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Journal of the
Commonwealth Magistrates' and
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Vol 15 No 2 December 2003

EDITORIAL

The Malawi triennial conference was obviously the resounding success that we knew it would be. Our greatest thanks and congratulations must go to Michael Lambert, Keith Hollis and members of the Steering Committee and Local Organising Committee, Karen Brewer and Paul McDermott. If evidence was required of the high quality of the papers received, look at the pages of this Journal. We have made a small selection from the conference papers. The rest will be published in the New Year.

Sadly your Editor did not make it to Malawi. But those of us back here in England who are interested in the courts and the judiciary have plenty to keep us busy. The Government has published five consultation papers on constitutional reform – a new way of appointing judges; a Supreme Court for the United Kingdom; the future of Queen’s Counsel; reforming the office of the Lord Chancellor; next steps for the House of Lords. The plan is a new way of appointing judges and a new Supreme Court. All the recommendations have proved controversial. It has long been difficult to defend the system of appointing judges in the United Kingdom: while there are few critics of the quality of individual judges, particularly the senior ones, the system of appointment, including private ‘soundings’ seems indefensible. More importantly, merit is only one factor: diversity is another. It is not easy to defend the obvious shortage of women and ethnic minority judges. It may be that public confidence in the judiciary has little to do with the quality of individual judges themselves. This Association welcomes and acclaims the first woman appointed as a Law Lord, Brenda Hale. But why has it taken until 2003 for a woman to reach the highest court of the land? Perhaps the Book Review of “Women in the Law” will give you some idea!

The subject of a Supreme Court may prove just as thorny. Senior judges are reported as being

divided in their views: the current House of Lords has a splendid reputation, it is suggested, and the current arrangements work well. What is the reality of the alternative? Would a new Supreme Court be adequately accommodated and equipped? Are there not other greater priorities (a new Commercial Court, for example)? There are also plans to abolish the office of Lord Chancellor. Whilst the separation of powers, particularly the separation of the judiciary from Parliament and from the Government, is a cardinal feature of the modern democratic liberal state, it is not yet clear what will replace the office of Lord Chancellor. What role should a ‘Minister of Constitutional Affairs’ who is ‘just’ an ordinary Minister have in the administration of justice? Is it necessary to have a trained lawyer at the heart of Government responsible for the rule of law?

In October 2003 the Centre for Public law at the University of Cambridge hosted a conference on ‘Judicial Reform: Function, Appointment and structure’. The comparative perspective was presented in papers on India, New Zealand, South Africa, Ireland, as well as wider European perspectives. Whilst all speakers underlined the need for fearless judges, there was some debate as to how best to achieve this. Should a Judicial Appointment Commission be an appointing Commission, or merely an advisory body? Do questions of accountability suggest that the executive should be involved in judicial appointments? Should there be expert sub-committees appointing judges to different courts? Should it be judge or lay member dominated? Who employs the judiciary? There are no easy answers to these questions, as readers around the Commonwealth will all agree. Let us hope that the British Government does not move too swiftly and take a step in the wrong direction.

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.

PROFILE

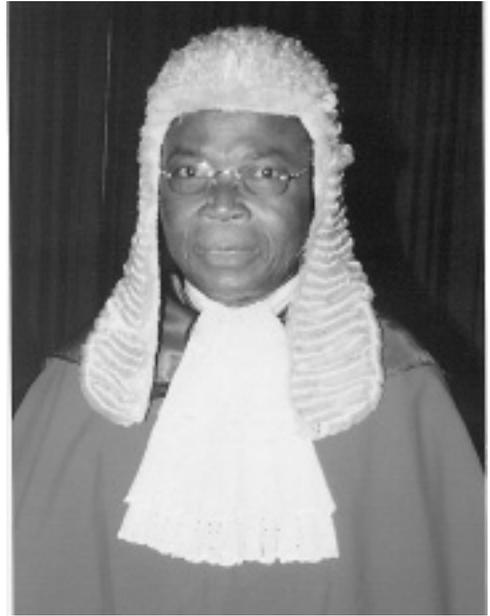
of His Lordship Mr. Justice George Kingsley Acquah *Chief Justice of Ghana*

It is a truism that nothing good comes easy, that is to say, except by hard work. This aptly sums up the track of the current Chief Justice of Ghana, His Lordship Mr. Justice G .K. Acquah as far as I have known him, and I am proud of the opportunity which has come my way to write this profile of him.

Mr. Justice G .K. Acquah is a Ghanaian to the core. He was born on 6th March, 1942. He attended a number of schools including Adisadel College, before obtaining a BA (Hons) in Philosophy from the University of Ghana, in 1967 and an LLB degree in 1970. He was called to the Ghana Bar in 1972. He then went into private legal practice, in 1972. In 1989 he gave up his otherwise lucrative practice and accepted appointment to the Ghana Bench, as a Justice of the High Court. Indeed, it is an open secret, that he was initially proposed for appointment to the Court of Appeal, but in his characteristic humility , he confounded those who had nominated him by opting for the lesser tier of a High Court Judge. His reason, for which he has won high respect, was to thereby have an insight and experience of a trial court and shape or orient him properly, for the work on the Bench. His progress, along the ladder on the Bench, has been relatively mercurial. In 1994, he was elevated to the Court of Appeal, where he served for only one year and was appointed to the Supreme Court, in 1995. His appointment as Chief Justice took effect from 4th July 2003.

In the process of his work as a Judge, His Lordship Mr. Justice Acquah, also served in various quasi-judicial positions, in the Judicial Service. Indeed, on the eve of his appointment as Chief Justice his appointments included:

- a. Chairman, Budget Committee of the Judicial Service.
- b. Chairman, Judicial Service Reform and Automation Committee.
- c. Chairman, Board of Trustees of the Institute of Continuing Judicial Education of the Judicial Service of Ghana.



- d. Chairman, Disciplinary Committee of the Judicial Council.
- e. Chairman, National Multi-sectorial Committee on the Protection of the rights of the Child.
- f. Member, African Regional Council of the International Planned Parenthood Federation (IPPF AR).
- g. Member, Governing Council of the Ghana Legal Literacy and resource Foundation.
- h. Patron, Commonwealth Legal Education Association, London.
- i. Honorary Legal Adviser of the International Planned Parenthood Federation (I.P .P .F) London.
- j. Editorial Advisor, Banking & Financial Law Journal of Ghana.
- k. External Examiner (Law of Evidence) Ghana Law School.

Before then, he had been:

- a. President, Planned Parenthood Association of Ghana (1998 2002).
- b. Chairman, Council for Law Reporting (1998 to October, 2001).

- c. Member, General Legal Council of Ghana (1982–83).
- d. Member, Governing Council of the University of Ghana: (1997–2001).
- e. Chairman, Search Party for a candidate for the post of the Registrar of the University of Ghana. (1999).
- f. Member, Search Party for a candidate for the post of the Vice- Chancellor of the University of Ghana (January, 2002).
- g. President, Central Regional Branch of the Ghana Bar Association (1986–89)
- h. Member, General Council of the Bar (1986–89).

He has also presented numerous lectures and papers. But he is not all books and work. His social life, has equally proved rewarding. He is married to only one wife and together, they have six children. His hobbies include reading, Table Tennis and Badminton; he also demonstrates an uncommon interest, in the plight of the disadvantaged people, in society.

His Lordship, Mr. Justice G.K. Acquah, has warmly accepted the multifaceted challenges of his new appointment and has already revealed parts of his vision for the Judiciary of Ghana. It is his aim to develop the Service and raise its image, to enviable standards; to reform and modernize the Judicial Service, so as to ensure speedy disposal of cases; effect a practical maintenance of the almost illusive independence of the judiciary; ensure respect for Human

Rights; promote proper interpretation of the Constitution and Laws of Ghana; and in a nutshell, make justice accessible to every individual in the State. Already there are positive signs that the right atmosphere is being created for the enhancement of settlement of commercial disputes, in addition to pronouncement by the new Chief Justice on the grant of injunction by the courts. He has already set up of a Complaints Unit, where complaints and/or allegations of any kind against any Judge or staff of the Service, might be lodged and addressed. Terms of reference and procedure, have already been published and appointments of staff made: A two-year training programme for Lay Magistrates, has been launched and advertisements, have appeared in the national daily newspapers, for interview well educated Ghanaians to apply. A programme, directed at increasing the number of Courts, has been initiated and, not the least, financial Consultants, have been commissioned, to reappraise the financial section of the Service and recommend measures, to improve financial management and practices.

His Lordship, Mr. G .K. Acquah, is welcome to the exclusive roll of Chief Justices, with great hope as an inspirer for success.

GM Quaye
Regional Vice President
Ghana West Africa

OBITUARIES

MRS DOROTHY WINTON

A tribute by Brenda Hindley
former Editor of the Commonwealth Judicial Journal

I first met Dorothy in Bermuda. I had seen an advertisement in the Magistrate that the Commonwealth Magistrates' Association were to hold their second annual conference there and I telephoned Dorothy, who had been appointed Secretary of the Association in 1970, for information. She was warm and welcoming and I resolved immediately to attend.

The conference in 1972 was a great success building on the tentative ideas put forward at the first meeting in London and Oxford in 1970 and giving birth to the much larger

gatherings, which I also attended, in Nairobi in 1973 and Kuala Lumpur in 1975, as well as a regional seminar in Jamaica. Many others followed and all laid the secure foundations for the birth of the Commonwealth Magistrates' and Judges' Association as it is today.

Dorothy and I became friends in Bermuda and my husband and I became frequent visitors to her home at The Old Workhouse in Harefield . Dorothy loved people and whilst she suffered a series of strokes in recent years her real interest and pleasure in visitors never dimmed.

Over the years I learned so much from Dorothy. She was very committed to her work on the Uxbridge Bench and for many years after her retirement Supplemental gatherings were held in her garden. Also her tiny office at Fitzroy Square became an important port of call for visiting overseas magistrates and consequently, a veritable library of useful information which I found invaluable during the time that I edited the Commonwealth Judicial Journal.

Dorothy was the ideal choice of first Secretary and she put enormous time and effort into making a success of the job. 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.

For the latter reason I am particularly pleased that her children have chosen to set up a fund in her name to enable the Association to provide financial assistance to people from such countries who otherwise would find it impossible to attend events. Dorothy, I know, would approve of this and be delighted that the time which she spent as Secretary, which she so much enjoyed, has produced such a lasting legacy.

Dorothy died in October 2003 and I miss her, but I am proud to have known a lady of such remarkable enthusiasm, vision and kindness.

In memory of Dorothy her children, Rosalind, Rick and Rod, are providing funds towards Dorothy Winton Travel Bursaries to enable magistrates from developing countries to attend the Conferences of the Commonwealth Magistrates and Judges Association. 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.

If you would like to contribute to these Bursaries, contributions (by cheques drawn on a UK bank, bank transfers – making clear what the transfer is related to or bankers draft) made payable to CMJA should be sent to the Commonwealth Magistrates and Judges Association at Uganda House, 58–59 Trafalgar Square, London WC2N 5DX, UK. Please remember that as a registered charity, they can reclaim tax paid by UK tax payers. If you include your name and address (eg on the back of the cheque) they will send you the form to fill in for gift aid purposes – a simple declaration and signature.

VINCENT WINSTON MEERABUX, (PUISNE JUDGE, BERMUDA, 1993–2002)

by
Ian Kawaley
Puisne Judge, Bermuda

Introduction

Born in Georgetown, Guyana on September 15, 1937, Vincent Meerabux was appointed a Puisne Judge in the Supreme Court of Bermuda in late 1993 and served for three years until he retired at the end of 2002. He passed away on 22nd August, 2003.

Prior to coming to Bermuda in 1986 as Parliamentary Counsel, he worked as a Parliamentary Officer with the House of Lords in the 1960s, served as a Magistrate and Parliamentary Counsel in Guyana in the 1970s, and served as a Parliamentary Counsel in Bahamas and as a Legal Draughtsman in

Trinidad and Tobago and Tonga between the mid-1970s and the mid-1980s.

Once appointed to the Supreme Court bench, Justice Meerabux established himself as one of the leading judicial minds and most prolific judgment writers in the jurisdiction. He delivered, over his 9-year judicial career in Bermuda, some 107 judgments or rulings which are reported in the electronic Bermuda Law Reports. An attempt will be made below to identify, a small sample of his more important decisions.

Arbitration law

One of the most significant pieces of legislation

drafted by Vincent Meerabux before his judicial appointment was the Bermuda International Conciliation and Arbitration Act 1993, which incorporated the UNCITRAL Model Law on Arbitration into Bermuda law for international commercial arbitrations. In *Skandia International Insurance Company et al v Al Amana Insurance and Reinsurance Company Limited* [1994] Bda LR 30, Meerabux, J., shortly after his own elevation to the bench heard the first case brought before the Bermuda Courts under the 1993 Act.

After reviewing the *travaux préparatoires* of the Model Law, and leading practitioner's texts, Justice Meerabux ruled that the underlying arbitration clause was incorporated into the reinsurance contract for the purposes of the Model Law. He further held, relying in part on persuasive Hong Kong caselaw, that Article 16 of the Model Law contemplated issues on the validity of the arbitration clause being determined by the arbitration tribunal, and only by the courts by way of appeal.

This decision was not appealed is good authority in Bermuda today, not just on the interpretation of the UNCITRAL Model Law, but also on the Court's inherent jurisdiction to restrain the pursuit of foreign proceedings in breach of an agreement to arbitrate in Bermuda.

Contempt of Court (freedom of the press, refusal to disclose journalistic sources)

In a June 9, 1999 ruling on an application to commit a journalist to prison for contempt in refusing to disclose the sources for a story relating to one of Bermuda's largest commercial trials, Justice Meerabux again broke ground in deciding for the first time in Bermuda the extent to which a journalist could be compelled to reveal his sources and/or be liable in default for contempt: *Bermuda Fire & Marine Insurance Company Ltd. (in Liquidation) v BF&M Ltd. et al* [1999] Bda LR 46.

Applying English and European Court of Human Rights caselaw on the need to balance the protection of journalistic sources as part of freedom of the press with countervailing fair trial interests, Meerabux, J. dismissed the contempt application. His crucial factual finding was that the identity of the sources only went to the credibility of the journalist,

and had no bearing on the merits of the central issues being tried.

Criminal law

Justice Meerabux, while mostly a civil judge, also presided over one of the most highly publicized criminal trials in Bermudian legal history. On July 13, 1996, a Canadian teenager holidaying in Bermuda was brutally raped and murdered. Two men were arrested and, before all the forensic evidence was in, the Crown charged the older of the two with a history of violence with being an accessory after the fact, and charged the younger man with premeditated murder (which at that time carried a mandatory penalty of death) on the basis that he had acted alone. When the forensic evidence came in (after the elder accused had been convicted of being an accessory on his own plea having agreed to testify against the younger accused), it was clear that two persons had committed the murder and that the only direct forensic evidence placing either man at the scene of the trial did not implicate the younger man who alone was charged with murder.

In *R-v- Smith* [1998] Bda LR 44, at the end of the prosecution case, a no case submission was made on two broad planks. Meerabux, J., held that there was no evidence to prove premeditation and that no reasonable jury could make the inferences the Crown sought to draw from the circumstantial evidence.

This ruling in a case where there was considerable popular and political clamour for a conviction in relation to a crime widely publicized in Canada, as well as Bermuda, was undoubtedly Justice Meerabux's most controversial and courageous ruling. The decision stood because both the Court of Appeal for Bermuda and the Privy Council held that no appeal lay for the Crown against rulings on questions of mixed fact and law which resulted in an acquittal.

The Privy Council's *obiter* criticism of the ruling as "surprising" was, in itself, arguably somewhat surprising. The *ratio* of the Board's decision was, after all, that Bermuda's legislature had left such decisions to the judgment of the trial judge, without any right of Crown appeal. Had the *Smith* case gone to the jury and resulted in a conviction, it would have been the trial judge who would have had to

impose the death penalty, not their Lordships in London. (The death penalty has now been abolished in Bermuda).

Director liability (company law, scope of bye-law indemnity provisions)

A major advantage in terms of director liability exposure in incorporating companies in offshore jurisdictions such as Bermuda is the permissibility of company bye-laws exempting directors from liability for ordinary negligence or breach of duty. The practice was common in England & Wales prior to 1948. Bermuda's Companies Act 1981, section 98, permits companies to indemnify directors from all liability falling short of fraud or dishonesty.

In his December 5, 2001 judgment in *Re SFH Trading and Brokerage Ltd. (in liquidation)* [2001] Bda LR 75, Justice Meerabux had to consider what was for the Bermudian Supreme Court the novel question of whether a director's criminal defence costs were recoverable as a claim in the company's liquidation. The joint liquidators rejected the claim, principally on the basis that section 98 of the Companies Act 1981 and the relevant bye-laws only permitted reimbursement legal expenses in respect of criminal proceedings resulting in an acquittal.

Meerabux, J. held that under Bermuda law a company cannot by its byelaws agree to indemnify directors in respect of defence costs incurred by a director in relation to civil or criminal proceedings which have not resulted in a judgment or acquittal in the director's favour. Further, applying English persuasive caselaw to the effect that expense indemnity provisions only apply to expenses incurred by a director performing acts he is authorized to perform, Justice Meerabux held that the director was *functus officio* once liquidators were appointed and the expenses were not incurred by him as a director.

Trust law

In a May 13, 1994 judgment in *Jurgen Von Knieriem v Bermuda Trust Company Ltd et al* [1994] Bda LR 50, Meerabux, J. was required to determine the validity of a purported change of trustee by the protector of two substantial Bermudian trusts.

He held that although the protector's powers were fiduciary, no breach of fiduciary duty had

occurred when he removed the former trustees and replaced them with another equally reputable professional trust company. A fiduciary power could only be improperly exercised if motivated by a corrupt purpose, namely the intention of personally benefiting the donee of the power. Not only was there no evidence that the protector had changed trustees for his own benefit; there was no evidence that the new trustees would in any way be subservient to the protector so as to enable the protector to control the exercise of the trustee's powers.

This case, is believed to be the first Commonwealth authority on the nature of the powers of a protector under a trust.

Conclusion

Mr. Justice Vincent Meerabux made a substantial contribution to Bermuda law, across the full range of civil and commercial law. A driving force behind his jurisprudence was an unflagging commitment to the most fundamental notions of judicial independence. As Justice Meerabux himself noted in *Re J (A Minor)* [1997] Bda LR 56 at page 28 of his judgment:

"I think it is necessary and desirable to comment briefly on Bermuda's judicial system and independence of the judiciary. It is apposite to refer to S and M Motor Repairs Pty Limited and Anor v Caltex Oil (Australia) Pty Limited and Anor (1988) 12 NSWLR 358, where Kirby J. at 360-361 said thus:

'It would be tedious to elaborate the antiquity and universality of the principle of manifest independence of the judiciary. It is axiomatic. It goes with the very name of a judge. It appears in the oldest books of the Bible: see e.g. Exodus 18:13-26. It is discussed by Plato in his Apology. It is elaborated by Aristotle in The Rhetoric, Book 1, Chapter 1. It is examined by Thomas Aquinas in part 2 of the Second Part (Q 104 AA2) of Summa Theologica.'

