“Judicial Independence: The Challenges of the Modern Era”
7-11 September 2014
Livingstone, Zambia
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Foreword

The 2014 CMJA Annual Conference was held from the 7-11 September 2014 at the Zambezi Sun. We wish to acknowledge the generosity of the Judiciary of Zambia, the Magistrates and Judges Association of Zambia, the Law Society of Zambia and the Members of the Local Organising Committee.

The Conference organised by the CMJA was open to all Commonwealth judicial officers and others interested in the administration of justice in the courts of the Commonwealth. 214 delegates and 44 accompanying guests from 35 Commonwealth jurisdictions participated in the meeting. I am very grateful for the support of the Steering Committee and our Executive and Admin Officer Temi Akinwotu in the preparation for the conference as well as our Conference Registrations Coordinator, Jo Twyman and our ever willing volunteer on site, Ms Debbie Le Mottee.

The programme consisted of Keynote Speeches and Panel Sessions on a range of issues relating to judicial independence. These were complemented by a number of Breakout Sessions and Specialist Sessions, which focussed on specific issues. This report contains the texts of the Keynote Speeches as well the panel papers received to date and summaries of some of the discussions held on Specialist issues.

Dr Karen Brewer
Secretary General

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Words of Welcome
By His Hon. John Vertes, CMJA President

We are here on the 50th anniversary of the independence of Zambia. I also wish to specially welcome the distinguished judicial leaders attending the Southern African Chief Justices Forum being held in conjunction with this Conference.

Ladies and Gentlemen, the Commonwealth has been rightly described as a family of nations, a family of independent nations allied not primarily for military or even economic objectives but by a shared vision of ethical governance, sharing a commitment to democracy and the rule of law while at the same time celebrating the diversity that exists within it.

The Commonwealth Magistrates’ and Judges’ Association has been in the forefront of promoting the rule of law, judicial independence and the good administration of justice throughout the Commonwealth for over 40 years. It is the only international judicial organisation bringing together judicial officers of all ranks and from all jurisdictions large and small. We provide judicial training and education. Over the past year we undertook training workshops in the Cameroon, Guyana, Kiribati and the Maldives. Through conferences such as this, we provide a forum where judicial officers may discuss issues of mutual concern and by doing so raise standards of judicial ethics and practice.

The CMJA monitors threats against judicial independence around the Commonwealth. Over the past year we have made representations on judicial independence and constitutional reforms that have affected judicial officers in several Commonwealth countries and issued joint statements with other associations relating to what we considered to be arbitrary and undue actions that threatened the independence of our judicial colleagues in those countries.

The CMJA continues to be active in promoting the Latimer House Principles on the separation of powers in order to safeguard the independence of the judiciary and fundamental rights in the interests of the public good. We have produced a number of reports and participated in a number of working groups that have resulted in submissions to Commonwealth Law Ministers and Heads of Government relating to issues of concern relating to judicial matters. Last year, the CMJA was commissioned by the Commonwealth Secretariat to produce a “Latimer House Toolkit” for dialogue between the three branches of government in order to ensure good governance in Commonwealth countries.

I highlight these activities because recent events across the Commonwealth have continued to underline the need to protect judicial independence – not as a right of the judiciary but as a right of the public that we serve.

Judicial officers in several countries have been subjected to removal without due process and in some notorious cases to impeachment and deportation.

Last year the Commonwealth Heads of Government endorsed a Charter that is supposed to enshrine the fundamental values of the Commonwealth: democracy, the rule of law, separation of powers, human rights, tolerance and freedom from discrimination of all kinds. We, in this Association, believe that an independent, effective and ethical judiciary is the primary vehicle for safeguarding these values.
The Theme of this Conference is: “Judicial Independence: Challenges in the Modern Era”. Over the next few days, we will explore issues relating to judicial accountability, security of tenure, anti-corruption measures, as well as diversity and gender equality. We believe you will find it stimulating and challenging.

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Keynote Speech
“Judicial Independence: The Challenges of the Modern Era”

By Her Hon. Acting Chief Justice Lombe P Chibesakunda, Zambia

It is my special pleasure to welcome you all most cordially to the 2014 Annual Conference of the Commonwealth Magistrates’ and Judges’ Association held here in Livingstone, Zambia’s Tourist Capital and Home to the Mighty Victoria Falls, shared with Zimbabwe, but of course a creation of nature for the benefit of all mankind hence a World Heritage Site; named by Dr. David Livingstone in Honour of Queen Victoria, in our local language the water falls is named, Mosi-oa-Tunya meaning “The Smoke that Thunders”.

INTRODUCTION
I am very pleased to note and take humble recognition that many of you have managed to come and attend this year’s CMJA Annual Conference despite your demanding and equally important day-to-day court work. The Honourable Judge Keith Hollis once remarked that “Most Commonwealth judicial officers come from the common law tradition. A tradition of an independent but isolated judge”. However, our overwhelming attendance bears testimony to our desire to break our isolations and be able to meet in this fashion to promote judicial dialogue, and judicial interaction thus sharpen one another. Undoubtedly, the Conference is aimed at enhancing networking within the Commonwealth Magistrates’ and Judges’ Association on judicial development, thereby advancing the administration of the law and justice. We are brought together because we share common usages, values, and with such usages and values we have acquired a common vision and mission, thus in tandem with this year’s theme dubbed; “Judicial Independence: The Challenges of the Modern Era”.

Distinguished Delegates, ‘Judicial Independence”, is one of the most discussed topics at conferences of adjudicators and at times, at meetings of members of the Executive, the Legislature and the general public.

In a democratic setup, the Judiciary constitutes one of the three arms of Government alongside with the Legislature and Executive. The judiciary plays a universally accepted key role in the era of constitutional democracy, a role that entails, safeguarding the rights of individuals through the enforcement of individual liberties enshrined in many constitutions and holding government accountable through judicial review.

One cannot talk about separation of powers without judicial powers; that is to say, the power to exclusive and ultimate jurisdiction over all cases concerning civil rights and liberties, civil and criminal matters; the power to review administrative acts and compel government to act where a legal duty exists. Additionally, the notion of separation of powers also entails that judicial decisions may only be reversed or set aside only through the appellate process.

In this regard, courts are essential to the process through which society’s collective rules, values and usages collectively acquired are enforced on its members and through which the reach of the Executive Government is properly checked. Courts are also a service provider, a mechanism through which disagreements between individuals, between individual and state are resolved. On account of this duo role, issues relating to governance of the Judiciary attract a lot of debate. Australian
Writers, John Alford, Royston Gustavson and Philip Williams, in a Book entitled “The Governance of Australia’s Courts: A Managerial Perspective” aptly have submitted that-

“Indeed, the very way their roles have been defined in a democratic society in such notions as the separation of powers reflects this importance. Our constitutional arrangements and conventions reflect a deeply held principle that courts should be impartial in their proceedings and judgments and by corollary should not be subject to undue influence from the Executive or any other party.”

Our discussion on the theme of this Conference will therefore in essence centre around the appropriate allocation of powers between the Legislature, Executive and the Judiciary and interrogate internal weaknesses and threats to Judicial Independence. Our discussion, I dare say will touch on stress and strains of an independent judiciary. For convenience, I have divided my presentation in sub-topics. I will start with a brief, Historical Development of the Independence of the Judiciary in the Commonwealth.

HISTORICAL DEVELOPMENT OF THE INDEPENDENCE OF THE JUDICIARY IN THE COMMONWEALTH

Briefly, the historical development of judicial independence in the United Kingdom began with the history of Courts known as Cura Regis, i.e. the King with his close advisors presided over all cases, judicial functions were centralized. This developed into a central body of five judges charged to hear all suits within the confines of the Cura Regis. But certain cases were reserved for the personal attention of the King. This group of five judges developed into a Court of Common Pleas. This was confirmed by Magna Carta in 1215, it was therefore ordained that “Common Pleas shall not follow our courts but shall be held in some places”. The Courts of Common Pleas gave rise to other common law courts, including the Court of Chancery. However, the King and his Council still exerted its influence on courts and could give directives to the courts on how to decide cases.

However, the Statute of Northampton of 1328 ended this practice of the King deciding the manner of deciding cases. Thereafter, the judges with time became independent. Nevertheless, the King alone appointed judges and had the power to revoke the appointment of judges at his pleasure (durante bene placito - at the King’s pleasure as grantor).

By the end of the 17th century, the English Judiciary plagued with bribery and corruption sank to its lowest ebb, prompting King William the III to sack all judges he considered incompetent and undesirable, the Act of Settlement of 1701 was enacted. This Act stated that judges’ commission shall in future be made quam diu se bene gesserint (as long as the judges behave well). The Act of Settlement of 1701 also provided that judges could only be removed from office upon an address of both Houses of Parliament, this significantly marked the beginning of protecting Judicial Independence.

Coming to British colonies and protectorates, the judiciary was part of the colonial civil service, or rather its “special branch”. It was, therefore, a career job in which appointment to judgeship rested largely on promotion from the Magistracy or from some other positions in the judicial or legal departments.

For example, the office of Attorney-General in the colonial legal service had always been a stepping stone to judgeship, and it could be said that the majority of those who had held the office of Attorney-General were eventually promoted to the Bench. The appointment of judges was in the hands of the Executive, the Governor, acting on the instructions of the Secretary of State for the Colonies in London. And like other civil servants, Judges and Magistrates held office during Her

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Majesty’s pleasure\(^3\). Prima facie there is inherently nothing wrong with this selection process. However, what is objectionable is the perception that such appointments were on political grounds.

As a run up to Post Colonialism, experiences of World War II increased calls for human rights protection cascading the notion of Judicial Independence. As such the notion and concept of judicial independence was enshrined in almost all the constitutions of former colonies.

And Post De-Colonization, it was no longer desirable to rest the matter entirely on practice and tradition. A constitutional guarantee was felt to be of utmost importance by the majority. The settler community equally wanted constitutional guarantees so that what was acquired as a result of their privileged position, in the colonial state, was not expropriated in the post-colonial-state. Being in the minority, the settler community viewed its position with considerable apprehension; and demanded constitutional protection of their rights. Obviously, it would not have been enough to rhetorically guarantee their rights in the Constitution in the absence of Judicial Independence to enforce their rights and liberties impartially between the individuals and the majority-controlled Executive\(^4\).

Even after independence the judiciary in most former colonies has remained to some extent a career job, for appointments have so far depended almost as much on promotion via the Magistracy, Chief Registrarship, Solicitor-Generalship and Attorney-Generalship as well as on direct elevation from the Bar. Some pundits have criticized this system of promotion on the ground that it is bound to induce in the mind of the person expecting that promotion some kind of fear, respect and loyalty for authority which he/she considers will have to promote him\(^5\).

So in order for the judiciary to be credible and transparent, and for the members of the public to have confidence in the judiciary as a service provider as well as being guardian of law and established usages, the regime regulating the appointment of its members of the Judiciary is of vital consideration.

The historical perspective is not in any way intended to apportion blame for our present challenges, but should invariably help us understand where we are coming from in order to shape our on-going respective judicial reforms and avoid anomalies of the past and confront the challenges of the modern era and age of globalization; an era in which advancement and access to an avalanche of information technology and social media, has put the judiciary under intense microscopic watch irrespective of physical boarders. Constructive use of this tool is indeed inescapable and welcome; however, its abuse has potential to undermine judicial independence in particular independent judgment.

**JUDICIAL INDEPENDENCE**

Courts are central institutions in any society. The judiciary’s primary role is anchored on a root concept employed in most societies of resolving conflicts. The Genis and Core Theory cutting across cultural lines, appears to be that where two persons come into conflict, which *inter se* they cannot resolve, one solution appealing to common sense is to call upon a third party for assistance in achieving a resolution. This universally simple but significant social invention of the triads is discoverable in and employed by all societies. No society fails to employ it. And from its overwhelming appeal to common sense stems the basic political legitimacy of courts everywhere.

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3. Terrell v Secretary of State for the Colonies (1953) 3 WLR 331
5. Per Mr. Briggs, House of Representatives Debates, 16th April, 1963 Col 1392 (Nigeria)
In short, the triad for purposes of conflict resolution is the basic social logic of courts, a logic so compelling that courts have become a universal political phenomenon. This whole reasoning gave birth to the principle that decisions aimed at resolving conflicts in society are acceptable if perceived to have been based on predetermined standards embodied in values and well established usages. These values and well established usages are the predetermined standards.

In my view, the legitimacy of court decisions has from time immemorial been anchored to a very large extent on the court’s independence and impartiality, that is to say, the Judge has not been influenced by his personal will or interest in the outcome of the case or that he has not been influenced by malice or by ill will, nepotism or any negative issue of any kind other than that the decision has been based on predetermined normative standards imbedded in the law.

In the quest to define Judicial Independence, perhaps one starting point is to appreciate that judicial independence is symbiotically synonymous with judicial impartiality, these two concepts have been referred to as “the sister concepts”. I subscribe to the notion that these two concepts are sister concepts because they are very supportive of each other. The Concise Oxford Dictionary defines impartiality as “treating all sides in dispute equally, unprejudiced, or fair”. Independence means that those who wish their disputes to be settled in court, desire their case to be addressed fairly, impartially and resolved within the confines of the law.

I wish to underscore the point that Judicial Independence is founded on the independence of an individual judge as well as the independence of the judicial organ. These two foundations complement each other. Siracuse’s Draft Principles on the Independence of the Judiciary addressed these two foundations of judicial independence and made the following pronouncements, that:-

**Independence of the Judiciary means:**

(a) That every judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law, without any improper influences, inducements or pressures, direct or indirect from any quarter or for any reason, and

(b) That the Judiciary is independent of the Executive and Legislature, and has jurisdiction, directly or by way of review, over all issues of a judicial nature.

**PERSONAL - JUDICIAL INDEPENDENCE:**

There is a school of thought that the principle of personal judicial independence is a matter of degree. For instance what may be considered as interference with judicial independence in one jurisdiction may be considered otherwise in another jurisdiction. For instance the selection and the appointment process of judges differ from one jurisdiction to the other. In some States in the United States of America, judges go for elections. They campaign for votes like parliamentarians. A question may rise whether such judges can be said to be independent.

The goal of Personal Judicial Independence is twofold; to guarantee procedural fairness and to guarantee protection of human rights. In the words of Chief Justice Lame of the Supreme Court of Canada:-

“Judicial independence is essential for fair and just dispute-resolution in individual cases’.

Personal Judicial Independence is the life blood of constitutionalism in democratic societies. Without Judicial Independence, there is no preservation or observance of the Rule of law. The existence of Personal Judicial Independence depends on the existence of legal arrangements that

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6 Barak Aharon, the Judge in a democracy (Princetown: University Press, 2006) pp. 77-78.

7 Beauregard v. Canada 1986 2 SCR 56, 70
guarantee it, arrangements that are actualized in practice and are themselves guaranteed by public confidence in the Judiciary. Personal Independence of a judge is a constitutional principle. In some countries Personal Judicial Independence is explicitly enshrined. Whatever the character a judicial organ or institution may publicly portray, the demand for judicial independence at an individual level is ever constant and undiminished.

In describing Personal Judicial Independence of a Judge, I am in this regard compelled to vouch the remarks of Aharon Barak a former President of the Israeli Supreme Court when he said:-

“I do not mean freedom from internal pressure, which is sometime expressed in a Judge’s internal pressure, which is sometimes expressed in a Judge’s deliberations concerning a judicial decision. Such deliberation is often related to the social reality of which the Judge is a part and to societal trends which the Judge must balance. A Judge’s freedom from pressure refers to freedom from external pressure, regardless of source. Personal independence is independence from relatives and friends, independence from the litigating parties and the public, independence from fellow Judges and Judges responsible for managing the system (including the President or Chief Judge of the Court), independence from office holders in other branches of government. The Judge’s master is law. The Judge has no other master from the moment a person is appointed as Judge, he must act without any dependence on another.”

Fundamentally the issue that must be appreciated by all is that independence of an individual judge means that the judge is subject to no authority other than the well established usages and values in the law. This authority includes, of course, the authority of case law determined by superior courts whose opinions bind lower courts. Judicial independence does not mean arbitrariness neither does it mean release from the chains of binding precedent or other judicial instructions that bind Judges. These are part of the law. It does not mean distancing yourself from public expectation of justice. Judicial Independence principally entails building a protective wall around an individual judge that will guard against the possibility of undue influences. We must always be mindful that a judge is custos morum (a guardian of morality which is the way of life) measured against the background of multi-culturalism; as such a judge’s decision should not be tainted by any obstruction. Distinguished Delegates, one fundamental criterion to the assurance of individual independence lies in the process of selecting and appointment of judges including magistrates, the process should be considered in line with the candidate’s integrity, independence of judgment, professional competence, and commitment to uphold the rule of law.

Another important criteria, is the provision of adequate judicial conditions of service which play a key role to attract and retain qualified judges, persons of integrity. Here I am talking about salaries sufficient enough to support our lives and our families without necessarily resorting to other sources of income that may potentially affect the independence of judgment. Security of tenure is also a key factor in ensuring Personal Judicial Independence. Promotion to higher ranks in the judiciary is another important factor.

Protection and promotion of individual independence must also be considered in light of judicial security. The question is, do we enjoy adequate protection from personal security threats? The protection provided by the police in many of our judiciaries is fraught with inadequacies and limited, and generally restricted to judges only. So the constitution and any other legislature must generically guarantee all these.

INSTITUTIONAL - JUDICIAL INDEPENDENCE

Institutional (or collective) as explained by Dickson CJ of Canada in 1986, means:-

“On the institutional plane, judicial independence means the preservation of the separateness and integrity of the judicial branch and a guarantee of its freedoms from unwarranted intrusions by, or even intertwining with, the legislative and executive branches. When judges reverse their decisions in the wake of political or media criticism, the judiciary as an institution is presented as unacceptably supine. When judges are exposed to removal from office at the behest of politicians who dislike their decisions, they are highly vulnerable to the improper pressure that diminishes their real neutrality. When judges are submitted to unrelenting political attacks by people who would know better, there is a danger that the public will draw from the silence of the judges an implication that the criticism was justified. Yet silence is ordinarily imposed by judicial convention.”

It is certainly true that a judge and the institution as a whole may in some instance suffer from improper influences, threats or interferences either directly or indirectly. It is, therefore, my submission that laws must exist that protect judges/magistrates from external and internal influence together with laws that make the judiciary accountable. The notion of judicial independence in my assessment essentially entail that judicial decisions are based on facts and law without any undue influence, by private interests, media or other branches of government.

It is therefore undeniable that judicial independence flourishes when security of tenure is guaranteed. And public confidence is certainly attainable when the public has faith that the decisions reached are solely based on facts and law no matter the outcome. Lord Steyn of the House of Lords addressed this point and made the following remarks:-

“The Judiciary can effectively fulfill its role only if the public has confidence that the Courts, even if sometimes wrong, act wholly independently”.

While recognizing that personal independence is a necessary condition for judicial independence, it is not a sufficient condition. A peremptory condition is institutional independence. A Judge’s personal independence is incomplete unless it is accompanied by institutional independence, designed to ensure that the judicial arm fulfills its role of protecting the Constitution and its values. This indeed is a real challenge.

Institutional independence is designed to build a protective wall around the judicial organ that prevent the Legislative and Executive organs and media from influencing the way judges actualize their roles as protectors of the Constitution and its values.

The judicial arm must, therefore, be run in an independent and autonomous manner. It should not be part of the executive arm and should not be subject to the administrative decisions of the Executive or Legislative organ. One school of thought is that even the choice of judges should not be subjected to ratification by Parliament because that is considered to be an intrusion in the independence of the judiciary. In India, fellow judges choose other incoming judges.

Essentially Institutional Independence entails that the judiciary is properly bequeathed with the power to exclusive and ultimate jurisdiction over all cases concerning civil rights and liberties, civil

10 Kirby (1998), pp 604 - 5
and criminal matters; the power to review administrative acts and compel government to act where a legal duty exists. And I wish to reiterate that the notion of separation of powers also entails that court judgments or judicial decisions may only be reversed or set aside only through the appellate process.

In terms of the Judicial Governance, the judiciary must be totally autonomous; the judiciary must be allocated with sufficient operating funds. There is an ongoing debate as to what extent the branches of the Executive and the Legislature should have an input in the budgetary allocation to the judiciary.

One school of thought says that the judiciary should be budgeted by an independent body and that the Executive should not arbitrarily reduce the budget allocation. Another school of thought is that the judiciary’s budget should be provided for in the Constitution (e.g., Singapore). In the same vein, there is an ongoing debate as to how the judicial organ can be held accountable in the way it is run. For now the contention is that the judiciary should be afforded opportunities to influence the amount of money allocated to it by the legislature and executive arms. It must be noted that inadequate funding inhibits judicial efficiency, in particular access to justice and can undermine Institutional Independence.

**PROTECTING THE CONSTITUTION AND DEMOCRACY – HUMAN RIGHTS AND DEMOCRACY**

We live in an age of universally increased human rights awareness. Justice Pikis, President of the Supreme Court of Cyprus, rightly observed that:-

“The essence of human rights lies in the existence within the fabric of the law of a code of unalterable rules affecting the rights of the individual. Human rights have a universal dimension, they are perceived as inherent in man, constituting the inborn attribute of human existence to be enjoyed at all times in all circumstances and at every place.”

We all bear true testimony that we are constantly experiencing a human rights revolution necessitated by increase in human rights violation, acts of impunity and atrocities through genocide and terrorism abound. Even in the face of these atrocities, the judiciary must be seen to be independent and impartial, by ensuring that those who are guilty do not escape justice and those who are innocent are not found guilty. Indeed, a central element of modern democracy is the protection of the Constitution, statutes, and common law human rights. Without protection and promotion of rights, we cannot have democracy. Take human rights out of democracy, democracy loses its soul, it becomes an empty shell. It is the task of a judge to protect and uphold human rights.

Justice McLachlin of the Supreme Court of Canada rightly said that:-

“Courts are the ultimate guardians of the rights of society, in our system of government”

These rights are the rights of a person as an individual, as well as his rights as a member of a society. Judges must resolve cases of conflict between individual and group rights. Prempeh, calls the protection and enforcement of the Bill of Rights by the Judiciary in the context of private

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12 Supra Aharon Barak, at P.80
13 The Police v. Georgiades (1983) 2 CLR 33 50-54, 60-65, in which Justice Pikis compared different national and international legal systems to give content to the right of privacy. It was decided by the Supreme Court of Cyprus that the right of privacy applies not only, vis-à-vis the state, but also to relationships between individuals.
14 Supra Aharon Barak, at P81.
initiated litigation as “Judicial constitutionalism.” He acknowledges that Courts in the Commonwealth have demonstrably fared very well.\(^{17}\)

The underlying values and principles of a free democratic society are the genesis of the rights and freedoms guaranteed by the Constitution. Human rights can be limited, but there are limits to the limitations. The role of an adjudicator in a democracy is to preserve both of these limitations. Judges must ensure the security and existence of the state as well as the realization of human rights, Adjudicators must determine and protect the integrity of the proper balance.

**CHALLENGES TO JUDICIAL INDEPENDENCE**

I have dedicated a segment of this address to challenges of the judiciaries. The theme for this 18\(^{th}\) Conference of the Commonwealth Magistrates and Judges’ Association is “Independence of the Judiciary: Challenges of the modern era”. Therefore, the most obvious questions; are whether or not the modern era has posed any more challenges than those the judiciary had been facing. Whether in the modern era there are any specific occurrences happening other than the constant evolvement of the world where there has been cataclysmic challenges e.g. challenges experienced during the 2\(^{nd}\) World war, post colonization and civil wars etc. Whether or not there has been more tensions by the judiciary being a third arm of government. How do the challenges of accountability balance with judicial independence, whether challenges of corruption and abuse of power have posed more of a threat to judicial independence in the modern era as compared to the past. To what extent can it be said that there are more challenges to an independent judiciary in a pluralistic society as it is now, has globalization provided limit to judicial independence.

My view is that since judicial independence is wedded to the notion of *Custos Murum* (Guardian of morality as it is not what it ought to be). Most of these challenges posed by different circumstances have been and will continue to be with us. I will therefore not attempt to respond to these questions because of the view I hold.

In my view, the starting point in assessing actual and potential challenges to Judicial Independence lie in the structure of a given Constitution.

It is widely argued that there has been failure by the post-colonial state constitutional designers or architects to balance power between the three organs or branches of government. Prempeh characterizes this as the failure of “Structural Constitutionalism”.\(^{18}\)

Sometimes judicial power and independence are usurped not only by the Executive but also by the Legislature. A classical example that immediately comes to mind is the Ceylon case of R v Liyanage\(^{19}\). Don John Francis Douglas Liyanage was a former Sri Lanka civil servant. He was the former Secretary to the Ministry of State. In 1963 he was named as the first accused of the attempted coup d’état in 1962. He was indicted along with others. During trial, the legislature enacted a law which altered retrospectively the mode of trial, the offences, and the admissibility of evidence. The onus of proving the involuntariness of the confessions was shifted to the accused. Statements of an accused person against his co-accused persons was admissible. The statute also set a minimum sentence. It was argued that the amendments introduced by the Legislature were intended to direct and influence the Court to give a verdict of guilty. The changes were held by the Judicial Committee of the Privy Council as:-

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\(^{17}\) Kwasi Prempeh H, Marbury in Africa: Judicial Review and the challenge of Constitutionalism in contemporary Africa 2 Tulane Law Review Vol. 80, P 56.  
\(^{18}\) Supra Kwasi Prempeh, P56  
\(^{19}\) R v. Liyanage (1963) 64 WLR 313
“an interference with the functions of the Judiciary, a grave deliberate incursion into the Judicial sphere. The act was a special direction to the Judiciary as to the trial of particular and identifiable accused person”.

