

# Commonwealth

# Judicial Journal



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# COMMONWEALTH MAGISTRATES' AND JUDGES' ASSOCIATION

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Chief Justice Marshall of the United States, in a speech quoted in a Ugandan case noted in this issue, said this:

*Advert, Sir, to the duties of a Judge. He has to pass between the Government and the man whom that Government is prosecuting: between the most powerful individual in the community, and the poorest and most unpopular. It is of the last importance, that in the exercise of these duties, he should observe the utmost fairness. Need I press the necessity of this? Does not every man feel that his own personal security and the security of his property depends on that fairness? The Judicial Department comes home in its effects to every man's fireside: it passes on his property, his reputation, his life, his all. Is it not, to the last degree important, that he should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience? ... I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent Judiciary.*

That can well serve as a text for this issue. It speaks of the value of an educated, honest and independent judiciary. The education of judges is of critical importance, and in his article on the work of the Australian Judicial College, Chief Justice Doyle of South Australia draws an important distinction between improving judicial skills and 'compulsory re-education', the deliberate shaping or forming of judicial attitudes on issues that will fall for decision.

Judicial misconduct is a difficult and sensitive matter, and there is a need for great clarity in the legislation dealing with complaints and allegations against judges. We include a detailed study by Bilika Simamba on the law governing the suspension and removal of judges from the East African Court of Justice.

Judicial Independence, judicial training, the fight against corruption and the relationship between the three branches of government were the focus of the Pan African Forum on

the implementation of the Commonwealth (Latimer House) Principles on the Three Branches of Government organised by the Commonwealth Secretariat in April in Nairobi. The Communiqué of the Forum can be found on the Commonwealth's website ([www.thecommonwealth.org](http://www.thecommonwealth.org)) and it is hoped to report further on this Forum in a later edition.

Judicial independence and the constitutional provisions as to the courts and the judiciary feature in a number of items in this issue. Readers will no doubt warm to the remarks of Lady Justice Mpagi-Bahigeine of Uganda in which, straying perhaps from the precise issues before the Constitutional Court, she urges the case for adequate judicial salaries, regularly increased to combat the effects of inflation. Changes in court systems have proved controversial in the Caribbean (witness the Privy Council's judgment, on legislation designed to end its own jurisdiction, in *Independent Jamaica Council for Human Rights (1998) Ltd v Marshall-Burnett*; and the careful reassertion of judicial independence and the rule of law in the legislation making changes in the courts of the United Kingdom).

As this issue goes to press, there seems no resolution of a controversy as to reforms proposed by the South African Government. Three Bills are to be tabled in Parliament:

- a Superior Courts Bill, which reforms the structure of the higher courts and relates it better to the provinces, but which some see as allowing too great a degree of ministerial involvement in the administration of courts, and too tight a control of judges' working methods;
- a Justice College Bill, which allows a degree of ministerial control over academic appointments at the College, which in turn leads some to fear that the education programme will overstep the line so carefully drawn by Chief Justice Doyle; and
- a Bill establishing a complaints mechanism for dealing with complaints against judges, especially allegations of racism and sexism.

It seems that the need for reform is accepted, but the Chief Justice and members of the

judiciary have expressed concerns about particular provisions and especially about any proposal to amend section 165 of the Constitution, which guarantees the independence of the judiciary and ensures that no

person or organ of the State may interfere with the functioning of the courts. We hope to include a detailed account in a later issue of the *Journal*.

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.

Don't Forget to Register for the CMJA's  
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Which will be held in  
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Hosted by the Ghanaian Judiciary, this Conference will deal with the experiences from around the Commonwealth in judicial reform and mechanisms for minimizing delays in administration of justice both in civil and criminal matters as well as continuing judicial education.

The social programme will include a day visit to the Cape Coast and a Durbar of Chiefs and peoples. Optional study visits to the University of Ghana, The Du-Bois Centre and Kwame Nkrumah Mauseoleum as well as a number of evening receptions and a closing dinner.

Further details are available from the CMJA Secretariat or on the CMJA's website: [www.cmja.org](http://www.cmja.org)

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# SUSPENSION AND REMOVAL OF JUDGES FROM THE EAST AFRICAN COURT OF JUSTICE

*Bilika H Simamba*

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In 1967 the East African Community (EAC), one of the most famous and long-standing economic co-operation arrangements in Africa, collapsed only to be revived at the turn of the century. The Community comprises three countries of the British Commonwealth, namely, Kenya, Tanzania and Uganda. They were all members of the original Community. Article 9 of the Treaty establishing the resurgent Community provides for a judicial organ known as the East African Court of Justice (EACJ). The Summit, which comprises the Presidents of the Partner States, acting under Article 24(1) of the Treaty, appointed as Judges of the Court the following persons: Mr Justice Moiwo M. Ole Keiwua (President) (Kenya); Mr Justice Joseph Mulenga (Vice-President) (Uganda); Mr Justice Augustino Ramadhani (Tanzania); Mr Justice Kasanga Mulwa (Kenya); Mr Justice Joseph Warioba (Tanzania); and Ms Justice Solomy Bossa (Uganda). Dr John Eudes Ruhangisa is Registrar.

Mr Justice Keiwua, the President Judge of the Court, who is also a serving Judge of the Court of Appeal in Kenya, and Mr Justice Mulwa, a serving High Court Judge also in Kenya, were among six Court of Appeal and seventeen High Court Judges suspended from their duties in Kenya by President Mwai Kibaki for alleged 'misbehaviour' in relation to the performance of their judicial functions in that country. This action was taken pursuant to Article 62 (6) of the Constitution of Kenya, under which the President may, in any case where a question of removing a Judge is referred to a tribunal, suspend that Judge. Such a provision is found in many other Commonwealth Constitutions, e.g., Tanzania, Art 110 (8); Uganda, Art 144 (5), where the text is that the President 'shall' suspend; Zambia, Art 98 (5), under which the President can also suspend once an inquiry is instituted.

The case for appointment of tribunals and the consequent suspensions arose after the two

Judges were mentioned in what *The East African* newspaper called 'a highly damaging report on corruption and unethical conduct by the Bench' (issue of Monday 20 October 2003). The report was prepared by a committee chaired by Justice Aaron Ringera of the High Court. The two Judges face tribunal hearings, amid much procedural wrangling, to determine whether or not they should be removed from office. The tribunal for Court of Appeal Judges is headed by one time Lord President of the Court of Justice of the Common Market for Eastern and Southern Africa, retired Judge Akilano Akiwumi, while that for High Court Judges is chaired by Judge Abdul Cockar. It must be emphasized that at the time of writing, the two Judges were still members of the EACJ and had not been found guilty of any wrong doing by a court of law or other competent tribunal.

The appointment of tribunals and the suspensions have made it necessary to inquire into the issue as to whether these Judges can be removed or otherwise dealt with on the basis of newly discovered alleged or proven previous misconduct in a judicial capacity held in their home country. This in turn calls for an examination of the adequacy or otherwise of certain provisions in the EAC Treaty relating to the removal of Judges of that Court. In this article we propose to discuss the issues and offer solutions. However, so that the importance of the questions is more fully appreciated, it is necessary first to set out briefly some basic facts about the Community.

On 30 November, 1999, the EAC Treaty was signed. It entered into force on 7 July 2000, twenty-three years after the collapse of the former Community of the same name. The EACJ is different from the previously existing East African Court of Appeal. With some narrow exceptions, that court had jurisdiction over appeals in both civil and criminal matters emanating from national courts. The EACJ on the other hand has jurisdiction much like the

European Court of Justice based in Luxembourg (the European Court). One major difference, however, is that whereas the European Court does not deal with human rights issues (those being dealt with by the European Court on Human Rights based in Strasbourg) the Treaty establishing the EAC does at least mention the issue of human rights. It stipulates that the EACJ 'shall have such other original, appellate, human rights and other jurisdiction as will be determined by the [Council of Ministers] at a suitable subsequent date' (Art. 27(2)). The EACJ became technically operational upon its inauguration by the Summit and the swearing-in of the Judges and the Registrar on 30 November, 2001. At the time of writing, the Court had not heard any cases.

In order to examine the matter comprehensively and on account of the approach to be taken in the analysis, it is necessary to deal also with the matter of appointment. And in dealing with this and other issues, comparisons will be made to the provisions governing the European Court, that being the court upon which the EACJ is in great measure modeled.

### Appointment

Article 24 of the EAC Treaty empowers the Summit to appoint a maximum of six Judges. The term is 7 years, but the first Judges will retire in staggered fashion by lot (conducted by the Summit), 2 Judges retiring at the end of 5 years, another 2 at the end of 6, and the last two serving the full term. The Summit also designates a President and Vice-President. The manner in which the President of the European Court is appointed is in some respects significantly different from that relating to the EACJ. The Judges of the European Court are appointed by 'the common accord of the Member States', in practice the Council of Ministers, as ordinary Judges for six years (Art 165 TEU). The Judges then, from among their number, by absolute majority and in secret ballot, elect a President. He serves in that capacity for a renewable term of three years (Art 167 TEU). At the end of his term as President, he is allowed to return to ordinary judgeship for the remainder of the six-year term.

With regard to the appointment of Judges of the EACJ, Article 24(1) of the EAC Treaty provides, as do other similar Treaties, that the

Judges of the Court shall be appointed from among persons of 'proven integrity, impartiality and independence and who fulfill the conditions required in their own countries for the holding of high judicial office, or who are jurists of recognised competence, in their respective Partner States'. Article 167 of the Treaty on European Union (TEU), in similar language, provides that the Judges and Advocates General 'shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are juriconsults of recognized competence.'

### Removal

The EAC Treaty provides that a Judge is removable only for 'misconduct or for inability to perform the functions of his or her office due to infirmity of mind or body' (Art 26(1)). This power is also vested in the Summit. However, it is further provided that

*'...a Judge of the Court shall only be removed from office if the question of his or her removal from office has been referred to an ad hoc independent tribunal appointed for this purpose by the Summit and the tribunal has recommended that the Judge be removed from office for misconduct or inability to perform the functions of his or her office' (Art 26(2)).*

The tribunal appointed under this provision is supposed to consist of three eminent Judges drawn from within 'the Commonwealth of Nations' (Art 26(3)). This expression is not defined. However, it seems clear that it cannot be referring to the three States that comprise the Community, for when that is intended, the expression 'Partner States' is used throughout the Treaty. Considering that the three Partner States are all former British colonies, it is safe to conclude that the reference is to the Commonwealth, once known as the British Commonwealth of Nations.

In the EU, a Judge is not removed by politicians. Article 6 of the Statute of the Court of Justice of the European Union clearly states that he may be removed from office 'only if, in the unanimous opinion of the Judges and Advocates General of the Court, he no longer fulfills the requisite conditions or meets the obligations arising from his office.'

Although the matter under examination has arisen in relation to Judges who are serving both at home and on the subregional Court, there are a number of material permutations to the problem which would dictate a different approach to solving each class of case. It is therefore necessary to outline these.

First, an EACJ Judge who is also serving at home may have misconducted himself in his home country in a judicial capacity with respect to a matter in which he was involved there before appointment to the EACJ, as in the case at hand. Second, it is also possible that the alleged misconduct might occur at home, again in a judicial capacity, during a period when the Judge is also serving in a similar capacity on the subregional Court. This is possible because of the part-time nature of the Court. Third, there may be cases where a Judge is no longer serving as a judicial officer at home but evidence of misconduct emerges (with respect to his conduct when he was on the Bench there) after he is appointed to the subregional Court; this is possible for Article 24 of the EAC Treaty does not require that Judges of the EACJ continue to be serving Judges in their countries, although all current Judges happen also to be Judges in their home countries. Fourth and finally, whether or not the person is or was a Judge in a national court, the misconduct in issue may relate to his conduct when he was a lawyer in practice or otherwise involved in the legal field.

In all four scenarios, the Judge's integrity on the Court may correctly be called into question and yet there is no express provision in the EAC Treaty to deal with them. The approach to solving these questions, therefore, must be a matter of interpretation. What is more, it seems that any proposed solution must consider separately cases where a Judge is under formal investigation, or has been suspended or removed for misconduct (or inability) at municipal level, on the one hand, and where the allegation has not been subjected to such inquiry or action.

In relation to the first two of the four scenarios, the procedures existing in the Judge's home country for inquiry into his conduct there must obviously be invoked, although this is not in the power of the Summit but the individual President concerned. The apparent problem is that no specific power is

conferred on the Summit to suspend the Judge pending the outcome of such inquiry or to remove him or clear him on the basis of a finding that may be made by a home tribunal. And even if there were to be an inquiry in his home country and he were to be removed from that position following that procedure, there is no clear legal requirement for him to be removed from the EACJ as a consequence of removal at home. This is because of what we mentioned earlier that there is no requirement under the Treaty that the Judges of the EACJ should continue to hold office in the countries from which they are sourced.

