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Edinburgh, Scotland's capital, is a beautiful city especially in Summer. So it was a great shame that the week in July 2008 in which it hosted two important Commonwealth legal meetings should have been unseasonably wet and cold. The incessant rain made the dark stone of so many of Edinburgh's buildings seem quite threatening. But Commonwealth lawyers are made of stern stuff, and both meetings were very successful.

One was the triennial meeting of Commonwealth Law Ministers which sets much of the Commonwealth's legal agenda. The CMJA and the other NGOs which relate to the Commonwealth Secretariat were present and able to report on their work.

Of even more immediate concern to readers of this *Journal* was the immediately preceding meeting, held in the Scottish Parliament's modern (and controversial) building. Representatives of the CMJA, with those of the Commonwealth Lawyers' Association, the Commonwealth Legal Education Association, and the Commonwealth Parliamentary Association and of Law Officers, met to mark the tenth anniversary of the Commonwealth (Latimer House) Principles on the Accountability of and Relationship Between the Three Branches of Government and to draw up the Edinburgh Plan of Action to build on what had already been achieved.

CMJA members have already received the full text of the Plan, but some of its features deserve emphasis. The Plan notes that there remains ignorance of the importance of the Principles among government officers, parlia-

mentarians, lawyers, judicial officers and members of civil society; each new generation of parliamentarians, judicial officers and public servants, on election or appointment, should be given awareness training on basic constitutional principles and their primary roles in the constitutional process.

On the independence and accountability of the Judiciary, the Plan urges that the allocation of resources by Parliament, for the judiciary and the running of the courts, should be made following consultation between the Head of the Judiciary and the relevant minister, and that appropriate dispute resolution mechanisms should be put in place to deal with any disputes arising in relation to the allocation of resources. The judiciary should continue to develop and review their codes of conduct/ethics on a regular basis.

On gender issues, the Plan calls on those responsible for recommending judicial appointments, through public information programmes, broad advertising of judicial vacancies, and by adapting judicial working conditions which encourage women and those from diverse backgrounds to apply for judicial appointments.

A glance at the Contents page will show that many of these matters are touched on in the articles and law reports published in this issue. That was not a matter of deliberate design, and it convinces me, if I needed convincing, that the Edinburgh Plan of Action reflects the concerns of judges and magistrates in many parts of the Commonwealth.

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

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

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## WOMEN LAWYERS IN NEW ZEALAND

*The Rt Hon Dame Sian Elias, Chief Justice of New Zealand. An Address at the Australian Women Lawyers' Conference, Melbourne, June 2008*

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For my secondary schooling, many years ago, I went to an old established church school in Auckland. It was an all-female school and all of our teachers were female. Around the walls of our beautiful wooden hall were inscribed biblical texts in gold letters. One which always struck me as incongruous was "Let us now praise famous men and our fathers that begat us".

It seemed to me for many years afterwards that famous men were all we had to praise. For those women who studied law in the 1960s, in a climate which veered between outright hostility and amused tolerance, we heard nothing of famous women. For the diminished group which eventually entered the profession, the heroes of legal practice were entirely male.

Nothing changed very fast. I was greatly taken aback a few years ago to read a history of the legal profession in New Zealand which does not acknowledge the entry of women into the profession until the 1980s. The few of us who thought we were making an impact during the preceding decade were clearly invisible to the writer. And he goes on to say that the profession became duller during the 1980s. He does not, it is true, suggest strict cause and effect between the entry of women and what he calls the "greying" of the profession but the golden age he invokes is that of the boozy Bar dinner reminiscences. Perhaps nostalgia for those times could only survive while the profession remained a male club.

Although the custodians of the centennial history of the New Zealand profession published in 1970 did not think to mention it, the long, if not prominent, history of female participation in the legal profession of New Zealand should have been a matter of pride. New Zealand was one of the first countries in the Commonwealth to permit women to practise law with the enactment of the Female Law Practitioners' Act 1896.

### **Ethel Benjamin**

The enactment of this legislation was just in time to allow Ethel Benjamin into the profes-

sion in 1897. Now Ethel Benjamin does not even rate a mention in the "national" section of the centennial history of the New Zealand Law Society published in 1972, dealing with notable figures of the profession. Instead she rates two brief references in the section of the history dealing with the District of Otago, as of provincial interest only.

The entries themselves indicate the steel in this slip of a woman. Ethel Benjamin studied for her LL.B. with no assurance that she would be able to work in law because the legislation that allowed her to practise had not been enacted when she began her studies at Otago University. The only law library available to students in Dunedin was that maintained by the Law Society. Ms Benjamin's application to use the library is the subject of the first entry relating to her. It caused some consternation. Eventually, however, the Council resolved that she could be given a permit to read in the Judge's Chamber Room, "there being no rule applicable to her case". This permit was solemnly renewed from time to time.

The only other mention of Ethel Benjamin in the centennial history of the profession relates to the embarrassment caused by her insistence on participating in the procession through Dunedin to mark the opening of the Royal Courts of Justice in 1902. Despite the fact that by then she had been practising as a member of the Society for 5 years, no one was prepared to walk beside her in the procession. Eventually Mr JM Gallaway who, it is said, "had always been a champion of her cause", "came to the rescue and walked with her". For which I think the women lawyers of New Zealand should remember Mr Gallaway with gratitude.

It would be nice to be able to report that Ethel Benjamin confounded the sceptics and had a fulfilled and honoured career in law. In fact, she was frozen out from conventional work, as from the society of her fellow practitioners. In an act of defiance that could only have been prompted by deep anger and the realisation that she was beyond further humiliation, she took out advertisements for work in the Law

Society newsletter. When that failed to shame the profession into some support, she threw herself into representing women who were the victims of domestic violence or, being abandoned by men, were destitute. Her practice might charitably be described as fringe.

Eventually, disheartened, she turned to other work and gave up Law. She opened a restaurant. Then finally she left the country and settled in the United Kingdom where she died during World War II. Her history was largely overlooked in New Zealand until the Otago Women Lawyers took up her story in the 1980s. I did not hear of her until that time. But she remained a folk memory in Dunedin. When Silvia Cartwright (later successively Judge of the District Court, Chief Judge of that Court, the first woman Judge of the High Court and Governor-General of New Zealand) applied for jobs in Dunedin in the 1960s she encountered some reserve because of the example of Ethel Benjamin “and the trouble she caused”.

### The New Zealand scene today

One hundred and ten years on from Ethel Benjamin, how are women doing in New Zealand, both generally and in law? The report card is not so good. The Human Rights Commission of New Zealand has recently published a census of women’s participation in our society. The survey showed that former incremental progress has slowed or stalled. Despite New Zealand’s reputation for progress in gender representation, the position on the ground gives no cause for self-congratulation:

- 14.81% of editors are women.
- 19.19% of university professors and associate professors are women.
- 29.2% of the New Zealand police force are women.
- 25.76% of judges are women.

Despite a government commitment to achieve parity between men and women in government-appointed boards by 2010, the gap is still 8%. The representation of women in the corporate sector remains “dismal”.

Nor does the position in the profession give cause for satisfaction. Only 16.8% of women are partners in the larger legal firms. Overall, they are 19.34% of the partners in firms of all sizes. Although women currently comprise 62% of the

admissions to the profession and have been above 50% for more than ten years, they comprise 41.6% of the legal profession. Proportionately fewer women law graduates than men end up in legal practice. 35% of barristers sole in New Zealand are women. In a profession which is fused and in which the pattern until recently has seen the most successful practitioners emerge from firms at a comparatively late stage, usually to qualify for taking silk, the numbers of women practising at the junior bar may not be a good sign. Many have resorted to practise at the Bar either because it is easier to juggle with child-rearing responsibilities (that was certainly the reason I went to the Bar at an early stage), or because promotion within legal firms has not been available to them.

Few objective measurements, such as have been attempted in Australia, are available for assessing the success of women at the Bar and in particular their ability to attract high quality work. Judges at all levels remark however upon the absence of women counsel and the dominance of male leaders. The impression in New Zealand has of course been demonstrated in Australia. The gender appearance survey conducted by the Victorian Bar confirms what is our experience too that women are a minority of counsel appearing before judicial officers. It confirms also that the participation of women declines in the “higher end” work.

In New Zealand, of the 90 practising Queens Counsel, 11 are women. The Human Rights Commission reports that:

*“At least 15 years after the free flow of women to the Bar began, few are appearing in appellate matters or in big commercial cases, although the reasons for this are unclear.”*

The one stand-out statistic that the Human Rights Commission publishes about women’s representation in the judiciary is that 100% of the Chief Justices of New Zealand are women. Speaking for them all, I am very conscious that I accepted appointment to the bench in 1995 at the urging of male colleagues, whose view (based on their lack of success in recommending me for briefs) was that I would never get instructed in the cases I aspired to lead. I went on the bench to practise law.

And for those in practice, my impression is that they still feel the chill that buffeted Ethel

Benjamin. Only those who cannot seem to attract work know how it gnaws at self-esteem. And for many able women, those are still the conditions under which they practice. It is not surprising that women in the legal profession continue to exhibit the restlessness shown by Ethel Benjamin. Her movements in and out of the profession, her attempts to regroup and change direction, are still familiar patterns today. There are still women lawyers who, like Ethel Benjamin, operate restaurants, try unlikely specialities, set up their own firms or go to the Bar with no work assured to them, and who throw themselves into poorly paid and unfashionable work because they feel invisible and undervalued by the profession and excluded from traditional practise.

### Women and the nature of legal work

Quite apart from the exclusion of women and discrimination against them, there are signs of growing disenchantment with legal and judicial work among women. Some of their concerns are shared by their male colleagues. And there is no doubt that the expectations of firms today and the mindlessness of many of the tasks they require of young lawyers are turning off a generation. But I do not think it fanciful to think that the price paid by women lawyers falls more heavily in many cases on them and is a price fewer of them are willing or able to pay.

A New Zealand Law Society committee in a 2005 survey sought to identify matters which were of key concern to women practitioners.

Their four most significant concerns as reported were:

- Hours of work
- Professional support
- Advancement
- Salary

The concern about hours of work and salary were echoed in a cohort survey of male lawyers. But all surveys in my country and in yours show that it is women who lag in the salary stakes. Men too rated advancement as a concern, but it was a less acute preoccupation for them than for the women. And again, the information about how women are doing in the firms and at the bar suggests that the anxiety of women is well-founded; their prospects of advancement are more limited. Most tellingly, the men did not report similar

concern with professional support. I think this may be an important finding, wrapped up with the culture of legal practice, a theme I want to explore further.

It is echoed in the experiences of women judges. In the United States, Judge Patricia Wald has referred to the “peer deprivation” of being a woman judge. And most of us would, I think, recognise similar deprivation in our own careers, as practitioners and on the bench.

Even where peer deprivation should have receded because the numbers of men and women are more even in particular areas of practice or on specific courts, women remain apart, remarked upon as “women practitioners” or “women judges” in public estimation. They are measured against standards they do not set and may not value. In the Supreme Court of Canada, Justice Claire L’Hereux-Dubé speaking in 2001 of the “continuing struggle for equality” thought women judges remained “outsiders” at least in public perception. It would be wrong to leave the impression that the inside perception of female colleagues within courts or chambers or firms is very different from the public perception.

What is more, few male colleagues are able to be entirely easy about serious attempts to redress the imbalance in gender representation in the profession and on the bench. It means that there will be fewer jobs for the boys. I do not suggest that there is any conscious or vicious self-interest at work here. But the insistence on “merit” (which is self-reflective) and the blind faith (against the evidence) that self-correction is only a matter of time and numbers must now be seen as denial.

As it is becoming clearer that the impediments to women’s participation in the legal profession are not confined to those that block the door but include patterns of behaviour and work which women do not accept or cannot meet, strategies for overcoming these impediments may collide with legal culture or give rise to fears that women are to receive advantages. Young women with family responsibilities cannot keep up with ridiculous billing hour requirements or demonstrate commitment by working unhealthy work hours. Nor should their male colleagues, but they seem more willing to do so. And if they are, the chance for a shift in the legal culture recedes and accommodation for others is resented as favoured treatment. Those who

obtain it are said to “lack commitment”. Even on the bench, strategies to relieve women judges with young children of circuit responsibilities may not be well-received. And yet in the United Kingdom growing fears are being expressed that qualified women are turning down appointment to the bench because of such inflexibility.

### Appointment systems

This Association has called for a fairer and more transparent judicial appointments system. One day I will have the emotional strength to say something of my own experience at the receiving end of the unfairness of the anonymous soundings and semi-public humiliations which go with the traditional process. So I do not mean to be negative about the initiative. But I do not think it is sufficient strategy. And I think that is being demonstrated by the difficulties being encountered by the new appointments process in the United Kingdom. No one can seriously doubt the commitment to a more representative judiciary of the Commission and its impressive chairman, Baroness Prashar. It is early days. And it may be that the critics of the Commission are shedding crocodile tears when they say it is failing to deliver on the appointment of women and minorities. But perhaps the problems are more deep-seated than can be cured by good process in appointments. If we are serious about achieving a more representative judiciary perhaps we have to tackle the culture of the profession, of which the judiciary is part, and the cultural impediments women face in our societies more generally.

Should we be surprised that, nearly 40 years after women started entering the profession in numbers, their position in the profession remains ambivalent? Certainly, although I felt and was treated as something of a freak 39 years ago when I first tried to get employment with my shiny new degree, I told myself, as I developed the hide of a rhinoceros, that this was a transition. I comforted myself with the confident view that my grand-daughters would find the experiences I had unbelievable. I expected to be laughing in 2008 about the way things were in 1969. In retrospect, much was very funny. And for a time it did seem that we were in the middle of a fundamental shift in attitudes and opportunities. Many of the more ridiculous prejudices against women in law

melted away when male practitioners confronted the reality of women practitioners. Having morning tea or lunch together no longer became unthinkable. Women’s voices *did* carry in court. Women *could* think like lawyers – and even out-think their male opponents.

Writing in 1983, Justice Bertha Wilson, the first woman to be appointed to a final court in the Commonwealth, thought that a sure platform for the advancement of women had been created by the social and political upheavals of the 1960s and 1970s. And it is true that through them we came to see that this cause was just and that equality of opportunity for women and racial minorities was a human right. But we did not see that this wave, too, would recede. We bought into the lie that the advancement of women in the legal profession was just a matter of time and numbers. And that merit would out.

### Gender equality

The intractability of the issue of gender equality in our societies more generally and in the international community is now evident. Despite international commitment to the equal rights of men and women since the Charter of the United Nations was adopted and recommitment through the international instruments which followed it, there remains in all societies a gap between the expectations and the reality of women’s lives. The manifestations of inequality may be different in affluent societies like ours, but they are real enough. The extent and effect of violation of women’s rights is staggering. In employment, education, and income in all societies women come in well behind men.

No country is immune from the problems of domestic violence against women. Such violence, as the CEDAW Committee has recognised, is “a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men”. Underreporting of such violence means that we see only the tip of the iceberg. Domestic violence is a main inhibitor to the social advancement of women, but laws and enforcement agencies have been slow to respond. What is clear is that there are cultural inhibitors to the achievement of equal protection of the law for women.

Whatever the positive law statements about equality, the reality of women's lives is shaped by the culture they live within, including the legal culture. No woman is an island. We should not expect to see wealthy and educated women fully accepted in the legal profession while the standing of women in the wider community languishes. That insight has implications for the scale of the struggle and for the role of an Association such as this. We need to change this world, as the suffragettes saw.

### Women are different

In launching this Association more than ten years ago Mary Gaudron was absolutely right to say that its formation in 1997 should be seen as an acknowledgement “perhaps belated” that women are different and are asserting their right to be different. For too long we thought it was enough to break down the doors and be admitted as “honorary men”. Gaudron says that what went wrong was that women “did not really dare to be different from their male colleagues, did not dare to be women lawyers”. It should not have taken so long for the penny to drop. We should have remembered the example of the suffragettes. For them, the vote was not the end, but the beginning. There was no point in gaining the vote if women were not to change the world. The suffragettes aimed to make the world a better place, through practical gains for real people in our communities. In the same way, when astonished and exhausted some of us find ourselves partner, or Queen's Counsel, or Chief Justice, we have lost the plot if we think it is the end.

The first wave of women lawyers' associations provided networking to help women lawyers gain access. We looked forward to the time gender need not be on the agenda. The ambition of access was too limited. As Mary Gaudron said, the aim must not be to give women – more accurately, affluent, well-educated women – “a better share of the spoils”, but to improve law and the administration of justice for all. If the new horizons are the old horizons, we have failed. If the positions we achieve do not lead to changes for better justice in our societies – for all women, for men as well as women, for children as well as adults, for all races – we will have failed.

To make a difference in this way women lawyers have to be good lawyers. That is why

in a conference such as this we want to talk about law and judicial method. The claims we have to equality of treatment are claims of legal entitlement under the rule of law and constitutional principle. These are themes Mary Gaudron paid special attention to as a judge. Indeed, it has been said that “non-discrimination” emerges in her judgments as an “organising principle of the constitution”. And discrimination she recognises to arise as much out of the “equal treatment of unequals” as out of the unequal treatment of equals (*Castlemaine Toobey's v South Australia* (1990)).

