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This year we celebrate the fortieth anniversary of the Commonwealth Judicial Journal (CJJ), which first appeared in March 1973. Leafing through the pages of that first issue, one is immediately struck by how current some of the articles remain, for instance, on the valuable role of dissenters and demonstrators in the body politic, on the effects of misreporting of judicial proceedings by the media and on the particular challenges presented by juvenile offenders. At various intervals, these articles are interspersed with witty one-liners (in addition to a section entitled “Shorts from the Courts”), such as a defendant accused of speeding offering, in tentative explanation, “I am sorry I was going so fast. I was trying to get to a garage before I ran out of petrol.”

In this first issue, the President of the Commonwealth Magistrates’ Association (as it then was called), W. T. C. Skyrme, set out the following vision for the Journal:

The Journal should become one of the most important features of our activities. It will not only provide a vehicle for dissemination of news and ideas to all sections of the Commonwealth judiciary, but will, I hope, be a forum for discussion. Much of the value of the Journal will lie in the opportunity it will afford for the expression and exchange of views on matters of common interest. I urge all members of the Association to avail themselves to the full of this unique channel of communication provided by the Journal, especially in the correspondence columns.

These sentiments were echoed by the Journal’s first editor, Eric Crowther, who noted that the CJJ depends on its members for its healthy survival as a physical and spiritual entity. It was essential, Crowther went on to observe, that, if the Journal is to be truly representative of the Commonwealth as a whole, that judges and magistrates from all parts of this great association of peoples should contribute their views on legal topics, penal problems, and the administration of justice in their lands in the form of articles and/or letters to the editor.

Fast-forward twenty years. Reading through the issue of June 1993, one notes the emergence of some new features, such as a Profiles page and two sections dedicated to Commonwealth Judicial Reports and Book Reviews, with others, however, such as the one-liners, apparently having fallen by the wayside. This led one reader from Canada to remark “I am told there is nothing much to laugh at in Britain today but that is hardly an excuse for the absence of wit in recent copies of the Journal. I always considered that was a saving grace of the judicial system.” The editor at the time, Nicola Padfield (whom we are fortunate enough to have on the Editorial Board and whom we would also like to congratulate warmly for her recent election as Master of Fitzwilliam College, University of Cambridge), like the first editor of the Journal (and all successive editors) pointed out that she is “forever urging readers to offer contributions. So here is a new challenge: please try to make our readers smile!”

Fast-forward another twenty years. Through the continued support of the Commonwealth Magistrates’ and Judges’ Association, as well as that of its readership, the CJJ today still serves, as its founders had envisaged, as an important forum for the discussion, expression and exchange of views on matters of common interest for magistrates and judges in the Commonwealth. However, it is also undoubted that the context has changed significantly in these last forty years, prompting the need for the Journal to constantly renew itself in order to meet new challenges and the changing expectations of its readers. Nowadays, it is considered standard practice for journals to be published online and a number of academic journals are being published only in this format. In addition to being instantly available for download and searchable, readers would have the flexibility of downloading only the particular sections that interest them. It is a matter of pride that, for a number of years now, the CJJ has been made available electronically to CMJA members, through the CMJA website.

This is not to overlook the obvious value of the print version. However, it would appear inevitable that, if the publication is to remain sustainable and if we wish the CJJ to still be in circulation in forty years’ time, it may have,
eventually, to be published primarily in electronic format. In this respect, in Volume 20(2), it was noted that the Journal was searching for a new publishing house and called on readers who could assist to contact the CMJA (info@cmja.org). To date, the CJJ has had discussions with some potential parties, but no publisher has been identified as yet. May I, therefore, once again call on any readers who may have suggestions or contacts with potential publishing houses to please come forward.

Following our call for new members of the Editorial Board of the Journal, which appeared in Volume 20(2), we would now like to announce the appointment of four new members, namely Dr Rowland Cole, Justice Keith Hollis, Justice Gilles Renaud and Justice Thomas Woods, who join Dr Peter E. Slinn (chairperson), Mrs. Nicky Padfield, Justice Geoffrey Care, as well as His Worship Dan Ogo and Mr Christopher Rogers (as correspondents). I am sure you will join me in extending a warm congratulations to them. I would also take this opportunity to remind readers that the CMJA Annual Conference on “Is Your Latimer House in Order?”, is to be held in Jersey, Channel Island, on 23-26 September 2013. The timing of this Conference is significant, as it marks the fifteenth anniversary of the Commonwealth (Latimer House) Guidelines and the tenth anniversary of the endorsement of the Commonwealth (Latimer House) Principles by the Commonwealth Heads of Government Meeting in Abuja, Nigeria. More details may be found on the CMJA website (www.cmja.org).

In this issue, Justice Margaret Wilson examines the question of extra judicial activities undertaken by magistrates and judges while they are serving. Justice Vasheist Kokaram makes the case for a more humanistic approach to dispute resolution with particular reference to the courts of Trinidad and Tobago. The Hon Michael Kirby examines the role of comparative legal analysis in the Commonwealth, and the issue also features an abridged version of the address delivered by the Hon Chief Justice Sir (Gilbert) John Baptist Muria Kt at the Opening of the Court Commencing the 2012 Legal Year of the High Court of Kiribati.

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 Supreme Court of Pakistan relating to events following the Proclamation of Emergency of 3 November 2007 and the issuance of an executive decree which required judges to swear a new oath of office or cease to hold office; and (2) a decision of the Constitutional Court of the Seychelles considering whether the right to immunity from suit was subject to the right to fair trial. 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 the President of the CMJA, the Hon. Justice John Vertes and to Dr Karen Brewer, Secretary General, for their ongoing support of the Journal. Finally, in this issue, Justice Gilles Renaud undertakes a review of the book *The African Canadian Legal Odyssey: Historical Essays* and the particular distortions in the justice system which were occasioned on account of racist attitudes in the not-too-distant past.

In his editorial, the first editor of the CJJ made reference to the feeling of friendship which pervades so many individual members of the Commonwealth and to a sentiment of pride; pride in being a free association of free people, and pride in the judges and magistrates, in their common design “to do right to all manner of people without fear or favour, affection or ill-will”. He expressed the wish that this pride be justly and properly reflected in the CJJ – and I am sure you will agree, forty years on, this Journal continues to be inspired by that sentiment.
EXTRA JUDICIAL ACTIVITIES WHILE A SERVING JUDGE: COMMUNITY AND SOCIAL ACTIVITIES

Margaret Wilson, Judge of the Supreme Court of Queensland.
This article is based on a presentation delivered at the Pacific Judicial Conference, Honiara, Solomon Islands, November 2012.

Abstract: This article examines some of the issues which may arise with respect to extra judicial activities, such as engagement in community organisations, in social networking sites and in fund-raising, undertaken by magistrates and judges while they are serving. In particular, it discusses the question of apparent bias and the fair minded lay observer test. It makes the point that, while engagement with the community and social interaction are to be encouraged, there is an ever present need for caution and reticence on the part of sitting judges, as gratuitous comments can easily be taken out of context and give rise to apprehension of pre-judgment. The article acknowledges that social networking sites like Facebook and Twitter have transformed the way judges communicate. While a judge should not, and should not be expected to, retreat into isolationism, the article underscores the need for some restraint, because the frequency of communication, its scope or its intimacy may subsequently result in an assertion of apparent bias or prejudice.

Keywords: apparent bias – fair minded lay observer test – social networking sites – fund-raising – religious affiliations – need for reticence – application of ethical principles must be informed by context

Introduction
The rule of law assumes the existence of a Judiciary that is in fact independent and impartial, and that is seen to be so by fair minded lay observers. In the words of Lord Bingham:

“... a judge must free himself of prejudice and partiality and so conduct himself, in court and out of it, as to give no ground for doubting his ability and willingness to decide cases coming before him solely on their legal and factual merits as they appear to him in the exercise of an objective, independent, and impartial judgment” (see Bingham, The Business of Judging, p.74).

Ideals of judicial conduct and ethical principles are relatively easy to state, but their application can be problematic. Their application involves judgment calls, which must be made in the context of the community and the time in which the judge holds office. Recently, the Prime Minister of Samoa addressed the General Assembly of the United Nations at its High-level Meeting on the Rule of Law. He said:

“The rule of law does not exist in a void. Ultimately, it is how individual governments localize the international norms and behaviors (sic) that the rule of law has meaning and benefits ordinary people everywhere. Only then can the long term sustainability of the rule of law be assured” (see the Hon Tuila’epa Luperolai Sailele Malielegaoi, Statement delivered at the High-Level Plenary Meeting of the 67th Session of the United Nations General Assembly on the Rule of Law, New York, 24 September 2012, 2).

So, too, with ethical principles and guidelines: their application must be informed by context. In this article, I propose to focus on some of the issues which may arise with respect to extra judicial activities undertaken by judges while they are serving, in the context of the experiences of judges in the Commonwealth and beyond.

Apparent bias
From time to time there are cases of overt, easily recognisable conflict between a judge’s judicial duty and his or her own interests. I am confident that in such circumstances 99.9% of judges would recuse themselves. But it is in the realm of apparent bias that problems are more likely to arise, and judges need to be always
conscious of it when becoming involved in extra judicial activities.

In Australia and New Zealand the test for apparent bias is whether a fair minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question to be determined. In England, the test is expressed in terms of a real possibility of bias rather than a reasonable apprehension of bias. But as McGrath J of the Supreme Court of New Zealand has observed, in reality there is no significant difference between the tests. They both focus on the perception of a fair minded lay observer and emphasise the need for such a person to be fully informed of all relevant circumstances (see Saxmere Company Ltd v Wool Board [2010] 1 NZLR 35 at [76]).

What type of person is the fair minded lay observer? He or she is someone who:

“…is presumed to be intelligent and to view matters objectively. He or she is neither unduly sensitive or suspicious nor complacent about what may influence the judge’s decision. He or she must be taken to be a non-lawyer but reasonably informed about the workings of our judicial system, as well as about the nature of the issues in the case and about the facts pertaining to the situation which is said to give rise to an appearance or apprehension of bias” (see Saxmere Company Ltd v Wool Board [2010] 1 NZLR 35 at [5]).

In Australia and New Zealand there are two steps in determining apparent bias:

(i) first, the identification of what it is that might lead a judge to decide a case other than on its legal and factual merits; and

(ii) second, an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits.

Friendships and Acquaintances

Does a judge have the same rights to freedom of association, freedom of speech and privacy as other members of the community? Does the holding of judicial office affect the exercise of those rights? Should it do so?

As judges, our job is to pass judgment on the conduct of others. It is important not only to the understanding of human nature which we bring to our work, but also to our own wellbeing, that we have lives outside the law. As members of our communities we owe it to others to be active participants in those communities. Yet our extra judicial acquaintances and experiences can unwittingly affect our capacity to carry out our judicial functions.

While engagement with the community and social interaction are to be encouraged, there is an ever present need for caution and reticence in what a judge says and does, at least while he or she continues in office, and perhaps except in the company of utterly trustworthy and trusted friends. A gratuitous, indiscreet or unguarded comment can so easily be taken out of context and give rise to apprehension of pre-judgment.

A case in point is a Scottish case decided in 1985: Bradford v McLeod (1986 SLT 244). The following is some background to this case. In Scotland, the Sheriff Courts are local courts which deal with most civil and criminal cases. The presiding judicial officer is the sheriff, who is usually a qualified advocate or solicitor. At least in the 1980’s, the grant of legal aid was within the discretion of the presiding judicial officer in each case. This was the period of the tumultuous miners’ strike in Britain in the mid-1980’s in which the General Secretary of the National Union of Mineworkers (Arthur Scargill) and the Prime Minister (Margaret Thatcher) were at loggerheads.

The Ayr Sheriff Court was located in a mining area. One of the sheriffs attended a dance organised by the local curling club (a popular sport in Scotland) at an ice rink. A local solicitor was present. He and the sheriff knew each other well, and were both members of the committee of the curling club. The sheriff knew that the solicitor acted for members of the National Union of Mineworkers. Late in the evening there was a conversation among the committee members about television images of violent exchanges between police and miners at collieries. The sheriff commented that he would not grant legal aid to miners. Three months later a miner appeared before that sheriff charged with disorderly conduct, represented by that very solicitor. The sheriff asked the sheriff to disqualify himself for bias. The sheriff refused.
He heard the case and convicted the miner. In 14 similar cases, the sheriff refused to disqualify himself and convicted the miners.

The High Court of Justiciary held that the sheriff had erred in not disqualifying himself, and set aside the convictions. Referring to what had happened late in the evening at the ice rink, Lord Justice Clerk Ross observed that no doubt the sheriff had considered he was conversing with friends on a private occasion. He may have been confident that others present would treat his remarks on the same basis, but, if so, his confidence in the solicitor appeared to have been misplaced. While satisfied that the sheriff had not in fact pre-judged the cases, his Lordship held that he had nevertheless erred in not appreciating that the interests of justice required not merely that he not display actual bias, but also that the circumstances should not be such as to create in the mind of a reasonable man a suspicion that he might not be impartial.

The outcome in Bradford v McLeod was not dissimilar from that in the later Fijian case of Takiveikata v State ([2007] FJCA 45). The appellant faced four counts of inciting to mutiny and one of aiding soldiers in an act of mutiny. Three and a half months before the trial began, the judge was present at a cocktail party which was also attended by an expatriate businessman and his wife. During the course of social chat with them, the case was mentioned, and the judge said of the appellant “I will put him away.” The trial was conducted before the judge and assessors. The assessors recommended that the appellant be convicted of only one count of inciting to mutiny and that he be acquitted on all other counts. The judge, as he was empowered to do, reversed the assessors’ opinion. He found the appellant guilty of the four counts of inciting to mutiny and not guilty of the other charge. The Court of Appeal quashed the convictions and ordered a new trial on those counts. Their Honours said that, even without considering what actually happened at trial, any fair minded lay observer who knew what the judge had said to the businessman and his wife in relation to the upcoming trial would apprehend that he might not bring an impartial and unprejudiced mind to it.

These days we can all have friends and acquaintances not only in the real world, but also in the virtual world. Social networking sites like Facebook and Twitter have transformed the way we communicate, and with whom. As political commentators have observed, the widespread uprisings in the Arab Spring would not have happened but for social media. There can surely be nothing wrong in principle in judges embracing the new forms of communication. They have, at breakneck speed, become an integral part of contemporary society, and judges must have an awareness and understanding of their actual and potential use if they are not to be isolated from an ever widening proportion of those on whom they pass judgment.

The new forms of communication are instantaneous, and once a user clicks the “Send” button what he or she has written is potentially accessible by anyone anywhere. It can be extremely difficult, if not impossible, to ensure that a message will not reach unintended, even unimagined recipients, whether in whole or in some edited form. The ever-present need for caution and circumspection in what judges say and do in their professional and private activities is heightened when they step into the virtual world. The likelihood that improper communications or other improper conduct will be exposed is also heightened when relevant communications occur over the internet.

It is generally accepted that judges may maintain friendships with practising members of the legal profession, although they must be astute not to speak about litigation over which they preside or are likely to preside with practitioners whose clients are parties to the litigation.

In North Carolina a judge was a Facebook friend of an attorney who was appearing before him in a divorce and custody case. The judge read and posted comments about the pending case on the attorney’s Facebook page. He also conducted independent research into a party’s business through the internet, without disclosing this to the parties or their attorneys. He was reprimanded by the Judicial Standards Commission of that State.