The interface of proper execution of judicial, executive and legislative power should be in the spirit of promoting co-existence. Mention must be made that the Judiciary depends on Executive power to execute its orders and writs, but sometimes the Executive places its interest above the interest of executing court orders for example in the Zambian case of *Shipanga v. the Attorney General*.\(^{20}\), the Government incapacitated itself from making a return to the writ of Habeas Corpus, in respect of a then South West African People’s Organization (Namibia) dissident detained by the Zambian authorities. Instead of the Government producing the person in Court, they surrendered the dissident to the Tanzanian Government and pleaded that he was out of jurisdiction. They also pleaded that they could not make a return in the interest of the liberation struggle. The Supreme Court was not amused. Such experiences result in judicial nightmares and can be very frustrating. We should not, therefore, relinquish our powers to punish for contempt for the sake of fair seeming. The power of contempt in deserving cases can be used to protect judicial independence otherwise the administration of justice may be rendered a mockery.

Let me echo the words of South African Chief Justice Mogoeng Mogoeng in discussing challenges to judicial independence said:--

“South Africa needed a ‘truly independent body of Judges’ to safeguard its Constitutional democracy.”

He drew some interesting observations regarding South Africa’s three arms of governments in terms of comparison, regarding the Executive and Legislature he made the following observations:-

- had their own vote account
- were free to decide on administrative support, job descriptions and salaries; and
- could decide which projects to prioritise

To guarantee Judicial Independence he submitted that the Judiciary should not directly or indirectly be controlled or seen to be controlled by the other arms of government.\(^{21}\)

Distinguished delegates, it is my firm belief that the observations made by Mr. Justice Mogoeng are generally applicable in most of the Commonwealth judiciaries either in full or in part. The source of these threats are external, however, that is not to say there are no internal weaknesses.

One daunting internal weakness that we need to courageously address is corruption which has proved to be a huge challenge to the promotion and protection of Judicial Independence. Bribes corrupt the mind of an adjudicator and compromise judicial independence and diminish the reputation and integrity of the judiciary. Corruption by one adjudicator affects the standing of the whole Judiciary. When we open ourselves to corruption we disgracefully surrender our independence to the dictation of the paying master. We must have a zero tolerance approach to corruption and the slogan that should invariably prick our conscience is that; “Justice is not for sale”. I am therefore delighted that in our programme we have dedicated a session to specifically deliberate on; “Judicial Independence: Zero Tolerance – Identifying and Eliminating Corruption in the Legal System”.

I wish to repeat that the challenges we face in relation to judicial independence are various and may differ from jurisdiction to jurisdiction and the approaches in giving redress to these challenges may

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\(^{20}\) Shipanga v. the Attorney General (1977) ZR 71

\(^{21}\) Annual Human Rights lecture at the University of Stellenbosch’s Law Faculty
equally differ, but the overall goal should be aimed at promoting and protecting judicial independence. Mr. Justice Michael Kirby Judge of the Federal High Court of Australia (retired) advisedly said:-

“A reflection upon the variety of the challenges to judicial independence and the differing ways in which different countries have responded to such challenges suggested a need to avoid hard and fast rules. Instead, the diversity of the problems for judicial independence called forth a recognition of the need for diverse answers to the question of how in a particular society, judicial independence could be defended, and strengthened, consonant with the defence of other human rights and fundamental freedoms”. 22

Distinguished delegates, it is said judicial office is not for the faint hearted, however, we are not supernatural beings, we are in all respect humans, and as a fraternity of adjudicators we need to encourage and support one another, because we inevitably face criticisms, some criticisms are bona fide and some mala fide. The media is never short of unleashing attacks on the judiciary, unfortunately we cannot launch a counter attack, the media has from time to time mercilessly attacked decisions of the court, and the courts have been silent by convention.

The media has sometimes internationally sought to influence the outcome of some decisions in which they have some interest by running stories and making adverse comments of ongoing cases more less undermining the judiciary. Perhaps these are “occupational hazards” that have now come to be associated with the job in the modern era. However, I am compelled to reproduce the comforting remarks of Mr. Justice Frank Lacobucci of the Supreme Court of Canada, he said:-

“Each Judge with the privilege of serving on an ultimate appellate or Constitutional Court of his/her country, indeed each judicial officer of whatever rank, has to accept the real world of criticism and even political attacks, in which the Courts today operate. The advice that could be offered to such Judges was to take each day at a time, attempting with true humility to perform duties of office with fidelity and devotion of duty.” 23

CONCLUSION
Finally, Judicial Independence is a hard earned value that is cardinal to the promotion and protection of justice, and an incentive for economic development by promoting investor confidence in the judicial system, by analogy it is the oxygen of an active and inspiring judiciary; it is a lubricant of judicial machinery. To this end as a value it must be jealously nurtured, protected and promoted. Otherwise abuse or misuse of Judicial Independence may have results that are too ghastly to contemplate.

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23 Ibid
Keynote Speech

“Judicial Independence And The Role Of The Chief Justice - Powers, Limitations And Challenges”

By His Hon. John Z. Vertes, CMJA President, Canada

Introduction

The Commonwealth Charter, adopted by the Commonwealth Heads of Government on December 14, 2012, declares in Article VII its belief in the rule of law and its support for an independent, impartial, honest and competent judiciary. It also recognizes that an independent, effective and honest judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice.

The rule of law is fundamental in a democratic system of government. Similarly, an independent judiciary is essential to the rule of law in a democratic society. The rule of law at once justifies and serves as the foundation of judicial independence.

Judicial independence is a norm deeply rooted in tradition and practice throughout the Commonwealth, one that predates the concept of separation of powers and the entrenchment of judicial independence in written constitutions. Illustrative of this very point is the fact that the Act of Settlement of 1700, which instituted the basic requirements of security of tenure and financial security, was enacted even before the democratization of political power in England.

Modern jurisprudence recognizes both an individual and a collective or institutional aspect to judicial independence. This was explained in the judgment of the Supreme Court of Canada in Valente v The Queen, [1985]2 S.C.R. 673 (at pp. 685 and 687):

[Judicial independence] connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees...

It is generally agreed that judicial independence involves both individual and institutional relationships; the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government.

It must be remembered, however, that judicial independence is but a means to an end. It is not an end in itself. The objective is to enable judges to render decisions in accordance with the law and the facts without concern for the consequences to themselves. The protections for judicial independence – protections such as security of tenure, financial security and institutional independence – were “not created for the benefit of judges, but for the benefit of the judged.”

Independence is not a perk of the judicial office. It is a guarantee of the institutional conditions of impartiality. It is the “cornerstone, a necessary prerequisite, for judicial impartiality” and critical to

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the public’s perception of the impartiality of the judiciary.\textsuperscript{25} As noted in the Valente case, judicial independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operations.

Much has been written about the principles of judicial independence but very little has been written about the role of the Chief Justice in the maintenance of the independence of the judiciary. And yet it is the Chief Justice of each court who manages the relationship between the court and the government. It is that relationship which carries the most obvious risks to the independence of the judiciary. It is also the Chief Justice who has responsibility for the internal management of the court. And it is the exercise of that authority that could pose risks to the independence of the individual judges of that court. The Chief Justice, therefore, has a unique responsibility not shared by the other judges of his or her court for safeguarding the independence of the judiciary.

This paper will examine the modern role of the Chief Justice: the powers, both statutory and traditional; limitations on those powers; challenges posed by internal court management responsibilities; and challenges posed by external forces, particularly those of government and the public’s changing expectations of the courts.

When I speak of Chief Justices, I will speak generally of that judge who is the highest judicial officer in his or her court. There is ordinarily a Chief Justice of any multi-judge court, and not necessarily just the Chief Justice of a country, or the apex court of the country. For example, in Canada, the Chief Justice of the Supreme Court of Canada is designated as the Chief Justice of Canada. But the Chief Justice’s administrative responsibilities do not go beyond her court. The internal management of every other court in Canada is the responsibility of each court’s Chief Justice (or Chief Judge as the case may be), whether it is a superior court of inherent jurisdiction, a court of appeal, or a court of limited jurisdiction.

The Chief Justice of Canada certainly has a significant moral authority and is viewed by the public generally as the voice of the Canadian judiciary. She also exerts authority as chair of the Canadian Judicial Council, which is composed of all Chief Justices of the superior courts of Canada. The Council authorizes education initiatives, conducts inquiries into complaints against superior court judges, and from time to time issues guidelines and protocols to the superior courts on various matters, most significantly guidelines on ethical principles. But the direction of each court is the responsibility of that court’s Chief Justice.

Also, it is not uncommon for the head of the judiciary not to be in the highest or apex court of the jurisdiction in question. In the United Kingdom, for example, the apex court is the Supreme Court. Yet its President is not the head of the judiciary. Those heads are respectively, the Lord Chief Justice in England and Wales, the Lord President in Scotland, and the Lord Chief Justice in Northern Ireland.

So my discussion will focus on the role of a Chief Justice generally. And, in this discussion, I hope to emphasize two points. First, the most powerful and effective form of leadership occurs when the leaders lead by example. And, second, the personal qualities, conduct and image that a judge, and particularly a judicial leader, projects affect the image of the judicial system as a whole, and therefore, the confidence that the public places in it.

\textsuperscript{25} R v Lippé, [1991] 2 S.C.R. 114 (at p. 139)
A Chief Justice has a special role. The Chief Justice sets the direction and tone of the judicial system. He or she is the public face of justice. A strong and able Chief Justice can personify the independence of the judiciary and exemplify that independence in the conduct of judicial proceedings in his or her court. A weak Chief Justice, however, will undoubtedly have a debilitating effect on the other judges and detrimentally affect the public’s trust and confidence in the justice system.

What is the effect on the administration of justice when a Chief Justice misconducts himself or herself? A few recent examples may illustrate the potential problems.

In 2009, the Chief Justice of Gibraltar was removed from office after a recommendation for his removal by the Judicial Committee of the Privy Council. The allegations included a lack of restraint in his public statements over what he regarded as intrusions on judicial independence, making unfounded allegations that he was being hounded out of office and improperly entering the political arena by launching a court action attacking parts of a draft new constitution. The Committee’s majority and those in the minority agreed that upholding the principle of judicial independence is one of the most important functions of a Chief Justice. The majority, however, concluded that the demands and expectations of the office of Chief Justice go well beyond those placed on ordinary judges and, in this case, the conduct of the Chief Justice brought him and his office into disrepute and adversely affected the public’s perception of the administration of justice.

In 2013, the International Commission of Jurists issued a report entitled “The Crisis in Judicial Leadership in the Kingdom of Lesotho”. The source of the crisis was a dispute between the Chief Justice and the President of the Court of Appeal over the issue of which of them is the head of the judiciary – a dispute that was widely covered in the media and attracted significant public scrutiny. Traditionally the Chief Justice performed that role but the constitution was unclear on the subject. As the report noted, the public watched as the two most senior judges became embroiled in a rancorous battle for leadership of the judiciary. They witnessed an increasingly contentious series of encounters resulting in a breakdown of the system to the point where the Court of Appeal cancelled a regular session. Most detrimentally, the public witnessed the failure of the judiciary to avert a crisis brought on by the individual egos of these two leaders while at the same time failing to address issues of inefficiencies and backlogs in the court system.

A significant feature of this controversy was that, as the dispute escalated, the President of the Court of Appeal urged the executive of the government to intervene. As the report stated, there is a danger in inviting the executive to intervene in matters falling within the purview of the judiciary. This may well create the perception that the judiciary is dependent on the executive. In addition, this undermines the principle of separation of powers and the independence of the judiciary.

The crisis in Lesotho ended with the Chief Justice retiring and the President of the Court of Appeal becoming the subject of removal proceedings.

Then, there is the peculiar example from earlier this year in which the Chief Justice of Swaziland issued arrest warrants for three High Court Judges for allegedly ignoring his orders and undermining his position. This situation arose when one of the judges set aside warrants issued by the Chief Justice for the arrest of a journalist and a human rights lawyer for alleged contempt of court.

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Finally, there is the unedifying example of the disgraced Chief Justice of Malta, Noel Arrigo, who in 2002 was charged and convicted of accepting a bribe to reduce the sentence of a convicted drug trafficker. Arrigo was eventually sentenced to a prison term of 33 months.

The lesson to be taken from these types of incidents is that judges, in particular those who are in positions of leadership, must hold themselves to the highest standard of conduct and accountability. They are entrusted with the responsibility to protect the independence, integrity and image of the judiciary. They must not allow their idiosyncrasies or their personal interests to override that responsibility. Judges are the servants of justice and the people; not the other way around.

**The Powers of a Chief Justice**

Generally speaking, most of the powers of a Chief Justice will not be found in legislation but in tradition, constitutional theory and the conventions of the office. In Canada, for example, governments historically preferred to establish the position of Chief Justice with a paucity of specific statutory authority. The federal *Judges Act* says virtually nothing about the powers and duties of a Chief Justice other than giving a Chief Justice a role in approving the attendance of judges at meetings, conferences and seminars (s. 41) and in granting a leave of absence to a judge for a period of less than 6 months (s. 54).

This lack of specific statutory stipulations is noteworthy in several respects. First, it provides the office with considerable flexibility, enabling it to evolve with the personality, strengths and interests of the person holding it. Thus, an administrator may strengthen the structure of the court and streamline its procedures. A scholar may concentrate on elevating the academic quality of the court’s work. A reformer may seek to change existing practices. Second, the absence of detailed legislation permits the Chief Justice to emphasize his or her independence from government and the legislative branch. Faced with a particular problem, the Chief Justice is able to request from the government whatever he or she feels they should request. It follows that the lack of extensive statutory regulation of the function of Chief Justice is of great significance because it allows the Chief Justice to determine in large measure the scope of his or her office, in accordance with his or her own judgment, energies and abilities.

There are, of course, some constitutional dimensions to the question of powers. The Supreme Court of Canada, for example, has held that there are certain powers that are necessary in order to maintain a sound separation between the judiciary and other functions of government. These are the assignment of judges to hear particular cases; the scheduling of court sittings; the control of court lists for cases to be heard; the allocation of courtrooms; and the direction of registry and court staff in carrying out these functions. These are the essential requirements for institutional independence.

Where there are statutory provisions in place they usually follow this model outlining a Chief Justice’s duties. However, as I mentioned previously, much of what is understood to come within the parameters of a Chief Justice’s powers stems from tradition and the conventions of the role. In its judgment in *Ruffo v Conseil de la Magistrature*, [1995] 4 S.C.R 267, the Supreme Court of Canada held that a large part of a Chief Justice’s role in maintaining a high quality system of justice was defined gradually over the years, in the same way as judicial precedents. Powers were derived from judicial tradition. The supervisory powers conferred on a Chief Justice were derived from general practice and gradual developments over time.

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One of these areas of general practice and tradition was the Chief Justice’s supervisory role concerning the ethical conduct of the judges of his or her court. As many authors have noted, judicial independence and judicial ethics have a symbiotic relationship. Public acceptance of and support for court decisions depends upon public confidence in the integrity and independence of the bench. This, in turn, depends upon the judiciary upholding high standards of conduct.

There is strong authority for the proposition that a Chief Justice’s supervisory powers over ethics are inherent in the exercise of his or her functions and need not be conferred by specific statutory provisions. And this makes good sense. The Chief Justice oversees the court’s operations. He or she is in a preferred position to ensure compliance with judicial ethics. He or she is the person closest to the judges and, as their administrative supervisor, the one most likely to observe problems arising or receive complaints. Further, because of the Chief Justice’s status, he or she is often the best situated to deal with difficult matters of conduct through personal intervention with the judge concerned.

There was a long history in England where complaints about judges were directed to the Lord Chancellor or the Lord Chief Justice. It was common to deal with such issues informally and internally. Today many of the old informal procedures have been replaced by formal investigative and inquiry procedures. But there is still room for the informal intervention of a Chief Justice, as a matter of guidance and correction if needed, where the subject matter of the complaint does not raise an issue that could lead to removal or more formal disciplinary measures.

It goes without saying, of course, that the primary supervisory role for a Chief Justice in this respect is with regard to his or her own conduct. A Chief Justice must set the example for his or her court in disregarding pressure or influence from any source, particularly political pressure with regard to the outcome of cases, and in fighting corruption. The courts are the defenders of the rule of law and this role becomes ever more important when the courts must operate in the context of authoritarian or corrupt regimes.

One can point, for example, to the legacy of the recently retired Chief Justice of Pakistan, Iftikhar Muhammad Chaudry. Although not without controversy himself, Chief Justice Chaudry, during his eight-year tenure as Chief Justice, transformed the Supreme Court into a robust institution capable of exercising its power independently and impartially, safeguarding the country’s constitution and acting as a check on the powers of a government and military that failed to protect and respect the rights of its citizens. In a 2013 report by the International Commission of Jurists, entitled “Authority without accountability: the search for justice in Pakistan”, the ICJ concluded that the Supreme Court, under Chief Justice Chaudry’s leadership, has consistently taken a firm stance against the unconstitutional usurpation of power by the military and has effectively held public officials accountable for corruption and abuse of power.

Another area emanating from tradition is the Chief Justice’s role as liaison with the government. A Chief Justice who ignores the need to develop a working relationship with government will only see his or her court resources suffer as a result. I will discuss administrative arrangements later in this paper but suffice it to say that generally courts are still dependent on government for financial and human resources. An open line of communication is absolutely necessary to avoid problems.

The reality in every Commonwealth country is that, of the three branches of government, the judiciary is the weakest because it depends on the other two branches of government to pay the

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salaries of judges and to provide the necessary infrastructure for an effective court system. Therefore a constructive working relationship must exist between the judiciary and the other branches of government if the public is to have meaningful access to justice. And the Chief Justice has the lead role in creating that constructive relationship.

Finally, a developing area of responsibility for Chief Justices is that of being the public face and voice of the court. Many modern Chief Justices are coming to the view that, if they have a responsibility to uphold judicial independence and to act so as to enhance public confidence in the judiciary, then surely that obligation extends to communicating with the public to explain the court’s procedures and the principles under which it operates. In the words of Chief Justice John Doyle of South Australia: If the public do not understand these things, can we really expect the public to value them and to support them if they are under threat? If the public do not understand the workings of the judiciary, can we assume their confidence in the judicial system when others challenge that confidence, depict the system in a way that might undermine confidence or when decisions are made which might test that confidence?30

A good example of the type of public communication that might be helpful is a paper published jointly by the Chief Justices of the Court of Appeal, Supreme Court and Provincial Court of British Columbia in 2012 entitled “Judicial Independence (And What Everyone Should Know About It)”. It outlines, in plain language, what is meant by judicial independence and why it is important. It was widely publicized and distributed as well as being posted on the courts’ website.31

Another example is the “Corporate Communications Office” set up in the office of the Chief Registrar of the High Court of Malaysia. That office plans, designs and executes programmes and activities to increase public awareness of the court’s role in the community.

It is instructive that the International Summit of Chief Justices and Senior Justices of the Asia-Pacific Region, held in Istanbul in November 2013, issued a declaration on transparency in the judicial process. Among the principles enunciated in that declaration was that the judiciary should initiate and support appropriate outreach programmes designed to educate the public on the role of the justice system in society. It stated that transparency involves more than simply providing access to court proceedings. To achieve transparency, information must also be disseminated in a form that is easily accessible, especially for those who do not have a legal background and may often have limited literacy. Publicizing information about court operations and judicial programmes to increase the quality and efficiency of justice also has beneficial effects on public confidence in the judiciary.

Today, there is greater responsibility on the judiciary, and primarily on Chief Justices, to inform the public about the court’s role and function as the guardian of the public interest and the rule of law.

**Limitations on the Powers of a Chief Justice**

The principle of judicial independence protects all judges, including the Chief Justice, in his or her adjudicative role. But that principle also imposes a restraint on a Chief Justice, a limitation that draws a line between the necessary and important administrative role of a Chief Justice and the adjudicative independence of the Chief Justice’s colleagues. This limitation arises from the definition of judicial independence.

In *The Queen v Beauregard*, [1986] 2 S.C.R. 56, then Chief Justice Dickson of the Supreme Court of Canada wrote (at p. 491):

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Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide cases that come before them: no outsider – be it government, pressure group, individual or even another judge – should interfere in fact, or attempt to interfere, with the way a judge conducts his or her case and makes his or her decision. [Emphasis added.]

In *R. v Lippé*, [1991] 2 S.C.R. 114, the Supreme Court of Canada was more specific when it stated that “members of the Court must enjoy judicial independence and be able to exercise their judgment free from pressure or influence from the Chief Justice” (at para 46).

These pronouncements accord with international norms.

Part II of the Universal Declaration of the Independence of the Justice, enacted in Montreal in 1983, stipulates that, in the decision-making process, judges shall be independent vis-à-vis their judicial colleagues and superiors. The U.N. Basic Principles on the Independence of the Judiciary, adopted in 1985, state that respect for the independence and impartiality of the judiciary requires that judges decide matters free from any restrictions, improper influences, inducements, pressures, threats or interference, direct or indirect from any quarter or for any reason.

These principles must, of course, be put into context. A Chief Justice, sitting as part of a multi-judge panel in an appellate court, will surely try to convince his or her colleagues of the rightness of his or her opinion on a case they heard, as would the other judges. The more difficult question is where to draw the line between proper attention to the administration of the court and improper interference in the independence of a judicial colleague.

I suggest that these pronouncements on the limitation of a Chief Justice’s power do not diminish the important role of a Chief Justice in administering the court. There is a long tradition of puisne judges seeking the advice of a Chief Justice on difficult issues such as recusal or disqualification. There is an equally long tradition of Chief Justices giving advice, if asked, on matters arising during a trial and even on the substantive result of a case. I emphasize “if asked”. I cannot think that these traditions cross the line into interference with judicial independence.

Moreover, it would be wrong, in my view, to insist that a Chief Justice be silent if a judge is performing poorly, even if that poor performance arises in the context of a specific case. What if lawyers complain that a judge is letting the case proceed too slowly? What if lawyers complain, or the press reports, about a judge being persistently rude in his or her treatment of litigants? What if a judge is taking an excessively long time to render a decision? I realize that the decision to intervene would not be an easy one. However, in my view, in each instance the Chief Justice has the power, indeed the duty, to intervene and speak to the judge about it. I do not think these interventions by a Chief Justice would constitute improper interference.

All of this, in my view, simply reiterates what was said by the Judicial Committee of the Privy Council in the well-known case of *Rees v Crane*, [1994] 2 A.C. 173, an appeal concerning the decision of the Chief Justice of Trinidad and Tobago to not include one of the High Court judges on the list of judges assigned to cases for a specific term. Their Lordships said (at p.177):

> Their Lordships accept that ... the Chief Justice must have the power to organise the procedures and sitting of the courts in such a way as is reasonably necessary for the due administration of justice. This may involve allocating a judge to do particular work, to take on administrative tasks, requiring him not to sit if it is necessary because of the backlog of
reserved judgments in the particular judge’s list, or because of such matters as illness, accident or family or public obligations. It is anticipated that these administrative arrangements will normally be made amicably and after discussion between the Chief Justice and the judge concerned. It may also be necessary, if allegations are made against the judge, that his work programme should be arranged so that for example he only does a particular type of work for a period, or does not sit on a particular type of case or even temporarily he does not sit at all. Again this kind of arrangement can be and should be capable of being made by agreement or at least after frank and open discussion between the Chief Justice and the judge concerned.

Having said that, however, it should be noted that in the Rees case their Lordships ultimately decided that what the Chief Justice had done was more than merely an administrative arrangement. It was in effect an indefinite suspension, something that the Chief Justice could not do because of the specific provisions of that country’s constitution.

There is a notable Canadian example of a Chief Justice over-reaching the administrative powers of the office. In Canada v Tobias, [1997] 3 S.C.R. 391, the Supreme Court addressed the issue of a stay of proceedings granted by the trial judge due to an alleged interference with his independence by his Chief Justice.

In that case, a senior official of the federal Department of Justice met privately with the Chief Justice of the Federal Court complaining about the slow progress of certain cases being presided over by a judge of the trial division. The official and the Chief Justice, it should be noted, were friends and former colleagues. The Chief Justice spoke to the trial judge, received assurances that the cases would proceed more expeditiously, and wrote back to the government official confirming that the cases would be expedited. Once these things became public, the defendants sought and obtained a stay of proceedings on the basis that the trial judge’s independence had been interfered with and, because the Chief Justice enjoys authority over all the judges of the court, a reasonable observer could conclude that the independence of all the judges had been compromised. Ultimately the Supreme Court of Canada agreed that the appearance of judicial independence had suffered as a result of the meeting between the official and the Chief Justice but that a stay of proceedings was not an appropriate remedy. Instead it ordered that the cases continue but before a different judge and directed that the Chief Justice have no involvement whatsoever with the case.

