CMJA CONFERENCE 2019

“Parliamentary Democracy and the Role of the Judiciary”
8-12 September 2019

CONFERENCE REPORT

Port Moresby, Papua New Guinea

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The CMJA held its Annual Conference in 2019 at the Stanley Hotel in Port Moresby, Papua New Guinea from 8-12 September 2019. The Conference was open to all Commonwealth judicial officers and others interested in the administration of justice in the courts of the Commonwealth.

The Conference attracted 299 participants from 44 jurisdictions in the Commonwealth and beyond. We are deeply grateful to the Local Organising Committee, led by the Hon. Chief Justice Sir Gibuma Gibbs Salika for all the hard work put into the Conference to make it such a successful event. We are also deeply grateful to the National Judicial Staff Services and the Centre for Judicial Excellence and in particular for their support of the Conference. The CMJA are indebted to Paul Kelly and the staff of the Judiciary for all their support during the run up and at the Conference itself.

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. We are also very grateful to all the speakers, panellists and contributors to this educational programme. I am also grateful to our intern Sierra Ross for compiling this Report of the Conference papers presented during the Conference.

In his Welcome speech at the Opening Sir Gibbs pointed out that Papua New Guinea was a diverse society with over 850 different tribes and over 800 languages. The participants in the Conference were privileged to see some of the diversity at the different receptions but also at the Opening Ceremony. Cultural groups from different parts of PNG also demonstrated their local cultures during the Opening Ceremony.

The Theme of the Conference this year was: “Parliamentary Democracy and the Role of the Judiciary”.

The programme comprised keynote speeches, and panel, learning and specialist sessions issues addressed during the sessions included. This report contains the texts of the keynote speeches as well as panel, specialist and panel sessions received to date.

Dr Karen Brewer
Secretary General
INTRODUCTION

In the Foreword above, Dr Karen Brewer acknowledged the hard work of the Steering Committee and the Local Organising Committee for their tremendous effort in making the 2019 conference a great success in Papua New Guinea. The number of 299 delegates is a considerable achievement, bearing in mind that many of them would have taken two or three flights to reach Port Moresby.

For those who managed to attend, the PNG conference has been rated amongst the best of all our conferences. The vast local culture was ever-present in our social events, with some of it being rather eerie.

The programme was widely drafted to allow a whole host of topics to be discussed. The speakers gave superb presentations which provoked much discussion. Time prevented us from longer sessions. For example, following some lively speeches about post-retirement, it was interesting to hear from so many senior judges what they planned to do after retirement. From looking for yet more judicial work to spending time with the family and rearing chickens, the retirement plans were varied indeed. More sensitive discussions took place on topics such as witchcraft violence, a major problem not only in PNG but also in Africa, and perhaps elsewhere too. A different international problem, and a sad indictment of ourselves as judicial officers, is that there remains a problem of sex discrimination in the judiciary and in the legal profession. Some of the breakout group discussions are related in the papers written by the respective group facilitators.

There are far too many papers to write about here. I hope you enjoy reading them and perhaps use them for research or further discussion with colleagues in order to improve the law and legal systems.

Judge Shamim Qureshi
Director of Programmes
“WELCOME”
By Chief Justice, Sir Gibuma Gibbs Salika GCL KBE CSM OBE, Chief Justice of Papua New Guinea


It gives me great pleasure to welcome delegates and guests for the very first time here to our country, Papua New Guinea and in particular to our capital city, Port Moresby. The PNG Judiciary has had a long association with the CMJA and we have been staunch supporters of the Association and the work it does.

I would now like to tell you a little bit about our country. While you are here you will be able to learn more about us by talking to us and interacting with us over the course of the conference. Archaeological evidence indicates that humans first arrived in Papua New Guinea around 42,000 to 45,000 years ago. These people were descendants of migrants out of Africa, in one of the early waves of human migration.

In more recent times at the national level, after being ruled by three external powers since 1884, Papua New Guinea established its sovereignty in 1975. Papua New Guinea is one of the most diverse countries in the world. It is also one of the most rural, as only 18 per cent of our people live in urban centres. There are 851 known languages in the country, of which 11 now have no known living speakers. Most of our population of more than 8 million people live in customary communities, which are as diverse as the languages. PNG is one the world’s least explored, culturally and geographically. It is believed that there are still numerous groups of uncontacted peoples, and researches believe there are many undiscovered species of plants and animals in the interior. The last group of uncontacted people were the Hagahais, discovered only in 1983, some 36 years ago with only 300 now living.

Our country is classified as a developing economy by the International Monetary Fund. Strong growth in the mining and resource sector led to our country becoming the sixth-fastest growing economy in the world in 2011. Growth slowed once major resource projects came online 2015. Mining remains a major economic factor.

Most of the people still live in strong traditional social groups based on subsistence farming. Commercial farming has a lot of potential. Our commodity properties which support our economy are oil palm, coffee, cocoa and copra. Our modern social lives combine with traditional beliefs with modern practices, including primary education. Societies and clans are explicitly acknowledged by the Papua New Guinea Constitution, which expresses the wish for “traditional villages and communities to remain as viable units of Papua New Guinea society” and protects the continuing importance of local and national community life.

Now turning to the PNG Judiciary. We started a reform program a few years ago with the appointment of Judges in provinces together with the registry expansion program in rural areas. The overall number of Judges has increased from twenty three (23) in 2008 to an establishment of 40 today. All of our court files have been scanned and uploaded and data bases developed. We use a Case Docketing System (CDS), Sentencing Database and we are now rolling out an Integrated Electronic Case Management System. We are acquiring an Integrated Electronic Case Management System for our civil cases. With the support of Regional Chief Justices, the PNG Centre for Judicial Excellence will be expanded to provide a service of judicial and court staff education and training to judiciaries in the Pacific region. The new building for the CJE has recently been completed. The construction of the new court complex is well advanced and will cost K680 million and we expect it to be completed in 2020/21. Furthermore, the Judiciary, the lower and the
higher, is looking forward to the support of the government and the parliament to pass legislation separating the National Court and the Supreme Courts and establishing a Court of Appeal. The process of separating the Supreme Court from the National Court will begin administratively first and has begun.

For the benefit of our delegates, PNG has 2 constitutional heads for the Magistracy and the National Court and Supreme Court. The Chief Magistrate is the head of the Magistracy while the Chief Justice is the head of the higher Judiciary.

I hope that I have given you information that will heighten your interest in our country, our people and the Judiciary.

Delegates and guests, I look forward to meeting and interacting with each of you over the next few days and also to renew old friendships and make new ones and create network. It is my personal pleasure and that of my fellow PNG Magistrates and Judges that we extend to you all a very warm and sincere welcome to Papua New Guinea. We trust that you will find the conference interesting and informative and it is my hope that we all learn from each other and that you will go home satisfied and happy with fond memories of Port Moresby and Papua New Guinea.
“WELCOME”
By Justice Charles Mkandawire, President CMJA

Gutpla monin tru----Good morning. Gutpela dei tru, mi hamamas long stap lo PNG Tede-----Good
day, I am happy to be in PNG today

May I, at the outset, thank you Deputy Chief Justice Ambeng Kandakasi for your introduction.
2. Sir Bob Dadae, GCL GCMG KStj, Governor General of Papua New Guinea;
3. The Hon. Davis Steven, Deputy Prime Minister and Minister of Justice and Attorney General;
4. The Hon. Chief Justice of Papua New Guinea, Justice Sir Gibuma Gibbs Salika, GCL, KBE, CSM;
5. The Hon. Chief Justices of the Commonwealth (20);
5 (a) Presidents of Regional Courts EACJ, COMESA Court of Justice, ECOWAS Court of Justice.
6. Hon. Justices of Supreme Courts, Justices of Courts of Appeal;
7. The Governor of National Capital District.
8. Your Excellences High Commissioners and Ambassadors;
10. Hon. Judges, Registrars and Magistrates;
11. Mr. Paul Kelley, Advisor to the Chief Justice of Papua New Guinea and Resource person to the Committee;
12. Invited Guests;
13. Delegates and Accompanying Persons;
13 (a) Members of the Media
14. Ladies and Gentlemen;
15. It is my pleasure to welcome you to the 2019 Regional Conference of the Commonwealth Magistrates’
and Judges’ Association (CMJA) held here in Port Moresby, Papua New Guinea- THE LAND OF THE
UNEXPECTED
In a special way, let me welcome India and the Gambia for re-joining the CMJA. I also welcome
Guernsey as a new member. May I also take this opportunity to welcome back Sierra Leone as a fully
paid up member.
16. On behalf of all members of the CMJA and delegates attending this conference, I thank the Judiciary of
Papua New Guinea with support of the Government of Papua New Guinea for hosting this year’s conference.
We are so grateful for the wonderful facilities that have been put at our disposal since our arrival.
17. The Association is very grateful to all members of the Local Organizing Committee under the able
leadership of the Hon. Chief Justice for their efforts and hard work in making this conference a reality. I am
aware that there will be an opportunity at the close of the conference to properly thank them.
18. I am also excited to note that during the past four years, the Pacific Region has been extremely generous
in hosting CMJA Conferences and Meetings. In 2015, we were hosted in Wellington by the Judiciary of
New Zealand. In 2018, we were in Brisbane, Australia. This year we are here in Papua New Guinea.
19. The theme of this conference is “Parliamentary Democracy and the Role of the Judiciary”. It is not my intention to unpack this theme in my welcome remarks. Suffice to say that the theme resonates well with what has been going on in many Commonwealth Constitutional Democracies.

20. Within the thematic structure of this conference, you will be treated to an impressive array of speakers and presenters – some of which will give keynote addresses or speeches while others will speak to more specific aspects of the conference’s theme.

21. The conference program speaks for itself. Over the coming three days, we will be provided with a variety of food for thought. A number of issues will arise for our serious consideration such as:

- What is the relationship between the legislature and the judiciary in our jurisdictions taking into account the doctrine of separation of power?
- What are the challenges to the separation of powers in constitutional democracies?
- How have Parliaments embraced judicial review?
- Judicial Financial Autonomy-Does it exist?
- Many more questions will arise.

22. I am sure that you will be as excited as I am about the coming three days during which we will have the opportunity to consider and exchange ideas about what amounts to Parliamentary Democracy and of course about the role of the Judiciary.

23. I wish you all an enjoyable and rewarding conference.

Tenkiu tru long harim bilong yupela--------Thank you for your attention.
1.0 INTRODUCTION
This paper focuses on the manner in which, even in a Constitutional Democracy, the application of Separation of Powers might pose challenges to the independence of the Judiciary in its interrelations with the democratically elected arms of government, i.e. the Executive and Legislature. I have taken the experience in my country, Ghana, as a case in point, since Ghana’s model of Constitutional Democracy is not fundamentally different from what pertains in other such democracies in the Commonwealth. I will take into account the modalities for the appointment and removal of Judges and Magistrates, as well as the allocation of financial resources. Although the independence of the Judiciary is guaranteed by the Constitution of Ghana, provisions in the same Constitution, covering these areas of governance, create certain challenges to such independence.

2.0 SEPARATION OF POWERS
The principle of Separation of Powers is premised on the concept that concentration of power in one government institution or person results in arbitrary governance. Montesquieu opined that to secure liberty, government power must be divided among different people who should constantly check one another, so that state power is never concentrated in one person. In modern times, Separation of Powers, essentially, connotes three elements; that one person should not be in more than one arm of the government, one organ should have its own functions and should not exercise the function of the other and the powers must be distributed in a manner that there are checks and balances. Complete independence and separation, however, is not possible. The agencies of governance must cooperate and complement each other.

Separation of Powers ensures rule of law by creating checks and balances. It eliminates arbitrariness through various levels of oversight by the different arms of government. It further enhances accountability as decisions of the Executive and Legislature can be nullified if they are unconstitutional. It also promotes transparency; for instance, the cabinet can be summoned by the Legislature to account for decisions or expenditure. Most importantly, to avoid abuse of power by the majority and the elite, an independent Judiciary protects the rights of the citizenry without fear or favor and with equality.

3.0 CONSTITUTIONAL DEMOCRACY
“Constitutional” in this case is a reference to a system of government which has a fundamental law, whether embodied in a formal document or evolved through statute, convention, custom, and practice that allocates power to various organs of government and places limitations on the exercise of these powers. Constitutional government, therefore, requires two things - a Constitution which allocates and limits the exercise of governmental power and an umpire, usually a Court, to enforce the Constitution.

“Democracy” connotes that government derives its power from, and reflects the will of the majority of the citizens of a country. In modern times, democracy requires that governments are the outcome of periodic free and fair elections. Therefore, in most countries, the Executive and the Legislative arms of government are elected. On the other hand, in most Commonwealth countries Judges are not elected.

Constitutional Democracy is, thus, a system of government in which the Executive and the Legislature are elected and there is a Constitution, which allocates power to various institutions and organs of state, and

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1 The Spirit of Nations (1748)
2 Such as the Constitution of the Republic Ghana (1992)
places limitations on the exercise of these powers. Such arrangement also requires that there is a referee or an umpire (in many cases a Court) to interpret and enforce the Constitution.

4.0 INDEPENDENCE OF THE JUDICIARY
An important component of Separation of Powers in a Constitutional Democracy is an independent Judiciary. In Ghana, the independence of the Judiciary is guaranteed by the Constitution. The Judiciary is an independent and separate arm of government and is headed by the Chief Justice who is responsible for the administration of the Judiciary; it is not part of the Civil Service. Judicial power is vested in the Judiciary and neither the President nor Parliament may, by any means, be given final judicial power. The Constitution also provides that neither the President nor Parliament nor any other person shall interfere with Judges in the exercise of their judicial power.

This requires that the Judiciary be objective, fair and impartial in the administration of Justice. To achieve this, the processes for appointment to, and promotion in the Judiciary must be merit based and free from extraneous considerations. It is also imperative that, once appointed, Judges must have security of tenure and not be removed or dismissed except upon stated grounds and after a credible Judicial or quasi-judicial process. Another requirement of judicial independence is financial autonomy. Lastly, independence of the Judiciary requires that the Judiciary is separate from the Executive and Legislature and that it is not influenced by any person in the performance of its judicial functions. It must be noted, however, that this does not mean that the Judiciary does not interact or come into contact with any other institution.

5.0 CHALLENGES TO SEPARATION OF POWERS IN GHANA
The Constitution itself contains provisions which pose a number of challenges to Judicial Independence, and are presented on many fronts in every governmental institution. However, we will limit this presentation to the challenges faced by the Judiciary under the doctrine. These challenges include financial autonomy of the Judiciary and independence in respect of the appointment of Judges, security of tenure of Judges and removal of Judges.

5.1 Appointment of Judges
As is typical in many Commonwealth countries, including Ghana, the elected branches of government play key roles in the appointment of Judges of both the higher and lower Judiciary.

5.1.1 Chief Justice
In Ghana, the Chief Justice is appointed by the President in consultation with the Council of State and with the approval of Parliament. Thus, the politically elected President and Parliament play key roles in the appointment of the Chief Justice, the head of the Judiciary.

One may therefore ask: Does the participation of the Executive and/or the Legislature in the appointment of the Chief Justice pose a challenge to the independence of the Judiciary? Could there be a “safer” method of selection?

5.1.2 Justices of the Superior Courts
Justices of the Supreme Court, Court of Appeal and High Courts are appointed by the President acting on the advice of the Judicial Council, in consultation with the Council of State and with the approval of Parliament. Once appointed, both the Chief Justice and Justices of the Superior Courts have security of tenure until they reach the mandatory retiring age of 70, or 65 in the case of Justices of the High Court.

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3 Ghana Constitution: Article 125 Clause 3
4 Ghana Constitution: Article 127 Clause 1
5 Examples include Zambia, Canada, United Kingdom and Uganda (see attached appendixes)
6 Ghana Constitution: Article 89 – the Council of State comprises 31 members, of whom 11 are direct appointees of the President
7 Ghana Constitution: Article 144 Clause 1
8 Ghana Constitution: Article 153 – the Judicial Council comprises 19 members of whom 1 (one) is the Attorney General and 4 are directly appointed by the President
9 Ghana Constitution: Article 144 clause 2
The question again is, does the participation of the State President and Parliament in the appointment of Justices of the Supreme Court pose a challenge to the independence of the Judiciary?