In many jurisdictions it is considered only proper that ex-curial communications between a judge and lawyer friends be suspended while such litigation is pending.
Should there be some restraint on a judge’s use of social media to communicate with lawyer friends on topics which have nothing to do with cases which come, or may come, before the judge? There is probably always a need for some restraint, because the frequency of communication, its scope or its intimacy may subsequently result in an assertion of apparent bias or prejudice.

In an opinion expressed about three years ago, the New York State Commission on Judicial Ethics found nothing inherently inappropriate about a judge joining and making use of a social network. There was nothing per se unethical about communicating via social networking technology rather than by using some other medium such as the telephone or a web page. The Commission concluded that “the question is not whether a judge can use a social network but, rather, how he/she does so” (see Estlinbaum, ‘Social Networking and Judicial Ethics’ (2012) 2(2) St Mary’s Journal on Legal Malpractice & Ethics 2, 15).

Guidelines on the use of social networking sites have been issued in Ohio by the Board of Commissioners on Grievances and Discipline (under the supervision of the Supreme Court of Ohio). In Britain, the Senior Presiding Judge for England and Wales and the Senior President of Tribunals have recently issued guidance on “Blogging by Judicial Office Holders” to all courts and tribunal judicial office holders in England and Wales. They said:

Judicial office holders should be acutely aware of the need to conduct themselves, both in and out of court, in such a way as to maintain public confidence in the impartiality of the Judiciary.

Blogging by members of the Judiciary is not prohibited. However, judicial office holders who blog (or who post comments on other people’s blogs) must not identify themselves as members of the Judiciary. They must also avoid expressing opinions which, were it to become known that they hold judicial office, could damage public confidence in their own impartiality or in the Judiciary in general.

The above guidance also applies to blogs which purport to be anonymous. This is because it is impossible for somebody who blogs anonymously to guarantee that his or her identity cannot be discovered.

(See Senior Presiding Judge for England and Wales and the Senior President of Tribunals, Blogging by Office Holders, August 2012).

Suffice it to say, experience has taught us that it is not always easy to balance the judge’s rights as a private citizen against the strictures of judicial office.

**Engagement in community organisations**

In most jurisdictions judges’ engagement in community organisations is viewed favourably, subject to some restraints. The Guide to Judicial Conduct published by the Council of Chief Justices of Australia and New Zealand and the Australasian Institute of Judicial Administration Inc. encourages it, provided it does not compromise judicial independence or put at risk the status or integrity of judicial office. The Guide lists these limits:

- commitments should not be too numerous or too time consuming;
- they should not involve active business management;
- there is need to weigh the extent to which the organisation is subject to government control or intervention.

In Webb v The Queen ((1994) 181 CLR 41), which concerned a decision of the High Court of Australia about apparent bias on the part of a juror who arranged for flowers to be sent to the mother of the deceased victim of a crime, Deane J identified four distinct, though overlapping, categories of case where a decision-maker may be disqualified because of the appearance of bias – interest, conduct, association and extraneous information.

The Pinochet litigation in Britain a decade or so ago illustrates how personal beliefs and commitment to a cause may give rise to a reasonable apprehension of bias. In terms of Deane J’s four categories, it was a case of overlap between interest and association.

Pinochet was the former Head of State in Chile. He was in Britain receiving medical treatment when the Spanish judicial authorities issued international warrants for his arrest to enable his extradition to Spain to face trial for various crimes against humanity. The House of
Lords had to consider the validity of a provisional arrest warrant issued by Metropolitan Magistrates under the *Extradition Act 1989* (UK). Amnesty International was given leave to intervene to argue in favour of the validity of the warrants.

Amnesty International was an unincorporated association. It was a non-profit organisation with sections in different countries throughout the world. It had its international headquarters in London. The work of the international headquarters was undertaken through two United Kingdom companies – Amnesty International Limited (“AIL”) and Amnesty International Charity Limited (“AICL”).

AICL was a registered charity which had been set up for tax reasons to undertake charitable (cf. political) aspects of the work of Amnesty International – e.g., research into human rights issues. Members of AICL were all elected members for the time being of the International Executive Committee of Amnesty International. Its directors were appointed by and removable by the members in general meeting.

Lord Hoffmann sat on the hearing of the appeal. By a majority of 3-2 their Lordships upheld the validity of the warrant. Lord Hoffmann was in the majority. He did not write a separate judgment but agreed with the other two Law Lords who held the warrant valid. His Lordship was not a member of Amnesty International, the unincorporated association which had intervened in the litigation. But, after the decision, it was revealed that he was a director and chairperson of AICL (for which he received no remuneration).

The Appellate Committee of the House of Lords, differently constituted, was reconvened. The decision was set aside and a rehearing was ordered.

In weighing the pros and cons of any particular involvement, a judge needs to give careful consideration to the way the organisation operates. In *Pinochet*, the House of Lords looked at the overall picture. Amnesty International was in substance one organisation and their Lordships were not concerned with fine distinctions between the related bodies. As chairperson of AICL, Lord Hoffmann was so closely associated with Amnesty International that he could properly be said to have an interest in the outcome of the proceeding to which Amnesty International had become a party. Lord Hutton said:

“The links... between Lord Hoffmann and Amnesty International... were so strong that public confidence in the integrity of the administration of justice would be shaken if [the] decision were allowed to stand” (see *R. v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No.2) [2000] 1 AC 119, 146*).

Their Lordships noted in passing that Lord Hoffmann’s wife had been employed in Amnesty International’s International Secretariat since 1977. However, in all the circumstances, her involvement did not have any bearing on the outcome of the case.

In Australia the failure to disclose an association with a party or someone closely connected with litigation is not *per se* a disqualifying factor. But it may cast some evidentiary light on the ultimate question – whether a fair minded observer might reasonably apprehend the judge might not bring an impartial mind to the resolution of the question for decision.

In *Pinochet*, Lord Browne-Wilkinson stressed that a judge is not necessarily unable to sit on a case involving a charity in whose work he or she is involved. Generally, it is only in cases where a judge is taking an active role as trustee or director of a charity, closely allied to working with a party to the litigation, that he or she should be concerned to stand aside or make disclosure. There may be other exceptional cases.

The burden of deciding whether there might be a reasonable apprehension of bias falls on the judge whose own conduct is in issue. Referring to the *Pinochet* litigation, the President of the Commonwealth Judicial Education Institute, Judge Sandra Oxner, commented:

“Conflict of interest rules are complex. An English Law Lord recently misunderstood the conflict rules. How much more difficult must it be for a young magistrate in a developing country to be clear on the appropriate conduct in such a situation and have the courage to stand on principle despite the inconvenience and expense caused by the stance?” (see Oxner, ‘The Quality of Judges,’ paper presented at the
As a rule of prudence, if in doubt whether involvement may have a disqualifying effect, a judge should disclose it to the parties and receive submissions before deciding whether recusal is the proper course.

The Guide to Judicial Conduct contains a “disqualification procedure” – a number of steps which a judge should follow in deciding the recusal question. A judge has an obligation to sit unless satisfied that the threshold of reasonable apprehension of bias has been reached. To refuse to sit where the threshold has not been reached may cause disruption or inconvenience to the court lists and to the parties. This can be so particularly in smaller jurisdictions and regional courts.

Litigation involving an organisation with which a judge is considering becoming associated may not be pending or even foreshadowed. Should the judge refuse to become involved because there is always the possibility the organisation will be involved in litigation? Generally not: a judge should not, and should not be expected to, retreat into isolationism. This is really a question of where the particular organisation stands on a spectrum ranging from a remote possibility to a real likelihood of its becoming involved in litigation. It is always a matter of judgment.

If a judge elects to become involved, should he or she restrict the nature of that involvement? What should the judge do if there is litigation?

I suggest that before becoming involved the judge should consider carefully the structure of the organisation and what role he/she proposes to undertake. Having become involved, if controversy or litigation erupts, generally the judge should not leave the organisation in the lurch, but steer a course through the minefield. It is important that there be a strong leadership team, so that if, in all the circumstances, the judge steps aside, someone is able to assume his or her role in the organisation.

Fund raising
What about fund raising? There is a fairly widely held view that a judge should not solicit funds or use the prestige of judicial office for that purpose. Donors may be intimidated into making donations when solicited by a judge, and/or they may expect favours in return. In this regard, as in so many others, the judge should bear in mind that the conduct of one judge may reflect adversely on the whole court to which he or she belongs.

Religious affiliations
What about a judge’s religious beliefs and practices? A judge is entitled to the same religious freedom as any one else, although in discharging judicial functions the judge must apply the law impartially, and not with a view to the particular interests of his or her own religion.

Not every assertion of apprehended bias passes the fair minded lay observer test. In another Scottish case, Helow v Secretary of State for the Home Department ([2008] 1 WLR 2416), the Immigration Appeal Tribunal had upheld a decision of an immigration adjudicator to refuse a claim for asylum. A judge dismissed a petition to review the decision of the tribunal. The petitioner sought to have the judge’s decision set aside on appeal, on the basis that it was vitiated for “apparent bias and want of objective impartiality”. The petitioner was a Palestinian with connections with the Palestine Liberation Organisation (‘PLO’) and the judge was Jewish. Her Ladyship was also a member of the International Association of Jewish Lawyers and Jurists, whose quarterly publication included some articles that were fervently pro-Israeli and antipathetic to the PLO. It was not suggested that the judge could not be impartial merely because she was Jewish. The argument was that, by virtue of her membership of the association, she gave the appearance of being the kind of supporter of Israel who could not be expected to take an impartial view of the petition. The argument was that, as a member of the association, she must have received the publication and read the articles. However, there was no evidence that she had even read the articles, let alone of her reaction to them. Members of the association held widely differing views, as was acknowledged publicly by its president and by the publishers of the journal. In the circumstances, the House of Lords held that a fair minded and informed observer would not have considered there was a real possibility the judge would not be impartial. In a subsequent speech, Lord Hope (who had sat on the appeal) said:
“...the complete absence of anything that [the judge] said or did to associate herself with the published material was crucial. Had she dropped even the slightest hint on any occasion, however informal, that she was in sympathy with what was published the result might well have been different. As it was, since she had said and done nothing at all, the conclusion had to be that test of apparent bias was not satisfied in her case. That case offers some reassurance to judges who like to be well informed and are observed reading the Sun or some other such tabloid which has taken sides on an issue which comes before them judicially. They can read what they like, so long as they do not say or do anything to associate themselves with what has been written” (see Lord of Hope of Craighead, ‘What happens when the Judge speaks out?’ (address delivered at the Holdsworth Club, Birmingham, 19 February 2010) at 8).

Conclusion
Let me return to what I said at the outset: the application of ethical principles and guidelines must be informed by context.

In small communities, judicial officers may be expected to assume leadership or advisory roles which they might be well advised to decline in larger communities, where there are more likely to be other people able to do so.

Take the hypothetical example of a small island community which is anxious to attract some of the lucrative tourist trade. The island is one of about 30 small islands which together form a nation state. A group of off-shore investors is seriously considering acquiring a parcel of land from the local people and developing it as a resort. There is only one magistrate on the island. Although magistrates from other islands have jurisdiction on this island, they seldom sit here because they are fully occupied on their own islands and the nation simply does not have the financial resources to allow them to do so. The magistrate is also a community leader, and in that capacity he gives behind the scenes advice and assistance to those members of the community who negotiate a deal with the investors. The inevitable occurs, and a dispute arises between the investors and the community. A proceeding is commenced in the Magistrates Court, and an urgent interlocutory application comes before the magistrate. To recuse himself may leave the aggrieved party without any avenue of potential redress, because he is the only magistrate on the island. He must make full and frank disclosure of his role in the negotiations, hear the parties on how urgent the application really is, hear them on the issue of bias or apparent bias if it is raised, and in the light of those submissions decide whether to hear the application. He is in an unenviable position.

The fair minded lay observer knows that sometimes idealism has to be tempered by pragmatism. He or she knows that judges are human, and that they must have lives outside the courtroom.

When a judge recognises that his or her prior conduct or relationship with a litigant or a witness may give rise to an issue of apparent bias, or when such an issue is raised by a party, he or she can be expected to do no more than conscientiously strive to be candid with the litigants about the nature and extent of his or her involvement or interest, and diligently and dispassionately apply the fair minded lay observer test.

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Abstract: This article makes the case for a more humanistic approach to dispute resolution with particular reference to the courts of Trinidad and Tobago. A system that integrates mediation softens justice, making it accessible, user friendly and socially acceptable. The humanistic approach proposed in this article is the use of justice as a means to create harmony in the citizen’s social affairs, commercial relationships and domestic matters. In judicial settlement conferencing, the judge sits in the chair not as adjudicator but as a friend of harmony trying to restore the balance. Thereby, the cycle of an eye for eye is broken by a collaborative exercise conducted by neighbours. The article takes issue with the imposition of exemplary damages, expressing doubt whether these are, in reality, having the effect of deterring others. The article also addresses the question of just outcomes, which necessitates the adoption of a fair process where the principles of economy, proportionality and equality are carefully weighed in the balance. In this respect, the article underscores that judges and mediators must be properly trained and monitored by the judiciary to ensure fair outcomes.

Keywords: court annexed mediation – judicial settlement conferencing – creation of harmony – therapeutic jurisprudence – fair procedures – substantive justice – whether exemplary damages are effective – recovery of costs

Introduction

“When suffering knocks at your door and you say there is no seat for him, he tells you not to worry because he has brought his own stool.”

Chinua Achebe

The famous African novelist Chinua Achebe captures accurately what may well be the experience of most users of the civil justice system. A never ending line of suffering litigants knocking on the judiciary’s door, dragging their stools to our doorsteps, to await their turn for lady justice to cast her gaze. Many do so reluctantly, as they would rather not be here. Some judicial systems feel overwhelmed by the sheer numbers of these sufferers with their stools. However empirical studies have demonstrated that these disputants represent but the apex of a multitude of disputes that arise in our society which are not litigated because of high legal costs or the anticipated exasperation of the nuances of the civil judicial system. Nevertheless those sufferers who feel compelled to do so still pick up their stools with their disputes bundled under arm and come sit at our doorsteps.

What do they wait for? Justice. But justice is not a loaf of bread in the baker’s shelf nor a carefully drawn plan on an architect’s desk. It is intangible, almost indefinable, it is multifaceted. One aspect of justice is the notion of fairness. The delivery of the good of fairness is however being offered by a monopolistic service provider which gives no guarantees as to outcome, no estimates as to timeliness and no forecast as to budgetary expenditure. Imagine if this was your architect or plumber? In any competitive environment such an institution would have already been out of business or the subject of a commission of enquiry.

Another aspect of justice is predictability. But civil litigation is a gamble and if they are so advised then really what are they waiting on their stools for? Perhaps it is simply for a
decision. A decision on the law or on a rule that will regulate their lives. However to be accepted it must be a decision arrived at by fair and just means. It can be nothing else. We can unfortunately give no comfort in anything more in the traditional adversarial civil justice system. We do not promise truth although we will try our best to search for it. Nor do we promise substantial justice although we feel we can get close to it. The civil justice system has been marketed like the famous Buckley’s advertisement “it tastes awful but it works”. It is an imperfect system which prides itself with the knowledge that there is no other better alternative. Or is there?

