

Winter 2010

Message from the Chair: Sandra E. Oxner



Much has happened since the last newsletter. I will tell you of just a few highlights.

Our Biennial Meeting took place March 23 – 26, 2010 at the Royale Chulan Hotel in Kuala Lumpur, Malaysia and was an outstanding success. A special thank you to the Right Honourable Tun Dato' Seri Zaki bin Tun Azmi, Chief Justice of Malaysia and his judiciary and support staff for their outstanding hospitality. Sixty-one judicial educators gathered and we were delighted that thirteen were CJIEI Fellows. Nineteen countries were represented.

The topics discussed included "Providing Instruction for Teaching Adults"; "Constructing Instructional / Learning Objectives"; "Child Pornography Cases"; "Courts and the Environment"; "Application of Case Flow Management Principles in Commonwealth Jurisdictions"; "Mediation"; "Faculty Development – Commonwealth Panel describing national initiatives in faculty recruitment and development, programmes, problems and solutions"; "Balancing State Security and Protection of Constitutional and Human Rights" and "Common Areas of Interest for Sharia and Common Law Courts in Judicial Education".

All participants were very impressed with the new case flow management system in place in Malaysia which reduced pending cases at the High Courts by 52.8 percent in 18 months. An article on this will be included in the next newsletter.

An Executive Meeting was held on March 23, 2010 and we are pleased to welcome two newly elected Directors to our Board – Justice Meyer M. Joffe and Justice Leona Theron both of South Africa.

Considerable discussion took place on our proposed new fact finding project which is under the leadership of Dr. N.R. Madhava Menon of India, former Director of the Indian National Judicial Academy. By this project we hope to identify and design judicial education programmes to assist judges in this most difficult aspect of judicial decision making.

Our flagship programme the Intensive Study Programme for Judicial Educators was once again held in Halifax, Ottawa and Toronto June 6 – 25, 2010. We were pleased to have participants from Anguilla, Australia, Guyana, India, Pakistan, Philippines, Sierra Leone, St. Lucia, Swaziland, Trinidad and Tobago and Uganda – all of whom became new CJIEI Fellows.

We were invited to participate in the Asia Pacific Courts Conference October 4 -6, 2010 in Singapore where I joined the panel on "Judicial Training" and discussed judicial education in the context of international and inter-regional training and how organizations such as CJIEI are able to promote and coordinate such activities. This programme was the launch of the International Framework for Court Excellence. CJIEI was pleased to be one of the first organizations endorsing this framework and is a member of the International Consortium for Court Excellence.

We were more than delighted to have the Chief Justice of Hong Kong accept our invitation to the Hong Kong Judiciary to participate in our judicial education network and we look forward to their valuable participation.

I would like to express my appreciation to Chief Justice Madan Lokur for his outstanding work as the outgoing editor of this newsletter and wish him well in his new responsibilities .

I also wish to thank the distinguished Indian legal and judicial educator Prof.(Dr.) Madhava Menon for taking on this task. Profiles of both jurists will appear in our next newsletter "

We look forward to the Patron Chief Justices' Meeting and our booth at the Commonwealth Law Conference in February.

My very best wishes for a happy and fruitful new year.

Message from the President



I am very pleased to announce that the CJEI has recently joined the International Consortium for Court Excellence which produces the International Framework for Court Excellence which was formed by experts from the United States, Europe, Australia and Singapore. The Framework assesses a court's performance against seven areas of excellence, and provides guidance for courts to improve their performance. It utilizes recognized organizational improvement methodologies while reflecting the special issues that courts face. The Framework also incorporates case studies, court performance improvement processes and a range of available tools to measure court performance and development. As a Member of the Consortium, CJEI will provide advice, assist the Consortium, promote the Framework and share information, experiences and ideas with the Consortium. We look forward to active engagement in the Consortium.

During the past year, we had a very productive meeting of Commonwealth Judicial Educators in Malaysia. I left the meeting with a very high opinion of the Malaysian judiciary and their work.

2011 will be an exciting year for Commonwealth judiciaries – full of opportunity and challenge. The year will start with a meeting of Commonwealth Chief Justices in Hyderabad at the commencement of the CLA in February. In Commonwealth judiciaries, we need to continue to work in concert for justice and peace as we build on the importance of the judiciary in world peace and economic stability.

The Rt. Hon. Sir Dennis Byron

Message from the Outgoing Editor!



Hon'ble Justice Madan B. Lokur

Greetings, happy times and all the best for the New Year!

At some point of time in one's life, a shift needs to be made, and what better time than the beginning of a new year. The shift may be major or minor, it may bring joy or pain. In the recent past, I have had to make a major shift giving me immense joy.

A few months ago, I was appointed as the Chief Justice of the Gauhati High Court, a court that is unique in India (if not in the world). It has jurisdiction over seven States in the country, some of them remote and not easily accessible and some of them not as developed in terms of facilities and infrastructure as the rest of the country.

The shift is major, as you can imagine, and it has given me a tremendous thrill because of the opportunity afforded to make a contribution to the justice delivery system in the north east region of India. In a few districts of some States of the region, it is virtually like starting from scratch. This week, for example, I was evaluating the possibility of restarting the courts in two districts of the State of Manipur! The task I am attempting to accomplish in these districts is not only daunting but extremely challenging – and so it is in the other States as well.

One of my main priorities is to put into action everything I have learnt from the CJEI. I believe that imparting quality and continuing judicial education to the judges in the north east will go a long way in bringing about stability in justice delivery and restore the people's confidence in the institutional system. Formulating plans and putting them in place is time consuming though intellectually satisfying and physically exhausting.

This has led me to make another shift – but this one is rather painful. Given my latest assignment, I have little option but to give up my active association with the Newsletter. But before doing that, I must place on record that I have enjoyed every minute of working on the Newsletter, going through your contributions (after hassling you more than I should have) and learning from your experiences. Editing the Newsletter has given me greater insight, through your inputs, into making judicial education more meaningful to all of us. Many thanks to all of you.

Paradoxically, while this shift gives me some pain, it also gives me plenty of happiness – the editing of the Newsletter will pass on to the more than capable hands of the living legend of legal education and of judicial education in India – none other than Professor N.R. Madhava Menon. To those of us actively involved with judicial education, Professor Menon needs no introduction; others will appreciate his true worth with this very issue of the Newsletter. Professor Menon will open your mind to ideas and thoughts on judicial education that will fascinate you – I know, for I was his student in Delhi University and also learnt a great deal from him by association when he was the Director of the National Judicial Academy in Bhopal, India. So, welcome to a new era for the Newsletter!

While I bid you goodbye, I look forward to continue being in touch with you through the Newsletter, as a contributor and correspondent.

Madan B. Lokur

From the Editor's Desk ...



The Commonwealth Judicial Education Institute (CJEI) has been active in the field of judicial education and training in several countries in the Commonwealth for the last several years. An Intensive Study Programme (ISP) for three weeks every summer at CJEI headquarters at Halifax (Canada) on topical issues of contemporary relevance to judiciaries of member countries constitutes the flagship activity of the Institute. Several judges and court administrators and judicial educators from different jurisdictions participate in ISPs to learn from one another and to build fraternity for the cause of justice and rule of law. They are then called CJEI Fellows who continue to nurture the activities of CJEI and the training programmes of their respective jurisdictions. A Board of Directors with The Rt.Hon.Sir Dennis Byron as Chairperson guide its activities. The Commonwealth Chief Justices are patrons of CJEI and they generally meet in a separate conference at the venue of the Commonwealth Law Conference held every two years.

CJEI has now an alumni of several justices from around the Commonwealth who desired to be kept informed of developments in judicial education and training in different countries through the CJEI REPORT. Many of them have volunteered to post the developments in their respective countries which are edited and published in the CJEI Report twice a year both electronically and in printed version. On the request of the Chairperson, I am putting together the notes and articles received from Halifax for making the issue available to the Hon'ble Chief Justices and CJEI Fellows who are assembling for the CJEI-sponsored Chief Justice's Conference at Hyderabad during the Commonwealth Law Conference in February 2011.

My own interest in judicial education and training grew out of my four year term (2003-'06) as the Founding Director of India's National Judicial Academy at Bhopal. My association with CJEI during that period enabled me to learn a great deal of the art and science of adult learning and value addition to judicial administration and how it can be strengthened by sustained co-operation among judicial academies, law schools and court systems. I consider it an honour to continue associated with CJEI and its activities. I am equally delighted to work with CJEI Director in Charge of the Report, Hon'ble Mr. Justice Madan Lokur who is a lead player in judicial education and judicial reforms in India.

Admittedly the present issue of the CJEI REPORT is incomplete in the sense that many developments in member countries are not included. The only explanation I can offer is that I was given the assignment late and I could not contact the Correspondents/Fellows to seek their contributions in time. Meanwhile, I hope the items presented are of interest to the readers.

05 February, 2011

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CHALLENGES IN SUSTAINING FREEDOM AND JUSTICE*

The Hon'ble Mr. IVOR ARCHIE
Chief Justice of Trinidad and Tobago

At a fundamental level, law is firstly about the preservation of order and stability and secondly about the creation of a just society. Before I attempt to define those things I should say that both aspects are important. What, after all, is the difference between a bad dictatorship and a bad democracy?

If we start from first principles it seems that most people love something they call freedom. A moment's reflection though will show that the practice of this freedom requires some regulation of conduct, otherwise unbridled individual freedom becomes collective chaos. But limitations imposed on people do not succeed for very long if they are perceived to be unfair or driven by selfishness or an intention to exploit. It is only through the promulgation and enforcement of just laws that peace and good order may be sustained for a while. In other words peace is an unstable equilibrium so vividly illustrated by the scales that lady justice holds. We lawyers are engaged in that balancing act. But equilibrium can only be sustained by submission to some acknowledged supremacy or equal countervailing power. When that superior power is a human being, human failings such as greed and the lust for power are eventually destructive of equilibrium. And so we have developed this wonderful jurisprudential concept we call the rule of law.

The idea of 'Charter Rights' dates back to 1215, a time of great unrest and rebellion in the realm, when King John negotiated a truce with his barons, surrendered the presumed divine authority of the sovereign and submitted the King and His Heirs forever to what we have now come to call 'the rule of law'.

Listen to the words of Magna Carta:

"First, We have granted to God, and by this present Charter have confirmed, for us and our Heirs for ever, That the Church of England shall be free, and shall have her whole rights and liberties inviolable. We have granted also, and given to all the freemen of our realm, for us and our Heirs for ever, these liberties underwritten, to have and to hold them and their Heirs, of us and our Heirs for ever"; and what were some of those underwritten liberties?

"No Freeman shall be taken, or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we pass upon him, nor condemn him, but by lawful Judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer (delay) to any man either Justice or Right".

If it has a familiar ring, it should. I want to lay particular stress on the reference to access to justice for all and without delay! We see the same ideals reflected some 575 years later in the American Declaration of Independence.