5.1.3 The Judicial Council
The Judicial Council, in Ghana, plays an important role in the appointment and discipline of Justices of the Superior Courts and judicial officers of the Lower Courts. It also proposes judicial reform and considers matters aimed at assisting the Chief Justice to ensure an effective and efficient system for the administration of Justice. This Council is comparatively weak in its powers and responsibilities, in comparison with its functional counterparts in other Commonwealth countries. Membership includes one Justice each from the Supreme Court, Court of Appeal and High Court, a representative of the Lower Courts, two representatives of the Ghana Bar Association, and other members of the legal profession, as well as four non-lawyers appointed by the President. This Council, therefore, plays no role in the appointment of the head of the Judiciary, the Chief Justice.

5.2 Dismissal / Removal and Suspension of Judges
One vital chink in the protective armour of Judicial Independence is the procedure outlined in the Constitution for the removal of Judges in Ghana, which, in my view, involves too much Executive interference:10

5.2.1 The Chief Justice
The Constitution provides that if, and when, the President is petitioned for the removal of the Chief Justice, he shall, in consultation with the Council of State, appoint a committee consisting of two Justices of the Supreme Court11 and three other persons to inquire into the petition. The President shall act on the recommendations of the committee. The elected President therefore plays a key role in the removal of a Chief Justice though he/she is subject to the recommendations of a quasi-judicial process. This obviously poses a challenge to Judicial Independence.

5.2.2 Justices of the Superior Courts
In the case of other Justices of the Superior Courts, where a petition for the removal of such Judge is received by the President, he/she must forward it to the Chief Justice, who must determine whether or not there is a prima facie case against the Judge. If the Chief Justice so decides, he/she then sets up an ad hoc committee consisting of three Justices of the Superior Courts, appointed by the Judicial Council and two other persons ‘who are not members of the Council of State, nor members of Parliament, nor lawyers’, who are appointed by the Chief Justice on the advice of the Council of State.12 Again, it is curious why a petition for the removal of a Justice of the Superior Courts should be to the President and not the Chief Justice who is the head of the Judiciary.

In both the cases of the Chief Justice and other Justices of the Superior Courts, the outcome of the proceedings are recommendations, which are forwarded to the President, and it is the President who, in the case of removal, effects such removal.

5.2.3 Suspension
Where a petition against the Chief Justice has been referred to an impeachment committee, the Chief Justice may be suspended by the President acting in accordance with the advice of the Council of State; while in the case of a Justice of the Superior Courts he/she may be suspended by the President acting in accordance with the advice of the Judicial Council.

The role of the President in the suspension of the Chief Justice and Justices of the Superior Courts is puzzling and could in certain circumstances pose a challenge to Judicial Independence.

10 Ghana Constitution: Article 146
11 Ghana Constitution: Article 146 Clause 6
12 Ghana Constitution: Article 146 Clauses 3 and 4
5.3 Financial Independence and Autonomy

The Ghana Constitution provides that, in the exercise of the Judicial power of Ghana, the Judiciary in its Judicial and administrative function including financial administration, is subject only to the Constitution and shall not be subject to the control or direction of any person or authority.\(^\text{13}\) Therefore, by the terms of the Constitution, all salaries, allowances and administrative expenses payable to persons serving in the Judiciary are charged on the Consolidated Fund and such salaries and allowances may not be varied to the disadvantage of a Judge\(^\text{14}\). In reality, the administrative expenses, are subjected to the national budgetary process and are therefore proposed by the Executive (the Minister of Finance) to be approved by Parliament.

Funds voted by Parliament, or charged on the Consolidated Fund, for the Judiciary, are required by the Constitution to be released to the Judiciary, and in quarterly installments. In reality, the Executive hardly ever complies with this provision. Unfortunately, the Constitution prescribes no effective or practical sanction for such non-compliance. The usual remedy of suing to enforce a Constitutional provision, in the event of a breach, might not necessarily work in this context. This is yet another example of a democratically elected Executive and Legislature interfering in the financial autonomy of the Judiciary. When the Executive fails to release the Judiciary’s approved subventions on time, in practice, the only remedy that the Judiciary has is to resort to discussions with the Executive with a view to expediting such release. This is an inadequate remedy, which might create negative public perception, and which implies that the Executive can, through withholding funds, tinker with the autonomous financial functioning of the Judiciary.

It is important to distinguish between two methods of corruption of the Judiciary: ‘state capture’ (through budget planning and privileges) being the more dangerous, and the private bribery. State corruption of the Judiciary has the potential to bring the Judiciary into public ridicule, and impede the ability of businesses to optimally facilitate the growth and development of a market economy.

5.4 The Judiciary and the Legislature

The Legislature is responsible for making laws\(^\text{15}\). The Judiciary, in Ghana, on the other hand is empowered to interpret the laws and, inter alia, determine whether or not a piece of legislation has been made in excess of Parliamentary powers\(^\text{16}\). The Judiciary is thus mandated to answer the question of whether an Act of Parliament is constitutionally valid or not, and if not, to strike it down in whole or in part. What may seem like the Judiciary examining whether Parliament has breached the Constitutional limits on its legislative powers in actual fact may be an opportunity for the Judiciary to engage in poking its nose into the powers of the Legislature.

5.5 The Judiciary and the Executive

In addition to the power to nullify legislation deemed to be in contravention of the Constitution, the Supreme Court of Ghana (as well as the High Court in respect of the enforcement of the human rights of a person) is also empowered to strike down any action by the Executive, which is deemed to be unconstitutional.

Clearly, in the exercise of its enforcement powers under the Constitution, there is the possibility of the Judiciary usurping the powers allocated to the Executive. In this regard, the Supreme Court of Ghana has on occasion restrained this tendency through application of the interpretational doctrine of Political Question without necessarily abdicating its broader role as guardian of the Constitution. In a landmark case, Ghana Bar Association v. Attorney-General,\(^\text{17}\) the Supreme Court held that, the Political Question doctrine is applicable in Ghana. The challenge here is that, because of the doctrine of Separation of Powers, the Judiciary might, conversely, at times, leave matters in the hands of the appropriate branch of Government to

\(^{13}\) Ghana Constitution: Article 127 Clause 1.

\(^{14}\) Ghana Constitution: Article 127 Clause 5

\(^{15}\) The Constitution, article 93 (2)

\(^{16}\) The Constitution, article 130 - “The Supreme Court shall have exclusive original jurisdiction in - (a) all matters relating to the enforcement or interpretation of this Constitution; and (b) all matters arising as to whether an enactment was made in excess of the powers conferred on Parliament or any other authority or person by law or under this Constitution”

\(^{17}\) [1995-96] 1GLR 598 - 662
deal with politically charged matters when, in fact, the Constitution states that the Judiciary shall have the final adjudicating power.

5.6 The Executive and the Legislature
The core function of the Executive according to the Ghana Constitution is to execute and maintain the Constitution and all Laws made under or continued in force under the Constitution. These laws are made by Parliament. The Constitution, however, enjoins the President to choose the majority of its Ministers from Parliament. The challenge arising from this requirement is that, a Minister who is in Executive arm of government might equally be part of the Legislative arm of government. Indeed, over the life of the Constitution, it has almost become an imperative that a person desiring to become a Minister must strive first to win a parliamentary seat. How practicable is it for such a person to check his/her own party’s actions once he/she becomes a Minister? Whilst such an arrangement is not unknown in certain democracies such as the parliamentary system, this may be a major challenge as it goes against the very doctrine of Separation of Powers, and in an Executive Presidential system, and a national environment, where politics overwhelm every facet of life, and political interest is rife, this challenge has a tendency to dampen democracy and constitutionalism. Moreover, the appointment of Ministers from Parliament directly places that part of the Legislature under the control of an Executive President.

A further challenge to the doctrine of Separation of Powers in Constitutional Democracies with the Ghana model, is the requirement that the Speaker of Parliament, who is the head of the Legislature, must be sworn-in, and function, as the acting President (head of the Executive) every time both the sitting President and the Vice-President are not available to perform the functions of the President’s position. The question is, the period where the head of the Legislature is acting as the President, how separate will his powers under the Legislature to Executive arms of Government be? The Supreme Court has construed this requirement to include times when both the President and Vice President have travelled outside the country. This position of the law carries a potential conflict, in that, the Speaker, whilst acting in the capacity of President has power to direct Ministers and other Executive members on their functions. This cannot be said to be a separation of power. Rather, this constitutional requirement from time to time, (fortunately quite rare) vests in the Speaker of the Parliament of Ghana an overwhelming power and that might one day have disastrous outcomes, creating as it does an opportunity for an ill motivated Speaker, whilst functioning as Acting President, to use the Executive powers to manipulate situations to his/her advantage or the advantage of others.

7.0 CONCLUSION
The Constitution of Ghana declares: “Justice emanates from the people and shall be administered in the name of the Republic by the Judiciary.” The unique structure of the government of Ghana provides its own challenges to an ideally independent Judiciary. Though many of its powers are checked by the other branches, it still retains the final judicial power.

Also, the security of tenure for Judges is very important in ensuring an independent Judiciary. It is absolutely essential that a prima facie case is established before any impeachment process is commenced. The removal of Justices should be the responsibility of the Judicial Council and it is not the President who should have the final say on the dismissal of Justices, since he/she is the head of the Executive. Petitions for removal of Judges should be sent to the Judicial Council and final say given to the Judicial Council to ensure an independent Judiciary.

Again, in most developing countries, with Ghana as an example, where spending on the Judiciary is controlled by the Executive, this undermines the principle of Judicial independence because it creates a financial dependence of the Judiciary on the Executive, which if not expertly managed, can compromise the independence of the Judiciary.

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18 The Constitution, article 58 (2)
19 The Constitution, article 78 (1)
20 The Constitution, article 60(11
21 Asare v Attorney-General, [2003-2004] SCGLR 832
22 Ghana Constitution: Article 125 Clause 1
rule of law. When the Judiciary is free and unbiased, especially with no interference from Executive restraints, it inevitably goes hand in hand with economic development, since it attracts more investors who know their capital is safe from unjust political interests, actions and policies.

The doctrine of Separation of Powers in a Constitutional Democracy has its benefits as well as its challenges, not just in Ghana, but in other Jurisdictions as shown in the appendices. The functions of the arms of government intertwine. However, the Judiciary possesses the opportunity to create policy and enforce carefully crafted laws. The Legislature and the Executive have each been given specific powers to fulfill different tasks within their control. As a result, no one branch or institution should become so powerful as to control the system completely.

As we strive to cultivate Justice and ensure efficiency, we look forward to learning from our past and stepping into an even brighter future rooted in the fundamental principles of Constitutional Democracy.

Appendix 1
CHALLENGES TO SEPARATION OF POWERS IN OTHER COMMON LAW JURISDICTIONS
1.0 ZAMBIA

Zambia operates on the principle of Constitutional Supremacy and as such all the three organs of government are subject to the Constitution. To this end, the three organs of government are expected to provide checks and balances on each other in the exercise of their Constitutional powers. Each branch of government has a distinct role to play and no one branch is to interfere in the other’s function. Parliament makes the law; the Executive implements the law; while the Judiciary interprets the law. But this doctrine is quite subtle in Zambia.

Zambia's implementation of the doctrine of Separation of Powers is derived from their Constitution.

1.1. The Executive and the Judiciary

The roles of the Judiciary, envisaged by the Constitution include the following:

(i) interpreting the law;
(ii) adjudicating disputes of both civil and criminal nature;
(iii) determining the sentence of a convicted criminal offender;
(iv) judicial review of administrative action; and
(v) Protecting the rights of subjects by ensuring that Justice is done under the rule of law.

Article 122 (1) states:
“In the exercise of the judicial authority, the Judiciary shall be subject only to this Constitution and the law and not be subject to the control or direction of a person or an authority.”

On the possibility of the Executive dominating the Judiciary, due to the fact that the appointment of the Chief Justice and other Justices is by the head of the Executive, the President, article 140 stipulates:
“The President shall, on the recommendation of the Judicial Service commission and Subject to the ratification by the National Assembly, appoint the –
(a) Chief Justice;
(b) Deputy Chief Justice;
(c) President of the Constitutional Court;
(d) Deputy President of the Constitutional Court; and
(e) Other judges.”

This may pose a challenge to the doctrine of Separation of Powers.

23 See the Constitution of Zambia (Amendment) [No. 2 of 2016], article 1 (1)
24 See Constitution of Zambia (Amendment) [No. 2 of 2016]
25 See Constitution of Zambia (Amendment) [No. 2 of 2016], article 119
1.2 The Executive and the Legislature
The Zambian system of government does allow for some overlap. The Executive is almost exclusively made up of Members of Parliament and the President as head of the Executive is a principal actor in the legislative process.

The Zambian Constitution mandates the President to appoint the Vice President, Cabinet and Deputy Ministers from among the Members of Parliament. The main functions of the Zambian Parliament are:

(i) to legislate;
(ii) to oversee operations of the Executive arm of government; and
(iii) to approve government expenditure and taxation measures.

Article 62 states that:

“There is established the Parliament of Zambia which consists of the President and the National Assembly.”

Article 62 supra goes against the very principle of Separation of Powers. How could the President of Zambia act in a dual capacity; first as an Executive head and second as part of the Legislature? Where then lies the principle of checks and balances. How can the President balance his dual role and at the same time check that his acts are not in excess of the powers conferred on him?

1.3. The Legislature and the Judiciary
The Judiciary is the ultimate interpreter of the law; however, both Parliament and the Executive appear to have interpretive functions. In the Court’s ruling on March 23, 2016 in the case of Geoffrey Bwalya Mwamba v Attorney General, & Others (the “GBM 2016 case”), the Court dealt with the question of whether the Speaker as head of Parliament had the power to make the declaration that Geoffrey Bwalya Mwamba Kasama’s seat had become vacant.

The Court held that the very core principle of Separation of Powers suggests that the Speaker has no power to declare a seat vacant, that function is solely the preserve of the High Court of Zambia. Such a declaration by the speaker deviates from the doctrine of Separation of Powers and as such misconstrues the Judiciary’s role in interpreting the law.

While it is true that it is the Court’s role to interpret the law, it is necessary to understand circumstances under which such a duty arises. The Judiciary comes in to resolve issues when there are legal disputes. Judicial interpretation of the law is tied to its role as an arbiter of disputes. When we refer to judicial interpretation, we are in essence referring to a form of legal dispute resolution.

Article 133 of the Constitution of Zambia does state that only the High Court can settle a dispute concerning the loss of a Parliamentary seat. A Speaker of Parliament cannot declare a seat vacant if the seat is contested in Court between two parties that are claiming the seat.

Appendix 2
CHALLENGES TO SEPARATION OF POWERS IN OTHER COMMON LAW JURISDICTIONS
1.0 THE UNITED KINGDOM
The UK does not have a written Constitution. Regardless of the absence of a formal written Constitution, the principle of Separation of Powers exists, but in a weak form because they overlap and work together.  

1.1 The Executive Power

The Executive consists of the Crown and the government, including the Prime Minister and Cabinet of Ministers. Moreover, the Civil Service is also a part of the Executive. The Executive mainly formulates and executes the government policies. The government is answerable to Parliament which has the ultimate power to dismiss a government and force a general election in which the new government will be elected. The government is mainly elected from the Members of Parliament who sit in either House of Common or House of Lords.

1.2 The Legislative Power

The Parliament of UK is composed of three parts, namely; the Monarch, House of Lords and House of Commons. However, the Monarch has only nominal powers and mainly has to listen to the advice of the Prime Minister who in return follows the Members of Parliament. The House of Commons is made up of elected members of Parliament, whereas the House of Lords is made up of unelected hereditary peers and life peers appointed by the Crown and Archbishops and Bishops of the Church of England. The House of Commons, however, is superior to House of Lords in its law-making power. The main functions of the Parliament are to: create/amend law, scrutinise the government, and to enable the government to make financial decisions.