In the Commonwealth we have witnessed the rise of alternative dispute resolution (ADR) systems within and without the judicial system. As the Pound Conference of the 1970’s did for mediation in the US, regionally in the Commonwealth Caribbean, the ADR movement, and in particular mediation, received its impetus with the reform of the Civil Proceedings Rules in the late 90’s and early 21st century following in large measure Lord Woolf’s Report “Access to Justice” in the UK. Court annexed mediation is now well entrenched in the Organisation of Eastern Caribbean States (OECS) and Jamaica. In fact, in Jamaica, there is a mandatory court annexed mediation system. Court annexed mediation is still in its infancy in Barbados. It is perhaps a bit more mature in Trinidad and Tobago with an entrenched court annexed mediation service offered at the Family Court. Although introduced some years ago in Guyana, court annexed mediation is yet to gain widespread support from the litigant waiting on his stool.

The lack of development of a fully integrated court annexed mediation service in the judiciary of Trinidad and Tobago is not to be mistaken for a lack of appreciation of its importance in the delivery of justice nor of the institutional competence for it. The Trinidad and Tobago Civil Proceedings Rules 2006 (CPR) is the commencement of the reformation of the civil justice system which can only be complete with a fully integrated ADR system. In fact the Hon Chief Justice Ivor Archie continues to spearhead several experiments in improving the quality of justice with mediation through several pilot projects in court annexed mediation in both civil and family court matters and in judicial settlement conferencing. The latter is the only such intervention in the Commonwealth Caribbean.

This experimentation together with those of other public bodies (namely, the Mediation Board of Trinidad and Tobago, the Ministry of Legal Affairs) and private agencies (such as the Dispute Resolution Centre, Direct Resolve Limited) is designed to turn the gaze of the suffering litigant on the stool to mediation not as an alternative but as an appropriate dispute resolution strategy. We are philosophically far removed from 20th century adjudication of disputes. For the majority of cases such a system is unsuitable. Since 2010 in our jurisdiction the question no longer is whether ADR is to be introduced? The question now is, how, so as to ensure the quality of justice is not compromised. In promoting mediation we are not asking the suffering litigant to remove themselves from our doorsteps altogether. We are refashioning our civil justice system to deliver a better quality product. How is the quality of that product to be tested or measured? Is the quality of justice obtained in mediation superior to that in adjudication? Or is it similarly flawed? I would like to raise a few issues that have arisen in our experimentation in judicial mediation that should give us pause to rethink our roles as judicial officers.

To reshape the civil justice system to provide the justice the layman seeks by infusing a humanistic approach to dispute resolution.

In my view, unless judiciaries transform their vision of themselves as the drivers of an imperfect system, they will preside over the development of extra-judicial systems of dispute resolution which will find the judiciary becoming in the 21st century the alternative service provider of justice. Unless we transform our roles as judges and attorneys into peacemakers and facilitators we would be incapable of stemming a tide of public dissatisfaction with the integrity of the judicial system. In short, unless we introduce a humanistic approach to dispute resolution into the adjudicative process we cannot begin to speak in terms of measuring the quality of justice, as a purely adversarial system will fail any real
quality assurance test conducted by the suffering litigants judging us on their stools.

I begin this dialogue with the case of two cousins whom I will call Mohani and Mustaza.

The truth is...

Here were these two suffering cousins glaring at each other at opposite ends of the court room. They had spent a little over four years in pre-trial activity waiting on their stools. I should mention over that period of time in which the claim lingered in a judge’s docket, one judge retired and another judge to whom it was assigned was elevated to the Court of Appeal. The cousins both made their respective claims to a five acre parcel of agricultural land. Neither of the cousins actually lived on the land. It was owned jointly by the cousins’ fathers now deceased. Mustaza’s father survived Mohani’s father and on his death Mustaza together with her 5 siblings became the owners of the entire 5 acre parcel by the requisite deed of assent. Mohani, the Claimant however instituted a claim for the Eastern half of this 5 acre parcel by adverse possession. She claimed that their respective fathers had divided the 5 acre parcel of land amongst themselves and cultivated their respective portions. Since the death of her father her family continued using their father’s half of the property over the years including renting the land to farmers. The Defendant Mustaza maintained her claim for the entirety of the five acre parcel and denied any such acts of possession by Mohani or her family.

At the trial, both cousins exhumed the ghosts of dead uncles and aunts to demonstrate whether the land was informally subdivided and used amongst themselves. It was a simple trial of fact with the burden of proof squarely on Mohani. On the one hand, there were very few witnesses for Mohani. One witness forgot the contents of her witness statement, another witness claimed not to have read the statement before signing it. On the other hand, after cross examination Mustaza appeared terribly unprepared for trial or simply untruthful. The Defendant herself forgot many of the documents she was using to support her claim. Legal submissions were about to be made asserting legal rights over the family property when the judge asked the question of counsel for the Defendant “how would you assess the credibility of your client?” Counsel responded “well she was unable to identify the relevant documents, she forgot some of her testimony but I assure you M Lord everyone in Trinidad knows of the Mustazas if there is anything they are a reputable family and they tell the truth”.

But what was the truth about possession. What does the judge know of the truth of the deceased brothers? The attorneys both knew their client’s die was cast in the unknown. Acts of possession to prove a claim of adverse possession is a question of fact. The outcome was win or lose. Isn’t it tempting in this case to bring the sword of Solomon and cut the baby in half amongst the cousins? That in fact appeared to be the claim of Mohani. But were the admissible facts on her side? The dichotomy of justice according to facts is the blessing and curse of the adversarial system. Is it justice according to truth and reality? These disputes are so real for the litigant and so abstract for the judicial officer, who almost becomes a crime scene investigator coming after the fact to put the pieces back together and hopefully recreate a picture of reality from which he can judge or assess. Can there be justice by the imposition of a judge’s version of the life of the family? The truth is this was a family plot. The truth is the deceased brothers shared a very close relationship. The truth is that the land was seen as an inheritance to be enjoyed by the family. The truth is that the cousins since their fathers’ death have not been on speaking terms and the notion of settlement was never pursued because of the bitter relationship. The land a source of unity is now a source of friction for the second generation. Would the sword of Solomon be the only solution? Or can there be a family solution. A communal solution. A solution that sounds with social justice. A solution by consensus rather than by edict.

After hearing what Counsel said of his own client, the judge looked again at one of the exhibits, a copy book (used by students in primary school), containing the random writings of Mohani’s father. In the process of disclosure under the CPR only the relevant pages of this book was disclosed which
contained lists of short crops allegedly planted on the land and rent receipts allegedly from tenants of Mohani. At the trial the entire book was produced and tendered into evidence. In examining the book, it was a memoir of sorts not only useful for its list of random acts associated with the land but for its invaluable moral authority. The judge was surprised as he turned the pages. It contained phrases after phrases of Hindu prayers and devotions, passages from the family’s holy book the Bhagavad Gita. Prayers for the family of both the Mustazas and Mohanis. He re-opened the copy book and read aloud one of the prayers inscribed by their father and uncle to the attorneys and then asked a question which brought sighs of relief on the brows of the embittered attorneys and confused looks on the faces of the suffering cousins: “I doubt very much that your fathers would have wanted his family divided in this legal battle can you not settle this at a judicial settlement conference before I deliver judgment”.

This actually took place in one of my matters quite recently as part of an experimentation in the Judiciary of Trinidad and Tobago with a form of evaluative mediation known as Judicial Settlement Conferencing (JSC). In our system of JSCs, judges in an informal procedure have been referring cases to other judges to sit as evaluative mediators to assist the parties in arriving at a just and fair resolution of their dispute. The JSC Judge holds the conference in camera. The judge sits as a mediator and uses the facility of both facilitative and evaluative mediation. In the latter case the judge can give to the parties a non binding or binding opinion. Each step is authenticated by the consensus of party and attorney. If the matter is successfully resolved the agreement is issued to the trial judge to enter for approval and to be entered as a consent order. Consent orders have taken many forms to “The matter is compromised on terms endorsed on counsel’s brief” to “the proceedings are stayed save for the execution of the agreement annexed to this order and marked A” , or a classical Tomlin order or a record of the entire agreement as the order of the Court.

With respect to the case of the two cousins, I will be the first to admit that this was an act of adjudicative heresy in a 20th century civil justice model. Here the judge is seized of all the facts. All the evidence. It is his duty and task to sift the truth from the relative probabilities and piece together the family history of ownership to determine the existence of actual possession and animus possidendi. Did the judge abdicate his responsibility to deliver justice or was he trying to find a way to achieve harmony and appeal to a wider sense of social justice? Judging and creating harmony may be a concept in a Disney movie surely not in a civil adjudicative system.

I thought I should repeat verbatim the very brief note I sent to the judicial settlement judge for whom I am forever in debt.

“As discussed, the parties in this claim are agreeable to a Judicial Settlement Conference. However the case is at a very delicate stage. I have heard all the evidence and brief oral submissions. I indicated to the parties that this matter is fact sensitive and that neither of them are guaranteed any success. They, for the first time I understand, agreed to talk to try to resolve the matter ..... However both attorneys acknowledge that the emotional issues are too high in this case to result in a compromise.

I hold the personal view that the only issue that is preventing a settlement in this matter is an emotional one which may be unconnected with the case and that any judgment that I may render may not truly solve the real dispute between the parties.

I hope that you will be able to assist the parties in this matter..... I have made it clear to them if they cannot solve it I will deliver a judgment.”

What was interesting in this case was that it was the first time that a matter was referred to JSC literally at the doorstep of a judgment after all the evidence had been taken. The parties went off to engage in closed door discussions with another High Court judge. There were about three sessions with that Judge which spanned a period of some 6 months. The matter returned to me unresolved however it was announced to me that the parties were close. The attorneys revealed to
me that it was the first time that the cousins had spoken to each other for years. I recall, the JSC judge coming to me in exasperation telling me “I am sorry It was not resolved”. My immediate reaction was once they had spoken to one another, to me it was a success. Indeed the ice having broken between the cousins and having come so close to finding a solution to their own conflict I again encouraged them to find a way. They left and returned with a consent order.

A consent order was presented to me where Mustaza agreed to pay to Mohani 1.5m for the relinquishment of all her rights and entitlement to the land. I understand that the sum was a negotiated sum after the parties conducted a joint valuation of the eastern portion of the land. Instead of the sword of Damocles descending, the cousins for the first time were able to work out a solution. This immediately draws into sharp focus the benefits of mediation in the judicial system traditionally lauded by academics and mediation practitioners:

1. It allows for a greater degree of flexibility in the determination of disputes.

2. The just outcome is outside the contemplation of pleadings and reliefs sought in the litigation. The just outcome is one determined by the parties in accord with their own notions of justice and social responsibility. It turns on its head the notion of substantive justice in the adjudicative system and gives life to the concept of social justice.

3. It is ideally suited for disputes with underlying relationship issues. This land dispute is a typical dispute in our civil justice system. Although land disputes are framed as claims in legal terms such as possession, trespass, the underlying dispute is a human one which affects families or neighbours.

4. The success of judicial mediation is not measured by the entering into an agreement. It provides a forum for discussion which is the ideal lubricant for hardened positions. It directly engages underlying emotions and motivations in social interactions which had given rise to the dispute either couched in the instant legal battle or lying elsewhere in the relationship matrix of the disputants or extended participants.

5. The matter could not have been settled had I not encouraged the parties to give the system of JSC a try. It underscores the need for active judicial encouragement of dispute settlement as a social good as well as equips the judge with the relevant tools to be deployed in the deserving cases.

6. It reinforces the old adage that it may be too early to settle but never too late. In some cases a tolerable element of delay to arrive at a mediated result, in this case 6 months may just be worth the wait.

The struggle in the 21st century with integrating this form of dispute resolution into the adjudicative process is the tension between normative notions of justice and social justice. Is it fair? The principle of self-determination which predominates mediation as it also does evaluative mediations at the JSC promotes self-affirmation, individualism, but at the same time is a hidden trap for the unwary, unprepared or feeble. I believe however that adequate safeguards can be implemented to ensure the integrity of this form of dispute resolution and it highlights the importance of fairness in any dispute resolution process and the need of judicial control.

However in assessing the quality of this product we must be open to a new concept of justice within the traditional mould of fairness. If indeed we are interested in substantial justice and fair outcomes I have found that a system that integrates mediation and judicial mediation into it spruces softens justice makes it accessible user friendly and socially acceptable.

The Fair Outcome

Lord Devlin painted a rather pathetic picture of the Judge in the 20th century in his anguish over arriving at a just outcome.  

“In the course of their work Judges quite often disassociate themselves from the law. They would like to decide otherwise, they hint, but the law does not permit. They emphasise that it is as binding upon them as it is upon litigants. If a Judge leaves the law and makes his own decisions, even if in substance they are just, he loses the protection of the law and sacrifices the appearance of impartiality which is given
by adherence to the law. He expresses himself personally to the dissatisfied litigant and exposes himself to criticism. But if the stroke is inflicted by the law, it leaves no sense of individual justice; the losing party is not a victim who has been singled out; it is the same for everybody, he says. And how many a defeated litigant has saved his wounds with the thought that the law is an ass! So I am not distressed by the fact that at least nine-tenths of the judiciary spends its life submerged in the disinterested application of known law.”

One of the first lessons to be learnt from this case of the warring cousins is that we should no longer hold the view that we have a monopoly on the shape or form of the fair outcome. Michael Zander SC in his lecture “The state of justice”, thought the measuring of the quality of justice was almost impossible as we cannot unearth or grapple with a definition of justice. I tend to agree. It is of course always difficult to say what the just outcome is. Indeed in our civil justice system you have available to you eight versions of a just outcome. The version of the High Court judge, three appellate judges and five judges in the Judicial Committee of the Privy Council. And even then I imagine we are eventually all judged in another place.

Judicial officers are keenly aware of their social responsibility and role in improving the quality of justice. It can be measured by the reduction in time for the delivery of judgments, or the length of time it will take for a matter to be disposed of once introduced into the judicial system. It can be reflected by the quality of the judgments delivered by the courts. It can be measured by the impact the judgment has had in improving the lives of citizens or shaping democratic societies. The European Commission for the Promotion of the Efficiency of Justice correctly observed that the specific nature of the quality of justice “cannot be boiled down to the mere delivery of services: as a specific and unique public service, justice produces social links.”

The Trial Court Performance Standards articulates the fundamental purpose of courts within a framework of five areas:

1. Access to Justice
2. Expedition and timeliness: Decisions made by the courts should be delivered in a timely manner without any undue delay
3. Equality fairness and integrity. Courts should provide due process and equal protection of the law concerning integrity the decision and actions of a court should adhere to the duties and obligations imposed on the court by relevant law as well as administrative rules, policies and ethical and professional standards
4. Independence and accountability: Trial courts must establish their legal and organisational boundaries monitor and control their operations and account publicly for their performance
5. Public trust and confidence: courts should work in an accessible, fair and accountable way where there is a high level of public trust.

None of these tools are really helpful when we look at the disputing cousins and tell them after the litigation is over we are happy to say that we have checked off all the boxes on our quality assurance spreadsheet. There was no hindrance to you in accessing our courts, indeed one of you was legally aided, you met our friendly and helpful staff and administrators. Your case was streamlined in an efficient judge’s docket. You got your trial relatively early and a decision within three months by a judge of impeccable integrity uninfluenced by political persuasions. But I am not happy to report that this decision will fracture your families further and possibly forever and may even result in one of your members resorting to violence later on because of the emotional disputes we left unattended on our doorsteps.

