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“Conflicts of Ideology and Crises of Conscience: The Disciplining of Judges in the 19th Century British Empire”

Presentation by John McLaren, Professor Emeritus of Law, University of Victoria, British Columbia, at the British Legal History Conference, June 2-5, 2007, Oxford University, St. Catherine's College

Unlike English judges who were appointed during good behaviour under the Act of Settlement, 1701, most 19th century colonial judges were appointed at the pleasure of the imperial executive. If found guilty of judicial misbehaviour, they were normally subject to removal (amoval) or suspension by the Crown's representative in the colony, subject to the subsequent approval or disapproval of the Colonial Office.

Colonial judges, especially chief justices, were viewed by London as key players in colonial governance and administration, advising the Crown's representative and, where such bodies existed, sitting on executive and legislative councils. They were also expected to draft legislation in the absence of reliable legal services elsewhere. These facets of the colonial judge's role were as true of the career of Jonathan Belcher, first chief justice of the Nova Scotia in the mid 18th century, as they were of his counterpart Matthew Baillie Begbie of British Columbia a century later. Given this close relationship between the judiciary and the executive the expectation was that colonial judges would hew to a Baconian conception of the judicial role as one of loyal service to the Crown.

One way of ensuring that colonial judges did not stray from this expectation was to appoint them at pleasure. If a judge proved to be refractory, the executive power of removal or suspension pending removal provided a quick and uncomplicated process for dealing resolutely with the situation. To allow a local legislative assembly into the process was seen as creating two dangers. In the first place it might provide a constituency of support for a rogue judge where the executive had strong reasons for dismissal. Secondly, if a legislative assembly were given powers to initiate and administer removal from office loyal judges could be held hostage to local sectional interests that might well be detrimental to the welfare of the colony.

The fact that colonial judges could be removed at pleasure did not mean, as on occasion it had done in 17th century England, that they could be removed without cause. Moreover, there was a power of review in the Privy Council. The authority for review lay in Burke's Act (1782). Section 2 provided that where colonial office-holders "neglected the Duty of such Office or otherwise misbehaved" they might be removed. Once removed, said section 3, the person, if aggrieved, was entitled to appeal "whereon such Motion shall be finally judged of and determined by His Majesty in Council." The statute specifically stated that nothing in its terms was considered to prevent the grant of offices at pleasure. Practice suggests that when reviewing removals the Privy Council needed to be satisfied that the judge had been given full notice of the charges against him, invited to answer the allegations leveled and granted a hearing, as well as requiring cause.

Before 1833 appeals by colonial judges against removal were heard by an ad hoc committee of the Council. With the legislative establishment of the Judicial Committee of the Privy Council in that year as the final court of appeal in the Empire, this appellate jurisdiction devolved on that body.

Although removal with a right of appeal was the normal and, from the Privy Council's view the preferable way of proceeding, there was an alternative route. The Privy Council also had an original jurisdiction over the misbehaviour of colonial judges. It was thus open to the Council to respond to a petition from a colonial legislature requesting the removal of a judge for conduct unbecoming in the way it saw fit.

A third route for dealing with a recalcitrant colonial jurist was his recall by the Secretary of State for the Colonies. This expedient was employed where circumstances required a particularly resolute decision. In the case of recall, an exercise of the royal prerogative, there was no right of appeal.

Most difficult for the system to ignore were those judges who came directly into conflict with the administration in the colonies in which they served, on political grounds. These judges did not or were not thought to fit the Baconian mold.

Service in the colonial judiciary could be perilous for even those judges who it would be difficult to describe as mavericks. The career of the first Chief Justice of New South Wales, Francis Forbes, appointed in 1822, indicates the problems sometimes faced by a

judge with a very clear sense of his duty as judge both to serve the imperial interest, and to protect colonial judicial independence in a principled fashion. As a result of his disagreements over the extent of gubernatorial powers with Governor Ralph Darling, Forbes came within an ace of being recalled by the Colonial Office, along with his detractor, in 1828. Life in these often fractious micro-communities could be perilous even for the most professional and moderate of such judges.

The careers of those who for one reason or another saw themselves as activist political players in or saviours of the jurisdictions in which they served were normally not to survive the immediate conflicts that swirled round them. However, judges who successfully appealed removal or suspension (and some did) could expect judicial preferment in another colony.