To make a difference, women lawyers also have to understand that the experiences and perspectives they bring as women are important and valid considerations for their work. Sandra Day O'Connor once said that the fact that she was a woman who gets to decide cases is more important than the fact that she decides cases as a woman. I agree that the visibility of women lawyers and judges is critical in breaking down stereotypes and is important for that reason alone. I have elsewhere said that I think the assumptions about gender roles displayed by the judges when I first practised law which led them, for example, to be hostile to matrimonial property legislation could not have arisen had the judges had women colleagues. I think in any event that the distinct experiences and perspectives of women are critical if law is to be applied in the context of modern society.

### Life experience and judging

Contextual application of law is essential. What we see as discrimination, for example, is a social and ethical insight which must be made in the context of the values of the society in which the assessment is made. Richard Posner illustrated this point by reference to the Supreme Court decision in *Brown v Board of Education* (1954) 347 US 483. The about-face from the separate but equal doctrine accepted in *Plessey v Ferguson* (1896) 163 US 53717 did not come from brooding over the text of the words “equal protection of the laws” but from the Court's insight that there had been a change in the nation's ethical and political climate.

The judges who in my time in practice thwarted New Zealand's matrimonial property legislation because of sexual stereotyping were

judges who prided themselves on scrupulous legality. They did not have the insight to see that their construction of the legislation was heavily influenced by their personal values and that those values were out of touch with the values in society. Why would women make a difference to this sort of dissonance? I think because their life experiences have been different from those of their male colleagues.

Elizabeth Evatt thought that women and minority judges are more likely to realise how often claimed objectivity is marred by unconscious biases. Justice Anthony Kennedy illustrates the point by reference to Justice Thurgood Marshall:

*“The compassion of Thurgood Marshall is Exhibit A for the proposition that judicial reason cannot be divorced from the life experience of judges.”*

The same thing can be said of women judges like Mary Gaudron or Brenda Hale or Beverley McLachlin. I do not think it is fanciful to see in their judgments a different take on matters: an emphasis on human dignity; a greater scrupulousness not to wound or slight; a willingness to express doubt and to revise opinions previously held; and a sense of obligation to explore underlying principle in order to lay out the full reasons for decision and clear away suggestions of an undeclared major premise. Their evident compassion, like that of Thurgood Marshall, comes from their very different experiences from their colleagues who have had more traditional careers. They too in their work are Exhibit A for the benefits of diversity in appointments and in legal practice.

Women such as these have a heightened insight into the disadvantage of those who come before the courts. This insight helps when colleagues occasionally display lack of understanding about the reality of the lives of those who appear before them, or when they act in a way that may be seen as overbearing or hurtful. The experiences of male colleagues have not generally entailed the humiliations and set-backs all women practitioners will have experienced. Their practices have usually been less chaotic, more successful. The different experiences we have had shape

women. They are strengths they bring to legal practice and to judging.

### **Australian heroines**

In New Zealand the women of my generation looked with admiration across the Tasman. I have mentioned Elizabeth Evatt and Mary Gaudron, two women lawyers we too hold in admiration and affection. But I would not want to omit to mention the incomparable Roma Mitchell. I met her at a time when I was feeling discouraged about legal practice. I was working in an area that the profession did not value, because it was all the work that came my way. That was not so bad in itself because I knew that this work was worthwhile and mattered very much. But I was beginning to feel invisible within the profession. I was asked to speak to the International Association of Women Judges which was meeting in Wellington about the work I was doing for Maori. After it, a woman I did not know swept me into a hug. It was Roma Mitchell. She said that she had never before regretted leaving practice but that, hearing of the work I was doing, she wanted to change places with me. No one had ever spoken to me like that before. I will never forget her warmth, generosity and encouragement.

I started by mentioning the praise we have given to our forefathers. We have not done enough I think to praise our foremothers, the women who gave us the opportunities we now enjoy and which they could never hope to have. They were not famous. They worked for future generations in optimism. I mentioned my old school. Despite the inscriptions on the hall walls, it was founded by independent minded women who believed in the progress of women. We were taught by inspirational teachers. I have always been amused by the difference between the mottos of boys' and girls' schools. In Auckland the boys' schools had thrusting mottos about reaching for the stars through hard work or through manliness. The motto of our school, founded by pioneering women educators was “to serve”. I do not think that reflected a modest view of a woman's place. I think it was an understanding of where real strength lies. And through service we can change the world.

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# THE SEPARATION OF POWERS: A VIEW FROM SWAZILAND

*The Hon Richard Banda, Chief Justice of Swaziland. A paper from the CMJA Conference in Cape Town, October 2008*

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On 3 April 1790, George Washington, then President of the United States, had a meeting with the Chief Justice at the time and the Associate Justices of the Supreme Court of the United States. At that meeting he is said to have made the following remarks:

*“I have always been persuaded that stability and success of the National Government and consequently the happiness of the people of the United States would depend in a considerable degree on the interpretation and execution of its laws. In my opinion, therefore, it is important that the judiciary system should not only be independent in its operations but as perfect as possible in its formation.”*

That statement, in my view, illustrates the important role an independent judiciary plays in a democratic society. It emphasizes the point that in a democratic society the success of a Government, the peace and happiness of its people depends, to a large extent, on how an independent judiciary applies and enforces the laws of a country. You require a judiciary which has sufficient authority and independence in order for it to enforce the basic guarantees of freedom to ensure peace and happiness. One of the fundamental principles upon which a democratic government is premised is the doctrine of separation of powers.

The doctrine of separation of powers is, in my view, the fundamental basis of any democratic society. The doctrine has, however, been criticized in some quarters. It has sometimes been described both as a fallacy and as a necessary condition for the Rule of Law. The former Chief Justice of Zimbabwe, the late Honourable Justice Dumbushena, described the Rule of Law in the following terms:

*“The Rule of Law demands from the state and citizenry that they be subject to the laws and the rules which make society function in peace. Laws are necessary not*

*only to make society function in peace but also to establish the legality of the State.”*

That description of the Rule of Law once again demonstrates as the statement by George Washington does, the important role the judiciary plays in the maintenance of happiness and peace of a country when it enforces the laws and rules of a country because the preservation of the rule of law depends upon an independent judiciary.

## The new Constitution of Swaziland

Our new constitution in the Kingdom of Swaziland has entrenched both the doctrine of separation of powers and the independence of the judiciary. Section 140 of the new Constitution provides that the judicial power of Swaziland is vested in the judiciary. And Section 141 of the Constitution provides that in the exercise of the judicial power of Swaziland, the judiciary, in both its judicial and administrative functions, shall be independent and subject only to the Constitution and shall not be subject to the control or direction of any person or authority.

Because the judiciary is independent it means that no one can give it instruction as to how or who should try cases or how it should exercise its power of sentencing which, with a few exceptions under the law, is wholly within the courts' discretion.

The judiciary must be independent both in its function and authority, as the Constitution clearly provides. It would therefore be a clear violation of the Constitution for any person to suggest or appear to suggest that a particular judicial officer should or should not try a particular case. The assignment of cases within the court system is an internal matter for the judiciary itself.

Whether the judiciary in any given country is independent or not will, to a large extent, depend upon the country's commitment to the independence of the judiciary and a recognition

of the role the judiciary plays in upholding the rule of law in a democratic society. The manner in which judicial offices are appointed is an essential pointer to whether the judiciary is independent or not. The judiciary must enjoy security of tenure. Indeed, the Latimer House Principles stress the point that for accountability to be effective there must be judicial independence and security of tenure; the judiciary must be well funded and there must be an effective system for the dissemination and evaluation of judicial decisions.

An independent judiciary acts as a bulwark or protector of society against the erosion of its fundamental human rights. It is only an independent judiciary which can act as the custodian of the supreme law of the land which is the Constitution itself.

In its traditional role the function of the judiciary is to declare and apply the law as it exists. The judiciary, it has been said, merely reflects what the legislature has said in an Act of Parliament and gives effect to it by “investing it with meaning and intent.” In the case of *Duport Steels Ltd v Sirs* [1980] 1 WLR 142, Lord Scarman stated that a judges must be obedient to the will of Parliament as expressed in its enactments.

Parliament, it is said, makes and unmakes laws. The judge’s duty is to interpret and apply the law. It is not his duty to change the law to meet his own idea of what justice requires. The law requires the judge to interpret the law in a way which meets the legislative purport of the Statute. If the result of a Statute is unjust but inevitable the judge may say so and draw Parliament’s attention to it but he cannot deny the meaning of the Statute. Law which are inconvenient may not be rejected because of their inconvenience. The learned authors of Wade and Bradley, *Constitutional and Administrative Law* have described the role of the judiciary in the following terms:

*“The authoritative interpretation of the law is a matter for the courts. The interpretation of statutes is in one sense a vital part of the law making process as it is only after judicial interpretation that it is known whether the intentions of those who framed the law have actually been carried into effect; but in this task the judges must not compete with the political authority of the legislature.”*

But courts have been criticized for usurping legislative functions. It is said that by the doctrine of precedent the judicial function of declaring and applying the law has, sometimes, a legislative effect. Courts, it is contended, apply old cases to modern conditions. My own view, however, is that the scope for creating new laws through judicial interpretation is limited. However there is one area where it can truly be said that the judiciary usurps the legislative function of Parliament. There can be no doubt, in my judgement that when the judiciary invokes the principle of “judicial activism” as an aid in their judicial interpretation they are taking part in the process of law making which is the primary function of Parliament. That would be to disregard what Lord Donaldson, the former Master of the Rolls in England, said in the case of *R v HM Treasury, ex p Smedley* [1985] 1 QB 659 when he warned:-

*“It behoves the courts to be ever sensitive to the paramount need to refrain from trespassing upon the province of Parliament or so far as this can be avoided even appearing to do so. Although it is not a matter for me I would hope and expect that parliament would be similarly sensitive to the need to refrain from trespassing upon the province of the Courts.”*

The justification for judicial activism, as stated by the Honourable Justice Bhagwate, former Chief Justice of India and a leading proponent of judicial activism,

*“is that in a democratic society which has a Constitution with a Bill of Rights or which has subscribed to regional or international instruments on Human Right and which is seeking to build a fair and just society, judicial activism on the part of the judiciary is an imperative both for strengthening participatory democracy and for the realization of basic human rights by large numbers of people in a country.”*

My personal view is that courts should be slow to invoke principles of judicial activism because, unless it is clearly circumscribed and conditions in which it can be invoked clearly defined, it can create uncertainty in the law and might affect the orderly development of the law.

I will end by citing what Lord Scarman said, in the *Duport* case to which I have already referred, on the doctrine of separation of powers. He states as follows:

*“The Constitutional separation of functions must be observed if judicial independence is not to be put at risk. Because if society and Parliament come to think that judicial power is to be confined by nothing other than the judge’s sense of*

*what is right, confidence in the judicial system will be replaced by fear of it becoming uncertain and arbitrary in its application. Society will then be ready for Parliament to cut the power of judges. Their power to do justice will become more restricted by law than need be or is today.”*

For my part I would not want to see the power of judges restricted by Parliament in any way.

## DOROTHY WINTON TRAVEL BURSARIES FUND

### WE NEED YOUR DONATIONS!

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

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

The Fund was used to assist participation of three magistrates from Malawi, Uganda and the Solomon Islands at the CMJA's 14th Triennial Conference and will be used to assist participation of judicial officers who would not otherwise have the opportunity to benefit from the training opportunity offered by the educational programme of the Triennial Conferences of the Association.

**We WELCOME ALL CONTRIBUTIONS to the Bursary fund. Contributions should be** (by cheques drawn on a UK bank, bank transfers – making clear what the transfer is related to or bankers draft **made payable to CMJA**) and should be sent to the Commonwealth Magistrates and Judges Association at

Uganda House  
58-59 Trafalgar Square  
London WC2N 5DX, UK.

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

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## A CALL TO FAMILY LAW JUDGES

*The Rt Hon Sir Matthew Thorpe, Lord Justice of Appeal and Head of International Family Justice, England and Wales*

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The shape and direction of any judicial career depends upon ability, the requirements of the system, and choice, which may be conscious or unconscious. Why are some of us drawn to the resolution of family proceedings which expose even the most experienced to the trauma that flows from listening to harrowing stories and to decisions that are seldom either easy or free of emotional burden? It is choice and not chance that takes us there.

This generalisation may not extend to every family justice system. My jurisdiction has a highly specialist unified family court in which the same statutory law is applied by the eighteen family judges of the High Court, through the many circuit and district judges in the county court to the countless lay magistrates who sit in panels of three guided, where necessary, by a qualified legal adviser.

In this paper I consider only the full time professional judiciary who serve in the county court and the higher courts above them. In the common law system the state selects its family judges from those who have distinguished themselves as lawyers in the family courts. They achieve judicial office at the age of about 50 and serve for about twenty years.

What is their standing compared to fellow lawyers appointed to sit in crime or civil? First I must confess to simplification for the purpose of comparisons. There are many judges in the county court who cherish variety and who will therefore divide their sittings between family and crime or even between family, crime and civil. Even the family judges in the High Court may elect to sit in the Administrative Court or to hear criminal appeals. But to return to my question, the answer is that they are of equal standing on the face of things. The ultimate head of the unified family court bears the title of President and ranks in the judicial hierarchy only after the Lord Chief Justice, The Master of the Rolls and the newly created President of the Queen's Bench Division. Under our recent constitutional reforms all important policy and management decisions emanate from the Judicial Executive Board, of which the President is a member.

However, beneath the façade it is easy to detect the conviction of their superiority in the leaders of the other systems. This is never expressed: rather the reverse, as they profess that the decisions which we must make are infinitely harder than theirs. This custom has always struck me as the concealment or avoidance of their true view: an expression of *politesse judiciaire*. Their true view is founded on the conviction that crime and punishment, constitutional issues, the regulation of the power of the Executive in the Administrative Court, even the pre-eminence of the London Commercial Court, are of much greater momentum than the regulation of the minutiae following relationship breakdown. This is an understandable stance since the highest offices are effectively closed to family judges and in recent years have been largely filled by judges who have risen through the Commercial Court.

Politicians and Ministers make the same evaluation. "Law and Order" is the resounding cry on the hustings and in Parliament. Ministerial responsibility for the family justice system passes swiftly from one politician to another as they rise or fall in the favour of the Prime Minister. Since I became involved with government policy only one of the several junior ministers who have held this responsibility has impressed by commitment, willingness to listen and determination in fighting the corner of family justice.

The appointments to the Family Division of the High Court were, for a period of about 40 years from the 1960's, often given to men who had had little or no experience of family proceedings when practitioners. There were two factors contributing: First, prior to the Divorce Reform Act 1969, the main work of the judge was to decide defended divorces on the application of arcane rules and practices. This encouraged the view that the challenges encountered on the Family Division Bench required no great expertise. Second, men deemed worthy of appointment could not always be found a vacancy in the other two divisions and were housed, perhaps awaiting transfer or promo-

tion, in the Family Division. More recently this practice, which generally but not always worked to the disadvantage of the system, has ceased. Now that judicial appointment is in the hands of an independent commission I trust that specialist experience and expertise will be seen as an essential qualification.

However, for entry to the Court of Appeal the bar is raised for the family specialist in the High Court. Historically it is easy to see that those Family Division judges who had practised in other fields of law were given preference. From the perspective of the Court of Appeal this was a valid preference since the generalist would be valuable in civil as well as family appeals. But family justice was prejudiced by this preference since the best qualified family lawyers were sometimes denied the place they deserved. Even today the choice inclines to the Family Division judge who has sat in the Administrative Court or who has practised in other fields as an advocate.

At the highest appellate level, the House of Lords about to become the Supreme Court, the absence of expertise in family law has been justified by the rarity of the family appeal that has been permitted a full hearing. However, recently a distinguished family lawyer (Baroness Hale of Richmond) has been chosen and her influence has increased the number of family appeals reaching the court. She was a distinguished family law academic before being appointed to the High Court (one of the very few academics to reach that bench). However she has a much wider range academically and intellectually and has already demonstrated that she is a worthy member of our highest tribunal.

The creation of a unified family court has created new leadership roles for judges. The President is ultimately responsible for the delivery of this major innovation. The incorporation of the lay justices into the unified court of trial has considerably increased the responsibility of each of the Family Division Liaison Judges who are responsible for one of the six regions into which our jurisdiction is divided. But do they have the same status and recognition as the Presiding Judges responsible for civil and criminal justice in those regions? Clearly not, and I consider that their standing and efficacy would be increased by the appointment of a Senior Liaison Judge who

would have the same function in family justice as the Senior Presiding Judge in civil and crime.