The problem with the Chief Justice’s conduct in that case was not that he chose to address the issue of delay; indeed, the Supreme Court emphasized that “a Chief Justice is responsible for the expeditious progress of cases through his or her court and may, under certain circumstances, be obligated to take steps to correct tardiness” (p. 421). This was such a case because there was a legitimate concern about the exceedingly slow progress of the cases.

Rather, the problem with the Chief Justice’s conduct was his methodology, specifically his inappropriate decision to discuss the case privately with a representative of one of the parties, without the knowledge and participation of counsel for the other parties, and to adopt a course of action meant to appease the concerns of that party. As explained by the Supreme Court, these actions by the Chief Justice “were more in the nature of a response to a party rather than to a problem. Thus, an action that might have been innocuous and even obligatory under other circumstances acquired an air of impropriety as a result of the events that preceded it” (p.421).

How each Chief Justice defines and exercises his or her role will depend on many factors, including the Chief’s character and personality, the traditions of the court, its size, whether it is a trial or appellate court, and whether the Chief was appointed from inside or outside the court. But most
significantly, whatever the circumstances, the Chief Justice is a leader – a leader by virtue of historical development and moral authority, as supplemented by enabling legislation, and by virtue of his or her special role relating to the co-ordination of the activities of the court, its internal management, and to safeguarding standards of judicial ethics and practice.

Internal Challenges

What are some of the internal challenges confronting Chief Justices? By this I refer to the challenges emanating from within the court.

First and foremost is the Chief Justice’s relationship with his or her judges. It is not unusual for puisne judges to express concern regarding the potential abuse of power by Chief Justices. In a study of the Canadian court system commissioned by the Canadian Judicial Council, Professor Martin Friedland of the University of Toronto highlighted the concerns expressed by puisne judges: 32

- the power to control when and what education courses judges are allowed to take;
- the power to control attendance at conferences and seminars;
- the power to allocate desirable and undesirable cases so as to reward or punish judges;
- the discretion to approve or disapprove sabbatical and other leave; and,
- the influence that can be exerted on appointments and promotions.

The powers of a Chief Justice put them in such a dominant position that the independence of their judges may be compromised. Opportunities exist for interference because of the unique nature of the Chief Justice’s administrative authority and supervisory duties. Professor Shimon Shetreet, in his classic study of the English judiciary, also wrote about the pressures felt by puisne judges and gave examples of judicial heads manipulating the assignment of cases so as to either punish judges or to ensure that their views prevailed in cases of public importance. 33

What are some of the possible solutions?

First, courts could consider the adoption of formal guidelines or protocols. For example, the Canadian Judicial Council, in 1998, adopted a “Model Policy on Equality within the Court”. 34 The policy states that equality is a fundamental concept that should be taken into account by a Chief Justice in carrying out his or her duties and that the work to be done by judges, whether judicial or administrative, should be allocated in an equal manner. This does not preclude specialization where desirable or necessary, however, exclusive specialization should be the exception and judges should not be assigned to just one type of work without their consent.

Another example is the Canadian Judicial Council’s “Judicial Education Guidelines” adopted in 2008. 35 Those guidelines set out that each puisne judge should be credited with 10 days per year for education programmes against their sitting time. They also set out requirements for education plans and mentoring for newly-appointed judges.

These types of explicit guidelines go a long way to temper the possibility that assignments or decisions as to education opportunities would be used by a Chief Justice as a form of punishment or reward. They provide a framework to the exercise of discretion by a Chief Justice. And they are known by all of the judges.

Second, judges and legislators have increasingly turned their minds to the possibility of fixed terms for Chief Justices.

In Canada, Chief Justices of the superior courts are appointed by the Prime Minister. They are appointed to serve until the mandatory retirement age of 75. Although this has the effect of making them administratively independent, such long tenure may have an adverse effect on the other judges of the court in regard to their own independence. A shorter fixed term would put some real limit on the power of the Chief Justice and lessen the possibility of the Chief Justice coming to dominate the ideology of the other judges. A Chief Justice who was aware that he or she would soon return to the rank of puisne judge would be much more inclined to act equitably in allocating work and deciding on education and other opportunities. It should also lead to a style of administration that is more collegial, more consultative, and less autocratic.

In Canada, a number of provincial courts (courts of limited jurisdiction) now have fixed-term appointments of their Chief Judges. Ontario, for example, provides that the appointment of the Chief Judge of the Provincial Court is for six years and cannot be renewed. The U.S. federal court system now provides that a Chief Judge’s term is seven years. As far back as 1981, a report commissioned by the Canadian Judicial Council recommended a fixed, non-renewable term for all Chief Justices of between 5 and 10 years as did Professor Friedland’s subsequent report in 1995. To date, the Chief Justices who comprise the Council have not given the concept any active consideration.

The major criticism of fixed term appointments is that there is a lack of continuity of direction. This may be particularly pertinent when the position is that of a national Chief Justice or the Chief or President of a country’s apex court. But this may simply be a matter of setting the appropriate term. In principle, there should be no impediment to consideration of fixed-term appointments for the position of Chief Justice of any trial or appellate court with the usual array of administrative responsibilities.

**External Challenges**

In considering external challenges, I have in mind two issues: first, the issue of court administration and its independence from government; and second, the ever-increasing demands placed on the courts and the changing expectations of the public.

The principle of judicial independence has evolved significantly in the past few decades. This evolution has had as an overarching objective the depoliticization of the relationship between the judiciary on the one hand and the legislature and executive on the other hand. The norm of judicial independence is the means for the judicial system to depoliticize its relationship with government and to reinforce the public’s perception of the impartiality of the judiciary.

The need for depoliticization is most apparent in the area of court administration. Many international instruments, such as the UN Basic Principles on the Independence of the Judiciary in 1985 and the Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence in

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37 Friedland, at p. 230.
1998, recognize the importance of administrative autonomy as a fundamental aspect of the principle of judicial independence. They all state, in one way or the other, that the main responsibility for court administration should vest in the judiciary, including the appointment and supervision of support staff and control of the funds allocated to the judiciary.

In many jurisdictions, court administration is still controlled by the executive. This means that courts lack stable funding and discretion over expenditures; the courts are viewed as merely one more government department in the budgeting process; and, administrative staff often have divided loyalties between their ministerial employers and the judicial officers who direct them on a day-to-day basis. And there is very little that the courts can do to correct this situation when financial control is in the hands of the executive.

Fortunately, in recent years, there have been movements toward a more co-operative model and even arrangements whereby greater autonomy is granted to the courts. Arrangements in various courts in Australia, Scotland, Ireland, the United States, and now in some provinces of Canada have developed whereby the courts, and their Chief Justices, have full authority over court resources, both human and physical, with their budgets being set by the legislature after collaboration between the judiciary and the executive.

This trend means greater responsibilities for Chief Justices in planning and financial management. But independence of the judicial power must be based on a solid foundation of judicial control over the various components that facilitate and support the work of the courts. Preparation of judicial budgets, control over the allocation of resources and direction of support staff must be under the control of the Chief Justices for there to be a meaningful depoliticization of the relationship between the courts and government.

Finally, I turn to what everyone recognizes as the vastly expanded role of the courts in society. The past few decades has seen a formidable increase in judicial powers, particularly regarding judicial review of legislation, and an ever-growing involvement of the courts in the resolution of social issues. This trend has been propelled by the constitutionalization of rights and the perceived inability or unwillingness of the legislatures to deal with controversial social issues. The result is that courts are being asked to resolve these questions and to play a much more significant role in shaping the life of the community. The changing role of the courts was described as follows by Chief Justice McLachlin of Canada:

The necessary concomitant of the increasing insistence on human rights and the social face of the law is an independent judiciary, ready and able to review a wide range of government action. While the legislative and executive branches of government have an important role to play in supporting human rights, the difficult burden of interpreting the rights and maintaining them in the face of governmental intransigence if need be rests on the shoulders of the courts.

Some of the extremely controversial social issues that the Supreme Court of Canada, for example, has had to address include the scope of freedom of religion, the moment when human life begins, the right of a person to commit suicide with assistance, and same-sex marriage. Of

40 R. v Morgentaler, [1988], 1 S.C.R. 30.
course, even though such questions end up before the courts because the legislature has failed to act, this expanded role of the courts leads to the inevitable accusations of judicial activism.

A recent example of this tendency occurred in Canada where a Member of Parliament, a member of the governing party, stated that some groups in society are using the courts to do an “end-run” around the democratic process by using unelected judges to overturn policy decisions made by the government. The MP was quoted as saying: “If citizens through the democratic process are unable to make policy decisions because of unelected judges and well-financed interest groups, (then) we collectively lose.” The danger of such comments, ill-informed as they may be, is that they ignore the essential role courts play in society and can easily undermine the public’s confidence in the court system.

What this greater role for the courts also leads to are increasing demands for performance accountability. Dissatisfaction with the justice system, whether due to court backlogs or other inefficiencies, combined with expectations that the courts and justice system must somehow solve a variety of difficult social problems, and the continuing unwillingness of governments around the world to adequately increase the resources required by the courts, are among the forces that are contributing to greater demand for judicial system accountability. This reflects an increased scrutiny of the court system, especially scrutiny of the quality of service provided. This will impose a greater need to develop sophisticated workload indicators and budgeting systems as well as the need for more efficient court administration.

Demands for greater system accountability are becoming institutionalized by formal court standards measurement systems. The Council of Europe has introduced a wide-ranging quality measurement initiative through the European Commission for the Efficiency of Justice. In the United States, the state courts have established trial courts performance standards. In Singapore, the Subordinate Courts took the initiative to develop a “framework for court excellence”. These measurement standards focus on such things as access to the courts, clearance rates, reliability and integrity of case files, and court employee satisfaction.

The traditional response of the judiciary to accountability measurement systems, certainly ones devised by governments, has been to say that they pose a potential intrusion on judicial independence. After all, judges are accountable in other ways: they sit in open court; they give public reasons for their decisions; their decisions may be appealed; individual judges are accountable to the Chief Justice and Chief Justices are accountable in turn for the proper discharge of the court’s work and the expenditure of funds; and, if judges misbehave, they can be disciplined. But the reality is that this is an area where proactive leadership is critical for ensuring court excellence. And that role falls to the Chief Justice.

Here, again, the policies and procedures instituted by the Chief Justice can have a profound effect on a court’s performance and the public’s perception of that performance. For example, a court policy on the ethical behaviour of judges or the treatment of litigants and witnesses may positively influence the values of accessibility, integrity and impartiality. Effective management of court resources can lead to greater expedition in the resolution of cases. Inefficient management and utilization of resources will lead to cases of long duration and an increasing backlog of cases. The point is that the Chief Justice must be concerned with issues of efficiency and the quality of service provided to the public.

It follows naturally that a Chief Justice must foster a culture of excellence. The Chief Justice’s role can no longer be described as simply first among equals. Today a Chief Justice is also the chief executive officer of the court. The courts are a vital institution in modern society and it is the Chief Justice who must accept responsibility for that institution. Thus, the burden falls on the Chief Justice to move the institution forward while maintaining proper relationships with government, the Bar and the public. And, to do so, a Chief Justice must build support internally on his or her court by consulting the judges on the court so that a consensus can be reached as to the court’s goals and how to accomplish them. Important decisions regarding court administration and policy should be done in an atmosphere of consultation, collaboration and collegiality. The Chief Justice of a court may be its leader but without the active support of the judges, he or she will not be leading much.

The challenges for Chief Justices are many and varied. They must be scholars, administrators, communicators and leaders. They must uphold standards of conduct and ethical behaviour, in themselves and their judges. They must be able to work with government but at the same time keep their distance so that no one can accuse them of being either controlled or influenced by political connections. They are the face and voice of the court.

In conclusion, I will quote from a speech delivered by Canadian Chief Justice Beverly McLachlin to the law school at the University of Windsor in 2007: “Governments and societies may intentionally or unwittingly act to curb or undercut judicial independence, but they can never take away the individual judge’s independence of mind and spirit. Judges must be absolutely committed to doing what is right and just, however unpopular that may be. Judges must have courage. Judges must be in no one’s corner and in no one’s pocket.”

These words apply to all judges but in particular to the Chief Justices entrusted with the leadership of the courts throughout the Commonwealth.

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Judicial Independence: Building Public Confidence through Judicial Accountability

By His Hon. Chief Justice Emeritus Annel Silungwe, Zambia

This paper will be divided into three parts, namely: Judicial Independence; Building Public Confidence Through Judicial Accountability; and Conclusion.

I Judicial Independence

The importance of judicial independence cannot be overemphasized for it is not only a cornerstone of any democratic government, but is also crucial to the separation of powers, the Rule of Law and human rights.

What is Judicial Independence

Although many attempts have been made to define “Judicial Independence”, it is generally accepted that the term implies freedom from interference by either the executive or the legislative branch of Government in the exercise of its judicial function. According to Professor Stephen Burbank:

“True judicial independence … requires insulation from those forces, external and internal, that so constrain human judgment as to subvert the judicial process”

The independence of the Judiciary has a dual goal, namely (1) to guarantee procedural fairness in the individual judicial process; and (2) to guarantee protection of democracy and its values. That independence rests on two foundations which are mutually complementary, to wit: (a) the independence of the individual judge (i.e. personal Independence); and (b) the independence of the judicial branch of Government (i.e. Institutional Independence). The two foundations were formulated by the Draft Principles Committee on the Independence of the Judiciary (Siracusa Principles⁴⁵), in the following terms:

“Independence of the Judiciary means:

(1) That every judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law without any improper influence, inducements or pressures, direct or indirect, from any quarter or for any reason; and

(2) That the judiciary is independent of the executive and legislature, and has jurisdiction, directly or by way of review, over all issues of a judicial nature.”

The foregoing foundations are cumulative and, as such, neither of them is sufficient by itself.

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⁴⁴ Wayne Martin, CJ, Western Australia: The Rule of Law, Perspectives from Around the Globe (2009) at 126.

⁴⁵ Draft Principles on the Independence (Siracusa Principles), prepared by a Committee of Experts Convened by the International Association of Penal Law, the International Commission of Jurists and the Centre for the Independence of Judges and Lawyers, 1981.
Personal Independence
It is a truism that personal independence of a judge is a crucial condition for judicial independence. Judicial independence entails that, in judicial adjudication, the judge is free from external pressure, regardless of the source. Indeed, such personal independence includes independence from relatives and/or friends, the litigating parties, the public, other judges or judges responsible for managing the system as well as office-holders in other branches of government. Personal independence (at times referred to as individual independence or impartiality) is thus the absence of a personal interest in, or prejudice towards, the particular issues to be determined by the court or tribunal in a particular case.

Further, the independence under reference means building a protective wall around the individual judge that will guard against the possibility of influencing decisions by influencing the conditions of his or her employment. Removing of a judge from office must be done through a proceeding that guarantees independence of the judge in his or her tenure. In addition, judges should be protected against reductions or erosions in their salaries. A judge’s salary and conditions of service should not be set by the executive branch; they should be set by an independent body established by the Legislature.

However, personal independence in this regard is not a licence for administrative lawlessness in circumstances requiring, for instance, the fulfilment of a clear administrative need.

Institutional Independence
Although a judge’s personal independence is a necessary condition for judicial independence, it is nevertheless incomplete unless it is accompanied by the institutional independence of the judicial branch, designed to see that the judicial branch can fulfil its role in protecting the Constitution and its values.47

In reality, institutional independence is designed to build a protective wall around the judicial branch that inhibits the executive and legislative branches from influencing the way judges fulfil their role as guardians of the Constitution and its values.

Institutional independence has been defined by Sir Guy Green in the following terms:
“*I thus define judicial independence as the capacity of the courts to perform their constitutional function free from actual or apparent interference by, and to the extent it is constitutionally possible, free from actual or apparent dependence upon, any person or institution including, in particular, the executive arm of government, over which they do not exercise direct control.*”48

I now turn to the aspect of building public confidence through judicial accountability.

II BUILDING PUBLIC CONFIDENCE THROUGH JUDICIAL ACCOUNTABILITY
There is a correlation between building public confidence through judicial accountability on the one hand and judicial independence on the other. In the words of erstwhile Chief Justice Lamer of the Supreme Court of Canada:
“Judicial independence is valued because it serves important societal goals – it is a means to secure those goals. One of the goals is the maintenance of public confidence in the impartiality of the judiciary, which is essential to the effectiveness of the court system. Another societal goal served by

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46 See: The Rule of Law Perspectives from Around the World; ibid at 64.
47 The Rule of Law, ibid, at 64-65.
judicial independence is the maintenance of the Rule of Law, an aspect of which the constitutional principle that the exercise of all public power must find its ultimate source in the rule ...”

The independence of the judiciary from, inter alia, the executive on the one hand and the judicial accountability of the judiciary not only for probity, but more importantly for efficient and effective performance, on the other, are prerequisites for engendering public confidence in the judiciary. Hence, the acquisition and sustenance of public confidence in the judiciary is predicated on the realization of judicial accountability. It follows that judicial independence and judicial accountability complement each other and may thus be regarded as two sides of the same coin.

As Professor Woodhense put it, judicial accountability - “... can be identified as managerial and financial accountability - what Le Sueur calls performance accountability – which centres on efficiency and effectiveness and includes the way in which a judge runs his or her court and manages the throughput of cases; personal accountability which relates to the personal behaviour of a judge, both in the court and outside and includes Le Sueur’s ‘probity’ accountability as well as other conduct; process accountability, which concerns processes and procedures; and finally, ‘content’ or substance accountability, that is accountability for individual judgments.”

In a similar vein, erstwhile Chief Justice Brian Doyle, my immediate predecessor, made observations on the subject matter in these terms:

“First of all, they sit in public and discharge their judicial duties in public. They are open to complete scrutiny. Secondly, fair comment on what they do is protected, even if it is both inaccurate and defamatory. Thirdly, a judge must give reasons for a decision. Fourthly, more decisions are subject to appeal, and so to scrutiny of other judges. Fifthly, judges are accountable to peer opinion, which is a particularly powerful form of scrutiny. Sixthly, the decision on courts can be reversed by legislation, as long as it is not legislation aimed at a particular case. Finally, the judiciary is accountable for the public resources that it administers.”

In this modern day and age, when many jurisdictions have seen it fit to embrace what are, to all intents and purposes, Codes of Judicial Conduct, it is widely acknowledged that such Codes, when properly and effectively administered, do invaluably promote judicial accountability and thereby engender and enhance public confidence in the judiciaries concerned.

In Zambia, a Judicial Complaints Authority was established under the Judicial Code of Conduct Act No. 13 of 1999 which became operational in 2002. The Authority’s mandate is to receive complaints and allegations against judicial officers, to investigate them, to submit its findings and recommendations to appropriate authorities seized with oversight responsibilities over such officers for disciplinary action or other administrative action where such measure is necessary. The Authority can also, where appropriate, submit its findings to the Director of Public Prosecutions for consideration and, if need be, for necessary action. The Authority’s vision and mission statement is: To enhance and sustain public confidence in the Zambian Judiciary.

III Conclusion
The need for an efficient and effective observance of judicial independence, coupled with the quest for the establishment and sustenance of public confidence through judicial accountability, is widely accepted in our respective Commonwealth jurisdictions. What remains to complete the equation is the taking of effective measures towards the realization of meaningful judicial independence and sustenance of public confidence through judicial accountability.

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Allow me, first and foremost to join my predecessors, in expressing my sincere appreciation to the Acting Chief Justice of Zambia, Justice Chibesakunda for hosting this Conference and to our Secretary General, Dr. Karen Brewer and her able team for its organization and the well selected programme content.

Addressing, next, the subject of the Panel, there ought to be no second thoughts that judicial independence, in all its aspects – institutional, functional and individual – is vital for guaranteeing the core democratic values subscribed by the Commonwealth, in particular the rule of law; the promotion and protection of human rights and fundamental freedoms; due process and conflict resolution and the securing of a just, fair, accountable and democratic Government. That we should take judicial independence as the main theme of this Conference is most compelling. The Judicial needs to be vigilant: challenges to judicial independence, said Lord Bingham, may not always be by “frontal assault”; it may come about by “insidious erosion” or even “gradual (almost imperceptible) encroachment”\(^\text{51}\).

How does one objectively, quantitatively and qualitatively measure the progress realized or the shortcomings encountered in our own jurisdictions, regionally or throughout the Commonwealth, on judicial independence since the adoption of the 2005 Nairobi Plan of Action.

At times, statistics may offer a valid yardstick; but in these circumstances, they can only tell half the truth. As correctly remarked by Justice Sandra Day O’Connor:

“Judicial Independence does not just happen by itself. It is tremendously hard to create, and easier to destroy”\(^\text{52}\).

A convenient starting point is the relationship between the three branches of Government, namely, the Executive, the Legislature and the Judiciary. While the 2005 Nairobi Plan of Action recognised historically the concentration of power was in the hands of Executive, it purposely invited a cooperative relationship between the three pillars of Government. In particular, the plan called for the establishment of effective mechanism of communications between the Executive and the Judiciary to strength mutual understanding of each others respective constitutional power.

In terms of measuring progress, my own reading of the constitutional framework and recent developments, including in Tanzania, which in the midst of a new Constitutional making process, is that the doctrine of separation of powers, and its inbuilt checks and balances has on the balance, been maintained.

An aspect of any relationship is contact, especially at the higher or policy levels of the three pillars of government. There are those amongst us, conservative or for a better word, traditionalists, who


advocate no contact, on one hand between the Executive and the Legislative, the political branches and the Judiciary, the non-political branch. For my part, official contact in itself is neither a communicable virus nor a deadly disease on judicial independence. Inter-branch communication on the separation of powers, the rule of law and other core issues involving respect for the Constitution and the law between the three pillars of government is a means of resolving unnecessary tension or contentions. These may be unavoidable, but I believe can be well managed. By dialogue, contentions can be overcome and positions best appreciated. It may well be that in some instances, controversies may need to be litigated and before the Judiciary as the final authority for the dispensation of justice. Until that comes to the forefront, the underlying premise must always be, respect for and guarantee of the independence and impartiality of the Judiciary and judicial officers.

In Tanzania, one way that we have reinforced the relationship between the three pillars of government and raised public awareness on the co-equal status of these state organs, is through the Law Day, the beginning of the Judicial calendar or year, invaluably attended by the President as Head of the Executive and Head of State and the Speaker as the Head of the Legislature. This has been well received by the public, the media and the legal community to the extent that Article 72(1)(d) of the Draft Constitution currently before the Constituent Assembly provides that the President is duly bound to attend Law Day as one of his constitutional functions, as it is to defend the Constitution itself. This is but one example of relationship building and mutually respective of each pillars’ constitutionally allocated powers.

The second indicator of progress realized or regress that subsists on judicial independence is the legal designation of the Judiciary and its continuing marginalization (at times) as an institution or organ of State. One cannot convincingly or successfully argue that there is complete judicial independence, where the Judiciary as a third arm of Government and the authority vested with judicial power in a democratic Constitutional order, is still legally or practically considered a mere department of the Government, on a similar footing, say with the Public Works Department (PWD) (no disrespect intended) or some other departmental ministerial bureaucracy. The Latimer House Principles as well as the 2005 Nairobi Plan of Action, plainly recognises the Executive, the Legislature and the Judiciary as co-equal branches of Government, each with its own legitimate domain and functions. It is equally trite that one of the principal purposes of the doctrine of separation of powers is to safeguard against the concentration of power or its monopoly by one arm of government.

Our Constitution, including the new one in the making and laws have erased all defences to the Judiciary of Tanzania as a department (“idara”) of Government. The Judiciary is recognized and legally referred as a pillar (“Mhimili”) of Government and one of the three Organs of the State. In real life, this has its importance in ensuring respect for judicial independence and overcoming the negative effect and perception arising out of the Judiciary’s disadvantaged treatment, historically, as a mere department of Government and one among many others, in some Commonwealth Countries.

A third pointer of progress or otherwise on judicial independence that I propose to take up is financial autonomy or independence. Objective IV on Judicial Independence of the Latimer House Principles emphasizes the requirement for the provision by the Government of adequate, sufficient and sustainable resources (financial, human, infrastructural etc.) to the Judiciary to enable it to operate effectively, without any undue constraints which hamper its independence and impartiality.

53 “Independence of the Judiciary also involves a concomitant commitment by the other branches of Government to provide sufficient resources, within the available means of the State to the Courts to enable them to perform there functions effectively”, Rares, Justice Steven, “What is a quality judiciary”? FCA [2010] Fed JSchool 44, para 16, 24.
Sir Francis Purchas, lucidly expressed it this way: “Constitutional independence will not be achieved if the funding of the administration of justice remains subject to the influences of the political marked place.”

