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## CONTENTS

<b>EDITORIAL</b>		<b>2</b>
<i>Sir Shridath Ramphal</i>	A Commonwealth of Laws: At 60 and Beyond	3
<i>Renate Winter</i>	Children in Armed Conflict	9
<i>Ian Kawaley</i>	The Role of Specialist Commercial Courts	16
<i>John Z Vertes</i>	The Development of Judicial Codes of Conduct A Canadian Perspective	22
<i>David McClean</i>	Greek Tragedy in Gibraltar	27
<b>LAW REPORTS</b>		
	<i>Secretary General, Supreme Court of India v Subhash Chandra Agarwal</i>	33
<b>BOOK REVIEW</b>		
	<i>“Searching for Success in Judicial Reform: Voices from the Asia Pacific Experience”</i>	36

The judges and magistrates who make up the membership of the CMJA are diverse in their nationality, the jurisdiction they exercise, and their experience. At the same time, they share common concerns about the role of the Judiciary in a democratic society, anxious to guard its independence but also to ensure the maintenance of high standards and appropriate accountability. This issue of the *Journal* reflects both that diversity and those common concerns.

Ian Kawaley's paper on specialist commercial courts will be of interest to many whose own work lies outside the commercial field. He argues that specialised courts, serving a business community which is international and which expects disputes to be handled with efficiency and clarity, can have a tonic effect on the wider legal system. Legal practitioners may become more specialised and able to offer a higher standard of service; the courts administration may become more efficient; and the benefits may be felt in other specialised areas such as that of human rights law.

Renate Winter's very different experience as President of the Special Court for Sierra Leone led to the remarkable paper on Children in Armed Conflict which she gave at the CMJA conference in the Turks and Caicos Islands. The legal community owes much to those who are willing to serve on courts which have to deal with the horrific events such as those in Rwanda and Sierra Leone.

Few are better qualified to speak of the common values of the Commonwealth legal heritage than 'Sonny' Ramphal. We are happy

to print his lecture, given at the invitation of the Commonwealth Legal Forum of which the CMJA is a part, to mark the 60th anniversary of the Commonwealth. This is more than a celebratory lecture: readers in the Caribbean will see that he presents them with some very direct challenges.

He gives a valuable account of the decisions which led to the formation of the modern Commonwealth but also reminds us of some earlier history, the sadly mixed reaction of the common law to the institution of slavery. *Apartheid* was no less evil, and Clive Plasket's paper looks at the efforts since 1994 to produce in South Africa a Judiciary genuinely representative of the people it serves.

Two pieces address issues of judicial conduct. John Vertes writes on Codes of Conduct, especially the Canadian experience. The note on the removal from office of the former Chief Justice of Gibraltar tells a sorry story but also raises some questions about the tests to apply when it is alleged that a judge is guilty of misbehaviour or has become unable to continue in office. We publish a short report of *Secretary General, Supreme Court of India v Subash Chandra Agarwal* in which the Delhi High Court addressed some novel questions about the effect of Freedom of Information legislation on the Judiciary. There is much debate about the relationship between notions of 'accountability', 'the right to privacy' and 'freedom of information'. It may well be that the application of these ideas in the judicial context raises issues which will need much more exploration in the coming years.

### CALL FOR CONTRIBUTIONS

The Editor is calling for contributions from Readers. Articles, essays, reviews are all encouraged. Contributions, ideally no more than 3,000 words should be sent to the Editor c/o the CMJA, Uganda House, 58-59 Trafalgar Square, London WC2N 5DX or by email: [info@cmja.org](mailto:info@cmja.org).

The views expressed in the *Journal* are not necessarily the views of the Editorial Board or the CMJA but reflect the views of individual contributors.

### LETTERS TO THE EDITOR

If you have a burning issue you want to raise in the *Journal*, or if you feel you need to respond to an article that appears in the *Journal*, the Editor would welcome your input and feedback. Please contact him at the address above.

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# A COMMONWEALTH OF LAWS: AT 60 AND BEYOND

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*Sir Shridath Ramphal, Commonwealth Secretary-General 1975-1990. The Commonwealth Legal Forum Lecture 2009*

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## Language, Learning and Law

Language, Learning and Law; these three are the most precious heritage of the Commonwealth; but the greatest of these is Law. In this 60th Jubilee Year of the modern Commonwealth, it is fitting that its lawyers should celebrate the richness of this legacy – both its amplitude and its vibrancy and acknowledge our duty, ‘stern daughter of the voice of God’, to sustain and enhance that inheritance.

What better symbol of the fact that Commonwealth lawyers recognise that duty and the trust it imposes than the comingling of the eight Commonwealth law communities within the encircling arms of the Commonwealth Legal Forum that has made this occasion possible: Commonwealth Lawyers, Educators, Magistrates’ and Judges’, Law Reformers, Legislative Counsel, Private Sector Lawyers, the British Institute of International and Comparative Law and the Legal and Constitutional Affairs Division of the Commonwealth Secretariat. I congratulate them all and the Legal Forum which unites them on the initiative that made this possible. I urge that it renew itself from time to time as Commonwealth lawyers respond to needs that will ever arise to serve the law in the Commonwealth. Those highest needs have been in the past, and will be in the future, to secure this unique association of nations and people as a Commonwealth of Laws.

I thank you for inviting me to speak to those needs in this special year – about which I must say a word – and to do so here in this House that will forever be special for me. I had been here before I could claim a right to be here, before 1975 that is. As a fledgling Attorney General in the about to be independent British Guiana, I attended the 1965 Commonwealth Heads of Government Meeting held right here, in the room right behind me. It was a Summit chaired all those 44 years ago by a new British Prime Minister who was to be around for all of the next ten years, Harold Wilson, long enough for me to call on him in Downing

Street as a new Secretary General in 1975 and as the new occupant of Marlborough House.

That was to be the last Commonwealth Summit held here, because it was at that Meeting (in 1965) that the Commonwealth formally decided to establish the Commonwealth Secretariat; for which the British Government offered this magnificent House – a place which Her Majesty the Queen refers to endearingly as ‘my grand-mother’s home’, Queen Mary’s home. It was here, partly, where the young Princess Elizabeth grew up, never dreaming that one day it would be the Offices of a Commonwealth of a quarter of the world’s countries of which she herself would be so illustriously the Head. Our lives are indeed the blooms of plants whose roots have meandered in mysterious ways below our gaze and beyond our reach. Hamlet was right when he mused: (through Shakespeare’s quill) ‘there are more things twixt heaven and earth, Horatio, than this world dreams of.’

## The events of 1949

Among those undreamt consummations was the emergence of the modern Commonwealth in 1949, 60 years ago in April of this year. It is a story worth repeating to lawyers; for it was a masterly evolution under law of revolutionary change, managed by leaders acculturated to systems of law – systems that were part of the new Commonwealth’s inheritance.

In April 1949, Britain’s post-war Prime Minister, Clement Atlee, hosted his Commonwealth colleagues at a special meeting at No 10. It was to be the end game of Britain’s withdrawal from the Indian sub-continent. The ‘British Commonwealth of Nations’ was being challenged. Did it have the capacity to respond to the palpable need for change? And could that change be seamless?

Only four days before, Ireland had left the Commonwealth, baulking at ‘allegiance’ to the Crown and assuming Commonwealth membership to be incompatible with Republican Status. That the Republic of

Ireland Act providing for this was passed in December 1948, but only brought into force four days before the London Summit opened, suggests that that assumption may not have been unquestioned in Dublin. In other words, for the new Irish Republic leaving the Commonwealth was not so much a legal necessity (a necessary implication of becoming a Republic) but a deliberate political choice, a fact that Sean McBride many years later confirmed. McBride is perhaps best remembered as the long-serving Secretary General of the International Commission of Jurists and Nobel Peace Prize Laureate; in 1949, however, he was the Minister for External Affairs in Ireland's Inter-Party Government.

Now, India, Pakistan and Ceylon had become independent Dominions, but for India, in particular, independence on 15 August 1947 (independence by virtue of an Act of the British Parliament) was not the end of change. Before 1947 began, the Indian Constituent Assembly had already met to draft a Constitution for the proposed new Dominion. In February 1948, barely six months into independence, the draft of India's home-made Constitution was published. As expected, it provided for India to be an 'Independent Sovereign Republic'. Alive to the implications of this intent, the Constituent Assembly acknowledged with great delicacy that the relationship between the new Republic and the British Commonwealth of Nations was a matter 'to be subsequently decided.'

It was in furtherance of this that on 22 April 1949 (and for six days thereafter) the leaders of the still 'British' Commonwealth laboured to find a consensual way forward. With Atlee, were the Prime Ministers of Australia, Ceylon, India, New Zealand, Pakistan, South Africa and Canada's Foreign Minister. It was not an easy task that faced them; and had it not been for the very special quality of Atlee and Nehru and Lester Pearson (then Canada's Foreign Minister), and the potential of law to facilitate change, that way forward might never have been found, nor anything like the present Commonwealth ever have emerged.

Fortunately for the Commonwealth, and I believe for the post-war world, wise political counsels prevailed, and an entrenched legal orthodoxy did not stand in the way of

progress. Great vision characterised the Declaration that issued from Downing Street on 28 April 1949, one must assume not without the concurrence of the King. The critical paragraph was the second, which stated that India is soon to become an Independent Sovereign Republic, but that she still desired to retain her membership of the organisation, now described as the 'Commonwealth of Nations', and is prepared to continue to accept '(the) King as the symbol of the free association of its independent member nations and as such the Head of the Commonwealth'. It was a supreme example of enlightened constitutional law and consummate political skill, and a masterpiece of drafting.

But not everyone shared that judgment. Writing in *The Times* the next day L.S. Amery suggested, predictably, that the effect of the Declaration was that 'it has changed in respect of India alone the historic conception of allegiance as an element of our unity'. How often those timid of change minimise great moments of transition when they come?

In 1949, with these momentous events unfolding, I was a law student at King's College, London, and with all the brashness of youth I offered an article on the 'April Declaration' for *King's Counsel* – the Journal of the Faculty of Laws. It was written as a constitutional law answer to the 'Amery' view. I called it 'The Second Commonwealth of Nations', the modern Commonwealth, whose 60th Anniversary we have celebrated all year, and do as lawyers tonight. Law, constitutional law, was at the birth of the modern Commonwealth 60 years ago.

## Our legal heritage

Of course, the Commonwealth's legal heritage goes back much further, to the very beginnings of Empire and for centuries was symbolised by what began as far back as the Fourteenth Century as 'the Court of Review of the courts of His Majesty's possessions beyond the seas.' As those possessions spread, whether by conquest, cession or settlement, so extended the reach of the common law. The 'review' jurisdiction was formalised in 1833 when the Judicial Committee of the Privy Council was created by a Statute of the Imperial Parliament charged with the duty to hear appeals from the decisions of the courts in the East Indies and

the Plantations, Colonies and other Dominions of His Majesty abroad. A century later, in the 1930s, the jurisdiction of the Judicial Committee extended to appeals from more than a quarter of the globe in area and from every quarter of the globe in variety. And so, in a qualified sense, did the common law. But, it was not a pure stream.

Incongruously, in the Empire, slavery flourished, if one can describe so evil a system as flourishing. The rule of law was espoused; but the law itself served ignoble ends. Not everywhere in the Commonwealth, not for everyone, was 'law' a glorious charter. For a hundred years before the Abolition of Slavery Act of 1833, slavery had subsisted, sanctified under English law, Magna Carta notwithstanding. Lord Mansfield could assert, as he did in *Somerset's Case* in 1772, that 'the black must be discharged'; but that was more a commentary on life and the law in England than on life which English law ordained elsewhere. Half a century later, in 1827, Lord Stowell could assert in the High Court of Admiralty, in the *Case of the Slave 'Grace'* that Mansfield's judgment 'looked no further than to the peculiar nature, as it were, of our own soil; the air of our island is too pure for slavery to breath in'. Not so the air of the island of Antigua to which Grace was sent back enslaved, Caribbean air polluted by slavery's legitimisation, also under English law.

Mansfield's judgement, of course, was of great moment for Somerset, freed on the return of a writ of habeas corpus. But, in another sense, it confirmed, as one commentator put it, that 'English law was wonderfully flexible in accepting systems that were fundamentally different inside and outside the metropolis'. In the end, the Anti-Slavery Movement recognised that it was the legal framework, both metropolitan and colonial, which sustained slavery. What the Abolition of Slavery Act did, in the same year that the Judicial Committee of the Privy Council was established, was to change the law – a dichotomy lawyers ignored as they proudly viewed the legal order within narrow domestic walls.

### The Privy Council

It is intriguing that the establishment of the Judicial Committee of the Privy Council and the abolition of slavery were accomplished by

Acts of Parliament in the same year. They each ushered in a new era of enormous long term significance. The 'Privy Council', as the Judicial Committee is now generally described, rendered great service to the development of law throughout the Commonwealth, more particularly in the evolution and 'unification' of the common law throughout Commonwealth jurisdictions, a service, perhaps, more greatly needed by smaller Commonwealth countries than larger ones. I pay tribute to that service; and nothing I say hereafter qualifies that. But I believe more could have been made of it as a Commonwealth institution had the will to transform it from a British judicial body been more robust and sustained. When that will emerged, it was too late.

I told you I was here in Marlborough House as a young Attorney General in 1965. In that same year, I attended the 'Commonwealth and Empire Law Conference' in Sydney, Australia – a Conference whose all-round excellence remains a cherished 'Commonwealth Law' memory. It was a long time ago, and there are perhaps not many around who were with me there. Prominent in my memory of that Conference is Lord Gardiner, then Britain's Lord Chancellor.