The above view I endorse. I must add that it is expressly given recognition in section 6(1) and (8) of our Constitution...

Furthermore..., on appointment, I swore to 'do right to all manner of people, after the laws and usages of Bermuda without fear or favour, affect or ill-will' ."

CULTURAL AND SOCIAL DIVERSITY: OF HUMAN RIGHTS, COURTS, TRADITION AND SOCIAL CHANGE

by
The Hon. Justice John M. Evans
Federal Court of Appeal, Canada

A revised text of notes prepared for a keynote address given on August 29, 2003, at the 13th Triennial Conference of the Commonwealth Magistrates and Judges' Association held at Mangochi, Malawi, on the theme, "Human Rights and Human Needs: Seeking a Judicial Talisman".

PREFACE

Let me start by saying how pleased I am to have an opportunity to make only my third visit to Africa and my first outside South Africa. This Conference has provided a wonderful opportunity to meet and talk with colleagues from every walk of judicial life and from nearly every part of the world. I have learned from colleagues in countries where resources are scarce how much can be accomplished with so little by those who have put their very considerable talents and energy to promoting the well being of others, particularly the most vulnerable members of society.

I can only echo previous speakers' expressions of gratitude to and admiration of those who have worked so hard to make this Conference the outstanding success that it has been. In particular, we are deeply indebted to our hosts, the Malawi Magistracy and Judiciary, and to the countless other Malawians who have welcomed us with such openness and generosity. "Malawi, the warm heart of Africa" is no mere advertising slogan. You have set a formidable standard for the hosts, organizers and participants of the 14th Triennial CMJA Conference to be held in Toronto in 2006.

I feel very honoured to have been asked to speak to the Conference, in place of the Chief Justice of Canada, the Rt. Hon. Beverley McLachlin, who found in July that she had to decline the invitation. The Chief Justice had entitled the address that she proposed to give, "Cultural and Social Influences on Human Rights". I do not know what she intended to say and I thought it inappropriate to enquire if

she had a draft that I could borrow! Nonetheless, I have used her title, and a paper that she gave on another occasion earlier this year,¹ to think about and frame what I would say. I fear, however, that my words will fall short of the elegant and insightful contributions that our Chief Justice invariably makes to gatherings such as these.

I INTRODUCTION

I start my remarks with the trite observation that all societies must respond to the existence of differences among people, whether those differences are based on language, ethnicity, race, nationality, social status, or religion. Even the most homogeneous societies must respond to differences of gender, sexual orientation, age, and disability. Social and cultural homogeneity is the exception, not the rule. In addition, cultural diversification has increased rapidly in the last forty years as a result of the unprecedented volume of migration across national borders that has transformed the composition of the population of many countries, especially in the major cities. Some migrate in search of a safe refuge from war, famine, or persecution; some seek improved economic and social opportunities for themselves and their families; while others want to be reunited with relatives who have already settled in a new country.

This has nowhere been more true than in Canada, which, for some time now, has been adding about 1% to its population each year through immigration. Nearly 20% of Canada's current population is foreign-born, of whom half were born in a non-European country: in Toronto and Vancouver, that figure would be considerably higher. While the Indian sub-Continent, the Philippines, Vietnam, and China have been the largest sources of immigrants over the last few years, communities of people from every corner of the globe are to be found in all our major cities.

The rich ethnic and cultural diversity that these newcomers to Canada have brought has been a source of social enrichment and renewal to a population that is otherwise aging. When I was a law professor in Toronto, I always felt a particular pride to see how many of our graduates who crossed the platform at the Convocation ceremony to collect their degrees represented the “new face” of urban Canada.

In a very short time, Canada has transformed itself into a multicultural and multiracial society without public disorder, and with little of the acrimonious public and political acrimony found in many other countries on the issue of immigration. Indeed, most Canadians would identify, with a sense of pride, the harmonious diversity of our population as one of contemporary Canada’s defining characteristics and modern achievements. Tolerance and acceptance of difference have become perhaps our most publicly proclaimed civic virtues: 80% of those who identify themselves as members of a visible minorities report that they have not experienced discrimination on the ground of race, colour or ethnicity.²

Naturally, the story on the ground is not quite as simple or as rosy as the above would suggest. The average income of recent immigrants and, most worryingly, their children, is below that of the population as a whole. The professional or technical qualifications and experience acquired in one country are frequently not recognized in Canada. Some ethnic and national groups have fared particularly badly in education and employment. One third of Black people in Canada report that they have experienced racial discrimination, and racism in the criminal justice system is well documented. Refugee claimants, whether genuine or not, are sometimes regarded with some scepticism. And antisemitism still raises its ugly head.

A growing awareness of the challenges, and opportunities, of social diversity is evident as members of groups who have been the victims of social exclusion or marginalization have pressed to be included as equal members of society, with the same rights to personal fulfilment as those enjoyed by the “included”. At the same time as these claims are pressed, resistance to demands for social inclusion is apt to come from those who find social change very threatening, whether to traditional belief

systems, or to their economic interests and social status.

1. Difference and Diversity

It is a fact of human nature that we are attentive to differences in people. Indeed, many nation states have been built on the idea that they and their citizens are ‘different’ from others. A sense of nation has been important in building communities with which people have been able to identify. Membership of a group is an important part of the way in which we human beings, as social animals, acquire a sense of who we are. We typically belong to many groups: a nation, local community, family, and religious organization, for example. Not only are we, in some important respects, ‘like’ other members of the groups to which we belong, but those who are not members are ‘different’.

By helping to build identity and solidarity, creating and observing ‘differences’ can enhance both a sense of social cohesion and individual identity.

2. Responding to Diversity

Problems begin, however, when membership in a group comes to be regarded as a mark of superiority. Pride in the achievements of a particular nation and its people, or of an ethnic or linguistic group, have all too easily translated into a belief in the innate superiority of that nation or ethnic group, and in the inherent inferiority of all others. These are the origins of national arrogance and the social exclusion of non-members of particular groups, which have escalated into major human tragedies: in particular, wars, genocide, ethnic cleansing, and brutal state racism.

Thus, difference becomes a justification for denying to the ‘other’ benefits attaching to members of the included or dominant group. This is reinforced by ascribing to members of the ‘other’ characteristics relating to, for example, their intelligence, willingness to work, honesty, reliability and sexual morality. Stereotyping has been a very powerful instrument for justifying the continued dominance of the interests of the socially and economically entrenched, and denying to ‘others’ similar access to the benefits of belonging as full and equal members of the wider community.

Membership in the dominant group is not always closed to 'others'. Exclusion is not necessarily for ever. However, the price of admission may be high and may entail the loss or renunciation of the characteristics of the 'other' and the assumption of those of the dominant group: religion, language or gender-specific behaviour, for instance.

Exclusion and assimilation are two related social responses to difference. They stem from too much emphasis on the importance of difference and too little emphasis on the fact that, no matter how great our individual and group differences may appear to be, as human beings we are much more alike than we are different. Our humanity binds us together more tightly than any cultural and social pigeon-holing or stereotyping can divide us and deny our common heritage.

A more constructive approach to social or cultural difference or diversity seeks to recognize and accommodate individuals' multi-faceted social identities: as members of both particular groups and of the wider community. The healthy society is one that maximizes its members' opportunities to fulfil their aspirations and ability to lead satisfying lives according to their own lights, including those of the groups with which they identify. Our social nature means that group membership is an integral part of our ability to find fulfilment; we are not free-floating atoms. On the other hand, for society to limit a person's life-choices by reason of her membership in a particular social group is a denial of the inherent worth and dignity of the individual.

The law is the state's most important instrument for regulating the conduct of individuals and of defining relations between the individual, and the state and its agencies. One of the critical functions of those parts of the law dealing with human rights, whether contained in the constitution, legislation or the common law, is to ensure that, in our dealings with each other and with government, account is duly taken of our claims to be recognized as a member of particular social groups, as well as a member of society with the same right to pursue our aspirations as any one else. A central mission of human rights law is thus to seek to accommodate differences.

The judge is on the front line in ensuring the success of this mission, and may be called upon

to deliver in almost any kind of legal dispute. However, it is a task that the judge shares with others: administrative tribunals charged with the implementation of anti-discrimination legislation, and legislators, for instance. Finally, the way that the judge responds to difference in her own courtroom can send a powerful message about official and societal attitudes towards social inclusiveness.

II THE CANADIAN EXPERIENCE

In this part of my presentation, I want to tell two contrasting stories about difference, and about the responses to it, that are integral to Canada's identity a nation: Québec and Confederation, and Canada's First Nations. I hope that the Canadian content of my remarks may help entice you to come and visit us in 2006 and to make you feel when you arrive that you are not altogether in unknown territory.

I start with the cultural diversities that are deeply embedded in the historical foundations on which modern Canada is built: Québec and Canada's First Nations, before providing examples from several legal contexts of the law's accommodation of difference and of the role of an independent judiciary in responding to cultural and social difference in a way that enhances human rights.

1. The Québec Fact

Much of the history of English and French Canada has been one of compromise and accommodation. This may have helped contemporary Canada to deal with the very different challenges posed by the rapid transformation of its composition and social values. Our history may have helped us to be more accepting of social and cultural diversity and, indeed, even to celebrate it in public rhetoric.

When England defeated France in the Seven Years' War in the mid-eighteenth century, France ceded her prized colonial possession, Québec, or *la Nouvelle France* as it was then known. However, this did not result in the subjugation of *les habitants*, the people who had come from France and had settled in the New World. This was not the result of some great magnanimity on the part of the English, but of a realistic recognition that *les habitants* were too firmly entrenched to be easily governable as a subjugated people. Accommodation is always particularly attractive when there is

some kind of power equilibrium between different cultural or social groups.

The essential demands of Quebec have historically been for protection in Québec for the French language, the Roman Catholic religion and the civil law, although nowadays religion plays a relatively small part in Québec life. In 1867, when the Constitution of the Canadian Confederation was adopted, the division of powers between Canada and the Provinces reflected the historic accommodation between the English and the French settlers. Thus, while public law, including the criminal law, was assigned to the federal sphere, much of private law (captured in the Constitution by the words “property and civil rights in the Province”) was within the exclusive jurisdiction of provincial legislatures. Private legal relationships in Québec have continued to be governed by civil law.

The process of accommodating Québec as a distinct society within the Canadian Confederation has been one of the *leitmotifs* of Canadian history and remains a permanent and important reality of constitutional and political life in Canada today. The nature and intensity of Québec’s demands for more autonomy have ebbed and flowed over the years. We have recently emerged from a period in which demands for sovereignty by Quebec have been particularly strong and which very nearly attained majority support in that Province in a 1995 referendum. The consequences of the cultural distinctiveness of Québec do not lend themselves to definitive answers, but require continual discussion, patience, pragmatism and a willingness to compromise.

I would like to mention briefly two aspects of this accommodation that have attracted attention recently, partly as a result of demographic changes and of developments in contemporary human rights values.

(i) education, religion and public funding

Under the *Constitution Act* education is left exclusively to provincial legislatures, although in 1867 there were concerns from the mainly anglophone Protestant minority in Québec, and the Catholic minority in Ontario (many of whom were French speaking) that the right to educate their children in religious schools of their choosing would be overridden by the

wishes of the majority. This issue was solved by giving to Catholics in Ontario and to Protestants in Québec the right to public funding for their schools. Thus, in Ontario, local taxpayers may divert a portion of their property taxes to support the separate (that is, Catholic) school system, which receives the same level of funding from the provincial government as the state-run schools in the Province.

Today, this compromise looks out of keeping in a society that is both more secular and yet, paradoxically, contains a much broader range of religions than the Canada of 1867. Many members of other religious faiths think it an affront to notions of equality and religious freedom that the Province of Ontario should fund the separate schools of one religion, but not of others. Those who think that the state has no business supporting any religion object to all public funding for denominational schools.

Following the adoption of the *Canadian Charter of Rights and Freedoms*, which became part of our Constitution in 1983, a constitutional challenge was made to Ontario legislation that extended public school funding to include all the years of secondary education. The argument was that it was a violation of the right to equality and freedom from discrimination contained in section 15 of the Charter for Ontario to limit the educational funding arrangements to Catholic schools and to deny similar opportunities to non-Catholic Christian schools, as well as to Jewish, Muslim, and Sikh schools, for example.

However, the Supreme Court of Canada rejected the challenge, holding that the entrenchment of the educational rights of Catholic parents in Ontario was part of the historic constitutional package negotiated in 1867 by the founders of the Canadian Confederation.³ It is not the role of the judiciary, the Court said, to take that package apart in response both to the modern cultural and religious diversity brought about by immigration, and to contemporary human rights concepts of equality and religious freedom.

Interestingly, the disappointed litigants in the school funding cases received a more favourable response when they complained to the UN Human Rights Committee that school

funding in Ontario was in breach of the International Covenant on Civil and Political Rights. While the UN Committee's view of the human rights shortcomings of the minority religion education provisions of the Canadian Constitution are not binding on either our governments or our courts, the Government of Ontario recently proposed to extend some public funding to other minority religious schools. However, this proposal may never be implemented as a result of the defeat of the Progressive Conservative Government at the polls in October of this year.

Whether one praised the extension of public funding to a broader range of religious schools as the righting of an historical injustice, or condemned it as the inappropriate extension of an historical anomaly (namely, state financial support for religious education for one denomination), the story illustrates that there are limits to courts' willingness to rewrite constitutional history in order to accommodate social and cultural diversity. It also illustrates the important fact that national courts are not the only actors capable of advancing contemporary human rights claims: both elected legislators and international bodies have important roles to play in the evolution and elaboration of human rights values and norms, and in releasing them from the dead hand of history.

(ii) language

The second aspect of the accommodation of Québec about which I wish to say something is language although, since African countries accommodate up to as many as 11 official languages, I hesitate to say anything about our attempts to accommodate two! Nonetheless, linguistic diversity is an important fact of contemporary Canada and deserves mention.

In many respects, with the decline of the influence of the Church in Québec society, the issue of language and, more particularly, the survival of the French language in a predominantly English-speaking continent, has been a very important aspect of the cultural accommodation of Québec within Canada. In addition, since there is an anglophone minority in Québec and francophone minorities in all other provinces, another important aspect of the linguistic accommodation of Québec has been the legal protection of French and English speaking minorities across Canada.

Language is, of course, not simply a means of communication. It is also integral to the vibrancy and transmission of a people's culture, identity and history. It is a social fact that, to a great extent, children in Québec schools learn a different history from children in the rest of Canada. People in Québec read different books and know different songs, singers, and artists from those in the rest of Canada, leading to what is often called the "two solitudes".

Québec has enacted important legislation (known popularly as *Bill 101*) to protect the status of the French language in the Province. Thus, subject to the constitutional right to use French and English in the Provincial legislature and the courts, French is the only official language in Québec. This means that nearly all children must be educated in French, including those whose parents immigrated to Canada fairly recently and speak neither English nor French, commercial signs must be predominantly in French and, increasingly, French has become the language of work and everyday business. This is a big change from the not too recent past when business in Québec was largely controlled and managed by anglophones and economic life in the Province was lived, in the main, in the language of the dominant group.

At the federal level, Canada has been committed since the 1960s to a policy of official bilingualism through the enactment of the *Official Languages Act* and, more recently, the language provisions of the Charter. English and French have equal status, rights and privileges in all institutions of the Government and Parliament of Canada. Thus, Canadians have the right to communicate with and to receive services from the federal government and its officials in either official language. As a result, many positions in the federal public service are designated as bilingual. In addition to Acts of Parliament, which are constitutionally required to be in both English and French, the reasons for judgment of the Supreme Court of Canada, and of the federal courts and federal administrative tribunals are published in both languages. The bilingual packaging of goods is another result of legislated bilingualism.

To be sure, the linguistic reality can be markedly different from its portrayal in the law. There is an undercurrent of grumbling,

especially in parts of the country where few people speak French, about the economic costs and inefficiencies of official bilingualism or about the unfairness of denying an otherwise qualified unilingual federal public servant a promotion to a position designated as bilingual, despite the virtual absence of any demand from the public in that area for service in the other language. Just as non-francophone merchants in Québec whose customers may speak neither English or French can resent the prominence that they must give to French in their advertising signs, so francophones can feel very much not *chez eux* when travelling in predominantly anglophone parts of Canada.

Some of these discontents have matured into successful legal challenges. However, the legislature of Québec successfully immunized provisions of *Bill 101* from constitutional challenge by invoking the Charter's "notwithstanding" clause, which enables legislatures to override most constitutional protections of human rights. The courts have accepted that, subject to the express and specific protections afforded by the Constitution to the use of English in Québec, French is the only official language of Québec. Similarly, demands that another language, which may be the *de facto* second language in a particular part of the country (such as Ukrainian in parts of Alberta and Saskatchewan) be given equal status with English and French have been rejected. Again, history trumps demographic change and growing linguistic diversity.

(iii) conclusions

Nonetheless, despite occasional outbursts of irritation and feelings of injustice, Canada's accommodations with Québec, particularly over language, have been deeply enriching for Canadians both individually and collectively. For individuals, the survival of the two cultural and linguistic traditions has given Canadians of one tradition an insight into the other. Collectively, the bi-lingual nature of Canada has given us an *entrée* to two important international organizations that represent people of countries of both north and south: the Commonwealth and la francophonie.

The settlement in Canada of large numbers of people who speak neither English nor French has not shaken the legally privileged position occupied by the languages of the earliest European settlers, or the special status in

Ontario afforded to the accommodation between Protestants and Catholics in matters of education. Nonetheless, the overall success in accommodating cultural differences between Québec and the rest of Canada has had a broader significance for the development of human rights in Canada.

First, the acceptance of cultural and linguistic diversity, and its reality in the collective life of Canada, as well as in the lives of millions of Canadians, has helped to foster a willingness to accept other manifestations of cultural diversity and an understanding of how they can enrich all our lives.

Second, the important role of both constitutional and non-constitutional law in protecting and promoting linguistic accommodation has heightened public awareness of the importance of law and legal institutions in advancing other human rights.

Third, linguistic rights are not only about the communication rights of individuals, but also about the rights of groups of people to live in their own language, and to celebrate and transmit their culture, history and identity. This recognition of the importance of collective rights fits well with the social aspect of the human experience. It seems to me to provide a very healthy antidote to the widely accepted view of human rights in North America, where the atomized individual is widely seen as the only legitimate bearer of rights, a notion that denies the importance of the social aspect of human beings.