Lord Diplock indeed identified in Maharaj v AG that our fundamental right of due process of law is to a system of justice that was fair and not one that was perfect or infallible. Lord Devlin asked a question in 1970 “is it right to cling to a system that offers perfection for the few and nothing at all for the many?”
Sriram Panchu wrote in *Mediation and the Law*:

“There are limitations placed on a judge in the Anglo Saxon tradition. He administers the rules of the adversarial conflict which is played out by the counsel.

‘Do not enter the arena’ is the caution administered to judges who would like to play a greater role in the conduct of cases. The judge labours over facts, strains to capture the principle of law, wades through every case load of differences, writes a reasoned judgment, but is often denied the substantive satisfaction of having resolved the conflict. What will mediation do for him?”

In measuring the quality of justice we must shift our perspective and ask what is the law for? I believe that the greatest potential for radical reform achieved in the civil justice system has been the creation of the case managing judge meeting the litigant face to face from the moment that both parties have revealed their rivalling claims. I believe that the judge now becomes a part of the struggle that envelops both parties and must be part of the solution. Having such an intimate and first hand insight into parties cases, motivations, asking probing questions on the law and frank discussions with attorneys, is it to be utilised as a sifting out process in a sterile civil procedure or an opportunity for dynamism and change. An opportunity for reconciliation and restauration? The judge is no longer the silent sphinx. The client gets his opportunity to meet the man in robes long before his day of trial. Is this not all he wanted in the first place? Must we wait for a trial to get a solution? Is this not the opportunity for the judge to counsel and advise parties to shed light on their respective claims? Is this a new opportunity for the delivery of justice clamoured for by the suffering litigant sitting patiently on his wooden stool?

I am convinced that in a large majority of cases the cry for justice calls for a humanistic approach to the application of the law. Dr. Justice Arijit Pasayat in his essay “Human Rights and Social Justice” commented:

“*Humanism is the soul of justice and of all social sciences. In the words of Anatole France: To disarm the strong and arm the weak would be to change the social order which it’s my job to preserve. Justice is the means by which established injustices are sanctioned. Further he said the majestic egalitarian of the law, which forbids rich and poor alike to sleep under the bridges to beg in the streets and to steal bread*.”

Taking such an approach the law will serve as a guide and outer limit for human action and behaviour but that the individual given the opportunity in a JSC is reinvested with the liberty of choice and freedom to act, to collaborate, to cooperate and to create a viable realistic future in harmony with the wider society.

**The search for Harmony**

“*Secretary: And the key-word Kongi insists, must be- Harmony*”

*Kongi’s Harvest*, Wole Soyinka

Wyle Soyinka’s cynical play “Kongi’s Harvest” focused on King Kongi’s celebration of the Harvest as a feast with an obvious political agenda and to create the appearance of Harmony in the State. In essence the delivery of justice in the civil justice system is a search for harmony in the affairs of the citizen.

In 1978 Sir Jack Jacob observed:

“We must enable legal disputes conflicts and complaints which inevitably arise in society to be resolved in an orderly way according to the justice of the case so as to promote harmony and peace in society lest they fester and breed discontent and disturbance.”

Professor Hazel Genn in her distinguished Hamlyn Lectures observed that:

“The machinery of civil justice sustains social stability and economic growth by providing public processes for resolving civil disputes for enforcing legal rights and for protecting private and personal rights…the civil courts contribute silency to the social and economic well being”

Our very Constitution in its preamble recognises this concept of distributive and social justice where we have affirmed: “respect for the principles of social justice and therefore believe that the operation of the economic
system should result in the material resources of the community being so distributed as to serve the common good”. In the working out of fundamental human rights we have recognised that in a democratic society rights cannot be absolute but must be balanced and asserted within an overarching harmony with the rights of others. This was observed by Chief Justice Wooding in *Collymore v AG* and recently by Lady Hale in *re the Constitution of the Republic of Trinidad and Tobago... Surratt, Kenneth Ors v The Attorney General of Trinidad and Tobago*.

The humanistic approach I advocate is the use of justice as a means to create harmony in the citizen’s social affairs, commercial relationships and domestic matters. This is our focus of the judge in settlement conferencing who now sits in the chair not as adjudicator but as a friend of harmony trying to restore the balance.

Let us examine another case. Poor Mrs. Woodford she has been for years complaining to her neighbour about the damage done to her property at the boundaries of their respective parcels of forested land. These neighbours owned huge tracts of land in a forested area in Trinidad. Mrs Woodford had dreams of developing an eco-tourism centre to be operated for profit with nature trails and wildlife preserve on her tract of land. Mr Harry her neighbour wanted to develop his land for his children. He bulldozed several feet of Mrs Woodfords land, felling several mature trees in the process and leaving large muddied tracks left by Mr Harris’ equipment. She complained that her dreams of her centre were shattered. She brought her claim of course in damages for trespass. She also claimed exemplary damages. The defendant admitted in his pleadings that he had encroached unto Mrs Woodfords boundary but denying of course the full extent of the trespass as alleged by her and naturally putting her to strict proof as to the extent of her loss. As close as her lawyers could fashion a legal right to a shattered dream she itemised several aspects of her special damages such as the loss of several trees and saplings it ran close to a million dollars in damages. It also included the loss of several DVDs about Trinidad fauna and flora and her 4 x 4 jeep! At the CMC conference I exclaimed “Mrs Woodford did Mr Harry’s bulldozers demolish even your collection of DVDs and your 4 x4 vehicle as well?” Her attorney stepped in to say “no M Lord she had acquired those DVDs and 4 x 4 vehicle solely for use in the nature reserve which is now unusable. It is a consequential loss.”

Sometimes the lexicon of the law is unsuitable to articulate a litigants true concerns. This matter was settled at a JSC. The terms of that settlement was in short, Mr Harry agreed to supply and plant a number of fruit trees and timber trees, to pay an agreed sum in damages and to agree a common boundary by agreement of appointing a joint surveyor. There was an aspect of restoration and rehabilitation in this outcome which could not have been obtained in the adjudicative system. It was not about money. It was about an acknowledgment of wrong, restoring the harmony between the neighbours and what is significant the parties themselves were able to create certainty to guide their future lives by agreeing a common boundary. Exemplary damages are now irrelevant as punishment is no longer the objective. The cycle of an eye for eye is broken by a collaborative exercise conducted by neighbours. In this way the neighbouring parties have achieved a transformation in their lives, such a transformation achieved in mediation accords with social justice. As Baruch and Folger note in “The Promise Of Mediation: Responding To Conflict Through Empowerment And Recognition”:

“Transformation... involves transforming not just situations but people themselves and thus the society as a whole. It aims at creating a better world not just in the sense of a more smoothly or fairly working version of what now exists but in the sense of a different kind of world altogether. The goal is a world in which people are not just better off but better: more human and more humane. Achieving this goal means transforming people from dependent beings concerned only with themselves into secure and self reliant beings willing to reconcile with and be responsive to others the occurrence of this transformation brings out the inherent good, the highest level within human beings and with these
When last I saw them, they both smiled when they left the CMC room. This is the same experience that I have encountered when a matter is resolved by JSC. I don’t see the scowl or the frown. In several cases have I seen expressions of harmony. A sigh of relief. Many times a smile. In other cases, a spontaneous gesture of a handshake. There can be no other satisfaction for a judge. In taking this humanist approach, we are taking on the emotional baggage of disputes with all their liabilities and the triumphs. Family members speaking and crying together. In an insurance claim by a widow against the insurance company for damages for breach of contract in failing to reimburse the deceased’s medical bills, I have seen the grieving wife in the JSC emotionally open up as the conference moved forward and settling her dispute by adjusting her expectations. Still there was resentment against the company; indeed, the option of taking another insurance policy as an option to settle the dispute was flatly refused. But after three sessions there was a level of understanding between the two parties.

I have seen dispute over land between an aging father against his daughter and son-in-law being settled by the father making one phone call to his estranged daughter prompting her to visit her father at the next JSC in person. An occurrence which had not happened in years. Still resentment against the son-in-law, but peace was finally achieved between a daughter and father who was patently at death’s door.

I have seen simple commercial claims being settled with an expression of apology. I have seen close collaboration between several defendants including agents of the state working together in the acquisition of a new house for an elderly claimant whose modest wooden house was demolished by the defendant who claimed that her house was allegedly on his land.

In none of these cases was there an obsession of legal rights. Notably, in some case, the claimant’s chances of success in the litigation was very weak. The negotiated result was an expression of harmony, social justice at work.

Chief Justice Wooding, in his speech at the opening of the law term in 1963 a year after our Independence stated:

“To my mind, the intent and meaning of the Law is precisely that of disciplined endeavour in the cause of social justice. What do we do about it? Do we merely practise our profession or do we set about informing ourselves of the law’s inadequacies so that, armed with knowledge, we may give an impetus to social reform? Put another way, I would phrase it in this wise – that our purpose should not be limited administering the laws justly but should extend to seeing that the laws just.”

I believe that this notion of social justice should underpin the quiet revolution which will see the infusion of mediation and ADR appropriate dispute resolution systems into our formal judicial process.

Forging a new equity

Rather than dilute the civil justice system I anticipate that in incorporating mediation into the formal court process whereby negotiated agreements, compromises, settlements arrived at with the assistance of judges in facilitative or evaluative mediation may unwittingly forge a new equity! It will certainly result not only in softening of the rigors of the law through mediated outcomes but perhaps the realisation of new communal rights.

Take another example of rivalling claims to land however constructed through a different legal lens, An estate claim. Here is a claim between siblings over the deceased father's house and land. It is the family's inheritance. One sibling claims that by the father’s will the property was left to him. The other siblings claim that the will is a forgery. Therefore all the children would be owners of the property. The father died intestate. The claimant, the beneficiary under the will, makes a claim to propound the will in solemn form. The agreement that was arrived at in mediation is interesting:

1. The house at No. 631 Papoulis Road, Monkey Town to be a family house and that Mr. Hamlyn Goal is at liberty to reside in the family house.
2. The interested parties do undertake not to make any claims or contest the ownership of the lands described in deed dated 30 August, 2006 and registered as No. DE200602388938;

3. The applicant shall be responsible to pay all land taxes in respect of the loans. The house tax for the family home at No. 631 Papourie Road, Monkey town shall be paid by the interested parties;

4. The interested parties shall be responsible to pay all repairs and maintenance to ensure that the family house at No. 631 Papourie road, Monkey Town is kept in good condition; and

5. No costs.

The concept of a family house now bears greater significance outside the lexicon of equity or the law. There is now a moral and social responsibility. As a family home, a family decision has been made for the applicant to reside there with the family members contributing to the home’s upkeep and to maintaining it as the family home. It addresses the basic needs of shelter as well as the family sense of tradition. In our promotion of ADR systems mediation and JSC in our civil justice system we are promoting self worth, self determination and creativity. These mediated results by the private mediator or the JSC judge give life to new form of law of consensus. A new equity. A transformation in the way we see the application of the law.

Another transformation that can yet take place is in the law of exemplary damages. There must be some other social medium to correct deviant behaviour apart from registering disapproval of that behaviour by punishment. Exemplary damages sole objective is to punish the tortfeasor. Following the principles of Rookes v. Barnard [1964] 1 All ER 367 in Takiota the Board observed:

“The award of exemplary damages is a common law head of damages the object of which is to punish the defendant for outrageous behaviour and deter him and others from repeating it.”

Punishment is seen as the formula to prevent the recurrence of the same wrong. Is it effective? Is it just?

Our courts have been punishing prisoners and prisoner officers alike and unwittingly creating a more oppressive prison climate in our attempt to settle disputes between prisoner and prison officers. There are far too many claims for assault and battery that are coming into our courts. Some 13 years ago, in 1998, Chief Justice M A de la Bastide held, in Thaddeus Bernard v Nixies Quashie (CA 159 of 1992), that “There is a tendency among a minority of uniformed officials in this country to exercise their authority in an oppressive and unreasonable manner.” Such oppressive conduct which was censured by our Courts so long ago is still even today unfortunately rearing its ugly head and which the Court has had no choice in the traditional adjudicative setting but to condemn in the strongest of terms. But our condemnation is reflected in more punishment in the form of an award of exemplary damages.

I am doubtful whether awards of exemplary damages are in reality having the effect of deterring other members of the force from engaging in the type of conduct which the Court is condemning in this case. And it is doubtful whether a form or punishment is in fact appropriate to solve the problems underlying act of violence in prisons or between the state and member of the public. The prison system is a unique and sensitive environment of delicate relationships which must be carefully managed. What the judiciary has done in its attempt to deliver justice by making awards of exemplary damages has only served to create a cycle of hostility and acrimony in a high tension environment when every attempt shod be made to retro harmony. The social impact of hostility in a recent Report of the Commission on Safety and Abuse in American prisons, the Commission observed:

“What happens inside jails and prisons does not stay inside jails and prisons. It comes home with prisoners after they are released and with corrections officers at the end of each day’s shift. When people live and work in facilities that are unsafe, unhealthy, unproductive, or inhumane, they carry the effects home with them. We
must create safe and productive conditions of confinement not only because it is the right thing to do, but because it influences the safety, health, and prosperity of us all. We must remember that our prisons and jails are part of the justice system, not apart from it.”

In the new term, I have scheduled two such cases of claims by a prisoner for damages for assault and battery against prison officers to examine the prospect of mediating the dispute. The nature of the dispute was such that the facts or the versions of the incident are so at variance with each other: if I believe the prisoner, then it is a clear case of an unprompted attack and wanton mindless abuse. If I believe the officers, then it is a case of a prisoner who has fabricated charges against innocent guards out of the wind. The only legal result is either a dismissal of the claim and an award of costs to punish the lying litigant or the award of damages inclusive of exemplary damages to punish the abusive prison officers. Does a system of punishment reinforce core human values of compassion respect and understanding? There will still be in those scenario larger unresolved administrative institutional and emotional issues. Does either of the parties need counseling, what is the underlying cause of the tension leading to violence on the prisoner or to targeting innocent prison officers? What of the prison conditions or system within the prison? Was there some past unresolved issue between these persons?

We cannot continue to adopt a revolving door approach recycling deviant behaviour. In Judging in the 21st century: a Problem solving Approach (NJJI), the following point is made concerning therapeutic jurisprudence (TJ):

“It aims to make all courts and their decisions relevant to all people who use them and are affected by those decision wbetted in family appeal civil federal or small claims court settings...Therapeutic jurisprudence does not ask judges to be therapists or social workers. It does not ask judges to cure mental illness or addiction, to counsel court participants, or to single-handedly solve systemic social problems. It does, however, ask judges to be aware that such problems do exist, to be alive to their signs and symptoms and to consider the effects they may have on people in court and on the activities that have brought them to court, and to think about how to address these situations so as to maximize therapeutic outcomes.

Therapeutic jurisprudence asks all judges to recognize they can be important agents of change, and to acknowledge that their words, actions, and demeanour will invariably have an impact on the people who come before them in the courtroom.”

**Humanism vs. “Proceduralism”**

“Ogbuef Ezedudu, who was the oldest man in the village, was telling two other men when they came to visit him that the punishment for breaking the Peace of Ani had become very mild in their clan.

“It has not always been so,” he said. “My father told me that he had been told that in the past a man who broke the peace was dragged on the ground through the village until he died... but after a while this custom was stopped because it spoiled the peace which it was meant to preserve.”