It is forgotten now, but prominently addressed at the Conference (strange as it may seem now) was the issue of a Commonwealth Court of Appeal as a final Court of Appeal for all Commonwealth countries, including Britain. In a background Paper prepared for the Conference, one among many, Edward Gardner, QC and R Graham Page put the case for a Supreme Court of the Commonwealth in terms which may surprise us today. One paragraph urged:

*With such a court, Commonwealth countries would influence each other in the development of Commonwealth law. All countries submitting to the jurisdiction would in every way, be treated on an equal basis, subordinating their own final courts appeal to the overriding appellate jurisdiction of the Supreme Court of the Commonwealth. Thus in Great Britain, the appellate jurisdiction of the House of Lords would have to be replaced by the jurisdiction of a Commonwealth Court of Appeal...Whatever domestic advantages*

*may be lost will be more than counterbalanced by the advantages which will accrue to individual countries and to the whole concept of the Commonwealth of Nations.*

It was not a wholly new idea; but at Sydney in 1965 it burned with a new intensity. Lord Denning had spoken favourably of a Commonwealth Court five years earlier, and at Sydney, Gerald Gardiner as Lord Chancellor was known to favour the idea. In his opening speech at the Conference he said:

*If I may say so, there are two subjects we are going to discuss in which I take a particular interest. One is the question whether or not it is too late to constitute a true Commonwealth Court of Appeal, staffed by the best legal brains in the Commonwealth, and to which, perhaps, we in the United Kingdom would go as our final court of appeal, on the same footing as any other member of the Commonwealth who choose to do so.*

But, as I suppose Lord Gardiner himself had recognised, it was too late. While many small countries were for it, most of the larger ones were not. Having laboured over decades to establish national Supreme Courts of which they were rightly proud and confident, countries like Canada and Australia and India were in no mood, either professionally or politically, to head back to what they were inclined to see as a revamped Judicial Committee, though that was quite clearly not what was being proposed. The truth is, it was too late; and for all its merits, I believe it still is, at least today. If the Commonwealth itself prospers, some such collective judicial forum may one day become more generally acceptable.

### **The Caribbean Court of Justice project**

Yet, that does not mean there was satisfaction with the status quo, namely, the Privy Council. Quite the contrary, the exodus from the Privy Council, almost as an adjunct of decolonisation, had already begun and was to continue, so that today only a handful of countries, most of them very small jurisdictions, still cling to it. Of the Commonwealth's 53 member countries only sixteen still use the Privy Council as their final court of appeal – and of these 12 are Caribbean countries.

These 12 had decided in 2001 that they would abolish appeals to the Privy Council and establish their own Caribbean Court of Justice serving all the countries of the Caribbean Community with both original jurisdiction in regional integration matters and appellate jurisdiction as the final court of appeal from individual countries. As of now, only Guyana, which had abolished appeals to the Privy Council on independence, and Barbados have conferred on the CCJ that appellate jurisdiction, though Belize might soon. Constitutional amendment is required for the abolition of appeals to the Privy Council and in practical terms that means bipartisan political support. In Jamaica and Trinidad and Tobago (where the Court has its headquarters) that political consensus has not been secured. In St. Vincent and the Grenadines, a referendum in December 2009 rejected the transfer of appeals to the CCJ.

The situation has been complicated by the issue of the death penalty on which the Privy Council, reflecting contemporary English (and EU) mores and jurisprudence, has been rigorous in upholding Caribbean appeals in death sentence cases. Someday, the Caribbean as a whole must accept abolition of the death penalty – I believe they should have done so already; – but in a situation of heightened crime in the region popular sentiment has been reflected in political reticence. Yet, the Privy Council's anachronistic jurisdiction persists; and the Caribbean Court of Justice remains hobbled in pursuing its enlightened role in Caribbean legal reform.

It is almost axiomatic that the Caribbean Community should have its own final Court of Appeal in all matters. A century old tradition of erudition and excellence in the legal profession of the region leaves no room for hesitancy. I am frankly ashamed that we should be a major reason for the retention of the Privy Council's jurisdiction within the halls or the new Supreme Court in Guildhall. Now that we have created our own Caribbean Court of Justice and done so in a manner that has won the respect and admiration of the common law world, it is an act of abysmal contrariety that we have withheld so substantially its appellate jurisdiction in favour of that of the Privy Council; we who have sent Judges to the International Court of Justice, to the International Criminal Court and to the

International Court for the former Yugoslavia, to the Presidency of the United Nations Tribunal on the Law of the Sea; we from whose Caribbean shores have sprung in lineal descent the current Attorneys General of Britain and of the United States.

This paradox of heritage and hesitancy must be resolved by action. Those countries still hesitant must find the will and the way to end this anomaly, and perhaps it will be easier if they act as one. The truth is that the alternative to such action is too self-destructive to contemplate. If Caribbean lawyers remain complacent about this absurdity much longer, and I am afraid some are, we will end up making a virtue of it, and lose so much that we have already built.

To ensure against that, and to give confidence to our publics in so doing, Caribbean governments must be as assiduous in demonstrating respect for all independent constitutional bodies, like the Director of Public Prosecutions, lest by transference Governments are not trusted to keep their hands off the CCJ. In the end, the independence of Caribbean judiciaries must rest on a broad culture of respect for the authority and independence of all Constitutional office holders so endowed.

My embarrassment in this matter has been compounded by the recent observations by the eminent President of the new Supreme Court – of the United Kingdom, Lord Phillips, deploring how the time of this country's highest judges – now justices of the new Supreme Court will continue to be taken up with appeals to the Privy Council. 'In an ideal world', Lord Phillips is reported to have said, 'former Commonwealth countries – including those in the Caribbean – would stop using the Privy Council and set up their own final courts instead'. Many a Caribbean lawyer, many Caribbean persons, and at least some Caribbean governments welcomed the President's urging. The new Supreme Court – of the United Kingdom would have sturdier and healthier relations with counterpart courts of final jurisdiction in the Commonwealth without some of our countries loitering on the door-step of colonialism. In time, the interests of the law in the Commonwealth might require removal of the doorstep.

It is not strange that failure to reform our legal institutions in the Caribbean should have

direct implications for the administration of justice in England. It is a commentary on the symmetries of the Commonwealth's legal architecture. Modernising the structure is necessary to preserving it. But beyond harmonised structural change, no single factor, in my view, is more important to the preservation of what is best than the comingling that this occasion represents. It promises continuity – the strengthening of a community of Commonwealth legal folk held together by common allegiance to the rule of law in our countries and regions and in our globalised world. That is a purpose to be extolled and encouraged. It is at least thrice blessed: in nourishing the rule of law at all levels within our countries and regions, in bolstering the capacities of Commonwealth judiciaries in their role as its custodians, and in enlarging the promise of law as the cornerstone of our globalised legal system. The collective resolve of Commonwealth lawyers at occasions like this sends a message of assurance beyond the Commonwealth.

### The common law

And that 'beyond' is significant. Law in most of our countries was never just a home grown plant. Its roots lay in the Common Law of England. Its transplantation was simply one of the incidents of imperial spread; and for the most part one of its better legacies. From the beginning, our law was interlaced with the legal culture of England; and beyond England as the Common Law put down roots in a far flung Empire and flourished in and was enriched by its new environments in each of our countries.

*More common than other elements – more permissive than political systems or forms of government, and applicable to all citizens of the Commonwealth, many of whom do not speak the English language in which it is generally treated – the law provides the main unifying factor which links member-states of the Commonwealth and their peoples in a body of shared principles and practices.*

So perceptively wrote Professor James Read in the *Commonwealth Law Bulletin* a decade ago.

The trauma of the Second World War was to make way for new eras – the era of globalisation and the inseparable yet anomalous era of an

aspiring American imperium. Together, they provided the dominant environment of our time and the one in which Commonwealth legal systems have had to function. These new realities have brought the new legal challenges; but meeting them should be seen as an ineluctable but privileged vocation of today's Commonwealth lawyers: judiciaries, practitioners and academics.

The era of globalisation simply smothered the instinct to think otherwise. Our largely two dimensional world had gone global, affecting all countries and people and all systems on the planet. Basic to those changes is law. That is the essential truth our profession must grasp, one that has some special implications for the Commonwealth.

The magnitude of the assault on international law by the Bush administration from 2000 to 2008 in furtherance of what 'neo-con' ideologues conceived as the Project for the New American Century, was simply staggering – particularly coming from a nation that had played so large a part in erecting that edifice of global rules and the ethic of internationalism. That political environment has now changed providing an opportunity for law to be once more ascendant; but even before the change in the political environment, American judiciaries had taken up the challenge and begun to reassert the values of law. Because American jurisprudence springs from Common Law roots, it was a challenge for Commonwealth lawyers too – and it is gratifying that that challenge was worthily met.

In 2004, in the *Rasul* and *Hamdi* cases, the United States Supreme Court began the fight back. They were the first two cases relating to the Bush Administration's policies in the 'War on Terror' to reach the Court. Each case resulted in defeat for the Administration and affirmed the jurisdiction of the United States courts to review the legality of executive detention even in times of emergency or perceived emergency. Given the magnitude of the threat to the rule of law that the Administration's policies at Guantanamo Bay

held for all the world, the Commonwealth Lawyers Association took the exceptional step of filing an amicus curiae brief with the US Supreme Court in the *Rasul* case: the most practical way, you might think, of identifying common law jurisdictions worldwide with the issues at stake in these 'non-combatant' cases. They did so as well in the House of Lords case of *A v Home Secretary* dealing with 'confessions' secured under torture – a case distinguished by Lord Bingham's judgment.

In delivering the opinion of the Court allowing habeas corpus to run to the 'legal black hole' of Guantanamo Bay, Justice Stevens drew expressly on the case law addressed in the CLA brief in tracing the history of the writ back to Magna Carta and referring to English authorities going back over four centuries. I like to think that in both jurisdictions the CLA was acting for all Commonwealth lawyers. The very next day, in *Sosa v Alvarez Machain* the Supreme Court indicated that claims alleging breaches of international law norms, including torture, by United States authorities committed outside the United States would be actionable in United States courts. This trend was sustained in *Hamdan v Rumsfeld* in 2006 upholding the application of article 3 of the Geneva conventions, the 'Common Article'. The attempt to remake global legal rules had begun to falter; and Commonwealth lawyers could claim to have played an honourable part in the resistance.

'A Commonwealth of Laws' is not too large a claim for the Legal Forum to make in this Jubilee Year. But self-belief is not enough. Commonwealth lawyers nationally, regionally and internationally must be resolute in not ever falling short of that high standard. They must build upon the grand achievements of the past – ambitious for their enlargement in the new era we have entered. The challenges of our time are new, though some old ones remain; but challenge after all is in the bloodstream of the common law and responding to them is the life's work of Commonwealth lawyers.

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## CHILDREN IN ARMED CONFLICT

*The Hon. Justice Renate Winter, President of the Special Court for Sierra Leone. A paper from the CMJA's triennial conference, 2009*

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### The story of Ayodele

Ayodele is a Krio word and means 'joy comes home'.

At the Special Court for Sierra Leone I first heard Ayodele's story. A former child soldier was to give evidence at the Truth and Reconciliation Commission. He told that when he was 12 years old he had been captured by a rebel group during the eleven-year long civil conflict in Sierra Leone. To make it impossible for him to ever contemplate escaping from the rebel group into which he was to be integrated, the boy was forced at gunpoint to hack off both hands of the 12-year-old daughter of a neighbour, Ayodele. After the war, NGOs working with the Truth and Reconciliation Commission tried to find a way to help Ayodele and the now demobilised boy soldier.

Ayodele's father brought her to the Special Court to give evidence. While at the Court he said the Court could keep her as she was no longer worthy of being fed – without hands she was unable to work for a husband and would never fetch a bride price. Those dealing with the case tried to find a way to help that would conform to the traditional culture of the village from where the Ayodele and the boy came. The boy's family and the villagers did not accept that he should be reintegrated into family and village life, but village elders considered it likely that the boy would continue a life of violence and criminality and would bring criminals into the village to commit theft if he was not allowed to return. (They also considered killing the boy, but knew that would be a crime which they should not commit, particularly in the presence of internationals from NGOs). In the end, the boy volunteered to marry Ayodele and the village, as well as the two families, welcomed and consented to this proposal.

Needless to say, I was horrified. The thought that Ayodele the victim would be made to live with the boy perpetrator for rest of her life was appalling to me. So I was extremely astonished and saddened to hear Ayodele accept the

proposal saying that it did not matter to her who mistreated her – her father or her husband! It was of some comfort to learn that the boy said that he would not mistreat his soon-to-be wife as he knew from his experiences of being a child soldier what cruelty meant and he no longer wanted to live in that way.

### ...and many more

Far too many children face lives in difficult circumstances during and after an armed conflict. They face problems that involve their health and education; many are orphans; many live their lives on the street. These children have no voice; and the awful problems of the thousands of children who have survived involvement in armed conflicts often remain unheard and their plight is not understood. Child soldiers are at the same time victims and perpetrators and carry horrendous psychological scars earned through the atrocities they have been forced to witness or commit. After demobilization, they often have little to no sense of worth and frequently, as young adults, continue to take drugs or turn to alcohol and persist in their anti-social violent behaviour – the behaviour they learned as the norm when child soldiers.

Contemporary estimates put the number of children enlisted as soldiers worldwide at 400,000. There are also countless millions of children suffering through exposure to the wars raging in their countries. Judges that have not had to confront children that have been exposed to armed conflict can be grateful.

There is a phrase that is often used when speaking of modern warfare, which I find particularly abhorrent, and that is 'collateral damage'. Child soldiers, 'bush wives', children damaged by war who are psychological or physical cripples for the rest of their lives are but 'collateral damage.' They are often neglected when official assistance is being distributed as these children are seen to be of no value to societies because they have little chance of ever recovering from their traumatized lives.