It seems, however, that if the competent national tribunal were to find that misconduct had been proven of a type that called into question his 'integrity, impartiality and independence', the basis upon which he was appointed in the first place, the appointment would necessarily be vitiated. It is submitted, therefore, that a tribunal appointed by the Summit may in that eventuality adopt the findings of the national tribunal and remove the Judge under Article 24 of the Treaty. Because his appointment would have been tainted *de novo*, there would be no need to show that the misconduct was in relation to the performance of his functions on the EACJ. Indeed, by the same token, in the second, third and fourth scenarios also, it is submitted that a Judge can be removed if something untoward is unearthed after he is appointed to the subregional Court.

Even if these observations were to be correct, there would be a problem as to what happens during the investigative stage. Whereas as we earlier observed the Constitution of Kenya is one of those, among many, which provides for the suspension of a Judge once a formal inquiry has been instituted, the Summit on the other hand has no corresponding express power to suspend a Judge during an EAC tribunal inquiry, let alone suspend him on the basis of an inquiry in his home country. Certainly his continuance in office during the inquiry, even if only at the subregional level, would at the very least be questionable. The problem is not helped by the fact that (and that is ironically a good thing) even if prospective Judges are initially proposed by the Partner States in which they are nationals, they cannot be withdrawn by the Partner State concerned.

Whereas the Treaty specifically stipulates the grounds and procedures for the removal of a Judge, it is silent on the issue of suspension. The question that naturally follows is as to whether this power can be implied. It seems that it cannot. The suspension of a Judge or any office-bearer, especially where there are no safeguards as to how long a suspension may last, is akin to removal. That being the case, one should be slow to imply a power of suspension – *expressio unius est exclusio alterius*. This must apply, *a fortiori*, where there are special provisions relating to removal and where the matter has to do with a judicial officer. Accordingly, it is submitted that suspension would be *ultra vires* the Treaty. One should not get through the back door what they cannot get through the front door. In saying this, one must consider that there is a provision in many Interpretation Acts in the Commonwealth that a power to appoint a public officer includes a power to terminate an appointment, remove, suspend, reappoint or reinstate. Such provisions are found, for example, in Canada (Interpretation Act, Chap 1-21, s 24) and Zambia (Interpretation and General Provisions Act, s 26). However, for reasons stated above, this rule generally does not, and should not be made to, apply to judicial officers.

And yet, having said that, when there is a formal inquiry, that event alone, especially coupled with the kind of facts that may be alleged in the course of the inquiry and the nature of the evidence, may render it improper for the Judge to continue to serve during this time. The lack of a provision for suspension in the EAC Treaty, therefore, has to go down as a *casus omissus*.

Now, even if one were to accept, for the sake of argument, that a Judge can be suspended or, as we have argued, can be removed, on the basis of previous judicial or other professional misconduct, it is unclear at what point he can be suspended or removed. Can he be suspended or removed as soon as there is a plausible allegation of misconduct even if it has not been proved or should he be suspended or removed only after a final decision in that inquiry holding that he misconducted himself? Also, what if there is no official inquiry or case of any kind? The need for at least the appearance of judicial independence seems to require that if he cannot be suspended then he should

be removed as soon as there is a reasonably credible allegation of misconduct.

The next question is as to what happens if he is suspended or removed from the EACJ but is later found by the national tribunal not to have misconducted himself and the tribunal, therefore, does not recommend his removal. In such a case, there appears to be no legal impediment to his being restored to office. This happened recently at a municipal level, again in Kenya, but in relation to a Judge who was not and is not on the EACJ. Mr. Justice Philip Waki of the Court of Appeal was cleared of allegations and allowed to return to work. This, however, was because, under Article 62 (4) and (9) of the Constitution, the tribunal can only recommend removal if ‘misbehaviour’ (or ‘inability’) is proved. There is no equivalent provision under the EAC Treaty (which incidentally uses the word ‘misconduct’ rather than ‘misbehaviour’ which is used in the Kenyan Constitution, but which essentially has the same meaning in this context). Accordingly, if restoration is to occur, it must be by way of reappointment and rather than lifting of a suspension.

Often, however, there is a surviving problem in that even after a tribunal finds that the alleged misbehaviour has not been proven, a heavy cloud of suspicion might remain depending on circumstances. Such suspicion is not specified either in the EAC Treaty or the Constitution of Kenya as a ground for recommending removal. Removal can only be recommended if misbehaviour has been proved, upon which there must be a recommendation of removal and the appointing authority has in turn to remove. And yet, in many cases, once a full inquiry has been held, his position as a Judge becomes untenable anyway except in cases of clear and complete exoneration.

This is a flaw in the EAC Treaty and in the Constitution of Kenya, and similar Treaties and Constitutions. It is necessary for a tribunal, both at the EAC and national levels, to have a power in exceptional circumstances to recommend that notwithstanding that the misbehaviour might not have been proved, the position of the Judge has become untenable on the court concerned. Thus because there are exonerations and there are exonerations, in the case of the Community, the Summit should expressly be conferred with a power to remove a Judge if, even after exoneration by a national

tribunal, its own tribunal (which must be appointed for the purpose) is of the view that the image of the Judge has been tainted to such an extent as to be incompatible with his continuance in office. This is technically possible for the reference in Article 26(2) of the EAC Treaty to 'misconduct' *simpliciter* does not compel an interpretation that the misconduct must be in relation to a Judge's functions on the EACJ. It must be emphasized, however, that this additional power must be given to the relevant tribunal and not to the appointing authority.

The interpretation of provisions in the EU is marginally easier. Article 167 of the TEU brings the issue of vitiating home slightly better by stipulating that Judges (and Advocates General) shall be chosen from persons 'whose independence is beyond doubt'. Thus once a doubt emerges, even if an office holder is not shown to have been dishonourable, the mere existence of a doubt constitutes grounds for not appointing him and therefore for removing him through the prescribed procedure. His appointment must be regarded as having been necessarily vitiated and his colleagues can make the necessary declaration under Article 6 of the Statute of the Court. It is worthy of note in this regard that for the appointment of a Judge, the EAC Treaty requires not just 'impartiality and independence' but 'proven integrity, impartiality and independence'. It is submitted, however, that facetious arguments aside as to disproof of what might have been proven, it is the EU provision that better provides the clarity required in the matter and therefore the preservation of at least the appearance of honour among serving Judges.

In the same connection, a provision such as section 13 of the Interpretation Act 1999 of New Zealand, may be useful. It states that:

*'The power to make an appointment or do any other act or thing may be exercised to correct an error or omission in a previous exercise of the power even though the power is not generally capable of being exercised more than once.'*

Clearly this provision can be used to re-appoint a person who, for example, should have been appointed subject to the approval of another authority but was not so approved. The appointing authority can make the

appointment again and then convey his proposal to the approving authority. It is submitted that this provision would also cover a case where an 'error' is made in appointing a Judge who is later found to have acted dishonourably.

Speaking of vitiating, the issue also arises as to whether the vitiating of such appointment, if it were the only ground upon which a Judge were to be removed, would render void any proceedings in which he may have participated. It does not seem so unless the misconduct had a connection with a particular case. In any case, proceedings will have to be brought to have those particular proceedings quashed, as the applicant did (on other grounds) in *Martin Ogang v East and Southern African Trade and Development Bank*, Ref 1B/2000, a CCJ case. Indeed, any other construction would lead to what would be a burdensome and unnecessary practice by which once an appointment is vitiated, all cases, including those that were not thereby necessarily tainted, can be open to challenge on that ground alone.

Without prejudice to this position, here also the issue could have been brought home better if there had been a provision, common in municipal jurisdictions, providing for appointments to statutory bodies, which expressly states that:

*'Nothing done by any person appointed to hold any post shall be invalidated by the discovery of a fact which, had it been known to the appointing authority, would have disqualified him for appointment as such.'*

This makes it clear that all proceedings in which he participated are not *a priori* nullified, while leaving intact the right of a litigant to challenge the validity of the proceedings where it is shown that the misconduct in question is likely to have materially affected a judgment that was rendered or may do so in a matter that is *sub judice*. Better still, the provision could be extended to specifically add this proviso. There are also provisions such as section 33 (b) of the Interpretation Act, Cap 2, of Zambia, which stipulates that a decision of a statutory body shall not be affected by 'any defect afterwards discovered in the appointment or qualification of a person purporting to

be a member thereof.’ This can also be used with the same proviso added.

## **Conclusion**

There are clearly a number of reforms that are necessary in the provisions governing the suspension and removal of Judges in the EACJ. In particular, detailed provisions are needed regarding the removal and suspension of Judges who are found to have misconducted themselves before appointment or are alleged to have done so, whether in a judicial or other professional capacity. Whereas it has been

argued above that, upon proper construction, Judges can lawfully be removed on this ground and that a right to suspend cannot rightly be implied, it has to be admitted that the two issues are legally problematic as they were never expressly dealt with in the EAC Treaty. This makes it imperative that detailed provisions on the lines suggested above be instituted to avoid events such as the on-going saga that has engulfed the Kenyan judicial system, the legal fraternity there and the East African Court of Justice.

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# A PERSPECTIVE ON THE ENGLISH CRIMINAL JUSTICE ACT 2003

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## Introduction

The pages of this *Journal* have rightly explored recent constitutional changes in the United Kingdom, in particular the changes in the judicial appointments system and in the status and hierarchy of the courts (see David McClean's account elsewhere in this issue). But the hugely important changes to the criminal justice system in England and Wales also merit consideration around the Commonwealth (but not necessarily emulation without much greater evidence!). The Criminal Justice Act 2003, with its 339 sections and 38 Schedules, has resulted in such vast changes that all full-time and part-time judges attended one of more than 20 two-and-a-half day training courses run by the Judicial Studies Board between January and March 2005. This short article can only mention the central issues raised: it cannot adequately review the tensions which arise from a human rights or 'legitimacy' perspective as a result of reforms which are focused, all too often, on saving money and on 'effectiveness'.

## Procedural changes

Part 1 of the Act makes many amendments to the Police and Criminal Evidence Act 1984. It extends police powers, e.g., to stop and search (extended to criminal damage), to drug test under-18s, to take fingerprints and non-intimate samples without consent. The key issue is whether these new powers are needed. The police are also given the power to grant street bail<sup>2</sup>.

As well as new powers, there has been a flood of changes to the structure of the police: most recently the Serious Organised Crime and Police Act 2005 slipped on to the statute book in the closing week of the last United Kingdom Parliament, before the recent General Election. This Act, which builds on the White Paper *One Step Ahead: A 21st Century Strategy to Defeat Organised Crime* (Cm 6167), creates a new organisation, the Serious Organised

Crime Agency, replete with new powers and 'tasked with defeating organised crime'.

Part 2 of the Criminal Justice Act, on bail, gives effect to the Law Commission's recommendations<sup>3</sup> on reform of the Bail Act 1976 to ensure its compliance with the European Convention on Human Rights. But there are also new presumptions that bail will not be granted in certain circumstances, such as where a person aged 18 or over is charged with an imprisonable offence, and tests positive for a specified Class A drug, if he refuses to undergo drug testing, or following an assessment, refuses recommended follow-up action, unless the court is satisfied that there is no significant risk of his re-offending on bail. This Part also simplifies the bail appeals system, following the recommendations of Lord Justice Auld's *Review of the Criminal Courts of England and Wales* (2001)<sup>4</sup>. The prosecution's right to appeal to the Crown Court against a decision by magistrates to grant bail is extended to cover all imprisonable offences.

Part 3 on 'conditional cautions' is badly named: it allows not for a conditional caution so much as for a caution with conditions. The police may administer such cautions under the guidance of a Code of Practice. This, of course, needs careful monitoring: will suspects who previously were released on bail unconditionally now have conditions attached to their bail, or will conditional cautions be used effectively to reduce the remand population in prisons (around one in six of the overall prison population is on remand: in 2003, 58,700 unconvicted people were remanded into custody awaiting trial)? What is really needed is an increase in the number of remand hostels, and more community support, to give magistrates and judges the confidence that they can responsibly release suspects pre-trial.

Part 4 modernises the process of instituting proceedings (for public prosecutors). The old 'laying of an information' and 'the issue of a summons' are replaced by a written charge,

which will be accompanied by a 'requisition' informing D when he is to appear in court to answer to it. More importantly, the new charging scheme (see Schedule 2) marks a significant increase in the influence of the Crown Prosecution Service<sup>5</sup>.

Part 5 make significant changes to the disclosure regime of the Criminal Procedure and Investigations Act 1996. The prosecution is now bound by a single test for disclosure, requiring them to disclose material that has not previously been disclosed and which might reasonably be considered capable of undermining the case against the defendant, or of assisting the defendant's case. The prosecution has a continuing duty to disclose material that meets the new test, which means that the prosecution is specifically required to review the material in their possession on receipt of the defence statement and to make further disclosure if required. Whether this results in better disclosure will perhaps depend on the sanctions for breach.

