van Rooyen v The State* 2002 (5) SA 246 (CC), Chaskalson C.J. stated –

*“In deciding whether a particular court lacks the institutional protection that it requires to function independently and impartially, it is relevant to have regard to the core protection given to all courts by our Constitution to the particular functions that such court performs and to its place in the court hierarchy. Lower courts are, for instance, entitled to protection by the higher Courts should any threat be made to their independence. The greater the protection given the higher Courts, the greater is the protection that all courts have.”*

Ismail A.J. noted that, whatever the statistics as to completion rates might have shown, the decision to prevent new matters being placed before Mr Travers was not one for the prosecution authorities to make. Notwithstanding the Magistrates Commission’s recommendations the prosecuting authorities persisted with their policies and effectively suspended the applicant from presiding over new trials. He cited the Constitutional Court in *De Lange v Smuts* 1988 (3) SA 785 (CC): “Judicial Officers enjoy complete independence from the prosecutorial arm of the State and are therefore well placed to curb possible abusive of prosecutorial power.”

When dealing with the functions of a magistrate or judge the level at which cases are finalised might be important. However, it was not the sole factor which played a role in the equation. The speed at which cases were finalised could not be regarded as the sole criteria in determining productivity in dispensing of justice. The function of a presiding officer is not similar to that of a production manager in a factory, whose object

is to meet targets and deadlines. In a factory the units manufactured, be they cars or garments are done by machines, whereas in a court the object is to hear and to adjudicate over issues which will invariably differ from case to case. The duration of the trial would vary depending on the magnitude, novelty and complexity of the issues and the number of witnesses involved and the nature and substance of argument.

Section 165 of the Constitution has recognised that the principle of judicial independence applies to all court including the magistrates court. In *Van Rooyen*, the Chief Justice stated, “The Constitutional protection of the core values of judicial independence accorded to all courts by the South African Constitution means that all courts are entitled to and have the basic protection that is required” and emphasised that “magistrates are entitled to the protection necessary for judicial independence, even if not in the same form as higher Courts.”

Ismail A.J. declared himself of the view that magistrates enjoy the same level of judicial independence as judges do. Thus, any decision on the part of the prosecuting authority regarding finalisation of cases by magistrates amounted to an interference with the judicial independence of the magistrate. He accepted the argument of Mr Travers that the allocation of cases to the individual magistrates should be the function of the magistracy and under the supervision of the Regional Court President and not in the hands of the prosecuting authority who are a party to the dispute. The Basic Principles on the Independence of the Judiciary adopted in U.N. General Assembly Resolution 40/32 and 40/146 in 1985 included as Principle 14 “The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.” In the Supreme Court of Canada, in *Mackeigan v Hickman* (1989) 61 DLR (4th) 688 (SCC), McLachlin J stated that it was “beyond doubt that the assignment of judges is a matter exclusively within the purview of the court. It would be unthinkable for the Minister of Justice of Attorney General to instruct the Chief Justice as to who should or should not sit on a particular case; that prerogative belongs to exclusively to the Chief Justice as the head of the court. To allow the executive a role in selecting what judges hear what cases would

constitute an unacceptable interference with the independence of the judiciary.”

Ismail A.J. rejected the argument of counsel for the respondents that the reason for not referring new matters to the applicant had nothing to do with forum shopping or the interference with the independence of the judiciary. The decisions taken were taken in order to ensure that the accused received a speedy trial. It was not the case that that the Prosecuting Authority, being part of the executive branch of government, could exercise this right. Their dissatisfaction with the applicant’s work rate or productivity in the finalisation of matters ought to have been taken up with the relevant body, namely the Magistrates Commission. He commented,

*“Objectively seen the allocation of cases to magistrates by the prosecution would be perceived by accused persons and any*

*reasonable person as interference in the judiciary as the prosecution could manipulate the outcome of a trial by choosing certain presiding officers instead of others. In the apartheid era political matters were given to certain magistrates who were hand chosen to hear these cases. South Africa is no longer regarded as pariah state and is well regarded in the international community of nations. For this reason despite [counsel’s] argument that the system in place has been in operation for many years and for that reason it should not be altered is not a persuasive one.”*

The decisions were set aside, and the respondents interdicted from attempting to control or to influence which matters are enrolled before the applicant, and from interfering with the independence of the Regional Court in relation to any matters concerning the judicial office of the applicant.

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UNITED KINGDOM

E-Mail: [info@cmja.org](mailto:info@cmja.org)

Tel: +44 (0) 207 976 1007

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