2. First Nations

My second story concerns Canada's First Nations. For the most part, Canadian society has responded poorly to the cultural diversity represented by the presence of people whose ancestors lived in Canada for tens of thousands of years before the arrival of the first Europeans and the establishment of their first permanent settlements. From the seventeenth century, First Nations people or Indians, as the Europeans quaintly called them, were active participants in the fur trade, one of the earliest natural resources exploited by Europeans, and were later allied with either the English or the French during the struggles for colonial dominance.

Although ultimately excluded from most of the land on which they had lived and sustained

themselves, the First Nations were not, in formal terms at least, conquered peoples. From the earliest days, relations between the Crown and many Aboriginal peoples were negotiated and defined by treaty, a process that continues to this day in western Canada. In many of the original treaties First Nations gave up their rights to the land upon and off which they lived, in exchange for smaller areas of land reserved for their exclusive use and benefit, and for a variety of promises respecting goods and services to be provided or paid for by the Crown.

In reality, however, European Canada's treatment of the First Nations has, for much of our history, been little short of a national disgrace. It is a wretched catalogue of unfair bargains, broken promises, lack of good faith, forced cultural, linguistic and religious assimilation through the residential schools run by Christian organizations to which Aboriginal children were sent far from their families and communities, and discrimination. First Nations people, both on reserves and in the cities, are today grossly over represented among Canada's most disadvantaged: the poor, the unemployed, the incarcerated, the homeless, the sick and addicted, and the prematurely dead.

Nonetheless, over the last thirty years some more promising signs have started to appear. There has been a growing political and public recognition of national failure, gross injustices, and the present desperate plight of many Aboriginal Canadians. The process of accommodation has started. The courts have recognized Aboriginal title to land that was occupied by a Band and not ceded by treaty or extinguished by legislation. The courts have imposed fiduciary duties on the Crown in its dealings with Aboriginal peoples. Treaty promises have been established and enforced. Damages have been awarded for mistreatment in residential schools. Section 35 of the *Canadian Charter of Rights and Freedoms* recognizes and affirms the existing treaty and Aboriginal rights of First Nations peoples of Canada. Some First Nations' traditions have been incorporated into the administration of criminal justice (healing circles, for instance). And, new treaties have been and will be concluded to settle land claims, provide compensation for lost land, and, most importantly, to establish more extensive self-government by First Nations.

None of which is to say that all is now well: far from it. Nonetheless, in my view it would be as serious a mistake to discount these positive developments, which find their origin in a response that is more accommodating of difference, as it would be to deny the past.⁴ The law has played a key role in these changes: it has both reflected national soul-searching and has harnessed human rights values in the search for social justice.

However, as with the cultural accommodations that I have already mentioned with respect to Québec, the accommodations being reached with First Nations have also created their own tensions. For example, members of a First Nation may be competing with other Canadians for a natural resource, such as a fishery, which is scarce and diminishing. So, when a court rules that members of a Band have an Aboriginal right to fish in a particular bay or river, and that the statutory restrictions that apply to non-Aboriginal fishers do not apply to the First Nation, non-Aboriginals are likely to be very angry and, on occasion, violence has erupted. Similarly, many find it difficult to accept that First Nations enjoy statutory tax exemptions with respect to reserved land, some of which contain substantial oil and gas deposits, and to personal property situated on a reserve, including income earned from reserve-based businesses.

The resentment of some non-Aboriginal peoples towards the recognition of difference in this context often takes the form of a complaint that the idea that First Nations have legal and constitutionally recognized rights that other Canadians do not is incompatible with the modern concept of equality. There can be, it is said, no "citizens plus", or race-based rights. The assumption implicit in this position is that individuals may not claim rights by virtue of their membership in a social group and that human rights require that we all have the same rights. This is a very narrow and formal view of equality. It identifies equality with sameness and takes no account of either difference, here the historical relationship of First Nations and European settlers in Canada, or the idea of collective rights.

Another human rights issue to have emerged with respect to the right of First Nations to self-government is the extent to which a Band may follow traditional practices when they

conflict with human rights values of the wider community. There have, for instance, been questions as to whether a Band could deny housing on a reserve to a woman who had married a non-Aboriginal man, or could restrict the rights of women Band members to full participation in the governance of the Band. Should the accommodation of difference allow gender-based discrimination that would not be permitted under generally applicable human rights law?

A partial, but important legal answer to this question is provided by section 35 of the Charter, which provides that existing Aboriginal and treaty rights are guaranteed equally to male and female persons. In addition, Parliament has provided that a woman does not lose her status as an Indian by marrying a non-Indian man. The accommodation of difference does not mean embracing moral relativism at the expense of the basic human rights of members of minority groups.

III JUDGES, DIVERSITY AND HUMAN RIGHTS

In this part of my paper, I discuss some recent Canadian examples of judicial accommodation in a variety of contexts: gender, race and religion, and sexual orientation. Some of these examples also raise more general institutional questions about judicial independence and accountability, and about the relationships among judges, legislatures and public opinion in matters of human rights.

Human rights and diversity issues can arise in almost any area of the law. Here are three recent examples from the administration of criminal justice. First, in a sexual assault case⁵ in which the accused had been acquitted on the ground of the complainant's "implied consent" to the advances of the accused, L'Heureux-Dubé J. characterized the issue as being about the need to eliminate violence against women. She was very critical of the reasons in the court below for reinforcing male stereotypes about women's consent to sexual activity.

In particular, L'Heureux-Dubé J. said, the judge had been wrong to suggest that consent could be inferred from the fact that the complainant was dressed in a manner that the judge thought was not "modest", even though she had explicitly rejected her assailant's advances and had told him that she was afraid

of him. In addition, the appeal court was criticised for apparently agreeing with the trial judge that the fact that the complainant was a single mother who lived with her boyfriend was relevant to whether she had "impliedly" consented to the assault.

Following the release of the Supreme Court's decision in *Ewanchuk*, there were some sharp public exchanges between the appellate judge, who thought that he had unfairly been made the victim of "political correctness" by the Supreme Court of Canada, and L'Heureux-Dubé J. who, in turn, vigorously defended the propriety of her comments.

Second, an interesting example of the legal relevance of the different experiences that members of racial minorities may have in their dealings with the police is provided by a case⁶ in which the issue was whether a trial judge had created a reasonable apprehension that she was biased in a case in which some Afro-Canadian youths had been charged with assaulting a police officer, a charge which they denied. In the course of her reasons for judgment acquitting the accused, the judge, who was herself Afro-Canadian, said that she was aware that police officers at times attempted to mislead courts and overreacted when dealing with non-white groups.

The majority of the Supreme Court of Canada rejected the allegation of bias and concluded that, when read in their entirety, the judge's reasons did not give rise to a reasonable apprehension of bias. Judges are entitled to draw on their understanding of the racial dynamic in their community, here, relations between Black youths and the police, and to use it to help them to assess the evidence before them. There is no necessary incompatibility between, on the one hand, the judge's duty to approach the evidence with an open mind and to decide the case on the basis of that evidence, and, on the other, a judge's putting that evidence into a broader social context, here racism and police behaviour.⁷

In addition, judges must be well-attuned to issues of diversity and human rights in the way that we conduct the proceedings that come before us and must show proper respect for difference in our treatment of the parties, counsel, witnesses and members of the public. This brings me to my third example of the accommodation of difference in the administration of criminal justice.

A criminal trial held in Toronto in 1993, involving Dudley Laws, a leader of the Afro-Canadian community in Toronto and an outspoken critic of police treatment of Black people, attracted a lot of publicity. Many supporters of Mr. Laws attended the trial. The trial judge ordered a Muslim man, Mr. Taylor, to remove his head covering in court or leave, even though Mr. Taylor told the judge that he wore it as part of his religious practice. The Judge said that males must be bare-headed in the courtroom as a mark of respect for the court, “a tradition honoured by well over 90% of the population”, except by members of “well established and recognized religions” that require their adherents to cover their heads at all times.

The Ontario Court of Appeal reversed the conviction of Mr. Laws⁸ and rebuked the trial judge for failing to afford proper respect to Mr. Taylor’s religious practice in accordance with the Charter, which guarantees religious freedom for all, with no distinction among religions or religious practices. The Court found that the judge’s exclusion of Mr. Taylor could not be justified by the need to ensure order in the courtroom.

This was not, however, the end of the matter because Mr. Taylor complained about the Judge’s conduct to the Canadian Judicial Council, a statutory body charged with improving the quality of the administration of justice in Canada. The Council comprises chief justices from across the country, and some puisne judges as well, and its functions include the investigation of complaints of judicial misconduct received from the public, and from the federal Minister of Justice and Attorney General. The Council has the power to make findings on the propriety of the conduct of a judge who is the subject of a complaint, to express Council’s disapproval of any conduct that it finds to have been improper and, in very serious cases, to recommend that the judge be dismissed from office.

Mr. Taylor alleged that his exclusion from Mr. Laws’ trial because he was wearing a religious head covering constituted misconduct that rendered the trial judge unfit for office, because members of religious or racial minorities appearing before him in subsequent cases might reasonably think that he was biased against them. Mr. Taylor urged the Council to

recommend that the Minister of Justice introduce a motion in Parliament that the Judge be dismissed from office. The Chairperson of the Complaints Committee expressed the Council’s disapproval of the Judge’s conduct after he had apologized for creating the impression that he was insensitive to the rights of minority groups, but decided that the complaint did not warrant the Judge’s dismissal. Mr. Taylor unsuccessfully applied in the Federal Court for judicial review of the Council’s decision not to refer the matter for a full investigation.⁹

This latter aspect of the *Taylor* affair raises a wider issue about the proper balancing of judicial independence and judicial accountability, over and above the supervision of appellate courts and dismissal for cause. I should add that, in addition to this case, I am aware of at least three other recent instances in which comments by judges in the course of a hearing have been the subject of complaint by members of minority groups and have resulted in the administration of public rebukes by judicial councils and, in one case, to a recommendation of dismissal.

The accommodation of judicial independence and accountability in a multi-racial and multi-cultural society is a very delicate matter. “Social context” education for judges can help alert us to our own biases and ignorance of cultural differences, and to respond to diversity in a manner that is both respectful of difference and is consistent in other respects with our professional duties. However, some doubt whether it is compatible with judicial independence for a judge to be publicly reproved by the Council for misconduct that is insufficiently serious as to render the judge unfit for office.

I shall end this section of my paper by saying something about a very different kind of case involving a recent constitutional ruling of the Ontario Court of Appeal which has become a legal and political *cause célèbre*, and raises acutely the fundamental question of the proper relationships in matter of human rights and diversity among an independent judiciary, legislatures and public opinion. The case is *Halpern v. Canada (Attorney General)*¹⁰ where, like the courts of appeal for Québec and British Columbia, the Court of Appeal for Ontario held that the common law definition

of marriage as the voluntary union of a man and a woman to the exclusion of all others contravened the appellants' right to equality and freedom from discrimination as guaranteed by section 15 of the *Canadian Charter of Rights and Freedoms*, because it precluded them from marrying a person of the same sex. The Court declared the law to be invalid and reformulated the legal definition of marriage by substituting the words "two persons" for "a man and a woman", the remedy to take effect immediately.

Having supported the validity of the common law definition in the Court of Appeal, the Attorney General of Canada decided not to appeal to the Supreme Court of Canada, because, he said, he agreed with the Court that the recognition of same sex marriage was consistent with Canada's commitment to human rights and the protection of minorities, and because his officials had advised him that an appeal was very unlikely to succeed. Instead, the federal Government will introduce a Bill which will be the subject of a free vote in the House of Commons. The Bill will provide a statutory basis for the new definition of marriage applicable across Canada, require officials in every Province to issue marriage licences to same sex couples, and make it clear that no church or other religious organization is required to perform a marriage ceremony for a same sex couple. First, however, the Supreme Court of Canada will be asked for its opinion on the constitutional validity of this proposed legislation, but not on whether the common law definition of marriage was constitutional.¹¹ Meanwhile, many same sex couples have been married in Ontario and British Columbia.

The Ontario Court of Appeal's decision in *Halpern*, and the Government's response, have proved very controversial and have provoked a much fiercer public debate than, I suspect, the Court anticipated. Survey polls show that public opinion is more or less evenly divided on the issue, with a small majority in favour of legalizing same sex marriage. However, there are substantial disparities in views, based on region (rural/urban), age (more or less than 35 years old), and levels of education and income. The Roman Catholic Bishop of Calgary has gone as far as warning Prime Minister Jean Chrétien that, by supporting the same sex marriage law, he would be putting his soul at risk of eternal damnation.¹² Others have

argued, less dramatically perhaps, that the federal Government should invoke Parliament's "notwithstanding" power to pass legislation confirming the previous definition of marriage, and expressly stating that the statute is to take effect notwithstanding the Charter of Rights.

Of particular relevance to the role of the judicial officer and the protection of human rights is the argument made by some that, whether or not one agrees with the outcome, namely, the legal recognition of same sex marriages, the Ontario Court of Appeal should not have given immediate effect to its decision. Rather, it is suggested, the Court should have exercised its power to suspend the remedy in order to give Parliament time to debate the issue and to reach a solution that takes into account both the demand of equality seekers that the state extend the institution of marriage to same sex and heterosexual couples alike, and the concerns of those who, for religious or other reasons, wish to retain the traditional legal definition of marriage. Such important and controversial social issues should not be decided by the courts alone, it is said, but should be the result of a dialogue between the courts and the legislature.

This last point is especially pertinent since, at the time that the Court's decision was released, a Committee of the House of Commons that had been studying the issue, was close to reporting. The Committee, like public opinion and, it would seem the House of Commons itself, was about evenly split on the legalization of same sex marriage. By instantly legalizing same sex marriage in Ontario, the Court of Appeal seemed to some to have short-circuited the Parliamentary process, and to have announced in no uncertain terms that, on matters relating to the protection of the human rights of minorities and the constitutional accommodation of difference, the judiciary is the only arbiter, save for Parliament's use of the notwithstanding clause, a power that the federal Government has been most reluctant to invoke for fear of setting a precedent.

There is no doubt the constitutional and political debates over same sex marriage will stretch well into next year, and into the first year of the administration of the next Prime Minister of Canada. For many, this an issue that pushes to the limit the notion of the accommodation of

difference through the courts' interpretation of the constitutional protection of the human right of equality. For them, such a fundamental change to the traditional understanding of the institution of marriage should only be made by the elected representatives of the people or by referendum.

I would add only that, in the last resort, the legitimacy of judges' power authoritatively to declare laws unconstitutional rests on broad public acceptance. This does not mean that judges should decide difficult or controversial cases on the basis of opinion polls or of the views expressed in the media. Moreover, "public opinion" is neither monolithic nor unchanging, and judicial decisions have been important in nudging public opinion towards the recognition of human rights violations.¹³

Nonetheless, the danger of the courts' getting too far ahead of public opinion, or of prematurely ending political debate and the political search for a compromise solution, is that they may be drawing too heavily on their constitutional capital, which may be insufficient to sustain the next decision on a hotly contested issue of rights.

IV CONCLUSIONS

I hesitate to suggest what "lessons" may be drawn from Canadian experience with cultural and social difference by jurisdictions that face many different challenges. Public law, particularly constitutional law, is notoriously difficult to transplant. Nonetheless, I would say that, with us, human rights values and the legal instruments and institutions designed to further them, have had most success in fostering appropriate responses to difference on issues of social inclusiveness. Success has been much less evident, however, when a substantial redistribution of resources is required to address issues of social and cultural difference, as is the case for remedying the results of past policies of the exclusion and attempted assimilation of Aboriginal people, and for tackling other kinds of economic inequality.

The lively discussion that followed the oral delivery of this paper highlighted the fact that, while we speak of the universality of human rights, their implementation may be culturally conditioned. In particular, some delegates regarded the notion of same sex marriage as

antithetical to the cultural traditions of their countries.¹⁴ Nonetheless, for all the limitations of accommodation as a response to difference, and its chequered record of success, I am convinced that no society that is committed to the enhancement of human rights can address issues presented by cultural and social diversity or difference other than by accommodation or giving proper recognition to the social and individual aspects of the human experience.

In the furtherance of this endeavour, an independent, well educated, and thoughtful judiciary, at all levels of the administration of justice, has a pivotal, but not a solitary role to play. While judicial timidity may stifle the creative moulding of specific human rights protections to respond to new problems, judicial overreaching may imperil the entire human rights enterprise in a constitutional democracy. As is ever the case in judging and in life at large, finding the right balance is the thing.

Endnotes

- 1 Beverley McLachlin, "The Civilization of Difference" (LaFontaine-Baldwin Symposium, 2003 Lecture; Halifax, Nova Scotia; March 7, 2003). I am indebted to the intelligent industry of my law clerk for 2002-03, Noah Gitterman, for bringing this paper to my attention.
- 2 For an informed and revealing account of ethnic diversity in contemporary Canada, see *Ethnic Diversity: Portrait of a Multicultural Society* (Statistics Canada: Ottawa, 2003).
- 3 *Re Ontario Separate School Funding Reference*, [1987] 1 S.C.R. 1148
- 4 The magisterial and visionary multi volume *Report of the Royal Commission on Aboriginal Peoples* (Minister of Supply and Services Canada: Ottawa, 1996) contains a wealth of information and analysis of past injustices, present problems and the bases on which the relationship between Aboriginal peoples and the rest of Canada can be renewed.
- 5 *R. v. Ewanchuk*, [1991] 1 S.C.R. 330.
- 6 *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484.
- 7 For an extremely thoughtful dissection of the theoretical difficulties of reconciling accommodation, or attention to difference, and traditional notions of impartiality and neutrality, see Jennifer Nedelsky, "Embodied Diversity and the Challenges to Law" [1997] 42 *McGill L.J.* 91.
- 8 *R. v. Laus* (1998), 41 O.R. (3d) 499 (C.A.).
- 9 *Taylor v. Canada (Attorney General)*, 2003 FCA 55.
- 10 [2003] O.J. No. 2268.
- 11 The Supreme Court currently has under consideration a motion by the religious groups who intervened before the Ontario Court of Appeal in *Halpern* asking for leave to appeal to the

Supreme Court of Canada, even though they were not parties in the Court below.

