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EDITORIAL

Regular readers of the Commonwealth Judicial Journal (CJJ) may have noticed the absence of the publisher's logo on the outer cover of this issue. Indeed, earlier this year, we were informed by Bloomsbury Professional (who took over Tottel Publishing) that, as a result largely of cost-saving measures, they would be unable to continue to support the publication of a number of Commonwealth-related journals, including the CJJ.

Naturally, in the eyes of commercial publishers, the CJJ finds itself at a disadvantage when compared to the journals of larger academic institutions. However, this view fails to take into account the particular strengths of the journal, not least its highly-specialised and devoted readership hailing from across the Commonwealth and beyond. Moreover, the CJJ continues to fulfil one of the primary aims of the Commonwealth Magistrates' and Judges' Association (CMJA), namely, to disseminate information on matters of interest to magistrates and judges concerning the legal processes within the various countries comprising the Commonwealth.

In view of the developments detailed above, I would firstly wish to thank the various entities which have already stepped in to support the CJJ. As the journal continues to search for a new publisher, moreover, I recognise that several of our readers themselves have contacts with *bona fide* publishers which, perhaps, may be interested in publishing the journal. I would therefore use this opportunity to call on readers to communicate any recommendations to the CMJA (email: *info@cmja.org)*.

As the CJJ moves towards celebrating its 40th anniversary in 2013, moreover, we are looking to expand the Editorial Board. This is an opportunity for those who wish to be associated more closely with the CJJ, particularly in encouraging contributions to the journal and serving as its 'ambassadors'. It is not envisaged that the position would entail any significant additional workload for members, although contributions in the form of articles for publication are always encouraged! Expressions of interest may be sent by email (*info@cmja.org*) or post (to the address indicated on the inside front cover).

In April 2013, our sister organisation, the Commonwealth Lawyers Association will be organising the 18th Commonwealth Law Conference (CLC) in Cape Town, South Africa. Those interested in attending may register on the CLC website (http://www.commonwealthlaw2013.org).

In this issue, we have two papers taken from the very successful 16th Triennial Conference of the CMJA in Kampala, Uganda. In his paper, the Deputy President of the Supreme Court of the United Kingdom, Lord Hope of Craighead, sets out some guidelines for effective case management with respect to civil litigation, while the Chief Justice of Rwanda, Justice Sam Rugege, examines the legacy of the Gacaca courts, as well as judicial reforms which have been undertaken in Rwanda to improve the administration of justice after the Genocide. This issue also includes an incisive account, by the Resident Judge at Peterborough and Huntingdon Crown Courts, Nic Madge, of a trial before the Supreme Court of British Colombia in Vancouver relating to cannabis cultivation. The final article, by the President of the International Association of Refugee Law Judges, Geoffrey Care, relates to the role of judges and magistrates in the inspection of prisons.

While it is considered that the above articles provide a cross-section of important legal issues of relevance within the Commonwealth, I do not wish to simply brush over the fact that the majority of the authors in this issue hail from the United Kingdom. In this respect, I wish to urge readers to have a look at the Call for Papers at the back of this issue, and to submit articles and letters for publication, in the hope that the CJJ may continue to reflect a broader spectrum of opinion from across the Commonwealth.

The CJJ has once again collaborated with the Law Reports of the Commonwealth (LRC) to publish the following two law reports: (1) a decision of the Constitutional Court of South Africa relating to the presidential power to extend the term of office of the Chief Justice; and (2) a decision of the Supreme Court of India allowing an appeal from a group of lawyers who had been found in contempt of

court for abusing and threatening a magistrate. In this respect, I would like to thank Dr Peter E. Slinn both in his capacity as chairperson of the Editorial Board of this journal and as general editor, together with Prof. James S. Read, of the LRC, for allowing us to publish these law reports. I would also like to express my appreciation to Dr Karen Brewer, the Secretary General of the CMJA, for her ongoing support of the journal.

Finally, the Book Reviews section contains an entertaining review, by Judge Gilles Renaud of the Ontario Court of Justice, of the book *Bewigged, Bothered, & Bewildered British Colonial Judges on Trial, 1800–1900*.

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.

CALL FOR CONTRIBUTIONS

Have you dealt with an issue/ a case which other members of the CMJA might find of interest?

Have you ever thought of writing a piece for the Journal on a topic close to your heart?

Have you spoken at a seminar/meeting recently and would like to share your presentations with others in the CMJA?

Why not send us an article? The Editorial Board is seeking articles on issues affecting judicial officers across the Commonwealth.

Contributions, ideally no more that 6,000 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.

LETTERS TO THE EDITOR

Have you an opinion about the articles we are publishing? Why not send us your feedback in the form of a letter to the Editor?

JUDGES OUGHT TO BE ACTIVE REFEREES AND NOT MERE SPECTATORS

David Hope, Deputy President of the Supreme Court of the United Kingdom.
This article is based on the keynote address delivered at the CMJA 16th Triennial Conference, Kampala, Uganda, September 2012.

Abstract: *This article sets out some guidelines for effective case management with respect to civil litigation, from managing the life cycle of a case more effectively, to ensuring judicial continuity and exercising closer control over the entire litigation. It sets out a list of issues which have to be borne in mind in this context, such as familiarity with rules of procedure, focusing on the principal issues in the case, setting down and adhering to timetables while avoiding apparent bias and ensuring fairness in the case. The article draws on some examples from the jurisdiction of Scotland, including practice notes in the area of adoption of children and directions for the management of a group of personal injury action. It is submitted that judges and magistrates who are doing their best to manage their cases actively, and who do so justly and proportionately, are entitled to expect to receive the support of the appellate judges if their decisions are taken to appeal.*

Keywords: case management – civil litigation – judicial continuity – impartiality – sanctions

Referees And Spectators

Nobody today, I think, would suggest that a judge should be a mere spectator. The mere spectator does not have to do, say or decide anything at all. He or she has the luxury of just watching the game and leaving it to the players. Spectators can be as biased and partisan as they like. They may not even know what all the rules are. But that does not matter. The spectators can leave all that to the judgment of the referee, and then have the fun of shouting abuse at the referee if the decision goes against the side they are supporting. We have mere spectators in our court rooms too, of course. It is one of the most fundamental of all our principles of justice that trials should take place in public, so that everyone can see that justice is being done. We provide places for the spectators to sit, and we make sure that they can see and hear what is going on. But their place is on the public benches, not on the bench itself.

Dealing with the issue superficially, as the Chief Justice of England and Wales, Lord Judge, put it, judges or magistrates are referees. The question is, what type of referee should they be? The phrase that is in everyday use now in my country to describe the process is "case management". The phrase itself is not new. It was not invented by the lawyers. It has been borrowed from the medical profession, where it is used to refer to the coordination of services and the facilitation of treatment plans to ensure that appropriate medical care is given to disabled, ill or injured individuals. Legal case management by judicial officers in the courts and tribunals means managing the life cycle of a case more effectively. It means judicial continuity, as ensuring that the same judge is in charge of the case from the outset reduces the risk of delay. It means the exercising by that judge of closer control over the entire litigation process. It means identifying and defining the issues in dispute, and reducing delay and cost by eliminating unnecessary steps in procedure. These things, which are worth repeating – identifying and defining the issues in dispute and reducing delay and cost by eliminating unnecessary steps in procedure – these are easy to say, of course. Putting it all into practice, while ensuring that the parties have a fair trial, is much more difficult.

Each legal system is different. Each has its own rules. So each system must find its own way to solve this problem. What I should like to do is set out some general guidelines. Different approaches may be required in criminal proceedings as compared with those that may be permissible in civil litigation. That is especially so in jurisdictions that require prosecutions for serious crimes to proceed by means of jury trial. The scope for active case manage-

ment by the trial judge has to be balanced much more carefully against the imperative that the accused must receive a fair trial and the risk that, if the trial is judged to have been unfair, there will have to be a new trial with all the problems this may cause for the administration of justice. The context for what I am about to say is that of civil litigation, where the judicial officer is the judge of fact as well of law and it can be assumed that there is equality of arms on both sides.

Do's and Don'ts

This is my list of ten things you should or should not do:

First, know your rules of procedure inside out. They are there to guide you and should be at your fingertips at all times. Rules of procedure cannot provide for everything that may happen, but they are there to be observed and adhered to. You cannot go wrong if you insist on this, and insisting on the rules being observed is your responsibility. As we all know, a referee who lets things pass and does not blow the whistle when he ought to have done is asking for trouble. He loses the respect of the players as well as that of the spectators. So make it your job to see that the rules are adhered to. Where they leave things to your discretion, exercise that discretion as carefully and narrowly as you can, bearing in mind the overriding objective that underpins all rule-making.

The overriding objective is to enable the court to deal with cases justly. As rule 1.1(2) of the Civil Procedure Rules of England and Wales (the "CPR") puts it, dealing with a case justly includes, so far as is practicable, (a) ensuring that the parties are on an equal footing, (b) saving expense, (c) dealing with cases in ways which are proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party, (d) ensuring that the case is dealt with expeditiously and fairly and (e) allotting to it an appropriate share of the court's resources, while taking account of the need to allot resources to other cases (see also the Practice Direction (Public Law Proceedings: Case Management) [2008] 1 WLR 1040, para 2.1). This is as good a guide as any to the approach you should take when exercising any discretionary power that is given to you by your rules or interpreting their terms.

Second, start your management of the case at the earliest opportunity. If you leave this until the day of the trial it will almost certainly be too late. The best course to follow, if your rules and the court's timetable allow for this, is to ask the parties' representatives to appear before you at a preliminary hearing some weeks before the trial starts, to discuss how the case is to proceed. Time may be saved if you were to direct the parties' representatives to meet before they meet you, to facilitate agreement and to narrow the issues that you will have to consider when they appear before you. You should make clear to them that they can assist the court by good case preparation at each stage in the proceedings, and by co-operation with the court in the process of case management. If a preliminary hearing has not been possible before the trial date, you should take time to discuss with counsel the procedure that you propose to adopt to manage the case before the trial begins.

One of the things that you really should insist on at the outset is a proposed timetable. This is among one of the most important of the case management tools that are at your disposal (see CPR, rule 1.4(g)). If you think that the proposed timetable is too long, you should ask for an explanation and, if at all possible, insist on its being shortened. And you should make it clear that you expect the timetable of which you approve to be adhered to. This is, of course, easier to do in the appeal courts than it is at first instance where evidence is being led. But insisting on economy in the leading of evidence, including any cross-examination, and the elimination of irrelevant or unnecessary detail is a crucial part of the exercise. You should do your best to set out the ground rules at the outset.

Third, do not allow the parties to dictate the rate of progress. It is their duty to help the court to further the overriding objective (see CPR, rule 1.3). Once a timetable has been identified, it will be your responsibility to see that it is adhered to. Fairness requires that, if you are minded to enforce a time limit, you should alert counsel in good time before the time limit runs out. In the United States some appellate courts employ a system of traffic lights – green, amber and red – with the obvious consequences. Giving an early verbal warning is just as good. But you must be careful to be fair to both sides when doing this.

Fourth, identify the issues that really matter and those which do not matter at all. This requires some effort, as you will need to get into the case to understand what is in issue, what is in dispute, what is not and what can be left out as immaterial. But the time taken on this part of the exercise will be time saved at the end of the day. It will reduce the length of the trial and the number of issues that you will have to determine. It is best, of course, if this part of the exercise can proceed by agreement. Once again, fairness to both parties must be the guide as to how much can be done by direction if they are not prepared to agree. In practice a frank laying of the cards on the table by both sides, which you should insist on, is likely to result in a shrinking of the areas in dispute.

Fifth, always start on time and insist that the parties stick to the timetable. It is up to you to set an example. It should be a point of honour that your court sits at the time that has been publicly advertised. Sometimes a delay in coming into court is unavoidable. If that happens, an explanation should be given. The important point is that you should make it clear that you are applying the standards that you are setting for the parties to yourself as well. You will earn their respect if you do this. You risk losing it if you do not.

Sixth, ensure that all your directions are accurately noted in the court's records. This is an essential and obvious protection against misunderstanding and dispute as the trial proceeds, and it will be equally important should the case go to appeal. In some jurisdictions, as in Scotland for example, an appeal court can, and usually will, ask for a report from the trial judge which is made available to the parties as well as the court if his or her handling of the case is challenged on appeal as having been oppressive or unfair. This provides an opportunity for providing the appeal court with the judge's account of what actually happened, which may differ from the account that the court has been given by the parties. In other jurisdictions, such as England and Wales, the practice is the other way. This gives rise to the risk that a judge may be criticised on grounds that he or she thinks is unfair because their side of the story has not been heard, but the appears to be no enthusiasm among the senior judges for the practice to be changed. The court records are, however, always available for scrutiny. Make sure therefore, for your own protection and in the interests of fairness to both parties, that any directions that you give are written down.

Seventh, be firm with counsel, however senior and distinguished they may be. It is you, after all, who is in charge of the case. Its effective management is your responsibility in the public interest. You should take confidence from this if your authority is being questioned. It is counsel's professional responsibility to observe and respect rulings from the bench. Jurisdictions differ in the extent to which complaints to the professional body about counsel's conduct will be effective. But, as a last resort, a report to the professional body is the equivalent of the red card.

Then there are three things that you should avoid doing:

First, do not descend into the arena. As Lord Parker CJ once said (in *R v Hamilton* (unreported), adopted by the Court of Appeal in *R v Hulusi* (1973) 58 Cr App R 378, 382), it has always been recognised that it is wrong for a judge to descend into the arena and give the impression of acting as advocate. Denning LJ put the point in this way:

> *A judge's part…is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and stick to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the role of an advocate; and the change does not become him well. (See Jones v National Coal Board [1957] 2 QB 55, 64).*

Case management, in short, is your responsibility. Presentation of the evidence and the argument, once the trial starts, is the responsibility of counsel. You should be careful not to try to run the case for either side. Frequent interruptions in the course of the leading of evidence can provide the losing party with grounds for an appeal. If the complaint of

unfairness is judged to be well-founded, it will lead to the appeal being allowed and may give rise to adverse comments on your conduct by the appeal court (eg *Peter Michel v The Queen* [2009] UKPC 41). Like the referee, you should leave moving the ball about the field to the players, once you have told them how the game is to be played.

Second, do not do or say anything while giving your directions that might suggest that you could be biased for or against either party. Article 10 of the Universal Declaration of Human Rights states that, in the determination of his rights and obligations, everyone is entitled to a fair and public hearing by an independent and impartial tribunal. Like the referee, you must be impartial and you must be seen to be so. It is quite common for judicial officers who are accused of being biased to insist that they are not biased at all, and that they have conducted or will conduct the proceedings fairly. But actual bias, which may be hard to prove and is very rarely found in our judicial systems, is not the whole story. What the judge thinks of himself or herself subjectively is not determinative. The real risk is of being thought to have what is best described as an apparent bias. The test which the courts in the United Kingdom now apply is whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. This is not an easy test for an appellant to satisfy, and it is most unlikely that well thought out measures of case management will give rise to such an objection. But you should be aware of the possibility and be careful.

