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CIJL Yearbook

January 2000

Universal Aspects of Judicial Independence

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Centre for the Independence of Judges and Lawyers
Geneva, Switzerland

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- organizes support for judges and lawyers who are being harassed or persecuted.

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Table of Contents

Editorial	7
<i>Robert D. Nicholson</i>	
Judicial Independence -	
An Enduring, Widespread Social Value	13
<i>A.R.B. Amerasinghe</i>	
Capturing and Maintaining Public Confidence in Courts	43
<i>Robert D. Nicholson</i>	
Modes of Appointment and Training of Judges –	
A Common Law Perspective	81
<i>Michael D. Kirby</i>	
From Diplock Courts to Jury Courts?	99
<i>Peter Charleton and Paul Anthony McDermott</i>	
Prosecuting Authority in the New South Africa	137
<i>Dirk van Zyl Smit and Esther Steyn</i>	
The Role of the Zimbabwe Judiciary since Independence	157
<i>A.R. Gubbay</i>	
Starting Down the Long Trail of Judicial Independence:	
The Experience in Russia, the Newly Independent States,	
and Central and Eastern Europe	173
<i>James G. Apple</i>	
Judicial Independence in the South Pacific	191
<i>Thomas Eichelbaum</i>	
 <i>Texts</i>	
Beirut Declaration	207
Recommendations of the First Arab Conference on Justice, held in Beirut, Lebanon, 14 to 16 June 1999	
Latimer House Principles and Guidelines for the Commonwealth	215
Colloquium on “Parliamentary Supremacy, Judicial Independence towards a Commonwealth Model”, held at Latimer House, United Kingdom, 15 to 19 June 1998	

Editorial

Looking through former Yearbooks of the Centre for the Independence of Judges and Lawyers, the universal and enduring character of the themes relating to that independence is readily apparent. This being the 21st year of the Centre's work, it is appropriate for this Yearbook to remind us that the universality of the issues dealt with by the Centre is such that its work may never be completed.

One change concerning these themes in recent years, however, is that they are more than ever being discussed, debated and sought after. With the demise of many totalitarian regimes, the spread of democracy and the globalization of the economy and the law, the social and political value of independence in judges and lawyers has received enhanced public attention.

There are ironies associated with this. In countries seeking to develop along democratic lines, there may be occasion for constant struggles to obtain respect for the necessary conditions of independence in which law can truly rule. Yet in developed countries that owe so many of their achievements to the stability of the rule of law, the same conditions of independence constantly lack full appreciation and may even be under challenge and attack.

The universal lesson is that where people wish to be ruled by the laws they have made, they must be both aware of and stand up for the conditions of independence which enable decisions to be made truly in accordance with those laws. The papers in this Yearbook illustrate particular aspects of that ongoing endeavour around the world.

Public knowledge of the political value of independence is vital. It is sometimes sadly true that it is only the judges and lawyers themselves who are asserting that value. Yet the principles of

independence for which the Centre stands are not for the benefit of lawyers and judges. Rather they are a fundamental principle of political organisation providing protection to a people against the “raw” exercise of power. Public understanding of this is therefore necessary to the endurance of the political value attached to the principles.

For that reason this Yearbook contains papers which look at the operation of judicial independence from the perspective of both the wider political context in which the principles are asserted and from the viewpoint of the public.

The democratic setting of the principles has been the focus of two significant meetings during the year. The first was the First Arab Conference on Justice, held in Beirut. The second was the issue of the Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence. This was the product of work of representatives of the Commonwealth Parliamentary Association, the Commonwealth Magistrates’ and Judges’ Association, the Commonwealth Lawyers’ Association and the Commonwealth Legal Education Association. The former frankly acknowledged that “the judiciary’s capacity to be a substantial power in Arab countries and to be an active party in entrenching democratic principles and the rule of law is pending on the progress of democratic development and respect for the law, including the subjection of the main powers to it”. The preamble to the latter recalled the renewed commitment of the 1997 Commonwealth Heads of Government Meeting to the Harare Principles and the Millbrook Commonwealth Action programme which included commitment to the fundamental political values of “democracy; [and] democratic processes and institutions...”. The Yearbook draws attention to the content of these two new expressions of principle, which are reproduced in this volume as texts.

In doing so it is not the intention of the Yearbook that it should suggest the principles of judicial and professional independence are entirely the product of Western democratic political thought.

The Yearbook therefore opens with a challenging presentation by Justice Amerasinghe of Sri Lanka in which he evokes ancient sources of judicial independence in the faiths and practices acknowledged outside Western history.

The public context in which the principles operate continues as a theme of this Yearbook. In the Latimer House Guidelines it is stated that among the “accountability mechanisms” for the judiciary is public criticism. There it is asserted that “legitimate public criticism of judicial performance is a means of ensuring accountability”. Furthermore it is said “criminal law and contempt proceedings are not appropriate mechanisms for restricting legitimate criticism of the courts”.

This role of public criticism is among themes examined in the next paper by Justice Robert Nicholson of Australia under the title of “Capturing and Maintaining Public Confidence in the Courts”. It focuses on an issue that has received particular attention recently in both Australia and the United States. The foundation of the issue is that while it is essential to the capture of public confidence that courts deliver justice, that alone is no longer enough to secure the level of public confidence which the courts must maintain.

Central to the maintenance of confidence, however, remains the proper performance of the judicial function. In the Beirut Declaration, considerable attention is directed to the issue of qualification and training of judges. In the Latimer House Guidelines it is said “a culture of judicial education should be developed”. The culture, it is declared, “should include the teaching of the law, judicial skills and the social context, including ethnic and gender issues”. Those issues are examined by Justice Michael Kirby in his paper on judicial training in the context of the common law world.

The Beirut Declaration extols the view that “the public prosecution shall be considered a branch of the judiciary”. By this means it is sought to both protect the independence of the

prosecution and safeguard the courts from the loss of independence in prosecution. The Arab concern is mirrored in Northern Ireland and in South Africa. Papers by Peter Charleton SC and Paul McDermott BL and also Dirk van Zyl Smit and Esther Steyn discussed issues arising in relation to the principles of independence in the context of criminal jurisdiction in those countries. These papers, as well as Justice Michael Kirby's paper, were presented during the *Workshop of Experts on the Review of Criminal Justice in Northern Ireland*, that was held in Belfast on 8 and 9 June 1999. The Workshop was organized by the International Commission of Jurists (ICJ) and its Centre for the Independence of Judges and lawyers (CIJL), in cooperation with the Committee on the Administration of Justice (CAJ) and the Centre for International and Comparative Human Rights Law of Queen's University, Belfast, with the aim of supporting the review of criminal justice that started in the context of the Good Friday Peace Agreement.

The Beirut Declaration recognizes that democracy may progress "with difficulty". Developing countries are very aware of the link between their development and the successful establishment in the public mind of the principles of judicial independence. Two papers focus on recent experience in that respect. The first is by the Chief Justice of Zimbabwe, Justice Gubbay. The second is by James Apple formerly of the United States Federal Judicial Centre and now President of the International Judicial Academy. He has had considerable experience in implementing programmes in the newly independent countries of Eastern Europe.

There are also instances where the existence of judicial independence in one part of the world may act as an exemplar for adjacent countries. Former Chief Justice Sir Thomas Eichelbaum in his contribution addresses issues in relation to the Pacific area adjacent to New Zealand.

The result, it is hoped, is that the Yearbook will both evidence the universality of issues concerning judicial and legal indepen-

dence as well as demonstrate the liveliness of the present day debate concerning it. If discussion, articulation and espousal are good guides, the merits of the principles do not lack appreciation. The lesson of the Yearbook, however, must be that that endeavour should be an unceasing one.

Robert D Nicholson
Justice of the Federal Court of Australia
Yearbook Guest Editor
January 2000

Judicial Independence *An Enduring, Widespread Social Value*

by

A.R.B. Amerasinghe¹

Introduction

In August 1997, I delivered a paper on “Judicial Independence – Some Core Issues” at the Australian Institute of Judicial Administration Asia-Pacific Courts Conference.² In my introduction, I observed that the underlying concepts relating to judicial independence had deep and widespread roots. I was somewhat surprised by the number of questions addressed to me on that matter. It seems to have been erroneously assumed by some persons that judicial independence was a concept that had been invented and made over to their dominions, territories, colonies and dependencies by the British.³ The limited purpose of this paper is to briefly refer to some Asian sources like the *Dharmasutras*, ancient and mediaeval chronicles, rock inscriptions and literary works of India and Sri Lanka as well as some West Asian sources, like the Bible, the Qur’an and the Pahlavi Texts, which show that the concept of judicial independence has very much older roots and that they were found in many communities: I have had to link the old ideas to later, perhaps more familiar, expressions and explanations of the standards aimed at.

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- 1 Judge of the Supreme Court and Chairman of the Law Commission of Sri Lanka.
 - 2 For an edited version of the paper, see (1977) 7 *Journal of Judicial Administration*, ed. Greg J. Reinhardt, pp. 74-82.
 - 3 See A.R.B. Amerasinghe, *The Legal Heritage of Sri Lanka*, The Royal Asiatic Society of Sri Lanka, Colombo, (1999).

But this has been kept to a minimum, for I am not in this paper undertaking a discussion of the subject of judicial independence today.

“Independence and Impartiality”

Sometimes distinctions are drawn between ‘independence’ and ‘impartiality’ that are seen as distinct values, or requirements of a judicial system. ‘Independence’, it has been said⁴, connotes not merely a state of mind or attitude in the exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of the government, that rests on objective conditions or guarantees. ‘Impartiality’, it has been said, refers to a state of mind or attitude of a judge in relation to the issues and the parties in a particular case. Although they are distinguishable, the concepts are related. As Lord Bingham⁵ observed, there is: “... a very close blood-tie between them: for a judge who is impartial, deciding each case on its merits as they appear to him, is of necessity independent.” It has also been said⁶ that a lack of independence could be considered a good indication of a lack of impartiality. Eventually, in my view, it comes down to this: a judge must have been, and must be seen by the public to be, fair. John P. Mackenzie⁷ observed: “Just as the independence and impartiality of a Court seem to go together, so it is hard to separate a Court’s independence from an attack on its

4 *R. v. Valente* (No. 2) (1985) 23 CCC (3d) 193; 24 DLR (4th) 161; [1985] SCR 673, per Le Dain J.

5 The Rt. Hon. Lord Bingham of Cornhill, Lord Chief Justice of England, “Judicial Independence”, *Annual Judicial Studies Board Lecture*, 5th November, 1996, p. 5.

6 Greene, “The Doctrine of Judicial Independence Developed by the Supreme Court of Canada”, 26 *Osoode Hall L.J.* (1988) 177 at 194.

7 *The Appearance of Justice*, Charles Scribner’s Sons, New York, (1974), p. 207.

ability to be fair." A very long time ago, Narada said⁸: "Either the judicial assembly must not be entered at all, or a fair opinion delivered. That man who either stands mute or delivers an opinion contrary to justice is a sinner." A judgment decided in an improper manner was subject to review.⁹

The idea of sin may no longer be relevant, but the concept of public accountability remains. There ought to be a total approach comprising all aspects of a fair trial if "judicial independence" is to be addressed in a balanced manner so that, from the point of view of the public in general and litigants in particular, it may be regarded as adequate. However, judges may find it more comfortable, and therefore in their discussions usually tend to focus almost exclusive attention on freedom from direct or indirect government interference.

Monarchs were Expected to Rule Impartially

In India¹⁰ and in Sri Lanka, the monarch was the fountainhead of justice – *Dharmaprabavartaka*. The old chronicles of Sri Lanka always refer to a good monarch as one who reigned "righteously and impartially" – *dharmin semen*, practising the tenfold royal virtues – *dasa-raja-dharma*.¹¹ Ruling "righteously" meant that the monarch rightfully, conscientiously and impartially discharged his or her judicial functions.¹² In the advice of ministers to the

8 *The Independent*, 90 S.B.E., op. cit. note 15 below, Vol. XXXIII, p. 380.

9 Narada, S.B.E., op. cit. note 15, Vol. XXXIII, p. 235.

10 Narada, III.6, S.B.E. op.cit. note 15, Vol. XXXIII, p. 37. Cf. Manu, IX. 234, S.B.E. op. cit. note 15, Vol. XXV, p. 383, who said the King must "re-settle" the matter and fine the judge.

11 Cf. Proverbs, 16.13: "Righteous lips are the delight of kings ; and they love him that speaketh right."

12 *Saddharmaratnavaliya*, ed. D.B. Jayatilake, Lankabhinavavisurutu Press, Colombo, (1963), p. 239; M.B. Ariyapala, *Society in Mediaeval Ceylon*, Dept. of Cultural Affairs, Colombo, 1956, pp. 48, 123.

ruler of Rohana, Kakavanna Tissa (Kavan Tissa) (circa 250 – 150 B.C.), it was said that a monarch was required to rule “rightly and impartially”.¹³ Judges appointed by the monarch were expected to do likewise, for officials exercising judicial authority were regarded as monarchs.¹⁴ In the Galpota slab-inscription, King Nissankamalla (1187-1196 A.D.) stated: “The appearance of an impartial king should be welcomed as the appearance of the Buddha.”¹⁵ In Sri Lanka, where Buddhism has been the religion of the state since the rule of King Devanampiyatissa (250-210 B.C.), there could be no stronger way of stating that judicial impartiality was of paramount concern.

The Appointment and Qualifications of Judges

It is a self-evident proposition that the public can be expected to repose confidence in judges only if they have certain basic accomplishments and qualities that fit them to sit in judgment. In ancient India, during Vedic times, judicial powers were exercised primarily by the head of a village (*Gramani*) or guild groups, assisted by the elders. These judges were neither appointed nor elected but reached their positions by some sort of common acquiescence, based on the respect of the community to which they belonged. It is doubtful whether the King had any authority to meddle in ordinary disputes. His authority to interfere might have arisen if there was a question of public importance, such as a serious violation of the sacred law (*Dharma*) which he was

13 *Saḍbarmalamkaraya*, ed. B. Sraddhatissa Thera, Panadura Press, Ceylon, (B.E. 2478), p. 452.

14 *Samanthapasāḍika*, ed. Simon Hevavitharana, p. 222.

15 *Epigraphia Zeylanica*, Vol. II, ed. and tr. by D.M. De Z. Wickramasinghe, Oxford Univ. Press, (1928), p. 121.

obliged to maintain. Gradually, however, by the time of the *Dharmasutras*,¹⁶ the decision of other matters (*vyavahara*) was taken over by the King, and in the discharge of his duties he was assisted in his court (the King's *sabha*) by *sabhasadas* (judge-assessors) appointed by the King. Besides these appointed members of the court, any learned Brahmana who came into court could take his place in the *sabha* and it would be his right and duty to give his opinion, whether appointed or not (*niyukto'niyuktova*). Other tribunals such as the *Kulas*, *Srenis*, *Pugas*, *Vratas* and *Ganas* also exercised judicial functions, from which appeals lay to the King's Court and to the King himself. Eventually, the judicial authority of the King came to be delegated to permanent judges.¹⁷ Requiring emphasis is the fact that judges, whether nominated by the people or appointed by the monarch, were people in whom the public had confidence by reason of their learning, experience, wisdom, and good conduct. Apastamba¹⁸ said: "Men of learning and pure descent, who are aged, clever in reasoning and careful in fulfilling the duties of their caste shall be judges in lawsuits." Narada¹⁹ said: "Let the king appoint as men of a court of justice, honourable men of tried integrity who are able to bear, like good bulls, the burden of the administration of justice." "The members of a royal court of justice must be acquainted with the sacred law and with rules of prudence, noble, veracious and impartial ..." The chief judge, he said²⁰,

16 Although Max Muller advanced the assertion that the works of the *Dharmasutras* like those of Manu were written in 600-200 B.C., it has been said that "It seems no longer advisable to limit the production of Sutras to so short and so late a period": G. Buhler, *The Laws of Manu*, in *The Sacred Books of the East*, - 50 volumes - ed. F. Max Muller, Motilal Banarsidass, Delhi, 3rd reprint, (1970), (cited in this paper as S.B.E.), Vol. XXV, p. xxii.

17 N.C. Sen-Gupta, *Evolution of Ancient Indian Law*, Tagore Law Lectures 1950, Arthur Probsthain, London, (1953).

18 II, 11, 29.5, S.B.E. op.cit. note 15, Vol. II, p. 170.

19 III.4 & 5, S.B.E. op.cit. note 15, Vol. XXXIII, pp. 36-37.

20 S.B.E. op. cit. note 15, Vol. XXXIII, p. 250.

“must be a Brahman, thoroughly versed in the Vedas and Vedangas, instructed in sacred learning and of religious conduct, tranquil-minded, unambitious: Fond of veracity, pure, able, delighting in the welfare of all sentient beings ...” Manu²¹ said: “When he is tired with the inspection of the business of men, let him place on the seat of justice his chief minister, who must be acquainted with the law, wise, self-controlled, and descended from a noble family.” He also said²²: “But if the king does not personally investigate the suits, then let him appoint a learned Brahmana to try them.” Brihaspati²³ said: “Men qualified by the performance of devotional acts, strictly veracious and virtuous, void of wrath and covetousness, and familiar with legal lore, should be appointed by the ruler as judges (or assessors of the court).”

The *Mahāsupina-Jātaka*²⁴ refers to some of the dangers of appointing an insufficiently qualified person, or an upstart or parvenu as a judge. Apart from other considerations concerning public confidence arising from the obvious fact, as stated in the ancient records, that “only a person who knows the law can pass a just sentence,” there was also a suspicion raised when an unqualified person was appointed: Was the appointing authority hoping for a return of the favour thereby, as in the notorious case of Chief Justice Jeffreys in comparatively more recent times, casting public doubt on the independence of the judge? Deciding that a particular person is not sufficiently qualified is invariably a debatable matter. However, where the appointment in question has been made by the executive branch of government, a debate on the appointment of a particular judge may raise the question whether the appointee is likely to be influenced by party political

21 VII.141, op. cit. note 15, p. 238.

22 VIII.9, S.B.E. op.cit. note 15, p. 254.

23 I.19, S.B.E. op.cit. note 15, Vol. XXXIV, p. 279.

24 The *Jātaka or Stories of the Buddha's Former Births*, ed. E.B.Cowell, 1895, Cambridge Univ. Press, reprinted in 1994 by Motilal Banarsidass Publishers Private Ltd., Delhi, *Jātaka* No. 77, Vol. I, pp. 187-193.

or such extraneous considerations rather than the merits of a case.

Pragmatic reasons, including the need to provide geographical access to justice and efficiency in the disposal of matters, among other things, in the context of demographic factors, in terms of numbers and dispersal, necessitated the appointment of permanent judges from the earliest times. The origin of the court system of Judaism is instructive in that regard. Moses, it is said, "sat to judge the people and the people stood about Moses from morning until the evening". Observing that single-handed administration of justice was unsatisfactory, Jethro, the father-in-law of Moses, said: "What you are doing is not good. You and the people with you will wear yourselves out, for the thing is too heavy for you; you are not able to perform it alone. Listen now to my voice; I will give you counsel, and God be with you! You will represent the people before God, and bring their cases to God; and you shall teach them the statutes and the decisions, and make them know the way in which they must walk and what they must do. Moreover, choose able men from all the people, such as fear God, men who are trustworthy (men of truth) and who hate (covetousness) a bribe; and place such men over the people as rulers of thousands, of hundreds, of fifties, and of tens.²⁵ And let them judge the people at all times; every great

25 Divisions of this kind are also referred to in the records of ancient and mediaeval India and Sri Lanka. Manu, op. cit. note 13, VII.115 says: "Let him appoint a lord over each village, as well as lords of ten villages, lords of twenty, lords of a hundred, and lords of a thousand." Manu, op. cit., note 15, (VII.124), refers to the rights of the ruler of ten villages, twenty-five Kulas, the superintendent of a hundred villages and the lord of a thousand. There was an integrated system of reporting crimes between these units: Manu, op. cit. note 15, VIII. 116-117. See also the Vevalketiya slab inscription of the Sri Lankan monarch Udaya IV (946-954 A.D.) which refers to the legal duties of an administrative unit of ten villages – *dasagama*. *Epigraphia Zeylanica*, Vol. I, ed. and tr. D.M. De Z. Wickremasinghe, Oxford Univ. Press, (1912), p. 241 sq.; Sirimal Ranawella "Vevalketiya slab inscription and its copies", Sri Lanka Historical Association, Colombo, (1966).

matter they shall bring to you, but any small matter they shall decide themselves; so it will be easier for you. If you do this, and God so commands you, then you will be able to endure, and all this people will go their place in peace.” Moses responded positively:²⁶ “And at that time I said to you, I am not able alone to bear you; the Lord your God has multiplied you, and behold, you are this day as the stars of heaven for multitude ... How can I bear alone the weight and burden of you and your strife? Choose wise, understanding and experienced men, according to your tribes, and I will appoint them as heads over you...”²⁷

Among other things, judges had to know the “statutes and decisions” – they had to be learned in the law – and they had to be “wise, understanding and experienced” persons. This is expressed in other systems as well. In 1215, Magna Charta said: “We will not make any justiciaries, constables sheriffs or bailiffs but from those who understand the law”. But judges had to have other qualifications as well. Manu said: “They declare that king to be a just inflicter of punishment, who is truthful, who is wise, and who knows the respective value of virtue, pleasure, and wealth.”²⁸ “A king who properly inflicts punishment prospers with respect to those three means of happiness, but he who is voluptuous, partial and deceitful will be destroyed, even through the unjust punishment which he inflicts”.²⁹ “Punishment cannot be inflicted justly by one who has no assistant, nor by a fool, nor by a covetous man, nor by one whose mind is unimproved, nor by one addicted to sensual pleasure.”³⁰ “By him who is pure and

26 Exodus: 18,13-26.

27 Deuteronomy, 1:9-15.

28 S.B.E. op.cit. note 15, Vol. XXV, VII. 26.

29 Manu, VII.26, op.cit. note 15, p. 220.

30 Manu, VII.30, op. cit. note 15, p. 220.

faithful to his promise, who acts according to the law, who has good assistants and is wise, punishment can be justly inflicted.”³¹

Judges were required to be persons who not only understood the law of the realm, but were also “well disposed to observe it.”³² They were, as we have seen, Apastamba said, expected to be persons “careful in fulfilling” their duties. They were expected to be “trustworthy”. James E. Priest³³ has pointed out that the rabbinical view of the judges appointed by Moses included the appointment of persons of “ability” and persons “of truth”. “These are people commanding confidence; who are deserving that one should rely upon their words – appoint these as judges because on account of this their words will be listened to.”

A person is likely to “be listened to” if that person has the moral authority to sit in judgment. Romans 2.1 says: “Therefore thou art inexcusable, O man, whosoever thou art that judgest another, thou condemnest thyself; for thou that judgest does the same thing.” John 8:7 says: “[H]e that is without sin among you, let him first cast a stone”. As we have seen, Manu insisted that persons who were “voluptuous” or “addicted to sensual pleasure” ought not to be appointed as judges. Plato³⁴ said: “... the honourable mind which is to form a healthy judgment should have had no experience or contamination of evil habits when young ... he should have learned to know of evil, not from his own soul, but from late and long observation of the nature of evil in others: knowledge should be his guide, not personal experience ... that is the ideal of a judge ... the virtuous, and not the vicious man has wisdom ...”. Many years later, in a letter written to George Whythe in July 1776, Thomas Jefferson said: “Judges ... should

31 Manu, VII.31, op.cit. note 15, p. 221.

32 Magna Charta.

33 *Governmental and Judicial Ethics in the Bible and Rabbinic Literature*, KTAV Publishing House, New York, 1980, p. 83, note 22.

34 Republic, III.409, in *The Dialogues of Plato*, tr. B. Jowett, Oxford Univ. Press, 3rd ed. (1892), Vol. III, p. 97.

always be men of learning and experience in the laws, of exemplary morals, great patience, calmness and attention; their minds should not be distracted with jarring interests: they should not be dependent upon any man or body.”³⁵ More recently, Sir Alfred (later Lord) Denning said that a judge should be beyond reproach and that people should not be able to point a finger of scorn saying: “Who made thee a ruler and judge over us.” “Such scornful remarks destroy the confidence which people should have in the judges.”³⁶

Immoral Behaviour and Independence

Apart from moral authority, there is also the possibility that a judge’s independence might be affected by his criminal or immoral behaviour, for he may be subject to blackmail or other pressures on the part of those who may know of his misconduct. As we have seen wise persons throughout the ages, for good reason, as experience has shown, have said that persons whose moral lives were questionable should not be (1) appointed to, or (2) permitted to continue on, the Bench. While people in a more tolerant age were, it seems, settling down to accepting the position that a judge’s sexual life is his or her own business, in 1996, the premature retirement and suicide of Mr. Justice David

35 Simon James & Chantal Stebbings, *A Dictionary of Legal Quotations*, Croom Helm, London, 1987, p. 67; Cf. Shirley Abrahamson citing Adams “On Government” in the Foreward to Shaman, Lubet and Alfini, *op.cit.*, note 31, p. ix.

36 Sir Alfred Denning, *The Road to Justice*, London, Stevens & Sons Ltd., 1955, pp. 30-32. On the question of morals and personal misbehaviour, see Shimon Shetreet, *Judges on Trial*, Amsterdam, North-Holland Publishing Co., (1976), pp. 62, 63, 65, 272, 274, 275, 277, 280, 282, 284; see also Jeffrey M. Shaman, Steven Lubet, James J. Alfini, *Judicial Conduct and Ethics*, Michie, Charlottesville, Virginia, 2nd ed., (1990), pp. 91-93, 306, 309-315, 335-340, 348-351, 352-353.

Yeldham of the Supreme Court of New South Wales re-opened the question of morals and judicial independence.³⁷ *The Sydney Morning Herald* of December 9, 1996, said:

“...there is evidence he conducted himself in such a way as to lay himself open to blackmail or improper influence... There is no evidence that his work as a judge was compromised in this way. But the question cannot simply be left hanging.

When public confidence in one judge is shaken, public confidence in the judiciary as a whole is affected. That is the other side of the judicial independence coin. ...”

Freedom from External Pressure

Junius observed³⁸ : “A judge under the influence of government, may be honest enough in a decision of private causes, yet a traitor to the public.” Sir George Jeffreys, it is said, as Chief Justice of England, was perceptive, able and usually impartial; however, “his judicial brutality and manifest unfairness in his zealous pursuit of the Crown’s interest earned him a lasting reputation as the very worst judge that ever disgraced Westminster Hall.”³⁹ Lord Denning said that judges should not be “diverted from their duty by any extraneous influences; nor by hope of reward nor by fear of penalties; nor by flattering praise nor by indignant reproach”, for it is the “sure knowledge of this that gives the people their

37 See Richard Evans, “Yeldham – “Awkward Questions Remain”, *Australian Lawyer*, Vol. 32 No. 1, February, 1997, p. 10; *Sydney Morning Herald*, 1 November 1996.

38 Letters, No. 1, 21 January, 1769, in James and Stebbings, op. cit. note 34, p. 52.t.

39 A.W.B. Simpson, *Biographical Dictionary of the Common Law*, Butterworths, London, (1984), p. 275.

confidence in the judges.”⁴⁰ Lord Bingham,⁴¹ said: “Any mention of judicial independence must eventually prompt the question: independent of what? The most obvious is, of course, independent of government. I find it impossible to think of any way in which judges, in their decision-making role, should not be independent of government. But they should also be independent of the legislature, save in its law-making capacity. Judges should not defer to expressions of parliamentary opinion, or decide cases with a view either to earning parliamentary approbation or avoiding parliamentary censure. They must also, plainly, ensure that their impartiality is not undermined by any other association, whether professional, personal commercial or whatever.” In 1985, the *United Nations Declaration on the Basic Principles on the Independence of the Judiciary* stated as follows: “The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law without any restrictions, improper influences, inducements, pressures, threats or interferences direct or indirect, from any quarter or for any reason.”

A person whose appointment to the Bench is not based on merit but upon other considerations, could hardly be trusted to be impartial, as Jeffreys demonstrated in a rather extreme way. Such appointments “lower the status of the judiciary and create a climate for interference with the necessary independence of the judiciary.”⁴²

In ancient and mediaeval times, when the concept of the separation of powers was unknown and there were no constitutional assurances guaranteeing security of tenure, it has been suggested that judicial independence was of little or no importance,

40 The Rt. Hon. Lord Denning, Master of the Rolls, *What Next in the Law*, Butterworths, London, (1982), p. 310.

41 Op. cit. note 4, p. 7.

42 Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada*, Canadian Judicial Council, (1995), p. 233.

especially in matters involving the state. However, these matters have not necessarily ever been decisive.

For instance, it has been pointed out⁴³ that the Qur'an gives people the right to differ from their rulers, the verdict of Allah and His Messenger being taken as final. "This clearly implies that there must be some institution for deciding such disputes in the light of the Qur'an and the Sunnah. In other words, the judiciary in an Islamic State must be independent, competent and bold enough to give an impartial verdict irrespective of the position and the power of the parties." In his study of the life and work of the famous Spanish Maliki jurist, Abu Ishaq al-Shatibi, Masood⁴⁴ pointed out that in Muslim Spain, although the Sultan, and the *wazirs* as well, sometimes interfered in the administration of justice, yet the *qadi al-jama'a*, who was responsible for the administration of justice, enjoyed great prestige and power in the political structure, perhaps partly on account of his belonging to the religious elite. Qadi al-Nubahi's success in prosecuting the powerful *wazir* Ibn al-Khatib, is offered as an example of the powers of the *qadi* in Muslim Spain. The judge had no executive power: But it was the duty of the Sultan to support a *qadi's* judgment with his executive powers. Muhammed Zafrulla Khan⁴⁵, sometime President of the International Court of Justice, observed that the office of *qadi* "has throughout been held in high honour and enjoyed great prestige in Muslim lands." Just rulers themselves despised subservient judges. It is said that when the Caliph Omar who had a lawsuit against a Jew went before the *qadi* (judge), the latter rose in his seat out of deference to Omar. Omar regarded this as an unacceptable manifestation

43 Sayyid Abul A'la Maududi, *The Islamic Law and Constitution*, Taj Co., Delhi, (1986), pp. 182-183, citing Tafhīm-al-Qur'an, Vol. I, pp. 363-366.

44 M. Khalid Masood, *Islamic Legal Philosophy*, International Legal Publications, Delhi, (1989), esp. at pp. 14, 47, 52, 77.

45 *Human Rights*, The London Mosque, (1967), p. 132.

of subservience and dismissed the judge at once.⁴⁶ “Lions under the throne” were not expected or respected. Moses charged his judges in the following manner: “Hear the cases between your brethren, and judge righteously between a man and his brother or the alien that is with him. (Ye shall not respect persons in judgment). You shall not be partial in judgment; you shall hear the small and the great alike; you shall not be afraid of the face of man, for the judgment is God’s; and the case that is too hard for you, you shall bring to me and I will hear it.”⁴⁷

A decision obtained by exerting force or instilling fear is no independent judgment. Indeed, it is no *judgment* at all. And so Brihaspati⁴⁸ said: “When people try to excite fear, or to cause dissension, or terror among the judges or witnesses or to throw other obstacles in their way, such litigants lose their suit.” Judges were expected to act fairly, not concerning themselves with the acceptability of their decisions to the powers that be. Thus Narada⁴⁹ said: “When an assessor of the court has recognized the royal mind to swerve from the path of duty, he must not pronounce an opinion which is agreeable to the King. It is only by delivering what is just that he becomes free of sin.” Deuteronomy⁵⁰ states: “Thou shall not respect persons.”

46 C.G.Weeramantry, *Islamic Jurisprudence, An International Perspective*, Macmillan, London, (1988), re-published by Sarvodaya Vishva Lekha, (1999), p. 80.

47 Deuteronomy, 1: 16-17. It is said (Exodus, 18:26) that the judges “judged the people at all times; hard cases they brought to Moses...”

48 V.4, S.B.E. op. cit. note 15, Vol. XXXIII, p. 295.

49 I.10, S.B.E. op. cit. note 15, Vol. XXXIII, p. 234.

50 XVI, 17 – 19.

As we have seen, in ancient India the King was expected to follow the advice of his *sabha* (court of advisers). In later times, he was required by law to accept the advice of the Pradvivaka – an independent, permanent judge.⁵¹

Brihaspati⁵² extends the duty: "Let the King or a member of a twice-born caste officiating as chief judge try causes, acting on principles of equity and abiding by the opinion of judges and the sacred law." Narada⁵³ said that a monarch should "attend to the dictates of the law book" and "adhere to the opinion of his chief judge." Manu⁵⁴ said: "Whenever any legal transaction has been completed or a punishment inflicted according to the law, [the King] shall sanction it and not annul it."

In ancient and mediaeval Sri Lanka, there were village and district tribunals. It is unlikely that the monarch interfered with their decisions, for local autonomy was jealously guarded. A judge appointed by the monarch was sometimes referred to as *viniscaya-svami*, the lord of judgment, implying that his position as a judge was supreme. The monarch was the ultimate appellate authority. But that is another matter. In general, in the courts of the monarch, he would act on the advice of his councillors, just as monarch of England in more recent times would act on the advice of the Privy Council. There is evidence that a monarch usually abided by the decisions of his judges: King Voharika Tissa (214-236 A.D.) is said to have appointed a learned Minister called Kapila to hear an ecclesiastical dispute, and that the King abided by his decision.⁵⁵ King Mahasena (276-303 A.D.) appointed the High Minister (*maha-macca*) to hear a

51 Narada, Introduction I.35, S.B.E. op. cit. note 15, Vol. XXXIII, p. 14; Narada added, p. 233, that the Pradvivaka or Chief Judge should be "fully acquainted with the law and thoroughly versed in revealed and traditional lore". N.C. Sen-Gupta, op.cit. note 12, pp. 41-43.

52 I. 24., S.B.E. op. cit. note 15, Vol. XXXIII, p. 280.

53 Author's Preface, 35, S.B.E. op. cit. note 15, Vol. XXXIII, p. 14.

54 IX.233, S.B.E. op.cit. note 15, Vol. XXV, p. 382.

55 *Nikayasangrahaya*, p. 12.

complaint of the gravest kind against his friend, a Buddhist monk called Tissa. It is said that "The High Minister, who had a reputation for being just, according to law and equity, expelled Tissa from the order of monks, albeit against the King's wishes—*tam anicchaya rajino*."⁵⁶ The *Patisambhaddamagga* glossary speaks of instances where an impartial King abided by decisions made according to law by eight judge-ministers.⁵⁷

Corruption

Jethro advised that those who were appointed judges were people who "hate a bribe." Brihaspati⁵⁸ said: "... a King should be equitable towards litigants, and should pass a just sentence, discarding avarice and other evil propensities." Horace⁵⁹ observed: "The good and upright magistrate has preferred the honourable to the profitable." The concept has come down to us through the ages and stretches across the world. Bowen, L.J., said: "Judges, like Caesar's wife, should be above suspicion."⁶⁰ J.O. Wilson, a former Chief Justice of the Supreme Court of British Columbia, sets out what is expected of modern judges.⁶¹ "A judge should not receive from any person, corporation or organization, gifts, favours or benefits the acceptance of which would cast the least doubt on his impartiality. This ban extends not just to gifts from litigants or their counsel; it includes the larger area of gifts or favours from persons or corporations who or which may in the

56 *Mahavamsa, The Great Chronicle of Ceylon*, tr. by Wilhelm Geiger, (1912), reprinted Govt. Information Dept., (1960), XXXVII.39.

57 *Saddhamappakasini*, ed. Simon Hewavitharane, (1927), p. 18.

58 I. 36, S.B.E. op.cit. note 15, Vol. XXXIII, p. 231.

59 *Odes*, IV.ix.

60 *Leeson v. General Council of Medical Education and Registration*, (1890) 43 Ch. D. 366, 385.

61 *A Book for Judges*, quoted in Canadian Judicial Council, *Commentaries on Judicial Conduct*, Les Editions Yvon Blais Inc., (1991), p. 29.

future be expected to be involved in litigation or materially interested in the results of litigation by others. Any gift to a judge from an unexpected or unfamiliar source must at once be suspect."

The underlying idea is that a judge, who is expected to be impartial, could not act independently if his or her vision is obscured by bias or prejudice brought about by bribery or corruption or pressure. Deuteronomy⁶² said "Neither take a gift; for a gift doth blind the eyes and perverts the word of the righteous." The concept of judges whose vision is impaired by ignorance, bias, prejudice, corruption and so on is also found in ancient Indian texts. For instance, Narada⁶³ said: "No gifts must be accepted from one accused of a crime ...". He also said⁶⁴: "He who, having entered the court delivers a strange opinion, ignoring the true state of the case, resembles a blind man who regardless swallows fish together with the bones. Therefore let every assessor of the court deliver a fair opinion after having entered the court, discarding love and hatred, in order that he may not go to hell."