Much more controversially, the Act amends defence disclosure requirements, requiring the defendant to provide a more detailed defence statement than was previously required. The defendant is required to set out the nature of his defence including any particular defences on which he intends to rely and indicate any points of law he wishes to take, including any points as to the admissibility of evidence or abuse of process. The judge will warn the defendant about any failure to comply with the defence statement requirements: adverse inferences may be drawn at trial from his failure to comply. The defendant will also have to provide an updated defence statement with details of any witnesses he intends to call to give evidence (other than himself) and also details of all experts instructed, including those not called to give evidence. This new obligation on the defendant will allow the prosecution to interview potential defence witnesses. A Code of Practice governing the conduct of any interviews by the police or non-police investigators with defence witnesses is still under consultation<sup>6</sup>.

Part 6, on the allocation and sending of offences between criminal courts (magistrates' courts, where there are nowadays many professional judges who sit alone as well as the traditional lay magistrates, and Crown Courts,

where serious cases are heard by judge and jury), gives effect to a number of recommendations from Lord Justice Auld's *Review of the Criminal Courts (2001)*, including making magistrates aware, when they determine allocation, of the defendant's previous convictions; removing the option of committal for sentence in cases which the magistrates decide to hear; allowing defendants in cases where summary trial is considered appropriate to seek a broad indication of the sentence they would face if they were to plead guilty at that point<sup>7</sup>; and replacing committal proceedings and transfers in serious fraud and child witness cases with a common system for sending cases to the Crown Court. Defendants under 18 are now to give, for certain offences, an indication of plea, along the lines of the procedure which applies in adult cases: will this avoid cases involving young defendants being sent to the Crown Court unnecessarily?

It is widely agreed that the allocation of cases between the two levels of criminal trial court needs simplifying. The new unified 'Her Majesty's Courts Service', which combines the functions of the former court service and the magistrates' courts committees, was created in the Courts Act 2003 and started work in April 2005. It is to be hoped that it will help smooth the wheels of justice.

Trial by jury is of course expensive, and recent Governments have made many attempts to limit the right to trial by jury by encouraging guilty pleas and greater use of magistrates' courts. Part 7 of this Act is undoubtedly controversial in the eyes of those who share Lord Devlin's view that the jury is the 'the bulwark of our liberties' and 'the lamp that shows that freedom lives'. Yet it is much less restrictive than the Government had originally wanted. The provision which would have allowed the prosecution to apply for a trial of a serious or complex fraud case to proceed without a jury can only be commenced after a further vote in both Houses of Parliament and it seems unlikely that it will be introduced in the short term. Is it really so controversial? The judge would only be able to order the case to be conducted without a jury if he was satisfied that the length or complexity of the case (having regard to steps which might reasonably be taken to reduce it) 'is likely to make the trial so burdensome to the members of a jury that the interests of justice require that serious

consideration should be given to the question whether the trial should be conducted without a jury'. There are other challenges afoot for trial by jury. Thus, the Department of Constitutional Affairs has recently consulted on the issue of jury research and impropriety: there is much that could be done to improve the current jury system<sup>8</sup>.

Another limitation on trial by jury has already been brought into force. A trial may be conducted without a jury where there is a 'real and present' danger of jury tampering, or continued without a jury where the jury has been discharged because of jury tampering. The court must be satisfied that the risk of jury tampering would be so substantial (notwithstanding any steps, including police protection, that could reasonably be taken to prevent it) as to make it necessary in the interests of justice for the trial to be conducted without a jury. There is a right of appeal to the Court of Appeal for both prosecution and defence. Where a trial is conducted or continued without a jury and the defendant is convicted, the court will be required to give its reasons for the conviction: the absence of reasons is, of course, a major feature (and some would say a major disadvantage) of trial by jury.

Part 8 allows any witness, other than the defendant, where it is in the interests of efficiency or effectiveness, to give evidence by way of a live link from outside the court building. This is, potentially, a huge change, since there is no 'interests of justice' test included in the Act.

Part 9 creates a new system of prosecution appeals. The prosecution now have an interlocutory right of appeal against two categories of ruling by a Crown Court judge:

- (i) a ruling that has the effect of terminating the trial made either at a pre-trial hearing or during the trial, at any time up until the start of the judge's summing up to the jury; and
- (ii) an evidentiary ruling or series of rulings made in certain trials for qualifying offences listed in Schedule 4.

This latter right of appeal is limited to those rulings that significantly weaken the prosecution's case and may only be exercised up to the opening of the defendant's case. Interestingly, this change does not follow the recommenda-

tions of the Law Commission's Report No 267 on *Double Jeopardy and Prosecution Appeals*, which proposed appeals against actual acquittals, not interlocutory appeals.

Again very controversial, Part 10 permits retrials in respect of a number of very serious offences, where 'new and compelling' evidence has come to light, thus derogating from the principle of 'double jeopardy' or *ne bis in idem*. The new rules will apply only in respect of serious offences (defined as offences which carry a maximum sentence of life imprisonment, and for which the consequences for victims or for society as a whole are particularly serious). The 29 offences are listed in Schedule 5.

### Changes to the rules of evidence

Part 11 introduces important changes to the rules on the admission of evidence of bad character and to the hearsay rule.

There are entirely new rules on the use of 'bad character' evidence at trial<sup>9</sup>. The existing common law rules are abolished and many provisions in statute law repealed. Based on the Law Commission's Report No 273 on *Evidence of Bad Character in Criminal Proceedings*, the Act allows evidence of bad character in respect both of witnesses (where it is important explanatory evidence, or has 'substantial probative value' or is admitted by agreement) and defendants (where it is admissible through one of 7 gateways). These gateways include where it is important explanatory evidence, 'substantial probative value' or where it is relevant to an important matter in issue between the parties. The matters in issue between the parties may include the question whether the defendant has a propensity to commit offences of the kind charged. Evidence of the bad character of a defendant may not be admitted under this gateway if it would have an adverse effect on the fairness of proceedings.

As controversial as the rules themselves was the timing of their introduction in December 2004, before the judicial training seminars. The Court of Appeal in *Bradley* [2005] EWCA Crim 20, [2005] Crim LR 411 held that, despite some ambiguity, the new regime applied to any trial which started after the December date. They call 'for a reduction in the torrent of legislation affecting criminal

justice... wasteful of scarce resources in public money and judicial time'.<sup>10</sup>

The changes to the law on hearsay evidence have sought to simplify another complex area, but may prove even more difficult to apply in practice<sup>11</sup>. These changes are based on both the Law Commission's Report No 245 *Evidence in Criminal Proceedings: Hearsay and Related Topics* and also Lord Justice Auld's *Review* which recommended a more flexible regime. The exclusionary rule remains, but hearsay evidence is admissible (on behalf of both the prosecution and the defence) under new statutory rules and those common law rules expressly preserved. To add to the confusion, there is a broad discretion to admit hearsay, as well as discretion to exclude it (on grounds of resources, not injustice!). There will doubtless be a flurry of appeals before this new regime 'beds in'. The final Chapter of Part 11 allows certain witnesses in serious cases to use their video recorded statements in place of their main evidence.

### The new sentencing regime<sup>12</sup>

Part 12 of the Act makes major changes in sentencing law, based partly on the *Halliday Report: Making Punishment Work: report of a review of the sentencing framework of England and Wales* (2001). For a start, there are the statutory purposes of punishment set out in section 142(1):

- Any court dealing with an offender in respect of his offence must have regard to the following purposes of sentencing –*
- (a) the punishment of offenders,*
  - (b) the reduction of crime (including its reduction by deterrence),*
  - (c) the reform and rehabilitation of offenders,*
  - (d) the protection of the public, and*
  - (e) the making of reparation by offenders to persons affected by their offences.*

The Act sets out principles for determining the seriousness of an offence, for reductions in sentences for early guilty pleas, and aggravating factors where the offence was motivated by the offender's race, religion, disability or sexual orientation. It sets out numerous procedural requirements.

Importantly it creates the Sentencing Guidelines Council, which is chaired by the Lord Chief Justice and is charged with

producing sentencing guidelines, the first three of which (most usefully on 'seriousness', most controversially on discounts for guilty pleas) are already applicable<sup>13</sup>.

The Act provides for a single generic community sentence, rather than the variety of community sentences previously available. The requirements available with a generic community sentence are:

- Compulsory (unpaid) work;
- Participation in any specified activities;
- Programmes aimed at changing offending behaviour;
- Prohibition from certain activities;
- Curfew;
- Exclusion from certain areas;
- Residence requirement;
- Mental health treatment (with consent of the offender);
- Drug treatment and testing (with consent of the offender);
- Alcohol treatment (with consent of the offender);
- Supervision;
- Attendance centre requirements (for those under 25).

Prison sentences of less than 12 months are replaced with 'custody plus', a short period in custody of up to 3 months followed by a longer period under supervision in the community of a minimum of 6 months. There are new rules on intermittent custody, deferred and suspended sentences.

Most controversial are the new sentencing provisions for so-called 'dangerous offenders'. Where an offender has been assessed or presumed to be dangerous and has committed a specified sexual or violent offence, the court has to impose a life sentence or imprisonment for public protection ('IPP') where there is 'a significant risk' of 'serious harm' from future 'specified offences' likely to be committed by the offender. The controversy lies in the definition of 'dangerous': if a defendant has a previous conviction for a 'relevant offence' (= a 'specified offence') then the court 'must assume' that there is a significant risk of future serious harm, unless the court considers that it would be 'unreasonable' to conclude that there is such a risk.

The list of specified offences in Schedule 15 includes virtually every violent or sexual

offence including for example, affray and actual bodily harm. The provisions apply even where the defendant has no previous convictions. Applicable to offences committed after 4 April 2005, these rules seem certain to lead to a large increase in the number of people serving indeterminate sentences. Whatever happened to proportionality? Following release, at the discretion of the Parole Board after serving a minimum term, those serving a sentence of IPP will be able to apply to the Parole Board to have their licence rescinded after ten years. Offenders serving a discretionary life sentence will be on licence for the rest of their lives.

There is a new form of extended sentence for 'dangerous offenders' who have been convicted of a trigger sexual or violent offence for which the maximum penalty is between two and ten years. This is a determinate sentence served in custody to the half way point, with release during the second half on the recommendation of the Parole Board. Extended supervision periods of up to five years for violent offenders and eight years for sexual offenders must be added to the sentence.

There are new provisions for prisoners' early release on licence, recall to prison following breach of licence requirements, and further re-release. There are complex new rules on calculating remand time, calculating how sentences should be served and drug testing requirements on licence. Time spent in custody on remand will no longer be automatically deducted from the sentence to be served: the court will have to specify any time that should be deducted. Offenders serving sentences of 12 months or more will be released automatically on licence at the halfway point of their sentence (subject to executive early release on home detention curfew (HDC) which remains available). The second half of the sentence will be subject to licence conditions which, for new custodial sentences of 12 months or more, may be imposed right up to the end of the sentence. Recall becomes an executive decision - by the prison and probation services - rather than by the Parole Board. The offender will have the right of appeal to the Parole Board, and, even if the offender chooses not to exercise this right, the Parole Board will scrutinise all recall decisions. There is a new early removal scheme

from prison for foreign national prisoners liable to removal from the UK.

Following the decision of the European Court of Human Rights in *Stafford v UK* (2002) 35 EHRR 32, and of the House of Lords in *Anderson* [2002] UKHL 46, [2003] 1 AC 837, the Government was forced to introduce a new scheme under which the court, rather than the Home Secretary, determines the minimum term to be served in prison by a person convicted of murder. But the length of this minimum term is determined by reference to the framework set out in detail in Schedule 21. When setting a minimum term, the court must take into account three categories of starting point: a whole life order, 30 years and 15 years. 18-21 year olds may only be subject to the 30 and 15 year starting points. Juveniles may only be subject to a 12-year starting point. Once an offender has been allocated a starting point, the court must then consider aggravating and mitigating factors to arrive at a minimum term. The offender must serve the entirety of this minimum term before being considered for release by the Parole Board. This greatly increases the length of time that murderers will serve. It also greatly increases the disparity between the lengths of sentences served by murders and those convicted of offences such as attempted murder, who will be considered for release at the half-way point in their fixed length sentence unless subject to the 'dangerous offender' provisions<sup>14</sup>.

This Part ends with numerous other changes e.g. minimum sentences for certain firearms offences and increases to the penalties for others; changes to the release rules for offenders transferred from prison to mental hospital and powers to impose unpaid work requirement or curfew requirements on fine defaulters.

Finally, many important provisions are tucked away in Part 13 (Miscellaneous) and Part 14 (General) of the Act. Thus the Juries Act 1974 is amended to abolish (except in the case of mentally disordered persons) the categories of ineligibility for, and excusal 'as of right' from jury service. Judges and lawyers have now been serving on juries. Multi-Agency Public Protection Arrangements/Panels, set up under the Criminal Justice and Court Services Act 2000 to manage high-risk offenders in the community, have been given new powers and

duties. The Police Act 1997 which sets out the statutory framework under which the Criminal Records Bureau provides criminal record disclosures for employment vetting purposes has been amended.