- 12 In contrast, public opinion polls reveal that a clear majority of respondents who identify themselves as Catholic favour the legalization of same sex marriage. This finding is doubtless in part a reflection of the social liberalism of people in Québec.
- 13 For instance, public opinion in Canada swung decisively in favour of a woman's right to choose to terminate a pregnancy after the Supreme Court of Canada held in *R. v. Morgentaler*, [1988] 1 S.C.R. 30, that the then provisions of the *Criminal Code* that strictly limited the circumstances in which abortion was lawful violated the right to life, liberty and security of the person guaranteed by section 7 of the *Canadian Charter of Rights and Freedoms*.
- 14 To what extent human rights are properly

regarded as universal among countries committed to upholding them as part of the rule of law, and to what extent they are culturally contingent, is a very difficult and sensitive issue that I cannot do justice to here. However, one workshop that I attended at this Conference discussed the topic of female genital mutilation and views were expressed on both sides of the issue of whether this was a "culturally contingent" practice when it involved an adult woman who freely consented. No one suggested that it was justifiable from a human rights perspective to subject children to the practice. I have no doubt that a woman who fled to Canada to escape female genital mutilation would be accepted as a refugee by virtue of a well founded fear of persecution as a member of a special social group (that is, a female) if the state of which she was a national was unwilling or unable to protect her.

PUBLIC INTEREST LITIGATION AND THE ENFORCEMENT OF HUMAN RIGHTS

by
The Hon. Mr. Justice Benjamin J Odoki
Chief Justice of Uganda

Introduction:

The judiciary plays a leading role in the protection and enforcement of basic human rights and freedoms. Its role is not restricted to providing redress to violations of human rights but also to interpret and expand the scope of human rights in accordance with the national constitution as well as the growing body of international human rights norms. These two roles on adjudication, and creativity are crucial for the effectiveness of the judiciary as the guardian of basic human rights and freedoms.

However, the judiciary may not accomplish its role unless individuals and groups have the capacity and means to enforce their rights. Effective enforcement of human rights in Courts is hampered by the high cost of legal services, complexity of litigation and the procedural restrictions on the right to bring actions in Courts. These constraints affect the poor and venerable groups more adversely than the rich and affluent. It is for this reason that in many countries judicial and legislative innovations have been developed to increase access of the poor to justice so that they may realize their God given entitlements which no one, not even the state has the right to take away.

One of the strategies which the Courts and in some jurisdictions legislation, have developed has been public interest litigation. In most countries public interest litigation has been developed through the judicial process. In a few cases like Uganda, innovations have been introduced through the Constitution and legislation with the result that the doctrine of *locus standi* has been liberalised to allow any person or organisation to bring an action against, the violation of another persons or group's human rights.

This paper briefly examines the role of public interest litigation in the protection and enforcement of basic human rights and freedoms.

Public Interest Litigation and Locus Standi:

Public interest litigation is litigation in the interest of the public. It is litigation which is instituted with a desire that the Court would be able to give effective relief to the whole or a section of the society. The only condition that must be fulfilled, therefore before, public interest litigation is entertained by the Court, is that the Court should be in a position to give effective and complete relief. If no effective and complete relief can be granted, the Court should not entertain public interest litigation. As it was said by the High Court of Tanzania in *Mtikila vs Attorney General* (Civil Case No.5 of 1993),

“if there should spring up a public spirited individual and seek the Courts intervention against a legislation or actions that pervert the Constitution, the Court, as guardian and trustee of the Constitution, and what is stands for, is under an obligation to rise up to the occasion and grant him standing.”

Public interest litigation defers from personal litigation. Public interest litigation is confined to public law which unlike private law, does not require the presence of personal interest, personal injury or sufficient interest over and above the interest of the public. Under English Common Law, a litigant had to show that he had a *Locus Standi* before he could bring an action to challenge an administrative body or action. It was that sufficient personal interest that justified intervention by the Courts. Only the Attorney General had the right to bring actions to protect the public.

However, the growth of administrative law and the need for new remedies and procedures to protect individuals against administrative actions, gave rise to the need to broaden the scope of the rule on *Locus Standi*, to allow pressure groups, or spirited individuals to

bring actions where they have a genuine interest as citizens or bona fide litigants, even where they have no personal interest. The crusade for effective protection of basic human rights has added another impetus to the reform of the rule.

Why do we need public interest litigation? Public interest litigation gives more hope for the people than any other strategy given the current socio-economic conditions in our developing societies. Many people are illiterate and unaware of the law and their rights. The vast majority of the people are poor and cannot afford the services of a lawyer. There is also apathy because of mistrust of the legal system. Therefore it is necessary and healthy to allow public-spirited individuals to take up worthy causes on behalf of others who are not in a position to do so.

The recognition of existence of public law as distinct sphere from private law can be traced from the 1980s when the change on the rule of *Locus Standi* was demonstrated by Lord Diplock in *IRC vs National Federation of Self Employed and Small Business Ltd*, (1981) 2 All ER 93 when he said,

"It would, in my view, be a grave lacuna in our system of public law if a pressure group like the federation or even a single spirited tax payer were prevented by outdated technical rules of Locus Standi from bringing the matter to the attention of the Court to vindicate the rule of law and get the unlawful conduct stopped."

The Canadian Supreme Court has enlarged the ambit of public interest litigation. In *Minister of Justice vs Borowski* (1981) SCR 175, the Court said,

"...to establish status as a plaintiff in a suit seeking declaration that the legislation is invalid if there is invalidity, a person need only show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other and effective manner in which the issue may be brought before it."

In India the rule has been relaxed through public interest litigation so that *Locus Standi* can be given to any person who writes a letter of complaint from any part of the country in the name of the People's Union for Democratic

Rights to the Chief Justice. The rationale for this approach was given by Dayal J in *Peoples Union for Democratic Rights vs Minister of Home Affairs*, (1986) LRC Const. 547 when he said,

"Following English and American decisions, our Supreme Court has of late admitted exceptions from the strict rules relating to Locus Standi and the like in the case of a class of litigations which have acquired classification known as "public interest litigation" that is, where the public in general are interested in the enforcement of fundamental rights and other statutory rights... Today it is perhaps common place to observe that as a result of series of judicial decisions since 1950, there has been dramatic and radical change in the scope of judicial review. The change has been described as an upsurge of judicial activism."

India has been at the forefront in the development of public interest litigation through judicial activism. Former Chief Justice of India, Justice Bhagwati, in a paper delivered at the Fifth Judicial Colloquium on Domestic Application of International Human Rights, held at Balliol College, Oxford in 1992, defined judicial activism as follows:

"But what do we mean by judicial activism? And for what purpose and on whose behalf? The term 'judicial activism' is slippery as Robert McClosky said, but it does have some meaning. To him, one of its aspects was 'the Supreme Court's propensity to intervene in the governing process.' This definition is obviously in need of greater specificity; yet according to this definition, judicial activism is not only (defensible) but it is also inevitable in any system of Constitutionalism. "The two fundamental correlative elements of Constitutionalism," Charles McLewin has said, "are the legal limits of arbitrary power and a complete political responsibility of government to the governed." Without a creative and activist judiciary, these two elements would be impossible to achieve. Judicial activism has been used in India extensively for actualising these two elements and establishing a new form of Constitutionalism."

Judges need judicial activism in order to enforce constitutional and legal rights against the state. The objective of developing the strategy of public interest litigation was to make basic human rights meaningful for the large masses of the people. The strategy was calculated to bring social justice and human rights within the reach of the common man. As Justice Bhagwati has observed, in the same paper,

“The Supreme Court also developed the innovative strategy of public interest litigation for the purpose of making basic human rights meaningful for the large masses of people in the country and making it possible for them to realize their social and economic entitlements. The Supreme Court incorporated international human rights norms, not only civil and political, but also social and economic, in the interpretation of the provisions of the Constitution and the Law and this was done through judicial activism of the highest order. The result was that the Supreme Court became identified by the justices as well as by the people, as the last resort for the oppressed and bewildered, and by providing easy access to justice and ensuring basic human rights to them, the Supreme Court required a new credibility with the people.”

For instance, the Supreme Court of India expanded the frontiers of fundamental rights and natural justice and in the process rewrote some parts of the Constitution. The right to life and personal liberty enshrined in Article 21 of the Constitution of India was converted into procedural due process contrary to the framers of the Constitution. The right was expanded to include the right to bail, the right to dignified treatment in custodial institutions, the right to live with basic dignity, the right to livelihood, the right to legal aid in criminal proceedings and the right to a healthy environment.

Public interest litigation is now accepted as an essential strategy in the promotion of Constitutionalism and human rights. Many countries have embraced the strategy using judicial activism. There are significant developments in this area in Zimbabwe, Botswana, Tanzania, South Africa and Nigeria among other African countries. We need to encourage them and also to learn from them.

Promotion of Public Interest Litigation through Legislation: The Case of Uganda:

In order to address with the problems created by the rule of *Locus Standi*, the framers of the new Constitution of Uganda 1995 sought to liberalise and reform the rule in order to allow any person or organisation to defend the rights of another person or group, to bring an action to defend the Constitution, and to Challenge the Constitutionality of an Act of Parliament or action by Government.

A major innovation was introduced by Article 50 of the Constitution which gives Courts jurisdiction to enforce basic rights and freedoms. Clauses 1 and 2 of the Article provide,

- “(1) Any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to competent Court for redress which may include compensation.
- (2) Any person or organisation may bring an action against the violation of another's or groups human rights.”

It is clear that under Article 50(2), a person or group need not prove a personal interest in the violation in order to bring an action on behalf of another or group of persons. Any public spirited person or organisation can take action to protect the rights and freedoms of another person or group of persons. This procedure should be able to allow the stronger to protect the weaker and to make every person his or her brother's keeper. It should also be able for individuals or groups to take proceedings to protect group rights or interests for the entire community.

Two recent cases filed in the High Court for the enforcement of the right to a clean and healthy environment which is enshrined in Article 39 of the Constitution are illustrative of the importance and value of the reform of the doctrine of *Locus Standi* in the enforcement of basic human rights. The two cases are *The Environmental Action Network Ltd vs Attorney General and National Environment Authority*, Misc. Application No. 140 of 2002 which challenged smoking in public, and *Greenwatch vs Attorney General and the National Management Authority*, Misc App.No. 140 of 2002 where the manufacture,

distribution use and disposal of plastic bags and containers was challenged. These two cases were instituted by public interest groups to protect the right to a clean and healthy environment on behalf of the people of Uganda.

In Environmental Action Network Ltd vs the Attorney General and National Environment Management Authority (Misc. Application No. 39 of 2001) the applicant, a public interest litigation group brought an application on its own behalf and on behalf of the non-smoking members of the public, under Article 50(2) of the Constitution, to protect their right to a clean and healthy environment, their right to life, and for the general good of public health in Uganda.

In the application information based on medical and scientific reports highlighted the dangers of exposure to second hand smoke or environmental tobacco smoke. The applicant sought several declarations which included,

- A declaration that smoking in public constitutes a violation of the rights of non-smoking members of the public to a clean and healthy environment as described under Article 39 of the Constitution of the Republic of Uganda and Section 4 of the National Environment Statute 1995.
- A declaration that smoking in public place constitutes a violation of the rights of non-smoking members of the public to the right to life as prescribed under Article 22 of the Constitution of the Republic of Uganda.
- An order that the second respondent takes the necessary steps to ensure the enjoyment by the Ugandan Public of their right to a clean and healthy environment.

A State Attorney representing the respondents raised preliminary objections that the applicant had no cause of action, that the applicant cannot claim to represent the Ugandan Public and that no notice that the present suit would be filed against the respondents was filed as provided for in the Civil Procedure and Limitations of Actions (Miscellaneous Provisions) (Amendment) Act 2000.

The Principal Judge of the High Court who heard the application held that the objection relating to failure to give Statutory notice of 45 days to the second respondent as a scheduled corporation before filing the application was

misconceived because applications brought under Article 50 of the Constitution were governed by the Fundamental Rights and Freedoms (Enforcement Procedure) Rules 1992 (S.I No.26 of 1992) and the Civil Procedure Act and Rules made there under. He held that it was not necessary to give prior notice of 45 days because people need immediate and urgent redress in case of infringement of their rights and freedoms. In so holding the Principal Judge said,

“I agree with this requirement that the respondent usually Government or a schedule corporation which is supposed to be as busy as Government, needs sufficient period of time to investigate a case intended to be brought against it so as to be able to avoid unnecessary expense on protracted litigation. This rationale cannot apply to a matter where the rights and freedoms of the people are being or about to be infringed. The people cannot afford to wait for 45 days before pre-emptive action is applied by the Court. They would need immediate and urgent redress. They need a short period which is the one provided under the ordinary rules of procedure provided by the Civil Procedure Act and Rules. To demand from the aggrieved party a 45 days notice is to condemn them to infringement of their rights and freedoms for that period which this court would not be prepared to do. Any alleged infringement must be investigated expeditiously before damage is done.” (emphasis added)

In his second objection, Counsel for the respondents contended that the applicant could not claim to represent the Ugandan public and therefore it should have brought the application under Order 1 rule 8 of the Civil Procedure Rules which provides,

“(1) Where there are numerous persons having the same interest in one suit, one or more of such persons may with the permission of the Court, sue or be sued, or may defend in such suit, on behalf of or for the benefit of all persons so interested. But the court shall in such a case give notice of the institution of the suit to all such persons either by personal service or, where, from the number of persons or any other cause such service is not reasonably practicable,

by public advertisement as the Court in each case may direct.

- (2) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub-rule (i) may apply to the Court to be made a party to the suit.”

The Principal Judge overruled this objection holding that representative actions and public interest litigation were distinguishable and the latter was governed by Article 50 of the Constitution. He held,

“Here again the State Attorney failed in his preliminary objection to distinguish between actions brought in a representative capacity pursuant to Order 1 Rule 8 of the Civil Procedure Rules and what are called “Public Interest Litigations “ which are the concern of Article 50 of the constitution and S.1 No. 26 of 1992. The two actions are distinguishable by the wording of the enactments or instruments pursuant to which they are instituted. Order 1 Rule 8 of the Civil Procedure Rules governs actions by or against the parties (i.e. plaintiff or defendant) together with parties that they seek to represent and they must have similar interest in the suit. On the other hand Article 50 of the Constitution does not require that the applicant must have interest as the parties he or she seeks to represent or for whose benefit the action is brought.”

It was the view of the Principal Judge that Clause (2) of Article 50 of the Constitution was sufficient to answer the State Attorney’s objection that the applicant could not represent the Ugandan non-smoking public. The judge recognized that there were decided cases which decided that an organisation could bring a public interest litigation on behalf of groups or individual members of the public even though the applying organisation had no direct individual interest in the infringing acts it sought to have redressed. He referred to *Regina v 1 RC Exp. Federation of Self-Employed* (H.L.E) (1982) A.C 643, and the Tanzanian case of *Mtikila v. The Attorney General* Civil Suit No. 5 of 1993 (unreported). The judge observed that he understood from these two decisions that the interest of the public demands that rights and freedoms transcend technicalities as to the rules of proce-

dures leading to the protection of such rights and freedoms. The judge concluded.

“the applicant say that they are specially interested in the infringement of the rights and freedoms of the poor, and children - those who cannot know and appreciate their rights and freedoms and who do not know where to go and how to go there for redress. Is it not compelling that a body like the applicant stands up for them and fights for their cause? I think the application deserves hearing and I will hear it.”

In *Greenwatch vs Attorney General and the National Environment Management Authority*, Misc. App. No. 39 of 2001 (High Court of Uganda) the applicant, a Non-governmental organisation whose objectives include focusing on issues and problems of environment and using all avenues possible to monitor and expose danger to environment however caused and by whoever, brought an application before the High court of Uganda seeking several orders and declarations, among which were the following:

1. A declaration that the manufacture, distribution use, sale, disposal of plastic bags, plastic containers, plastic food wrappers, and all forms, of plastic commonly known as “kaveera,” violate the rights of citizens of Uganda to a clean and healthy environment.
2. An order banning the manufacture, use, distribution and sale of plastic bags and plastic containers of less than 100 microns.
3. An order directing the second respondent to issue regulations for the proper use and disposal of all other plastics whose thickness is more than 100 microns including regulations and directions as to recycling and reuse of all other plastics.

Counsel for the Attorney General raised several objections the first of which was that the application did not disclose a cause of action against the Attorney General. The second was that the application was not before the Court in that it was brought by the applicant on behalf of other Ugandans who had not authorised the applicant to do so, and without leave of Court as legally required by order 1 rule 8 of the Civil Procedure Rules, before filing a representative suit. Counsel for the second respondent associated himself with the objections raised by Counsel for the first

respondent especially the objections that the application did not disclose a cause of action against both respondents.

The learned Judge referred to Article, 39 of the Constitution which provides that “*Every Ugandan has a right to a clean and healthy environment.*” He also referred to Article 20 (2) of the Constitution which provides that:

“The rights and freedoms of the individual and groups enshrined in this Chapter shall be respected, upheld and promoted by all organs and agencies of the Government and all persons.”

The learned Judge then observed that the state and the Authority had a duty towards all citizens of Uganda to promote and preserve the environment. He said,

“I have studied the application and the two affidavits filed in support and I find them pointing a finger at the state that it has failed or neglected its duty towards the promotion or preservation of the environment. The state owes this duty to all Ugandans. By so failing or neglecting the Government is in breach of its duty towards the citizens of Uganda.

Any concerned Ugandan has a right of action against the Government of the Republic of Uganda, for that matter against the Attorney General in his representative capacity to seek the enforcement of that failed or neglected duty of the state.

The National Environment Management Authority (second respondent) is a body corporate established under Section 5 of the National Environment Statute No.4 of 1995 capable of suing and being sued in its corporate name. The respondent has a mandatory duty under the Statute, Section 3, to ensure that the principles of environmental management are observed. These include:- “to assure all people living in the country the fundamental right to an environment adequate for their health and well being.”

The Judge held that from the averments in the affidavits, it was clear that there was a plea that the second respondent was in breach of its duty to ensure that the principles of environment management are observed which duty it

owes to the citizens of Uganda. The Judge therefore overruled the first objection that there was no cause of action.

As regards the second objection the Judge noted that it was impracticable to bring a representative action on behalf of all the citizens of Uganda because they are required to give consent in a case like this where the complaint is of common and general interest, not just a group but all citizens of Uganda.

The Judge referred to Article 50 and stated that from the wording of Clause (2) of the Article, *any concerned person or organisation may bring public interest action on behalf of groups or individual members in the country even if that group or individual is not aware that his fundamental rights or freedoms are being violated.*

He gave lack of public awareness about human rights as one of the justifications for such public interest litigation when he recognised that, *“There is limited public awareness of fundamental rights or freedoms provided for in the Constitution, let alone legal rights and how the same can be enforced. Such illiteracy of legal rights is even evident among the elites.”*

The learned Judge concluded that the applicant had *Locus Standi* to bring the action on behalf of other Ugandans:

“It is just appropriate that a body like the applicant comes up to discharge the Constitutional duty cast upon every Ugandan to promote the Constitutional rights of the citizens of Uganda and the institution of a suit of this nature is one of the ways of discharging that duty. This Court is under an obligation to hear the concerned citizen, in the instant case of the Applicant. The second preliminary objection is accordingly overruled.”