Raja of Sri Lanka was 12 years old when the rebels approached his father and asked for one of his sons to be given to fight the rebel war. The father had little choice but to hand Raja over; he had to protect his family from attack by those same rebels. Some weeks later, army soldiers came and approached the father with a request for a son for the war. For the same reason, the father was forced to part with his eldest son. The brothers, fighting on opposing sides, met on the battlefield. Raja killed his older brother, thus breaking one of the most sacred taboos of Sri Lankan society. He has never been able to return home, even though the war has ended.

Maria of Colombia was sexually abused by her stepfather when she was 8 years old. Even though her mother knew, she did not help Maria as she was too scared that the man would leave her and she would be left alone to provide for the children. At the age of 9, Maria was sexually abused by her mother's brother. She ran away from home. She joined a group of rebels in the belief that was her only option for survival. She did not know what kind of life awaited her with them. Now it was the rebels who sexually abused her on an almost daily basis. At the age of 12 she had already survived two abortions forced on her by the rebels. The only person to help her was a woman who worked as a nurse for them. Maria was rescued finally, and sent to live with girls who had been subjected to similar experiences. When asked what she would like to be when grown up, she answered she wanted to be a nurse so that she could do good. Unfortunately, to qualify for a career in nursing, one has to have had a college education – an opportunity that was not available to Maria. It took the government of Colombia almost two years to create a possibility for Maria and the other girls to be able to catch up with their studies in order eventually to enter nursing school.

Paul from Sierra Leone was 8 years old when the rebels abducted him. He was brought to a training camp and joined an 'SBU' or 'small boys unit'. From the day of his abduction there was not one day that passed when he was not using drugs or drinking alcohol. He was not given any schooling to learn to read or write. He learned only how to kill, maim and torture without thought or conscience. One day, he and three other boys that were not much older

than him, were part of a rebel group that invaded a village. One of the villagers that these child soldiers caught was a young boy who in his terror could not stop screaming. So they hacked off the child's right hand. When the little boy now screaming in agony howled for mercy, they chopped off his left hand. The little boy could not stop screaming. So they hacked off his right leg, and then his left leg. The little boy was still alive when they dumped him head first into the village latrine. Stupefied and dazed with drugs, the four child soldiers shouted, and laughed, and danced in celebration to the cries of the dying boy.

If you talk to Paul about the dreadful atrocities he has committed, he knows he has done awful things, but in trying to recall with accuracy those deeds, his memory is damaged and he says it is like looking through a heavy veil. He was so under the influence of drugs that he cannot remember clearly what he has done. What he does remember clearly however, are the nightmares that hound him through the nights. His own blood-curdling screams wake him every morning. He fears that the ghosts of the people he tortured and killed will come for him – and that just may happen as who can say whether Paul's sanity will desert him?

Why are there 400,000 child soldiers in the world today? Why? I had the chance to ask a rebel leader in an African country in the south of the continent. He gave me a very good and very direct explanation. Children, he said, are prolific on the African continent – they are easy to enlist or to abduct, have no expensive demands, are easy and cheap to provide for, and they are willing, absolutely fearless fighters, and obedient. They are the cheapest weapon available ever. And they are expendable. He saw absolutely no reason as to why they should not be recruited. Moreover, his reasoning seems to be that of the majority of warlords, militia and unfortunately, of commanders of legitimate armies as well.

### **Children and the Special Court**

When I was interviewed for the post of international judge at the Special Court for Sierra Leone by United Nations personnel, I was specifically asked if I would have any problems in dealing with children that had been child soldiers. An interesting discussion ensued as the mandate of the Court was to try those who bear the greatest responsibility for

serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. It was evident to me that no child soldier, even one who had committed a huge number of incredibly brutal atrocities, could be considered to be one of those bearing greatest responsibility. A further interesting argument in this regard is that it has also to be considered (from a strictly legal point of view) how the age of a child who has been involved in an eleven-year long war can be determined. How can one know when a child reached the age of 14 and criminal responsibility during that period of civil conflict in a country that rarely issues birth certificates?

The Special Court handles child soldiers in two ways: as witnesses and as victims. Even though these are children that are also offenders as they committed monstrous crimes during their period of soldiery they are before the Court as witnesses only. This attitude takes into consideration the reasons why they became child soldiers in the first place.

There are many reasons why children become child soldiers, some of which are peculiar to Sierra Leone, but most of the reasons exist globally. While many children are forced to join armed groups, many child soldiers are volunteers who face lives that offer little to compare with what they may obtain through enlisting. Those who have witnessed their mothers' fatally raped, their fathers' tortured and killed, their siblings burned alive, invariably seek revenge and are motivated by the desire for retaliation to enlist. Poverty and lack of access to education or employment opportunities are additional reasons. Children with no hope but to continue the same miserable lives as their parents will be attracted to joining an armed group in their eagerness for adventure. In some cases, children may be encouraged by their parents or peers to join up for ideological or political reasons and to honour family traditions. In many tribal or village societies, a child has to pay utter respect not only to the parents but also to the village elders, and must be unconditionally obedient. If such a child that has suffered frequent whippings and other abuse in an enforced silence is given a gun, how high are the odds that he or she will not use it? Girls are particularly prone to enlistment. Those who have suffered mistreatment and abuse at home,

girls who have been abducted and given as bush wives to armed fighters only to suffer further mistreatment and abuse, if given the chance, they will certainly fight as child soldiers thus obtaining a better social standing. Many girls have done so. Those children who have lost everything – families and homes, with no one left to turn to for protection or comfort, may see child soldiering as the only option left open to them if they are to survive. Whatever the reasons, a child who is poor, hungry, uneducated, orphaned or abandoned and who has no say in his or her imminent future is ripe for enlistment.

Most of these children when asked to recount their stories as child soldiers will be unable to remember many of the appalling cruelties they have inflicted, whom they killed, where they looted or burned, and when these crimes were committed. They only know that they were perpetrators of such vicious violence and like in a repetitive, unending horror movie script, are haunted by the heavily misted memories of their deeds. In many cases, such psychological terror will remain with them for as long as they live as they are usually the last to benefit from any support or assistance that may be available in post-conflict circumstances.

What about the victims? The SCSL established the Witness and Victims Section (WVS) as a neutral body responsible for supporting and protecting all witnesses before, during and after their testimony. In carrying out its work, the Section has heard many stories of victims of the war. Ibrahim was a young boy when his fingers and thumbs were chopped off. Now a young man who sells bags stitched by his grandfather, Ibrahim is unable to speak about what happened to him during the war. He says simply that he was 12 years old when he 'had this problem'. He does what he can to survive and although he faces a bleak future, he keeps smiling. WVS investigators having to interview young people such as Ibrahim have to ascertain whether participating in the judicial process as witnesses would result in the further traumatising of those who have experienced human rights abuses. They also have to judge the value of their recall.

### **Victims as witnesses**

In many countries, judicial systems are not interested in victims who are unable to give testimony as witnesses. Frequently, the social

infrastructure of such countries has been damaged or destroyed. A great number of child victims depend on their families if the families have survived, on an extended family, if it exists, or on the good will of neighbours if they have the means to help, and on the community, if it has survived. Governments in post-conflict countries are often corrupted by financial donations meant to help the victims of war and the monies are pocketed by selfish and greedy politicians. It is largely left to the private sector, non-governmental and international organizations to provide some assistance to victims, such as basic medical assistance for example. The luxury of psychological assistance for victims is rarely, if ever, available.

I have touched on the difficulties of examining witnesses when their testimony would result in their further traumatisation. This is especially true when the witness was a child at the time of the commission of the abuse. It is very difficult to listen to the testimony of a witness whose emotional state leads to the constant interruption of their testimony, and who breaks down under cross examination when the questions asked bring back terrible memories. Defence lawyers charged with proving the innocence of their clients can be particularly cruel in their cross-examination of such witnesses. Imagine how it was for the young woman who as a nursing mother had been gang raped by a group of rebels, who then gouged out her eyes so that she would be unable to identify her attackers, and who, under cross examination, had to suffer the inference that there had perhaps been no rape but that she had perhaps invited the sexual encounter. It is especially difficult for girls to testify about sexual crimes committed against their persons, particularly in those societies that condemn girls who have lost their virginity even when it was not the girls' will or fault. In poor African societies, the economic damage of losing the possibility of a bride price for a young woman can have far-reaching consequences. These women face the wrath and punishment of their families and those who are married may not be accepted back by their husbands, even when their injuries show that they defended themselves against the sexual attack.

All witnesses, adult or child, male or female, fear giving testimony. The judicial systems in most post-conflict countries are unable to

guarantee that testimony given in confidence will stay confidential. Corruption often prevails and 'leaks' as to who provided what information against who can, and often is, sold to those seeking revenge against those who testified. Giving testimony in a closed setting is also no water tight guarantee that the identity of the witness and testimony given will remain confidential. In post-conflict countries, corrupt or untrained court personnel may speak about what they have heard whether for financial gain or for psychological reasons (to deal with emotional distress caused by hearing the horror of testimonies when human rights abuses are described in detail). Also, professional ethics can be missing in many post-conflict countries. It thus takes a lot of courage, particularly for a child, to give testimony, especially when recalling events will cause distress, compounded by having to face the accused in a court of law and the verbal guile of skilled lawyers.

### Protecting the children

Taking all the above into consideration, the question which arises is how can children that have been involved in armed conflict be protected in a criminal justice system? I remember when I first joined the Special Court for Sierra Leone, there were those who said it would be better to use the financial resources allocated for the Court to improve the well-being of the victims of Sierra Leone's civil war. It was only when the debate started as to who was to be considered a victim, what amount of financial compensation should a victim get for what injury, and who would dole out the payments to the victims that it became clear that justice is necessary, and bringing the main perpetrators to trial was a highly valuable step in the healing process. Again though – what can the justice system do? A sound justice system can carry out proper investigations and indict the true offenders – those who conscripted and used children as soldiers, who used children to spread terror and to commit atrocities against their fellow citizens, who used children as sexual and domestic slaves, who used girls as 'bush wives' and to bear their children – in other words, to bring the warlords, those bearing the greatest responsibility for these acts – to trial.

In the case against one of the accused in the Special Court for Sierra Leone, in arguing for

his client's right to recruit children as soldiers, Counsel for the defence suggested:

*'I would not say please do, but you can do it, it is not a crime under international law. As long as they [are] not members of warring factions you can do it'.*

His reasoning was that as international treaties address States parties and not individuals, and as a warlord is not a representative of a State party but an individual, he can do whatever he sees fit as far as recruiting children is concerned. This and similar arguments have been disproved in trial, and accused in that particular case were convicted for their roles in 'enlisting or conscripting persons under the age of 15 years into armed forces or groups or using them to participate actively in hostilities'. This clearly evidences the value of a justice system that can convict and sentence those responsible for such behaviour. The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict of 25 May 2000, condemns the targeting of children in situations of armed conflict and notes the inclusion in the Rome Statute of the International Criminal Court as a war crime, of conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities in both international and non-international armed conflicts.

### **Disarmament, demobilization and reintegration**

When peace returns to a country, the plight of its children is far from over. The disarmament, demobilization and reintegration (DDR) of former combatants is one of the first steps in the peace process. Many of those ex-combatants will be children. The United Nations DDR Resource Centre describes the DDR of ex-combatants as

*'a complex process, with political, military, security, humanitarian and socio-economic dimensions. It aims to deal with the post-conflict security problem that arises when ex-combatants are left without livelihoods or support networks, other than their former comrades, during the vital transition period from conflict to peace and development. ... DDR lays the groundwork for safeguarding and sustaining the communities in which these individuals*

*can live as law-abiding citizens, while building national capacity for long-term peace, security and development.'*

On the DDR process involving children, the United Nations recognizes that child DDR is not the same as that for adults. It notes that when DDR exercises have made the presentation of a weapon for disarmament as a criteria for eligibility for DDR, children, especially girls, have been excluded. It also recognizes many children associated with armed forces and groups are not just combatants with weapons and must also be considered as child soldiers and released by the groups that recruited them and receive reintegration support.

It goes without saying that in the DDR process, children that do have weapons will most likely have to hand them over to an adult combatant who is seeking the DDR reward package. Girls particularly suffer. Not only will a girl soldier lose her weapon to a male, she will most likely never present herself for the DDR process for fear of being identified as a child soldier and thus stigmatized and rejected by her community, family and friends.

Mary was a girl soldier. She was by far a more effective and disciplined soldier than the boys under her command. As a girl that had dared to break with tradition however, it was clear that any attempt to reintegrate her into a post-conflict society would fail as she had learned to question and disobey male authority. Her former commander decided that he should disarm her and give her weapon to a male for the DDR process, and demote her to the inferior female status she held before she became a soldier.

Sarah was unable to speak about her experiences as a 'bush wife' from fear that the shame would reflect badly on her reputation. She did not want to be considered as a 'savage of the jungle'. Her silence was to no avail and she was rejected by her village and ostracised by even her closest family members. When she received financial aid from a NGO dealing with these victims of the war, she was accepted back into her community. When the financial aid ran out, she again found herself without family or friends or community support.

The lives of many girl soldiers that were subjected to sexual abuse are often more grim

after the war. Many had born children to their 'husbands'. Those children were considered to be the 'children of hate' and society rejected them along with their mothers. Living in exile, being ostracized in a society that depends on family and extended family for support, and being born into this expulsion, makes life especially difficult and many former girl combatants are forced to turn to a life of prostitution in order to survive and raise their children.

Many families and communities that did accept the reintegration of former child combatants were not given support or information on what to expect from a child that may continue to display a violent disposition as they have been reared in a system of violence and their moral development has been stymied by their exposure to armed forces. These are children who have learned violence as a way of life. They do not know how to reason or conduct themselves in any situation non-violently. Some of those families accepted the children as long as there was some financial assistance provided. When that stopped, their care for the children stopped too.