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. — That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, —

Precedent has its limitations

We look for a precedent expecting that someone, somewhere (usually somewhere else) has already written down 'the answer' for us. We forget that precedent is only one tool of our Platform for argumentation. We invalidate our own history, experience, culture, social context and even legislative intent because we lack the confidence to forge our own solutions and cite English Court of Appeal cases as if we need look no further for the answers to complex questions that confront us. After 48 years of independence, surely we should be further along the path of developing a Caribbean jurisprudence instead of Speaking English law with a fairly Caribbean accent I hope that is a Challenge you will embrace".

Indeed that is the only real justification for submitting to government rule. As Lawyers, the preservation of the rule of law is our *raison d'être*. It provides the framework for the building of a just society.

* Adapted from the Address to the Graduating Class of 2010 of Norman Manley Law School, Kingston, Jamaica, on October 2, 2010.

When we adopted our Constitutions, we did two very profound things. The first was that, by declaring them to be the Supreme Law, we placed all other laws in a context by which their legitimacy is to be judged. The second and equally important thing was that we tied the legitimacy of our institutions, including the Courts to their ability to deliver 'justice' in that broader sense that includes consideration of social and economic rights [and here I distinguish providing 'justice' from providing a 'legal remedy or procedure'].

Justice is Fairness:

And what is this 'justice' of which we speak? I like the Nuremburg definition which states:

What is Law for? ... "We must remember that when the first Caribbean Law Schools opened their doors over three decades ago, it was with specific mandate to provide a system of preparation and certification that was not only of an internationally accepted standard, but one that was also relevant to the region that we serve. After nearly 13 years as a judge I have come to appreciate the truth of the maxim that the quality of justice (and jurisprudence) that emanates from the courts has a direct relationship with the quality of research and presentation of the practicing bar. Therein lies a clue to your first challenge. I am not sure that my generation of lawyers has discharged to a sufficient degree, the mandate to develop a relevant jurisprudence perhaps sadly, because we did not see it as our responsibility".

"Justice" is understood as meaning accountability and fairness in the protection and vindication of rights, and the prevention and redress of wrongs.

Justice must be administered by institutions and mechanisms that enjoy legitimacy, comply with the rule of law and are consistent with international human rights standards. Justice combines elements of criminal justice, truth-seeking, reparations and institutional reform as well as the fair distribution of, and access to, public goods, and equity within society at large"

Legitimacy, in so far as it is measured by general respect for and compliance with lawfully constituted authority, requires that citizens remain confident that they will be protected from injustice by whomever perpetrated, including organs of the state. That is what, as lawyers, we are trained, and obliged, to preserve.

How do our institutions achieve 'legitimacy'? Permit me at this stage to return to the notions of universal access and timeliness first foreshadowed in the Magna Carta. That is one of our major

challenges. Following the adoption of the Latimer House Guidelines, a forum was convened in Nairobi in 2005 to develop a plan of action for Africa. The language of the plan is instructive and neatly articulates the challenge. Under the rubric "Access to Justice" we find the following:

"2.3.7 Access to Justice

The formal structures of justice, high costs, and the culture of delays, and physical distances from courts limit the effective participation of the people, especially the poor in accessing justice. In the context of the need for alternatives to formal procedures, Commonwealth Africa [and in this context I say the Caribbean nations] needs to construct new ways of pursuing a human rights vision of justice due to the failure of the old formal approach to guarantee effective access to justice. There was a need to incorporate procedures and institutions into the mainstream judicial system that guarantee better access to justice"

Indeed there is a growing body of academic writing that is now beginning to recognize "access to justice" as a separate and distinct fundamental right. All the wonderful guarantees of rights and freedoms in our constitutions are meaningless if practical barriers to their vindication remain in the form of poverty, gender, illiteracy, disability or prejudice. It is the job of the lawyer to assist in surmounting these barriers, to take on causes, not because they are popular, but because they are just and, if necessary, to work for no financial reward.

The Challenge of building a just society:

So there is the challenge. It is huge. It is the protection of the society and its legitimate institutions from subversion and anarchy. It is the advancement of your country and the region towards fuller self-determination and social and economic progress. It is the protection of the rights of the poor and disadvantaged and the improvement of their plight by providing access to remedial mechanisms. In short, it is the development and preservation of a just and stable society. That is what all of this is for!

Of course you are allowed to make a decent living for yourself and your family along the way.

There is so much more that I could say but we have a time constraint. I trust that I have adequately set out the challenge, now hear my plea:

- Do not measure success by the amount of money you accumulate, you have to leave it all. Your only lasting legacy will be your impact on the lives that you have touched by your service.
- Never regard a case, no matter how routine or straightforward, as unimportant. To your client it is the most important case in the world. He/she is entitled to your best professional effort.
- Never compromise your integrity. It is your greatest professional asset. Once lost, it cannot be regained. The most pathetic of persons is the lawyer who has lost the trust of the Court and his peers. Your submissions will be treated with suspicion and nobody will cut you any slack when you need it.
- Remember to give back! You do owe a debt to your society. That means pro bono work!
- The future of your society depends on your involvement in the strengthening and protection of the institutions of governance. Take time to contribute directly.
- Give respect to everyone with whom you come into contact. It is their inalienable entitlement as human beings.
- Be humble. You do not know everything. In fact, assume you know nothing about any issue or scenario that is put before you. In most instances you will be right! There is a reason it is called 'practising' law.
- Do not repeat the mistakes or omissions of my generation of lawyers. Be bold where we shrank back. Seize the moment!
- And finally.....Remember what your LEC is for!!

Social context judging for relevant justice ...

“Judging is not an abstract exercise and ought never to be divorced from its societal context. That is what is so sad about the notion that somehow we receive a purer and unsullied form of justice from a distant court – as if they are immune from prejudice, paternalism and irrelevant influence”.

LEARNING RESOURCES FOR JUDICIAL ACADEMIES

Professor John A. Yogis

CJEI USING FILM IN JUDICIAL EDUCATION

In recent years it has become increasingly common to use movies and literature in educational courses for law students, lawyers, judges and others. Three years ago CJEI introduced “Law and Film” as part of its intensive study programme for judicial educators. The course was designed, researched and presented by Professor John A. Yogis, Q.C. of Dalhousie University’s Schulich School of Law. As Professor Yogis describes it, “The prime objective of the course is to impart a sense of how the legal system and its personnel, particularly judges, are perceived by popular films; to ask if film can teach judges, lawyers, and others something about themselves which will enable them to explore their own feelings, behaviours and opinions from a safe distance. It also provides an opportunity for the participants in the programme to determine if film would be an effective educational tool in delivering their own educational programmes.”

Films help in attracting attention of adult learners:

The Honorable Terry P. Lewis, wrote in the National Association of State Judicial Educators Newsletter (2003) that film and literature are:

...powerful art forms that entertain and engage us. The good ones stay with us and continue to have an impact on the way we think about things long after the initial reading or viewing....Entertainment value is important. If you don't get and keep your participants' attention, it is less likely that there will be any learning going on.... Our culture is fascinated by trials and the judicial process. There are, as a result, many films and works of fiction that revolve around a trial or other court proceedings that portray judges, lawyers, and the other 'players' and raise issues of justice, ethics and morality. It is not difficult to find a film or work of fiction that is both entertaining and has educational value....”

Issues for judicial education through films:

Professor Yogis agrees and states that legal dramas often involve many controversial topics such as criminal evidence and procedure and issues like human trafficking, HIV aids, abortion, sexual assault, discrimination, poverty, child and family abuse. Sometimes judges themselves are shown as unsympathetic, biased in favour of one side, corrupt or disposed towards certain political, religious, or social views. Sometimes in a classroom such topics may be difficult to deal with directly. Judges, like those in other walks of life, may be reluctant to openly discuss their personal opinions, values, or experiences directly. They may even be unaware of how they are perceived by others, or what factors motivate their decision making. Film offers participants an opportunity to explore and deal with many of these issues, vicariously, through fictional characters or stories. In other words, behavior, feelings, opinions, and the like, may be explored more easily and shared from a safe distance. In her course on “Film and the Law” at the University of Seattle’s School of Law Professor Marilyn Berger puts it this way in her course description:

“There are many films and works of fiction that revolve around a trial or other court proceedings that portray judges, lawyers, and the other 'players and raise issues of justice, ethics and morality”.

Treating the film as if you were a participant in the events portrayed...how did you react? What emotions were stirred? How would you like to have been the judge involved in the film? Would you have acted differently than he/she did? Do you see the (judges) involved as role models, or just the opposite?

Depending upon time Professor Yogis uses 5 to 7 film excerpts to arouse discussion amongst the participants regarding such points. As time does not permit a viewing of an entire film he provides a brief synopsis leading to the scene or scenes to which

he intends to draw attention. He also attempts to provide a variety of themes and styles in the films selected. He often starts with “My Cousin Vinny” which is #3 on the American Bar Association’s list of the “greatest legal movies.” Although essentially a comedy the film depicts a judge who is a stickler for procedure and etiquette in his courtroom. While well versed in the law some may see this as an obsession that perhaps hampers a young defence lawyer, from a working class background, from adequately presenting the merits of his clients’ case. What may be viewed at first blush as a courtroom farce can also be regarded as a drama with its roots in a class struggle.

By contrast, *The Star Chamber* is a legal drama in which a judge seems to be losing faith in a system where accused persons are released on legal technicalities where their guilt seems apparent. The film frequently results in a lively discussion on the judge's role in resolving issues that arise when law, justice and morality seem to be at odds. A more complex treatment of these issues also arises in *Judgment at Nuremberg*, arguably the best courtroom drama ever made. The Chief Judge (played by Spencer Tracy) must confront the legal question whether the defendants (four jurists who presided over German courts during the Nazi regime) should be held responsible for enforcing laws passed by government in power.

The Rainmaker depicts an idealistic lawyer who takes a case against an insurance company that has stalled on paying the legal bills of a young man dying of leukemia. The film features two judges with differing views on how to handle the case. One judge seems to favour the defence and sees the best way to proceed is in an attempt to get the plaintiff's lawyer to accept a cash settlement. Upon his sudden death the new judge (who comes from a background of fighting corporate enterprises) seems to shift positions by showing lenience to the plaintiff. Issues of bias, judicial backgrounds and judicial attitudes and habits provide a basis for class discussion.

Professor Yogis asks class members to consider some of the following questions as they watch film excerpts:

1. Are the judges and other legal personnel portrayed in a realistic manner?
2. What positive or negative qualities or characteristics are ascribed, for example, to judges, lawyers, and the legal system generally, etc.?
3. Can film teach judges, lawyers, and others something about themselves which will enable them to explore their own feelings, behaviours and opinions from a safe distance?
4. Is film an effective vehicle for raising complex legal, moral, social and ethical issues?
5. How would you as a legal educator go about using film as a teaching tool?

Class members are cautioned about making sure that as instructors they follow the rules of copyright law in their jurisdictions. For additional guidance and direction they are provided with reading lists of source materials for further exploration on the subject of film and the law.

ACCESS TO JUSTICE, PATHWAY TO PEACE*

Peter Jamadar

Chairman, Trinidad & Tobago Judicial Education Institute

Dag Hammarskjöld, the second secretary-general of the United Nations (1953 – 61), speaking in the fall of 1953, said of the UN, “Our purpose is peace, nothing but peace.”

