

# THE IMPACT OF CORRUPTION WITHIN THE COURT SYSTEM ON ITS ABILITY TO ADMINISTER JUSTICE

by

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I commend the organisers of this 14<sup>th</sup> Commonwealth Law Conference on the choice of the theme **“Developing Law and Justice”** and the various streams which include human rights and corruption within the Courts, issues which are inter-related and important in the administration of justice.

One of the fundamental rights of humankind is the expectation of reciprocity of treatment in the conduct of one’s affairs. This translates into being just and fair, and to be so treated in the courts which are charged with administering justice. In discharging this obligation, the streams of justice must be kept pure and unadulterated, not clogged or polluted.

The right to be treated fairly is recognised in international human rights treaties. **The Universal Declaration of Human Rights**<sup>1</sup> stipulates that every human being is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations of any criminal charge against him.

The **1966 International Covenant on Civil and Political Rights**<sup>2</sup> similarly provides, and the Human Rights Committee has unambiguously held that “the right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception”.<sup>3</sup> Other international treaties have similar provisions, e.g. the African Charter on Human and People’s Rights, the American Convention on Human Rights and the European Convention on Human Rights.

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<sup>1</sup> Article 10

<sup>2</sup> Article 14 (1)

<sup>3</sup> Communication No. 263/1987, M. Gonzalez del Rio-v-Peru (Views adopted on 28 October, 1992)

The common thread woven into all of these treaties and which is relevant to the topic under discussion is the impartiality of the court or tribunal. The objective of every court in the judicial system of any nation is to administer justice by protecting the rights of citizens. Justice can only be achieved by holding the scales evenly which involves being impartial. No party should come to the court with an unfair advantage over the other.

Preservation of the integrity of the judicial system is a sine qua non of its effectiveness, and this can be tarnished by the corruption of its functionaries no matter how lowly. The whole structure becomes infected resulting in loss of confidence and trust in the persons responsible for safeguarding the rights of a state's citizens.

### **CORRUPTION**

Corruption in its ordinary meaning connotes dishonest or fraudulent conduct, typically involving bribery, and in the context of this paper attributable to persons who are in positions of authority or in a position to influence those in authority. It has also been defined as the abuse of public office for private gain.<sup>4</sup> Members of any judiciary by virtue of their eminence are expected to be pillars of rectitude in their communities, and above reproach. They are expected to provide solutions to problems and redress for violation of rights. They are expected to be objective in assessing evidence and determining guilt or innocence.

Oft times in some jurisdictions the failure of governments to ensure the independence of the judiciary by according to it adequate and reasonable financial resources leads to corruption within the court system. If judges and support staff are inadequately paid or remunerated for their services they will inevitably become vulnerable to external pressures and corruption.

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<sup>4</sup> Framework for Commonwealth Principles on Promoting Good Governance and Combating Corruption approved by CHOGM in Durban, 1999.

In 1985 the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted the Basic Principles on the Independence of the Judiciary which was later unanimously endorsed by the General Assembly of the United Nations.<sup>5</sup> One of the Principles is to this effect:

***“It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions”.***

The whole issue of the independence of the judiciary has been debated and discussed repeatedly at different fora. One wonders whether any judiciary can ever be totally independent having regard to the fact that its whole existence requires some dependence on the legislative and executive branches of government. The judiciary cannot stand in isolation. It needs to be funded by the government, and some postulate that this compromises its independence and violates the doctrine of separation of powers. This is a notion to which I do not subscribe since of necessity every state must provide for the establishment of a court system which must be adequately staffed and funded. To request and expect adequate financing in no way compromises the independence or integrity of those who work within the judicial system. The compromise results when little or grossly inadequate financial resources are allocated to the administration of justice in a government’s budget, and the judiciary is relegated to the position of a mendicant in order to keep the court system on an even keel.

The symbiotic relationship between the executive and the judiciary was fully ventilated in the **Report of the American Bar Association Commission on Separation of Powers and Judicial Independence**<sup>6</sup> where it was stated that the success of any cooperative and constructive relationship ultimately depends upon meaningful communication. The Executive must appreciate that the Judiciary is usually in a better position to determine the most efficient and effective means of administering the

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<sup>5</sup> General Assembly resolutions 40/32 of 29 November, 1985 and 40/146 of 13 December, 1985

<sup>6</sup> 1997 – Findings, Conclusions and Recommendations

courts, and must remain attentive to the Judiciary's needs and concerns. By that same token, the Executive is in a better position than the Judiciary to decide upon fiscal priorities, and it behoves the Judiciary to be sensitive to those priorities when communicating its own needs and concerns.

A balancing act of competing priorities for finance is always performed in developing countries with scarce financial resources. This results in the administration of justice being placed at the bottom of the scale when cash-strapped governments have to decide whether a school or hospital should be erected rather than a new court building or whether the emoluments of the judiciary should be increased.

The inevitable result of persistent failure to address the needs of a state's judiciary is that the scourge of corruption rears its ugly head. Judicial officers may be tempted to devise ways and means to augment their limited earnings. This also spreads to an underpaid and overworked support staff within the court system. These lowly persons are the main focus of my attention in that they can influence adversely the public's perception of a judicial administration which strives valiantly to uphold standards of fair play and principles of impartiality.