Let me also contrast the senior circuit judge who assumes responsibility for family justice in one of the forty areas into which the jurisdiction is divided with the Resident Circuit Judge who is responsible for crime, or the Circuit Judge responsible for civil. The Resident Judge is regarded as the pillar of justice administration at the local level. Few will be aware of the identity or the responsibilities of the Designated Family Judge. Most telling indication of the distinction is that the Resident Judge generally receives an enhanced salary in recognition of his important function. So too may the Civil Judge. That the Designated Family Judge receives no enhancement is, in my opinion, discriminatory and unjustifiable. What these local leaders of family justice would no doubt appreciate would be the recognition as much as the cash.

To survey the status of the specialist family judge in my jurisdiction I have necessarily descended into detail that will probably be obscure to many. So for those who have skimmed this detail I offer the conclusion that there are many incentives and rewards for those judges drawn to specialise in family justice but also subtle indications that their work is not esteemed as it should be by those judges and politicians who are principally concerned with the larger justice systems.

Family law is not venerable, deep-rooted in legal history. It is a twentieth-century product fashioned to meet huge social and moral changes and the emergence of the child as a person in need of protection. Perhaps the modernity of family justice also contributes to the relationship it has with the courts that have been administering criminal and civil justice for centuries.

I come now to consider the position of the judge specialising in international family justice. This might be said to be premature since the emergence of international family justice is a twenty-first century event and its evolution has hardly begun. All the Member States of Europe have been compelled by Council Decision No. 2001/470 to enter the European Judicial Network and to appoint up to four Contact Points. The Regulation does not stipulate that the Contact Points must be judicial officers and there is a tension between

those states that have appointed judges and those who have appointed administrators. Attached to the European Judicial Network is the Network of Liaison Judges for Family Justice. Again there is a divergence between those jurisdictions that have nominated sitting judges and those who rely on the seconded magistrate serving as the Contact Point. However, all liaison judges have basic needs for internal recognition of their role and external inter-relationship. The opportunity to develop inter-relationship comes at meetings of the European Judicial Network when a family law or mediation item is on the agenda.

Is more needed? I look to another region, Southern and Eastern Africa comprising some fourteen jurisdictions. At the regional conference convened in The Hague in September 2006 the judges present passed resolutions including requests for (i) developing a Judicial Network on the African continent for international protection of children; (ii) training and sensitisation of judges in international child protection law; (iii) holding regular international and regional meetings for judges concerned with cross border child protection cases.

Do these resolutions not indicate a need for mutual support and the opportunity to share common anxieties and problems? What I am contemplating is the launch of an international association for specialist family judges. It would have the advantage of a focus on the global issues rather than the domestic. It should be particularly attractive to international family law specialists but I would hope that it would also attract family judges looking for opportunities for comparative education and debate. The creation of an association would create a sense of an international judicial community committed to the same ends and facing the same problems.

None of the existing international associations would meet this judicial need. The International Society of Family Law is primarily for academics and its conferences and publications, admirable as they are, are focussed on the theory rather than the practice of international family law. The Association of Conciliation and Family Court Judges is an international organisation based in the USA with a history of strong work in the field of family law over the last forty-five years. They disseminate information and share ideas

through their network and hold important conferences. However, their work is clearly interdisciplinary and within it there is no common profession. Equally commendable is the work carried out by the International Association of Youth and Family Judges and Magistrates. Whilst their remit certainly encompasses family law, it is with an accent on children's rights and they have a strong focus on delinquency and youth justice.

I have therefore canvassed the launch of an association with a modest annual subscription initially designed to disseminate information on developments on international family law and practice. The membership list would constitute a directory that would enable members to communicate individually knowing that the judge in the selected jurisdiction would be ready and willing to reciprocate. The administration will be managed from my office in London.

There is no doubt that within the European context, and perhaps beyond, common law concepts and practices so valuable in the management of trans-national family disputes, are either not understood or actively rejected by civilian jurisdictions. In those jurisdictions it is all too often the case that there is no specialisation within the jurisdiction and no concentration of international family proceedings to specialist courts. In some measure the creation of the Association, albeit in no way limited to judges within the common-law tradition, would help to foster faster, better understanding and better collaboration between common-law and civil law jurisdictions.

My proposal for the creation of the Association was first published at the Anglophone-Germanophone Family Law Judicial Conference in Vienna in September. There it received an enthusiastic response. Dissemination of information concerning the proposed Association will continue at the Judicial Conference in Brussels 14-16 January 2009, jointly convened by the Hague Permanent Bureau and the European Commission. Beyond that it will be strongly presented at the Common-Law/Commonwealth International Family Law Judicial Conference in August 2009. At this stage I am asking judges who are attracted by my proposal to simply email my administrative secretary to register an expression of interest, her email address is [karen.wheller@justice.gov.uk](mailto:karen.wheller@justice.gov.uk).

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# CULTURAL PRACTICES AND VIOLENCE AGAINST WOMEN

*Justice Christiana Fomenky, Court of Appeal of the South West Province, Cameroon. A paper from the CMJA Triennial Conference, Toronto, 2006*

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Violence against women and girls constitute the single most prevalent and universal violation of human rights. Such violence has been acknowledged as having a profound impact on the physical and mental well-being of those affected by it. The growing international recognition of the importance of gender based violence came on the heels of almost two decades of organising by women's groups to draw attention to the issue. In September 1992 the United Nations Commission on the status of women convened a special working group to draft a declaration against violence against women. The Declaration on the Elimination of Violence against Women (DEVAW) unanimously adopted by the United Nations General Assembly in December 1993 is the first international human rights instrument to exclusively and explicitly address the issue of violence against women. It affirms that the phenomenon violates, impairs or nullifies women's human rights and their exercise of fundamental freedoms. Although not a legally binding document, DEVAW reflects the global consensus that violence against women is a serious human rights violation.

Article 1 of the Declaration provides a definition of the term "violence against women" calling it "any act of gender based violence that results in or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life"

The definition is amplified in article 2 of the Declaration, which identifies three areas in which violence commonly takes place:

- Physical, sexual and psychological violence that occurs in the family, including battering; sexual abuse of female children, in the household; dowry-related violence; marital rape; female genital mutilation; and other traditional practices harmful to women; non-spousal violence; and violence related to exploitation;
- Physical, sexual and psychological violence that occurs within the general community, including rape; sexual abuse; sexual harassment and intimidation at work, in educational institutions and elsewhere; trafficking in women; and forced prostitution;
- Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

Significantly, this definition recognises both physical and psychological harm and threats of such harm in the public and private sphere. The definition also refers to the gender based roots of such violence amongst which are traditional practices harmful to women.

This paper seeks to examine such traditional practices which I have replaced with the term "cultural practices" and the implications thereof for violence against women.

The list of practices I am going to present is not exhaustive because I have limited myself to such practices as are common in my country Cameroon and maybe to other African and Asian Countries which might not necessarily include practices in other parts of the world I am not familiar with.

## Harmful Cultural Practices

Cultural practices reflect values and beliefs held by members of a community for periods often spanning generations. Every social grouping in the world has specific cultural practices and beliefs some of which are beneficial to all members while others are harmful to a specific group such as women. Cross cultural research have shown that violence against women is an integral part of virtually all cultures and has evolved from a system of gender relations which posits that men are superior to women. The idea of male dominance, even male ownership of women is present in most societies and reflected in their customs. According to many cultural beliefs and stereotypes, women are not considered equal to men but subordinates who must obey

their husbands or male partners. An attempt by women to exert themselves may be seen as a threat to the existing power relations and may be suppressed through physical violence or psychological means.

These standards are learnt from an early age in the family and reinforced by peer pressure and community institutions. In many societies, children learn that males are dominant and that violence is an acceptable means of asserting power and resolving conflict. Even mothers unwittingly perpetuate violence by socializing boys and girls to accept male dominance by acquiescing throughout life to male demands. They teach their daughters to accept the roles that society assigns them and they punish deviant behaviour to ensure their sexual and social acceptance. These cultural beliefs and practices have been significant factors in relegating women to an inferior position as compared to men leaving them vulnerable to abuse. Women have continued to fall victims to these traditional practices that violate their human rights and the persistence of this problem has much to do with the fact that most of these physically and psychologically harmful customs are deeply rooted in the tradition and culture of the society.

These harmful cultural practices include but are not limited to:

### **Child Betrothal**

A betrothal is simply a mutual promise for marriage in the future between a man and a woman. There being no minimum age for a betrothal to take place, it might take place when the parties, particularly the girl, are quite young; between 0 and 5 years. Children have been known to be betrothed *en ventre sa mère* with the hope that the mother is carrying a female child. In child betrothal the agreement is made by the parents of two children who promise to marry their children without their consent, or sometimes a little girl may be promised into marriage with a man old enough to be her father, and the infant not being able to give her consent to what she does not know or understand, the father validly gives his consent for the betrothal of the infant child.

This agreement is binding and as soon as the girl is 'ripe' for marriage, she then fulfils a promise she was never a party to. The parents of the girl usually receive financial support or

other kinds of support from the would-be husband or his parents on behalf of the girl. Often the cost of education of the girl is borne by the would-be husband or his family until such time that they feel the girl is 'ripe' for marriage. In most instances, the girl is withdrawn from school at this stage to fulfill the promise, only the lucky ones are allowed to finish school. Sometimes this minor becomes a third or last wife among women old enough to be her mother. Most of such marriages have been known to end in divorce and the women become single parents with no job and no education. There have even been instances where the mother of the girl has had to suffer serious consequences such as a divorce from the husband, if her betrothed daughter refuses to comply with the marriage arrangement.

### **Early and Forced Marriages**

Early marriage, especially without the consent of the girl, is another form of human rights violation. Under customary law there is no stipulated minimum age at which one can get married. It is dictated by the physical maturity of the male and female and most often puberty, shown by the enlargement of the breasts, menstruation and the ability to procreate in the female, is an indicator. Instances are numerous where, because of this absence of a minimum age, young girls who have not reached the age of puberty have also been given into marriage. The principal reasons for this practice are the girl's virginity and the bride price. Young girls are less likely to have had sexual intercourse and thus are believed to be virgins; this condition raises the family status as well as the dowry to be paid by the husband.

### **Bride Price**

It is one of the most distinctive features of a marriage under customary law. This bride price with its different appellations such as dowry, dower, marriage consideration, marriage payment depending on the tribe or ethnic group, is a *quid pro quo* arrangement that compensates the bride's family for the loss of a daughter and grants the husband legally enforceable rights over the wife and her children. The amount of the payment is fixed by custom in most tribes though it varies and because the law is not written, most families tend to exaggerate it. Payment is made in gifts of clothes, ornaments, livestock, drinks, salt etc but nowadays with the intense commercialization of bride price; nearly

everyone now gives cash or a combination of cash and gifts in kind. The price charged has not only increased enormously but the payment is now used by the family rather than being kept as financial security for the divorced or widowed wife. The age, education and social status of the girl are some factors that influence the amount to be paid. Because the bride price is refundable upon divorce or separation, the amount paid to poor families are sometimes set purposely excessively high to ensure that the wife's family does not sanction a divorce given their inability to repay it.

## **Polygamy**

As far as many African and Asian communities are concerned, polygamy is a long standing practice which has been given recognition by the official legal sphere. By this practice, a man is allowed to marry as many wives as he pleases.

## **Domestic Violence**

### *a) Spousal Abuse*

The most endemic form of violence against women is spousal abuse or wife abuse or more appropriately abuse of women by intimate male partners. Cultural practice allows the husband the right to "reasonably chastise his wife by physical force" Such force includes slapping, boxing, punching, hitting with a weapon. Many cases have been reported where the abuse when unchecked often gets more and more blatant and very violent. Where the husband is persistently cruel and frequently beats the wife to the point of causing her great pain or serious harm, the wife could divorce him, but under customary law a single act of physical and brutal force is permitted. This is considered to be an inherent part of a marital relationship. Because the society in which this act is practiced tends to regard divorced women as failures, women tend to endure beatings, harassment and torture at the hands of their husbands or male partners for the sake of staying married. Even the Supreme Court of Cameroon confirmed the traditional right of a man to "box" his wife: CS Arrêt no.42/L of 4 January 1972

### *b) Marital Rape*

Culture does not consider marital rape offensive because when a woman marries, she is deemed to have consented to have sexual intercourse with her husband at any time, except

she is physically ill, menstruating or suckling a young child. The argument has even been raised that the husband, by virtue of the payment of bride price, has a legal right to unlimited sexual access to his wife. Cultural practice demands that as soon as the husband enters the bedroom the wife must obey him. It is believed it is the husband's rights to have sexual intercourse at any time he so desires. Mothers often instruct their daughters never to say no to a husband's sexual advances even if she has good reason to do so. Men receive similar instructions from their fathers and are made to understand that it is their absolute privilege to have sex. They thus embrace the notion that a woman's refusal to have sexual intercourse is meaningless. This kind of sex education accounts for widespread societal acceptance of marital rape.

## **Female Genital Mutilation (FGM)**

The cultural practice of genital mutilation or female circumcision as frequently called, occurring in several countries, refers to several surgical operations that entail the removal of parts or all of the clitoris and other female external genitalia. In its most severe form known as infibulation, the clitoris and both labia are removed and the two sides of the vulva are sewn together, leaving only a small opening to allow urine and the menstrual flow to pass. In its less extreme form, all or parts of the clitoris is removed (clitoridectomy) or the clitoris and inner lips are removed (excision). The conditions under which these operations take place are often unhygienic and the instruments used are crude and unsterilized. A kitchen knife, a razor blade, a piece of glass or even a sharp fingernail, are the tools of the trade. These instruments are used repeatedly on numerous girls, thus increasing the risk of blood transmitted diseases, including HIV/AIDS. The operation which takes about 10 to 20 minutes is done without anesthesia and treatment of the wound is by applying traditional herbs, earth, cow-dung, ash or butter depending on the excisor. If the child dies from complications, the excisor is not held responsible; rather the death is attributed to evil spirits or fate.

The origin of the practice has been traced to a desire to control female sexuality and to preserve the virginity of young girls until marriage. A host of superstitious beliefs help to

perpetuate the practice but the core belief is that men will not marry uncircumcised women, believing them to be promiscuous, unclean and sexually untrustworthy.

### **Son Preference**

Son Preference refers to a whole range of values and attitudes which are manifested in many different practices, the common feature of which is a preference for the male child, often concomitant with daughter neglect. The practice denies the girl child good health, education, recreation, economic opportunity and the right to choose her partner. She is marginalized and discriminated against from birth particularly where resources are scarce. In extreme cases son preference may lead to selective abortion or female infanticide.

Son preference is a transcultural phenomenon, more marked in most African countries and some countries in the Asian region and historically rooted in the patriarchal system. Because sons are considered to be the family pillars who ensure continuity and protection of the family, the family lineage is carried on by male children and the family name is guaranteed by sons the cultural practice of son preference is rooted in culture.

### **Widow Inheritance (Levirate)**

Under customary law when a man dies, his wife is not automatically released from the marital bonds. She is still deemed to be a wife of the family and so she is expected to marry one of the deceased husband's relatives, usually a brother. If she refuses, she is cursed and chased off the deceased's property and forced to pay back the bride price. This custom referred to as the levirate is linked to the belief that bride price is paid on the husband's behalf by the family and so even upon his death; the family still has a lien on it and must exploit it to the full. In some families where the males die young the widows who accept remarriage end up marrying up to about 3 or 4 brothers or sons.

### **Sororate**

This is an opposite practice to the levirate. In this case it is possible under customary law where a man loses his wife or where the wife runs away without giving birth, for the deceased or runaway wife's family to present the husband with another girl from the family.

Such a union is deemed a continuation of the previous marriage without any additional costs.

### **Same Sex Marriage**

The culture exists in some tribes where an elderly woman without children will pay bride price to the parents of a girl in order for a 'marriage' to take place between them. After this 'marriage' has taken place, the elderly woman allocates a man, usually from her clan to the 'bride' and children born of this relationship will belong to her. It is believed that this 'marriage' brings social security to the elderly woman. There have actually been cases in the law courts in Cameroon where the 'bride' of such 'marriage' came to court claiming property rights upon the death of the elderly woman she claims to be her 'husband'.

### **Widowhood Rites**

As part of the practical demonstration of mourning, widows are expected to undergo widowhood rites according to the customs of their ethnic group. These rites which vary from one ethnic group to the other usually include but are not limited to: 1) mourning period and confinement, a period where the widow dresses in white, black or navy blue mourning clothes and her movement is very restricted, she is not allowed to farm, fetch water, cook or go to the market; 2) hair scraping, where the hair is scraped from the widow's hair with a razor blade or other instrument, usually in an untidy manner in order to make the widow ugly since the hair is said to be the woman's crowning glory; 3) sitting and sleeping on the floor, a widow is made to sit and sleep on the floor for a period of time during which period she is fed by others usually from the same dirty bowl and is not even allowed the privilege of having a bath. Recently in Cameroon, a woman who was forced by her sister-in-law to sit on the floor for two months was only rescued by the police officers; 4) disinheritance, the widow has no access to economic trees or even land and she is therefore socio-economically dependent and cannot even take care of her children; 5) routinised weeping, the widow is made to cry whether she wants to or not; 6) no bathing; 7) seclusion ; 8) ostracism; 9) ritual cleansing; 10) staying naked and naked walk; 11) drinking water used in bathing the corpse, etc etc.