Sufficient and sustainable financial resources go to guarantee the Judiciary’s functional independence. Increased and better access to justice; improvement of Court business process and the delivery of timely justice cannot be ensured by an allocation of a shoe string budget that does not meet basic needs for effective functioning. It is definitely unhealthy for judicial independence if the Judiciary continues to the poor cousin of the two other pillars of Government. While it is to be accepted that it is the Executive that is the Tax Collector and Master of public revenues and to use Alexander Hamilton’s phrase the Legislature commands the purse, the sound principle of good governance and respect for each pillars’ legitimate functions calls for the allocation of adequate resources to enable each of the three arms of Government to effectively perform its constitutional responsibilities. This is exactly what the Latimer House Guidelines emphasize.

The experience, our Judiciary can share in terms of progress on financial autonomy is the establishment of a Judiciary Fund under section 52(1) of the Judiciary Administration Act, 2011. The Fund emulates the Parliamentary Fund established under section 31(1) of the National Assembly Administration Act, Cap 115. R.E. 2002.

Obviously, the existence of the Judiciary Fund by itself does not provide the Judiciary of Tanzania with a blank cheque to fill its own pockets by a self-allocation of budgetary resources, without parliamentary vote. Its net advantages lies in the Judiciary no longer operating under the traditional Exchequer system of payment or through the Treasury; the possibly for the Judiciary to carry forward unused funds in the Judiciary Fund, past the financial year, which would otherwise have to be mandatory surrounds to the Treasury, as is the case with Departments of Government; for the Judiciary to avoid budgetary shocks caused by delayed disbursements or payments and equally important, for it to directly administer and manage the financial resources once approved by Parliament. A prominent role is also give under section 58(2) of the Judiciary Administration Act to the Judicial Service Commission to review and concur with the budget estimates.

By way of valid comparison, the Judiciary of Kenya also has a Judiciary Fund, under Article 173 of their Constitution and by which the annual budget is submitted by the Judiciary directly to the Parliament for approval, and once approved becomes a charge on the Consolidated Fund. Article 183 of the Draft Constitution of Tanzania uplifts the Judiciary Fund from its statutory source to a more secure constitutional foundation.

Looking at the issues across Commonwealth Africa, in terms of progress, I would propose that financial autonomy or resource allocation as an aspect of judicial independence remains an unrealised objective. Effective and efficient justice delivery compels us to continue to strive for adequate and suitable resources to fully exercise the judicial power vested in the Judiciary, as an arm of Government.

One eminent aspect of the relationship between the Executive, the Legislature and the Judiciary is that concerning the judicial appointments process. Given that we are examining best practise, there has been some anxiety over the recent past, in parts of the Commonwealth, on the appointment process of the Chief Justice or High Judicial Officers to the Judiciary. The key criteria for judicial

55 Article 152(1) of the Constitution of Zambia recognizes the Judiciary a “self accounting” institution. “The Judiciary shall be adequately funded “(Article 152).
56 Act No. 4 of 2011.
appointments includes, transparency, accountably, merit, integrity, gender equality and the equality of opportunity⁵⁷.

There is of course neither a universal model nor a perfect template on judicial appointments⁵⁸. A one size-fits-all template would not have with stood national contexts. In some jurisdictions appointments are made by Executive, with or without input from J.S.C., which recommend only one or several nominees. Other have a mixed Executive and Parliamentary appointment arrangement. In many Jurisdictions, the J.S.C. is a crucial driver of the process.

My reading of the recent post suggests a need to closely revisit Constitutional or statutory provisions governing appointment by the Executive to high judicial office as they may be a source of impasse or interpretational controversy detrimental to judicial independence. Let me argue my case. A number of Constitutions provide that the Chief Justice or Deputy Chief Justice or President or Vice President of the Constitutional Court shall be appointed by the President “in accordance with”⁵⁹ or “on the recommendation of”⁶⁰ or “acting on the advice of”⁶¹ or “after consulting”⁶² or “in consultation with”⁶³ the J.S.C. Pertinent questions have arisen, whether this advice or recommendation is binding or only advisory on the Executive and whether it is the J.S.C. or the Executive which is enjoined by the Constitution to take the initiative or the lead. Depending on the answer, judicial independence including justice delivery may be put in strain and under stress.

That apart, the 2005 Nairobi Plan of Action contains a number of other essential bench-marks on judicial independence. To name a few: the fight against corruption and its zero tolerance by and in the Judiciary; Judicial accountability and public confidence, etc. As it as obvious as daylight that I am almost time-barred, I would differ any progress arising out of these objectives for further exchange during the Conference.

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⁵⁸ “There is no consensus as to which is the right system”, Ministry of Justice, The Governance of Britain, Judicial Appointments, para 4.6, 25/10/2007.
⁵⁹ See Article 166(1), Constitution of Kenya.
⁶¹ Article 82(1) Constitution of Namibia; Article 169, constitution of Zambia.
⁶² Article 142(1), Constitution of Uganda.
⁶³ Article 174(2), Constitution of the Republic of South Africa.
⁶⁴ Article 118(3) Constitution of the United Republic of Tanzania.
By His Hon. Justice Charles Mkandawire, Malawi/SADC

Introduction
I have been requested to speak to this issue which has been the subject of intriguing debate for over 16 years. I shall therefore take this rare opportunity to invite delegates to this conference to refresh our minds and revisit the Commonwealth (Latimer House) Principles which have been adopted by Commonwealth Heads of Government in Abuja Nigeria in December 2003.64

In June 1998, a group of distinguished Parliamentarians, judges, lawyers and legal academics joined together at Latimer House, Buckinghamshire, United Kingdom, at a colloquium on Parliamentary Sovereignty and Judicial Independence within the Commonwealth. The colloquium was sponsored by the Commonwealth Parliamentary Association (CPA), The Commonwealth Magistrates’ and Judges’ Association (CMJA), the Commonwealth Legal Education Association (CLEA) and the Commonwealth Lawyers’ Association (CLA) with the support of the Commonwealth Foundation, the Commonwealth Secretariat and the United Kingdom Foreign Office and Commonwealth Office. The product of the colloquium were the Latimer House Guidelines on Parliamentary and Judicial Independence. These guidelines were later refined and developed into principles by Commonwealth Law Ministers and eventually adopted by the Heads of Government in Abuja in 2003.

We should therefore at this time be reminding ourselves as to what has become of these principles in our respective sub-regions and countries. I am aware that following the adoption in 2003, the Commonwealth Secretariat organised several sub-regional conferences to sensitisie the three branches of Government. In Africa, such a conference was held in Nairobi, Kenya from 4-6 April 2005. I had the privilege of being part of the delegation from Malawi which also comprised of the Secretary to the President and Cabinet (Executive) and 2nd Deputy Speaker (Legislature). An action plan was adopted by conference delegates.65 I vividly recall how excited most delegates were with the outcome of this conference and most of them pledged that they would implement the action plan in their respective countries.

Good Governance
The purpose of good governance is the progressive well-being of the people (development), liberty and the prevention of concentration of power in one branch of government. The pillars of good governance are; accountability, transparency and participation. Thus even though the three branches of government have separate and complimentary functions and roles, ultimate focus should not be on power but on how best to serve the people. There is great need to recognise and practice Complementarity amongst the key branches of government and its complimentary organs. The separation of powers and Complementarity required practical adherence within the organs of government, which must be characterised by checks and balances and adhered to the rule of law.

Separation of powers
The antiquated doctrine of separation of powers has never been a correct reflection of politics and there is more of cooperation than separation amongst the three branches of government. As Prof. Friedmann observes;

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“It is now increasingly recognised by contemporary jurists that the borderline are fluid, and that cooperation rather than separation in a constant interchange of give and take between legislature, executive and judiciary reflects the reality.”  

It is therefore pleasing to note that the Latimer House Principles use the term “Relationship between the three branches of Government”. Separation of powers, is one of the Values and Principles of the Commonwealth global village and it has been recently affirmed by the Heads of Government of the Commonwealth. Historically concentration of powers has rested in the hands of the executive arm of government. It is however clear now that most States have entrenched constitutional democracy whereby all state organs are subject to constitutional imperatives. This has led to what constitutional experts call the doctrine of constitutional supremacy.

NAIROBI PLAN OF ACTION

1. **Relationship between the three branches of government**
   
   Each institution must exercise responsibility and restraint in the exercise of power within its constitutional sphere so as not to encroach on the legitimate power vested constitutionally on other institutions. It was affirmed that Commonwealth Africa needed to pay particular attention to processes of democratisation that meet the needs of Africa’s historical, cultural and economic peculiarities and in a manner which is consistent with the Principles.

   1.1 Interaction between the Judiciary and the Executive

   **Proposed Action**

   - The relationship between these two branches of government should be governed by the principle of cooperative governance, with each branch fulfilling their respective critical role in a constitutional, complementary and constructive manner.
   
   - Governments and Judiciaries are encouraged to establish effective mechanisms of communication between the Executive and the Judiciary so as to strengthen mutual understanding of their respective functions.

2. **Good Governance and Accountability**

   The Commonwealth (Latimer House) Principles require that the three branches of government should maintain high standards of accountability, transparency and responsibility in the conduct of all public business.

   2.1 Judicial accountability and confidence building

   There should be adequate observance of principles of accountability in its processes, professional ethics and conduct amongst judicial officers as well as court officials. The institution of peer review mechanisms by members of the profession, appropriate criticism through the media, legislative reversal of judicial precedents and case law should be considered. For accountability to be effective, there must be judicial independence and security of tenure. The judiciary should be well resourced and there must be an effective system for the dissemination and evaluation of judicial decisions.

   There is a particular need to provide security of tenure for judicial officers serving in the lower courts in order to build public confidence in the judicial system (we therefore applaud the findings and recommendations of the CMJA Task Force on the Status of Magistrates in the Commonwealth).

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67 Commonwealth Heads of Government Meeting Republic of Trinidad & Tobago, 27-29 November 2009 (*Trinidad & Tobago Affirmation on Commonwealth Values and Principles*).
Proposed action
Judiciaries are encouraged to:
• adopt Codes of Ethics for Judicial Officers and judicial personnel and review their codes periodically
• embark on judicial outreach programmes to communicate to the general public the role and functions of the judiciary

3. Maintaining an Independent Judiciary - Judicial Training
The need for judiciary driven training should target not only judicial officers but also personnel of the judicial and para-judicial staff.

Proposed action
Governments should recognise the importance of judicial-driven training and education in maintaining judicial independence and to make judicial continuing education an integral part of the administration of justice and provide adequate funding for this.

Judiciaries are encouraged to:
• Identify and prioritise areas of judicial training
• Form a core group of judicial officers to become trainers to ensure that judicial training programmes can be sustained

4. Combating corruption in the judiciary
Corruption is found in all jurisdictions in the commonwealth. The fight against corruption should be spearheaded by Chief Justices.

Proposed plan
Governments are encouraged to:
• set in place clearly defined criteria and a publicly declared process for judicial appointments (Judicial Appointments Commissions: A model clause for constitutions - CMJA, CLA, CLEA 19/04/2013)
• review and establish adequate terms and conditions of service for the judiciaries to minimise their vulnerability to corrupt influences

Heads of Judiciaries are encouraged to:
• spearhead the fight against corruption in the judiciary
• ensure that court operations are transparent and open to the public through awareness of programmes
• engage in appropriate interaction with the media
• prepare annual reports on the work of the courts and the judiciary
• support Chief Justices in Commonwealth Africa to network and meet regularly for the purposes of exchanging experiences, learning from one another, promoting best practices and developing strategies to improve relationships with other arms of government (I commend the Southern African Chief Justices Forum - SACIF).
• Where constitutional provisions are silent to put in place internal investigative mechanisms in the form of integrity, ethics or peer committees charged with the responsibility for investigating all complaints against-judicial officers.
5.  **59th Commonwealth Parliamentary Conference (CPA) 28th August to 6th September 2013, Sandton Convention Centre, South Africa**

On invitation by the CPA Secretariat in London, as Regional Vice-President of CMJA, I attended the above conference and was one of the speakers on the subject matter “**Separation of powers**”. The conference was attended by 850 delegates comprising of Speakers and Members of Parliament from all the 9 regions of the CPA. It was officially opened by President Jacob Zuma. In his opening address, President Zuma said that there can be no good governance without separation of powers.

**Lessons Learnt:**

It was very clear that most Parliamentarians were and are not aware of the Commonwealth (Latimer House) Principles. They confessed that due to high turnover as a result of periodic elections, a lot of institutional memory is lost.

Each speaker was requested to table a recommendation of not more that 25 words which had to be put to the plenary which would either be endorsed if there was unanimity or noted if there was dissent. I proposed the following recommendation which has been endorsed by the CPA:

> “**Commonwealth Parliaments should ensure promotion of awareness of the Commonwealth Latimer House Principles and enact legislation to preserve judicial independence and judicial accountability**”.

6.  **Commonwealth Law Ministers Meeting, Gaborone, Botswana 5-8 May 2014**

Commonwealth Law Ministers/Attorneys-General from 28 Commonwealth countries met in Gaborone Botswana to discuss several issues including consolidating the rule of law and human rights in the Commonwealth, judicial independence and economic development, international judicial assistance.

The CMJA was invited to attend the Meeting in an observer capacity and I was requested by the Secretary General of CMJA in London Dr Karen Brewer, to represent the CMJA in my capacity as Regional Vice President of CMJA. During the meeting, Ministers of Justice/Attorneys-General raised a lot of issues in relation to judicial accountability and judicial corruption. They lamented as to what the judiciaries were doing to address these issues.

As I had to present an activity report for the CMJA, I stressed on the need to implement the Commonwealth (Latimer House) Principles if the above were to be attained.
**Session 6**

**Judicial Independence: Security of Tenure – Improving the Terms and Conditions for Magistrates**

His Worship Araali Kagoro Muhiirwa, Uganda

**What is judicial independence?**

Judicial independence is a concept that the judiciary should not be subject to improper influence from other branches of government. The judiciary as an adjudicating organ of the State shall decide matters before the courts impartially, on the basis of facts and in accordance with the law without any restrictions, improper influence, inducements, pressures, threats or interferences direct or indirect from any quarter or for any reason.

Therefore judicial independence promotes the principle of separation of powers, the rule of law, constitutionalism and democratic governance. It also checks any excesses either by parliament or executive.

In several jurisdictions in the common wealth, the independence of the Judiciary is specifically provided for in the national constitution. Article 128 of the Constitution of Uganda provides that; *in exercise of judicial power the courts shall be independent and shall not be subject to the control and direction of any person or authority*. And further state that; *no person or authority shall interfere with the courts or judicial officers in the exercise of their judicial functions*. This kind of provision is also found in the constitutions of most African countries.

The question then arises whether there is no interference with the Judiciary while in execution of its mandate. Cases of interference with the judicial independence have been reported across Commonwealth Africa.

A good example is what happened on 16th November 2005, the High Court of Uganda granted bail to treason suspects, a decision which some government functionaries did not like. Thereafter, the court premises were stormed and surrounded by the armed members of the Joint Anti Terrorism Team which tried to re arrest the suspects. As a consequence of this incident the trail judge in the case withdrew from the conduct of the case citing interference from the military.

In March 2007, similar incidents happened when armed forces invaded the High Court of Uganda in an apparent attempt to intimidate the judiciary and disrupt the proper discharge of the judicial function. The former Principal Judge, Justice James Ogoola called the attack on the judiciary “the rape of the temple of justice” and the most reprehensive affront to the independence of the Judiciary.

Other forms of interference with the independence of the Judiciary are manifested through; complete defiance of court orders by some government officials, direct interference with the discharge of judicial duties, repeated criticism of judicial officers and court decisions especially by the executive and other politicians, lack of adequate funding, delay to fill vacant posts at the bench and failure by the executive to appoint adequate numbers of judicial officers at all levels of courts. The appointment of judicial officers largely lies with the Executive, for instance, Article 142 of the Constitution of Uganda provides that the President appoints a judicial officer acting on the advice of...
the Judicial Service Commission and with approval of Parliament. This provision has been put to test in Uganda in the case of *Hon Gerard Karuhanga vs Attorney General, Constitutional Petition no.39 of 2013*; where the court held that the President can not appoint a judicial officer without acting on advice of the Judicial Service Commission.

As for appointment of Magistrates, the Judicial Service Commission has the mandate to select and appoint Magistrates, however before such an appointment is made the Ministry of Public Service approves the structure and the Ministry of Finance issues certificate of availability of funds for such appointment.

The other challenge that faces the Judiciary in Uganda is inadequate infrastructure to accommodate courts and in bid to overcome this, buildings which were constructed for operating businesses like shops have been rented out to accommodate courts. And the court users now refer to them as “judicial arcades”.

**Security of Tenure**

Security of tenure is a term that refers to a constitutional or legal guarantee that an office holder cannot be removed from office except in exceptional and specified circumstances.

Hence without security of tenure a judge or magistrate may not have ability to carry out their mandate, powers, functions without fear that if someone disapproves of any of their decisions may be able to easily remove him or her from office in revenge.

Therefore security of tenure offers protection by ensuring that office bearers cannot be victimized for exercising their judicial powers, executing their functions and duties. The principle emphasizes the democratic, open and legal methodology through which an office bearer can be removed from office for justifiable reasons.

The security of tenure of judges of superior courts in most commonwealths Africa has been codified in the national constitutions. The Constitution of Ugandan in Article144 & 148 is very elaborate on why, when, how and for what reason a judicial officer can be removed from office. Interestingly it is important to note that the title Magistrate does not appear anywhere in the Constitution of Uganda but only the phrase judicial officer and subordinate courts is used.

**Improving the terms and conditions of magistrates**

We cannot discuss improving the terms and conditions of magistrates without first considering the matters of selection, recruitment and deployment of magistrates.

It is important to note that in some countries inn commonwealth Africa, the selection and recruitment, deployment and remuneration is decentralized to regional States or Provinces. In Nigeria the responsibility of appointment and remuneration on Magistrates is a mandate of the Provincial State government. Therefore, this brings about varying standards of terms and conditions of magistrates in one national jurisdiction.

Fortunately, in Uganda there is one Judicial Service Commission that deals with the selection, appointment, recruitment and discipline of magistrates. The terms and conditions are standardized nationally. However, when it comes to representation at the Judicial Service Commission the superior courts are represented by a Judge (Article 146 (2) (d) Constitution of Uganda) while magistrates who form the bulk of judicial officers in the country are not represented at all.
The new constitution of the Republic of Kenya has corrected this imbalance and has provided for representation of the magistrates on the Judicial Service Commission.

**Salaries of magistrates**
The salaries of magistrates are meager as compared to those of judges. Secondly, under Salaries and Allowances (Specified officers) Act (Cap 291), the remuneration and emoluments of Judges is specifically provided for by an Act of Parliament while Magistrates are just considered as ordinary public servants and their remuneration is determined by the Public Service Commission. In accordance with these provisions, the Judges in Uganda receive their salaries on or about 15th day of every month and in contrast the magistrates receive salary at the end of the month.

**Article 126 of the Ugandan Constitution** provides that **salaries, emoluments, privileges and benefits of judicial officers shall not be varied to their disadvantaged**. The Executive had for some time interpreted the term judicial officers to mean judges and justices of the higher bench only and when it came to payment of salaries; the Judges salaries were paid tax free while Magistrates salaries were taxed. The magistrates saw this as promoting unfairness and encouraging discrimination. The Magistrates filed a constitutional petition for interpretation of Article 126 (Masalu Musene and 3 others vs. A.G Constitutional Petition No.07 of 2005) at which the following questions were for determination; who is a judicial officer and what is variation? The court held that the term judicial officer used in the Constitution included Magistrates of all ranks and the phrase ‘vary’ as applied in the Constitution meant reduction.

The present Constitution of the Republic of Kenya in an attempt to cure issues relating to payment of salaries of government officers has provided for a Salary Board Commission which will streamline the nature of salaries of various government officers including magistrates.

**Judicial code of conduct**
The Uganda judicial code of conduct is elaborate and all judicial officers have to observe, promote, adhere and live to it by letter. Most countries in the Commonwealth also have similar codes of conduct.

The question posed is that when it comes to the standard of judicial conduct, the measurement is the same for both judges and magistrates. However, when it comes to terms and conditions of service the measurement varied. It is this kind of marginalization that has left Magistrates wondering why when it comes to discipline the measurement is the same like for Judges but on issues of bread and butter, the measurements differ.

**Personal Security**
Whereas the Judges are provided with personal security in form of body guards and police guards and their residences, the Magistrates are just left to enjoy the general security provided by the State to all citizens. In Uganda there have been incidents where Magistrates have been violently attacked. The incidents in point are; a serial killer who was appearing before a lady magistrate attempted to attack and strangle the Magistrate in the open court, a group of criminals abducted a lady magistrate and psychologically tortured and a male magistrate who had gone to visit locus in a land dispute was attacked and injured using a machete.

**Office accommodation and furniture**
In some countries there is insufficient office accommodation for the Magistrates courts. And at times where the office accommodation is available the space is not big enough and the furniture for use by both the court officials and court users is inadequate.
Lack of Residential Accommodation for Magistrates
In Commonwealth Africa some areas are so remote that accessibility is very difficult, the roads are impassible especially during the rainy seasons and there is general lack of social amenities like piped water and electricity. A magistrate may not get a habitable accommodation when deployed in such areas. When some magistrates are deployed in such areas it is seen as a punishment. The Karamoja region in Uganda and the Lake Turkana region in Kenya are good examples where magistrates find such difficulties. And for these reasons deliberate efforts must be taken to construct institutional houses for the magistrate otherwise it is not easy to find a habitable accommodation in such regions.

Transport
In adequate transport for the magistrates is another area where the terms and conditions of service have to be improved. Most judiciaries in the Commonwealth Africa have not been able to provide adequate transport to magistrates thus hindering effective delivery of judicial service.

Corruption
The court users, civil society, politicians have always complained about corruption in the magistrates courts. There is need for all judiciaries to take deliberate efforts to fight the cancer of corruption. In Uganda two magistrates were arrested and tried for receiving bribes. They were found guilty and are now serving sentences in prison.

In Kenya when the government decided to purge the judiciary and have all sitting judicial officers reapply for appointment by going through the public vetting system; about 10% of the magistrates opted to quietly retire than go through the public vetting.

Pension
This is another area which needs to be streamlined. In Uganda the pension and gratuity of magistrates is processed through the normal Ministry of Public Service procedures. The magistrates are mixed up with all other pensionable officers who include police, army, nurses, teachers, etc, and at the end of the day it takes a very long period of time for the magistrate to access the pension benefits.

Disciplinary Procedures
The judiciaries should put in place an elaborate, transparent disciplinary procedure for disciplining magistrates. Principles of natural justice should be observed so that the magistrates facing disciplinary action are handled appropriately through due process.

Judicial Education
The world is continuously becoming a global village. The question is how are judiciaries prepared to constantly train magistrates to be able to handle crimes of modern era such as human trafficking, computer crime, terrorism, cyber crime, drug abuse and religious extremism.

It is necessary for governments and various judiciaries in the region to provide adequate funding for continuous judicial education for magistrates. There should be equality in distribution of training resources between the higher bench and the magistrates.

Retirement Age
Several national constitutions in the Commonwealth Africa provide the age at which the magistrates will retire. The retirement age in most constitutions is 60 years. However there is no mechanism put in place for magistrates who are endowed with special skills to be contracted after retirement to employ such skills.
Discipline and of Removal of Senior Judges
Lord Robert Carnwath CVO, Justice of the Supreme Court of the United Kingdom

The principle that judges of the High Court and above were entitled to security of tenure during good behaviour (“quamdiu se bene gesserint”) and removable only on an address to both Houses of Parliament was established in the United Kingdom by the time of the 1701 Act of Settlement. That principle has been translated in to many modern constitutions or statements of principle. For example, article 98(2) of the Zambian Constitution provides:

“(2) A judge of the Supreme Court, High Court, Chairman or Deputy Chairman of the Industrial Relations Court may be removed from office only for inability to perform the functions of his office, whether arising from infirmity of body or mind, incompetence or misbehaviour and shall not be so removed except in accordance with the provisions of this Article.”

The Latimer House Guidelines are clear on these issues:

“i. In cases where a judge is at risk of removal, the judge must have the right to be fully informed of the charges, to be represented at a hearing, to make a full defence and to be judged by an independent and impartial tribunal.

ii. Grounds for removal of a judge should be limited to:
   a) Inability to perform judicial duties;
   b) Serious misconduct.

iii. In all other matters, the process should be conducted by the Chief Judge of the courts.”

The main tensions in practice have been as to the responsibility for deciding whether the tests are met: in particular the respective roles of the Chief Justice (assuming he or she is not the person under challenge) and the Executive. Each has a legitimate interest in the outcome, the former in protecting and promoting judicial independence and effectiveness, the latter the wider interests of the public in the efficient and impartial administration of justice.

In the United Kingdom the Lord Chancellor used to have a claim to act for both interests. He was traditionally a senior legal figure who combined the roles of leader of the judiciary, membership of the Cabinet, and for good measure speaker of the House of Lords. Reform by the Constitutional Reform Act 2005 redistributed the judicial responsibilities of the Lord Chancellor, and transferred most of them to the Lord Chief Justice. Discipline was shared between them. Removal requires concurrence between them – still with the added protection, in the case of High Court judges and above, of a vote of both Houses of Parliament.