The commentary to the ancient Pali work, *Dhammapada*, (The Words of Truth), which records the sayings of the Buddha, said⁶⁵: "One day some *bhikkhus*⁶⁶ were returning to the monastery after their almsround in Savatthi. While they took shelter in a hall of justice during a heavy shower of rain they saw some judges who were deciding cases arbitrarily after having taken bribes. They reported the matter to the Buddha who said: "Bhikkhus! If one is influenced by monetary considerations in deciding cases, he cannot be considered a just judge who abides by the law. If one weighs the evidence intelligently, and decides a

62 XVI. 19.

63 *Miscellaneous*, 40, S.B.E. op. cit. note 15, Vol. XXXIII, p. 220.

64 *The Judgment*, 14 & 15, S.B.E. op. cit. note 15, Vol. XXXIII, p. 39.

65 *Dhamattha Vagga*, Ch. XIX:I, ed. K. Sri Dhammananda, Sasana Abhiwurdhi Wardhana Society, Kuala Lumpur (1988), p. 471.

66 Buddhist monks.

case impartially, then he is to be called a just judge who abides by the law.”

Several books, chronicles and inscriptions communicate the attitude of ancient and medieval monarchs and lawgivers to the importance of judges – including the ultimate judicial authority, the monarch – being free from bias brought about by corruption. The *Qur'an*⁶⁷ cautioned: “Devour not your wealth among yourselves vainly, nor present to the judges that ye may devour a part of the wealth of men sinfully, the while ye know.” The Pahlavi texts also condemn corruption. *The Dina-i Mainog-i Khirad* (Opinions of the Spirit of Wisdom)⁶⁸ states: “The judge who exercises true justice and takes no bribe is said to be, in his own degree, such as Auharmazd and the archangels. And he who exercises false justice is said to be, in his own degree, such as Aharman and the demons.” Manu said: “Neither for friendship’s sake, nor for the sake of great lucre, must the king let go of perpetrators of violence, who cause terror to all creatures.”⁶⁹ Officials⁷⁰ in Sri Lanka were prohibited from accepting gifts or, except in accordance with custom, taking anything for their subsistence.⁷¹ Narada⁷² said that if there was a judgment obtained by corruption, the decision should be set aside and the matter be heard anew. The Badulla pillar-inscription, records the fact that when it was brought to the notice of King Udaya IV (946-954 A.D.) that the *ḍandanayaka* (a judge and high military official) was levying illegal fines and extorting gifts, he ordered that a decree be passed and promulgated prohibiting such unlawful

67 II.184, S.B.E. op.cit. note 15, Vol. VI, p. 27.

68 S.B.E., op.cit. note 15, Vol. XXIV, p. 79.

69 Manu, VIII. 347.

70 All officials in mediaeval Sri Lanka had judicial functions.

71 Tablets of Mahinda IV (956-972 A.D.) at Mihintale, *Epigraphia Zeylanica*, Vol. I, ed. and tr. by D.M. De Z. Wickremasinghe, Oxford Univ. Press, (1912), p. 105.

72 II.40, S.B.E. op.cit. note 15, Vol. XXXIII, p. 34.

acts and directed that officials who visited the area should ensure that the rules were observed.⁷³ Officials were warned to desist from corrupt practices so that they might not incur Royal disfavour and “be tormented by the fire of anguish called remorse.”⁷⁴ Manu was more explicit: Corrupt judges were to be punished by forfeiture and ostracism. He said: “But those appointed to administer public affairs, who, baked by the fire of wealth, mar the business of suitors, the king shall deprive of their property.”⁷⁵ “Let the king confiscate the whole property of those officials who, evil-minded, may take money from suitors, and banish them.”⁷⁶ Monarchs who appointed corrupt judges were regarded as stupid and unrighteous. The *Mahasupina Jataka*,⁷⁷ the *Dhammaḍḍhaja-Jataka*,⁷⁸ the *Badḍha-Sala-Jataka*,⁷⁹ the *Mahabodhi-Jataka*⁸⁰ and the *Khaṇḍabala-Jataka*⁸¹ show that corrupt judges were removed from office. This was also done by monarchs later on. For instance, in Sri Lanka, Aggabodhi VII (772-777 A.D.) “rooted out” dishonest judges – euphemistically

73 S. Paranavitana, “A revised edition of the Badulla (Horabora) Pillar-inscription”, *Epigraphia Zeylanica*, ed. S. Paranavitana and C.E. Godakumbura, Archaeological Dept. Ceylon, (1963), Vol. V, part 2, pp. 177-195.

74 S. Paranavitana, “An Inscription of King Nissankamalla (1187-1196 A.D.) near the Van-Ala, Polonnaruwa”, *Epigraphia Zeylanica*, ed. D.M. De Z. Wickramasinghe and H.W. Codrington, Oxford Univ. Press (1933), Vol. III, pp. 150-152.

75 Manu, op. cit. note 15, IX. 231.

76 Manu, op. cit. note 15, VII.124.

77 *Jataka* No. 77, op. cit. n. 21, Vol. I, p. 189.

78 *Jataka* No. 220, op. cit. note 21, Vol. II, Book II, pp. 131-138 at p. 131.

79 *Jataka* No. 465, op. cit. note 21, Vol. IV, Book XII, pp. 91-98 at p. 95.

80 *Jataka* No. 528, op. cit. note 21, Vol. V, pp. 116-126 at pp. 117-118.

81 *Jataka* No. 542. op. cit. note 21, Vol. VI, pp. 68-80 at p. 69.

described at the time as discharging their duties with 'cunningness' (*kut attakarake*).⁸²

Monarchs were anxious to avoid being regarded as "unrighteous" not only because their constitutional right to the sceptre depended on their ruling "righteously with justice", but also because a failure to do so, for instance by retaining the services of corrupt judges, might have brought evil consequences to the country and exposed the monarch to sedition. The *Shayast La Shayast* states: "The rule is this, that when in a country they trust a false judge, and keep him among their superiors, owing to the sin and breach of faith which the judge commits, the clouds and rain in that country are deficient, a portion (*bavan*) of the deliciousness, fatness, wholesomeness and milk of the cattle and goats diminishes, and many children become destroyed in the mother's womb."⁸³

Bias and Prejudice

It is a fundamental principle of modern legal systems that judges should perform their duties impartially, free from personal interest or bias. It is axiomatic that judges should be sufficiently detached and free from predisposition in their decision-making.⁸⁴ This has been so in many communities down the ages. Moses told his judges: "You shall not be partial in judgment; you shall hear the small and the great alike."⁸⁵ Vasistha required

82 *Culavamsa, Being the More recent part of the Mahavamsa*, tr. Wilhelm Geiger and from the German into English by C. Mabel Rickmers (nee Duff), Ceylon Govt. Information Dept., Colombo, (1953), 48.71-72.

83 *Shayast La-shayast*, X. 13, S.B.E. op.cit note 15, Vol, V, Pahlavi Texts Part I, tr. E.W.West, p. 322.

84 In general, see Shaman, Lubet and Alfini, op. cit. note 27, Ch. IV.

85 Deuteronomy, I: 16-17.

judges not to be "partial"⁸⁶; Narada⁸⁷ said: "The king shall examine judicial quarrels between two litigant parties in a proper way, acting on principles of equity and discarding both love and hatred." He also said:⁸⁸ "Let a judge discard love and hatred, reject every kind of bias and deliver a fair, i.e., impartial, opinion in order that he may not go to hell with the crime of a guilty person acquitted by him." Brihaspati⁸⁹ required judges to act in an "impartial spirit devoid of malice and avarice." Manu warned that "partial and deceitful" judges would be destroyed⁹⁰; and Jefferson, closer to our time, as we have seen, said that a judge's mind "should not be distracted with jarring interests".

Narada said⁹¹ that those causes tried by friends, relations or persons having other connections with the litigants shall be tried anew after the delinquent judges had been punished. Narada⁹² explained that a person may lose control over his actions and cease to be an independent person in certain circumstances. "That also which an independent person does, who has lost control over his actions, is declared an invalid transaction, on account of his want of real independence. Those are declared to have lost the control over their actions who are actuated by love or anger, or tormented by an illness, or oppressed by fear or misfortune, or biased by friendship or hatred."

86 XVI.2 & 3, S.B.E. op.cit. note 15, Vol. XIV, p. 78.

87 Quotations from Narada, *Judicial Procedure*, I.4, S.B.E. op. cit. note 15, Vol. XXXIII, p. 233.

88 *The Judgment*, S.B.E. op.cit. note 15, Vol. XXXIII, p. 39.

89 V. 11.16, S.B.E. op.cit. note. 15, Vol. XXXIII, p. 296.

90 Manu, VII.27, S.B.E. op. cit. note 15, Vol. XXV, p. 220.

91 *Introduction, Legal Procedure*, 50, S.B.E. op. cit. note 15, Vol. XXXIII, p. 18.

92 Debts, Invalid Transactions, I.40, S.B.E. op. cit. note 15, Vol. XXXIII, p. 52.

Prejudgment was to be always avoided. Narada⁹³ said: "Therefore it is proper to investigate a matter, even though it should have happened before one's own eyes. One who does not deliver his opinion till he has investigated the matter will not violate justice." Apastamba⁹⁴ said, "... the King shall not punish on suspicion. But having carefully investigated the case ... the King may proceed to punish."

Tipitaka Culabbhaya Thera, a Buddhist monk - a celebrated specialist in jurisprudence who was a contemporary of Kunkanaga (194-195 A.D.) - was said to have been taking a class in the "Brazen Palace" (*lobhapawada*) in the ancient Sri Lankan capital city of Anuradhapura. When the class was over, all but two monks left the place. The two monks were arguing and the learned *thera* overheard them. When the two monks later requested the *thera* to adjudicate upon the matter, he declined to do so, stating that after what he had heard, his view was in favour of the defendant.⁹⁵

In the *Kukkura Jataka* it was said that the king had ordered all dogs, except those within the palace, to be slain, for some dogs had gnawed the leather- work and straps of his carriage. The Bodhisatta told the King that he was "following the four evil courses of partiality, dislike, ignorance and fear." He added: "Such courses are wrong and not king-like. For the king in trying cases should be as unbiased as the beam of a balance."⁹⁶ The symbol of the scales of justice to denote impartiality and

93 Rules of Procedure, S.B.E. op. cit. note 15, Vol. XXXIII, p. 23.

94 II, 5, 11, S.B.E. op. cit. note 15, Vol. II, p. 125.

95 Amerasinghe, op. cit. note 2, p. 173.

96 Tr. Robert Chalmers in *The Jataka*, op.cit. note 21, Vol. I, Bk. I at pp. 59-60.

independence was very widespread.⁹⁷ The Pahlavi texts in several places⁹⁸ mention the fact that when a soul is called to account for its actions in life, the righteous⁹⁹ judge or angel, Rashnu, used golden scales in passing judgment. Mankdimauthanar, the chief poet in the Court of Nedubjelyan II of Madura, India, in the last years of the first century and the early years of the second, in a poem advising the king describes “just judges” as follows: “With fair impartial minds they ponder things/ As though they weighed them in a pair of scales.”¹⁰⁰ The venerated sage, Tiruvalluvar – “the weaver of Mayilapur”, in *Kural* said: “It is the glory of the just to stand like the adjusted balance, duly poised nor swerve to either side.”¹⁰¹ The scales of justice are also mentioned in a Sinhalese work of the thirteenth century – the *Saddharmaratanavaliya*, which itself was based on works dating back, perhaps, to about the fifth century.¹⁰²

The concept of the scales possibly goes back to the days of trial by ordeal by balance. One recalls the dream of the Babylonian prince Belshazzar who saw the writing on the wall: “You have

97 Cf. Proverbs 6.11 “A just weight and the balance are the Lord’s.”

98 I, 2, S.B.E. op.cit. note 15, Vol. V, p. 241 note 4; *Dina-I Mainog-I Khiraḍ* II. 122, S.B.E. op.cit., note 15, Vol. XXIV, p.18.

99 See *Dinkarḍ*, VIII.23, S.B.E. op.cit. note 15, Vol. XXXVII, p. 80.

100 J.V. Chelliah, *Pattupattu, Ten Tamil Idylls*, Tamil Univ., Thanjavur, (1985), p. 259.

101 A.R.B.Amerasinghe, *The Supreme Court of Sri Lanka, The first 185 Years*, Sarvodaya Vishvaleka, Ratmalana, (1985), p. 509.

102 See M.B. Ariyapala, op. cit. note 9, pp. 124-5. Lord Denning’s words come to Mind. The judge “must keep his vision unclouded... Let the advocates one after the other put the weights into the scales – the ‘nicely calculated less or more’ – but the judge at the end decides which way the balance tilts, be it ever so slightly...” *Jones v. National Coal Board*, (1975) 2 QB 55, 64. Denning’s concern was that a judge should not be unfaithful to the adversary process by abandoning the role of independent adjudication and adopting the role of advocate, by descending into the forum and appearing to be partial. Cf. *In re Mikesell*, 243, N.W, 2d 86, 96 (Mich 1976).

been weighed in the balance and found wanting." This was not dissimilar to the ordeal by balance (*Tula* or *Ghata*) described by Katyayana and other ancient Indian sages like Narada.¹⁰³ Sen-Gupta¹⁰⁴ said: "It may be that this practice was borrowed by one community from another or it may be that it was an institution common to all races inhabiting the area from India to Palestine. No one knows."

In ancient India, a monarch was seen as Yama – the Lord of Justice.¹⁰⁵ What this meant was that in dispensing justice the monarch and his judges had to treat the parties evenhandedly, without prejudice or bias. "As Yama at the appointed time subjects to his rule both friends and foes, even so all subjects must be controlled by the king; that is the office in which he resembles Yama."¹⁰⁶ "Let the prince, therefore, like Yama, not heeding his own liking and disliking, behave exactly like Yama, suppressing his anger and controlling himself."¹⁰⁷ "If subduing love and hatred, he decides the causes according to law, the hearts of his subjects turn towards him as the rivers run towards the ocean."¹⁰⁸ King Parakrambahu I (1153-1186 A.D.), it was recorded, "being in virtue of his impartiality free from liking and disliking ...", made decisions "free from error."¹⁰⁹ King Sena IV (954-956 A.D.) was said to have been "impartial towards friend

103 I. 260 – 284, S.B.E. op. cit. note 15, Vol. XXXIII, pp. 102-108.

104 Op.cit. note 16, p. 64, On Ordeal by balance, see Narada, S.B.E. op. cit. note 15, Vol. XXXIII, p. 251 sq.

105 Manu, VII.7. S.B.E. op.cit. note 15, Vol. XXV, p. 217. See also Narada, S.B.E. op.cit. note 15, Vol. XXXIII, p. 218.

106 Manu, IX. 307, S.B.E. op. cit. note 15, Vol. XXV, p. 397.

107 Manu, VIII.173, S.B.E. op. cit. note 15, Vol. XXV, p. 285.

108 Manu, VIII. 175, S.B.E. op. cit. note 15, Vol. XXV, p. 285. Samuel 15.2-15, states that Ab'sa-lon "stole the hearts of the men of Israel" by doing justice."

109 *Culavamsa*, op. cit. note 70, 73.23.

and foe".¹¹⁰ Narada¹¹¹ required judges to be "impartial to friends and foes". The *Mahavamsa*¹¹² recorded the fact that King Elara (204-161 B.C.) ruled "with even justice toward friend and foe, on occasions of disputes at law." The *Vamasattthappakasani* explained that what was meant was that Elara "dispensed justice with equanimity and impartially between accuser and accused." The *Mahavamsa* adds: "At the head of his bed he had a bell hung up with a long rope so that those who desired a judgment at law might ring it. The King had only one son and one daughter. When once the son of the ruler was going in a car to the Tissatank, he killed unintentionally a young calf lying on the road with the mother cow, by driving the wheel over its neck. The cow came and dragged the bell in bitterness of heart; and the king caused his son's head to be severed from his body with the same wheel". A similar act by the South Indian monarch, Karikala Cholan, is recalled in the *Silapadhikaaram*, verses 53-55.¹¹³

Manu said: "Neither a father, nor a teacher, nor a friend, nor a mother, nor a wife, nor a son, nor a domestic priest must be left unpunished by a king, if they do not keep within their duty."¹¹⁴ Kautilya¹¹⁵ said: "It is power and power alone which, only when exercised by the king with impartiality and proportion to guilt, either over his son or his enemy, maintains both this world and the next."

110 *Culavamsa*, op. cit. note 70.54.2.

111 III.5. Today, perhaps, the appearance of justice would require a judge to step aside in a matter involving a friend or foe.

112 XXI.13-18.

113 The *Cilappatikaram*, tr. Tamil Univ., Thanjavur, (1989), p. 86, canto 23, lines 46-49 states: "For the Colas, justice has been the supreme principle; to save a dove one Cola king gave his own flesh; another Cola sacrificed the flesh of his flesh for the sake of satisfying a cow in trouble."

114 Manu VIII.335, S.B.E. op. cit. note 15, Vol. XXV, p. 313.

115 *Arthashastra*, Book III.150.

Islamic law strongly supported the notion of judicial impartiality. "O ye who believe! Be ye steadfast in justice, witnessing before God though it be against yourselves, or your parents, or your kindred, be it rich or poor, for God is nearer akin than either. Follow not then lusts, so as to act partially; but if ye swerve or turn aside, God of what ye do is well aware."¹¹⁶ "O ye who believe! Stand steadfast to God as witnesses with justice; and let not ill-will toward people make you sin by not acting with equity. Act with equity, that is nearer to piety, and fear of God: for God is aware of what ye do."¹¹⁷

Conflicts of duty and interest were to be avoided. Thus the monarch could not be a witness.¹¹⁸ Weeramantry¹¹⁹ has pointed out that in Islamic jurisprudence even a ruler could not be a judge in his or her own cause and had to refer his or her dispute to a judge who was regarded as *bakim-usba-shara* – a ruler through law. He refers to the case of the Caliph Othman in the following terms: "The Caliph, appearing personally before the Court of the *qadi* of Kufa, in an action to recover a suit of armour from a Jew, was unsuccessful. His claim was dismissed on the ground that the only witnesses he had in support of his claim were his slave and his son – persons who were not competent witnesses under Islamic law. It was said of the Jew that he was so moved by his success that he gave the armour back to the Caliph." Was he moved by the fairness of the *system*?

It has been observed¹²⁰: "Unbelievable as it may seem, there are a number of cases that might be called 'coin-flip cases', - that is, instances where judges made a decision by flipping a coin in

116 *The Qur'an*, IV. 130-134, S.B.E. op.cit. note 15, Vol. VI, p. 91.

117 *The Qur'an*, V. 10, S.B.E. op.cit. n.15, Vol. VI, p. 98.

118 Manu, VIII.335, S.B.E. op.cit. note 15, Vol. XXV, p. 256. Cf. Shaman, Lubet and Alfini, op.cit. note 35, at pp. 121-122.

119 Op.cit. note 45, pp. 79-80.

120 Shaman, Lubet and Alfini, op. cit. note 35 , at pp. 34-35.

open court, or by throwing a dart at a dart board, or by taking a vote of the spectators in the courtroom. This sort of behaviour goes distinctly beyond the bounds of judicial independence because it constitutes a complete abdication of the duty to exercise judgment. The essence of the judicial function is to make *judgments*, in other words, to make reasoned decisions according to the law. Deciding a case by the flip of a coin (or its equivalent) is decision-making that ignores the law. It amounts to incompetence, impropriety and faithlessness to the law."

In ancient and mediaeval Asia, the duty to exercise *judgment* was well recognized: arbitrariness was unacceptable. The *Dhammapada*¹²¹ said: "He is not just if he decides a case arbitrarily; the wise man should decide after considering both what is right and what is wrong." "The wise man who decides not arbitrarily, but in accordance with the law is one who safeguards the law; he is called 'one who abides by the law' (*dhammattha*)".

Since an independent judge had to give a *judgment*, in the manner of hearing a matter, the impression of prejudgment and partiality had to be avoided. Moreover, it was a rule in Sri Lanka that both sides must be heard.¹²² According to Islamic Law, Abu Da'ud, Tirnizi and Ahmad said that the Holy Prophet laid down this rule for judges: "When two persons bring a dispute to you for decision, do not deliver a judgment unless you have given an equal hearing to both of them". In a case decided by Caliph Umar, he makes the following elucidation: "According to Islamic law none can be imprisoned without doing full justice to him."¹²³

121 *Dhammattha Vagga*, op. cit., note 63 , 256, 257.

122 *Ubhaya paksayen ma adyanta asa ganna dadeka da: Saḍḍharmaratanavaliya*, op. cit. note 9, 365.

123 S.Abul A'la Maududi, op.cit. note 42 , p. 268.

In Sri Lanka, the appearance of bias or prejudgment was to be avoided. It was said a "judge must not wink or nod significantly at suitors, nor should he by the shaking of his head or knitting of his brows allow his thoughts to be guessed."¹²⁴

Weeramantry¹²⁵ says: "The realist school in the USA has drawn pointed attention to the unseen and unarticulated factors which sometimes affect the impartiality of judges – such as illness, domestic disagreements, anger or even indigestion. The 13th century poet, Nawavi, refers to this. 'It is blameable,' he wrote, 'in a judge to deliver a judgment when he is angry, or hungry or in a state of excessive satiety or in general when he has any physical state likely to trouble his mind'." Much earlier, Brihaspati¹²⁶ said: "They who are ignorant of the customs of the country, unbelievers, despisers of the sacred books, insane, irate, avaricious, or troubled by pain or illness should not be consulted in the decision of causes."

Conclusion

Judicial independence is a social value that has wide and deep roots. Although recent discussions have focussed attention on independence from executive and legislative interference and the immunities and rights judges should have, the duties of judges and their accountability relating to impartiality should not be lost sight of for the sake of adequately and credibly responding to increasing consumer demands for complete public confidence in the judiciary. Conference agendas often focus attention

124 "Rules for Administering Justice in the Kandyan Kingdom" [of Sri Lanka] quoted by John D'Oyly, in *A Sketch of the Constitution of the Kandyan Kingdom*, Tisara Prakasakayo Ltd., Dehiwala, (1975), p. 142.

125 Op. cit. note 41, p. 81.

126 J. 33, S.B.E. op. cit. note 15, Vol. XXXIII, p. 282.

127 S.B.E. op. cit. note 15, Vol. XXXIII, pp. 22-23. See also Manu in note 9 above.

on independence from government. That is an important subject. However, my submission is that any thing – pressure from the executive or legislature, the media, giant corporations, bribery, corruption, fear of blackmail, prejudice, personal bias – that “blinds the eye” or “clouds one’s vision” and “perverts the word of the righteous”, leads to “losing control”, or “leads one to swallow the bones of a fish” or appears to do so, interferes with judicial independence and destroys public confidence. This has been the belief for a very long time: and so, for instance, Narada¹²⁷ observed: “When a member of a court of justice, actuated by wrath, ignorance, or covetousness, has passed an unjust sentence, he shall be declared unworthy to be a member of the court, and the King shall punish him for this offence.”

Whether a matter belongs to the one or the other side of “the judicial independence coin” is of little or no relevance. I should like to conclude by borrowing, with some modifications, the sentiments expressed in 1954 by Justice William O’Douglas of the U.S. Supreme Court: The judiciary has no forces to execute its mandate to compel obedience to its decisions. Nor does it control the purse-strings of government. Those sources of power rest in other hands. The strength of the judiciary is in the command it has over the hearts and minds of men and women. That respect and prestige are the product of a mosaic of decisions composed from a multitude of cases decided. Respect and prestige do not grow suddenly; they are the products of time and experience. But they flourish when judges are, and are perceived by the public to be, independent in the fullest sense of the word. Those are ideas that are both ancient and universal.

127 S.B.E. op. cit. note 15, Vol. XXXIII, pp. 22-23. See also Manu in note 9 above.

Capturing and Maintaining Public Confidence in Courts

by

*Robert D. Nicholson*¹

“Public confidence” in the courts is universally relied upon as necessitating judicial independence.² The word “confidence” requires reference to the “mental attitude of trusting in or relying on”³ the courts by the members of the public. What is involved is therefore “the opinion of the mass of the community”.⁴ Public confidence in the courts therefore posits a symbiotic relationship between judicial independence and the confidence derivative from public opinion. The condition of impartiality which institutional and personal judicial independence implies is the apparent foundation for that confidence.

However, there is a danger that references to public confidence may assume the character of incantations⁵ utilised with the

- 1 Justice of the Federal Court of Australia; Chair of the Australian Institute of Judicial Administration (AIJA) Advisory Committee for the Report on the Courts and the Public; Chair of the AIJA Committee on Courts and the Public. The chapter was written while the writer was a Visitor at the Swiss Institute of Comparative Law in July/August 1999. Appreciation is expressed for the support of the Institute and of Edith Cowan University.
- 2 *E.g.* Gerard Brennan CJ, “The State of the Judicature”, 72 *Australian Law Journal* 33, 33-34.
- 3 The Oxford English Dictionary 803 (1978).
- 4 *Id* at 1558.
- 5 Gleeson C.J., *Judicial Accountability, in* Courts in a Representative Democracy 165 (Australian Institute of Judicial Administration, 1995) refers to the concepts of independence and accountability as “sometimes used as mere incantations”.

assumption that public confidence must necessarily follow the presence of judicial independence and without reference to the conditions that may be required to ensure confidence is both created and sustained.

This contribution explores the theoretical underpinnings and practical steps that may be necessary to the maintenance of public confidence in the courts. It does so largely with reference to Australian materials, not out of any excess of parochialism but as a demonstration of the universality of materials generated there in recent debates and writing concerning judicial independence and the need to attend to the relations between courts and the public.

Reasons Why Public Confidence Is an Issue

There are four principal reasons why public confidence in the courts has recently become an issue in Australia. The first is that the courts of Australia, in common with courts throughout the common law world,⁶ have lost some public confidence in them because of the cost and complexity of litigation. "Most [people] regard the prospect of a court appearance as so daunting and intimidating that they deliberately seek other remedies for their grievances."⁷

6 Impression of the writer from a broad range of literature; see particularly the proceedings of the United States, National Center for State Courts, National Conference on Public Trust and Confidence in the Justice System, May 14-15, 1999, Washington DC, [http://www.ncsc.dni.us/PTC/ISSUES/Crit iss. html](http://www.ncsc.dni.us/PTC/ISSUES/Crit%20iss.html).

7 John Baldwin, "Flies on the Legal Carcass: The Disreputable Study of Judicial Administration", 16 *Holdsworth Law Review* 22,23 (1993/4).

The second is that the courts have been the subject of continued public criticism because of a gap perceived by the public between their expectations of sentences for criminal offences and the sentences imposed by the courts as well as other matters.⁸

The third is that the impact of recent decisions of the ultimate court in Australia, the High Court of Australia, has led to public criticism of the courts for having exceeded the role of the judiciary and assumed the political role of the legislator. This has been accentuated by its relative concurrence in the public mind with the abandonment of the theory that judges do not make law.

The fourth is that the High Court of Australia has placed reliance in its judgments on the need to preserve public confidence in the courts.

To accept that public confidence in courts is an issue is not to say or imply that courts in Australia have not been actively taking steps to capture and maintain public confidence. Rather it is to recognize that perceptions by courts of what is necessary to capture confidence inevitably differ from that of the public that they serve.⁹

Judicial Reliance on the Concept of Public Confidence

In *Grollo v Palmer*¹⁰ the High Court of Australia upheld the validity of ss6D and 6H and Divisions 3 and 4 of Part VI of the *Telecommunications (Interception) Act 1979* (Cth) which conferred

7 John Baldwin, "Flies on the Legal Carcass: The Disreputable Study of Judicial Administration", 16 *Holdsworth Law Review* 22,23 (1993/4).

8 The range of criticism is illustrated in Michael Kirby J, *Attacks on Judges-A Universal Phenomenon*, 72 *Australian L.J.* 599 (1998).

9 Fred Chaney, *Commentary on Courts and the Individual*, in *Courts in a Representative Democracy*, 119-124 (Australian Institute of Judicial Administration, 1994).

10 (1995) 184 CLR 348.

on any consenting federal judge the power to issue telecommunication interception warrants. Brennan CJ, Deane, Dawson and Toohey JJ accepted the authority of *Hilton v Wells*¹¹ that conferment of non-judicial power functions on judges as designated persons is subject to two limitations. The first is that the consent of the judge is necessary. The second is that conferment cannot occur where there is an incompatibility either with the judge's performance of his or her judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power.¹² Their Honours said in *Grollo* the latter category "might consist in the performance of non-judicial functions of such a nature that public confidence in the integrity of the judiciary as an institution or in the capacity of the individual judge to perform his or her judicial functions with integrity is diminished".¹³ Gummow agreed with the conclusion. McHugh J dissented, but placing similar reliance on perceptions of judicial independence as founding public confidence.¹⁴

In *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*¹⁵ the High Court held that the nomination of judges appointed under Ch III of the Australian Constitution as persons to report to the Minister under s10 (1)(c) of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) was not constitutionally permissible. The particular reporting function under that provision was held to be incompatible with the holding of the office of such a judge. Brennan CJ and Dawson, Toohey, McHugh and Gummow JJ considered the case was different from an instance of a judge conducting a Royal Commission. The task of the reporter under the Act was essentially a political function placing the judge in the equivalent position to that of a

11 (1985) 157 CLR 67.

12 *Grollo v Palmer* (1995) 184 CLR 348 at 364-365.

13 *Id.*, 365; see also 366 and 368.

14 *Id.*, 376, 380 and 382.

15 (1996) 189 CLR 1.

ministerial adviser.¹⁶ The foundation of the reasoning of these members of the Court was that “the appearance of independence preserves public confidence in the judicial branch”.¹⁷ Gaudron J shared the view that the function in question gave the judge the appearance of acting as servant or agent of the minister.¹⁸ Her Honour also was of the view that public confidence in the judicature would be diminished if it was not perceived as independent in fact and in appearance.¹⁹ Kirby J, in dissent, considered the Australian community would feel much more comfortable with such an inquiry if it was performed by a judge.²⁰

In a third decision, *Kable v Director of Public Prosecutions (New South Wales)*,²¹ the High Court upheld a challenge to the validity of the *Community Protection Act 1994* (NSW). That Act provided for the Supreme Court of a state to order the detention for up to 6 months of a person previously convicted and imprisoned whose sentence was about to expire. The Court held that the incompatibility doctrine extended to state courts.

The Court also held the legislation raised an incompatibility. Gaudron J said public confidence in the courts could not be maintained where courts were required to deprive persons of their liberty, not on the basis they have breached any law, but on the basis they may do so.²² McHugh J considered ordinary members of the public might reasonably see the Act as making the Supreme Court a party to and responsible for implementing the political decision of the executive government that the appellant should be imprisoned without the benefit of the ordinary

16 *Id.*, 19.

17 *Id.*, 14-16.

18 *Id.*, 26.

19 *Id.*, 24-26.

20 *Id.*, 49-50.

21 (1996) 189 CLR 51.

22 *Id.*, 107.

processes of law. That being the case, “public confidence in the impartial administration of the judicial functions of the Supreme Court must inevitably be impaired”.²³ In his reasons Gummow J stated that judicial involvement in the choices required by the Act “saps the appearance of institutional impartiality and the maintenance of public confidence”.²⁴

Is Public Confidence Appropriate as a Constitutional Value?

This reliance by the High Court on public confidence has recently been questioned as an appropriate constitutional value.²⁵ The essence of the questioning is that public confidence will itself be created where the courts habitually receive the explicit or implicit support for the other branches of government so that the public’s beliefs concerning the judicial role and method might be irrelevant to the public’s acceptance of judicial decisions. In short, it is said it may well be the backing of the government, and not the average person’s commitment to the rule of law, that makes all the difference for public acceptance of judicial actions. Consequently, a perception of separation of powers may not be as crucial to public confidence as a perception of support. Alternatively it is argued that attacks by politicians on decisions of the Court, while evidencing separation, is likely and calculated to bring the judiciary into disrepute.²⁶

These views are obviously relevant to the analysis of factors creating actual public confidence in any particular case. They are not, however, the sure foundation for institutional theory. There could be nothing surer than that courts not perceived as separate

23 *Id.*, 124.

24 *Id.*, 133.

25 Elizabeth Handsley, “Public Confidence in the Judiciary: A Red Herring for the Separation of Judicial Power”, 20 *Sydney L.R.* 183 (1998).

26 *Id.*, 195-196.

from the executive would not be in the position to capture or maintain public confidence. While executive support may contribute to public confidence, it cannot, without destruction of judicial independence, create the foundations for it. The public will accept executive endorsement as a contributing factor to its confidence in a judicial decision precisely because it understands that the Court has arrived at its decision in a particular case without the influence of the executive playing any part.

The views referred to, although limited to the constitutional context of separation of powers, are out of accord with wide experience. It is universally accepted that in a democracy public confidence is an essential constitutional tenet. This is as true of courts²⁷ as it is of commentators.

The constitutional principles of a democracy involve "the possible clash between values – democratic accountability and judicial independence".²⁸ This requires an optimisation rather than maximisation of independence.²⁹ A balance is involved and public accountability must be "qualified by the necessary limitations which will assure public confidence in the courts".³⁰ In countries where the process of democratisation is in progress, behaviour by state actors that is positive to legal stability can create the

27 *Valente v The Queen* (1985) 2 S.C.R. 673; *Jens Viktor Plabte v The State* Supreme Court of Norway, 19 December 1997 both cited by Param Cumaraswamy, "International and Regional Standards for the Protection of Judicial Independence" 12 *Commonwealth Judicial Journal* 8, 11 (1998).

28 S. Shetreet and J. Deschenes, *Judicial Independence: The Contemporary Debate* (Martinus Nijhoff Publishers, 1985) 569.

29 Owen M. Fiss, "The Limits of Judicial Independence", 25 *U. of Miami Inter-Am.L.R.* 57, 66-67 (1993).

30 Shimon Shetreet, "Judicial Independence and Accountability in Israel", 33 *International and Comparative Law Quarterly* 979 at 1006 (1984). Cf. Merlin M Magallone, "Philippine Experience In Judicial Independence: General Context and Specific Problems", 72(2) *Philippine Law Journal* 164, 175 (1997).

condition for operation of judicial independence. However, “where courts lose the public confidence, there is no reason to expect that some enduring constitutional virtue will be seen in their endurance”.³¹ What is required is that the independence of the courts be “ingrained in the constitutional culture of the country”.³² That is as true of international courts³³ as of domestic courts.³⁴

The resulting model of democracy in which the courts and the judiciary are to find their role has been described as “responsive” or “consumer oriented”, reflecting the central idea of a democratic system that no source of power should be unchecked.³⁵ Courts cannot now be conceived of as a branch of government delivering a monarchical measure of justice to an

31 Christopher M. Larkins, “Judicial Independence and Democratization: A Theoretical and Conceptual Analysis”, 44 *Am. J. Comp. L.* 605 at 625 (1996).

32 *Id.*, 623.

33 Edith B. Weiss, “Judicial Independence and Impartiality: A Preliminary Inquiry”, in *The International Court of Justice at a Crossroads* 106, 134 (Lori F. Damrosch, ed., 1987). See also Monroe Leigh and Stephen D. Ramsey, *Confidence in the Court: I need not be a “Hollow Chamber”* at 106.

34 The position may be tested in relation to the People’s Republic of China: Jerome A Cohen, “The Chinese Communist Party and ‘Judicial Independence’: 1949-1959”, 82 *Harv. L.R.* (1969): 967; Marie Seong-Hak Kim, “A Distant Premise: Judicial Independence in the People’s Republic of China” 24 *Korean J. of Comp. L.* 17; M.Y.K. Woo, “Adjudication supervision and judicial independence in the PRC”, *Am. J. of Comp. L.* 39 (1991). Cf. John O. Haley, “Judicial Independence Revisited”, 25 *Law in Japan – An Annual* 1.

35 The model resulting has been described as “responsive” or “consumer oriented”, reflecting the central idea of a democratic system: M. Cappelletti, “Who Watches the Watchmen”, 31 *Am. J. of Comp. L.* 61-62 (1983). There are, however, deeper issues in defining the nature of the democracy in which a judiciary is to function: Tom Campbell, *Judging in a Democracy*, Judicial Conference of Australia, www.law.monash.edu.au/JCA/campbell.html.

unquestioning public but rather must be viewed as institutions serving the public.³⁶ Once this is understood, it becomes axiomatic that courts, alike with other institutions in the democratic polity, must seek to capture and secure confidence in their operations.

Confidence and Judicial Law-Making

The second factor conditioning public opinion in Australia concerning the courts is the recent public appreciation that judges are required to make law. This was forcefully brought home in Australia by decisions of the High Court of Australia giving legal recognition to the doctrine of native title.³⁷

It has not always been the position in the common law system that judges have been remote from law making. In earlier times common law judges had a role both in proposing and drafting legislation.³⁸ However, in Australia thirty years ago (as in the country of origin of the common law) it was not countenanced that judges made law. Announced changes of perception in the United Kingdom, the teaching of Australian academic lawyers and vast changes in Australian society and its laws have led to public demonstration that on occasions it is necessary for judges to make law.³⁹

36 Sir Anthony Mason, "The Judiciary, the Community and the Media", 12 *Commonwealth Judicial Journal* 4 (1997).

37 *Mabo v Queensland (No 2)* (1992) 175 CLR 1; *The Wik Peoples v Queensland* (1996) 187 CLR 1.