Another arena where public interest litigation has flourished is in the Constitutional Court. Article 137 of the Constitution provides that any question as to the interpretation of the Constitution shall be determined by the Court of Appeal sitting as the Constitutional Court. The Court of Appeal is established by Article 129 of the Constitution and normally determines appeals from the High Court. Constitutional jurisdiction is the only original jurisdiction it exercises.

The Constitution allows any person to bring an action in the Constitutional Court to challenge the Constitutionality of any Act of Parliament or any act committed by any person or authority. In this connection, clause (3) of the Constitution provides,

- “(3) Any person who alleges that –
- (a) an Act of Parliament or any other law or anything done under the authority of any law, or
 - (b) any act or omission by any person or authority of any law, is inconsistent with or in contravention of a provision of the Constitution, may petition the Constitutional Court for a declaration to that effect, and for redress where appropriate.”

Clause (4) of the same article gives power to the Constitutional Court to grant a declaration or order of redress or refer the matter to the High Court to investigate and determine the appropriate redress.

Although the Constitution is still new a number of cases have been filed in the Constitutional Court challenging the Constitutionality of Acts of Parliament. The Constitutional Court has taken an activist role in determining these petitions to protect the rights of citizens. In *Salvator, Abuki vs Attorney General*, Constitutional Petition No 1 of 1997 (unreported) the Constitutional Court held that certain sections of the witchcraft Act were unconstitutional and in particular Section 7 which authorises a Court to make an exclusion order banishing a person found to be practising witchcraft from his home. It was held that such an order contravened Article 24 which prohibits inhuman or degrading treatment or punishment. In *Paul Ssemogerere & Others vs Attorney General*, Constitutional Petition No.1 of 2000, the Constitutional Court struck down the Referendum and other Provisions Act 1999 as unconstitutional on the ground that it was passed without a quorum in Parliament. In *Kyamanywa Simon vs Uganda*, Constitutional Reference No. 10 of 2000, the Constitutional Court held that the sections in the Penal Code imposing corporal punishment were unconstitutional as being in contravention of Article 24 of the Constitution prohibiting torture, cruel, inhuman or degrading punishment or treatment.

Public interest groups have also brought petitions in the Constitutional Court challenging the Constitutionality of certain laws. A case in point are the groups promoting gender equality and equity. The Federation of Women Lawyers (FIDA-Uganda) has taken up “strategic litigation” to establish precedents challenging discrimination and inequality before the law and affecting gender positive law reform. The litigation is intended to further substantially equality for women and children, have gender insensitive legislation overturned, have Courts making positive orders for the protection of women and children’s rights and to bring about the enactment of better legislation.

Two cases illustrate this “strategic litigation.” FIDA filed a Constitutional Petition No.2 of 2001 seeking interpretation of Article 33 (3) of the Constitution. This provision states that “The State shall protect women and their rights, taking into account their unique status and natural maternal functions in society.”

The case gained a lot of media coverage and public interest but unfortunately before commencement of the case the client died. She had been arrested on suspicion of stealing a baby who was later found to be her own. During her detention her baby died. The purpose of the litigation was to promote the special status of women especially their maternal functions as envisaged in the Constitution.

In the second case, FIDA and five female and male activists have filed in the Constitutional Court, Constitutional Petition No.2 of 2003, titled *Uganda Federation of Women Lawyers and Others vs the Attorney General*, challenging the Constitutionality of certain Sections of the Divorce Act which deal with divorce but contain discriminatory provisions on ground of sex, as being inconsistent with various articles of the Constitution. The averments in the Petition are interesting and far reaching and it may be useful to reproduce them here:

- “1. Your Petitioners are persons having interest in and being affected by the following matters being inconsistent with the Constitution of Uganda, whereby your Petitioners are aggrieved that:-
- (a) Section 5(1) of the Divorce Act (Cap 215) is inconsistent with and contra-

venes Article 21(1) and (2), Article 31(1) and Article 33(1) (6) of the Constitution in so far as it permits a husband to petition for dissolution of marriage solely on the grounds of adultery and does not afford a wife the same opportunity.

- (b) Section 5(2) of the Divorce Act (Cap.215) is inconsistent with and contravenes Article 21(1) and (2), Article 31(1), Article 33(1) and (6) of the Constitution in so far as it requires a wife seeking a divorce to rely on the multiple grounds of apostasy; or incestuous adultery; or bigamy with adultery; or rape, sodomy, or bestiality; or adultery coupled with cruelty; or adultery coupled with desertion without reasonable excuse for two years;
- (c) Section 6 of the Divorce Act (Cap. 215) is inconsistent with and contravenes Article 21(1) & (2), Article 31 (1) and Article 33(1) & 6 of the Constitution in so far as it obligates only a husband to name the alleged adulterer as co-respondent and does not require the same of a wife petitioning for divorce;
- (d) Section 22 of the Divorce Act (Cap. 215) is inconsistent with and contravenes Article 21(1) & (2), Article 31(1) and Article 33(1) & (6) of the Constitution in so far as it permits only a husband petitioning for divorce to collect damages from the alleged adulterer and does not allow a wife petitioning for divorce the same from an adulteress;
- (e) Section 23 of the Divorce Act (Cap. 215) is inconsistent with and contravenes Article 21(1) & (2), Article 31(1) and Article 33(1) & (6) of the Constitution in so far as it permits only a husband petitioning for divorce to collect costs from a co-respondent and does not afford a wife petitioning for divorce the same opportunity;
- (f) Section 24 and 25 of the Divorce Act (Cap. 215) is inconsistent with and contravenes Article 21, article 31(1) of the Constitution in so far as it permits only a wife to obtain alimony and does not afford a husband the same opportunity;

(g) Section 27 of the Divorce Act (Cap. 215) is inconsistent with and contravenes Articles 21(1) & (2), Article 31(1) and Article 33(1) & 6 of the Constitution in so far as it permits a successful husband petitioner to claim property of his wife and does not afford the same opportunity to a successful wife petitioner.”

In the affidavit in support of the petition one of the petitioners, Jacqueline Asiimwe Mwesigye, avers as follows:

- “1. THAT I am Coordinator of Uganda Women’s Network(UWONET), Ugandan non-governmental organization registered in 1993, whose overall mission is the transformation of the unequal gender relations in society, and the fostering of gender equity and the creation of a society free from all forms of discrimination both in law and in practice;
2. THAT I am a believer in constitutionalism, and the rights of women generally and in particular their right to equality and non discrimination on the basis of sex;
3. THAT I bring this action in the public interest and in observance of my constitutional duty and obligation to uphold and defend the Constitution;
4. THAT I verily believe that Sections 5(1), 5(2), 6, 22,23,24,25 and 27 of the Divorce Act (Cap. 215) are unconstitutional and are a violation of the right to equality and non discrimination on the basis of sex and are a violation of the right of men and women to equal rights at the dissolution of marriage;
5. THAT I verily believe that keeping the Divorce Act (Cap. 215) in its present form on our statute books has the effect of perpetuating inequality between the sexes as well as discrimination on the basis of sex and is a violation of the rights of women;
6. THAT I verily believe the Divorce Act (Cap. 215) is a law which is against the dignity, welfare or interest of women and undermines their status in as far as it maintains and entrenches inequality between men and women and discrimination on the basis of sex through Sections 5 (1), 5(2), 6, 22,23, 24,25 and 27 of the said Act;
7. THAT I verily believe that the Divorce Act (Cap. 215) in its present form does not

accord women full and equal dignity with men as required by the Constitution since Sections 591, 5 (2), 6, 22, 23, 24, 25 and 27 of the said Act by inference treat women as less than men;

8. *THAT I verily believe that the Divorce Act (Cap. 215) does not accord all persons especially women, equality before and under the law, nor does it confer equal protection of the law as required by the Constitution, since by its Sections 5 (1), 5 (2), 6, 22,23,24, 25, and 27 women are discriminated against and do not have the same rights as men;*
9. *THAT I swear this affidavit in support of a joint petition for a declaration that S.5 (1), (2), 6, 22, 23, 24, 25 and 27 of the Divorce Act (Cap. 215) are unconstitutional and a violation of International Human Rights Conventions to which Uganda is signatory."*

This petition is yet to be heard and determined but it is a clear example of strategic litigation by gender activists, whether groups or individuals on behalf of others, mainly vulnerable members of our society. The groups are using constitutional provisions to promote better protection of human rights and the Courts must employ judicial activism in order to realise the promise of the new Constitution.

Conclusion:

There is growing interest in public interest litigation as a strategy to promote constitu-

tionism, human rights and social justice. The old strict rule of *Locus Standi* is being liberalised by judicial activism and legislative innovations.

The application of international human rights norms to the jurisprudence of public interest litigation is a welcome development. The strategy must not lose sight of one of its main purposes, which is to make human rights meaningful for large masses of the people and other vulnerable groups in our societies.

The case of Uganda demonstrates that the reform of the rule of *Locus Standi* through Constitutional or legislative reform can stimulate public interest litigation by spirited individuals and groups on behalf of others. The scope of such intervention extends to the entire spectrum of human rights, constitutional and legal, civil and political as well as economic, social and cultural rights.

The role of the judiciary in promoting public interest litigation remains crucial through judicial activism. The courts must create new methods and devise new strategies for the purpose of providing access to justice to large masses of people who are denied their basic human rights and to whom freedom and liberty have no meaning. The Courts will however be more successful in this endeavour if judicial activism is supported by legislative reform.

ACCESS TO THE COURTS FOR THE POOR

by
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Chief Justice of Tanzania

(A short paper presented at a meeting of the Conference of the Commonwealth Magistrates' and Judges' Association, held at Mangochi, Malawi on 24–29th August, 2003).

A prominent Indian jurist once said: “Judges should be dear, but justice should be cheap.” Cheapness of justice is one of the principal aspects of access to justice. The Constitutions of many countries guarantee freedoms and human rights, but it is universally acknowledged, I think, that the enjoyment or exercise of those freedoms and rights to a very large extent depends upon the existence of the right of easy and expeditious access to justice. Without that right, the enjoyment of many other rights cannot be assured. Sadly, more than fifty years after the United Nations Organisation adopted and proclaimed the *Universal Declaration of Human Rights* the poor in many countries still find themselves having to struggle against laws or practices which unreasonably limit the enjoyment of their fundamental rights, including the right of access to justice. In this paper, I propose to examine, very briefly, the subject of *access to the courts by the poor*.

One can hardly speak of rule of law if there is no right of access to courts. That right is a cardinal feature of the rule of law. The importance of it has been pointed out by many eminent judges. In her judgment in *Chief Direko Lesapo v (1) North West Agricultural Bank (2) Messenger of the Court, Ditsobotla*, Case CCT 23/99, with which the rest of the members of the Constitutional Court of South Africa agreed, Makgoro, J., expressed the importance in the following words:-

“The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in

this context of the rule of law and the principle against self help in particular, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable”.

Emphasizing the importance of the principle of equality before the law to the rule of law, Rahman, J., said the following in *Faroque v Secretary of the Ministry of Irrigation. Water Resources and Food Control (Bangladesh) and others*, [2000] 1 LRC 1, at p.28:

“If justice is not easily and equally accessible to every citizen there can hardly be a rule of law. If access to justice is limited to the rich, the more advantaged and more powerful sections of society, then the poor and the deprived will have no stake in the rule of law and they will be more readily available to turn against it. Ready and equal access to justice is a sine qua non for the maintenance of the rule of law. Where there is a written Constitution and an independent judiciary and the wrongs suffered by any section of the people are capable of being raised and ventilated publicly in a court of law there is bound to be greater respect for the rule of law.”

The poor encounter many barriers in their struggles to have access to courts. These barriers include the following:

- (1) High court-fees
- (2) Expensive services from advocates
- (3) Courts being located too far away from them
- (4) Court procedures which are very technical
- (5) Non-familiarity with court language
- (6) Laws are enacted in languages which they are not familiar with
- (7) Laws are enacted in styles which are very difficult, if not alien, to them
- (8) Unfriendly court environment.

Of course, the intensities of these barriers differ from one country to another.

Should access to justice be *completely free*? In an ideal world that would, perhaps, have been the proper position. Do the financial capabilities of States permit the introduction of a judicial system in which the term court-fees has no place? The concept of equal justice is not a modern one. Research on it has shown that in the Roman period the poor were enabled access to justice by a system known as *Clientella*. Under that system the poor attached themselves to a powerful man who, in return for certain services and political support, the patron made legal assistance available to them in their litigation, among other fields. During the medieval period legal aid was treated as a charity. In England, legal aid to the poor is traceable to the *Magna Carta*, the charter extracted from King John in 1215 and which pledged that:-

“To no one will we sell, to no one will we deny, or delay, right or justice.”

Later this Charter gave rise to a statutory legal aid scheme. Today, in England, as in many other countries, legal aid is regarded as a very important aspect of administration of justice, particularly in the field of criminal cases. Should legal aid be recognized as a human right? This question is very important because quite often a person can enjoy human rights and freedoms only when he can enforce them. The barriers which I have referred to earlier, however, many times stand in the impoverished person's way. Equality before the law should not be a mere pious declaration. Courts should be as accessible to the poor as they are to the rich. In real life the poor need court services more than the rich do. When, for example, his bicycle is stolen, a poor man's suffering is likely to be much greater than the suffering a rich man is subjected to when his car is stolen. Generally speaking, access to justice will not mean much to a poor man if legal aid is not made available to him, at least in serious court proceedings, and if he is not exempted from paying court-fees or depositing some money as security for costs, for; as Professor Venice of Yale University once rightly asked:

“What does it profit a poor and ignorant man that he is equal to his strong antagonist before the law if there is no one to

inform him what the law is? Or that the courts are open to him on the same terms as to all other persons when he has not where-withal to pay the admission fee.”

The importance of the right to be heard through counsel cannot be over-emphasized. As was stated, in his characteristic style, by Lord Denning, M.R., in the well-known case of *Pett v Greyhound Racing Association Ltd.*, (1969) 1 Q.B. 125, at p.132.

“...It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weaknesses in the other side. He may be tongue-tied or nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man: “You can ask any question you like”, whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him. And who better than a lawyer who has been trained for the task?”

In every serious court proceeding an accused person or litigant should have the right to be represented by counsel. But what is the meaning of the term “serious proceeding” in this context? I would answer that question by saying that the term should mean a proceeding in which a man's reputation or livelihood is at stake. In such a proceeding legal aid should be recognized as a right of every poor person, and providing it as a constitutional obligation of the State. No one should face a criminal charge the conviction on which would attract a custodial sentence without having the opportunity to speak by counsel. Under no circumstances should legal aid be treated as charity as was done during the Medieval period. Advocates, on their part, should always remember that, as an American jurist once said, the most important thing a lawyer can do is to become an advocate of the powerless citizens.

The answer to the question what kinds of legal aid schemes should be put in place will, to a large extent, depend upon the circumstances prevailing in the particular country. What should principally be aimed at is giving the impoverished a stake in the rule of law. The doors of temples of justice should not be closed against anyone on the ground of his poverty or ignorance.

Should the system of charging court-fees be abolished? The charging of court-fees has been defended by some lawyers on the ground that it discourages frivolous and vexatious litigation. But this argument was eloquently demolished by Lord Macaulay in his criticism of a preamble of a Bengal Regulation of 1795 which purported to justify court-fees on that ground. His Lordship is on record as having said:

“...It is undoubtedly a great evil that frivolous and vexatious suits should be instituted. But it is an evil for which the Government has only itself and its agents to blame, and for which it has the power of proving a most efficient remedy. The real way to prevent unjust suits is to take care that there shall be just decision. No man goes to law except in the hope of succeeding. No man hopes to succeed in a bad cause unless he has reason to believe that it will be determined according to had laws or bad judges. Dishonest suits will never be common unless the public entertains an unfavourable opinion of the administration of Justice”.

Another basis for charging court-fees has been said to be governments’ financial inability to provide free access to courts. There may be some force in this argument, but the argument cannot constitute a warrant for denying access to justice to the poor. If court-fees charging is unavoidable, the State must ensure, through legislations and court practices, that court-fees can, in appropriate situations, be easily waived or at least reduced. As was rightly remarked by Judge Thomas Curtin, of US District Court:

“The court should be a place where anybody can come – whatever they have in their pocket – and be able to file a

complaint in simple fashion and at least have somebody give consideration to it and give them an opportunity to be heard.

There is nothing morally wrong in taxing the rich an extra penny so that the poor may reach temples of justice.

Removing the barriers I have discussed will not be enough to give the poor access to courts; further measures must be taken. The following are, in my opinion, some of those measures:

- (1) Locating court-houses near where the poor live.
- (2) Laws being enacted in a language or languages which the ordinary man understands, or at least being translated into those languages.
- (3) Laws, as far as possible, being enacted in a simple style.
- (4) Court proceedings being conducted in a language which litigants know best.
- (5) Simplifying court procedures, thereby doing away with unnecessary technicalities.
- (6) Courts taking a liberal and realistic approach on the issue of locus standi especially in constitutional and environmental matters.
- (7) Translation, printing and dissemination of basic statutes and legal information.
- (8) Establishment of the cadre of paralegals.
- (9) Eradicating corruption in the judiciary.

If the impoverished see the judicial system as mainly serving the interests of the rich and the powerful, the demise of the rule of law and democracy will become inevitable. If this paper provokes great interest in steps which can be taken to prevent that tragedy taking place, it will have served the purpose for which it has been prepared.

A JUDGE'S DUTY IN A REVOLUTION – THE CASE OF MADZIMBAMUTO V. LARDNER-BURKE

by
Sir Sydney Kentridge Q.C.

This is a slightly developed version of the annual Incorporated Council of Law Reporting annual lecture given at the Middle Temple Hall, London, England on 6 March 2003. We are grateful for permission to publish it here.

When Judge Nicholas Chambers invited me to give this year's annual ICLR Lecture, I was told that the subject of the lecture could be on any case reported in the Law Reports during the past 135 years. I chose the case of *Madzimbamuto* and *Lardner-Burke*, an appeal to the Privy Council from Southern Rhodesia reported in the Appeal Cases of 1969. This once celebrated constitutional case has passed into history. The case arose from UDI, the unilateral declaration of independence from the United Kingdom made by the Prime Minister of Southern Rhodesia, Mr. Ian Smith and his Rhodesian Front cabinet. This declaration was obviously illegal under the existing constitution of the colony. Nonetheless, the issue of the legality of Mr. Smith's government and its decrees came before the judges of the High Court of Southern Rhodesia. The litigant who brought the case before the court was the wife of a black political activist, Mr. Daniel Madzimbamuto who had been detained without trial by Mr. Smith's Minister of Justice, Mr. Lardner-Burke. Mrs. Madzimbamuto brought an application for her husband's release on the grounds that the minister was not in law a minister and had no legal authority to order the detention. This case was heard by two courts in Southern Rhodesia and eventually reached the Privy Council. But Mrs. Madzimbamuto's path to the Privy Council was a long one and entails a quick look at the history of Southern Rhodesia.