There is still potential for tension. At present, for the first time in modern history, we have a Lord Chancellor who is a career politician not a lawyer, and who may not perhaps see issues of judicial independence through the same eyes as us. Happily so far there have been no problems. Protection for the judge is provided by elaborate statutory procedures, administered by the Judicial Conduct Investigation Office (JCIO), which reports jointly to the LCJ and the Lord Chancellor.

68 I take England and Wales as the model. There were equivalent changes in Scotland and N Ireland.
The most recent example involving a senior judge concerned Lord Justice Fulford, a member of the Court of Appeal and a distinguished former judge of the International Criminal Court. This resulted from allegations made in early March of this year (2014) by the Mail on Sunday that as a young lawyer in the late 1970s, working for the National Council of Civil Liberties, he had written in support of an organisation known as the “Paedophile Information Exchange”. This allegation was referred to the JCIO for investigation under the statutory rules, and he was suspended from sitting in the meantime. The investigation was carried out by Lord Kerr, a member of the Supreme Court (and former Lord Chief Justice of Northern Ireland). The process was concluded by an announcement of 18 June 2014, which cleared the judge of any wrongdoing, since when he has returned to sitting.

This case illustrates three important aspects: (i) that even very senior and highly respected judges are not above suspicion, (ii) the importance of well-established independent procedures for investigating such complaints, and above all (iii) the need if at all possible to act speedily. Suspension provides protection for the public, but if prolonged it may deprive them of the services of a valuable judge, and be grossly unfair to him or her if eventually cleared of any wrongdoing.

The Judicial Committee of the Privy Council has a special role in respect of some Commonwealth constitutions, under which removal requires a request of the Governor, followed by an inquiry by a tribunal appointed by the Governor, and then a reference to the Privy Council to advise Her Majesty. This provides the dual protection of a full investigation, followed by confirmation by a wholly independent judicial body. I have not yet been directly involved in such cases, but I can see how difficult they can be. He has mentioned the case involving the Chief Justice of Gibraltar, where the tribunal’s recommendation for removal was upheld by the Board by a narrow 4:3 majority, the minority opinion being given by Lord Hope. I will come back to some of his comments.

Another very difficult case was from the Cayman Islands, relating to Madam Justice Levers. Although the Board upheld the dismissal of the judge, it criticised the strength of some of the Tribunal’s comments:

“……the Board considers that it was not appropriate for the Tribunal to castigate Levers J’s conduct in the extreme terms adopted in the Executive Summary. It is one thing for an investigating tribunal to identify conduct that it considers amounts to misbehaviour justifying removal. It is quite another to do so in terms that may irreparably damage the reputation of a judge before her conduct has been appraised by the Judicial Committee.”

Here in Zambia the provisions for removal of senior judges have come under close scrutiny recently following the decision of the President to initiate removal procedures for three senior judges in May 2012 for alleged irregularities in the relation to cases before them. Article 98 of the Zambian constitution, to which I have already referred, gives the President the power to initiate and conclude the process:

“98(3) If the President considers that the question of removing a judge of the Supreme Court or of the High Court under this Article ought to be investigated, then –

(a) he shall appoint a tribunal which shall consist of a Chairman and not less than two other members, who hold or have held high judicial office;

(b) the tribunal shall inquire into the matter and report on the facts thereof to the President and advise the President whether the judge ought to be removed from office under this Article for inability as aforesaid or for misbehaviour.”

(4) Where a tribunal appointed under clause (3) advises the President that a judge of the Supreme Court or of the High Court ought to be removed from office for inability, or incompetence or for misbehaviour, the President shall remove such judge from office.”

By 98(5), having initiated the process the President has power to suspend the judge from performing the functions of his office.

Here again the potential for tension between the judiciary and executive is clear, but ultimately the President seems to have the whip hand. It is true that he can only act on the recommendation of a judicial tribunal, but its members are appointed by him, and his power to suspend in the meantime is apparently uncontrolled.

In May last year (2013) in Mutuna v Attorney General, this case came before the Supreme Court which gave an important judgment on the availability of judicial review to control the President’s action. Leave had been granted in the High Court, but the Attorney General applied to discharge the leave on the basis that the case was not reasonably arguable. He was successful, and the claim was dismissed at the leave stage, but only by a narrow majority (4:3). There were three strong dissenting judgments, on the basis that the case was sufficiently arguable to be allowed to go to full hearing.71

The difficulty which even the majority found is perhaps apparent from the final words of the leading judgment (given by Chibesakunda Ag. CJ). Although the court discharged the leave to apply for judicial review, it concluded with these words:

“Before we end, we want to state that although we agree that the President in exercising the powers vested in him under Article 98 has unfettered discretion under the said Article, we nonetheless believe that it would be advisable, considering circumstances of this matter, for the tribunal not to proceed.”

Notwithstanding that plea, I understand that a tribunal was subsequently established by the President, but is itself now subject to an application for judicial review which may come before the Supreme Court. So it would be wrong to enter into a discussion of the merits at this stage.

I would make only one comment, which relates not to the substance of the judgments, but simply to one aspect – that is, the use of the English authorities on Wednesbury reasonableness. As far as I can judge from my limited reading of the case, the arguments turned on a relatively narrow application of that principle, based particularly on Lord Diplock’s famously restrictive definition of irrationality in the CCSU case in 1985 72 (was the decision “so outrageous in its defiance of logic or of accepted moral standards that no reasonable person in his position could have acted in the way he did?”). I confess, with respect to that great judge, that I have never found that part of his speech easy to follow. Judicial outrage seems a curiously inappropriate criterion for the reasoned and objective decision-making normally required of a judge. In any event, that narrow approach has been substantially modified in later case-law, particularly where constitutional principles or basic human rights are at stake:

“The common law no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called Wednesbury principle. The nature of judicial review in every case depends upon the context.”

71 I was kindly supplied with complete transcripts during the course of the conference. For a critical academic comment on the judgments see: http://zambiareports.com/2013/07/12/prof-ndulo-disputes-supreme-court-judgement-on-mutuna/
72 [1985] AC 374
I quote the leading judgment of Lord Mance in a Supreme Court case earlier this year.\textsuperscript{73} It may be, I say no more, that the flexibility allowed by such developments in the law provides a route to a greater degree of judicial supervision of decisions relating to the discipline of judges, even in cases where constitution appears to give unfettered power to the President.

Looking more internationally, basic principles on the Independence of the Judiciary were adopted by the UN General Assembly in 1985, but as the preamble acknowledged “there still exists a gap between the vision underlying these principles and the actual situation”. In a recent article “Judicial Independence: some recent problems” (IBA Human Rights Institute Thematic Papers No 4 June 2014) Geoffrey Robertson QC comments “this was in 1985 and remains in 2014 an understatement”. He cites examples of serious threats to judicial independence from around the world, happily mostly outside the Commonwealth.

A controversial case cited by him from within the Commonwealth was from Sri Lanka, where in 2013 the Chief Justice, Shirani Bandaranayake, was removed from office by a process of impeachment initiated by the President. Robertson gives a characteristically hard-hitting and critical account, asserting (inter alia) that she was—

“... found guilty by a Parliamentary Select Committee, which comprised seven government ministers, sitting in secret and denying her the opportunity to cross-examine witnesses or to have the benefit of a presumption of innocence...”\textsuperscript{74}

It would be difficult for me to comment on the facts without more direct knowledge, even if it were appropriate to do so. I note that the process was governed by Article 107 of the Constitution (“Independence of the Judiciary”) which on its face gives the power of removal to the President subject only to Parliamentary control:

“Every judge shall hold office during good behaviour and shall not be removed except by an order of the President made after an address of Parliament supported by a majority of the total number of members of Parliament (including those not present) has been presented to the President for such removal on the ground of proved misbehaviour or incapacity”.

The same article provides that “the investigation and proof of the alleged misbehaviour or incapacity and the right of such judge to appear and be heard in person or by a representative” are left to Parliament to determine “by law or by Standing Orders”.

Interestingly, Robertson does not condemn the impeachment process outright:

“Although in many respects unsatisfactory, impeachment does at least ensure judicial accountability to an outside body – the democratically elected legislature – and this provides an ultimate safeguard against judicial guardians becoming too incestuous or being perceived as too self-interested to regulate themselves.... The impeachment process may not be objectionable per se – at least for a chief justice – so long as it is conducted fairly in a way that fully protects the judge’s rights and in circumstances where it cannot be credibly suggested that it has been instituted or carried on as a reprisal, for reasons such as the government is unhappy with a judge’s decision in a particular case..”

\textsuperscript{73} Kennedy v Charity Commission [2014] UKSC 20 paras 51-55 (a decision concerning the right of access to documents relating to a statutory inquiry into a matter of general public concern). I reviewed these developments in a speech in HK earlier this year: From Rationality to Proportionality in the Modern Law, to be published later this year in the Hong Kong Law Journal, but now available on the UK Supreme Court website: http://www.supremecourt.uk/docs/speech-140414.pdf

\textsuperscript{74} The impeachment was also criticised by the International Commission of Jurists: http://www.icj.org/icj-condemns-impeachment-of-sri-lankas-chief-justice/
This recognizes first that not all judges, even chief justices, are beyond criticism, but secondly that the government is and should be concerned about the proper and efficient functioning of the judicial system. The law can be a crucial instrument of government policy for good, and an effective judicial system is a critical part of that.

In deference to the Sri Lankan judges who are here, and with whom I have discussed the case, I make clear that it does not throw any doubt on the independence of the Sri Lankan judiciary as a whole. On a more positive note, I would also add that last month I attended a very impressive international conference on environmental law in Sri Lanka (sponsored by UNEP and the Asian Development Bank), which was attended by senior judges from the South Asian region, and impressively chaired by the present Chief Justice. As far as I could judge, in spite of the circumstances of his appointment, he appeared to have gained the respect and support of his colleagues both national and regional.

In conclusion I come back to Lord Hope’s dissenting opinion in the Gibraltar case, which shows how difficult the balance can be. The opinion deserves close attention, not least (in this audience) for the attention it gives to the valuable work in this field of the CMJA. I also commend his account of his own experience as Lord President, when faced with disagreements with the then government over criminal sentencing policy. As he said, “The ability of the press too to stir up trouble must not be underestimated”. He referred to a particular headline in The Scotsman’s report following one such disagreement: “Warning over threat to justice”. He continued:

“From then on the press sought to exploit what they saw as a rift between me and the Secretary of State over issues of policy. As report fed upon report the number of occasions on which I had intervened were said to have been much greater than they actually were. So much so that when it was announced that I was to resign as Lord President on my appointment as a Lord of Appeal in Ordinary the headlines were "Was he pushed or did he jump?" and "(Minister) tightens grip on crime as Lord Hope quits". I was able to correct this impression in an interview after my resignation. But it was obvious to me that any attempt to do so earlier would only have provided the press with further copy and made matters worse.”

Of the majority opinion to uphold the dismissal of the Chief Justice, he said:

“It fails to give proper weight to the crucial importance of protecting senior judges against attacks by the executive upon their efforts to uphold judicial independence in their jurisdiction. Errors of judgment there may well have been. But to say that this amounts to an inability to discharge the functions of the office… seems to me to go too far. It risks setting a dangerous precedent.”

He concluded, however, by recognizing sadly that the harm could not be undone:

“The Chief Justice has now been suspended from office for more than two years. He has been exposed to a long and bruising inquiry, the effect of which has been to harden attitudes on either side.”

In the minority’s view, the proper course would have been for him to be given the opportunity simply to resign, with no adverse inferences of any kind being drawn against him.

Those passages show how difficult it can be in practice to draw the line between acceptable and unacceptable conduct, even at the highest level, and emphasise that in all these cases we are dealing not just with a fundamental public interest, but also with individuals who, unless and until shown to be guilty by a fair process, are entitled to be treated with respect and compassion.
An independent judiciary is an essential ingredient of the rule of law, itself an essential ingredient of democratic government. That this is so is apparent from the evolution of an independent judiciary predating the evolution of democratic control of the executive in the modern sense. It is because of this interdependence between the freedom of the citizen and the existence of an independent judiciary that the latter is always one of the first victims of dictatorships. Removal of the independence of the judiciary removes the rule of law leaving the way open for arbitrary government. Whilst dictatorships destroy judicial independence, societies living under the rule of law must balance the need to preserve, and nowadays foster, judicial independence, with the need to ensure that holders of such office observe appropriate standards of conduct, and discharge their functions in such a way that public confidence in the judiciary is not diminished.

The importance of judicial independence has long been recognised. There is evidence of it being present in Jewish thought going as far back as Deuteronomy. The issue faced by the Hebrews then was identical to that which faced the English, and others, millennia later – how to separate the judges from the control of, and protect them from the power of, the king, on whose executive authority the courts ultimately relied on for the enforcement of judgments, for the buildings in which judges sat and for their ability to derive remuneration from their activities.

Throughout history monarchs have expected subservience, and English history is littered with the names of judges removed from office, imprisoned, demoted or, in some cases, executed for standing in the way of the king: removal was at the King’s will, salaries were uncertain, or dependent on fees paid by those who appeared before them. James I removed Sir Edward Coke when the latter said that judges were not “lions under the throne” but “umpires between the King and subject”.

In many countries today, judges continue to display heroism in the face of prolonged harassment or danger, as well as more mundanely but nonetheless importantly facing difficulties in terms of the payment of salaries and conditions of service. Many examples come to mind where courts have stood their ground in the face of armed soldiers or have upheld the rights of minority groups of citizens in politically controversial circumstances. Such examples are a humbling display of judicial independence, giving life across the centuries and cultures, to Sir Edward Coke’s statement. But the parallels go further and some of the judges have, as Coke himself had to, paid the price and been removed from office.

It was not till 1688, (some 400 years into the existence of the English judiciary), and the Glorious Revolution that saw the deposition of James II, that what we would recognise as security of tenure make its appearance, in the Heads of Grievance presented by Parliament to William and Mary, the Co-Sovereigns who succeeded James, and not in statutory form until the Act of Settlement 1701, when judges positions became permanent during good behavior with remuneration out of the public purse, and arbitrary removal or suspension brought to an end. Since then, only on an Address to the Crown by both Houses of Parliament can a judge be removed. Section III of The Act of Settlement provides:

“The Judges commissions be made quamdiu se bene gesserint and their salaries ascertained and established: but upon an address of both houses of parliament it may be lawful to remove them”.

Those guarantees are a benchmark for security of tenure in the Commonwealth and beyond. In those parts of the Commonwealth constitutionally dependent on the United Kingdom, and in some member states, removal is by reference to a tribunal composed of senior judges and the advice by the Privy Council and not by a vote of Parliament.

Once judges are protected from the whims of tyrants another problem is created, what to do with judges who misbehave or are incapable of carrying out their functions and bring the judiciary into disrepute? The answer raises another set of questions? When the behaviour complained of is criminal, as was that of Sir Jonah Barrington, a Judge of the High Court of Admiralty in Ireland who, after conviction for appropriating court funds, was removed on an Address by both Houses in 1830 the decision to remove is easy. But where exactly is the boundary between acceptable and unacceptable behaviour? When is removal justified? Who decides? How is a matter dealt with before Parliament gets involved? What is the standard of proof? If there is a hearing what is the procedure? What constitutes misbehavior or inability? What to one person may appear to be misbehavior may to another appear judicial robustness, or even if reprehensible not enough to warrant removal, which may be sought for the wrong reasons. Procedures adequate in the 18th Century do not necessarily answer the problems raised by today’s society. Restricting removal of a judge to a matter to be decided by Parliament demonstrates the importance attached to the act but is parliamentary control enough? Does it have the flexibility and immediacy to be able to answer today’s needs? Might it not be 18th century hammer to crack a 21st century nut?

The need to provide a more flexible response in increasingly sophisticated societies, to public concerns about judicial misconduct, has led to the creation in many Commonwealth countries of bodies through which complaints about individual judges can be lodged. The Canadian Judicial Council, the Judicial Conduct Investigations Office in England and Wales and the Conduct Division of the Judicial Commission in South Wales to name three. Statutory procedures, generally very similar, are in place specifying how complaints are processed. These are assessed and if found to have merit and not be frivolous or malicious a judge is nominated to investigate and make recommendations. If the matter is deemed serious enough it then goes to a hearing. Throughout this process, the impugned judge can make representations and dispute any evidence and challenge procedure. At the conclusion of the hearing, recommendations are made as to what sanction if any is appropriate, these range from the judge in question being spoken to about his behaviour, to remedial work been undertaken to a recommendation that the question of his removal be referred to Parliament. But such referrals are usually, and I submit must, as a matter of practicality, be preceded by a judicial hearing as the only way to determine fairly the legal and factual issues necessarily raised by such a process. This is what happened in the case of Vasta J a Justice of the Supreme Court of Queensland, removed by the Governor in 1989 on an Address by the Legislative Assembly. An ad hoc commission of senior judges was set up, which incidentally cleared the judge of the allegations of judicial wrongdoing, but parliament asked for his removal because of other allegations of irregularity. A similar “ad hoc” commission was appointed in the case of Murphy J, also in Australia. (The judge died during the process for his removal, so that was never concluded) Section 41 of The New South Wales Judicial Officers Act provides that before an address on Removal there must be a report by the Conduct Division of the Judicial Commission. Public hearings by the Canadian Judicial Council would also precede a referral to Parliament.

Referrals are rare, but in recent years the Privy Council has had to deal with three. You will recall that I said earlier that in territories constitutionally dependent on the United Kingdom, and in some member states, the question of removal of judges is referred to the Judicial Committee of the Privy Council for advice, to the Queen or Head of State, as the case may be. Given the Committee’s standing, and the rarity of the proceedings, whilst procedures may vary between countries, it is worth considering how the Privy Council dealt with some of the issues. The cases concerned Chief
Justice Sharma of Trinidad and Tobago, Chief Justice Schofield of Gibraltar and Madam Justice Levers of The Cayman Islands. In all three cases Tribunals were appointed to consider if there were grounds for referring the matter to the Privy Council. They were chaired by Lord Mustill, Lord Cullen of Whitekirk KT and Rt. Hon. Sir Andrew Leggatt, respectively. It is, I feel, neither necessary nor helpful to go into the facts of each case, more than absolutely necessary to make sense of the proceedings. These are referred to and, if I may say so, admirably dealt with by David Hacking and Lydia Banerjee in their article Judicial Independence and the Removal of Judges. Given the inevitable constraints, it may not surprise you if I refer mostly to the proceedings concerned with Gibraltar, but the procedural and constitutional overlap between the three is considerable.

Constitutionally the procedure to be followed was the same in, The Cayman Islands and Trinidad and Tobago as in Gibraltar. Judges have security until their statutory retirement age. They can only be removed “from office only for inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour...”. The Governor “shall” remove a judge if the question of the judges’ removal has been referred to the Privy Council at the Governor’s request “and the Judicial Committee has advised Her Majesty that the judge ought to be removed from office for inability as aforesaid or misbehaviour”. The procedure leading up to a referral to the Judicial Committee is contained in the next subsection, and provides:

(4) If the Governor considers that the question of removing the Chief Justice from office for inability as aforesaid or misbehaviour ought to be investigated, then-
(a) the Governor shall appoint a tribunal...
(b) the Tribunal shall inquire into the matter and report on the facts thereof to the Governor and advise the Governor whether he should request that the question of the removal of that judge should be referred to the Judicial Committee and
(c) if the Tribunal so advises, the Governor shall request that the question should be referred accordingly.

In all three cases the decision to appoint a tribunal was taken. The first point I wish to raise is: what is the nature of the proceedings before the Tribunals? The Mustill Tribunal stated: “The Tribunal is not engaged in a criminal process. Even if it were to find facts, which disclosed a criminal offence, it could not proceed to verdict and sentence. It should not make a detour via the law of crime, but should proceed directly to apply the special law created by the Constitution.” The proceedings are thus neither a prosecution, nor disciplinary proceedings, as Lord Phillips stated in the Schofield Case, agreeing with the Cullen Tribunal’s ruling, the proceedings “were concerned with the public interest that called, on the one hand for the protection of a judge against unfounded or illegitimate interference with his tenure of office and, on the other, for his removal should he show unfitness for office that need not necessarily be based on misbehaviour”, they are inquisitorial in nature. The Leggatt Tribunal had come to a similar conclusion in The Cayman Islands.

Linked to the above is the standard of proof to be applied each Tribunal is master of its own procedure and the standard of proof applied will vary depending on the nature of the allegations and the facts which the tribunal has to determine. The Mustill Tribunal decided that the criminal

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76 Unpublished but available on the Internet
77 Section 49(2) and (4) Cayman Islands Constitution Order 1972
78 Section 137 Constitution of Trinidad and Tobago
79 Section 64 (1) Gibraltar Constitution Order 2006
80 Section 64(2) Gibraltar Constitution Order 2006
81 Section 64(3) Gibraltar Constitution Order 2006
82 Para 87 Mustill Tribunal
83 Per Lord Phillips (2009) UKPC 43 Para 15
standard had to be applied, given the nature of the allegations, in that case. Lord Phillips in Schofield stated: “The present proceedings are not however concerned with disciplining the Chief Justice for misconduct but with deciding whether he is fit to perform his office and the committee has decided, as did the Tribunal, that issues of fact that bear on that question should be determined according to the civil standard of proof.” Lord Phillips continued; “The Tribunal applied the civil standard of proof according to what it described as “the flexible approach” that “the more improbable the event, the stronger must be the evidence that it did occur” – see In re D (Secretary of State for Northern Ireland intervening (2008) 1 WLR 1499 per Lord Carswell at paras 23 and 25. That approach is no more than the rational way of determining facts on a balance of probabilities, the more improbable the event the greater the weight of evidence that must exist before the scales tilt in favour of a finding that the event occurred”. Thus the standard to which facts have to be proved is dependent on the allegations before the tribunals, rather than the standard being predetermined by the nature of the proceedings.

In deciding the standard of conduct to be expected recourse can be had to the Bangalore Principles of Judicial Conduct 2002 as well as the Guide to Judicial Conduct - presumably applicable in the particular country. The Cullen Tribunal observed: “Mr. Fitzgerald QC (Counsel for Chief Justice Schofield) was right to emphasise the high test that had to be satisfied before the removal of a judge was warranted. However, it also has to be borne in mind that the performance of a judicial function calls for virtually irreproachable conduct (Therrien v Canada (Minister of Justice) (2001) 2 RCS 3 paragraph 111).”

Guidance can also be derived on the scope, meaning and overlap between grounds on which a judge can be removed under the 2006 Gibraltar Constitution – misbehaviour and inability. The Cullen Tribunal accepted the submission by Mr. Otty QC Counsel for the Tribunal; “that the concepts of “inability” and “misbehaviour” were closely related and that the interpretation of one may assist in the interpretation of the other ...”

The allegations of misbehaviour in the Schofield matter ranged over a number of years, Edward Fitzgerald QC submitted before the Cullen Tribunal that: “Misbehaviour” imported serious misconduct, typically of a criminal, or morally abhorrent or grossly unprofessional nature, which constituted an affront to the standing of the high office of judge. It originated in the common law crime of misbehaviour in public office (Boulanger v The Queen (2006) 2 SCR 49). He submitted none of the allegations, which ranged over a number of years, levelled against the Chief Justice reached the standard to be considered misbehaviour in the context. He further submitted that whilst inability could be inferred cumulatively from a number of incidents, misbehaviour could never be so inferred where none of the instances relied on could themselves be considered misbehaviour. This was rejected by the Tribunal to the extent that it found that reliance could properly be placed on a the cumulative effect of a number of incidents so long as at least some of them properly constituted misbehaviour. The Committee held that that the Tribunal was correct in holding that incidents of misbehaviour displaying the effects of a defect of character could cumulatively be capable of amounting to inability.

84 Paras 82, 91 Mustill Tribunal
85 Per Lord Phillips (2009) UKPC 43 para 16
86 Per Lord Phillips (2009) UKPC 43 Para 17
87 Per Lord Philips (2009) UKPC 43 Para 28
88 Para 22 Tribunal Report
89 Para 22 Cullen Tribunal Report
90 Para 16 , 17 Second Schedule to the Cullen Tribunal Report
91 Para 22 Second Schedule to the Tribunal Report
92 Per Lord Phillips (2009)UKPC 43 Para 206
The Leggatt Tribunal had come to a similar conclusion construing an identical provision in the Caymans Constitution. “Misbehaviour was not serious misconduct of the relevant kind but is used in the constitution to mean “serious misconduct warranting removal”. But misconduct which does not in itself render a “judge to be unfit for office, it may when taken together with other such instances amount to misconduct and so warrant removal.” The Report continues: “A judge may be guilty of serious misconduct without on that account being adjudged unfit for office. But a series of such incidents may constitute a pattern or exhibit a proclivity, which spells misbehaviour.”