What of the colonial judges who were disciplined or threatened with it for what we might describe as perceived political subversion? A prime example in Canadian colonial legal history is Robert Thorpe. In 1805 he was transferred on his request from the Chief Justiceship of Prince Edward Island where he had fallen out with the governor, Edmund Fanning, on land policy to the position of puisne King's Bench judge in Upper Canada. Thorpe quickly became embroiled in local politics in this fractious province. In his self-serving-and thoroughly indiscreet letters to the Colonial Office, but more especially in his decision, as a sitting judge, to stand in a by-election for the Legislative Assembly and, once elected, his conduct in endeavouring to lead the opposition Thorpe proved how injudicious he was. He had an inflated sense of his own destiny as the political saviour of

the colony, as well as a thoroughly distorted sense of the meaning of judicial independence. Not surprisingly he was removed by Lieutenant Governor Francis Gore on the authority of Lord Castlereagh in 1807.

Dismissed by many historians as a self-serving crank (historian Paul Romney labels him as “devious and hysterically irresponsible”), Thorpe in fact embodied a set of Irish and British Whig values which with some justification he used as a basis for critique of the conservative, anti-revolutionary political system in which he found himself. Strong evidence exists that Thorpe’s views on compact constitutionalism, that colonists enjoyed a direct relationship with the Crown unfettered by the imperial authorities, and his talk of something close to responsible government sowed the seeds of the campaigns of moderate colonial reformers, notably William Warren and his son Robert Baldwin, in later decades in Upper Canada. Apart from his inability to contain his political ardour and loose tongue, this judge’s problem was that his political views were out of sync with the conservative form of imperialism which had taken root in Britain in the wake of the American War of Independence and had been accentuated by rebellion in Ireland and the struggle with Napoleon Bonaparte.

Thorpe’s judicial career was not finished. Having successfully appealed to the Privy Council his dismissal on procedural grounds he was appointed Chief Justice of Sierra Leone in 1809. Problems with the Colonial Office over his salary and its perception that Thorpe was devious were to result in his being relieved of his office by Lord Bathurst in 1814. Thereafter, he faded from history although not before waging an intemperate

pamphlet war against the activities and leadership of the anti-slavery movement (especially William Wilberforce and Zachary Macaulay) over the governance of the colony.

That a judge did not have to manifest radical or even liberal propensities to find himself in ideological trouble and suffer the indignity of removal of office is evident in the case of Henry John Boulton. This scion of the arch-Tory Family Compact in Upper Canada had been removed from the position of Attorney General of that colony in 1832 on grounds of harassing radicals, especially William Lyon Mackenzie. Falling for Boulton's argument that instructions from the Colonial Office had confused him the illiberal, Colonial Secretary, Lord Stanley, appointed him Chief Justice of Newfoundland in 1833. Given the fact that this peculiar and tempestuous colony had just been granted a Legislative Assembly with a broad male franchise and that an alliance between reformism and the large Roman Catholic population in the jurisdiction had developed this was not an inspired choice. Boulton who like other Chief Justices enjoyed both political and judicial status (he was president of the Legislative Council) quickly ran into spirited opposition for his critical comments on and perceived antipathy to reformers and Roman Catholics (in the process attracting the critical attention of Daniel O'Connell M.P. who was increasingly directing his attention to the treatment of Roman Catholics in British colonies). The jurist was also reviled for his attempts to revamp the system for the selection of juries, and for his judicial decisions on both land holding and natural resources which sought to apply strict English law and ignored the attempts of his predecessors to mould the law to the particular character of economic and social relations

on the island. In response to a petition from the Legislative Assembly to remove Boulton from office, the Privy Council (in this instance an *ad hoc* committee) found that the Chief Justice had not abused or misrepresented the law. However, by his words and actions in the political sphere he had compromised the administration of justice in the colony and his termination was thus justified.

The short duration of Boulton's tenure in Newfoundland may be partly explained by the fact that London was in the process of rethinking its constitutional relationship with its colonies and the status of colonial judges who also acted as key players in the executive system of government. More influential, however, would have been the fact that Upper and Lower Canada were at that same time the sites of attempted insurrection, and it is likely that London did not want to add to its woes in North America by encouraging further internal conflict in its remaining colonies there.

The Caribbean colonies were to prove particularly perilous for judges who reacted unfavourably to the social and economic conditions they found in those territories, and in particular cruel treatment of slaves, former slaves and indentured labourers from elsewhere in the Empire.

Joseph Beaumont who was appointed Chief Justice of British Guiana in 1863 over a local candidate almost immediately ran into opposition from the Governor, Francis Hincks, and the planter elite in the colony. Hincks had had a previous career as an Upper Canadian politician, but had left the colony under a cloud because of the nature of his

involvement in railway speculation. The judge sought to establish his preeminence in matters relating to the administration of justice. His greater sin, however, was his attempts to alleviate the oppression suffered by both the former slave population and indentured labourers introduced from India and China and to actually apply law designed to afford them protection. A lone voice on the two legislative bodies in the colony Beaumont became more strident in his criticism of the executive and its supporters for their manipulation of the economic and social system and vigorous in opposing what he saw as corruption in the justice system. He was removed from office in 1867 on a petition from the local legislature to the Judicial Committee. The latter concluded that his criticism of the colonial executive and its tone were potentially subversive of political order in the colony.