## **Nutritional Taboos**

Permanent nutritional taboos are placed on female members of most communities throughout Africa. Many taboos are upheld because it is believed the consumption of a particular animal or plant will bring harm to the individual.

## **Implications of Cultural Practices for violence against Women**

Betrothal and early (child) and forced marriage are forms of gender based violence that lead to a range of other forms of violence. They inflict great emotional stress on the wife who loses the right to choose who to marry; she is forced to live with a partner most often several years her senior with very little in common with her and stands the risk of physical violence at his hands. A majority of girls that are forced into early marriages have their first sexual experience through forced sex or rape. They are traumatised by adult sex and forced to bear children before their bodies are fully mature. A common side effect of too early child bearing is vesico-vaginal or recto-vaginal fistula – a tearing of the walls between the vaginal and the bladder or rectum due to prolonged obstructed labour. Women with unrepaired fistulae constantly drip urine and faeces, making them social outcasts and likely candidates for abandonment. Girls from communities where early marriages occur are also victims of son preferential treatment and will probably be malnourished, and consequently have stunted physical growth.

Bride price is a major contributory factor to violence against women and abuse in the home. Rather than cementing the relationship between the families concerned, and providing stability to the marriage, the customary payment of bride price gives the husband proprietary rights over his wife, allowing him to treat her more or less like a chattel. Bride price encourages male domination and control, exacerbates property rights violations against women and is also a contributory factor to the spread of HIV/AIDS. A woman on whom bride price has been paid is considered as property and cannot own property of her own. Since a woman who contemplates divorce has to contend with being sent away empty handed, this makes women stay in abusive relationships or those that carry the threat of infection and end up being infected with STDS and AIDS.

Spousal abuse or abuse by intimate male partners has both physical and mental health consequences. The physical consequences include injuries such as bruises, cuts, black eye, concussions and broken bones. Abuses also lead to miscarriages and permanent injury such as loss of body organs, loss of hearing and vision and scars from burns, bites and wounds, and sometimes to death of the victim. Mental health consequences include chronic headaches, abdominal and other body pains, infections etc. Fatal outcomes include suicide and homicide. [Actually as I was writing this paper, one woman in the town where I live hit her husband with a stick as he was beating and kicking her and he just collapsed and died. She is presently in police custody as investigations are being conducted].

Marital rape can cause both physical injury and profound emotional trauma. Marital Rape is often accompanied by violence including verbal threats, the use of weapons such as knives sticks guns belts slaps or severe beatings and other harmful sexual practices. Negative long term effects include: negative feelings towards men in general, lack of confidence in oneself, severe depression, anger, desire to hurt and a general hatred of sex.

The cultural practice of polygamy increases the incidence of domestic violence because of jealousies, rivalries, constant suspicion and feelings of insecurity among multiple wives. Any attempt to sever the relationship with a polygamous husband is usually met by violence. In other cases, men resort to beating up their older wives to intimidate them and force them out of their home to make room for a new wife. Polygamy also leads to beating of weaker wives by stronger wives and women also fall victims to unfair treatment by men in favour of other wives. Women in polygamous relationships continue to live with increased risk for health impairments, impoverishment and unfulfilled marital relationships.

Female genital mutilation has severe physical and psychological consequences for the woman. It constitutes a violation to girls/women's rights to physical and mental health as it imposes on women and the girl child a whole catalogue of health complications and untold psychological problems. Immediate consequences are unbearable pain which can lead to shock and sometimes results

in death, hemorrhage which sometimes leads to death, several types of infection which can be fatal. Keloid formation, infertility as a result of infection, obstructed labour and psychological complications are identified as later effects. Also complications resulting from deep cuts and infected instruments can cause the death of the child.

Infibulated women must be reopened for sexual intercourse and the process is often very painful. Obstetric complications are the most frequent health problems, resulting from vicious scars in the clitoral zone after excision.

Under the levirate and sororate practices, the woman is mere chattel as she is forced to validate previous bride price. Her choice of freely choosing her partner is taken away from her. The widow's refusal to remarry strips her of her possessions; she is left penniless, homeless and brutalized. The effect of such custom is to thrust many women into unwanted marriages and results in forced marriage and forced sex within marriage. There is also the increased risk of HIV/AIDS transmission between partners.

Son Preference practised in many cultures have serious consequences for the health and lives of the females. In some cases where the preference is strong and resources are scarce, girls receive less food, education and medical care than boys. This increases the mortality rate for the girls. In some communities, the preference for male children is so strong that parents eliminate girl children through infanticide or selective abortion. Neglect of and discrimination against daughters, in societies with strong son preference, also contributes to early marriage of girls with all its attendant consequences.

In same sex marriages, there is a double oppression of the woman, exploitation and slavery. The woman's sexual rights are violated, her rights to own and control her body are relinquished, and she is subjected to serious health problems and is exposed to HIV/AIDS. Thinking that she is not privileged like other girls, she suffers from psychological and mental trauma.

Core widowhood rites subject women to dehumanizing treatment, trauma, pain, suffering, humiliation, loss of dignity and also psychological devastation, their health is impaired, their self esteem lowered or lost. They are prone to several infections and

diseases. Sometimes the stress they have to go through can lead to hypertension, stroke and even death.

The practice of food taboo ensures that pregnant women are deprived of essential nutrients and they tend to suffer from iron and protein deficiencies. Eating habits guided by food taboos during pregnancy contribute to anemia and other forms of malnutrition.

## Conclusion

The problem of cultural practices has been reviewed by several United Nations World Conferences which took place during the past decade. The World Conference on Human Rights, held in Vienna in June 1993, laid extensive groundwork for eliminating violence against women. In the Vienna Declaration and Programme for Action, Governments declared that the United Nations system and Member States should work towards the elimination of violence against women in public and private life; of all forms of sexual harassment, exploitation and trafficking in women; of gender bias in the administration of justice; and of any conflicts arising between the rights of women and the harmful effects of certain traditional or customary practices, cultural prejudices and religious extremism.

The Committee on the Elimination of Discrimination against Women, established under the Convention on the Elimination of All Forms of Discrimination Against Women has expressed its dismay at the persistence of certain discriminatory practices, including, *inter alia*, female circumcision, polygamy, lobola (bride price), witch hunting, food taboos, inhumane rites undergone by widows, and unequal subsistence rights and shares. The Committee has condemned such practices as gravely offending the dignity of women, impeding the advancement of women and affecting the health of future generations. Recommendations to state parties have included the organization of public information campaigns on the issue, the strengthening of existing programmes to combat traditional practices and the review of family and customary laws to eliminate customary laws and practices that impede gender equality and the empowerment of women.

The Beijing Platform for Action adopted at the fourth World Conference on Women in 1995

addressed the issue of harmful traditional practices within several of the critical areas of concern. Emphasizing the harmful effects of certain traditional and customary practices on women and girls, Governments were requested to take legal measures to eliminate practices and acts of violence against women such as female genital mutilation, female infanticide, prenatal sex selection and dowry-related violence.

The Programme for Action adopted at the 1994 Cairo International Conference on Population and Development called on governments to take action to stamp out female genital mutilation and protect women and the girl-child against such unnecessary and dangerous practices.

The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, includes a number of protections designed to combat violence against women, including a denunciation and call for criminalization of harmful practices such as FGM and forced sex, whether they occur in public or private. Article 4 (2)(a), (b) of the Protocol also require States to "enact and enforce laws to prohibit all forms of violence against women ... and adopt such other legislative, administrative and social and economic measures as may be necessary to ensure prevention, punishment and eradication of all forms of violence against women ..."

Despite the progress made in the field of protection, there are thousands of women worldwide that have continued to suffer on a daily basis from all forms of cultural practices as commitments and promises remain unfulfilled. The situation is compounded by the fact

that most women in developing countries are unaware of their basic human rights and it is this state of ignorance that ensures their acceptance, consequently the perpetuation of harmful cultural practices affecting their well-being and that of their children. Eliminating these practices and breaking the cycle of abuse require greater and concerted action across several sectors at the local and National levels. Fundamental changes in societal attitudes and beliefs are necessary.

## Recommendations

- A clear expression of political will and an undertaking to put and end to harmful cultural practices are required on the part of governments of countries concerned.
- Governments should take steps to ratify all relevant international and regional human rights treaties and the obligations in those instruments be fully implemented.
- Legislation prohibiting practices harmful to women and children should be drafted.
- Effective legal measures and enforcement mechanisms should be put in place for the elimination of all forms of harmful cultural practices.
- National legal protection should be put in place and laws modified so that harmful cultural practices are discouraged effectively.
- National laws should be reviewed to ensure that women and girls are not adversely affected by the coexistence and interaction of customary and general laws.
- National committees should be established to combat cultural practices affecting women and girls and government financial assistance provided to the committees.

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# INDEPENDENCE OF THE JUDICIARY IN SOUTHERN AFRICA: SOME REFLECTIONS

*Justice Kate O'Regan, Judge of the Constitutional Court of South Africa. Remarks during a panel discussion at the CMJA Conference in Cape Town, October 2008*

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Article 26 of the African Charter on Human and Peoples' Rights recognises the importance of the independence of the judiciary on our continent particularly in the context of the protection of human rights. Article 26 provides that –

*“States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.”*

In 1996, the African Commission on Human and People's Rights, in recognition of the importance of the principles stated in article 26, adopted a resolution “on the Respect and Strengthening of the Independence of the Judiciary” which called upon African countries to repeal legislation inconsistent with respect for the principle of the independence of the judiciary, especially with regard to the appointment and posting of judges; to provide judges with decent living and working conditions to enable them maintain their independence and realise their full potential; to incorporate universal principles establishing the independence of the judiciary, especially with regard to security of tenure in their legal systems; and to refrain from taking any action which may threaten directly or indirectly the independence and the security of judges and magistrates.

Both article 26 and the Commission's resolutions are in line with numerous international documents asserting the need to protect the independence of the judiciary. In the course of my remarks this morning, I intend to address four issues: why do we care about the independence of the judiciary? What does the concept entail? The relationship between free speech and the independence of the judiciary in a modern democracy? And finally, I will take a little of your time to urge on you the importance of electronic law reporting in facilitating

a regional dialogue between courts about principles such as independence of the judiciary.

## Why does the independence of the judiciary matter?

I can think of no better answer than that given by the former Chief Justice of Canada, Judge Lamer, when he remarked in the leading case of *Beauregard v Canada* [1986] 2 SCR 56 at 70:

*“Judicial independence is essential for fair and just dispute resolution in individual cases. It is also the life blood of constitutionalism in democratic societies.”*

This answer really contains two inter-related reasons supporting the independence of the judiciary. The first reason is the entitlement of all to the impartial and fair resolution of their disputes with others according to the law. This is a human right recognised in article 10 of the Universal Declaration of Human Rights (1948):

*“everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights obligations and of any criminal charge against him.”*

Similar provisions are also to be found in article 14 of the International Covenant on Civil and Political Rights and article 7 of the African Charter on Human People's Rights.

The second reason is the rule of law. As Judge Spigelman, the Chief Justice of New South Wales noted in an address at the 7th Worldwide Common Law Judicial Conference in London April 2007.

*“The legal system performs a critical role in the promotion of social order by the administration of the law in a manner which answers the fundamental requirements of justice namely fair outcomes arrived at by fair procedures. The fairness of the procedures is as essential as the*

correctness or fairness of the outcomes. When people talk about having their “day in court” this is a matter that is of significance to their sense of freedom and of personal autonomy.”

He continued:

“Citizens are entitled to protection from the exercise of the power that others are able to exercise over their lives. Actual or threatened transgression of civil rights in society, notably but not limited to the exercise of the police function of government, are in large measure deterred by the very existence of an independent legal profession with access to courts consisting of independent judges. From time to time deterrence does not work and the judicial arm of government must be invoked, sometimes against other arms of government, both executive and parliamentary.”

So the independence of the judiciary is important because it provides a guarantee for the protection of human rights; and it is a key pillar of the rule of law.

### What do we mean by independence of the judiciary?

The 1981 Syracuse Draft principles on the independence of the judiciary states that –

“Independence of the judiciary means –

- (1) that every judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law, without any improper influences, inducements or pressures, direct or indirect from any quarter or for any reason; and
- (2) that the judiciary is independent of the executive and legislature, and has jurisdiction directly or by way of review over all issues of a judicial nature.”

This definition indicates that there are two aspects to the independence of the judiciary: a personal aspect and an institutional one.

The first aspect is the personal independence of the judge. This is described by the former Chief Justice of Israel, Aharon Barak, in his book *The Judge in a Democracy* (Princeton University Press, 2006) as follows:

“Judicial independence means that in judicial adjudication the judge is free of all

pressures. ... A judge’s freedom from pressure refers to freedom from external pressure, regardless of the sources. Personal independence is independence from relatives and friends, independence from the litigating parties and the public, independence from fellow judges ... and independence from officeholders in the other branches of government. The judge’s master is the law.”

I should stop here to emphasise that the requirement of personal independence imposes a heavy ethical burden on judges. This is generally reflected in the judicial oath of office. In South Africa, the terms of that oath are set in our Constitution as follows:

“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”.

From this oath, it is clear that the first – and arguably most important – person who bears an obligation in respect of the independence of the judiciary is the judge him or herself. Acting without fear, favour or prejudice requires an ongoing internal dialogue with oneself and efforts to increase one’s self awareness. Generally it requires considered action, not precipitate action.

Secondly, however, the need to protect personal judicial independence requires the protection of judges’ salaries and terms and conditions of office. Many Constitutions, including the South African Constitution, provide that the “salaries, allowances and benefits of judges may not be reduced” (Section 176(3) of the 1996 Constitution). Not only are judicial salaries and benefits protected, but generally judges are afforded security of tenure as well.

The second aspect of the independence of the judiciary is institutional independence. Institutional independence requires that the judiciary is able to function efficiently without excessive interference by the other branches of government.

## Independence of the judiciary and free speech

The importance of the principle of the independence of the judiciary does not mean however that the judiciary may not be subject to fair and principled criticism. Such criticism is an important part of a democracy. Sometimes of course the bounds of fair criticism will be exceeded and hot-headed political statements about the judiciary may be made.

This was brought sharply to my attention on a visit to the United States of America some three years ago when my colleague, Justice Yvonne Mokgoro and I were invited, with Ruth Bader Ginsburg, distinguished associate justice of the United States Supreme Court, to address a joint sitting of several congressional committees in Washington DC. It was a time of great tension between the legislative branch and the courts. The tension had arisen as a result of a controversial euthanasia case concerning Ms Terri Schiavo. Ms Schiavo had suffered brain damage in 1990 and become dependent on a feeding tube. Her husband wished to remove the feeding tube but her parents opposed. After the Florida courts authorised the removal of the tube, legislation was passed permitting the governor to intervene to ensure that the feeding tube was replaced. The Florida courts declared the legislation unconstitutional and Ms Schiavo died on March 31 2005. The matter was not heard by the US Supreme Court.

The result of the case had been sharp and hot-headed attacks on the American judiciary, including by members of Congress. In discussion, Justice Ginsburg acknowledged the tension calmly but continued with words to the following effect: “you must do your job; and I must do mine. Mine requires me to decide cases according to their facts, the law and the Constitution.”

I would suggest Judge Ginsburg’s response provides two insights for judging in a constitutional democracy. First, judges must continue to observe their oath of office and decide cases according to the Constitution and the law, regardless of public debate and even intemperate statements outside of the court room. Secondly, judges should not engage in debate with the criticisms. They should speak through their judgments. Judges must not be deaf to the criticism of course. The challenge of impar-

tiality in any legal system requires a judge, as I have said, to continually appraise their task and the manner in which they perform it, but they may not succumb to external pressure, however noisy.

## Sharing our knowledge on the independence of the judiciary — SAFLII

One of the major obstacles to the development of a regional debate about the principle of the independence of the judiciary, and also to the development of a regional judicial dialogue on human rights and constitutionalism has been the difficulties caused first, by the absence of reliable and regular law reports in many of the countries of our region; and secondly, even where countries have reliable and regular law reports, the cost of those reports. It was for this reason that the Southern African Chief Justices Commission endorsed a project to facilitate the web publication of judgments throughout our region.

That project is now well under way and I have been involved with it from the start, as the chairperson of its board. The project is called SAFLII – the Southern African Legal Information Institute. And its website is available at [www.saflii.org](http://www.saflii.org).

SAFLII aims to publish the superior court decisions of courts throughout the region. At present, it is based in Johannesburg and has a team of lawyers and IT experts drawn from around the region. It is working closely with similar projects in Kenya and Uganda, and is actively seeking to assist in the establishment of other legal information institutes in other jurisdictions such as Botswana.