Chinua Achebe, Things Fall Apart

Customs, laws, mores change with time as societies recalibrate needs and standards against a yarstick of social development and economic growth. Indeed a legal system that drags the litigant through a rugged civil landscape until he is exhausted, near death and crying out for mercy could hardly be described as achieving the objects of justice. However civil procedure may unwittingly do just that and “spoil the peace it was meant to preserve”. In our reform of the civil justice system under the CPR we have still paid undue deference to procedure as a guarantee to justice. It is time to recalibrate our process and eliminate if not reduce altogether the temptation to play procedural games with the lives of litigants. While many academics argue that substantive justice is obtained when procedures that are fair are implemented and preserved, there is a danger that procedure may tie the hand of justice leaving the suffering litigant without a remedy.
Indeed our entire exercise of case management is cast in the language of ensuring that procedural justice is observed. The overriding objective of these rules is to “Deal with a case justly”. To deal with a case justly means we must ensure we have adopted a fair process where the principles of economy, proportionality and equality are carefully weighed in the balance. A just outcome is premised on such processes. But in many judicial settlement conferences disputants frequently agree on one thing they only want what is fair. It is their vision of fairness which colours their lens of justice this transcends any issue of procedural justice.

In 1968 Sir Jack Jacob wrote:

“The admonition by Lord Justice Bowen that courts do not exist for the sake of discipline should be reflected in the principles that rules of court should not be framed on the basis of imposing penalties or producing automatic consequences for non compliance with the rules of order of the court. The function of rules of court is to provide guide lines not trip wires and they fulfil their function most where they intrude the least in the course of litigation.”

Dick Greenslade, responsible for the reform of the civil rules of Trinidad and Tobago, described procedural rules as “electric fences, not meant to kill cows”. The editors of our Caribbean Civil Practice admonished us not to follow the UK example of developing a tome of practice directions which is larger than the rules themselves and become encrusted in procedural law. Justice Goblin recently in Alicia House highlighted the travesty of a legal system that foisted procedural rules over substantive rights. Commenting on our relief from sanctions provisions she commented:

“Judges must simply be allowed to judge. The interpretation of the rules must allow a sufficient discretion in matters of procedure which does not unlawfully limit the jurisdiction of the Court. ......In its judgment in the case of Carmine Bernard v Rajesh Seebalack ([2010] UK PC 15), the Privy Council also warned that inflexibility in the rules of court can lead to injustice as it is ordinarily understood. However, it paid due regard to comments of the Court of Appeal in relation to the litigation culture in Trinidad and Tobago and these aims of rules insofar as they were intended to produce a change in the laissez-faire attitude to civil litigation and to introduce more discipline in the conduct of it. This court too zealously embraced this aim in the early days of CPR in the belief that they were acceptable and necessary, but six years into the new system the question has to be asked, is there no price which is too high for this cultural shift? If the pursuit of these objectives leaves a judiciary with judges whose hands are tied, who must suppress their instinctive aversion to injustice, who are constantly apologizing for not being able to do other than as the rules dictate, then I daresay this could not have been the intention of the Rules Committee and if it was, this could not be right. Procedural rules cannot systematically deny access to substantive justice.”

Quite recently, the relief from sanction regime, which is more draconian than that in the UK, was challenged as being unconstitutional in Karen Tesheira v AG – so much so, it was a barrier to access to justice. I ruled that it was a rule which was proportionate to achieving justice in a disciplined civil system. The ball is in the Court of Appeal. But it continues the debate between procedure and substantive justice. Taking a humanistic approach we can sympathise with Justice Goblin’s sentiments and either find ways to stretch the law or implement mechanisms to achieve substantial justice through mediation.

In August 2006 the Chief Justice of Western Australia commented of the Australian legal system:

“It is the Rolls Royce of justice systems but there is not much point in having a Rolls Royce in the garage if you can’t afford the fuel to drive it anywhere. You can sit in it, polish it, admire it, boast about it, lend it to rich friends or give it out to people who can afford to drive it, but you can’t use it for its basic purpose which is to get you from A to B. We might
be better off trading in our Rolls Royce for a lighter more fuel efficient vehicle”

Our Chief Justice is leading the transformation of our civil justice system to meet the needs of our citizens. He said:

“The transformation of the judiciary therefore is and always will be about more than ad-hoc and intermittent ‘interventions’. We are not talking about tweaking the organizational chart. There must be a real change in thinking and culture…There must be a change in culture because one lesson I have learned from observation and experience is that among the biggest impediments to achieving the developed status to which we aspire are some aspects of our national culture that feed into our organizational culture.”

In the new term the Chief Justice will lead another pilot project where both mediation and JSC will be applied to the same case before a trial. Mediation is viewed as an integral part of the suite of options made available to the litigant along his or her path towards an efficient and economical disposal of their dispute. The Chief Justice commented:

“In doing this we complete a transformation of our judicial system from a purely autocratic rights based system to one that offers customized conflict settlement...Mediation and case management philosophy must be viewed in a broader perspective of achieving justice in a flexible and fair manner. If we transform our image of our courts in this way, if we transform our vision along these lines we will focus on the true task of guaranteeing access to justice which recognizes the realities of culture, expectations, interests and the demands of time, costs and resources.”

In this transformed culture the trial is no longer the centre piece of dispute resolution. It will be a collaborative approach to dispute resolution which will begin and end in the case management room. The menu offered is no longer a main course of a trial but a starter of mediation a main course of judicial settlement with a side dish of a trial.

A significant and unfortunate obstacle in this approach is the judgement of the UK Court of Appeal in *Halsey v Milton Keynes* and the spawn of several recent judgments on the satellite issue of the recovery of costs by a successful party to litigation which refused to mediate the dispute. In its attempt to structure a procedure for determining what is an unreasonable refusal to mediate the dispute the Court has unwittingly added fuel to the flames of “proceduralism”. The onus is on the defeated party to show that the other party’s refusal was unreasonable. The guidelines to determine reasonable refusal adds even more complicated layers over a process which should be engaged by almost any litigant as a matter of course. The Halsey guidelines are perhaps better put in perspective when one views the philosophy of the Court’s view of ordering mediation as a breach of the litigants fundamental right to access the court. But ordering mediation is far removed from forcing parties to settle. In any event, arguably, the Mediation Act of Trinidad and Tobago provides a unique platform for Courts to order mediation and even categorises the Judiciary as a mediation agency!

**To the naysayer and enthusiast**

This takes me directly to the distinguished lecture of Professor Genn of the UK and her cautious reservation of the benefits of mediation. She decried the promotion of ADR as a path to diluting the civil justice process. She advocated against the mediation hype and the pro mediation rhetoric.

“Much of the interest in ADR in jurisdiction around the world has grown out of the failure of the civil courts to provide access to fair procedures. In many parts of the world both the criminal and civil courts are overloaded....ADR can be a means of citizens of side stepping legal systems in which the public have no confidence. More importantly in such circumstances the promotion of ADR by governments could be interpreted as less about the positive qualities of mediation and more about diverting cases to mediation as an easier and cheaper option than attempting to fix or invest in dysfunctional systems of adjudication. It is in effect a
throwing up of the hands and admission of defeat.”

Professor Genn further postulated:
“We must therefore conclude that mediation may be about problem solving, it may be about compromise, it may be about transformation and recognition, it may be about moral growth, it may be about communication, it may be about restoring relationships, but it is not about substantive justice. Concern for justice and fairness is not perceived to be the goals of mediation.”

Professor Genn saw mediation as not just settlement but just about settlement. From my experiences in judicial settlement, I am unsure whether anyone can authoritatively speak to the injustice of a collaborative system of justice or discount its social value. Professor Genn’s work is however quite helpful: rather than offend the mediator enthusiast, it should remind us of the place for mediation within the civil justice system. To manage the integrity of the results of mediation, it must operate within the shadow of the law.

If outcomes are to be arrived at by the mediated processes, it must be done through a supervised by the courts, otherwise we would encourage the privatisation of dispute settlement which may supplant the civil process. I find it very comforting in judicial settlement conferencing and mediation to know that the prospects of a trial lay in the wings and can be the party’s last resort to settle the dispute. The emphasis in these mediations has never been, nor should it be, in arriving at agreements, but in promoting the principles of collaborative approaches to solving human problems. For this reason, the use of caucusing should be rarely used by the JSC judge in any style of mediation facilitative or evaluative. The general principle should be transparency and openness. If parties still wish to snuggle in a corner maybe they are not ready for this collaborative exercise. I have used the device of caucusing in JSC rarely. In one case, however, I could not help but feel that I was becoming a pawn in the party’s game; a mere shuttle of information from one camp to the next to broker a deal. Shuttle diplomacy should be left to the diplomats. Judges should be equipped with the skill to avoid such cases and in most instances it may simply be the result of sheer fatigue and a desire to work out a quick deal. Such temptations must be resisted if the integrity of the process and purpose of the exercise is to be preserved.

Furthermore, Professor Genn’s work reminds us that the movement to promote mediation must be judge-led. There is value in a judiciary that is respected for its integrity and its past record of resolving disputes, in promoting these forms of legitimate dispute resolution. This is more so the case in our society which has been bedevilled by a high incidence of crime and hostility. We need more than ever to introduce new ways to restore harmony and peace in our society. If the judiciary takes the lead in such an approach, if it can infuse through our society the humanism that is sorely needed for the restoration of order, then it would achieve the transformation of a justice system that delivers justice in a fair and flexible manner.

Breaking the glass ceiling

Take the case of Samson, a resident of Ghana, who married Susan in Ghana. Susan, who is a citizen of Trinidad, was on holiday in Ghana for a few weeks. At the end of her vacation, Samson accompanies her back to Trinidad. However at our Airport, Samson is seized by the Immigration authorities for declaring and using a forged passport. He is charged and he pleaded guilty and sentenced to a term of imprisonment of 3 months.

The term of imprisonment came to an end in November 2011. Susan is at a loss as to why he is still in the custody of the authorities. She is getting no information about the reason for his detention and is getting the run around. She is very concerned since she has not been able to see Samson since November 2011. The only response she has received by letter from the Prison authority is that Samson is in the custody of the immigration authorities. In January 2012, she meets an attorney Mr Right who makes an application for a writ of habeas corpus against the Chief Immigration Officer (CIO).

A writ of habeas corpus was issued by the Judge. On the return of the writ, an affidavit
was filed in the morning by the CIO who explains that a Special Tribunal has now been convened under the Immigration Act to determine the status of Samson. One of the orders the Tribunal can make is an order of deportation. The only explanation given for the delay in setting up the Tribunal was that the department was awaiting a response from the Ghanaian embassy in Cuba to issue fresh documents to Samson.

At the hearing, the CIO is present with State Counsel ready to argue that the Court has no jurisdiction and that this is a matter for the Tribunal. Samson is present with his Mr Right who is ready to argue that the establishment of the Tribunal is an abuse of power to circumvent the hearing of the habeas corpus. If a deportation order is made, Samson can no longer return to Trinidad.

In using a collaborative approach to dispute resolution, this public law matter was resolved within the immigration laws by the detainee voluntarily subjecting himself to the Special Tribunal. The state making arrangements for his voluntary departure so that his passports could be regularised in his native country and he would be allowed to return. This could have been a result easily obtained in a judicial settlement conference but the attorneys themselves already familiar with the culture of collaboration of this court was willing to simply find a logical solution acceptable to all parties.

The lesson, first there are no barriers to the application of mediation, the language of collaboration is infectious. What is needed is a bold and fresh look at the objectives of justice and the methodology that is applicable to produce the fairest outcome adjudged by the underlying interests of all the parties. Second the principles of collaboration through mediation and JSCs are infectious and affect the practice of the law. I recall my obsession when at the bar, in the days before hearing, to ensure that all procedure was observed, list of documents, hearsay notices, notices to strike. Now the obsession should be on examining all the ways in which a human problem presented in a legal dispute can be resolved.

The genie is out of the bottle

In closing this short presentation, there is much to be said for the introduction of judicial mediation into the mix of civil justice systems as a means of improving the quality of justice. The genie is out of the bottle. Who knows the judiciary of the future will be regarded as “peace centres” and not as “war rooms”.

But we must be careful what we wish for. We cannot, in integrating mediation into the formal court process, allow it to be enmeshed in procedural niceties. The fundamentals of collaborative consensus and self-determination must be preserved. Judges and mediators must be properly trained and monitored by the judiciary to ensure fair outcomes. The increased and frequent use of caucusing for instance is a red flag which deserves investigation. The cloak of secrecy that comes with these conferences must equally call for increased vigilance by the judge to preserve his integrity and impartiality. We must remember that the simplest of things said by the judge is taken as golden and great care must be exercised in a push or the nudge to get the parties to settle. A tired judge saying we are not leaving unless this matter is settled may produce a result or it may compromise the entire campaign for judicial mediation. We must constantly remind ourselves of the underlying social purpose of which these opportunities are being made available to the litigant.

A forced agreement is not superior to a decision by the judge at trial. Outcomes are not as important as the creation of opportunities to achieve a restoration of harmony and the achievement of social justice. As a last resort the litigant can have their trial if it is really appropriate. These are the considerations that are uppermost in our mind in adopting a humanist approach to the law which will make the system of civil justice that more understandable, acceptable and relevant to the sufferers sitting on his stool at our doorsteps.
CONSTITUTIONAL ADJUDICATION AND LEARNING FROM EACH OTHER: A COMPARATIVE STUDY

This article is based on an address to Justices of the Supreme Court of Nigeria, Abuja, Nigeria, June 2012.

Abstract: This article examines the role of comparative legal analysis in the Commonwealth. Faced with specific challenges and controversies, judges may draw strength and determination from knowing how judges in other countries face, and resolve, similar controversies. The author discusses three developments which have combined to promote comparative constitutionalism in Commonwealth countries, namely, the approach of British courts, new technology and the Law Reports of the Commonwealth. Although comparative constitutional law does not bind the local judges, when experienced and learned judges have examined problems in the past, it is frequently of great assistance for those who come later to have access to their decisions. The article also discusses the 2009 findings of the High Court of Delhi in Naz Foundation v. Delhi and Ors with respect to the criminalization of sodomy in India and the recommendations of the Eminent Persons Group of the Commonwealth of Nations (2011).

Keywords: comparative legal analysis – separation of powers – assistance derived from judicial decisions – penal codes across the Commonwealth – sodomy – Eminent Persons Group of the Commonwealth of Nations

Comparative Constitutionalism: A Beneficial Study

In a sense, judges in common law countries, who share the English language and similar ways of deciding and expressing legal conclusions, have always been engaged in forms of comparative legal analysis.

All of us were originally linked through the imperial court of the British Empire, the Judicial Committee of the Privy Council. The Privy Council was a court of distinguished (mostly) English judges. They offered a little of their time to resolve legal problems in the far-away dominions and colonies. Their integrity, intelligence and efficiency set a very high standard for the performance of judicial duties by judges far from London. Sometimes, Their Lordships did not have a full appreciation of the local conditions that made it difficult for them to reflect all of the factors necessary to a lawful and just resolution of the cases. Some critics suggested that they were occasionally unduly protective of British commercial interests in the Empire. For all this, the role of the Privy Council was mainly benign and highly useful. However, one by one, the newly independent nations of the Commonwealth terminated this imperial link. Today, only a majority of the Caribbean countries, Mauritius and a few outposts maintain the role of this expositor of comparative constitutionalism.