But first, I must answer an obvious question. The colony of Southern Rhodesia became the independent Republic of Zimbabwe in 1980. Mr. Smith and his regime disappeared from the

political scene. So why choose *Madzimbamuto* as the subject of a lecture? There are two reasons. First, the arguments and authorities considered in the three courts covered an unparalleled range of historical and jurisprudential material including the Statute of Treasons of Henry VII, the writings of Grotius and other seventeenth century civil lawyers, cases arising after the United States Civil War, the defence of necessity and the theories of Professor Hans Kelsen whose concept of the *Grundnorm* had a rare outing from Academia. Second, the case raised in the most direct way the issue of the duty of the Southern Rhodesian judges. These judges, it must be remembered, were the Queen's judges, all of whom had taken an Oath of Allegiance and a Judicial Oath. They had sworn to be faithful and bear true allegiance to Her Majesty Queen Elizabeth II, her heirs and successors, according to law, to serve the Queen in the office of judge of the High Court and to do right to all manner of people after the laws and usages of Southern Rhodesia ...” What were the judges required to do faced with a revolution, albeit a peaceful one, by the government itself? As the independence of the judiciary is a matter of universal concern the response of the Southern Rhodesian judges to this challenge seems to me a subject of continuing fascination.

There is a third reason why I chose the *Madzimbamuto* case as my subject. I was counsel for Mrs. Madzimbamuto in the High Court and the Appellate Division of the High Court of Southern Rhodesia and then in the Privy Council. Under the current and more relaxed Code of Conduct of the Bar of England and Wales I believe that sufficient time has passed for me to discuss these cases without impropriety.

Now let me go back to the history. The territory which became Southern Rhodesia and is now Zimbabwe became British by conquest in the late nineteenth century. The territory was

formally annexed to the Crown as the colony of Southern Rhodesia in 1923 but the ultimate legislative authority remained the United Kingdom Parliament and the Sovereign acting on the advice of her United Kingdom ministers. There was a short period in the late 1950's when the colony became a constituent part of the short-lived Federation of Rhodesia and Nyasaland. On the dissolution of the Federation, the Parliament of the United Kingdom passed an act which authorised the Queen by Order in Council to grant to Southern Rhodesia a new constitution, providing for a greater degree of self-government. Under this constitution, known as the 1961 Constitution, the Queen was represented by a Governor who was to act on the advice of a cabinet of Southern Rhodesian ministers, who were responsible to the elected legislature of the colony. The significant change was that the Southern Rhodesian legislature could, subject to a few exceptions, by a special procedure amend the constitution itself. The exceptions included the position of Her Majesty as Sovereign, the appointment of the Governor, appeals to the Privy Council (which were preserved), and the composition of the legislature. Under the 1961 Constitution Southern Rhodesia remained a Crown Colony over which the United Kingdom Parliament retained complete legislative power. Southern Rhodesia was therefore something of a hybrid. It was not a self-governing dominion but it had more self-government than most Crown Colonies.

At the root of Mr. Smith's declaration of independence was the Southern Rhodesian franchise. The existing franchise qualifications were not expressed in racial terms. They were expressed in terms of property ownership, income and level of education, but given the poverty of the African population and their lower level of education, the franchise was in practice heavily weighted in favour of the White population. The White population in 1965 was no more than 220,000; the Black population was over 4 million. Yet, in 1965 the legislative assembly had 51 White members (all but one belonging to Mr. Smith's Rhodesian Front) and 13 African members. Under the 1961 Constitution special procedures were required for altering the qualifications of voters. Even under the 1961 Constitution it would have been many years before Black

voters acquired parity with White voters, let alone majority rule, but the policy of the United Kingdom, whether under Labour or Conservatives, was movement towards parity, and at some undefined future time, majority rule. Mr. Smith's frankly avowed policy was "no majority rule in my lifetime". (Mr. Smith is still alive.) The maintenance of White political supremacy was the admitted motive for Mr. Smith's attempt to escape the sovereignty of the United Kingdom.

I shall not recount the events of the period before the Unilateral Declaration of Independence on the 11th November 1965. I would note only that on the 6th November the Southern Rhodesian government lawfully declared a state of emergency. On that day, acting under emergency powers, Mr. Lardner-Burke as Minister of Justice issued a detention order against Mr. Daniel Madzimbamuto. It was at no time disputed that Mr. Madzimbamuto's detention at that stage was lawful.

On the 11th November Mr. Smith and his cabinet proclaimed their Declaration of Independence. They prefaced their Declaration with a lame and indeed impertinent parody of the American Declaration of Independence. Two aspects of the American declaration were omitted from Mr. Smith's proclamation. He forbore to assert that "all men are created equal", and that the governmental power was derived "from the consent of the governed". In this Declaration, Mr. Smith purported to declare the country an independent sovereign state and to "give" to the country a new constitution in place of the 1961 Constitution. Under this constitution, throughout referred to as the 1965 Constitution, the title of Queen of Rhodesia was conferred on Her Majesty Queen Elizabeth II, and the functions of the governor would be vested in "the officer administering the government". Under the 1965 Constitution the existing legislative assembly was to continue, but as the Parliament of Rhodesia; and the existing cabinet was continued in office.

The United Kingdom government (then Mr. Harold Wilson's government) reacted immediately. Her Majesty, acting in terms of her powers under the 1961 Constitution, dismissed what had been Her Majesty's ministry in Southern Rhodesia. A few days

later the United Kingdom Parliament passed the Southern Rhodesia Act 1965 which declared that Southern Rhodesia continued to be part of Her Majesty's dominions, and authorised Her Majesty by Order-in-Council to make laws for Southern Rhodesia.

In pursuance of that power Her Majesty made an order declaring "for the avoidance of doubt" that the purported promulgation of the 1965 Constitution was void and of no effect and that henceforth no laws might be made by the legislature of Southern Rhodesia. There was no doubt that under the constitutional provisions governing Southern Rhodesia at the time of the Declaration of Independence the United Kingdom Act of Parliament and the Queen's Order-in-Council had the force of law.

Mr. Smith paid no heed to them. The legislature acting as the Parliament of Rhodesia under the 1965 Constitution continued to pass laws, and the ministers continued to exercise executive powers. The civil service continued to obey the directions of Mr. Smith's government as did the police and the army. The fact was that Mr. Smith's legislature and executive had effective control of the whole country.

On the other hand the United Kingdom government had declared its intention to restore constitutional government to Southern Rhodesia. Mr. Wilson had at an early stage disavowed the use of force but applied economic sanctions which were in due course strengthened by a resolution of the United Nations. No foreign government, not even South Africa, accorded *de jure* or *de facto* recognition to the new regime.

Although under the United Kingdom Act of Parliament the Queen had full power to make laws for Southern Rhodesia, she in fact did not make any laws. The Governor remained in his official residence in Salisbury, as it then was, and did not resign his office as Governor under the 1961 Constitution, but with trivial exceptions did not exercise any of his functions under that Constitution. Immediately after UDI he received instructions from the Queen which he passed on to the citizens of the colony. This was the Governor's statement

"In accordance with the Queen's instructions I have informed Mr. Smith and his colleagues that they no longer hold office. I call on the citizens of Rhodesia to refrain

from all acts which would further the objects of the illegal authorities. Subject to that, it is the duty of all citizens to maintain law and order in this country and to carry on with their normal tasks. This applies equally to the judiciary, the armed services, the police and the public service."

This message became the subject of considerable debate in the courts.

I must now go back to Mr. Madzimbamuto. Under what I will call the 1961 laws, the state of emergency proclaimed by the Governor on the 6th November 1965 automatically expired after three months. Immediately before its expiry the Parliament sitting under the 1965 Constitution authorised the extension of the state of emergency and authorised regulations providing for the continued detention of any person detained under the preceding emergency. Mr. Madzimbamuto thus remained in prison. It was at that stage that Mrs. Madzimbamuto applied to the High Court for the release of her husband and a declaration that his continued detention was illegal. At the end of June 1966 her case came before two judges of the High Court. Mrs. Madzimbamuto's case was fundamentally a simple one. Her case was that under the 1961 Constitution and in light of the United Kingdom legislation which had followed the Declaration of Independence, no decrees or actions purportedly taken under the authority of the 1965 Constitution had any legal validity. The court should protect the liberty of the subject against the decrees of persons claiming to be ministers but acting without any legal authority.

I have not so far said anything about the position of the High Court under the 1965 Constitution. At the time of the Unilateral Declaration of Independence, all the judges of the High Court had taken the oaths to which I have referred. The 1965 Constitution provided that every judge appointed under the 1961 Constitution could continue in office as if he had been appointed under the 1965 Constitution. But the 1965 Constitution also provided that the Prime Minister could require a judge "to state forthwith whether he accepts this Constitution". If the judge refused to do so his office would be deemed to have become vacant. None of the judges had been called upon by the Prime Minister to state whether

they accepted the 1965 Constitution and none of them had done so. The two judges hearing the case sat as judges under the 1961 Constitution and made it clear throughout that they were doing so.

The Smith government did not ignore these court proceedings. From the beginning it treated the case as a test of its authority. Mr. Lardner-Burke, who was the first respondent in the case, boldly contended that as there had been a successful revolution the old 1961 order had been completely replaced by a new, 1965, order. Whether the new order had come about in a legitimate way or not was irrelevant. Strangely enough, the Smith government in those proceedings recognised that the judges were sitting as judges under the 1961 Constitution and had not accepted the 1965 Constitution, yet it was asking those judges to declare that the 1961 Constitution had disappeared and been replaced by a new one.

When I was a law student a good deal of time was devoted in the jurisprudence course to the writings of Professor Kelsen. One would hardly have guessed that Professor Kelsen would be extensively quoted and relied on in British colonial courts in the years to come. Professor Kelsen's doctrine was that all the norms or rules of a legal order derive their ultimate validity from a basic law or *grundnorm*, usually a constitution. When we reach that ultimate constitution, we cannot look beyond it: we must simply presuppose its validity. If that ultimate basic law is displaced, for example by a revolution, and the citizens of the state accept the new order, that new order becomes the *grundnorm* from which all legal authority will in future be derived. Counsel for Mr. Lardner-Burke submitted that that is what had happened in Southern Rhodesia. He was able to refer to judgments of the Supreme Courts of Pakistan and Uganda which, sitting after coups d'état, had on the basis of Kelsen's theory held that the old constitution had been effectively annulled and that there was a new *grundnorm* in each of those countries.

This argument did not convince the High Court. They said, that even if the Smith government was at present in complete and effective control of Rhodesia, it could not be said that there had been a successful revolution. The United Kingdom had not abandoned sovereignty over the country nor could it be

said that the measures taken by the British Government to put an end to the revolution would be doomed to failure. Lewis J., the presiding judge, emphasised that the judges derived their powers from the 1961 Constitution. He said that if he were to hold that the 1965 Constitution was the legal constitution of the country and the rebel government was the lawful government, he would be false to his judicial oath and false to his own oath of allegiance. He said that any judge who took up office under the 1965 Constitution would be taking up such office purely through political expediency, would be aiding the government from a political point of view, and that his decisions upholding everything done under the 1965 Constitution would have no value as legal decisions.

But Mr. Lardner-Burke had an alternative argument. He argued that even if Mr. Smith's government was not the *de jure* government, it was the *de facto* government in that it was the only effective government of the country. The court should therefore recognise at least those of its acts which were done for the preservation of law and order.

The concepts of *de jure* and *de facto* governments are well known in international law and relate to the recognition by foreign governments of a new government or regime in an existing state. Here the court was asked to apply the concept of *de facto* recognition to an illegal government sitting within the territory of its own jurisdiction.

On the other side, the argument for Mrs. Madzimbamuto was unequivocal. The fact that the present government was in effective control of the country was irrelevant. The court, being bound by the 1961 Constitution, could not recognise the so-called Parliament of Rhodesia; nor could it recognise any actions of ministers who had been dismissed by the Queen. The court should not be swayed by arguments that the measures of the unlawful regime were necessary for the preservation of peace and good government. The way to preserve those was for the rebel regime to return to legality.

The court described this as a very far-reaching submission as indeed it was. What it meant, they said, was that since the 11th November 1965 there had been a vacuum in the law of Southern Rhodesia.

Lewis J. and his colleague (Goldin J.) held that it was not for the court to try to force the government to abandon the revolution, even supposing that it could do so, and felt able to recognise the admittedly illegal regime as a *de facto* government. They took comfort from two remarkable sources of authority. The first was a passage in the celebrated work of the great 17th century Dutch jurist, Grotius, *De Jure Belli ac Pacis* – The Law of War and Peace. This classic work laid the foundations of modern international law. Grotius was also, of course, one of the greatest writers on the classical Roman-Dutch law which was the common law both of South Africa and of Southern Rhodesia. The passage on which the judges relied fell under a sub-title, “*How far obedience should be rendered to a usurper of sovereign power.*” In this passage Grotius speaks of the usurper who has unlawfully assumed power in a state.

“1. Now while such usurper is in possession the acts of government which he performs may have a binding force, arising not from a right possessed by him, for no such right exists, but from the fact that the one to whom the sovereignty actually belongs, whether people, or king, or senate, would prefer that measures promulgated by him should meanwhile have the force of law, in order to avoid the utter confusion that would result from the subversion of laws and suppression of the courts.

.....

However,

In the case of measures promulgated by the usurper ... which have as their purpose to establish him in his unlawful possession, obedience is not to be rendered unless disobedience would involve grave danger.”

It is easy to see why counsel for Mr. Lardner-Burke relied strongly on this statement by one of the greatest of European lawyers. There was in it an echo of that part of the Governor’s message where, in the name of the Queen, he stated that “it is the duty of all citizens to maintain law and order in the country and to carry on with their normal tasks”.

The second source of authority relied on by the judges was a series of cases in the United States

Supreme Court. At the end of the American Civil War questions arose in the United States courts whether any recognition should be given to any official acts of the Confederate States performed while those states were in rebellion against the United States. So one had the extraordinary sight of counsel and judges in wigs and gowns in the heat of tropical Africa debating in detail judgments which in their own country had passed into legal history.

The cases were undoubtedly fascinating in themselves. The leading case was *Texas v. White*. There Chase C.J. held in the first place that the Confederacy itself and its constitution were “absolutely null” and that legislature of Texas, established in hostility to the constitution of the United States, could not be regarded in the courts of the United States as a lawful legislature or its acts as lawful acts. Nonetheless, the government of Texas during the secession was in full control of that state as a *de facto* government. Then he said, in words constantly quoted in later cases and adopted by the Southern Rhodesian court the following –

“Acts necessary to peace and good order among citizens, such, for example, as acts sanctioning and protecting marriage and domestic relations, ... regulating the conveyance and transfer of property, ... and providing remedies for injuries ... and other similar acts which would be valid if emanating from a lawful government must be regarded, in general as valid when proceeding from an actual though unlawful government”.

Later cases extended the scope of acts which could be recognised to police regulations and the prosecution of crimes. But every American judgment excluded from recognition any acts which tended to impair the supremacy of the national authority (i.e. the United States) or which impaired the rights of citizens under the United States Constitution.

On these precedents the High Court, sitting as a court under the 1961 Constitution, held that the declaration of the state of emergency and the detention of Mr. Madzimbamuto although unlawful should be recognised as valid measures taken for the maintenance of peace and order by a *de facto* government. Lewis J. summed up his conclusions by saying that –

“On the basis of necessity and in order to avoid chaos and a vacuum in the law, the court would give effect to such measures of the effective government as could lawfully have been taken by the lawful government under the 1961 Constitution for the preservation of peace and good government and the maintenance of law and order.

The extensions of the state of emergency and the detention measures were all within that category; they had not been shown in their purpose to have been hostile to the authority of the sovereign power or to have impaired the just rights of citizens under the 1961 Constitution or to have been taken with actual intent to further the revolution.”

Goldin J. reached a similar conclusion. So Mrs. Madzimbamuto’s application was dismissed.

One can well understand and even sympathise with the unusual position in which the judges found themselves. Nonetheless their judgments gave rise to some troubling questions.

First, the recognition of the regime as a *de facto* government. Such recognition by the sovereign’s own court was not only unprecedented but contradictory. The judges adopted, from an English case, the definition of a *de facto* government as one exercising all the functions of government, including maintaining courts of justice. When a government does not appoint its own judges but submits the question of its status to the courts of the lawful sovereign how then can it be a *de facto* government? As to Grotius, should he not be read as giving sensible advice to subjects in the power of the usurper rather than advice to the sovereign’s judges? In *Texas v. White* and the other United States cases, the acts recognised as valid after the Civil War were acts related to property, contracts, marriages and ordinary crimes. Save for arrests on ordinary criminal charges there is no case in which the executive’s interference with the liberty of the subject was recognised. Moreover, the courts would not recognise any act done in conflict with the Constitution of the United States or which impaired the supremacy of the lawful government. One recalls that the Governor’s message called upon all citizens “to refrain from all acts which might further the objectives of the illegal

authorities”. Surely there was no act more likely to further the objectives of the illegal authorities and to impair the supremacy of the lawful government than the act of the court itself in recognising the rebel regime as a *de facto* government. Nor could there surely be anything more calculated, in Grotius’ phrase, to establish the usurper in his unlawful possession.

That was certainly the view of Mr. Smith himself. In a speech made on the day that the judgment was given Mr. Smith declared the judgment to be a victory as it accorded his government “*de facto* recognition”. What the effect would have been if the court had refused recognition one can only speculate. There was certainly one aspect of executive power which the Smith government did not venture to exercise as long as its legal status remained doubtful. At this there were many prisoners under sentence of death, their appeals exhausted, who had been awaiting execution for months, even years. Those who had the heavy task of hanging the condemned men apparently had qualms about doing so on the orders of an unlawful government.

Nor do the judgments seem to have paid much attention to the rights of Mr. Madzimbamuto himself. He was detained, as the court itself found, by an unlawful government on the orders of persons holding no office under the 1961 Constitution. What of his constitutional right to liberty? The judges had sworn to “do right to all manner of people after the laws and usages of Southern Rhodesia”. Under those laws and usages his detention was plainly illegal. Some might say that the duty of the court was to do right to Mr. Madzimbamuto, not to fill a supposed vacuum in the law.