38 John Buchan, "The Judicial Temperament", 73 *Australian Law Journal* 260, 265 (1999).

39 Sir Anthony Mason, "The Judge as Law-Maker", 3 *James Cook University Law Review* 1 (1996).

The present perception of the role of a judge in Australia has been described curially by Brennan J of the High Court of Australia. In *Dietrich v The Queen*⁴⁰ he said he did “not doubt that the courts of this country, and especially [the High Court] as the ultimate court of appeal, acting within their respective jurisdictions and in response to the exigencies of particular cases, create new rules of the common law”. This was because “the genius of the common law system consists in the ability of the courts to mould the law to correspond with the contemporary values of society”. He said it had fallen to the courts to keep the law in a serviceable state, “a function which calls for consideration of the contemporary values of the community”.

He continued:

Where a common law rule requires some expansion or modification in order to operate more fairly or efficiently, this Court will modify the rule provided no injustice is done thereby. And, in those exceptional cases where a rule of the common law produces a manifest injustice, this Court will change the rule so as to avoid perpetuating the injustice.⁴¹

As an example of the latter category Brennan J referred to the decision of the High Court recognizing native title.⁴²

Two areas of potential problem for the capture of public confidence emerge once it is accepted that judges on occasion make law.

The first is how the line is drawn between the legislative and judicial tasks. If the line is not properly observed the courts will be criticised for usurping the role of the legislature.⁴³

40 (1992) 177 CLR 292 at 318-319.

41 *Id.*

42 *Id.*; a reference to *Mabo v The Queen (No 2)* (1992) 175 CLR 1.

43 M. H. McHugh J, “The Judicial Method”, 73 *Australian Law Journal* 37, 42 (1999).

Furthermore judges will place in jeopardy their relatively unaccountable status if they engage in a quasi-judicial role.⁴⁴ Brennan J in *Dietrich* saw the judicial task at first instance and in intermediate courts as constrained by precedent. In ultimate courts of appeal he considered the chief constraints are found in the traditional methods of judicial reasoning which ensure that judicial developments remain consonant not only with contemporary values but also with principles giving the law its shape and internal consistency.⁴⁵ Yet these factors will not delineate a dividing line with certainty outside the facts of a particular case.⁴⁶

The second problem is how the judiciary, without acting legislatively, can determine what are the applicable community values. Brennan J in *Dietrich* distinguished between transient notions emerging in reaction to a particular event or inspired by a publicity campaign conducted by an interest group (on the one hand) and the relatively permanent values of the Australian community (on the other hand).⁴⁷ For him, judicial experience in the practical application of legal principles and the coincidence of judicial opinions in appellate courts provide some assurance those values are correctly perceived.⁴⁸ He considered that "although the term [contemporary community values] cannot be exhaustively defined, its content in a particular context is not reasonably open to controversy".⁴⁹

44 A. M. Gleeson CJ, "Individualised Justice – The Holy Grail", 69 *Australian Law Journal* 421, 432 (1995).

45 *Dietrich v The Queen* (1992) 177 CLR 292 at 320.

46 Cf. JJ Doyle CJ, "Judicial Law Making – Is Honesty the Best Policy?", 17 *Adelaide L.R.* 161, 204 (1995).

47 *Dietrich*, 177 CLR at 319.

48 *Id.*

49 Sir Gerard Brennan, "Why be a Judge?", 14 *Australian Bar Review* 89, 93 (1996).

Judicial determination of enduring community values is to be distinguished from ascertainment of majority opinion⁵⁰ or policy considerations.⁵¹ One observer of the Australian judiciary has argued for the courts to actively seek out and rely on available materials which throw light on community attitudes and standards about a particular issue on the basis judges by their background and methodology are ill equipped to make declarations about community standards.⁵² That view is not universally shared but nevertheless the question arises whether courts need additional techniques to determine the relevant values, for example whether the preparation of 'Brandeis briefs' should be invited or courts should undertake their own research.⁵³ Furthermore there may be a need for courts to explore and explain the boundaries between permissible activism and deference to the legislature.⁵⁴

That issue would merit a paper of its own. For present purposes it is important to have in mind that the occasions when courts are required to delineate enduring community values are very limited and may be confined to the work of ultimate courts in a jurisdiction. Nevertheless the scope for public impact of decisions at that level is such that the issue remains a most important one and lies at the core of current public confidence in courts.

50 Ronald Sackville, J, "Continuity and Judicial Creativity – Some Observations", 20 *Univ. of New South Wales L.J.* 1,162 (1997).

51 Sir Anthony Mason, "The Judge as Law-Maker", 3 *James Cook University L.R.* 1, 13 (1997).

52 Stanley Yeo, "Judicial Law-Making and Community Standards", 8 *Journal of Judicial Administration* 203, 211 (1999).

53 Sackville, *supra* note 49, 160.

54 *Id.*, 161.

Australian Initiatives Concerning Public Confidence

Motivated by consideration of these issues relating to public confidence in the courts, the Australian Institute of Judicial Administration commissioned a study on the topic of "Courts and the Public" by Professor Stephen Parker ("the AIJA report").⁵⁵ The publication of that report stimulated further discussion and debate on the topic of how courts can better relate to the public. The Report was forwarded to the Council of Chief Justices and to each Chief Justice and received consideration in the context of each particular jurisdiction. For example, the District Court Judge's Conference in Queensland focussed its keynote session on the report.⁵⁶ The Law Society of Western Australia sponsored a courts' symposium which involved court user groups.⁵⁷ The Federal Court of Australia produced a list outlining the action taken by it on the recommendations of the AIJA report. The 1999 Annual Court Administrators' Conference organised by the AIJA will have as its theme "Improving Client Satisfaction – Positive Responses to Public Concerns".

Professor Parker commenced the report by stating that "the whole area of the relationship between Courts and the Public is incompletely theorised in Australia".⁵⁸ A significant contribution of the report is to focus attention on the question of identity of the publics served by a court.⁵⁹ The report concludes with a list of recommendations for better communication and better identification of needs of the public. The report is conditioned by the

55 Stephen Parker, *Courts and the Public* (Australian Institute of Judicial Administration Inc., 1998).

56 Queensland, District Court, Judges' Conference, 31 March 1999.

57 Law Society of Western Australia, *Seminar on Improving the Court Experience*, 1 May 1999.

58 Parker, *supra* note 54, 5.

59 *Id.*, 12-14; 35-48.

view that there has been an inexorable movement to a more consumer-oriented court.⁶⁰

It is proposed in the remainder of this contribution to consider the recommendations of the AIJA report in the context of practical steps necessary to both capture and maintain public confidence in the courts. In doing so it is proposed to follow a classification of court environments made by the Chief Justice of Singapore, the Hon Yong Pung How, at the Asia Pacific Courts Conference in 1998.⁶¹ The environments there suggested were that pertaining to internal organisation, where the court has control; the transactional environment, comprising its constituents over which the court has influence; and the contextual environment, over which the court has limited influence.

Why Public Confidence Requires More than Judicial Performance

The attention directed towards methods of capturing and maintaining public confidence is itself a rejection of the concept that proper performance by the courts of the important social tasks assigned to them will be sufficient to secure public confidence. Experience has shown to the contrary. No longer can it be thought to be sufficient that judges will capture public confidence by the “impartial, procedurally fair and rigorous ... application of the law”⁶² alone.

60 *Id.*, 26-28.

61 M. Gleeson CJ, *The Future State of the Judicature*, The Judicial Conference of Australia Colloquium on the Courts and the Future, 8 November 1998, 1.

62 G. Brennan CJ, “Courts for the People – Not People’s Courts”, 94 *Victorian Bar News* 25, 26 (1995) cited in G. L. Davies J, “Judicial Reticence”, 8 *Journal of Judicial Administration* 88, 104 (1998) in developing the argument that more is required of courts to answer uninformed and wrong criticism.

In his address on the occasion of the 175th Anniversary of the Supreme Court of New South Wales, Chief Justice Spigelman reminded the audience that courts were not to be judged as consumer organisations but rather as deliverers of justice.⁶³ That profound truth is not gainsaid by examining ways in which the role of the courts can win confidence. It is axiomatic that unless a court is seen to deliver justice it will most certainly not capture public confidence. But the modern addendum is that even where it is seen to do so there are steps which, easily taken, will ensure that is so in respect of the courts' various publics.

There are at least three reasons why this is so. The first is that the attraction and holding of public confidence will be in issue with the courts even where the justice dispensing function of the court is not ultimately exercised. It has been said "one main purpose of the existence of the courts is actually to discourage the parties from using them".⁶⁴

To address mechanisms to secure public confidence lying beyond the delivery of justice is not therefore to diminish the central function of the courts. Rather it is to acknowledge that the central function of the courts is of such crucial importance to society that unless its value is recognized, the public could let slip that value to their peril. To view courts as service organisations is not to supplant their role as deliverers of justice but to ensure the delivery of justice is best serviced. The goals are complementary, not antithetical.

63 J. Spigelman CJ, *Remarks at the 175th Anniversary Ceremony of the Supreme Court of New South Wales*, 17 May 1999; www.lawlink.nsw.gov.au/sc/sc.nsf/pages/175-6.

64 John Baldwin, "Flies on the Legal Carcass: The Disreputable Study of Judicial Administration", 16 *Holdsworth Law Review* 22, 27 (1993-94).

The second is that the standard means utilised by the justice system to communicate may have become outdated. Nowhere is this made more apparent than in a recent survey by a judge of the Australian High Court of the art of communication with “generation-x”.⁶⁵

The third reason is that courts must have means by which to withstand loss of confidence resulting from unreasonable criticism. Brennan CJ has distinguished legitimate and illegitimate criticism of the courts.⁶⁶ He considered the former “must be found in the reasons for judgment or in some blemish in the conduct of the proceedings”. Criticism made without consultation of the public record was “mischievous”. Yet it is the case that the criticism the courts have to face on occasion is not shaped by the methodology of reason familiar to the courts. It may be motivated by profound disagreement with the result of a decision. The motivation may be intensely political, with no regard to the factors identified by Brennan CJ. In such circumstances it is more important than usual that the court and the principles by which it functions is understood by its publics.

Court Internal Environment

I. Court Charters

Consistently with developments in relation to all services involved in the exercise of public power – and perhaps consistently with practices in public enterprise for delivery of services to customers – one technique utilised by courts to improve relations with their publics has been to develop court charters. These are essentially documents in which the public goals of the operation of the courts are described and adopted as targets for

65 M. D. Kirby J, “Delivering Justice in a Democracy III – The Jury of the Future”, 17 *Australian Bar Review* 113, 120-126 (1998).

66 Brennan, *supra* note 1, 42.

achievement. They have the virtue of both committing the court to the declared public goals as well as enunciating those goals clearly to the public. The public is then entitled to expect delivery of court services in terms of the stated goals.

In 1994 the Access to Justice Advisory Committee saw the role of charters as providing for the formulation and publication of more comprehensive and specific performance standards. It regarded these as having a symbolic value; as providing a framework for identifying and addressing deficiencies; as providing information to court users; as allowing structured assessment of court administration and practice and providing a more informed basis for the allocation of resources required to maintain standards. It envisaged that such charters should include reference to court physical facilities, information made available by the court, timeliness and efficiency in delivery of services, courtesy to the public, access to the court and accountability for service delivery.⁶⁷

For example, the Family Court of Australia has a service charter setting out the quality of service that the public can expect from the Court. It sets out the purpose of the Court and the services and quality of services offered by it.

A further development of this concept is referred to in connection with the transactional environment under the heading of communication plans.

II. Self-Governance

The need for courts to secure public confidence in their functions has led to a desire on the part of courts to assume responsibility for management of the courts. It is not enough for that task to be left to others. In Australia, the High Court of Australia attained

67 Australia, *Access to Justice: an Action Plan*, Access to Justice Advisory Committee, 1994, 365-367.

self-governance in 1980.⁶⁸ The Federal Court of Australia followed in 1990.⁶⁹ Where self-governance is so assumed, there is no room to blame others for shortcomings of the court, save that the need for funding of court budgets remains ever with government.

III. Procedural Reforms

It lies in the hands of each court to reform its procedure. Such reforms are likely to resonate in improvement of public access and reduction of cost. Unnecessary complexity in rules, documentation or verbiage may all be simplified by action of the court in the exercise of normal rule-making powers. A senior Australian judge has urged that the *modus operandi* of the adversarial trial system should be reconsidered in the light of public needs. He has suggested, for example, that there is perhaps no reason why the trial process should be continuous and witnesses could be heard by appointment.⁷⁰

The focus of much procedural reform in Australia has been on the introduction of systems of mediation into the normal court processes.⁷¹ This has been in addition to the growth of alternative dispute mechanisms in the wider community.

Modifications to the procedure of a court can be utilised to achieve better communications with the publics of a court. For example, in the previously cited problems of communication

68 *High Court Act* 1979 (Cth), s17 operative from 21 April 1980.

69 *Courts and Tribunals Administration Amendment Act* 1989, s15 inserting s18A into the *Federal Court of Australia Act* 1976 (Cth) operative from 1 January 1990.

70 Peter Underwood J, *Has the Trial Process Reached its 'Use By' Date?*, Judicial Conference of Australia, Colloquium, 7 November 1998, www.law.monash.edu.au/JCA/Underwoodpaper.html.

71 E.g. Federal Court Rules, O72.

with generation-X, it is open to a court to adopt new modes of communication with juries to accommodate changes in community expectations for effective communication.⁷²

IV. Management Reforms

Procedural reforms have encompassed and been accompanied by extensive management reforms. In Australia the stimulus for this appeared to come initially from the experience in case management in the United States. Subsequently the report of Lord Woolf in the United Kingdom offered further overseas confirmation that the courts of the common law world were radically taking command of the conduct of their business as part of a determined effort to more effectively relate to the public.⁷³ A former Australian Chief Justice has given support to case management while pointing to the need for speedy disposition of cases not to prejudice the just disposition of cases.⁷⁴ This was indeed the ratio of the decision of the High Court of Australia in *State of Queensland v JL Holdings Pty Ltd*⁷⁵ where it was held the ultimate aim of a court is the attainment of justice and no principle of case management could be allowed to supplant it. There it was held that case management, while being a relevant consideration to the exercise of the discretion of a judge in refusing leave to amend a defence, could not be allowed to prevail over the injustice of preventing the applicants from raising an arguable defence.

72 See Kirby, *supra* note 64, 120-126.

73 Lord Woolf of Barnes, Access to Justice: Final Report, Her Majesty's Stationary Office, London, 1996. See David Gladwell, "The Civil Justice Reforms in England and Wales", 8 *Journal of Judicial Administration* 194.

74 Mason, *supra* note 35, at 8.

75 (1997) 141 ALR 353.

V. Performance standards

Courts have traditionally been loath to measure their performance, limiting data to inputs rather than outputs.⁷⁶ A further aspect of courts taking command of their management is the development of standards of performance. Such standards may appear in court charters or be separate from them. So far as such standards relate to the time in which proceedings are to be finalised by a court, there is the inherent danger that the standard may override the requirements of justice. Provided that danger is guarded against, there is every reason for a court and its judges to have standard goals for compliance with in the resolution of cases. One senior Australian judge has urged that the judiciary be bolder in imposing time limits upon what litigants do in court so that quality time is available out of court.⁷⁷ Another has pointed out that the development of time standards raises, in acute form, the problem of the overlapping responsibilities of all branches of government in that the capacity of a court to meet some limits is resource dependent. For example a standard may prescribe the time within which an accused person is to be brought to trial but whether the courts have resources to enable that to occur may be dependent upon provision by the executive of resources.⁷⁸ Furthermore an implicit or explicit intention in the standards to induce settlements may have implications for the theoretical and practical construct of the justice system.⁷⁹ And finally it must always be borne in mind that performance standards may prove unable ever to measure quality.

76 Carl Baar, "The Emergence of the Judiciary as an Institution", 8 *Journal of Judicial Administration* 216, 230 (1999).

77 Keith Mason J, *What are the Essentials for the Australian Judicial System?*, Supreme and Federal Court Judges' Conference, 28 January 1999.

78 Gleeson, *supra* note 4, 138.

79 Ted Wright, *The essentials of the judicial system – some essentials for re-examining essentials*, Supreme and Federal Court Judges Conference, 24-29 January 1999, 2.

VI. Safety Standards

The AIJA report found a need exists for the courts of Australia to each develop a Safety Plan. Professor Parker's recommendation was that this be done with the reasonable apprehension of court users in mind.⁸⁰

V. Judicial Cultural Education

The traditional view of a judge as a person remote from the everyday pressures of life has not worn well in the multi-cultural environment in which courts now operate, particularly in Australia. This is noticeably so in relation to contact between judges and the Aboriginal peoples of Australia but it is equally true in relation to Australians who have come from diverse ethnic and religious backgrounds. The result has been that a number of Australian courts have introduced judicial education programs for judges in relation to cultural and ethnic matters. One of the first was that presented in the Supreme Court of Western Australia. The Australian Institute of Judicial Administration has also organised courses for courts at various levels on cultural issues relating to Aborigines and Greek and Vietnamese speaking peoples.

In this context it is of significance that a justice of the Supreme Court of the United States has recently urged judicial education of judges as a means of safeguarding necessary public trust in the courts.⁸¹

80 Parker, *supra* note 54, 165 (recommendation 8).

81 Stephen Breyer J, *Judicial Education and Judicial Independence*, The Hemispheric Judicial schools Conference, Puerto Rico, 27 October 1998, 2; www.afr.com.au/content/981119/verbatim/verbatim5.html.

VIII. Judicial Evaluation

Programs of judicial evaluation have been introduced in North America since the mid-1970s. By judicial evaluation is meant "the process to develop reliable information concerning judicial performance of individual judges to the end that judges can gain needed insight into their performance and can improve that performance accordingly".⁸² These programs have generally involved assessment of judges under criteria relating to legal ability, impartiality, judicial management skills, comportment and disposition practices.⁸³ Such concept is presently under consideration in Australia. If any such program were to be established, preliminary thinking is that it is likely it would involve recently retired judges as assessors.

IX. Formulation of Judgments

The manner in which reasons for judgment give expression to the reasons of the court is uniquely within the control of each court. For the purposes of communicating effectively with the public, it is possible for judges to formulate their reasons so as to be more communicative to the lay reader. A former Chief Justice of Australia has referred in this context to the practice of the High Court of Australia, and now other Australian courts, of issuing short form summaries of the reasons for judgement in complex cases.⁸⁴ That has the potential of both aiding the winning and losing parties to comprehend the reasoning of the court as well as to aid the public at large by ensuring it receives accurate media reports.

82 Barry Grannary J, "Judicial Development: and Examination of Judicial Evaluation Initiatives and Mentoring Programs", 21 *Provincial Judges' Journal* 5 (1997).

83 *Id.*, 6.

84 Mason, *supra* note 35, 8-9.

X. Sharing Best Practice

In the AIJA report Professor Parker found an absence of shared best practice among courts. He recommended the establishment of an independent, central site with the resources and authority to survey what is occurring in all Australian courts.⁸⁵ He would include benchmarking exercises in this.⁸⁶

XI. Costs and Fees

It is within the jurisdiction of courts to determine the basis upon which costs and fees may be properly charged. Market forces will determine the quantum of costs allowable. But the complexity of the costs scale lies with the court to settle. Fees imposed by governments may deter access to a court. They have the potential to cause public resentment and hence loss of public confidence.⁸⁷

Transactional Environment

I. Communicative Approach

The starting point for a court wishing to create public confidence within its transactional environment is to recognize the need for appropriate communication of the court's purposes at all levels. The Chief Justice of South Australia has spoken of the need for justice to be "administered courteously promptly and efficiently".⁸⁸ This is the "user friendly" approach, sometimes used in discussion as a subtle denigration of moves to make

85 Parker, *supra* note 54, 167 (recommendation 14).

86 *Id.*, (recommendation 16).

87 Mason, *supra* note 35, 6.

88 John Doyle CJ, *What are the essentials for the Australian Judicial System?*, Supreme and Federal Courts Judges' Conference, 24-29 January 1999, 3-4.

courts in Australia more responsive to public needs. Professor Parker formalised this by recommending courts should have a Communications Plan, including an information strategy setting out the mechanisms by which information is to be given to a court's publics.⁸⁹ He envisaged these might include web sites, summaries of judgments in prominent cases, fact-sheets, newsletters to addressees on a mailing list, videos, help-desks and information sessions.⁹⁰ The Federal Court of Australia has advertised the position of Community Relations Officer to further these goals.⁹¹ Along with other Australian courts, it has a website, provides summaries of judgments for major cases, informational leaflets for the public and written information to assist litigants in person.⁹²

II. Reverse Communication

An important feature of Professor Parker's recommendations is that communication needs to be two-way so that courts hear from their publics where possible and appropriate. Mechanisms suggested by him are court user forums, feedback forms and user surveys.⁹³ The involvement of court user groups in the previously mentioned seminar organised by the Law Society of Western Australia was confirmatory that such communication can be both educative and non-controversial.⁹⁴ One Australian Supreme Court conducts regular client surveys⁹⁵ and a Ministry

89 Parker, *supra*, note 54, 164 (recommendations 1 & 2).

90 Cf. Davies, *supra* note 61, 105.

91 The Australian, 24 April 1999.

92 Federal Court of Australia, Courts and the Public Report: Follow up on Recommendations, 12 February 1999, 1.

93 Parker, *supra* note 54, 165 (recommendation 6).

94 Law Society of Western Australia, *supra* note 66.

95 Advice to the AIJA from the Registrar of the Australian Capital Territory Supreme Court, 21 April 1999.

of Justice has conducted customer surveys of the judiciary, legal practitioners and litigants and jurors.⁹⁶ A District Court has established a "customer council" to keep in touch with user views.⁹⁷

The customer surveys disclosed a low level of dissatisfaction with court services in Western Australia. Both practitioners and litigants rated service from staff as the most influential factor in determining overall satisfaction.⁹⁸

III. "Complaints" System

Professor Parker recommended "all courts should state clearly the mechanisms by which complaints about the service of the court can be made by court users and how those complaints will be dealt with".⁹⁹ He excluded from "service" the content of decisions made by the court in interlocutory matters or at a trial. The Access to Justice Advisory Committee had previously recommended that an important element of a court charter should be the development of a mechanism for dealing with complaints from the public concerning any failures to comply with the standards set out in the charter.¹⁰⁰

These practices are largely now in existence in Australian courts. The administrative changes introducing such provisions share

96 Western Australia, Ministry of Justice, Court Services Division, Customer Survey, 1999.

97 Western Australia, District Court, advice from Executive Officer to AIJA, 10 May 1999.

98 Western Australia, Ministry of Justice, Court Services Division, Customer Survey, Executive Summary, 5.

99 Parker, *supra* note 54, 165 (recommendation 7).

100 Australia, Access to Justice Advisory Committee, *Access to Justice: an Action Plan*, 367-368 (1994).

common features and display novelty of approach in some jurisdictions:

1. Courts Charters specifying service standards have been widely adopted so that there is an overall culture of client service.¹⁰¹
2. Such Charters are displayed on counters and in the court-houses to which they relate.
3. The Charters contain a statement concerning the making of complaints, identifying the person or persons to whom complaints concerning service may be made and how the complaint may be lodged (in the Australian Capital Territory provision is being made for lodgment by free phone or fax).
4. Some Charters contain a form for making a complaint or comment on service (in the case of South Australia this being a tear off slip capable of reply paid mailing).
5. The identity of the person who will resolve a particular complaint is dependent upon the nature of the complaint: that is, whether they go to the counter officer, a designated officer, the Registrar, or the chief executive of the courts' authority.
6. The intention is that as many complaints as possible will be resolved at the counter (over 90% of all complaints in the Australian Capital Territory Supreme Court being so resolved).
7. In the case of the Family Court of Australia provision is made for users to express satisfaction with a particular

101 Queensland, Court Registries Charter, June 1996; South Australia, Courts Administration Authority, Courts Charter; Victoria, County Court, Customer Service Charter; Victoria, Magistrates' Court, Customer Service Charter; Western Australia, Ministry of Justice, Customer Service Charter; Australian Capital Territory, Supreme Court, Commitment to Service Statements for Registry, Sheriff's Office and Library; Family Court of Australia, Service Charter.

service or to suggest improvements to it by placement of a tear off card in a Suggestions Improvement Box or by mailing to the Court.

8. "Complaints" boxes are also provided on the counters of the Registries.
9. Complainants are not required to identify themselves although they are given the option of doing so if they wish to learn of the outcome of their complaint.
10. These procedures are in addition to any statutory rights of complaint such as those that may be open to an Ombudsman or (in the case of Queensland) the Criminal Justice Commission.¹⁰²
11. The procedures also operate in addition to the determination of complaints made directly to an Attorney General or to directly to a Chief Justice or Chief Judge or by reference to that person, this being the case in relation to complaints concerning the conduct of a judicial officer.

Complaints relating to judicial conduct raise more far-reaching issues. New South Wales is the only State that has established a Judicial Commission with functions, which include those of providing for the examination of complaints against Judges and other judicial officers.¹⁰³ Experience in the Commission has shown that most complaints are examined and dismissed as not reaching the status of minor complaints under procedures available to the Commission under the Act.¹⁰⁴

102 *Criminal Justice Act* 1989 (Qld), s29.

103 *Judicial Officers Act* 1986 (NSW).

104 *Id.*, ss18, 20; New South Wales, Judicial Commission, Annual Report 1997.

IV. Court Support

Although the AIJA report did not review the current levels of provision of court support, Professor Parker recommended a further inquiry should seek to document the present level of such services.¹⁰⁵ By court support is meant provision of social, spiritual and material support to persons engaged in the court process. A further recommendation was to the effect that courts have a referral strategy under which up to date information should be maintained on local advice and support systems.¹⁰⁶

V. Physical Facilities

Closely related to provision of court support is the availability of appropriate physical facilities for a court. "Appropriate" is to be understood with reference to the needs of court support as well as the requirements of judges, registries and libraries.

There is an evolving literature on court architecture. It is well captured for present purposes in the Conference held at the University of Wollongong in 1998.¹⁰⁷ An equally interesting development is a recent report on the impact of court architecture, which opens up interdisciplinary considerations not yet fully explored.¹⁰⁸ The report stresses the importance of user feedback and court communications.¹⁰⁹

105 Parker, *supra* note 54, 166 (recommendation 9).

106 *Id.* (recommendation 13).

107 The papers are available on the internet at www.uow.edu.au/law/repjustice/index.html.

108 Western Australia, Law Reform Commission, Consultation Draft, *Court Perspectives: Architecture, Psychology and Western Australian Law Reform* (Louise St J Kennedy and David Tait, authors).

109 *Id.*, 31-34.

VI. Litigants in Person

Of particular importance in Australia is the emerging presence of litigants in person. These are persons underrepresented by private lawyers and unable to qualify for legal aid or pro bono assistance of any other type. A former Australian Chief Justice has expressed the view that "the adversarial system, especially the jury trial, is not well geared to deal with the litigant in person".¹¹⁰

In the AIJA report Professor Parker recommended that all courts should have a Litigants in Person Plan dealing with every stage of the process from filing through to enforcement.¹¹¹ In Australia the desirability of that step has been enhanced by several developments. The first is that, since *Dietrich*, an indigent person charged with a serious criminal offence who is unrepresented without personal fault is entitled to a stay of proceedings for the purpose of representation being provided at the expense of the state.¹¹² The second is that decline in the funding available for legal aid has occasioned more persons to appear unrepresented. The third is there appears to be a greater willingness on the part of members of the public, perhaps necessitated by the high level of the costs of representation, to "have a go" at presenting their own case.

The presence of an increased number of litigants in person in the justice system raises a series of issues in terms of the capture and preservation of public confidence in the court system. Those issues arise prior to lodgment of process; after such lodgment and prior to hearing; during the hearing and after conclusion of trial. The issues arise as much for the service personnel of the court as for the other parties and their counsel and the presiding judicial officer.

110 Mason, *supra* note 35, 7.

111 Parker, *supra* note 54, 166 (recommendation 10).

112 *Dietrich*, 177 CLR 292.

Lord Woolf's final report on the English Civil Justice System concluded "parties of limited financial means should be able to conduct litigation on a more equal footing".¹¹³ For him this meant "litigants who are not legally represented will be able to get more help from advice services and from the courts".¹¹⁴ Therein lies the present dilemma for both courts and litigants in person. Additional funding from public sources for provision of such services is simply not in expectation. This is precisely the point, earlier referred to, at which the public confidence in the courts lies in the hands of the executive.

The preparation of a Litigants in Person Plan has the advantages of directing specific thought to the issues raised by such litigants and providing those engaged in the work of the court with guidance on the range of issues which can arise. It is a desirable step both for public confidence and for proper management of the business of the court.

VII. Technological Communication

Growth and adjustment by courts to developments in technology is capable of effecting both procedural and managerial change. Yet, perhaps more importantly, such growth and adjustment has the capacity to place courts in unparalleled communication with the public, which it serves. Electronic filing will be matched by electronic access to court records; the character of submissions and transcript will adjust to electronic forms; even attendance may occur by electronic means.¹¹⁵ Video-conferencing is now routinely used by the High Court of Australia for special leave applications, by the Federal Court of Australia

113 Woolf, *supra* note 72, 7.

114 *Id.*

115 Michael Kirby J, "The Future of Courts – Do They Have One?", 8 *Journal of Judicial Administration* 185, 189 (1999).

in connection with its nationwide jurisdiction and by State Supreme and District Courts in relation to bail applications and sentencing appeals by imprisoned appellants. Video and telephone are on appropriate occasions now used for the receipt of evidence.¹¹⁶ Professor Parker cautioned, however, that before placing great reliance on technology a court should be sure that its relevant publics have reasonable access to and facility with computers.¹¹⁷

Contextual Environment

I. Jurisdictional Environment

The capture of the public confidence in the courts in the exercise of their jurisdiction to determine constitutional questions is more likely to be seen in the public perception as verging into the political where the issues are of constitutional, and therefore necessarily of political, significance. Similarly, in criminal matters the determination of sentences by judges is a public act attracting views of the community on the appropriateness of the sentence. In civil matters the decision of the judge is more likely to be of concern to the parties alone, although in significant cases the decision may have ramifications for persons beyond those engaged in the litigation. Nevertheless, in all jurisdictions a judge will be exercising public power and so need to capture and maintain public confidence in the exercise of the jurisdiction.

116 Margaret White J, *Comment on paper by McGarvie J*, Judicial Conference of Australia, Colloquium on the Courts and the Future, 8 November 1998, 3.

117 Parker, *supra* note 54, 166 (recommendation 11).

II. Government

It is axiomatic that the courts must coexist with the other powers constituting the government; that is, the legislative and executive powers. This must be so even where the courts have the power to review, either constitutionally or as a matter of law, the conduct of the other branches of government. In Australia, following the Westminster system, the executive is comprised of persons drawn from the legislature. Public confidence in the courts can be shaped by executive and legislative opinion as much as by the conduct of the courts. It is therefore very important that courts have means to communicate with the other branches of government concerning the proper role and function of the courts.

There are a number of techniques of communication which have been used by courts in Australia to communicate appropriately with other branches of government. In relation to the legislature, Chief Justices or their representatives have appeared before legislative committees charged with settling the budget in relation to courts.¹¹⁸ In relation to the executive, Chief Justices meet from time to time with the Cabinet officer responsible for the courts, in addition to continual exchanges through correspondence. It is possible that when judicial officers point to desirable law reform in the course of their reasons for judgment that such suggestions can be forwarded to the executive for attention. They could as easily be forwarded to any legislative committee with involvement in law reform. In the past appeals were made for the Australian Law Reform Commission to fulfil a clearing-house role in that respect.¹¹⁹

118 In Papua New Guinea there is a constitutional right for the Chief Justice to do so: Papua New Guinea, Constitution, s209(2B), s210(3).

119 Australia, Law Reform Commission, Annual Report 1977, 6-7; Australia, Law Reform Commission, Annual Report 1979, 4.

In the AIJA report Professor Parker saw the need for improved communication between the judicial and political arms of government. He suggested periodic meetings between representatives of the judiciary, legislatures and executive for the purpose informing each group about the perspectives of the other and ironing out avoidable differences.¹²⁰

III. Attorney- General

Until recently in Australia it had been thought that it was incumbent on an Attorney General, as the first law officer, to "defend" the courts against improper criticism. However, the present Commonwealth Attorney-General, prior to assuming that office, said that the judiciary should not look to the attorney-general to represent or defend it in public debate in the media. He considered this was better done by judges and would be more compatible with judicial independence.¹²¹ He has largely adhered to this view since assuming that office although he qualifies his basic propositions to accept "sustained political attacks capable of undermining public confidence in the judiciary may call for defence by the Attorney-General".¹²²

The first expression of these views met with opposition at the highest levels of the Australian judiciary. Brennan CJ said "...why should an Attorney not defend the reputation of the judiciary, explain the nature of the judicial process and repel attacks based on grounds irrelevant to the application of the rule of law?"¹²³ Former Chief Justice Mason said "... an Attorney-

120 Parker, *supra* note 54, 164-165 (recommendation 5).

121 Hon Daryl R. Williams, "Who Speaks for the Courts?", in *Courts in a Representative Democracy* 183, 189-192 (Australian Institute of Judicial Administration, 1994).

122 Hon Daryl Williams, Address Monash University Law School Foundation, 1 May 1997, 15.

123 Brennan, *supra* note 1, 41.

General should defend the courts and judicial officers against irresponsible criticism and he should be prepared to do so when irresponsible criticism is made by politicians".¹²⁴ The obligation to speak in these circumstances would now appear to be accepted by the Attorney-General in his second statement.

Nevertheless the Attorney's other point – that judges should speak out more for themselves – has been generally accepted. There is a range of matters where the knowledge of the judiciary better informs the public debate, for example in connection with administrative changes in the courts and matters of general judicial philosophy such as sentencing.¹²⁵ The formation of the Judicial Conference of Australia and its subsequent symposiums and statements has sought to advance that view.¹²⁶

IV. Media

As one academic observer has recently said, there is a vast Australian literature on judges and the media.¹²⁷ Professor Parker recommended that media liaison officers or equivalents should be appointed in all jurisdictions and appropriately resourced.¹²⁸ His recommendation was outstripped by developments to that effect. It is sufficient here to record that all Australian courts and jurisdictions have taken steps of one sort or another to improve communications with the media. Prime among these are the appointment of Public Information Officers to facilitate liaison between the courts and the media. There are recent but well-established systems. In Western Australia, the

124 Mason, *supra* note 35, 11.

125 David Wood, "Judges and Community Involvement", 7 *Journal of Judicial Administration* 229, 247-248 (1998).

126 See the papers of the Conference cited in these footnotes.

127 Wood, *supra* note 124, 236, fn 37.

128 Parker, *supra* note 54, 164 (recommendation 4).

courts have issued "Guidelines for the Media".¹²⁹ These explain the jurisdiction, location, sitting times and circuits of each court; the nature of what occurs in court; the personnel who will be in court; expectations and requirements for the reporting of hearings; conditions of media access and contact points for further information.

V. Public Education

A former Chief Justice of Western Australia made the point that the public could not be expected to look to the courts with confidence if they did not know what the courts did. Furthermore, he said, they could not be expected to distinguish the role performed by the courts if their perception of society was that all their benefits and rights came from actions of the executive.¹³⁰ In Western Australia the result has been the establishment of the Francis Burt Law Education Centre. The function of the Centre is to provide community legal education to school students and to the public. Approximately 12,000 secondary students participate in the programs of the Centre each year. Featured in its activities are a mock trial competition between schools and an innovative focus on Aborigines and the law. In Sydney there is a government sponsored Police and Justice Museum with a focus on criminal aspects of the law.

While these are important steps, they have to be measured against the absence of any basic education civics training for the broad membership of the public. The principles upon which public life, including the work of the courts, is conducted is not

129 Western Australia, Courts, Public Information Officer, Guidelines for the Media, June 1999.

130 Sir Francis Burt, former Chief Justice of Western Australia, December 1987.

the subject of general across the board teaching to Australians.¹³¹ It is more likely that most Australians will have some idea of the concept of democracy and the role of the legislature. It will be largely unknown to them that the courts may provide protections to them. It is not surprising that is so given the apparent inaccessibility of courts to the public because of cost. Furthermore there is no entrenched Bill of Rights in Australia to make apparent the role of the courts in protecting freedoms of the individual against state action. These and other factors make it highly desirable that the public education in the school system should extend to the role and function of the courts. Where that does not occur or where it occurs inadequately, there is scope for others (such as the legal profession) to provide community legal education.