Back in the days of Empire, it was not only courts that looked to other jurisdictions. Legislators did so too. Thus, in the Second World War, the United Kingdom Parliament enacted the harsh provisions of the Defence of the Realm Act 1914 (UK) (DORA). Aspects of that Act were copied in the terrorism legislation enacted in countries such as Malaya and South Africa. Indeed, the apartheid system in South Africa was derived from, and built upon, such legislation. Even the United States Congress copied aspects of the legislation in the enactment of the Smith Act. That statute imposed severe legal restrictions on communists. It was upheld by the Supreme Court of the United States in Dennis v. United States (341 US 494 (1951)), despite the strong constitutional provisions protecting freedom of expression and freedom of association in that country.

In 1950, the Parliament of Australia enacted the Communist Party Dissolution Act 1950 (Aust). That Act, in its terms, set out to ban the Communist Party; confiscate its assets; and impose severe restrictions on members and sympathisers. Its constitutional validity was challenged in the High Court of Australia.
That court, by majority (Dixon, McTiernan, Williams, Fullagar and Kitto JJ.: Latham C.J. dissenting) found that the Act was constitutionally invalid. In effect, the judges concluded, that whilst there was abundant power under the Australian Constitution to deal with any anti-social actions by communists, their beliefs and political manifestations of those beliefs, were beyond the legislative power of the Federal Parliament (see Australian Communist Party v. The Commonwealth (1951) 83 CLR 1). It was a brave and surprising decision of the Court. It helped to protect Australia from the intolerable excesses that were seen at the same time in South Africa and the United States. It was a clear example of the importance of the rule of law. And of the role of a final court to protect the citizens from transient political passions that sometimes occur in any democracy.

An attempt, by referendum, to amend the Australian Constitution to overcome the decision in the case was held in September 1951. It did not gather the double majority required by s.128 of the Australian Constitution: a majority of the total electors voting and a majority of the States in favour. That vote demonstrated the wisdom of the Australian people. And their sense of tolerance and acceptance of diversity. It set the foundations for the building of the Australian Commonwealth as a more diverse, multi-racial and multi-cultural community. Upholding such values is an important feature of a democratic society. Courts play a vital role in safeguarding such values. Happily, on this occasion, Australia came through to a good outcome.

 Judges, particularly in constitutional litigation, constantly face similar tests. Sometimes those tests are presented in the form of anti-terrorism legislation. Maintaining essential freedoms and upholding the letter and spirit of the constitution is an abiding duty of judges in constitutional cases. Governments and officials will often urge the need for exceptional measures and harsh regulations. However, Judges, who march to a different drum, must be faithful to the Constitution and to the abiding values that it enshrines. Fortunately, this is what the High Court of Australia did in 1951. Judges in other countries (including the United States of America) were not so defensive of traditional liberties at that time.

Knowing about the challenges and controversies that happen elsewhere, can sometimes provide strength and resolution to judges, in their own jurisdictions, faced by similar crises. The law and the constitution will of course be different. But the challenges may be similar. We can draw strength and determination from knowing how judges in other countries face, and resolve, similar controversies.

**Inter-Commonwealth Jurisprudence**

Nigeria terminated Privy Council appeals soon after independence. Australia’s legal independence was basically secured with the adoption of the Commonwealth of Australia Constitution Act 1900 (Imp). However, because our independence came earlier, and was granted by a country from which most of the Australian settlers themselves derived, provisions in the Australian Constitution acknowledged the continuing role of the Privy Council (Australian Constitution, s.74). That role was to remain until, in the 1970s and 1980s, appeals to Their Lordships were gradually terminated (see the Privy Council (Limitation of Appeals) Act 1968 (Aust); the Privy Council (Appeals from the High Court) Act 1975 (Aust.) and Australia Act 1986 (Aust. and U.K.), 5, 11). By chance, the very last appeal to the Privy Council from an Australian Court, came from a decision of my own, when sitting in the Court of Appeal of New South Wales. Happily, the appeal was dismissed (Austin v. Keele (1987) 10 NSWLR 283 (PC)).

The end of such appeals has deprived Commonwealth countries of a stream of cases in which comparative constitutionalism could have been made available for our guidance and assistance. Had those with the power created a true Commonwealth appellate court in the 1940s and ‘50s, with judges from all Commonwealth countries, it might have been possible to continue this exercise in institutional comparativism. However, that was not done. The opportunity passed and will not be revived.

Instead, three developments have occurred which promote comparative constitutionalism in Commonwealth countries:

1. Firstly, the British courts themselves, particularly under the wise leadership of Lord Bingham and Lord Phillips, began to insist
upon the use of Commonwealth judicial authority. In its last days, the House of Lords, as the final court of the United Kingdom, instructed counsel, coming to argue British cases, to bring with them relevant authorities from other English speaking courts from which the British judges could secure wisdom;

2. Secondly, the advent of the internet has removed one of the major impediments to access to Commonwealth judicial authorities. Whereas the case books once were virtually unobtainable, now they are often replaced by digital systems that render comparative constitutional authority available to a diligent researcher, interested to explore common themes; and

3. Thirdly, in proof of this, a significant series of Commonwealth judicial decisions has been initiated in the Law Reports of the Commonwealth. This series, beginning in 1985 and published by Butterworths/LexisNexis in London, brings to judges of all Commonwealth countries the major decisions made elsewhere in the Commonwealth. The series is efficient, up-to-date and broad ranging in its coverage. Its headnotes are excellent. It is very well served by cumulative indexes that facilitate the search for cases of possible comparative utility. Moreover, each year, the general editors, Professor James Read and Dr Peter Slinn, provide an Editorial Review. This review paints the large picture of Commonwealth judicial authority in the year past, as captured in the pages of the Law Reports of the Commonwealth. It is a wonderful service. Even busy appellate judges who do not have time to read all the cases themselves, can familiarise their minds with the broad contours of judicial developments. This will plant thoughts and ideas for retrieval at a later time when a case comes before them raising the same or similar problems. It is a medium by which judges can share knowledge. They can both receive and offer the lessons of their analysis and legal learning. Whilst the time of the imperative instruction of the Privy Council has passed, the facility of learning from each other continues in this new, voluntary and supportive format.

**Comparative Law Themes**

Each nation’s national constitution emerges from its peculiar history. Yet there are common themes such as:

- The separation of the Judiciary;
- The independence of the courts;
- The powers of the legislature;
- The powers and modes of government of the executive;
- The meaning of a charter of rights; and
- [at least in countries such as Canada, Australia, India and Nigeria] the issues of federalism.


Of course, every constitutional court must enjoy and exercise its own powers. Today, such courts are not subject to the coercive power of the orders of foreign judges or decisions. Nonetheless, it is a lesson of this important series of cases that similar problems tend to arise in different jurisdictions at much the same time. Access to comparative constitutional law does not bind the local judges. Sometimes foreign authority can be distinguished because of differences in the text, context or constitutional culture and national history. Just the same, when experienced and learned judges have examined problems in the past, it is frequently of great assistance for those who come later to have access to their decisions. They do not bind the local judges. But they at least provide guidance that ensures that, when they come to a similar problem, national judges will not be forced to reinvent the wheel. They will have the stimulation and assistance of earlier writings. They will be able to ‘tick the boxes’ to make sure that they have considered all relevant considerations of law,
principle and policy. It is this facility that is the main benefit of comparative constitutionalism in the world today.

Naturally, we are all loyal to our own constitutions and local doctrine. But we can be assisted, supported, stimulated and sometimes corrected by the insights offered by judges, examining like problems in other jurisdictions that are sufficiently similar in their legal traditions to our own.

A decision of the High Court of Australia, shortly before I retired from office is a case in point: Roach v. Electoral Commission ([2007] 233 CLR 162; [2007] HCA 43). There the Australian Federal Parliament in 2006 had enacted a law depriving all prisoners of the right to vote. Until that time, prisoners in Australia serving sentences of less than 2 (later 3) years imprisonment were entitled to cast their vote. Because voting at federal and State elections is compulsory in Australia, this meant not only a privilege, but a duty to vote. Arrangements had been made in Australian prisons for a century, to permit short-term prisoners to vote.

Sensing an electoral advantage and a close election, the federal government in 2006 moved to deprive all prisoners of that vote. A law to that effect was enacted where minority rights are concerned, there is sometimes a need for special vigilance by the courts. The High Court of Australia, by majority, concluded that the legislation was disproportionate and constitutionally invalid. The minority judges (Justices Hayne and Heydon) dissented and concluded that, for default of any express constitutional protection, such matters had to be left to Parliament to decide. The majority judges (Chief Justice Gleeson, Justices Gummow and Crennan and myself) concluded that removing the vote from prisoners serving sentences of shorter than 3 years was constitutionally invalid. Their right (and duty) to vote was re-affirmed.

In reaching that conclusion, reference was made by the High Court of Australia to comparative constitutional law sources in the Supreme Court of Canada in Sauvé v. the Queen ([2002] 3 SCR 519 at 585 [119]) and the decision of the European Court of Human Rights in Hirst v. United Kingdom [No. 2] ([2005] 42 EHRR 41). No judge considered either of these cases, or any other foreign decision or legal authority, binding the Australian court to a particular outcome. However, having access to such decisions, reading and reflecting on the common problems they addressed and the issues they grappled with, was of help to the majority, despite the significant distinctions of the Australian constitutional context.

Constitutional Wisdom: Abiding Values

This reflection and the foregoing illustrations, bring me back to the issue of the value, even in constitutional adjudication, of learning from each other. Constitutional cases often concern deep values of a society and its people. Such values, where they address fundamental human rights and human dignity, are often shared across jurisdictions. Sometimes, as well, legal norms are shared across jurisdictions, or are sufficiently similar to warrant examination of the way others have resolved a common problem.

An instance of this type of question can be seen in several areas of the law, where in imperial times, particular statutes were shared in countries in several parts of the British Empire. The 19th Century was a time when codification of the law was being developed in England and its colonies. Thus, statutes with common features were copied in many jurisdictions concerned with subjects as diverse as the law of evidence; the law of marriage and divorce; the law of pleading and court jurisdiction; the law of extra territorial recognition of judgments and orders; the law on the sale of goods; the law of cheques and negotiable instruments; and the criminal law. To this day, in many Commonwealth countries, the basic principles established by those 19th Century codes continue to operate in their original, or revised, form. They constitute a kind of shared tradition and corpus of law that makes the use of comparative material helpful to many judicial decisions.

A prime example of this inter-jurisdictional comparison is the penal code that was exported by the British colonial administrators to most parts of their Empire. Whereas the advocacy for codification of the criminal law, advanced by Jeremy Bentham and John Stuart Mill, did not bear fruit in England, it proved most successful in the Empire. There were four models on offer, all with common themes: Thomas Macaulay’s code of 1837 - the Penal
Code for India; James Fitzjames Stephen’s adaptation of 1870; Robert Wright’s Jamaica Code of 1877; and Samuel Griffith’s Queensland Criminal Code of 1899.

The similarities of the underlying concepts appearing in each of these codes was not surprising, given that each was an endeavour to express in the form of a statutory code, the criminal law of England which had developed over 6 centuries and which comprised an unruly mixture of common law, ecclesiastical law, early statutory law with some reform of the laws of evidence and procedure.

Each of the foregoing criminal codes has proved highly influential in different jurisdictions of the contemporary Commonwealth. Possibly the most successful has been the Macaulay code, drafted by Thomas Babington Macaulay in 1837 and enacted for the Indian territories of the Crown in 1860.

In providing these codes for colonial peoples, the British administrators had neither the time, nor the resources, nor the inclination to adapt them for local conditions, pre-existing law, culture and traditions. They simply imposed the criminal law throughout their Empire as one of the key provisions which every government had to secure: the public law of crime and the ordering of the conduct of those present in their jurisdiction. It was in this way that the offence of sodomy came to apply throughout the British Empire.

It was not originally a crime in England. But it came to be adopted in early days through ecclesiastical law, on the basis of understandings of the Bible. It was then enacted by statute of Henry VIII, arguably to assist in his endeavour to take over the property of the Roman Catholic Church when the monasteries were closed in retaliation against the Pope’s refusal to recognise the King’s divorce from Queen Catherine.

An equivalent provision in the French criminal law, dating from before the Revolution of 1789, was repealed in 1793. Thus, the offence was never part of the modern penal law of France. It did not appear in the French Penal Code of 1810. It was not exported to the French colonies nor to the countries of Europe where the French Penal Code was taken up by Napoleon. Thus, the offence was never part of the bequest of the European colonies from France, Belgium, The Netherlands, Scandinavia, Germany, Austria or Russia. It was not adopted in the laws of China or Japan. Because it was not part of the Netherlands law. It did not become a criminal offence, it was not imposed in what is now the largest Islamic nation in the world, Indonesia. It is substantially an offence confined to former British colonies and to a number of Arab and Islamic jurisdictions (see M.D. Kirby ‘The Sodomy Offence: England’s Least Lovely Criminal Law Export?’ [2011] Journal of Commonwealth Criminal Law 22).

Arguably, the offence of sodomy involves an excessive intrusion of the criminal law into private, adult, ‘self-regarding’ conduct which is not normally the subject of criminal sanctions. In the contemporary world, experts have also repeatedly concluded that such crimes seriously impede the outreach of measures designed to contain the HIV/AIDS epidemic. On this ground the Eminent Persons Group of the Commonwealth of Nations (of which I was a member), chaired by Tun Abdullah Badawi, former Prime Minister of Malaysia, unanimously recommended that steps be initiated to procure repeal of such laws. If anything, they are matters for private morality, not the public criminal law (see Commonwealth of Nations, Eminent Persons Group, Report, A Commonwealth of the People: Time for Urgent Reform (Commonwealth Secretariat, London, 2011), CHOGM, Perth, October 2011, 98-102).

In India, in July 2009, the High Court of Delhi unanimously upheld a challenge to the constitutional validity of the sodomy provisions in s.377 of the Indian Penal Code 1860 (India) in Naz Foundation v. Delhi and Ors ([2009] 4 LRC 838). In that case, Chief Justice A.P. Shah and Justice Muralidhar measured the provision of the Indian Penal Code and found that it was inconsistent with at least two important provisions of the Indian Constitution of 1950, namely article 14 providing for the right to equality of citizens and articles 19 and 21, which have been interpreted to provide a right to privacy and to live with dignity.

The Government of India accepted the decision of the Delhi High Court and did not appeal against the order made in Naz. In particular, the references by the judges of the Delhi Court to the impediment provided by the law to
successful strategies to combat the spread of HIV/AIDS had a broad resonance in India. India, inter alia, faces a significant challenge from the spread of HIV/AIDS and great cost and grave personal and economic consequences from the ongoing infection of its inhabitants with HIV.

Although the Government did not appeal against the decision, a number of religious groups did so. A hearing of their appeal was concluded before the Supreme Court of India in recent months. The decision of that court is awaited.

The opinion of the Delhi High Court has been published in the Law Reports of the Commonwealth. It can be viewed there and on the internet and considered by judges and lawyers in the many countries where similar or identical penal provisions were adopted in colonial times.

The fact that a court in India has held criminal offences addressed to homosexual men are incompatible with the local national constitution does not, of course, mean that it is necessarily incompatible with other constitutional requirements. Nonetheless, the similarities between the criminal laws derived from colonial times and human rights provisions in national constitutions adopted more recently, mean that the Indian decision will be read and considered for its local relevance. At least this will occur where a challenge is brought to the constitutional validity of provisions such as s.377, however expressed in the various criminal codes derived from colonial days.