Although there are many organizations in the world today attempting to assist former child soldiers, it remains the best case scenario that such children may be given a little financial assistance, the chance of some basic education and if lucky, a little psychological assistance. In the worst case scenario they are abandoned by all and are unwelcome wherever they go. For their victims, often children themselves who have been amputated, mutilated and permanently handicapped, the future is even bleaker and they are usually left dependent on the good will and assistance of non-governmental organizations and civil society.

### **The role of justice**

How can justice be considered in the face of such problems? Can it be used to forgive, or to forget, or to help to reconcile, or just to punish? There is no justice system, no amnesty treaty, and no government decision that can force a victim to forgive or forget. It is a choice that has to be made by the victim. What about punishment? Is punishment a step towards reconciliation? If so, must justice not first be done so that reconciliation is possible?

Some time ago, I visited a prison for children in a post-conflict country. There were 250 boys detained in one small room that had one window, one door and a hole in the floor for a latrine. Those 250 boys had been held for 3 years without ever being allowed to leave the room. According to the law of that country, children under the age of 14 should not be detained under any circumstances. When I spoke to the children, I discovered a very small boy that could not possibly have been more than 14 years of age. I asked him how old he was and he said he thought he was 8. So he would have been incarcerated at the age of 5. I asked the prosecutor who accompanied me on the visit how this could be possible and he answered that the boy had no identification papers and thus could not prove that he was less than 14 years of age. I argued that according to the law it was up to the prosecutor to prove that the boy was above 14 years of age, and it was not up to the boy to prove that he was below that age. He angrily questioned me as to who did I think I was that I could tell him what he should or should not do in his own country. I asked the boy what he had done that had led to his imprisonment. He answered that he had been a genocidaire. I asked him what that meant and he replied 'Madam, I do not know'. When I could bear it no longer and tried to leave the room, the little boy held on to my skirt and whispered 'Madam, can you please help me see the sun once more before I die?'

He is dead now. He did not see the sun again before his death.

As I mentioned before, there are currently an estimated 400,000 child soldiers in the world today. I cannot guess at the numbers of child victims. I can however state that in Sierra Leone, which is a small country with approximately 5 million inhabitants, there are over 10,000 former child soldiers and over 10,000 mutilated child victims and the country has an unemployment rate of nearly 90%. What future is there for these young people? They live in a society that has woven violence into the very fabric of life,

It should be a lesson for all countries that continue to use children in armed conflict. By the very act of recruiting children into violent conflict you destroy the chances for your countries future prosperity and peace. As these

young violent children become violent adolescents and then violent adults, you increase thousandfold the probability that instability will be the norm, and the probability

that war will re-visit your nations. Let that thousandfold be children enjoying their childhoods. Leave them in peace.



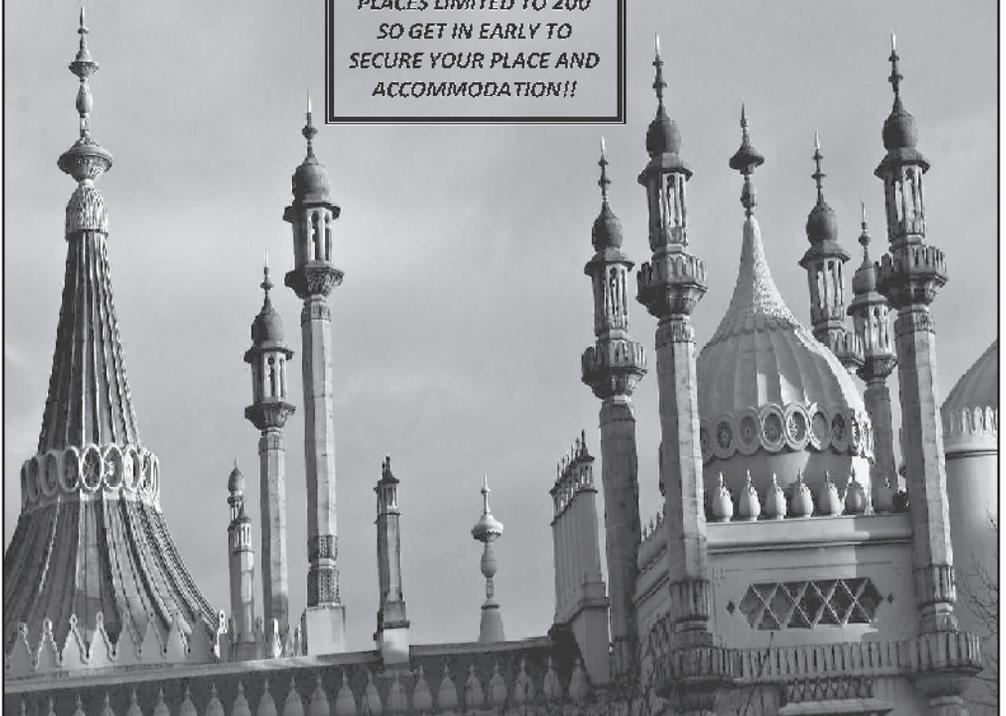
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# THE ROLE OF SPECIALIST COMMERCIAL COURTS

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*The Hon. Mr Justice Ian Kawaley, Commercial Court Judge, Supreme Court, Bermuda. An edited version of a paper given at the CMJA triennial conference, 2009.*

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## Introduction

There is an emerging consensus in the global legal community that independent courts and the rule of law are essential pillars of economic and human development. Focussing on the economic domain in particular, this is evidenced by the extensive support given by the World Bank to legal and judicial reform in developing or emerging economies. The establishment of specialist commercial courts is a related trend in judicial reform. In the Commonwealth, commercial divisions have existed in England & Wales and Australia for over 100 years. In Scotland, a Commercial Division has existed within the High Court for many years as well. Similar courts exist in Canada (Ontario), the Caribbean and in countries such as Ghana in West Africa, Kenya, Tanzania and Uganda in East Africa. Hong Kong, a former Commonwealth country, has also had a Commercial List for many years. In many other significant offshore financial centres (such as Cayman and Singapore), specialist commercial judges exist where formal specialist courts do not.

This trend has been driven by the growing significance of courts which are capable of efficiently resolving commercial disputes to businessmen in a global commercial environment which spawns multi-jurisdictional commercial disputes. The specialist commercial court has emerged as part of the national infrastructure which cities and/or countries (as well as local service providers) rely upon to attract business to their shores.

The specialist courts are clearly viewed as beneficial for local and international investors. But also, international commercial dispute resolution is seen as a business niche in and of itself. The most important attributes such courts are arguably required to manifest include handling cases in a manner which is (a) expeditious and efficient, (b) independent of any biases, particularly biases in favour of local political or economic elites and (c) consistent (as far as possible) with commercial

logic and common sense. As now retired Canadian Justice James Farley observed at a World Bank sponsored Judicial Forum:

*‘... [I]t is important that the court system in any country be set up in such a way that the public and litigants have the utmost confidence in it. This is particularly important where there may be a high degree of foreign participation in the lawsuits. Needless to say the court system must be blind as to the nationality or domicile of a litigant (except as to security for costs concerns.) Otherwise needed foreign investment will tend to dry up or become considerably more expensive, thereby depriving the domestic economy of the opportunity to fully develop its growth potential and deprive the society of the economic engine working to efficiency to fund social needs.’*

## Specialist commercial courts: recent Commonwealth developments

On 8 September 2009, it was reported that the Commonwealth’s most populous country, the world’s largest democracy and emerging economic powerhouse, India, will soon be establishing commercial courts in major metropolitan centres.

In the Atlantic and Caribbean region, commercial courts have recently been established as separate divisions in Bermuda (2006) and the British Virgin Islands (2009) in part to make these jurisdictions more attractive as an investment destination, and in part as a necessary response to the increasing volume of commercial litigation. Cayman may follow suit in the near future. The Bahamian Chief Justice Sir Burton Hall in opening the Law Term in January 2009 indicated that plans were in motion to establish a dedicated courtroom for commercial cases in Freeport to enable his country to compete effectively as an offshore centre.

Beyond the Commonwealth, distinguished British judges have recently been appointed to a commercial court established in Qatar. The

Qatar Financial Centre Civil and Commercial Court was established in 2007 is presided over by Lord Woolf and judicially staffed by Commonwealth judges from Britain, Australia and India. Sir Anthony Evans, former English Court of Appeal Judge and current Bermuda Justice of Appeal, was earlier appointed as head of the Dubai International Financial Centre Court. Ireland some years ago established a Commercial Court, reflecting Dublin's growth as a leading international financial centre.

While Governments may understandably view the establishment of commercial courts from the perspective of positioning their countries favourably with respect to competitor jurisdictions, such specialisation is arguably a necessary part of judicial infrastructure for any significant or aspiring financial centre. This is because the highly global nature of commercial transactions means that civil and commercial litigation frequently cannot be effectively managed in any one centre without receiving cooperation from another forum's courts.

### **Spill-over benefits for non-commercial areas of the law**

The recent Bermuda experience suggests that the adoption of either the specialist commercial court or the dedicated commercial court model has spill-over benefits for the Judiciary as a whole, and sheds light on the often hidden importance to economic development of non-commercial areas of the law. The most obvious benefit is that specialisation in the commercial sphere stimulates specialisation in other areas such as criminal law, family law and human rights law. Since the growth of commercial litigation in the 1990s in Bermuda, the litigation Bar has become increasingly divided into groups of specialist rather than general practitioners. Since the establishment of the Commercial Court in 2006, two of Bermuda's six Supreme Court judges have become specialist criminal judges, a development which the increasingly complex criminal law régime requires. A Law Reform Sub-Committee on Family Law chaired by Justice Norma Wade-Miller has recently considered proposals which might result in the establishment of a two-tiered specialist Family Law Court, following the Trinidad & Tobago model.

The more subtle spill-over benefit is that of increasing judicial professionalism generally.

This in turn seems to have contributed to an enhanced spirit of judicial independence, with a better balancing of the scales between prosecutor and accused (criminal cases) and citizen and state (judicial review and/or human rights cases), and a more sensitive and sophisticated management of family law cases.

Further, it is difficult to sustain within one court system (particularly in smaller jurisdictions) a modern customer-friendly and impartial approach to commercial cases and a more antiquated parochial approach to other areas of the law, human rights included. Jurisdictions such as Bermuda have had for over 40 years constitutionally entrenched bills of rights. Because of the strong influence of UK law on commercial practice elsewhere in the Commonwealth, the increasing interaction between commercial law and human rights (principally the right to a fair hearing) being explored in the UK courts has created ripple effects in other jurisdictions as well. Respect for human rights is not simply a 'conditionality' to be satisfied to enable emerging countries to qualify for foreign investment or lending. It is now an integral part of the commercial dispute resolution process itself as well.

### **Commercial law and public law developments in modern Bermudian history**

Bermuda was first settled in 1609 when British adventurers bound for Virginia were shipwrecked there by a storm later fictionalised in Shakespeare's *The Tempest*. Subsequent settlers imported African slaves, and institutionalised racial segregation and undemocratic political structures entrenching 'white minority' rule, structures which persisted from Emancipation in 1834 until the enactment of the 1968 Constitution. This Constitution introduced full internal self-government with a bicameral legislature with the lower House elected on universal adult suffrage, a Cabinet, and a bill of fundamental rights and freedoms that the legislature was not competent to alter. Thirty years before the UK Parliament enacted the Human Rights Act 1998 with limited powers for reviewing the compliance of UK primary legislation with the European Convention of Human Rights, the courts in this British colony were empowered to strike-down legislation which was

inconsistent with fundamental human rights. Forty years before the Supreme Court of England and Wales was established as a wholly independent judicial body separate from the Legislature, Bermuda's courts were clearly separated from the local legislature, with the Judicial Committee of the Privy Council in London entrenched as Bermuda's highest appellate court.

These constitutional changes were most directly the result of post-War political campaigns and the creation of political parties in 1963 and 1964. But, by way of economic background, Bermuda was moving out of a long period of comparative pre-War stagnation into a period of rapid economic growth, driven by a dynamic tourist industry and a nascent offshore financial industry based on the absence of income and corporate taxation. With the nearby Civil Rights movement in the US, Bermuda's major trading partner, economic and social segregation and undemocratic governance did not sit well with the long-term economic interests of Bermuda's ruling merchant class.

Commercial legal developments took root more quickly in Bermuda's soil than did human rights law, in practical terms, inspired in large part by the visionary efforts of the Bermudian principals of leading law firms. An estimated five-fold increase of Bermuda's legal profession between 1970 and 1980 was largely attributable to international commercial legal work. Bermuda's political and economic transition from parochial oligarchy to internationally connected democracy required the courts to adopt a commensurately modern approach.

In 1972, Dr Earle Seaton, a Bermudian international lawyer who had spent most of his legal career in pre-Independence Tanganyika and post-Independence Tanzania, was appointed as Bermuda's first black Puisne Judge. In 1977, Bermudian James Astwood (soon to become Sir James) became Bermuda's first black Chief Justice. The Court of Appeal, initially established in 1964, continued to be an international tribunal staffed by Commonwealth judges (generally judges who had served or were serving in other British colonies) who sat no more than three times a year.

The first recorded Bermudian decision involving the grant of relief for breach of a

litigant's fundamental rights and freedoms was *Fisher v Minister for Home Affairs* (Bermuda CA, 1977), a case successfully argued by Bermudian lawyer Julian Hall. It involved an application under section 15 of the Constitution for a declaration that the right to reside in Bermuda conferred on the 'child' of Bermudian by section 11 of the Constitution applied to all children, whether born in or out of wedlock. Court President Sir Michael Hogan agreed with Seaton J at first instance that the term 'child', applying ordinary common rules of construction, did not include an illegitimate child. However the majority of the Court (Telford Georges JA and Sir William Duffus JA) held that a broader interpretative approach was required with respect to provisions protecting constitutional rights. This allowed the children of a Jamaican woman born before she came to Bermuda and married a Bermudian to join her in Bermuda. The affirmation of this decision by the Privy Council (*Minister of Home Affairs v Fisher* [1980] AC 319) is still a leading Commonwealth authority on the interpretation of constitutional fundamental rights and freedoms provisions.