At present SAFLII hosts nearly 20,000 judgments. It has an almost complete current collection of South African judgments (all the judgments of the Constitutional Court, the Supreme Court of Appeal back to 1984, the High Courts, the Labour Court and the Competition Court); Namibian Courts (the Supreme Court back to 1990 and the High Court to 1997); the Lesotho Courts (the High Court back to 1980 and the Court of Appeal from 2000); Kenya (the Court of Appeal from 1979 and the High Court from 1980); Botswana (the High Court from 2001 and the Court of Appeal from 1980); Zimbabwe (from 2002); Uganda (the Court of Appeal from 1997, the High Court from 1970 and other

courts including the Constitutional Court from the late 1990s); and Swaziland.

This is a wonderful research tool. When I entered “independence of the judiciary” in the search pane, I obtained references to 706 judgments from jurisdictions all over the region. Search results can be displayed in a variety of different ways – by date, by relevance and by court (called data base). Time does not permit me to analyse all the cases I found. But in the top 50 cases (that is cases with a high level of relevance to the topic), there were 18 from South Africa, 16 from Namibia, 8 from Zimbabwe and Uganda, and 1 each from Malawi and Mauritius.

Several dealt with the question of the status of lower courts. See, for example, *S v Van Rooyen* [2002] ZACC 8 which was a constitutional challenge to the legislative provisions regulating the lower judiciary which was partially successful. See also the Lesotho High Court, sitting as the Constitutional Court, case of *Judicial officers Association of Lesotho and Another v The Prime Minister* Case 3/2005 which dealt with a similar question.

Several also dealt with the question of the interference with the implementation of court orders. Perhaps most famously the East African Court of Justice decision *Katabazi and 21 Others v Secretary General of the East African Community* [2007] EACJ 3. This case involved a complaint by the Uganda Law Society where 14 individuals had been granted bail by the High Court in Uganda but who were immediately rearrested and arraigned before a military tribunal on the same facts as they were arraigned before the High Court. They were remanded in prison by the military tribunal. The Ugandan Constitutional Court ruled that the re-arrest was unconstitutional but the 14 complainants were not released. The matter was then referred to the East African Court of Justice which held that “the prevention by the armed security agents of Uganda to prevent the execution of a lawful court order violated the principle of the rule of law and consequently contravened the East

African Treaty. Abiding by court decisions” the court continued “is the cornerstone of the independence of the judiciary which is one of the principles of the rule of law”.

I would urge you to use SAFLII and to give us any feedback. In some jurisdictions, we are still struggling to obtain judgments and if you can help in this regard, we would be most grateful.

Electronic reporting of judgments can also be facilitated by the manner in which judgments are presented. Electronic reporting does not ordinarily produce page numbers, so paragraph numbering is very helpful. You may have noticed that many courts around the world now use paragraph numbers in their judgments. The advantage of this is that no matter where the judgment is reported: in print even in several different sets of law reports or electronically, the paragraph numbers remain constant and assist readers in finding their way around the judgment.

Another development has been the MNC – the medium neutral citation where courts add a number to a case when a judgment is handed down which must always be printed with the name of the case and is thus medium neutral. The South African Constitutional Court for example is referred to as the ZACC. Each year its judgments start at number 1 and go from there. If I tell you then that the medium neutral citation is 2008 ZACC 23, you should be able to find the case in a variety of different ways.

There can be no doubt that electronic law reporting in our region will greatly enhance our access to the jurisprudence of our neighbours as my brief research into the topic “independence of the judiciary” demonstrated. This in itself will be of great value not only to domestic courts, but one hopes in time to the regional courts that have been established such as the SADC Tribunal and the East African Court of Justice to which I have referred, but also to the African Court of Justice. In so doing, I am sure a distinctively southern African jurisprudence on human rights and the rule of law will emerge in the interests of all those who live in our region.

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## IS PUNISHMENT AN EFFECTIVE DETERRENT TO ILLEGAL DRUG-USE?

*Hon. Justice S. Sriskandarajah, Judge of the Court of Appeal, Sri Lanka*

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Drugs are used in order to get relief from pain and misery and to attain a state of forgetfulness. In ancient India, the Aryans used to drink a kind of beverage called 'Soma ras'. There are also a large number of instances of the use of addictive drugs in various other countries in hoary past. There is a legend that both 'opium' and 'Hashish' were cast into wine by Helen of Troy to sooth all pain and sorrow. Many Greeks and Roman Physicians had referred to the medical properties of opium. Hippocrates (460-357 B.C) recommended the juice of the poppy for uterine suffocation. A Chinese surgeon is also said to have administered narcotic drugs called Ma Fu Shuan to his patients before operations. Similarly, there are numerous references to the sleep-producing properties of cannabis in the Arabian Nights. It is the custom to chew coca leaves in the South American Andes. In the United States, the recreational users here generally sniff or snort doses containing 25 to 50 percent cocaine. It thus proves that drugs have been used and abused in different countries since time immemorial.

There is evidence that in Sri Lanka (Ceylon) the use of opium and ganja was common and the use of opium was regularised from time to time by licensing the sale and possession of opium. With the gradual expansion of the health infrastructure and the introduction of modern medicines, the need to rely on opium diminished. In 1929 Sri Lanka laid the foundation for the Poisons, Opium, and Dangerous Drugs Ordinance and this Ordinance is still in operation subject to amendments introduced from time to time. There has been no in-depth survey made in the recent past to assess the estimated number of illegal drug users, abusers, addicts and dependents. However by going through the statistics on the detections made on dangerous drugs and the suspects arrested in the year 2004, it can be clearly seen that there has been an increase in detections in comparison to the previous years. Based on the above findings we could safely arrive at a conclusion that the methods adopted by the

authorities all these years to curtail illegal drug use have not produced any substantial result. The Government of Sri Lanka having identified the drug menace which has caused a serious impact on social and economical instability has taken every effort to control the drug problem with great interest. Although the authorities give priority in the perspective of dangerous drugs, it has been seriously felt that tobacco and alcohol too should be considered when addressing drug problem. It has been revealed that in most of the cases tobacco and alcohol have played the role of a foundation to hard drugs.

The intake of drugs was very much prevalent in the primitive society, but at the same time, their use was controlled within the framework of a community-oriented value system. Over the years, the traditional pattern of society has undergone changes and new values have automatically evolved. The coming generation has been greatly influenced and the drug abuse referred to a type of sedative effect to relieve psychological distress through a variety of naturally occurring and manufactured drugs which brings about a change in the mood, thought and behaviour. The propensity to use drugs to alleviate distress is a universal phenomenon. It is misleading to discuss the effect of drugs without emphasizing that drug effects are dependent on a number of key factors. What a drug does to the mind and body of a user depends on how it is taken. Attitudes towards drugs and drug-use have changed towards the 1980s and into the 1990s, but according to a recent survey by the United Nations Office on Drug and Crimes (UNODC) there are an estimated 15 million opioid abusers in the world (including 9 million who take heroin); about 14 million cocaine abusers, and there are, perhaps 30 million amphetamine type stimulant (ATS) abusers. Cannabis abuse involves about 150 million individuals but no reliable figures are available for sedative/hypnotics, hallucinogens, khat and solvents. They are in addition millions who have drinking problems and are addicted to tobacco.

There has been a marked rise in the feeling that users risk harming themselves if they use illegal drugs, a marked increase in disapproval of illegal drug use, and a growth in support for the view that illegal drugs should be prohibited.

### **Criminalisation of drug-use**

The abuse of drug use is regarded as a social problem. Laws are passed and actions are criminalised to the extent that the actions are harmful to the society. Inflicting punishments on violators presumably lowers the likelihood of such violations.

The first statutory enactment in Sri Lanka (then called Ceylon) appeared in 1867 (Ordinance No.19 of 1867) when an Ordinance was enacted to restrict the use of opium and bhang and to prohibit the sale thereof except by persons who had obtained a licence. This Ordinance was amended on several occasions. By an amendment in 1897 the importation of bhang and ganja was prohibited and customs duty was increased on the import of opium to create an effective control of the use of opium. International conferences and conventions from 1909 onwards led to the enactment of Drug Laws in Sri Lanka and in other countries all over the world which had imposed penal sanctions on the sellers of illegal drugs, sending them to prison for long terms, making it impossible for them to do their business, and imposing the death penalty for certain drug selling crimes. This punitive approach is to deter the persons tempted to enter the drug trade. But most of the laws enacted in different jurisdictions have also made possession of drugs an offence, including possession of small quantities so indirectly punishing persons who use illegal drugs.

It appears that the legislation enacted all over the world to control illegal drugs has not achieved its desired results and illicit drug abuses remain high. Advocates of the punitive policy still argue that the high number of drug users, abusers and addicts are due to the failure in implementing this policy effectively.

Imposing severe penalties for offences sometimes have a negative effect: 'An increase in the severity of the penalty will result in less frequent application of the penalty'. When the penalty of a given offence rises, the defence

demanding a trial rises, dismissals rise, convictions decline and appeals rise. In the end, the harsher penalties make no difference: the same number or even fewer individuals actually go to prison. On the other hand, criminalisation and harsher punishments make drug distribution and sale more difficult and therefore the drugs become more costly: this, in turn makes selling it enormously profitable for few daring or desperate entrepreneurs, who are willing to do virtually anything to maintain these artificially high profits. Because cocaine and heroin are worth more than their weight in gold, the incentives to transport these drugs are so great we can safely assume that there will never be a shortage.

Ethan Nadelmann wrote in 1989: 'The great beneficiaries of the drug laws are organized and unorganized drug traffickers. The criminalisation of the drug market effectively imposes a de facto value-added tax. It is in effect, a subsidy of organized criminals'. It was argued that if the currently illicit drugs were to become legalized and be sold in government dispensaries, much of the motive for criminal behaviour would be removed. With each drug dose costing a fraction of the price that is now artificially influenced by illegality, the users, abusers, and addicts would no longer be forced to commit crimes to obtain drugs.

If we analyse the drug problem more deeply, the starting-point is consumption by the drug users and drug addicts. The sale, trafficking and manufacture of drugs or the cultivation of plants for drugs manufacture are all based on the consumption. Therefore eliminating drugs at the source and the prevention of sale and trafficking seems attractive at its first glance. In practice this is impossible because of its sheer profitability; when a crackdown takes place in certain area other areas step into fill the void left. In the early 1970s, then-President Richard Nixon attempted to institute a strategy of crop substitution by convincing the Turkish Government to induce farmers to substitute wheat and barley for their opium crop. This policy appeared to work for a while, but over the long term, it was a failure. Why? No crop can be as profitable to those farmers as opium; much of their land will not grow anything else; opium is both an economically and a culturally crucial crop to them; the market for other crops are too distant to make production worth-while. Even if a temporary halt in

opium production were to take place in one country, other areas are ready, willing and able to step in and supply the short-fall, which is precisely what happened when Turkish farmers temporarily ceased opium production. First Mexico, for a while, and then Southeast Asia and Afghanistan became major suppliers of heroin. If in fact the drug problem has to be dealt with efficiently, it has to be dealt at the consumption level.

Drugs are introduced to young persons by various sources. Most people are first introduced to the use of an illegal drug by friends rather than by a drug seller. It is precisely because drugs are initiated, used and circulated among intimates that their spread appears almost impossible to stop. Friendship networks are far more difficult to penetrate than those of the drug dealers. This situation has led to new thinking. One approach is decriminalisation.

### **Decriminalisation**

Decriminalisation is suggested only in respect of drug use and not for manufacture, sale or trafficking. Those who advocate decriminalisation state that even with the stringent laws anyone who wish to obtain illicit drugs can generally do so with a minimum effort. Decriminalisation of possession of illegal drug means the removal of all criminal penalties for the possession of small to moderate quantities of illegal drugs. When considering today's extremely conservative climate surrounding drugs, it is unlikely that it will be accepted by the community at large. Erich Goode states 'In my estimation, decriminalisation and/or legalisation would result in the greater availability of certain drugs, and this in turn, would result in more widespread use. The two drugs I have a special concern about are cocaine and heroin. In my view, decriminalising or legalising these two drugs would make them more available than they are currently. Today, under a more or less punitive policy, for the majority of American youths, heroin is not easily obtainable. A certain proportion of those who are now prevented from using heroin would do so if it were more readily available'.

### **Social problem approach**

Illegal drug use has to be considered as a social problem considering the harm it does to the people and society. Drug use can cause damage

to human life: it can kill people; it can make it impossible for users to pursue an education, hold a job, or remain healthy. The community at large lives every day in fear that they will get robbed or killed, that their children will get snatched up by a life of addiction and crime. The quality of life indeed, the very existence of life itself may be threatened or damaged by the ingestion of drugs.

In 1973 the Sri Lankan Government set up a National Narcotics Advisory Board with the Deputy Minister of Defence and Foreign Affairs as Chairman. In the same year Sri Lanka Police Narcotics Bureau and the Colombo Plan Bureau held a Seminar on 'Narcotics and Drug Abuse Problem in Sri Lanka'. One of the recommendations made at the Seminar was that treatment facilities should be made available to drug dependent persons. The general consensus of opinion among medical practitioners and law enforcement persons appears to be that the abuse of psychotropic drugs is prevalent mainly among middle, upper middle and upper class of society, specially among teenagers and youth. Similar concerns were expressed in India and by the Narcotic Drugs and Psychotropic Substances Act 1985, drug addicts were released to medical treatment by courts. Singapore is known for its tough drug laws and strict law enforcement. However, Singapore experienced a surge in drug related problems, including an increased number of addiction and drug law violations in the early and mid 90's. Now it seems that the tide has turned, with the help of increased efforts and a new, effective master plan aimed at curbing the problem. In 1994, the Government of Singapore launched a comprehensive new master plan which involved efforts under four main strategies: Preventive drug education (PDE), Enforcement, Treatment and Rehabilitation, and aftercare support. In United States in September 1986, the House of Representatives approved, by an overwhelming vote of 393 to 16, a package of drug enforcement, stiffer federal sentences, increased spending on education, treatment programmes, and penalties against drug-producing countries that would not co-operate in eradication programmes.

In the 1990s most of the countries that were facing illegal drug problems have realised that a new approach is necessary to eradicate this

problem. They identified illegal drug use as a social problem and adopted strategies to reduce drug demand by prevention, treatment and by rehabilitation. In this connection the General Assembly of the UN at the 20th special session in 1998 recognized that drug demand reduction programmes should be one of the key elements of a comprehensive strategy combating drug abuse and trafficking, and adopted 'the Declaration on the Guiding Principles of Drug Demand Reduction' More specifically, paragraphs 13-14 put emphasis on focusing on the special needs of clients in prevention and treatment, and paragraphs 15 and 17 encourage scientifically reliable information and evaluation.

The strategy to control illegal drug use must have a two-pronged attack one for the prevention of drug abuse and the other for the treatment of drug abusers.

### **Prevention**

The prevention of drug abuse could be dealt with at three levels. 'Primary prevention' which is directed at the general public for enhancing awareness; 'secondary prevention' which is directed at specific high-risk groups who have increased susceptibility for drug abuse; and 'tertiary prevention' which is directed at drug abusers who could relapse into subsequent drug use.

Drugs education is one of the effective methods to enhance awareness among the general public. Experts divide drugs education programmes into three levels or stages. Primary drugs education programmes begin before drug use has occurred and are aimed at young people who have not yet tried psychoactive substances or illicit drugs. A secondary stage aims to turn people away from substances they are already experimenting with. And the tertiary stage comprises programmes aimed at preventing ex-addicts and abusers from relapsing to their previous patterns.

Some observers began to fear that drugs education actually encouraged illicit drug use. Clearly, the relationship between drugs education and drug use is more complicated than the early educators could have imagined. Drugs education was successful when it was shifted from individual students to the student environment. This approach is based on the theory of social inoculation; one application of

this theory is the 'Just Say No' campaign. Social inoculation is based on the idea that students live in an environment in which drugs and the temptations to use drugs are endemic; to resist them, they must first understand how these pressures and temptations operate. Students are taught to avoid situations in which drug and alcohol use takes place; shown what to do when an offer to use them arises; and encouraged to make a public commitment to avoid the use of drugs. In short, students must fight the widespread 'everybody's doing it' attitude.

In Singapore, Central Narcotics Bureau (CNB) is responsible in drugs education, in co-operation with voluntary welfare organisations. They give special attention to high-risk groups such as school dropouts. CNB also works with schools in order to identify high-risk students so that they can be counselled. Cambodia made use of its annual Water Festival in November 2001 to begin its drug education by distributing drugs awareness materials containing basic information on the dangers of drug abuse to over 1.5 million people. 250,000 drug information leaflets and 250,000 pocket guides including anti-drugs advertisements were distributed to young people attending the 2001 Water Festival in Phnom Penh. In addition to the leaflets and pocket guides, large billboards giving basic information on the potential risk of contracting HIV/AIDS by using drugs, through either injecting or by unsafe sexual practices whilst under the influence of narcotics, were erected onto the side of trucks and driven around central Phnom Penh for the 3-day festival. Cambodian experience is another form of creating awareness and educating public in drug abuse. There cannot be a set pattern of drug education that could be introduced universally. The vulnerable groups in different societies should be first identified and different methods of education should be developed and adopted which could reach them with out much effort.