In reaching its decision, the Delhi High Court drew substantially upon decisions of the constitutional courts of other common law countries which had earlier faced similar challenges and like legal questions. These courts included the decisions of the Supreme Court of the United States in Bowers v. Hardwick (478 US 186 (1986) (USSC)) reversed in Lawrence v. Texas (539 US 558 (2009) (USSC)); the decision of the Supreme Court of Canada in Vriend v. Alberta ([1998] 3 LRC 483); of the South African Constitutional Court in National Coalition v. Minister of Justice ([1998] 3 LRC 648; 1999 (1) SA6 (SACC)); the decisions of the European Court of Human Rights in Dudgeon v. United Kingdom ([1982] 4 EHHR 149); Norris v. Ireland ([1991] 13 EHRR 186); and Modinos v. Cyprus ([1994] 16 EHRR 485); and of the UN Human Rights Committee in Toonen v. Australia (UNHRC DOC. CCPR/C/50/D/488 (1992)). Many other decisions on like questions were examined, although the final conclusions were based squarely on Indian local jurisprudence. The Indian judges concluded that to criminalise a group of persons for aspects of their being that was private, adult and consensual, was similar to attempts during colonial times to oppress particular groups in the Indian community. Against such attempts, the Constitution of India had set its face:

If there is one constitutional tenet that can be said to be an underlying theme of the Indian Constitution, it is that of ‘inclusiveness’. This court believes that Indian Constitution reflects this value deeply engrained in Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognising a role in society for everyone. Those perceived by the majority as ‘deviants’ or ‘different’ are not on that score excluded or ostracised.

Where society can display inclusiveness and understanding, such persons can be assured of a life of dignity and non-discrimination. This was the spirit...of which Nehru spoke so passionately. In our view, Indian Constitutional law does not permit the statutory criminal law to be held captive by the popular misconceptions of who the [sexual minorities] are. It cannot be forgotten that discrimination is the antithesis of equality and that it is the recognition of equality which will foster the dignity of every individual. (See [2009] 4 LRC 895).

I realise, of course, that cultural and religious norms are different in Nigeria from India, and again, from Canada, New Zealand and even South Africa. Just the same, the notions expressed in the Indian decision are deserving of attention and careful thought for their application in other parts of Africa and in the world. This is the way the law is in the 21st Century. We can learn from each other, including in the matters of constitutional law, the purpose of law, the limits of law and the
basic principles of human rights and human dignity.

Conclusion
A person’s race, ethnicity and skin colour is something indelible in them. It is not chosen. It cannot easily or successfully or at all be changed. Similarly, a person’s sexual orientation. I know this from my own experience. To endeavour to change a person’s sexuality is as impossible as to try and change their race. And it should not be attempted. This is what is unnatural. And disrespecting a portion of humanity on the basis of their gender or sexuality is no better than disrespecting people because of their race. In Australia, we have belatedly come to recognise this. And it has been given the strongest affirmation by the nation’s highest court (see Mabo v. Queensland [No.2] (1992) 175 CLR 1 at 42 per Brennan J. (Mason CJ and McHugh J. concurring); (Aboriginal rights); Appellant s395/2002 v. Minister for Immigration and Multicultural Affairs (2003) 216 CLR 473 (homosexuals)).

Judges, as civilised leaders of thought and wisdom in their societies, must, so far as the law permits, be voices for our shared humanity. This is the end to which comparative constitutionalism and the force of international human rights law direct our species. A realisation that we are one, together, on a small planet, circling a minor star, in a tiny galaxy, surrounded by billions of stars and millions of galaxies. In that context it behoves judges and lawyers to be voices for justice for all, with hatred for none. This should be possible.

Though tribe and tongue may differ,
In brotherhood we stand!
Abstract: This is an abridged version of the address delivered by the Chief at the Opening of the Court Commencing the 2012 Legal Year of the High Court of Kiribati. The Chief Justice underscores that in order for the Judiciary to perform its functions and responsibilities under the Constitution, it must be adequately resourced. He notes that the record shows that the number of cases disposed of, compared to the number of cases filed, were very low. This applies both in the High Court and the Magistrates’ Courts of Kiribati. This demonstrates that something is not altogether right in the way cases are managed after they were filed. In this respect, he criticises the “adjournment culture,” which continue to linger on to the great disadvantages of litigants/parties. The Chief Justice, moreover, sets out the vision of the Judiciary in Kiribati.

Keywords: independence of the Judiciary – adequate resources – case management – “adjournment culture” – need for expansion of law courts

This is an abridged version of the address delivered by the Honourable Chief Justice Sir (Gilbert) John Baptist Muria Kt at the Opening of the Court Commencing the 2012 Legal Year of the High Court of Kiribati. The annual legal opening of the Court is an occasion at which the Chief Justice informs the nation about the health, progress and needs of the Judiciary, bearing in mind that it is one of the three arms of the Government.

The need for adequate resources
Like the other two branches of the Government, the Judiciary must also perform its functions and responsibilities conferred on it by the Constitution. In order for the Judiciary to perform such functions and responsibilities, it must be adequately resourced. Traditionally, the Judiciary never asks for too much beyond its needs but always requests to be adequately supported financially and with human resources.

Presently the Judiciary has been able to meet many of its needs and programme with financial resources at its disposal. The Judiciary is most grateful. There are major areas in the development of the Judiciary that still require attention and which I will mention later in this address.

I take this opportunity, as a matter of principle, both traditionally and constitutionally to echo the call for the need for the Judiciary to be adequately resourced. An adequately resourced Judiciary enhances, secures and strengthens the independence of the Judiciary as agreed to and adopted by all Heads of Government of Commonwealth countries in Abuja, Nigeria, in 2003.

Number of Cases before the Courts
(i) High Court

The courts continue to be busy as usual. The number of cases filed in the High Court Registry in 2011 were 421. These comprise of criminal, civil (including criminal and civil appeals from the Magistrates Courts), land appeals and divorce appeals and reviews.

There were 133 cases disposed of in 2011, of which 69 or 51% of them were in respect of cases filed between 2008 – 2010, while 64 (49%) were in respect of cases filed in 2011.

(ii) Kiribati Court of Appeal

In 2011 there were 25 appeal cases dealt with by the Kiribati Court of Appeal. All the 25 had been disposed of. Other appeals still outstanding will hopefully be dealt with at the next sitting of the Court which we hope it should be in April this year.

(iii) Magistrates Courts

The Magistrates’ Courts are the front line in the justice system in Kiribati. There are 24
Magistrates’ Courts in Kiribati. All are manned by lay Magistrates. Presently, we have more than 140 Magistrates throughout Kiribati.

The Single Magistrates, who are also lay Magistrates, sit singularly. Presently we have 9 Single Magistrates in Kiribati with the appointment of Magistrate Vincent Tong to the Single Magistrates Bench in late 2011.

Efforts are under consideration to professionalise the Magistracy, beginning with the Single Magistrates. One (1) Single Magistrate is nearing completing his LLB Programme. Two (2) Single Magistrates had completed their LLB Programmes with one of them completed her PDLP training. We will work on a plan that in time to come all our Single Magistrates will be legally qualified. It has been done in other jurisdictions and Kiribati can also do it.

In the course of 2011 there were 3,187 cases lodged in the Magistrates’ Courts. These comprise of criminal 1182, civil 583, land 1254, boundary determination 132, and divorce 36. Of the 3187 cases, 700 had been disposed of.

Change in approach to litigation
The record shows that the number of cases disposed of, compared to the number of cases filed, were very low. This applies both in the High Court and the Magistrates’ Courts. This demonstrates that something is not altogether right in the way cases are managed after they were filed. The problem must be addressed.

There may be other reasons for the low disposal rate of cases. Two reasons appeared to stand out for such a low disposal rate. One, there is an apparent culture of adjournment. Because of such an “adjournment culture” cases continue to linger on, and sadly to the great disadvantages of litigants/parties.

A catalyst to the “adjournment culture” in the practice of having Mention Lists month after month. This is most frustrating to all concerned, especially the parties in the cases. If anything, the Mention Hearings, are an abuse of court’s time and a great inconvenience to parties to litigation. The practice will cease and adherence to the Rules of practice must now be done.

Secondly, the relax approach to litigation in matters put before the Court contributed to a large extent in the high number of cases not disposed of. Both Legal Practitioners and the Courts have the obligation to ensure that once a case is filed in Court, the rules of Court and directions must be followed so that the case is disposed of within a given period. We hope to start this new legal year with a different culture in litigation before the Court – a culture of effective management of cases and speedy justice.

Vision and plans for the Judiciary
The vision of the Judiciary in Kiribati, I suggest, should be one of attaining a strong, independent and effective Judiciary in Kiribati. Its mission is to achieve that vision. This is a tall task and as the slang of the Western cowboys goes ‘it ain’t gonna be easy’ nor is it going to be achieved overnight. But a start must be made and the first step is always very important.

In order to achieve the aims set out, the Judiciary has developed some draft strategies concerning the steps to take. Among other things, these strategies and steps include Consultation and Identification of Priorities. Discussions and sharing of ideas have been done formally and informally with stakeholders and will be an ongoing process. In the meantime the following targeted priorities have been identified. These include:

1. Training for judicial officers with emphasis on the Magistrates.
2. Additional appointments to the High Court Bench.
3. Modernising the Rules of Court.
4. Modernising the Court’s IT.
5. Terms and Conditions of services for judicial officers. Experience from other similar jurisdictions shows that while we encourage local legally qualified lawyers to come to the Bench, the terms and conditions of service for judges and other judicial officers must be attractive enough to offer them incentives to serve in the Judiciary.
6. Scheme of Service for Court Staff.
7. Magistrates Courts to have its own administration headed by a Chief Magistrate.

These are bold aims but not impossible to achieve. What is needed is consultation and
coordinated efforts by all stakeholders with the Government system. We in the Judiciary cannot do it alone. The administrative machinery of the executive Government, the legislative machinery of the Legislative, the backing of the legal profession, and the commitment of the Judiciary all play important roles in this development stride. Consultation and discussions with outside bodies have also been undertaken. But we have to take steps to show that we are genuine in our efforts for change, then others can feel the need to help us, and hopefully be convinced to lend a helping hand.

One of the ultimate aims of the emphasis on training for Magistrates is to eventually have a professional Magistracy. In many jurisdictions professionally qualified and experienced Magistrates is a stepping-stone to the High Court Bench.

**Need for expansion**

Back in the days when there was only one judge (Chief Justice) and probably only one or two lawyers, the facilities of the Judiciary were adequate then. The same cannot be said today. Today Kiribati has moved on a long way from the 1970’s and 1980’s.

The number of lawyers had increased. We now have more than 40 admitted I-Kiribati lawyers in Kiribati, without counting the foreign lawyers admitted to practice in Kiribati. We need more lawyers in Kiribati, just as we need more doctors, to provide legal services to the people, both in public offices and in private practice. There is no such thing as an oversupply of lawyers.

The increase of legal practitioners obviously means that there is going to be an increase in the demand for legal work and services in the country. Thus the volume of cases and litigation had increased considerably over the years. The number of Court users have also increased considerably.

The increase in caseloads is not restricted to South Tarawa only. There is a considerable increase of cases from the other outer islands. Sadly, many of the cases from the outer islands have not been given proper or any attention at all. With only one judge and a handful of legal practitioners, it is impossible to adequately cover all the islands in Kiribati, scattered over millions of square kilometres.

All these necessitate the increase in the number of judges in order to adequately serve the people of this country in the Judiciary. More professionally qualified lawyers are needed to serve the need of the increasing population of Kiribati.

There is a pressing need for more court rooms for the Magistrates’ Courts, a separate office to house the High Court Registry, space for storage of goods seized by the sheriff, adequate space for a proper establishment of the High Court Law Library, and additional office space for an additional judge of the High Court. At least three more additional court rooms are needed for the Magistrates Courts in South Tarawa – one in Bikenibeu and two in Betio.

The High Court building itself was last renovated and done up, I am told, in 1986 (25 years ago). As you can see for yourselves, the building is in need of renovation and expansion.

Many of the suggestions, require additional space/land to the existing Court premises. I urge all those, who are in positions to assist, in particular, the Government, to lend their attention to the Court’s need for expansion and development.
On 3 November 2007 the then President of Pakistan, who was also the Chief of Army Staff, issued three decrees, a Proclamation of Emergency, the Provisional Constitution Order 2007 and the Oath of Office (Judges) Order 2007. The Proclamation of Emergency placed the Constitution of Pakistan 1973 in abeyance with immediate effect. Under the Provisional Constitution Order the courts were to continue to function and exercise their powers and jurisdiction subject to the Oath of Office Order, under which all existing superior court judges ceased to hold office with immediate effect but would continue to hold judicial office if they swore an oath of office that they would abide by the Proclamation of Emergency and the Provisional Constitution Order, but would cease to hold office with immediate effect if they failed to take the new oath. On the same day, 3 November, a seven member Bench of the Supreme Court (in Wajihuddin Ahmed (Justice Rtd) v Chief Election Comr PLD 2008 SC 25) made an order: (i) restraining the government of Pakistan, ie the President and Prime Minister, from undertaking any action which was contrary to the independence of the judiciary, (ii) banning any judge of the Supreme Court or High Courts, including Chief Justices, from taking an oath under the Provisional Constitution Order or any other extra-constitutional step, (iii) restraining the Chief of Army Staff or other military personnel from acting on the Provisional Constitution Order or from administering a fresh oath to judges or undertaking any action which was contrary to the independence of the judiciary and (iv) declaring that any appointment of a Chief Justice and judges of the Supreme Court or the High Courts of the four Provinces under the new regime was unlawful and without jurisdiction. At the time when the emergency was proclaimed, there were 17 permanent judges of the Supreme Court and one ad hoc judge. Five of those judges chose to take the oath under the Oath of Office Order and one of them was appointed Chief Justice in place of the incumbent Chief Justice. The other 13 judges refused to take the oath. Likewise, some judges in the High Courts chose to take the oath and others did not. Those who refused or failed to take the new oath were physically stopped from performing their judicial functions and some, including the incumbent Chief Justice, were also imprisoned. On 23 November 2007 the validity of the Proclamation of Emergency, the Provisional Constitution Order and the Oath of Office Order were affirmed by a newly constituted Supreme Court (in Khan v Musharraf [2008] 4 LRC 157) in proceedings in which applications for a declaration that the three decrees were invalid and orders that the judges who had resigned be restored to office were refused. On 15 December 2007 the Constitution was restored and on 18 February 2008 fresh elections were held, a new Parliament came into existence and the former Chief Justice was restored to office. On 20 April 2010 the 18th Constitutional Amendment, which substituted a new art 270AA of the Constitution re-establishing parliamentary democracy to Pakistan, came into force and the amendments to the Constitution made in 2007 by the Chief of Army Staff were repealed and invalidated. In proceedings brought to determine the constitutional validity or otherwise of the dismissal of judges and appointment of new judges after the three decrees, the reconstituted Supreme Court (in Sindh High Court Bar Association v Federation of Pakistan [2010] 2 LRC 319) held: (i) that the Proclamation of Emergency, the Provisional Constitution Order and the
Oath of Office Order were made unconstitutionally and without any valid legal basis, (ii) that the judges who were declared to have ceased to hold office for refusal or failure to take oath under the Oath of Office Order were deemed not to have ceased to be judges, (iii) that the replacement Chief Justice and all judicial appointments made in consultation with him were unconstitutional, void ab initio and of no legal effect and (iv) that those judges who took oath under the Oath of Office Order had violated the order made by the court on 3 November 2007 (in Wajihuddin Ahmed) and had rendered themselves liable for consequences under the Constitution for their disobedience of the order, including dismissal for misconduct by the President under art 209 of the Constitution on the recommendation of the Supreme Judicial Council made after inquiry. Subsequently notices were issued to 72 judges of the Supreme Court and High Courts requesting them to explain why proceedings should not be initiated against them for contempt of court under art 204, under which a court had power to punish any person who abused, interfered with or obstructed the process of the court in any way or disobeyed any order of the court or scandalised the court or otherwise did anything which tended to bring the court or a judge into hatred, ridicule or contempt or did any other thing which, by law, constituted contempt of the court. Many of the affected judges tendered unconditional apologies and/or opted for early retirement, and the notices issued to them were discharged. However, contempt proceedings were instituted against six judges of the Supreme Court and the High Courts who failed or refused to apologise and were heard by a four member Bench of the Supreme Court. The issues arose (i) whether it was constitutionally permissible for the Supreme Court to proceed under art 204 against judges of the Supreme Court and the High Courts for contempt of court, (ii) if so, whether as a matter of propriety the Supreme Court should proceed against the appellants or, having regard to their status as superior court judges, should discontinue the proceedings and (iii) if the Constitution did not place restrictions on contempt proceedings against judges and if questions of propriety did not prevent the court from proceeding against the appellants under art 204, whether there was sufficient material before the court to charge the appellants with contempt of the Supreme Court for disobedience of the order of 3 November 2007. The court held that the Constitution and the law did not prohibit proceedings being taken against the appellants under art 204 of the Constitution despite their status as judges of the superior courts, and that they were not immune from proceedings under art 204. The appellants appealed by an intra-court appeal to a six-member Bench of the Supreme Court, contending (i) that they were still judges and as such proceedings could only be taken against them under the procedure for removal set out in art 209, which required the Supreme Judicial Council to conduct an inquiry into their conduct before making a recommendation to the President, and could not be taken by proceedings under art 204 for violation of the order of 3 November 2007, (ii) that the court should exercise its discretion to condone or excuse the conduct of the appellants because they had taken the new oath under a misunderstanding for which they should not be made culpable and (iii) that the four member Bench directing that contempt proceedings be taken against them had not given detailed reasons for their decision, but only made a short order.