Perhaps it was Lord Mustill who best dealt with what constitutes misbehaviour when he stated: “Whatever exactly “misbehaviour may mean, one can recognise it when one sees it”

In Lawrence v Attorney General of Grenada Lord Scott of Foscote approved of Para 85 of the judgment of Gray J in Clark v Vanstone (2004) FCA 1105, (2004) 81 ALD 21.” And (per Lord Phillips in Schofield); “derived the four ingredients that will normally need to be present before conduct can be characterized as “misbehaviour ”for the purposes of removal from office. We consider that Lord Scot’s analysis can helpfully be applied in the present case. The search for the four ingredients raises the following four questions:

i) Has the Chief Justices’ conduct affected directly the Chief Justices’ ability to carry out the duties and discharge functions of his office?

ii) Has that conduct adversely affected the perception of others as to his ability to carry out those duties and discharge those functions?

iii) Would it be perceived to be inimical to the due administration of justice in Gibraltar if the Chief Justice remains in office?

iv) Has the office of Chief Justice been brought into disrepute by the Chief Justice’s conduct?

On the meaning and scope of “inability”, the Committee derived assistance from Stewart v Secretary of State for Scotland where the House of Lords upheld a finding by the Court of Session that “inability was not to be restricted to unfitness through illness but extended to unfitness through a defect in character …. There is good reason to give “inability” in section 64 (2) (Gibraltar Constitution Order 2006) the wide meaning the word naturally bears. If for whatever reason a judge becomes unable properly to perform his judicial functions it is desirable in the public interest that there should be power to remove him, provided that the decision is taken by an appropriate and impartial tribunal”. “We consider that it was open to the Tribunal to proceed on the basis that defect of character and the effect of conduct reflecting that defect, including incidents of misbehaviour, were cumulatively capable of amounting to “inability to discharge the functions of his office” within section 64(2)”.

The occasions on which the question of removing a judge has a clear answer will be rare, when issues are clear cut experience shows proceedings to remove the judge are often preempted by a resignation. But differences of opinion will colour how others view a judge’s conduct. The public perception of a judge, where credible grounds for removal have been proved, is central to determining when a judge should be removed. The concepts to be applied are difficult, the process must be fair and the judicial assessment of facts must be fine, but therein lies the challenge for free

93 Para 2.10 Leggatt Tribunal
94 Para 2.12 Leggatt Tribunal
95 Para 2.13 Leggatt Tribunal
96 Para 87 Mustill Report
97 (2207) UKPC
98 Per Lord Philips (2009) UKPC 43 Paras 202,203
99 1998 SC HL 81
100 Per Lord Philips (2009) UKPC 43 Para 204, 205
101 Per Lord Philips (2009) UKPC 43 Para 206
societies, and how it is faced is central to the rule of law. The threshold for removal is high, but so is the standard of conduct to be observed. The danger exists that the removal process can take so long and be so acrimonious, that at the end it can be difficult for a judge who has been suspended for a long time to return to office, if he is not removed. In such cases the judges’ could be a Pyrrhic victory. This would not only be personally very unfair to the judge in question, but that the danger exists must be a cause for concern. At the end of the day the question is simple – Can the judge against whom certain serious matters have been proved continue in office? The matter is serious and delicate especially because of what Lord Hope refers to (in Schofield) as “the crucial importance of protecting senior judges against attacks by the executive upon their efforts to uphold judicial independence”\textsuperscript{102} The question must, and I submit the authorities show, be answered in the round and robustly.

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\textsuperscript{102} Lord Hope (2009) 43 UKPC Para 234
Introduction
The purpose of my paper is to stimulate and provoke discussion on possible strategies to overcome some of the challenges identified in the Commonwealth Secretariat Report, “Jurisprudence of Equality on Violence against Women: Towards Judicial Leadership” (2012).

I will start off the discussion with a brief definition of judicial leadership. Underpinning my discussion will be the finding that judicial leadership cannot be exercised in isolation. Although we may hail an individual judge for a landmark decision that sets the tone for eliminating violence against women, the processes that lead to such leadership can often be attributed to a variety of factors that have enabled the judge to come up with that decision. Any action that manifests judicial leadership operates within the context of an enabling environment made up of sufficient resources ranging from adequate funding of the judiciary, availability of relevant information, adequate laws protecting the rights of women and the expertise necessary to interpret them. It is thus as much about the enabling factors as it is about judicial decision making. Judicial leadership extends further than the courtroom, and may see the judge at the helm of reforms that enable him to effectively address violence against women working in collaboration with others. It is my suggestion that creatively harnessing the roles that each of the stakeholders necessary to creating an enabling environment could go some way into overcoming the challenges that judiciaries over the Commonwealth are facing in addressing violence against women.

By way of background to the Commonwealth Secretariat Report I have referred to above, it is the product of the mid-term review of the Commonwealth Plan of Action which identifies “Violence Against Women” as one of the critical areas for action. The Commonwealth Secretariat, focusing on efforts to strengthen jurisprudence of equality on violence against women commissioned a review of case law, in Commonwealth Jurisdictions. The purpose of the review was to access the outcomes of domestic violence cases filed in national courts within the Commonwealth with a view to analysing the gendered pattern of the judgments and subsequent implementation measures. The Report identified and examined how the various Judiciaries around the Commonwealth have interpreted and applied national and/or international human rights law, to address violence against women.

To briefly summarize the findings that relate to the judiciary, the Report:
(a) bemoans the absence of a comprehensive law on violence against women in some jurisdictions compounded by the existence of discriminatory laws that reinforce gender stereotypes;
(b) also notes a failure by some judges to apply the law resulting in narrow interpretations and understanding of domestic violence. This results in failure by the court in question to fairly balance the rights of the victims against those of the accused resulting in a miscarriage of justice. It is clear from some of the cases reviewed that, where there are no physical injuries, some courts have trivialized some forms of violence as less serious and not warranting police or judicial intervention;
(c) identified the persistence of gender stereotypes and bias by some courts particularly in sentencing; and
(d) and in cases of marital rape it highlights that there is a lack of a gender sensitive approach in understanding what constitutes domestic and other forms of violence against women.

The result of these challenges is that perpetrators often walk away free or with lenient sentences that do not reflect the gravity of the offence committed. This state of affairs sends a wrong message that violence against women is not a serious crime after all.\(^{103}\)

Not wishing to highlights the obstacles, the Report also presents promising standards and practices that could strengthen the administration of justice and enhance women’s access to justice. It also acknowledges the efforts by national judiciaries to address violence.

An example of one of the cases presenting promising standards is the Botswana case of **Sekoto v. DPP (2007)1BLR 392(CA).** Sekoto was convicted and sentenced to serve twelve years imprisonment for the murder of his live-in girlfriend. He had stabbed her with a knife 18 times inflicting fatal injuries. This was after she ended their troubled relationship. He appealed against the sentence on the ground that the High Court failed to give due weight to the mitigating circumstances raised in his defence.

In dismissing the appeal against sentence, the Botswana Court of Appeal seized the opportunity and sent a strong message that domestic violence was on the increase in Botswana and could not be tolerated. The court recognized the right of the deceased to end the relationship and rejected the accused person’s portrayal of himself as the wronged party. In dismissing the appeal, the Court reiterated that it had a duty to play its part in stamping out domestic violence and found that a stiff sentence was called for in the circumstances. Such warnings can be effective in conveying the message that violence against women has consequences and will not be condoned by the judiciary. The question that I will seek to address in my presentation, is how judicial leadership can be exercised in overcoming the challenges cited in the report using four strategies so that decisions like the **Sekoto** case are the norm and not the exception. I do however acknowledge the diversity of the Commonwealth and therefore in no way suggest that these strategies are a “one size fits all” solution.

**What is judicial leadership?**

The normal tendency is to describe judicial leadership with reference to the cases decided or the jurisprudence developed by individual judges, especially those that sit in an appellate capacity. The 21\(^{\text{st}}\) century has seen an expansion in this perception and the term has come to be associated with judges taking overall responsibility for the overall health of the judicial institution and its effectiveness at dispensing substantial justice in the society that relies on it for doing just that.\(^{104}\)

Both contexts of the role of the judge in judicial leadership are extremely important in addressing, dealing with and violence against women. The Commonwealth Report highlighted that judicial leadership is critical at all levels, the local, the national and the international. The judiciary, being the institution on which “women’s rights ultimately depend”, makes “critical decisions affecting the lives of victims of violence as well as perpetrators of such violence” and are thus ideally situated to “strengthen access to justice and to help protect women victims of violence”.\(^{105}\)

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\(^{105}\) Justice Sarah Ondeyo-Omolo, cited above, p.5
It is important to reiterate at this point that such leadership cannot be exercised by the judiciary in isolation. Whether a judge is presiding over a case involving violence against women or is involved in campaigns for the change in laws, policies, systems and structures that perpetuate violence against women, he or she can only effectively do so with the collaboration of all relevant stakeholders.

Judicial leadership must however be exercised with caution so as not to compromise the impartiality that is expected of the judiciary. Judges must also be careful not to be involved with extra-judicial activities that compromise their independence or to in any way compromise their impartiality or independence when deciding on any particular case.

At an individual level, a judge must be a leader and must be encouraged to take action in the exercise of this leadership that improves the lives of women, protects them and sends out a message that violence against women is a breach of a fundamental human right, both at local and international level and will not be tolerated. Court leadership must therefore strive to take the lead, with Chief Justices adopting or approving strategies that work within their jurisdictions to overcome the challenges faced by them.

**Strategy 1: Continuing education through Internal Training Programmes**

Many of the challenges identified have their root in a lack of appreciation of the implications of violence against women and its ever changing manifestations. Whilst the argument for continuing education for judges especially in gender sensitivity, to keep their skills up to date, has often been brought up, not as much as should be done about it has actually been done. The word “training” is usually synonymous with a substantial input of resources which a good many jurisdictions in the Commonwealth can ill afford. Funding levels for the judicial arm of government may not stretch as far as education programmes when faced with even more pressing operational costs. Yet if we are to get the courts to an acceptable level of competence to understanding, appreciating and actually engaging with violence against women, it is imperative that they are trained to “recaste their roles as formative social institutions, embracing new paradigms, notably as “managers of justice”, to become more accountable and improve service delivery. As a part of this on-going transformation, these courts are grappling with the need not just to reflect social values of diversity and gender equality but to assume a leadership role in promoting and protecting them. In this dynamic context, the techniques of judicial education in supporting the courts to assume and exercise their leadership role are all the more important today.”

How then do judiciaries in such low funding predicaments acquire this essential training?

At the risk of sounding overly simplistic, I would like to suggest that there is still something that judiciaries can do in the form of training without having to strain on resources. Looking inwardly, or in-house, many judiciaries have the necessary knowledge base, but just aren’t sharing it within themselves. For some judiciaries in the Commonwealth, there are no specialized courts for dealing with violence against women. Most cases of violence come before judges in general divisions with no specialization or training in gender equality, however, within the pool of judges, some may have such training or experience and this can be exploited to the benefit of all. A judiciary with an internal training programme, one organized in collaboration with stakeholders, could also harness the expertise within its ranks so that those judges with the requisite expertise could also form be used as resource persons sharing experiences and knowledge with others.

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For example in my own jurisdiction a number of judicial officers have postgraduate degrees in Women and the Law. To borrow an American strategy used for in-house training and information sharing, judicial officers could meet during lunch hour over a working packed lunch, on a designated day and listen to a presentation on current issues in women and the law delivered by a colleague on a rotational basis. Simple and cost effective.

Collaboration with stakeholders with the relevant expertise though, as noted earlier is also important. I would therefore like to suggest that with the right collaborations, a judiciary can formulate a simple programme where not only judicial officers but also various stakeholders that are experts in the field, serve as resource persons at regular judicial colloquia focussing not just on prevailing social norms, but also the technicalities of gender equality and the impact of gender based violence or violence against women on society. I believe some gains would be made by investing time for on-going dialogue that ensures that that all relevant subject matter is explored to the required depth. The judiciary should however initiate contact with the stakeholders as many would shy away for fear of being seen as influencing the judiciary. The judiciary should in consequence take up its leadership role and request general trainings on specific areas in which they are lacking. Internal judicial training committees could take charge in drawing up lists of resource persons and subject matter which could include judicial leadership.

It should not be assumed that every judge will know about judicial leadership and the confines within which it may be exercised. It is therefore very important that this particular topic should also be included in a training program of this nature.

In conclusion, judiciaries must be accountable to the population they serve and there is no better way to ensure accountability than through continuing education, albeit of an informal nature. “To the extent that complaints of inequality encapsulate an underpinning demand for judicial accountability, it is argued that continuing education is acquiring a significant role for the judiciary at two levels: first, as a means to enhance equality of treatment before the law; and second, to illuminate an appropriate means to provide accountability. For these reasons, the judiciary has an emerging interest in developing its continuing education.”

Strategy 2: Judicial watch project

As noted above, judicial leadership is not restricted to the delivery of judgments but also extends to maintaining the health of the judicial institution and to its survival and its relevance and acceptability on society. The various challenges discussed above can also be resolved through programmes sanctioned by the judiciary, aimed at maintaining public confidence in the judiciary, as an institution that is willing to listen to the public it serves. I would therefore like to propose as a strategy, not lacking in controversy, that other jurisdictions have called “court watch projects”. These projects, common in the United States seek to utilize court monitoring as part of a coordinated response to end violence against women. The goal of such a strategy is to have objective court observers document, not only how victims are treated in court, but also how the lack of adequate funding for the judiciary, prosecutors and legal aid practitioners as well as other relevant service providers, impedes the ability of the judiciary to provide high quality service. Once the chief justice of a jurisdiction sanctions the use of such a strategy, objective monitors (perhaps from the Law Society) would be permitted to come into the courtroom and write reports on cases involving violence against women for the consumption of the court. Whether or not these reports are to be circulated further raises a number of issues and is a matter than can only be decided by each jurisdiction having considered the implications. Such monitors would report on

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107 See foot note 1 above.
and accumulate statistics on the types of cases heard, what the outcomes were for the victim and the offender, whether the case was adjourned and why, how long it took for judgment to be delivered, whether the victim was legally aided and the overall conduct of the case.

These statistics could show a trend for certain judges that may very well point to the areas in which they need more training. On the other hand, such reports could also show sentencing trends and the judge would realize whether he is unduly lenient or overly strict with offenders. This data if properly documented may also be used to advocate for the allocation of adequate resources. It may also provide the court’s public relations officer with the information that shows the judiciary in a positive light to share with the public who may often be misguided by negative reporting, thus enhancing public confidence. Properly agreed upon, court watches can be a very effective mechanism to bring about changes to the court.

An example of a court watch report could read:

*In 85% of all your cases Judge ..., you did not order restitution for the abused victim. Battery experts tell us that abusers need to be held financially accountable for their crimes and victims should be compensated for out of pocket expenses directly caused by their crimes. Our request is that you consider the recognized international practice, including asking victims for documentation of crime related expenses, then ordering the defendant to reimburse those.*

*In 90% of the observed cases, in which protective orders were violated, there were no additional sanctions imposed on the defendant. In order to implement the legislative intent of abuse prevention, batterers must know that there will be swift sure sanctions for flaunting the court’s orders. Our request is that some types of sanction are imposed for every violation assuming a full range of punishments depending on the severity of the offence.*

It is also very important to report the positive:

*My Lord, in over 50% of cases watched, you ordered restitution to the victim. Also very helpful was that you ordered money to be paid through the courts so that victim wasn’t endangered further during collection.*

**Strategy 3: Law Reform**

The Commonwealth Report has also highlighted the need for law reform as an urgent priority in the quest to deal with and eliminate violence against women. Many countries still do not have specific legislation that deals with violence against women in the home in separate statutes outside their Penal Codes. Enacting such legislation and enhancing the capacity of all service providers dealing with it is only the first step. The repeal of discriminatory laws that reinforce gender stereotypes must run concurrently with the enactment of specialized laws. Comprehensive and integrated support and other legal services that take survivors through the judicial process should also be specifically provided for in legislation. Other issues also need to be addressed within the legal framework to ensure that whilst the perpetrator is facing justice in the criminal justice system, the victim is also provided for and protected.

Law reform should not be a challenge in the Commonwealth where almost every country has an institution specifically set up for that purpose. In Malawi, the practice of the Malawi Law Commission which operates with *ad hoc* law commissioners chosen for their expertise in the field of law under review, the practice has been to appoint a high court or a Supreme Court judge as the chairperson of that particular commission, called a special law reform commission. In many other jurisdictions, the head of the law reform body is often a senior judge. This provides ample opportunity for judicial leadership, with the judiciary participating in the development and
formulation of new laws as well as the repeal of discriminatory ones. Such practice also recognizes the unique role of the judge in motivating change. It is therefore very good practice to include judges in law reform initiatives, realizing that judges have the training to see any situation from all perspectives and thus provide a clear vision of new laws or systematic frameworks that work towards eliminating and preventing violence against women.

**Strategy 4: Lobbying and advocacy**

Whilst many of the challenges can be dealt either at the individual judge level through training, or at the collaborative level through collective responses with multiple stakeholders, some issues need to be escalated to political and government structures in order for the changes to be made. This is where lobbying and advocacy becomes a useful strategy. Judges can be at the helm of such initiatives because of their status which gives them a natural leadership role. Judges hold the clout to call for meetings which may be attended by high level functionaries with the potential to ensure that law reforms are speedily enacted, so that more meaningful interaction and engagement between them and the executive and legislative arms of government is the order of the day. Meaningful dialogue, initiated by Chief Justices as we heard yesterday, is crucial.

To conclude,

“A society’s institutions either grow deeper and adapt, or wither and get bypassed. Just as the adjudicating judge long ago ceased being the passive non-manager of litigation, today’s judge must take interest and responsibility for building better systems of justice.”

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108 Randall T Shepard, cited above at page 772
SPECIALIST SESSIONS

Cybercrime
Facilitator: Judge Colin Greasley – Notes from the Presentation

Introduction
Areas to be considered.
1. Types of activity.
2. Nature and Size of the Problem
4. Commonwealth Working Group on Cybercrime (focus on a few of its key recommendations and judicial training)

Discussions and Shared Experiences.

1. Definition of CC
Where does cyber come from? 1980s abbreviation from cybernetics ...or robotics (cyborgs)'
Cybercrime isn't a legally defined category. Essentially, it's a label applied to a range of illegal activities associated with computer, information and communication systems or networks.
Examples of cybercrime.

2. Nature and Size of the Problem
Highest level of CC victims?
1. China. 2. Russia. 3 South Africa

Types of Victims
Government.
Organisation (public or private)
Corporation (Large or small, national or international).
Any system that operates computer or IT technology (Denial of Services Attacks).
Individuals.

The problem
Now estimated there are approximately 4 billion users of the internet world wide. Computers form major part of our personal and working lives. They store valuable information, hold money, electronic images, fly airplanes, run courts systems, contain government secrets, corporate strategies, intellectual property, new designs etc. Today, we send and receive personal and work emails on I-phones, I-pads, smart phones, tablets. We store all kinds of data on our various devices. Data stored on devices is vulnerable to acquisition, attack, or compromise.

There are 1.5 million victims of cybercrime every day. That 18 victims every second. (1,080 per minute: in our 75 min specialist session there will be another 81,000 victims!). The computer can be the weapon and the target. Or it can be the accessory; temporary storage for illegally obtained property or information - especially money laundering - a digital filing cabinet. The computers could be in the same building, or in different continents. Cybercrime shows no respects for international boundaries: it is 21st century burglary.

Some sources estimate losses to businesses and institutions in the US alone to be $67 billion in a single year, but not all businesses publicise attacks or vulnerability to cybercrime, as this undermines confidence in their products, so the losses could be higher.
Perpetrators
Mainly professional criminals - groups and individuals, with significant resources and skills, but also children. Teenagers form a very unhealthy proportion of computer hackers.

Many masterminds behind cybercrime are kids! Hacking tools are now easily available on the net, once downloaded, they can be used by computer novices. This expands the potential group of perpetrators. Children (and often sometimes their parents) think that shutting down or damaging IT systems, releasing a virus, are amusing pranks. Some of the media have in the past almost portrayed them as modern Robin Hoods. Nothing could be further from the truth. These acts are illegal, and cause real damage and loss to others.

Recent major cases:
US government indicting 5 members of the Peoples Republican Army of China.

Russian Evgeniy Bogachev also accused of being involved in major cyber attack on US computers from his boat in the Black Sea. UKs NCA, working with the FBI and Europol issued warnings in June 2014 regarding Cryptolocker virus. Use of the Zeus malware.

Sony Play station shut down in August 2014 by cyber attack (denial of service attack)

Ebay asked users to change passwords in May 2014 after computer hacking comprised its systems. PM David Cameron pledge of 1.1 billion for military to fight cyber terrorists.

Cybercrime is truly international problem and shows no respect for international boundaries. Offenders often in different countries or continents.

Council of Europe Convention on Cyber Crime (the Budapest Convention)
Drawn up by Council of Europe with participation from US, Canada, Japan, and SA. Entered into force in July 2004.

By June 2013, ratified by 39 countries. Signed by an additional 12 Countries, and a further 10 invited to accede. Many other countries (including Commonwealth countries) have used the Convention as a guide to cybercrime legislation. It’s an open Convention, so not limited to States which are members of the CoE.

To date, 4 Commonwealth states are party to the Convention (Australia, UK, Cyprus, Malta). A Protocol was added to the Convention "The Criminalisation of Racist and Xenophobic Nature Committed through Computer Systems" came into force 2006. The Convention aims principally at:

- Harmonising the domestic criminal substantive law elements of offences and connected provisions in the area of cyber-crime
- Providing for domestic criminal procedural law powers necessary for the investigation and prosecution of such offences as well as other offences committed by means of a computer system or evidence in relation to which is in electronic form
- Setting up a fast and effective regime of international cooperation

The following offences are defined by the Convention: illegal access, illegal interception, data interference, system interference, misuse of devices, computer-related forgery, computer-related fraud, offences related to child pornography, and offences related to copyright and neighbouring rights.
It also sets out such **procedural law issues** as expedited preservation of stored data, expedited preservation and partial disclosure of traffic data, production order, search and seizure of computer data, real-time collection of traffic data, and interception of content data. In addition, the Convention provides for the setting up of a 24/7 network for ensuring speedy assistance among the Signatory Parties.

**Commonwealth Model Law in Computer Related Crime and Security.**
The Commonwealth developed its own Computer Related Model Law in Computer Related Crime and Computer Security, drafted in 2001. The initiative came from Law Ministers at their 1999 meeting in Port of Spain; they asked for an expert group to consider the content of a model law on the basis of the then work underway by the CoE who were considering the draft Budapest Convention.

The Expert Group produced a Model Law, which became wholly compatible with the Budapest Convention, although mutual assistance provisions are not in the Model Law. Scheme revised in 2011. 53 member countries. Much quicker process than accession route to the Budapest Convention, and same principles exist.

**3 Parts.**
Pt 1. Definitions of computer, service provider, data, and jurisdiction.
P2 deals with substantive criminal law offences, relating to illegal access to data, interference, interception, child pornography.
Pt 3 deals with procedural matters, search and seizure, disclose and preservation of data, interception of electronic communications, general evidential provisions.

**Harare Scheme**
In addition to the Model Law, the Commonwealth has the Harare Scheme. The latest revision involved an Experts Group meeting in 2007 involving 15 countries, and a further working group in 2010 when 22 Commonwealth countries attended. The Harare Scheme relating to Mutual Assistance in criminal matters is a voluntary scheme which provides a framework for cooperation between Commonwealth countries.

The Harare Scheme introduced material on taking evidence or statements from witnesses, through live video link or other audio visual means, preservation of computer data, and covert electronic surveillance. This is its practical purpose. The Harare Scheme is voluntary.

The existence and operation of piecemeal international provisions relating to Computer related crimes led to the establishment of the Commonwealth Working Group of Experts on cybercrime, held under the auspices of the Secretariat and which reported to Commonwealth Law Ministers in 2014. Far reaching report.

**4. Commonwealth Working Group of Experts on Cyber Crime.**

The Group of Experts looked at, inter alia:
1. Implications of CC for Commonwealth Countries;
2. Identify effective means of cooperation and enforcement;

Report made to Ministers in 2014. Number of recommendations: Consider/discuss 3 of these.
1. Increased Accession to the Budapest Convention Paragraph 2.25
2. Training for Judges/Prosecutors paragraphs 3.10; 3.12; 3.15; 3.27-29; 3.34
3. Establishment of the Cybercrime Initiative. Page 48 onwards. This is a key document which anyone interested in cybercrime issues within the Commonwealth should regard as essential reading.

The Way Ahead

The cybercrime Initiative now provides a focus for assistance to Commonwealth Countries to seek help in establishing cyber security and adaptation of substantive criminal law, through means of needs assessments by panels of experts. The CCI is designed to provide member states with coherent and sustainable measures to combat cybercrime. This includes prevention measures, appropriate legal frameworks, and attendant investigation, technical and prosecutorial capabilities. The Commonwealth Secretariat is the focal contact point.

Phases 1 and 2. Financed by FCO. The Phase 2 assistance can last up to 2 years. Already, assessments have taken place in Ghana, Trinidad and Tobago, Dominica, Uganda, Tasmania and Botswana. This is ongoing work.