## Conclusion

Unsurprisingly, this fundamental shake-up of the criminal justice framework has been, and is being, brought into force in stages. This has necessitated complicated transitional provisions. This commentator has reservations about the wisdom and need for many of the changes; she also echoes the words of the Lord Chief Justice in a speech in May 2005, that ‘the government should recognise that what is needed now is a period of consolidation. The system has reached the limit of the amount of change it can, for the time being, absorb’<sup>15</sup>. The law is remarkably inaccessible: the time has surely come for Codes of criminal law, procedural, evidential, and substantive.

## Endnotes

- 1 Please feel free to contact her at [nmp21@cam.ac.uk](mailto:nmp21@cam.ac.uk) if you would like to discuss these issues further.
- 2 For a critique, see Hucklesby [2004] Crim LR 803.
- 3 See Law Commission Report No 269, *Bail and the Human Rights Act 1998*.
- 4 Available at [www.criminal-courts-review.org.uk](http://www.criminal-courts-review.org.uk)
- 5 See Brownlee [2004] Crim LR 896.
- 6 See Redmayne [2004] Crim LR 441; Corker [2004] 9 Archbold News 5.
- 7 See also the important recent case of *Goodyear* [2005] EWCA Crim 888: a judge is now entitled to give an indication of likely maximum sentence on a guilty plea on a request from the defendant in the Crown Court, and the practice in *Turner* [1970] 2 QB 321 need no longer be followed. Guidelines were given on the procedure to be followed in giving advance indications of sentence.
- 8 See *Mirza* [2004] 1 AC 1118 and *Smith* [2005] UKHL 12 for examples of what can go wrong.
- 9 An excellent paper on the topic of bad character evidence by Professor John Spencer is freely available on [www.jsboard.co.uk/criminal\\_law/index.htm](http://www.jsboard.co.uk/criminal_law/index.htm). See also Tapper [2004] Crim LR 533; Sikand [2005] 1 Archbold News 6; Munday [2005] Crim LR 337.
- 10 The Court of Appeal in *Hanson, Gilmore and Pickstone* [2005] EWCA Crim 824 laid down ‘general observations’ on these controversial new laws on the admission of previous convictions to prove propensity.
- 11 Birch [2004] Crim LR 556; Birch [2005] 3 Archbold News 6.
- 12 See Ashworth [2004] Crim LR 516; Thomas [2005] 4 Archbold News 6.
- 13 Much useful information as well as the guidelines is available on [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk)
- 14 For more details see Home Office Circular 62/2003; *Sullivan* [2005] 1 Cr App R 3; [2004] Crim LR 853; *Holbrook* [2005] EWCA Crim 106, [2005] Crim LR 407.
- 15 See [www.dca.gov.uk/judicial/speeches/lcj120505.htm](http://www.dca.gov.uk/judicial/speeches/lcj120505.htm).

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# THE NATIONAL JUDICIAL COLLEGE OF AUSTRALIA

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*The Hon John Doyle AC*

Chief Justice of South Australia and Chairman of the College Council

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The National Judicial College of Australia (NJCA) was established in 2002 as an independent entity, incorporated as a company limited by guarantee. It is funded by contributions from the Commonwealth Government and from some, but regrettably not all, State and Territory Governments. The NJCA reports annually to the Australian Council of Chief Justices and to the Standing Committee of Attorneys-General.

The NJCA is managed by a Council that comprises a nominee of the Chief Justices of the State and Territory Supreme Courts, a nominee of the Chief Justices of the Federal Court and of the Family Court, a nominee of the Chief Judges of the District and County Courts, a nominee of the Chief Magistrates of the Magistrates Courts, Local Courts and Federal Magistrates Court, and two non-judicial members. One non-judicial member is nominated by the Attorney-General of the Commonwealth. The other is nominated by the Attorneys-General of the States and Territories that support the College financially. I have been appointed as the first Chairman of the Council.

## The establishment of the College

During the 1990s calls were made for the establishment of a body to provide judicial education for the whole of the Australian judiciary. The establishment of such a body was supported by, among others, Sir Anthony Mason, a former Chief Justice of the High Court and by the present Chief Justice, Chief Justice Gleeson, and by the Australian Institute of Judicial Administration (AIJA).

In 2000 the Australian Law Reform Commission published a report *Managing Justice: A Review of the Federal Civil Justice System* (Report No.89). The report proposed the establishment of an Australian Judicial College, with a governance structure under the control of the judiciary. The College was to have formal responsibility for meeting 'the education and training needs of judicial officers'.

When that report was published, only New South Wales had a separate entity, with its own funding, providing professional development programs for the judiciary. The AIJA, supported by government funding, included judicial education in its activities, and had done so since about 1987. However, the AIJA was not established for the specific purpose of providing professional development for the judiciary. By way of contrast, for example, England had had a well resourced judicial studies body since 1979. Other than in New South Wales, professional development for the judiciary depended on small groups and committees, usually set up within particular courts. The members of these groups and committees were entirely or mainly members of the judiciary, fitting this work in where they could. They were not assisted by staff with skills and experience in the area of professional development. They achieved a good deal, despite the lack of resources, but it was widely believed that more could and should be done.

In March 2000, responding to the ALRC report, the Standing Committee of Attorneys-General endorsed a proposal by the Hon Daryl Williams QC, the Commonwealth Attorney-General, to form a working group to consider the establishment of a national judicial college. In its report of May 2001, the working group supported the establishment of a national college. The working group said:

*Currently judicial officers in Australia attend a diverse range of judicial education programmes but the availability varies greatly between jurisdictions. A national approach to judicial education would address the needs of judicial officers throughout Australia. A national college would ensure that education for judicial officers was planned and coordinated at a national level, both increasing quality and avoiding duplication. Judicial officers from across jurisdictions and from different geographical regions would have the opportunity to exchange information and experiences. This would maximize the benefit derived by judicial officers and the*

*community from professional development programmes. The establishment of a national judicial college would bring Australia into line with developments in other common law jurisdictions in relation to the provision of judicial education.*

The working group's report was accepted in principle by SCAG in July 2001, and the working group was asked to implement the proposals in the report.

At the launch of the NJCA in August 2002, I put the case for a National Judicial College as follows:

*Judges and Magistrates are expected to have professional legal skills of a high order. They should also have a wide range of practical judicial skills to enable them to carry out judicial work properly. Some of these practical skills are peculiar to the judicial role, some are skills that are also required in other professions.*

*The administration of justice involves much more than professional and practical competence. There is a qualitative aspect to the administration of justice which calls for judicial officers to have a real enthusiasm for their work, a strong belief in the importance of justice, and a commitment to the administration of justice in the fullest sense of the word. While these attitudes and beliefs are instilled in us in our professional life, experience tells us that over time judicial officers can become cynical and can suffer what is generally called 'burn out'. Experience tells us that most judicial officers can benefit from programmes of professional development that help them avoid this phenomenon.*

*Finally, judicial officers tend to occupy judicial office for fairly lengthy periods. This is in the public interest. It takes time to develop fully the skills required of a judicial officer, and it is in the public interest that those who have fully developed those skills put them to the public benefit for as long as possible. The fact that judicial officers hold office for substantial periods of time mean that they are likely to benefit from programmes of professional development that reinvigorate, refresh and enthuse.*

*Thus, the members of the Australian judiciary can benefit from programmes of professional development that focus on their legal skills, their practical judicial skills, and their approach to their work and which help them to maintain fitness and enthusiasm for the work. The scope for programmes for professional development is substantial.*

The College is a small organisation. It operates from premises adjacent to the Law School at the Australian National University in Canberra. It has a staff of three and annual recurrent income of approximately AUS\$320,000. This is a small sum for a body that is to meet the needs of the whole Australian judiciary, numbering about 950 judicial officers.

### **The College's approach to professional development**

The Council of the College has given a good deal of thought to the approach that it should take to the provision of professional development for Australia's judiciary.

There are certain matters for which the Council must allow, as must anyone involved in professional development for the judiciary in Australia.

First, participation is voluntary. It is generally thought that judicial independence means that a judicial officer cannot be directed to participate in programs of professional development. Whether that is correct may be open to debate, but it is the general view.

Second, as a group judicial officers are highly educated, and have a high level of skills in their particular field. They will be a critical audience. They are likely to respond to programs only if they are high quality.

Third, programs that are presented must avoid any hint of 'compulsory re-education' or of the deliberate shaping or forming of judicial attitudes on issues that will fall for decision. There is a line here that must be drawn with some care. It would be inconsistent with the requirement of independence and impartiality were a program, for example, to be aimed at persuading judicial officers to take a particular attitude to issues that might come before them for decision. On the other hand, there is no objection to programs aimed at improving

judicial skills, and aimed at informing judicial officers about the people with whom they deal, their circumstances and expectations, and about the likely effects of particular approaches and decisions.

Finally, most judicial officers are busy people. Programs that are offered must not only be relevant, but must warrant them finding the time to involve themselves in the program.

As well, providing professional development programs for the judiciary is a specialised activity. Providers need to identify the real needs of the judiciary. This will vary to some extent from court to court. They need to be able to draw on the substantial experience and expertise of the judiciary.

The College aims to work with existing bodies involved in professional development. We aim to try to fill the gaps and to meet needs that they are unable to meet. As we develop our own expertise, we hope to use that expertise to assist other bodies involved in professional development.

### *Policy concerning programs*

The Council's approach to programs has also been the subject of considerable discussion. The policies that the Council has adopted are as follows.

Programs should be developed to meet real needs. They must be delivered in ways which maximize the benefit to be derived by judicial officers and which take account of the particular sensitivities incidental to activities concerning judicial officers.

In developing programs the emphasis should be on matters not adequately covered by readily available sources such as text books and journals. In particular, emphasis should be on practical skills. The College appreciates the importance of providing programs on matters such as social and cultural awareness, disability awareness, and the treatment by courts of persons from non English speaking and indigenous backgrounds and of children. Other important matters include programs dealing with physical and mental health. The College will not ignore matters of substantive law, but usually this will be better addressed in other forums or by private study.

In Australia there are a large number of judicial officers with different responsibilities.

Needs may be quite specialised. Although there are some common aspects to all judicial work, the College will not assume that one program will be suitable for all, or even most judges.

The College should adopt best practice for adult professional learning. The emphasis should not be on formal lectures. Rather the College will use structured discussion of practical problems and other similar forms of active learning, for example self-teaching in small discussion groups, based on well-planned, practical problems.

The College's programs will be participant focussed rather than 'teacher focussed'. Judicial officers collectively will often bring more to college programs than any one presenter or group of presenters, and the emphasis should be on sharing and building on the experience of participants. Presenters should guide discussion and encourage participation, but should not be seen as a faculty separate from the participants.

The Council believes that those who are carrying out judicial work are usually best placed to lead professional development programs, bearing in mind that usually this involves a mix of technical and practical skills. The accumulated experience and skill of the judiciary are valuable assets. The College should harness and enhance them in ways which are appropriate to their true value. Thus most of the educational programs of the College will be led by experienced judicial officers. However, the College will also draw on academic lawyers and members of other professions who have appropriate expertise and experience. In particular, the College hopes to build a fruitful relationship with the members of the Faculty of Law at the ANU.

### *Delivery of programs*

As far as possible, the College will take its programs to the Australian judiciary, rather than bring them to Canberra to attend courses. There is a place for both approaches, but the emphasis should be on providing programs to the Australian judiciary in their home towns. The College's programs must be designed to be easily conducted at various places around the country and allow for different presenters to present the same program in different cities. To the extent that it is practical, we will develop 'template programs' that can be readily

repeated, with or without changes. Presenters should change regularly to maximize input from the whole judiciary and to avoid the institutionalisation of the views of a small group.

As the College's current funding is sufficient only to cover its central administrative costs, the programs delivered by the College must be financially self-supporting. This means that courts nominating participants will be asked to pay program fees designed to cover the costs of presenting the program.

The Council has given careful consideration to the provision of a professional development program by electronic means or by way of distance education. Council believes that good quality programs can be provided in this way, and that the use of electronic means is a way of overcoming the problems involved in reaching a judiciary scattered throughout the whole of a large nation. The use of information technology to deliver distance education programs should enable the College to reach more judicial officers than it would otherwise be able to reach.

The College needs to develop skills in the preparation and presentation of programs electronically, and in the use of the information technology. We already know that the development of high quality programs is time consuming, and fairly expensive.

The Council has entered into a contractual arrangement with the Australian National University for the development of a pilot program on judgment writing. The cost of this is being met from the College's funds. The Council has also entered into a contractual arrangement with Monash University for the development of a pilot program on disability awareness. This has been assisted by a generous grant from the Committee that organises the annual Supreme and Federal Court Judges' Conference.