Professor Parker's approach was to recommend that all courts should have and keep under review a community education strategy. Such strategy would set out the different mechanisms by which the court aims to inform the public about the role of courts in the community. He instanced judicial outreach programs, school and community visits, open days, public meetings, pamphlets, and juror education programs.¹³² He also recommended that the Council of Chief Justices and the Judicial Conference of Australia continue their active role in promoting greater communication between courts and the public.¹³³

VI. Private Competition

The point has been made in Australia that unless courts take steps such as those outlined above, they will be less able to

131 Cf. Davies, *supra* note 61, 93. Kirby, *supra* note 7, 607-608 urges the teaching of civics.

132 Parker, *supra* note 54, 164 (recommendation 3).

133 *Id.*, 167 (recommendation 14).

compete with privately organised dispute settling agencies who have regard to principles of organisation involving appropriate communication.¹³⁴

Conclusion

Public confidence in the courts depends fundamentally on the reputation of a court to deliver justice according to law. Without that, there can be no foundation for true public confidence. However, without denigrating from the essential function of the courts to deliver justice, without turning courts into imitations of corporate entities, without transmogrifying courts into consumer organisations, there is much more that can be done by courts to capture and maintain public confidence in today's society. Such steps are not only desirable; they are essential. Public education and expectations have risen; if courts do not communicate in the environment of present day society they will not hold the confidence of that society. Repositories of public power in a democracy today spend a considerable time in communicating effectively with the public and courts can not stand away from that development. It is necessary for those responsible for the courts to take an outside view of the institution through the eyes of those unfamiliar with the law. That done, it will be apparent that the steps outlined in this paper are common sense, practical steps which it is desirable any court should take. The goal of taking those steps is to ensure the continuity of the law in times where, unless there is public confidence in the courts, its application may be socially disputed and the rule of law placed in doubt.

134 Wright, *supra* note 78, 3-4.

*Modes of Appointment and Training of Judges A Common Law Perspective**

by

*Michael D. Kirby*¹

Old Ways

Northern Ireland, like Australia and most other jurisdictions of the common law, inherited from England the old ways of going about judicial appointment and the training of judges.

Unlike the countries of the civil law tradition, it rejected a career judiciary with training and promotion inside the ranks. Instead, judges, whether of superior or inferior courts, were chosen (almost without exception) from members of the practising legal profession. Indeed, they were usually chosen from an even smaller group, being barristers whose full time work was normally in advocacy before courts. For the superior courts, appointment typically from the senior members of the Inner Bar whose professional skills and learning had earlier been recognised by their appointment as Queen's Counsel.

Under the old ways the judge, upon appointment, was given no formal training to ease the path from the life of an advocate to a life on the bench. Usually, after a formal welcoming ceremony, at which extravagant praise was voiced about the judge's merits, he or she (usually he) was scarcely over the pleasure of the event

* This paper was presented during the *Workshop of Experts on the Review of Criminal Justice in Northern Ireland* that was held in Belfast on 8 and 9 June 1999 and was organized *inter alia* by the ICJ and its Center.

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when the rude necessity to sit in court descended. For most, the transition from the well of the court to a seat on the bench appeared to go smoothly enough. Occasionally, the novice would be seen to leap to the feet or to cry "I object" when a question was asked or answer given that seemed objectionable. But the kind of person who was appointed to judicial office had normally had such a long experience as an advocate in the courtroom that the transmogrification was relatively painless. In most cases it turned out to be astonishingly successful. I say astonishingly because the qualities inherently required of an advocate are substantially different from those required for a judge. Truly, in mid-life and mid-career the appointee has the challenge of a virtually unaided translation to large public responsibilities for which the only real preparation was the observation, over many years, of other judges at work.

The training of judges, in a formal school or college, as a prerequisite to the commencement of judicial service, or as an accompaniment to years of service, was, in the old days, out of the question. In part, the resistance flowed from the fact that this had never been the way it had been done in England which, in the judiciary (as in so many other things) adored the gifted amateur. In part, doubtless, it was because the English way of doing things was cheap to the public purse and relatively efficient. The private sector, of the advocate's practice, was thought to give the judge the necessary preparation at no cost to the state.

Setting up schools and colleges for judicial education is an expensive business. It involves the provision not only of the infrastructure and the personnel but also diverting the judicial novice from the performance of judicial duties. As these are at a premium in every common law jurisdiction, and because judge power is scarce as the case lists expand, the notion of "lost time" in judicial training was uncongenial to the Executive. But there were also theoretical objections. In England, Lord Devlin, a great judge, was most critical of the Bridge Report which

had suggested that English judges should undergo specialised training:²

I ... regard with a degree of indifference verging on contempt the criticism of judges that demands for them a type of training which render them more like assessors or expert witnesses than judges of fact and law ... The judge's function is to listen intelligently and patiently to evidence and argument ... to evaluate the reliability and relevance of oral testimony ... and finally to reach a conclusion based on an accurate knowledge of law and practice ... The capacity of being a judge is acquired in the course of practising the law.

Lord Devlin's view was supported by Lord Hailsham.³ The explicit fear expressed by Devlin was that judicial training would become an illicit means of inculcating in the judicial branch the values and opinions of the Executive Government. In the United States, with a different organisation of the legal profession (and without the specialised *cadre* of advocates known as barristers) the necessity to provide schools and colleges, training and instruction was clear in some cases. But this was not thought to be the case in countries which followed the English model. A fine Australian judge, Gordon Samuels, remarked in 1980:⁴

The best way of maintaining judicial competency is to appoint reasonably competent judges, who already know enough to embark on their task with tolerable efficiency. If it is recognised that a large proportion of new appointees cannot perform competently without prior instruction, then the system of selection has failed, and basic training is little more than a means of propping it up.

2 P Devlin, *The Judge*, OUP, 1979, 36-47.

3 Lord Hailsham, *Hamlyn Revisited: The British Legal System Today*, London, Stevens, 1983, 50-51.

4 G J Samuels, "Judicial Competency: How Can it be Maintained" (1980) 54 *Australian Law Journal* 581 at 585.

There were similarly settled ways for the selection of the judiciary. Whereas in civil law countries, those who would advance through the ranks were persons who entered college after university and spent a lifetime as a member of the judicial branch and whereas in the United States formalised procedures of selection, confirmation and even election were the norm, things were different in most of the jurisdictions of the common law. It was true that independence constitutions commonly introduced new systems of appointment in many new Commonwealth countries. These usually involved a Judicial Services Commission comprising representatives of the legal profession and of the judiciary to temper the judicial appointments of the politicians. There was no suggestion of election: an American extension of democracy thought in most parts of the world quite unsuitable to the choice of judges and to the need to secure and maintain in office independent and courageous persons who (if required) would actually stand *against* the tide of popular opinion. Even formal confirmation hearings were regarded as an anathema. The instances in the United States involving Judge Bork and Justice Thomas are frequently mentioned - but there are other equally depressing stories about the confirmation process.⁵

Instead of these systems of choice or recommendation by a Commission, the old ways involved a remarkably simple procedure. Appointment to the Bench was in the gift of the elected Executive Government of the day. A principal political officer would make the eventual proposal (in England the Lord Chancellor; in Australia usually the Attorney-General). The decision to appoint or not, or to select amongst candidates, would be made by the Cabinet of politicians, usually in the midst of other pressing political business. Once the new appointee was chosen, his or her name would go forward to the Queen, the

1 J A Maltese, *The Selling of Supreme Court Nominees*, Johns Hopkins, Baltimore, 1995. See esp the defeat of the nomination of John J Parker, 52ff.

President or a Vice-Regal representative for formal confirmation. That was it.

Advantages of the Old Ways

There are many defects in the foregoing description of the old ways of appointment and training of judges in the courts of the common law. Some of the defects explain the invention of new systems for appointment and training now followed in many countries of the new Commonwealth and the established systems of election, appointment, confirmation and formal training which are a feature of the judiciary of the United States. I will turn to these innovations. But first, I want to note a number of important values which the old ways preserved in jurisdictions, such as Northern Ireland and Australia.

As in most things in life, the old ways were not wholly bad. As in many things long settled, they had reasons behind them which explained their endurance. In considering changes to the settled practice hitherto followed in the matter of appointments and training of judges, it is as well to start with a recapitulation of the advantages of the systems that have been followed to date:

- So far as appointment is concerned, there can be no doubt that there are important strengths of the common law system over that followed in civil law countries. A person appointed to the judiciary in middle years, after having established a significant legal career in the private sector, is likely to have a different attitude to the office of a judge than a person who has never done anything else, has always worked in the public sector and who has been dependant on superiors, bureaucrats or politicians for advancement to higher judicial office. It has always seemed to me to be an explanation of the strongly independent cast of mind of the judge of the common law tradition is that he or she will ordinarily not consider the judicial office to involve service to the government. On the contrary, those who have spent the better part of their lives in the

successful pursuit of functions as an advocate (or more recently as a senior solicitor, government lawyer or academic) will tend to have a different point of view to the person whose life has been spent in various positions of government service. This *attitude of mind* is extremely important to the way in which judges of the common law go about their work and to the power which they exercise on behalf of the people whom they serve. It explains, for example, why the reasons of judges of common law courts are more discursive, longer and less obviously syllogistic than those of judges of the civil law tradition. There is a greater candour. There is greater willingness to explore the major and minor premises which explain the decision in hand. Nowadays, there is less self-deception that the words of constitutions or statutes are unambiguous, that past precedents of the common law fill all the gaps needed to meet new circumstances or that policy and legal principle have nothing to do with the decision in a particular case.

People nurtured in the private sector are, it seems to me, more likely to be questioning and candid about such matters. They are likely to be more insistent upon the right to dissent (not often a feature of the jurisdiction in civil law countries). They are prone to demand the opportunity to explain honestly and in detail the reasons for their opinions. They do not pretend that the law is always clear and unambiguous lest ambiguity or dissent might unsettle obedience to government and respect for the law.⁶

- There is another strength in the flexibility which the politicians of the day had in choosing the judges. In the right hands, it meant that appointees could reflect, over time, and in a very general way, the differing philosophies of successive

6 L Mailbot and J D Carnwath, *Decisions, Decisions*, a handbook for judicial writing, Y Blais, Quebec, 1998 (reviewed (1999) 73 *Australian LJ* 290 at 291-2.

governments. There was never a precise correlation in this. Where governments rarely changed, correctives often emerged as (I would suggest) the appointments of high quality to the House of Lords in the last years of the previous Conservative Government. Governments could sometimes be greatly disappointed by the decisions of their appointees once safely in office. But the old ways did allow light and shade. There is a risk in judicial commissions and legislative confirmation proceedings that the appointment process will opt for the "safe" or "unknown" candidate rather than the intellectually vibrant, energetic or bold appointee. Judge Bork was brought down largely by his mass of academic writing revealing his opinions on a great range of topics. Studies of the United States scene have demonstrated a significant fall-off in the academic writings of judges of the United States Courts of Appeals who may be aspirants for appointment to the Supreme Court.⁷ The old ways could sometimes result in the appointment of controversial candidates who would never make it through a club-like astrosphere of a judicial commission or the political circus of a legislative confirmation.

- There is another feature of the old system of appointment which is connected with this. Many defenders of the old method of appointment argue that it ensured that the politics of candidates was treated as irrelevant. If by politics it is meant that politicians would ignore the projected philosophical stance of a candidate, it is probably true that this mattered less in a jurisdiction such as the United Kingdom, where there is no comprehensive written Constitution and where, until recently, there was no formal bill of rights. In a country such as Australia, where the federal Constitution is extremely important to the division of powers in the nation between the

⁷ J Gaille, "Publishing by US Court of Appeals Judges Before and After the Bork Hearings" (1997) 26 *Journal Legal Studies* at 371. cf M D Kirby, "Attacks on Judges - A Universal Phenomenon" (1998) 72 *Australian Law Journal* 599 at 606.

Commonwealth and the States, the perceived social values of the judges are inescapably significant to the governments appointing them. The present Chief Justice of Australia earlier introduced an element of *Realpolitik* into this debate.⁸

There is nothing that makes one person appear more enlightened to another person than that the former agrees with the latter's views. It is only human nature that politicians, like everybody else, tend readily to accept the notion that a particular person is wise and enlightened when they know that that person shares their opinion on matters affecting law and society ... That is just human nature.

I venture to suggest that this has always been the case wherever politicians have been involved in the appointment of judges. It is not necessarily a bad thing, unless the convention of seeking high quality candidates is ignored or unless a long-term government of one political persuasion seeks to stamp on the judiciary partisan appointees unquestioningly loyal to its values. If these abuses are avoided by the observance of conventions, the right of the elected representatives of the people to appoint the judges from those senior, qualified lawyers whose general values they hope will be in tune with their own is a means which defends the judicial institution from uniform or monochrome social values. Under the system copied from England, it is legislators who have the final say in removing judges from office for proved incapacity or misconduct. It is therefore not entirely inappropriate that, in parliamentary democracies, representatives of the legislators in government should have the final say in the matter of appointment. This gives an element of democratic legitimacy to the judiciary. Of course, once appointed, the judge must be independent of

8 R T Thomson, *The Judges*, Sydney, Allen and Unwin, 1987 quoting Gleeson CJ at 72.

party politics and must avoid all appearance of partisan allegiance.

- The lack of formalised judicial education had the advantage that most governments would hesitate before appointing a person to judicial office who did not have easy acquaintance with the running of a court and the business of law as the courts practise it. In this sense, the lack of formal training tended to reinforce the mode of appointment from the select band of experienced senior advocates. They could be trusted, once appointed, to perform their duties easily, with skill and without embarrassment to the government which put them there. The lack of institutional courses reinforced the high individualism of the Bench. This, in turn, was a defence against orthodoxy and the waves of received wisdom and popular passion against which the judiciary is sometimes essential to defend the individual.

It is rare today to see the traditional common law method of appointment defended and the previous lack of formal judicial training explained. But it is important, in addressing the options for reform, to realise that the old ways did not develop and persist wholly by accident. They had merits. They had rational supporters. In devising any new procedures that will be put in their place, it is essential to keep the values defended by the old ways in mind.

New Ways – Selection

A number of features of the outcome of the established procedure for judicial selection have lately cast doubt on whether it is still appropriate for the judicial institution in common law countries as the judiciary readies itself for service in the 21st century.

Despite the opportunity for varied appointments, from different backgrounds, the reality is that in most common law jurisdictions

the judiciary is fairly uniform, usually being a reflection of the composition of the senior Bar. The kinds of people who make it to the ranks of Queen's Counsel (or Senior Counsel as they are now known in a number of jurisdictions, including Australia) are often those with substantial commercial or other practices. They may not reflect an entire cross-section of talent of the Bar, still less of the legal profession as a whole. Furthermore, there remains a serious under-representation of women, of ethnic or other minorities and sometimes a disinclination to look to other, equally independent minded lawyers, who have served in senior positions in universities, in large law firms or even perhaps in government departments. In the past two decades, an increasing number of appointees to the judiciary in Australia - especially the federal judiciary - have come from the new ranks. This has occurred because of a personal commitment of individual Attorneys-General to appoint judges from outside the lists of the senior silks, whilst insisting on professional skill.

Accepting that it is unlikely that any common law jurisdiction would throw over its procedures of appointment for those followed in civil law countries, and accepting further that it is unlikely that we would now follow the Jacksonian model and move to the election of judges (as occurs in 33 States of the United States) the options for reform in the procedures for appointment are principally as follows:

1. To introduce a procedure whereby the legislature elects judges, at least of the highest courts;
2. To adopt the procedure of advice and consent, with formal *confirmation* hearings, as followed in the United States for the appointment of federal judges;
3. To establish, by judicial decision⁹, the special prerogative of the judges to be involved in the business of appointment

9 cf *Supreme Court Advocates Association v Union of India* [1994] AIRSC 268; [1993] Supp 2 SCR 659.

of the judiciary so as to maintain the quality of appointments and to ensure the true independence of the judiciary from the other branches of government;

4. To establish some form of judicial appointments body in which the voice of sitting judges will be heard but at a table at which the Executive Government and perhaps community groups, reflecting democratic will, has a say or the predominant say, in the final appointments; and
5. To introduce a procedure of formal consultation before appointment but continuing to reserve to the Executive Government the final say.

The involvement of the legislature occurs in Germany where judges are appointed under a system of election by the legislature.¹⁰ In Israel, almost a country of the common law, judges are selected by a committee comprising representatives of the legislature, the Executive, the judiciary and the Bar. An analogous system appears now to operate in South Africa. Candidates are interviewed and voted upon.

Because of notable, and highly publicised examples, most lawyers are familiar with the procedures followed in the case of appointments of federal judges in the United States, whether as Justices of the Supreme Court or as judges of the other federal courts. The President's nominees are investigated by the Department of Justice, the Federal Bureau of Investigation, the White House, the American Bar Association and the various lobby groups in the community prior to consideration by the Senator's Judiciary Committee, in advance of their hoped for confirmation. In some States of the United States, the Missouri Plan involves the Governor of the State appointing a judge from a list of qualified candidates screened by a nominating committee. Within a year after appointment, however, the judge must

10 L Armytage, *Educating Judges - Towards a New Model of Continuing Judicial Learning*, Kluwer, the Hague, 1996, 59.

stand for election where he or she can be confirmed or recalled. To most of us, the involvement of the electorate is wrong in principle. Moreover, it is likely to be a formula for judicial caution where sometimes boldness and courage are absolutely necessary.

In India, in a controversial decision of the Supreme Court, a majority held that the constitutional requirement that in the case of a judge other than the Chief Justice, the Chief Justice of India shall always be “consulted” by the President¹¹, “consultation” meant concurrence. Thus, without the agreement of the Chief Justice of India, no judge could be appointed to the Supreme Court. Whilst there may be special conditions in India which gave rise to this decision, whether as a matter of interpretation of the language of the Constitution or as a matter of policy, few countries of the common law are likely to go down the same path. A judiciary, and particularly a judiciary of an ultimate constitutional court, whose members are effectively controlled solely by the judges themselves might tend to adopt a rather uniform outlook. It would lack entirely the democratic legitimacy which the involvement in the process of persons elected directly by the people, gives to the current system.

The establishment in new Commonwealth countries, often under constitutional provisions, of Judicial Services Commissions was designed to formalise the protection of the judiciary against excessive politicisation, incompetence, corruption and other such vices. It would be necessary to be on guard that such a commission did not become a further vehicle for judicial orthodoxy: each generation replicating itself in mirror image of its own esteemed qualities.

11 Indian Constitution, s 124(2).

The International Bar Association's *Code of Minimum Standards of Judicial Independence* provides:¹²

Participation in judicial appointments and promotions by the Executive and legislature are not inconsistent with judicial independence provided that the appointments and promotions of judges are vested in a judicial body in which members of the judiciary and the legal profession form a majority.

This would no doubt be acceptable to most members of the legal profession. But many politicians, and not a few citizens, would question the necessity and wisdom of removing political choice. Perhaps it depends on the society concerned. In those in which conventions rule which ensure the appointment of adequate women and members of ethnic, religious and other minorities, the need for such a commission may be doubtful. In societies which are divided along such lines, the establishment of institutional arrangements may be necessary.

At the very least, a more open procedure of consultation and appointment seems to be required. In Australia, legislative provisions require consultation by the federal Attorney-General with his State counterparts before appointing the Justices of the High Court.¹³ The procedure of consultation is now quite formalised. The federal Attorney-General also takes considerable time in consulting judges, legal professional groups, political parties and others. But there is no assurance that the consultative process will deliver a consensus candidate. In a recent appointment to the Court, it was widely rumoured that the Attorney-General took one name to Cabinet but another person was appointed. In some States of Australia, for appointments to the magistracy at least, advertisements are now lodged and specialist selection

12 New Delhi, 1982, par 3a.

13 *High Court of Australia Act 1979* (Aust), s 6.

committees interview candidates before appointment. Whilst the final say remains that of the politicians, the anterior procedure is more open. There is some evidence that it has resulted in appointees of greater diversity and with no suggested fall-off in professional skill and appropriate temperament.¹⁴

New Ways – Judicial Education

Within Australia, a series of radio lectures given by me 15 years ago on the judges¹⁵ included the first proposal, at a national level, that judicial training should be institutionalised. It led to a vigorous public debate in which my proposal was often roundly condemned. Most judges of the time (1983) thought my ideas to be unnecessary and even dangerous.

However, in the ensuing years, the establishment of the Judicial Studies Board in Britain (1988), the introduction of special courses for new appointees in New Zealand¹⁶ and ultimately the joint activities of the Australian Institute of Judicial Administration (AIJA) and the Judicial Commission of New South Wales, have seen the opposition to training crumble. A past Chief Justice of Australia, Sir Anthony Mason, observed in 1994:¹⁷

There has been some apprehension that educational programmes [could compromise] judicial independence. So long as these programmes are left in the hands of the AIJA, the Judicial Commission and the courts, I do not

14 Armytage, above n 9, 62.

15 M D Kirby, *The Judges*, Boyer Lectures 1983, 25-26.

16 I Richardson, "Changing Needs for Judicial Decision-Making" (1991) 1 (Aust) *Journal of Judicial Administration* 61.

17 A F Mason, "The State of the Judicature" (1994) 20 *Monash Uni Law Review* 1; A F Mason, "The Role of the Courts at the Turn of the Century" (1993) (Aust) *Journal of Judicial Administration* 156 at 166.

think these apprehensions will be realised ... The need to maintain judicial independence is no argument against the desirability of judges becoming better informed.

One factor in the appreciation of the need for the provision of introductory courses for judges is the growing realisation of the inadequacies of the declaratory theory of the judicial function and of the choices which judges (especially of the higher courts) have to exercise every day. Informing those choices with policy oriented courses as well as courses in judicial technique, can only be to the advantage of the appointee. Mixing with other new appointees - and especially those from different jurisdictions of Australia and from other common law jurisdictions of the region - is also of great benefit. Lecturers are chosen to reflect a happy mixture of experienced judges and lawyers and challenging academics from Australia and overseas. Most of the new appointees find the courses extremely helpful. No one now, in Australia, suggests that they should be disbanded.

On the contrary, in April 1999 the Judicial Conference of Australia announced a plan to establish a National College to educate the judiciary, including in such matters as gender issues, cross-cultural awareness and new technologies. The proposed college would also have a role in continuing professional education. The Director of the Conference, Professor Stephen Parker indicated: "Judges are so busy it is unrealistic for them to seek out their own professional development ... Judges have an increasingly important role in society. More things are subject to law now than in the past. These are such important appointments in public life that the time has come for them to be more open."¹⁸ National arrangements for the training of the judiciary in Canada have been long established. For the last decade,

18 S Parker, "Back to School for Judges Under National Reforms" in *The Age*, (Melb) 14 April 1999 A3.

Australia has got by with improvisations. It is now on the brink of considering a more substantial and clearly national institution, possibly in conjunction with a university.¹⁹

The heretical idea has thus become orthodoxy. The dire predictions of disastrous consequences have not been borne out. It is a sign of the open-mindedness of the judiciary and its willingness to change, that most judges in Australia today acknowledge the value of formal orientation procedures.

When I was President of the New South Wales Court of Appeal, I invited new Judges of Appeal to sit with me to observe the very busy motions list before they tackled the list on their own. It was a tribute to their integrity and curiosity that even judges who had served for many years in trial courts gladly embraced the opportunity. Once judicial apprenticeship would have been regarded as an admission of self-doubt or incapacity. Now, judicial education and on the job experience are regarded, in most courts, as the norm. The capacity of virtually all recently appointed judges to access the Internet and to tap into websites specifically designed for new judges means that the formal processes of education are supplemented by those offered in the new technology.

Conclusions

Thirty years ago the subjects of this paper were hardly discussed in most jurisdictions of the common law. When mentioned, change would generally be denounced as unnecessary and mischievous. But now changes in judicial education are clearly established. Changes in the appointment process have occurred in some places and are likely to be adopted in most others.

19 *Ibid.*

The old ways had strengths. They could not have persisted for so long in common law jurisdictions if that had not been so. But these are rapidly changing times for the law, for society, for technology and for community values. The old ways are now questioned. The genius of the common law has always been that of preserving the good of the past whilst discarding the outdated, the irrelevant and the erroneous. I have no doubt that this is the way in which Northern Ireland, Australia and other jurisdictions of the common law will approach the important and sensitive topics of this paper.

*From Diplock Courts to Jury Courts?**

by

*Peter Charleton and Paul Anthony McDermott*¹

Introduction

It is now over a quarter of a century since a commission headed by Lord Diplock recommended the abandonment of jury trials in Northern Ireland for certain types of terrorist cases and their replacement by a tribunal consisting of a single judge.² The question arises : why should anyone outside of Ireland be interested in these so-called Diplock Courts? The reason is that the debate

* This paper was presented during the *Workshop of Experts on the Review of Criminal Justice in Northern Ireland* that was held in Belfast on 8 and 9 June 1999 and was organized *inter alia* by the ICJ and its Center.

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- 2 *Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland*, Cmnd 5185 (1972). The Committee was chaired by Lord Diplock. In chapter 5, para 37 the Committee noted that "While the danger of perverse convictions by partisan juries can in practice be averted by the judge, though only at the risk of his assuming to himself the role of decider of fact, there is no corresponding safeguard in a jury trial against the danger of perverse acquittals." Subsequently the *Report of a Committee to consider, in the context of civil liberties and human rights, measures to deal with terrorism in Northern Ireland*, Cmnd. 5847 (1975), chaired by Lord Gardiner, declared that trial by jury is the best form of trial for serious cases, and that it should be restored in Northern Ireland as soon as this becomes possible. However it went on to conclude that, for the present time, the Diplock courts should be maintained; see chapter 2, paras 24 to 33.

as to the future of the jury system, a debate which exists in every legal system, can be given new impetus by an assessment of the effects of the alternative, namely judicial fact finding, on the character of the criminal trial.³ In the words of Jackson and Doran :

“For many years now throughout the common law world, trial by jury has had to withstand sustained criticism from many varied quarters. Yet the would-be-dispensers of this near sacred institution have rarely given serious attention to the most obvious alternative of trial by judge alone. The Diplock court offers a unique opportunity for direct comparison of these two forms of trial.”⁴

A non-jury court also exists in the Republic of Ireland, known as the Special Criminal Court. The purpose of this paper is to compare the workings of Diplock Courts and the Special Criminal Court and to see if there is anything to learn from their differences.

The Justification of Special Laws

At the outset it needs to be considered whether special laws against paramilitary violence can ever be justified in a liberal democracy. It is submitted that the answer is yes. Walker has argued that “[i]n principle, it is justifiable for liberal democracies to defend their existence and their values, even if this involves some temporary limitation of rights”.⁵ This viewpoint is reflected in the European Convention on Human Rights, which

3 Jackson and Doran “The Diplock Court : Time for Re-examination” (1989) *NLJ* 464.

4 *Id.* at p 466.

5 Walker “Anti-Terrorism Laws for the Future” (1996) *NLJ* 586. For a general discussion of the context of emergency law in Ireland see Hadden, Boyle and Campbell *Emergency Law In Northern Ireland: The Context* printed as chapter 1 of Jennings *Justice Under Fire* (Pluto Press, 1988).

recognises that not all rights are absolute and which permits Member States to derogate on grounds of national emergency. In addition the Irish Supreme Court has recognised that constitutional rights must be balanced and that on occasion the public's interest in seeing dangerous criminals convicted can justify the limitation of the rights of the accused; see *DPP v Special Criminal Court*.⁶ Implicit in the judgment of the Supreme Court is the idea that the State has a duty to protect the life of its citizens. This concept was also recognised by the European Court of Human Rights in the *McCann*⁷ case, where the threat to the lives of the population of Gibraltar was held to justify the decision of the English security forces not to attempt to arrest the IRA terrorists at the Spanish border but rather to confront them later.

What sets terrorism apart from ordinary crime is that it aims to terrorise and to destabilise political life. Terrorist groups are highly organised and it may be impossible to persuade members of the communities they operate in to place their lives at risk by giving evidence against them. Walker concludes:

"From these factors, one can conceive it to be justifiable for a liberal democracy to design and to employ special laws against groups engaged in political or paramilitary violence. This conclusion does not, however, entail allowing liberal democracies *carte blanche* in response to how they react ... there must be limiting principles which reflect the value of constitutionalism and democratic accountability, which can be considered as universal moral goods and not simply autopoietic features of the British Constitution."⁸

The fact that special powers can be justified does not mean that one should not be vigilant in assessing their impact. As an editorial in the Irish Bar Review recently noted, "[w]hen a democratic

6 [1998] 2 ILRM 493.

7 *McCann v UK*, Appl No 18984/91, Vol 324.

8 Walker "Anti-Terrorism Laws for the Future" (1996) *NLJ* 586 at 587.

state takes swift and decisive action to protect its citizens and institutions there is always a danger that the frontier of fairness will be crossed and injustice may follow".⁹ As a minimum it may be suggested that special laws should follow the following principles :

- i) They should operate only in so far as is absolutely necessary.
- ii) They should derogate as little as possible from the ordinary criminal law.
- iii) They should be as clear as possible.
- iv) They should be kept distinct from ordinary powers and should only be used against terrorists. The temptation to use special powers against non-paramilitary criminals should be resisted.
- v) They should be reviewed at regular periods and should be repealed as soon as the conditions justifying their existence have ceased to exist; in other words 'no emergency, no emergency law'.

Non-Jury Courts in the Republic: Background

Article 38 of the Constitution of Ireland provides:

1. Special courts may be established by law for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order.

2. The Constitution, powers, jurisdiction and procedure of such special courts shall be prescribed by law ...

It ill-behoves anyone from Ireland to come to Northern Ireland and criticise a non-jury criminal trial system. In offering some

⁹ 4 *The Bar Review* 5 (October 1998).

observations, we hope to expose the parallels that exist between the system on the other side of the border to the system which prevails here. There are differences and, if it might be respectfully suggested, the adoption of some of the procedures and safeguards in place in the Republic might usefully be seen as a halfway house to a full return to what is regarded throughout the common law world as the ideal system of criminal trial, that of trial by jury. The largest common law jurisdiction, the United States of America, notwithstanding the presence of organised crime in its most vicious form, for at least the greater part of this century, has not abrogated the right to jury trial. That system shares with the Irish Constitution a division of crimes into minor and non-minor offences. For the latter, one has an entitlement to the jury trial, and for the former, in the United States by a judge-made rule, one may be tried by the equivalent of a magistrate. The basic underlying theory is clear: a citizen charged with a serious criminal offence has an entitlement to that safeguard which will ensure that he will not be convicted unless a randomly chosen group of his or her fellow citizens become convinced beyond any reasonable doubt that he or she committed the crime charged. Perhaps in the United States of America, we do not know, government resources are such that jury trial may be maintained in the face of organised crime through the channelling of huge resources to the protection of jury members and the safeguarding of their families. It may also be that there is a fundamental difference between the two jurisdictions on this island and the United States. The revolution setting up fundamental democracy is two centuries old in the United States. The most extreme problems that remain are due to the remnants of segregation and racial discrimination. The revolution which re-established Ireland as a nation is about seventy years old. The revolution was violent and established a division. Both violence and division remain with us to this day. In the result the Republic has its own equivalent of the Diplock Courts, the Special Criminal Court.

At the time of writing, the trial lists for the Special Criminal Court are booked until February, 2000. The Court has no shortage of work. While it has not occasioned the degree of controversy that has been focused on the Diplock Courts in Northern Ireland, nor anything like the same degree of international attention, its continued existence is a cause of discussion, if not disquiet.¹⁰

Special Criminal Court

From the founding of the Irish State special non-jury courts continued in operation, with short time gaps, in essence to allow the government to suppress bodies of insurrectionists who refused to accept the division of this island into two jurisdictions. In the 1920s and 1930s these special criminal tribunals consisted of army officers. The Constitution of 1937 contemplated that special courts would continue to be provided for, in other words that on serious criminal charges certain accused persons would be deprived of the ordinary right to jury trial guaranteed by Article 34. Against a background of gathering war clouds in Europe the government perhaps expected to be sucked into international strife or that the heroic British stand against fascist menace (in which, notwithstanding neutrality, many of our countrymen joined) might occasion another insurrection similar to that of the civil war of 1921-1923. Section 35 of the Offences Against the State Act, 1939 provides that where the government is satisfied that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order, it may make and publish a proclamation bringing the Special Criminal Court into force. All offences scheduled in the Act must come before the Special Criminal Court for trial unless the Director of Public Prosecutions certifies that the ordinary

10 See generally Robinson, *The Special Criminal Court* (Dublin, 1974); and Hogan and Walker, *Political Violence and the Law in Ireland* (Manchester, 1989) 227-244.

courts are adequate in that regard. The list is similar to that contained in the Emergency Powers Act (Northern Ireland), 1972. It includes firearms, explosives and subversive offences under the 1939 Act. Until the Criminal Damage Act, 1991 it also included all cases of criminal damage. Under the Act, where the Director of Public Prosecutions is satisfied as regards an ordinary offence, such as murder or robbery, that the ordinary courts are inadequate to secure the effective administration of justice, he may require that someone should be tried before the Special Criminal Court. The High Court has never set aside the Director's opinion either that the ordinary courts are adequate, or that they are inadequate.¹¹ Unless an applicant can put forward a *prima facie* case of a serious irregularity which amounts to an impropriety he cannot obtain judicial review.¹² While the Court was set up to deal in essence with the threat of insurrection, it has been acknowledged many times by the Supreme Court that the court can be legitimately used in other respects. Walsh J. has observed:

"It is common knowledge...that what was envisaged were cases or situations of a political nature where juries could be open to intimidation or threats of various types. However, a similar situation could well arise in types of cases far removed from what one could call "political type" offences. There could well be a grave situation in dealing with ordinary gangsterism or well financed...drug dealing or other situations where it might be believed or established that juries were for some corrupt reason, or by virtue of threats, or illegal interference, being prevented from doing justice."¹³

In the Summer of 1996 the problem Ireland has with organized crime was brought home to the people of Ireland through the

11 *O'Reilly v DPP* [1984] ILRM 224.

12 *Foley v DPP*, Irish Times Law Reports, September 25th, 1989.

13 *The People (DPP) -v- Quilligan and O'Reilly (No. 1)* [1986] IR 485.

murder of Veronica Guerin and Detective Garda Gerry McCabe. The latter was murdered by a unit of the self-styled Provisional IRA while escorting a cash delivery to a small town in Limerick. The former was a distinguished investigative journalist who seemed to have cottoned on to the fact that organised crime of a non-subversive kind had taken a deep root in Irish society.¹⁴ The use of referral to the Special Criminal Court has been exercised sparingly, though it would be wrong to pretend that this is anything other than a significant power. The Director of Public Prosecutions does not give reasons as to why cases are referred to the Special Criminal Court. However, making the best guess one can, there appears to be a shared characteristic. Referrals seem to be made where there is a suspicion that the accused is a member of a well organised and ruthless mafia-type organisation which has been known in the past to resort to jury intimidation, witness intimidation or other gangster tactics designed and executed to subvert the ordinary course of justice. Juries are easy to intimidate. In April 1999 at the trial of Joe Delaney a jury spontaneously complained to Quirke J., sitting in the Central Criminal Court, that they felt themselves to be under threat and intimidation as a result of what was happening in court. The result was that the judge ordered the trial to be heard *in camera* subject only to the right of the press to remain. There is no doubt there have been instances of jury intimidation by parties who are utterly ruthless. Some of you may have seen the film 'The General' and it can be confirmed that the tactics of witness intimidation, of shooting the accused through the leg on the night before the commencement of his trial and (one tactic not mentioned in the film) having someone burst into court at the hearing of a robbery trial to roar at the accused that he was a child sex abuser, in the hope of securing the discharge of the jury on the grounds of prejudice, are more than the stuff of mere fiction. Organised crime has perhaps had an easier soil in which

¹⁴ See the judgement of the Special Criminal Court in the case of *The People (DPP) -v- Paul Ward*, 27 November, 1998, Unreported.

to grow, be it for commercial or subversive motivation, because the division between the governed and those who govern still remains extremely strong in the Irish psyche.

The provisions of the Offences Against the State Act, 1939 may be used against both subversive and non-subversive cases. In other words they may be used against persons who are suspected of involvement with the self-styled Irish Republican Army or persons who are suspected of involvement with mafia-type organisations. The only test is whether the section giving the power to the Garda Síochána makes a difference between the types of crime targeted. Invariably, it does not. This means that the power to arrest and detain someone for up to forty eight hours in respect of a scheduled offence, for example, possession of a firearm with intent to endanger life, is equally exercisable if the intent to endanger life is that of a woman who is suspected of murdering her husband, or a terrorist who is suspected of having murdered a soldier on this side of the border¹⁵. In the result strong powers of arrest and detention have been available, and have been used, in non-subversive as well as in subversive cases. Section 30 of the Offences Against the State Act, 1939 constitutes the main power. This provides not only that a person may be arrested on suspicion of having committed a scheduled offence, but also that any person who has any information in relation to the commission or intended commission of a scheduled offence may also be arrested, detained and questioned for forty eight hours. Hence, a person who returns from an armed robbery and has a chat about his whereabouts with his grandmother around a turf fire may be subject to such an arrest, but so can his grandmother. These powers are used and are the subject of huge legal debate as to the admissibility of evidence derived from them and, on occasion, stringent judicial criticism.¹⁶

15 *The People (DPP) -v- Quilligan (No. 1)* [1986] IR 495.

16 See the original judgment of Barr J. which led to the *Quilligan* case, cited above and the judgment of the Special Criminal Court in *The People (DPP) -v- Paul Ward*, 27 November, 1998, Unreported.