1.3 The Judicial Power

The main function of the Judiciary is to hear matters and adjudicate on them using the law. However, in the UK, the Judiciary has one more essential function: to develop the law through their judgments. The Judiciary consists of Judges in Courts, as well as those who hold judicial office in tribunals. The senior judicial appointments are made by the Crown. According to various sources, the Judiciary in the UK is independent of both Parliament and the Executive. It may be argued that this “independence” is really not independence per se, as Senior Judges are appointed by the Crown. However, once these Judges are appointed, they become completely independent and have complete authority over all their actions. Their independence is protected in the “Act of Settlement – 1700”, according to which, Senior Judges can only be dismissed by address to the Crown from both Houses of the Parliament.

1.4 The Lord Chancellor and the doctrine of separation of powers

One of the most peculiar features of the UK was probably the Lord Chancellor. This is mainly due to the fact that the Lord Chancellor was a part of all three branches of the government. The Lord Chancellor is often regarded as a disregard to the doctrine of separation of powers. Prior to the “Constitutional Reform Act 2005”, the Lord Chancellor acted as the head of the Judiciary, was a member of the Cabinet and presided over the House of Lords as its Speaker. However, after the “Constitutional Reform Act 2005” was passed, the Lord Chancellor was removed from his position in the Judiciary. As a matter of fact, the Constitutional Reform Act 2005, places an obligation on the Lord Chancellor under section 3 subsections (1), (4), (5), and (6) to continue to uphold the continued independence of the Judiciary.

Section 3 of the Constitutional Reform Act 2005 stipulates:

“3 Guarantee of continued Judicial Independence
(1) The Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the Judiciary or otherwise to the administration of Justice must uphold the continued independence of the Judiciary.
(4) The following particular duties are imposed for the purpose of upholding that independence.

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34 Papworth N, Constitutional & Administrative Law, 9th edn (Oxford University Press, 2016)
35 Papworth N, Constitutional & Administrative Law, 9th edn (Oxford University Press, 2016)
36 Papworth N, Constitutional & Administrative Law, 9th edn (Oxford University Press, 2016)
37 Papworth N, Constitutional & Administrative Law, 9th edn (Oxford University Press, 2016)
The Lord Chancellor and other Ministers of the Crown must not seek to influence particular judicial decisions through any special access to the Judiciary.

The Lord Chancellor must have regard to:
(a) The need to defend that independence;
(b) The need for the Judiciary to have the support necessary to enable them to exercise their functions;
(c) The need for the public interest in regard to matters relating to the Judiciary or otherwise to the administration of Justice to be properly represented in decisions affecting those matters."

1.5 Inter-relation between the three Arms of Government.
The UK has a unique system because it does not represent any standard structure; in fact, it is a mixture. This can be proved by looking closely at the interrelation between the three powers.

1.5.1 The Legislature and the Executive
The Legislature is dominated by the Executive because the Government is formed by the leader of whichever party wins the most seats in the House of Commons; who is the Prime Minister. Consequently, the Legislature might receive a considerable amount of pressure from the Executive. Therefore, even though it is the Parliament’s job to legislate, in reality the Government mainly controls it.38

1.5.2 Executive and the Judiciary
Since the appointment of the Senior Judges is in the hands of the Lord Chancellor, it can be said that there is a slight element of domination. However, once the Judges are appointed, it is not up to the Lord Chancellor to dismiss them.39

1.5.3 Judiciary and the Legislature
The Judiciary and Parliament mainly share the powers, rather than separate them. This is due to the fact that in Common law system Judges have a legislative role. Despite this overlap, the Judges have deferred to the authority of the Parliament since the 17th century. However, during the past two decades, there has been a shift in the balance of powers due to UK’s “increased obligations to Europe”.

Despite the fact that, Montesquieu based his explanation of the doctrine on the British system, it is obvious that the British system has a weak division of powers.40

Appendix 3
CHALLENGES TO SEPARATION OF POWERS IN OTHER COMMON LAW JURISDICTIONS
1.0 CANADA
The recurrent theme of the respective roles of the Legislatues and Courts within Canada’s Constitutional framework, so prevalent in the debate over scope of the rule of law as a Constitutional principle, brings us to a brief assessment of another and still-emerging principle, the separation of Executive, legislative, and Judicial powers.

Professor Peter Hogg has argued cogently and consistently since the first edition of his treatise in 1977 that there is no general Separation of Powers in the Constitution Act, 1867.

Nevertheless, in recent years, the Supreme Court of Canada has elevated the Separation of Powers to the level of a structural Constitutional principle. However, the Court has yet to provide a comprehensive and persuasive account of the meaning, scope, and normative effect of this principle. Indeed, the path of the Court’s jurisprudence has veered significantly on this issue.41

38Mike Thadkobylarz (2010)
39See Constitutional Reform Act, 2005, section 26 (5A) (b)
41The Rule of Law, the Separation of Powers and Judicial Independence in Canada by Warren J. Newman
In the *Provincial Court Judges Reference* in 1997, Chief Justice Lamer, writing for a majority of the Court, asserted that ‘a fundamental principle of the Canadian Constitution, the separation of powers… requires, at the very least, that some functions must be exclusively reserved to particular bodies’.

A year later, in upholding its advisory jurisdiction in the *Quebec Secession Reference* the Court declared that ‘the Canadian Constitution does not insist on a strict separation of powers’. Parliament and the provincial Legislatures may properly confer other legal functions on the Courts, and may confer certain judicial functions on bodies that are not Courts.

In *Babcock*, the Chief Justice found:

“There is no general ‘separation of powers’ in the Constitution Act, 1867. The Act does not separate the legislative, Executive and Judicial functions and insist that each branch of government exercise only ‘its own’ function. As between the legislative and Executive branches, any separation of powers would make little sense in a system of responsible government, and it is clearly established that the Act does not call for any such separation. As between the Judicial and the two political branches, there is likewise no general separation of powers. Either the Parliament or the Legislature may by appropriate legislation confer non-Judicial functions on the Courts and (with one important exception [the core jurisdiction of superior Courts under s. 96]), may confer judicial functions on bodies that are not Courts.”

The biggest problem is definitional and terminological: nowhere in Canadian Constitutional jurisprudence is there a thorough analysis of the Constitutional meaning animating the concept of the Separation of Powers, or the Constitutional values it is meant to protect and enhance.

### 1.1 The Executive and the other Arms of government

The Constitution Act, 1867 establishes Executive power by ss. 9-16. These provisions vest the Executive power in the Queen, and call for its exercise by the Governor General and Privy Council. The Constitution Act, 1867 establishes significant power in the Executive branch, including, by s. 15, the command of the Armed Forces. The Constitution Act, 1867 identifies and organizes separate Constitutional status as well for the Legislature (sections 17-52) and Judiciary (sections 96-101) and specifies their respective powers and limits.

However, what the Constitution giveth in relation to the Separation of Powers, it also taketh away: Under sections 17 and 91, the Queen is also an essential actor in the exercise of legislative power: Her Majesty is one of the three bodies composing the Parliament of Canada, and in strictness of law, it is the Queen, under section 91, who makes laws for the peace, order, and good government of Canada, albeit by and with the advice and consent of the Senate and House of Commons.

Another illustration is provided in the *Quebec Secession Reference* wherein it was observed that the United States Supreme Court cannot render advisory opinions, in keeping with the strict Separation of Powers reflected in the limitations expressed in that country’s Constitution, whereas in Canada there is ‘no Constitutional bar’ to the conferral of what is traditionally an Executive function (the rendering of legal opinions by the law officers of the Crown) upon the Judicial branch.

Canadian Parliamentary democracy increasingly trends towards power concentration in the Executive branch – a tendency that has disturbed many observers.

Parliamentary government fuses the legislative and the Executive branches. In a Parliamentary system the Executive springs from the Legislature, is part of it and is responsible to it as a confidence chamber.

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42 Re Remuneration of Judges of provincial Court (P.E.I) [1997] 3 SCR [88]
43 Re Secession of Quebec [1998] 2 SCR [217]
44 Babcock v Canada (Attorney-General) [2002] 3 SCR [57]
The Lieutenant-Governor is part and parcel of the Legislature. He appoints members of the Executive Council and Ministers and these, according to Constitutional principles of a customary nature referred to in the preamble of the British North American (B.N.A.) Act of 1867 as well as in some statutory provisions, must be or become members of the Legislature and are expected, individually and collectively, to enjoy the confidence of its elected branch. There is thus a considerable degree of integration between the Legislature and the Government; *(Blaikie v. A.G. Quebec (No. 2) (1981), 123 D.L.R. (3d) 15 at 122 (S.C.C.))*

Although Blaikie dealt specifically with the provincial Executive power, the Court’s description applies equally to the Federal Executive. The Court’s observations in Blaikie are interesting because the Court focuses on the institutions of Parliamentary government established by Constitutional convention, particularly the institutions of responsible government. It is at the conventional level that integration between the Executive and legislative branches occurs.

Constitutional convention enhances integration between the Legislature and Executive in two respects. First, the formal Executive, the Governor General, is controlled by responsible Ministers of the Crown, creatures unknown to the formal Constitution. Second, the Legislature’s powers and priorities are in practice controlled by other Executive instrumentalities unknown to the formal Constitution – the PMO (Office of the Prime Minister), PCO (Privy Council Office) and Cabinet. These institutions, particularly PMO and PCO, act as a clutch that meshes the gears of formal Constitutional institutions into the full force of operating political power. Donald Savoie, *Governing from the Centre: The Concentration of Power in Canadian Politics* (1999) describes the real situation:

"Central agencies stand at the apex of the machinery of government…. they have a licence to roam wherever they wish and to raise whatever issue they may choose; (p. 5) … The prime Minister alone thus has access to virtually every lever of power in the federal government, and when he put his mind to it he can get his way on almost any issue; (p. 87)."\(^{45}\)

In other words, the central agencies, particularly PMO, PCO and, to a lesser extent, Cabinet, are the conventional Executive. It is the conventional Executive which in practice controls the Legislature, and which allows the writers to speak about the integration between the Executive and Legislature.

In practice, the bulk of the new legislation is initiated by the government (Executive). By virtue of s. 54 of the Constitution Act, 1867, a money bill, including an amendment to a money bill, can only be introduced by means of the initiative of the Executive.

It is at the conventional level, not the formal level or the text of the Constitution, that the operation of Canada’s Constitution exhibits a high degree of integration between the Executive and legislative branches of government. At the conventional level, where the Constitution actually functions, it is accurate to say that Canadian government is characterized by a high degree of control by the Executive over the legislative branch, particularly as contrasted with presidential systems. It is perhaps this situation that was in the mind of the Supreme Court of Canada when it commented that “the Canadian Constitution does not insist on a strict separation of powers…"\(^{46}\)

1.2 The Legislature and other Arms of Government

In a system of responsible government, once Legislatures have made political decisions and embodied those decisions in law, it is the Constitutional duty of the Executive to implement those choices.

Parliament is vested with Constitutional power to enact all federal laws and to establish Federal Courts. The establishment of the Courts by Parliament is the grey area here in terms of its comparison with the situation in Ghana. This is an additional means of interference on the Judiciary by the Parliament.

\(^{45}\)http://www.constitutional-law.net

\(^{46}\)The Rule of Law, the Separation of Powers and Judicial Independence in Canada by Warren J. Newman

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Parliament is, however, checked by the power of the Executive to call the House of Commons into session (s. 38) and by the power of the Judiciary to declare laws enacted unconstitutional. Parliament is also checked by power in the Executive to reserve Bills passed by the Houses of Parliament and to disallow laws enacted (secs. 55-7). These veto-like powers, designed for British control of Canadian law-making, have long since fallen into disuse, but they still exist in the text and structure of the Constitution.

The Courts do not hold a monopoly on the protection and promotion of rights and freedoms; Parliament also plays a role in this regard and is often able to act as a significant ally for vulnerable groups. In R. v. Mills, [1993] 3 S.C.R. 668 it was held that:

“If Constitutional democracy is meant to ensure that due regard is given to the voices of those vulnerable to being overlooked by the majority, then this Court has an obligation to consider respectfully Parliament’s attempt to respond to such voices.”

1.3 The Judiciary and other Arms of Government

The Judicial branch has Constitutional power to try all cases, to interpret the laws in those cases and to declare any law or Executive act unconstitutional. The Judiciary is checked by power in the Executive to appoint its members; by power in the Legislature to enact amendments that overturn Judicial decisions, including many Constitutional decisions (Charter of Rights, s. 33); and also, by the combined power of the Executive and legislative branches to remove Judges.

In reviewing legislative enactments and Executive decisions to ensure Constitutional validity, the Courts speak to the legislative and Executive branches. Most of the legislation held not to pass Constitutional muster has been followed by new legislation designed to accomplish similar objectives. By doing this, the Legislature responds to the Courts.

This is on all fours with the current situation of the influence of the Judiciary over other arms of government in Ghana.47

Appendix 4

1.0. UGANDA

1.1. Executive and the other Arms of Government

The power of the Executive Branch is vested in the President of Uganda, who also acts as head of state and Commander-in-Chief of the armed forces. The President is responsible for implementing and enforcing the laws written by Parliament and, also appoints the Cabinet. The Vice President is also part of the Executive Branch, ready to assume the Presidency should the need arise.48

The Constitution of Uganda provides that the President shall execute and maintain the Constitution and all laws made under or continued in force by the Constitution. It is the duty of the President to also abide by and uphold and safeguard the Constitution and the laws of Uganda and to promote the welfare of the citizens and protect the territorial integrity of Uganda.

The influence of the Executive over the Judiciary in Uganda is similar to the current situation in Ghana. Article 142 on the appointment of Judicial Officers provides as follows:

“(1) The Chief Justice, the Deputy Chief Justice, the Principal Judge, a Justice of the Supreme Court, a Justice of Appeal and a Judge of the High Court shall be appointed by the President acting on the advice of the Judicial Service Commission and with the approval of Parliament.

(2) Where-
(a) the office of a Justice of the Supreme Court or a Justice of Appeal or a Judge of the High Court is vacant; or

47 The Rule of Law, the Separation of powers and Judicial Independence in Canada by Warren J. Newman
48 Article 99(1) of the 1995 Constitution of the Republic of Uganda (as amended)
(b) a Justice of the Supreme Court or a Justice of Appeal or a Judge of the High Court is for any reason unable to perform the functions of his or her office; or
(c) the Chief Justice advises the Judicial Service Commission that the state of business in the Supreme Court, Court of Appeal or the High Court so requires, the President may, acting on the advice of the Judicial Service Commission, appoint a person qualified for appointment as a Justice of the Supreme Court or a Justice of Appeal or a Judge of the High Court to act as such a Justice or Judge even though that person has attained the age prescribed for retirement in respect of that office.

(3) A person appointed under clause (2) of this article to act as a Justice of the Supreme Court, a Justice of Appeal or a Judge of the High Court shall continue to act for the period of the appointment or, if no period is specified, until the appointment is revoked by the President acting on the advice of the Judicial Service Commission, whichever is the earlier.” [Emphasis supplied]

Furthermore, Article 144 on the tenure of Office of Judicial officers provides that:

“(3) The President shall remove a Judicial officer if the question of his or her removal has been referred to a tribunal appointed under clause (4) of this article and the tribunal has recommended to the President that he or she ought to be removed from office on any ground described in clause (2) of this article.

(4) The question whether the removal of a Judicial officer should be investigated shall be referred to the President by either Judicial Service Commission or the Cabinet with advice the President should appoint a tribunal; and the President then appoint a tribunal consisting of-
(a) in the case of the Chief Justice, the Deputy Chief Justice or the Principal Judge, five persons who or have been Justices of the Supreme Court or have been Judges of a Court having similar jurisdiction or who are advocates of at least two years standing; or
(b) in the case of a Justice of the Supreme Court or a Justice of Appeal, three persons who are or have been Justices of the Supreme Court or who are or have been Judges of a Court of similar jurisdiction or who are advocates of at least fifteen years standing; or
(c) in the case of a Judge of the High Court, three persons who are or have held office as Judges of a Court having unlimited jurisdiction in civil and criminal matters. A Court having jurisdiction in appeals from such Court or who are advocates of at least ten years standing.