Third, above all, do not lose your temper. It is so easy to get irritated when people do not do what you want them to do or are obstructive or uncooperative. Controlled anger is one thing. If you can express yourself in this way without actually losing your temper, it may produce dividends. But loss of self-control is quite another. It will almost certainly lead to error and embarrassment. You must do everything you can to avoid getting into that position. One does not expect a referee to lose his or her temper. Nor should you.

Some guidance from Scotland

It may help to put some of these points into their proper perspective if I were to give three examples of how case management is being encouraged in Scotland. The first is in the field of commercial actions, where the action arises out of, or is concerned with, any transaction or dispute of a commercial or business nature. A special procedure has been laid down by the Court of Session, the senior court of civil jurisdiction in Scotland, in Chapter 47 of its Rules (see Act of Sederunt (Rules of the Court of Session 1994) 1994 (SI 1994/1443)) to enable disputes of that kind to be dealt with by specially appointed commercial judges as quickly as possible under the close supervision of the court. It was introduced about 20 years ago to answer the perception of the business community that the court's procedures caused delay and lacked expertise. Among the procedures that were introduced by an amendment to the rules were a preliminary hearing to enable the commercial judge to take control of the proceedings from the outset, such as by ordering disclosure and setting out time limits, and a procedural hearing to determine further procedure once the case is under way and the issues involved and the methods of disposing of them have been identified. The main purpose of the procedural hearing is to achieve speedy resolution of the case by reducing to a minimum the time spent on preparing for the case to go to court and the time actually spent in court when the case gets there. This is achieved by eliminating the leading of evidence or the presentation of argument on points which are not disputed or which turn out to be immaterial. The judges expect those who appear before them at these hearings to be fully informed about the case. This system works well in practice. It has the advantage, of course, of being underpinned by rules which give extensive management powers to the judges – which they are astute to exercise.

The second example relates to cases about the adoption of children. One of the most difficult aspects of this branch of the law is freeing the child from its ties with the natural parent so that it can be adopted. For understandable reasons, the natural parent may be very reluctant to agree to this, and in such a case there is a risk that proceedings may become protracted contrary to the best interests of the child which, as Article 3 of the Convention on the Rights of the Child declares, must be a primary consideration. Rules providing for a degree of case management of these proceedings in the sheriff

court were introduced in 2009 (see Act of Sederunt (Sheriff Court Adoption Rules Amendment) (Adoption and Children (Scotland) Act 2007) 2009 (SSI 2009/284)), and they have been supplemented by guidelines as to good practice in the form of practice notes (eg, the Sheriff Principal of Glasgow and Strathkelvin's Consolidated Practice Notes, para 3.2.1 *et seq*.). The system that the rules adopt is similar to that for commercial cases. They provide for a preliminary hearing at which the sheriff is required, among other things, to ascertain the anticipated time required for the leading of any evidence, to fix a date for a procedural hearing and to make orders about the pleadings and the production of documents in advance of that date. He has power at the procedural hearing, after considering the state of preparation of the parties, to make such orders as he thinks fit to secure the expeditious progress of the case. This is a wide discretion, with the exercise of which an appeal court would be very unlikely to interfere.

The practice notes give useful guidance as to how these powers are to be exercised. They state that the object of the preliminary hearing is to enable the sheriff to make preliminary inquiries with a view to ascertaining the likely scope of the dispute, encouraging early preparation for the trial and the drawing up of a timetable and giving such directions as may be appropriate for the purpose of ensuring, so far as reasonably practicable, that the timetable is adhered to. The sheriff is encouraged throughout the proceedings to be prepared to engage in active management of the case and to maintain control over the proceedings while exercising flexibility in doing so. As the case proceeds it is his responsibility to direct his attention to securing that the issues at the trial are as sharply focussed as possible, to draw up a timetable and determine further procedure after consultation with, and with the agreement of, the clerk of the court. A lengthy and poorly focussed trial must be avoided.

If this guidance is followed, the trial should not be unduly long. It has been stressed by the appeal court that there is a heavy responsibility on the parties' representatives to exercise all reasonable economy and restraint in their presentation of the evidence and in their submissions to the sheriff (see *Lothian Regional Council v A*, 1992 SLT 858, 862). Furthermore, it is necessary if the court is to deal with cases justly, that the parties and their legal representatives too act justly, responsibly and in accordance with the directions of the court (see *Albon v Naza Motor Trading Sdn Bhd and another (No 5)* [2007] EWHC 2613 (Ch), [2007] 1 WLR 2380, para 19). They must expect to be held to their estimates of time to be taken for the examination and cross-examination of witnesses and to any other directions that the court may have given as to how the case on either side is to be conducted. They cannot be allowed, as it were, to hold a gun to the court by resorting to conduct that will put pressure on the court by preventing it from determining the merits of the application or subjecting it to unreasonable delay.

These rules were designed for use in adoption cases. They have not yet been made applicable outside that special field. But there is a case for saying that they are capable of being applied more widely. Family law disputes are notorious for their tendency to overrun. The parties to a broken marriage may wish to throw a host of accusations of misbehaviour of all kinds against each other. Resolving endless disputes about who said, or did what, and to whom, during its entire history are unlikely to help the judge to resolve the real issues between them. But, as we all know, the parties' representatives cannot always be relied on to exercise all reasonable economy and restraint. It is the judge's task to see that they do so, and that they do so from the very start of the case before it gets out of hand.

The third example provides us with a useful illustration of what can be done by presiding judges to assist the process. In August 2012, Lord Gill, the Lord President of the Court of Session, issued a direction about the management of a group of personal injury action for damages for pleural plaques and other asbestos-related conditions for which, under a recent statute passed the Scottish Parliament, damages are now recoverable – despite the fact that, according to expert medical opinion, these conditions are symptom-free. This change in the law gives rise to some interesting questions, and it is expected to give rise to a large number of claims. So the Lord President felt it appropriate to give directions as to how they were to be handled (see the Court of Session Direction of 27 August 2012:2012 SLT (News) 173). They are quite detailed, so I shall attempt to summarise them.

First, the pursuer (or claimant) must assemble and deliver to the other side a "pursuer's pack" which must include a summary of the pursuer's employment history, an explanation of the trade or other activity which exposed him to asbestos and a copy of his up-to-date medical records. Within 8 weeks of the delivery of that pack to it, the other side (the defender) must intimate to the pursuer whether it intends to settle his claim. If it elects to go for settlement, it will have four weeks form the date telling the pursuer that it intends to settle it to agree the terms of the settlement and to produce an agreed minute disposing of the action. If the defender fails to respond the pursuer's pack or tells the pursuer that it does not propose the settle the action the pursuer can proceed with his action, which will then be sent for a procedural hearing before the judge who has been nominated to discharge the court's management function. Her task will be to manage the action with the aim of securing its efficient disposal. She will have power, among other things, to fix procedural hearings, determine further procedure, issue a timetable for the progress of the action, order the production and recovery of documents and the production of expert reports and ordering each party to produce a statement of valuation of the claim. The direction also states that the nominated judge may make any of these orders on her own initiative or on the application of one or more parties, but that if she acts on her own initiative she must give the parties an opportunity of being heard. She has been directed to give early consideration to whether it is appropriate to identify a lead action or actions to be progressed at an advanced rate in order to determine guidance on any generic issues in the action.

One can see from this summary that the overriding aim is to ensure that this difficult group of cases is dealt with as quickly and as economically as possible, while ensuring fairness to both sides. It is a good example of the court getting ahead of the game before it starts, and of the use of a timetable to ensure that it is controlled by the judge from the outset. It is a useful reminder, too, that case management is not just the responsibility of the judge before whom the case is to be tried. Those in senior positions who have power to give directions or give guidance to the judges at first instance have a part to play in this as well. We are all in this together, and everyone from the top down has a responsibility to ensure that overriding objective is given effect to.

Sanctions and the appeal court

Case management should, for the most part, be achieved by persuasion. It should result in agreement between the parties and the court itself as to the steps that are to be taken, and there should be no need for the imposition of sanctions or the production of the red card. But, human nature being what it is, there will be occasions when the court's orders will need to be backed up by a condition indicating that, if the order is not observed, certain consequences will follow. There will be other occasions where an application, such as for permission to amend the pleadings or for an adjournment, will have to be refused because to grant it would not be to deal with the case justly in accordance with the overriding objective. This is where the role that the appeal court can be expected to play comes into focus.

Responsibility for case management does not, of course, stop when the case leaves the trial court. The overriding objective remains in play at all stages of the case, including on appeal. One of the functions of the appeal court is to review decisions that have been taken by the first instance judges on matters of procedure and, where sanctions have been imposed, to consider whether they were justified. From the trial judge's point of view there are perhaps two ways of looking at this. One is to acknowledge with gratitude that, if things go wrong, the appeal court is there to correct them. The other is to feel a sense of irritation, to put it no higher, that his or her decisions may be second guessed by the higher court. I would encourage you to prefer the former view, and not allow yourselves to be inhibited by the prospect of an appeal.

It has been recognised by the Court of Appeal in England that, in order to ensure that the court's process is not subverted so as to become an instrument of injustice, every procedural system must place at the court's disposal the power to manage proceedings before it by, if necessary, imposing sanctions on litigants who fail to comply with its rules and orders:

> *The ultimate sanction, of course, is to dismiss the claim or strike out the defaulting party's statement of case. A well-recognised way of imposing a degree*

of discipline on a dilatory litigant is to make what is known as an 'unless' order by which a conditional sanction is attached to an order, requiring performance of a specific act by a particular date or a particular period. (See Marcan Shipping (London) Ltd v Kefalas [2007] EWCA Civ 463, [2007] I WLR 1864, para 10, per Moore-Bick LJ).

An order in such terms takes effect without the need for any further order to make the sanction effective. The onus is on the defaulting party to take steps to obtain relief. In that event the court is required to consider whether, in all the circumstances, it is just to make an order granting relief from the consequences that would otherwise follow. But an appeal court can be expected to adopt a robust approach to litigants whose conduct is liable to subvert the overall fairness of the proceedings (see *Marcan Shipping (London) Ltd v Kefalas*, para 19) or, it may be added, to subvert the overriding objective. And an exercise of his or her discretion by the judge at first instance cannot be impugned unless the judge's decision was plainly wrong (eg, *Maguire v Molin* [2002] EWCA Civ 1083, [2003] 1 WLR 644, para 35). So there should be no second-guessing by any appellate court of the decision by the trial judge. Judges who are doing their best to manage their cases actively, and who do so justly and proportionately as the overriding objective requires, are entitled to expect to receive the support of the appellate judges if their decisions are taken to appeal.

Conclusion

At the heart of all of this is the principle of judicial independence. That is where our strength lies. It carries with it the clearest possible message that the judge is not to be subjected by anyone – government, media or litigant – to pressure to fear or favour, or display affection or ill-will towards, any one side or the other, or indeed to anyone in his or her court. Respect for the principle cannot be taken for granted, however. It has to be earned. So the judge must resist fear or favour, affection or ill-will, in whatever form it may take. And judges must be responsible to their consciences too. They must maintain their knowledge of the law and of procedure, and keep up to date with their developments. They must be aware of the problems created by modern technology, not just of its potential to assist. The proliferation of paper which was the product of the photocopier, and of endless information on every conceivable subject which is now obtainable by means of the internet, has made it all the more important for judges to exercise their own judgment and to manage their cases without fear or favour, courageously and robustly. If they do not do this, the system will be at risk of being overwhelmed by the sheer weight of the technology which the modern world has created.

The responsibility that this places on them does indeed, then, require judges to be active. They must not just sit there and wait for the parties to present their case. They must get to know the case each side intends to present, and they must prepare themselves to manage the case accordingly. The tendency to overburden the court with too much detail, too much information, too much case law, must be resisted. So too must the tendency for the parties to seek adjournments of the case to suit the convenience or counsel or for other reasons that conflict with the overriding objective to ensure that cases are dealt with expeditiously. Care should be taken, when the time comes to prepare the judgment, to ensure that it is no longer than it needs to be. Excessively long judgments too may make it hard to identify the crucial points and give rise to unnecessary cost and delay (see *Customs and Excise Commissioners v A and another* [2002] EWCA Civ 1039, [2003] Fam 55, para 83). All of this takes judicial effort. It requires knowledge and it requires training. And it takes time. But that is what our systems demand of each one of us.

POST-GENOCIDE JUSTICE IN RWANDA

Sam Rugege, Chief Justice of Rwanda.
This article is based on a paper delivered at the CMJA 16th Triennial Conference, Kampala, Uganda, September 2012.

Abstract: *This article examines the successes and challenges related to the Gacaca courts, which were established to hear cases relating to the crime of genocide and crimes against humanity, and were based on Rwanda's traditional form of administration of justice. In particular, the article examines the contribution of these courts to promoting reconciliation in Rwanda. In the ten years in which they have operated, the Gacaca courts have heard a total number of 1,958,634 cases. The article further discusses particular reforms which have been undertaken in Rwanda to improve the administration of justice after the Genocide. These include reforms in the fields of judicial training, legal assistance programmes and mediation.*

Keywords: Gacaca courts – genocide – reconciliation – judicial reform – administration of justice – legal assistance – mediation – training – fighting corruption

Background

The genocide against the Tutsi that happened in Rwanda in 1994 was the culmination of periods of repression and mass killings that had taken place since 1959. A culture of impunity had developed with the active support of the state. The colonial and post-colonial regimes that ran the state up until the genocide were discriminatory and repressive, characterized by ethnically-based policies and politics. This led thousands of citizens who survived the repression and atrocities to flee into exile in neighbouring countries of Burundi, Congo, Tanzania and Uganda, with some returning in 1990 to wage a war to regain their citizen rights.

As far as justice is concerned, there was little respect for the rule of law and the judiciary was untrained and corrupt with no semblance of judicial independence. The judiciary was an appendage of the executive. The Head of State was the Chairman of the Superior Council of the Judiciary (the equivalent of the judicial service commission in most Commonwealth countries), which was charged with the recruitment, discipline, and termination of judicial officers. The Minister of Justice was the Vice-Chairman of the Council. It could not possibly be argued that such a council was independent of the Executive. The nature of the Judicial Council coupled with the fact that one did not have to be a lawyer to be appointed a judge (according to one report, in 1994, only 32 out of 1000 judges had legal qualifications and only 18 prosecutors had law degrees; see International Crisis Report No.1, *Five years after genocide in Rwanda*, 7 April 1999) created a fertile ground for interference and pressure from the executive power as well as promoting incompetence in the administration of justice.