### **Treatment**

The aim of treatment for drug dependence is simply stated: to help the drug dependent individual to lead a full life, integrated into society without the need for drugs. Whilst it is a comparatively straightforward procedure to achieve drug withdrawal, continued abstinence is much more difficult because drug depend-

ence is a chronic condition lasting for years rather than months and has a natural history of relapse and remission. More importantly, the existence of treatment offers the possibility of recovery; it is a statement to the addict that he/she is not incurable, that there is hope. Thus the existence of treatment is a clear statement that the individual is worth helping, that he/she is not rejected by society. This is an important statement for the large number of young drug-dependent individuals today who should not be condemned as incurable nor rejected as worthless.

Treatment for drug abusers differs among jurisdictions characterized by differences in relevant determinates such as laws related to drug offences, type of dominant drugs used in each country, etc. For instances, programmes for drug abuses include detoxification, prescription of substitute drugs, psycho-social intervention by multi-disciplinary teams, relapse prevention programmes and a variety of support for smooth reintegration into society. Some countries have developed various diversion programmes at the police, prosecution, and court levels, in order to intensify alternatives to imprisonment and/or to conduct early intervention. Some countries utilize special institutions or units for drug abusers, and/or provide intensive treatment programmes based upon individual risks and needs of drug abusers. These experiences and practices in each country might be re-examined in terms of such viewpoints as applicability, sustainability, cost effectiveness, result of evaluative studies in improving current practices and strategies of treatment of drug abusers in each country.

## Rehabilitation

In rehabilitation the problem that is encountered is bringing these offenders back to society and the acceptance of society. Even if the offenders are trained in different skills, their background of incarceration creates confusion and mistrust in the public. This is because the young drug offenders when they are incarcerated come into contact with other drug offenders and criminals and it is difficult to disassociate from them even after they are released from the custody. There has to be a method sending young drug offenders incarcerated for the first time to an open prison or rehabilitation centre or to keep them separate

from other prisoners. The majority of non-incarcerated, first-time young offenders do not re-offend. Once incarcerated, the likelihood of re-offending increases. The most promising rehabilitation takes place in the community and in the home. For rehabilitation of drug abusers it is fundamental to undertake a needs assessment and programme planning that prepares young offenders to be productive members of society. Dependents and addicts must be provided with life skills but such programmes must also address psychological and learning deficiencies and they should be built on sound institutional principles with signification duration and multi-faceted.

A good example for multi-faceted programme applied in Canada is The Break Away Company programme. It is a highly structured, 12-weeks programme for residential or school use based on cognitive-behavioural instruction principles. It simulates a work place in which students are treated as 'employees' and group identity is fostered. The teacher/counsellor is their 'supervisor' they receive a token salary and bonuses, negotiate contracts, work cooperatively, receive information through Company memos, attend staff meetings, and do job shadowing and short-term placements. The Company products are reflected in its objectives: discovering one's own abilities and job-related skills, and learning cognitive-behavioural strategies that address problem-solving, interpersonal relations, and aggression control.

## Conclusion

It has been accepted that the punishment is an effective deterrent for the prevention of crimes. In most of the jurisdictions the Legislatures have enacted laws imposing severe punishments for serious crimes in order to control such crimes. But in the case of drug offences we cannot draw a parallel. In many jurisdictions death penalties are imposed for illegal drug trafficking, sale and possession of a specified quantity of drugs. Despite the stringent laws and penalties the drug trafficking and sale are on the increase. This is for two reasons. One is that the demand is so high and the other is the illegal drugs are fetching a very high price. The demand of illegal drugs increases day by day due to the illegal drug introduction to young persons and they become drug users, abusers, addicts and dependents. Once a

person becomes an addict or dependent the punishments will not have any deterrent effect. The punitive sanctions have been tested for several decades and found to be a failure. The present strategy to combat illegal drug use is by prevention, treatment and rehabilitation. Prevention through education among cross section of people produces good results but it needs financial assistance and the backing of the community. The treatment method is to reform the drug addicts and dependents and to integrate them with the society. Effective treatment in some cases are by providing maintenance doses of drugs through hospitals and dispensaries under medical care, by this process demand of the illegal drugs could be brought down and it will invariably have an adverse effect on the price of the illegal drugs. Rehabilitation on the other hand provides learning cognitive-behavioural strategies that address problem-solving, interpersonal relations and aggression control and integrate them to the society.

Punishment may be an effective deterrent for drug offences such as illegal drug sale, trafficking and possession but it is certainly not an effective deterrent for illegal drug use. Alternatives such as prevention, treatment and rehabilitation are the new approach to control illegal drug use. It is the responsibility of the respective governments to have a policy change by introducing non-custodial sentencing options and avoiding the inclusion of mandatory or minimum sentences in statutes for illegal drug use. This would give the Judges a wide discretion to formulate a sentencing policy based on the concept of individualisation of punishments and developing alternative options that are available in the relevant jurisdictions, the prison should be regarded as the last resort. Individualised sentences should focus attention to meet the needs of the individual offender in order to reinstate him in civil life.

# IN LIGHTER VEIN

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## FROM STIPENDIARY MAGISTRATE TO DISTRICT JUDGE

*Shamim Qureshi, District Judge, England and Wales. A speech delivered at CMJA Conference at Cape Town in October 2008*

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During these last few days we have discussed an extremely serious topic and as the conference comes towards a close, I want to take a light-hearted approach look at this. I have grossly simplified things and I hope no one will be offended. I was born in Pakistan and went to England when I was five years old and have adopted it as my country. I can therefore speak as a Briton when it suits me and as an outsider when I want to criticise Britain.

The heading “From Stipendiary Magistrate to District Judge” represents a story over 250 years which ends like a fairytale. On 31 August 2000 about 100 Stipendiary Magistrates went to bed (hopefully not together). At the stroke of midnight the fairy godmother waved her magic wand and next morning these Magistrates woke up as Judges. They looked and appeared to be the same. They went to the same court. They were still wearing the same clothes. In fact the only difference was their name. We all know fairytales are stories that you cannot believe, but this one actually happened.

Four hundred years ago, Shakespeare predicted the change of title from Magistrate to Judge when he wrote in *Romeo and Juliet*:

*“O, be some other name! What’s in a name? That which we call a rose by any other name would smell as sweet.”*

So am I suggesting that judges are like roses? On the surface the judiciary often presents a pretty picture but it hides a thorny bottom. This is the antagonism or tension between judges and professional magistrates all around the Commonwealth. You cannot deny it since I have spoken with many of you informally and discovered this. Today I ask the question, how did you get into this mess?

I am sorry to tell you that the British gave you this problem during the time of the Empire. When you were obtaining independence,

everyone was so busy having a party, writing a new constitution, writing a new national anthem, designing a new flag, that you all forgot in your happiness to change the legal system to make it more appropriate for your own needs.

Did you not understand that the British sold you the idea of constitutions and yet we have never had a constitution? We often speak of an “unwritten constitution” but that is simply the sleight of hand of a magician. That magician was Albert Dicey who, in 1885, persuasively argued that Britain does not need a written constitution. He wrote, “There is no need for a bill of rights because the general principles of the constitution are the result of judicial decisions determining the rights of the private person.”

An unwritten constitution is in reality a fancy way of saying that we simply do not have one. Parliament recently passed a legislation which was titled Constitutional Reform Act 2005, a title which suggests that Parliament was reforming the constitution, and yet such a constitution does not exist. Do not feel alone; even the British public regularly get fooled by this! When Oliver Cromwell imposed martial law and executed the King, he must have been amazed that he did not have to suspend the constitution, a problem which modern generals and dictators still have in other countries.

The British sold you the idea of the separation of powers and yet we continue to break the rules about separation of powers that were written by British political philosophers. You all try to follow these rules, but until very recently, our Lord Chancellor wore three hats and was a member of the legislature, executive and judiciary. After a thousand years of breaking the rules, he had a pang of conscience and stepped down as head of the judiciary. However he continues to wear the other two hats. I will come back to our Lord Chancellor later on.

The British also sold you a legal system based on judges and magistrates. Britain has since changed its legal system but you are all stuck with it in the Commonwealth. I need to explain this with a bit of our history. Over 700 years of the British legal system can be summarised as follows. The Justices of the Peace Act 1361 created unpaid volunteers called “justices of the peace” to act in a judicial capacity to ensure that laws were observed throughout the country. These JPs did a splendid job except in Middlesex, which is broadly from the centre of London to Heathrow airport, which obviously did not exist at that time. In 1780 the great parliamentarian and philosopher Edmund Burke announced in the House of Commons that the Middlesex Justices were “the scum of the earth... unworthy of any employment and ...so ignorant they could scarcely write their own names.” To put it into context, Middlesex was the crime capital of Britain at that time. Law and order was losing the fight against crime, when along came Henry Fielding. His simple virtue was that he was an honest man. He employed a group of men to catch criminals and he then tried them at Bow Street. Those found guilty were sent to prison or the gallows. There are no statistics about his acquittal rate. But Henry Fielding was no angel; he wrote Tom Jones, a classic novel but still regarded as mild pornography.

This government pilot scheme was so successful that it was adopted by local councils which started to employ professionally qualified magistrates, who were called “stipendiary magistrates” because they were paid a stipend or salary in contrast to the existing unpaid lay magistrates. They were employed in high crime areas and there are only 140 of them today. This is in stark contrast to the 30,000 lay magistrates who actually do the vast majority of our criminal work and continue to do a sterling job.

With the Administration of Justice Act 1973, the Lord Chancellor took over the appointment and removal of stipendiary magistrates. All appointments were to be made by the Queen. The Lord Chancellor fixed their salaries. Their terms and conditions became almost identical to judges. They became like judges in all but name. The selection procedures have become the same, although one has to do a few more years as an advocate to apply

to become a judge than a magistrate. All posts are advertised and the competition is fierce. For example, in a current competition for Deputy District Judges (a mandatory part-time judicial post for an advocate who hopes to become full-time in due course), there were 820 applications for 20 posts. The selection criteria are identical for all tiers of the judiciary. Chief Justice Pius Langa has mentioned some of the qualities of judges in his opening speech to the conference on Monday. These include legal knowledge, honesty, integrity, impartiality, reliability and commitment. He also mentioned that judges should act with humility. However I personally cannot think of many judges with that quality! I have come across judges with other qualities that are not advertised. How many of you have appeared in front of judges who are pompous, arrogant, and rude to the advocates. Mind you, you don't see many magistrates like that, do you?

By virtue of the Access to Justice Act 1999 the Lord Chancellor arranged to change the title of “Stipendiary Magistrate” to “District Judge”. Overnight we became part of the Judicial Family. We were all brother and sister judges in one big happy family, under the parental guidance of the Lord Chancellor, who was our new Daddy Judge. It was the same feeling as an orphan gets when he is adopted by a large family. Daddy Judge either had a big heart or was a great reformist. He went on to change the title of Tribunal Chairman and Adjudicator to Judge. The Judicial Family grew rapidly. It had another boost when he adopted all the 30,000 lay magistrates into the Judicial Family.

Sadly all fairytales do not have a happy ending. Daddy Judge could not cope with the pressure of the size of his new family. He started mixing and drinking with bad company, a gang called The Cabinet led by a man called Tony. Daddy Judge was coming home late and there were arguments. One day Daddy Judge just walked out of the family home. He said he had had enough and was not going to come back. Lucky for us, Mummy Judge (Lord Chief Justice) stepped in to look after everyone. Tony and his gang got a public telling off from Mummy Judge but it did not do any good. After all, we all know you cannot trust men! Now when Daddy Judge wishes to meet with us, he needs to have “supervised contact.”

Because we are in South Africa for this conference, I will use your experiences to illustrate the point I am trying to make. Here the Regional Magistrates are trying murder cases, often several per week, and routinely passing life sentences. In Britain, such cases are mercifully rarer and are tried before High Court judges. The accused is usually represented by a team of three lawyers, a QC, barrister and a solicitor all paid for by the State. A murder trial is given the full Rolls-Royce treatment, or some of you might call it in your countries as the Mercedes treatment. Despite this, in South Africa, you still call your arbiters Regional

Magistrates. I ask you, what more do they have to do in order to deserve the title of Judge? I would suggest that you change their name. Call them anything but put the name “judge” in it. That is the way forward to a harmonious relationship. It will make them all happy and increase morale no end. South Africa is a large and important player in the Commonwealth, and if you do this, then the rest of the Commonwealth will surely follow suit. In this way you can finally get rid of this remaining legacy from your colonial past.

Thank you.



*New govt car for High Court Judges Theron, Owusu and Wade-Miller.*

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## UNDRESSING THE COURT

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*David McClean*

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There can be few professions in which correct dress is as important as in the Law. In England, the Bar has always tried to maintain a distinctly sombre look. In 1574 the Benchers of Gray's Inn railed against those of the Inn who wore gowns, doublets, hose or outward garment of "any light colour". Black was much preferred, even if the morning coat and later the black jacket gave way in the 1970s to a sober business suit. Gowns, of course, were black though the distinction between the black silk and the black "stuff" gowns remained of great significance.

There is much to be said for a uniformity of that sort. In a recent case, a woman defrauded of many thousands of pounds by a confidence trickster described him as so well dressed, with a blue pin-striped suit and sparkling cufflinks, that she thought he was a barrister. She should have realised that his taste in dress gave him away.

Judicial dress is a subject in its own right. English judges from the 14th century to more recent times (to be exact, 1 October 2008) wore outfits suitable at the start of that period for attendance on the Sovereign. Violet and even green gowns were once worn, but the guide to judicial dress published in 1635 specified a black robe faced with a light-coloured fur in winter, and violet or scarlet robes, faced with shot-pink taffeta, in summer. A black girdle, or cincture, was worn with all robes. Well before the time of the great reforms of the Judicature Acts in 1875 robes had been rather simplified: a scarlet robe, black scarf and scarlet casting-hood (also known as a tippet or stole) was used for criminal trials, and for civil trials some judges had begun to wear a black silk gown. By the seventeenth century, bands and the wing collar were standard neck-wear.

After the Judicature Acts, the new Divisions of the High Court wore the robes of their predecessor courts. The Queen's Bench Division retained its scarlet, but black silk gowns were worn in the Chancery Division and the Probate Divorce and Admiralty Division. Black silk gowns were favoured by many judges, and

were introduced in the Court of Appeal and in the 1960s in the Queen's Bench Divisional Court and in criminal appeals. County courts were established in 1846 and the new judges wore black gowns until the early years of the 20th century when a violet robe, not dissimilar in pattern to the High Court robes was introduced.

Probably the most controversial item of judicial dress is the wig. They are not as ancient as some suppose: they were fashionable in society for little more than a hundred years from the late seventeenth century, and judges merely copied the practice but persisted when fashion changed. By the middle of the nineteenth century the short "bench wig" was universal.

As we know, English judicial dress set the tone for that worn in many parts of the world: when so many practitioners trained in the Inns of Court in London, that was perhaps understandable and the natural conservatism of lawyers ensures that in many places, at least on ceremonial occasions, the old pattern continues. No self-respecting President of a republican member of the Commonwealth would be sworn in without a Chief Justice in scarlet robe and full-bottomed wig.

English practice underwent a revolution in the summer of 2008. A new 'civil gown' was introduced to be worn in all but criminal cases. Styled by the fashion designer Betty Jackson, it is a dark blue gown, closed at the front with velvet facings. Tabs at the neck of the new gown indicate the rank of the judge. The Lord Justices in the Court of Appeal sport gold tabs; High Court judges retain some hint of scarlet in their red tabs; Masters of the Chancery or Queen's Bench Division and some others have pink tabs; and District Judges blue tabs. No wigs, bands or wing collars or (for ladies) collarettes. Circuit judges resisted the change, with some success. They keep their existing gown and lilac tippet but in civil cases will not wear the wig or other accessories. There is no change in judicial dress in criminal cases. There the wig survives, but High Court judges will

now wear their “winter” robes all year round; the scarlet summer robe disappears.

The new Practice Direction goes further: the Heads of Divisions may specify when no gowns are to be worn, and the President of the Family Division has directed that a gown should not be worn when the judge is sitting in family proceedings, otherwise than in open court. When not wearing a gown, judges should sit wearing a dark coloured business suit or similar.

All this saves a deal of money, but that does not mean it is popular. A well-known commentator on legal matters, Joshua Rozenberg, wrote in the *Daily Telegraph* soon after the

change-over that “appeal judges coming into court now bear an uncanny resemblance to a gospel choir from the southern United States. You almost expect to see them swaying in unison as they bow to the traditionally-dressed barristers. One judge complained that the high collar made it difficult for him to look down and make notes. Another said it was difficult to retrieve his handkerchief without too much unseemly groping.” Even the circuit judges, who have kept their traditional robes, have complained that their existing robes do not look right without wing collars and bands.

It will be interesting to see whether the English revolution has echoes in other Commonwealth jurisdictions.