What is our purpose, we who are gathered here in Trinidad and Tobago for this IACA Western Hemispheric Conference, 2010? May we not by analogy say, “Our purpose is justice, nothing but justice?” While undoubtedly this is so, I want to suggest that beyond the resolution of rights and entitlements, whether between State and State, the State and its citizens or between individuals, corporations or otherwise, one of our underpinning purposes is peace. Access to justice, whether in criminal, commercial or international courts and tribunals, is not only in service of justice, but also of peace.

Indeed, the **delivery of justice** to all serves the cause of peace. And, **access to justice** for all is one of the core judicial values that legitimises any credible judicial system. Both sustain civilization. When there is available open and fair access to justice, together with the timely and impartial disposition of disputes, this creates a civilizing effect in a society. This civilizing effect is one of the best guarantors of peace.

Furthermore, sustained peace in a just society has proven over history to be among the best guarantors of constructive and sustainable growth and development in a society. In other words, the creation of sustainable peaceful relationships facilitates the growth and development of civilization; and the growth of civilization (in any context – whether within the family, a community, a nation or among nation states) is inextricably bound to the existence of peaceful relationships (in all contexts).

True function of administration of justice:

Access to justice and the due delivery of justice are two fundamental pillars upon which the edifice of the Administration of Justice in any State must be constructed, if it is to serve the ends of the growth and development of peaceful, productive and sustainable civilizations. This proposition may be best demonstrated through the experience of its lack. For example, when there is an increase in crime and lawlessness in a society, compounded by the inability of the Administration of Justice to successfully detect, prosecute, convict, punish and reform the perpetrators, the consequence is a societal descent into fear and anger. These twin reactions can then trigger a generalised loss of confidence in the institutions responsible for the Administration of Justice – courts and tribunals, and a resort to ‘self help.’ Anarchy is at the door. Indeed, in Trinidad and Tobago at this very time, with spiralling and seemingly uncontrollable crime and plummeting detection and conviction rates, there is a real crisis of confidence in the Administration of Justice. No doubt there are others here who may share this experience, even if to a different degree. Threats to the Administration of Justice anywhere are of concern for all of us.

War, as the antithesis of peace (even when it is deemed to be just), undermines civilization, retards true social development and endangers human and relational growth and development at every level. Few would disagree with this statement. Yet, we sometimes fail or refuse to see in every conflict, the seeds of war and the destructive face of violence often lurking behind the mask of justification. If we could see more clearly this relationship between conflict and war, we would more easily recognise the imperative for peace and the role of justice in the creation of true civilization.

We, as those entrusted with the administration and delivery of justice and the fair and timely resolution of disputes, have a great responsibility. The peace, prosperity and wellbeing of our peoples and our lands depend, to a significant extent, on how we perform. It is our capacity to create and sustain judicial systems that guarantee and facilitate access to justice for all and the fair and timely disposition of all disputes that come before us, that can constructively influence how our civilization evolves, or whether it devolves. We contribute to the latter whenever we fail to deliver on these expectations and the trust that has been placed in us.

Such is our responsibility that we cannot afford to see ourselves as simply actors in an unfolding script. We need to see ourselves as the authors of this script, and to do so we must be clear about what we are trying to create. This is a story about the creation of civilizations. Not any ordinary civilization, but one that is peaceful, equitable, meaningful, productive, caring and life giving for all. Our responsibility is to recognise the significance of this and our role is to facilitate access to and the delivery of justice for all in service of this objective.

* Adapted from the address delivered on 01 November, 2010 at the IACA Western Hemisphere Conference, Port of Spain, Trinidad

It is always easier to identify the external factors and agencies that impede the attainment of our objectives. These, after all, are unfortunately the realities that we often have to live and work with. Yet, we must also be prepared to look closely at ourselves to see whether we are doing all that we can to improve the administration of justice. When we start this process of looking at ourselves, and especially if we do it with like-minded persons, we soon begin to see how much more can be done – often with proportionately little resources, to advance our aims and objectives.

OPEN-MINDEDNESS: Core Principle in Delivery of Justice:

In ancient Jerusalem, there was a gate called 'The Eye of the Needle' that led into the city. It was so called because it was narrow in relation to the camels and other beasts of burden that were used to transport goods at the time. To pass an animal through 'The Eye of the Needle' one would have to unload everything that it was carrying from off of it, before it could pass through. Being open-minded is similar. To be truly open to another and to his/her thoughts and ideas, we must first set aside our own.

“Access to justice for all is one of the core judicial values that legitimizes any credible judicial system.... When there is available open and fair access to justice, together with the timely and impartial disposition of disputes, this creates a civilizing effect in a society. This civilizing effect is one of the best guarantees of peace”

Open-mindedness is also a lens through which we can view our ideas and our conversations about and our efforts to manifest access to justice. An open mind begins with no baggage. It is simply open, open to receive, non-judgemental. In a similar way, access to justice ought to begin with no pre-conditions. All are entitled to have and gain access to justice, that is, to the courts and tribunals for the resolution of their disputes and of charges made against them. If we keep in mind that what we are trying to create is a peaceful society, then we will, I believe, see the need to facilitate, permissively, access to justice for all.

However, once we state this proposition of access to justice for all we immediately run into a difficulty. The difficulty is one of limits. Indeed, it is really about the balance between order and chaos. Are there any limits to an open-minded, open-ended theory of access to justice? Let me share a recent experience that I think highlights this dilemma.

Reforms to promote access:

Recently (in October, 2010) the Court of Appeal of Trinidad and Tobago had before it a matter which raised this very issue of the limits of access to justice. The matter was commenced by the Plaintiff in the High Court in 1994. It arose out of an injury caused to a woman which resulted in a claim for damages for personal injury. The matter was filed, pleadings were closed and the matter then lay dormant for a decade, waiting for a trial date.

This occurrence was typical of the delay and inefficiency that had been plaguing the judicial system for decades in Trinidad and Tobago. Matters set down for trial had been languishing in the system, some forgotten, others lost, never to be brought on for trial, or when brought on, this was too often only after several years had passed (at times up to twelve to fifteen years). As a consequence, in 2000, a Practice Direction was issued by which all pending civil trials were to be administered in a new way. The court office was to take control of all such matters, and the aim was to list them for trial and to do so in order to achieve 'trial date certainty' leading to disposition.

This matter was one of those dealt with under the 2000 Practice Direction. As a result it was placed on a Warning List of matters likely to be scheduled for trial. This list was then published and made available to all attorneys. Attorneys were expected to examine this list and ascertain if they had matters on it and to be warned that such matters were likely to be placed on a Cause List and to be set down for trial in the near future.

This matter then appeared, some two months later as was the practice, on a first Cause List. At that Cause List hearing no one appeared for the Plaintiff and the matter was adjourned to the next Cause List which was to be heard in July, 2005. At this Cause List hearing the Plaintiff's attorneys appeared. They had been in telephone contact with the Plaintiff, who had indicated that she was out of the country and would not be able to return on short notice. The matter then came up for a Pre-Trial Review in October, 2005. At that hearing, the Plaintiff's attorneys indicated to the judge who was to hear the matter that the Plaintiff was out of the jurisdiction. Nevertheless, the judge fixed the matter for trial for one day in January, 2006 (three months later), so as to permit sufficient time for arrangements to be made for the parties to be ready to proceed with the trial. Under the new approach, this was the only matter fixed for trial on that day and the expectation was that it would proceed.

In January, 2006 at the hearing of the trial, the Plaintiff and her witnesses failed to appear. The court was simply told that the Plaintiff was abroad studying theology. No indication of whether or when she could return was given to the court. A short

adjournment was sought, on the basis that the parties were having settlement talks. From the judge's notes of evidence and reasons, it appears that these talks of settlement were not confirmed by the Defendant's attorneys. The judge refused the application for the adjournment. The Plaintiff's attorneys were unable to proceed, and the judge dismissed the Plaintiff's action. The Plaintiff appealed, claiming that the trial judge had wrongly exercised his discretion in refusing to adjourn the trial.

Before the Court of Appeal, the Plaintiff's attorneys cited a 1920's English Court of Appeal decision and a 1976 local Court of Appeal decision which had followed the English authority. It was submitted that those cases had held that even though a Court of Appeal would rarely overturn the exercise of a judge's discretion (and only do so if a judge was shown to be plainly wrong), where the effect of a refusal to grant an adjournment had resulted in the dismissal of a party's claim, the Court of Appeal had a duty to intervene and to ensure that the claim was heard.

The Court of Appeal of Trinidad and Tobago unanimously rejected the Plaintiff's argument and dismissed her appeal. It held that the two authorities cited were of limited assistance in light of the Practice Direction 2000 and the new and different context in which civil litigation was being conducted in 2006. And further, that the appropriate test, in the context of case flow management and trial date certainty, was whether there was a good and sufficient reason to grant an adjournment of a trial of a matter that had passed through the process of the Warning List, Cause List, and Pre Trial Review hearings, before being fixed for trial on a certain date.

This case highlights a dilemma in subscribing to the judicial value of access to justice for all. For the Court of Appeal of Trinidad and Tobago, the dilemma was resolved, it would appear, by affirming the value without making it substantively absolute. That is, the judicial value of access to justice for all is satisfied if there is **sufficient opportunity** to avail oneself of it. However, it is not considered an absolute value that guarantees an entitlement to a hearing on the merits of a claim, even when that opportunity is denied by a refusal to grant an adjournment of a trial date hearing. This modern approach in Trinidad and Tobago is clearly quite different from that which informed the local courts three decades ago.

"An open mind begins with no baggage. It is simply open, open to receive, non-judgmental. In a similar way, access to justice ought to begin with no pre-conditions..... If we keep in mind we are trying to create is a peaceful society, then we will see the need to facilitate, permissively, access to justice for all".

In Trinidad and Tobago at the present time, the prevailing view seems to be that the judicial value of access to justice for all must be balanced against the pragmatic need for an efficient and effective system of justice. Discipline and responsibility are the new watch words in the 21st Century. Some have lamented that this new approach has resulted in the failure to deliver true justice to users of the judicial system.

What both sides of this debate sometimes fail to see, is that both are motivated by the same desire to grant access to justice to all and to deliver it fairly and equitably. Indeed, both sides also agree that untimely delay in the delivery of justice undermines public trust and confidence in any judicial system; and I may add, erodes the sustainability of peaceful civilizations.

The challenge, I suggest, lies in finding the right balance to be struck between order and chaos in the pursuit of an effective and efficient justice system. That is, the right balance between control and certainty, on the one hand, and flexibility and uncertainty on the other. This move to discipline and responsibility in Trinidad and Tobago was a direct consequence of a judicial system that was failing, because there was so much indiscipline and uncertainty which resulted in inordinate delay, that the administration of justice in Trinidad and Tobago had almost fallen into disrepute. We can say that chaos reigned. The need for order to be returned to the system was clear to all.

Case flow management leading to trial date certainty and the timely disposition of matters (aided by alternative dispute resolution interventions), was seen as the necessary cure for a system spinning uncontrollably off course. These interventions were seen as what was needed, together with robust support from the courts, if the entrenched culture of inefficiency and delay was to change and in order to regain public trust and confidence in the Administration of Justice in Trinidad and Tobago. The Practice Direction of 2000 was a first concrete step in this direction. The introduction in 2005 of new Civil Proceedings Rules was the culmination of this effort in the civil jurisdiction.