(5) If the question of removing a Judicial Officer is referred to a tribunal under this article, the President shall suspend the Judicial Officer from performing the functions of his or her office.”

These provisions are on all fours with articles 144, 146, 148 and 151 of the Constitution of Ghana which mandate the president to appoint and remove the Chief Justice, Justices of the Superior Courts and Judicial Officers.

1.2 Legislature and the other Arms of Government
The Parliament of Uganda is the legislative arm of Government. The Constitution of the Republic of Uganda establishes this arm of government and lays down its functions under Chapter Six thereof. It is headed by the Speaker of Parliament.

The Legislature is the law-making body in Uganda; entrusted with the making of law. It is also the organ with the mandate to monitor and bring the executive to account. It can also, vary, limit or expand the jurisdiction of the Courts by law, provided all these are in conformity with the Constitution.

Similar to the Ghanaian situation, the legislature exerts influential authority in the following ways;

By virtue of the fact that Parliament has the mandate to create laws, it may take advantage of this power to interfere in the work of the judiciary. An example of this was in the case of Jowett Lyagoba v Bakasonga
[1963] E A 57 where the Court held that the installation of the Kyabazinga of Busoga was illegal. Shortly after, the then president ensured that Parliament pass the Busoga Validation Act validating the installation of the Kyabazinga. By doing this, Parliament was interfering in the judiciary by making use of its legislative powers.

Again, Article 78(d) states that, the Vice-President and Ministers, who, if not already elected members of Parliament, shall be ex-official members of Parliament without the right to vote on any issue requiring a vote in Parliament.

Here, it is difficult to see how powers between the legislature and the executive can be separated when in one breath one acts as a minister and in another breath a member of Parliament. It is likely that an issue of conflict of interests would arise in such a situation.⁴⁹

1.3 Judiciary and the other Arms of Government
The Judiciary is an independent legal organ comprised of Courts of Judicature as provided for by the Chapter Eight of the Constitution of the Republic of Uganda. It is headed by the Chief Justice who is at position four in the national hierarchy after the Speaker of Parliament.

The Judiciary is entrusted to administer justice through Courts of judicature including the Supreme Court, the Court of Appeal, the High Court and other Courts or Tribunals established by Parliament.

The Judicial function consists of the interpretation of the law and its application by rules or discretion to facts of particular cases.

Under Article 82 of the Constitution, the judiciary is given a considerable amount of control on Parliament where the Chief Justice, or a Judge designated by the Chief Justice, presides at an election of the Speaker of Parliament. It might be unsettling for some that, a person who is said to be at position 4 of the national hierarchy be empowered to preside over, or to appoint another judge to preside over, the election of the person who is supposed to precede such a person in hierarchy.

⁴⁹ http://asgp.co.net
“JUDICIAL LEADERSHIP”

By Sir Peter Thornton, England and Wales

INTRODUCTION

Just the other day I walked into a bookshop in London looking for a novel. As I browsed I noticed that the shelves were full of books on leadership - in business, in teaching and sport - what skills you need, building a career, how to be a CEO, taking responsibility and making decisions, crisis management, even learning who not to trust. I did not look under ‘J’ for ‘Judges’; ‘judicial leadership’ as a concept is relatively new. When I was a young barrister, I did my job, I worked hard for my clients, put on my robes, went to court, won cases, lost cases, but I did not imagine I would be a judge, let alone a leader. And when I became a leader nobody told me how to be a leader - how best to lead and get the best out of others. So I am going to be bold enough to tell you how to do it.

My credentials for this task, such as they are, are these. I am not a Chief Justice (although I am grateful to be introduced by one). I was Head of Chambers of one of the largest set of barristers in England, employing staff, managing the business, and leading a fine team of lawyers (now 200 strong). As the first Chief Coroner of England and Wales and a senior judge, I was asked to lead a coroner service of 380 coroners and 590 coroners’ officers in 92 coroner areas, as well as my own staff of six. Back home we take death investigation very seriously: 240,000 deaths are reported to coroners, with 30,000 inquests each year. Inquiries into high-profile mass fatality events are conducted by senior judges (such as Lady Justice Heather Hallett in the 7/7 Bombing Inquests). I sat with our Chief Justice when we ordered fresh inquests into the Hillsborough football stadium deaths. I have also designed various training courses for judges, coroners, lawyers and students, often leading a team of trainers and course directors.

In all of these jobs I was expected to show leadership. Nobody told me how to. It was never set out in my job description. There was no book in the bookshop. But I have thought about it and would like, respectfully, to share my thoughts with this distinguished audience.

The purpose of this talk, therefore, is to introduce some basic thinking into the process of leadership and how we work with others. I want to try and provide some answers, at least some thinking, to the following questions. What is leadership? How do I become a good leader? What is expected of me? How can I work better with others?

Your credentials for having to listen to me are these. Many of you, if not all of you, whether judges or magistrates, are leaders. You may be a Chief Justice (head of the whole judiciary of your country), or head of the Court of Appeal, or Senior Judge of the Supreme Court (or High Court), or leader of a division of judges such as family court judges or sharia judges, or the senior judge at a court or the judge in charge of court administration, or a leader of a smaller team such as a committee working to improve some aspect of the administration of justice such as better listing of cases, reducing delay, introducing new procedures, or you may be a judge or magistrate with a small staff. All leaders in one way or another.

In each one of these roles you as judges - and I will use the word judge to include judges and magistrates - are not just required but expected to take the lead and lead others, whether judge colleagues or administrative or other staff: to lead the team. And it may come upon you suddenly. A colleague moves on or falls ill and you have to step in at short notice.

And we all know that the success of any team, large or small, is often dependent upon the skill of the team leader as leader. You only have to think of other team leaders and what a pivotal role they play: a CEO, a head of division in a business, head of department in a university or school, leader of an expedition, captain of a sports team - all leaders who need to perform as leaders in order to improve the performance of others working together. Sometimes a school which is rated poorly gets a new head teacher and the leadership and inspiration of that teacher turns the school around. Leadership matters.
You could also say that you are leaders by virtue of your very appointment as a judge or magistrate, leaders representing, upholding and developing the rule of law, that essential of the democratic process, and following the Latimer House Principles to which all Commonwealth countries adhere. You are seen as leaders by litigants and by the public in your open court performance. In civil cases you lead the way where the parties have failed to agree. In criminal cases you hold the ring between the state and the individual. Your role as law-maker, decision maker, arbiter, is perceived as a role of leadership, hopefully of strictly independent leadership.

So if you are leaders, in one way or another, how do you do it? I have seven suggestions to make, seven basic maxims of judicial leadership, which I hope will help you in that role.

SEVEN MAXIMS FOR JUDICIAL LEADERSHIP

(1) Understand your role
- Think about your role as a judge in a leading role or as a team leader
- Consider your job description or terms of reference
- Be prepared for your specific role

Let us begin at the beginning. It may sound obvious, but it helps just to sit down and think about your role. Think about your own role, not just as judge but as team leader or as a person in a leading role (as judges are perceived). There may be a job specification for your role. Check it, if there is one. If there isn’t, set out on a sheet of paper the main points of your role, what is important for you and others.

As Chief Coroner, I had a very brief job description (agreed by the Chief Justice) which included the words, ‘The Chief Coroner will lead the coroner service’ - no more. I had, in effect, carte blanche, a blank piece of paper. When I was a barrister and later a judge, I used to write down the key points of every new case, however long or complicated, on one piece of paper: the key names, dates, places; the key points put forward by the parties; the gaps which might need to be filled. It meant, at a very basic level, that I would not confuse a witness’s name with the defendant’s. It meant, too, that as a judge I kept my eye on what mattered (even if the lawyers didn’t). I did the same for my leadership role as Chief Coroner. I tried to identify for myself what my particular leadership role was and I listed the points on one piece of paper. Two years later I developed (and published) a more extensive three year plan for the service: new work and work to be completed. With a lot of hard work I achieved it.

What, then, you should ask, are the key points of your role? Ask yourself what precisely is expected of you as leader. Do others understand that role? They should. Everyone needs to know. What is the extent of your leadership role? What are its limits?

For example, if you are appointed to chair a committee to improve procedures in criminal courts, begin by setting out the aims and objectives of the committee with strict terms of reference. If they are not clearly stated in your brief, state them yourself and discuss and develop them with your committee members. Agree on the objectives and keep them always in mind. Have timescales and targets (which are realistic). Know what you are doing and why you are doing it. A project is a project. To make it work it needs structure and design, foresight and clear thinking. That is your job as leader. A word of warning. Keep your meetings focused, short and to the point. As someone once said: People who enjoy meetings should not be in charge of anything.

(2) Understand the bigger picture
- The administration of justice
- The rule of law, protected by judges (independent, objective decision-makers)
- Public perception and the need for public trust
- Sharing ownership with your team, a common purpose
This is what we should all do from time to time: stand back and look at the bigger picture. What is the greater purpose of our daily work? We are all playing a significant part in the administration of justice, in one way or another. We all know it is our charge, our duty, to represent, uphold and develop the rule of law, that essential (if sometimes elusive) tenet of the democratic process (which Sir Nicholas Blake has considered in his presentation), and to personify the benchmark of independence as set out in the Bangalore Principles of Judicial Conduct (2002). The rule of law is there to be protected by independent, objective judges, and that is of fundamental importance for a well-ordered society.

The need for public trust in the judiciary is today, perhaps, greater than ever. In our country we have the political and constitutional upheaval of Brexit. When our top court ruled against the Government in a Brexit case, deciding that the UK could not withdraw from the European Union without prior authorisation by Parliament, a popular, should I say populist, newspaper attacked the judges of the Court. The front page headlines decried them as The Enemies of the People. Sadly, the Lord Chancellor, a minister of that Government, did not come rushing to defend the independence of the judiciary as she should have done. You will have your own examples of judges being undermined from time to time. That is why the strength of the CMJA is so invaluable as international support.

It is important, therefore, to understand how our particular function, large or small, fits into the bigger picture, for two reasons. First, we need to know our place in the wider context. Secondly, others in the team need to appreciate the importance of their role in that context too, the common purpose and why it benefits the public. It is sometimes called ‘sharing ownership’, not just coming into work in the morning and going home in the evening, but having a real standing and an appreciation of it, how they fit in and why. You want to hear them thinking: I never thought of it like that; that’s good, that’s me and I like it, my job is worthwhile.

(3) Give priority to working relationships

- Make time for your colleagues and staff
- Listen, discuss and consult
- Appreciate good work; encourage others
- Be prepared to delegate

Make time for your colleagues and staff. Think about them - as colleagues, as co-workers, as people. Think about their roles and let them think about their roles. Of course that is easier said than done. You all lead busy, demanding working lives. But spending some time with those who work for you (and therefore with you) will reap dividends. It is better to know about a problem when it is gently bubbling up than when it has come to a head and lands on your desk with a thump. When I was Head of Chambers, a barrister had behaved so poorly to a solicitor instructing him on a piece of work that I rang up the solicitor and said I was going to cross London to apologise to him in person. He said that was not necessary, but he was grateful for the apology and because I was going to make sure it wouldn’t happen again.

Listen, discuss and consult. Listening gives others a feeling of involvement and being valued. Listening is a more powerful form of encouragement than praise, and praise will do no harm. When my job as Chief Coroner was well under way, I invited my staff of six to come together for a short meeting, but didn’t tell them what it was about. I took the opportunity to praise each one, in front of the others, for the work they had done, to tell them how I valued their work, and, also, how it fitted in to the bigger picture. They loved it.

Hold meetings so that they can be heard; their ideas may even be better than yours. Work collaboratively, but at the same time decisively, looking for positive outcomes, so that something has been gained from a meeting and everyone knows it and appreciates it. You want to be able to trust your team - that means knowing how they work, and what they think. They want to be able to trust you.

When I gave a version of this talk for discussion with the judiciary in The Gambia, one of the English magistrates said: ‘I have monthly meetings with my staff. I usually start off the agenda but let them add
items. And, although I am the leader, we take it in turns to chair the meeting.’ A bold step, but one that shows confidence in his team, and in himself as leader.

Mahatma Gandhi said: *I suppose leadership at one time meant muscle; but today it means getting along with people.* There’s a man called Gregg Popovich who is the head coach of a very successful American basketball team. With a reported $11 million salary (judges – you are in the wrong job), he spends as much as $1m a year of his own money on team dinners with his players, with fine food and wine. No friends or partners, no PAs, no phones - just coach and players. He says it creates a better understanding of each individual person and their understanding of each other and how they relate to each other off and therefore on the pitch. As one of his former assistants catchily put it: ‘He is just trying to hook everybody up to life support.’

I am not suggesting you wine and dine your staff, although I have done it occasionally (with a small team) and it can work really well. But the objective is a good one. You will know and understand them a bit better and they will appreciate that you appreciate them a bit more. There is certainly no harm in being popular with staff; it is better than being unpopular, or just not available. Don’t be anonymous. Indifference is as contagious as yawning.

Encourage good work. Be available, be supportive, but don’t get too close. There are boundaries. For example, don’t overdo the personal remarks. It is said that Prime Minister Margaret Thatcher had a good memory for personal detail. She remembered that one woman working at No.10 Downing Street had a dog which was injured in an accident. She asked her about the dog, which was good, and appreciated. But then she asked her every time she saw her, over and over again, so much so that the woman thought Mrs Thatcher was more interested in the dog than her as a person.

And be prepared to delegate. Try and give staff a level of autonomy in areas of work where that is feasible. They will appreciate that they are being trusted. Although be careful. I had a diary secretary once. One of her jobs was to book my trains. This did not go well. She thought there was not really any difference between a slow stopper train going to a destination to a fast train going to the same place. As long as the train got there that was fine. Wasn’t it? No, it wasn’t. And then I discovered that she had never been on a train. She just didn’t use them or understand them. I had not learned enough about her and she was probably not in the right job anyway, and I should have found that out earlier.

And talking of Prime Ministers you may have noticed that we have a new one in the UK. He has many qualities, I am sure, but is perhaps not known for his grasp of detail. When his father, a bit of a TV personality in his own right, was asked about this, he said (on the radio): ‘That’s not a problem. He lets others do the work.’ I think by that he meant ‘delegate’.

(4) Lead the way

- Demonstrate that you are in charge, in a way that gains respect and trust
- Take responsibility; do not make excuses
- Do not bludgeon or bully
- Lead by example
- Set realistic objectives and priorities

Demonstrate that you are in charge, in a way that gains respect and trust. Lead from the front. Where necessary be decisive. Make a decision; don’t put it off. Leadership is about taking responsibility, not making excuses. My father was in the army in the 2nd World war. On D Day, the invasion of Normandy (then occupied by Germany), he was in charge of a small craft that went over the English Channel. In his role as a young leader, he told me that he prayed with these words: *I pray, Lord, that I shall never show the fear that I shall undoubtedly feel.*
But do not bludgeon or bully or demand or shout or harass. The Alex Ferguson ‘hairdryer’ approach (or the boot thrown at David Beckham) may not be quite what we want here. It is not your role to do as you like and hope that others will tolerate you. And it won’t work anyway. People will resent you and you will never get the best out of them. They will never go the extra mile for you. Lao Tzu, the Chinese philosopher, said: *Be the chief, but never the Lord*. That’s not to say that you should be a charming but toothless pussycat. That’s not wanted either.

Lead by example. Steve Jobs (of Apple fame) was not, some said, a model leader in personal terms (you may have seen the film). But he did say: *Be a yardstick of quality. Some people aren’t used to an environment where excellence is expected.* I rather like that. It is certainly a target to aim for.

One skill required from leaders, including judges, is speaking clearly and directly (to those you lead, whether other judges or staff). Good communication, whatever the context, is vital. There is no point having a vision or objective unless you can explain it. Keep the message simple and jargon free. Rather like the students of philosophy who were asked in an exam paper: *Is this a question?* There were many long answers, but the one that stood out was: *Yes, if this is an answer.* Keep it simple, but not absurdly simple. In the UK the Banking Act 1979 Appeals Procedure Regulations used to state: *Any reference in these regulations to a regulation is a reference to a regulation contained in these regulations.*

And in keeping the message simple, rather like a ruling, you should give clear and persuasive reasons for the message, particularly if it heralds change. As Chief Coroner I had a day’s conference in London with victims’ organisations, individuals and charities where lives had been lost, often in terrible circumstances, such as *WAY* (Widowed and Young), and *Deaths Abroad*. I asked them: What would you say was most important for you as family members of someone who had died as you were brought into the inquest process? They all agreed: top of the list was good information, good communication, early communication, regular communication.