Operation of the Special Criminal Court

Every Special Criminal Court has control of its own procedures, but in essence it models itself on the Central Criminal Court.¹⁷ To be a member of the Special Criminal Court one has to meet the qualification requirement set out in section 39(3) of the 1939 Act:

No person shall be appointed to be a member of the Special Criminal Court unless he is a judge of the High Court or the Circuit Court, or a justice of the District Court, or a barrister of not less than seven years standing, or a solicitor of not less than seven years standing, or an officer of the Defence Forces not below the rank of commandant.

The above eligibility requirement includes former judges of the High Court and Circuit Court.¹⁸ In law, therefore, one could be tried by an eighty year old former High Court judge sitting with two retired judges of the Circuit and District Courts. In practice, since 1986 the judges are all sitting judges. There must be three of them and they must be appointed by the government. In theory they hold office at the will of the government, but are, and always have been, utterly independent in the exercise of their judicial function, something with which no Irish Government would dare to interfere. A decision is given by a majority and no dissent is to be disclosed.¹⁹ The court operates within an ethos of extreme legal formalism; for example errors in an indictment will destroy the validity of charges before it.²⁰

17 Offences Against the State Act, 1939, section 41, section 44.

18 *The State (Gallagher) -v- The Governor of Portlaoise Prison*, Unreported, 27 July, 1983; *McGlinchey -v- Governor of Portlaoise Prison* [1988] IR 671.

19 Offences Against the State Act, 1939, section 40.

20 *The State (DPP) -v- Special Criminal Court*, High Court, 19 May, 1983, Unreported.

Safeguards

It seems to us that there are a number of important safeguards built into the Special Criminal Court system. The most important of them are intangible and difficult to articulate on the basis of legal rules. However, as Mr. Justice Kirby indicates in his paper on the appointment of and training of judges, it is the human quality of individuals that make up a legal system as much as, or more than, their formal training and qualification that ensures its success in dispatching cases with a true regard for justice. So, on a human basis, it seems to us the points that tend to make the Special Criminal Court operate justly are as follows:

Example of jury trial

1. The judges are drawn from all divisions of the courts in Ireland, but chaired by a High Court judge.²¹ They have the advantage of sitting, as regards the High Court and Circuit Court judges, on a regular basis with juries. This provides them with a continuing insight into the methodology of juries and their propensity to convict and to acquit in certain types of cases. While this is intangible, an honest and earnest desire to apply the standards of a jury to the facts of the case before them at least continues to have that touchstone as a guiding principle in decision making.

More than one judge

2. The judges sit as a panel of three and adjudicate as a panel of three. Thus there are at least the safeguards applicable to non-stipendiary magistrates in England with the additional safeguard of judicial training. We do not believe that anyone should be

21 As to the worth of this system see Robinson – *The Special Criminal Court* (Dublin, 1974) 28.

placed in the position of having to make a lonely decision as to the guilt or innocence of any citizen. Even under the old Soviet system of law a judge always sat in serious criminal cases with two lay assessors.

The judges, when they retire, are at least not debating with themselves alone, but have some degree of pooling of resources, intelligence and common experience from which to draw. When one comes to the notion that has been somewhat ridiculed, of a judge "warning himself" of the dangers of relying on visual identification evidence or accomplice evidence,²² there is at least the prospect of a genuine discussion between people on these issues and as to what dangers can be identified and perhaps the pooling of judicial experience as to problems with accomplices or visual identification in the past. In addition to these two categories in Ireland, juries must be warned that they should have regard to the absence of corroboration when considering convicting someone on a confession, whether made to members of An Garda Síochána, or otherwise.²³ A similar educated scepticism as to dropped verbals in the course of lengthy interviews might again usefully be pooled, and the warning, in that context, might have the advantage of a genuine human dynamic as opposed to the possibility that it may degenerate into a solo mind game.

Sole Judges

The reasoning in the judgments of the Diplock Courts that we have read indicates the intellectual rigour of the individual judges employed on that court. However, if we might respectfully say so, there is a danger in a judge simply sitting alone. If one is to be deprived of a jury trial, surely something which does not simply rely on the good will and human qualities of a single

22 *No Emergency, No Emergency Law* - C.A.J., March, 1995, 58-70.

23 Criminal Justice Act, 1994, section 12.

individual is required. Some attempt must be made to gather at least some of the characteristics of a jury trial, in terms of a shared wealth of experience of a number of individuals, for such a system to command widespread trust. It seems to us to be off the point to argue that an individual lawyer has a wider depth of experience of the criminal justice system than a juror. He or she may well have and, as a result, he or she may well have deep seated views or a legalistic style of reasoning which can look upon the existence or non-existence of a reasonable doubt as being a legal formula instead of what it is, the judgment of ordinary people on a series of facts. Furthermore, within a divided society it is surely incumbent to have a system of justice which, at a minimum, allows for the possibility of drawing from different strands within society and for their representation within the system of criminal adjudication. This is not to distrust any individual, but it is rather to attempt to set up a system in which an increasing number of citizens can have faith. What is seen to be done can be as significant as what is in fact done.²⁴

Parallels with the Special Criminal Court

So, let's look at the criticisms that are levelled against the Diplock Courts in Northern Ireland, as regards special rules of procedure, and see whether they find a parallel on the other side of the border. The following emerges:

Informers

1. It is alleged that informers are encouraged to give evidence through deals with the police, involving immunity from prosecution, reduced prison sentences in more comfortable conditions

24 Robert Butler - Personal Communication. Anecdote here.

25 *No Emergency, No Emergency Law* - C.A.J., March, 1995, 67.

and new identities. The allegation is that this amounts to an inducement and, as such, is an alarming practice.²⁵ As a matter of fact, with the growth of the international drug problem, courts in all common law jurisdictions are declaring that assistance to the police in putting away major offenders is to be taken into account to a significant degree in sentencing. For example, the New Zealand Court of Appeal in *Ulrick*²⁶ stated:

“... The appellant gave all assistance he could in identifying his suppliers and disclosed to the police the whereabouts of the drugs he had abandoned. That in itself justified some reduction of the sentences that these very serious offences would have otherwise called for. The court wished to stress particularly that the revealing of suppliers can be crucial in suppressing the drugs trade. It is important that this should be recognised in a significant way on sentence.”²⁷

As a matter of fact, in the major series of criminal trials now proceeding in Ireland in relation to the *Veronica Guerin* murder, those who gave such cooperation were treated with leniency for these very reasons. To stigmatise the Diplock Courts on this basis is unfair. It also seems to us to be unfair to characterise the necessity to build a new life for a former offender, based on the imperative of preserving his life against well founded threats, to be an inducement. Again, on the other side of the border we have, over the last couple of years, learnt of the necessity to implement a witness protection programme. There is no statutory requirement of corroboration before an accused can be

26 [1981] 1 NZLR 310.

27 For a list of further authorities see Charleton and McDermott “Drugs: The Judicial Response”, 3 *The Bar Review* 347 & 370 (1998).

28 *Director of Public Prosecutions -v- Special Criminal Court*; See the remarks of Carney J. in *DPP -v- Special Criminal Court*, High Court, Unreported, 13 March, 1998.

convicted on accomplice evidence. Nor should there be. To introduce such a requirement is to pander to organised crime.²⁸

Voire dire

2. It has been recommended that in order for justice to be seen to be done pending the reinstatement of jury trials, that in cases where the admissibility of a confession is contested, that the issue on admissibility should be tried by a different judge to that hearing the case. There are strong reasons for believing that this would not work. Firstly, and most importantly, it ignores the fundamental common law principle that the issue of admissibility is always ruled only on a preliminary basis. The accused is entitled to have that issue kept under review for the entirety of the trial. If at any stage a judge develops a reasonable doubt on admissibility the statement is then ruled out even though formerly it had been ruled to be admissible. Secondly, the idea of hearing cases in watertight compartments seems beyond practical necessity. Recently, in a similar sense, this issue came for decision before the High Court and Supreme Court in Ireland. In *Director of Public Prosecutions v Special Criminal Court* and *Ward v Director of Public Prosecutions*, the prosecution had withheld the statements of about twenty witnesses on the grounds that these were either classic police informers or were persons in respect of whom the Gardaí had a well founded fear that the release of their names would lead to life threatening retaliatory measures. Ward argued that to have the court of trial reading prejudicial material would lessen his chances of receiving a fair trial. After a review of the authorities the Supreme Court held that since the Special Criminal Court was well used to dealing with the hearing of and exclusion of confession statements they would have no difficulty in following the prosecution's suggestion of reading the undisclosed material to see if any of it came within the innocence at stake exception, whereby it must then be disclosed to the accused. The Supreme Court reasoned that the presence of professional judges on the court was a sufficient safeguard for

any risk of possible prejudice. In other words, the matter came back to a question of legal training and the integrity of the members of the court. In the end, we have to have faith in the personnel administering justice.²⁹

No preliminary investigation

3. Section 2 of the Emergency Powers Act, 1991 restricts recourse to preliminary investigation in cases scheduled for the Diplock Courts. The idea of a preliminary investigation has its origin in the well-founded belief that no citizen should be put on trial for a serious criminal charge without the State having the obligation to first prove that there is a stateable case against him. In Ireland this procedure takes place pursuant to the Criminal Procedure Act, 1967 in the District Court and, in Northern Ireland, takes place in the Magistrate's Court. The objection to the Emergency Powers legislation is that the examination can take place solely on the basis of documents and that therefore valuable opportunities for the defence may be lost. These are, it seems to us, good arguments. However, they do not take account of the fact that the idea of preliminary examination in the common law world is a simple inquiry as to whether there is enough evidence to put an accused on trial. It is not the trial of the issue itself. It is an issue that can be tried by review of documents. The parallel with the Republic is that under the recently enacted Criminal Justice Act 1999, the right of preliminary examination is, in effect, abolished in its entirety. Virtually no one in the Republic makes use of it, makes submissions to say that there is no case to answer or calls for a witness to give evidence on deposition. Even if a witness is called, the examining party is limited to an examination in chief, which achieves virtually nothing. Preliminary examination has been regarded as a waste of time and the idea is to replace it with the ability to bring a motion

29 *Ward -v- Special Criminal Court* [1998] 2 ILRM 493.

before the court of trial whereby an argument can be made that there is no prima facie case prior to the commencement of the trial.

Scheduling

4. An argument is made that the scheduling in and the scheduling out provisions, central to the Northern Ireland Criminal Justice system of Diplock Courts, and scheduled under Part I of the Emergency Powers Act, 1991, should be phased out. The argument is that cases which have no political motivation should not be scheduled and should, in fact, be de-scheduled. A 1981 survey by Dermot Walsh is cited to the effect that approximately forty percent of cases processed by the Diplock system were ordinary criminal cases. Regrettably, no such survey has been done on our side of the border. As one has seen from the introduction, the prospects of judicially reviewing a decision by the Director of Public Prosecutions to list a case before the Special Criminal Court are dim.³⁰ It is utterly undesirable to deprive people of jury trials where it is their ordinary constitutional entitlement. However, in cases of armed gangs, be they subversive or not, who are determined not just to commit crime, but to set up structures to subvert the State and destroy the administration of justice as it applies to them, it seems to us that it is expecting too much to expect citizens to sit on juries and face the prospect of intimidation or trickery. Some flavour of the reality of the kind of crime with which the Republic now has to deal with is given by the judgment of Carney J. in *DPP -v- Special Criminal Court*:³¹

"The evidence of assistant commissioner Anthony Hickey given before the Special Criminal Court, evidence accepted by that court, establishes that An Garda Síochána as

30 *Foley -v- Director of Public Prosecutions*, Irish Times Law Reports, September 25, 1989.

31 High Court, Unreported, 13 March, 1998.

well as having to deal with crime in its traditional form now has in addition to deal with organised crime. Those engaged in such crime require a wall of silence to surround their activities and believe that its maintenance is necessary for their protection. They have at their disposal the resources including money and firearms to maintain this wall of silence and will resort to any necessary means including murder to further this objective...Those prepared to furnish confidential information to the police in relation to organised crime know they could face a death sentence if this cooperation became known."

Organised crime

5. Ultimately, as it seems to us to be necessary to stress, a legal system is not simply a matter of rules, it is also a matter of honesty and faith in the personnel administering it. It is important to keep a very close watch on the proportion of subversive to ordinary crime being tried in both the Diplock Courts and the Special Criminal Court. The reality of it is, however, that organised crime intended to subvert the Constitution of Ireland, and organised crime for the purpose of criminal greed and status, are here with us to stay. The extent to which they can grow and dominate society, the arrogance of those involved with their gangs and their determination not to abide by any rules of decency and standards makes, for us at least, a reasonable case for the measured use of multi-judge non-jury courts on an emergency basis. Nor should one forget that the European system of criminal trial does not employ a jury.

Recording interviews

6. The Criminal Justice Act, 1984 introduced a requirement that there should be electronic recording of Garda interviews. Notwithstanding the fact that fifteen years have passed since the

signing into law of this Act, only three stations in Dublin and one in Cork have audiovisual recording of police interviews. The measures are described as "a trial basis introduction". This sounds less than convincing. One notes from the report of the Special Rapporteur³² that at least there is a proposal to introduce silent video recordings to back up monitoring by closed circuit television. The Special Rapporteur urges speedy implementation of legislation in that regard. It cannot be said that in Ireland we are any different to Northern Ireland. Nor can it be said that everyone is entirely happy with methods of Garda interrogation. In both jurisdictions, clearly, audio and visual recordings cannot do anything other than help to discover the truth.

Presence of lawyers

7. There is no right in Ireland to have a solicitor present during Garda interrogations. The Special Rapporteur thought that it was desirable to have an Attorney present during police interrogation. What he says about Northern Ireland can equally be applied to Ireland. In the United States the *Escobedo-Miranda* doctrine indicates that defendants have a right to be warned of their right to silence and of their right to counsel at public expense.³³ The long interrogation can be treated as evidence of the accused not having waived these rights even if the police testify that he has. Warren C.J., commented in the *Miranda* case:

"... the current practice of incommunicado interrogation is at odds with one of our nation's most cherished principles - that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed

32 E/CN.4/1998/39/Add4.

33 *Miranda -v- Arizona* (1966) 384 US 436.

to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.”

While there is no entitlement on either side of the border to the presence of an Attorney during an interrogation, audio and visual recording will at least move us in the right direction where that might be considered as a further step.

Non-Parallels

In addition to the foregoing, and probably to a degree unwelcome comments, it is also correct to point out some of the aspects of the operation of the Diplock Courts that do not find a parallel south and west of the border. For the sake of completeness we set them out in numbered paragraphs, as above:

Several judges

1. We have previously commented on the difference in make-up personnel between the Diplock , and the Special Criminal, Courts. The case for having a body of three or more judges is, to our minds, a compelling one.

Right to silence

2. In our view, national governments are fighting a losing battle, in the European context, in their efforts to restrict or abolish the right to silence. The right to silence exists because there are two categories of persons who may exploit it. The first are obviously members of organised crime gangs. The second, and these are the people who need protection, are that under-class of society, ill-educated and inarticulate who, if forced into the witness box will place themselves in the position of immediately raising suspicions as to their guilt, not because of what they have done, but

because of how they express themselves. This opinion is not far-fetched. Perhaps some of us have seen the Chamberlain Baby Film *'A Cry In The Dark'*. The film portrays the reason behind the couple's conviction for the murder of their baby in the Australian outback near Ayres Rock as the woeful performance by Mr. Chamberlain, a Minister of Religion, in the witness box. Of course, he was not forced into the position of giving evidence, but his kind of case operates as a warning. The criminal justice system is there to protect that small percentage of people who come before it who either are, or may by reasonable people, be regarded as possibly being innocent. The Criminal Evidence (Northern Ireland) Order, 1988 permits a judge to draw adverse inferences from a detainee's silence in three circumstances:

- (a) When the defendant bases his or her defence on a fact that he or she could reasonably have been expected to raise during police questioning, but did not;
- (b) When an accused fails to give the police an explanation for the presence of a nearby substance, object or mark that could reasonably be believed to have a connection with a crime and;
- (c) When a defendant fails to account for his or her whereabouts at the time a crime was committed.

Negative inference

3. There is no parallel on the other side of the border with allowing a negative inference to be drawn if a defendant fails to answer questions at trial. In Ireland, that would simply be a contempt of court and punishable as such. In practice, it has never arisen. So, to comment on the first three: as to (a), the prosecution in Ireland are entitled to question why an explanation given in evidence has not now been given. This is to be used solely as a test of credibility and not something from which an inference can be drawn. However, the distinction is a narrow one. Something similar to (b) is contained in the Criminal Justice Act of 1984,

but has been virtually never used. Under section 52 of the Offences Against the State Act, 1939 a person is obliged to give an account of his movements when under arrest and given a statutory request, in that regard, by a member of An Garda Síochána. In a recent case involving bank officials the Supreme Court finally bit the bullet of the right to silence. In effect, what they said in the *Matter of National Irish Bank*³⁴ was that it is alright to require information for administrative or police investigative purposes, but that a compelled statement, whether under duress, by way of an inducement, or by way of a statutory requirement can never be admissible against an accused at his trial. These are the comments of Barrington J. for the Supreme Court:

“The judgment in this case follows the decision in *Heaney -v- Ireland* [1996] 1 IR 580 insofar as that case decided that there may be circumstances in which the right of the citizen to remain silent may have to yield to the right of the State authorities to obtain information. It is not inconsistent with the decision in *Rock -v- Ireland* [1998] 2 ILRM 37 that there may be circumstances in which a court is entitled to draw fair inferences from an accused having remained silent when he could have spoken. It follows *The People (AG) -v- Cummins* [1972] IR 312 insofar as that case decided that for a confession to be admissible in a criminal trial it must be voluntary. In the course of the submissions the question arose as to what would be the position of evidence discovered by the inspectors as a result of information uncovered by them following the exercise by them of their powers under section 10. It is proper therefore to make clear that what is objectionable under Article 38 of the Constitution is compelling a person to confess and then convicting him on the basis of his compelled confession. The courts have always accepted that evidence obtained on

34 [1999] 1 ILRM 321.

foot of a legal search warrant is admissible. So also is objective evidence obtained by legal compulsion under, for example, the drink driving laws. The inspectors have the power to demand answers under section 10. These answers are in no way tainted and further information which the inspectors may discover as a result of these answers is not tainted either. The case of *The People (AG) -v- O'Brien* [1965] IR 142 which deals with evidence obtained in breach of the accused's constitutional rights has no bearing on the present case. In the final analysis, it would be for the trial judge to decide whether, in all the circumstances of the case, it would be just or fair to admit any particular piece of evidence, including any evidence obtained as a result or in consequence of the compelled confession." ³⁵

Using compelled information

4. On the issue as to the use that can be made of information unlawfully compelled the United States Supreme Court set a standard in *Kastigar v U.S.*: ³⁶

"We hold that such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore it is sufficient to compel testimony over a claim of privilege. While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader. Transactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege. The privilege has

³⁵ [1999] 1 ILRM 321 at pp 360-361.

³⁶ (1972) 406 US 441.

never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being "forced to give testimony leading to the infliction of 'penalties affixed to ... criminal acts'". [*Ullmann -v- United States*, 350, U.S., at 438-439, quoting *Boyd -v- United States*, 116 U.S. at 634. See *Knapp -v- Schweitzer*, 357 U.S. 371, 380 (1958)]. Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness."

We think one is wasting one's time to attempt to keep these measures in place in the light of the European Court of Human Rights' decision in *Murray v The United Kingdom*³⁷. We do not know whether the idea of presumptions arising from particular facts would pass European scrutiny. Certainly, those presumptions are ever present in Irish law, such as the presumption that someone with a large amount of a drug has it for drug pushing (Misuse of Drugs Act, 1977, section 15(2)) or the presumption that a gift to a public official is for the purpose of corruption (Prevention of Corruption Act, 1884, as amended).

Confessions³⁸

5. In Northern Ireland confession evidence is admissible in cases which are scheduled under the Emergency Provisions Act, in effect cases which come before the Diplock Courts, unless the accused are subjected to torture, to inhuman or degrading treatment, or to any violence or threat of violence (whether or not

37 [1996] 22 EHRR 29.

38 See generally, Charleton, McDermott & Bolger, *Criminal Law* (1999), chapter 2.

amounting to torture), in order to induce the accused to make a statement.³⁹ There would seem to be little excuse for the continuance of this provision. However, one cannot honestly say that it is entirely without parallel on the other side of the border. The cases of *The People (DPP) -v- Breathnach*⁴⁰ and *The People (DPP) -v- Pringle*⁴¹ are worth contrasting. Breathnach had been almost constantly interrogated for forty hours following his arrest; he had been denied access to legal advisers and to friends and his confession was made after he had been awakened from a few hours of much needed sleep and brought down at 4.00 a.m. for further interrogation into the passage way of the Bridewell Garda Station in Dublin. The Court of Criminal Appeal⁴² reversed the ruling of the Special Criminal Court and excluded the confession. In the case of *Pringle*⁴³ the judgment of the Court of Criminal Appeal allows one to glean the following timetable of interrogation following upon his arrest on the afternoon of the 19th of July, 1980:

19th July 1980:

- 4.05 p.m. 35 minute interrogation.
- 4.50 p.m. 45 minute visit from legal advisors.
- 5.35 p.m. 2 hour 20 minute interrogation.
- 7.55 p.m. Large meal and short interview.
- 9.15 p.m. 50 minute interrogation.
- 10.05 p.m. 40 minute visit from solicitor with one hour interview to follow.

39 Northern Ireland (Emergency Provisions) Act, 1996, section 12(2)(b).

40 (1981) 2 Frewen 57.

41 (1981) 2 Frewen 43.

42 (1981) 2 Frewen 43.

43 (1981) 2 Frewen 57.

20th July 1980:

- 12.05 a.m. 4 hour 10 minute interview.
- 4.15 a.m. Sleep.
- 9.25 a.m. 1 hour 35 minute interrogation.
- 11.00 a.m. Breakfast.
- 11.35 a.m. 30 minute visit from solicitor.
- 12.00 a.m. 8 hours interview interrupted only by fingerprinting and the reading of the order for extension of custody.
- 8.20 p.m. 1 hour visit from solicitor.
- 9.20 p.m. Interview began again but was interrupted by meal.
- 9.50 p.m. Eva Curtin brought to interview room and questioned in the presence of the accused - see below.
- 9.55 p.m. 4 and a half hour interview with coffee supplied at 12.40 a.m.

21st July 1980:

- 2.30 a.m. 1 hour visit from solicitor and interview.
- 3.50 a.m. Accused sleeps.
- 8.25 a.m. Interview.
- 9.30 a.m. Confession.

In admitting the confession particular emphasis was laid by the Court of Criminal Appeal on the nature of the accused's work and what the court of trial had found to be the toughness of his character. Under the definition of oppression as previously defined, the test of its occurrence is subjective. It depends not only on the degree of burdensome conduct by the questioners,

but also on the character of the person under interrogation and his specific reaction to what was done to him:

“In this case the accused was a man of forty two years of age, in good health, who for some time prior to his arrest had been a fisherman in the Galway area. He was apparently an experienced man of the world not unused to conditions of physical hardship. It was clearly open to the Court of trial to hold that the will of such a man would not have been undermined by the interviews he had experienced and by lack of sleep and that he spoke the inculpatory words when otherwise he would have remained silent.”⁴⁴

Recent developments on confessions

6. It must be stated that any potential for error by the use of anything less than a standard of requiring the prosecution to prove the absence of oppression beyond reasonable doubt has been removed by a series of recent decisions. These include the decision of the Special Criminal Court in *The People (DPP) v Paul Ward* where what the Court had characterised as dubious interrogation methods by An Garda Síochána were subjected to scorching criticism and the ruling out of a series of confession statements. The reason for the existence of the traditional common law requiring confession evidence to be voluntary is that a confession is enough to convict a person beyond reasonable doubt. It follows that if there is any reasonable doubt as to its voluntary nature it cannot be allowed to stand. The Northern Ireland standard is a departure from that and, it seems to us, undermines the very basis upon which British law is built.

⁴⁴ Per O'Higgins C.J. at 82. For the subsequent history of the case see *The People (DPP) v- Pringle* [No. 2] [1997] 2 IR 225.

Access to counsel

7. Another parallel is the idea that people can be deprived of access to counsel. Under section 47 of the Emergency Powers Act a detainee has the right to see a solicitor, but if a senior police officer reasonably believes that such access will interfere with the investigation or alert other suspects, or hinder the prevention of an act of terrorism, access may be denied for up to forty eight hours. The figures between 1987 and 1991 indicate that deferral occurred in 58% of Prevention of Terrorism Act detentions on average, but have been dropping rapidly over the last five years, down to 0.5% in 1995 and 3% in 1996.⁴⁵ There is no excuse for the deferral of such access. What has happened in the Republic is that where a danger similar to that identified in the Northern Ireland legislation has been reasonably suspected to exist, the accused is deprived of his right to a solicitor of his choice by that solicitor being barred from visiting him, but is instead given access to another solicitor named by him. The reason can be a reasonable suspicion of corruption within the legal profession, which is not immune, after all, to the possibility of wrongdoing, arising, for example, out of the relevant solicitor being involved in dubious financial transactions.

Further Features of Diplock Courts

The legislative background to the Diplock courts

In their detailed study of the legislative history of the Diplock Courts, Greer and White, reach two conclusions: ⁴⁶

- i) Although regarded by many as self-evident truths, the reasons for the establishment of the Diplock courts, namely pro-

45 Northern Ireland (Emergency Provisions) Acts: Statistics, Northern Ireland Office, cited in the Special Rapporteur's Report, above.

46 Greer and White *Abolishing the Diplock Courts*.

loyalist jury bias and the risk of jury intimidation, have never been justified with empirical evidence.

- ii) Whilst there may have been potential problems in the way the jury system operated in Northern Ireland, sufficient consideration was never given to alternatives to abolishing trial by jury.

In response to the first of these criticisms Lord Diplock replied in a speech delivered in the House of Lords : “[w]hen I see a fire starting, and indeed we saw a fire starting then, I send for the fire brigade not a statistician”.⁴⁷ In reply, one might suggest that when one seeks to calculate how high the risk of fire is in particular circumstances, one normally sends for a statistician and not the fire brigade. The parliamentary debates on the Northern Ireland (Emergency Powers) Bill 1973, are littered with anecdotal evidence and vague speculation about jury intimidation and perverse verdicts. When asked whether he could provide firm evidence that juries were returning perverse verdicts Mr Whitelaw replied that he could go no further than saying “that some of the verdicts given had been rather hard to understand”.⁴⁸ In the words of Greer and White, “...the evidence which was presented to justify the introduction of jury-less Diplock courts in Northern Ireland in 1973 was seriously deficient. At most it indicated that eligibility for jury service should have been democratised, the selection of juries randomised and the identity of jurors concealed.”⁴⁹

47 HL Debs, Vol 855, col 380.

48 HC Debs, Vol 855, col 282.

49 ‘A Return to Trial by Jury’ in Jennings *Justice Under Fire* 68 (Pluto Press, 1988).

Case hardening

One of the biggest complaints about Diplock courts is that they lead to case hardening among the judges who sit in them. This concept was explained by Sir George Baker in the following terms :

“I understand it to mean that the judge has heard it all before; therefore he does not believe the accused; therefore he is or becomes prosecution-minded or more prosecution-minded. I accept at once that it is possible.”⁵⁰

Do Diplock courts change the character of the criminal trial?

Jackson and Doran have suggested that by careful scrutiny of the Diplock courts “one may detect certain traits which betray a fundamental shift from the traditional character of the criminal trial”.⁵¹ Essentially the introduction of Diplock Courts was not accompanied by any significant overhaul of ordinary criminal procedures. Thus, in theory at least, the rules and procedures of an ordinary criminal trial remain intact in a trial without a jury. However Jackson and Doran suggest that the reality may be different:

“Do [the judges] strive to maintain a stringent division between their traditional role as tribunal of law and their “jury role” as tribunal of fact? Or do they accept that a judge alone could never hope to simulate the decision-making process of twelve lay persons and do they therefore adopt a somewhat different approach to matters of fact?

50 Review of the Operation of the Northern Ireland (Emergency Provisions) Act 1978, Cmnd 9222 (HMSO, 1984) para 122.

51 Jackson and Doran *‘The Diplock Court : Time for Re-examination’* (1989) NLJ 464 at 465.

Do they, for example, consider that their position allows them to take a more active responsibility on matters of fact during the trial than the jury is able to take? Do they take a more active role in questioning the witnesses than in a jury trial? Do they allow counsel greater freedom in questioning witnesses or do they adhere to stricter standards of relevance than they might be prepared to in a jury trial? Are judges able or willing to indicate in a way that juries are not whether they consider particular lines of enquiry to be more fruitful than others?"⁵²

Subsequently Jackson and Doran conducted a comparative study of jury and non-jury trials, and proposed the following answer to their own question:

"We found that judges have scope in both jury and non-jury trials to deviate from the umpireal role associated with the latter. There was, however, no clear evidence from our survey that judges necessarily acted in a more inquisitorial manner when sitting in the absence of the jury. ... Since justice itself is considered to be epitomized by jury trial, it is not surprising that judges should try to adhere to the umpireal role associated with those proceedings. This is especially likely when, as in Northern Ireland, jury trial continues to be a prominent feature of the criminal justice system."⁵³

Judges in Diplock courts appear to take a more inquiring approach towards defence witnesses.⁵⁴ The absence of the jury seems to free judges from the careful detachment which they felt had to be preserved in jury trials and at the same time prompted them as triers of fact to play a more intrusive role.⁵⁵ As for the

52 Jackson and Doran *'The Diplock Court : Time for Re-examination'* (1989) NLJ 464 at 465.

53 Jackson and Doran *Judge Without Jury* 289 (Clarendon Press, 1995).

54 Jackson and Doran *Judge Without Jury* 290.

55 Jackson and Doran *Judge Without Jury* 290.

alleged phenomenon of case-hardening, Jackson and Doran draw an interesting conclusion from their study ;

“... judges did adopt an approach towards the evidence which could be described as ‘case-hardened’, not in the commonly understood sense of being prosecution-minded, but in the sense of confining their consideration to the issue of legal guilt on the offences charged. This did not necessarily disadvantage accused persons. Indeed we saw that judges were scrupulous in applying a strict legal standard of proof to the evidence and there were certain kinds of cases and certain kinds of evidence which counsel admitted they would prefer to be tried by professionals. The fact remained, however, that the scope of the contest was more restricted and there could be no consideration of the merits of conviction other than on the basis of the legal standards to be applied to the defendant. In jury trials, by contrast, counsel were given greater freedom within more relaxed standards of relevance to build up a rounded picture of a defendant or a witness which then enabled them to appeal to the merits of the case.”⁵⁶

Part of the reason why Diplock courts do not automatically lead to a more interventionist approach by the trial judge, may be because when judges and practitioners appear in both jury and non-jury trials “the influences of jury trial are reinforced in their day-to-day practice”.⁵⁷ A lot may also hinge on the relative experience and dominance of personality of the counsel and judge in any particular case.

56 Jackson and Doran *Judge Without Jury* 291.

57 Jackson and Doran *Judge Without Jury* 293.

Trial by Jury

The jury as scapegoat?

Lord Devlin has suggested that we are too ready to dispense with the jury system in times of crisis of confidence in the criminal justice system:

“There is in some minds a tendency to think that, if anything goes wrong or is thought likely to go wrong with the criminal process, the first thing to do is to get rid of the jury. Jury exclusion seems to have the same appeal as bleeding the patient had to the medicos of the 17th Century.”⁵⁸

The advantages of trial by jury

Blackstone described the jury in the following terms :

“Trial by jury ever has been, and I trust ever will be, looked upon as the glory of English law ... the liberties of England cannot but subsist so long as this palladium of liberty remains sacred and inviolate, not only from all open attacks (which none will be so hardy to make), but also from all secret machinations, which may sap and undermine it by introducing new and arbitrary methods of trial, by justices of the peace, commissioners of the revenue and courts of conscience.”⁵⁹

The advantages of jury trial over the Diplock courts are as follows:⁶⁰

- i) Trial by jury bestows upon ordinary people the democratic

58 Foreword to Greer and White *Abolishing the Diplock Courts* (1986 , The Cobden Trust).

59 *Commentaries* Book IV, p 350.

60 The list that follows is drawn from Greer and White *Abolishing the Diplock Courts* pp 11-12.

right and duty to directly participate in decisions which gravely affect the rights of others.

- ii) Trial by jury maintains contact between the criminal justice system and ordinary people and sustains their confidence in it.
- iii) In a trial by judge alone the vital distinction between the admissibility of evidence and the weight which should be attributed to it is all but lost. In a jury trial the question of admissibility of evidence is decided in the absence of the jury. Thus, if the evidence is ruled to be inadmissible, the jury will never be exposed to it. However, in a Diplock trial, the judge cannot determine the question of admissibility without hearing, or at least being aware of, the evidence on which he has to rule. If he determines that the evidence is inadmissible, he must then attempt to put it out of his mind as he takes on the role of trier of fact. Greer and White have argued that, "[i]t would be very difficult for a judge genuinely not to be influenced by the fact that the accused had confessed, even though the circumstances of the confession rendered it inadmissible".⁶¹ In addition, in a jury trial, even if the judge rules a confession to be admissible, it is still open to the defence to try to convince the jury that the circumstances in which it was taken render it untrustworthy. However, in a Diplock trial, it will not be easy for a defendant to attempt "to persuade a judge who has already ruled that the circumstances of a confession do not render it inadmissible, that such circumstances nevertheless detract from its weight".⁶²

61 'A Return to Trial by Jury' in Jennings *Justice Under Fire* 52 (Pluto Press, 1988).

62 'A Return to Trial by Jury' in Jennings *Justice Under Fire* 53 (Pluto Press, 1988).

- iv) The separation of powers between judge and jury is particularly valuable in testing the credibility of witnesses. In the words of Greer and White, "[w]hereas a judge's legal training will lead him or her to concentrate on inconsistencies or the lack of them, a jury will take an overall view of a witness, bearing in mind his or her demeanour, attitude and so on".⁶³
- v) Trial by jury could assist in solving the controversy surrounding the lethal use of firearms by the security forces in Northern Ireland.
- vi) Through the contempt of court laws jury trial tends to reduce the latitude the media and others might otherwise have to prejudice the outcome of criminal trials.
- vii) Trial by jury provides a means by which each case is heard on its individual merits by a fresh tribunal of fact thereby avoiding the danger of case-hardening to which judges sitting alone may be prone.

Alternatives to the Diplock Courts

When a State is faced with the threat of terrorism or the jury system is perceived to be flawed, are there any less extreme measures which may be taken instead of banishing the jury system? In the context of Northern Ireland, Greer and White have proposed the following steps:⁶⁴

- i) Scheduled offences should be tried by a jury except in individual cases where there is clear proof of intimidation.
- ii) The randomness of jury selection should be increased by reducing the number of pre-emptory challenges to three per side.

63 'A Return to Trial by Jury' in Jennings *Justice Under Fire* 54 (Pluto Press, 1988).

64 Greer and White *Abolishing the Diplock Courts*, chapter 7.

- iii) The anonymity of jurors should be further protected so that only a skeleton staff of court officials would be aware of their identities

However, experience has shown that once the authorities become used to operating within the framework of emergency legislation, they are often unwilling to give up these powers when the emergency has ended. In this context, Ewing and Gearty have noted that:

“... in the years from 1980 to 1986 an average of 630 defendants per year were proceeded against on serious charges without a jury. It is noteworthy how quickly even this dramatic break with our ancient traditions has been assimilated.”⁶⁵

Conclusion

All in all, it seems to us, it ill-behoves citizens of Ireland to come up to Northern Ireland and to preach about the inadequacies of the local criminal justice system. If that were to be done, and we hope we have not done it, it would have to be on the basis both of adequate knowledge and, more importantly, an awareness of the faults of the system from which we come. The parallels between the two systems are obvious. They have arisen out of the necessity to fight organised crime. Some aspects of the criminal justice system in the Republic, particularly multi-judge courts and the ordinary application of admissibility standards to confessions, surely must commend themselves as basic steps forward. We believe those steps should be taken one at a time before the wider reforms that are obviously necessary in both jurisdictions come into play. Ultimately, the criminal justice system is supposed to be a search for the truth. In that regard it

65 *Freedom Under Thatcher* 229 (Clarendon Press, 1990).

seems to us to be beyond argument that both jurisdictions should have some means, other than the recollection of the accused and interviewing police officers, of discovering what precisely happens during interrogation. There cannot be any excuse in either jurisdiction for deferring audio-visual recordings of interrogations any further.

Finally, a paper such as this cannot end without a brief mention being made of the Human Rights aspects of the Good Friday Agreement. In particular, the agreement provided for the establishment of a human rights commission. The way in which this will change the legal landscape in Northern Ireland remains to be seen. Bruce Dickson, writing in the *Bar Review*, has said of the future :

“The future then looks rosy. Let us all hope that the politicians in both parts of Ireland can ensure that the right political environment exists in the years to come to allow the human rights and equality provisions of the 1998 Agreement to be fully realised in practice in both jurisdictions.”⁶⁶

⁶⁶ “The Northern Ireland Act: Issues of Equality and Human Rights” 4 *The Bar Review* 212 at 213 (1999).