However, the obvious danger in this return to order is an insistence on too much rigidity and inflexibility in the effort to achieve certainty, predictability and efficiency in the judicial system. This danger is one which should trouble us all, as we discuss the issue of access to justice. The challenge of the right balance between order and chaos will always be with us. Let us all be truly open-minded as we seek to resolve this dilemma and the many others that will confront us as we try to continually improve access to and the delivery of justice for all.

OPEN-HEARTEDNESS: Another Core Principle in Delivery of Justice:

Whereas passing through The Eye of the Needle meant setting aside all of our pre-judgements in order to be truly open-minded, open-heartedness implies taking on all of the other person's points of view before coming to any judgement about a matter.

In traditional African communities, the idea of separation is anathema. One is a part of a whole, and one's primary identity is in the identity of the community. In the West, we tend to see things quite differently. To be, is to be an individual, separate and unique, entitled to individuate into personhood (understood in an essentially individualistic way). It is not very easy for us in the West to step into the shoes of the other, or into their skins. Yet, how are we to ever understand the other if we do not enter into their experiences as best we can?

Open-heartedness is also a lens through which we can view access to and the delivery of justice. To truly respond in any situation in a fair and just way, we need to be able to step into the shoes and skins of those who appear before us. This is especially so for those of us who have responsibilities as fact finders. Because we bring to the bench as judges and adjudicators our own particular history, perspectives and experiences, self awareness and empathy are necessary in order to offset the implicit and often unconscious or taken for granted assumptions that we all carry. Open-heartedness is therefore, I suggest, a core principle in access to justice, understood as access to a fair and impartial court or tribunal.

Moreover, in so far as the reform of administrative systems is concerned, both open-mindedness and open-heartedness are invaluable tools. Whereas open-mindedness facilitates hearing, receiving and understanding information largely at a cognitive level; open-heartedness facilitates seeing, feeling and understanding information largely at an emotional level. However, open-heartedness is particularly useful, because it seeks to enter into the situation and see and feel as the other does. This approach presumes real consultation with all stakeholders, and the recognition that they carry within their collective experiences both the causes of dysfunction within the system and the solutions for it.

An open-hearted approach to systems reform works primarily from the inside out and in collaboration with all stakeholders, in the search for meaningful solutions. This makes good practical sense. Who better than the people in the system have the information and experience as to why it is failing and the ideas as to how it can be fixed? Hearing, seeing, feeling and understanding these ideas and experiences can only help facilitate constructive and sustainable administrative reform in the judicial sector.

“To truly respond in any situation in a fair and just way, we need to be able to step into the shoes and skins of those who appear before us. This is especially so for those of us who have responsibilities as fact finders. Because we bring to the bench as judges and adjudicators our own particular history, perspectives and experiences, self awareness and empathy are necessary in order to offset the implicit and often unconscious or taken for granted assumptions that we all carry. Open-heartedness is therefore a core principle in access to justice, understood as access to a fair and impartial court or tribunal”.

COURT-INDUCED TRANSITION TO A NEW CONSTITUTIONAL ORDER
(Reflections on some path-breaking judgments of the Supreme Court of Bangladesh)

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1. Introduction

The framers of Bangladesh Constitution, as it originally was in 1972, established the judiciary as an independent, co-equal branch of the other two organs of the state. Firstly, for decisional judicial independence, so that they can render impartial verdict in concerned cases. Secondly, for institutional judicial independence, in order to reduce the concentrations over the political organs. In both cases, the operating assumption was that an independent and responsive judiciary was needed to preserve the democratic values.

Role of the Supreme Court in the journey of constitutionalism in Bangladesh is not optimal, if not trivial. During the military regimes¹ the apex court lost opportunities to uphold the supremacy of the constitution though some half-hearted attempts can be traced from some solo voices. However, when democracy was purported to be restored in the 1990s the court started to give many remarkable judgments on constitutional issues having significance for rights, governance, democracy etc. The Supreme Court seems to have been well on course for a positive approach having regard to the well expressed social goals the framers intended to achieve through the process of law.² In *Dr. Mohiuddin Farooque v. Bangladesh* the Appellate Division took note of the special character of the constitution and of the objectives mentioned in the constitution to liberalize the standing issue and thereby paving the way for a purposive interpretation of the constitution. In *Secretary, Ministry of Finance v. Masdar Hossain*, the same trend continued. This decision has gone a long way in affirming the independence of judiciary as a basic feature of the constitution and together *Dr. Mohiuddin Farooque* will pass on as trend setters in constitutional interpretation in Bangladesh. For a long time, there was a reluctance to view the provisions of Article 31 and 32 (right to life, liberty and property) as requiring to be reasonable and as importing the concept of due process of law of the American jurisdiction. Though not explicit, *Ain O Salish Kendra v. Bangladesh*, shows that the Supreme Court is ready to apply the due process test to determine the validity of the governmental actions and several other cases in this direction followed. In 2005, the High Court Division of the Supreme Court of Bangladesh rendered an epoch making judgment declaring 5th Amendment of the Constitution illegal and unequivocally condemned the unconstitutional assumption of power successively after the assassination of the Founding Father of Bangladesh Bangabandhu Sheikh Mujibur Rahman. In 2009, the Appellate Division approved the decision with a slight modification. The stand again received recognition in the recently disposed of writ petition relating to 7th Amendment upholding the supremacy of the constitution over martial law creating another watershed in our constitutional and legal history. This write up notes some leading cases decided by the apex court of Bangladesh and comments on their impact on Bangladesh legal system and democratic polity.

2. Fifth Amendment Case³ The Constitution Revives its Original Shape

Unconditional acceptance of the judiciary of the subservience of the Constitution to the Military dictators during General Zia and Ershad regime was a dark chapter for the judiciary of this country. However, later on some principles were enunciated to ensure the limited jurisdiction of the Supreme Court over Martial law courts on the ground of *coram non judge*, *mala fide* exercise of power⁴. For a long time, the decisions constituted some decadent jurisprudence on the question of legitimacy of martial law.

1. Bangladesh faced martial law for over 15 years from 1975 onwards to 1990 by Khondoker Mushtaque Ahmed, General Ziaur Rahman, Genera H M Ershad.

2. Mahmudul Islam, *Constitutional Law of Bangladesh*, (Mullick Brothers: Dhaka, 2003) at Preface to the Second Edition.

3. *Bangladesh Italian Marble Works Ltd. v. Bangladesh* 2006 BLT (Spl) 1.

4. Some examples are: *Nasiruddin v. Government of Bangladesh* 32 DLR (AD) 216, *Meher Ali v. A.K. Murshid* 42 DLR (HCD) 357, *Ehteshasm Uddin v. Bangladesh* 33 DLR AD 154 and *Jamil Huq v. Bangladesh* 34 DLR (AD) 125, *Khandaker Moshtaque Ahmed v. Bangladesh* 34 DLR 9AD0 222 and *Bangladesh v. Md. Salimullah* 1983 BLD (AD) 10.

Bangladesh Italian Marble Works Ltd v. Government of Bangladesh and Others, popularly known as 5th Amendment Case marks the beginning of a new era in our constitutional dispensation. Delivered by Mr. Justice ABM Khairul Haque, the style and content of the judgment of this case would have a lasting influence in the future course of constitutional jurisprudence of Bangladesh. In this case, the court had to hear the arguments of existence of martial law jurisprudence developed by courts over the time. The court unequivocally turned down any existence of such martial law: 'We are not aware of any such Martial Law Jurisprudence either under our Constitution or any other laws of the land.' There is no such law in Bangladesh as Martial Law, no such authority as Martial Law Authority³ and hence no such jurisprudence as Martial Law Jurisprudence.

The fact of the case was simple, declaring the petitioner's property as abandoned property and thereby depriving him from the right to property, the abandonment was safeguarded by the vice of a Martial Law Regulation (MLR VII of 1977). That was not the end; the MLR VII of 1977 was given constitutional protection through the notorious Fifth Amendment of the constitution, an amendment which reversed the fundamental principles⁵ of the state enshrined in the original constitution of 1972. After many unsuccessful attempts to recover the property, petitioner filed the present writ petition challenging the vires of the Fifth Amendment. And the court sounded the emphatic words against the usurpers of state power:

Taking over of power by Khandaker Mushtaq Ahmed, nomination of Justice Sayem as President, appointment of Ziaur Rahman as Deputy Chief Martial Law Administrator, handing over of the office of Chief Martial Law Administrator to Ziaur Rahman, nomination of Ziaur Rahman as the President and Referendum Order of 1977 - were all without lawful authority and in an unlawful manner'. 'The Constitution (Fifth Amendment) Act, 1979 (Act I of 1979) is illegal and void ab initio⁶

Doctrine of necessity, as the tradition goes, was pleaded to validate the regimes of the martial law administrators relying on Dosso⁷ Ghost. The court observed, "The Constitution is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men at all times, and under all circumstances" Emergency must be faced through constitutional method not by extra-constitutional interventions and so, turmoil or crisis in the country is no excuse for any violation of the Constitution⁸. On appeal the Appellate Division of the Supreme Court was also of the same view:

Let it be made clear that Military Rule was wrongly justified in the past and it ought not to be justified in future on any ground, principle, doctrine or theory whatsoever as the same is against the dignity, honour and glory of the nation that it achieved after great sacrifice.⁹

It was pleaded that passing of a long time since its adoption without being challenged immuned the Fifth Amendment from constitutional challenge. The court found no difficulty in sharply rejecting the contention, saying, 'No one acquires a vested or protected right in violation of the Constitution by long use even when that span of time covers our entire national existence and indeed predates it'¹⁰. In appeal, the Appellate Division also concurred with the opinion:

If the Constitution is wronged, it is a grave offence of unfathomed enormity committed against each and every citizens of the Republic. It is a continuing and recurring wrong committed against the Republic itself. It remains a wrong against future generations of citizens. As such, there cannot be any plea of waiver or acquiescence in respect of unconstitutionality of a provision or an Act of Parliament. It is far, far better thing that we do now, what should be done in the interest of justice, and even if it was not done earlier¹¹.

For the sake of continuity certain condonations were conceded with sufficient note of cautions, 'the Constitution is not to be soiled with illegalities'. Rather, the perpetrators of such illegalities should be suitably punished and condemned so that in future no adventurist, no usurper, would have the audacity to defy the people their Constitution, their Government, established by them with their consent. It may be a vain hope that the judgment of court will deter a usurper, or have the effect of restoring legality, but for a court to be deterred by fear of failure is merely to acquiesce in illegality.¹²

5 The four fundamental Pillars of the original constitution were *secularism, Banglalee nationalism, democracy and socialism*.

6 *Bangladesh Italian Marble Works Ltd v. Government of Bangladesh and Others* 2006 (Spl) BLT (HCD) at 240-242

7 *State v. Dosso* (1959) 11 DLR SC 1.

8. *Ibid* at 242

9. *Khandker Dlewar Hossain v. Bangladesh Italian Marble Works Ltd. Vici Leave to Appeal Petition 1044/2099* at 181; Full text available : <http://www.supremecourt.gov.bd>.