We have high hopes for these pilot programs. We hope that we will be ready to test the pilots in the first half of 2005. All being well, we should then be able to begin offering them on a regular basis as from late 2005. We will then develop further programs for delivery by way of distance education. However, this is another area in which our limited funding will be an issue.

## College programs so far

The Council has assumed responsibility for the very successful National Judicial Orientation Program (NJOP). The NJOP was previously conducted by the Judicial Commission of New South Wales and the AIJA. They generously relinquished responsibility for the NJOP to the NJCA. This is a five day residential program. It is aimed at recently appointed judges of the Supreme Courts, Federal Court, Family Court and of the District Courts. The program includes sessions on judicial ethics and conduct, contempt of court, assessing the credibility of witnesses, evidence, judgment writing, cultural awareness, court craft, unrepresented litigants, sentencing, alternative dispute resolution and health.

The Phoenix Program is a five day residential program which, so far, has been offered to magistrates. The program has two aims. It aims to provide an orientation program for recently appointed magistrates, and to provide professional development, reflection and refreshment for experienced magistrates. The program caters for a group between 20 and 30 judicial officers, about half of whom are recently appointed and about half of whom are experienced. The program places a strong emphasis on transferring the knowledge and skills of the experienced magistrates to the recently appointed magistrates. At the same time, the recently appointed magistrates are encouraged to test and to challenge the practices and attitudes of the experienced magistrates. A substantial number of the sessions are led by participants in the course. The program has included sessions on decision-making, judgment writing, court craft, ethical issues, sentencing, alternative dispute resolution, children and family matters, cultural awareness, professional relationships between magistrates, the use of information technology, list management and stress and lifestyle issues. In 2005 the College will offer a Phoenix Program for judges and also for magistrates.

The College has presented a Travelling Judicial Education Program (TJEP), which is a series of 1.5 day programs presented to judges and magistrates in capital cities around Australia. The program is based on three half day modules on subjects such as litigants in person, sentencing, disability awareness and expert evidence. The aim of the program is to offer

judicial officers the opportunity to review key areas of their work, while benefiting from exchanges with judicial officers from other jurisdictions. The aim of the College is to ensure that when the program is presented, usually to a group of between 20 and 30, about one half of the group come from the State or Territory in which the program is presented, and that the other half come from other States and Territories. This encourages the sharing of the experience and approaches of different jurisdictions.

The College has also offered modules from the TJEP for inclusion in annual court conferences and seminars. In 2004, for example, modules from the TJEP were included in conferences organised by the Magistrates Court in Western Australia (witness identification), the Northern Territory (courtroom communication) and South Australia (the Commonwealth Criminal Code). A one day program on human rights issues was provided for judicial officers of the Australian Capital Territory.

In all of these programs there has been a strong emphasis on judicial officers working together in relatively small groups, and on the exchange of views and experience between participants. Formal lecture content has been kept to a minimum.

## Challenges

The NJCA must meet a number of challenges to the successful implementation of its objectives.

The first is our limited funding. The bulk of our funding is consumed in salaries and support costs for our staff of three. Of necessity, any programs that we present have to be presented on a cost recovery basis. I have referred to the need, as we see it, to make a substantial investment in the development of courses to be provided electronically. At present we lack the funds to do that, although we have sufficient funds to take the first steps, and we have already commissioned the development of a pilot course. But assuming that the pilot is successful, we will have to find additional funds to enable us to continue with the project.

Our funding has been sufficient to bring the College into existence and for it to find its feet. It is not sufficient for it to discharge its function long term.

Another obstacle to our success is the fact that most courts have limited funds for judicial education. As I mentioned, the College has to present courses on a cost recovery basis. Some courts have difficulty finding the funds to enable their judicial officers to participate in our courses. We believe strongly in the value of mixing judicial officers from different courts and different locations. The cost of travel and accommodation, in addition to the cost of the course itself, can be significant and limits the ability of some courts to send judicial officers to our programs.

Another difficulty that we face is the difficulty that courts have in releasing judicial officers from their judicial duties to attend our programs. We believe that the investment of time is well warranted, but we recognise the fact that most courts find it difficult to release judicial officers for a number of days.

The Council of the College believes that a short-sighted approach has been taken by Australia's governments, and to some extent by courts, to the issue of professional development. The importance of the judicial function, the public interest in it being performed as best it can, and the substantial investment that society makes in the judiciary, all lead to the conclusion that it is in the national interest that adequate funding be made available to ensure that judicial officers receive adequate programs of professional development. That requires a much greater commitment than governments are making.

The Council of the College regards this as an important issue. At our request, the Judicial Conference of Australia and the AIJA have begun the process of identifying a reasonable benchmark for professional development, measured by the number of days that should be made available to each judicial officer, free from ordinary duties for that purpose, and by the funding that should be available to each court to enable its judicial officers to participate in professional development. If we can identify a sensible benchmark, we then aim to persuade Australian governments to meet that cost, and to persuade heads of jurisdictions to do all they can to ensure that the benchmark is met for their court. The benchmark would also recognise the responsibility of individual judicial officers to commit their own time to

professional development, as well as to involve themselves in our programs or other programs.

As well, the Council has come to realise that it is not enough for us to provide professional development programs to the judiciary. We need to inform governments and the community about what we are doing. The community is entitled to know, and we want them to know. We believe that this will enhance public confidence in the judiciary.

## Conclusion

The Council of the NJCA wants to help the judges and magistrates who constitute Australia's judiciary to administer justice as well as they are capable of doing. We believe that we can help them do this by providing a strong program of professional development. To do this to the full we need a commitment from Australia's governments to provide the resources that are needed to meet the costs associated with the participation of the judiciary in good quality programs of professional development, year in year out.

## DOROTHY WINTON TRAVEL BURSARIES FUND CONTRIBUTIONS WELCOME

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

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

**The CMJA and the family of Dorothy Winton want to thank those who have already contributed to the this fund which currently stands at £3,631.32.**

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

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

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

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# LAW AND LAWYERS IN GHANA

IT IS STILL NOT TOO LATE TO REGISTER FOR THE CMJA'S NEXT CONFERENCE BEING HELD IN ACCRA IN LATE JULY!

*The Accra conference prompts this brief on the judicial system of Ghana*

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Lawyers have been central players in the Republic of Ghana, the Fourth Republic since independence in 1957. The Head of State since 2001, who was re-elected for a second four year term in 2004, President Kufuor, was called to the Bar by Lincoln's Inn and before entering public life had a distinguished career in local government, serving as Chief Legal Officer and Town Clerk of Kumasi.

Like many other African Commonwealth countries, Ghana inherited the common law tradition, and relevant United Kingdom legislation as at the date of colonisation in 1874. There is also a considerable body of Ghanaian customary law which applies to many family law issues and contractual relationships.

## Judicial independence

The Constitution guarantees the independence of the judiciary. Section 125(1) declares that:

*Justice emanates from the people and shall be administered in the name of the Republic by the Judiciary which shall be independent and subject only to this Constitution.*

This is reinforced by section 127:

*(1) In the exercise of the judicial power of Ghana, the Judiciary, in both its judicial and administrative functions, including financial administration, is subject only to this Constitution and shall not be subject to the control or direction of any person or authority.*

*(2) Neither the President nor Parliament nor any person acting under the authority of the President or Parliament nor any other person whatsoever shall interfere with Judges or judicial officers or other persons exercising judicial power, in the exercise of their judicial functions; and all organs and agencies of the State shall accord to the courts such assistance as the courts may reasonably require to protect the independence, dignity and effective-*

*ness of the courts, subject to this Constitution.*

## The court system

The court system includes the Superior Court of Judicature, which comprises the Supreme Court, the Court of Appeal, the High Court, and Regional Tribunals with jurisdiction to try certain offences against the State and the public interest. Lower courts include Circuit Courts, Circuit Tribunals, and Community Tribunals, the latter replacing the former district (magistrates') courts. There are a number of traditional courts.

The Supreme Court of Ghana is the final court of appeal and is the final authority on the interpretation of the Constitution (which dates from 1992). It is headed by His Lordship Mr Justice George Kingsley Acquah, who became Chief Justice in June 2003 and who was the subject of a profile in this Journal in our December 2003 issue. There are twelve other members of the Supreme Court which, except in the most important cases, sits in panels of five justices.

There are 24 judges serving in the Court of Appeal, and 55 in the High Court of Justice which has jurisdiction in all matters, civil and criminal, other than those involving treason. There are three chairmen of Regional Tribunals. In the lower courts there are some 64 Circuit Judges and 50 Magistrates.

The Ghana Bar Association has a distinguished record in defending the Rule of Law in the difficult phases of Ghana's recent history. There is an active Association of Judges and Magistrates, presided over by His Lordship, Mr. Justice Yaw Appau.

## The appointment of judges

Under the Constitution, the Chief Justice is appointed by the President acting in consultation with the Council of State, a national advisory body, and with the approval of Parliament. The other Supreme Court Justices are appointed by the President acting on the

advice of the Judicial Council, in consultation with the Council of State and with the approval of Parliament. Justices of the Court of Appeal and of the High Court and Chairmen of Regional Tribunals are appointed by the President acting on the advice of the Judicial Council.

More will be said about the Judicial Council below. The involvement of Parliament in approving the nominations of the Chief Justice and other Supreme Court Justices is a feature of the United States system, but not of many Commonwealth constitutions. The system, which applies to other public offices and is not limited to the judiciary, was the subject of discussion at a recent Annual Lecture of the Ghana Academy of Arts and Sciences, given by the present Chief Justice. Mr Justice Acquah argued that the vetting process would only succeed if the President, Parliament, the public and the media played their respective roles with due diligence. It was for the President to screen of his nominees, to avoid the presentation to Parliament of incompetent and unsuitable candidates.

He urged Parliament to put in place comprehensive guidelines on the vetting process, to sufficiently inform both the public and the nominee what would be expected of them. The Chief Justice expressed grave concern about the situation, where certain nominees sat as members of the Appointments Committee to vet others, and later appeared before the same committee to be vetted. He called for the amendment of the standing orders of Parliament, in order to allow ad hoc members to be appointed onto the Appointments Committee, when such a situation arose in future.

### **Improving the quality of the judicial system**

A feature of Ghana's Constitution is the existence of a Judicial Council established under section 153 with power to propose for the consideration of Government, judicial reforms to improve the level of administration of justice and efficiency in the Judiciary, and with the task of providing a forum for the consideration and discussion of matters relating to the discharge of the functions of the Judiciary and to assist the Chief Justice in the performance of his duties with a view to

ensuring efficiency and effective realisation of justice.

The Judicial Council consists of the Chief Justice, as Chairman; the Attorney-General; a Justice of each of the Supreme Court, the Court of Appeal, and the High Court nominated by their respective colleagues; two representatives of the Ghana Bar Association one of whom a person of not less than twelve years' standing as a lawyer; a representative of the Chairmen of Regional Tribunals; a representative of the lower courts or tribunals; the Judge Advocate-General of the Ghana Armed Forces; the Head of the Legal Directorate of the Police Service; the Editor of the Ghana Law Reports; a representative of the Judicial Service Staff Association nominated by the Association; chief nominated by the National House of Chiefs; and four other persons who are not lawyers appointed by the President.

Ghana has made significant progress in recent years in the use of advanced technology to speed the administration of justice. The Government launched a Legal Sector Reform Project, and World Bank funding was secured to establish of a pilot automated court popularly called the Fast Track Court. This proved successful, and the new technology was extended to 31 High Courts rooms.

### **Developing the High Court**

Ghana is implementing plans to develop specialist jurisdictions within the High Court. The first such development was brought to fruition in March of this year with the inauguration of the Commercial Court.

The need for a specialist commercial court was recognised in the 1960s after research by Dr. Fiadjo of the law faculty of the University of Ghana. Nothing could be done until 1997, when the increasing number of commercial cases in the High Court prompted the then Chief Justice to designate two High Court rooms as commercial courts. That was not a successful experiment: the judges and court staff had no special facilities or training, and the manual recording of cases meant that trials were slow and inefficient.

The Danish International Development Agency (DANIDA) has been involved with a number of projects in Africa designed to improve the efficiency of justice in business and commercial cases. In Tanzania this had led to

the creation of a Commercial Court. In Ghana, DANIDA had encouraged the establishment of a business law division in the Attorney General's Office, and expressed a willingness to assist in establishing a Commercial Court.

The outcome was a three-storey court building, with six court rooms, fully automated and fitted with air conditioning and soundproof ceilings. DANIDA funded specialist training for the judges and court staff, which took place not only in Ghana but also in East Africa, Denmark and Britain.

The new Commercial Court deals with a wide range of cases involving:

- the formation or governance of a business or commercial organisation;
- the winding up or bankruptcy of such an organisation;
- the restructuring or payment of commercial debts by or to such an organisation;
- a business document or contract;
- the export or import of goods;
- the carriage of goods by sea, air, land or pipeline;
- the exploration of oil and gas reserves;
- insurance and re-insurance;
- banking and financial services;
- commercial agency;
- disputes involving commercial arbitration and other settlements awards;
- intellectual property rights, including patents, copyrights, and trademarks;
- tax matters; and
- commercial frauds.