**HELD: Appeal dismissed.**

(i) The Constitution, being an accord among the people, was not an ordinary legislative instrument but the supreme law of the land and an instrument for running the affairs of the country, which governed the rights and obligations of citizens. Self-evidently, the Constitution did not allow a military person to diverge into politics and take over power contrary to his commitment to protect and preserve the Constitution. It was abundantly clear that the Chief of Army Staff had no authority to hold the Constitution in abeyance and, in the absence of any validation, indemnification or legitimisation of his unconstitutional actions by Parliament, everything done by him during the period of the purported Proclamation of Emergency from 3 November 2007 to 15 December 2007 was unconstitutional and illegal. The superior courts had no jurisdiction or authority to legitimise or validate any action based on extra-constitutional steps and neither the Supreme Court nor the High Courts had lawful jurisdiction to validate, condone or legitimise the unconstitutional acts, actions, omissions and commissions of any functionary.
who acted contrary to the Constitution. Members of the judiciary were not ordinary persons and were supposed to know the consequences of deviations from the Constitution and that a constitutional deviation by a dictator or usurper could not be rectified or legitimised by a judgment of the court, but only by Parliament making an amendment to the Constitution.

(ii) The appellants, instead of showing allegiance to Pakistan and to preserving and protecting the Constitution in terms of their oath of office, had opted to be obedient to rule by one man, essentially without any constitutional authority. There was a marked distinction between the judicial oath under the Constitution and the oath under the Provisional Constitution Order and Judges Oath Order; in the former case the oath was to perform functions in accordance with the Constitution, whereas in the latter case the oath was to abide by orders made from time to time by the person issuing the Provisional Constitution Order and Judges Oath Order. If the practice of obedience to one-man rule was followed or permitted there would be no end to constitutional deviations and instead of the rule of law there would be the rule of martial law. Those persons holding the highest posts in the superior judiciary who had taken the oath of office in full knowledge of the Constitution and laws could have refused to have taken the new oath under the Judges Oath Order instead of opting to do so and becoming active parties in an unauthorised constitutional deviation.

(iii) Those judges including the appellants who made oath under the Provisional Constitution Order on or after 3 November 2007 did so on the basis that they accepted that they ceased to hold office with immediate effect on and from 3 November 2007. Moreover, when it was held in 2010 that all appointments of judges of the Supreme Court and the High Courts made during the period of the Proclamation of Emergency and the Provisional Constitution Order were unconstitutional, void ab initio and of no legal effect they ceased to hold office forthwith and it was clear from art 270AA of the Constitution, as substituted by the 18th Amendment, that the unconstitutional actions of 3 November 2007, including the appointments of the appellants, were not subsequently validated, affirmed or condoned by the Parliament. In the absence of protection provided by Parliament allowing or condoning their deviation from their constitutional appointment and oath, the appellants were not judges of the Supreme Court and High Courts under the Constitution as from the date of passing of the 18th Constitutional Amendment on 20 April 2010, and, applying the maxim that no man could take advantage of his own wrong, they could not take advantage of their own wrongs or manipulations to claim that they were still judges. In the absence of any judicial immunity available to them from proceedings under art 204 of the Constitution, the procedure under art 209 for judicial removal did not apply and contempt proceedings could be initiated against them for disobedience of the order of the court of 3 November 2007.

(iv) To accept the plea that the actions of the appellants be condoned would be tantamount to reverting back to the doctrine of necessity, which had been discredited by previous authority. Moreover, if the actions of the appellants were to be condoned, other persons who were responsible directly or indirectly for violation of the Constitution would also be entitled to have their actions condoned.

(v) In the absence of the detailed reasons, a short order which contained specific directions was to be considered as an order of the court and acted upon without waiting for detailed reasons, but in any event, in contempt proceedings detailed reasons were not required. A notice of contempt in terms of s 3 of the Contempt of Court Ordinance 2003 was always based on a prima facie opinion of the court, which only had to satisfy itself that there existed an arguable case for the alleged contemnor to meet. The court was not required to consider all the facts in depth, since a predetermination of the facts and circumstances would amount to prejudging the issue and would prevent there being a fair trial without any prejudice.

(vi) The appellants ceased to hold office of judges of the superior courts with effect from the date of passing of the 18th Constitutional Amendment on 20 April 2010 but were entitled to service and pension benefits up to that date, unless ultimately they were found to be guilty for contempt of court.
The first to fourth petitioners were the majority shareholders (the shareholders) in the fifth petitioner, a company registered in the Seychelles (the company). The government of the Seychelles was a minority shareholder in the fifth petitioner. The government applied to the Supreme Court for an order winding up the fifth petitioner, which was resisted by the shareholders. The first respondent was the Acting Chief Justice of Seychelles and the judge responsible for the winding up proceedings. The respondent granted the order and the shareholders appealed to the Seychelles Court of Appeal. The shareholders applied for interim relief pending appeal but the respondent, who also oversaw the interim proceedings, refused to grant their application. The shareholders applied to the Constitutional Court under art 46(1) of the Constitution of the Republic of Seychelles 1993, which stated ‘[a] person who claims that a provision of this Charter had been … contravened … may, subject to this article, apply to the Constitutional Court for redress’, alleging that the respondent had been partial to the government in a number of respects during the winding-up proceedings and the interim proceedings. They alleged that their right to a fair trial, as guaranteed by art 19(7) of the Constitution, had been contravened. The respondent argued that he was immune from suit, under art 119(3) of the Constitution of the Republic of Seychelles 1993, which stated ‘[a] person who claims that a provision of this Charter had been … contravened … may, subject to this article, apply to the Constitutional Court for redress’, alleging that the respondent had been partial to the government in a number of respects during the winding-up proceedings and the interim proceedings. They alleged that their right to a fair trial, as guaranteed by art 19(7) of the Constitution, had been contravened. The respondent argued that he was immune from suit, under art 119(3) of the Constitution, which stated that ‘[s]ubject to this Constitution, Justice of Appeal, Judges and Master of the Supreme Court shall not be liable to any proceedings or suit for anything done or omitted to be done by them in performance of their functions’. The petitioners argued, inter alia, that the right to a fair hearing under art 19 was absolute, could not be subject to any derogation and was more precious and important than a judge’s right to immunity from suit, particularly because art 119 began with the words ‘[s]ubject to this Constitution’, which indicated that it was not an absolute right, so that art 119 could not restrict the right of a petitioner under art 46. Further, the shareholders argued that existing case law on judicial immunity should not bind the Constitutional Court because it was decided by a court of equal jurisdiction.

HELD: Application dismissed.

The immunity from suit conferred on judges by art 119 was not qualified by the fundamental rights provisions of the Constitution. The qualifying phrase ‘subject to this Constitution’ which opened art 119(3) indicated that the article contemplated only limitations derived from the Constitution, implying that judges would not be liable to any proceedings except those which the Constitution itself had provided for and sanctioned against judges. Article 134 was the only article taking away such judicial immunity and sanctioning inquiry proceedings against erring judges before a special tribunal. Articles 46 and 19 did not expressly provide for any such exception. Moreover, art 46 had no clause which allowed it to supersede art 119(3) to deprive judges of their immunity from suit and, further, had nothing to do with art 119 at all, both articles being of different genre and having nothing in common to establish any nexus. Article 46 could not, therefore, form part of or provide for any constitutional exception to the rule granting judges immunity from suit. Accordingly, in the instant case, the respondent was immune from the instant proceedings and the application would be dismissed.

Per curiam. (i) The right to immunity from suit conferred on judges was a qualified right, granted on an implied condition that a judge should perform his judicial functions without self-interest, fear or favour and in accordance with law and the Constitution. If they behaved in breach of that condition, they would lose that immunity and may be impeached for misbehaviour.
(ii) The rights enshrined in the Charter ranging from arts 15 to 39 are ‘Fundamental Human Rights’, whereas the rights contained in the other provisions of the Constitution are ‘Constitutional Rights’. Therefore the right granted by art 46 does not fall in the category of ‘Fundamental Human Rights’. The right to the remedy is simply a ‘Constitutional Right’. Within the category of ‘Constitutional Rights’ there cannot be a superior and an inferior right in the eye of the law.

(iii) On principle while the Constitutional Court should regard itself as normally bound by its previous decisions, it is at liberty not to do so if it is convinced that the previous decision was wrong or given per incuriam.

DOROTHY WINTON TRAVEL BURSARIES FUND

WE NEED YOUR DONATIONS!

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

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

The Fund was used to assist participation in the CMJA’s 14th, 15th and 16th Triennial Conference by magistrates who would otherwise not have the opportunity to benefit from the training opportunity offered under our educational programme at the Triennial Conferences of the Association.

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BOOK REVIEW

The African Canadian Legal Odyssey: Historical Essays

Canadian and Commonwealth judges are not trained to be arbiters of the law and fact finders when they study Law, unlike our counterparts in so many countries, and thus, we begin our careers on the Bench with a keen appreciation that judging our peers is a complex and controversial enterprise fraught with difficulty and which requires total dedication and our utmost industry. In applying the Law, we must call upon our experience, including experience of life, training and a great deal of psychology, leaving aside other social sciences. Doubtless, we must also be gravely concerned that we do not allow our judgment and our common sense to be swayed by bias, prejudice or other such human traits, especially unconscious ones.

In this vein, the recent publication of this superb book will be of considerable assistance to those judges desirous of not repeating the mistakes of others, thankfully occurring mostly in the distant past, especially as it touches upon interpreting the common law and statutory provisions in the light of distorted views held by some of our fellow citizens, notably discriminatory views. Stated otherwise, racism is blight and we must guard against allowing any hint of this blight to influence ourselves and our work, and a unique opportunity to study how the judgments of others have been impaired in this fashion is not to be avoided.

From the first chapter, a tour de force review of the question of the advancement of Blacks within Canadian society, notwithstanding the existence of former formal degrees of inequality and subsequent informal obstacles to equality no less effective, to the last chapter dedicated to analysing the contemporary situation of a trial involving at least one Black participant, the contributors offer a thorough, nuanced and highly readable account of the development (and, at times, arrest) of justice before the Courts. We read in Part One of the travails of those Black pioneers who sought admission to the Bar whilst Part Two is dedicated to explaining how formal legal equality might nevertheless not give rise to equal justice, chiefly by reason of the lack of intellectual rigour in the case of certain judges, and due to class, race or status based views of the world that we now find remarkable in certain other instances. Time and again, the authors present an unanswerable réquisitoire condemning the views and decisions of so many judges in the past when called upon to evaluate critically the actions of individuals towards Black Canadians. I note in particular the able analysis of the legion of cases addressing the refusal of services to individuals by reason of their skin colour. In this context, an interesting account of one such case of discrimination which took place in England and involving the noted Black cricketer Mr. Leary Constantine, may be found in Hilary Heilbron Q.C.’s biography entitled Rose Heilbron The Story of England’s First Woman Queen’s Counsel and Judge (Hart Publishing: Oxford, 2012). Indeed, the subtle elements which undergird so much of the analysis serve to make plain to us how true equality before the Courts requires judges to question, on occasion or more often if required, the very perspective which typically is adopted in order to ensure that the merits of any proposition is not evaluated by means of a Euro-centric or other biased viewpoint.

In addition, The African Canadian Legal Odyssey: Historical Perspectives, goes on to discuss with no less ability and interest the question of slavery and its consequences, including current instances of discriminatory practices which may influence the potential jury pool, leaving aside other themes.

In the final analysis, judges are vitally interested in ensuring neutral and even-handed justice within our Parliamentary forms of Government, that is to say, being ever mindful of the division of Powers and legitimate interest of the Government to legislate, a theme explored in so many texts, notably, by Justice Aharon Barak’s The Judge in a Democracy
(Princeton University Press, 2006). In addition, the question of the training of judges presents certain controversial elements, as discussed thoroughly in Chapter 6, and elsewhere, such as in Penny Darbyshire, Sitting in Judgment: The Working Lives of Judges (Hart Publishing: Oxford, 2011) and the various references to the work of the Judicial Studies Board and of the education of judges in general in J. Temkin and B. Krahé, Sexual Assault and the Justice Gap: A Question of Attitude (Hart Publishing: Oxford, 2008).

It is for this reason that so valuable a text as The African Canadian Legal Odyssey: Historical Perspectives, one which offers a direct basis for understanding and overcoming this type of challenge, ought not to be overlooked.

Gilles Renaud
Judge, Ontario Court of Justice

WIDOWS RIGHTS INTERNATIONAL

Widows Rights International (WRI) is seeking your help. For over 15 years WRI has been trying to fight against the abusive practices and inhumane treatment of widows across the globe. WRI has received a small grant to enhance its networks of activist widows groups, lawyers and judicial officers working on cases related to harmful cultural mourning rites or the violence and inhumane treatment suffered by widows. WRI is setting up a forum on its website soon to share good practice in making the world a fairer and better place for widows.

If you are involved in promoting widows rights, then WRI would like to hear from you

WRI would also like to hear from you if you have recently heard cases in which widows were involved (especially in relation to abuse of widows, inhumane treatment, land or property rights). Please send any information to: administrator@widowsrights.org
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