Perpetrators of ethnic-based killings were granted immunity from criminal prosecution. For instance, the amnesty law of 20 May 1963, which was promulgated by the First Republic, was intended to exonerate those who had been killing Tutsis during the 1959-62 massacres (see Law of 20 May 1963 on General Amnesty for political offences committed between 1 October 1959 and 1 July 1962. *Official Gazette of the Republic of Rwanda*, 1963, p. 229). As it has been said, the law "consecrated the principle of impunity which characterized all subsequent ethnic crimes committed from that point on"(see Institute of Research and Dialogue for Peace, *Building Lasting Peace in Rwanda: Voices of the People*, Kigali, Nov. 2003, p.148). The perpetrators of criminal acts were granted amnesty because according to the regime, they had participated in a struggle for national liberation. The Amnesty law of 30 November 1974 similarly granted amnesty for certain political offences. It is this long established culture of impunity, encouraged by the ideology of ethnic divisionism, which made the atrocities of the genocide against the Tutsi possible.

After the 1994 genocide, Rwanda embarked on policies and set up institutions and mechanisms that were the building blocks for unity and peaceful coexistence of its people, so that the country itself could be primarily responsible for ensuring that never again will genocide take place on its soil. These policies and mechanisms were aimed at reconciliation but had to be accompanied by mechanisms to bring to justice those who committed the heinous crimes, so that the culture of impunity that prevailed until 1994 could be eradicated. The measures included encouraging and assisting refugees who had fled after the genocide (including perpetrators of genocide) to return, creating the National Unity and Reconciliation Commission, and the National Human Rights Commission. A new democratic Constitution that enshrined the protection of human rights, respect for the rule of law and the separation of powers was put in place after a period of extensive consultation and a national referendum. This was followed by a law reform program focusing on the administration of justice.

Despite all the legal and administrative measures, for healing and reconciliation to take place, it was crucial that a credible and effective administration of justice be established and put into operation. The biggest challenge to the post-genocide government in the area of justice was how to deal with those suspected of involvement in the genocide. In its aftermath, thousands were arrested, suspected of crimes committed in the genocide. They had to await trial in circumstances of meagre human and material resources. The detention facilities were grossly inadequate as they were never meant to cope with large numbers. The suspects needed to be tried as soon as was practically possible. On the other hand, survivors of the genocide expected that the new dispensation would not tolerate impunity; they wanted to see justice being done. It was imperative that the new state find a way of dealing with the situation that addressed the need to clear the prison population, eradicate the culture of impunity for serious crimes while giving some semblance of justice to survivors. However, for many survivors who had lost whole families and all they owned, there would never be full justice.

The justice apparatus after the genocide was in shambles. Many of the judges, magistrates, prosecutors and lawyers in private practice were killed in the genocide. Others had been involved in the genocide and had either run away when the genocide was stopped or were in jail awaiting trial for their crimes. This situation was compounded by the fact that prior to 1994 there was a dearth of trained lawyers as the state had not encouraged the study of law. About ten lawyers graduated from the single university at Butare each year.

There was no professional body for lawyers. From independence in 1962 to the 1994 genocide against the Tutsis, Rwanda did not have a self-regulated legal profession. Article 81 of the 1964 law on the Code of Civil and Commercial Procedure specified that "advocates enrolled in the national bar association" were the only persons qualified to represent and assist parties in courts. However, there was no such organization and no mechanism providing for enrolment. In 1984, Law N° 12/1984 of 12 May 1984 was enacted giving powers to the Justice Minister to regulate representation and assistance in courts. The Minister had discretionary powers to issue advocates' licenses to applicants wishing to represent and assist people in courts. However, there were no pre-established criteria for such licensing. Legal training was not a prerequisite and any literate person was eligible to apply. These discretionary powers coupled with a lack of minimum standards resulted in the poor quality of the legal services offered to the public. Thus, even before the chaos of 1994, there was lack of confidence in the administration of justice. It is in this context that we look at the administration of justice in post-genocide Rwanda.

Multiple jurisdictions in genocide cases

A new law dealing specifically with genocide and related crimes was passed in 1996, namely, the Organic Law No. 8/96 of 30 August 1996 on the Prosecution for offences constituting the crime of genocide or crimes against humanity. Trials started in regular courts and subsequently in specialized chambers created to speed up the trials. However, the trials in the conventional adversarial system, although commendable, were very slow. The number of people tried was constantly increasing since 1997 but, by 31 December 2002, only 8,363 individuals had been tried for the crime of genocide and other crimes against humanity.

At this rate the trials would have taken forever to complete.

Meanwhile, at the international level, in late 1994, the United Nations Security Council set up the International Criminal Tribunal for Rwanda (ICTR) to try those most responsible for the genocide; the planners and organizers of the genocide, most of whom were hiding in different countries around the world. In terms of finding a solution for those accused of genocide inside Rwanda, the ICTR was no answer and was not intended to be. The speed of ICTR in processing genocide trials was many times slower than the Rwandan courts and hardly addressed the issue of reconciliation even though, in setting up the Tribunal, the Security Council Resolution had talked of reconciliation as one of the objectives of the Tribunal. The impact of the ICTR trials on the Rwandan population as a whole was, therefore, bound to be minimal.

It was clear that disposing of these cases within a reasonable period of time, at the normal pace of criminal trials, was going to be an impossible task. Different studies speculated that at a normal pace criminal trials would take anything between 100 and 300 years to complete. The country started a national dialogue aimed at coming up with a solution to the crisis of the huge backlog of genocide cases. The dialogue involved politicians, civil servants, intellectuals and ordinary peasants. It is from these discussions and after months of debate that the idea of going back to Rwanda's traditional form of administration of justice called Gacaca was agreed upon. Ironically, opposition to the use of these courts came from outsiders, in particular foreign Non-Governmental Organisations, which argued that these lay courts could not deliver justice in such serious cases without the involvement of lawyers. However, they offered no viable alternative that could cope with the numbers while applying what they called international standards of due process. Rwanda decided to go ahead and experiment with these courts as it was crucial to deal with the problem if the country was to make any progress towards recovery, unity and reconciliation and reconstruction and development.

Gacaca courts were set up in every village and local communities elected from among themselves persons considered to be persons of integrity to hear and decide cases of the ordinary people and low level officials accused of participation in genocide. The so-called Category One suspects, accused of masterminding, planning, organizing, instigating and supervising the genocide were left to be tried by regular courts. The objectives of Gacaca were set out as:

- to reveal the truth about Genocide;
- to speed up the cases of Genocide and other crimes against humanity;
- to eradicate the culture of impunity;
- to strengthen unity and reconciliation among Rwandans;
- to prove that Rwandans had the capacity to solve their own problems.

By the time Gacaca trials came to an end in 2011, more than a million cases (including property cases) had been decided by these courts.

Gacaca courts

The nature of the courts

Gacaca courts were specialized courts set up to deal specifically with genocide cases. They were an adaptation of the traditional courts whereby members of the community used to come together and resolve disputes. Gacaca courts had many advantages over regular courts, especially in the context of the large number of suspects. These included:

(a) *Speedy trials*: the procedure was simplified to make cases move faster. There were no lawyers to raise objections on minor issues of procedure or making other preliminary applications. Judgments were often delivered on the day of completion of the hearing or the day after. In contrast, it is interesting to note that by mid-2012, the ICTR had only finalised about 60 cases.

(b) *Less formal and not intimidating to witnesses*: Anyone in the community or outside it who could assist the tribunal to reach the truth was allowed to speak. There was a relaxed atmosphere that encouraged people to say what they knew, what they saw. To the unschooled the truth is more likely to be told in such circumstances than in a cold intimidating courtroom of robbed judges and prosecutors and defence counsels bent on destroying the credibility of witnesses through cross-examination.

(c) *Inexpensive for the state, the victims and witnesses*: As much as possible, the trial took place at the local area where the offence was committed and where the witnesses were likely to be. Travel and other logistical expenses incurred by state or individuals were minimal.

(d) *Truth, forgiveness and healing*: In the Gacaca court, the accused was given the opportunity to acknowledge wrongdoing, tell the truth of how the crime was committed and ask for forgiveness. If this happened, the person once convicted was given a lesser sentence than he/she would have otherwise got. The victim or a relative of the victim, if present, was able to come face to face with the perpetrator and if forgiveness was asked for it was often given and there was a real chance of forgiveness and reconciliation. Over time, there was a good chance of healing for the victim and reintegration into normal society to get on with life psychologically and economically.

Gacaca court judges

Gacaca judges were lay people who were carefully selected by the communities from among themselves based on their reputation in the community for high integrity, honesty and trustworthiness. They had to be persons not involved in politics or certain positions in government service and should not have been involved in the Genocide. Persons elected to Gacaca who were subsequently discovered not to be persons of integrity or to have been involved in the Genocide, were removed and, where appropriate, prosecuted and punished.

Some human rights activists argued that justice could not be properly rendered by a group of lay men and women from the community of the accused and complainant and in the absence of qualified legal advisors. However, Gacaca courts were at the grass-roots level, in every village and ward. It was not possible in the circumstances of Rwanda, or anywhere else for that matter, faced with over a million cases, to have enough legally qualified judges and lawyers to handle these cases. Rwanda therefore came to the conclusion that the advantages of such community courts rendering justice during the lifetime of the victims and perpetrators outweighed the possible disadvantages of using lay judges.

Jurisdiction

Initially, Gacaca courts handled cases of so-called Category Two suspects, that is, those who killed but were not its planners, organisers or those in leadership positions. They also dealt with Category Three suspects who committed offences relating to property. Category One suspects, that is, those who were in government leadership positions, were among planners, organisers, supervisors and ringleaders of genocide or other crimes against humanity, those who committed torture or rape, were not within the competence of Gacaca courts. In 2008, however, when it became clear that ordinary courts were failing to cope with Category One suspects, the Gacaca law was amended to empower Gacaca courts to try certain Category One cases. These were cases involving lower ranking leaders who committed genocide and those who committed sexual offences. There are now only a handful of Category One suspects still to be tried in the ordinary courts.

Punishment that could be imposed by Gacaca

Imprisonment and Compensation

Gacaca courts could only pass a maximum sentence of 30 years imprisonment for second category offenders. This could only be imposed by the higher (ward) level Gacaca court. The court could, however, also impose various intermediate punishments. The lower Gacaca court at the cell level, only dealt with issues of damage to property and could only order reparation or compensation where the parties were unable to agree. Where the accused and the victim of property damage were able to agree, the state only got involved with enforcement of the agreement.

Community Service as Alternative Punishment to Imprisonment

The law on Gacaca provided that if a Category Two suspect (that is, one who killed or committed other crimes against a person but was not in a leadership position and did not commit the more serious violations mentioned above) confessed his crimes, told the truth of what happened and asked for forgiveness, he/she would be given a lesser sentence (up to half the prescribed sentence) than those who did not confess and ask for forgiveness. More importantly, of the sentence imposed, only half was to be served in prison while the other half

of the sentence was served in the community or in a public institution in work beneficial to the public (*Travaux d'Intérêt Général* (TIG)). Often, part of the sentence was suspended. Some in the survivor community thought that, over time, the law had become too soft on persons who committed heinous crimes.

The type of work involved included: building and repair of rural roads, repair and maintenance of public buildings, growing food for prisoners, orphans and others who are indigent and whom the state is responsible for feeding, as well as environmental protection – planting forests, clearing rivers and lakes etc. Thus perpetrators of genocide who did a lot of destruction were able to participate in the reconstruction of the country.

In carrying out community service, convicted perpetrators gained vocational skills that helped them later to be more easily reintegrated in society and to become economically active, especially in construction and handcrafts. Those who were illiterate were taught how to read and write. This also helped in enabling them to participate more effectively in development. In general, the community service punishment was intended to ease the perpetrator back into normal society and therefore to promote reconciliation and peaceful coexistence and avoidance of conflict. From 2005 to 2011, those who had been sentenced to community service were over 80,000.

Some Criticisms of the Gacaca process

Lack of Legal Representation

The Gacaca system has been criticised for not permitting the right to legal representation to the accused. However, permitting legal representation would have changed the whole character of the court and would have turned it into a regular court. It would have brought in the formality of elaborate legal procedures and consequent delays. It would have also meant bringing in legally qualified judges who would understand the legal technicalities so well-loved by lawyers. It would have brought in the almost hostile atmosphere of cross-examination, all kinds of preliminary objections, adjournments *et cetera*. Moreover, even if the system were designed to accommodate lawyers, there were not enough of them in the country to represent over a million defendants scattered in villages around the country. It is also noteworthy that traditional courts in other African countries do not permit legal representation so as to keep proceedings simple, people-friendly and to ensure speedy resolution of disputes. Once again, it was a matter of weighing the pros and cons and in this case the country chose to take the many advantages of Gacaca and live with the possible disadvantage of the absence of legal representation. At the same time, the accused had all the time he or she needed to challenge whatever was said by the complainant or witness and to call witnesses willing to testify on his or her behalf and could be assisted by another person not claiming the prerogatives of defence counsel.

No Appeals to regular courts

Appeals were only allowed from the village Gacaca court to the ward or sector Gacaca court. There were no appeals to the regular courts. In the regular courts, convictions and sentences of imprisonment are appealable up to the High Court and in serious cases up to the Supreme Court. However, again for the reasons given regarding delays in regular courts, it was considered prudent to limit appeals to the system of Gacaca in the interest of fast-tracking genocide cases, getting convicted persons back into normal society as soon as possible and hence promoting reconciliation. Permitting appeals to regular courts would have meant following the usual procedures in those courts with the inevitable delays. That would have defeated the whole idea of taking the cases to Gacaca in the first place.

Some Successes of the Gacaca process

Compared to the ICTR and the regular courts in Rwanda handling genocide cases, Gacaca courts were, in our view highly successful in the ten years they were operating. The total number of cases tried by Gacaca is 1,958,634 of which 67.4% were property-related cases. Convictions amounted to 86% and 14% acquittals. The largest number of acquittals was in Category Two (37.4%) while the smallest was with respect to property cases at 3%. There were a significant number of guilty pleas among those accused of acts of genocide (41.4% in Category One and 30% of those in Category Two), whereas the numbers of guilty pleas among those accused of looting or property damage was very low at 7.4%. This

can be explained by considering the consequences: guilty plea on charges of committing acts of genocide meant a reduction of sentence and community service while with property cases, there was little advantage to entering a guilty plea, since reparation would still have to be made without reduction. These cases were tried in 12,103 courts before nearly 170,000 lay judges. This is a far cry from the just over 6,000 cases tried by regular courts, and the just over fifty cases by the ICTR. It is also clear that Gacaca courts have, to a large extent, achieved the objective of justice and enabled a substantial number of victims and perpetrators to reconcile and live in peace with each other.