In 1879 the government of what was then the Cape Colony acting without lawful authority arrested a local chieftain and in justification contended that the disturbed state of the country necessitated the arrest. One of the greatest of South African judges, Chief Justice (later Lord) de Villiers said, however –

“The disturbed state of the country ought not ... to influence the Court for its first and most sacred duty is to administer justice ... and not to preserve the peace of the country ... the civil courts have but one duty to perform and that is to administer the laws of the country without fear,

favour or prejudice independently of the consequences which ensue”.

Eighty years later in an English case arising from Northern Rhodesia (as it then was) an English judge said this “there may come times in a country’s history when it may appear highly inconvenient or politically hazardous that the law should pursue its course, but in a court of law such considerations are irrelevant and cannot serve to deprive the subject of a right ...”.

Such citations were shrugged off by the judges of the High Court.

The High Court gave its judgment in September 1966. Mrs. Madzimbamuto appealed to the Appellate Division of the High Court where a hearing before five judges began on the 30th January 1967. The Appellate Division was presided over by the Chief Justice, Sir Hugh Beadle, a considerable figure in Southern Rhodesian political and legal history. It must be emphasised that neither the Chief Justice nor his colleagues at that stage had joined the revolution. No member of the court had taken the oath under the 1965 Constitution. Consequently when the appeal hearing began the judges were still sitting as judges under the 1961 Constitution. Indeed, at the beginning of the appeal the Government did not persist in its contention that the 1965 Constitution was a lawful constitution.

After lengthy argument judgment was reserved. Some months later, and before judgment was given, the court asked for further argument on a number of points. The main question raised by the court was whether the citizens of Southern Rhodesia (presumably including the judges) still owed allegiance to Her Majesty. They also wished to hear argument on whether the English Treason Act of 1495 applied to the situation in Southern Rhodesia. In addition, notwithstanding the original disavowal by counsel for the government, the court invited argument on whether the 1965 Constitution had become the lawful constitution of Southern Rhodesia. I should immediately say, for the benefit of those not familiar with the Treason Act of 1495, that that statute was a product of the Wars of the Roses during which the possession of the English throne had fluctuated with the fortunes of war. What it provided, in brief, was that allegiance was owed by subjects to the King

“for the time being” and that those who served him would not be liable to be convicted of high treason if the rightful King regained the throne. The King for the time being might be called a *de facto* King. These points were enthusiastically taken up by counsel for the Smith government. The hearing resumed in October 1967 and judgment was given on 29th January 1968, a full year after the appeal had begun.

The five judgments of the appellate judges take up 197 printed pages. I shall not attempt to do more than give the gist of them. The Chief Justice held that although the court had originated from the 1961 Constitution, that constitution was in suspension and likely to remain so and therefore the court did not derive its present authority from that source. On the other hand, he said, the court did not derive its authority from the 1965 Constitution which was not the *de jure* constitution. The court derived its authority simply from the fact that the government in power allowed it to function. The regime was a fully *de facto* government and could lawfully do anything which its predecessors could lawfully have done under the 1961 Constitution. On this basis the emergency measures of the government were to be regarded as lawful. Sir Hugh said it was an admittedly unprecedented solution to an unprecedented problem. In the course of argument he suggested an analogy. He said that by the year 1900 zoologists believed that they knew of the existence of every possible genus of large animal. But then an explorer in central Africa discovered the okapi. Although the okapi could not be fitted in to any known genus, that did not justify a refusal to acknowledge the animal’s existence. Perhaps, he said, the case before him might be the okapi of jurisprudence. Counsel retorted, more or less respectfully, that at least the okapi was discovered and not invented.

Mr. Justice Jarvis on the other hand stated that the court remained a court under the 1961 Constitution, as the regime had not usurped the functions of that court. The regime was not the lawful government but did constitute a *de facto* government. Like the High Court he was prepared to give legal effect to any of its acts which could have been lawfully done by the government under the 1961 Constitution.

Mr. Justice Macdonald took a radically different approach. He held that allegiance was

now owed exclusively to “the State of Rhodesia” and The Queen through her United Kingdom Government had withdrawn its protection from Southern Rhodesia and thus forfeited her claim to its allegiance. The government was a *de jure* government and the 1965 constitution was the *de jure* constitution and the court was exercising its power under the authority of the new regime and not under the 1961 Constitution.

Mr. Justice Quenet also held that the 1961 Constitution had disappeared. The regime and the 1965 Constitution had acquired what he called “internal *de jure* status”. Thus two of the judges had asserted that the 1965 Constitution was now the legal constitution under which they exercised their authority, while a third, Beadle C.J. while not going so far had held that the 1961 Constitution was no longer operative.

The fifth judgment was given by Mr. Justice Fieldsend. I venture the respectful opinion that, Mr. Justice Fieldsend’s judgment is the clearest, and above all the most principled of the seven judgments given by the Rhodesian courts in the *Madzimbamuto* case. Fieldsend J. held that the Southern Rhodesian courts derived their existence and powers solely from the 1961 Constitution. In ruling upon the validity of any legislation the yardstick was still the 1961 Constitution. As to the approach of the Chief Justice, the fact that the rebel regime had allowed the court to sit could not constitute a new basis for its jurisdiction. The judicial power was still exercised in the name of the lawful sovereign and the rebel regime, not having a judicial arm, could not be said to be a *de facto* government. In any event, a court owing its existence to a lawful constitutional order could not recognise the existence within its own jurisdiction of a rebel *de facto* government. I should like to quote from one paragraph of the judgment of Fieldsend J.

“Judges appointed to office under a written constitution, which provides certain fundamental laws and restricts the manner in which those laws can be altered, must not allow rights under that constitution to be violated. This is a lasting duty for so long as they hold office, whether the violation be by peaceful or revolutionary means. ... The court must stand in the way of a blatantly illegal

attempt to tear up a constitution. If to do this is to be characterised as counter-revolutionary, surely an acquiescence in illegality must equally be revolutionary. Nothing can encourage instability more than for any revolutionary movement to know that if it succeeds in snatching power it will be entitled ipso facto to the complete support of the pre-existing judiciary in their judicial capacity. It may be a vain hope that the judgment of a court will deter a usurper, or have the effect of restoring legality, but for a court to be deterred by fear of failure is merely to acquiesce in illegality.”

Fieldsend J. nonetheless held that although the rebel government could not be recognised as even a *de facto* government, the necessities of the factual situation might require the court to recognise some particular acts directed to and reasonably required for the ordinary running of the state. On the evidence of the security situation in Southern Rhodesia he was prepared to find that the continuance of a state of emergency was necessary for the preservation of peace and order.

As it happens the judges in the Appellate Division had discerned a flaw in the regulation under which Mr. Madzimbamuto was being held, a flaw which had nothing to do with the constitutional question. On that ground alone they upheld the appeal knowing that the government could (as it did) correct the flaw within 24 hours. Their judgments on the constitutional issue stood notwithstanding Mrs. Madzimbamuto’s technical victory, and Mr. Madzimbamuto remained in prison.

Mrs. Madzimbamuto did not accept that this was the end of the line. She applied to the Appellate Division for leave to appeal to the Privy Council. At the same time a similar application was made on behalf of three Africans who were awaiting execution. Their application and Mrs. Madzimbamuto’s were both refused. It was open, however, to Mrs. Madzimbamuto to approach the Privy Council itself for leave to appeal. The three Africans were theoretically also entitled to make an application to the Privy Council but at that stage the Solicitor General, speaking on behalf of the Smith government, informed the Court that no order of the Privy Council would be obeyed in Rhodesia and, if the Appellate

Division were to order a stay of the execution pending an appeal to the Privy Council, that order would likewise be disobeyed. The Solicitor General's statement, a defiance of the Court, and its acceptance without demur by Sir Hugh Beadle and the other members of Court led to the resignation of Fieldsend J. Within the week the regime, its legal authority now endorsed by a majority of the Appellate Division, exercised that authority, not uncharacteristically, by hanging the three Africans. Thereafter the remainder of the Rhodesian judiciary, with one exception, continued in office recognising the 1965 Constitution.

Mrs. Madzimbamuto got to the Privy Council. Her application for leave to appeal against the Rhodesian judgment was accepted, notwithstanding the Smith government's statement that it would not obey an order of the Privy Council.

In the Privy Council I again appeared for Mrs. Madzimbamuto together with Mr. Louis Blom-Cooper whose knowledge of British Colonial law was unrivalled. Needless to say, the Rhodesian ministers took no part in the proceedings but Mr. Godfray Le Quesne appeared as *amicus curiae* together with Mr. Andrew Bateson and Mr. Stuart McKinnon. Over nine days in the Privy Council all the precedents were again debated at length – Kelsen, Grotius, the American cases, the Treason Act of 1495. Some five weeks after the conclusion of the hearing the Privy Council upheld the appeal. The judgment of the majority of their Lordships was delivered by Lord Reid. Their conclusion was that the acts of the UDI Parliament and Ministry, were without any legal validity. Lord Reid stated that the Queen in the Parliament of the United Kingdom remained Sovereign in Southern Rhodesia. As to *de facto* and *de jure* governments, those were concepts of international law, quite inappropriate in dealing with the legal position of a usurper within a territory in which the Sovereign's judges still sat. Both the judges in the High Court and three in the Appellate Division had disavowed any suggestion that they were sitting as a court under the revolutionary constitution of 1965. The Treason Act of 1495, said Lord Reid, did no more than excuse a subject's obedience to a King *de facto*. It did not require recognition by the judges of a usurping government. The question of "necessity" was given detailed

consideration. The American cases were carefully examined. Lord Reid's conclusion was that they were concerned only with the civil claims of individuals after the end of the Civil War. None of them were cases of courts called upon during the rebellion to pass upon the legality of the governments of the rebel states or the validity of their legislation. None of the cases conferred validity upon acts of the Confederate States which were contrary to the United States Constitution. As to Grotius, it may be that he had stated a general principle, and had recognised the need to preserve law and order in territory controlled by a usurper, but no such principle could override an act of the Parliament of the United Kingdom. Lord Reid acknowledged that Her Majesty's judges had been put in an extremely difficult position. But he said, the fact that the judges had been put in this position could not justify disregard of the legislation passed or authorised by the United Kingdom Parliament. The Queen's Order-in-Council of 1965 had declared that every act done under the purported 1965 Constitution was void and of no effect; no doctrine of necessity could override that law of the Sovereign power. Lord Reid's judgment was concurred in by Lord Morris of Borth-y-Gest, Lord Wilberforce and Lord Pearson. Lord Pearce dissented. He held that there was scope, albeit limited, for the operation of the doctrine of necessity as defined in the judgment of Fieldsend J.

The Rhodesian judges did not accept the decision of the Privy Council. They continued to sit but now as judges under the 1965 Constitution. Apart from Mr. Justice Fieldsend the only exception was Mr. Justice Dendy Young. The refusal of his colleagues to recognise the Privy Council judgment prompted his resignation.

So ended the case of *Madzimbamuto v. Lardner-Burke*. There had been seven judgments in Rhodesia and two in London. I respectfully suggest that the majority in the Privy Council gave the right judgment. But my theme is not so much the merits of the judgments as the conduct of the judges. Faced with the revolution, did they do their judicial duty? Their duty as judges, in the case of all of them, stemmed from their acceptance of the Queen's Commission and their oaths. Their Oath of Allegiance to the Queen was an oath of allegiance to the lawful 1961 Constitution.

Their second oath was to do right to all manner of people after the laws and usages of Southern Rhodesia. At the time of UDI there was no doubt what the laws and usages of Southern Rhodesia were. They included the 1961 Constitution and the constitutional sovereignty of the Queen and the United Kingdom Parliament. It was clear what was lawful and what was not. Lewis J. and Goldin J. had both said that it was not the function of a court to attempt to end the revolution and restore legality. Beadle C.J. endorsed that view. That was tantamount to saying that the Court must not choose between legality and illegality. But as Fieldsend J. had said in a passage I have already quoted if a court standing in the way of a blatantly illegal attempt to tear up a constitution is to be characterised as counter-revolutionary, surely an acquiescence in illegality must equally be revolutionary. If the judges had resolutely adhered to the 1961 Constitution the usurpers would have had to make a difficult political decision. Until three judges of the Appellate Division had said that the 1961 Constitution was at an end the Smith government had not indicated that it would disobey the decisions of the Court. There was, no doubt, a strong possibility that if the judges had refused to give any recognition to the acts of the unlawful government, they would have been removed and replaced with more amenable judges. But that would not have been an easy political decision for Mr. Smith. And if adherence to legality had led to their forcible removal that would have one of those consequences which, on high authority, judges ought to disregard. Again to quote Chief Justice de Villiers of the Cape, the courts have but one duty and that is to administer the laws of the country independently of the consequences which ensue. The High Court judges and Sir Hugh Beadle responded by saying that circumstances were different or, as I would put it, that that great principle applies only when it does not really matter.

I have no doubt that until the end of the *Madzimbamuto* case it was entirely right for the judges to remain in office, in accordance with the Governor's direction. But once Mr. Smith had made it clear after the Appellate Division had given judgment that his government would not accept any limitation of its powers and would disobey orders of court not consonant with the 1965 Constitution, I find it

difficult to see how the judges could continue in office consistently with their oaths. As a matter of personal and political decision it was open to any of the judges to resign the Queen's Commission, to adhere to the revolution and to take office under the 1965 Constitution. But none of them was prepared to do that. Those who continued to sit and to apply the 1965 Constitution purported to do so by reason of purely legal considerations. There was much judicial talk of their duty to continue to administer justice and to the chaos which would ensue if the Privy Council judgment was to be accepted. There was no mention of the terms of the oaths¹ under which they had taken office nor of their duty to protect citizens from unlawful executive action.

Lord Atkin, once said in a case which reached the Privy Council from Nigeria that on issues affecting the liberty of the British subject "it is in the tradition of British justice that judges should not shrink from deciding such issues in the face of the executive."

Did the majority of the Rhodesian judges act in that tradition? I fear that they did not.

In my respectful opinion the honour of the Southern Rhodesian judiciary was maintained by Mr. Justice Dendy Young and Mr. Justice Fieldsend. In his letter to the Governor seeking to be released from his judicial duties, Mr. Justice Fieldsend said –

"Until now I have acted on the basis, that as a member of the court deriving its authority from the 1961 Constitution I was helping to safeguard the rights of citizens under that Constitution. It is my view that to continue in my office in the present circumstances, particularly in the light of the Government's declared intention not to recognise any right to appeal to the Privy Council, amounts to accepting abandonment of the 1961 Constitution ... This renders nugatory the protection which the court can afford to rights enshrined in the 1961 Constitution. ... I cannot accept this abandonment with all that it entails, and accordingly I do not feel that I can continue as a member of the court".

The rest of the story can be quickly told. The Smith government remained in office, fighting a debilitating and unwinnable guerilla war,

until 1978. A settlement in London brought independence and majority rule to the new Republic of Zimbabwe in 1980. The first Chief Justice of the new Republic was, fittingly, Mr. Justice Fieldsend. He and his successors maintained the independence of the courts against an increasingly unruly executive. Two years ago Chief Justice Gubbay was compelled to leave the Bench, under threat of forcible removal. The rule of law in Zimbabwe has virtually gone.

I seek no moral in the present state of Zimbabwe. One cannot attribute the present lawlessness to Mr. Smith's revolution, still less to the acquiescence in it of the Rhodesian judges. Nor is there any reason to think that if not for UDI President Mugabe would have been a more benign ruler.

But there may be a moral in the story of the Rhodesian judges. In any country with an independent judiciary there will always be some tension between the executive and the judiciary. Sometimes there will be pressure on the judiciary to pay special heed to the difficulties of government. The Rhodesian experience perhaps teaches us that any yielding to such pressures, whether on the plea of avoiding chaos, preserving peace or some lesser ground, may be the first step on a slippery slope. Such

pressures whether from government or the press or sections of the public must be valiantly resisted. Not long ago, after a judge had given a decision most unwelcome to the government, the judge was savaged by a section of the press, and an angry minister said that he was fed up with a situation where Parliament debates issues and judges then overturn them. "Parliament", he said, "did debate this and we are going to implement it."

As you will all recognise, neither the newspaper nor the minister were Zimbabwean.

My final word is that we should never assume that the independence of the judiciary is anywhere unassailable. It depends first on the integrity of the judges, which in this country we do not doubt, next on restraint observed by government, but equally on the support that we as citizens give to the judges in their exercise of their vital constitutional function.

Endnotes

- 1 Sir Hugh Beadle was Privy Counsellor. As such he had undertaken to be a true and faithful servant of the Crown, not to countenance any word or deed against the Sovereign but to withstand the same to the utmost of his power to bear faith and allegiance to the Crown and to defend its jurisdiction and powers.

GENERAL ASSEMBLY (AND ANNUAL GENERAL MEETING)

Minutes of the 13th General Assembly of the CMJA held on Friday 29 August 2003 at the Sun 'n' Sand Conference Centre, Mangochi, Malawi at 14.30pm

The President of the CMJA, Justice Richard Banda welcomed Delegates to the General Assembly. Those present remembered the judicial officers who had played a role in the Association's progress and had now passed away. There was a period of silence for the CMJA members to remember in particular:

Sir Thomas Skyrme
Justice Andreas Loizou
Professor Anthony Allott
Justice Najeme
Mrs Grace Ndacheredwa

The President then declared the Meeting open.

1. MINUTES AND MATTERS ARISING

The Minutes of the last General Assembly Meeting held in Edinburgh were taken as read. There being no amendments the Minutes were approved. Proposer: Sheriff Douglas Allan, Seconder: Justice Mensah Quaye.

There were no matters arising.

2. APOLOGIES FOR ABSENCE

Apologies for absence were received from Mr David Armati, Mr Fred Field, Mrs Clover Thompson Gordon, Judge Sandra Oxner and Sir John Walsh of Brannagh and Chief Justice Uwais of Nigeria who sent his best wishes for the Conference.

3. PRESIDENT'S REPORT

The President's report had been circulated with the Papers for the Conference. He reported that the CMJA had been active in the last three years in providing support to judicial officers in countries where there had been attacks on the independence of the judiciary such as Malawi, Zimbabwe, Fiji and Swaziland. He reiterated that it was important that members notify the Secretary General of any problems so that the Council could consider what action should be taken. The CMJA was conscious of its apolitical status. However, it could ask for

assistance from other organisations, as it had done in the past, in order to publicize the plight of judicial officers where necessary.

Turning to the Malawi Conference, the President thanked the Council for supporting the proposal for the Conference to be held in Malawi, which he recognised was not an easy decision. At times it had been thought that the Conference would not have been held but he welcomed all the participants to the Conference.

Members were the life blood of the Association and the President appealed to members to renew their subscriptions and to help promote the association and increase membership. In addition he appealed to members to contribute to the Commonwealth Judicial Journal by sending in articles to the Secretariat.