In common with similar courts in other parts of the world, the Commercial Court has its own procedural rules, for example requiring the use of mediation or alternative dispute resolution mechanisms at the pre-trial settlement conference stage; and the use of experts at that stage and as assessors at trials. An important feature of the arrangements is the Court's Users Committee, which includes representatives of the Ghana Bar Association, chambers of commerce, banks and other inter-

ests, as well as a number of the judges of the Court.

At the Inauguration of the Commercial Court, the Chief Justice had this to say:

*The rationale for setting up this court is to promote efficient, speedy and effective determination of commercial disputes. Accordingly I appeal to parties, litigants and lawyers in particular to desist from employing delay tactics to frustrate the process of the court. The Court works strictly according to prescribed time and no adjournments would be entertained. Neither can the judges and the supporting staff alone work to realize its noble objective, unless all the parties before it play their respective roles properly and honestly.*

### Future plans

There are plans for another commercial court at Tema Harbour, and for another specialised division, a Land Court. There are also hopes for a better-resourced Judicial Training Institute designed to assist judges to acquire the knowledge, skills and attitudes required to perform their judicial responsibilities fairly, correctly and efficiently; to promote judges' adherence to the highest standards of personal and official conduct; to preserve the integrity and impartiality of the judicial system through elimination of bias and prejudice, and the appearance of bias and prejudice; to promote effective court practice and procedures; to improve the administration of justice; and to enhance public confidence in the judicial system.

Much of the credit for this progressive programme must be given to the Chief Justice. As the CMJA's regional vice-president wrote in the December 2003 issue of this *Journal*, he has a vision for a reformed and modernised Judiciary and has already taken practical steps to establish standards which could be envied by other States.

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# JUDICIAL REFORM IN THE UNITED KINGDOM

*David McClean provides an update on major changes in the UK's legal system*

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When is a Lord Chancellor not a Lord Chancellor? Readers of this *Journal* may recall my description in the July 2004 issue of the sense of shock felt in British legal circles when the Prime Minister announced in a press release the abolition of the office of Lord Chancellor. Even Prime Ministers cannot get their own way all the time, and when the Constitutional Reform Act 2005 finally emerged from its long parliamentary gestation the office of Lord Chancellor survived, albeit with what was described as 'new architecture'. After a series of close divisions in the House of Lords, the new legislation does mean that a future Lord Chancellor need not be a member of the House of Lords (a distinct office of Speaker of that House is created) and perhaps not even be a lawyer. He must be 'qualified by experience' (section 2). This, however, includes not only experience as legal practitioner or as a university teacher of law but also as a Minister of the Crown or as a member of either House of Parliament.

The anxieties excited by this change are reflected in a number of provisions in the Act. The content of these provisions is unsurprising; what is surprising is that they were felt necessary. So, section 1 declares that the Act does not adversely affect the existing constitutional principle of the rule of law, or the Lord Chancellor's existing constitutional role in relation to that principle. Section 3 enshrines the principle of judicial independence, both generally ('The Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary') and in respect of particular cases ('The Lord Chancellor and other Ministers of the Crown must not seek to influence particular judicial decisions through any special access to the judiciary').

One of the driving forces behind the Act's reforms was a wish to take into the British system the doctrine of the separation of powers. There has been growing discomfort with the position under which the most senior judges (the Lord Chancellor and the Lords of

Appeal in Ordinary) are also members of the Legislature, although in practice they are punctilious in observing the distinction between legislative and judicial roles. Under the new Act, judges are expressly disqualified from sitting and voting in the House of Lords (section 137). Instead a new procedure is introduced by section 5 of the Act under which the chief justice of any part of the United Kingdom may lay before Parliament written representations on matters that appear to him to be matters of importance relating to the judiciary, or otherwise to the administration of justice, in that part of the United Kingdom.

The same notion of the separation of powers led to one of the Act's major changes in the structure of the superior courts in England. Most notably, it will in due course replace the House of Lords in its judicial capacity with a new Supreme Court of the United Kingdom. 'In due course' for section 148 of the Act specifies that its provisions about the Supreme Court may not be brought into force 'unless the Lord Chancellor is satisfied that the Supreme Court will at that time be provided with accommodation in accordance with written plans that he has approved' and he may approve plans 'only if, having consulted the Lords of Appeal in Ordinary holding office at the time of the approval, he is satisfied that accommodation in accordance with the plans will be appropriate for the purposes of the Court'. As yet, the accommodation issue is unresolved.

The new Supreme Court will hear appeals from the Court of Appeal and the Scottish courts on the same basis as that now applying to the House of Lords, but will also have 'devolution jurisdiction', concerned with the respective competences of the Scottish and Westminster Parliaments, now vested in the Judicial Committee of the Privy Council (section 40). It will consist of 12 judges appointed by Her Majesty by letters patent, a President, a Deputy President and 10 'Justices of the Supreme Court'. In practice the court will normally sit with 3 or 5 justices present, and has power to call on the assistance of 'specially qualified advisers' (section 44).

Initially, the Law Lords in office will transfer to the Supreme Court. Future Justices (and future Presidents and Deputy Presidents) will be appointed on the recommendation of a selection commission consisting of the President and Deputy President of the Supreme Court and one member of each of three bodies, the Judicial Appointments Commission, the Judicial Appointments Board for Scotland, and the Northern Ireland Judicial Appointments Commission. As part of the selection process the commission will have to consult, *inter alia*, all the senior judges who are not members of the commission and are not willing to be considered themselves for selection. A recommendation may be rejected, or the commission may be invited to reconsider, a number of times but eventually the commission's recommendation must be accepted: section 29 sets out the complex and possibly five-stage procedure.

The Act also creates a Judicial Appointments Commission, and a Judicial Appointments and Conduct Ombudsman. The Commission will consist of a chairman (who must be a lay member), and 14 other Commissioners: 5 judicial members (a Lord Justice of Appeal; a puisne judge of the High Court; a third holding either of those offices; a circuit judge; and a district judge); 2 professional members (one a barrister, the other a solicitor), 5 lay members, 1 member of a tribunal listed for the purpose, and 1 lay justice of the peace. The Commission has responsibilities in relation to most senior appointments: those of the Lord Chief Justice and Heads of Divisions, meaning the Master of the Rolls, the President of the Queen's Bench Division (a new post), the President of the Family Division, and the 'Chancellor of the High Court' (formerly the Vice-Chancellor); Lord Justices of Appeal; and puisne judges of the High Court.

The Act specifically provides that selection of Justices of the Supreme Court 'must be on merit' (section 27(5)). Rather different, and oddly convoluted, provisions apply to all other judicial appointments. Section 63 provides that selection must be solely on merit, but adds that a person must not be selected unless the selecting body is satisfied that he is of good character. An additional criterion is set out in section 64, which requires the Judicial Appointments Commission to 'have regard to the need to encourage diversity in the range of

persons available for selection for appointments'. But this is subject to section 63. It is difficult to know quite what to make of these rules, which may well provide material on which those passed over for appointment may complain to the new Ombudsman on the ground of maladministration.

The Act changes a number of familiar terms and introduces some new ones. The existing 'Supreme Court of Judicature' (the Court of Appeal and the High Court) will no longer have the adjective 'Supreme' (and the Supreme Court Act 1981 is renamed the Senior Courts Act). The Lord Chief Justice becomes additionally President of the Courts of England and Wales (and specifically of the Court of Appeal, the High Court, the Crown Court, the county courts, and the magistrates' courts) and Head of the Judiciary of England and Wales. He is given formal responsibility for representing the views of the judiciary of England and Wales to Parliament, to the Lord Chancellor and to Ministers of the Crown generally; for the maintenance of appropriate arrangements for the welfare, training and guidance of the judiciary of England and Wales within the resources made available by the Lord Chancellor; and for the maintenance of appropriate arrangements for the deployment of the judiciary of England and Wales and the allocation of work within courts.

The Court of Appeal will nonetheless continue to be headed by the Master of the Rolls (also 'Head of Civil Justice'), and the Divisions of the High Court will have their Presidents, or in the case of the Chancery Division the Chancellor of the High Court. The Act provides for a new post of Head of Criminal Justice. This latter role has traditionally been seen as part of the Lord Chief Justice's responsibilities and he has often presided over the Criminal Division of the Court of Appeal. The Act allows him to retain the role, or appoint a Deputy or indeed appoint another judge as Head of Criminal Justice. There is also to be a Head and Deputy Head of Family Justice. Many of these provisions give some formality to arrangements which have developed in recent years, and the Act allows room for continued development by leaving undefined the responsibilities of the various offices.

A further novelty in the Act is the material dealing with the removal of judges from office

on the ground of misbehaviour or inability to perform the functions of the office. This must be the subject of a tribunal established under section 135 of the Act. For example, a tribunal to consider the removal of the Lord Chief Justice, a Lord Justice of Appeal or a judge of the High Court would consist of three persons, one holding 'high judicial office' (but not that of Lord Chief Justice, Lord Justice of Appeal or judge of the High Court), a present or former member of the Court of Appeal (or the Inner House of the Court of Session in Scotland), and one lay member.

The original Bill was undoubtedly much improved during its passage through Parliament. The retention of the ancient office of Lord Chancellor is welcome, but it remains to be seen whether the changes will diminish

the very high standing of the office. The more transparent system for judicial appointments is overdue, and in this respect the United Kingdom has lagged far behind many other Commonwealth countries. It may be doubted whether the actual results of the procedure will be very different from those of the current system: that has given us a Bench of high quality, but it will be good that any suspicion of bias or reliance on inappropriate factors will be banished.

Overall, the Act tackles a number of matters which have needed attention. The process which led to its introduction was astonishingly high-handed, and much credit is due to the senior judges and parliamentarians whose efforts have secured a much better Act than initially seemed possible.

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# LAW REPORTS

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## RE APPLICATION UNDER S 83.28 OF THE CRIMINAL CODE

2004 SCC 42

SUPREME COURT OF CANADA

McLachlin CJ, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish JJ  
10–11 December 2003, 23 June 2004

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On 23 June 1985 an explosion killed two baggage handlers and injured four others at the Narita Airport in Japan. A second explosion occurred approximately one hour later, causing Air India Flight 182 to crash off the west coast of Ireland. All 329 passengers and crew perished in that explosion. Between 1988 and 1991 the first accused, R, was arrested and convicted on various counts relating to the incident. Two other men, M and B, were jointly charged with several offences in relation to both explosions and to an intended explosion on Air India Flight 301 on 27 October 2000. R pleaded guilty to a new indictment in 2003, charging him with aiding or abetting the construction of the explosive that was placed on Air India Flight 182 and the manslaughter of the 329 passengers and crew. Following R's guilty plea, M and B re-elected to have their case tried by judge alone.

The trial of M and B (the 'Air India Trial') began on 28 April 2003. Shortly thereafter, on 6 May 2003, the Crown brought an *ex parte* application before another judge, seeking an order that the appellant, the Named Person, attend for examination pursuant to s 83.28 of the Criminal Code ('the Code'), which authorised such an order where there were reasonable grounds to believe that the person concerned had information relating to a terrorism offence. Dohm ACJ of the British Columbia Supreme Court granted the application and issued an order for the gathering of information on the basis of an affidavit by a police officer. Dohm ACJ set out a number of terms and conditions to govern the conduct of the judicial investigative hearing: (1) it was to be conducted in camera; (2) the appellant was entitled to counsel; (3) the examination was to be undertaken by the Attorney General; (4) the appellant was required to answer questions and produce items ordered to be produced,

subject to privilege or other non-disclosure considerations; (5) the appellant was prohibited from disclosing any information or evidence obtained at the hearing and (6) notice of the hearing was not to be given to the accused in the Air India Trial, to the press or to the public. Upon service of the order, the appellant was to be informed of the right to retain and instruct counsel and that a failure to attend or remain in attendance at the hearing might result in the issuance of an arrest warrant.

The order required the appellant to attend at an examination on 20 May 2003. However, at some point prior to that date, counsel for M and B fortuitously became aware of the order and advised Dohm ACJ that they wished to make submissions. The appellant retained counsel and on 16 June 2003 Dohm ACJ was advised that the appellant wished to challenge the constitutional validity of s 83.28 of the Code. Dohm ACJ directed that Holmes J hear all submissions jointly in seven days time. The constitutional challenge to s 83.28 and the application to set aside Dohm ACJ's order commenced on 23 June 2003. The application to set aside the order was dismissed. The order was varied, however, to permit counsel for M and B to attend the judicial investigative hearing and examine the appellant, under the proviso that they leave the hearing if information unrelated to the trial was elicited. The amended order further prohibited the accused from attending the hearing. Counsel were prohibited from disclosing any information or evidence obtained at the hearing to the public or to the accused. The reasons for judgment were sealed.