In leading the way you should set realistic objectives and priorities. Draft a plan, a 12 month or two year plan, if that is appropriate, with strategic, practical objectives. Mike Tyson, the boxer, said that *Everybody has a plan until they get punched in the mouth.* Well, we can do better than that. Make your plan punch-proof. Share it with others: listen and discuss. Work collaboratively, but decisively. Take the initiative. Move on, with consensus where possible. Martin Luther King said: *A genuine leader is not a searcher for consensus, but a moulder of consensus.* Work to create momentum, for good, positive change, but do not change too much too quickly and without consensus. I can give you an example of that. In England, a coroner was appointed to lead a busy coroner area. He was experienced, capable and full of bright ideas. But he wanted to implement those ideas too quickly and without taking his staff with him. It was a disaster and took a long time to unravel and put back together again effectively.

All leaders face problems and conflicts. Be available to listen and discuss. Colin Powell, a four-star general and US Secretary of State under George W Bush, said: *Leadership is solving problems. The day soldiers stop bringing you their problems is the day you have stopped leading them. They have either lost confidence that you can help or concluded that you do not care.*

*(5) Play to your strengths*

- What are your strengths and what are your weaknesses?
- How do others see you?
- What do you want people to say about the service you lead?
- Be a role model in your teamwork and casework
- Be prepared to be wrong

I think this may be the most difficult of the seven points. Being self-aware is not always easy. Nobody’s perfect. So, be honest with yourself. Ask yourself: What am I good at? What am I less good at? What are
your strengths and what are your weaknesses? No leader ticks all the boxes. In the world of football (soccer), you are not going to put Lionel Messi in goal.

Nobody tells you what your weaknesses are. There is not usually anyone there to say: ‘You know, please don’t take this badly, but you just talk too much in court.’ Or ‘You ignore your staff and they really don’t like it’ or ‘You’re not very fair to the women in your team’ or ‘The judges in your team say this problem’s been going on for months now and you’ve just ignored it’.

I will come clean. It’s only fair. I was trying a case at the Old Bailey and the prosecutor was really getting to me. She was a young-ish woman prosecutor who thought her case was the grandest of state trials (which it wasn’t), a cast-iron case (which it certainly wasn’t) and on top of that she had the nerve to try to get me to recuse myself on the most spurious of grounds. I was not amused. At the lunch break, the usher, one of that great breed of wise court birds, who manage people brilliantly day in day out, said to me: ‘I hope you don’t mind me saying, Judge, but are you being a bit too ha-

So, how do others see you in your leadership role, in court and out? A troublesome question that is not always easy to answer. (You may not want to answer it.) It is a little like the test for judicial bias. How would the independent observer, just dropping in to the public gallery of your court, consider the fairness of your conduct of the proceedings? Would the fair-minded and informed observer conclude from all the circumstances that the judge was biased, or not (Porter v Magill, 2001)? Do you have a blind spot, some element of bias or prejudice, and are you aware of it? Be a fly on the wall, your wall.

If you chair meetings, do you drone on, irritate others, get angry? Or are you sensibly detached, listening, focused on the aims of the meeting? If you come into a meeting with the mindset that your pre-determined opinion is right at all costs, you’re in trouble. The meeting will be all about you and not the issues you’re there to discuss.

Let’s look at it the other way round. Everybody has a talent, a positive side. What are you good at? Are you good at communication or ideas or detail or with people? Let the others fill the gaps. Play to your strengths. Gain respect and trust through those strengths. When I’m training new judges or coroners I say: Be yourself; don’t try and be somebody you’re not. If you are normally a bit loud, turn it down a bit. If you’re normally a bit quiet, turn it up a bit. But don’t try and be false to your true self. Develop yourself and your natural strengths. If you are aware of yourself and aware of others, good will come of it.

So think about yourself and think about your role as a leader. What do you want people to say about you and about the service you lead? What personal image do you present? What personal image are you trying to present?

Whatever that image is, try and make it a positive image. Just a small example which I give in training to new judges: Be on time, sit in court on time; if you expect others to be timely, be timely yourself. Set an example. I sat in on the beginning of an inquest in a coroner’s court once and the coroner did not start on time. He was 20 minutes late. Everybody else was there and ready. You could see the deceased’s family waiting, looking at the clock, thinking: why can’t the coroner start, what can be more important than the inquiry into the death of my child. The coroner must think he has better things to do (maybe fixing a social engagement), or he hasn’t bothered to prepare the case earlier so is looking at the papers at the last minute, or he just doesn’t care. It did not look good; it was not a good start. It’s a small example, but it’s symbolic.

Try and be a role model in your work and casework, in your leadership of judges or staff. If you can, inspire motivation in others. If you are a good leader, a positive leader, good workers will want to join your team. This is not about being popular, but being unpopular is not good either. Trust and respect are better.
Also, be prepared to be wrong. Somebody once said: *A good leader takes a little more than his share of the blame, a little less of his share of the credit.*

### 6. Manage your pessimistic thinking

- Do not broadcast your pessimistic thinking
- Focus on the positive
- If you are not positive, you cannot expect others to be
- Don’t find fault, find a remedy

We all have something to moan about. Probably top of the list is the usual complaint about lack of resources: the shortage of judges, too few staff, the quality of staff, poor accommodation, poor IT. And so on.

But do not broadcast your pessimistic thinking (however justified your frustration may be), for example in correspondence, in repeatedly gloomy emails. It does no one any good. It won’t even make you feel better. Of course it can be hard to be constructive about problems, particularly if you don’t always have a responsive ear to talk to. But do not whinge endlessly, particularly to staff who may have considerably fewer resources than you, and will certainly be paid less than you.

So manage your pessimistic thinking. Make your point but know when to move on. As the old car man, Henry Ford, once said: *Don’t find fault, find a remedy.* Focus your time and energy where you have control.

If you are driving along a country road and there is suddenly an animal in front of you - a horse, a deer, a cow - the animal is already there. You can’t control it. But you do have the steering wheel and the brake. Focus on the positive, on what you can do. If you are not positive, you cannot expect others to be. Be positive, even occasionally a little passionate (there’s nothing wrong with that); it might inspire enthusiasm.

### 7. Assess your leadership from time to time

- Are you getting it right - for yourself, for your team, for your staff, for others?
- Review progress: assess and re-assess
- Make changes where necessary

Are you getting it right - for yourself, for your fellow judges, for your staff? Review your own progress. Assess and re-assess. Nothing stands still. What can you do to improve? As we get older we inevitably become more resistant to change; we don’t notice that we may be too set in our ways. Change can be uncomfortable, but necessary. That’s why we talk about our ‘comfort zone’. *The only thing that is certain is change,* somebody said. And I think it was Benjamin Franklin who said, *Nothing can be said to be certain except death and taxes.*

If you are meticulous, give yourself targets, for reasonable self-assessment. There is nothing like a progress review. For example, you have just set up and run for the first time a training course for newly appointed magistrates. Get structured feedback, from the trainers and the magistrates. I myself have had the privilege of being involved in setting up courses in one or two countries. I know from experience that there is always something you can do better.

### CONCLUSION

- Good leadership produces obvious benefits
- Training in leadership helps
- Look after yourselves; manage your stress

Those are my seven points for better judicial leadership. Whether they are seven pillars of wisdom is not for me to say. One thing is clear; good leadership produces obvious benefits, so long as it is provided with humanity, fairness and purpose. The benefits are trust and respect, from colleagues, staff and the wider public. And there will be better working, more coordinated working, more efficient working (more enjoyable working).
I hope that my seven points will help you to achieve these benefits. Like anything else we do, they need thinking about. There are no secrets to success, just preparation, hard work, persistence and learning from failure. Training helps too. In England and Wales we now have judicial leadership training for all senior judges, in how to provide leadership and manage others.

And last but not least, I believe it is necessary to remember that as leaders we need to look after ourselves, our physical and mental health. Judges and magistrates can lead stressful working lives, often over-worked and over-burdened with responsibilities. So as a leader you have a duty to yourself and to others. Be kind to yourself. Manage your stress. You could, I suppose, do that by dropping out and starting an alligator farm or becoming a Buddhist monk. But these may not be realistic options. You can, however, take more control. Do not let the dreaded emails follow you home. Keep your life in perspective, your work versus your family life.

In England and Wales judges now have two supports. There is a free anonymous phone helpline for those badly affected, whether from stress or emotion or addiction, any affliction that needs addressing because it is affecting the day job. It is a first point of call with advice and support and, if necessary, onward referral. We also have an online training resource, organised in bite-sized modules, entitled Mindful Judging, helping to manage life’s pressures and increase personal resilience.

Being a judge or a magistrate (at any level) is a senior role. It is a serious role. It is an important role. It is a humble role - not just there to make decisions, but to serve the public. The way we do that, in public or in private, whether in a team or singly, will be judged by others. So we should think about it, how we do it, and how we can do it better. We should be aware of the benefits of good leadership and how others respond positively to it. It may not always be so simple to achieve. But at least we should try.

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Global Judicial Integrity Network
April 2018 – Launch of the Global Judicial Integrity Network
- +350 Participants, +100 Countries

Structure
- TOR and Declaration on Judicial Integrity
- Advisory board of 10 senior judges and representatives of judicial associations

Objectives
- Promote networking and dialogue
- Facilitate access to resources
- Address pertinent challenges
- Develop new knowledge products

Outreach – website unodc.org/ji
- 13,000 global users, 6,500 new users in 2019, and 68,825 pageviews.
- News and event information
- Podcasts → one per month

unodc.org/ji
- Online library of resources → 1700 documents from 173 countries and 300 institutions, 39 languages
- The online library of resources → you can search resource database or start browsing by countries, document types and/or thematic topics
- Views pieces → one per month
- Views → This section contains opinion pieces written by Global Judicial Integrity Network participants, who are members of judiciaries worldwide. The pieces focus on the personal opinions and experiences of these external experts on issues related to judicial integrity.

Restricted area - unodc.org/ji
- Restricted area for Network participants → + 780 registered users

Judicial Ethics Training Package
- E-learning course
- Self-directed course
- Trainers’ manual

All three components of the Judicial Ethics Training Tools package are now translated into Arabic, English, French, Portuguese, Russian and Spanish. Shortly the Tools will be available in all these languages on the website.
Training
• + 40 jurisdictions and beneficiary countries – implementation at national and regional levels of the training tools
• +110 trainers and +1,200 trained judges
• 3 Global Train-the-Trainers workshops + 2 Regional Train-the-Trainers workshops

How to become a registered user?

Why register?
Participants will have access to the features of the restricted section of the Global Judicial Integrity Network website. It includes: additional resources, online consultation, the query system, and access to the contact database for Global Judicial Integrity Network participants.

How to register?
1. Users must first go to the Judicial Integrity website: unodc.org/ji
2. Under the Network tab, they should select “register”
3. Users should then enter their personal information into the form
4. Unite ID technical team will create the Unite ID accounts manually. For security reasons the validation process can take 1 to 2 weeks
5. Then, they will send the users an email asking them to create a password
6. Once the password has been chosen, the username and password can be used to log into the Global Judicial Integrity Network website

How to become a pilot site?

What does it mean to be a pilot site?
• The pilot sites are jurisdictions committed to the implementation of the Training Tools at national or regional level

How to become a pilot site?
• Exchange of letters between the secretariat of the Network and the Judiciary, in most cases the Chief Justice

What is expected from a pilot site?
• Nomination of a focal point
• Organization of at least one training workshop in 2019 at national or regional level
• Dissemination of the Training Tools and encouraging the completion of the course by judges, including by e.g. setting a personal example by completing the course

Knowledge products and tools developed under the Network
EGM: The Use of Social Media by Members of the Judiciary
• Non-Binding Guidelines on the Use of Social Media by Judges

EGM: Gender-Related Judicial Integrity Issues
• Issue Paper on Gender-Related Judicial Integrity Issues

EGM: The Role of Judicial Immunities in Safeguarding Judicial Integrity
• Discussion Paper on Judicial Immunities

Other priority areas: Codes of Conduct, Artificial Intelligence, Ethics Training, etc.
Non-binding Guidelines on the Use of Social Media

Preamble of the Non-binding Guidelines

The universally recognized Bangalore Principles of Judicial Conduct identify six core values that should guide each judge's work and life, namely independence, impartiality, integrity, propriety, equality, and competence and diligence. When using social media, judges should always be guided by the Bangalore Principles as well as the detailed accompanying Commentary. However, it should be noted that when these documents were first drafted, social media platforms did not exist, and so neither document makes specific reference to their use or provides advice regarding the unique challenges and opportunities that social media platforms may create.

The non-binding guidelines are intended to provide guidance to both judges and judiciaries and to delineate a broader framework on how to guide and train judges on the use of different social media platforms consistent with international and regional standards of judicial conduct and ethics and existing codes of conduct.

Issue Paper on Gender-Related Judicial Integrity Issues

- It aims to raise awareness about various existing gender-related judicial integrity issues, including sextortion, sexual harassment, biases, prejudices, sex-based discrimination or inappropriate sexual relations
- It collects good practices and experiences in providing gender sensitivity training to judges and accountability mechanisms specifically aimed at monitoring and implementing gender guidelines and policies

Discussion Paper on Judicial Immunities

Elements of a framework for judicial protection → How to balance judicial accountability and judicial independence

Other priority areas

- Exchanging good practices in judicial ethics training
- Exchanging good practices in transparency and community outreach
- Exchanging good practices in the investigation of judicial misconduct
- Creating a guide on how to draft, review, and implement judicial codes of conduct
- Drafting guidelines for the development of court and case management software
- Maintaining and expanding the online resources of the Global Judicial Integrity Network website

More information

- @DohaDeclaration on Twitter
- unodc-judicialintegrity@un.org
- unodc.org/dohadeclaration
- www.unodc.org/ji
**PANEL SESSIONS**


By Judge Paul Howard, Australia

**Introduction**

1. The countries of the Commonwealth inherited certain priceless constitutional traditions from the United Kingdom, including:
   a. representative democracy;
   b. an independent Judiciary; and
   c. the rule of law.

2. Where the rule of law prevails, economic prosperity will follow. The rule of law will only prevail if the Judiciary are truly independent – including financially independent. “Financial independence”\(^{50}\) used in this context means ensuring that systems are in place as part of a country’s budget process to make certain:
   a. that the Judiciary’s constitutional role as the third branch of government is understood and respected; and
   b. that proper resources are made available each year to the Judiciary and to the Courts to enable the administration of justice according to law in a timely manner.

3. There are 53 member States within the Commonwealth of Nations – 30 Republics and 23 Constitutional Monarchies. The constitutional principles stated here apply equally to both systems of government.

4. In 1924 Lord Chief Justice Hewart enunciated the memorable principle that “…justice should not only be done, but manifestly and undoubtedly be seen to be done”.\(^{51}\) I have borrowed and adapted this sentiment for constitutional purposes. In a constitutional sense – to maintain good government it is necessary that – “the independence of the Judiciary must not only exist – but it must be seen to exist”. “The optics” are crucial. Perhaps they are the most important part in terms of ensuring the rule of law. By "the optics" I mean – what does it look like to the average citizen in the street?

5. To gauge the financial independence of the Judiciary, it is necessary to closely examine the processes of government relating to the funding of the Courts in each country. One of the problems confronting Commonwealth countries is that the Courts are generally required to deal directly with employees of the Executive departments in relation to obtaining funding in each fiscal year. Those employees will be from the Justice Department, the Finance Department, or the Treasury. Sometimes the Courts will deal directly with the Prime Minister's Office or the Prime Minister’s Department. It is an unfortunate fact that many employees within the Executive departments see the Courts as "another" government department. Every time this misconception becomes apparent the Judges should point out to those employees of the Executive that the Judiciary is most definitely not "another" government department. The Judiciary is not similar to the Department of Education or the Department of Agriculture. Furthermore, the Judiciary is not a "part" of the Justice Department. These are all departments within the Executive branch of government. More and better training for civil servants will correct this erroneous view.