As Bermuda's courts and legal system expanded, absorbing a diverse mix of Bermudian and Commonwealth judges and lawyers, the sophistication of both private commercial law and public law also increased. Although the Human Rights Act 1981 created a Human Rights Commission, and public lawyers gained success with two fundamental rights and freedoms cases (*Royal Gazette v Attorney-General* (1982; search of newspaper's premises on suspicion of criminal libel held to infringe newspaper's freedom of expression and privacy rights); *Marsh v Attorney-General* [1989] Bda LR 52 (provisions of the Road Traffic Act 1947 held to be inconsistent with constitutional presumption of innocence)), the 1980s were more notable for the emergence of 'serious' commercial litigation, driven in part by a wave of insurance insolvency which swept across the Islands' shores in the second half of the decade, but also reflecting the fact that major trading companies were now headquartered in Bermuda.

Upon the advice of Sir James Astwood CJ, the Governor in 1992, appointed Richard Ground QC (Bermuda's current Chief Justice) as Puisne

Judge in Bermuda. Although not formally designated as a commercial judge, Ground J between 1992 and 1998 presided over many of the significant commercial cases which came before the Supreme Court, modelling the role of the specialist commercial judge for the first time in Bermuda's legal history. During this same period, which also witnessed the dramatic growth of Bermuda's international business sector, specialisation within the legal profession became the norm rather than the exception, with the quality of advocacy in commercial, criminal and public law cases steadily growing. The transition of Bermuda's Courts from local and parochial to independent and internationalist, a process which was started by Sir James Astwood CJ, gathered a full head of steam after Barbadian-born Bermudian L.A. Ward QC (now Sir Austin Ward JA) became Chief Justice in 1993. His landmark judgment in *Re ICO Global Communications (Holdings) Ltd* (1999] Bda LR 69) paved the way for the now established practice of judicial cooperation through parallel insolvent restructuring proceedings between the Bermuda Supreme Court and the US Bankruptcy Court.

By the early 21st century, on the judicial front, the Commercial Bar in Bermuda had become accustomed to two dedicated commercial judges, Guyanese-born Vincent Meerabux, and Scottish-born Denis Mitchell. When these two left Bermuda, coincidentally in quick succession, the case for a formal Commercial Court was seriously advanced for the first time.

### **The establishment of Bermuda's Commercial Court**

The Bermuda Commercial Court was established under Order 72 of the Rules of the Supreme Court with effect from 1 January 2006. The initial stimulus for the creation of a specialist court undoubtedly came when a large trust case had to be aborted in 2001 because the trial judge's contract expired in the midst of the trial and was not renewed. By early 2003 (largely due to judicial staff shortages which could not have been predicted) Bermudian commercial litigators were calling for a commercial court.

In February 2004, then Attorney General appointed a Justice Review Committee which, chaired by Justice Norma Wade-Miller, reported by the end of the following month.

The Justice Review Committee Report made the following recommendation in paragraph 7.4.4:

*'The Chief Justice amends as soon as practicable the existing Rules of the Supreme Court to create a Commercial Division of Supreme Court similar to that established under Part 71 of the Jamaican CPR...'*

This recommendation was substantially implemented, save that the provisions enacted follow more closely the English Supreme Court Practice 1999 version of the rule. Order 72 created both a Commercial Court as a division of the Supreme Court and a Commercial List. It identified as 'commercial actions' any claim or counterclaim relating to a business document or contract; the export or import of goods; the carriage of goods by land, sea, air or pipeline; the exploitation of oil and gas reserves or other natural resources; insurance and re-insurance; banking and financial services; the operation of markets and exchanges; the purchase and sale of commodities; the construction of ships; business agency; arbitration; and any application under the Companies Act 1981.

The institutional arrangements for Bermuda's Commercial Court are more formal than those in Hong Kong, New South Wales and Ontario where only a 'list' is established and judges are assigned to it. The Bermuda version formally creates a separate division of the Supreme Court, and provides for judges to be designated as 'Commercial Judges'. The Chief Justice and two other puisne judges were designated as such in January, 2006. However, as appears to be the case elsewhere, cases can be initially filed in the Commercial List or transferred into or out of it.

### **The protection of human rights in the post-Commercial Court era**

Prior to the establishment of the Commercial Court, there was a criminal case back-log. Three years later, following the designation of two judges (Bermudian Charles-Etta Simmons J and Barbadian Carlisle Greaves J) as specialist criminal trial judges, this backlog has been eliminated. This ensures respect for the rights of accused persons to a trial within a reasonable time in accordance with section 6 of the Bermuda Constitution. Bermuda's legal

aid scheme has in recent years supported the engagement of foreign leading counsel in serious cases—typically, murder cases, reflecting an enlightened approach to giving substance to fair trial rights, irrespective of a defendant's means. Such a provision is only made possible by the successes achieved on the economic development front.

Two of the most significant recent public law decisions came at the Court of Appeal level where Parliament's attempts to take away the Judiciary's sentencing discretion have been held to be unconstitutional. This is the same appellate panel that presides over international commercial disputes and it is surely not wholly coincidental that a modern international best practice approach is being aspired to by Bermuda's Judiciary in the fields of commercial law and public law at one and the same time.

The commercial internationalisation of Bermuda's economy has compelled the Courts to adjudicate more cases in other areas of the law in a manner which has an enhanced regard for human rights, broadly construed, beyond their local parameters. Judicial review cases in relation to immigration matters and child custody and access cases involving parties temporarily resident in Bermuda or Bermudian parties who wish to emigrate, are cases in point. Much new law has been created by well-heeled litigants and subsequently been applied for the benefit of those of more modest means. Consideration is currently being given to a Law Reform Sub-Committee Report on Family Law which has recommended a unified Family Court, following the Trinidad and Tobago model.

### **Ethical business law: is there an inevitable conflict between serving the needs of businessmen and the promotion and protection of human rights?**

There will perhaps always be a tension between the role of Commercial Court in meeting the expectations of business litigants (and, perhaps, Government economists) and the promotion and protection of human rights within and beyond the jurisdiction of the court. How this tension can best be resolved lies beyond the scope of the present paper but deserves further analysis. A few summary observations will be made at this stage.

Firstly, it has been argued above, that the Bermuda experience suggests that there is more of a natural synergy between economic development, the efficient resolution of commercial disputes and the protection and promotion of human rights than might ordinarily appear to be the case. This is because promoting prosperity makes it easier for a responsible Government to invest in human rights, as well as because increasing specialisation of the legal profession and judiciary will inevitably result in an enhancement of public and private law systems alike.

Beyond this, it is necessary to remember that the courts are constitutional creatures and must exercise their judicial powers in a constitutionally compliant manner. Human rights issues may not routinely be engaged in commercial cases, but where they are raised the courts must deal with them to the extent that they are relevant. It is said that limited liability companies cannot lawfully put morality ahead of the pursuit of profit, but regulatory authorities have considerable scope to punish corporate immorality. So do the courts, when presented with cases of fraud, for instance, as well. But philosophical concerns relating to the moral impurities in certain global commercial activities ought not to be used as an excuse for the courts failing to meet the legitimate needs of business litigants, and potentially undermining long-term growth in economic and human terms as well. After all, most Commonwealth courts in the early 21st century are constitutionally bound to afford civil litigants including commercial litigants, a fair hearing within a reasonable time.

### **Conclusion**

The Bermuda experience suggests that a solid constitutional base guaranteeing at least the potential for democratic good governance, the rule of law and respect for human rights is (or may be) required as a precondition for significant economic growth. It also suggests that where it becomes a national imperative that courts adjudicate commercial disputes involving foreign interests in a fair and efficient manner, and where specialisation of the legal profession emerges, human rights cases will tend to be adjudicated in a fair and efficient manner as well. This process of maturation in Bermuda (and no doubt other Commonwealth

offshore centres) has been facilitated by the importation, both permanently and temporarily, of Commonwealth judges and lawyers from almost every corner of the globe. Most independent Commonwealth countries are increasingly able to rely on home-grown judicial talent at all court levels, and there, the sun appears to be setting on the golden Commonwealth era of 'Judges *Sans Frontieres*'. The smaller nations and the British Overseas Territories and Crown Dependencies, however, will perhaps always look overseas, especially at the appellate level.

If economic development and human rights are to be promoted effectively by Commonwealth judges in the years ahead, the CMJA will undoubtedly have a vital role to play in sustaining an internationalist impulse and spirit amongst its far-flung national membership. And whatever the educational and motivational benefits of the above reflections may be, the real business of judging ultimately requires judges handling individual cases, be they international or local, large or small, to 'do right by all manner of people'.

## DOROTHY WINTON TRAVEL BURSARIES FUND

### WE NEED YOUR DONATIONS!

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

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

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

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

Uganda House  
58-59 Trafalgar Square  
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Please remember that as a registered charity, the CMJA can reclaim tax paid by UK tax payers. If you include your name and address (e.g. on the back of the cheque), we can send you the form to fill in for gift aid purposes – a simple declaration and signature.

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# THE DEVELOPMENT OF JUDICIAL CODES OF CONDUCT – A CANADIAN PERSPECTIVE

*His Hon. Chief Justice John Z Vertes, North West Territories of Canada*

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## **Independence and accountability**

Judicial independence is an essential part of the fabric of a free and democratic society. Judges must be free from all external influence or control so as to ensure the impartial application of the law. The independence of the judiciary is all but universally recognized as a necessary feature of the rule of law.

Numerous international instruments declare that, in the determination of civil rights and obligations, and criminal responsibility, all people are entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. These declarations represent a common understanding of those rights which the signatory states pledge to respect and observe. But judicial independence is not an end in itself; it is rather a means by which other principles or values are realized, especially the rule of law and judicial impartiality. It is not some self-serving judicial privilege. It represents an obligation, the obligation of judges to apply the law impartially and fairly.

It follows that judicial independence is not a shield behind which judges can shelter themselves from criticism. Responsibility entails accountability. It is an underlying principle of democracy that power should not go uncontrolled. Institutions, including governments and the judiciary, are expected to carry out their roles and responsibilities with integrity in the service of the public. They are expected to be accountable. And, as was said by Chief Justice McLachlin of Canada in 2006, ‘the need for public confidence in the independence and impartiality of the courts dictates the form that judicial accountability takes. Any system of accountability for judges must take judicial independence as a necessary condition.’

## **Methods of accountability**

There are, of course, numerous methods by which judges are held accountable. There is the open court process itself. Judges work in public

and must give reasons for their decisions. There is peer review through appeals and commentaries in law journals. Because of their public nature judicial decisions are subject to criticism and commentary by the press. And there is the process for the removal and discipline of judges.

In Canada, s 99 of our Constitution Act incorporates the principle contained in the Act of Settlement 1701, that federally-appointed judges shall hold office during good behaviour. Judges may only be removed from office by the Governor General upon an address of Parliament. There is no corresponding constitutional provision for provincially-appointed judges (judges of limited jurisdiction). However, each Canadian province and territory has adopted similar protections against arbitrary removal.

There are judicial councils in Canada both at the federal level and at the provincial level that have the responsibility of carrying out investigations into complaints of judicial misconduct. For federally-appointed judges (these would be all superior court trial and appellate judges), the Judges Act gives the Canadian Judicial Council (a body composed of the chief justices of all superior and appellate courts) the power to recommend to the Minister of Justice that a judge be removed from office. Section 65(2) of that Act stipulates that the Council may recommend removal where, in the opinion of the Council, the judge has become incapacitated or disabled from the due execution of the office of judge (a) by reason of age or infirmity; (b) for having been guilty of misconduct; (c) for having failed in the due execution of the office of judge; or (d) for having been placed, by his or her conduct, in a position incompatible with the due execution of the office.

The test for judicial incapacity was established by the Canadian Judicial Council in a 1990 inquiry decision:

*Is the conduct alleged so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office?*

To date, no Canadian judge has been removed from office through an address of Parliament. Those few for whom a recommendation for removal has been made, or was contemplated, have resigned from the bench prior to Parliament having to act.

### **The Canadian Judicial Council's procedures**

The Canadian Judicial Council has established an elaborate system for the investigation of complaints of judicial misconduct. This is premised on the theory that the standard of accountability in the complaints process is not limited to the high standard set by the constitution. The Council may receive and consider any complaint, including those that may not lead to, nor have any reasonable expectation of leading to, removal. There is general agreement among the Canadian judiciary that, even while Parliament's role is restricted to questions of removal, there is no impediment to the Council having a mechanism to review judicial conduct that falls short of removal and to impose some form of intermediate discipline by way of expressions of concern regarding the judge's conduct or addressing the conduct complained of through remedial measures. Such powers are viewed as a safeguard against all complaints being treated as if they were questions of removal.

Throughout the investigation and discipline process, there are significant protections built in for the judge in question. Judges must not be incapacitated by the complaints procedure. For that reason there is an intensive initial vetting process for each complaint. Those that are clearly frivolous or vexatious are dismissed at this initial stage. If the complaint reveals something of substance, the judge is given a chance to respond. A panel of judges may investigate the complaint further. The panel may recommend that the file be closed with or without an expression of concern or that a committee of inquiry be constituted. If there is a committee of inquiry then those proceedings are presumptively public and the judge has the

right to appear by counsel. The committee's findings and recommendations are then reviewed by the entire Judicial Council. It is that body that decides whether to make a recommendation for removal to the executive.

It is important to distinguish between matters of misconduct, which are governed by standards of professional conduct, and the judicial role in adjudication. The latter are not part of the discipline process. Judges cannot be removed for the *bona fide* exercise of their adjudicative powers or for errors of law. Those questions are left to the appeal process. Indeed, the vast majority of complaints received each year by the Canadian Judicial Council are really complaints about the result in a case.