Holmes J stayed the judicial investigative hearing on 22 July 2003 until 2 September 2003, so that the appellant could seek leave to appeal to the Supreme Court. On that date

Holmes J delivered, in open court, a synopsis of her reasons for judgment. Holmes J stated that an order under s 83.28 had been issued on the basis that the ordering judge had reasonable grounds for believing that a terrorism offence had occurred and that information in relation to that offence was likely to be obtained as a result of the judicial investigative hearing. Holmes J concluded that the order was validly issued and constitutionally sound. Holmes J further stated that the hearing was subject to restrictions regarding the privacy and other rights and interests of the appellant, as well as regarding the integrity of the investigation.

The appeal to the Supreme Court raised the following issues: (1) did s 83.28 of the Code infringe s 7 of the Canadian Charter of Rights and Freedoms; (2) if so, was the infringement nevertheless valid as a reasonable limit under s 1 of the Charter, prescribed by law, demonstrably justified in a free and democratic society; (3) did s 83.28 of the Code infringe the principles of judicial independence and impartiality guaranteed by s 11(d) of the Charter; (4) if so, was the infringement nevertheless valid as a reasonable limit under s 1 of the Charter; (5) did s 83.28 of the Code infringe the principles of independence and impartiality established by the preamble to the Constitution Act 1867 ('the Constitution'); (6) could s 83.28 of the Code be applied retrospectively where the terrorist offences had been committed in 1985, before the Anti-Terrorism Act SC 2001, c 41 came into force; (7) could s 83.28 be used for the purpose of pre-trial discovery of the evidence of the named person, a witness under subpoena by the Crown to attend and give evidence at the Air India trial; (8) was the order of Holmes J contrary to s 83.28 in that the order—(a) permitted the attendance at the in camera hearing of counsel for the accused, (b) permitted each defence counsel, in addition to counsel for the Crown, to cross-examine the witness and (c) required defence counsel to undertake not to disclose to the accused information received at the judicial investigative hearing.

Held: (1) The modern principle of statutory interpretation required that the words of an Act be read in their entire context and ordinary and grammatical sense along with the scheme and object of the Act as well as the intention of Parliament. Underlying that approach was the

presumption that legislation complied with constitutional norms, including Charter rights and freedoms. In the instant case, in parliamentary debate at the introduction of Bill C-36 (the Code), the Minister of Justice expressed the three main objectives of the legislation as suppressing the existence of terrorist groups, providing new investigative tools and providing a tougher sentencing regime to incapacitate terrorists and terrorist groups. The discussions surrounding the legislation and the legislative language itself clearly demonstrated that the Act purported to provide means by which terrorism might be prosecuted and prevented. Section 83.28 of the Code reasonably bore two differing interpretations; one narrow and restrictive in scope, the other broad and purposive. Two principal ambiguities were apparent on the face of the provision. The first concerned the role of counsel and the second related to the threshold for relevance and admissibility. Public inquiries, by their nature, required the courts when considering commissioners' powers to control their own proceedings to adopt a generous interpretation and purposive approach. Such an interpretative approach was further supported by the wide ambit given to the ordering judge to set such terms and conditions as he or she desired under s 83.28(5)(e). Section 83.28(7) also provided for the ordering judge or any other judge of the same court to vary the terms and conditions set. The inclusion of such a broad power to amend the order empowered the ordering and/or hearing judge to respond flexibly to the specific circumstances of each application of the provision and to ensure that constitutional and common law rights and values were respected. Section 2 of the Canada Evidence Act 1985 ('the CEA') stated that the principles of relevance and admissibility applied to all civil and criminal proceedings. In the context of Charter interpretation, 'proceedings' had been given a large and liberal interpretation and taken to include both adjudicative and investigative processes. The common law evidentiary principles of relevance and fairness clearly applied to s 83.28, as did evidentiary requirements mandated by the CEA. Consequently there was no ground at the interpretative stage to conclude that the presumption of constitutionality of the impugned provision had been rebutted. *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*

[1995] 2 SCR 97, *R v Gladue* [1999] 1 SCR 688, *Global Securities Corp v British Columbia (Securities Commission)* 2000 SCC 21, [2000] 1 SCR 494 and *Reference re Firearms Act (Can)* 2000 SCC 31, [2000] 1 SCR 783 approved.

Per curiam. Per Binnie J. (i) The challenge posed to legal institutions by the current ‘war on terrorism’ promised to be more enduring and difficult to manage than the more traditional wartime challenges to civil liberties previously experienced. The terrorist threat had no announced point of commencement and might have no end. Efforts to counteract terrorism were likely to become part of everyday existence for perhaps generations to come. In those circumstances little comfort could be taken from the declared intention of government that the Anti-Terrorist Act was a temporary measure.

(ii) The difficult issue for the s 83.28 hearing judge was not so much the fair treatment of the appellant as the need to ensure that the charges against the accused, M and B, in the *Air India* case were dealt with in accordance with the usual rules of a fair trial.

(2) Rules of evidence were usually considered to be procedural and thus presumptively to apply to pending actions immediately upon coming into force. However, where a rule of evidence either created or impinged upon substantive or vested rights, its effects were not exclusively procedural and it would not have immediate effect. Section 83.28 of the Criminal Code was prima facie procedural, as it outlined the process by which judicial investigative hearings were to be carried out. The term ‘terrorism offence’ was defined in s 2 of the Code that created new offences under para (a) but also referred to pre-existing offences under paras (b)–(c). Neither s 83.28 nor the definition in s 2 altered the substantive elements of those offences. Clearly the offences listed under paras (b)–(c) were not substantively new because they existed prior to the enactment of the anti-terrorism provisions. The characterisation of a ‘terrorism offence’ was a descriptive compendium of offences created elsewhere in the Criminal Code. The mere association of offences with a ‘terrorist group’ or ‘terrorist activity’ did not constitute a substantive change in the law so as to transform the procedural nature of s 83.28 into a

substantive one. While the judicial investigative hearing might generate information pertaining to an offence, the hearing itself remained procedural. In the manner of other procedural tools, such as DNA and wiretap authorisations, s 83.28 provided a mechanism for the gathering of information and evidence in the ongoing investigation of past, present and future offences. While the legislation was not express on the issue of temporal application, the purpose and effect of the inclusion of s 83.28(4)(a) indicated that Parliament intended that the provision might be applied retrospectively. Section 83.28 did not interfere with the substantive rights of the appellant and was, accordingly, strictly procedural. Section 83.28 had immediate effect and applied retrospectively to the effects of past events. *Howard Smith Paper Mill Ltd v R* [1957] SCR 403 and *R v Wildman* [1984] 2 SCR 311 approved.

(3) Statutory compulsion to testify engaged liberty interests under s 7 of the Charter. The encroachment upon liberty was complete at the moment of the compelled speech, regardless of its character. Individuals named in an order under s 83.28(5) might be required to attend at a hearing, be examined under oath and be required to produce anything in their possession. Moreover, under s 83.29 such individuals might be imprisoned for evasion of service or failure to attend or remain at the examination. Section 83.28 also attracted the ordinary laws of contempt of court in relation to a failure to answer questions and potential liability for offences relating to perjury. Given those consequences, the judicial investigative hearing provision clearly engaged s 7 liberty interests. The right to silence was inextricably tied to the right against self-incrimination. The right against self-incrimination was a principle of fundamental justice. Testimonial compulsion had been invariably linked with evidentiary immunity. Three procedural safeguards had emerged: use immunity, derivative use immunity and constitutional exemption. Use immunity served to protect the individual from having the compelled incriminating testimony used directly against him or her in a subsequent proceeding. The derivative use protection insulated the individual from having the compelled incriminating testimony used to obtain other evidence, unless that evidence was discoverable through alternative means. The constitutional exemption provided

a form of complete immunity from testifying where proceedings were undertaken or predominately used to obtain evidence for the prosecution of the witness. Together those necessary safeguards provided the parameters within which self-incriminating testimony might be obtained. It was against that backdrop that s 83.28 had to be assessed. Section 83.28(10) provided both use and derivative use immunity to the individual named in an order for the gathering of information. Testimonial compulsion was precluded where the predominant purpose of the proposed hearing was the determination of penal liability. There was no reason to believe that the predominant purpose of the judicial investigative hearing, in the instant case, was to obtain information or evidence for the prosecution of the appellant. The procedural protections available to the appellant in relation to the judicial investigative hearing were equal to and, in the case of derivative use immunity, greater than the protections afforded to witnesses compelled to testify in other proceedings, such as criminal trials, preliminary inquiries or commission hearings. However, s 83.28(10) provided for such safeguards only in the context of ‘any criminal proceedings’. Compelled testimony obtained pursuant to s 83.28 might potentially be used against individuals in extradition hearings and subsequently passed on to foreign authorities for use in prosecution abroad. Such testimony might also be used against non-citizens in deportation hearings under s 34 of the Immigration and Refugee Protection Act 2001, so that the minister’s ‘reasonable belief’ that an individual had been engaged in terrorism might be based on the testimony of that individual at a judicial investigative hearing. Guarantees of fundamental justice applied where deprivations of life, liberty or security might be effected by actors other than the Canadian government, if a sufficient causal connection existed between the participation of the Canadian government and the ultimate deprivation effected. A sufficient causal connection existed where information gathered under s 83.28 was used to effect deprivations of liberty, such as torture or death, in circumstances where the government’s participation was a necessary precondition, and the resulting deprivation an entirely foreseeable consequence, of the participation. Accordingly, deportations or

extraditions had to accord with the principles of fundamental justice. A balance had to be struck between the principle against self-incrimination and the state’s interest in investigating offences. In order to meet the s 7 requirements, the procedural safeguards found in s 83.28 had necessarily to be extended to extradition and deportation proceedings. The protective effect of s 83.28 would be significantly undercut if information gathered under s 83.28 was used at the state’s discretion in subsequent extradition or deportation proceedings. Therefore, where there was potential for such use by the state, the hearing judge had to make and if, necessary, vary the terms of an order properly to provide use and derivative use immunity in extradition or deportation proceedings. *R v S (R)* [1995] 1 SCR 451 applied. *British Columbia Securities Commission v Branch* [1995] 2 SCR 3, *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)* [1995] 2 SCR 97, *United States v Burns* [2001] 1 SCR 283, *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 4 LRC 640 and *R v Jarvis* 2002 SCC 73, [2002] 3 SCR 757 considered.

(4) The importance of judicial independence to the promotion and preservation of the rule of law could not be overstated. An independent judiciary was absolutely necessary to ensure that state powers were exercised in accordance with the rule of law and that there were no unwarranted deprivations of the rights and freedoms of individuals by the state. Judicial independence represented the cornerstone of the common law duty of procedural fairness, which attached to all judicial, quasi-judicial and administrative proceedings and was an unwritten principle of the Constitution. Judicial independence was critical to the public’s perception of impartiality. Ultimately the court had to consider whether a reasonable and informed person would conclude that, under s 83.28, the court was independent. Once legislation invoked the aid of the judiciary the court had to remain vigilant to ensure that that integrity of its role was not compromised or diluted. However, the function of a judge in a judicial investigative hearing was not to act as ‘an agent of the state’ but rather to protect the integrity of the investigation and, in particular, the interests of the named person vis-à-vis the state. The provision conferred upon the judge considerable flexi-

bility and discretion to set and vary the terms and conditions of the initiating order and the subsequent hearing. In light of the mandatory exercise of such discretion with respect to rules of evidence and use and derivative use immunity being extended to extradition and deportation hearings, judges brought the full weight of their authority as impartial adjudicators to the hearing, to provide witnesses with all the constitutional guarantees of the Charter. A failure on the part of the hearing judge to exercise his or her discretion in that manner would constitute reviewable error. The ultimate question was whether a reasonable and informed person, weighing up the historical context of all the relevant statutory provisions, would conclude that the court or tribunal was independent. Judicial investigative hearings were to be held presumptively in open court and the onus was on the Crown to rebut that presumption. The presumptive openness of the judicial investigative hearing militated in favour of the conclusion that such hearings did not compromise the independence or impartiality of the judiciary. In the instant case, a reasonable and informed person would conclude, in light of the institutional function of the judiciary, that judicial impartiality and independence had not been compromised or diluted. *Valente v R* [1985] 2 SCR 673, *Dagenais v Canadian Broadcasting Corp* [1994] 3 SCR 835 and *R v Mentuck* 2001 SCC 76, [2001] 3 SCR 442 applied. *Re BC Motor Vehicle Act* [1985] 2 SCR 486, *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3 and *Alberta v Ell (A-G of Canada intervening)* [2003] 5 LRC 256 approved.