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\(^{50}\) Financial Independence is a cornerstone of Institutional Independence.

\(^{51}\) Judicial Independence must be “Seen to Exist”

\(^{52}\) R v Sussex Justices: Ex parte McCarthy [1924] 1 KB 256.
6. One way to ensure that judicial independence is "seen to exist" is to avoid a situation whereby the Courts have to "line up" or "get in a queue" with the departments of the Executive government to obtain funding each year. If the Judiciary within the countries of the Commonwealth are going to achieve true financial independence the mechanisms and the processes of government need to be reformed.

Judicial Independence and the Separation of Powers: the Ancient Greeks and the United States

7. We do well to remember that the concept of separating the powers of the State originated in ancient Greece. The concept of the separation of powers was explained by Aristotle in the "Politics" in the fourth century BC. The philosophical basis for the doctrine was revived and renewed during the seventeenth and eighteenth century by John Locke and Montesquieu. The concept may have originated in antiquity but it was the English Parliamentarians whom history has to thank for the practical implementation of the doctrine. By the end of the fourteenth century, it was definitely established in England "that there should be no taxation without consent of Parliament". By implementing this measure the Legislature began to operate as a "check" and a "balance" on the power of the Executive (the King). Furthermore, the independence of the Judiciary was assured when the Parliament at Westminster passed the Act of Settlement in 1701. The constitutional history of England was well known to the framers of the American Constitution when they sat down to write their document in Philadelphia in 1787. In relation to the question of judicial independence it is of great benefit to the countries of the Commonwealth to consider the constitutional history of the United States and it is helpful to have regard to what has occurred in that country since the late eighteenth century. In many important respects the countries of the Commonwealth have a shared legal history with the United States. It is worth noting the progress made by the Federal Courts in the United States in relation to the separation of powers and the accompanying systems of government – particularly relating to the yearly process of obtaining the budget for the Judiciary.

8. As noted, the raising of money from the local population and the appropriation of money from the Treasury has long required the consent of the Legislature. This key point holds true in the countries of the Commonwealth – as well as in the United States. During a period of study in the United States in 2018 I came to the conclusion that the role of the Legislature is the key to ensuring financial independence for the Judiciary. If there are processes in place that allow the Judiciary to approach the Legislature directly in relation to the funding of Courts each year this will mean that the Judiciary are no longer is required to "line up" or "get in a queue" with the Executive departments of government at budget time. Such an approach puts a clear and noticeable distance between the Executive and the Judiciary. This is important for many reasons including the fact that the Judiciary in each country is often called upon to decide cases in which the Executive is a litigant. It also properly acknowledges the constitutional role and the importance of the Judiciary as a separate and distinct third branch of government.

9. The study of constitutional law requires attention to history and to political realities. Certain political realities emerged in the United States early in the twentieth century which fundamentally changed the manner in which the Federal Courts in that country interacted with the other branches of government in relation to securing a proper appropriation from the Treasury in each fiscal year.

10. Notwithstanding the constitutional separation of powers achieved by the “Founding Fathers” in the United States – it is the case that for 130 years following the ratification of the Constitution the Judicial branch of government was required to “line up” to obtain its financing directly from the Executive branch of government.

54 Montesquieu (“The Spirit of Laws” Baron De Montesquieu originally published in 1748 (translated by Thomas Nugent of Gray’s Inn and published in 1823, Cambridge (1823))
56 By 1787 there had been a Parliament at Westminster for more than 500 years. Parliament’s “supremacy” over the Executive, in essence, dates from the Glorious Revolution of 1688. The independence of the Judiciary (including guarantees of tenure and salary) dates from the Act of Settlement (1701).
57 Shaw v Minister for Immigration and Multicultural Affairs 2003 218 CLR 28 (12). In this decision the High Court of Australia referred to Quick and Garran’s Commentary on the Australian Constitution: The judgment of Viscount Sankey LC in British Coal Corporation v The King [1935] AC 500 at 520; and especially to an observation by Sir Robert Menzies that “Constitutional Law combines elements of history, statutory interpretation and Political Philosophy.”
government. The Federal Courts in the United States were administered from within the Department of Justice. True reform never comes easily. There is always opposition and reluctance. People with vision are needed. Such a person emerged in the United States in the form of William Howard Taft. Taft was the Chief Justice of the United States from 1921 until 1930. Taft had served as the President of the United States from 1909 to 1913. He was well versed in the art of politics.

11. Taft’s real contribution to his country came in the form of his reform of the Federal Judiciary. A political reality had emerged in the United States in the form of Prohibition. The eighteenth Amendment to the United States Constitution came into effect in January 1919. This amendment to the Constitution (and federal legislation enacted to enforce it) prevented the production and sale of intoxicating liquors. Prohibition remained in place until the twentieth amendment passed in December 1933. The introduction of Prohibition led to a substantial increase in the number of Federal Court filings. The Federal Courts found themselves overwhelmed by this increase in their workload. When Taft became Chief Justice in 1921, it was apparent to him that the third branch of government needed more resources and needed an effective spokesman. He well knew that money can only be appropriated from the Treasury by an Act of Congress. Taft came to the conclusion that there needed to be a member of the Judiciary who was willing and able to make direct representations to the Legislature. He knew that he could fulfil that role while he was the Chief Justice. But his reputation as a reformer was built on much more. He proposed the creation of a permanent line of communication between the Judiciary and the Legislature. This conduit would enable the federal Judges to keep Congress up to date in relation to judicial workloads, case filing numbers in the various districts, backlogs, the need for retired Judges to be replaced, the need for additional Judges, and other information pertaining to necessary resources. The Attorney-General, Harry Daugherty, supported Taft’s plan. Congress accepted the proposal and the Judicial Conference of the United States was established by an Act of Congress in 1922. The Chief Justice of the Supreme Court presides over the Conference and nowadays all of the federal Judges are members.

12. The passage of this legislation through Congress might appear a mundane governmental reform but in fact it corrected an imbalance of power. It provided the Judiciary with an effective voice – one which would be heard by the Congress and not just by the Executive. In securing the legislation to establish the Judicial Conference Taft had built a pathway for his federal judicial successors to travel directly to the Legislature. Securing Congressional funding for the construction of the Supreme Court building in Washington, DC was another of Taft’s achievements. But Taft’s true legacy to his country – was the achievement of an adjustment of power within the federal government thereby securing equality between the three branches.

13. Taft died in 1930 one month after resigning as Chief Justice. At that time the administration of the federal Courts was still the responsibility of the Executive branch. The federal Judiciary argued – via the Judicial Conference – that the administration of the judicial branch should not be under the control of the Department of Justice. Judicial independence from the Executive was at the heart of the matter. The Judicial Conference won the argument. In 1939 the Senate Judiciary Committee conducted hearings on a Bill proposing the establishment of the Administrative Office of the United States Courts – in essence, a body to administer the Courts from within the judicial branch. The Bill passed through Congress that same year.

The Commonwealth

14. Many countries in the Commonwealth will not have the resources to establish a Judicial Conference or a Judicial administration similar to the Administrative Office of United States Courts. However, if judicial independence is going to be “seen to exist” it is preferable if the Judiciary in each country approaches the Legislature each year to obtain the necessary appropriation for the running of the Courts. The best approach is for a senior member of the national Judiciary in each country to appear before a Parliamentary Committee.

58 28 U.S. Code § 218 (Act of Congress 14 September 1922). At that time it was known as the “Conference of Senior Circuit Judges”. In 1948, by a further Act of Congress, the name of the Conference was changed to its present name, “The Judicial Conference of the United States” - 28 U.S. Code § 331 (Act of Congress 25 June 1948). The membership of the Conference was also enlarged and from 1948 included Federal District Judges as well as the Federal Circuit Judges.
established for the purpose of determining an appropriate amount of funding for the Judicial branch of government. The Committee should then advise the Parliament of the amount of the budget appropriation necessary to fund the Judicial branch for the upcoming year.

15. Sometimes in history a person of the calibre of William Howard Taft emerges. It does not happen often. Once in a generation a country might have the benefit of a visionary Attorney General or, perhaps, a Chief Justice with a zeal for reform. When this does occur great steps forward can be made in strengthening constitutional arrangements and enhancing the administration of justice. The strength of Taft’s reforms in the United States lie in the fact that not many Legislators or Judges actually have the ability or the political acumen to achieve proper reform. **By having a pathway for the Judiciary to make direct representations to the Legislature there is at least a fighting chance that the Courts in the countries of the Commonwealth will be able to achieve adequate funding year in and year out.** If the Judiciary can justify to the Legislature the reason and the need for particular resources it is much more likely that those two branches of government will be able to persuade the Executive branch of government to agree to the necessary legislative appropriation to make the resources available. This has been the experience of the Federal Courts in the United States. Having the Judiciary approach the Legislature directly properly acknowledges the Judiciary's constitutional role. It also enhances and acknowledges the role of the Legislature in the appropriation of public money from the Treasury.

Judge Paul Howard
Federal Circuit Court of Australia.
“IMPROVING GOVERNMENT DECISION-MAKING AND JUDICIAL REVIEW”

By Justice Daniel Musinga, Kenya

A paper presented by Justice Daniel Musinga and read by Justice Patrick Kiage

INTRODUCTION
On 27th August, 2010, Kenya adopted a new Constitution, The Constitution of Kenya, 2010, (hereinafter “the Constitution”) which radically transformed the country’s pre-existing socio-economic, political and legal framework. The preamble to the Constitution recognizes the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. Kenya is a multi-party democratic State founded on defined national values and principles which include patriotism, national unity, sharing and devolution of power, participation of the people, human dignity, equity, inclusiveness, equality, human rights, non-discrimination, protection of the marginalized, good governance, integrity, transparency, accountability and sustainable development. (See Article 10 of the Constitution.)

These national values and principles bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes any public policy decisions. In spite of the express stipulation about the binding nature of these national values and principles, there have been many instances where the government, State organs, State officers and public officers have failed to adhere to the constitutional dictates. In a recent paper entitled: “THE QUEST FOR CONSTITUTIONALISM IN AFRICA” delivered by Chief Justice David Maraga of Kenya at the Oxford Union Conference, Oxford University, United Kingdom, the Chief Justice stated:

“[11] Though the Legislative Arm plays a critical role in the implementation of the Constitution by enacting the required implementing legislation and the ultimate decisions in the process require their political will, and the Judiciary, on its part, serves as the bedrock for the protection, interpretation and application of the Constitution, the primary responsibility of implementing the Constitution rests with the Executive Arm of government. It is mainly the Executive that has to originate amendments and alignments of various pieces of legislation or lend crucial support to the enactment of implementing legislation; and it is mainly the one that has to formulate and execute appropriate implementing policies.

[12] Left on their own, however, the Legislative and Executive Arms of Government, often comprised mainly of politicians and the political elites, will implement the Constitution in an arbitrary manner cherry-picking the easier and non-contentious provisions but always safeguarding their personal or sectarian interests. And that is exactly what they have done in Kenya.”

In such instances, Kenyans have not shied away from moving to court to seek its intervention by way of judicial review. This paper shall highlight how the Judiciary in Kenya, by way of judicial review, has improved government decision making. I shall first give a general overview of judicial review in Kenya and how it has changed within the last ten years or so, and thereafter I shall cite a few cases to demonstrate that indeed judicial review has improved government decision making in Kenya.

JUDICIAL REVIEW PRIOR TO THE 2010 CONSTITUTION
Prior to the 2010 Constitution, judicial review in Kenya was exercised pursuant to the inherent and unlimited original jurisdiction granted to the High Court by the existing Constitution, sections 8 and 9 of the Law Reform Act which granted the High Court power to issue orders of mandamus, prohibition and certiorari, and section 3 of the Judicature Act that enabled Kenyan courts to apply the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th
August, 1897, and the procedure and practice observed in courts of justice in England at that date. **Order 53** of the Civil Procedure Rules provided for the mode of institution and prosecution of judicial review applications.

In such applications, the court religiously followed the dictum of Lord Brightman in *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155, that **“Judicial review is not an appeal from a decision, but a review of the manner in which the decision was made.”**

The court was therefore not concerned with the merits of the impugned decision but with the decision-making process. Judicial review was only applicable to check the exercise of powers by public authorities in a public law matter, not the enforcement of private law rights. In *Commissioner of Lands v Kunste Hotel Limited* [1997] eKLR, the Court of Appeal held:

> “But it must be remembered that judicial review is not concerned with the private rights or merits of the decision being challenged, but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected.”

According to **Judicial Review Handbook, 6th Edition** by Michael Fordham at page 5, judicial review is a central control mechanism of administrative law (public law), by which the judiciary discharges the constitutional responsibility of protecting against abuses of power by public authorities. It constitutes a safeguard which is essential to the rule of law: promoting the public interest; policing parameters and duties imposed by Parliament; guiding public authorities and ensuring that they act lawfully; ensuring that they are accountable to law and not above it; and protecting the rights and interests of those affected by the exercise of public authority power.

In the pre-2010 constitutional era, the basis of judicial review rested on the principle that every action of a public body must be justified by law and the ability to challenge the acts or omissions of public authorities was seen as a necessary check on the use of the power of the State, and a positive encouragement to maintain high standard in the public administration by public bodies. Since the executive government exercises public powers which are created or recognized by law and have legal limits, the task of patrolling these powers rests on the courts. However, the primary function of judicial review was to ensure that public bodies did not exceed their statutory roles. Consequently, the doctrine of ultra vires was the bedrock of judicial review during that era.

**JUDICIAL REVIEW POST THE 2010 CONSTITUTION**

Judicial review in Kenya is no longer confined to the conventional common law principles such as violation of the rules of natural justice, breach of legitimate expectation, irrationality, illegality and impropriety. It is now anchored on the Constitution. In *Communications Commission of Kenya v Royal Media Services Limited* [2014] eKLR, the Supreme Court of Kenya stated that **“the Constitution of 2010 had elevated the process of judicial review to a pedestal that transcends the technicalities of common law.”**

Further, the Constitution has transformed judicial review from parliamentary sovereignty to constitutional supremacy. (See *Speaker of the Senate v Attorney General* [2013] eKLR.) As a result, every judicial review decision and indeed every court decision ought to reflect the supremacy of the Constitution. In *Nairobi City County Government v Chief of Defence Forces* [2016] eKLR, the court invoked the concept of the people’s sovereignty under Article 1 of the Constitution to grant the public right of access over a disputed public road where the applicant claimed that citizens had been unlawfully blocked by the Kenya Army from accessing essential services, including educational and health facilities. It has been argued that under the old constitutional regime such a decision could not be made; the Army, being an important defence entity of the State, would have successfully raised the issue of national security to override the people’s right to access the aforesaid essential services.
Chapter 4 of the Constitution establishes the Bill of Rights as an integral part of Kenya’s democratic State. It further stipulates that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice. Article 22 grants every person the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. The Constitution provides that in such proceedings a court may grant an order of judicial review, among other reliefs.

Further, Article 165 (6) of the Constitution grants the High Court supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function. It does so by way of judicial review.

Article 47 (1) which falls under Chapter 4 of the Constitution (Bill of Rights) provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. That the Constitution transformed judicial review from a mere common law remedy to a constitutional one was recognized by the Kenya Court of Appeal in Judicial Service Commission vs. Mbalu Mutava [2015] eKLR at para 23, where Githinji, JA. held that:

“Article 47 (1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in Article 10, such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47 (1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

Pursuant to Article 47 of the Constitution, Parliament enacted the Fair Administrative Action Act, 2015. The Article provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The Article required Parliament to enact legislation to give effect to the said rights, and the legislation was also to provide for the review of administrative action by a court or an independent and impartial tribunal. Under section 9 of the Act, a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court. This provision of the law, by granting jurisdiction to subordinate courts in judicial review matters, which hitherto was exclusively exercised by the High Court, has considerably enhanced public access to justice in this important branch of the law. Unlike the High Court that has less than one hundred judges stationed mainly in the large urban centres, Kenya’s subordinate courts are manned by hundreds of magistrates, and are spread throughout the country. The people are therefore enabled to easily apply for judicial review orders from every corner of the country.