It is also worth distinguishing between judicial accountability for the discharge of professional functions and accountability for ordinary crimes which a judge may commit in their private capacity. For those the applicable rules are the same as for other individuals.

It should also be noted that, in the Canadian context, the power of the Governor General to remove a judge from office upon the address of Parliament is not affected by anything done, or omitted to be done, by the Judicial Council under its investigative powers contained in the Judges Act. It is possible in theory for a judge to be removed from office even if the inquiry procedure, discussed above, is never engaged. The Canadian Federal Court of Appeal has remarked, however, as follows:

'As a practical matter ... it seems highly improbable that Parliament could be moved to recommend the removal of a judge without the kind of firm foundation in fact and principle that is likely to be obtained through an inquiry under [the Judges Act] or its functional equivalent.'

### **Establishing standards**

The question then becomes how to establish standards for judicial conduct without eroding judicial independence. There is quite a large area of overlap between judicial ethics and judicial discipline. And, to state the obvious, a judiciary that sets its own ethical standards, and disciplines itself, reinforces its independence. But, as noted by one Canadian commentator, the concepts of independence and of judicial ethics are interdependent. Without ethics, independence cannot be

justified, and without independence ethics do not suffice. The two are thus essential and mutually reinforcing.

Judicial independence cannot be used as a shield behind which judges have the opportunity to conceal possible unethical behaviour. For this reason, judges must conduct themselves according to ethical guidelines. The primary responsibility for determining what behaviour best reflects the duties inherent in the position of judge rests, of course, with each judge, whose appointment should be a sign of confidence in his or her personal integrity. On an institutional level, the responsibility for ensuring compliance with ethical standards resided for many years with the chief justice of the court. A supervisory power over ethics was seen as being inherent in the position, at least in a highly persuasive sense.

More recently, and in order to provide judges with clear rules of conduct, many countries have seen the adoption of codes of ethics to regulate judicial behavior. In some cases, judges have drafted these codes; in other cases, governments have made such codes part of legislation. In the international sphere, the Bangalore Principles of Judicial Conduct (2002) contains a set of values which are reflected in most codes of conduct: independence, impartiality, integrity, propriety, equality, competence and diligence.

Many writers, in Canada and elsewhere, have argued that there is a need for standards of conduct within the judiciary designed to maintain the public's confidence in it. Writers and academics, however, do not always agree as to how such standards can be translated into conduct, be it conduct that is appropriate in court or conduct that judges may adopt in public. Some advocate formal codes of conduct to regulate the judiciary, the breach of which would be sanctioned by discipline, whereas others would rely on ethical guidelines.

As previously noted, there is quite a large area of overlap between judicial discipline and judicial ethics. Unfortunately the tendency has been to conflate the two into the same thing. But, while the two spheres intersect, they are not the same. While it would be difficult to imagine wrongful conduct worthy of sanction that would not also be a breach of ethics, the reverse is not necessarily true.

Codes of conduct can create standards and rules which if departed from may automatically lead to disciplinary proceedings. Such a code would need to focus on specific prohibited acts so that a breach would be objectively verifiable. The difficulty with such a prescriptive code, of course, is that it lacks the flexibility to address the particular circumstances of each case. These types of generalized rules may be, depending on the circumstances, over-inclusive or under-inclusive. And usually they reflect the lowest common denominator – the minimally acceptable behaviour which, if the judge falls below it, would lead to discipline.

Codes of ethics (or ethical guidelines), on the other hand, reflect a normative system made up of general admonitions to adopt suitable conduct. They are aspirational, meant to reflect ideals to which judges should aspire. They do not have the same degree of specificity found in a code of conduct. The meaning of each ethical rule must be worked out with reference to each particular case. They are, by nature, difficult to define with precision. As noted by Justice Gontier, of the Supreme Court of Canada, in a 1995 decision:

*Ethical rules are meant to aim for perfection. They call for better conduct not through the imposition of various sanctions but through compliance with personally imposed constraints. A definition, on the other hand, sets out fixed rules and thus tends to become an upper limit, an implicit authorization to do whatever is not prohibited. There is no doubt that these two concepts are difficult to reconcile, and this explains the general nature of the duty to act in a reserved manner: as an ethical standard, it is more concerned with providing general guidance about conduct than with illustrating specifics and the types of conduct allowed.*

The aim of any model must be to give judges a useful tool based on generally accepted ethical standards. But ultimately it is for the judge to decide what he or she should do in any given situation. The judge's autonomy must not be placed into a legal straight-jacket. So the form adopted has implications for the independence of the judiciary. Codes of conduct tell judges what they must do; ethical codes articulate a concept of what it means to be a judge.

## Rules or principles?

Canada did not follow the proscriptive code of conduct model. Historically the view was that questions of whether a judge's conduct was proper or improper, and, if improper, how serious, depended upon the circumstances, and to attempt to codify such circumstances was impossible. Nevertheless, from the inception of the Canadian Judicial Council, it was thought that the judiciary, particularly newly-appointed judges, would benefit from a systematic presentation of the legal and ethical problems that may confront judges and suggested ways of dealing with them. These were not to be official directives, merely advice from experienced judges to their colleagues. As a result, the Council issued a number of publications over the years.

In 1995, the Canadian Judicial Council undertook the preparation of a 'statement of principles on judicial conduct'. From the start there was a concern that such a statement of principles would be used to govern judicial behaviour, as a code of conduct, and thereby undermine the independence of individual judges. Because such a document was to be disseminated to the public, there was a fear that the public would view it as standards of judicial conduct and an expectation would develop that any breach would be sanctioned. Thus it would become a discipline code.

Notwithstanding these concerns, in 1998, the Council formally approved and published what is now known as the Ethical Principles for Judges. In doing so, the Council rejected the proscriptive model and instead aimed to set forth general guidelines meant to provide ethical guidance to judges. It adopted an aspirational and educational model, using language that is hortatory in nature. The Ethical Principles address this directly when, after commenting that the purpose is to provide ethical guidance to judges, it states:

*The Statement, Principles and Commentaries are advisory in nature. Their goals are to assist judges with the difficult ethical and professional issues which confront them and to assist members of the public to better understand the judicial role. They are not and shall not be used as a code or a list of prohibited behaviours. They do not set out standards defining judicial misconduct.*

The preface to the Ethical Principles also addresses the interaction of such guidelines with the principle of judicial independence:

*An independent judiciary is the right of every Canadian. A judge must be and be seen to be free to decide honestly and impartially on the basis of the law and the evidence, without external pressure or influence and without fear of interference from anyone. Nothing in these Statements, Principles and Commentaries can, or is intended to limit or restrict judicial independence in any manner. To do so would be to deny the very thing this document seeks to further: the rights of everyone to equal and impartial justice administered by fair and independent judges.*

The format of the Ethical Principles is such as to set out broad principles and then provide an explanatory text and commentary. It is divided into five categories: judicial independence, integrity, diligence, equality and impartiality. In each category there is a general statement. Then there are defining principles which give some body to the general statement. These are followed by commentaries with references to texts and cases as well as some illustrative examples.

Most significantly, the Council, in recognition of the fact that no document can be the 'final word' on such an important subject, established an Advisory Committee of Judges to which specific questions can be submitted by judges. The Committee assesses each question on a confidential basis and issues an advisory opinion. These opinions are also published, on an anonymous basis, to the entire judiciary.

The 'Advisory Committee' approach has two benefits. First, the opinions rendered contribute to the ongoing review and elaboration of the ethical principles as well as addressing new issues that may arise. Second, it provides readily available help to judges looking for guidance on a specific issue. The opinions are advisory only, non-binding, so each judge must make his or her own decision regarding the ethics of the situation canvassed. But the opinions, if followed, could be regarded as evidence of good faith on the part of the judge should his or her conduct be questioned.

Since promulgation of the Ethical Principles by the Council, there are still concerns that they may be used in the context of disciplinary proceedings to generate standards of conduct for the sanctioning or removal of judges. In several cases where the conduct of a judge was being examined, the conduct was assessed in light of the Ethical Principles before it was assessed with reference to the test for removal established by the Council in 1990 (quoted earlier). In these cases the Committee of Inquiry made a preliminary determination that there had been a breach of one of the ethical principles. The Ethical Principles, even though they were issued for federally-appointed judges, have also been referred to in discipline hearings into the conduct of provincially-appointed judges. The Canadian Judicial Council has approved the use of the Ethical Principles as part of the assessment as to whether the conduct complained of constitutes sanctionable conduct:

*In summary, conduct by a judge which jeopardizes the impartiality or integrity of a judge in the minds of right-thinking members of the public may properly be the subject of judicial conduct proceedings. As the Ethical Principles state at page 14, judges have an obligation due to their unique constitutional role in society to 'conduct themselves in a way that will sustain and contribute to public respect and confidence in their integrity, impartiality, and good judgment.' While the Ethical Principles are not absolutes and while a breach will not automatically lead to an expression of concern by the CJC, much less a recommendation for removal from the Bench, they do set out a general framework of values and considerations that will necessarily be relevant in evaluating allegations of improper conduct by a judge. Therefore, the fact that challenged conduct is inconsistent with or in breach of the Ethical Principles constitutes a weighty factor in determining whether a judge has met the objective standard of impartiality and integrity required of a judge and in determining whether the challenged conduct meets the objective standard for removal from the Bench.*

Critics of this approach have pointed out that, while the use of the Ethical Principles to examine conduct may be a useful analytical tool, it poses a danger that the Ethical Principles will be turned into a code for determining misconduct. The Principles do not address minimum standards of acceptable conduct. While any discussion of misconduct would involve ethical considerations (since the two overlap), not all questions of ethics necessarily involve misconduct. Reliance on the Ethical Standards for judging misconduct also runs the risk of watering down the stringent test for removal developed previously.

In the view of many of these critics there is a need to maintain a firmer distinction between sanctionable misconduct and a question of ethical behaviour alone. In order for a breach of the Ethical Principles to be sanctionable, the conduct should also breach a standard of judicial conduct that is generally accepted outside of the parameters of the Ethical Principles. In such case there would be no need to rely only on the Ethical Principles, thereby avoiding the possibility of turning it into a code of conduct.

These are obviously difficult and sensitive issues. How far judicial conduct on and off the bench should be guided by rules, codes or guidelines, is a question that every court must address. It is essential to the integrity of the judicial system that judges be free to act independently. It is equally essential that public confidence in the administration of justice and the judiciary be preserved.

Every country has to adopt those measures that best fit its circumstances. In Canada, and many other parts of the Commonwealth, the principle of judicial independence is so entrenched that it is inconceivable to think of a direct challenge to it. What is more likely, however, is that encroachments will be made in the name of accountability. Accountability there will and must be. But it must always be commensurate with judicial independence, not for the benefit of the judges, but for the benefit of the public that relies on an independent and impartial judiciary as the foundation of the rule of law.

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# GREEK TRAGEDY IN GIBRALTAR

David McClean, Emeritus Professor of Law, University of Sheffield

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The removal of a Chief Justice of a Commonwealth jurisdiction is, happily, an uncommon event. There have been cases, most recently in Pakistan and Fiji, where the removal was part of a political struggle; removal for cause is rare indeed. The recent removal of the Honourable Derek Schofield as Chief Justice of Gibraltar is of considerable interest and the opinions delivered in the Judicial Committee of the Privy Council (*Hearing on the Report of the Chief Justice of Gibraltar (Referral under s 4 of the Judicial Committee Act 1833)* [2009] UKPC 43, [2010] 2 LRC 450, a case said by the majority of the Board to have aspects of a Greek tragedy) have a significance far beyond what Lord Phillips described as ‘a self-governing British overseas territory of a modest size’. It is unfortunate that the Board was narrowly divided: Lord Phillips, Lord Brown, Lord Judge and Lord Clarke formed the majority; Lord Hope, Lord Rodger and Baroness Hale the minority.

Mr Justice Schofield was appointed Chief Justice of Gibraltar in 1996, having previously served as a judge in the Cayman Islands and Kenya. Throughout the process which led to his removal, no criticism was made of his ability as a lawyer to decide the cases which came before him. However, on 17 April 2007, virtually all the leading practitioners in the (fused) legal profession in Gibraltar presented a memorandum to the Governor expressing ‘deep concern at a state of affairs which has developed seriously affecting the administration of justice and the reputational image of Gibraltar’ and declaring that they had lost confidence in the ability of the Chief Justice to discharge the functions of his office. A supplementary memorandum, an extraordinary document, listed a number of ‘anomalies relating to the behaviour’ of the Chief Justice going back to 1997. It is difficult to summarise the allegations made; some of them will become clear in what follows.

## The background: the Constitution, judicial standards and the nature of Gibraltar

The Constitution of Gibraltar contains, as one would expect, provisions on the tenure of office

of the judges. In particular, section 64(2) provides that ‘The Chief Justice ... may be removed from office only for inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour ...’. In any such case, the process requires reference first to a tribunal appointed by the Governor and then, if the tribunal so advises, a reference to the Judicial Committee. It is also provided that the powers of the Governor under section 64 are to be exercised by him in accordance with the advice of the Judicial Service Commission. As the Judicial Committee noted, the independence of the judiciary requires that a judge should never be removed without good cause and that the question of removal be determined by an appropriate independent and impartial tribunal.

All parties accepted that the Bangalore Principles of Judicial Conduct 2002 and the *Guide to Judicial Conduct*, published by the Judges’ Council of England and Wales in October 2004, provided guidance as to the standard of conduct to be expected of a judge. The Committee quotes extracts from the Bangalore Principles as being of particular relevance.

Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.

A judge shall perform his or her judicial duties without favour, bias or prejudice.

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

A judge shall, so far as is reasonable, so conduct himself or herself as to minimise the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases.

Propriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge.

A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office.

A judge shall, in his or her personal relations with individual members of the legal profession who practice regularly in the judge's court, avoid situations which might reasonably give rise to the suspicion or appearance of favouritism or partiality.

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

A judge shall not allow the judge's family, social or other relationships improperly to influence the judge's judicial conduct and judgment as a judge.

However, the majority of the Board noted that while the highest standards were expected of a judge, failure to meet those standards would not of itself be enough to justify removal of a judge. So important is judicial independence that removal of a judge could only be justified where the shortcomings of the judge were so serious as to destroy confidence in the judge's ability properly to perform the judicial function.

Gibraltar is a small community and many of its leading citizens have family and business links. The Judicial Committee received a statement by the Chairman of the Gibraltar Bar, which clearly influenced the approach of the majority of the Board:

*The seriousness of the matters complained of must be judged from the standpoint of Gibraltar and not from that of a larger jurisdiction. In, say, London with its large number of judges the conduct of individual judges would not have the same impact on the judiciary, or on the operation of the principle of the separation of powers or on the justice system generally*

*as would the conduct of a Chief Justice in a two judge jurisdiction like Gibraltar. Office holders in Gibraltar have to be particularly sensitive to the need to maintain the respect and confidence of the public, which are as necessary, if not more so than institutional safeguards, for the proper discharge of their functions. The public in Gibraltar is much closer to public figures than in the case of say, England. Their scrutiny is more intense and their actions more directly felt.*

### **The tribunal report**

The subsequent tribunal (composed of Lord Cullen of Whitekirk, Sir Peter Gibson and Sir Jonathan Parker) delivered a report of 207 pages in December 2008, which examined 23 different episodes in great detail. It found (para 7.35) 'that in a number of instances there was misbehaviour on the part of the Chief Justice, without our going so far as to say that any single instance amounted to such misbehaviour as to show that he was thereby unfit to hold office'. However, it also identified a number of characteristics of his personality and attitude: 'the Chief Justice did not seem to be alive to the boundary between what was and what was not proper for someone in his position to do or say'; 'he showed a pre-occupation, bordering on an obsession, with judicial independence. He claimed that it was under threat when this was not the case'; 'he showed himself to be unable to restrain himself from supporting his wife in her attacks on the members of the Bar Council or her libel action against its Chairman ... He was unable to grasp that his association with them would have been seen by a fair minded and well informed observer as improper'; and 'the perceptions arising from the conduct of the Chief Justice inevitably rendered it impossible for the Chief Justice to sit in a significant number of cases'. In these circumstances the tribunal concluded that the Chief Justice was unable to discharge the functions of his office and declared itself satisfied that this inability warranted his removal from office.

It is, with respect to the very distinguished judges who made up the tribunal, not very clear what this means. There is a clear finding that there was no misbehaviour such as would warrant removal. No detailed reasoning explains the relationship between defects of

‘personality and attitude’ and the constitutional test of ‘inability’. The reader is a little concerned that a pre-occupation with judicial independence should be listed as a defect of personality or attitude; many readers of this *Journal* must fall foul of that test.

### Before the Judicial Committee

Although not strictly the case, the Judicial Committee having original jurisdiction to consider the reference, the hearing was in effect an appeal against the findings and recommendation of the tribunal. The Board addressed a number of issues of law.

The tribunal applied the civil standard of proof when resolving issues of fact, taking the view that the proceedings before the tribunal were not to be equated with disciplinary proceedings where the criminal burden of proof was applicable. The Judicial Committee admitted that it had not found the issue of standard of proof an easy one. It did, however, hold that the proceedings before the Board were not about misconduct but with deciding whether the Chief Justice was fit to perform his office; the civil standard was appropriate. There seems to have been no dissent by the minority on this point, but it remains puzzling. The majority, much later in their opinion, explain that misbehaviour and inability overlap, and so cover much of the same ground. That rather suggests that an allegation would be judged by one standard of proof for one purpose but by a lesser standard for another, overlapping, purpose. That could lead a future tribunal to tie itself into some pretty messy knots.

The Judicial Committee rightly rejected an argument that the public statements made by the Chief Justice or his wife that were no more than the exercise by them of the right of freedom of expression that is recognised by art 10 of the European Convention on Human Rights. The proper exercise of judicial office necessarily circumscribes the freedom of expression open to those who do not have to ensure that they are seen to be acting without fear or favour, affection or ill will.

### The majority view

The majority opinion, delivered by Lord Phillips, examined in turn a number of episodes and differed from the tribunal’s views on some of them. It differed in part from the tribunal’s view of the conduct of the Chief

Justice at the 1999 opening of the legal year in speaking trenchantly about the control of funding for the judiciary, remarks sparked by an issue related to his wish to attend a conference for which funding was refused. The majority thought that this did have relevance to the question of whether defects of character and personality had resulted in a current inability to perform the functions of his office, but this matter should not have been treated as an incident of misbehaviour that formed part of the justification for removing him from office ten years later. Similarly, some of the Chief Justice’s actions in connection with his failure to make social security or PAYE payments in respect of a domestic servant were judged ‘reprehensible’ but those failings were ‘water long under the bridge’ and should, in 2009, not have weighed against him in the scale as significant misbehaviour. The tribunal report had examined what seemed an extreme reaction by the Chief Justice to a prosecution for a minor road traffic offence; the Board thought the tribunal had not placed that in its context nor set out the full story. Following these incidents, there was a period of some four years without relevant difficulties and no events that, on the findings of the tribunal, were cause for criticism of the Chief Justice.

The majority was moved by a series of much more recent events. One was a row over precedence at the formal departure of the retiring Governor in 2006. The Board described this as ‘a single incident of thoroughly unattractive behaviour by the Chief Justice’. The tribunal was justified in describing this as disgraceful behaviour, governed by pique that was inconsistent with the dignity of his office. It could properly be described as misbehaviour, albeit not of major consequence.

A more complex matter concerned the very strong public statements made by the Chief Justice during the settlement of the new 2006 Constitution of Gibraltar. Here, the Board accepted that the Chief Justice’s actions were motivated by the praiseworthy aim of promoting judicial independence:

*But to attempt to achieve this by a public and unbalanced attack on the draft Constitution shortly before the referendum showed a serious lack of judgment. The Chief Justice accepted that, with hindsight, his actions might be open to*

*criticism. The problem with his conduct was that he did not exercise the foresight required of someone in his position. It may be open to question whether his headstrong action amounted to misbehaviour. It certainly demonstrated an inability to pay due regard to the likely political consequences of his actions.*

The Board was much more critical of the Chief Justice in respect of an interrelated series of issues which had their origins in the proposal for a new Judicial Services Bill which would make the President of the Court of Appeal (who is not resident in Gibraltar) Head of the Judiciary. The Chief Justice and his wife formed the view that this particular proposal was directed at him personally and was intended to drive him from office by forcing his resignation. This led to a very public argument between Mrs Schofield and the Bar Council, leading to her commencing a libel action against its Chairman, and statements by her on a Bill her husband had received in confidence.

After the Bill had come into force, the Chief Justice filed an application for judicial review as a claimant in his own court seeking a declaration that sections of the Judicial Service Act were *ultra vires* the Constitution. As if that were not startling enough, Mrs Schofield sought similar orders in her libel action. The Board commented:

*Had the Chief Justice's application for judicial review been supported by argument that focussed solely on the question of whether section 6 of the Judicial Service Act was constitutional, we consider that his action in making that application would have shown a grave lack of judgment. Bringing legal proceedings in the court over which he presided would have been bound to raise severe practical problems to the administration of justice in Gibraltar. They would be likely to be seen to be motivated not simply, or perhaps not at all, by the Chief Justice's concern for the Constitution of Gibraltar, but by concern for his personal position and as part of the battle that his wife was fighting on his behalf. In the event the Chief Justice ensured that such a conclusion would be drawn by supporting his application with a statement that alleged that the legislation was motivated*

*by personal animosity against him on the part of the Chief Minister. This was based not on hard evidence but on conjecture. Even if that conjecture had been reasonable, which it was not, the Chief Justice should not have founded allegations upon it in his judicial review application. In the first place the motives of the Chief Minister had no relevance to the constitutionality of the Judicial Service Act. In the second place the allegations were calculated to damage the standing of his office and to render it at least questionable whether he could continue to hold that office. The tribunal was correct to hold that the action of the Chief Justice in bringing the judicial review proceedings constituted misbehaviour.*

### **Inability and misbehaviour**

The majority recognised the need for a closer analysis of the concepts of misbehaviour and inability than had been provided by the tribunal.

On 'misbehaviour', the Board relied on its own guidance in *Lawrence v A-G of Grenada* ([2007] UKPC 18). This pointed to four questions to be asked. As applied to the present case, these were:

- (i) Has the Chief Justice's conduct affected directly his ability to carry out the duties and discharge the functions of his office?
- (ii) Has that conduct adversely affected the perception of others as to his ability to carry out those duties and discharge those functions?
- (iii) Would it be perceived to be inimical to the due administration of justice in Gibraltar if the Chief Justice remains in office?
- (iv) Has the office of Chief Justice been brought into disrepute by the Chief Justice's conduct?

This is, frankly, a surprising set of questions. Only the last seems directly related to misbehaviour; the others are about ability or acceptability or suitability.

On 'inability' the Board cited the House of Lords' guidance in *Stewart v Secretary of State for Scotland* (1998 SC (HL) 81). 'Inability' was not to be restricted to unfitness through illness but extended to unfitness through a defect in character. If for whatever reason a judge

becomes unable properly to perform his judicial function it is desirable in the public interest that there should be power to remove him, provided always that the decision is taken by an appropriate and impartial tribunal.

So the majority of the Board held that it was open to the tribunal to proceed on the basis that defect of character and the effects of conduct reflecting that defect, including incidents of misbehaviour, were cumulatively capable of amounting to 'inability to discharge the functions of his office' within section 64(2). The majority shared the overall judgment of the tribunal. This conclusion was based in part on the perception of others as to the Chief Justice's ability to perform his functions; partly on the pragmatic argument that he would, as events had developed, to recuse himself from trying any case involving the Government and perhaps also the Attorney General of Gibraltar; partly on the repeated and serious shortcomings and misjudgements' in his public behaviour. The conduct of the Chief Justice had brought him and his office into disrepute.

### The minority view

Lord Hope, for the minority, was critical of the tribunal's report. It contained 'remorseless criticism' of the Chief Justice, creating a marked lack of balance in its approach to the issue.

Lord Hope spoke of the significance of judicial independence in this case.

*It is a striking fact that the first and last of the episodes listed by the majority as those for which they consider that the tribunal was right to criticise the Chief Justice's conduct were instances where he was addressing himself to what he saw as risks to the independence of the judiciary. This was the theme of the relevant part of his address at the opening of the legal year in 1999. It was also the theme of his statement that was filed in support of his proceedings for judicial review on 29 August 2007. Leaving aside some of the earlier episodes which fall outside this pattern, it is a theme that runs right through the problems that his relationship with the executive gave rise to. One of the central questions in this case is how far it was open to the Chief Justice to exercise his own judgment as to what the need to protect the independence of the judiciary required of him.*

*In his address to the Commonwealth Law Conference in Nairobi on 12 September 2007 Lord Phillips of Worth Matravers CJ said "A judge should value his independence above gold. Not for his or her own benefit, but because it is of the essence of the rule of law."*

*Nine years earlier, in June 1998, the Chief Justice was among the group of parliamentarians, judges, lawyers and legal academics who joined together at Latimer House at a Colloquium on Parliamentary Sovereignty and Judicial Independence within the Commonwealth. He participated in these discussions as a representative of the Commonwealth Magistrates' and Judges' Association and presented a paper on maintaining judicial independence in a small jurisdiction. He brought to these discussions his own experience of the risks to the independence of the judiciary in Commonwealth Africa. ... The product of the Colloquium was the Latimer House Guidelines in which various principles were set out for preserving judicial independence. There is no doubt that the Chief Justice saw it as part of his mission in life to promote these principles and, by doing so, to set an example for others in small jurisdictions such as his own. He may be criticised for the way in which he pursued this aim. He was perhaps too ready to perceive threats to his independence when in reality there were none. Perhaps he took insufficient care in his choice of language. But the importance of the principle is not in doubt. I do not detect any reasons for doubting his good faith in seeking to do all that he could to uphold it.*

Lord Hope gave some examples of other 'bruising exchanges between the senior judiciary and the executive' which were not unknown in England and Wales.

The minority took the view that the key to the case against the Chief Justice lay in two matters: (a) his actions in taking judicial review proceedings in his own court and the content of the witness statement he submitted in that case; and (b) his wife's behaviour and the extent to which, if at all, it was correct to hold him to account for those actions. On the first, Lord Hope accepted that the Chief Justice's actions raised a

serious question as to whether he had shown that he was unable to discharge the functions of his office or was guilty of misbehaviour of a kind which justified his removal.

The second gave rise to an important issue of principle. To what extent, and in what circumstances, is a judge to be held accountable for the actions of his or her spouse or other close relatives? It was difficult to find anything in the Bangalore principles or similar documents which told the judge what to do in the unusual circumstances exemplified by this case. The days were long gone when a husband and wife were treated as one person in law and the husband was that person. It was not unknown for senior figures in public life to have spouses or partners who pursued their own careers and interests, in the course of which they might say or do things that were controversial and embarrassing. Any difficulties that this might give rise to should be resolved between themselves, if they could be resolved at all, in private. Judges were not to be taken as supporting or endorsing their spouse's or partner's conduct if they did not publicly dissociate themselves from it. The law should recognise that they are independent actors and that the deeds of the one are not to be visited on the other. It was by reference to the Chief Justice's own actions alone, not those of his wife, that his ability to perform the functions of his office must be judged.