10. *Bangladesh Italian Marble Wrks Ltd. v. Government and Others* (Spl) BLT (HCD) at 162.

11. *Khandker Delaware Hossain v. Bangladesh Italian Marble Works Ltd., Civil Leave to Appeal Pet. 1044/2009* at 92.

12. Per Justice Fieldsend in *Madzimbamuto v. Lardner Burke N.O. and another* 1966 R.L.R. 756.

Fifth Amendment is the case by which a nation has turned back to its right track of lofty ideals for which the nation emerged as an independent state. It is interesting to see how Bangladesh as a nation can once again work to perpetuate the thirst for constitutionalism and democracy. The immediate effect is that in line with the Fifth Amendment, the Seventh amendment of the constitution, another stigma on our constitution was declared null and void on the same ground. In this case one Siddique Ahmed of Chittagong filed the petition in January 2010, challenging the legality of the Seventh Amendment that had ratified the proclamation of martial law and other regulations, orders and instructions by General Ershad between March 24, 1982, and November 10, 1986. The petitioner also contested his murder conviction in 1986 by a martial law court, and sought an order for retrial. Speaking for the Court, Justice S. Chowdhury Manik observed:

The proclamation of martial law and its regulations and orders and all actions under this law shall remain illegal until Qayamat (the Dooms Day)....The martial law was beyond the mandate of the constitution and will be invalid for eternity.....We cannot be oblivious to the fact [that] a usurper is a usurper...General Ershad also acted as a usurper to grab the state power. He cannot avoid responsibility of a usurper.¹³

Through the annulment of Fifth Amendment and Seventh Amendment by the Highest Court of Bangladesh the original character of Bangladesh Constitution is revived. The constitution has regained its secular character and constitutional supremacy is said to march with fame. One final note about Fifth Amendment and Seventh Amendment cases—after the verdict of these two cases the media were vocal in commenting that the judiciary has expiated its past deed of approving martial law by throwing the sordid chapter away to new constitutional philosophy.

3. Masder Hossain Case¹⁴. Judicial Independence on Track

Masder Hossain is somewhat Marbury-Madison for Bangladesh. Principle of judicial independence was vigorously examined in Masder Hossain and exposed to blossoms by Mr. Justice Mustafa Kamal. In this case, the Court had to scrutinize whether the Constitution of Bangladesh has sufficiently addressed and accommodated the principles of independence of judiciary. Inclusion of judicial service in the name of BCS (Judicial) under the Bangladesh Civil Services (Re-Organization) Order 1980 was challenged by judicial officers after the government had denied certain benefits to them. The Court Observed:

The Service of the Republic is a broad term embracing generally all services in Bangladesh including the defence service and judicial service. That does not mean that judicial or defence service is a part of the civil or administrative services. So this definition in article 152 (1) does not bring the judicial service into the ambit of the Civil service. It is a service of the republic, not civil service¹⁵.

The Appellate Division of the Supreme Court gave a number of directions to achieve separation of the judiciary including magistracy from the executive. Constitution of Judicial Pay Commission, Judicial Service Commission, amending the laws which are contradictory with concept of independence of judiciary, framing of rules for judicial service etc. were some of the major directives. The court recognized that independence of the judiciary is one of the basic pillars of the constitution and can not be demolished, whittled down, curtailed or diminished in any manner whatsoever....what can not be done directly, can not be done indirectly.

The judgment was delivered by the Appellate Division in 1999. Up to February 2006 the successive governments took 23 adjournments to implement the judgment on this or that plea. Finally the Caretaker Government amended the Criminal Procedure Code, 1898 in November, 2007 and along with these changes the lower judiciary was separated from the clutches of the executive on 1st November, 2007. Masder Hossain is distinct in the sense that perhaps this is the only case in our constitutional history where the implementation process is actively guided by the Court itself. However, it can not be claimed that judiciary has become independent in the full-fledged sense in the post-Masder Hossain era, yet the age old clutch on the point is settled at least by the institutional separation of the judiciary.

4. BLAST and Others v. Bangladesh¹⁶: Custodial Torture Prohibited

In this case, the notorious provision of section 54 (arrest on suspicious ground without warrant) and section 167 (remand) of the Code of Criminal Procedure came under the scrutiny of the High Court Division of the Supreme Court. The unprecedented, inhuman and unscrupulous use of these sections virtually came to an end after Court had abandoned the effect of them. The

13. Cited from newspaper report 30 December 2010 (The Daily Star).

14. Masder Hossain v. Secretary, Ministry of Finance 18 BLD (HCD) 558.

15. Ibid. at Para 28.

16. 55 DLR 363

validity of this pre-constitutional colonial law was challenged when Shamim Reza Rubel, a bright student of the Independent University, was put to death by custodial torture. The Learned Judges of the High Court Division felt obliged to exercise their jurisdiction to put a curtain on this dark episode. While delivering judgment the Court set a series of guidelines mandatory for the executive authority. The guidelines set-forth by the Court are to be adhered to until the laws are amended. A vital question was involved in the case as to whether the High Court Division can recommend specific law reforms. The court reiterated,

“Our answer is that this court has such power under the Article 102 of the Constitution. As we have found that some of the existing provisions of the Section 54 and 167 of the code are inconsistent with the fundamental rights of the citizens, this court can not only recommend, it can even issue directives.”¹⁷

The court added that the incredible practice of arresting people and sending them in to police custody to deduce confession i.e. remand had been going on with impunity for many years. This does not match with any constitutional jurisprudence; accordingly such inconsistency is liable to be quashed. The court very much can give proper and necessary direction to the Government to make proper amendments of the provisions of Section 54 of the Code to ensure the fundamental rights as guaranteed under Articles 27, 31, 32, 33 and 35 of the Constitution. So, the directives are operating as a safeguard against the so called bad practice of remand¹⁸.

This judgment delivered by the High Court Division is a praiseworthy pro-active exercise in public interest that the relevant organs of the government must take note of. Against the backdrop of such flagrant violations of the law such assertive and upbeat role of the Higher Judiciary was crucial to break the unfortunate nexus between police and magistracy. Indeed, this judgment is a classic precedent of judicial activism for protecting fundamental human rights, human dignity and establishing good governance.

5. Conclusion

The wider amplitude of Court's function should be judged not only through its ability to realize and vindicate the rights of the parties involved, but also its persuasive roles in strengthening democracy and fostering human rights jurisprudence¹⁹. Role of the judicature in our context should encompass not only widening of certain concepts of law and procedure, but also judicial intervention in areas which traditionally were considered to be beyond the jurisdiction and accepted norms of common law judges²⁰. The function of the judiciary is to bring up and nurture a broken legal infrastructure by its care and intervention. With the changing perceptions of human rights and growing importance of sustainable development, democracy in its economic sense, the role of the judiciary is becoming more crucial. It is increasingly being recognized that the judiciary is not only the dispenser of justice but an important contributor in fashioning of new rights and obligations, including the rights of the, unvoiced and unborn generation. The above discussed cases in this note flame-forth one fundamental question: 'What is Law if it is not justice' or 'Why Law is not dead if it upholds Injustice'?²¹. Therefore, we deduce the conclusion: the best judgment is that which makes a transition from the burning embers of the Old Order to a New Order based on a new Jurisprudence—*socially relevant and purposive*.

17. Ibid at 368

18. Some points of directives are : identity disclose while arresting, information to relatives, medical check up, interrogation in the presence of lawyer, action against the investigation officer in case of allegation of torture etc.

19. Dr. Shahdeen Malik, Human Rights and Role of the Judiciary, (BILIA: Dhaka, 2005) at 148.

20. Dr. Mizanur Rahman, Unveiling Democracy: State and Law, (Parama Prokashoni: Dhaka, 1999) at 63.

21. Justice V.R. Krishna Iyer, Social Justice – Sunset or dawn, (Eastern Book Company, Lucknow, 1987) at 27.

THE ROLE OF TECHNOLOGY AND E-FILING*

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Technology impacts administration of justice:

The age of the Internet has had an impact upon every facet of society including the law and the courts. Judges and lawyers now use technology for legal research, communication, legal education, presentation of evidence in court, recording of court proceedings, and security. Today's fully automated law firm is a marvel of modern machinery, outfitted with a network of computers, voice mail, email, fax, cell phones, copiers, scanners, shredders and sophisticated software programmes. The practice of law, like many other professions, is adapting to advances in technology. One such change has been the slow migration of law offices to paperless operations. As the courts move towards going paperless so too are the law offices, more and more attorneys realize the benefits, costs effectiveness, and relative ease of the transition from traditional paper to electronic documents.

E-filing has long been heralded as the future of the practice of law. This move is based not on isolated elements but on influencing factors coming from many directions. One factor is that the opportunity has presented itself, and the other factor is that the courts are implementing electronic case filing and electronic case management systems that require law offices to produce electronic documents rather than traditionally accepted paper documents. In addition, the courts are equipping themselves with advanced technology installing video evidence presentation software, videoconferencing systems, real time receiving software, monitors for Judges and courtroom personnel, and real time transcription technology. Advanced technology allows attorneys to present and display many types of evidence and testimony to the judge and jury in clearer and more comprehensive ways.

Litigation and adjudicating are thoroughly documented processes, even oral proceedings are transcribed or captured into a transcribable form so that the written record will not be incomplete. Strategic information technology initiatives targeted at reducing both the reliance on paper and the costs of its business processes have been introduced in many courts all over the world. New technology in telecommunications and computers allows for more mobility, so a lawyer can be "connected" to the work place without being physically present. Many courts have recognized that streamlining procedures are critical to control expanding case loads. The proliferation of computers, local area networks, and electronic mail technologies presents a unique opportunity to organize procedures cost effectively. One of the new advances introduced in many courts to ease growing caseloads is Electronic Case Filing.

The Role of E-Filing

Electronic Case filing (E-Filing) allows court documents to be filed in an electronic medium rather than in the traditional paper medium. E-Filing is a court document filing and handling system. E-filing is revolutionary in that it is changing the way courts interact with each other, with lawyers, and with the public.

Paper is a significant problem for courts worldwide. Courts are faced with large volumes of judicial paper processed each day and lack efficient methods for handling the increasing volume. This build-up of paper creates serious processing challenges for court personnel and puts a significant strain on facilities as courts must constantly search for space to file and store legal documents in buildings filled to the brim. E-filing eliminates, to a large extent, the use of paper in the courts saving physical space to store paper and physical effort in transporting physical files within the courthouse. All documents that are required to be filed subsequently are also done electronically. With this system, lawyers no longer have to present paper documents to commence or further court proceedings.

E-filing enables lawyers to commence proceedings by filing of originating process documents from outside the courts through the Internet. Once an originating document such as a writ or summons is electronically filed, a case file is created in the court's computer system. Service of the writ or summons on the lawyers representing a defendant may be effected electronically by the E-filing system. Service of all other documents in the litigation process may be similarly effected such that no paper need to be exchanged between solicitors acting for the parties to the litigation. Communications by letter among solicitors and the court

* Adapted from the address given at the meeting of Registrars of Courts, April, 2010.

registry may also be effected via the electronic system. E-filing system provides Judges and Registrars with access to case files from any location, be it the office, courtroom or home. Each step of the litigation process and every decision are recorded on the system. Affidavits of evidence are also filed in the electronic filing system as are transcripts of testimony given in trials.