Challenges

Intimidation and killing of witnesses in genocide cases

Despite the obvious successes of the Gacaca system, there were challenges. One of the most serious ones was the intimidation of witnesses to dissuade them from testifying against suspects. Witnesses were killed; some after testifying, others before they were due to testify. Acts of intimidation included setting houses ablaze, sending anonymous letters, uprooting crops and the killing of animals belonging to survivors. This caused great concern on the part of government and all peace-loving Rwandans. It was a source of bitterness for some survivors who thought that the state was not doing enough to protect them and a number got discouraged from participating in the process. Some Gacaca judges (*Inyangamugayo*) were also intimidated, assaulted or killed.

Fake confessions

As indicated, the law allowed suspects who confessed, told the truth and asked for forgiveness to get lighter sentences and to serve half of their sentence in community service. It was also the practice that those who confessed and asked for forgiveness were released from prison and awaited their trial in Gacaca from their homes. However, there were some who did not tell the whole truth and just said enough to get them out of prison or to get them a light sentence. Some even mocked the Gacaca process once they were out and threatened to finish the job they had started when the time was right. This did not advance the cause of reconciliation. The whole philosophy of the Rwandese reconciliation strategy was that truth and justice must precede reconciliation and not the other way round. This had a negative effect on the survivors and slowed down their healing.

Cases of misconduct by Gacaca judges

There were a few cases of Gacaca judges who were discovered to have been involved in genocide and other crimes against humanity. They were removed and prosecuted. Some Gacaca judges were prosecuted for demanding or accepting bribes. Other cases related to malfunctioning of some courts because of judges who were not genuine. For example, in one court, two Gacaca judges destroyed a notebook containing the information that had been collected on suspects. However, the vast majority of Gacaca judges were honest and committed to the cause of justice and reconciliation.

Escaping from Community service

Not all persons sentenced to TIG showed up for the community service. Because they performed it in camps close to communities and because there has been insufficient guarding and monitoring, a number have escaped and disappeared. They may have changed their identities and resettled in places far from their former communities or may have left the country. These are of course those who were not sincere in their pleas for forgiveness in the first place. This has been a serious challenge to the search for maximum reconciliation when perpetrators have gone unpunished.

Insufficient material support for survivors

Most survivors lost family and all the property they had in the genocide. They have not got any compensation. Again this is discouraging, especially when survivors see those who were not affected by the genocide living comfortably. Although the state has acknowledged responsibility for reparation to survivors under the state succession doctrine, it has so far only been able to help those who are destitute or very poor through a state fund.

The Fund for the Support of Genocide Survivors popularly known as FARG (from its French name) is a state fund established in 1998. This fund provides assistance for housing, health and covers school expenses for

the children of indigent survivors and orphans. A more comprehensive assistance fund for the survivors of the Genocide was created in 2008, under Law No. 69/2008 of 30 December 2008. It is intended to support genocide survivors through building houses for elderly, widows, widowers, orphans of the genocide as well as assisting them engage in beneficial self-help economic and social programs. It also has the responsibility of supervising and coordinating activities relating to the collection of contributions intended for survivors. This is an independent body with legal personality and may raise funds from any source including charities as well as taking action and seeking indemnity against those convicted of genocide, although in the latter cases, it is unlikely to raise substantial amounts for compensation of survivors.

Despite the challenges, Gacaca was a substantial success. We believe there is something to be learnt from the Rwanda experience with our version of restorative justice by other countries emerging from conflict or currently going through conflict. The country has moved on with a revamped system of administration of justice that attempts to deliver justice to all through different mechanisms including the conventional court system, mediation and other alternative dispute resolution mechanisms.

Judicial Reforms that Have Improved the Administration of Justice After the Genocide

After the genocide Rwanda embarked on a reconstruction programme not only for infrastructure which had been destroyed but the rebuilding of institutions including the judiciary.

The current justice system in Rwanda

Reformed structure

In Rwanda, we have tried to get justice closer to the people and to enable whoever wishes to access the justice system to be able to do so. We also continuously try to improve the quality of service provided to the users of courts. There are sixty primary courts at the lowest level of the court hierarchy and 12 regional magistrate's courts. With regard to the superior courts, there is the High Court with five branches (called detached chambers) serving the four provinces and the City of Kigali. At the top of the hierarchy, there is the Supreme Court.

There are also specialized courts. There are three commercial courts based in the 3 major commercial centres of Kigali, Musanze and Huye (Butare). Commercial Courts hear all commercial disputes at the first instance. Their decisions may be appealed to the Commercial High Court and thereafter may be appealed to the Supreme Court if they meet the monetary threshold of 50 million Rwandan Francs. There is also the Military Court and a Military High Court handling appeals from the former.

Regional courts take appeals from primary courts while appeals from the regional courts go to the High Court. The Supreme Court is the highest court of appeal handling appeals from the High Court, the Military High Court and the Commercial High Court. However it has no mechanism for selecting or vetting cases that come to the Court. The only limitations are the monetary threshold of 50 million Rwanda francs or USD 80,000 (before the 2012 Supreme Court Act, the threshold was 20 million or just over USD 3,000) in civil matters and, with respect to criminal cases, any case heard by the High Court or Military High Court at first instance (including murder cases) and those on second appeal where a sentence of 10 years or more was imposed, can be appealed to the Supreme Court. Thus, access to the courts, including the Supreme Court, is very liberal.

Legal assistance

There is of course the issue of cost of litigation for those who wish to access courts. The initial cost of accessing a court is affordable to the average litigant. In fact it has been argued that it is too low and encourages litigation in cases that could easily be resolved by agreement. Court fees for initiating a claim in the Primary court is two thousand Rwandan francs or about 3 USD, while at the High Court level it goes up to 6000 Rwandan Francs or approximately 10 United States dollars. The fee at the Supreme Court is only 8000 francs or USD13. The problem arises with respect to the payment of lawyers' fees in both civil and criminal cases. There is legal assistance provided through legal aid programmes, but they are of limited coverage; the programmes do not provide assistance to all who would need to be assisted due to limited funds.

It is only the most vulnerable who get assisted, that is, minors and the indigent. With regard to minors, there are a number of legal provisions that specifically cover legal assistance for minors. Article 185 of the Code of Criminal Procedure provides that a minor who is being prosecuted must be defended by counsel. If the minor or his or her guardians cannot afford one, the prosecution requests the President of the Bar Association to appoint one.

Assistance to the child in other cases is provided for in paragraph 2 of Article 64 of the Law N°54/2011 of 14 December 2011 relating to the rights and the protection of the child which states that: "The Government shall provide legal assistance to a child who has no guardian when he/she is tried before courts."

The Bar Association administers a fund partly funded by the Ministry of Justice for this purpose.

Besides the requirements of free legal assistance to minors, the law also requires that all litigants appearing before the Supreme Court must be assisted by counsel. Where the litigant cannot afford counsel, an application for free legal assistance is made to the President of the Supreme Court. If the President accedes to the request, it is communicated to the President of the Bar Association who appoints counsel to represent the applicant. However, a person applying for free legal assistance is required to provide proof of indigence from the local authority.

In addition, Article 13(6°) of the Organic Law n° 11/2007 of 16 March 2007, concerning transfer of cases to the Republic of Rwanda from the ICTY and from other states, provides that the accused is entitled to counsel of his choice. In case he or she has no means to pay, he or she shall be entitled to free legal representation.

At the same time, legal practitioners are obliged to perform pro bono services. The Internal Rules of the Bar Association require that in criminal matters an advocate provides legal assistance free of charge on request of the indigent client or the President of the Bar.

To boost Government's efforts with regard to ensuring access to justice for all, in October 2006, the Rwandan Civil Society created a Legal Aid Forum (LAF). The forum is made of 37 member organizations comprising of international, regional and national NGOs working in various human rights related fields as well as professional bodies such as the Bar Association and University legal aid clinics. Since 2008, a Legal Aid Civil Society Fund (LACSF) was established with the purpose of ensuring the provision of quality and accessible legal aid services to indigent persons and vulnerable groups by LAF members in pilot areas. The services provided are of three kinds:

- Legal representation in courts;
- Legal advice/mediation: this includes for instance drafting of court submissions, orientation to the competent organs and authorities such as the Mediation Committees for cases that need prior settlement by the latter before seizing the courts, local authorities, labor inspection service, etc.
- Legal information/education to the general public with particular emphasis on indigent population and vulnerable groups.

In addition to these services, the LAF (through its members) has been actively involved in the joint justice stakeholders' initiative of carrying out a Legal Aid Week since 2009. During that week, free legal aid services are provided to the general population across the country and particularly minors in conflict with the law.

The situation is certainly not very satisfactory. However, it seems to be the best that can be done in the circumstances of a country that is not rich in resources and at the level of economic development like that of Rwanda.

Community mediation: Abunzi

Most civil disputes as well as minor criminal offences must by law go through the process of mediation before they can be considered by the formal judicial system. Mediation is done by a panel of mediators drawn from a mediation committee elected by the community in every cell and ward. The mediators do not have legal qualifications. Their only qualification is that they are regarded by the community as persons of integrity, not liable to be corrupted and who are wise enough to be able to resolve disputes at the local level. They take the same oath as judicial officers before other members of the community under the supervision of the President of the Primary Court in whose area of jurisdiction the committee falls. In their

oath, they undertake to diligently fulfil the responsibilities entrusted in them and never to use the authority conferred on them for personal ends.

Although the members of the Committees are not legally qualified they receive some training, largely on the procedures that they are supposed to follow. They are also trained on some legal issues which may have been introduced by new laws. They are urged not to turn themselves into judges but rather to try and reconcile the parties and get them to reach a settlement of their own dispute. It is only where the parties fail to agree that the panel is allowed to make a decision as to what should be done. Generally, they apply basic principles of fairness and justice.

Some of the disputes falling within the powers of the Mediation Committees are those relating to land and other immovable property whose value does not exceed 3,000,000 Rwandan Francs (approximately USD 5,000); cattle and other movable assets worth up to one million Rwandan francs, family matters (except civil status), succession if the value does not exceed three million francs, simple contracts, etc.

As far as criminal matters are concerned mediation committees are competent to handle offences relating to damage to property, theft, breach of trust where the value does not exceed three million francs and common assault.

Mediation committees have no competence over disputes involving the state or state-owned structures or associations or companies with legal personality.

The purpose of mediation is to assist the parties to reach a settlement. However where the parties fail to agree, the mediation panel takes a decision which it communicates to the parties. The decision must be reduced to writing and is enforceable by the local authority. Where one of the parties is dissatisfied, he/she may lodge a claim with the Primary Court.

It is clear that, if mediation in these disputes is fully embraced and its decisions accepted by all parties, it is bound to reduce the burden on the courts as well as to ensure greatest access to a system of justice. In practice, the system has worked fairly well. This is evidenced by the fact that the disputes finally settled by the Mediation Committees are double those that go to court after the mediation process. It may be safely said that the majority of citizens with disputes are satisfied with the mediation process. It saves them time and money. It has also saved the state money as well as other resources. Mediators are volunteers; they receive no payment from the state although they get some incentives such as bicycles and radios.

Ensuring quality in delivery of justice

Recruitment and discipline of judges and registrars

The recruitment and discipline of judges and registrars/court clerks is handled by the High Council of the Judiciary whose membership is comprised mostly of judges representing their fellow judges at all levels of courts and is chaired by the Chief Justice. Members from outside the judiciary are the Ombudsman, the President of the Human Rights Commission, two deans of law faculties elected by fellow deans, a nominee of the Minister of Justice and a representative of the Bar Association. Thus the Council is a body independent of the other branches of government. The Council ensures that persons appointed as judicial officers are well qualified for the positions and that the recruitment process is fair and transparent. It also ensures due process for those judicial officers accused of misconduct and where the accusations are found justified, appropriate disciplinary sanctions are applied, including dismissal.

Training

In order to continuously improve the quality of judicial officers, training is regularly organised. The law requires that every judge must take the diploma in legal practice offered by the Institute for Legal Practice and Development in order to improve the practical skills of judges for instance in the conduct of proceedings, assessing evidence, judgment writing etc. So far it is mostly the younger judges with little experience who have taken the course but over time it is expected that all judges will have taken the course. In addition, the judiciary regularly organises continuing legal education seminars and workshops on specialist topics, largely with facilitators coming from more developed jurisdictions such as the

Netherlands, United Kingdom, United States and Canada. The Dutch government has been particularly supportive in funding these trainings and seminars. The Commonwealth Secretariat has also been very supportive in funding training that introduces Rwandan judicial officers to common law concepts as Rwanda pursues its vision of a mixed legal system that incorporates aspects of the civil law as well as those of the common law.

Promoting use of ICT

The judiciary has promoted the use of information and communication technologies to enhance performance and efficiency in all its operations. All judges have computers and write their own judgments. All staff in the registries have computers and enter all information electronically as soon as it is received. Although recording of proceedings in most courts is manual, digital recording has been introduced in Commercial Courts. All judges and other court staff have access to internet which they use for communication and research. A system of electronic filing of cases is working well, making it unnecessary for litigants to come to court while an electronic records management system has also been installed to ease the exchange of documents among courts and enable the management of the judiciary to monitor activities at all levels of courts as well as receive monthly reports on the performance of courts. There are video conferencing facilities in a number of courts which make it possible for court proceedings to be conducted simultaneously from different parts of the country as well as enabling foreign courts to take evidence of persons in Rwanda in conducting proceedings relating to the 1994 genocide against Tutsi.

Fighting corruption in the judiciary

A judicial system cannot work well if its officers are corrupt. This is why the judiciary together with other state agencies have taken various measures to combat corruption. As a result of various strategies adopted at the national level, Rwanda is among countries that have been recognised regionally and internationally for substantial improvement in combating corruption. In December 2011, Transparency International issued the Report on Corruption Perceptions Index in which it ranked Rwanda 49th in 182 countries. This placed Rwanda in the lead among East African countries, and in 4th position among all African countries.

Strategies for fighting corruption include public awareness campaigns on the evils of corruption through radio talk shows, pamphlets and other literature; an annual anti-corruption week to mobilise the population against corruption with an anti-corruption walk through the streets, a press conference and fast tracking hearings of corruption cases; and naming and shaming those involved in corruption which also ensures that corrupt officials are not recruited into other public institutions where they could perpetuate the cycle of corruption.