# LAW REPORTS

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Sometimes this section of the *Journal* has a single theme. In this issue we have notes on four cases which cover some very different matters, but all are related in some way to the judicial role. The first case, *Fraser v Judicial and Legal Services Commission*, concerns the security of tenure of the lower ranks of the judiciary, especially those judges and magistrates serving on relatively short-term contracts. If we believe in the independence of the judiciary, we must apply that principle to all judicial officers. That was always important but is perhaps of increasing practical significance as the lower courts acquire wider powers. Judges serving on contracts for a year or two at a time are in an unusually weak position, and the Privy Council in *Fraser* has affirmed that constitutional protections cannot be circumvented by contractual arrangements.

*R v Jones* is another case in which a claim of apparent bias was made. The judgment records the problems over judges' salaries in The Bahamas, as elsewhere in the Commonwealth, and also the sensitivity of comments made by Government ministers on the performance of the judiciary.

The background to *Khan v Musharraf* is very well known. Military intervention in the government of that country is a recurring phenomenon and such action always raises issues about the position of the judges sworn to uphold the existing Constitution. In Pakistan matters were complicated by the fact that the actions of the senior judges were part of the stated reasons for the intervention. Extracts from the judgment are presented but the reader is left to draw his or her own conclusions.

The applicant in *Kotzmann v Adult Parole Board of Victoria* stood little chance of success, but the case raises wider issues than might at first appear. It is quite unsurprising that judges should be appointed to serve on bodies such as parole boards, but questions are sometimes asked about the use of judges on commissions of enquiry or major investigations on behalf of the Government. The test applied by Judd J, whether the appointment of a serving judge gave the appearance that the court as an institution was not independent of the executive, has a wider relevance.

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## FRASER V JUDICIAL AND LEGAL SERVICES COMMISSION

*St Lucia – Removal of magistrate from office - Contract terminated after investigation into alleged corruption*

PRIVY COUNCIL

6 May 2008

Lords Hoffmann, Hope, Scott, Walker and Mance

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Under the Constitution of St Lucia “[t]he power to appoint persons to hold or act in offices” which include the office of magistrate is vested in the Judicial and Legal Services Commission (s 91(2)), and “the power to exercise disciplinary control over persons holding or acting in [such] offices . . . and the power to remove such persons from office” is likewise vested in the Commission (s 91(3)).

The Appellant served as a magistrate in St Lucia under successive annual contracts, the most recent commencing on 6 September 2003. By a letter from the Permanent Secretary of the Ministry of Public Service in January 2004, the Appellant was dismissed from his office with effect from 19 January 2004. In respect of that dismissal, the Appellant sought constitutional relief against both the

Commission and the Attorney General representing the Government of St Lucia. Shanks JAg gave judgment in his favour, declaring that both the Commission and the Government had contravened s 91 but the Eastern Caribbean Court of Appeal allowed the Commission's and Government's appeals in respect of the judge's finding that they had been in breach of s 91 of the Constitution. The court held that the only breach was a breach of the Appellant's contract by the Government.

The background to the Appellant's dismissal was as follows. At a meeting in September 2003, at which the Appellant was present, the Commission decided to appoint a retired High Court judge to investigate what the Commission's chairman, Sir Dennis Byron, described in the letter dated 14 October to the Appellant confirming the decision as "the unsubstantiated reports I have received of corruption in drug cases involving you". The letter recorded that the Appellant had welcomed the investigation. Retired Justice Odel Adams was appointed and produced a report dated 3 November and submitted to Sir Dennis Byron on 11 November 2003. Justice Adams considered the papers in three drugs cases. In two he thought that the Appellant had, in acquitting the Defendants at the close of the prosecution case, reached a wrong decision, but not so wrong as to give rise to any adverse inference about his integrity. In the third, he found no acceptable excuse for a grant of bail involving the revocation of an order by Shanks J that the Defendant surrender his passport. On 20 November 2003 Justice Adams wrote to Sir Dennis Byron that in the light of his report he believed it to be justifiable to lay against the Appellant a charge of gross incompetence (which he formulated in detail), but concluded the letter with this sentence "Having reflected on the matter however, I believe that the Commission may wish to consider that Magistrate Fraser's service be terminated pursuant to the notice provisions in his contract."

The Commission acted on the last sentence. On 5 January 2004 it wrote to the Ministry of Public Service reporting that Justice Adams had carried out an inquiry into reports and allegations of improper conduct on the Appellant's part and that the Commission agreed with the recommendation for termination. The Ministry in turn wrote to the Appellant a letter saying that having read and

considered the Commission's report, "we have found the said charges substantiated" and that it had therefore "no alternative" but to terminate his contract.

Before Shanks J, counsel for the Commission frankly accepted that the Commission had not complied with its own procedures or with any procedure which entitled it to reach any conclusion that the Appellant had misconducted himself in any way. Equally, he accepted that any decision by the Commission to remove the Appellant under s 91(3) could only be made for reasonable cause, and that, if there was a removal in this case, the Commission was unable to show any such cause. Although Justice Adams had found that the Appellant had a case to answer in disciplinary proceedings, but no further steps were taken in accordance with the prescribed disciplinary procedure. The Commission and the Ministry evidently took the view that it was open to them to recommend or take a simple contractual step.

In support of this view, the Commission relied on a decision of the Court of Appeal in an appeal from St Christopher and Nevis in *Attorney-General of St Christopher and Nevis v Inniss*. In that case the registrar and additional magistrate was summarily dismissed. Section 83(3) of the Constitution of St Christopher and Nevis gave the power to exercise disciplinary control and to remove from office to the Governor General "acting in accordance with the recommendation of the Judicial and Legal Services Commission". The registrar argued unavailingly that this provision overrode or precluded the operation of the contractual provision for summary determination. The Court of Appeal did not accept the submission. It observed that members of the lower judiciary did not enjoy the same security of tenure as the Board had recognised the higher judiciary to have in *Hinds v R* [1977] AC 195, [1976] 1 All ER 353, [1976] 2 WLR 366, and held that there was nothing to preclude either a short or fixed term or the exercise of a contractual right. In the present case Shanks J was not referred to the decision in *Innis*, but the Court of Appeal was and held (or in the case of Rawlings LJ felt constrained to hold in its light) that Shanks J had erred. The Board had no doubt that *Innis* was wrongly decided and that the Court of Appeal's decision in the present case should be overruled.

The issue was ultimately a short one: were the Commission and the Ministry taking steps to “remove” the Appellant from his office, when they recommended and gave notice to determine his term of office under contractual provisions prior to its natural expiry date? In *Thomas v Attorney-General of Trinidad and Tobago*, Lord Diplock giving the Board’s judgment, had emphasised the constitutional importance of the autonomous commission established under Westminster style constitutions with powers of discipline and removal relating to specific officers, the Board said of a provision providing security of tenure for police officers that:

*“To ‘remove’ from office in the police force in the context . . . embraces every means by which a police officer’s contract of employment (not being a contract for a specific period) is terminated against his own free will, by whatever euphemism the termination may be described, as, for example, being required to accept early retirement.”*

This pointed to a broad interpretation of such provisions with which the Board fully concurred.

The expiry in the ordinary course of a fixed term could not be described as a “removal”. But provisions whereby the Ministry engaging a member of the lower judiciary could bring a term of office to an end prior to its natural expiry fall into a different category. If the Government, when engaging a member of the lower judiciary, could include and then operate such a provision independently of the Constitutional protection afforded by a provision such as s 91, the judicial officer in question would have little security at all.

A purported contractual termination clearly constituted a removal and could not be effective unless the Commission had beforehand determined, in accordance with a proper

procedure, that reasonable cause existed under one of the stated heads. The constitutional protection therefore operated over and above any contractual provisions for termination against the officer’s will of the engagement prior to its natural expiry date.

The Commission was in breach of its constitutional duty in recommending, and making clear that it expected immediate action by, the Government to remove the Appellant when it is accepted there was no reasonable cause for such removal. The question then was whether the Government was also in breach of constitutional duty by acting on the Commission’s letter. Counsel for the Government submitted that it was not, that under s 91 the Ministry had no option but to act on the Commission’s decision and that it could not itself be in constitutional breach as a result of doing so. This analysis would have the consequence that magistrates such as the Appellant could be validly removed from office without cause, and their only remedy for the constitutional breach involved would lie against the Commission. They could not refuse to accept their removal and seek to establish their right to remain in office. That would water down the constitutional protection of their office in an unacceptable manner. Again, it is necessary to interpret and read together the Constitution and the contractual arrangements in a way which provides the intended protection. The agreement between the Appellant and the Ministry must be read as permitting removal under the agreement only in the event, determined by the Commission, that reasonable cause for such removal actually exists. Here, no such reasonable cause was determined to exist. Both the Commission and the Government were therefore rightly held by Shanks J to have been in breach of constitutional duty, and the Court of Appeal was wrong to reverse his decision.

SUPREME COURT OF THE BAHAMAS

Allen SJ

1 February 2007

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The applicant was convicted of murder and sentenced to death. The Privy Council quashed his sentence and remitted the matter to the trial judge for re-sentencing. Before the trial judge, the applicant sought a declaration that the trial judge was not independent and impartial.

ALLEN SJ set out the background and noted that there was no suggestion that there was any actual bias or prejudice against the convict but rather that a reasonably informed member of the public aware of these matters might perceive him not to be independent and impartial. He cited a number of cases from several parts of the Commonwealth to show that ‘The foundation of judicial independence is the freedom of a judge to hear and decide cases without undue or improper influence, inducements, pressures, threats or interferences, direct or indirect from any source or for any reason.’

The principle that the judiciary must be free from interference and influence and that judges are accountable to the Constitution and the law, which they must apply honestly, independently and with integrity, was broadly accepted in all democratic societies and approved in the Commonwealth (Latimer House) Principles by the Commonwealth Heads of Government meeting in Abuja in 2003.

Judicial independence had two dimensions, an individual dimension, which embodied the independence of a particular judge, and an institutional dimension, which was the relationship of the judiciary to the other branches of government. It also had three essential characteristics, namely, security of tenure, security of salary and pension and administrative independence, which in The Bahamas was limited to matters of administration bearing directly on the exercise of the court’s judicial functions such as the assignment of judges, the sittings of the court and the preparation of court lists.

The learned judge continued:

“The grounds upon which my independence and impartiality are challenged arise from the alleged actions of the executive and it stands to reason that any apparent lack of independence and impartiality arising therefrom could only possibly affect matters involving the executive. In my view, different considerations would apply in disputes between private parties in which there was no lack of the requisite appearance of independence and impartiality.

The first charge to my independence and impartiality rested on remarks allegedly made by the Attorney General at a press conference on 8 October 2006 and published in the 9 October 2006 edition of *The Tribune*. There was no suggestion that the remarks were not made and so I find as a fact that they were made as published. [The Attorney commented on statistics showing the number of cases completed and of judicial sitting days lost.]

[Counsel’s] view was that the above-mentioned remarks amount to the issue of a ‘report card’ on the judges concerned, grading judges for their performance with the intention of impressing on them the need to improve on the rate of convictions and consequently their grade. He further contended that what made the situation more egregious was the failure of the Attorney General to repudiate this notion.

... The second charge like the first, rested on a statement made by the Attorney General that judges are accountable to the public. ... The Attorney General did not elaborate on what she meant by “judges are accountable to the public”, but, in my view, a fair-minded informed observer would think that what she meant was not that judges are accountable to the public for the decisions they make, but rather that the work of the courts should be transparent to the public. In other words, it ought to be apparent to the public that judges are aware of the importance of an efficient

court system, that they are getting value for the resources spent in the operation of the courts and that the appropriate standard of judicial conduct is maintained.”

The third charge rested on the failure of the executive to comply with s 4 of the Judges Remuneration and Pensions Act. Under that provision a commission to review the remuneration of judges should have been appointed in 2003 (when none was appointed) and again in 2006, resulting in no review of judges’ salaries for more than six years.

The learned judge observed that “judicial independence requires that judges have financial security. An aspect of that security is that judicial salaries should be commensurate with the status, dignity and responsibility of judicial office and should be regularly adjusted to account fully for cost of living increases.” The government’s failure in this regard was egregious and a potentially serious threat to the health of judicial independence in The Bahamas. There was no doubt that this situation had a potential to negatively impact the public’s perception of judicial independence and to undermine public confidence in The Bahamas’ system of justice. The best outcome for judicial independence and indeed for the citizens of this country, whose privilege it was, would be for the commission process to be completed without any further delay.

In the result:

“In my view, the fair-minded informed observer would be aware of the centuries-long tradition of judicial independence of the courts of The Bahamas, he would be aware that judges respect and adhere to their oath to discharge their judicial functions ‘without fear or favour, affection or ill will’, and he will be aware that despite the failure of the government to review salaries and to adequately compensate judges, they continue to sit and to perform their judicial functions in accordance with their oaths. ... That observer would also discover that judges are accountable only to the Constitution and to the law for their decisions, and that there are no performance appraisals of judges by anyone within or outside the judiciary. He would know that judges’ salaries are paid only in accordance with the law and are not tied to a conviction rate or any other performance. He would know that when the commission’s findings are made that they must also be implemented in accordance with the law and without regard to performance or to any decisions made by any particular judge. In my view, these matters are a sufficient guarantee to exclude all legitimate doubt about my independence and impartiality and I am unable to see how a fair-minded informed observer could perceive otherwise.”

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## KHAN V MUSHARAF

*Unconstitutional steps by President – Judges required to take new oath of office – criticism of former Chief Justice and other judges for ‘judicial activism’ – acts justified in interests of the welfare of the people*

SUPREME COURT OF PAKISTAN  
9–23 November 2007

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On 3 November 2007 the President of Pakistan issued three decrees: a Proclamation of Emergency and a Provisional Constitution Order, both of which were subsequently endorsed by resolution of the National Assembly, and the Oath of Office (Judges) Order 2007. The Proclamation of Emergency placed the Constitution in abeyance with immediate effect. The Provisional Constitution

Order suspended fundamental rights under the Constitution, gave the President power to amend the Constitution, and prohibited the courts from making any order against the President, the Prime Minister or any person exercising powers or jurisdiction under their authority or from calling into question any of the three decrees. Under the Oath of Office order all existing superior court judges were

required to swear an oath of office that they would abide by the Proclamation of Emergency and the Provisional Constitution Order. The majority of the Supreme Court bench, including the Chief Justice, refused to swear the new oath. The petitioners presented constitutional petitions to the Supreme Court pursuant to art 184(3) of the Constitution of Pakistan 1973 seeking inter alia a declaration that the three decrees were invalid and an order that the judges who had resigned be restored to office. The petition was considered by the newly appointed Supreme Court. This note only examines certain aspects of a very lengthy judgment.

The Court held (1) That, following case-law from two previous military interventions in the constitutional order of Pakistan (*Begum Nusrat Bhutto v Chief of Army Staff* PLD 1977 SC 657 and *Zafar Ali Shah v Pervez Musharraf, Chief Executive of Pakistan* PLD 2000 SC 869), the Supreme Court was competent notwithstanding the purported ouster of jurisdiction of the courts by art 3 of the Provisional Constitution Order No 1 of 2007 to examine the *vires* of the decrees until they were protected by an amendment to the Constitution. The petitions could therefore be heard by the court under art 184(3) of the Constitution.

(2) That the Constitution remained the supreme law of the land albeit certain parts thereof were held in abeyance for a limited transitional period in the larger interest of the country and the people of Pakistan. The validity of the Proclamation of Emergency and the Provisional Constitution Order was buttressed by the subsequent endorsement by the National Assembly and by decisions of the court in an almost identical situation in 1977, and again in 1999, to uphold the actions of the Armed Forces in placing the Constitution in abeyance and imposing martial law in the interests of state necessity. Under the doctrines of state necessity and *salus populi est suprema lex* (the welfare of the people is the supreme law) a minimum deviation from the Constitution was necessary in the larger interests of the welfare of the people in order to save the country from chaos and anarchy. Accordingly, the court would declare that the extra-constitutional steps embodied in the three decrees had been validly taken, subject to the condition that the country was to be governed in accordance with the Constitution.

(3) The Constitution embodied a separation of powers, but the judicial activism of the superior judiciary had transgressed the constitutional limits and ignored the well-entrenched principle of judicial restraint. In particular, the Chief Justice's action in establishing a human rights section of the Supreme Court had opened a floodgate of applications which had led, on the one hand, to the arbitrary picking and choosing of cases and, on the other hand, to interference in the other branches of the government in the name of judicial activism, thereby conveniently ignoring and defying the principle of judicial restraint. In that situation extra-constitutional steps such as the Oath of Office (Judges) Order 2007 were justified in the larger interest of state necessity and for the welfare of the people.

(4) The Chief Justices and judges of the superior courts who were not given, or who did not make, the oath under the Oath of Office (Judges) Order 2007 could not be reinstated, 'being hit by the doctrine of past and closed transactions'.

On the question of the 'judicial activism' of the former Chief Justice, the Court noted that both counsel for the petitioners had conceded in plain terms that the country was in a grip of terrorism, extremism and militancy and the state institutions had been rendered non-functional and ineffective on account of the conduct of some of the former judges, particularly the former Chief Justice, as a result of which a state of uncertainty had overtaken the government machinery.