From the point of view of the lawyer, he is able to commence a suit 24 hours a day, 7 days a week and so is not constrained by the opening hours of the court registry. He is able to file and serve any document from his office or home or hotel room overseas.

E-filing allows law firms to serve court documents electronically over the Internet to one or more law parties. This technology allows the court to receive pleadings, motions, briefs etc. electronically and provides accessible up to date information. An electronic certificate of service can also be generated by the system. This certificate of service is sufficient proof of service and can be filed in court in place of an affidavit of service. Apart from enjoying the benefits of convenience, speed and reliability, users no longer have to rely on manual service. Users can therefore save the cost of employing manual process servers and filing affidavits of service.

“Paper is a significant problem for courts world wide. Courts are faced with large volumes of judicial paper processed each day and lack efficient methods for handling the increasing volume. This build-up of paper creates serious processing challenges for court personnel and puts a significant strain on facilities as courts must constantly search for space to file and store legal documents in buildings filled to the brim. E-filing eliminates, to a large extent, the use of paper in the courts saving physical space to store paper and physical effort in transporting physical files within the court house”.

E-filing also provides easy retrieval of documents from the web. The electronic information system created for automating case filing automatically;

1. receives signed case file documents via electronic mail,
2. checks each such document for conformity to court requirements,
3. updates the court database with data extracted from the document,
4. adds the document to an electronic case file, and
5. responds with a return mail message to the sender reporting the action taken.

E-filing allows law firms to perform public search queries on case information directly from their office.

The Benefits of E-filing

E-Filing exploits the electronic super highway to minimise not just the physical movement of people and paper documents, but also to contain the increasing requirement for physical storage space. The following are the main benefits of E-Filing:

- An integrated information system through which Courts can proactively track each case through its life-span;
- Improvements in efficiency through minimising paper flow throughout the litigation process;
- Shortened case processing times;
- Faster document filing and retrieval;
- Minimising loss of documents or files through filing mistakes;
- Concurrent access to any case file by different persons;
- Access to case files from any location (e.g. outside the courts).

E-Filing greatly benefits both the law firms and the judiciary and has greatly enhanced case flow management since its introduction.

Benefits to Judiciary

- ***Resolving problems of handling paper for the Judiciary*** – It is inevitable that in a paper-based regime, documents may be filed into the wrong paper file, or inadvertently missed out. There is also the problem of storing a large number of paper files, and the need to move bulky paper files from court official to judicial officer or judge. Files may get mis-routed, or misplaced in the paper transport process. With E-Filing, most of these problems are significantly curtailed, if not eliminated. All documents are stored electronically in the system and most up-to-date information can be viewed by

more than one person at the same time. This allows judges to retrieve and view documents more quickly and easily than paper filings, generally within minutes rather than days. This is particularly relevant in cases involving critical issues concerning children or emergency situations. In storage, the electronic collections take up a fraction of the space required by paper files. Storage of computerised documents requires less physical space to store than paper. The reduction in paper would represent a drastic change in case management and access to documents.

- **Ease of handling for the judicial officers** – With a “pack-and-go” feature available on E-filing, court files can be neatly extracted onto CD-ROMs or even USB memory devices, for off-line usage. Computers can move documents into the court faster, less expensively and with greater security than paper carrying systems such as the postal service or couriers. Computers are faster and less expensive than humans for doing the step-and fetch work of document retrieval. The capabilities of the computer save the time and effort of pulling paper files or volume off shelves, flipping pages and replacing the files or volumes.
- **Reducing the need for the Judiciary to handle cash** - With E-Filing, collection of fees is electronic and collection of fees over the counter is virtually eliminated. E-filing for courts reduces problems with incorrect fees that tend to occur with manual filings.
- **Improving case management** – Traditionally cases are tracked by separate computer systems requiring staff to manually enter data so that the tracking mechanisms can be put into place. With E-Filing, inbuilt case tracking and monitoring features remove the need for costly and error-prone re-entry of data. The automatic entry of information into a case management system reduces data entry time and eliminates errors.
- **Improving case file security and confidentiality** - With e-filing, it is easier to implement restricted access to case files or documents that are “sealed” by Court order.
- **Saving costs** - with e-filing the courts save money on stamping and mailing, and it reduces the number of people who need to handle a document. As lawyers can have access to all orders, pleadings and other documents as soon as they are filed. E-filing reduces the number of people who need to handle a document and makes it possible for more court workers to focus on legal issues as opposed to clerical ones.

Although it has been proven that e-filing has revolutionized the case management processes there are a number of challenges affecting the introduction of this revolutionary change.

Training- E-Schooling

“Given its profession-wide impact, it is clear that the success of E-filing depends on the strong support and commitment of the legal profession, the judiciary and the technology solution providers. No matter when or how courts decide to use e-filing, it is well on its way to becoming the standard in case management”.

they do in the paper world but more quickly, they tend to move to electronic documents. As judges get training and see how it works, you will see many of them move to it exclusively.

Proponents of E-Filing believe training, online, at the courthouse or in seminars through a bar association can smooth the transition from paper to digital. A few courts require attorneys to take such a class before registering to e-file, but that is rare. Training for judges, lawyers and court employees should explain how e-filing works, from the genesis of a document through the disposition of a case. The e-filing process should work the same as things do in the paper world, something training should emphasize. But once Judges realize that they can make comments in electronic documents, electronically sign an order, and do everything

Rules governing litigation both civil and criminal are to be amended to permit mandatory e-filing. The Court will have to decide whether it approaches the introduction gradually on a case-by-case basis or mandate that all cases be filed electronically. Although e-filing is likely to become the preferred method of filing documents in court, mandating it would increase burdens of litigants who lack word-processing and electronic mail capabilities. To avoid limiting recourse to the courts, the amendment of the Rules would have to permit paper filing for certain litigants’ especially pro-se litigants.

The Eastern Caribbean Supreme Court Experience

The courts of the Eastern Caribbean Supreme Court (ECSC) are experiencing the very same issues as other courts with paper filings. The volume of civil and criminal filings has increased to the point that the courts can no longer maintain efficient filing, circulation and storage systems. Determined to find a solution to the existing problem the ECSC embarked on the introduction of e-filing for all the nine jurisdictions forming the Eastern Caribbean Supreme Court.

In 2004, the former Chief Justice Sir Dennis Byron initiated the process towards the introduction of e-filing in the Eastern Caribbean Supreme Court. A committee comprising of a team from an e-Filing software firm, attorneys, judges, members of the IT Department and other key stakeholders met in 2004 to discuss the way forward towards the implementation of E-filing. It was anticipated that the electronic documents and the associated electronic data already existing in the Judicial Enforcement Management System (JEMS) would move seamlessly into the new electronic filing system. JEMS is an automated case management system that electronically captures all case related matters filed in the OECS courts. However, the Pilot Project had to address several issues to implement that technology, key of which was the need to obtain a merchant bank in St. Lucia to accept payment (on behalf of the High Court). Another issue was associated with the absence of a functioning management committee to oversee the implementation of the pilot. . A third issue involved the establishment of a VPN between the ECSC headquarters where the e-Filing server is maintained and the High Court registry, where the JEMS server is housed.

Resolutions to issues associated with payments of filing fees and establishment of the VPN network have been obtained and the Eastern Caribbean Supreme Court is now to embark on appointing a steering committee to provide a detailed phased approach towards the implementation of e- filing.

Conclusion

In a rapidly changing society, laws often lag behind changing social trends. This combined, with the added caseload that accompanies increased regulatory interventions and conflicts, has brought challenges to modern judiciaries. Judiciaries have come under heightened scrutiny from the public, as demands for accountability and user expectations have grown. As the courts handle ever-increasing caseloads, many of the familiar, trusted methods, including processing paper documents, are simply unable to adequately meet the demands. These forces have caused judges to rethink their roles and acquire new competencies. As leaders of the judiciary, it is imperative that clerks and judges understand that e-filing offers a viable means for improving the way courts conduct business. The introduction of E-filing in Courts marks a paradigm shift in the civil litigation process which had historically relied on paper. Given its profession-wide impact, it is clear that the success of E-filing depends on the strong support and commitment of the legal profession, the judiciary and the technology solution providers. No matter when or how courts decide to use e-filing, it is well on its way to becoming the standard in case management.

LAW ON JUDICIAL STANDARDS AND ACCOUNTABILITY

Prof. (Dr.) N.R. Madhava Menon
Former Director, National Judicial Academy, India

Background to the legislative initiative:

In the recent past, Indian Courts have been the subject of public criticism in their treatment of certain high profile cases involving politicians, corporate groups and influential persons in society. Certain civil rights organizations, professional groups and media have even alleged corrupt practices on the part of certain judges which led to the Chief Justice of India initiating in-house proceedings against some of them. Despite finding of irregularities in one or two cases, nothing much could be done against them because of the constitutional immunities judges enjoy and the difficulties in organizing impeachment proceedings. Guaranteeing complete independence, India's Constitution permitted only impeachment against erring Supreme Court and High Court justices which have come to operate as insulating them from questions of personal accountability and desirable standards of behaviour. The Code of Conduct evolved by the Supreme Court in the 1990s could not be enforced against justices who did not care to abide by it. The in-house method of inquiring into complaints through the Chief Justice-constituted judicial committees have limited jurisdiction and cannot recommend punishments excepting removal through impeachment. At best, the Chief Justice could only avoid assigning him judicial work or transfer him to another high court. In view of this, there were demands, even from judicial circles, to legislate judicial standards including the Code of Conduct and strengthen the disciplinary mechanism to extract accountability for unacceptable conduct from judges.

In November 2010, the Government of India introduced a Bill in Parliament entitled "The Judicial Standards and Accountability Bill, 2010" addressing the issues raised and providing a mechanism to enforce accountability without compromising independence of judiciary. The Bill incorporates a Code of Conduct evolved earlier by the justices themselves as mandatory standards to be followed by judges, the failure of which will be construed as 'misbehaviour' actionable under the law. Furthermore, the Bill mandates that every judge on assuming office shall make a declaration of his as well as his spouse's and dependent children's assets and liabilities in the manner provided in the law and repeat doing so every year. Of course, there are restrictions in accessing such data by general public excepting in circumstances stated in the Bill. By and large, these requirements have been there for a long time, though they are expected to be voluntarily adopted by judges without oversight mechanisms within the judiciary or outside.

Mechanisms for Enforcement:

What is innovative in the Bill is a mechanism for enforcement carefully crafted to balance accountability with independence. There are several stages in processing complaints against judges. A "National Judicial Oversight Committee" consisting of Chief Justices of the Supreme Court and High Courts and including two eminent jurists nominated by the President of India will be established under the chairmanship of the President of the Council of States (Upper House of Parliament). If the allegation is against the Chief Justice of India, the next senior-most judge of the Supreme Court and if it is against the Chief Justice of a High Court, the Chief Justice of another High Court chosen by the Chief Justice of India shall be the member of the Oversight Committee.