While there has been substantial success, there are still challenges in combating corruption. New ways of covering corruption tracks are being invented and, even though reporting of corruption has increased, some judicial officers and court staff remain reluctant to report instances due to fear for their personal safety or because of negative solidarity.

Conclusion

Rwanda has come a long way on the road to justice that is fair and accessible to all. There were numerous problems in the aftermath of the genocide that appeared insurmountable but Rwanda has not only pulled through but has done well in rebuilding institutions and ensuring their efficient functioning. The struggle for improvement continues.

THE TRIAL OF A CANADIAN CANNABIS GARDENER

Nic Madge, Resident Judge at Peterborough and Huntingdon Crown Courts.

Abstract: *This article provides an incisive account of a trial before the Supreme Court of British Colombia in Vancouver of a defendant charged with the unlawful cultivation and possession of a controlled drug for the purpose of trafficking. It highlights the quality of the judging in face of an unrepresented defendant and the severity of the sentence imposed.*

Keywords: unrepresented defendant – search warrant – cultivation of controlled drugs for commercial trafficking – circumstantial evidence – sentencing principles

"Order in Court."

A female clerk, Crown Counsel (gowned but not wigged), the defendant and a sheriff with a hand gun on his belt, all rose. Mr Justice Randall S. K. Wong walked into court and gave a minimal bow. He was wearing a wing collar, long tabs, and a black gown, but no wig. Behind him were the royal coat of arms, *Dieu et Mon Droit*, with a lion and unicorn. In front of him was a large, windowless, concrete and light wood court room with a red carpet and ceiling fans.

The clerk called out the "Crown and James Billyard" (see *R v Gregory James Billyard* [2010] BCSC 284, Vancouver, B.C., 4 and 5 January 2010). The defendant, a white man aged 39, with short brown, greying hair, wearing a leather jacket and black shirt, sat in a small dock in the middle of the court room. The defendant had elected trial by judge alone and so the twelve, red jury chairs were empty. The six rows of seats at the back of the court, the public gallery, were also empty.

This was Court 54 of the Supreme Court of British Colombia in Vancouver. Outside, in a glass atrium, among ivy, umbrella plants and sofas, there was a bust of Lord Denning, unveiled by Lord Ackner in 1995 to mark Denning's 95th birthday, and a statue of Themis, Goddess of Justice.

Prosecuting counsel, perhaps in her thirties, competent, but nervous, addressed the judge as "My Lord", but sometimes she slipped by calling him "Your Worship". The judge turned to the defendant.

"Are you representing yourself?"

"No."

"Do you have counsel?"

"No."

"What do you mean?"

"I ran out of money. I have been on bail two and a half years. The lawyers want ten or fifteen grand. I've been to Access to Justice and Legal Aid."

"Are you ready for trial?"

"No."

The judge reviewed the history of the prosecution. This was the third trial date. The first had been in September 2008, but the defendant's counsel had come off the record a week before and there was an adjournment for new counsel to be instructed. The defendant obtained new counsel, but he too came off the record ten months later, a week before the second trial.

"On the first day of that trial, you said you wanted counsel – and so the trial was adjourned to today. Are you gainfully employed?"

"I earn $18 an hour scaffolding. Access to Justice don't do criminal trials. The prosecution are asking for jail time. I have got a life. I am not willing to plead guilty."

"Do you have any dependents?"

"I have a girl friend and a son aged 20."

The judge's tone of voice, which until now had been gently avuncular, became firmer. "Mr Billyard. It's like baseball. Three strikes and you're out. We will proceed to trial."

The defendant was arraigned by the clerk. "Count 1. On 24th July 2007 at the District of West Vancouver, you unlawfully possessed cannabis marihuana in an amount exceeding

three kilograms for the purpose of trafficking. Count 2. On the same date you did unlawfully produce cannabis marihuana."

The defendant pleaded not guilty to both counts and began to speak again to the judge. "My Charter Rights say a lawyer will be appointed." [Note: the Canadian Charter of Rights and Freedoms, contained in The Constitution Act 1982. Section 11, *Proceedings in criminal and penal matters*, does not include an express right to representation].

"I think you're wrong about the law. The trial must go ahead. You have had ample opportunity to seek representation. You will have the opportunity to ask questions."

"I am not representing myself."

"I may give suggestions, but I am not your counsel. I am a gate keeper of the evidence. I will ensure that you have a fair trial."

"That does not seem fair."

The judge's tone hardened again. "Don't fence with me young man." Mr Billyard sat down.

The prosecutor explained that previous defence counsel had indicated that he wanted to challenge the validity of the search warrant. Mr Justice Wong said that raised a Charter issue and that he would hold a *voir dire* to determine the validity of the warrant. He asked the Crown to open the case.

"Mr Billyard took part in a residential 'grow op'. He grew a lot of plants where he resides. There were 748 plants growing in two rooms on a lower level. The residence was on the upper floor. There was an informant's tip. Officers attended. They gathered evidence and then obtained a search warrant. The issues are knowledge and control. He was a gardener. There was visual observation by the police and documents were found in the residence, in his name. There were photos, health insurance, tax forms, financial statements, birthday cards etc. The plants far exceed personal possession. He was resident. He was trafficking."

"Was he present on execution of the search warrant?"

"No, he was not present, but he was observed leaving and driving away. He was arrested not far away. Keys in the car were used to open the residence. He was not the owner."

"Was he the renter?"

"The documents do not conclusively determine that. There is a hydro [electricity] bill in the name of someone else. The police investigated theft of hydro, but he was not committed on that. Equipment was not submitted for finger print analysis. No statements were taken from neighbours."

"So, is it circumstantial?"

"There are documents, and he was physically observed there. He was observed coming out on the day of the warrant. Evidence will show that there were no locked doors."

The judge read out the allegations and carefully explained the prosecution case to the defendant. He repeated that the issues were control and knowledge and that circumstantial evidence allowed the drawing of inferences. The defendant nodded and said "mmm". The judge told him that he was presumed innocent and explained the concept of reasonable doubt. He asked the clerk to give Mr Billyard pen and paper and said that he would have the opportunity to give evidence if he wished.

"Do you understand?"

"Yes, sir."

The court embarked on the *voir dire*, with prosecuting counsel submitting that the defendant had to show that there was insufficient basis for obtaining the warrant. The standard to overturn it was that "it could not be granted, it was fraudulent, or it was so unreasonable that it could not be granted". She said that it was valid on its face and that there was ample evidence to obtain it.

Mr Justice Wong said that, as the defendant was "self representing, from an abundance of caution" and "without wanting to create a precedent" all the officers who were involved in the pre-warrant investigation should be present to give evidence.

After a twenty minute mid-morning recess, Detective Corporal Robin McDonald walked into the raised witness box. He wore a navy uniform with a firearm in a holster. The oath was read out by the clerk. "Do you swear the evidence you shall give will be the truth, the whole truth and nothing but the truth, so help you God?" "I do."

The officer gave evidence sitting down because he was not well. He explained how the hydro

records showed an "abnormal energy consumption" and produced copies of the bills. The police went to the perimeter of the property, but did not put a foot over the boundary. Some smelt "an overwhelming odour of vegetative marijuana". Others did not. The windows were obscured by curtains and brown paper. They could hear humming, the constant sound of fans.

The judge asked the defendant if he wanted to ask questions. He did not, but after the officers had finished giving evidence, he said "How could they hear the steady sound of fans if they were not on the premises? The odour could have been coming from anywhere. It's impossible, ridiculous to hear a fan coming from another property."

After the court had adjourned for lunch from 11.40 a.m. to 2 p.m. and the evidence on the *voir dire* had concluded, the judge gave a short ruling. "The role of a reviewing judge is a limited one. Could the warrant have been granted? Could it reasonably have been granted? There is ample evidence to justify the issue of the search warrant. Officers attended the perimeter on a number of occasions. They smelled cannabis. They heard fans. There were hydro records. There was informant information. The evidence was compelling, credible and corroborative. There was an abundance of evidence within the four corners of the information. The inference can be drawn that there was cultivation. I must rule that the search warrant is valid."

The officers returned to the witness box and gave evidence in more detail. The upstairs rooms were occupied. There were beds, sheets, newspapers, food in the fridge, personalised photos, a satellite tv, washing, toiletries, tools etc. A spirally bound book of photos of all the rooms was produced. The electrical system had been tampered with. In a closet, there was large ventilation tubing. An officer produced a photograph of the defendant and his birth certificate which she had found in a dresser drawer. There was a list of fertilizers and a manual for growing marijuana which had been found in the bathroom.

In the middle of the afternoon, the judge rose for a twenty minute recess and prosecution counsel tried to set up on her lap top the video, showing covert film of the defendant leaving the house just before his arrest. It did not work until moments before the judge came back into court. Prosecution counsel clapped and giggled. The footage, filmed through bushes, showed Mr Billyard walking to an old white Pontiac and putting a back pack into the trunk. A woman and a dog got into the car. He secured the door of the house and drove off. Two traffic cops gave evidence about how the car was stopped and he was arrested shortly afterwards.

The court adjourned until the following morning when the prosecution called an expert as to the value of the plants. After hearing from the defendant, Mr Justice Wong gave a short, *ex tempore* judgment. "Gregory James Billyard you stand charged on an indictment of two counts." He read them out. "The evidence here is strictly circumstantial in that on the day that the police executed the search warrant, they saw you leaving the house. After confiscating some keys which gave them access to the premises, they found various documents associated with you of a personal nature, birth certificates, and other assorted identification documents. The house appeared to be inhabited by a male and a female, and you were observed leaving the premises just prior to your arrest with a female person."

"It appeared that the other areas of the house were generally accessible. You came out of those particular premises and, on the basis of the evidence viewed cumulatively, it is inescapable that you had both knowledge and control of the presence of those plants. Circumstantially, even though there was no evidence of anyone observing you handling or marketing those particular plants, all that is required to be established is that you had knowledge and control of those plants. From the amount of clothing, it appears that whoever had access to the place had lived there some time. There is evidence that that grow operation requires daily tending because those plants basically need to be hand-watered. Therefore, on that basis, I am satisfied beyond a reasonable doubt that you had both knowledge and control of those particular plants, and the scale of the operation clearly indicated that it was not for personal use, but for commercial trafficking."

"Accordingly, on both counts, I find you guilty as charged."

Mr Justice Wong adjourned for a pre-sentence report. The case came back before him some

six months later ([2010] BCSC 901, 11 June 2010), when Mr Billyard was represented by counsel. The judge referred to his family background, his employment history and gambling addiction. He continued, "The aggravating feature in this case is that this is your second conviction. The first conviction for the same type of offence was back in 2002 for which you received a 12-month conditional sentence order and [were] apparently placed on probation at a subsequent time. This present offence took place in 2007, five years after the previous one. As indicated in the evidence, this was a major and large operation which appeared to be well planned. There were 748 plants, a considerable number … the expert said that even sold at wholesale price, the value would range from $336,000 to over $400,000 and that is only with one harvest. Quite likely, over a period of time, there would be multiple harvests, so that would be compounded."

"I must take into account also some mitigating factors, that recently you have developed relationships that appear to be more stable. There are prospects of using your employment skills and perhaps a late recognition, although I must say it is rather suspicious that the epiphany was rather late, some two weeks ago, that you may need treatment or counselling for your gambling addiction. I have no doubt that the means to pay gambling debts was a main feature for your involvement in this particular offence."

"The guiding principle in this case is a balance of these sentencing principles, namely, specific and general deterrence and denunciation of the offence here. There are dangers to the community, primarily because it is a known fact that grow operations are potential fire hazards in the neighbourhood beside health hazards potentially to occupants of the house. I note in this case there were no children residing in this house, but nevertheless there are those potentials. This does not appear to be a rented premise as there is some indication perhaps the owner of the premise was the person who was involved with you. It is a known fact that marihuana grow operations more or less eventually trash the house."

He sentenced the defendant to twelve months imprisonment, concurrent on each count, with a two year probation period to follow. Terms of the probation order included substance abuse counselling, gambling addiction counselling and an obligation to "seek and maintain verifiable employment". Mr Billyard was also required "not to attend any gambling establishments including casinos and racetracks". The paraphernalia seized by the Crown was forfeited and Mr Billyard was prohibited "from having in [his] possession any firearm, ammunition or explosive substance for life." However, Mr Justice Wong refused a prosecution request for a DNA sample order.

This was not an English or Welsh trial, but the procedure and the law were almost identical. During the trial, the only distinguishing features were the absence of a jury for a serious charge, judge and advocates without wigs, officers with guns on their belts in court and the phrase "so help you God." The judging was of the highest quality. The prosecution case was overwhelming, but Mr Justice Wong was patient. He bent over backwards to be fair to an unrepresented defendant and to ensure that he understood everything, but was firm at the first suspicion that the defendant was challenging the authority of the court.

Perhaps the biggest difference was the sentence imposed. In England and Wales, the Court of Appeal has indicated that the starting point for sentences for "gardeners" concerned in large scale cultivation of cannabis is three years, even for a first offence (see *R v Xu* [2008] 2 Cr. App. R(S.) 50). Under the more recent Sentencing Council *Drug Offences, Definitive Guideline*, the starting point, on the basis that this was an "operation capable of producing significant quantities for commercial use" would be likely to be four years imprisonment.

THE SENTENCE OF THE COURT: DO THE JUDGES KNOW WHAT THEY ARE DOING?

Geoffrey Care, SC LLM former High Court Judge Zambia and Deputy Chief Adjudicator, UK Immigration Appeals Authority; President International Association of Refugee Law Judges.

Abstract: *This article looks at the role of judges in the inspection of prisons and early disposal or the release of those awaiting trial in history and today. It is based on a survey conducted by the author of the different systems in operation, with particular (but not exclusive) regard to the Commonwealth countries, as well as a consideration of how judges are (or should) be involved. Special attention is paid to what judges could be (and in some countries are) doing to alleviate the almost universal problem of the lengthy periods in which people are kept in custody whilst awaiting trial, as well as the conditions of their detention.*

Keywords: sentencing – prison visits – conditions – overcrowding – supervisory systems – remandees

> *I believe we have a responsibility to see the places we send people to serve the sentences we impose.*
>
> US Judge (2012)
>
> *The conditions in prisons…measure the stored up strength of a nation, and are the sign and proof of the loving virtue within it.*
>
> Winston Churchill

Introduction

The length of time in which people are kept in custody whilst awaiting trial, sometimes in appalling conditions, is a blot on a country's claim to adhere to its own constitution and international standards. This article deals with the need for awareness, on the part of judges, of the effects and implications of the sentences they impose. The article also addresses the important role of prison inspections. It is based on a survey conducted by the author of some of the different systems in operation, mainly, but not exclusively, in Commonwealth countries. Wherever possible, the relevant sources have been indicated in bracketed text in the article, however, it should be noted that more detailed responses to the survey remain available on file with the author.