4. HON TREASURER'S REPORT

The Hon. Treasurer's Report was tabled at the meeting. He reported on the "bad news" that expenditure had exceeded income in the year ending 30 April 2003 by £24,642. The expenditure had been kept to a minimum and the Association only employed two people, the rest working on a voluntary basis. The Association had benefited through some generous support, including the Commonwealth Foundation grant worth 28% of our total income last year. This contribution by the Commonwealth Foundation was, unfortunately, likely to be less in the future.

If each delegate at this Conference can persuade four colleagues to register as individual associate members, then the extra income so derived would offset the deficit. Most lawyers had special ability in verbal persuasion and delegates should use these skills for the benefit of the Association to support the valuable work carried on by the CMJA. The Association was a registered charity. It was the international charity for magistrates and judges. It needed financial support through individuals registering as members. If each

person attracted four new members each year until the next Triennial meeting in 2006, then the individual associate membership would have enlarged to over 3000.

5. REPORTS FROM

5.1 EXECUTIVE VICE PRESIDENT

The Executive Vice President's report had been circulated with the papers for the Conference.

The Executive Vice President reported that the Association's influence was increasing steadily and it had asked to make representations to Commonwealth official bodies. He also reported on progress with the Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence and the Commonwealth Principles which had emerged from the Law Ministers Expert Working Group and which it was hoped would be placed before CHOGM.

He thanked Justice Banda, Judge Keith Hollis, Regional Vice Presidents and Council Members as well as Karen Brewer, Paul McDermott for their work for the Association over the last three years. The Association, could not progress without the voluntary work of its officers and members. He also thanked the Editorial Board of the CJJ and Nicky Padfield the Editor for their continued work.

He thanked Paul Norton who had taken over as Treasurer and the members of the Steering Committee for the Conference for their support for the Conference. The Executive Vice President pointed out that there were a number of Council Members who had contributed to the work of the Association and who were not going to be continuing on Council: Sybil McLaughlin, Graeme Garden, Harry Mawdsley, Dato' Ramalingam, George Manuhu, Fred Field, Jayan Prakash and Solon Nikitas on behalf of the Association he thanked them for their work.

Finally he urged Members to support the Association and in particular assist in bringing back the Indian sub-continent which was one of the major population areas of the Commonwealth.

5.2 REGIONAL VICE PRESIDENTS

The reports from the following regions were circulated in advance.

Caribbean
Central, Eastern and Southern Africa
North Atlantic and Mediterranean
Indian Ocean

The reports from the Pacific and West Africa were circulated at the meeting.

Central, Eastern and Southern Africa

The Regional Vice President congratulated Justice Banda and the Malawi judiciary for organising the Conference. He pointed out that Malawi should be proud as the 13th Triennial Conference could compete with any other held around the Commonwealth. He also felt that although there had been a long journey to get to Mangochi, this was all part of the educational programme of the Conference as learning about the problems faced in Malawi was an important part of the Association's work.

The reports were noted.

5.3 GENDER SECTION CHAIR

In the absence of the Gender Section Chair, the Secretary General reported that the Gender Section had held a successful Regional Caribbean and Gender Section Conference in Barbados in July 2001. There had also been a Gender Day held during the Jubilee Conference held in London in September 2002 focussing on HIV/AIDS; Domestic Violence and Gender-mainstreaming. The CMJA had also been contributing to the work of the Commonwealth Secretariat in this area in particular in regard to the forthcoming Commonwealth Women's Affairs Meeting to be held in Fiji in May 2004.

The report was noted.

5.4 SECRETARY GENERAL

The report from the Secretary General had been circulated in advance and was noted.

5.5 DIRECTOR OF STUDIES

The report from the Director of Studies had been circulated with the Conference papers.

Judge Hollis reminded the General Assembly that he was, like them, a full time sitting judicial officer. Bearing in mind the limited time he was given to devote to the education programme of the CMJA, he asked for support from members and for continued communication with him on a regular basis.

and approval of Council and consultation with the Charity Commissioners, new articles were proposed for adoption. He outlined the proposed amendments.

In response to a request for questions the North Atlantic and Mediterranean Region felt that the name of the region should be amended to reflect the South Atlantic membership of the CMJA. It was reported that such a change would not require General Assembly approval but could be accomplished by Council and Council were asked to consider this issue at their next meeting.

It was proposed by Judge Keith Hollis and seconded by Justice Petros Artemis and it was resolved that following approval from the Council, the Meeting approved the amendments made to the Articles of Association.

8. OPEN DISCUSSION

Joe Raulinga reported that during some of the panel discussions a number of issues were raised and these needed to be discussed within the region. In addition, the CMJA was asked to consider making public statements whenever there were problems with regard to the fulfilment of the aims of the Association. It had done so with regard to Zimbabwe, Malawi and Swaziland but the Council were asked why nothing had been said about Guantanamo Bay. Although the USA was not a Commonwealth country, the UK had been involved in the conflict. The Council were asked to consider this.

The Hon. Treasurer had circulated a draft Press Release which he asked members to use as a basis for any information sent to their local journals/newsletters which in turn would promote the CMJA and its aims.

9. ANY OTHER BUSINESS

CHIEF JUSTICES STATEMENT

The Secretary General read out the Statement of Chief Justices and Heads of the Judiciary representing 19 jurisdictions, which was issued on 24 August 2003. The General Assembly endorsed the statement of the Chief Justices.

GREETINGS FROM LADY RALPHS

The Secretary General read a greetings letter from Lady Enid Ralphs CBE, former Chairman of the Magistrates Association of England and Wales and long term supporter of the CMJA.

HONOURS SUB-COMMITTEE

It was reported that the Honours Committee was proposing that Mr David Armati should be nominated Hon. Life Vice President. The proposal was endorsed by acclamation.

In addition the Honours Sub-Committee had considered nominations for Hon. Life Membership for people who had provided tremendous service to the CMJA. The following names were proposed:

Mrs Sybil McLaughlin JP
His Worship Danladi Hallilu
Justice Solon Nikitas

The proposal was endorsed by acclamation

DATE AND PLACE OF NEXT TRIENNIAL

Traditionally, the CMJA received an invitation and presented a written invitation to the General Assembly. The General Assembly were very pleased to note that an offer had been received from the Canadian Superior Court Judges Association who were willing to host a Conference in Toronto, Canada for 2006.

NEW PRESIDENT, LORD HOPE OF CRAIGHEAD

The new President made the following speech:

Friends old and new, fellow judicial officers,

Time marches on relentlessly, as it has done throughout this Conference. But I hope that you will allow me to say just a few words in response to your decision to elect me as your President.

I am deeply conscious of the honour which has been bestowed on me, first by the Council in nominating me for this office and now by you all in the General Assembly for electing me. It is an honour not only for me but also for Scotland, which is the country to which I belong and which has had so many links with Malawi since the day when David Livingstone first came to the shores of the Lake 150 years ago.

I was first introduced to the CMJA by its joint founder, Sir Thomas Skyrme, in 1990 when I was the Lord President of the Court of Session in Scotland. It was he who persuaded me to take an interest in its activities. I certainly never expected then to become the Association's President. The fact that this is a

He also pointed out that for the first time, the United Nations Environmental Programme had been involved in a CMJA Conference, thanks to Sir Robert Carnwath who had organised the panel session on environmental rights. The Session had produced a Resolution which the General Assembly were invited to consider:

“This General Assembly

- (1) welcomes the Johannesburg Principles on the Rule of Law and Sustainable Development (adopted by the UNEP Global Judges Symposium on 18-20th August 2002) and the capacity building programme approved by the UNEP Governing Council at its 22nd Session in February 2003 (Decision 22/17/11A); and*
- (2) records CMJA’s commitment to co-operate fully with UNEP in the future implementation of this programme.”*

Proposer: Keith Hollis Seonder Wilson Masulu Musene. The General Assembly endorsed the Resolution.

5.6 REPORT FROM THE EDITOR OF THE CJJ

The report was noted.

6. ELECTION OF OFFICERS

The following Officers and Council Members were standing for the period 2003-2006

President: Lord Hope of Craighead (UK)

Caribbean

Regional Vice President:

Mrs Clover Thompson-Gordon (Jamaica)

Council Members

Chief Magistrate Kwasi Bekoe (Turks and Caicos)

East, Central and Southern Africa

Regional Vice President:

Mr Wilson Masulu Musene (Uganda)

Council Members

Mrs Gertrude Chawatama (Zambia)

Chief Magistrate Joe Raulinga (South Africa)

Indian Ocean

Regional Vice President:

Justice Dato’ Siti Norma Yaakob (Malaysia)

Council Members

Dr Booshan Domah (Mauritius)

To ask the General Meeting to authorize the Council to fill the vacancy

North Atlantic and Mediterranean

Regional Vice President:

Sheriff Douglas Allan (Scotland)

Council Members

Mrs Jean Hanson (England and Wales)

Justice John Jennings (Canada)

Pacific

Regional Vice President:

Mr Samuiela Palu (Tonga)

Council Members

Chief Magistrate Michael Hill (Australia)

Sir Robin Millhouse (Kiribati)

West Africa

Regional Vice President:

The Hon. Justice Mensah Quaye (Ghana)

Council Members

His Worship Dan Ogo (Nigeria)

Magistrate Paul Evande Mwambo (Cameroon)

The above were duly elected by the General Assembly.

As was the custom the President of the Association continued until the end of the Conference when the Badge of Office would be handed to the new President.

7. ANNUAL GENERAL MEETING

The Meeting then considered the business as required by the United Kingdom Companies Acts. It was proposed by Mr Joe Raulinga and seconded by Dr Booshan Domah and **it was resolved** that the Association’s Accounts for the year ending 30 April 2003 be adopted.

It was proposed by Mr Michael Lambert and seconded by Gertrude Chawatama and **it was resolved** that Messrs Alliotts Chartered Accountants be appointed for the forthcoming year.

It was proposed by Dr Booshan Domah and seconded by Justice Desiree Bernard and **it was resolved** that Lord Hope of Craighead be re-elected as a Director.

It was proposed by Mrs Gertrude Chawatama and seconded by Mrs Jean Hanson and **it was resolved** that Michael Lambert be re-elected as a Director.

The Executive Vice President informed the meeting that following the recommendation

position which I have not sought makes my election all the more special for me.

I should like to pay particular tribute to Richard Banda, my predecessor, for all that he has done for the Association during these past three years. I remember the justified pride which he took in the fact that he was the first President to have been elected from the African region in the 30 years of its existence, and his observation upon his election in Edinburgh that the honour was not only personal to him and his country but that it belonged to all Commonwealth Africa. The dignity and calm efficiency with which he has performed his duties has set a fine example for us all. We are deeply grateful for all he has done to make this conference in Malawi – his country, to which he has given such leadership and which has captured the hearts of all of us – such a success.

A moment ago I mentioned the name of Sir Thomas Skyrme. I am one of those who is fortunate enough to have known him, to have seen him in action and to have heard him speak. I am sure that no-one who was present at the General Assembly in Cape Town six years ago and heard him speak then, as he addressed us for what turned out to be the last time, will ever forget him – his magnetism, the clarity of his words and his rich, warm voice.

The CMJA was his creation. The vision which he had was inspired by the Commonwealth itself, now enlarged by the addition of Mozambique and Cameroon – 54 independent states, one third of all the countries in the world, one quarter of its population. It is bound together by its unity through the common law and the English language and by its diversity. It is bound together too by the principle of equal participation by all. Added to that was his vision of an association where magistrates and judges, judicial officers of all kinds from the highest to the lowest in the hierarchy, could join together to draw strength from each other and share experiences.

I am deeply conscious of the fact that, as judge, I have led a very sheltered life. I have spent my entire judicial career sitting as a judge in the appellate courts. But I have always recognised, as Tom Skyrme did too, that the face of justice for almost everyone in each of our countries is to be found in the lower courts – the courts of first instance. That is the coal face, as Paul Du Plessis, a regional magistrate from South Africa, said today in one of our Panel Sessions. It was in work done in the lower courts, without doubt, that Tom Skyrme's heart lay. I know that he would not want us ever to lose sight of that fact.

Behind all this was Tom Skyrme's realisation of the fact that we can never, in this uncertain world, take anything for granted. The principles of the separation of powers and the independence of the judiciary, in which we all believe, are so simple and so easy to state that there is always a risk that they will become no more than that: principles to which those in positions of power pay lip service but do not practise. They are nothing if they are no more than words. It is their practice which provides the guarantees which democracy needs if it is to survive.

The ideals for which Tom Skyrme stood were, above all, practical ideals, to be fostered by personal contact, by discussion and by training. In the years which lie ahead of me I shall do my best to live up to these ideals. I know that I can count on the support of each one of you as I try to do so.

May I end by wishing you all, as Richard Banda did in Edinburgh, godspeed as you return to your own countries. I look forward to our meeting again in three years' time in Canada.

Signed
President

BOOK REVIEWS

Reviewed by Mr Justice Gilles Renaud

Changing Attitudes to Punishment Public Opinion, Crime and Justice

Edited by Julian V. Roberts and Mike Hough

Willan Publishing: Portland, Oregon, 2002

It may be asked to what extent do sentencing courts consider public opinion in the selection of a fit and proper sanction? Further, it may also be asked to what extent are tribunals even made aware of public opinion in establishing the proper weight to be assigned to denunciation? Indeed, it must be asked to what extent are judges and magistrates even aware of the fundamental divergence between what is reported to be public opinion and what opinion is actually held by the great majority of the members of the public in respect to matters of sentencing?

If the answer to any or all of these questions is of interest to you, then you are invited to consider the instruction advanced in *Changing Attitudes to Punishment Public Opinion, Crime and Justice*. As the title makes plain, attitudes to punishment are changing. That in itself is not surprising. What is surprising is the extent to which public opinion is either misunderstood or misrepresented, with the obvious consequence that very few sentencing courts are possessed of accurate information as to the views of the general public touching upon the need for rigour in sentencing, or the proper role of imprisonment as a means of protecting the community, to cite but two examples of many. In other words, the editors have made a convincing case that what little information is generally available is generally unreliable. (Of course, the articles selected underscore that the general public understands very little of what the sentencing courts seek to achieve, much less of what they may lawfully select by way of sanction in any given case.)

With a view to illustrating one of the signal features of this book, the ease with which information may be sought and selected, a relatively rare feat in the case of many related publications, I wish to point out that the reader may consult a list of 14 figures, and a

list of 35 tables, and a quite detailed index explaining and illustrating many of the conclusions set out in the 12 chapters.

Further, the quality of the introductory chapter must be emphasized. Written by the co-editors, it provides a detailed road map of the many themes to be encountered and serves to outline the main thesis that is put forth. The opening words follow: "The criminal justice systems of all western nations face a common problem: responding to public attitudes to punishment. Legislators, policy-makers, judges and other criminal justice professionals often cite public opinion...". We are then made to understand throughout the 228 pages of text that manipulation of information, be it innocent or by design, is common place; that shifts in attitudes (or in the evaluation of the attitudes) flow from minor flaws in methodology, resulting in skewed conclusions and contradictory results; that context is everything such that attitudes are shown to be malleable by the addition or subtraction of modest facts and that most sentencing objectives are misunderstood to such a degree that leniency is decried unfairly and severity sought unwittingly.

By way of brief compass only, permit me to draw attention to some of the themes I found of particular assistance: the discussion surrounding the structure of attitude in memory, as outlined at pages 16-18, and as verified by a fascinating figure illustrating the many aggravating and mitigating elements that might sway the public's and the judge's attitude in sentencing; the discussion touching upon the creation of enduring attitude changes at pages 27-28; the importance of increasing public awareness of community sanctions at pages 43-45; the review of the relationship between public support for imprisonment and national imprisonment rates at pages 72-74; the study of the disparate sentences imposed by judges in Switzerland as measured by various factors, as found at pages 118-123 and the role and future of deliberative polls, discussed at pages 180-182, as it may portend future developments with respect to conferences as adjuncts to sentencing for youths and other discreet groups of offenders.

At the end of the day, I can think of very little that I would have wished had been included in this excellent text, and little that ought to be excised. It has taught me to question all elements of public opinion that might be raised in argumentation, to seek a full understanding of any study purporting to reflect what the community wishes or fears and, most of all, to be wary of any attempt to evaluate or measure public attitudes in sentencing that is not founded upon a rigorous method, verified objectively, and presented with restraint.

Reviewed by Dr Karen Brewer

Women in the Law Strategic Career Management

General Editor by Elizabeth Cruickshank

**2003, Published by the Law Society, pp353
price £29.95 ISBN 1853288225**

This publication was launched to coincide with the 80th Anniversary of the first woman to be admitted as a solicitor in England and Wales, Carrie Morrison. It's objective, as pointed out by the Editor was to map the progression of women in the legal profession since 1922 to date. At present women account for 55.6% of all newly qualified lawyers in England and Wales.

Women in the Law is not just an historical account of women in the law but also examines the career prospects in the legal profession and advises additional skills required when contemplating a profession in the legal field. It also focuses on the work-life balance of people (not just women) with busy legal careers.

Although published by the Law Society, the Editor interviewed women who have become barristers, solicitors or law professors or who have progressed to the Bench or quit the legal profession and become poets, or Directors of the Royal Opera House, in order to provide the reader with examples of women who have used their legal skills to good effect.

Dame Elizabeth Butler Sloss, one of the interviewees and the first woman to become a Court of Appeal judge, describes the attitude of one solicitor seeking a barrister to represent his client who asked her clerk: "Haven't you got anyone who is a man? Even a pupil?". Of course, attitudes have changed slightly or have they in all Commonwealth countries? Elizabeth Cruickshank also interviewed Dame Brenda Hale who has just been appointed a Law Lord. The Commonwealth angle is touched on in the Interview with the immediate past president of the International Bar Association, Diana Kempe of Bermuda who organised the First World Women Lawyers Conference in which over 900 people participated.

Women in the Law also provides extremely helpful advice on using your "soft skills" which, I found out means unleashing your personal talents as opposed to "hard skills" or technical knowledge. We are talking about presentation skills, dealing with people, negotiating and most importantly to advance in your career what you need to do to sell yourself. Other helpful advice is given on time-management and leadership as well as the most important to many of us, how to manage your stress!

This publication is an easy read but also a must-read for all those promoting gender equality in the legal and judicial profession. Despite its title it is of interest to both men and women and the advice that the interviewees and specialists give on managing your career is relevant to all of those who find it sometimes difficult to Say No and by default become workaholics. I learnt some really useful phrases in this respect such as this one which I may yet use: " I appreciate your confidence in me, I wouldn't want to take this on knowing that the other tasks and responsibilities I have right now would prohibit me from doing an excellent job".

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