The case had been treated as one of 'inability'. This should be interpreted as meaning 'wholly unfitted to perform judicial functions'. Lord Hope did not accept that the Chief Justice's attitude to his wife's behaviour could be regarded as a defect in his character or personality. The suggestion that his pre-occupation with the principle of judicial independence was such a defect seemed to be venturing into very dangerous territory. The proposition that the Chief Justice's conduct demonstrated inability to fulfil the functions of his office, in the sense that he was wholly unfitted to perform them, had not been made out.

## Reflections

It may be doubted whether the law is clarified or improved by this case. The majority opinion suggests that the concepts of misbehaviour and inability, when found in constitutional documents, are not to be distinguished one

from another but cover much of the same ground. The notion of inability through a defect in character, endorsed by the majority, is one which could be misused by an Executive.

The story is altogether a very unhappy one. As the minority judgment spells out, Chief Justices must sometimes speak out against the Executive's proposals which they believe would harm the administration of justice. The last issue of this *Journal* reproduced some trenchant remarks by the Chief Justice of Trinidad & Tobago at the start of his legal year, courteously phrased but notable given the difficult recent judicial history in that country. What does seem to have happened is that Chief Justice Schofield got things out of proportion and made a number of serious errors of judgment. His wife's behaviour – she was described as 'headstrong' – added to his difficulties. In a small jurisdiction, mistakes cannot be hidden. Lord Hope set out the reality of the position reached:

*'The Chief Justice has now been suspended from office for more than two years. He has been exposed to a long and bruising inquiry, the effect of which has been to harden attitudes on either side. In these circumstances it is probably unrealistic to think that he could now resume the functions of his office. I would not hold this consequence against him. It was not his choice that he should be suspended. But we are where we are, and it seems to me that the proper course for him now to take would be for him simply to resign. I would hold that he should be given that opportunity and that, if he were to do so, no adverse inferences of any kind should be drawn against him.'*

Against that it must be said that parties to disputes in public life are usually reluctant to 'go quietly' even to advance a greater good. The majority opinion contains hints of the view that in that sort of case there must be a way of removing a judge, and the presence of a tough-minded and impartial judicial process would protect a judge against any Executive minded to abuse the tests laid down. That may work in the colonial situation of Gibraltar, where judges from Scotland or the Privy Council come from a safe distance. It is much more difficult to take that line in a small sovereign jurisdiction.

# LAW REPORTS

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## SECRETARY GENERAL, SUPREME COURT OF INDIA v SUBHASH CHANDRA AGARWAL

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[2010] INHCD 40 (12 January 2010)

HIGH COURT OF DELHI AT NEW DELHI (Ajit Prakash Shah, CJ and Vikramajit Sen and S Muralidhar JJ)

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An application was made to the Central Public Information Officer of the Supreme Court of India ('the CPIO') under the Right to Information Act 2005 seeking information (a) as to a Resolution of 7 May 1997 of the Full Court of the Supreme Court in which it was agreed that every judge should make a declaration of all his or her assets to the Chief Justice of the Court, which declaration should be confidential; and (b) as to whether such declarations had been made. The application did not seek information about the content of the declarations. Part (a) of the application was complied with, but the CPIO answered the second by asserting that the information was not available to it. Subsequently the Full Court resolved to make the information available on a website, but the matter had by that time come before the High Court and the matter was dealt with because of the importance of the issues raised.

### Judges' notes and draft judgments

In examining the scope of the right to information under the 2005 Act, which is defined in s 2(j) as the right to information accessible under the Act which is held by or under the control of any public authority, the Court considered an argument by the Attorney General that unless a restrictive meaning was given to s 2(j), the notes or jottings by the judges or their draft judgments would fall within the purview of the Act. The Court held that this argument was misplaced:

'Notes taken by the Judges while hearing a case cannot be treated as final views expressed by them on the case. They are meant only for the use of the Judges and cannot be held to be a part of a record 'held' by the public

authority. However, if the Judge turns in notes along with the rest of his files to be maintained as a part of the record, the same may be disclosed. It would be thus retained by the registry. Insofar as draft judgments are concerned it has been explained by Justice Vivian Bose in *Surendra Singh v. State of UP* (AIR 1954 SC 194):

*'Judges may, and often do, discuss the matter among themselves and reach a tentative conclusion. That is not their judgment. They may write and exchange drafts. Those are not the judgments either, however heavily and often they may have been signed. The final operative act is that which is formally declared in open court with the intention of making it the operative decision of the Court. That is what constitutes the "judgment"'*

The above observations though made in a different context, highlight the status of the proceedings that take place before the actual delivery of the judgment. Even the draft judgment signed and exchanged is not to be considered as final judgment but only tentative view liable to be changed. A draft judgment therefore, obviously cannot be said to be information held by a public authority.'

### The nature of the Resolutions of the judges

The Court also considered in detail the nature of the 1997 Resolution and of a subsequent Resolution of December 1999 of the Conference of Chief Justices of all High Courts to adopt the 'Restatement of Values of Judicial Life':

- (1) Justice must not merely be done but it must also be seen to be done. The

- behaviour and conduct of members of the higher judiciary must reaffirm the people's faith in the impartiality of the judiciary. Accordingly, any act of a Judge of the Supreme Court or a High Court, whether in official or personal capacity, which erodes the credibility of this perception has to be avoided.
- (2) A Judge should not contest the election to any office of a Club, society or other association; further he shall not hold such elective office except in a society or association connected with the law.
  - (3) Close association with individual members of the Bar, particularly those who practice in the same court, shall be eschewed.
  - (4) A Judge should not permit any member of his immediate family, such as spouse, son, daughter, son-in-law or daughter-in-law or any other close relative, if a member of the Bar, to appear before him or even be associated in any manner with a cause to be dealt with by him.
  - (5) No member of his family, who is a member of the Bar, shall be permitted to use the residence in which the Judge actually resides or other facilities for professional work.
  - (6) A Judge should practice a degree of aloofness consistent with the dignity of his office.
  - (7) A Judge shall not hear and decide a matter in which a member of his family, a close relation or a friend is concerned.
  - (8) A Judge shall not enter into public debate or express his views in public on political matters or on matters that are pending or are likely to arise for judicial determination.
  - (9) A Judge is expected to let his judgments speak for themselves; he shall not give interview to the media.
  - (10) A Judge shall not accept gifts or hospitality except from his family, close relations and friends.
  - (11) A Judge shall not hear and decide a matter in which a company in which he holds shares is concerned unless he has disclosed his interest and no objection to his hearing and deciding the matter is raised.
  - (12) A Judge shall not speculate in shares, stocks or the like.
  - (13) A Judge should not engage directly or indirectly in trade or business, either by himself or in association with any other person. (Publication of a legal treatise or any activity in the nature of a hobby shall not be construed as trade or business).
  - (14) A Judge should not ask for, accept contributions or otherwise actively associate himself with the raising of any fund for any purpose.
  - (15) A Judge should not seek any financial benefit in the form of a perquisite or privilege attached to his office unless it is clearly available. Any doubt in this behalf must be got resolved and clarified through the Chief Justice.
  - (16) Every Judge must at all times be conscious that he is under the public gaze and there should be no act or omission by him which is unbecoming of the high office he occupies and the public esteem in which that office is held.
- The Court noted that the merits of the argument about the binding nature of the Resolutions involved, to a great extent, the examination of the role of the Judiciary in a democracy. 'A judiciary of undisputed integrity is the bedrock institution essential for ensuring compliance with democracy and the rule of law. Even when all other protections fail, it provides a bulwark to the public against any encroachments of its rights and freedoms under the law.' It quoted from various international texts, Justice Michael Kirby's dictum that 'A judge without independence is a charade wrapped in a farce inside an oppression' and Bhagwati J's statement in *S.P. Gupta v. Union of India*:
- If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the rule of law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and effective. It is to aid the judiciary in this task that the power of judicial review has been conferred upon the judiciary and it is by exercising this power which constitutes one of the most potent weapons in armoury of the

law, that the judiciary seeks to protect the citizen against violation of his constitutional or legal rights or misuse or abuse of power by the State or its officers. ... But it is necessary to remind ourselves that the concept of independence of the judiciary is not limited only to independence from executive pressure or influence but it is a much wider concept which takes within its sweep independence from many other pressures and prejudices. It has many dimensions, namely, fearlessness of other power centres, economic or political, and freedom from prejudices acquired and nourished by the class to which the Judges belong.

On the need for Codes of Conduct, the Court referred to the Bangalore Principles of Judicial Conduct and the Beijing Statement of Principles of the Independence of Judiciary. It noted that the 1997 and 1999 Resolutions emphasised that any code of conduct or like expression of principles for the judiciary should be formulated by the judiciary itself. That would be consistent with the principle of judicial independence and with the separation of powers.

### **Fiduciary capacity?**

The Attorney General submitted that the declarations are made to the Chief Justice of India fell within s 8(1)(e), having been received by the Chief Justice in a fiduciary capacity. The Court rejected this submission: the Chief Justice could not be a fiduciary vis-à-vis Judges of the Supreme Court. The Judges of the Supreme Court hold independent office, and there is no hierarchy, in their judicial functions, which places them at a different plane than the Chief Justice. The declarations were not furnished in a private relationship or as a trust but in discharge of the constitutional obligation to maintain higher standards and probity of judicial life and are in the larger public interest.

### **Confidentiality**

The 1997 Resolution spoke of the declarations as 'confidential'. The Attorney General argued that this attracted s 8(1)(j) of the 2005 Act, exempting from disclosure 'information which relates to personal information the disclosure of which has no relation to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless

the CPIO ... is satisfied that the larger public interest justifies the disclosure of such information.'

As the Court noted, the right to information often collides with the right to privacy:

*'The government stores a lot of information about individuals in its dossiers supplied by individuals in applications made for obtaining various licences, permissions including passports, or through disclosures such as income tax returns or for census data. When an applicant seeks access to government records containing personal information concerning identifiable individuals, it is obvious that these two rights are capable of generating conflict. In some cases this will involve disclosure of information pertaining to public officials. In others, it will involve disclosure of information concerning ordinary citizens. In each instance, the subject of the information can plausibly raise a privacy protection concern. As one American writer said one man's freedom of information is another man's invasion of privacy.'*

The Court noted further that the 2005 Act makes no distinction between an ordinary individual and a public servant or public official:

*'As pointed out by the learned single Judge "an individual's or citizen's fundamental rights, which include right to privacy, are not subsumed or extinguished if he accepts or holds public office." Section 8(1)(j) ensures that all information furnished to public authorities, including personal information [such as asset disclosures] are not given blanket access. When a member of the public requests personal information about a public servant, – such as asset declarations made by him – a distinction must be made between personal data inherent to the person and those that are not, and, therefore, affect his/her private life.'*

In the present case the particulars sought by the applicant did not justify or warrant protection under s 8(1)(j) inasmuch as the only information the applicant sought was whether 1997 Resolution was complied with.

# BOOK REVIEWS

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## **Asia Pacific Judicial Reform Forum, Searching for Success in Judicial Reform: Voices from the Asia Pacific Experience (Oxford University Press, 2009)**

*By Ms Laura Wiley*

A composition of practical experiments and tested approaches to the issues faced in judicial systems around the globe, this book contains a challenging message of honesty, realism, solidarity, and hope. Divided into five sections, each detailing a general aspect of judicial reform, the chapters contain case studies from Cambodia, India, Indonesia, Nepal, the Philippines, Sri Lanka, and Vanuatu, providing a inclusive and comprehensive report on the status of the judiciary around the Pacific region, through the description, analysis and reflection of each specific reform experience. The reform topics highlighted include: securing justice, case management reform and delay reduction, promoting access to justice, ethics integrity and judicial accountability, and judicial education and skills development for judicial staff. Included among the authors are judges, lawyers, court administrators and researchers, creating a qualified collection well-suited for readers with professional backgrounds. However, the book is written in practical language and stresses inclusiveness of justice and judicial reform, making the book a beneficial read to individuals qualified by an interest in social and governmental reform and not exclusive to those with professional credentials.

*Searching for Success* emphasises the importance of practical experiences over theory and deals head-on with the most common issues found in Judiciaries around the globe, including exclusion, delay, corruption, and incompetence. The papers found within cite real-life controversies, failures and successes, allowing a realistic look at the judicial landscape and its future place in Asian-Pacific societies. The strategies are detailed in a practical manner, so that they could be implemented in nearly any jurisdiction, regardless of the diversity of funding, budgets, IT access and training.

Sustainability is an overarching theme of the pieces, and the papers offer information and strategies to redress the past and current status and shortcomings of the judicial system, as well as anticipatory programs to avoid recurring issues and to allow for positive future reform. Highlighted in many of the papers, judges and judicial officers are upheld as the catalysts of social reform and characters central to an effective and successful government. It is also stressed that communal involvement better the chances of success and sustainability, involving the entire community in the process and creating local ownership of local issues. Police forces, civil society organisations, and all individuals are granted power and responsibility, placing the book in a forward-thinking dialogue of inclusion and involvement.

Access to quality justice is also highlighted as an integral focus and task of judicial reform. Concurrent with the philosophy of communal involvement, ensuring access to justice for marginalized groups is a key point in progressive judiciaries. The justice offered must also be of quality, thus the focus on judicial training, skills development, staff integrity, and effective management of cases loads and donors. The case studies deal with the difficult issue of rebuilding a judiciary after political upheaval, such as seen in many Pacific nations. However, regardless of the difficulty of the challenges at hand, the papers form a cohesive vision of persistence and promise. Though evidence is presented at a local level, the authors recognize the benefit of the global sharing of ideas, theories, experiments, successes, and failures.

The book provides a starter and comparative point for those interested in assisting local judicial reform and the eventual contribution to the global taskforce and idea generator. Readers will be well-informed and well-prepared to evaluate local judicial issues and to stimulate the reform necessary to face the countless challenges at hand to better local and global society.

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