Three quotations may set the context of what is at stake for prisoners, judges and the state itself. Firstly, Sir Henry Brooke, formerly a Lord Justice of Appeal in England, speaking at a Seminar in Moscow 1996 quoted from *Termes de la Ley, Imprisonment* (cited with approval by Lord Jauncey in *ex p Hague* [1992] 1 AC 58, 173):

> *Imprisonment is no other thing but the restraint of a man's liberty, whether it be in the open field, or in the stocks, or in the cage in the streets or in a man's own house, as well as in the common gaols; and in all the places the person so restrained is said to be a prisoner so long as he hath not his liberty freely to go out all times to all places whither he will without bail or mainprise or otherwise.*

Secondly, Professor Peter Schuck (Yale), although writing with reference to the Californian context, condenses the challenges which are universal thus:

> *Overcrowded prisons constitute a very serious social problem of many dimensions: human rights threats, violence against prisoners and guards, breakdown of order and discipline, obstacles to prisoner rehabilitation and good health, fiscal integrity, and violation of constitutional or statutory rights…'. (See Schuck, Deportation Before Incarceration, Hoover Institution Policy Review No. 171 (2012), at 34; and Schuck, Immigrant Criminals in Overcrowded Prisons: Re-thinking An Anachronistic Policy (2012) (draft)).*

Thirdly, a Canadian judge Peter Doherty said, in company with another judge from Oregon, USA, that:

[…] we have a responsibility to see the places we send people to serve the sentences we impose. The education committee of my court has arranged such visits in the past (7 April 2012).

Speaking of the situation in India with respect to people in preventive detention, a former Chief Justice, PN Bhagwati, spoke of the importance of raising awareness: "[i]t is high time that the public conscience is awakened and the government as well as the judiciary begins to realise that in the dark cells of our prisons there are a large number of men and women who are waiting…in vain, for justice – a commodity which is tragically beyond their reach and grasp." (See Commonwealth Human Rights Initiative (CHRI), *Undertrials - A Long Wait To Justice. A Report on Rajasthan's Periodic Review Committees* (2011)).

Judges have a key role to play in raising awareness of this phenomenon. However, before that may happen it would seem self-evident that they must themselves visit the relevant detention facilities. For instance, Sir Henry Brooke explains,

[…] When I was trying cases in the Midlands...I visited a large number of young offenders' institutions which received young men who had been remanded in custody by a number of different courts in the locality. A prison officer in the reception section told me that the first thing he does when a new prisoner arrives is to check the warrant for his detention which has been signed by an officer of the relevant court. If he has any doubt about its validity, he rings up the court, and if he cannot contact anybody that night he will usually decide to detain the offender overnight, although he is conscious that he and the prison service may be sued for damages for false imprisonment if it should turn out that the offender was not lawfully detained. (Unpublished speech in Barbados).

Sir Henry proceeds to highlight the importance of judicial control in ensuring that prisoners do not remain in custody without good reason for far too long awaiting trial. He notes:

At a Crown Court...[I] directed that a prisoner should be released on bail pending committal for trial because I considered there was no good reason to extend the custody time limit...I have [also] allowed a remand prisoner leave to apply to the High Court for a judicial review of a decision by a judge to postpone the date of his trial until next autumn after he had already been in custody as an untried, unconvicted prisoner for a year. (Unpublished speech in Barbados).

History

In England the concept of emptying the gaols of those awaiting trial and those who should not have been there goes back, at least, to Henry II of England with the Justices in Eyre in 1176.

Prison was not then, nor until the 19th century, regarded as a place for punishment. In those early days there was no clear distinction between criminal and civil wrongs where the judicial system was generally directed at retributive justice and reconciliation except for crimes the social impact of which was wider, such as treason. Itinerant justices were sent from London on Commissions from the King around England and Wales to administer justice and check up on affairs. The judges were to *deliver to the prisons* every person awaiting indictment by a Grand Jury. This covered every gaol on their circuit. The gaols therefore were more like a loose remand system and it would appear doubtful whether it would have ever occurred to a judge that there was any need to physically visit one of them, though they may well have done so.

In fact, however, it seems that the majority of those awaiting trial were not confined at all; the threat of outlawry was enough to ensure they answered the call of the *"horn"* to attend trial.

When the Grand Jury found a true bill of indictment (i.e. decided there was a case to answer) against an accused he or she would be arraigned before the judge (in modern terms, put on trial) and those whom the Grand Jury failed to indict were released (see 3 Bl. Com. 58-9; Crabb's Eng. Law, 103-4. Vide Eire). The original Commission was abolished as part of the reform of the courts system in 1971 except for the Isle of Man, where all serious crimes are tried in the Court of General Gaol Delivery.

Nevertheless, the High Court judges still go on circuit in England and Wales – as they do in many Commonwealth countries

In the mid-15th century, committees were appointed to visit the prisons: for example annual visits to Newgate in 1462. By the 19th century, the conditions of places of detention (such as Marshalsea, Newgate, The Clink and Bridewell) were such that no judge would have wanted to visit them anyway for fear of catching 'gaol fever' (typhoid).

The reform of these conditions (usually 'debtors' prisons then) are traditionally attributed to Elisabeth Fry and John Howard (see the Howard League for Penal Reform), but they and others were prompted to this zealous pursuit of a structured system of reform by the actions and initiatives of the prison inmates themselves in the 18th century. Modern day equivalents of similar prisoner oriented initiatives can be found, *inter alia*, in Ethiopia and South Africa.

Statutory provisions for prison inspections in England and Wales first appeared in 1835, followed by the Prison Visitors and, presently, by the 1982 HM Inspectorate of Prisons for England and Wales (see http://www.justice.gov.uk/about/hmi-prisons/index.htm). Recently, the Home Secretary appointed a Prison Ombudsman.

Prison Conditions Generally

It is not possible here to do more than provide some snapshot examples of the prison conditions extracted from various published reports.

The United Nations Optional Protocol to the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requires signatory states to establish a National Preventative Mechanism (NPM) to carry out independent preventative inspections of all places of detention. Only four countries in the Commonwealth have both signed and ratified or acceded to this Protocol although many have some form of prison inspection system in place and frequently judges are appointed to fulfil the NPM role in some manner. (See also the Kampala Declaration 1996 on *Prison Conditions in Africa Report, Plan of Action* No. 5, adopted at the Kampala Seminar on Prison Conditions in Africa, September 1996).

The International Centre for Prison Studies (ICPS), a joint initiative between Essex University and the Home Office UK, has detailed world prison population figures. Although the statistics the ICPS has produced are revealing, they do not paint the full picture of the situation "on the ground", but they do consolidate the statistics which follow (see www.idcr.org.uk; and www.apcca.org/stats/). Moreover, although the reliability of statistics in painting a reliable picture of prison conditions in various countries very much depends on the nature of the data kept by such countries, as will be discussed below, a consistent picture of prison conditions nevertheless seems to emerge.

The ICPS statistics show that many of the smallest countries, such as St Kitts and Seychelles, have amongst the highest ratio of prisoners per head of the population e.g. over 500 per 100,000 as against countries like the US with 737, Russia 568, South Africa 316. Other countries, which have large populations, such as India, Pakistan and Nigeria have among the lowest ratios – below 45 per 10,000 of the population. However, encouraging as some of these percentages look, there are, for example, still some 2.5 million people in custody in India awaiting trial – for up to 20 years. Even in Pennsylvania (USA) Judge Jeannine Turgeon stated on 4 June 2012 there was a total of 1173 incarcerated in the county jail of which 789 (67.3%) are listed as unsentenced.

What is more revealing is the ratio of people in custody to the population of the country set alongside the percentage of the prison population awaiting trial. Nigeria, Pakistan, Bangladesh and India have among the lowest for the former yet the highest ratios for the latter – over 60% (see www.idcr.org.uk; and www.amnesty.org/en/news). The prison occupancy rates themselves can also be deceptive. If the rates for individual prisons in each country are not known, averages must be given and an average does not necessarily reflect reality. For example, the average occupancy rate for the prisons in Nigeria is 107% (compared with the UK and Australia at 104%). Whereas the percentages of prison occupancy for Malawi is 218%, for Zambia 207%, and Kenya 236%. With the percentage of prisoners awaiting trial in Malawi of 12%, Zambia 33%, and Kenya 36% (see www.idcr.org.uk).

In Malawi, 12 years ago, there were 1200 prisoners on remand awaiting trial for

upwards of 3 years on capital charges alone. Based on the personal observations of the author, of these, two thirds would have eventually had their charges reduced to manslaughter and sentenced to terms which would lead to immediate (and often belated) release. As will be seen below, however, Malawi has successfully turned this situation around.

According to the Nigeria Prisons Service Report on Prisons Capacity and Inmates Population 2011 and February 2012, Nigeria has 234 prisons, which are mostly over 80 years old and are reported to be overcrowded and lacking basic facilities. Some hold fewer prisoners than they have capacity for, but others hold over one and a half times the number they were built for, and in some major centres, the occupancy rates are between 280% and 300%. One of the largest industrial cities in the country has a dilapidated structure built in 1910 for 800 prisoners which now holds 2,995 prisoners of which 90 per cent are unconvicted (see www.idcr.org.uk). The problem of overcrowding of remandees has been highlighted by the Senate Report of the Joint Committee on Judiciary, Human Rights and Legal Matters, Interior, and Police Affairs (4 July 2012).

Statistics relating to the period in which prisoners in that country have been in custody awaiting trial seem unobtainable but, at least, some examples may give a general sense of the figure. Three judges in 3 of the thirty-seven States in Nigeria visited gaols in their States between January and April 2012; the Chief Judge in the Federal Capital Abuja (Justice Gummi) found and released one prisoner who had been awaiting trial for 5 years and another 2 years. The Chief Judge Umeh in Lagos released one prisoner who had been awaiting trial for 2 years, and the Chief Judge of Rivers Ndu freed 156 of those awaiting trial.

Sana Das, a coordinator of the CHRI report *Liberty at the Cost of Innocence: A Report on Jail Adalats in India* (2009) observed that in Rajasthan, India, there were about 17,194 prisoners of whom nearly 11,000 were in pre-trial detention, and many of whom were accused of minor offences punishable by not more than three years, who were kept pending for years together. If they are poor and helpless, they languish in jails for long periods. Das underscores that the importance of the oversight role that Chief Judicial Magistrates can play, when they wish or will, emerges clearly from this report. He relates "a concerned Indian Supreme Court recently, ordered the expeditious trial of criminal cases pending for more than five years. It may come as a shock to the Judges who passed the order, that there are under trial in our prisons those who have spent 20 years or more behind bars, without actually being convicted".

The situation encountered during a visit by the Vice President of Zambia at a maximum security prison prompted him to describe the establishment as "hell on earth" (Zambia Daily Mail, 5 April 2012, Ng'uni). Such a dire situation would not have escaped a judges' inspection, had it ever been made. In this context, the author recalls, from personal recollections, that in the 1970s, the judges in Zambia used to visit the prisons more or less every three months.

With respect to Ontario, Canada, Judge Peter Doherty also reported that the most violent and dangerous prisoners in the country were locked up in the Special Handling Unit for 23 of 24 hours of the day, in a room about the size of a small bathroom, and never permitted out in groups. He added that other tough military prisons in Canada and Europe were not as extreme.

Supervisory Systems

Some examples of supervisory systems may be found on the website: www.prisonstudies.org. In most countries, there are provisions for prison visits by judges or magistrates but there is no evidence that the *Advice to Judges* put out by the Inspectorate of Prisons in England exists elsewhere.

In Bangladesh and India, for instance, where there are State Jails, such judicial visits seem generally confined to the magistracy or district judges. As far as the present author is aware, nowhere are judges required to visit prisons as part of their training (or otherwise). In no country either, except where sentencing is in the curriculum of judicial training, does it appear that judges are instructed on the broad effects of different sentences or on the overall effects of attitudes toward bail.

Where judges, at any level, do visit prisons, research shows that they do so irregularly and without encouragement from any quarter. For

instance, Judge Lynton Laing (New Zealand), who also held the title of Visiting Justice and in that role held disciplinary hearings in prisons, visited a prison when first appointed and, together with the author, conducted a tour of the prisons around Wellington City. However, in general, there appears to be no urgency to requests from prisons for a judges' visit. Overall it seems that, although judges have the ability to improve and raise awareness of the conditions of those in custody by the exercise of their inherent powers, they only do so sporadically.

Two States in Nigeria have taken steps to modernise the system. Ondo State has tackled delays and overcrowding by arranging for judges to visit the prisons and try cases there. This bears a resemblance to the purpose behind the *jail adalats* (discussed below). Additionally if witnesses cannot be found, the Attorney General will withdraw the charges. In Lagos State (Kirikiri Prison), non-custodial sentences for lesser offences are being introduced and it is claimed that a more humane attitude toward prisoners now prevails.

In Jos (Plateau State), a visitor (Dr. Mrs. Emily Alemika Department of Public Law. Faculty of Law, University of Jos) reported, "theoretically Visitors make a visit twice a year. In a recent visit to the Jos Prison the general condition was [found to be] not too good especially sleeping space and kitchens. Most of the training facilities are in a terribly bad shape. I do not think the farm prison is any better because there is general neglect."

In Belgium, the 2011 Report of *Le Conseil Central de Surveillance Penitentiare* indicates disappointment with government responses to prison conditions and remarks that there is a good deal more work to be done to make the Belgian prison system live up to EU standards. Five examining Magistrates visiting some prisons were shocked by conditions due to overcrowding and, amongst other things, observed, "I went there 25 years ago and nothing has changed" (see *Le quatrième rapport du Conseil Central de Surveillance Pénitentiaire,* http://actualite-generale.dhnet.be/rapport-conseil-de-surveillance-prisons.html).

One of the complicating factors in reviewing systems of prison inspection is the type of custodial establishment in use. Apart from juveniles and young offenders centres, some countries such as in Bangladesh, India and Pakistan distinguish between local *jails* or subjails (such as that used recently in Pakistan for the family of Osama Bin Ladan) and State Prisons. Other countries such as the USA and Canada distinguish between State (or Provincial) and Federal Penitentiaries or Prisons and each have different regimes and legislation. Yet again one can find overnight (theoretically at least) lockups in police stations and "open" and "maximum security" prisons. Remand prisons for the unconvicted (those awaiting trial or indictment) may be placed in any of these various prisons.