*Prosecuting Authority in the New South Africa**

by

Dirk van Zyl Smit¹ and Esther Steyn²

Introduction

Who decides whether to prosecute or not is a matter of considerable significance in any criminal justice system. This is particularly true where prosecutors are allowed a wide discretion to formulate policy and to decide whether to apply it in individual cases. Recent developments in South Africa have significantly changed the locus of this decision-making power without reconsidering the underlying philosophy according to which it is exercised. Prosecution in South Africa continues to follow the Anglo-American opportunity principle rather than the continental legality principle.³ Adoption of the opportunity principle implies that there is open recognition of the discretionary nature of the decision whether to prosecute. It also means that the question of who has the authority to prosecute is a matter of considerable importance as it brings with it an exercise of power that

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3 See F G Richings 'The Prosecutor's Discretion: A Plea for Circumspection' (1977) 1 *SACC* 143; D W Morkel and J M T Labuschagne 'Die diskresie van die prokureur-generaal' (1980) 4 *SACC* 160; T Geldenhuys et al *Criminal Procedure Handbook* 2nd ed (1996) at 53; J H Hugo 'The prosecutor: Cinderella in a black gown' (1971) XII *Codicillus* 25.

has major sociopolitical implications. This paper traces the history of prosecutorial decision-making in South Africa. It then analyses the current decision-making framework in more detail in order to provide a basis for considering whether this power is now being exercised in a way that is likely to prove effective while at the same time meeting appropriately the potentially conflicting constitutional standards of accountability, openness and independence.

Early History

South Africa has vacillated amongst different models of prosecutorial authority for most of the century. In the first decade of the century the four territories that were later to make up the Union of South Africa had attorneys-general who on the English model were members of the colonial cabinets and were therefore directly accountable to the electorate. As elected politicians though there was the obvious risk that their decisions not only on prosecutorial policy but also in individual cases would be influenced by their desire to please their electorate. With the coming of Union in 1910 the post of Minister of Justice was created in the national cabinet.⁴ In each Provincial Division of the newly established Union-wide Supreme Court, an attorney-general was appointed with authority to prosecute.⁵ There was no national attorney-general and each attorney-general formally prosecuted in his own name on behalf of the state, or delegated this authority to others to do so.⁶ Initially, at the lower level

4 See s 139 of the South Africa Act 1909.

5 The right and duty to prosecute in criminal matters were entrusted to attorneys-general in terms of s 7 of Act 31 of 1917. In the Eastern Cape, which was part of the Cape Province, the solicitor-general performed this function. This was an historical anomaly as the only difference between the attorneys-general and the solicitor-general was in the name and the fact that the solicitor-general was responsible for part of a province.

6 Section 13 of the Criminal Procedure Act 31 of 1917.

these delegates were police, or in Supreme Court trials advocates in private practice. (Capital cases had to be tried in the Supreme Court, and most other serious crime was also tried there.) The provincial attorneys-general were civil servants, a position akin to that of the Director of Public Prosecutions in England and they were also the final arbiters of who should be prosecuted. Independence was guaranteed but there was no accountability to the electorate.

The Politicians Strike Back

In the early 1920s a dispute arose when the Minister of Justice sought to instruct an attorney-general to prosecute in a particular matter. The attorney-general concerned refused to do so. The upshot was that the Criminal Procedure Act was amended to give the Minister of Justice all powers to institute prosecution and to assign to respective attorneys-general as his deputies some of his power. The amendment was drastic in that it stripped from the attorneys-general their independence and powers.⁷ It was so unpopular that two attorneys-general resigned in protest against this legislation.⁸ The main reason for this change was, as

7 See s 1 of Act 39 of 1926, subsection 3 of which provides:

All powers, authorities and functions relating to the prosecution of crimes and offences in the name and on behalf of His Majesty the King are vested in the Minister of Justice who may in any Province assign to an officer, to be appointed by the Governor-General subject to the provisions of the law relating to the Public Service, styled the Attorney-General or in the area of jurisdiction of the Eastern Districts of the Cape of Good Hope Local Division of the Supreme Court, the Solicitor-General, the exercise, as his deputy, of such powers authorities and functions in the area for which such officer has been appointed. (Emphasis added).

8 The two attorneys-general that resigned were Charles de Villiers (Transvaal) and E W Douglas (Eastern Cape). For discussion of the development of the role of Attorneys-General, see C Heyns and P Coetser 'Die ontstaan en ontwikkeling van die amp van die Prokureur-Generaal van die Transvaal' 1986 *Nuntius* 60.

the Minister of Justice explained when introducing the second reading debate of the amendment Bill, to ensure ultimate parliamentary responsibility for prosecutorial decisions, even if most of these decisions would continue to be made by the attorneys-general.⁹

In 1935 the earlier status quo was reinstated but only in part. Prosecutions were now once again formally instituted by the attorneys-general but the Minister of Justice was given the power to issue directions to the attorneys-general and to exercise their powers directly in any specific matter.¹⁰ The power to intervene was limited to the Minister of Justice alone. Theoretically the Minister of Justice could manipulate the attorneys-general by prescribing to them how they should exercise their discretion. Anecdotal evidence suggests that this power to intervene was rarely exercised. The 1935 amendment was retained in substance in subsequent versions of the Criminal Procedure Act.¹¹

Politicians relied on the (truncated) independence of the attorneys-general as it was re-established after 1935. In later years in controversial political cases in particular they emphasised that prosecutions were conducted in the name of the attorney-general

9 See S A Strauss 'The development of the law of criminal procedure since Union' 1960 *Acta Juridica* 157 at 166.

10 See s 1 of Act 46 of 1935 that repealed the 1926 amendment of s 7 of the Criminal procedure Act 31 of 1917. Section 7(4) as amended provided for ministerial control:

Every Attorney-General and the Solicitor-General shall exercise their authority and perform their functions under this Act and under any other law subject to the control and directions of the Minister who may, if he thinks it fit, reverse any decision arrived at by an Attorney-General or the Solicitor-General and may himself in general or in any specific matter exercise any part of such authority and perform any such function.

11 See s 5(3) of the Criminal Procedure Act 56 of 1955 and s 3(5) of the Criminal Procedure Act 51 of 1977.

and that he made the decisions, thus ignoring the Minister of Justice's right to intervene. And the attorneys-general did have considerable powers, not only to prosecute, but also from the 1960s onwards in security cases and serious common law cases effectively to exclude the powers of the court to grant bail¹² and to order the detention of witnesses under certain circumstances.¹³

A further weakness of the system was that the attorneys-general remained public servants and hence subject to the public service laws and regulations. This impacted on the independence of these positions for as employees too they were ultimately subjected to ministerial control. The system in which a public servant appeared to have substantial independent power but in fact was beholden to the Minister of Justice was not ideal. In 1983 it was strongly criticised by the Hoexter Commission of Inquiry into the Structure and Functioning of the Courts.¹⁴

Prosecutorial Independence Reasserted

In 1992, that is, in the dying days of the old government, legislation was passed to entrench the powers of the attorneys-general.¹⁵ The 1992 Attorney-General Act went further than its predecessors did and changed the independent status of attorneys-general almost to what it was before the 1926 amendment Act was adopted. The authority to institute prosecution

12 See s 61 of the 1977 Criminal Procedure Act. This provision was, however, repealed in its entirety by s 4 of Act 75 of 1995.

13 See s 185 of the Criminal Procedure Act.

14 See comment by the Hoexter Commission *Commission of Inquiry into the Structure and Functioning of the Courts* Vol. III Part VIII RP78 of 1983 at 1.14.

15 See the Attorney-General Act 92 of 1992, which came into operation on 30 December 1992.

became the sole responsibility of the attorney-general and his delegates.¹⁶ In terms of the Act discretion to institute criminal proceedings could be exercised without any fear of control or interference from the executive, as had been the case in terms of the repealed s 3(5) of the 1977 Criminal Procedure Act.¹⁷ The independence of the attorneys-general was also secured by other measures, such as the guaranteed remuneration¹⁸ for the attorneys-general and their security of tenure of office.¹⁹ The function of the Minister of Justice was reduced to that of a coordinator: to ensure that the reports of the attorneys-general were submitted to Parliament. At most he could request an attorney-general to furnish him with a report and to provide reasons regarding the handling of particular cases.²⁰ In terms of this Act attorneys-general enjoyed absolute independence. They were accountable only to Parliament and then only in the limited sense that Parliament could question them about their annual reports or dismiss them in very exceptional circumstances.²¹

16 The delegation of the authority to prosecute by an attorney-general to advocates and local prosecutors was governed by s 6 of Act 92 of 1992.

17 See J A van S d'Oliveira SC 'The Office of the Attorney-General' 1993 *Nuntius* 70.

18 The salary of an attorney-general could no longer be reduced, except through an act of Parliament. (Section 3(1)(b) of Act 92 of 1992.).

19 Section 4 of Act 92 of 1992 provided such security.

20 See s 5(5) of Act 92 of 1992, that provided:

The Minister shall coordinate the functions of the attorneys-general and may request an attorney-general to-

(a) furnish him with information or a report with regard to any case, matter or subject dealt with or handled by an attorney-general in the performance of his duties or the exercise of his powers; and

(b) provide him with the reasons for any decision taken by the attorney-general concerned in the performance of his duties or the exercise of his functions.

21 Section 4 of Act 92 of 1992 regulated the discharge of an attorney-general from office.

The New Constitutional Era

In spite of its undoubted advantages in terms of guaranteeing prosecutorial independence, the 1992 Act was viewed with considerable suspicion by the new government, which regarded it as an attempt by the old order prosecutors to protect their entrenched positions. The African National Congress, the majority party in the Constitutional Assembly, pushed for the introduction of a clause into the 1996 Constitution that would provide in some detail for the form that the prosecuting authority would take in the new constitutional order. The result was that a provision dealing specifically with the prosecuting authority was introduced into the Constitution.²²

22 Section 179 of the Constitution of the Republic of South Africa, Act 108 of 1996, reads as follows:

- (1) There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of-
 - (a) a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and
 - (b) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament.
- (2) The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.
- (3) National legislation must ensure that the Directors of Public Prosecutions-
 - (a) are appropriately qualified; and
 - (b) are responsible for prosecutions in specific jurisdictions, subject to subsection (5).
- (4) National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.
- (5) The National Director of Public Prosecutions-
 - (a) must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process;

This provision, s 179 of the Constitution, was one of the most controversial in the constitutional drafting process - so much so that its constitutionality was subject to immediate challenge. It had been agreed in the negotiations leading to majority rule that the 'final' Constitution should meet a number of constitutional principles. Consensus had been reached on what these principles should be and they had been added as a schedule to the interim 1993 Constitution,²³ which also empowered the newly established Constitutional Court to test whether the 'final' Constitution complied with them before it could be brought into effect. Section 179 was challenged on the grounds that it did not comply with Constitutional Principle VI which required a separation of powers between the Legislature, Executive and Judiciary with appropriate checks and balances to ensure accountability, responsiveness and openness.

.../...

(b) must issue policy directives which must be observed in the prosecution process;

(c) may intervene in the prosecution process when policy directives are not complied with; and

(d) may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following:

(i) The accused person.

(ii) The complainant.

(iii) Any other person or party whom the National Director considers to be relevant.

(6) The Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority.

(7) All other matters concerning the prosecuting authority must be determined by national legislation.

23 Act 200 of 1993.

The Constitutional Court did not uphold this objection, which was based primarily on the fact that in terms of s 179(1) the National Director of Public Prosecutions is appointed by the President as head of the National Executive.²⁴ It held that the prosecuting authority was not part of the Judiciary and that Constitutional Principle VI had no application to it. In any event, the court continued, appointment of the head prosecutor by the President did not in itself contravene the doctrine of the separation of powers. Finally the court noted that s 179(4), which provided that legislation had to ensure that the prosecuting authority exercises its functions without fear, favour or prejudice, was a constitutional guarantee of prosecutorial independence.²⁵

Subsequent legislation and executive action have ensured that the prosecutorial scheme lightly sketched in s 179 of the Constitution has been developed further. In early 1998 the National Prosecuting Authority Act²⁶ was passed. It spelt out the details of a new prosecutorial system which made provision, for the first time, for a National Director of Public Prosecutions who has the overall power to direct the prosecutions throughout the country. Technically, the prosecuting authority is still exercised by provincially-based Directors of Public Prosecutions, who are in fact the old attorneys-general, in their areas of jurisdiction. The newly named DPPs continue to delegate their authority to local prosecutors.²⁷ However, the Deputy National Directors of Public Prosecutions have concurrent country-wide prosecutorial jurisdiction. Moreover both the Deputy National Directors of Public Prosecutions and the Directors of Public

24 *Ex Parte Chairperson of the Constitutional Assembly: in re certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) par 141.

25 At par 146.

26 Act 32 of 1998.

27 Section 20(5).

Prosecutions are subject to the control and directions of the National Director. Add to this s 22(1) which provides that

‘the National Director, as head of the prosecuting authority, shall have authority over the exercising of all powers, and the performance of all duties and functions conferred and imposed on or assigned to any member of the prosecuting authority by the Constitution, this Act or any other law,’

and the picture of a centralised system is complete.

Under these circumstances the details of the manner in which the National Director is appointed, the framework within which he must operate and the controls to which he is subject, become matters of considerable importance.

When the act was being drafted it was vigorously argued that the National Director of Public Prosecutions, although formally appointed by the President as required by the Constitution, should be selected by the Judicial Services Commission, which would then nominate an individual or propose a shortlist to the President.²⁸ This would be analogous to the process required by the Constitution for the appointment of judges and would serve to guarantee the independence of the National Director of Public Prosecutions. However, this proposal was not adopted. The Act provides simply that the President must appoint the National Director and makes no provision even for consultation of interested parties.²⁹

Once in office there are some measures to protect the National Director of Public Prosecutions (and the Deputy National Directors) from outside influences. The appointment of the National Director, at no less than the salary of a High Court

28 See Jeremy Sarkin and Susie Cowen ‘The draft National Prosecuting Bill 1997: A critique’ (1997) 10 *SACJ* 64.

29 Section 10.

judge, is for a non-renewable term of ten years.³⁰ Deputy National Directors serve unrestricted terms until the age of 65 years.³¹ During that time the grounds on which the National Director or his Deputies may be suspended or removed from office are limited. Any such step has to be taken by the President and is subject to ratification by Parliament. Alternatively, the President must remove the National Director of Public Prosecutions or the Deputy National Directors if requested to do so in an address from each of the Houses of Parliament. Directors of Public Prosecutions, the old attorneys-general, are also formally appointed by the President and can only be removed by a procedure similar to that for removing the National Director.

Deputy Directors and other prosecutors below that rank are, however, largely subject to public service rules in relation to their appointment or dismissal. The Minister of the Public Service and Administration has to be consulted about their salaries, the determination of which requires furthermore the concurrence of the Minister of Finance.³² The effect of these arrangements is that these prosecutors are structurally far less independent than their more senior colleagues.

The powers of the National Director as spelled out in the Act follow very closely the relatively detailed requirements of s 179 of the Constitution. Crucial in this respect is the requirement that the National Director must, with the concurrence of the Minister of Justice and after consulting the provincial Directors of Public Prosecutions, determine prosecution policy. (The detailed wording is important here: the concurrence of the Minister means that the National Director requires his approval;

30 Or until he reaches the age of 65 years when other rules apply (s 12(1) and s 12(5)).

31 Section 12(2).

32 Section 18.

expressed differently the Minister can veto policy proposals of the National Director. Conversely the words 'after consultation' mean that the National Director can go ahead and ignore the input of the Directors if he disagrees with it.) A second important power is that of the National Director to intervene in any prosecution where his policy directives have not been followed. This power should be read with the further power to review a decision to prosecute or not to prosecute after consulting the relevant Director and 'after taking representations ... from the accused, the complainant and any other person or party whom the National Director considers to be relevant'.³³ This latter power appears to exist even where policy directives are being followed. It is limited, however, to review of decisions on whether to prosecute or not and would not include a direct intervention in the way a case is presented in court, for example. It could also not be exercised without the National Director taking representations from all the prescribed parties.

Other aspects of the powers of the National Director are less controversial characteristics of a centralised prosecuting authority in which the national prosecutor accounts to Parliament while at the same time advising and assisting his deputies. A noteworthy requirement is that the initial prosecuting policy adopted by the National Director has to be tabled in Parliament and subsequent amendments to it must be included in the annual reports that the National Director has to provide to the same body. Of particular interest too is that National Director has a statutory duty to bring the United Nations Guidelines on the Role of Prosecutors to the attention of all prosecutors and to 'promote their respect for and compliance with [the Guidelines] within the framework of national legislation'.³⁴

33 Section 22(1)(c).

34 Section 22(4)(f).

Evaluation

What are the strengths and weaknesses of the new prosecutorial framework? On the positive side, the centralisation of the prosecuting authority allows for the setting of national priorities. Constitutionally, justice and, with some exceptions, policing are functions of the national rather than the provincial tiers of government.³⁵ A centralised prosecuting authority allows for the development of policies that can easily be co-ordinated with, for example, the National Crime Prevention Strategy - the South African government's blueprint for dealing with crime - in a way that straddles the divides of the various government departments in this field. In addition the new National Prosecuting Authority Act provides a logical place within the national prosecuting framework for Investigating Directorates such as the Office for Serious Economic Offences that for some time have been operating at a national level.³⁶

The increased openness and accountability that the new Act requires can also be recorded as a positive feature of the new system. Careful analysis of its various components is necessary, however. Thus the publication of the National Prosecution Policy³⁷ is in principle a constructive development. A close

35 Justice is not one of the areas over which provinces have jurisdiction in terms of s 104 of the Constitution. All other areas are the concern of the national government. For the special arrangements for the police, see ss 205-208 of the Constitution.

36 It is noteworthy that the Investigation of Serious Economic Offences Act 117 of 1991 is repealed by the National Prosecuting Authority Act. Chapter 5 of the latter Act that deals with 'Powers, Duties and Functions relating to Investigating Directors', now provides the legal framework for the Office of Serious Economic Offences to do this work. Chapter 5 may also be used for investigations related to organised crime: See s 72 of the new Prevention of Organised Crime Act 121 of 1998.

37 The National Prosecuting Authority of South Africa *National Prosecution Policy* (1999).

examination of it reveals mostly a collection of generalisations, and exhortations to do what all good prosecutors should do, namely not to proceed unless they have a reasonable prospect of securing a conviction. Only if specific directives are included which reveal more about strategic choices will this innovation make a major contribution to open government. The annual report is also a mechanism for accountability but here too much will depend on what it contains and on how critically it is scrutinised by Parliament.

Finally, there is political accountability, namely the requirement in the Constitution itself that the cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority. In practice this means that the Minister of Justice has to answer to Parliament and through it to the public for the operation of the prosecuting authority. The ruling of the Constitutional Court that the prosecuting authority is not part of the Judiciary, underlines the status of the prosecuting authority as part of the Executive; and, in principle, it is desirable that government ministers take responsibility for the operations of all aspects of the executive.

Accountability in respect of prosecutorial authority to a democratically elected body is not necessarily an unqualified good, however. It may, as in 1926,³⁸ lead directly to a loss of prosecutorial independence. If this were to be the case it would be a serious criticism in the light of the recognition by the Constitutional Court of a specific constitutional guarantee of the independence of the prosecuting authority.³⁹ Where one wishes to use 'prosecutorial independence' as a criterion for judging a way of exercising prosecutorial authority one needs to define the term more closely. One should distinguish between the setting of prosecutorial policy and the exercise of discretion in individual cases.

38 See the text at note 6 above.

39 *Ex Parte Chairperson of the Constitutional Assembly: in re certification of the Constitution of the Republic of South Africa*, 1996 *supra* par 146.

Arguably, both would benefit from a system that allowed prosecutorial authority to be exercised without being subject to political pressures, but where it comes to weighing the potential advantages of efficiency and accountability, on the one hand, against independence, on the other, the ideal balance may be different.

There are aspects about the current South African system that militate against independence. One of these is the mode of appointment of the National Director. Although the Constitutional Court did not require the involvement of the Judicial Services Commission, there can be little doubt that, had the National Prosecuting Authority Act done so, the appointee would have been more effectively isolated from intervention by the legislature in both the policy and individual decisions that he must make as National Director. In reality, the first appointee as National Director of Public Prosecutions was a senior ANC Member of Parliament, Mr. Bulelani Ngucka. His personal qualities notwithstanding, the appointment of someone with such clear political affiliations must raise doubts about his independence.

In the area of policy formation there is, as we have seen, little independence for the prosecuting authority in general, or for the National Director in particular. Policy can only be made with the concurrence of the Minister. Moreover, the National Director must advise the Minister on all matters relating to the administration of justice.⁴⁰ Add to this the fact that the Minister has overall responsibility for the prosecuting authority and it is clear that at the policy level a conscious choice has been made to subordinate the National Director and his staff to the authority of an elected politician.

A case can be made for this approach. It can be argued that the adoption of the opportunity principle in prosecution creates such

40 Section 22(4)(a)(iii).

a wide discretion for prosecutors that there is a great need for policy on when to prosecute. The ramifications of the policy that is followed are so substantial that a degree of political control of such policy is needed. In South Africa crime control is a major political issue, resources for all forms of crime control including prosecution are limited and it can be argued that the elected politicians have a duty to ensure that these resources are deployed in terms of a strategy that carries the approval of the electorate. Against this can be ranged a view that at the policy level too the professional judgement of a senior prosecutor on how to enforce the criminal law should not be influenced by short-term concerns of political popularity. A senior prosecutor or group of prosecutors could develop a policy that focused, for example, on crimes that posed a threat to the economic wellbeing of the country rather than other cases (let us say flashers) about which there was a public outcry, but which in their professional judgement posed no threat to economic (or social) stability. In the policy area there is a real choice between accountability and independence and one may conclude that the choice made is justifiable in current South African circumstances.

It is at the level of the decisions in individual cases, however, that independence of the prosecuting authority is perhaps most important. The National Prosecuting Policy recognises that a decision to prosecute has immense consequences for the person prosecuted.⁴¹ Of course, the ultimate safeguard for the prosecuted is to be found in the courts that decide on their guilt or innocence, but by the time they reach final decisions an accused person may be ruined financially and socially. A decision not to prosecute can be almost equally devastating to a complainant. Other prosecutorial decisions in individual cases, on what evidence to lead or whether to appeal, for example, also affect the parties involved greatly. Will the new legislative framework

41 The National Prosecuting Authority of South Africa *National Prosecution Policy* (1999) 5.

ensure that individual decisions are made independently of outside pressure? At the level of the individual prosecutors and even of the provincial Directors of Public Prosecutions the appropriate legislative safeguards appear to be in place. These are reinforced by the national policy that all prosecutors are compelled to follow and also indirectly by the United Nations Guidelines.

In the new hierarchy however, all prosecutors are largely subordinate to the National Director. He may intervene in individual cases if policy is not followed or 'review' specific decisions to prosecute or not to prosecute. Intervention to enforce a publicly declared policy, assuming that, as is currently the case, that the policy itself is not discriminatory, is not a problem. However, indirect or direct intervention in specific decisions could undermine the independence of the prosecuting authority if he himself is not sufficiently independent. Are there adequate legislative guarantees in the legislation of the National Director's independence in individual cases? The fact that he is a political appointment must be a negative factor in this regard. Conversely, the fact that it is relatively difficult to remove him from office must be seen as a positive factor. Also on the negative side is the very close relationship with the Minister of Justice in the policy sphere. Although the latter is not given any power to intervene in individual cases, which of course legislatively speaking would have destroyed any notional independence of the prosecutorial authority, the structure as a whole does not inspire confidence that there will be no such intervention. It is a pity that further safeguards to ensure independence in individual cases were not built into the new Act.

Formal independence does not guarantee fairness in prosecutorial decision making any more than its absence means that decisions are necessarily unfair. These guarantees have to be sought elsewhere. One place in which they can be sought is in judicial review through the courts of the decisions taken by the prosecuting authority. Historically South African courts were extremely

reluctant to review decisions of the attorneys-general whose independence and probity they praised in extravagant terms.⁴² However, this attitude began to change from the late 1970s onwards and Baxter, the leading South African writer on administrative law could record by 1984 that 'this unrealistic attitude [had] begun to change with normal standards of review at last being applied to both prosecutors and the attorneys-general'.⁴³ The recognition by the Constitutional Court that the prosecuting authority is part of the executive, as well as the expansion of the powers of judicial review by the new Constitution,⁴⁴ may further advance this trend.⁴⁵ Moreover, the detailed requirements in the new legislation, such as those set for review by the National Director of a decision to prosecute will themselves provide the basis for review by the courts as may even the rather general requirements set in the National Prosecution Policy and the United Nations Guidelines for Prosecutors. In this indirect way openness may contribute to enforcing independence.

It should also not be forgotten that more traditional legal mechanisms for constraining the unfair exercise of prosecutorial discretion remain in place. The new prosecuting authority like

42 See the early cases of *Gillingham v Attorney-General and Others* 1909 TS 572 and *R v Waldeck and Thine* 1913 TPD 568 at 570. For a more modern example, see *S v Hassim* 1972 (1) SA 200 (N) strongly criticised by A S Mathews and Barend van Niekerk 'Eulogising the Attorney-General – A Qualified Dissent' (1972) 89 SALJ 292.

43 D Baxter *Administrative Law* (1984) 333.

44 See in general J Klaaren 'Administrative Justice' in M Chaskalson et al eds *Constitutional Law of South Africa* Revision Service 3 (1998) 25-1.

45 On judicial review of the decisions of attorneys-general, see *Wronsky v Prokureur-Generaal* 1971 (3) SA 292 (SWA); *Highstead Entertainment (Pty) Ltd t/a 'The Club' v The Minister of Law and Order and Others* 1993 (2) SACR 625 (C).

its predecessors may be delictually liable for malicious prosecution.⁴⁶ The institution of a private prosecution remains on the statute book as an option for persons with a 'substantial and peculiar interest' in a matter,⁴⁷ who believe that, notwithstanding an official decision not to prosecute on behalf of the state, they could bring a successful criminal prosecution. It is complex and potentially expensive option for an unsuccessful private prosecutor, but nevertheless must be recognised as a safeguard against unbridled prosecutorial discretion.

Conclusion

The new structure of the national prosecuting authority in South Africa represents a conscious break with the past. It has the potential to be more effective than its fragmented predecessors. It may also be more open to public scrutiny and therefore more accountable to the electorate. There are some doubts about whether the structural arrangements will ensure that the national prosecuting authority and, in particular, the powerful new National Director of Public Prosecutions will be sufficiently independent in his decision-making. We hope that future practice will allay our doubts in this regard.

46 *May v Union Government* 1954 (3) SA 120 (A); *Prinsloo v Newman* 1975 (1) SA 481 (A); *Malabe and others v Minister of Safety and Security and Others* 1999 (1) SA 528 (SCA). See in general J Neethling, J M Potgieter & P J Visser *Law of Delict* 3 ed (1999) 349-353.

47 Sections 7-16 of the Criminal Procedure Act 51 of 1977.

The Role of the Zimbabwe Judiciary Since Independence

by

*A.R. Gubbay*¹

In order to appreciate the changes that have occurred to the judiciary since Zimbabwe attained its independence from Britain on 18 April 1980, it is necessary at the outset to sketch the history of the superior courts of the country up to that critical event. Constraints of space, however, necessitate the exclusion of any reference to the many inferior courts whose function is indispensable to the judicial system of the country.

General Background

Zimbabwe is situated in south central Africa. It is a Republic within the Commonwealth. Before Independence the country was known as Southern Rhodesia and later as Rhodesia. It is bordered on the south by South Africa, on the north by Zambia, on the east by Mozambique, on the west by Botswana and is approximately 157 000 square miles in extent. The population is between 11,5 and 12 million. At the present time there are about 90 000 white Zimbabweans, a small Asian community of about 3 000 to 4 000, and an equally small section of persons of mixed race.

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Early History

The area now covered by Zimbabwe was inhabited by descendants of the great southern migration of Bantu people. They occupied most of central and southern Africa. By the end of the 19th century there were two main tribes in the country, the Matabele and the Mashona. Lobengula, the King of the Matabele, asserted sovereignty over the whole country.

In 1890 the country was occupied by the British South Africa Company operating under a Royal Charter which enabled the Company to exercise powers of governance. In 1923 the country became a self-governing British colony. It finally achieved full independence in 1980, following upon a fourteen year civil war against the unlawful declaration of independence by the white minority government.

Development of the High Court

For a few years after occupation there was no High Court as such. The administrator, in his capacity as Chief Magistrate, however, possessed the jurisdiction of a superior court of record in all cases, both civil and criminal. He was also empowered to hear appeals from, and review the proceedings of, magistrates courts.

The judicial system of the country was put on a proper basis in 1894 when the Matabeleland Order in Council was promulgated. Under this Order, the High Court of Matabeleland was established, with full jurisdiction over inferior courts. Notwithstanding its title, this Court's jurisdiction extended over the entire country. The provisions for the appointment of Judges were very simple. They were to be appointed by the British South Africa Company with the approval of the Secretary of State and would hold office "during pleasure". Salaries could not be increased or diminished without the approval of the Secretary of State. No qualification for judicial office was prescribed. At first only one Judge was

appointed, but in 1896 a second appointment was made. Both came from the Cape of Good Hope.

At the beginning of 1899 the High Court of Matabeleland was reconstituted as the High Court of Southern Rhodesia under the Southern Rhodesian Order in Council, 1898. The appointment and tenure of office of Judges were provided for much as before, save that appointments were now made by the Secretary of State on the nomination of the British South Africa Company, which was required to nominate "a fit and proper person".

Between 1923 and 1962 there was no alteration of any significance in the composition, structure or jurisdiction of the High Court. It was only in 1933 that it became necessary to increase the judicial establishment from two to three. Since then, of course, the number of Judges has increased steadily over the years.

Towards the end of 1962, the Constitution of Southern Rhodesia 1961, came into effect. The old High Court which sat both in the capital (then named Salisbury) and the second largest city, Bulawayo, continued in existence as the new High Court provided for in Chapter V of the Constitution, and existing Judges, who then numbered six, continued in office. A feature of the new Constitution was that more elaborate provision was made for the appointment, qualification and removal of Judges. A person would not be qualified for appointment as a Judge unless he or she was or had been a Judge of a superior court in a country in which the common law was Roman-Dutch, with English as the official language; or if he or she had been qualified to practise as an advocate in Southern Rhodesia or in a country in which the common law was Roman-Dutch with English as the official language. Appointments were made by the Governor on the advice of the Prime Minister, with the latter being obliged to consult the Chief Justice and the puisne Judges. The retirement age was set at sixty-five with an extension to seventy. Removal from office was by the Governor on the recommendation of an independent judicial tribunal of inquiry.

The next major development to the situation of the High Court came as a result of the dissolution of the Federation of Rhodesia and Nyasaland at the end of 1963. With the cessation of the Federal Supreme Court as a court of appeal from decisions of the High Court, it became necessary to put in place a substitute local appellate system for the country. The system devised was to split the High Court (until then at all times a single-decision court) into two divisions: the Appellate Division and the General Division (or trial division). The Appellate Division dealt with the bulk of the appellate work of the former High Court and also heard appeals from the General Division. The General Division dealt with the trial work of the former High Court and also retained some minor appellate and review jurisdiction. The Chief Justice could sit in both divisions.

The same structure continued until 28 April 1981 – a year after Independence – when the High Court Act and Supreme Court Act became operative.

The System of Appeal

Prior to 1964 the country was served by a number of different courts of appeal. It did not have the system of appeals from a High Court decision to a full Bench of the High Court – which would have been impossible because for so many years the High Court had only two Judges.

From occupation in 1890 until the unilateral assumption of independence on 11 November 1965, the Privy Council was the ultimate court of appeal. During most of this period appeals lay by special leave only.

The first intermediate appeal court was the old Cape Supreme Court. An appeal to it lay from the High Court, initially in civil matters and, from 1898, against conviction by way of a question of law reserved by the High Court.

The South Africa Act of 1909, which provided for the Union of

South Africa, set up the Appellate Division of the South African Supreme Court, at Blomfontein, and made special provision for appeals from the High Court of Southern Rhodesia to that court. Civil appeals, except in certain minor matters in which appeals still lay to the old Cape Supreme Court (which then became the Cape Provincial Division), lay direct to the Appellate Division of the Supreme Court of South Africa. In criminal matters appeals still lay to the Cape Provincial Division, with no further right of appeal from a decision of that court. But in 1931 the Cape Provincial Division ceased entirely to be an appeal court for Southern Rhodesia. All appeals lay to the Appellate Division of the Supreme Court of South Africa. In civil matters an appeal lay where the dispute exceeded £100 in value, or with leave of the High Court. In criminal cases there was no full appeal on fact, and no appeal against sentence as such.

An alternative right of appeal was granted to persons convicted before the High Court under the Rhodesian Court of Appeal Act, 1938. The Act established a local court of appeal for Southern Rhodesia and what was then Northern Rhodesia (now Zambia). In 1947 Nyasaland (now Malawi) was added, and from then on the court was known as the Rhodesia and Nyasaland Court of Appeal. A person convicted by the High Court who elected to appeal to this Court lost his right to appeal to the Appellate Division in Blomfontein. The significant feature about the right of appeal to the Rhodesia and Nyasaland Court of Appeal was its wider scope. For the first time there was a full appeal on fact with leave of the Court. There was a right of appeal from it to the Privy Council with special leave of that body.

Common Law Applicable

In the 17th century Dutch settlers had established a colony in the Cape of Good Hope. They applied the law current in the Netherlands at the time. That law was Roman-Dutch, a fusion of

Roman law and the customary law of the Netherlands. Roman-Dutch law was still the common law of the Cape when Southern Rhodesia was founded. Because of its close geographical, historical, political and judicial association with the Cape, the Roman-Dutch system became the common law of Southern Rhodesia. It has remained the common law ever since. Its development has been influenced strongly by the decisions of the South African Courts.

Independence and After

At Independence the General Division of the High Court consisted of the Chief Justice and nine puisne Judges, and one acting Judge. The Appellate Division consisted of the Chief Justice, the Judge President and one full time Judge of Appeal. All the Judges were white. The self-same Chief Justice who had indicated an unwillingness to serve under a nationalist government represented the judiciary at the granting of Independence and swore into office Robert Mugabe as Prime Minister. As part of the process of reconciliation the Mugabe government left in office all the members of the judiciary who had served under the white minority government of Ian Smith. However, during May 1980 the Chief Justice and one Judge of Appeal retired, having both reached sixty-five years of age. On 8 May 1980 the first black Judge was appointed to the General Division of the High Court. He was Enoch Dumbutshena. The first Chief Justice of Zimbabwe was John Fieldsend (who had left the Bench in 1968 in protest against the decision of the Court to accord judicial recognition to the government of Ian Smith).

During the early years of Independence many of the white Judges resigned. By mid-1984 only two remained, with one retiring at the end of 1986. The government was obliged to recruit on contract four expatriate Judges from Ghana and Tanzania. One of them later took permanent appointment and remained in office until he retired at the end of 1997.

At present the Supreme Court (the successor of the Appellate Division of the High Court) has five Judges and the High Court has nineteen Judges, fifteen, including the Judge President, are assigned to the High Court at Harare, and four at Bulawayo. The composition of both courts is non-racial. All the Judges are citizens of Zimbabwe although this is not a specific requirement for appointment. It is true to say that Zimbabwe is praised by the international legal community for the fact that race, creed and political affiliation do not count in the appointment of Judges.

Four years after Independence the then Minister of Justice, Legal and Parliamentary Affairs said what represented the government's attitude to the appointment of Judges:

In Zimbabwe, shortly after Independence, Enoch Dumbutshena, a Zimbabwean lawyer who has never been a member of the ruling party, ZANU (PF), was appointed a High Court Judge.

In *York and Another v Minister of Home Affairs and Another* a vital case concerning the interpretation of the Constitutional provisions relating to preventive detention, Dumbutshena J ruled against the Executive. This decision, which was upheld by the Supreme Court, caused some anti-judicial feelings in Zimbabwe. However, when the time came in 1983 to appoint a new Judge President of the High Court, the Executive chose Dumbutshena J for the very qualities, *inter alia*, of courage and independence which he had displayed in the *York* case. In the *State v Slatter and Others*, Dumbutshena J conducted the trial of the Air Force officers charged with sabotage of a large number of aeroplanes. He acquitted all the accused on the basis that their confessions were inadmissible. This case caused widespread comment among the public in Zimbabwe. Indeed, in the Inns of Court it was said that the Judge would be in some sort of danger from the wrath of the Executive! On 29 February 1984 the President

swore in the new Chief Justice Dumbutshena. The judicial career of Dumbutshena CJ surely demonstrates our determination in Zimbabwe to have a truly independent judiciary which will interpret the Constitution and try all cases – be they of a sensitive security nature or otherwise – with total impartiality.”