Cybercrime is a global growth industry. Training of judiciary, prosecutors, and investigators is vital. The Council of Europe programme for Judicial Training is easily useable within a Commonwealth context.

The creation of specialist Judges, prosecutors and investigators in what effect would be "Cybercrime Courts" may not be far away. As more remote Commonwealth countries acquire internet technology, with it will come cybercrime problems - especially cybercrime security. There will be a constant battle to attempt to keep one step ahead of the cyber criminal.

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INTRODUCTION

- **Globalization is transforming family law**
  - Families are the primary unit of social organization, and families are changing, trying to adapt to new demands and taking advantage of new mobility.
  - Lawyers the world over are increasingly confronted with issues regarding international adoption, child abduction, divorce, custody and domestic violence, where the parties reside in, or are citizens of, different states.

MARRIAGE

- **Traditional vs. Modern marriages**
  - Traditional marriages usually involve a religious ceremony, while statutory marriage is often entered into through a secular, civil ceremony.
PREREQUISITES TO MARRIAGE

- Prerequisites to marriage fall into three categories: eligibility, consent and formalities.

- Eligibility refers to a wide range of factors, including laws which incorporate incest taboos, prohibit close relatives from marrying and impose some age limit.
  - Under traditional Islamic law, no minimum age is established. However, several Islamic States have set a minimum age at which consent is valid. In Jordan, for example, the man must be 16 and the woman 15.
  - Most non-Muslim States require that a person be unmarried in order to be eligible for marriage. Several Muslim States, however, permit polygamy, under some interpretations of Islamic law, a husband may marry up to four wives. Polyandry, in which a woman has more than one husband is however rare.
  - The new Kenya Marriage Act, 2014, sets the marriage age at 18 years old.

- Consent requirements refer to the consent of the spouses’ families in traditional marriages or to consent of the spouses in modern or statutory marriages.

- States often require some ceremony, registration or similar formality to distinguish marriage from other relationships and to impress this distinction upon the parties as well as their families and their communities.

RECOGNITION OF FOREIGN MARRIAGES

- A marriage which is valid under the law of the State where it is entered into will be recognised as valid by another State.
  - The exception to this rule is that if a marriage is void as a matter of public policy in the second state, it may not be recognised even if it were valid under the laws of the State in which it was entered into.
  - In France, for example, the second and third wives of Muslim immigrants from Northern Africa or the Middle East are not considered the wives of their husbands even though they were recognised as legal wives in the State in which they were married.
    - Under Articles 5 and 14 of the Convention, a Contracting State may refuse to recognise the validity of a marriage where such recognition is manifestly incompatible with its public policy.
    - In Cameroon, Kenya and many other countries, couples can choose to be married under statutory law or customary law.
      - The latter permits polygamous marriages and requires the payment of a bride price. Since the bride price is paid to the family, represented by the family head, parental consent is implicitly required.
CHILD CUSTODY AND ABDUCTION

- Custody refers to the post-divorce or post-separation living arrangements of the minor child.
- The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction is a multilateral treaty, which seeks to protect children from the harmful effects of abduction and retention across international boundaries by providing a procedure to bring about their prompt return.
  - The Hague Convention does not apply unless both States are contracting parties to the Convention.
  - In the Netherlands, for example, joint custody is automatic after divorce unless either or both parents explicitly asks for sole custody on the ground that it is in the child's interest.
  - In Islamic States, in contrast, custody is determined by the age and sex of the child, in accordance with Islamic Law.
  - The convention on the Rights of the Child explicitly incorporates the 'best interest of the child' standard, so does the African Charter on the Rights and Welfare of the Child.

DOMESTIC VIOLENCE

- Domestic violence refers to a broad range of actions, from verbal abuse, including threats, to spousal rape and murder, that takes place within the privacy of an intimate relationship often within the marital home.
- As part of public international law, domestic violence has been recognised as a violation of women’s human rights.
  - In 1993 the UN General Assembly passed the Declaration on the Elimination of Violence Against Women
  - Since domestic violence is now considered a human rights violation, a state may be held accountable under international treaty monitoring bodies.
- Pakistan – Killings in the Name of Honour
  - In Pakistan, hundreds of women of all ages, in all parts of the country and for a variety of reasons connected with perceptions of honour are killed every year. The number of such killings appear to be steadily increasing as the perception of what constitutes honour – and what damages it – steadily widens. As State institutions – the law enforcement apparatus and the judiciary – have dealt with such crimes against women with extraordinary leniency, and as the law provides many loopholes for murderers in the name of honour to get away, the tradition remains unbroken.
CONCLUSION

- Historically, International Family Law has been regarded primarily as the province of private international law.
- The erosion between public and private international law has been so thorough in the context of international family law that the subject can no longer be understood merely as a part of private international law. Rather it requires a grasp of the applicable public international laws, especially human rights law as well.
- Culture is one major factor to take into consideration as it relates to the on-going debate between universalism and cultural relativism.
- States constantly have to find a balance between their obligation to protect the rights of the individual and the rights of the family unit across borders.

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Criminal law and Sentencing Reforms
Facilitator: Sheriff Robert Dickson - Summary of discussions

The room was full and there were delegates from all parts of the Commonwealth. I began by giving a brief summary of the changes which had happened in my lifetime (the abolition of Capital and Corporal Punishment and the expansion in the non-custodial disposals now available compared with the very limited or non-existent Probation service of the immediate post War period).

I spoke about the Scottish Drug Treatment and Testing Orders (DTTOs) which we have in Scotland and this gave rise to a wide discussion. Representatives from England, Australia and parts of the Caribbean spoke about similar systems and their value. All felt that it involved a great deal of Court time with repeated checks on how the accused was progressing but all felt it very well worthwhile. Various delegates mentioned that for some addicts who were trying hard to overcome their addiction, a few words of praise from the presiding judge at a continued hearing was invaluable; few had ever received encouragement from anybody in authority.

The African Delegates largely had no such system but were interested to hear about how it worked.

Discussion moved to the use of the Death Penalty in certain countries and the efforts of the Privy Council to place as many obstacles as possible in the way. There was a clear divergence of views on this subject.

There was a wide ranging discussion on whether the legislators were interfering with a Courts discretion by creating mandatory minimum sentences for certain offences. One example was the provision which provides a minimum 5year term for possession of a firearm when this could (and had) entrapped an elderly widow who had kept as a souvenir a pistol which her late husband had brought back from the 2nd world War. Other examples were given and the general consensus was that (a) Governments too often make knee jerk reactions to the clamour of a vocal minority and (2) that it is an insult to assume that the Courts cannot impose an appropriate sentence in each individual case without the legislators decreeing the range into which ever sentence must fall. It is at worst an interference with Judicial independence and at the least an indication of a lack of confidence in those chosen to preside in the courts.

This was a good session with a wide ranging discussion displaying that much progress has been made in trying to find methods of lowering the crime rate. There however was a divergence between those who felt that too often a soft approach was tried but failed and those who welcomed the wider use of supervision, unpaid work and other disposals within the community.

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LEARNING SESSION
“Producing Succinct and Quality Judgments in a Timely Manner”

Producing Succinct Quality Judgments
By Hon. Christopher Gardner, Chief Justice of the Falkland Islands

Slides produced by the Hon. Christopher Gardner below outlining the issues

3 components to producing such a judgment:

Succinct = no longer than it needs to be to be readily understood

Quality = explains the issues and demonstrates that you have considered them and the evidence and arguments relevant to them

sets out your reasons for deciding them in a particular way, making clear why one party has won and the other has lost

Timely = produced in a reasonable time and whilst you still have sufficient recall to do justice

1. When does the preparation of a judgment commence?
As soon as the case comes before you.

Do not just think case or hearing, but also think Judgment
i.e. the need to make a decision relating to issues raised by evidence and argument

2. Importance of defining issues

Sources:

Pleadings
Directions (Opportunity to ask for help)
List of issues agreed between the parties
List of admissions
Chronology
Indexed paginated trial bundle
Indexed highlighted authorities bundle
Pre Trial reading list
Skeleton Arguments

Essential to get issues clear and hopefully agreed by lawyers/parties before hear evidence or arguments, if necessary in opening. Reduce to writing

Once identified: number the issues
3. Recording of evidence:

**Notebook:** Page numbers

**Index:**
Day numbers/dates

**Witnesses:**
New Page for: Chief: note times of start/ end
Cross-examination
Re-examination
Speeches

**Left hand page:** Leave blank for:
issue numbers
questions you wish to ask
comments re witness:

**Pens**
Different colours for Claimant/Plaintiff and Defendant

**Highlighters**
important answers

**Stickers**
day numbers
witnesses
speeches
issues

4. START

**Structure**

**Target**

**Arguments**

**Research**

**Timetable**

(1) **Structure**
How complex are the issues?
How detailed does the summary of evidence have to be?
How much reference to legal authority?

(2) **Target**
Who will be the main audience?

Parties (Litigant in person)
Parties’ Lawyers
Public
Press (soundbites, summary)
Legal Commentators/Law Reporter
Court of Appeal (beware writing mainly with Appeal Court in mind)

**These considerations should determine whether:**
Language needs to be kept simple
Paragraphs need to be short
Sentences need to be short
Bright lines, not shades of grey (see Lecture of Lord Hope of Craighead “Writing Judgments” delivered to the Hong Kong JSB, 26 September 2011) Headings are needed
Footnotes/endnotes should be used
An introduction is needed
A conclusion is needed

Remember that first paragraph is the one most likely to be read
Paragraphs should be numbered
Pages should be numbered

Length:
Apply a 10 page alarm. Once you have reached the 10th page you need to justify to yourself that further pages are really necessary, and ask if you can reduce what you have already written.

Example:

1. In this case on Saturday 6 September 2014 at about 10 am, the Plaintiff, Craig Hope, a 21 year old student from Edinburgh University, Scotland, was riding his 500 cc. Kawasaki motorcycle, in a southerly direction along the Great North Road, Livingstone, when he collided with the rear nearside wheel of a Lexus motor car, registration number H 715 FLR, which was driven by the Defendant, who was travelling to a Law Conference, in the opposite direction and which had turned right at Obote Road. The Plaintiff was thrown from his seat and hit his head on a mopane tree on the eastern side of the road, sustaining injury. The location is shown on the scale plan at page 27 of the Trial Bundle. The Plaintiff claims damages for his pain, suffering and loss of amenity and loss of earnings. The Defendant counterclaims for the cost of repairing her motor car. This trial before me relates to liability on the Claim and Counterclaim.

164 words

If this can be edited by deleting the following underlined words:

1. In this case on Saturday 6 September 2014 at about 10 am, the Plaintiff, Craig Hope, a 21 year old student from Edinburgh University, Scotland, was riding his 500 cc. Kawasaki motorcycle, in a southerly direction along the Great North Road, Livingstone, when he collided with the rear nearside wheel of a Lexus motor car, registration number H 715 FLR, which was driven by the Defendant, who was travelling to a Law Conference, in the opposite direction and which had turned right at Obote Road. The Plaintiff was thrown from his seat and hit his head on a mopane tree on the eastern side of the road, sustaining injury. The location is shown on the scale plan at page 27 of the Trial Bundle. The Plaintiff claims damages for his pain, suffering and loss of amenity and loss of earnings. The Defendant counterclaims for the cost of repairing her motor car. This trial before me relates to liability on the Claim and Counterclaim.

164 words

The result is a paragraph that is quite sufficient and more succinct:

1. On 6 September 2014 the Plaintiff was riding his 500 cc. motorcycle south along the Great North Road, Livingstone, when he collided with the rear nearside of a car, driven by the Defendant in the opposite direction, which had turned right towards Obote Road. The Plaintiff was thrown from his seat sustaining injury. The location is shown on the scale plan at page 27 of the Trial Bundle. This trial relates to liability on the Claim and Counterclaim.

78 words
“A mini can get you to your destination. You do not need a Rolls.”
(Lord Judge)

(3) Arguments
In relation to each issue:

Ask: how many relevant arguments need to be referred to?
   how many and what authorities need to be referred to/quoted?

(4) Research
What research as to the law is still necessary? There should not be any! Any research (internet, worldii, bailii, judicial portal) should be done before case has ended, so that parties have opportunity to comment upon it.

(5) Timetable
How long will Judgment take to produce in view of above?
Diarise. When can you start it?

Truism: the longer you leave it, the longer it will take

If there is to be an unavoidable delay before you can begin writing your judgment, at least make a short note of your view of the witnesses, of the matters you are satisfied about and matters about which you need to think about.

5. “MEASURED” is an adjective that describes a good judgment

Main factual issues
Evidence relating to those issues
Authorities and how they relate to the legal issues
Summary of findings
Unacceptables
Reasons
Edit

Decision

(1) Main factual issues
These can often be shortly stated within one paragraph.

(2) Evidence
It is only the evidence relevant to those issues that needs to be referred to.

Beware getting bogged down with non-relevant factual differences unless they bear on credibility.

(3) Authorities
The legal issues should also be capable of being shortly summarised.

A judgment only becomes weightier on the scales if it is full of long quotations. It will not impress the Court of Appeal, and can make a judgment impossible to follow.

Select the parts of a statute or judgment that need to be quoted, rather than summarised, sparingly.
Do you need to quote the whole passage, or can you put dots in place of unnecessary words?

If you want the Court of Appeal to know you have taken account of an authority which you do not need to quote, you can put its name in brackets behind “see also.”

Authorities must never be used as a substitute for explaining your own process of reasoning

(4) Summary of Findings
These should be as concise as possible

Relate to the relevant issues, both as to fact and law

(5) Unacceptables
Plagiarism.

In Crinion (2013) the appeals were based solely on the fact that almost all of the judgment was taken word-for-word from D’s counsel’s closing submissions. The Judge took his Word file that he had been sent as, in effect, his first draft. The Judge made no changes to the overall structure. He retained all the headings. The Appellants submitted that for the Judge to base his judgment to such an extent on D’s counsel’s submissions created the impression that he had abdicated his core judicial. It was of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done. A litigant who sees the other party’s submissions adopted in such a wholesale way will justifiably not believe that his own side of the case has received any attention.

Underhill L.J. agreed that it was thoroughly bad practice for the Judge to construct his judgment in the way that he did. He agreed that appearances do matter. For the Judge to rely as heavily as he did on D’s written submissions risked giving the impression that he had not performed his task of considering both parties’ cases independently and even-handedly.

(6) Reasons
Most important part of any Judgment.

Your reasons for preferring one witness over another should be clear.

A party must know why they have won or lost.

Do not be afraid to state that you have been misled if that is what you believe, but you have to give clear and compelling reasons for such belief.

Here inconsistencies, particularly under cross-examination, are important.

The reasons for accepting one legal submission and rejecting another must be clear.

If dependant on authority, the rationale of that authority should be stated. If you distinguish an authority you reason for doing so must be explained.

(7) Edit
Edit out anything that is not necessary. Rewrite something that is too long-winded or unclear, or expressed in a too complicated or legalistic way. Move paragraphs around if it makes if it is more
logical to do so, or improves the structure of your judgment. Remember to renumber the paragraphs if necessary. The use of a computer facilitates this.

**Political correctness check.**
It is wise to always carry this out.

**Spelling check.**
Recently in England one of the grounds of appeal against a ruling in the Court of Protection was based on the number of typographical errors which, it was argued, suggested that the Judge had no approached his task with sufficient care.

(8) **Decision**
This should be concise and usually capable of being contained in one paragraph.
The effect of your decision should be stated.

Before delivering or handing down your judgment, read it through one last time. You will be surprised how often this reveals something that still needs correcting.

If you read the following paragraph through carefully, do you notice anything unusual about it?

“This is an unusual paragraph. I’m curious as to just how quickly you can find out what is so unusual about it. It looks so ordinary and plain that you would think nothing was wrong with it. In fact, nothing is wrong with it! It is highly unusual though. Study it and think about it, but you still may not find anything odd. But if you work at it a bit, you might find out. Try to do so without any coaching!”

Finally, remember to **sign and date your judgment**. Oh, and the above paragraph has no letter e in it.

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In our tradition writing judgments is an art, not a science. It is not something that is easily taught, and I am not really sure that is an appropriate subject for a lecture of this kind at all. Far better, you may think, that we should just follow our own instincts and build up our own expertise by practice and experience. Each case, after all, is different, and it is the nature of the case that dictates the problems that have to be solved and shapes each judgment. Moreover we spend much of our judicial lives looking at other people’s judgments. Our bookshelves, memory sticks and websites are full of them. It is the lifeblood of our existence. We all think that we know what is expected of us when the time comes to put pen to paper or to settle down in front of our computer screens. Why should we be taught what to do when it is perfectly satisfactory for us to do what comes naturally?

I do not wish to suggest, of course, that the common law judges should be dictated to in this matter. But in most other European systems the opposite is true. They are trained in writing judgments. This is seen as an application of the rule of law which governs all public authorities. For them the legitimacy of the judicial power is rooted in the idea that the law must be complied with and that everything that a judge does must indeed be regulated. In Spain, for example, it is a constitutional requirement that reasons for judgments must always be given. Not only that, the judgments must be prepared according to the Basic Law of the Judiciary. Regulations in the Civil and Criminal Prosecution laws say how reasons for decisions must be formulated. It is not surprising that, in order to meet strict requirements of that kind, judges there are taught. The training which they receive is designed to ensure that their judgments conform to a uniform pattern in both their form and their language. There is a fixed format of judicial decisions, with no discussion or acknowledgment that there may be several possible outcomes. This system serves to reinforce the apparent objectivity of the judgment while concealing much of the judicial reasoning process. The product is that of a system which is essentially collegiate in nature, not that of the individual. All that matters is that the essential requirements for a reasoned decision are satisfied and, in a culture which favours judicial anonymity, the system seeks to ensure that the work of no single individual stands out from the common pattern. There is no encouragement for variation in style according to the writer’s taste or for embellishment.

The style of judges in the common law systems, on the other hand, has been described as that of masterful advocates promoting or defending their own conclusions – the very opposite of that of continental judges ingrained with notions of regulation and officialdom. There are no set rules and the law does not impose any specific requirements. Judges must, of course, give reasons for their decisions. But it is left to each of them to decide for themselves how they should do this. That does not mean, however, that the way a judgment should be produced is not worth studying and thinking about.

Thirty years ago Alan Paterson, now a Professor of Law at Strathclyde University on Glasgow, wrote a book based on his PhD thesis about the process of decision-making by the Law Lords. He had

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109 Spanish Constitution (1978), art 120.3.
110 The Basic Law of the Judiciary (LOPJ-1985), the Law of Criminal Prosecution (LEC 1882) and the Law of Civil Prosecution (LEC-2000); I am grateful to my colleague Baroness Hale of Richmond for these references.
113 In Spain, article 689 of LOPJ-1985 enables a judge, by means of a reserved vote, to dissent from the decision of the majority.
115 The Law Lords (Macmillan, 1982).
studied their methods, and most of them had given him interviews. The theme of his book was that decision-making in the House of Lords should be seen as a social process\textsuperscript{116}. By that he meant that the speeches which were delivered by the Law Lords were the product of a complex series of exchanges between the Bar and Bench and between the Law Lords themselves. But he was surprised by the fact that fewer than half of the Law Lords whom he interviewed had given any thought to who their audiences were when they were preparing and delivering their speeches\textsuperscript{117}.

I suspect that the impressions of the Law Lords which Professor Paterson formed as a result of these interviews are capable of being applied to the judiciary generally. I think that we would all agree that the judgments which we deliver, are, to a greater or lesser extent, the product of a social process. It involves counsel, other judges and perhaps others, such as our spouses, our children or those we happen to meet at the race course with whom we may discuss matters of general interest from time to time. Concern as to who our audiences are is perhaps less widely appreciated. It is a subject that deserves a little thought as, in the best traditions of the Judicial Studies Board, we examine what we are doing and ask ourselves whether we could do it better. So it is to the questions who our audiences are, and how we can best serve them when we are preparing our opinions, that I should like to devote this lecture.

First, our audience. Who do we think we are speaking to when we write our judgments? This is not an idle question. For, if we are unclear about this, how can we be sure that we are framing them in the right way? A judicial opinion is, of course, addressed to the parties in whose favour, or against whom, the judge is pronouncing judgment. Unless it is a decision taken in a court of last instance, a careful judge will ensure that the judgment will give a sufficient explanation of the reasons for use by the appeal court. But there is a wider audience. Obviously it includes the legal profession, including other members of the judiciary who may be seeking guidance about what to do in similar cases. Then there are the academics, whose interest is not just to comment and to criticise. They have a teaching function too, so a judgment which explains or develops the law ought to be capable of being used for that purpose. An extempore judgment in a matter which is of no general importance and which is addressed to those in court who know what the point is can be quite brief. But in a reserved judgment, written with an eye on the wider public, you may have to set out the facts and the contentions in some detail to make it intelligible, and you may have to set your decision of the legal issue into the context of previous decisions on the same point.

Sometimes we choose our own audience. This includes members of the public. We issue warnings to those who are tempted to engage in crime, and we try to reassure the victims. We give directions on practice to the profession and to other judges. And sometimes, in an appellate court, we direct our judgments at each other in the hope – usually a forlorn hope, it must be said – that a judgment with which we disagree will be changed\textsuperscript{118}. For the American judge Benjamin Cardozo, each judgment was engaged in a competitive struggle with other judgments on the same topic. It needed to have persuasive force to win its way\textsuperscript{119}. For Lord Steyn\textsuperscript{120}, the fact that judges under our system are free to express their disagreement with one another, and do so freely and robustly, is a healthy feature of our democratic system. But, of course, once the judgment is in the public domain it is there for everyone to read who cares to do so. Above all, therefore our judgments should be crafted in such a way as to be readable and accessible to a wide audience.

\textsuperscript{116} Ibid, Introduction, pp 7-8.
\textsuperscript{117} Ibid, p 10.
\textsuperscript{118} I was the recipient of such an address in \textit{R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte} [2000] 1 AC 147, where Lord Goff of Chievely directed a section of his speech, which was headed “The conclusion of Lord Hope of Craighead”, at something that I had written in mine in the hope, perhaps, that I might be persuaded to delete it.
\textsuperscript{119} \textit{Law and Literature: Selected writings of Benjamin Nathan Cardozo}, p 338 at p 342.
\textsuperscript{120} In his Bentham Club lecture, University College London (1996) \textit{Does legal formalism hold sway in England?} at p 56.
How then is one to set about the task of preparing a judgment? I can only speak of this from my own experience. And I must confess at once that I have almost no experience of writing judgments at first instance. My progress to the Bench in Scotland took a course which would be unthinkable in the situation we have now in that jurisdiction, which places all judicial appointments in the hands of a judicial appointments board. I was appointed direct from the Bar to the chair of the First Division of the Court of Session as Lord President and Lord Justice General on the recommendation of the Lord Advocate. Not only was I untrained. I had no previous judicial experience. But within a few days of my assuming the chair I found myself delivering ex tempore judgments in the Criminal Appeal Court121. With very rare exceptions thereafter when I was dealing with chancery work at first instance, it was a continuous output of opinions, both written and oral, at appellate level that occupied my time in Edinburgh until, after seven years and still without training, I was moved to the comparative calm of the appellate and judicial committees at Westminster and in Downing Street and now of the UK Supreme Court.

The first question that an appellate judge must ask himself is whether or not to write a judgment at all. The judge at first instance rarely has that option in a case where he is called upon to deliver a final judgment. But at the appellate level there is usually at least one other judge. The number of judges on the tribunals on which I have sat has varied from three to nine. So there has always been the opportunity for me, except when I find myself a member of a dissenting minority, to remain silent except perhaps to say “I have nothing to add” or “I agree” or, in the style we used when we were in the House of Lords122 “I have had the advantage of reading in draft the speech of Lord X” or, as has become our practice in the Supreme Court, simply to add my name to the top of a judgment prepared by someone else. The practice in Scotland in my time was for the presiding judge in the appellate courts to write most of the leading judgments. So it was rare for me to have to ask myself whether I should add my opinion to that written by others. But however the decision is taken – and this applies in every appellate court, where there is an opportunity for more than one judgment to be given – the question for the other judges is whether they should write too or whether the leading judgment should be left to stand by itself.

There are two schools of thought on this issue. One, which Lord Reid favoured and Lord Rodger too felt very strongly about, is that the development of the law is assisted if there is more than one opinion123. As Lord Reid put it:

“The truth is that it is often not possible to reach a final solution of a difficult problem all at once. It is better to put up with some uncertainty – confusion if you like – for a time than to reach a final solution prematurely. The problem often looks rather different the second time you deal with it. Second thoughts are not always best but they generally are.”

Lord Rodger thought that judges should be free – even encouraged – to express their own conclusions in their own way, even if that meant that there are divergent approaches. The other view, which I know is felt particularly deeply in criminal cases, is that a plurality of judgments tends to confuse the courts below, who are looking for clear and simple guidance on the issue of law of general public importance which was before the appellate court124. Here an awareness of what the audience to whom the judgment is addressed requires is critical.