In Rajasthan, India, the 2009 CHRI Report *Liberty at the Cost of Innocence* addressed the innovation of *Jail Adalats* which are a method of persuading a prisoner to plead guilty and get out of prison quickly. The Report concludes:

> *Jail adalats are face saving exercises. Jail adalats reduce the under-trial population and overcrowding in prisons, and improve the overall conviction rate – but at a cost. They are denied any realistic alternative; all categories of inmates are huddled together in most of the prisons including women, children young offenders and adults.*

The Report also noted a lack of coordination among police, prosecution, judiciary, prison and probation. Attempts by voluntary agencies to extend their services for the welfare of prisoners are looked upon with suspicion by prison personnel.

Kenya has also established Court Users Committees, which have been helpful in detecting chronic overcrowding. Article 49 of the New Constitution grants bail to all suspects (unless of course there are compelling reasons not to do so). This has eased overcrowding, but it still exists (Justice Lenaiola).

Malawi has introduced both a Prison Inspectorate chaired by a judge and the judges also regularly visit the prisons and prepare reports. The Court User Committees (which comprise various stakeholders in the criminal justice sector) also prepare reports so that common approaches to challenges faced may be addressed. For example, the police may be challenged to desist from remanding people for long periods without trial and courts may

likewise be called to explain why judgments in concluded trials are delayed. Moreover, creative solutions are also factored into the overall prison regime, such as the rewarding of good behaviour with the 'freedom' which comes with the opportunity to work outside the confinement of jail walls (Justice Kachale).

Judges' Visits

The author has not found any evidence, in the countries examined, of any official requirements that all judges need to be familiar with, or at least aware of, the conditions in places to which they convict and sentence prisoners. A few judges (including in parts of the UK) do not think it necessary to visit a prison at all. Other countries do not allow every judge to visit prisons and, sometimes, even those on whose shoulders the duty rests simply do not go. Judge Stuart Friedman (Cuyahoga County Common Pleas Court Cleveland Ohio, 7 April 2012) acknowledges that judges do not often visit prisons but considers it would be instructive for judges to do so, to experience it from the inmate's point of view – spending some time with fellow inmates, eating their food, etc.

The following are some of the responses and views expressed by judges, further to a survey conducted by the author, regarding the question of prison visits by judges in their respective countries:

Canada

Judge Watson pointed out that the judiciary only gets involved when the internal systems are said to have misfired and agreed that a visiting judge would be a good idea if the place was a '*general hell*' though it seems judges in some provinces are more involved (Judge Watson, 6 April 2012).

Kenya

Justice Lenaiola held that "[t]he issue of Remandees is a big problem caused by a huge backlog of cases created partly by shortage of judicial officers, lethargy on the part of some, frequent and haphazard transfers of judges etc. Invariably in capital offences one stays for 5 – 8 years." He goes on to state "a few years back in a station where I was working, cholera broke out and it took partly my intervention to ease the overcrowding but all criminal justice agencies are working to contain the situation and avoid a repeat of what happened in my station". He also said that judges do visit prisons at least once every three months, but magistrates make more frequent visits (Justice Lenaiola, April 2012).

Seychelles

With respect to the very high rate of prison population in the Seychelles, the Chief Justice Fredrick Egonda-Ntende explains, "[t]here are two reasons to explain it. One is that we have about 100 Somali pirates. The number could easily be 125 both convicted and non-convicted. We have had 15 pirates' cases with an average of 10 persons in each case. 9 have been tried and 6 are awaiting trial. Secondly, we have had a dramatic increase in drug trafficking, possession cases as well as house-breaking, burglary, or stealing from a dwelling house, due to increased drug consumption in the community and the response has largely been a criminal justice response rather than health care response!" (Chief Justice Fredrick Egonda-Ntende, 11 April 2012).

Scotland

Section 15 of the Prisons (Scotland) Act 1989 authorises sheriffs to visit prisons but, according to information available to the author, it seems they do not exercise this right.

South Africa

A judge noted that in his experience of jail visits, the condition of the food was the main complaint. However, the judge noted that the warders generally prepared everything in advance ahead of a visit, so that unannounced visits did not have the desired effect (Justice Ralph Zulman).

Solomon Islands

One (post-colonial) informant (a magistrate in Solomon Islands in the 1980s) recalls prison conditions being basic, but humane, in accordance with local custom but discipline was lax. When order broke down in the Central Prison and there was a mass escape in 1980, it was brutally put down by the Controller of Prisons, which led to him being sentenced to four years' imprisonment himself. After he first appeared before the court on those charges, he had the prison gates opened, and the prisoners encouraged to leave. The resulting disorder eventually led to the appointment of a Prisons Adviser while loyal prison officers brought the prison to order and another magistrate read the Riot

Act 1712 (Senior Immigration Judge John Freeman).

Finally, it has to be underscored that, although this brief survey of systems tried to capture some of the more salient issues involved, it does not do justice to the rich detail in which some judges, including those from Bangladesh, Pakistan and India, have described the practice of prison visits and conditions in their jurisdictions. I hope those judges will forgive me.

Some Questions for the Judge

From the above, it may be seen that four matters, in particular, seem to be important for the judiciary to consider in relation to sentencing and prison visits:

a) Is there a need for a prison visit by a judge?
b) If there is such a need, what are the objectives of the visit?
c) How regularly should visits take place?
d) How can judges' visits be most effective?

Conclusion

It is clear from the comments above that, in some countries, the prisons are occupied by men, women and children awaiting trial often for several years. It is reasonable to suppose that the overcrowding which ensues, especially in the remand prisons, must contribute to the persistence of the unacceptable face of imprisonment in many parts of the world. Judges may make a significant impact by considering alternative sentences, fast tracking trials, and shortening outdated procedures. It has to be noted that the length of time prisoners await trial, and the effect of continued grants of adjournments, all contribute to overcrowding. These considerations should surely form part of judicial training. Above all, judges should be aware of any issues in the detention centres by conducting regular prison visits.

JUSTICE ALLIANCE v PRESIDENT

18, 29 July 2011

CONSTITUTIONAL COURT OF SOUTH AFRICA [2012] 1 LRC 66 Moseneke DCJ, Cameron, Froneman, Jafta, Khampepe, Mogoeng, Nkabinde, Skweyiya, van der Westhuizen and Yacoob JJ

Section 176 of the Constitution of South Africa provided that: 'A Constitutional Court judge holds office for a non-renewable term of 12 years, or until he or she attains the age of 70, whichever occurs first, except where an Act of Parliament extends the term of office of a Constitutional Court judge.' Under s 174 of the Constitution there was a distinctive procedure for appointing the Chief Justice and the Deputy Chief Justice: they were both appointed by the President, after consultation with the Judicial Service Commission and the leaders of the parties represented in the National Assembly. Section 2 of the Constitution stated that the Constitution was the supreme law of the country and that any law or conduct inconsistent with it was invalid. Section 165 of the Constitution provided that the organs of state not only had to refrain from interfering with the courts but they also had to 'assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts'. In 2001 the Constitution was amended to give Parliament the power to extend the term of office of a Constitutional Court judge. Section 4 of the Judges' Remuneration and Conditions of Employment Act 2001 (the Act) provided that a Constitutional Court judge, whose 12-year term of office expired or who reached the age of 70 years before completing 15 years' active service, had to continue in office until the completion of 15 years' active service or until that judge attained the age of 75 years, whichever was the sooner. Section 8(a) of the Act permitted the further extension of the term of office of the Chief Justice exclusively. It allowed a Chief Justice, whose 12-year term in this court was to expire and who would have completed 15 years' active service, to remain the Chief Justice of South Africa at the request of, and for a period determined by, the President. In 2011, the President extended the term of office of the Chief Justice of South Africa for five years, with that extension to commence in August. The instant case involved three applications for direct access to the Constitutional Court to challenge the President's decision to extend the term of office of the Chief Justice. The applicants challenged the constitutionality of the law that authorised the process by which the term of office of the Chief Justice was extended and, if the law was found to be valid, put in issue the constitutional validity of the conduct of the President in the process of extending that term of office. The applicants all claimed standing in the public interest under s 38 of the Constitution and were granted direct access by the court. The applicants claimed that s 8(a) of the Act was invalid because it violated the provisions of s 176(1) of the Constitution. They contended that its provisions were an impermissible delegation of the legislative power of Parliament to extend the term of office of a Constitutional Court judge to the President. The respondents submitted, *inter alia*, that s 8(a) was part of an Act of Parliament that gave effect to s 176(1) of the Constitution and that under that provision Parliament extended the term of office of the Chief Justice and merely authorised the President to implement that extension. They contended that this was permissible delegation to the President to decide: whether to extend the term of office of a Chief Justice; if so, to determine the period of extension and to seek the consent of the incumbent. The central issue that arose for determination by the courts was whether s 8(a) of the Act was consistent with s 176(1) of the Constitution. That inquiry required the court to determine, *inter alia*, whether s 8(a)

delegated the power to extend to the President and, if so, whether that delegation was permitted by s 176(1) of the Constitution. Other key issues that the court had to consider was whether the power conferred on the President to extend the term of office of the Chief Justice alone under s 8(a) was also compatible with s 176(1) of the Constitution and, if s 8(a) was invalid, whether or not a declaration of invalidity should be suspended, since the Chief Justice's post would be extended within four weeks.

HELD: Application allowed. Section 8(a) of the Judges' Remuneration and Conditions of Employment Act 2001 declared constitutionally invalid. Order for suspension of declaration denied.

(1) The interpretation of s 176(1) of the Constitution and s 8(a) of the Act necessarily engaged the concepts of the rule of law, the separation of powers and the independence of the judiciary. The significance of the rule of law and its close relationship with the ideal of a constitutional democracy could not be overemphasised. Section 2 of the Constitution enshrined the supremacy of the Constitution. The principle of the separation of powers emanated from the wording and structure of the Constitution. The Constitution delineated between the legislature, the executive and the judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness. Section 165 of the Constitution and case law highlighted the importance of judicial independence, which was further underscored by the oath or solemn affirmation taken by all judges when entering office. Judges undertook to uphold and protect the Constitution and administer justice 'without fear, favour or prejudice'. Judicial independence was crucial to the courts for the fulfilment of their constitutional role. Judicial independence in a democracy was recognised internationally. The international community had subscribed to basic principles of judicial independence through a number of international legal instruments. Section 8(a) of the Act conferred on the President an executive discretion to decide whether to request a Chief Justice to continue to perform active service and, if he or she agreed, to set the period of the extension. The term of office could not be extended unless the President so decided and the Chief Justice acceded to the request. The period of the extension too was in the exclusive discretion of the President and was unfettered, in the sense that he was not required to consult. In its purported delegation, Parliament had not sought to furnish any, let alone adequate, guidelines for the exercise of the discretion by the President. Parliament had delegated its power to the President and, in doing so, had granted him an executive discretion whether to extend the term of office or not. The contention that the President merely took an executive step to implement the extension granted by an Act of Parliament could not be sustained. There was no doubt that, as s 8(a) stood, Parliament had surrendered its legislative power in favour of an executive election whether to extend the term of an incumbent or not. The Constitution sometimes permitted Parliament to delegate its legislative powers and sometimes did not. The question whether Parliament was entitled to delegate had to depend on whether the Constitution permitted the delegation. Whether Parliament might delegate its law-making power or regulatory authority was a matter of constitutional interpretation dependent, in most part, on the language and context of the empowering constitutional provision. There were a number of textual and contextual indicators that s 176(1) of the Constitution did not empower Parliament to delegate the power to extend the term of service of a judge of the Constitutional Court. The words 'Act of Parliament extends' required that Parliament had to take the legally significant step of extending the term of active service of a judge of the court. The extension by the President did not qualify as an Act of Parliament as required. Section 176(1) explicitly referred to an Act of Parliament extending the term. That was a strong indication that the legislative power may not be delegated by the legislature. The primary reason for delegation was to ensure that the legislature was not overwhelmed by the need to determine minor regulatory details. Section 8(a) did not delegate the determination of mere minor detail to the executive but shifted all of the power granted by s 176(1) from Parliament to the executive. The provision usurped the legislative power granted only to Parliament and, therefore, constituted an unlawful delegation. Where the doctrine of parliamentary sovereignty governed, Parliament might delegate as much power as it chooses. In a constitutional democ-

racy, Parliament might not ordinarily delegate its essential legislative functions. The power to extend the term of a Constitutional Court judge went to the core of the tenure of the judicial office, judicial independence and the separation of powers. The term or extension of the office of the highest judicial officer was a matter of great moment in South Africa's constitutional democracy. Up until the 2001 amendment to s 176(1) of the Constitution, the term of office of judges of the Constitutional Court was regulated exclusively by the Constitution. Another important consideration in deciding whether s 8(a) was constitutionally compliant was the constitutional imperative of judicial independence. The Constitutional Court was the highest court in all constitutional matters. The independence of its judges was given vigorous protection by means of detailed and specific provisions regulating their appointment. The Chief Justice was at the pinnacle of the judiciary and, thus, the protection of his or her independence was just as important. Section 176(1) of the Constitution created an exception to the requirement that a term of a Constitutional Court judge was fixed. That authority, however, vested in Parliament and nowhere else. Section 176(1) did not merely bestow a legislative power, but it also marked out Parliament's significant role in the separation of powers and protection of judicial independence. The nature of that power could not be overlooked and the Constitution's delegation to Parliament had to be construed restrictively to realise that protection. Section 8(a) of the Act violated the principle of judicial independence. The provisions of s 8(a) amounted to an impermissible delegation and were invalid because they were inconsistent with the provisions of s 176(1) of the Constitution. Any steps taken or decision made pursuant to the provisions of s 8(a) of the Act were inconsistent with the Constitution and equally invalid.

(2) It was well established on both foreign and local authority that a non-renewable term of office was a prime feature of independence. Non-renewability was the bedrock of security of tenure and a dyke against judicial favour in passing judgment. Section 176(1) gave strong warrant to that principle in providing that a Constitutional Court judge held office for a non-renewable term. Non-renewability fostered public confidence in the institution of the judiciary as a whole, since its members functioned with neither threat that their terms would not be renewed nor any inducement to seek to secure renewal. The singling out of the Chief Justice, alone amongst the members of the Constitutional Court, was incompatible with s 176(1). The distinctive appointment process for the Chief Justice and Deputy Chief Justice indicated the high importance of their offices. It signified that their duties might require them to represent the judiciary and to act on its behalf in dealings with the other arms of government. They were the most senior judges in the judicial arm of government and their distinctive manner of appointment reflected the fact that they might be called upon to liaise and interact with the executive and Parliament on behalf of the judiciary. However, once appointed, the Chief Justice and Deputy Chief Justice took their place alongside nine other judges in constituting the membership of the Constitutional Court. Their views counted and their voices were heard equally with the respect and authority accorded every member of the court. When it came to the functioning of the highest court in constitutional matters, there was no distinction among the Chief Justice, the Deputy Chief Justice and the nine other judges. A signal feature of s 176(1) was that no mention was made of the Chief Justice or Deputy Chief Justice. The power to extend was afforded indifferently in relation to 'a Constitutional Court judge'. That description embraced each and every Constitutional Court judge, and singled out none of them. Incumbency of the office of Chief Justice or Deputy Chief Justice made no difference and conferred no special entitlement to extension. In exercising the power to extend the term of office of a Constitutional Court judge, Parliament should not single out the Chief Justice. The provision did not allow any member of the category of Constitutional Court judge to be singled out, whether on the basis of individual characteristic, idiosyncratic feature or the incumbency of office.