In the judicial systems of most developing countries the support staff which comprises clerks, typists, marshals and bailiffs is drawn from the traditional public service with fixed salary scales which are invariably low and hence attract persons with minimum qualifications. In most instances the wages earned can barely meet their living expenses. They are, however, expected to conform to high moral standards of behaviour befitting an institution charged with the responsibility of preserving the law and dispensing justice. They are expected to be scrupulously honest and fair in their interactions with the public, but are exposed on a daily basis to temptations and requests from parties to litigation in the courts to alter and remove files and documents or misrepresent facts or try to influence judges with whom they work.

The problem of corruption within the court system has gained momentum in proportion to the growth of the drug trafficking and narcotics trade. As law

enforcement personnel seek new ways of prosecuting drug offenders these wily fiends devise methods to infiltrate the court system by targeting the persons who work within it, particularly those at the lower levels who are the most vulnerable and easy prey to temptation having regard to their fragile financial situations.

One may posit the view that all support staff in the court system should be adequately trained not only in the procedures to be followed in the performance of their duties, but also in the ethics and moral norms of behaviour which they are expected to uphold. This is a laudable and commendable objective, but is it easily achieved by personnel whose earnings are minimal? The temptation to transgress may be too great to resist.

The answer to this may not be easy for poor developing countries, but efforts must be made and methods devised to increase the emoluments of the support staff in the court system. Failure to do so and do so effectively will result in an infection of the system with a virus of no mean proportion with justice being sold to the highest bidder, not to mention loss of confidence by the public in the ability of judges to effect justice fairly and without favour.

Having identified the problem, one may ask quite naturally what can be done to eradicate corruption. For a judicial system to function effectively, justice must not only be done but be seen to be done. Public perception is very important, and those who administer the court system must be perceived to be acting firmly and resolutely in eradicating any form of corruption. Several initiatives can be taken to maintain public confidence and restore it if it is perceived to be lost. One such initiative mentioned earlier was increasing the emoluments of the support staff, and I may also add the emoluments of judicial officers where necessary. Before proceeding to discuss other initiatives I wish to make reference to the **Limassol Conclusions**.

## **LIMASSOL CONCLUSIONS**

From 25-27 June 2002, Commonwealth Judicial Officers comprising Judges, Heads of Judiciary and Magistrates throughout the Commonwealth met in Limassol, Cyprus, at a Colloquium on ***Combating Corruption Within the Judiciary***.

The Colloquium welcomed the commitment of the Commonwealth Heads of Government to the Framework for Commonwealth Principles on Promoting Good Governance and Combating Corruption<sup>7</sup> and their intention to develop national strategies to promote good governance and eliminate corruption. The **Limassol Conclusions** can be regarded as one of the initiatives spearheaded by the Commonwealth Secretariat to eliminate corruption in one area where it ought not to be allowed to flourish, namely the Judiciary.

After extensive discussion in working groups on papers presented during the Colloquium by distinguished jurists, a variety of recommendations appropriately called the **Limassol Conclusions** were adopted. These conclusions are wide-ranging and multi-dimensional covering as they do guidelines on judicial ethics, anti-corruption programmes, strategies at eliminating corrupt practices within the judiciary, recruiting persons of integrity and competence, to name a few.

With regard to judicial ethics formulation and adoption of a code was recommended to the judicial systems throughout the Commonwealth, and I would like to add here that such a code should not be confined to judges or magistrates only, but should be formulated for all support staff and personnel employed within the system. Training programmes were also recommended, and again these should be organised for the support staff as well. Such persons must be sensitised to the realisation that they are an integral part of the court system, and misconduct on their part reflects adversely on the entire administration of justice.

The recommendations embraced members of the legal profession as well, with a suggestion that anti-corruption programmes for members of the Bar be promoted. This is very timely and necessary since in some jurisdictions support staff are particularly vulnerable to unscrupulous lawyers who dangle financial carrots and

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<sup>7</sup> Supra, footnote 4 at p. 2

inducements before economically-deprived court employees in order to ensure their clients' acquittal or determination of cases in their favour.

With regard to the underpaid support staff one working group at Limassol recommended that such persons should be appointed to positions in the judicial system by the same body or commission which is responsible for appointing judicial officers in countries where such a commission exists. This commission should be independent and constitutionally established and protected. Judicial appointments should not be placed in the hands of the Executive or Head of Government which will clearly compromise the integrity of the judiciary. Similarly, persons at lower levels in the judicial system need to be insulated from governmental pressure, and be paid salaries and emoluments commensurate with the positions they hold.

The Colloquium recognised that transparency assists in combating corruption, and suggested that judicial officers and court staff be encouraged to foster greater public awareness of the court's operations, role and function. For too long the court has been regarded as a mysterious organisation too complex for ordinary minds to comprehend, with its sombre attire, legal jargon and age-old traditions. Appearing before an austere personage dressed in peculiar black robes and looking down from on high can be a terrifying experience for the average person. Those who are responsible for the administration of justice need to make courts more user-friendly while at the same time preserving some of the traditions and certainly its dignity.