The establishment of a Human Rights Division of the Supreme Court by the former Chief Justice was unconstitutional, as previous case-law had established that the provision under which this action was taken does not apply to individual grievances. According to the Attorney General, the former Chief Justice used his assumed powers to interfere with and interrupt the working of each and every department and office of the government and created a situation in which the other branches of the government were not allowed to perform their functions and duties in accordance with the provisions of the Constitution and the law. This was a situation of chaos and anarchy for which the Constitution provided no solution.

The following extract from the Court's judgment indicates something of the nature of the arguments advanced:

The Attorney General vehemently contended that the treatment the Presidential Reference filed against the former Chief Justice received at the hands of the former judges of the Supreme Court closed the door for the government to resort to the constitutional remedies providing for the accountability of the judges of the superior courts. According to him, on the eve of hearings before the Supreme Judicial Council of Pakistan, lawyers-cum-political workers would enter the Supreme Court premises, raise slogans against the members of the Supreme Judicial Council and interrupt the working of the Council as well as the Supreme Court benches. The court premises were practically turned into a ground exclusively meant for political processions and rallies, which badly impaired the sanctity of the court. The Attorney General further stated that on the very first date of hearing of the reference before the Supreme Judicial Council, the former Chief Justice did not sit in the vehicle made available to him at his official residence for travelling to the Supreme Court to attend the proceedings of the Council and insisted on walking on foot along with his family members. According to the Attorney General, it was an act unbecoming of a person who happened to be the Chief Justice and thus, the dignity and prestige of the highest judicial office of the country were disregarded. He submitted that the law enforcement personnel on duty requested the former Chief Justice time and again to use the vehicle provided to him for going to the Supreme Court, but he did not accede to their request. Hence, the behaviour of the former Chief Justice created an unpleasant scene. On top of it, one of the former judges took *suo motu* action of the matter and created an embarrassing situation for the administration, a situation that was the creation of the former Chief Justice. The Attorney General lamented on the fact that the media, particularly some private television channels, took the occasion as the high time of their business and never realised the sensitivity of the issue. Instead of confining to their true role of relaying information to the masses, they

turned their talk shows into an exercise aimed at advocating a particular point of view.

The Attorney General also submitted that a politician-cum-lawyer, who was one of the counsel of the former Chief Justice, used all his political skills and expertise in turning the reference into a political gambol. He used every occasion in the course of the proceedings of the reference and later the Constitution petition filed by the former Chief Justice against the said reference to gain political mileage. He organised political rallies for the former Chief Justice to address the bar associations throughout the width and breadth of the country. He became a personal driver of the former Chief Justice and also intended to ply a coaster for the other former judges. Many former judges of the High Courts would participate in those events all of which were calculated to destabilise the government machinery under a scheme. Every speaker on the stage presided over by the former Chief Justice would make a political speech and at the end the former Chief Justice would deliver a speech on the 'rule of law'. It was a mockery of the Constitution and the law.

... We have given deep consideration to this aspect of the matter. Counsel for the petitioners have not been able to rebut the submissions made by counsel for the second respondent as well as the Attorney General on the above issue. The facts and circumstances narrated by the Attorney General in the preceding paragraphs presented an alarming situation and unfortunately the concerned stakeholders in the judicial and the legal arena of the time never realised the implications of the situation to which the country had been driven. The state functionaries were pushed against the wall and no way out was left for them. Thus, the action of 3 November 2007 had become inevitable, and had been taken by the second respondent to save the country from chaos and anarchy. Being a step taken in the interest of state necessity and for the welfare of the people, this court validated the same.'

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# KOTZMANN V ADULT PAROLE BOARD OF VICTORIA

*Judges of Supreme Court as members of Parole Board — Whether an invalid investment of administrative or executive power — Whether incompatible with judicial function*

IN THE SUPREME COURT OF VICTORIA, COMMON LAW DIVISION

Judd J, 15 September 2008

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Challenging an adverse decision of the Parole Board, the applicant argued that the governing provisions in the Corrections Act were unconstitutional, in that (a) the appointment of a judge of the Supreme Court to the Board was an impermissible attempt to confer administrative functions on a court which exercised Commonwealth jurisdiction under Ch III of the Australian Constitution; and (b) the performance of the functions of a Board member were repugnant to or incompatible with the office of a judge of such a court.

The first limb of this argument relied on the decision of the High Court of Australia in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, in which a New South Wales Act was held invalid because Ch III of the Constitution limited the power of state parliaments to confer non-judicial functions on state courts. In the present case, Judd J held, in effect, that although the legislation provided that the membership of the Board had to include a serving Supreme Court judge, this did not amount to conferring an administrative function on the court.

The second limb raised a “more difficult legal question” concerning the doctrine of “incompatibility”. This required an examination and assessment of the nature of the function performed by the Board, the manner in which

the Board performed its functions and the extent to which those matters might diminish public confidence in the integrity of the judiciary as an institution or the capacity of the individual judge to perform his or her judicial functions with integrity. Judd J observed:

*“Individual views will differ as to what will erode public confidence in the court and judiciary. The functions of the Board fall within that category of case where the public confidence and its integrity is very likely to be enhanced by the appointment of judicial officers and in particular a judge of this court. On the other hand, there are functions which may, according to some, appear to diminish public confidence in the court.”*

Ultimately, the issue was to be resolved by asking whether the appointment gave the appearance that the court as an institution was not independent of the executive. There was a possibility of executive interference, but no evidence of any such interference in the decision-making processes of the Board. The power of the Board to conduct an effective and thorough enquiry, should it be so advised, was a measure to enable the Board to protect the rights of prisoner. Judd J held that the appointment did not give the appearance that the court was other than independent of the executive.

# BOOK REVIEWS

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Laurie Elks, *Righting Miscarriages of Justice? Ten years of the Criminal Cases Review Commission* (Justice, 2008; £29.99).

All criminal justice systems suffer miscarriages of justice, and it is all too easy for a 'system' to ignore the victims of these personal disasters. We all find it difficult to admit that we were wrong! How miscarriages of justice (most often, wrongful dismissals by appellate courts of appeals against conviction) are dealt with across jurisdictions has not, as far as I am concerned, been studied enough. In England and Wales, the Criminal Cases Review Commission was set up as a result of widespread public concern following the quashing of the convictions of the defendants in a number of cases in the late 1980s. Thus the 'Guildford Four' were originally convicted in October 1975, and their original appeals were dismissed in October 1977. It was not until 1989 that the Home Secretary referred their cases back to the Court of Appeal and the prosecution decided that it was unable to support the convictions. The Birmingham Six were convicted of 21 murders in a pub bombing in August 1975. They appealed unsuccessfully in 1987 (see *Callaghan* (1988) 88 Cr App R 40) but three years later were successful (in *McIlkenny* (1991) 93 Cr App R 287).

One of the issues for the Royal Commission on Criminal Justice, chaired by Lord Runciman, was "the arrangements for considering and investigating allegations of miscarriages of justice when appeal rights have been exhausted". Until 1995, only the Home Secretary could refer a case back to the Court of Appeal. He of course sat on the horns of a dilemma: on the one hand, he was criticised for his reluctance to use his powers; and on the other he was also criticised, being essentially a political figure, for having a role in the court process at all. In most cases a convicted person had to attract the support of a public figure or a newspaper before the Home Secretary would refer a case back to the Court of Appeal. The power of the media was very clear. The Royal Commission, which reported in 1993 (see Cm

2263, HMSO) recommended a new and independent body. These recommendations were adopted and the Criminal Cases Review Authority was created in the Criminal Appeal Act 1995.

This book provides a detailed analysis of the work of the CCRC over its first decade or so, and is a wonderful discussion of both the problems faced by the CCRC and some possible solutions. (Further details on the Commission and its "successes" are available on [www.ccrc.gov.uk](http://www.ccrc.gov.uk)). The problems are perhaps obvious: how should such an independent review body deal with fresh evidence, how should it deal with changes in the law over time, what is the significance of a guilty plea (which may well follow a judicial ruling on a point of law) and so on. Elks asks difficult questions: Has the Commission been sufficiently concerned with genuine miscarriages of justice? Has it been the handmaid of the Court of Appeal? Has it made sufficient contribution to the criminal justice system? How do we measure success? (There is no obvious explanation of the fact, as Elks points out, that the English CCRC's rate of referral of cases back to the Court of Appeal runs consistently at about one half of the rate of referrals made by the Scottish CCRC). And there are plenty of people who continue to protest their innocence, supported or not by a wide variety of campaigning organisations. Although Elks was one of the original Commissioners, he is no simple apologist for the CCRC: he criticises the limitations of its own internal deliberations, for example, and takes on board criticisms both from defence lawyers and from the Court of Appeal (which seems at times to be exasperated by the CCRC: see its most recent decision in *Stock* [2008] EWCA Crim 1862, a case which has now been considered by the Court of Appeal on four different occasions). But the CCRC would not be doing its job effectively if its relationship with the Court of Appeal was smooth.

While this book explores the CCRC's powers of investigation (see sections 17–21 of the 1995 Act) in detail, perhaps the honest conclusion should be that these powers are in reality

constrained and perhaps controlled by its budget. What went before was clearly worse: Elks describes the dismal state of the files the CCRC inherited from the Home Office, arguing that the political accountability of the Home Office undermined rather than supported its effectiveness. This reviewer would be grateful to receive comments from other jurisdictions: does your country need a CCRC? If you have one, is it effective? How do you know? This book reviews an important subject: and will provoke questions in the mind of lawyers and judges all over the world: can we improve our criminal justice system for those who continue (perhaps rightly) to protest their innocence?

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**Justice S. K. Date-Bah *On Law and Liberty in Contemporary Ghana: the 41st J. B. Danquah Memorial Lectures: Ghana Academy of Arts and Sciences, Accra, Ghana, 2008***  
ISBN: 9964-969-21-X, pp 105 (no price).

This volume contains the texts of three lectures delivered by one of Ghana's most distinguished judges. They provide an invaluable insight into the health of the contemporary Ghanaian body politic from the perspective of liberty under the law.

Given the dark aspects of Ghana's past record in this respect (Justice Date-Bah begins his first lecture with a quotation from a letter written in 1962 by Dr Danquah from the prison where he had been incarcerated by the then President Kwame Nkrumah), the picture painted of Ghana in the first decade of the twenty-first century gives grounds for cautious optimism. Within a framework of analysis of 'negative liberty' (freedom from intrusions by the State and others) and 'positive liberty' (which enables the citizen to participate actively in government and society), Justice Date-Bah (who had a distinguished career as an academic and practitioner before his elevation to the Supreme Court bench in 2003) reviews the progress made since 1962 in the context of the overall framework for the protection of liberty. In particular he assesses the record of the judiciary operating under the 1992 Constitution in meeting the legitimate expecta-

tion of the public that the judiciary would assert its independence vigorously in defence of liberty, whenever it is threatened by abuse by the executive of the dominant power which it enjoys under the Constitution. After reviewing a number of cases in which the judiciary has been called upon to enforce the Bill of Rights, the learned judge concludes that 'our judges have amply demonstrated their commitment to protect and enlarge liberty in Ghana'. However, he uses the reports of the Commission on Human Rights and Administrative Justice as evidence that there is no room for complacency. These reports reveal the practical shortcomings of the justice system in which a remand prisoner is detained for as long as 192 months, and arrested suspects are regularly subjected to police brutality.

In his second lecture, Justice Date-Bah explores the extent to which the courts have ensured that the representative government established under the Constitution is adequately and meaningfully connected to the people in whom sovereignty resides. He reviews cases in which, inter alia, the courts have robustly protected the right to vote in the context of the registration of voters, the right to freedom of expression in the context of the duty of the state-owned media to be impartial and to give equal and unbiased access to their facilities, and the right to freedom of assembly in the context of restriction on peaceful protest. The learned judge also draws attention to a recent case (*Agyei Twum v Attorney-General & Akwetey* [2005-200] SCGLR 73) in which the Supreme Court quashed the appointment by the President of a committee to inquire into a petition seeking, on frivolous or vexatious grounds, the removal of the late Chief Justice from office. Liberty was upheld in the sense of refusing to countenance an interpretation of the Constitution that would have undermined judicial independence. Perhaps understandably, as a judicial office holder, the writer calls upon all Ghanaians to rally round the judges, as the principle of judicial review represents a solid pillar of liberty.

The third lecture examines the broader role of law as a means of fulfilling national development goals and the attainment of social justice in the context of the directive principles of state policy set out in the Constitution. Noting that the question of the justiciability of the directive principles was the subject of a conflict

in the case law in Ghana, the writer stresses the importance of the preservation of liberty as a necessary means of securing economic and social development. He also refers to the willingness of the judges of the South African Constitutional Court to assume oversight responsibilities over the executive's implementation of social and economic objectives set out in the Constitution. Ghana's judges might be faced with that task if the Supreme Court were to find in favour of the justiciability of the directive principles or if Parliament were to give them legislative effect. Here Justice Date-Bah, with appropriate judicial restraint, touches on an issue which in Ghana as in other Commonwealth jurisdictions, carries a high risk of conflict between the judiciary and the

executive and of sucking judges too much into political processes. His own approach is cautiously creative. While he admits that judges in Ghana do not, on the whole, set the social justice agenda, they do have a role in implementing that agenda by deploying their interpretative function in such a way as to enlarge liberty, rather than diminish it.

In a brief compass, Justice Date-Bah has analysed some fundamental issues relating to the judicial role in protecting the liberty and the welfare of the citizen in a manner from which his brother and sister judges throughout the Commonwealth should take comfort and inspiration.

*Peter Slinn*

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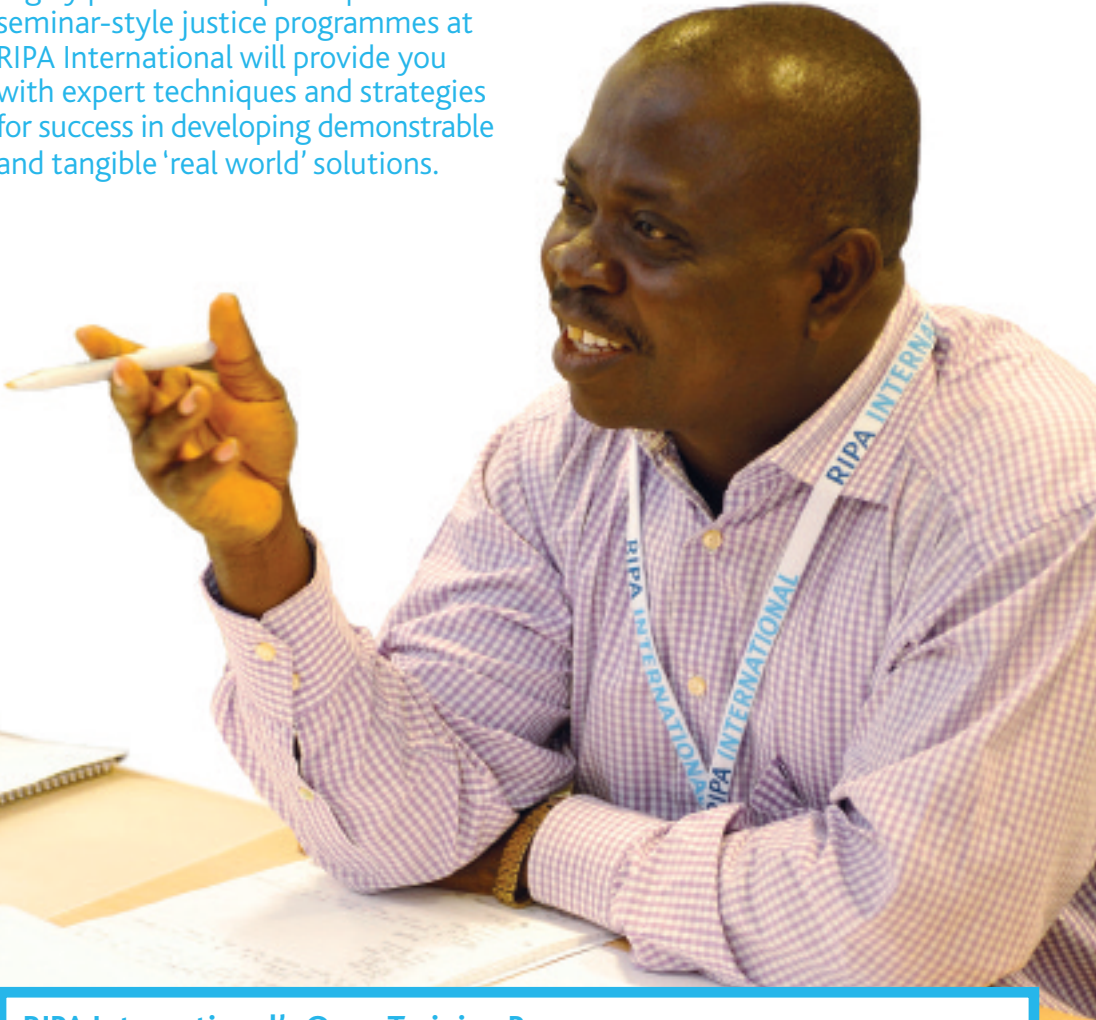
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