Under the Constitution of Zimbabwe, the Chief Justice and other Judges of the Supreme Court and the High Court are appointed by the President after consultation with the Judicial Service Commission. If any proposed appointment is not in accord with the recommendation made by the Judicial Service Commission, the President is enjoined to cause Parliament to be informed of the reasons as soon as is practicable. This has never happened. The Judicial Service Commission has as its members the Chief Justice, the Judge President of the High Court, the Attorney-General, the Chairman of the Public Service Commission, and two senior and experienced legal practitioners from the private sector. This composition ensures that judicial office is open to all.

Judges are the custodians of the Constitution of Zimbabwe. This means that the courts have the power, and the duty,

- (i) to ensure that all the provisions of the Constitution – which is the supreme and overriding law of the land – are observed by all the instrumentalities of government; and
- (ii) to declare as invalid any excess of power or Act of Parliament or Presidential or Ministerial Regulations which contravene a provision in the Constitution.

Anyone who alleges that a fundamental right or freedom has been, or is likely to be, violated in relation to himself or herself, may apply directly to the Supreme Court for determination of the matter. In this respect the Supreme Court functions as a court of first instance, besides exercising appellate jurisdiction. And the High Court, and any inferior court, are required to refer any such issue to the Supreme Court if

requested by the parties. Referrals may also be made *mero motu* by the courts.

The Constitution contains a justiciable Declaration of Rights which specifies a number of fundamental human rights and freedoms which are not to be breached. These rights were effectively entrenched for the initial ten years; the Constitution requiring a 100 percent vote in the then House of Assembly to derogate from them. That entrenchment came to an end on 18 April 1990. The provisions of the Declaration of Rights may now be amended upon a two-thirds majority vote by the members of Parliament.

The Supreme Court is empowered in terms of the Constitution to "make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Declaration of Rights". It was said of this provision in *In Re Mlambo* that: "It is difficult to imagine language which would give this Court a wider and less fettered discretion".² The Supreme Court utilised this wide discretion in *Catholic Commission of Justice and Peace in Zimbabwe v Attorney-General*.³ In that case, notwithstanding that Executive clemency had been refused, the sentence of death passed upon four condemned prisoners was quashed and replaced, in each instance, with imprisonment for life. In another matter that followed shortly thereafter, the Supreme Court again substituted life imprisonment for sentence of death, even though the exercise of Executive clemency had yet to be considered.⁴

In all humility, over the last eighteen years the Supreme Court and the High Court have developed a strong human rights jurisprudence. That this has been achieved, either through the

2 1991 (2) ZLR 339 (SC) at 355C; 1992 (4) SA 144 (ZSC) at 155J.

3 1993 (1) ZLR 242 (SC); 1993 (4) SA 239 (ZSC).

4 *Nkomo v Attorney-General and Others* 1993 (2) ZLR 442 (SC); 1994 (1) SA 34 (ZSC).

striking down of offending legislation or by a declaration of invalidity of governmental action, evidences the true independence of the judiciary. The decisions which follow bear this out.

One of the most important protections of substantive human rights is that enshrined in section 15(1) of the Constitution of Zimbabwe, which reads:

“No person shall be subject to torture or to inhuman or degrading punishment or other such treatment.”

The impact of this provision was considered by the Supreme Court in relation to the constitutionality of a judicial whipping upon male adults and juveniles.⁵ Both forms of whipping (they differed only in respect to the length and thickness of the cane used) had been in force under the Criminal Procedure and Evidence Act for well in excess of half a century. The punishments were struck down on the ground that, having regard to the sensitivities which emerge as civilisation advances, they were inhuman and degrading. In the course of the judgment it was remarked:

“We must never be content to keep upon our Criminal Code provisions for punishment having their origins in the Dark Ages.”

In the *Catholic Commission* case, the Supreme Court considered that delays of fifty-two months and seventy-two months from the date of imposition of sentence of death to the proposed date of execution, fell foul of the condemned prisoners' rights under section 15(1). It is important to note that the Supreme Court was not seeking to disturb its earlier judgments in which the appeals of the condemned prisoners were dismissed. Rather, it was functioning as a constitutional court and so was obliged to determine whether, even though the death sentence was the only fit and

5 *S v Ncube* 1987 (2) ZLR 246 (SC); 1988 (2) SA 702 (ZSC), and *S v A Juvenile* 1989 (2) ZLR 61 (SC); 1990 (4) SA 151 (ZSC).

proper punishment to have been imposed, supervening events, namely the “death row phenomenon”, was so adverse that the execution of the sentences on the appointed dates would constitute inhuman treatment.

In *Minister of Home Affairs v Bickle*⁶ the Supreme Court had to decide whether a person whose property had been declared forfeit in terms of an order made pursuant to the Emergency Powers (Forfeiture of Enemy Property) Regulations, because he appeared to the Minister to be an enemy of the State, was in fact an enemy. Section 16 of the Declaration of Rights protects the individual against compulsory acquisition of his property by the State save in certain prescribed circumstances, one of which is specified as “property belonging to or used by or on behalf of an enemy”. At issue was whether the definition of “enemy” as contained in the Regulations, namely, a person “who is or has been acting as the agent of, or on behalf of, or in the interests of, any foreign country or foreign organisation, and in a manner prejudicial to the public safety of Zimbabwe or which is subversive to the authority and the lawfully established Government of Zimbabwe”, was in accordance with the proper meaning to be ascribed to the word “enemy” in section 16. In confirming the decision of the High Court, the Supreme Court held that it was not and that, accordingly, the forfeiture order was unconstitutional. The ratio was that the word “enemy” in section 16 means an enemy of the State with whom Zimbabwe is at war, either because of a declaration of war or because of armed conflict between that State and Zimbabwe of such a scale as to amount to a state of war.

In the latter half of 1994, the Supreme Court was concerned with the mobility rights of a woman citizen married to an alien.⁷

6 1983 (2) ZLR 400 (SC); 1984 (2) SA 439 (ZSC).

7 *Rattigan and Others v Chief Immigration Officer* 1994 (2) ZLR 54 (SC); 1995 (1) BCLR 78 (ZSC).

Immigration authorities were refusing to grant permanent residence to foreign husbands and were deporting them. Consequently, the wives were compelled to decide whether to accompany their husbands from the country in order to secure and maintain the marital relationship, or to remain in Zimbabwe, living apart in potential destruction of it. The effect of this situation was held to undermine and devalue the exercise of the fundamental and unqualified right of the citizen wife to remain living in Zimbabwe as guaranteed by section 22(1) of the Constitution. As a member of a family unit she was entitled to have her husband living with her and to look to him for partial or total support. Hence he was to be accorded permanent residence and be allowed to engage in employment or other gainful activity in Zimbabwe.

These decisions (and there are many more) are proof of the preparedness of the Judges of Zimbabwe to be active in asserting an individual's fundamental rights against the might and authority of the State.

But it has not only been in the rôle of protector and enforcer of the Constitution that the courts have exercised and demonstrated their independence. In the case of *PF-ZAPU v Minister of Justice*⁸ the Supreme Court was seized with the question of whether the courts could enquire into an act of State and Executive prerogatives in areas in which Executive prerogatives oust the jurisdiction of the courts. PF-ZAPU felt that its members had been deprived of their legal right to contest a general election fairly because the date fixed by the President for the sitting of the nomination court afforded them insufficient opportunity to peruse the voters' rolls and to study the newly defined constituencies. The question before the High Court was whether it could redress PF-ZAPU's grievances or whether its hands

8 1985 (1) ZLR 305 (SC); 1986 (1) SA 532 (ZSC).

were tied by the doctrine of an act of State or Executive prerogative. At issue was the court's power to review a decision of the President fixing the date of the sitting of the nomination court. The High Court held that it had no power to review the President's prerogative. The Supreme Court disagreed. It was said:⁹ :

"... the arbitrary exercise by the Executive of a prerogative, regardless of its effects on those who may be deprived of their rights or interests or who have legitimate expectations, is nowadays subject to judicial review. The reason for reviewing such Executive action is that it would be unfair to deprive a citizen of his rights, interests or legitimate expectations, without hearing what he has to say, or to deny him the opportunity to find out whether the decision emanating from the exercise of an Executive prerogative is legal or not or, for that matter, irrational or unfair."

This was not, of course, the Court taking sides between political parties, but rather striving to ensure fair play whatever the political opinions of those involved.

Nor have our courts simply been on the "defensive" in the exercise of their duties. Whenever the opportunity has presented itself, Judges have seized it to develop the common law in accord with current trends and opinions. This approach is illustrative of the Courts exercising their independence, yet nevertheless exercising it within judicial restraints. Courts cannot, of course, make new laws – that falls within the domain of the Legislature – but they can, in keeping with public policy, extend the law to situations perhaps not covered by the strict letter of the statutory enactment.

9 *Ibid* at 318 B-C (ZLR) and 542 G-H (SA).

For example, I would refer to the decision in *Katekwe v Muchabaiwa*¹⁰ where the Supreme Court, recognising the need and desirability to improve the rights of female citizens, held that an African woman of or above the age of eighteen years was no longer subject to guardianship under customary law. She is free to contract a valid marriage without the consent of her father or guardian.

Then, more recently, the Supreme Court, in the case of *Zimnat Insurance v Chiwanda*¹¹, ruled that a wife of a customary union was entitled to claim compensation when her husband had been killed through the negligence of another. Here again, the Court adopted a progressive approach to the prevailing common law and extended strict legal principles to areas where public policy, justice and fairness demanded it be extended. This is what was said:¹²

“Today the expectations amongst people all over the world, and particularly in developing countries, are rising, and the judicial process has a vital rôle to play in moulding and developing the process of social change. The judiciary can and must operate the law so as to fulfil the necessary rôle of effecting such development.

It sometimes happens that the goal of social and economic change is reached more quickly through legal development by the judiciary than by the Legislature. This is because Judges have a certain amount of freedom or latitude in the process of interpretation and application of the law. It is now acknowledged that Judges do not merely discover the law, but they also make law. They take part in the process of creation. Law-making is an inherent and inevitable part of the judicial process.

10 1984 (2) ZLR 112 (SC).

11 1990 (2) ZLR 143 (SC); 1991 (2) SA 825 (ZSC).

12 *Ibid* at 154 C-E (ZLR) and 832H-833A (SA).

The opportunity to play a meaningful and constructive rôle in developing and moulding the law to make it accord with the interests of the country may present itself where a Judge is concerned with the application of the common law, even though there is a spate of judicial precedents which obstructs the taking of such a course. If Judges hold to their precedents too closely, they may well sacrifice the fundamental principles of justice and fairness for which they stand."

It is a matter for pride that Zimbabwe maintains a system in which the courts can and do uphold the rule of law. When the courts have declared the law, the other organs of the State have usually abided by the decision however unpalatable it may be considered to be. It is very important that this should be so, because the alternative is the ghastly dictatorships or rule by decree that the world has seen where the Executive or any other organ takes complete control such as Hitler and Mussolini in modern Europe, Idi Amin in Uganda and Mobutu Sese Seko in Zaire. Sustaining and maintaining the balance of power as our Constitution requires is in the interests of us all.

*Starting Down the Long Trail
of Judicial Independence:
The Experience in Russia,
the Newly Independent States,
and Central and Eastern Europe*

by

*James G. Apple*¹

When the framers of the United States Constitution gathered in Philadelphia in 1787 to write the paper that would govern the thirteen colonies making up the new American republic in the future, they created in Article III of that document a separate part of the national government that was to be called the Judicial Branch. By that action they fashioned a new political architecture. Before that time courts and the judges who sat in them were instrumentalities of the executive authority, in the case of Britain, the King, and in other countries, the reigning monarch or other head of state. The creation of a separate "branch" of government reserved for the judiciary was a new concept for the discipline we now call political science.

A corollary of the idea of a separate judicial branch of government was a new phrase, "the independence of the judiciary," which was heralded as a necessity for the functioning of a constitutional democracy.

1 James G. Apple, Formerly Chief of the Interjudicial Affairs Office of the United States Federal Judicial Center and now President, International Judicial Academy, Washington, D.C., U.S.A.

When the Constitution was being debated in the American colonies, and was under attack in the key state of New York, three statesman, Alexander Hamilton, James Madison, and John Jay, produced a remarkable series of papers explaining and defending its provisions. These papers have been preserved for posterity under the collective title, *The Federalist Papers*. In these papers, it was Alexander Hamilton, later to become the first Secretary of the Treasury of the new republic, who took up the cause of explaining the provisions in the new Constitution relating to the judiciary. He wrote a series of articles for newspaper publication about Article III.

Hamilton observed in different parts of the Federalist N° 78, the first essay dealing with the “judicial department”:

The complete independence of the courts of justice is peculiarly essential in a limited constitution.

This independence of the judges is equally requisite to guard the constitution and the rights of individuals.

[I]t is not with a view to infractions of the constitution only that the independence of the judges may be an essential safeguard against the effects of occasional ill humours of society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws.²

The judicial branch of the United States and the judges and court officials composing it, were thus, from the very beginning, instilled with a fierce loyalty to the principle of the independence of the judiciary, a loyalty that has been carried over a period of more than two hundred years to the present. That loyalty has

2 Hamilton, Alexander; Madison, and Jay, *The Federal Papers* (Buccaneer Books, Cutchogue, New York, 1992, pp. 392-399.

become especially meaningful and very evident in recent times when judges in the United States and agencies of the Judicial Branch began to provide assistance to judges and court officials from the newly emerging democracies in the Russian Federation, in the new Independent States of the former Soviet Union (NIS) and in those other countries of Central and Eastern Europe.

Judicial independence has become a subject of wide interest among judges and court administrators in the countries making up that area of the world in these times when the "rule of law" is a touchstone for reform. It is not an exaggeration to say that there was no judicial independence there before the collapse of the Soviet Union in 1989. "Telephone justice" was the dominant phrase to describe the judicial systems of these countries, meaning simply that judges in both civil and criminal cases telephoned the local Communist Party boss to determine the outcome of cases.

With the collapse of Communism, the justice systems of all of the countries that retained their national identities as well as those of the new countries that were created from the breakup of the Soviet Union had to be completely rebuilt. The judges and court administrators of the socialist systems were not familiar with even the most basic concepts of the functioning of a judiciary in a democracy, independent of the executive and legislative branches of government and outside the influence of political parties and political leaders.

The United States Federal Judicial Center very early after the end of the Soviet Union became involved in providing technical assistance to Russia, the New Independent States and Central and Eastern European countries. Two prime movers in this effort were Judge William W Schwarzer³, then Director of the Federal Judicial Center in Washington, and Richard Schifter, a former ambassador and at that time Assistant U.S. Secretary of

³ Judge Schwarzer is now Senior Judge of the United States District Court, Northern District of California, in San Francisco.

State for Human Rights and Humanitarian Affairs. One of the cornerstones of the effort to help these countries was the necessity for creating strong and independent judiciaries, because, in the words of Secretary Schifter, "there can be no true protection of human rights without an independent judiciary".

Within six months following a meeting between Judge Schwarzer and Secretary Schifter in August 1991 about assistance to the former Communist countries, the Federal Judicial Center and the U.S. Department of State began planning a seminar for representatives from the Russian Federation and the NIS about the functioning of a judiciary in a democracy and the necessity for a strong and independent judiciary.

The Federal Judicial Center, during this same time period, began to collect data from individual judges and court administrators in the federal court system of the United States who were interested in providing technical assistance to other countries. The Office of the Director sent out a questionnaire to every United States judge to determine interest, previous experience in other countries, language abilities and fields of expertise. The Judicial Center received over 300 responses to this initial questionnaire, the information from which was installed in a computer data base for regular reference.

The first of a series of seminars for judges and legal officers from Russia and the NIS in which the Federal Judicial Center was a major sponsor occurred in the summer of 1992, when representatives from the Russian Federation and nine NIS countries gathered in Washington for three weeks of presentations and discussions on a wide variety of issues relating to the functioning of a legal system. The seminar was divided into three parts with three different themes, using the U.S. judicial and court systems as models:

- the organisation and operation of a court system,
- the jury system, and
- the operation of a criminal justice system and the protection of human rights.

A specific topic of discussion during the first week was "Independence of the Judiciary", and the presentation was made by a United States District Judge.

One of the lessons learned from that first seminar was that three weeks was too long a period for a "rule of law" programme. Seminars that followed in succeeding years were shortened to two weeks, or one week, or some intermediate period of time, such as 10 or 12 days. And, as expected, the lectures and presentations had to be conducted at a very basic level because of the lack of familiarity on the part of the participants with more sophisticated and complex ideas and descriptions.

Experience with the Russian Federation

During the past seven years the Federal Judicial Center under the able leadership of Judge Schwarze and his successor, Judge Zobel sometimes working with its sister agency, the Administrative Office of the United States Courts, and at other times working only with the U.S. Department of State and other executive branch agencies, conducted or co-conducted 15 seminars for judges and court officers from the Russian Federation, involving 233 participants. Because the new Russian constitution drafted in 1992 and adopted in 1993 contained a provision giving persons accused of crimes the right to a jury trial, the seminars held at the Federal Judicial Center in 1993 and 1994 dealt with the jury system. Later seminars focused on court administration, the role of the judges functioning in an independent judicial branch, case management, alternative dispute resolution, and other topics related to the functions of courts. In all of these seminars, even when the focus was on court administration and court functions, there were always presentations on "the independence of the judiciary," or that issue was brought out and discussed during presentations on other subjects.

Another event, in 1993, increased the effort of the U.S. judicial branch in assisting other countries in court reform. In that year

the Judicial Conference of the United States, the national policy making body for the federal courts, created a standing committee, the International Judicial Relations Committee, with U.S. District Judge Michael M. Mihm, United States District Judge from the Central District of Illinois, as its first chairman. This committee, with Judge Mihm's strong leadership, very quickly established itself as a major player in court reform efforts in certain countries around the globe, but most particularly in the Russian Federation.

In addition to participating in the seminars that were being conducted at the Federal Judicial Center, members of the Committee and staff specialists from the Judicial Center and the Administrative Office of the U.S. Courts began making trips to Russia to confer with Russian judicial and court leaders and make presentations to them about discrete aspects of the U.S. courts system, about the independence of the judiciary, and particularly the institutions and organisations within a judicial branch necessary to support that independence.

Because of this emphasis on judicial independence and the need for simple materials explaining it, my office at the Federal Judicial Center, in the early 1990s, began both preparing and gathering materials about the American experience in creating an independent judiciary. One of the documents that resulted from that effort was a single sheet of paper that I prepared titled "Eighteen Building Blocks for an Independent Judiciary". This paper lists the constitutional and statutory provisions, institutions, mechanisms, and policies that have contributed to the creation of a strong and independent judiciary in the U.S. court system. The contents of that paper are found at the end of this document. An expanded explanation of those factors has been described in another publication.⁴

4 See Chapter 11, James G. Apple, "Judicial Independence and Judicial Leadership in the Protection of Human Rights", in *The Role of the Judiciary in the Protection of Human Rights* (Kluwer Law International, Amsterdam 1997).

As contacts between the federal judiciary of the United States and the judges of the Russian Federation increased, so did the sophistication of the Russian judges. They learned quickly. While the seminars in 1992 and 1993 in Washington had dealt with judicial and court reform matters on a very basic level, later seminars and conferences dealt with more complex issues relating to the administration of the courts.

By the early spring of 1997, the situation in Russia had progressed so far that four judicial leaders from the Russian Council of Judges (the new governing body of the Russian judiciary) came to the Federal Judicial Center for an intensive one week seminar on specific aspects of court administration, led by Justice Yuri Ivanovich Sidorenko of the Supreme Court of Russia and Chairman of the Russian Council of Judges. This seminar had one purpose: how to create through statutes, institutions and policies a judicial branch of government that could legitimately claim to be independent.

Subjects covered at this seminar included the function of a judicial conference, finance and budget issues for the courts, the making and implementation of court rules, judicial and court education practices and programs, space and facilities for judges and court staff, court security, automation and technology, legislation and public affairs, and court governance at the regional and local levels.

One of the problems facing the Russian judges under their new constitution was an issue of judicial independence: the control by the Russian Ministry of Finance of the budget for the courts. In 1995 the newly formed Council of Judges, which was created in the early 1990s and roughly resembles the Judicial Conference of the United States as a national policy making body, became involved in the preparation of the budget for the judicial branch. What happened is best described by an observer on the scene: "[The Council of Judges] immediately encountered fierce resistance from the Ministry of Finance and from the government. This was the start of a struggle between the judicial community

and the organs of the executive power over the financing of courts.”⁵

The judiciary of the Russian Federation ultimately achieved a kind of victory in the struggle,⁶ with the passage in the upper chamber of the Russian Parliament of the “Constitutional Law on the Judicial System of the Russian Federation” in late December 1996. That legislation was signed into law by President Boris Yeltsin on 31 December 1996. One of the features of the new law was the guarantee of judicial participation in the formation of the budget for the courts.

The Russian Federation had begun the long process of creating an independent judiciary by the passage in June, 1992 of a new law, “On the Status of Judges in the Russian Federation,” followed by the adoption the next year of the new constitution which, while not creating specifically a “judicial branch” in the manner of the United States, contained new provisions that increased the stature of the judiciary and the status of judges.

With the 1996 law referred to above, other significant changes were made in the structuring and functioning of the judiciary, including the federalisation of all sitting judges in Russia, the creation, under the Supreme Court and Council of Judges, of a “judicial department” (which functions like the Administrative Office of the United States Courts) and the creation of a new type of judicial officer, justice of the peace.

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- 5 Murphy, Wm. Patrick, “The Russian Courts of General Jurisdiction: In Crisis, Undergoing Reform, or Both?” *The Parker School Journal of East European Law*, Vol. 4, N° 2, 1998 (Parker School of Foreign and Comparative Law, Columbia University, New York).
 - 6 Ibid. at P. 219. The Deputy Minister of Justice of the Russian Federation, Sergei Tropin, made an appearance before the Russian Council of Judges in October, 1996 in which he stated that the Ministry of Justice “was no longer opposed to giving responsibility over the budget for the courts of general jurisdiction to the judiciary.”

There can be little doubt that the extensive contacts between senior members of the Russian judiciary and U.S. federal judges and personnel of the Federal Judicial Center and the Administrative Office of the U.S. Courts played an important role in these developments. One of the drafters of the new Russian legislation commented: "We've also seen how the courts are run in Germany and France, and we like the American model better."⁷ An on-the-scene American observer summed up the situation regarding American influence on the Russian experience:

In its broad outlines as well as in many of its details, the Russian judiciary is consciously borrowing from and adapting the American scheme of judicial self-government – a model that has served America's federal courts well, helping to insure powerful, independent federal courts. ("We've been intuitively going down the path that your country went down long ago", one of the leaders of the Council of Judges says). The parallel holds: a Council of Judges that meets twice a year like the Judicial Conference of the United States, extending to the Council's proposed committee structure; the impending creation of a specialised agency to provide for the judiciary's needs, and the intended participation of that Judicial Department in the budget process, like that of the Administrative Office in America; the (re)introduction of a system of Russian justices of the peace, analogous in some respects to U.S. Magistrate Judges; the Council of Judges' desire to make judicial discipline a judicial branch function to the maximum possible, and in other areas.⁸

The judges in Russia still have an arduous task before them: to increase further their status in Russian society, to insure full and

⁷ Id. at 222.

⁸ Id. at 223.

adequate financing for the courts and for judges' salaries, to construct new buildings that reflect their growing status and importance in the Russian government and in Russian society, and to create an effective court administrative structure that extends to all parts of the country. But they have achieved a surprising and laudable amount of success in seven years, a singular accomplishment when one considers the length of time it has taken judges in the United States to achieve their level of independence (an ongoing process over a period of 200 years). The progress made in Russia toward an independent judiciary has been in large part due to the leadership provided by senior Russian judges, and by the determination of the judiciary as a whole to create a system of justice that is respected by the citizenry of the country. It is also a point of pride among judges and court staff of the federal courts in the United States that they made a genuine contribution to these developments.

The Central and Eastern European Law Initiative

The efforts of the federal judiciary in the United States are not the only contributions made by American institutions to assist Russia, the New Independent States and the emerging democracies of Central and Eastern Europe in the creation of strong and independent judiciaries. While space limitation does not permit a complete recitation of contributions by other institutions, one is particularly worthy of mention.

The collapse of the Soviet Union precipitated in the United States the creation of a new private American organisation dedicated to the establishment of the rule of law in these countries, an organisation that reflects admirably on the altruistic nature of American lawyers, and the ingenuity of the private sector in the United States to support official foreign policy initiatives.

The Central and Eastern European Law Initiative (CEELI), a project of the American Bar Association (ABA), was founded in 1990 after the collapse of the Soviet Union by the then ABA

president Talbot "Sandy" D'Alemberte, a Florida law professor⁹, and Homer E. Moyer, a Washington lawyer. They were fortunate in the selection of a strong Executive Director, Mark S. Ellis, who has daily directed CEELI's programs and activities now for over eight years.

CEELI, based in Washington, with the backing of financial and manpower assets of the American Bar Association, quickly established itself as an organisation that could provide substantial assistance for rule of law programs in these countries, from Albania in the South, to the Baltic States, to Poland on the border of Russia. The activities of CEELI were not focused solely on the judiciary, although judicial reform was one part of its multifaceted program of assistance. Other assistance projects included advice on the structure and language of new constitutions and statutes that would serve the democratic aspirations of the citizens of these countries; the development of strong legal education programs in their law schools; understanding the legislative process; legal profession reform, meaning increasing the stature of lawyers and promoting the creation of bar associations; training of prosecutors; promoting the protection of human rights in the administration of the criminal justice system; and more recently providing advice on gender bias issues and environmental law.

CEELI originally operated solely out of its Washington office, but soon established branch offices in different major cities throughout the Central and Eastern European region, to better understand the issues and problems of these countries and develop effective programs to assist them. Another characteristic of CEELI's activities was the recruitment and development of a strong base of institutions and individuals to advise and assist with its projects in the area.

9 Talbot D'Alemberte is now President of Florida State University.

CEELI recruited law schools in the United States that had expressed an interest in international programs to form "sister" alliances with specific law schools in each of the targeted countries. It recruited not only judges, but law professors, practising lawyers, prosecutors, court officials and court administrators from both the federal and state courts to assist in specific projects. These activities ranged from commenting on drafts of constitutions and particular statutes; to preparing and distributing manuals and collections of essays and articles on discrete legal subjects, including a major work on the independence of the judiciary; to hosting delegations of visiting judicial and legal officers for seminars and conferences in the United States; to sponsoring and participating in conferences and seminars on legal reform issues in particular countries; to providing in-country assistance through long term resident advisors. CEELI also recruited lawyers and other citizens with national stature to serve on its Executive Board and Advisory Boards to give its' programs credibility and guidance.

The effort was a massive one, and has paid dividends in many of the targeted countries, although not with the same degree of success in every country. New constitutions, reviewed by constitutional law experts in the United States, were adopted. Statutes relating to the structure of government, the legal system and criminal justice system, and protection of human rights were passed. Legal education was upgraded. And, especially important, many of these countries began the long process of establishing independent judiciaries.

One of the new projects of CEELI is the development of a judicial independence index, by which progress towards judicial independence can be measured on a country by country basis. The index will consist of special survey questions addressed to a core group of judges in each country and the responses thereto. The survey questions will cover various components of judicial independence and the judges responding will give their opinions on how well the country ranks in each category. The index will be tested in Estonia and Belarus.

Assessment of Progress in Central and Eastern Europe

While a country by country assessment of progress in legal and court reform in general and judicial independence in particular in central and eastern Europe outside the Russian Federation is not possible within the confines of this article, some commentary and a review of successes and failures in the region is appropriate.¹⁰

Two of the three Baltic states, Estonia and Lithuania, have made substantial strides in their court reform efforts. Estonia very quickly after the fall of the Soviet Union established a strong National (Supreme) Court and a judicial training center under the able leadership of then Chief Justice Rait Maruste.¹¹ In Lithuania, the judges have created both a judges association and a new judicial training institute. Latvia is lagging behind its two neighbours in similar judicial reform efforts.

Poland is another country where substantial progress has been made toward a modern legal system with a strong and independent judiciary. Judges there created a very active judges association and are pushing for independence from the Ministry of Justice on budgetary and administrative matters. A new judicial code is under consideration.

The two States created by the dissolution of Czechoslovakia have been struggling with judicial reform efforts, with the Czech Republic making the better effort. The Slovak Republic received a setback soon after partition with the accession of an authoritarian, anti-democratic regime to power. A recent change in government in that country holds more promising prospects for reform.

10 The comments on specific countries were developed following an interview with Lisa Dickieson, Director of the Central and European Section of CEELI. However, the statements contained herein are those of the author.

11 Chief Justice Maruste is now a judge sitting on the European Court of Human Rights at Strasbourg.

In Bulgaria, a new government has increased hopes among the judges for judicial reform measures. A new judicial training center is being organised and a model court project is underway with U.S. assistance. In neighbouring Romania, while the government, and in particular, the Ministry of Justice, are eager for reform, a bad economy has hampered reform efforts. The new magistrate training academy in Bucharest has already held graduation ceremonies for a cadre of new judges.

The one country where there has been little progress towards democracy and an independent judiciary is Belarus. The authoritarian regime in that country has spurned reform efforts, and has even expelled almost all assistance providers from other countries.

The situation in the Balkans is a sad story. The continual strife in that area of the world has made improvements in the justice and court sectors almost impossible. Thus, in such countries as Bosnia and Herzegovina, Croatia, Albania, and Slovenia, despite the good intentions of many judges and others affiliated with the justice systems, progress in legal reform has been difficult if not impossible. The most promising reform effort in the region has occurred in Macedonia, where the government has created a judicial training institute, the judges have founded a judges association, and demands are being made by them for more independence from the Ministry of Justice.

Conclusion

Ambassador Richard Schifter, the former U.S. Assistant Secretary of State for Human Rights and Humanitarian Affairs, in February 1991, delivered an address at the Center for National Security Law at the University of Virginia in Charlottesville, Virginia on "The Rule of Law". In that speech, he listed nine elements of the rule of law in a "genuine democracy". They were:

1. A constitution that clearly spells out the fundamental rights of the individual citizen.
2. Statutes that amplify these rights and create a framework of institution for their full realisation.
3. The actual existence of such a framework, normally a judicial system, for the protection of the rights of the individual.
4. Knowledge on the part of the citizens of their rights.
5. A police force that while respecting the rights of the citizen provides effective protection against crime.
6. The availability of qualified advisers, lawyers, to assist citizens in their efforts to vindicate their rights in the courts.
7. Judges who have the competence and personal qualities to decide cases that come before them fairly and justly.
8. A climate in which the judges can render judgements without being influenced or intimidated by outside forces, including the government.
9. A society in which the judgement of the courts will be obeyed by all, including the governmental authorities.

Noteworthy in this listing is that four of the nine factors relate directly to the functions of judges and courts, and another one relates to another component of a legal system, the work of lawyers. The message is that the existence and functioning of a genuine democracy is intimately related to judges, courts and lawyers. And thus the success of the emerging democracies in the Russian Federation, the New Independent States, and the other countries in Central and Eastern Europe are very much tied to the success of the judicial and court reform movements in those countries.

Any kind of judicial reform or court reform in any country is usually a long term project. As a U.S. judge once commented about the slow pace of judicial reform in the United States:

“Court reform is not an activity to be engaged in by the faint-hearted.”

Most of the countries mentioned in this article have started down the long trail of reform to establish independent judiciaries. Some countries have progressed further down that trail than others. But the efforts big and small are being made in almost every country. Each success in one country, no matter how small, encourages reformers in the others. These efforts and successes cannot but offer substantial hope to those throughout the world who are interested in the establishment of stable democracies around the globe.

Appendix

18 Building Blocks for an Independent Judiciary

1. Separation of powers.
2. Equality of status of the judicial branch with other branches of government (legislative and executive).
3. Separation of the judicial branch from the department (ministry) of justice.
4. Judges appointed for life.
5. Adequate compensation for judges.
6. No reduction in judicial compensation during “good behaviour” (constitutional provision).
7. Adequate staff for judges.
8. Removal of judges only by impeachment.
9. Power of judicial review.
10. Determination of judicial misconduct and judicial discipline occur only within the judicial branch.

11. Judicial code of conduct that prohibit political and other kinds of inappropriate public and private conduct.
12. A conference of judges (e.g. the Judicial Conference of the United States) makes national policy for the courts and controls judicial administration.
13. Judges prepare and submit the budget of the judicial branch to the legislative branch.
14. Judges control the adoption and amendment of rules of procedure for courts.
15. Judges control day-to-day operation of courts.
16. Judges control content and delivery of judicial and court education programs.
17. Judges have control over space and facilities for courts and judges.
18. Lawyers serve as "officers of the court".

Judicial Independence in the South Pacific

by

*Thomas Eichelbaum*¹

Introduction

For purposes of this article, I have taken the South Pacific to be the area bounded on the west by Australia and Papua New Guinea, on the north by the Equator, on the east by French Polynesia and on the south by New Zealand. Broadly although not precisely, this area encompasses the countries, currently numbering about 20, to which invitations are sent to attend the South Pacific Judicial Conference, held biennially.

To obtain information for this exercise I surveyed the Chief Justices of 12 of the court systems within the area, including all the larger jurisdictions.² In the case of Australia, as well as the High Court of Australia (the highest Court) I included the Federal Court, one State court, and one of the Territories. The surveys dealt separately with issues relating directly to Judges, and others concerned more with the administrative support provided for the judiciaries. For information regarding the latter, in some instances, with the consent of the Chief Justices concerned

1 Thomas Eichelbaum, Formerly Chief Justice of New Zealand. Presently Judge of the Court of Appeal of Fiji.

2 Those surveyed were Australia (High Court of Australia, Federal Court of Australia, Australian Capital Territory & Tasmania), Cook Islands, Fiji, French Polynesia, Kiribati, New Zealand, Niue, Papua New Guinea, Samoa, Solomon Islands, Tonga and Vanuatu. In two instances only the first survey was answered.

I relied on a survey conducted for Law Asia in 1998 by the Chief Justice of Western Australia, the Hon David Malcolm AC, chair of the Judicial Section of Law Asia. I am grateful to him, and to all the other Chief Justices who assisted.

Not every judicial system in the area was surveyed. I did not survey any of the USA jurisdictions, several of whom are invited to send delegates to the South Pacific Judicial Conference. The Premier President of the Court of Appeal, Papeete kindly provided answers to both surveys. As he pointed out, the questions asked were based on perceptions of common law judicial systems. Nevertheless, it adds to the completeness of the survey to be able to incorporate answers relating to the French system operative in New Caledonia and French Polynesia.

The general terms in which, for the most part, the article is framed, cannot be taken as representing the situation in any particular nation, or state. Nevertheless I believe a broad picture, generally favourable, emerges about the state of judicial independence in the area as a whole.

While each of the countries or states surveyed of course operates in its own way, there is a degree of commonality. Directly or indirectly, most of the judicial systems in the area owe their origins to England. Despite individual modifications, the framework of the progenitor structure, and its practice and procedure, remain easily recognisable. There is some interchange between the judiciaries; Judges or, more commonly, retired Judges from some jurisdictions serve as Judges in others, generally at the appellate level but sometime at first instance. There are periodic judicial meetings; the South Pacific Judicial Conference, already noted, the meetings of the Chief Justices held in conjunction with the biennial Law Asia Conference, which has a larger catchment area but is attended by many of the Chief Justices of the South Pacific or their representatives, and the occasional special meetings of the Chief Justices, such as those convened in recent years to further the establishment of the Pacific Judicial Training Programme. The latter project, based on the University

of the South Pacific at Suva, Fiji, holds potential for further cooperation between the judiciaries of the area.

In the following sections I will summarise the information obtained by means of the surveys mentioned earlier. Sometimes the responses showed variations as between different levels of the same judiciaries, for example in relation to the appointment process, or the resources provided. Unless otherwise indicated the text gives the position relating to the superior first instance court.

The Size of the Judiciaries

As may be imagined, there is a considerable divergence among the nations in the area. At one end of the scale are the Australian and New Zealand judiciaries, running into the hundreds in the case of the former, and some 160 for the latter. There are those of medium size, Papua New Guinea and Fiji; proportionately, Papua New Guinea has a large Magistracy. Then at the other end there are numerous small units, typically with a Chief Justice and, at most, two or three High Court Judges, and a relatively small number of judicial officers at a lower tier. In the case of a few of the smaller countries, the Chief Justice may not reside in the territory, but may be a retired Judge from another country who visits periodically and otherwise attends to the necessary administrative work at long distance. In the smaller jurisdictions, typically the appellate Judges are recruited from overseas, visiting periodically for appeal sittings or, less commonly, holding the sittings in their country of residence.

The Judges

I. Appointment

The process for appointment

Generally, appointments are made, nominally, by the Head of

State. For about half of the respondents, effectively the appointment is made by executive government; that is, by Cabinet decision. As a matter of practice appointment is preceded by consultation, but generally, this would be by convention only, although in Australia, the Constitution mandates a degree of consultation in respect of appointments to the High Court. In those countries where Cabinet appointment is the rule, the Attorney General is usually responsible for management of the appointment process. One State advised that the Attorney General had proposed that future vacancies would be advertised.