The Oversight Committee to which complaints of misbehaviour have to be submitted shall within 3 months of its receipt refer it to the "Scrutiny Panel" of the respective court to scrutinize and report thereon. The Bill requires constitution of a "Scrutiny Panel" consisting of three judges of the court both in the Supreme Court and in every High Court. If the Scrutiny Panel is satisfied that there are sufficient grounds for proceeding against the judge, it shall, after recording reasons therefore, submit a report on its findings to the Oversight Committee for making a formal inquiry. If the complaint is found frivolous or vexatious, or, is not made in good faith, or there are not sufficient grounds for inquiring into the complaint, it shall report to the Oversight Committee accordingly. A time limit of three months is prescribed for the Scrutiny Panel to submit its report. The Scrutiny Panel is given the powers of a civil court in respect of summoning the attendance of persons, requiring the production of documents, receiving evidence on affidavits, issuing commissions for examination of witnesses or documents etc.

If the Scrutiny Panel recommended inquiry, the Oversight Committee shall constitute an "Investigation Committee" consisting of such members as it considers appropriate. These committees again have all the powers of a civil court for conducting the investigation. It can even authorize search and seizure of documents for which it has the powers of a Magistrate under the Criminal Procedure Code. It can proceed ex-parte in conducting the investigation if the judge concerned does not co-operate or

refuses to appear before it. The Investigation Committee shall frame definite charges against the judge, communicate the same and supporting documents to the judge who shall be given reasonable opportunity to present a written statement of defense. The inquiry is to be conducted in camera and shall be completed within a period of six months. The Investigation Committee after completion of the inquiry in respect of a complaint, shall submit its findings to the Oversight Committee for further action.

Penalties and Procedures:

During the pendency of the inquiry by the Investigation Committee, the Oversight Committee may recommend stoppage of assigning judicial work to the concerned judge if it appears to the Oversight Committee that it is necessary in the interest of fair and impartial scrutiny of complaints.

In respect of penalties on conclusion of inquiry, the Oversight Committee has a range of powers. If it finds no charges have been proved, it shall dismiss the complaint and close the matter. If it finds that the charges proved do not warrant removal of the judge, it may, by order, impose penalties such as issuing advisories, issuing warnings, withdrawal of judicial work, seek voluntary retirement or censure or admonish, publicly or privately. It can, in appropriate cases, further recommend to the Central Government for prosecution of the judge in accordance with the law for the time being in force. In serious cases warranting removal, it can advise the President accordingly.

The law requires confidentiality of the names of persons involved during complaint procedure and the names cannot be disclosed to anybody else including the media without the prior written approval of the Oversight Committee. The complainant can also seek such confidentiality from the Oversight Committee or the Scrutiny Panel or the Investigation Committee as the case may be.

The Bill also lays down the procedure for presentation of an address in Parliament for removal of a judge on the advice of the Oversight Committee. There are number of offences created by the Bill in respect of intentional insult or interruption to the Oversight Committee, violation of confidentiality in complaint procedure, making false and vexatious complaints against judges etc.

The Bill repeals the existing Judges (Inquiry) Act, 1968.

NEWS, NOTES, APPOINTMENTS, UPCOMING EVENTS ...

CJJI Intensive Study Programme for Judicial Educators, 2010

The seventeenth annual Intensive Study Programme for Judicial Educators (ISP) took place from June 6 – 25, 2010. The programme was attended by 17 participants from 11 countries. In attendance were: The Honourable Justice Louise Esther Blenman, Anguilla; The Honourable Justice Tom Gray, Australia; The Honourable Justice Robyn Layton, Australia; The Honourable Justice Dawn Gregory-Barnes, Guyana; Ms. Priya Sewnarine-Beaharry, Senior Magistrate, Guyana; Professor Ved Kumari, Chairperson, Delhi Judicial Academy, India; Ms. Anu Malhotra, Director, Delhi Judicial Academy, India; The Honourable Mr. Justice Tassaduq Hussain Jilani, Supreme Court, Pakistan; Mr. Parvaiz Ali Chawla, Director General, Federal Judicial Academy, Pakistan; The Honourable Justice Marina L. Buzon, Philippines; The Honourable Judge Maria Rowena M. San Pedro, Philippines; The Honourable Mr. Justice Emmanuel E. Roberts, Sierra Leone; The Honourable Justice Davidson K. Baptiste, St. Lucia; The Honourable Justice Stanley B. Maphalala, Swaziland; The Honourable Mr. Justice Geoffrey A. Henderson, Trinidad and Tobago; The Honourable Mme. Justice Judith Jones, Trinidad and Tobago; and His Worship Roy Byaruhanga Milton, Registrar Research and Training, Uganda.

The first two weeks of the programme were spent in Halifax, Nova Scotia. During this time, sessions were held on the following topics: judicial education and judicial reform; curriculum development; adult education – teaching and learning; case flow management; portrayal of judges in film; judicial independence; judicial discipline; sentencing; judicial communication; and judgment writing. The sessions were held in a manner which fostered open discussion and collaborative project work that allowed participants to draw on the specific realities of their home countries to make every learning outcome as relevant and applicable as possible. The participants were divided into three groups for programme development on the topics – balancing national security and human rights; environment law and child pornography.

The final week of the programme was spent in Ottawa and Toronto. While in Ottawa participants visited the Ontario Court of Justice; National Judicial Institute, Canada's national judicial education body; the Office of the Commissioner for Federal Judicial Affairs; the Canadian Judicial Council and the Supreme Court of Canada. The participants then traveled to Toronto to view some of Canada's most innovative specialized courts: The Drug Treatment Court, Aboriginal People's Court, Mental Health Court, and Domestic Violence Court; and the Office of the Chief Justice of the Ontario Court of Justice.

Overall, the ISP 2010 was favourably received by all those who participated. Participants left the programme armed with new tools and skills for judicial training and a wealth of knowledge and information on establishing new or building upon existing judicial education bodies.



Malawi

In the month of May, 2010, I gave what has been described by many as a landmark judgment on how Malawi elected the Leader of Opposition in Parliament. Many have remarked that the judgment also rescued democracy in Malawi which was in danger of being seriously harmed. I also refused an application for the stay of the judgment.

Again on 15th June 2010, the Malawi Parliament passed a comprehensive law on matters concerning children under a Child Care, Protection and Justice Act, Act No 22 of 2010. The passage of that law made me particularly happy because I chaired the Special Law Commission that proposed the Bill, later passed into law with very few and minor changes. The work of the Special Law Commission took a number of years and involved a comparative study of child related laws of various jurisdictions in African countries, Australia, New Zealand, The United Kingdom, Canada, the United States of America, as well as the many international instruments on children. Study tours were conducted in the process of formulation of that law. The new law consolidates the law relating to children by making provision for child care and protection and for child justice; and for matters of social development of the child. Duties and responsibilities of parents are emphasized. Guardianship and fosterage as well as community participation in the care and protection of the child are matters highlighted. In matters of child justice, diversion from normal criminal or court processes is the predominant feature. Reformation, rather than punishment, of a child in conflict with the law is emphasized.

Another important development in Malawi is the passing of an amendment to the Legal Education and Legal Practitioners Act, Cap 3:04 of the Laws of Malawi, providing for the establishment of the Malawi Institute of Legal Education. This amendment was passed by Parliament on 24th June 2010. The function of the institute shall be to provide practical legal training in courses approved by the Malawi Council of Legal Education for purposes of practice in Malawi and such training is at post-graduate level. The Institute shall be subject to the general and special directions of the Council in carrying out its functions and shall have a Director

**Supplied by Hon. Justice R.R. Mzikamanda
CJEI Fellow, 1995**

The Eastern Caribbean Supreme Court (ECSC)

The Hon. Chief Justice Hugh Anthony Rawlins (CJEI Fellow 2004), in keeping with his commitment to reforming and strengthening the Eastern Caribbean Supreme Court, has introduced the following initiatives to integrate modern technology with the justice delivery system and to facilitate a more timely access to justice:

Video-Conferencing Technology: The Eastern Caribbean Supreme Court (ECSC) recently installed Video Conferencing equipment at its Headquarters in Saint Lucia. This is the first phase of the sub-region-wide installation venture. This will be complemented with installations currently being undertaken by the Caribbean Court of Justice (CCJ) at High Courts (of all the independent Member States) in the sub-region. The CCJ project is being funded by the European Union and is expected to be completed by December 2010. On completion of the project, the ECSC will be able to conduct regular Court of Appeal sittings via the new facility. This will obviously redound to significant cost savings to the Court as a result of the reduced travel for the Court of Appeal.

Jury Management: Significant changes are underway in Saint Lucia, which will enable the Court to use computer programs and electronic databases in the Jury Management process. Rule 12.1 of the Criminal Procedure Rules 2008 approves the use of these facilities, developed in compliance with the relevant legislation concerning jurors lists, approved by the Chief Justice, which may be used in lieu of the Juror's Book for the selection, summoning and empanelling of jurors and calculation of fees to be paid to jurors. The IT Department will initiate discussions with the software vendor PCSS to develop mechanisms for the use of their Jury Manager software for management of the entire Jury process at the Criminal Division in Saint Lucia.

E-Filing and Interactive Voice Response (IVR) Technologies: During last year, new technical issues arose with the implementation of E-Filing and Interactive Voice Response (IVR) technologies. Whereas the E-Filing solution will eventually be established by the Court, the implementation of the IVR is being revisited based on issues surrounding its user-friendliness. The Court is exploring the movement towards an alternative technology to IVR - iJEMS by PCSS [an internet search and inquiry system of the Judicial Enforcement Management System (JEMS)].

Court-Recording Technology: The introduction of Audio (Analog) recorders in Courts, in 2003, signified the commencement of automation of recording court proceedings from the courtrooms of the sub-region. As a result of the obsolescence of this analog technology, plans have commenced to replace analog equipment with digital recording equipment and software solutions in the various courtrooms of the sub-region. To date the St. Vincent and the Grenadines High Court and the Criminal Division in Saint Lucia are using this technology. The ECSC will continue to explore the use of Digital Court Recording Software solutions during 2011, with a view to advise Member States on the most cost effective way forward.

JEMS: User Training Workshop: The Judicial Enforcement Management System (JEMS) continues to have a positive impact on the operations of court offices throughout the sub-region.

Halls of Justice Project: The Halls of Justice Project seeks to have new, modern, state of the art facilities in each of the nine Member States and Territories of the Organisation of Eastern Caribbean States.

Sierra Leone

Sierra Leone continued to work on establishing their Judicial Institute. In November, Justice Joseph Akamba (CJEI Fellow 2009) from Ghana went to Sierra Leone for a week as a consultant to help in setting up the Institute and Justice Emmanuel Roberts (CJEI Fellow 2010) worked closely with him. On December 9, 2010, the Judicial and Legal Training Institute in Sierra Leone was opened.

Trinidad and Tobago

The Trinidad and Tobago Judicial Education Institute (TTJEI) is in its eighth formal year of operation and our mission is to promote excellence through continuous training and development of judges, judicial officers and key support staff of the judiciary of Trinidad and Tobago.