Under Article 259 of the Constitution, there is a constitutional obligation placed on courts of law to develop the law so as to give effect to its objects, principles, values and purposes. Being incremental in its language, the current constitutional dispensation requires that both the grounds and remedies in judicial review applications be developed and the grounds for granting relief under the Constitution and the common law be fused, intertwined and developed so as to meet the changing needs of the Kenyan society in order to achieve fairness and secure human dignity. It is in this context that section 12 of the Fair Administrative Action Act, 2015 provides that:

“This Act is in addition to and not in derogation from the general principles of common law and the rules of natural justice.”

Therefore, as appreciated in R vs. Ministry of Defence, ex parte Smith [1996] QB 517, “the court has the constitutional role and duty of ensuring that the rights of citizens are not abused by the unlawful exercise of executive power.”
It is within those prescriptions that judicial review is seen in our context.

Apart from the traditional grounds for the grant of judicial review, the Fair Administrative Action Act has expanded the grounds for judicial review in section 7(2) by setting out the same as want of authority; excess of jurisdiction or power; unauthorized delegation of power; bias or reasonable suspicion of bias; denial of opportunity of being heard; failure to comply with condition precedent; procedural unfairness, material error of law in the action or decision; ulterior purpose or motive calculated to prejudice the legal rights of the applicant; failure to take into account relevant considerations; acting on unauthorized directions; acting in bad faith; a decision not connected to the purpose for which it was taken, the purpose of the empowering provision, the information before the administrator; or the reasons given for it by the administrator; abuse of discretion; unreasonable delay or failure to act in discharge of a duty imposed under any written law; unreasonable action or decision; an action or decision that is not proportionate to the interests or rights affected; the action or decision action or decision that violates the legitimate expectations of the person to whom it relates; where the action or decision is unfair; and where the action or decision is taken or made in abuse of power. Every government decision is therefore amenable to review by the Judiciary on any of the aforesaid grounds.

It must, however, be pointed out that these are not entirely new grounds or concepts. The House of Lords in Council of Civil Service Unions vs. Minister of State for Civil Service [1984] 3 All ER 935 rationalized the grounds of judicial review and held that the basis of judicial review could be highlighted under three principal heads, namely, illegality, procedural impropriety and irrationality. Illegality as a ground of judicial review, it was held, means that the decision maker must understand correctly the law that regulates his decision-making powers and must give effect to it. Grounds such as acting ultra vires, errors of law and/or fact, onerous conditions, improper purpose, relevant and irrelevant factors, acting in bad faith, fettering discretion, unauthorized delegation, and failure to act, fall under the heading “illegality”. Procedural impropriety may be due to the failure to comply with the mandatory procedures such as rules of natural justice, impartiality, the duty to act fairly, breach of legitimate expectations, failure to give reasons, and so on.

Since judicial review is now a constitutional remedy under Article 23 of the Constitution, a proceeding under Article 22 thereof for enforcement of the Bill of Rights, under which judicial review relief may be granted, may take the form of an inquiry which entails intense and in-depth investigation by the Court of the matters complained of. In the said proceedings, evidence is adduced and admitted through elaborate affidavits. Accordingly, the court is not prohibited from carrying out a merit review of the impugned decision which violated, infringed or threatens to violate a right or fundamental freedom of a person. Further, the court is under a constitutional obligation under Article 20 of the Constitution to develop the law to the extent that it does not give effect to a right and to adopt the interpretation that most favors the enforcement of a right.

That a merit review may be undertaken in judicial review was appreciated by the Court of Appeal in Suchan Investment Limited vs. Ministry of National Heritage & Culture & and 3 others [2016] KLR, at paras 55-58 where the Court stated, inter alia, that:

“Traditionally, judicial review is not concerned with the merits of the case. However, Section 7 (2) (l) of the Fair Administrative Action Act provides proportionality as a ground for statutory judicial review. Proportionality was first adopted in England as an independent ground of judicial review in R v Home Secretary; Ex parte Daly [2001] 2 AC 532. The test of proportionality leads to a “greater intensity of review” than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision; first, proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review in as
much as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, the intensity of the review is guaranteed by the twin requirements in Article 24 (1) (b) and (e) of the Constitution to wit, that the limitation of the right is necessary in an open and democratic society, in the sense of meeting a pressing social need and whether interference vide administrative action is proportionate to the legitimate aim being pursued. In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications.”

The Court of Appeal went on to state that the merit review does not however empower the review court to substitute the decision of the administrator with that of its own. The court held:

“Under the Fair Administrative Action Act, there is no power for the reviewing court to substitute the decision of the administrator with its own decision. This imposes a limit to merit review under the Act. Section 11 (e) and (h) of the Fair Administrative Action Act permits the court in a judicial review petition to set aside the administrative action or decision and or to declare the rights of parties and remit the matter for reconsideration by the administrator. The power to remit means that decision making on merits is the preserve of the administrator and not the courts”.

Despite the expanded scope of judicial review under the 2010 Constitution and the Fair Administrative Action Act, it is still a remedy of last resort. Courts in Kenya are slow to grant judicial review orders where available alternative remedies have not been exhausted. Section 9 (2) and (3) of the Fair Administrative Action Act make it mandatory for internal mechanisms of appeal to be exhausted before an administrative action is reviewed by courts.

The doctrine of exhaustion of alternative remedies has been adverted to in several decisions. In Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry [2015] eKLR, the Court of Appeal held as follows:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews…..The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts.”

EXAMPLES OF CASES TO DEMONSTRATE THAT JUDICIAL REVIEW HAS IMPROVED GOVERNMENT DECISION MAKING IN KENYA

The brief facts of this case were that the Attorney General (the respondent), directed that the engagement of external lawyers by State corporations, constitutional commissions and independent offices required his written approval and concurrence as relates to their terms of reference and fees payable, to which he must first issue a certificate of appointment. Further, no such legal fees shall be processed without the respondent’s approval and authorization. The respondent issued some Guidelines in a circular dated 1st March, 2018 titled: “Guidelines on Provision of Legal Services by the office of the Attorney General & Department of Justice.”

The ex-parte applicant, who was in the panel of external lawyers for various State corporations, argued that the respondent’s directive unlawfully interfered with his legal practice and that officers who engaged legal officers without the Attorney General’s approval were also threatened with personal liability. The ex-parte applicant further argued that the respondent’s directives were not based on any constitutional or statutory provisions, and the said Guidelines were ultra vires as they attempted to undertake a parallel evaluation process, which powers the respondent does not have; and that the Guidelines attempt to interfere and control Constitutional Commissions and Independent Offices contrary to Article 249 of the Constitution; are illegal.
as they were not made as required under the Statutory Instruments Act; and are arbitrary, in violation of the requirements of public participation and of the ex-parte applicant’s legitimate expectations.

The ex-parte applicant prayed for an order of certiorari to remove into the High Court for purpose of being quashed the aforesaid Guidelines.

The court held that:

“40. … to the extent that paragraphs 18 to 24 of Guideline D purport to change and amend the provisions of sections 134, 135 and 138 of the Public Procurement and Asset Disposal Act as regards the procedures of contracting in the procurement of goods, works and services by government entities, without any express power having been granted to the Respondent to do so, the same are ultra vires.

41. Guidelines H and L of the said Circular and the second set of Guidelines in the Circular dated 1st March 2018 are impugned, on account of infringing on the independence of Constitutional Commissions and Independent Offices, and the functions of other offices. The arguments made by the ex-parte Applicant and Interested Party in this respect, are to the effect that by providing directions on matters that are within the exclusive or primary jurisdiction of other authorities, the Respondent thereby exceeded his powers.

70. It is thus the finding of this Court that in this context, the Guidelines H and L of the Circular dated 1st March 2018 are ultra vires to the extent that they sought to direct other bodies which are granted constitutional and statutory powers and independence in the manner they should act, went beyond the functions granted to the Respondent under the Constitution and in relation to provision of legal services, and were made in excess of powers granted to the Respondent in this regard. In addition, the said circulars are also contrary to provisions in the Constitution, the State Corporations Act, the Public Procurement and Asset Disposal Act, and the Advocates Act that regulate the procurement of, and payment for legal services”

The judicial review orders sought were granted.

2. Republic v Secretary of the Firearms Licensing Board &2 Others Ex -parte Senator Johnson Muthama [2018] Eklr

The ex-parte applicant was a holder of a Firearms Certificate No.002754 which was revoked by the secretary of the Firearms Licensing Board vide a letter dated 30th January 2018. He alleged that his Firearms certificate was withdrawn and revoked by the first respondent on grounds that are baseless, without merit and biased, and in contravention of the provisions of the Fair Administrative Action Act, and that his fundamental rights as enshrined in the Constitution had been breached. He sought the following orders:

(a) An order of prohibition directed against the respondent and/or officers/personnel working under them from revoking the ex-parte applicant’s Firearm Certificate No.002754.

(b) An order of Certiorari to bring into this court for the purposes of quashing the first respondent’s letter of revocation of Firearm’s certificate No.002754 dated 30th January 2018.

In opposing the application, the respondent urged the court not to exercise its discretion in favour of the applicant for the reason that he had professed to be a member of a political group that had been proscribed as an organized criminal group at the time of institution of the application.

One of the issues for determination was whether the respondents had acted ultra-vires their powers under the Firearms Act in revoking the applicant’s Firearm certificate. In its judgment, the trial court held, inter alia, that there was no justification for withdrawing the applicant’s firearm; and that the act affected the applicant’s right to security of his person. The court went on to state:
41. It is evident from the provisions of section 5(7) that while the Respondent has power to revoke a Firearms Certificate, there is a statutory pre-condition to the exercise of that power, which is that the Respondent can only revoke after being satisfied that the holder is prohibited under the Act, or has failed to comply with a notice requiring the delivery of the firearm certificate.

42. In this respect where there is existence of a statutory pre-condition as to the exercise of a power, this Court as a judicial review Court will interfere with that exercise, if the challenge is as to whether or not the precondition was satisfied, and/or that there was a wrong finding made by the public body in this regard. Such a factual precondition is what is also known as a precedent fact, and the Court in judicial review proceedings will interrogate a conclusion made as to the existence or otherwise of such a precedent fact.

44. In the present application, the 1st Respondent indicated in the impugned letter that the Applicant had been found “unfit to be entrusted with a firearm anymore”. However, no basis or applicable provisions of the Act under which the Applicant had been found to have committed an offence or irregularity were provided by the 1st Respondent to support this conclusion.

45. In addition, the impugned letter also served as a notice to the Applicant, who was required to surrender his firearm immediately, and no evidence was given of any prior notice having been issued to him contrary to the express provisions of section 5 (7). There was thus an obviously wrong exercise of powers in section 5 (7) of the Firearms Act by the 1st Respondent, and the decision in the impugned letter of 30th January 2018 was both procedurally and substantively ultra vires the Firearms Act and illegal.”


In this case, the President of the Republic of Kenya ordered a crackdown on the production and sale of illicit liquor within the country. It was contended by the petitioners that following the said presidential directive, the Cabinet Secretary (CS) drafted and enacted the Alcoholics Drinks Control (Supplementary) Licensing Regulations, 2015 (Regulations) that raised serious and fundamental issues of administrative law. Further, the procedure adopted by the CS in enacting the Regulations and directing that they should take effect immediately was procedurally ultra vires as it was contrary to express provisions the Statutory Instruments Act with regard to public participation and consultation with persons likely to be affected by the legislation and Article 10 of the Constitution. The said directive was further faulted on the ground that by it the CS donated unto himself powers that he did not possess at their stage of enactment. In addition, the CS was accused of abusing his powers in directing that the Regulations take effect immediately and requiring a special license without taking into account the licenses that were still in force. The said Regulations further provided a blanket ban of certain ready to drink alcoholic drinks and beverages also referred to as second or third generation alcoholic drinks without defining what constituted second or third generation drinks and/or the criteria of identifying the same.

The main issues that fell for determination were:

1. The nature and effect of presidential directives;
2. Whether the Presidential directive on the crackdown of the production of illicit brews countrywide was illegal and unconstitutional;
3. Whether the CS acted ultra vires his statutory duties;
4. Whether there was breach of fundamental rights and freedoms of the petitioners;
5. Whether the Respondents violated Article 47 of the Constitution on obligations relating to fair administrative action.

It was held:

1. Article 135 of the Constitution requires a decision of the President in the performance of any functions of the President shall be in writing and shall bear the seal and signature of the President.
2. The President as any other human being has his own human rights, as such he has freedom of expression and can express himself in respect of any matter, but the freedom has to be distinguished
from the exercise of power under Article 135 of the Constitution as read with Article 132 (3) (b) of the Constitution.

3. The CS acted *ultra vires* his statutory power.

4. The decision to cancel all valid licences without considering whether or not the licensees had in their individual capacities broken the law amounted to arbitrariness.

5. There was breach of the petitioners’ fundamental rights and the Respondents had violated Article 47 of the Constitution relating to fair administrative action. Consequently, the orders sought were granted.

4. **Republic v Kenya Forest Services Ex-Parte Clement Kariuki & 2 others** [2013] eKLR.

The ex-parte applicants in this case sought court orders to prohibit and quash the decision of the Respondent (Kenya Forest service) which had advertised in the Kenya **“Daily Nation”** newspaper and called for individuals and interested institutions to apply for concessions in State forest plantations, for parcels of land between 1,000 – 12,000 hectares each. The applicants complained that if the Respondent was allowed to alienate forest land to any individual or private enterprises, it would result in hundreds and thousands of hectares of forest land being allocated to individuals and companies for a period of 30 years and more. This would be ultra vires the spirit of the Constitution of Kenya, 2010, the Forest Act, 2005 and the rules of natural justice. The respondent had also not conducted public consultation prior to the issuance of the notice, nor had it provided any information as to how the decision was arrived at. The Respondent had claimed that it was not bound by law to allow for public participation before putting the advertisement to invite concessions in State forest plantations, since the act of advertisement was intended to evaluate the expression of interest and thereafter call for bids from successful applicants.

The issue for determination by the court was whether the Kenya Forest services was in excess of its mandate by denying the Kenyan public a chance to participate in its decision of whether or not to invite bidding concessions for public forest lands and before advertising the forest lands in the daily newspapers.

The court held that the people of Kenya had to be given an opportunity to make representations on the issue. The respondent had also acted in excess of its mandate.

**CONCLUSION**

In the new constitutional dispensation, the Judiciary in Kenya is playing a critical role in improving government and public decision making. The government, Public and State officers are now more careful in their planning, policy making and execution of their duties; conscious of the fact that their decisions are subject to scrutiny by the courts. This review of government decisions has often caused unnecessary tension between the Judiciary and the other two arms of government, to the extent of the Judiciary’s budget being slashed by Parliament from time to time. That notwithstanding, the Kenyan Judiciary is steadfast in the discharge of its constitutional mandate to the best of its ability.
“IMPROVING GOVERNMENT DECISION-MAKING AND JUDICIAL REVIEW”

By Sir Nicholas Blake, England and Wales

Introduction

1. Siena Town Hall in Tuscany, Italy has since 1340 been famous for its superb set of frescoes by Ambrogio Lorenzetti entitled ‘Allegory of Good and Bad Government and its consequences’. It is not altogether surprising that Professor Martin Loughlin chose the image of good government as the jacket illustration for his scholarly musings in his 2003 work The Idea of Public Law. Good Government has Wisdom at its head; Bad Government is led by Tyranny. Wisdom presides over the counsellors of the state and those involved in litigation, linking them with a thread that leads to concord and peaceful resolution of disputes. Their actions are inspired by figures representing Faith, Hope and Charity, the theological virtues but not ones confined to the Christian religion, and the four cardinal virtues, Prudence, Temperance, Justice and Strength, the last designed to be subject to the laws and the application of justice. Bad Government of course only has the malevolent influence of Avarice, Pride and Vainglory to guide it. The images contrast prosperity in town and country under Good Government, and misery and famine under Bad. Six hundred years before modern conceptions of public law, we have here all the rudiments of a philosophy of right, governance by the law, and the law-makers in turn guided by wisdom, justice, prudence and charity.