121 HM Advocate v McKenzie 1990 JC 62 was the first.
122 Prior to 18 December 1963, when the speeches were delivered in this abbreviated form for the first time in Cleisham v British Transport Commission 1964 SC (HL) 8, the practice was for the Law Lords to read their opinions: see 1964 SLT (News) 5.
123 Lord Reid, The Judge as Lawmaker, 12 JSPTL 22 at pp 28-29.
124 In Doherty v Birmingham City Council [2006] EWCA Civ 1739, which was a case about the recovery of possession of a house by a local housing authority, Carnwath LJ was especially critical of the way the plurality of judgments of the majority in the House of Lords in Kay v Lambeth Borough Council[2006] 2 AC 465 had failed to give proper guidance to the lower courts.
You will, perhaps, have noticed that a marked change in the practice of the House of Lords occurred under the leadership of Lord Bingham. Under the rules of the House every member of the appellate committee was required to deliver a speech when the House delivered its judgment before the question as to how the case was to be decided was put to the vote. But when lay members of the House are sitting as a select committee it is the usual practice for a single report to the House to be prepared which is concurred in by all members of the committee. The appellate committee found this to be a useful vehicle for use in those cases where the development of the law was best served by the issuing of a single judgment. In the Privy Council the advice which was delivered to Her Majesty used always to take the form of a single judgment unless there was a dissent, but this practice is no longer rigidly adhered to. We in the Supreme Court have been released from the rules of the House of Lords. Judgments of the court are now resorted to quite frequently, and so too are judgments in which several Justices combine together to produce a joint judgment.

One may ask then what it is that moves other members of an appellate court who are in agreement with the decision of the court to write their own judgments when there is no need for them to do so. Once again I can only speak for myself, as I search my conscience and look back at my own record. There is, I must confess, an element of self indulgence here, and I think that I am not alone in succumbing to this temptation. The time which is given to the hearing of each case by the Justices, the seminar-like nature of the hearings that take place before us and our practice of discussing the case by presenting our conclusions to each other one by one in turn as soon as possible after leaving the court room all tend to germinate thoughts in our minds which are sometimes hard to discard. Producing a written judgment may be the only way of satisfying one’s need to express these thoughts. It is, after all, all we have to show for ourselves when the case is over.

But there are other reasons. Sometimes there is a difference of approach to the issue that is worth putting down in writing. Sometimes one is bold enough to think that the other judge’s reasoning might be expressed better. Sometimes one believes that the point at issue is sufficiently novel and sufficiently important and difficult for it to be worth adding one more reasoned judgment in the hope that this may add weight to the Court’s judgment overall. From time to time too, aware that I have the unusual privilege of sitting in a court whose jurisdiction covers the whole of the United Kingdom, I take the liberty of saying something in an English appeal which I think may be of interest from the standpoint of Scots law. Furthermore, the law is not like mathematics. There is rarely a single answer which everyone would express in exactly the same way. If there is, there are usually various ways of arriving at it. A single judgment may give the appearance of certainty in an area of law which is genuinely uncertain. Then there is the principle of judicial independence. Judges usually co-operate rather well together, but I believe that if they want to express their own views they should be entitled to do so.

Given then that one is faced with having to write a judgment, or succumbs to the temptation to do so, how is one to go about this task? What are the tricks of the trade that may be used to assist the person to whom it is addressed? And what are the pitfalls that must be avoided? Every judgment must have a beginning, a middle and an ending, of course. It must set out the facts, and it must contain some reasoning. The reasoning should be coherently and logically organised in a clear style that is accessible to everyone. Those are the basic ground rules. But it is possible to say a bit more than that.

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125 Exceptionally, in Heatons Transport v Transport and General Workers Union [1973] AC 15 at p 95 Lord Wilberforce delivered what he described as “the joint opinion of their Lordships”.
127 For an early example, see Brown v Stott [2003] 1 AC 681.
First there is the beginning. There is nothing more daunting than the blank page, or a blank screen on one’s computer. For the whole of my judicial life in Edinburgh I worked on paper. My practice was to write my judgments out in rough into a notebook and then to dictate them to my own personal secretary. When I moved to the House of Lords the secretarial services were rather thin on the ground. I found it more convenient, and more efficient, to use a computer. So in my case it is the blank screen, not a blank page, that now confronts me as I sit down to write.

The easiest way to get going, of course, is to begin by saying who the parties are and, if one is sitting in an appellate court, by identifying the court from which the appeal has been taken. But one can from time to time be more adventurous. Some judges are better at this than others. Lord Denning is, of course, famous for the brevity and the originality of the words and phrases with which he began his judgments: “It happened on April 19, 1964. It was bluebell time in Kent” is one example. More recently Lord Hoffmann began a judgment by describing how paths down to the lake where the claimant met with his accident ran through woods of silver birch and how in summer bright yellow brimstone butterflies fluttered in grassy meadows there. I myself succumbed to this temptation when, in a case about the regulation of fisheries in the South Atlantic, I referred to the misfortunes of the Black-browed Albatross. In our own time Lord Hoffmann is, I believe, the greatest exponent of the art of finding a neat way into the case by identifying the essence of it before getting down to the boring details – indeed the boring details may not even have to be dealt with once the judgment has developed a life of its own in this way. It may look easy, but he has confessed to me that it sometimes took him longer to write the first paragraph than it did to complete the rest of the judgment. The product that results from this is comparable to the work of an artist or of a composer. But it takes time, and in a busy court one may not have that luxury. So there is much to be said for beginning with the boring details, especially if this is to be the only judgment in the case.

The middle offers the opportunity for infinite variation according to the subject matter. The main thing, I suggest, is to do ones best to make all the detail that it has to contain accessible. By that I mean that that the reader to whom it is addressed must be able to pick up the bits that interest him without getting lost or necessarily having to comb through all of it. It is, I think, our common experience that much of what we write is of passing interest only. The litigants themselves can be expected to want to study every sentence, word by word, line by line. In the event of an appeal, the appeal court which will usually wish to do this too. But only some parts of the judgment are likely to attract the attention of the wider audience. There are some tricks of the trade. What litigants want is an explanation in simple terms which they can understand. What they want are bright lines, not shades of grey. Sentences should be kept short. So too should the paragraphs. The art of the paragraph in designing the pattern of a judgment so that it is attractive and easy to read should never be overlooked.

The use of paragraph numbers which have been introduced to enable our judgments to be made use of on the internet has assisted this task. It is clear that paragraphs have become shorter since they

130 *Hinz v Berry* [1970] 2 QB 40 at p 42B.
132 *R (Quark Fishing Ltd) v Secretary of State for Foreign Affairs* [2006] 1 AC 529, para 67.
133 See Lord Reid, *The Judge as Lawmaker*, 12 JSPLT 22 at p 25: “Technicalities and jargon are all very well among ourselves – a system of shorthand – but in the end if you cannot explain your result in simple English there is probably some thing wrong with it”.
134 The test, known as the Felsch Test, may be used to assess readability. Where \( w = \) the average number of words per sentence and \( s = \) the average number of syllables per word, the readability score is computed according to the formula: \[ 206.835 - \left[ \frac{(1.015) w + (84.6) s}{1} \right] \]. A score of over 50 is considered to be satisfactory. Lord Denning’s opening paragraphs in *Hinz* and *White* (see footnote 26) score 76.30 and 85.99 respectively.
were introduced — an unexpected and, I believe, welcome benefit. Another is the fact that judges can refer back and forward to specific passages in their own and their colleagues’ judgments. There was some resistance to the idea when it was first mooted on the ground, for example, that to put paragraph numbers onto judgments would be an invasion of the judge’s right to present his own work as he wanted or that it would be too laborious. But this and other similar problems have been mastered by the technology, and I do not think that anyone now objects to them.

Then there is the use of headings, of footnotes, of endnotes, of introductory summaries, of indices and of annexes and appendices. We have adopted the first quite liberally, although they are a comparatively recent innovation. But for the most part, in contrast to judges in the United States Supreme Court, who find it convenient to use footnotes to conduct vigorous arguments with each other, and in the High Court of Australia, our appellate judges have not favoured footnotes or endnotes. In the US Supreme Court they are used, as Lord Rodger remarked, to carry out raids on enemy territory or to mount rearguard defences of the author’s own dearly loved, if shaky, positions. With very rare, exceptions we in the United Kingdom have resisted this temptation. Indices, introductory summaries and tables of contents are becoming increasingly common, and they can be used to good effect in longer judgments. When an introductory summary is used it should be capable of being linked by the used of suitably worded headings to passages within the main text.

It is rare for the appellate courts to use annexes and appendices. But there are situations where this technique is useful. The placing of a headnote on the page, surprising as it may seem, is also a matter about which some judges feel quite strongly. Some like them, some do not. A short judgment ought not to need them, but for obvious reason they are worth putting in if the judgment is long or there are several issue that have to be dealt with. When I use headnotes, which I do quite frequently, I always begin them on the left hand margin as is the normal practice. Lord Steyn always insisted that his headings should be placed centrally but the publishers, usually on cost grounds, treated his headings in the same way as everyone else’s.

Reverting to footnotes, these used to be difficult to reproduce in a typewritten text and had no place, of course, in judgments which were delivered orally. But they can be produced at the touch of a button on one’s computer, and when preparing a lecture such as this I use the facility liberally. It was commonplace at one time to find case references relegated from the main text to footnotes until the publishers of the law reports dropped this practice on the ground that complicated the typesetting and was too expensive. Instead the reports adopted the helpful practice of grouping all the cases that were referred to in the judgments and in the argument at the start of the report and including all the relevant references. There can, surely, be no objection now to footnotes on the ground of cost. It is

136 The first reported case in which numbered paragraphs were used by an appellate court in the United Kingdom was Ex parte Guardian Newspapers [1991] 1 WLR 2130, the judgment in which was handed down by Brooke LJ on 30 September 1998. The Court of Session adopted the practice in March 2000: Cullen v Cullen, 2000 SC 396. House of Lords and the Privy Council started using numbered paragraphs in January 2001: Phillips v Brewin Dolphin Bell Lawrie Ltd [2001] 1 WLR 143; Snell v Beadle [2001] 2 AC 304.
137 eg Rasul v Bush (2004) 542 US in which the Supreme Court held that the US courts had jurisdiction to consider challenges to the legality of the detention of foreign nationals at Guantanamo Bay: see Steven J for the majority, fns 8, 9 and 10 and Scalia J’s dissent, fns 3 and 4.
138 Lord Rodger of Earlsferry, The Form and Language of Judicial Opinions (2002) 118 LQR 226 at p 234; Francis Bennion, Fussonotes and other Annotational Engines (2004) 168 JP 754, 755: “... all such aids to understanding should be deployed by authors and editors with discretion. The old motto applies. If in doubt leave it out.”
139 Lord Rodger, loc cit
140 In Ferguson Shipbuilders Ltd v Voith Hydro GmbH & Co KG the judge included footnotes in the opinion which he signed but they were omitted from the version that was published on the court’s website and in the law report: 2000 SLT 229.
141 For a recent example of the use of a helpful index in a comparatively short judgment, see Wall LJ’s opinion in R (Fisher) v English Nature [2005] 1 WLR 147, para 5 and at p 150.
143 The practice was ended by the Council of Law Reporting in 1969.
all a matter of taste, and there are signs that are being resorted to by judges at first instance when this is appropriate. But the oral tradition is still with us. This was certainly so in the House of Lords, where we delivered what until the end of our time there were still described as speeches. I dislike endnotes as they lack the immediacy of a footnote on the same page. But appendices can serve a useful function, especially if they are designed to contain tables which cannot be described conveniently in the main text 144.

I have left to the last in this section my observations on style and the use of language. Style has been described as that which can be left out by paraphrase – it is the package around which the essential points are placed 145. It can be rhetorical, literary or conversational. Sometimes one’s choice of style, albeit unconscious, is dictated by the subject matter. A “high” or declaratory style is often resorted to by an appellate court in criminal cases, having regard to the needs of the audience. A “low” or exploratory style is used where the writer sets out to persuade the reader by debate. This is the world of everyday speech. Formality is discarded. Rhetorical questions are used. Phrases such as “of course” are used also, to reassure readers that they and the writer are on the same wavelength. Sometimes the writer chooses to descend to the vernacular, using the words “guys” for example, as Lord Rodger of Earlsferry did when he described the race by law agents for the first registration of a title in Scots property law 147.

In the hands of some judges their style is so distinctive that it has become their voice or their signature. The contrast is between those on the one hand who burden their judgments with factual detail, quote heavily from previous judicial opinions, prefer the familiar to the unfamiliar and stick rigidly to all the conventions and current norms of political correctness, and those on the other who prefer to converse with their audience, leave out unnecessary details and avoid too much quotation so that what they have to say seems new and fresh. Judges in the latter category are those who seem to enjoy writing – although in truth it may take just as much effort, and perhaps more, for them to create their judgments than the rest of us.

By language I mean, of course, the English language. Other languages may appear in quotation sometimes. Lord Hoffmann and Lord Rodger were accustomed to reading texts in German, so they had no difficulty in slipping German phrases into a judgment when this was appropriate 148. French and even Latin 149, despite official discouragement, may appear from time to time to adorn the text in similar circumstances. Classical Greek, which never had much relevance to legal reasoning but was used sometimes for emphasis 150, appears to have disappeared from our judgments entirely. We in the United Kingdom at least must, of course, adhere to the convention that English is the language of the

144 See note 36.
145 Richard A Posner, Judges' Writing Styles (And do they matter?) 62 Chicago LR 1421 at p 1422.
146 For the adjectives “high” and “low” see Posner, loc cit, 1427.
147 Burnett’s Trustee v Grainger 2004 SC (HL) 19, para 141: “Nice guys finish last and don’t get the real right”. See also his remark, in support of a judgment prohibiting discrimination against homosexuals in immigration law, that male homosexuals should be free to enjoy themselves by going to Kylie concerts and drinking exotically coloured cocktails: HJ (Iran) v Secretary of State for the Home Department [2011] 1 AC 596, para 78.
148 Eg Lord Rodger’s quotation from article 830(1) of the Bürgerliches Gesetzbuch in Fairchild v Glenhaven Funeral Services Ltd [2003] 1 AC 32, para 167; see also his quotations from the German Constitution or Grundgesetz and from the Bürgerliche Gesetzebuch in Aston Cantlow Parochial Church Council v Wallbank [2004] 1 AC 546, para 167.
149 See Rix LJ’s quotation from Lucretius, De Rerum Natura, I. 101 (“Tantum religio potuit suadere malorum”) in Burnett’s Trustee v Grainger 2004 SC (HL) 19, para 141: “Nice guys finish last and don’t get the real right”. See also his remark, in support of a judgment prohibiting discrimination against homosexuals in immigration law, that male homosexuals should be free to enjoy themselves by going to Kylie concerts and drinking exotically coloured cocktails: HJ (Iran) v Secretary of State for the Home Department [2011] 1 AC 596, para 78.
147 Eg Lord Rodger’s quotation from article 830(1) of the Bürgerliches Gesetzbuch in Fairchild v Glenhaven Funeral Services Ltd [2003] 1 AC 32, para 167; see also his quotations from the German Constitution or Grundgesetz and from the Bürgerliche Gesetzebuch in Aston Cantlow Parochial Church Council v Wallbank [2004] 1 AC 546, para 167.
148 See Rix LJ’s quotation from Lucretius, De Rerum Natura, I. 101 (“Tantum religio potuit suadere malorum”) in (Williamson) v Secretary of State for Education and Employment [2003] QB 1300, 1329, making the point that great dangers exist in the potency of religious belief and in its potential for conflict; and Lord Rodger’s quotation from Ulpian, D.9.2.13.pr, in his remarkable concurring speech in R v Bentham [2005] UKHL 18, para 14, “Dominus membrorum suorum nemo videtur: no-one is the owner of his own limbs”. In Secretary of State for the Home Department v AF (No 3) [2010] 2 AC 269, para 98 he formulated the point he wanted to make in his own words: “Argentoratum locatum, iudicium finitum” – Strasbourg has spoken, the case is closed.”
150 See Lord Radcliffe’s reference in St Aubin v Attorney-General [1952] AC15 at p 45, to the prayer of Ajax (“Εν δε Φάει και άλεσσον”), which he said had been heard before in their Lordships’ House, when commenting on the obscurity which had been created by legislation about estate duty.
court. Where foreign languages are used a translation should be provided, unless the meaning of the foreign words is so well known as to make their translation superfluous. That is the practice too in Jersey and Guernsey, when it is necessary to refer to French texts. But in Mauritius, where English is the language of the court but almost everyone speaks French too, a translation of passages from the French Codes will usually be unnecessary.

The English language is, as we all know, remarkably versatile. In the right hands a phrase or two, neatly fashioned, can convey much more than a whole paragraph. One thinks of Lord Reid and Lord Wilberforce as leaders in the practice of this art. Lord Wilberforce’s observation that “no contracts are made in a vacuum; there is always a setting in which they have to be placed” is one example among many that could be quoted. In our own time Lord Steyn and Lord Hoffmann had the same ability. The persuasive power of Lord Steyn’s judgments was greatly enhanced by the uninhibited way he drew on compelling phrases, such as “an intense and particular focus” and the word “concrete” (in its adjectival sense), when he was developing his argument. Lord Hoffmann’s neat summary of the five principles for the interpretation of contracts stands out as an example of how useful it is to set out propositions in a few words written in the right way. Even in less inspired or less expert hands, the character of the judge may be revealed to the reader through the style of his writings. It would be nice to think that the example of the experts could be emulated. But I think that we who are less gifted have to face the fact that the attractive use of language is indeed an art which comes more easily to some than to others. The best we can do is try our best to keep our sentences short and our propositions simple and accessible.

The choice of individual words and phrases can give rise to difficulty. “Judges told to mind their language”, said the headline to an article in a newspaper about the advice to judges on the use of language which is contained in the Equal Treatment Bench Book which is issued to every new judge on appointment by the English Judicial Studies Board. The judges are told to not to overlook the use of gender-based, racist or homophobic stereotyping. There is no problem there in principle, of course. The modern judge is well aware of the need for sensitivity in these areas, and that language and ideas which may cause offence do not stand still. There has been some resistance to the idea that judgments should be constrained by what has been described as mere “political correctness”. It is not easy to avoid using words such as “postman” and “businessman”, as we are told to do, when these are encountered so often in everyday speech. But I believe that the book’s advice should be taken seriously. This is all part of having regard to the needs and character of one’s audience. A judgment which causes offence because of the careless use of words that may imply gender-based, racist, homophobic or even ageist stereotyping risks bringing the judiciary as a whole into disrepute. The problem can usually be avoided by rephrasing a sentence that may cause difficulty. I shrink from using the grammatically incorrect “their”, which for me still indicates the plural, as a gender-neutral substitute for the singular “his” or “her”. But a twist or two in the wording of the sentence will either make its use appropriate or remove the problem. Quite apart from political correctness, some words or phrases are so much part of legal jargon or old-fashioned – “the said”, for example, or “the instant case” (so characteristic of the speeches of Lord Diplock) – that they are best avoided altogether.

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151 This not so in the Privy Council in Channel Islands cases, where the practice is for the French texts to be quoted without translation: Snell v Beadle [2001] 2 AC 304.  
156 Clare Dyer in The Guardian, 13 May 2004. In The Times Frances Gibb’s article, published on the same date, was headed “Judges told to watch their language in changed society.” In The Independent Robert Verkaik’s article was headed “Judges given new advice on political correctness.”
Then there are quotations from poetry and from literature. Used sparingly and with care they can embellish a judgment. Lord Hoffmann quoted from poetry in his first speech in the House of Lords, and he teased us by recalling Schrödinger’s cat, an animal about whose misfortunes most of us know little – in suitably obscure language. References to Dickens’ *Bleak House* appeared from time to time in Lord Bingham’s judgments. I doubt whether quotations of this kind are appropriate in an opinion which is being delivered at first instance, although in November 2004 Judge Robert Gigante, a US judge, is reported to have given a judgment in lyrics which he had adapted from a song by the Beatles. It is best, I suggest, to leave this technique to the senior judges and, if one happens to regard oneself as a senior judge, to leave it to those who can use it without any risk of inviting the suspicion that they are showing off.

References to academic literature are far more common than they used to be. Thanks to judges with a strong academic background such as Lord Goff of Chieveley and Lord Rodger, there is, of course, now a much more healthy dialogue between academic writers – “the third branch of the profession”, as they have been called by Professor Kenneth Reid of Edinburgh University - and the judiciary. Appellate judges are particularly conscious of the good work which has been done by academic lawyers to reveal weaknesses in the existing law and to explore new territory. Their work has, for example, helped the judiciary to expand the frontiers of the law of negligence. Where this is so, it is only right that credit should be given when it is due. References to academic literature may also be used as a convenient guide to further reading, as can be seen from the many speeches using this technique which were delivered by Lord Steyn.

Lastly in this chapter, there is the problem of when to quote and when not to quote extensively from the judgments of other judges. This is a distinct issue from the routine task of referring to previous authority. Quotations are useful where one wishes to trace the way the law has been developing or to explain the origins of a proposition which one wishes to adopt or must follow. They may be

157 Lord Kilbrandon in *Assessor v Renfrewshire v Mitchell* 1965 SC 271 at p 280 illustrated his decision on the question whether caravans were heritable or moveable for the purposes of valuation for rating with this quotation:

“The user of a caravan in the ordinary sense can say with the poet Montgomery:

’Yet nightly pitch my moving tent
A day’s march nearer home.’ ”

158 In *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 at p 777:

“There may come a Secretary of State who will say with Larkin:

’Despite all the land left free
For the first time I feel somehow
That it isn’t going to last
That before I snuff it, the whole
Boiling will be bricked in ...
And that will be England gone
The shadows, the meadow, the lanes
The guildhalls, the carved choirs’

and promulgate a policy that planning permission should be granted only for good reason.”

159 Erwin Schrödinger used a story about a cat sealed in a box together with a deadly chemical to demonstrate the apparent conflict between what quantum theory tells us is true and what we observe to be true about the nature and behaviour of matter. This unhappy animal made its first appearance in Lord Hoffmann’s speech in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 249 at p 399E- “(and leaving aside the problem of Schrödinger’s cat)”. Like the Cheshire cat, it made two further barely visible appearances in his speech in *Gregg v Scott* [2005] 2 AC 176.

160 Eg *Rideonhalgh v Horsefield* [1994] Ch 205 at p 226:

“The one great principle of English law is, to make business for itself ...

161 Giving his decision to move a trial from New York City to Albany in a claim by Dr Gil Lederman that he would not get a fair trial in New York City because he had previously been accused of making George Harrison sign autographs as he lay dying: *The Times*, 7 December 2004, Law Section, p 8:

‘Something in the way he treats
Attracts bad press like no other doctor.’

162 *Chester v Afswar* [2005] 1 AC 134, para 88; *R (European Rome Rights Centre) v Immigration Officer at Prague Airport* [2005] 2 AC 1, para 37.

163 Ibid, para 22.
necessary where previous inconsistent authority has to be distinguished or departed from. But lengthy quotations can be very boring, and they tend to interrupt the flow of the judgment. They should never be used as a substitute for explaining one’s own process of reasoning. It is perfectly in order to adopt the wording of a previous judgment as one’s own, so long as a reference is given to explain its origin. But there is always a risk that a vivid expression which someone else has created will become associated with the adopter rather than the originator. I am sure that Lord Wilberforce, when he referred to what he said had been called “the austerity of tabulated legalism” and used inverted commas when he did so\textsuperscript{164}, did not expect that that phrase which he made famous would be regarded so widely today as his own invention.

The end of the judgment, when we reach it, should be simple enough. We have to tell the reader what was decided, and something will usually have to be said about costs. But reaching the end ought not to be seen as the end of the exercise. It provides an opportunity for going back over the whole product. This is so much easier than it used to be if it is on a computer, as one can scroll up and down, cut and paste and print out selected pages for review without troubling one’s secretary. My own practice, apart from checking for mistakes of course, is to have a look again at how the whole thing has been paragraphed. I may move a sentence here or there to ensure that the important ones are in the best place, and I may shorten my sentences by breaking them up for greater clarity or emphasis. The aim, as I have said, is to make the thing as readable and accessible as possible.

The result of our labours may be forgotten as soon as the judgment has been issued. Even if it makes the law reports, the pages on which it appears may lie unopened for year after year and perhaps for ever. But I see no reason why we should be disturbed by this. Writing a judicial opinion is not, after all, an exercise in self advertisement. If it attracts attention, and proves to be useful, so much the better. And one must also have in mind when writing it that it may have a wider audience. But in the end of the day its function is to serve the public interest, and in particular that of the litigant. It has to satisfy the rule of law that says that the litigant has a right to know why he has won or lost his case. Where the public interest requires that the law be clarified, the judgment must satisfy this purpose also. All else is there as an adornment. How fortunate we are however that, in our legal tradition, the character of our judges can live on through their reported judgments. Each volume of the law reports contains, in this way, a portrait of each of the judges whose work is reproduced in it. This is how the common law is made. It is our gift to posterity.

1 March 2014

Lord Hope of Craighead

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