(3) When deciding a constitutional matter, a court had to declare any law or conduct inconsistent with the Constitution invalid to the extent of its inconsistency and might also make any order that was just and equitable, including one that limited the retrospective effect of a declaration of invalidity or

suspended the declaration of invalidity to allow the competent authority to correct the defect. The precise circumstances of each case had to be considered in order to determine how best the values of the Constitution could be promoted by an order that was just and equitable. A suspension order usually came into play when the past implementation of invalid law or conduct had already led to practical consequences. Even in those cases, the Constitutional Court had emphasised that the rule of law must never be relinquished, but that the circumstances of each case had to be examined in order to determine whether factual certainty required some amelioration of rigid legality. The judicial work of the Constitutional Court would not be affected by the temporary absence of a Chief Justice appointed in terms of the Constitution. The important advances pioneered by the current Chief Justice in relation to the institutional transformation of the judiciary need not grind to a halt. There was nothing that prevented the incumbent Chief Justice from continuing to give his assistance regarding those projects on a practical level to any temporary or future appointment to the office of Chief Justice. A suspension order would perpetuate an unconstitutional extension of the term of office of the head of the judiciary. The interests of justice and the rule of law demanded certainty on the issues before the court. An order suspending the declaration of invalidity was not warranted.

SHARMA v PUNJAB & HARYANA HC

9 May 2011

SUPREME COURT OF INDIA [2012] 1 LRC 50 P Sathasivam and B S Chauhan JJ

At a hearing in September 1999 the Assistant Public Prosecutor requested the Judicial Magistrate, Faridabad, to remand one S to police custody. P, S's advocate, opposed the request. After hearing the arguments, the magistrate remanded S to police custody, whereupon P became enraged, threatened the magistrate and started hurling abuse and derogatory remarks at him: 'You have taken bribe … You are indulging in gangism … Come out, we will just now teach you a taste of judgeship … I will see to it that I suck your blood …' The magistrate requested OPS, a senior member of the Bar, to ask P to behave properly in court. However, OPS sided with P and along with 15–20 other advocates shouted slogans, abuse and threats. Ultimately, the Addl District & Sessions judge, Faridabad came to court to pacify the advocates. The magistrate subsequently wrote about the matter to the District and Sessions judge who wrote to the Registrar, High Court of Punjab & Haryana, as well as forwarding the magistrate's letter. The High Court initiated contempt proceedings against the contemnors under the Contempt of Courts Act 1971. Before the High Court the contemnors/advocates filed affidavits highlighting the circumstances under which the incident occurred and tendered an unconditional apology regretting the same. On direction by the High Court all appeared before the magistrate concerned and expressed their regret and also tendered an unconditional apology. The Division Bench found each of them guilty of criminal contempt under s 2(c) of the Act and sentenced them to various terms of imprisonment (for three to six months) with a fine (of Rs1,000–2,000). The appellants appealed to the Supreme Court, challenging their convictions and sentences. Counsel for the appellants submitted that the appellants/contemnors were prepared to file fresh affidavits conveying their unconditional apology and regret for the incident, as well as giving their assurances that they would not indulge in such activities in future.

HELD: Appeals allowed.

Lawyers were the officers of the court in the administration of justice. The duties of an advocate towards the court were set out in the 'Standards of Professional Conduct and Etiquette' section of the Bar Council of India Rules. A lawyer could not be a mere mouthpiece of his client and could not associate himself with his client in maligning the reputation of a judicial officer merely because his client had failed to secure the desired order from the said officer. A deliberate attempt to scandalise the court would shake the confidence of the litigating public in the system and would cause very serious damage to the name of the judiciary. Although s 12(1) of the Act enabled the court to order imprisonment for a term which might extend to six months, the proviso empowered the court to discharge an accused upon an apology being made to the satisfaction of the court. However, acceptance of such an apology should be as a matter of exception, not as a rule. On the facts, the unconditional apology and undertaking given as to future behaviour by the appellants even at the initial stages before the High Court and the magistrate were accepted, the appeals were allowed and the appellants were discharged.

Per curiam. (i) Advocacy touches and asserts the primary value of freedom of expression. It is a practical manifestation of the principle of freedom of speech. Freedom of expression in arguments encourages the development of judicial dignity and forensic skills of advocacy and enables the protection of fraternity, equality and justice. It plays its part in helping to secure the protection of other fundamental human rights. Freedom of expression is one of the basic conditions for the progress of advocacy and for the development of every man, including the legal fraternity practising the profession of law. Freedom of expression is vital to the maintenance of a free society. It is essential to the rule of law and liberty of the citizens. The advocate or the party appearing in person is given liberty of expression. But

they equally owe a countervailing duty to maintain dignity, decorum and order in the court proceedings or judicial processes. Any adverse opinion about the judiciary should only be expressed in a detached manner and respectful language. The liberty of free expression is not to be confounded or confused with a licence to make unfounded allegations against any institution, much less the judiciary.

(ii) There is no doubt that the Bar and the Bench are an integral part of the same mechanism which administers justice to the people. Many members of the Bench are drawn from the Bar and their past association is a source of inspiration and pride to them. It ought to be a matter of equal pride to the Bar. Members of the Bar will do well to remember that flagrant violations of professional ethics and cultured conduct will only result in the ultimate destruction of a system without which no democracy can survive.

(iii) A court, be it that of a magistrate or the Supreme Court, is sacrosanct. The integrity and sanctity of an institution which has bestowed upon itself the responsibility of dispensing justice ought to be maintained. All the functionaries, be it advocates, judges and the rest of the staff, should act in accordance with morals and ethics.

(iv) An advocate's duty is as important as that of a judge. Advocates have a large responsibility towards society. A client's relationship with his/her advocate is underlined by utmost trust. An advocate is expected to act with utmost sincerity and respect. In all professional functions, an advocate should be diligent and his conduct should conform to the requirements of the law by which an advocate plays a vital role in the preservation of society and the justice system. An advocate is under an obligation to uphold the rule of law and ensure that the public justice system is enabled to function at its full potential. Any violation of the principles of professional ethics by an advocate is unfortunate and unacceptable. Ignoring even a minor violation/misconduct militates against the fundamental foundation of the public justice system. An advocate should be dignified in his dealings with the court, his fellow lawyers and litigants. He should have integrity in abundance and should never do anything that erodes his credibility. An advocate has a duty to enlighten and encourage the juniors in the profession. An ideal advocate should believe that the legal profession has an element of service also and associate with legal service activities. Most importantly, he should faithfully abide by the standards of professional conduct and etiquette prescribed by in the Bar Council of India Rules.

BOOK REVIEW

Bewigged, Bothered, & Bewildered British Colonial Judges on Trial, 1800-1900

John McLaren, The Osgoode Society for Canadian Legal History (with the Francis Forbes Society for Australian Legal History), Toronto, 2011

There was a commonplace saying when I was in Law School in the late 1970's, inspired by the television show Star Trek: "This should be required reading!" Typically, it referred to a form of "canned notes", that is to say a comprehensive outline on a given subject which not only explained what we students had evidently misunderstood during the entire school year but which was hugely entertaining as well. Emeritus Professor John McLaren of the Faculty of Law, University of Victoria, has produced just such a text.

As a member of the judiciary for over 16 years, I have always been conscious of my duty to the Rule of Law and have always been offended by the seemingly commonplace attacks of the independence of judges in other countries. Thus, it was quite entertaining to read about the foibles of our predecessors, both here and in the Antipodes, in upholding Justice and in avoiding entanglement in political matters.

That being said, it was enlightening to study a comprehensive, coherent and masterful account of the obstacles to the flowering of justice, both from the perspective of the office holders and from that of those who appointed them. On the one hand, the detailed indictment of the failures of the members of the Bench offers a signal study of the evident and oft-times subtle failings of those appointed to mete out justice and a prescription on how best to identify the likelihood that current and future candidates are likely to succumb to such short-comings and as a means of assisting present-day office holders to avoid difficulties as they enter the second or third decade of their careers. In addition, the book's undoubted strong claim to fame over a lengthy period of time will necessarily be a product of its comprehensive and convincing analysis of the impediments to judicial independence arising from a legion of sources, ranging from the method of selection which might be tainted by political influence to the absence of financial autonomy with the result that the judiciary appears to be 'beholding' to the party in power.

Indeed, the ultimate lesson to be drawn from this astute (and yet entertaining) account of the mediocre, mendacious and misanthropic members of the magistry is that the past is presage to the future unless the lessons of prior errors are studied and understood and every effort is made to avoid further calumny by governments in seeking to influence the Law outside of Parliament and the Courts.

Drawing attention now to the specific, having re-painted the canvas of this excellent text with broad strokes, it will be opportune to point to the lasting lessons from the life of so-called ultra-conservative judges discussed at pages 88 to 121 and to underline that there is always a tension between the perceived public opinion, notably in sentencing matters, and the views of judges. A recent valuable study of this subject is found at pages 168 to 187 of *Mitigation and Aggravation at Sentencing*, edited by Professor Julian V. Roberts, and is entitled "Exploring public attitudes to sentencing factors in England and Wales", and was written by Roberts together with Professor Mike Hough.

Of further particular interest is chapter 7, "The Perils of the Colonial Judiciary: English Legal Culture and the repugnancy Card in the Australasian Colonies, 1830–1850", at pages 157–189. Professor McLaren's lucid account of this question reveals not only the concerns of the day but serves to explain a number of contemporary controversies in New Zealand and Canada arising out of the power of the Courts to strike down legislation based on Charters of Rights.

Further, I commend especially the discussion consigned at pages 10 to 35 on the subject of judicial tenure, accountability, and independence. The concerns raised by the author echo and introduce a number of the present-day debates involving the discipline of judges, their training and how they may seek elevation to

the higher levels of the judiciary, to name but three examples, as analysed thoroughly by Professor Penny Darbyshire in her revealing account, *Sitting in Judgment The Working Lives of Judges*, Hart Publishing, Oxford, 2011, at pages 103 to 117 and pages 406 to 426 in particular.

Bewigged, Bothered, & Bewildered British Colonial Judges on Trial, 1800-1900 offers an erudite, skilfully written and thoroughly researched judgment on the travails of justice during a precise time period but one which could, and should, be of assistance today as we confront the many challenges to judging. The need for a separation of the Lord Chancellor's powers in order to avoid conflict and the transformation of the Law Lords into the Supremes are but two of the many recent questions which are better understood and answered in light of Professor McLaren's guidance. Many more questions affecting the judiciary remain to be addressed and this excellent book remains available to assist in this important task.

Gilles Renaud

Judge, Ontario Court of Justice

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6. The CJJ encourages authors to refer to material from one or more jurisdictions across the Commonwealth.
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Providing funding for the Commonwealth Magistrates' and Judges' Association's activities and supporting judicial officers around the Commonwealth

For over 40 years, the CMJA has been working towards achieving respect for the rule of law, fundamental values and the respect for human and peoples rights across the Commonwealth.

The CMJA Endowment Trust has been set up to assemble a fund of

£5,000,000 – FIVE MILLION POUNDS STERLING

For over 40 years the **Commonwealth Magistrates' and Judge s' Association (CMJA)** has played a vital role in developing judicial standards and strengthening judicial independence and enhancing the rule of law, thereby touching the lives of millions of people.

THE CMJA ENDOWMENT TRUST- HOW IT WILL HELP?

The CMJA receives no support from governments. Its income comes from membership subscriptions and occasional minor grant-aid. The CMJA Endowment Trust has been set up to give the CMJA, for the first time, the financial stability to sustain its important work. The capital of the fund will be conserved for so long as the CMJA exists. The income from the fund will help to meet the core commitments of the Association at its headquarters in Trafalgar Square, and will enable it to give practical support wherever in the Commonwealth the independence of the judiciary is under threat. The ability to respond quickly to challenges to the rule of law can sometimes be vital, but such responses need resources. The Endowment Fund will help to provide those funds
The CMJA's influence is constrained by the lack of resources available to fund its activities, which historically have come from membership subscriptions and occasional minor grant-aid.

The CMJA Endowment Trust will therefore assist the CMJA to:

- Enable the CMJA to support the magistracy and the judiciary by providing moral and practical support to judicial officers facing improper challenges to their independence.
- Help the CMJA to give advice and training and to provide judicial mentoring so that judiciaries across the Commonwealth can improve standards.
- Strengthen the ability of the CMJA to fulfil its functions of upholding the Rule of Law throughout the Commonwealth.

HOW YOU CAN MAKE A DIFFERENCE

The Endowment Trust is seeking contributions across the Commonwealth from those individuals and organisations willing to support the work of the Commonwealth Magistrates' and Judges' Association in seeking to uphold the Rule of Law.

TRUSTEES

Sir Philip Bailhache, Chairman
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Tel: + 44 207 976 1007 Fax: + 44 207 976 2394 Email: kbrewer@cmja.org Website: www.cmja.info

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COMMONWEALTH MAGISTRATES' AND JUDGES' ASSOCIATION

(Registered Charity 800367)

AIMS

- to advance the administration of the law by promoting the independence of the judiciary;
- to advance education in the law, the administration of justice, the treatment of offenders and the prevention of crime within the Commonwealth;
- to disseminate information and literature on all matters of interest concerning the legal process within the various countries comprising the Commonwealth.

MEMBERSHIP

Associations of the judiciary of Commonwealth countries are Members whilst individual magistrates, judges and court administrators may become Associate Members

ACTIVITIES

Pan-Commonwealth Conferences; Regional Meetings and Workshops facilitating communications and co-operation between the different countries of each region; Study Tours and Exchange Visits; Judicial education seminar

PUBLICATIONS

"The Commonwealth Judicial Journal" and the "CMJA News" (both twice yearly and complimentary to members); Reports of proceedings of major conferences and seminars; specialised information books on particular topics (printing of copying costs may apply)

APPLICATION FOR ASSOCIATE MEMBERSHIP

Name: .....

Address: .....

.....

.....

Judicial position: .....

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Life membership @ £500.00

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