New Zealand appears to be the only instance where effectively, the appointment is made by the Attorney General in a personal capacity. The Attorney notifies Cabinet in advance of the public announcement, but the appointment is not a Cabinet decision. Expanding the previous practice, the New Zealand Attorney recently commenced advertising for expressions of interest for all judicial vacancies, other than in the Court of Appeal.

Several countries have a Judicial Commission, the membership typically including the Chief Justice, the Attorney General, the Head of the Public Service Commission or equivalent, a representative of the legal profession, and sometimes representatives of the public. Effectively, appointments are made by the Commission.

Under the French Constitution, professional Judges are appointed by the President, upon the recommendation of the Conseil Supérieur de la Magistrature. The Conseil comprises the President of the Republic, the Minister of Justice, members elected by the judiciary, and a number of appointed members.

Generally there are special provisions for the appointment of the Chief Justice; usually the Prime Minister makes the recommendation.

Term of appointments

In most countries, tenured appointments are the rule, commonly with a retirement age of 68 or 70, although there are instances of earlier retirement ages. In a few countries there is provision for appointment for a term of years, ranging from 3 years upwards. In some cases this mode of appointment applies only to expatriates. In New Zealand Masters are appointed for a renewable term of years, a most unfortunate precedent which despite the efforts of the judiciary it has not been possible to correct.

The survey asked whether there were instances where a Judge had been willing to accept a renewal of a term appointment but no renewal had been made. Three respondents replied in the affirmative.

II. Discipline

Removal of Judges

Generally, a resolution of Parliament (by both Houses, if there are two) is required before removal can be effected. One country stipulates that such a resolution must be by a two thirds majority; in the remainder, a simple majority is sufficient. In almost every case the grounds for removal are limited to incapacity or misbehaviour, or equivalent concepts. In a few instances, the Constitution stipulates an investigation and recommendation by an ad hoc Tribunal; while in others it may be assumed, on the basis of past practice, or political statements, that such a process would be followed when the need arose. The French Constitution requires a decision by the Conseil Supérieur de la Magistrature.

Complaints

In the case of complaints of the lesser degree of seriousness, making allegations of a kind which if proved would not warrant

proceedings for dismissal, almost all countries surveyed reported there was no formal procedure. Generally, the Chief Justice was expected to deal with such matters. In New Zealand the Attorney General, with the concurrence of the judiciary, recently announced the proposed establishment of a formal process, which basically required such complaints to be dealt with by the Head of the Court in which the Judge in question served, but made provision for a second opinion by a lay Observer, if the complainant was dissatisfied with the decision. Under the French system, minor complaints may be dealt with by the President of the Court of Appeal, the Attorney General, the Director of Central Administration, or the Inspectors of the Judiciary, in respect of such Judges as are under the authority of those officers respectively.

III. The Judiciary and the Public

Attacks on Judges

In many judicial systems of English origin, as is well known, there is or was a tradition that the Attorney General would speak in defence of the judiciary, when attacked by or in the media. In an era where the media and politicians are less restrained than previously in their comments on judicial performance, and it is increasingly difficult for an Attorney to take a public stance differing from that of political colleagues, the convention is seen as under strain, and the current Australian Attorney General has stated that he does not regard defending the Judges as part of his functions. The survey showed that in some other countries the convention has been maintained while in others any response is regarded as the judiciary's prerogative and responsibility. A number of the judicial systems in Australia, and likewise the New Zealand judiciary, now have the assistance of a public information or media liaison officer in dealing with such situations.

Political comment on the judiciary

In response to a question seeking to establish whether there was any rule or convention limiting political comment on the judiciary or judicial decisions, a number of countries drew attention to Parliamentary Standing Orders prohibiting, for example, intemperate criticism of the judiciary, or comment on matters *sub judice*. It is thought that most countries in the zone would have similar provisions. On the subject whether political criticism was limited by any convention some respondents thought such a convention existed while others did not. The author's own perception is that as with defence of the judiciary by Attorneys General, such conventions as stood previously are becoming weaker.

Public support

It has been said that maintenance of judicial independence requires the support of an independent law profession of good standing in the community. Likewise, public support and understanding is required. While only a small minority among those surveyed had any reservations under either heading, as some respondents pointed out there is an increasing amount of public criticism of the judiciary, some well informed, some not.

It must be accepted that public attitudes towards the judiciary are sometimes moulded by ignorance, and the question may be posed, whose function is it to ensure the public are better informed? The engagement of media liaison officers, and the publication of Annual Reports of the judiciary (as distinct from reports of the Departments providing administrative support) are moves in the direction of better informing the public, but to date only a few judiciaries in the area, mainly the larger and better resourced, have taken these steps.

IV. Salaries

Nearly half the respondents reported that an independent statutory tribunal of some kind is involved in the determination of judicial remuneration levels. In a few instances the tribunal makes the determination, while in others the final decision rests with Parliament. In practice, Parliament generally followed the tribunal's recommendation, although there have been instances to the contrary. Where there is no tribunal, Parliament or Cabinet makes the decision.

From the point of view of attracting candidates to the Bench, nearly half the respondents stated the level of remuneration is a concern.

V. Judges' personal staff

Understandably, the extent of the staff provided varies greatly. Heads of Court generally have administrative assistance. The Judges of the High Court of Australia each have a personal assistant and two associates (legally qualified research assistants). In some of the smaller jurisdictions, the assistance available was limited. In some cases there was shared access to secretarial or research staff.

In respect of personal staff, from the point of view of enhancing judicial independence important considerations are responsibility for the engagement and control of the staff. While, of necessity, they will be paid from government funds, ideally they ought to be engaged by the Judges, and responsible to them. In New Zealand the Judges of the Court of Appeal and the High Court have been able to maintain the concept that their personal staff are regarded as employed under the Crown prerogative but in about half the judiciaries surveyed they are simply members of the public service. However, in more than half the cases the Judges are responsible for appointment of the staff, and for their supervision and any disciplinary action.

VI. Miscellaneous

Access to court buildings

In a crisis this, along with control of personal staff, could be a significant factor in whether the judiciary was able to continue to function. Most respondents maintained the right of access is controlled by the Chief Justice or the judiciary, although some acknowledged that this might be somewhat theoretical.

Tribunals

A potential threat to judicial independence is the conferment on tribunals of jurisdiction traditionally exercised by the courts. With minor reservations, respondents did not see any such problem in their systems.

Expatriate Judges

Although the smaller Pacific nations have moved on from a tradition where most of the Judges in the higher courts were expatriates, in some cases the engagement of such Judges continues to an extent, in their first instance courts. Generally, such engagement is by way of contract for a short term of years, a situation normally regarded as undesirable from the point of view of judicial independence if renewal is a possibility; but it is accepted that sometimes there is no satisfactory alternative; and the qualities expatriate Judges have brought to the positions they occupy have made a significant contribution to judicial independence. Appellate courts of such countries continue to comprise or include prominent retired or serving Judges from other countries. This too seems inevitable, until a full transition to indigenous judiciaries is possible. In the meantime, the presence of overseas Judges of international reputation on the Supreme Court of Fiji, or the Court of Appeal of Samoa, for example, can only enhance the standing of the judiciaries in those countries.

Resources

In the setting common today of strict governmental budgetary controls, a potential concern is that an insufficiency of resources may impinge on judicial independence. Certainly my own experience in New Zealand was that the courts could function more effectively, and thus avoid public criticism, if more resources were available in areas such as evidence recording, computerisation (in particular in the fields of case listing and tracking, and sentencing materials) and research assistance. In saying this I am conscious that the New Zealand court system is much better resourced than many of its Pacific neighbours. While most respondents were satisfied that any shortcomings in resourcing did not impinge on their ability to maintain judicial independence, several expressed concerns under this heading.

Administrative services

VII. Courts administrative staff

Whether members of public service

With two exceptions, respondents reported that the administrative staff were members of the general public service of their country or state. Staff of the High Court of Australia are employed under special statute.

Court governance

It appears that traditionally, for most judicial systems in the area the administrative underpinning has been in the form of a courts division forming part of a larger department of state responsible for a variety of other functions as well, such as company registration, corrections, births, deaths and marriages registration, and others. In the last decade or so however there has been a move, led by South Australia, towards a separate department dedicated specifically to servicing the courts. In some sectors of the

Australian judicial system (including, now, South Australia) this has been taken a step further, to a concept where effectively the court is self-administering, including responsibility for its own budget. Although the administration of a budget brings its own problems, many think the further judicial governance can progress along on this continuum, the more judicial independence is enhanced.

About half of the respondents reported they are operating under what is described, above, as the traditional system. Others have the separate dedicated department model while the High Court of Australia, the Federal Court of Australia, South Australia and, at least in the case of the Court of Appeal, French Polynesia have a self administering system.

Appointment and control of staff

In most cases staff are appointed through the usual public service mechanisms. In a few, this is the responsibility of the Registrar, or the Chief Justice; in one, the Judicial Services Commission fulfils this role. Supervision and discipline generally rests with the Registrar.

VIII. Case Management

Place of sitting

Generally, the place of sitting is under the control of the Chief Justice, or the Judges.

Hearing date

In more than half the countries or states, this is determined by the Chief Justice or the Judges. In other instances the Registrar fixes the date.

The presiding Judge

Most respondents said the Chief Justice or a senior Judge allocates the Judge to hear the case. In two instances, it is done by or in conjunction with the Registrar. In two jurisdictions, the allocation for civil cases is by lot.

Case management

One jurisdiction, alone, is operating a full individual list system, where at an early stage cases are allocated to a Judge who except for special circumstances remains in charge of the case to its conclusion. About half the jurisdictions are operating a full or partial case management system or have one under consideration.

Rules of Court

In most instances, the Judges or the Head of Court have power to make rules of practice and procedure. In five instances rules were recommended by a Rules Committee but it is unclear whether in all cases (as for example in New Zealand) the support of the judiciary representatives on the Committee is a prerequisite. The ability of a Court to control its own practice and procedure is an important insignia of judicial independence.

IX. Funding

Source of funding

It appears that in all cases, the ultimate source of funding is the legislature, through its annual budget process.

The Court budget

In the majority of cases the court budget is prepared by the Registrar on behalf of the Court, in consultation with the Chief Justice or the Judges. In some instances the Department

responsible for the provision of administrative services prepares the budget. In one case, the individual items are approved by a Court committee.

Fiscal responsibility

Mostly, the Registrar is responsible for control of expenditure. In the remaining instances, the Department, or the Secretary for Justice or equivalent officer, has that role.

Fiscal constraints

About half the respondents stated that the operation of their Court system had been handicapped in some way by funding constraints. One respondent described this as the eternal problem for small jurisdictions.

Judicial Education

I. General

In the past decade or so there has been considerable progress in the provision of facilities for judicial education in the South Pacific area. In New Zealand, an intensive annual orientation course for new Judges, mounted by the District Court but attended by High Court Judges as well, has been available throughout that period. In Australia, the New South Wales Judicial Commission and, more recently, the Australian Institute of Judicial Administration (AIJA) have run orientation courses. To a modest extent these various courses have been attended by Judges from other judiciaries in the area.

Recent developments

Recent advances of significance are the establishment, only this year, of the Pacific Judicial Training Programme (PJTP); and

the launch of the New Zealand Institute of Judicial Education, a permanent body to coordinate judicial education in that country, under judicial direction.

Current participation

The responses to the question about participation in judicial education reflect the unavailability, especially in the smaller jurisdictions, of access to suitable programmes, a situation that ought to be eased by the commencement of operations of the PJTP. Attendance at the orientation courses mentioned in para 5.1 aside, a few jurisdictions are able to make provision for some Judges to attend seminars or conferences; one offers ad hoc seminars on new jurisdiction conferred on its court; one provides training at the lower jurisdictional level, and another has set up a judicial committee for continuing education. The most comprehensive provision for on-going judicial education appears to be in French Polynesia where Judges are entitled to at least five days of such instruction a year.

Conclusions

Of course, the most significant indication of independence lie in the actual performance of judiciaries on the ground; how they handle their day to day work, particularly in cases between the state and its subjects, or between local and foreign interests. At this level performance could only be measured by an in-depth locally based study. Occasionally, a constitutional crisis provides a real test of the judiciary's strength.

In the absence of opportunities of that kind, a survey assessing judicial independence against a series of traditional insignia may be a useful measuring stick. That has been the basis of the present exercise. Hopefully it may also be of some help to individual judiciaries in stimulating ideas, promoting change or obtaining additional resources.

The responses have not disclosed any decisive weaknesses or deficiencies in any of the judicial systems. There are areas where, viewed collectively, there is room for enhancement. In regard to the appointment process, in the author's opinion it no longer accords with optimum standards if effectively, the power of appointment is simply left in the hands of executive government, or a single Minister. Judicial Commissions, or nominating committees, comprising or including a Minister, representatives of the judiciary, the legal profession and the public would provide greater assurance of independence. In court governance, one may discern a movement towards self-governance which could spread to the smaller nations to their advantage. In the South Pacific zone, happily the need to consider the removal of a Judge has arisen rarely, but there ought to be a set process in place which provides fair protection for the Judge. Procedures for dealing with lesser complaints have not developed very far, and have been regarded as controversial by the Judges themselves. I am firmly of the view that to maintain confidence in a judiciary it is necessary to provide a system giving adequate opportunity for aggrieved parties to have their complaints considered, while at the same time minimising the risk of exposing Judges to inappropriate pressure. The need for provision for judicial education has been appreciated only slowly, even within judiciaries, but as seen there have been significant developments recently.

Despite the geographical spread of the national entities in this zone there is a considerable degree of interaction between their judiciaries. Heads of Court and Judges come together at a variety of conferences, meetings and seminars; and as noted earlier, the judiciaries of the smaller nations have a leavening of Judges and retired Judges from other countries in the zone. As the surveys confirmed, new concepts and achievements from one jurisdiction are often transplanted to another, the South Australian advances in judicial governance being a prime example. The co-operation and cohesion between the judiciaries in the zone add strength to the Judges' efforts to maintain and enhance independence.

Many of the judiciaries in the zone are small, and by the standards of the better endowed countries, work in often difficult conditions, with limitations on the support and resources provided. Nevertheless the results of the surveys show that in all the countries in question traditional judicial independence is being strongly maintained. The responses showed the judiciaries were well aware of potential threats to independence and those aspects of their system which particularly needed to be safeguarded. The respondents showed optimism that judicial independence was in good shape, a feeling I share.

Beirut Declaration

Recommendations of the First Arab Conference on Justice

Beirut, Lebanon

14 - 16 June 1999

Convened by the Arab Center for the Independence of the Judiciary and the Legal Profession (ACIJLP), in collaboration with the Geneva-based Centre for the Independence of Judges and Lawyers (CIJL), hosted by the Bar Association in Beirut, and under the auspices of the Lebanese Minister of Justice, 110 Arab jurists from 13 Arab states participated in a conference on "The Judiciary in the Arab Region and the Challenges of the 21st Century". The conference, held from 14 to 16 June 1999, focused on four main topics:

1. The main challenges faced by judiciary institutions in the Arab region in the 21st century
2. The main impediments and problems related to the independence of the judiciary in the Arab region.
3. The judiciary in the Arab region and international standards on human rights and the independence of the judiciary.
4. The basic safeguards for the independence of the judiciary in the Arab region.

The participants discussed the ability of the judiciary in the region to confront the various challenges resulting from international political and economic transformations and the new technological challenges. The ability to confront such challenges depends on the existence of real support for the independence of the judiciary in the Arab region.

Moreover, the judiciary's capacity to be a substantial power in Arab countries and to be an active party in entrenching democratic principles and the rule of law is pending on the progress of democratic development and respect for the law, including the subjection of the main powers to it. The discussions stressed that democracy is progressing with difficulty, which in turn affects the development of the judiciary in many Arab countries.

In the conference, participants discussed several papers and other issues in detail. They stressed the importance of articulating and implementing a set of recommendations which would be put into effect by individuals, jurist institutions and Arab governments. This action would serve as real support for the judiciary in enabling it to confront the challenges of the coming century, and would also contribute towards entrenching the rule of law and democracy in the Arab region,

The participants proposed the following recommendations:

First: Safeguards for the Judiciary

1. To include the UN Basic Principles on the Independence of the Judiciary into Arab constitutions and laws, and in particular, to penalise any interference in the work of the judiciary.
2. The state shall guarantee an independent budget for the judiciary, including all its branches and institutions. This budget shall be included as one item into the state budget, and shall be determined upon the advice of the higher judicial councils within the judicial bodies,
3. The executive power shall not intervene in the activities of judicial inspection in any form, nor shall it breach the independence of the judiciary through orders or circulars.

4. The public prosecution shall be considered a branch of the judiciary. The authority undertaking this prosecution shall be separate from those of investigation and referral.
5. Judges shall have immunity associated with their jobs. Except in cases of illegal acts no judicial measures shall be taken unless upon a permission issued by the highest council.
6. Lawsuits shall not be transferred from the judges reviewing them unless for reasons related to incompetence.
7. It is important to reform the administrative structure and other work mechanisms pertaining to the work of judges, and to facilitate the means for an efficient administration of justice.
8. To link the work of the judiciary with a democratic environment on the basis that democracy is the approach for a more effective management of justice.
9. Lawsuits shall be distributed among judges of various courts through their general assemblies or according to their internal regulations in case such assemblies do not exist. Such distribution shall be made in a manner that guarantees the non-intervention of the executive.
10. Judges shall freely practice freedom of assembly in order to represent their different interests. In this regard, they shall have the right to establish an organisation to protect their interests and guarantee their constant promotion.

Second: Electing and Appointing Judges

11. The election of judges shall be free of discrimination on basis of race colour, sex, faith, language, national origin, social status, birth, property, political belonging, or any other consideration. Particularly when electing judges, the principle of equal opportunity must be followed to, guarantee that all applicants for a judicial position are objectively assessed.

12. Assuming the position of judge shall be possible, without discrimination, for all those who meet the its requirements. The appointment of judges shall be made through the higher councils of the concerned judicial bodies.
13. No judges shall be appointed by virtue of temporary contracts. They cannot be disciplined unless by boards made from their bodies, provided that the decisions made by such boards shall not have immunity against being challenged, unless the decision is made by the highest council of the concerned judicial body.
14. The law shall stipulate the rules for appointing, delegating, transferring, promoting, and disciplining judges, as well as for all other matters related to their affairs, particularly those concerning their livelihood while in office and in retirement. The aim of this is to guarantee in all cases their independence from the executive.
15. A percentage of no less than 25 per cent of vacant judicial posts shall be allocated to lawyers and those working in legal issues, provided that the appointment is made by the highest judicial boards in the concerned judicial bodies.

Third: Qualification and Training of Judges

16. The state shall endeavour, through specialised centres and institutes, to provide judges with an effective legal training in order to prepare them adequately to assume judicial posts. All aspects of the study and training programs shall be subject to the supervision of the judiciary.

In the professional preparation of judges, the following principles shall be observed:

- A. To activate the Arab convention issued in Amman pertaining to the cooperation in the professional qualification of judges, and to reinforce the role of non-governmental

organisations to secure their support of qualification programs and to serve as intellectual entities for judges, particularly in the field of human rights.

- B. These qualification programs shall focus on legal and professional training as well as personal growth. The qualification programs shall particularly focus on managing and facilitating the role of the defence.
 - C. To develop national institutions specialising in qualifying judges, whether by developing courses or financial and information resources supported by modern technological systems, in such a way that would guarantee the modernisation of the judiciary, change educational courses in the faculties of law and develop infrastructure for the legal profession.
17. To support continuous judicial education in developing an in-depth understanding of constitutional provisions in a way that would guarantee constitutional legitimacy, the structure of which is connected with the intelligent understanding of human rights.
 18. To urge the judicial authorities to constantly refer to international human rights treaties ratified by states, as being part of the states' legal structure and a framework of the values which societies should adopt and try to implement.
 19. To make the exchange of legal expertise between judges and lawyers, supporting human rights and freedoms, a firm methodology of Arab states, and a planned attitude of their legal systems in order to guarantee the objectiveness of their application and their consistence with modern concepts of advanced countries.
 20. To develop educational law courses in Arab countries that will give special consideration to human rights and freedoms and constitutional legitimacy, and affirm solidarity with efforts made by the United Nations in this regard.

Fourth: Judicial Review on Constitutionality of Laws

21. States with no system for judicial review on the constitutionality of laws shall adopt such a system whether through establishing a supreme constitutional court for this purpose, or establishing constitutional councils to assume this task, provided that they are made of members of judicial bodies, lawyers, and law professors, and in a way that would guarantee the independence of such a court or council and secure the soundness of practising its constitutional responsibility. All members of such a court or council shall be appointed without the intervention of the executive. The right of individuals to bring a constitutional lawsuit by means of original claim shall be guaranteed.

Fifth: Safeguards for the Rights of the Defence and a Fair Trial

22. To call on Arab states to ratify the optional protocol to the International Covenant on Civil and Political Rights (ICCPR), which enables individuals to bring their case before the Human Rights Committee after having exhausted, national means of challenging through national judiciary without being able to obtain their rights.
23. Every defendant shall be guaranteed an attorney of his/her choice. In case the defendant is unable to afford lawyer's fees, the judicial authority shall appoint a lawyer to the defendant.
24. Laws applied in Arab states shall set short periods for suspension whether in the stage of gathering information or during interrogations. During these two stages, the minimum human rights and freedoms must be observed including the right to a defence as well as the constraints necessary to protect human rights and freedoms and secure everyone's right to refrain from making statements that would condemn him.

25. No suspension shall be made against misdemeanours of which the sentence is no more than one year in prison. Also, those in preventive detention shall not be denied their right to obtain, from the state, a suitable compensation for his imprisonment in case there is legal ground.
26. Decisions on judicial litigation must be made according to previously set legal rules which respect human rights and freedoms, provided that parties have equal chances to a defence, whether with respect to the actual dispute or its legal factors.
27. Judicial disputes shall only be decided on by judges who are the most objective given the nature of the case and the circumstances surrounding it.
28. Only natural judges shall decide on disputes of a judicial nature.
29. There must be a guarantee that any trial, be it civil or criminal, is heard within a reasonable time that would secure a fair trial. Trials shall be conducted with modern technical means as much as can be provided.
30. Refraining from implementing judicial rulings by law enforcement officials is a crime the penalty of which shall be stiffened. Impeding the implementation of rulings shall be considered as refraining from the implementation.

Sixth: Women and the Position of Judge

31. No discrimination is permitted between men and women with respect to assuming the judicial responsibility. Women shall not be subject to any discrimination for assuming this position.
32. The rights achieved by Arab women in the field of the judiciary shall be supported and extended. Existing laws shall be cleared from impediments which prevent or restrict the practice of these rights.

33. Links shall be made between the issue for women's rights in the society and cultural and social development in concerned Arab countries. Studies which stress women's rights in conscious work and in society shall be conducted.
34. To exchange experiences among Arab countries to support equal rights for men and women while practising judicial work.

Seventh: The International Criminal Court

35. To assert the role of the International Criminal Court and call upon Arab states to sign its Statute to support the Court and guarantee the effective practising of its jurisdiction.
36. To call upon Arab states to increase participation in preparatory meetings assigned to set the procedural rules of the Court in order to form a general trend with respect to the Court's safeguards, and particularly its independence from the Security Council.

Latimer House Principles and Guidelines for the Commonwealth

*Colloquium on "Parliamentary Supremacy,
Judicial Independence... towards a Commonwealth Model"¹*

Held at Latimer House, United Kingdom

15 - 19 June 1998

*Guidelines on good practice governing relations between the Executive,
Parliament and the Judiciary in the promotion of good governance,
the rule of law and human rights to ensure the effective implementation
of the Harare Principles*

Preamble

RECALLING the renewed commitment at the 1997 Commonwealth Heads of Government Meeting at Edinburgh to the Harare Principles and Millbrook Commonwealth Action Programme and, in particular, the pledge in paragraph 9 of the Harare Declaration to work for the protection and promotion of the fundamental political values of the Commonwealth:

- democracy;

¹ The Colloquium was jointly sponsored by the Commonwealth Lawyers' Association, the Commonwealth Legal Education Association, the Commonwealth Magistrates' and Judges' Association and the Commonwealth Parliamentary Association with the generous support of the Commonwealth Foundation, the Commonwealth Secretariat and the United Kingdom Foreign and Commonwealth Office.

- democratic processes and institutions which reflect national circumstances, the rule of law and honest government;
- just and honest government;
- fundamental human rights, including equal rights and opportunities for all citizens regardless of race, colour, creed or political belief;
- equality for women, so that they may exercise their full and equal rights.

Representatives of the Commonwealth Parliamentary Association, the Commonwealth Magistrates' and Judges' Association, the Commonwealth Lawyers' Association and the Commonwealth Legal Education Association meeting at Latimer House in the United Kingdom from 15 to 19 June 1998:

HAVE RESOLVED to adopt the following **Principles and Guidelines** and propose them for consideration by the Commonwealth Heads of Government Meeting and for effective implementation by member countries of the Commonwealth.

Principles

The successful implementation of these Guidelines calls for a commitment, made in the utmost good faith, of the relevant national institutions, in particular the executive, parliament and the judiciary, to the essential principles of good governance, fundamental human rights and the rule of law, including the independence of the judiciary, so that the legitimate aspirations of all the peoples of the Commonwealth should be met.

Each institution must exercise responsibility and restraint in the exercise of power within its own constitutional sphere so as not to encroach on the legitimate discharge of constitutional functions by the other institutions.

It is recognised that the special circumstances of small and/or under-resourced jurisdictions may require adaptation of these Guidelines.

It is recognised that redress of gender imbalance is essential to accomplish full and equal rights in society and to achieve true human rights. Merit and the capacity to perform public office regardless of disability should be the criteria of eligibility for appointment or election.

Guidelines

I. Parliament and the Judiciary

1. The legislative function is the primary responsibility of parliament as the elected body representing the people. Judges may be constructive and purposive in the interpretation of legislation, but must not usurp Parliament's legislative function. Courts should have the power to declare legislation to be unconstitutional and of no legal effect. However, there may be circumstances where the appropriate remedy would be for the court to declare the incompatibility of a statute with the Constitution, leaving it to the legislature to take remedial legislative measures.
2. Commonwealth parliaments should take speedy and effective steps to implement their countries' international human rights obligations by enacting appropriate human rights legislation. Special legislation (such as equal opportunity laws) is required to extend the protection of fundamental rights to the private sphere. Where domestic incorporation has not occurred, international instruments should be applied to aid interpretation.
3. Judges should adopt a generous and purposive approach in interpreting a Bill of Rights. This is particularly important in countries which are in the process of building democratic traditions. Judges have a vital part to play in developing and

maintaining a vibrant human rights environment throughout the Commonwealth.

4. International law and, in particular, human rights jurisprudence can greatly assist domestic courts in interpreting a Bill of Rights. It also can help expand the scope of a Bill of Rights making it more meaningful and effective.
5. While dialogue between the judiciary and the government may be desirable or appropriate, in no circumstances should such dialogue compromise judicial independence.
6. People should have easy and unhindered access to courts, particularly to enforce their fundamental rights. Any existing procedural obstacles to access to justice should be removed.
7. People should also be made aware of, and have access to, other important fora for human rights dispute resolution, particularly Human Rights Commissions, Offices of the Ombudsman and mechanisms for alternative dispute resolution.
8. Everyone, especially judges, parliamentarians and lawyers, should have access to human rights education.

II. Preserving Judicial Independence

1. Judicial Autonomy

In jurisdictions that do not already have an appropriate independent process in place, judicial appointments should be made on merit by a judicial services commission or by an appropriate officer of state acting on the advice of such a commission.

Judicial appointments should normally be permanent; whilst in some jurisdictions, contract appointments may be inevitable, such appointments should be subject to appropriate security of tenure.

The judicial services commission should be established by the Constitution or by statute, with a majority of members drawn from the senior judiciary.

Appointments to all levels of the judiciary should have, as an objective, the achievement of equality between women and men.

Judicial vacancies should be advertised. Recommendations for appointment should come from the commission.

2. Funding

Sufficient funding to enable the judiciary to perform its functions to the highest standards should be provided.

Appropriate salaries, supporting staff, resources and equipment are essential to the proper functioning of the judiciary.

As a matter of principle, judicial salaries and benefits should be set by an independent commission and should be maintained.

The administration of Moines allocated to the judiciary should be under the control of the judiciary.

3. Training

A culture of judicial education should be developed.

Training should be organised, systematic and ongoing and under the control of an adequately funded judicial body.

Judicial training should include the teaching of the law, judicial skills and the social context, including ethnic and gender issues.

The curriculum should be controlled by judicial officers who should have the assistance of lay specialists.

For jurisdictions without adequate training facilities, access to facilities in other jurisdictions should be provided.

Courses in judicial education should be offered to practising lawyers as part of their ongoing professional development training.

III. Preserving the Independence of Parliamentarians

1. Article 9 of the Bill of Rights 1688 is re-affirmed. This article provides:

“That the Fredome of Speech and Debates or Proceedings in Parlyement ought not to be impeached or questioned in any court or place out of Parlyement.”

2. Security of members during their parliamentary term is fundamental to parliamentary independence and therefore:
 - (a) the expulsion of members from parliament as a penalty for leaving their parties (floor-crossing) should be viewed as a possible infringement of members independence; anti-defection measures may be necessary in some jurisdictions to deal with corrupt practices;
 - (b) laws allowing for the recall of members during their elected term should be viewed with caution, as a potential threat to the independence of members;
 - (c) the cessation of membership of a political party of itself should not lead to the loss of a member’s seat.
3. In the discharge of their functions, members should be free from improper pressures and accordingly:
 - (a) the criminal law and the use of defamation proceedings are not appropriate mechanisms for restricting legitimate criticism of the government or the parliament;

- (b) the defence of qualified privilege with respect to reports of parliamentary proceedings should be drawn as broadly as possible to permit full public reporting and discussion of public affairs;
- (c) the offence of contempt of parliament should be drawn as narrowly as possible.

IV. Women in Parliament

1. To improve the numbers of women members in Commonwealth parliaments, the role of women within political parties should be enhanced, including the appointment of more women to executive roles within political parties.
2. Proactive searches for potential candidates should be undertaken by political parties.
3. Political parties in nations with proportional representation should be required to ensure an adequate gender balance on their respective lists of candidates for election. Women, where relevant, should be included in the top part of the candidates lists of political parties. Parties should be called upon publicly to declare the degree of representation of women on their lists and to defend any failure to maintain adequate representation.
4. Where there is no proportional representation, candidate search and/or selection committees of political parties should be gender balanced as should representation at political conventions and this should be facilitated by political parties by way of amendment to party constitutions; women should be put forward for safe seats.
5. Women should be elected to parliament through regular electoral processes. The provision of reservations for women in national constitutions whilst useful, tends to be insufficient for securing adequate and long term representation by women.

6. Men should work in partnership with women to redress constraints on women entering parliament. True gender balance requires the oppositional element of the inclusion of men in the process of dialogue and remedial action to address the necessary inclusion of both genders in all aspects of public life.

V. Judicial and Parliamentary Ethics

1. Judicial Ethics

- (a) A code of Ethics and Conduct should be developed and adopted by each judiciary as a means of ensuring the accountability of judges;
- (b) the Commonwealth Magistrates' and Judges' Association should be encouraged to complete its Model Code of Judicial Conduct now in development;
- (c) the Association should also serve as a repository of codes of judicial conduct developed by Commonwealth judiciaries, which will serve as a resource for other jurisdictions.

2. Parliamentary Ethics

- (a) Conflict of interest guidelines and Codes of Conduct should require full disclosure by ministers and members of their financial and business interests;
- (b) members of parliament should have privileged access to advice from statutorily-established Ethics Advisors;
- (c) whilst responsive to the needs of society and recognising minority views in society, members of parliament should avoid excessive influence of lobbyists and special interest groups.

VI. Accountability Mechanisms

1. Judicial Accountability

(a) Discipline

- (i) In cases where a judge is at risk of removal, the judge must have the right to be fully informed of the charges, to be represented at a hearing, to make a full defence, and to be judged by an independent and impartial tribunal. Grounds for removal of a judge should be limited to:
 - (A) inability to perform judicial duties; and
 - (B) serious misconduct.
- (ii) In all other matters, the process should be conducted by the chief judge of the courts;
- (iii) Disciplinary procedures should not include the public admonition of judges. Any admonitions should be delivered in private, by the chief judge.

(b) Public Criticism

- (i) Legitimate public criticism of judicial performance is a means of ensuring accountability;
- (ii) The criminal law and contempt proceedings are not appropriate mechanisms for restricting legitimate criticism of the courts.

2. Executive Accountability

(a) Accountability of the Executive to Parliament

Parliamentary procedures should provide adequate mechanisms to enforce the accountability of the executive to parliament. These should include:

- (i) a committee structure appropriate to the size of Parliament, adequately resourced and with the power to summon witnesses, including ministers. Governments should be required to announce publicly, within a defined time period, their responses to committee reports;
- (ii) standing orders should provide appropriate opportunities for members to question ministers and full debate on legislative proposals;
- (iii) the Public Accounts should be independently audited by the Auditor General who is responsible to and must report directly to parliament;
- (iv) the chair of the Public Accounts Committee should normally be an opposition member;
- (v) offices of the Ombudsman, Human Rights Commissions and Access to Information Commissioners should report regularly to parliament.

(b) Judicial Review

Commonwealth governments should endorse and implement the principles of judicial review enshrined in the Lusaka Statement on Government under the Law.

VII. The Law-Making Process

1. Women should be involved in the work of national law commissions in the law-making process. Ongoing assessment of legislation is essential so as to create a more gender balanced society. Gender-neutral language should be used in the drafting and use of legislation.
2. Procedures for the preliminary examination of issues in proposed legislation should be adopted and published so that:

- (a) there is public exposure of issues, papers and consultation on major reforms including, where possible, a draft bill;
 - (b) standing orders provide a delay of some days between introduction and debate to enable public comment unless suspended by consent or a significantly high percentage vote of the chamber; and
 - (c) major legislation can be referred to a select committee allowing for the detailed examination of such legislation and the taking of evidence from members of the public.
3. Model standing orders protecting members rights and privileges and permitting the incorporation of variations, to take local circumstances into account, should be drafted and published.
 4. Parliament should be serviced by a professional staff independent of the regular public service.
 5. Adequate resources to government and non-government back benchers should be provided to improve parliamentary input and should include provision for:
 - (a) training of new members;
 - (b) secretarial, office, library and research facilities;
 - (c) drafting assistance including private members bills.
 6. An all party committee of members of parliament should review and administer parliament's budget which should not be subject to amendment by the executive.
 7. Appropriate legislation should incorporate international human rights instruments to assist in interpretation and to ensure that ministers certify compliance with such instruments, on introduction of the legislation.

8. It is recommended that “sunset” legislation (for the expiry of all subordinate legislation not renewed) should be enacted subject to power to extend the life of such legislation.

VIII. The Role of Non-Judicial and Non-Parliamentary Institutions

1. The Commonwealth Statement on Freedom of Expression² provides essential guarantees to which all Commonwealth countries should subscribe.
2. The Executive must refrain from all measures directed at inhibiting the freedom of the press, including indirect methods such as the misuse of official advertising.
3. An independent, organised legal profession is an essential component in the protection of the rule of law.
4. Adequate legal aid schemes should be provided for poor and disadvantaged litigants, including public interest advocates.
5. Legal professional organisations should assist in the provision, through pro bono schemes, of access to justice for the impecunious.
6. The executive must refrain from obstructing the functioning of an independent legal profession by such means as withholding licensing of professional bodies.
7. Human Rights Commissions, Offices of the Ombudsman and Access to Information Commissioners can play a key role in enhancing public awareness of good governance and rule of law issues and adequate funding and resources should be made available to enable them to discharge these functions. Parliament should accept responsibility in this regard.

Such institutions should be empowered to provide access to alternative dispute resolution mechanisms.

- 2 Annexed in the original.

IX. Measures for Implementation and Monitoring Compliance

These guidelines should be forwarded to the Commonwealth Secretariat for consideration by Law Ministers and Heads of Government.

If these Guidelines are adopted, an effective **monitoring procedure**, which might include a Standing Committee, should be devised under which all Commonwealth jurisdictions accept an obligation to report on their compliance with these Guidelines.

Consideration of these reports should form a regular part of the Meetings of Law Ministers and of Heads of Government.

Centre for the Independence of Judges and Lawyers

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The Centre for the Independence of Judges and Lawyers (CIJL) was created by the International Commission of Jurists in 1978. Its mandate is to promote world-wide the UN Basic Principles on the Independence of the Judiciary and the UN Basic Principles on the Role of Lawyers. The CIJL organises support for judges and lawyers who are harassed or persecuted, it sends observers to the trial of jurists, missions to examine the state of the independence of the judiciary and the legal profession throughout the world, and issues two periodic publications. *Attacks on Justice* analyses legal structures and their effect on the independence of the judiciary in more than 50 countries of the world and documents cases of jurists who are harassed or persecuted for carrying out their professional activities. The *CIJL Yearbook*, is a legal journal devoted to discussing issues related to the independence of the judiciary and the legal profession.



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