From its inception the TTJEI has benefited from the training offered by the Commonwealth Judicial Education Institute (CJEI), and in particular from its Intensive Study Programme for Judicial Educators. Indeed, over the years many members of the Judiciary of Trinidad and Tobago have graduated as Fellows of the CJEI*

The available cadre of Fellows of the CJEI has been largely responsible for the successful growth and development of the TTJEI over the years, to the point where it has in 2010 submitted, for the approval of the Cabinet of Trinidad and Tobago, a major restructuring proposal that would see the TTJEI adding to its formal structure, inter alia, the following posts: a Judicial Educator, a Research Officer, a Librarian, an Information Technology Specialist and a full time Programme Director, all with the necessary support staff. The future of the TTJEI looks both promising and exciting, as it continues to expand its capacity to serve the Judiciary of Trinidad and Tobago.

The TTJEI has recognized that there is a need for the development of an original Caribbean and local Jurisprudence. In furtherance of this the TTJEI has hosted Dr. Leighton Jackson, Lecturer at the Faculty of Law, UWI to conduct workshops on this topic

The TTJEI also recently delivered two three-day programmes on Legal Reasoning and Writing for Judicial Research Assistants (JRAs) that were extremely well received by JRAs and the judges. JRAs assist judges and judicial officers in legal research and writing.

Wellness

The TTJEI continues to respond to the need to ensure that all judges and judicial officers are able to cope effectively in an increasingly stressful and demanding working environment. Two two-day non-residential Wellness Workshops for all judges and judicial officers were offered in 2010. The objective of the first workshop focused on personal levels of wellness and how that influences the quality of thinking and decision-making. The second focused on 'Assertion, Aggression, Anger - The Differences Between Them and Their Value'. It was intended to help participants raise their levels of understanding and self-awareness of the value of their assertive energies; to understand anger, its value and power; and to provide them with information and tools to help them manage their assertive energies in constructive (not destructive) ways. Both were extremely well received.

Wellness Workshops are a permanent part of the training landscape of the TTJEI and new workshops will be offered in 2011.

Partnerships

The TTJEl closely with the Hugh Wooding Law School to facilitate three levels of Paralegal Training for staff. This includes a four afternoon Orientation to Court Processes Programme, a 40 hour Basic course and a 48 hour Advanced course. Many jobs within the Judiciary require staff to have at least successfully participated at the basic level. Successful participants are issued joint JEI and Hugh Wooding Law School certificates which are recognized internally and externally as legitimate paralegal qualifications.

Publications

The TTJEl has successfully published three Educational Monographs, which have been circulated in CD format to all judicial officers.

The TTJEl has also undertaken the publication of a **Sentencing Handbook**, which will serve as a reference guide for all judges and judicial officers of the range of sentences imposed for selected specific offences together with an indication of aggravating and mitigating factors. The research has been undertaken by local judges and judicial officers assisted by their judicial research assistants and has been completed, and the content and layout of the publication settled. Publication is expected in December 2010.

The theme for 2010 – 2011 is “TECHNOLOGY AND ITS IMPACT ON JUDGING AND THE JUDICIARY.

The overall hope of this initiative is to encourage judges and judicial officers to understand and fully utilize the technological “tools” available that can assist in the practical areas of judging. It is also hoped as well that the use of technologies can effectively facilitate opportunities for interaction in new ways among judges and judicial officers.

The administrative arm of the TTJEl (our “Team JEI”) is headed by our Coordinator, Ms. Alyson Myers (CJEI Fellow 2008), who sits on the Board of the TTJEl and who is ably assisted by Ms. Bianca Morris, Ms. Amina Ward and Ms. Nikeisha Atwell. At this time all of the work and offerings of the TTJEl are coordinated and managed essentially by these four dedicated staff members of the TTJEl.

***Supplied by Hon.Mr.Justice Peter Jamadar (CJEI Fellow, 2004) and
Ms. Alyson M. Myers, Co-ordinator, TTJEl (CJEI Fellow, 2008)**

APPOINTMENTS



Hon'ble Justice S.H. Kapadia
Chief Justice of India

INDIA

Mr. Justice Sarosh Homi Kapadia is appointed the 38th Chief Justice of the Supreme Court of India after a distinguished career as judge of the Bombay High Court, Chief Justice of the Uttarachal High Court and judge of Supreme Court. He is the first Chief Justice of India who happened to be born after India attained Independence in 1947.

Chief Justice S.H. Kapadia has taken charge at a time when Indian judiciary is accused of having done precious little against corruption and the mounting arrears and delay in dispensing justice. Known as a no-nonsense judge, Justice Kapadia is expected to infuse a new work culture and discipline in the system during his tenure as Chief Justice which continues through September, 2012.

ETHIOPIA

Justice Menberetsehay Tadesse (CJEI Fellow 1996) was appointed Director General of the Justice and Legal System Research Institute on June 8, 2010.

MALDIVES

In August 2010, Justice Ali Hameed Mohamed (CJEI Fellow 2009) was appointed a Judge of the Supreme Court of Maldives.

OECS

The Hon. Chief Justice Hugh Anthony Rawlins (CJEI Fellow 2004) was appointed to serve as a member of the Regional Judicial and Legal Services Commission (RJLSC) for a three-year term with effect 12th January 2010.

The RJLSC was established by the Agreement Establishing the Caribbean Court of Justice (CCJ), and is mandated to appoint the Judges, and recommend the appointment of the Chief Justice of the CCJ.

PAKISTAN

Mr. Justice Asif Saeed Khan Khosa (CJEI Fellow 2006 and Director) was appointed a Judge of the Supreme Court of Pakistan on February 18, 2010.

TRINIDAD AND TOBAGO

After serving as an acting judge of the Supreme Court since February 2008, Justice Robin Mohammed (CJEI Fellow 2004) was made a permanent Judge of the Supreme Court in September 2010.

UPCOMING EVENTS

17th Commonwealth Law Conference, 5 – 9 February 2011, Hyderabad, India

International Humanitarian Hope Organization (IHHO) Symposium, February 21 – 24, 2011, Washington DC United States of America first phase and February 27 – March 2, 2011 in Dakar, Senegal, West Africa second phase

The Hague Forum for Judicial Expertise, 5-Day Course on International Law for Judges and Other Professionals in the Justice Sector, March 7 – 11, 2011, The Hague, The Netherlands

National Center for Justice and the Rule of Law, The Fourth Amendment for Appellate Judges: Foundational Principles and Selected Current Issues, March 9 - 11, 2011, Oxford, Mississippi, USA

Australasian Institute of Judicial Administration (AIJA), Child Protection in Australia and New Zealand - Issues and Challenges for Judicial Administration, May 5 - 7, 2011, Brisbane, Australia

National Center for Justice and the Rule of Law, Comprehensive Search and Seizure Training for Trial Judges, May 23 - 26, 2011, Reno, Nevada, USA

Commonwealth Judicial Education Institute (CJEI), Intensive Study Programme for Judicial Educators, June 5 – 24, 2011, Halifax, Ottawa and Toronto, Canada

Commonwealth Magistrates' and Judges' Association (CMJA) Conference, July 18 – 21, 2011, Kuala Lumpur, Malaysia

National Center for Justice and the Rule of Law, Search and Seizure of Computers and Digital Evidence for Trial and Appellate Judges August 25 – 26, 2011 Oxford, Mississippi, USA

International Organization for Judicial Training (IOJT) Conference, October 31 – November 3, 2011, Bordeaux, France

International Association of Women Judges (IAWJ), 11th Biennial Conference, May 2 – 5, 2012, London, United Kingdom

BOOK REVIEWS

The Idea of Justice

By Amartya Sen, Published by Penguin (Reproduced from Book Review for The Times)

Sen is one of the great thinkers of our era, and his writings range from discursive and luminous interventions on great modern questions, such as identity and famine, to major complex works on political philosophy. At a moment when many are wondering whether there couldn't be a better world than that preceding the credit crunch, and better lives to be led, Sen is publishing... *The Idea of Justice*, an attempt to construct a new way of understanding what a more just world might be like... If a public intellectual is defined by his or her capacity to bridge the worlds of pure ideas and the most far-reaching policies, Sen has few rivals... Sen's revolutionary idea is that of capability, the capacity that people have for living and choosing how to live a good life. A good idea of justice concerns enhancing capability.

--David Aaronovitch (*The Times* 20091024)

Scorpions: The Battles and Triumphs of FDR's Great Supreme Court Justices

By Noah Feldman, Published by Twelve; 1st Edition (November 8, 2010)

Review reproduced from Publishers Weekly.

Publishers Weekly

As a conservative Supreme Court flexes its muscles against a Democratic president for the first time since the New Deal, a series of recent books has explored the constitutional battles of the Roosevelt era and their contemporary relevance. Harvard law professor Feldman's *Scorpions* focuses more on the battles of the 1940s and 1950s, and it is distinguished by its thesis that the "distinctive constitutional theories" of Roosevelt's four greatest justices, all of whom began as New Deal liberals--Hugo Black, William O. Douglas, Felix Frankfurter, and Robert Jackson--have continued to "cover the whole field of constitutional thought" up to the present day. Feldman argues that Black, the liberal originalist; Douglas, the activist libertarian; Frankfurter, the advocate of strenuous judicial deference; and Jackson, the pragmatist; achieved greatness by developing four unique constitutional approaches, which reflected their own personalities and worldviews, although they were able to converge on common ground in *Brown v. Board of Education*, which Feldman calls the last and greatest act of the Roosevelt Court. The pleasure of this book comes from Feldman's skill as a narrator of intellectual history. With confidence and an eye for telling details, he relates the story of the backstage deliberations that contributed to the landmark decisions of the Roosevelt Court, including not only *Brown* but also cases involving the internment of Japanese-Americans, the trial of the German saboteurs, and President Truman's seizure of the steel mills to avoid a strike. Combining the critical judgments of a legal scholar with political and narrative insight, Feldman is especially good in describing how the clashing personalities and philosophies of his four protagonists were reflected in their negotiations and final opinions; his concise accounts of *Brown* and the steel seizure case, for example, are memorable. And he describes how the rivalries and personality clashes among the four liberal allies eventually drove them apart: Hugo Black's determination to take revenge on those who offended his Southern sense of honor led him to retaliate not only against Jackson and Chief Justice Harlan Fiske Stone but also against the racist Southerners who had disclosed his former Ku Klux Klan membership to the press. Not all readers will be convinced by Feldman's thesis that the judicial philosophies of the Roosevelt justices continue to define the Court's terms of debate today: on the left and the right, there are, for example, no advocates of Frankfurter's near-complete judicial abstinence or of Douglas's romantic libertarian activism. And in the political arena, the constitutional debates of the 1940s and '50s seem less relevant today than those of the Progressive era, when liberals first attacked the conservative Court as pro-business, and conservatives insisted that only the Court could defend liberty in the face of an out-of-control regulatory state. But Feldman does not try to make too much of the contemporary relevance of the battles he describes: this is a first-rate work of narrative history that succeeds in bringing the intellectual and political battles of the post-Roosevelt Court vividly to life. [Reviewed by Jeffrey Rosen, a law professor at George Washington University, is the author of *The Supreme Court: The Personalities and Rivalries That Defined America*, Publishers Weekly].

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