Regular visits to the courts in jurisdictions of the Commonwealth should be encouraged. Justice must not be regarded as a cloistered virtue; it must be patent and not obscure. The public must have free access to the courts and see the system at work. If this is denied inevitably adverse conclusions will be drawn based on hearsay and rumours which can only enure to the detriment of the administration of justice and an erosion of public confidence.

Overall, recommendations made at Limassol were directed to all stakeholders connected with the judicial system, namely, the judiciary itself, the legal profession, and governments. Of course, the main stakeholder is the judiciary and those charged

with its administration. The buck stops there, and the primary responsibility for eradicating corruption from the court system rests with the judiciary and its administrators. However, the judiciary does not operate in a vacuum, and it not self-sustaining. This leads me inevitably to a discussion of what is familiarly known as the **Latimer House Guidelines**<sup>8</sup>, and now formally called the **Commonwealth Principles**. For ease of reference I shall utilise the familiar nomenclature.

### **LATIMER HOUSE GUIDELINES**

These Guidelines were formally endorsed by the Commonwealth Heads of Government in 2003 at Abuja, Nigeria, and were principles on good practice governing relations between the Executive, Parliament and the Judiciary in the promotion of good government, the rule of law and human rights. The sections relevant to this presentation are Preserving Judicial Independence, Judicial Ethics, and Judicial Accountability.

In the section on Preserving Judicial Independence, the responsibility of providing sufficient and sustainable funding to enable the judiciary to perform its functions to the highest standards rests on the government. Such funds once voted for the judiciary by the Legislature should be protected from alienation and misuse. The allocation or withholding of funding should not be used as a means of exercising improper control over the judiciary. Further it was stated that appropriate salaries and benefits, supporting staff, resources and equipment are essential to the proper functioning of the Judiciary, and as a matter of principle judicial salaries and benefits should be set by an independent body and their value maintained.

The Judiciary's independence is severely compromised if it has to depend on the Executive for increases in its emoluments whenever that Executive sees it fit to grant an increase. This should be placed in the hands of a non-partisan body to review and recommend increases whenever necessary taking into account relevant factors.

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<sup>8</sup> Formulated at Latimer House, United Kingdom, in June 1998.

As mentioned earlier in reference to the Limassol Conclusions the Guidelines in relation to Judicial Ethics stipulate that a code of conduct should be developed and adopted by each judiciary as a means of ensuring the accountability of judges, and was in fact the basis for the recommendation in the Limassol Conclusions. Legitimate public criticism of judicial performance as a means of ensuring accountability was stressed in the Guidelines under this head.

The Colloquium at Limassol agreed that accountability was important if the judiciary is to develop competence and remain impartial and independent, and it was imperative that a mechanism be devised for dealing with complaints against judges. It urged that such mechanism must be transparent in order to command public respect and acceptance. However, **The Latimer House Guidelines** suggests that discipline of judges should be conducted by the chief judge and should not include public admonition. The thinking which informs this view is to avoid public humiliation and embarrassment thereby bringing the entire judiciary into disrepute.

Another aspect of accountability which forms part of the Limassol Conclusions is the relationship between the judiciary and the court staff to which I alluded earlier. The view was expressed that there should be a greater degree of judicial awareness of the work of the court staff, and liaison with the said staff should be encouraged in order to ensure the smooth operation of the judicial system.

In most jurisdictions members of the judiciary are totally unaware of the functions which support staff perform except of those working in close collaboration with the judge. Members of the judiciary need to climb down from their ivory towers and take an interest in what goes on around them. They need to be familiar with all aspects of the work of the courts and the persons who operate within the system. Every cog, no matter how small, is important if the wheels of justice are to turn smoothly. A greater degree of interaction is required in order to inspire confidence and trust between the judiciary and its support staff. If a level of trust is developed this may lead inevitably

to some degree of loyalty to the system, and perhaps reduce temptation which eventually leads to corruption of the entire judicial process.

## **CONCLUSION**

As indicated earlier in this presentation corruption in its ordinary meaning connotes fraudulent conduct typically involving bribery or some financial advantage. However, there are other aspects of corruption which are equally reprehensible, and I refer specifically to corruption of one's mind which in relation to the judiciary may be reflected in the delivery of perverse judgments based on a distortion of facts given at the behest of a relative or an acquaintance. This strikes at the very root of one's personal integrity, and unfortunately there are no easy solutions in this regard. Integrity is a virtue which inheres in an individual, and which cannot be taught.

The need for judicial codes of ethics cannot be over-emphasised as they may indicate what is regarded as acceptable conduct. Sadly, one cannot always assume that everyone who aspires to or holds judicial office is aware of the components of correct judicial behaviour. Codes of ethics hopefully will point would-be aspirants in the right direction.

The methods used to eradicate corruption from the judicial system will vary within jurisdictions, but the aim should always be to sensitise judicial officers and support staff to the need for upholding the integrity of their offices within the court system. It is a goal which must be pursued resolutely in the quest for good governance within the administration of justice.