Per LeBel and Fish JJ (dissenting). Section 83.28 of the Criminal Code compromised judicial independence and should, for that reason, be declared unconstitutional. The courts had identified three fundamental characteristics of judicial independence: security of tenure, financial security and administrative independence. Judicial independence also had two dimensions, individual independence and institutional independence. Institutional independence attached to courts as institutions. Courts had to be independent and appear independent of the legislative and executive branches of government to ensure the separation of powers. If the courts were to retain the ability to provide individuals with

effective protection against unwarranted deprivations of their rights and freedoms by the executive and legislative branches, they had to necessarily be independent of those branches. To determine whether a measure compromised judicial independence, it had to be asked whether the judicial institution was perceived by the public to be independent. When analysed from that perspective s 83.28 of the Code compromised the institutional dimension of judicial independence. Section 83.28 of the Code required judges to preside over police investigations; as such investigations were the responsibility of the executive branch, that could not but leave a reasonable person with the impression that judges had become allies of the executive branch. The rules of evidence laid out in the Canada Evidence Act 1985 and the common law rules of evidence would not create a framework allowing judges effectively to protect the rights and freedoms of the person being examined. The application of those rules of evidence was not mandatory. Moreover, some of the rules would not apply as they were incompatible with the type of investigation provided for in s 83.28. Finally, although the rules relating to the relevance of questions asked and to their probative value could be useful in theory, the judge would not be in a position to apply them. Without knowledge of the investigation's sources, framework and objectives it would be virtually impossible for the judge to rule on such objections. Thus, the power to limit the scope of questions put to the person being examined could prove illusory. Without a specific rule that could be applied uniformly to all cases, judges would have to rely on their own discretion, if not their subjective preferences, when deciding which solution to apply to a given objection. A judge's individual perception of his or her role would necessarily affect the nature and conduct of the examination. A judge acting under s 83.28 was not limited to making an order authorising the executive branch to conduct an examination and they might even be required to preside over the examination. Section 83.28 did not give judges the tools they needed effectively to play their role as protectors of the fundamental rights of the person being examined. Instead, the judge took part in and facilitated the police investigation, without having real power to act as a neutral arbiter. The public's perception that the judicial and executive branches did not act separately in an

investigation under s 83.28 of the Code would be heightened when the investigation was held in camera. In such a case, a reasonable, well-informed individual would be justified in questioning the role the judge was really playing in the investigation. The implementation of s 83.28 could therefore lead to a loss of public confidence in Canada's justice system. *Valente v R* [1985] 2 SCR 673, *R v Beauregard* [1987] LRC (Const) 180, *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3, *Mackin v New Brunswick (Minister of Finance)* [2002] 1 SCR 405 and *Alberta v Ell (A-G of Canada intervening)* [2003] 5 LRC 256 approved.

(5) (Binnie J dissenting) The purpose of the Crown in seeking the proposed hearing had to

be genuinely investigative and not founded upon any oblique motive or otherwise improper motive, such as pre-trial discovery. The onus was on the Crown to demonstrate its investigative purposes. The trial judge had correctly found no improper purpose in the Crown's calling of the appellant under s 83.28 provisions. In the unique circumstances of the instant case, the presumption of openness for the judicial investigative hearing and the participation of counsel for the accused from the outset would overcome any concerns regarding the practical effect of the hearing on the Air India trial. *Lemay v R* [1952] 1 SCR 232, *Boucher v R* [1995] SCR 16 and *Proulx v Quebec (A-G)* 2001 SCC 66, [2001] 3 SCR 9 considered.

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# INDEPENDENT JAMAICA COUNCIL FOR HUMAN RIGHTS (1998) LTD V MARSHALL-BURNETT

[2005] UKPC 3

PRIVY COUNCIL

Lord Bingham of Cornhill, Lord Steyn, Lord Rodger of Earlsferry, Baroness Hale of Richmond and Lord Carswell

14 December 2004, 3 February 2005

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The appellants challenged the constitutional validity of three Acts of Parliament enacted in 2004 according to the ordinary legislative procedure: the Judicature (Appellate Jurisdiction) (Amendment) Act 2004, the Caribbean Court of Justice (Constitutional Amendment) Act 2004 and the Caribbean Court of Justice Act 2004. The combined purpose of the Acts was to abolish the right of appeal to the Privy Council and to substitute a right of appeal to the new Caribbean Court of Justice ('the CCJ'), giving effect in the law of Jamaica to the international Agreement Establishing the Caribbean Court of Justice 2001 and the Protocol thereto of 2003. While the Bills were before Parliament, proceedings instituted by the appellants, challenging the legislative procedure adopted, were struck out by the Full Court of the Supreme Court as premature. The appellants' appeal was dismissed by the Court of Appeal after it had heard argument on the merits. Before the appellants' appeal was heard by the Privy Council the Bills had received the Governor-General's assent, so the argument on prematurity was not pursued. An undertaking was given that the Acts would not be brought into force until the appeal had been determined.

The appellants accepted that, because s 110 of the Constitution of Jamaica 1962, providing for the right of appeal to the Privy Council, was not entrenched, Parliament was competent to abolish that right of appeal by ordinary legislation; however, they argued that replacement of the Privy Council by the CCJ would establish a new final court of appeal enjoying none of the constitutional protection conferred on the higher judiciary by the provisions of Chap VII of the Constitution, which were entrenched and therefore alterable only by constitutional amendment enacted according to the special procedure prescribed by s 49 of the Constitution.

**HELD:** Appeal allowed. Declaration made that impugned Acts of Parliament were void.

(1) The Constitution of Jamaica 1962 was sovereign and, under s 2, any law inconsistent with the Constitution was void, to the extent of the inconsistency, subject to the power to amend the Constitution in accordance with the procedures prescribed by s 49. The question was one of substance, not form, and the definition of 'alter' in s 49(9)(b) of the Constitution as including 'amend [or] ... repeal' extended to cover an alteration by implication. The three Acts of Parliament did not, singly or cumulatively, weaken the constitutional protection enjoyed by the higher judiciary. Moreover, the Agreement Establishing the Caribbean Court of Justice 2001 represented a serious and conscientious endeavour to create a new regional court of high quality and complete independence. However, the Acts gave effect in the law to the Agreement, which under its own terms, given effect by s 5 of the Caribbean Court of Justice Act 2004, was subject to amendment by the governments of the contracting states: any amendment could be given effect in the law of Jamaica by affirmative resolution. Therefore the three Acts, taken together, had the effect of undermining the protection given to the people by the entrenched provisions of Chapter VII of the Constitution, 'The Judicature', including s 100, which protected the security of tenure of the judges, a very significant matter since the independence of the judges was all but universally recognised as a necessary feature of the rule of law. The Agreement also provided protection for the independence of judges of the CCJ, requiring a judicial tribunal of enquiry to investigate and report whether a judge should be removed for inability or misbehaviour, but the question was not whether such protection was stronger or weaker than that provided by the Constitution but whether in substance it was different: if it

was different, the effect of the legislation was to ‘alter’ the regime established by Chapter VII. Therefore, to achieve the purpose of the three Acts, the procedure prescribed by the Constitution for the amendment of such entrenched provisions should have been followed. As the Acts had been passed by the ordinary legislative procedure they were inconsistent with the Constitution and therefore void under 2 of the Constitution. Dicta of Lord Diplock in *Hinds v R* [1977] AC 195 at 211–214, 219 and of Sir Douglas Menzies in *Kariapper v Wijesinha* [1968] AC 717 at 743 applied.

*Per curiam.* The Board had no interest of its own in the outcome of the appeal. It sat as the final court of appeal of Jamaica to serve the interests of the people of Jamaica. If and when they judge that it no longer does so, they are fully entitled to take appropriate steps to bring its role to an end. The question was whether the steps taken in this case were, constitutionally, appropriate.

(2) Furthermore, although s 110 of the Constitution, providing for the right of appeal to the Privy Council, was not entrenched and therefore, under s 49(4)(b), could be repealed

by a vote of the majority of members of each House, the provision in Caribbean Court of Justice (Constitutional Amendment) Act 2004 replacing s 110 and abolishing that right of appeal could not be severed from the other provisions of the three Acts and given separate effect. The appropriate test for applying such severance was whether that provision was so inextricably bound up with the invalid provisions that it could not survive independently or represent alone the legislative intention. It was clear that the three Acts were presented to Parliament by the government as parts of a single, interdependent scheme: it did not appear to have been the intention of Parliament to revoke the right of appeal to the Privy Council without putting something in its place. The respondents had not challenged this conclusion and, therefore, the provision abolishing the right of appeal to the Privy Council could not be severed and sustained independently. A declaration was accordingly made that the Acts were void. Dicta of Viscount Simon in *A-G for Alberta v A-G for Canada* [1947] AC 503 at 518 and of Fitzgerald CJ in *Maher v A-G* [1973] IR 140 at 147 applied.

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## CONSTITUTIONAL PETITION NO 5 OF 2004 WILSON AND OTHERS V ATTORNEY-GENERAL

CONSTITUTIONAL COURT OF UGANDA

Mpagi-Bahigeine, Engwau, Twinomujuni, Kitumba and Byamugisha JJAA

23 February 2004

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*Judicial independence – taxation of judicial officers’ salaries – interpretation of Article 128 of the Constitution of Uganda – principles of constitutional interpretation – whether taxation ‘varied’ a salary – adequacy of judicial emoluments*

The four petitioners were employed as Judicial Officers (a Registrar, a Chief Magistrate, a Magistrate Grade One and a Magistrate Grade Two). They sought a declaration that the application of the provisions of section 4(1) of the Income Tax Act, cap 340, to judicial officers rendered it inconsistent with Article 128(7) of the Constitution of Uganda.

Section 4(1) of the Income Tax Act contains a general provision that income tax is imposed on every person who has a chargeable income in the relevant tax year. Article 128(7) of the Constitution provides:

*The salary, allowances, privileges and retirement benefits and other conditions of service of a judicial officer or other person exercising judicial power, shall not be varied to his or her disadvantage.*

The Ministry of Finance had accepted that Article 128(7) preserved the exemption from taxation enjoyed by senior members of the judiciary in the seven years before the enactment in 1997 of the Income Tax Act, but

maintained that it did not exempt newly appointed judges or judicial officers of lower rank, such as the petitioners.

**Held** (by Mpagi-Bahigeine, Engwau, Twinomujuni JJAA, Kitumba and Byamugisha JJAA dissenting) that the imposition of income tax on the salaries of judicial officers was inconsistent with the Constitution.

MPAGI-BAHIGEINE JA noted that it was regrettable that the matter had to be resolved by the court, given the relationship of the issue to the members of the court. However, the court was the only institution capable of resolving the issue, and it took pride in its impartiality under the judicial oath.

She noted a number of principles of constitutional interpretation: where words or phrases were clear and unambiguous, they must be given their primary, plain, ordinary or natural meaning; all relevant provisions of the Constitution must be considered as a whole; and the text must be given a 'generous and purposive' interpretation.

To 'vary' meant to change from one position to another. 'When the petitioners' fixed salaries are taxed at the end of the month, such taxation has the effect of *reducing*, *diminishing* them and therefore naturally *varying* them and changing them from what they were indicated to be, in their letters of appointment when they were stated to be fixed, to a reduced or diminished state which is to their detriment or disadvantage'.

*Evans v Gore, Acting Collector of Internal Revenue*, 253 U.S. 245 (1920), a decision of the United States Supreme Court which concerned Article 3 of the US Constitution supported this view. That case held that the provision that the compensation (i.e., salary) payable to judges should not be 'diminished' during their continuance in office covered diminution by taxation as well as otherwise.

The underlying principle of Article 128(7) was judicial independence and security of tenure. The rule against variation of salary to the

detriment of the judge was 'an elementary safeguard to be found in most developed legal systems where it took many historic struggles to establish on a firm footing as the most fundamental of all safeguards of judicial officers' security of tenure'. Corruption would be nurtured by a system which failed to pay its judicial officers well.

'I would hasten to add that due to the rapid and constant inflationary erosion of the value of money, it is not even sufficient to *merely* adhere to the historic formula that judicial emoluments should not be reduced, altered or varied to the detriment of judicial officers. What is necessary is to provide an independent machinery and a fair formula to ensure that judicial emoluments and pensions are effectively augmented to neutralise inflation and thus free judicial officers from financial anxieties which ensnare them'.

ENGWAU JA delivered a concurring opinion.

TWINOMUJUNI JA also agreed. He referred to Article 128, on the Independence of the Judiciary, as containing 'eight pillars of an independent judiciary ... You cannot remove any one single pillar without adversely affecting the independence of the judiciary'.

BYAMUGISHA JA agreed with the dissenting judgment of Kitumba JA.

KITUMBA JA, dissenting, expressed the considered view that taxation of a judicial officer's salary was not variation of salary; it was compliance with a constitutional duty. She said, 'I agree that maintenance of the independence of the judiciary is a cardinal principle of the rule of law. Taxation of judicial officers' salaries and allowances is not interference with that independence. Judicial officers in the two East African countries of Kenya and Tanzania and many Commonwealth countries do pay tax on their emoluments. I cannot say that the independence of the judiciary does not exist in those countries.' She would not follow *Evans v Gore*, as social and economic circumstances were different in the US from those in Uganda.



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