Beaumont, bitterly disappointed at his treatment, returned to the English Bar and wrote a spirited book entitled *The New Slavery* in which he criticized the governance of the colony and especially the partial and harsh fashion in which the indenture system was administered. He was, it seems, a committed anti-slavery advocate committed to the rule of law who wore his principles on his sleeve and suffered for it. It is not idle to speculate that this judge fell victim to London's concern to keep its Caribbean colonies under greater control in the wake of the deep controversy surrounding the actions of Governor Eyre in Jamaica in proclaiming martial law in 1865 and allowing troops to summarily execute hundreds of suspected rebels. Beaumont may have received some consolation from knowing that changes were made in the administration of the indenture system as a

result of an inquiry by the Des Voeux Commission in the early 1870s in response to criticisms which had closely tracked his own.

Another judge who possessed well-developed liberal political views on the issues in the jurisdictions that he served was John Gorrie, in sequence puisne judge in Mauritius and Chief Justice of Fiji, the Leeward Islands and Trinidad and Tobago. Gorrie, a Scottish trained lawyer came by his political beliefs honestly. He had been a member of the radical wing of the Liberal Party under Gladstone and had acted as both counsel and newspaper correspondent for the Jamaica Committee set up in 1865 to bring Governor Eyre to book

Whether sitting on the Bench or on a judicial enquiry in these multi-racial colonies, Gorrie publicly voiced and became increasingly garrulous about his concerns over the oppression of the indentured, indigenous or former slave populations by the elite creole or settler elements in the populations in question. Although a paternalist supporter of imperialism, this judge felt a genuine affinity for the oppressed in the colonies in which he served. His demise came in Trinidad and Tobago where he succeeded in riling the settler elite who formed a majority in the legislative bodies of the colonies. He engaged in open and strident criticisms of their attitudes and manipulated the administration of justice to provide greater access to and better serve former slaves. Gorrie's enemies pressed vigorously for the removal of this "tyrannical judge". Swayed by the adverse findings of a judicial commission into the administration of justice in the twin colonies

Governor Broome ordered Gorrie removed from office in 1892. He died soon after, before he could present his case to the Privy Council.

Gorrie's career and judicial activities draw sympathy. As his biographer, Bridget Brereton, suggests, he was perhaps better suited for a career in politics which had eluded him as a young man or in colonial administration which he sought while in Fiji, than for service in the colonial judiciary. Moreover, although stubborn and given to ill-temper, Gorrie ranks with Beaumont, among these "mavericks" as one having consistent and principled concerns about the fate of the downtrodden in the imperial system. His departure from office and his death were deeply regretted by those whose interests he had tried to serve. Like Beaumont, I would argue, that Gorrie became a victim of an increasingly conservative form of imperialism in the later 19th century empire, especially in those colonies in which non-Europeans predominated, where responsibility for control of internal tensions was placed more clearly and exclusively in executive authority.

Clearly the position of colonial judges was less independent than their English counterparts. Although English judges were not entirely free from attempted political influence during the 19th century, overall there was recognition that they should be seen to be independent, and that they were not to be penalized for resisting arbitrary action by the State and its agents. No English judge was formally disciplined during that century. By contrast and ironically because they were meant to be political players in the territories in which they served, colonial judges who became too enmeshed in politics at a personal level and openly resisted colonial authority or a colony's power brokers could

expect vigorous opposition and steps to neutralize their influence. Several were disciplined and removed from office. Given the fact that in some colonies jurists lacked the benefit of professional camaraderie with a tight-knit coterie of judicial colleagues, not to mention a well-established Bar, the sort of professional support system and advice that their English counterparts could rely on was lacking. Even where there were judicial colleagues present and a local bar did exist, as in Upper Canada and the Caribbean colonies, ideological division and professional jealousy could be highly detrimental to an independently-minded judge from outside. However, although judges in small, often fractious, colonial communities were open to challenge from various quarters, the majority were able to keep their heads down and their seats on the bench secure, either because they deftly navigated the shoals of colonial backstabbing, or more likely because they were compliant and loyal servants of the colonial government. The few who ran into trouble for undue political involvement had or developed intense ideological commitment to causes which offended their colonial masters and did not jibe with the imperial policies of the particular era. As the case of Thorpe and Gorrie in particular demonstrate, narcissistic or cantankerous personal qualities did not help their cause.