2. It is improbable that the good burghers of Wednesbury Corporation were thinking of Lorenzetti’s frescoes when they decided to exercise their powers under the Sunday Entertainments Act 1932 and impose a condition preventing any child under 15 going to the cinema on a Sunday whether accompanied by a parent or not. Although not considered to be a novel or remarkable one at the time, the resulting decision of the Court of Appeal in Associated Provincial Picture House v Wednesbury Corporation [1948] 1 KB 223 has been quoted extensively since the growth of judicial review in the United Kingdom for being the essence of the appropriate constitutional function of the court in reviewing the exercise of an apparently broad discretion.

3. Wednesbury itself is a disputed decision. The test of ‘so unreasonable that no reasonable authority properly directing itself could have reached it’, involves an element of tautology devoid of a working test to examine whether the power has been exercised lawfully. What is outwith the bounds of reasonableness can itself become a subjective decision. Notoriously, paying equal pay to men and women was once considered so unreasonable as to be outside the powers of the local authority (Roberts v Hopgood [1925] 2 AC 578). Professor John Griffiths complained about judicial interference with local democracy in his book The Politics of the Judiciary. Sir Stephen Sedley in his essay ‘The Sound of Silence: Constitutional Law Without a Constitution’ (Ashes and Sparks CUP, 2011) is critical of the court’s turning a blind eye to a decision of a Sabbatarian group of councillors to misuse a power under a law intended to permit Sunday cinema to give vent to their own religious views and essentially penalise families for going to the cinema together.

4. In issues concerned with interferences with recognised human and civil rights and EU law principles, the British judiciary use the more nuanced technique of considering whether the interference is justified and proportionate. This means asking a series of questions essentially devised by the European Courts: whether the power has a legitimate aim; whether its exercise is sufficiently circumscribed by law or policy so as to be predictable and in accordance with the law; whether the interference is rationally connected to the purpose and whether it is proportionate in representing a fair balance. In Commonwealth countries, alongside these questions, the issue of whether the same results can be achieved by a less intrusive means is usually considered (see the Privy Council decision in De Freitas v Minister of Housing [1999] 1 AC 69 adopted by Lord Steyn R Daly v Secretary of State for the Home Department [2001] UKHL 26 at [27]. However, in Keyu v Foreign Secretary [2015] 3 WLR 1665, the Supreme Court declined to substitute proportionality for rationality irrespective of context, and the
Court of Appeal have concluded that it is not open to them to give the last rites to Wednesbury and christen a new dawn for proportionality. The question of whether a manifestly proportionate decision could nevertheless be a rational one thus remains open to further debate at the highest level of judicial authority.

5. Proportionality has its critics. In a sequence of extra-judicial writings, recently repeated in his Reith Lecture, former Supreme Court justice Jonathan Sumption contends that for judges to decide on the proportionality of measures interfering with what he regards as an expanding field of private and family life rights, is to undermine the proper province of democratic government. I make no apology for supporting the different view that a proportionality assessment is a more principled and useful tool by contrast with Wednesbury irrationality; it asks relevant questions to the proper discharge of the judicial function, and communicates to colleagues in both European and Commonwealth courts what the judge is doing and why, and thus better promotes the prospect of mutual respect and understanding of these decisions. Even if and when the UK leaves the EU, it will still need to communicate with the European judiciary about justifiable interferences with respect to private life and communications, and one test would be preferable to two, albeit with the obvious point derived from proportionality principles that the more important the right the greater the need for justification of the interference. But whatever the precise test used in different jurisdictions of the Commonwealth and whether the judicial function rests on common law, local statute, a domestic constitution or an international human rights treaty, does judicial supervision of executive decision-making lead to better decisions?

6. The press and some politicians are inclined to see defeats in the courts as the product of a power struggle between the elected representatives and the courts. Notoriously, the most senior judges in England and Wales were dubbed ‘enemies of the people’ by the Daily Mail newspaper, without rebuke from the Secretary of State for Justice, for concluding that Parliament had to legislate for withdrawal from the EU following the referendum. On this view of the constitution, all essentially political questions are debates about who has the power to decide; and the executive is seen to be weaker if it cedes to or merely permits the judiciary to decide issues that were once wholly in the prerogative power of the executive. It is a view that appears to be gaining traction in some states where the executive can apparently fill the supreme or constitutional court with political nominations in order to disarm judicial opposition to legislative policy. It is view that seems to have inspired the result of the Brexit referendum and the present political crisis in the UK, where subservience to EU law is seen as undemocratic and unduly restrictive of national sovereignty. To those states run by dominant personalities where checks and balances seem to be a hindrance to executive action with strong leaders at the helm, the thought that government could be improved by submitting to decisions made by truly independent judges might seem absurd. The academic partisans of the Judicial Power Project, an oxymoronic title given the content of the Project, would suggest that the judges should be confined to strict black-letter interpretation of the text provided by the legislature. Interpretation of the law, however, also requires the judge fearlessly to decide whether the public authority has complied with it in the particular decision under challenge.

7. There are compelling arguments that judicial supervision of decision-making limits arbitrary government and improves the quality of executive decisions being made, certainly in democratic states governed by the rule of law. Thousands of public law decisions are made in the course of governance in our increasingly complex societies. The purpose of judicial review is to ensure such decisions:
   i. comply with both the primary law in force, and any relevant policies promoted by the executive for their being;
   ii. have been reached by a fair process often involving consultation with those likely to be affected or an opportunity to disabuse the decision-taker from a preliminary decision;
   iii. have taken all relevant considerations into account and excluded irrelevant ones;
   iv. are open to the decision-taker to reach for good reason having regard to its impact on others including in appropriate cases whether it is a fair balance of competing rights and interests;
   v. in complex cases at least have engaged in a reasoning process that explains how and why the decision was arrived at.
10. Cumulatively, these oversight functions ensure that the power is exercised for the permitted purpose and the executive has not exceeded the bounds of its authority. Provided these tests are met, there is no conflict between executive and judiciary. The judiciary does not seek to become the prime decision-maker in such cases but to ensure that all parts of the separate institutions of the state are working harmoniously within their proper sphere. In this paper I seek to explore the case for the contribution of judicial review to better government under two headings: rule of law and transparency

Judicial Review and the Rule of Law
11. The first meaning of the term Rule of Law, as explained by Tom Bingham in his magisterial book of the same name, is that the law applies to all persons within the state whether the executive or the ordinary citizen. In a democracy, government depends on the consent of people obtained from time to time in free and fair elections held regularly. However, success in elections is not a sufficient source of authority for government to act as it thinks fit. There is no dictatorship of the majority. The executive must act within the powers granted it by the laws adopted by previous legislators. If the government wants to change the laws it must persuade the legislature to do so. Above all this was demonstrated in the judgment in *Miller v Secretary of State for Exiting the European Union* [2017] UKSC 5. The rights granted to British citizens by EU law could not be taken away simply because of the result of a non-binding referendum. It required a change of the law by the legislature.

12. Second, the meaning of those laws and the authority to make decisions under them is reserved to the judiciary alone. This is the true province of the judicial part of the state and the basis of the common law hostility to ouster clauses that seek to restrict or exclude the jurisdiction of the High Court exercising judicial review. Last month, in the case of *R (Privacy International) v Investigatory Powers Tribunal and others* [2019] UKSC 22, a majority of the Supreme Court, overturning the Court of Appeal, affirmed that the purported exclusion of judicial review of decisions of the Investigatory Powers Tribunal, was ineffective, albeit that the IPT was presided over by a distinguished serving or former judge. The debate between Lord Carnwath, writing for the majority, and Lord Sumption for the minority, is an illuminating discussion of both legal history and principle and I have drawn on it in preparing this paper.

13. Drawing on the landmark case of *Anisminic v Foreign Compensations Board* [1969] 2 AC 147 and the cases that followed it, Lord Carnwath cites and approves those expressions of judicial opinion that state: it is a contradiction in terms for the legislature to create a body or tribunal of limited jurisdiction but leave it to that same body to decide for itself what its jurisdiction is, meaning in this sense exclusive competence to decide any issue of law coming before it (see by Farwell LJ in *R v Shoreditch Assessment Committee, Ex p Morgan* [1910] 2 KB 859, 880). He quotes Blackstone’s Commentaries on the Laws of England book III, Chapter 4, p. 41-2 (written in 1768),

   “where they concern themselves with any matter not within their jurisdiction … or if in handling matters clearly within their cognizance they transgress the bounds prescribed to them by the laws of England … else the same question might be determined different ways, according to the court in which the suit is depending: an impropriety which no wise government can or ought to endure, and which is, therefore, a ground of prohibition.”

14. Lord Nolan in *M v Office* [1992] QB 270 at 314 H sought to express the relationships between courts and the executive as follows “… the courts will respect all acts of the executive within its lawful province, and … the executive will respect all decisions of the courts as to what its lawful province is.”

15. Lord Carnwath noted that the focus of the actual decision in *Anisminic* was whether the Board had power to reach its decision and whether the error of interpretation it had made resulted in its decision being a nullity or void, a fact that could be declared by ordinary action rather than by quashing by judicial review. However, in 1982 a broader view prevailed when Lord Diplock summarised the effect
of Anisminic in O’Reilly v Mackman [1983] 2 AC 237, 279) in a speech agreed by the other members of the House:

“The breakthrough that the Anisminic case made was the recognition by the majority of this House that if a tribunal whose jurisdiction was limited by statute or subordinate legislation mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question, ie, one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported ‘determination’, not being a ‘determination’ within the meaning of the empowering legislation, was accordingly a nullity.”

In other words, a determination arrived at on an erroneous view of the relevant law was not a “determination” within the meaning of an ouster clause such as in Anisminic. Arguments about differences between jurisdictional and non-jurisdictional errors of law had become redundant.

16. From all this we are reminded that judicial supervision of the executive is needed to ensure that it remains within the law correctly understood, and not merely the executive’s view of what the law is or might usefully be considered to be. So important is this role that there is a very strong presumption against the executive and the legislature having excluded it, so that legal errors by decisions that purport to be final can always be corrected by the High Court exercising its function of ultimate arbiter as to the meaning of the law.

17. It is conceptually very difficult to imagine how this primary function of the judiciary is anything other than a benefit to good decision-making. It ensures both a harmony between the different branches of the state - legislature, executive and judiciary - and the proper relationship between the state and the citizen or subject when decisions interfere with their civil and political rights.

18. Unauthorised and therefore unlawful decisions may result in compensation being paid to those adversely affected by them; they may undermine investor confidence in the management of the economy; they make government action unpredictable and arbitrary. This is the essence of bad government. For example, in the case of executive detention the writ of habeas corpus has for centuries required the detaining authority executive branch to justify the basis for detention. Thus where there is power to detain pending removal those who entered in breach of the immigration laws, the case of R v Secretary of State for the Home Department, Ex p Khawaja [1984] AC 74 established that it is not sufficient for the executive authority to plead it reasonably believed that the person breached the conditions of entry by using deception, it must show on the civil balance of probabilities that the detained person actually did so.

Judicial review and Transparency

19. In Lumba v SSHD [2011] UKSC 12, the Supreme Court went further than Khawaja and concluded that a person was unlawfully detained and that damages were recoverable when held pursuant to an unpublished policy that conflicted with the terms of a published policy. Lord Dyson thought that publication of policy was necessary to comply with the rule of law:

“The rule of law calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria will be exercised. Just as arrest and surveillance powers need to be transparently identified through codes of practice and immigration powers need to be transparently identified through the immigration rules, so too the immigration detention powers need to be transparently identified through formulated policy statements. The individual has a basic public law right to have his or her case considered through the adopted policy that conflicted with the terms of a published policy. Lord Dyson thought that publication of policy was necessary to comply with the rule of law:

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20. Transparency is thus identified as another feature of good government that enables the citizen to predict how the executive will act and afford an opportunity to modify behaviour to avoid adverse consequences. It brings the business of government out of the unpredictable obscurity of the unaccountable exercise of prerogative discretion, into the measured light of day. This enables democratic oversight. How you can control the executive if you do not know what it is doing? A case in point is the reparations and change of heart towards the so called Windrush generation of British nationals of Caribbean origin, who came to build the public services of the nation after 1945, and were then caught up in a 2012 policy of a hostile environment to undocumented migrants.

21. A closely related aspect of transparency is the emerging duty in certain circumstances to give reasons for a decision. The executive must not only disclose how it will make decisions in particular fields of public law, but may well be obliged to inform those affected by its decisions why it has done so. The UK Supreme Court has reviewed the case law in *Dover City Council v CPRE Kent* [2017] UKSC where planning permission was granted in an environmentally sensitive area despite the recommendation of planning officers. Once again it was Lord Carnwath who reviewed the case law on reasons in the planning context and the common law. He noted:

i) In *Save Britain’s Heritage v Number 1 Poultry Ltd* [1991] 1 WLR 153, Lord Bridge said of the duty imposed by statute on the Secretary of State:

“That they should be required to state their reasons is a salutary safeguard to enable interested parties to know that the decision has been taken on relevant and rational grounds and that any applicable statutory criteria have been observed. It is the analogue in administrative law of the common law’s requirement that justice should not only be done, but also be seen to be done.” (p 170);

ii) Sullivan J explained (*R (Wall) v Brighton and Hove City Council* [2004] EWHC 2582 (Admin), para 52):

“Over the years the public was first enabled and then encouraged to participate in the decision-making process. The fact that, having participated, the public was not entitled to be told what the local planning authority’s reasons were, if planning permission was granted, was increasingly perceived as a justifiable source of grievance, which undermined confidence in the planning system …”

iii) Lord Brown in *South Buckinghamshire District Council v Porter (No 2)* [2004] 1 WLR 1953, para 36:

“The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the ‘principal important controversial issues’, disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds”

iv) In *Oakley v South Cambridgeshire District Council* [2017] 2 P & CR 4, [2017] EWCA Civ 71, Elias LJ said:

“The significance of that fact is not simply that it will often leave the reasoning obscure. In addition, the fact that the committee is disagreeing with a careful and clear recommendation from a highly experienced officer on a matter of such potential significance to very many people suggests that some explanation is required … the dictates of good administration and
the need for transparency are particularly strong here, and they reinforce the justification for imposing the common law duty.” (para 61)

v) Outside the province of planning law, Lord Mustill in R v Secretary of State for the Home Department, Ex p Doody [1994] 1 AC 531; gave another explanation of why reasons where required where liberty was at stake:

“To mount an effective attack on the decision, given no more material than the facts of the offence and the length of the penal element, the prisoner has virtually no means of ascertaining whether this is an instance where the decision-making process has gone astray. I think it important that there should be an effective means of detecting the kind of error which would entitle the court to intervene, and in practice I regard it as necessary for this purpose that the reasoning of the Home Secretary should be disclosed. If there is any difference between the penal element recommended by the judges and actually imposed by the Home Secretary, this reasoning is bound to include, either explicitly or implicitly, a reason why the Home Secretary has taken a different view …” (p 565G-H)

Conclusions

23. The quotations I have highlighted from the authorities stress the requirements of legality and transparency as reasons why the court will intervene in its supervision of executive decision-making. The same could be said of the case law on the separate topics of adequacy consultation, and the substantive and procedural aspects of the public sector equality duty. Indeed it may be that with the imagination applied by the living instrument principle of interpretation that the red-haired example given by Lord Greene in Wednesbury was a manifestation of the common law principle of equality. If so this was an early call for non-discrimination in executive decision making. It is irrational to treat like cases differently and materially different cases the same. Indeed this view of Wednesbury was adopted by McCombe J as he then was in R (Garung and others) v Ministry of Defence [2002] EWHC 2462 (Admin) when quashing the decision of the Ministry of Defence to deny a prisoner war gratuity to soldiers of the Gurkha regiments detained by the Japanese during World War Two, on the grounds that they (although not their officers) were assigned to the British Army of India at the time. The reasons for making these arrangements dating from the nineteenth century were so embarrassing and racially discriminatory that to use them as the basis for a 2002 decision was unlawful.

24. Government in the 21st century is a complex business, where decisions may have broad effect in a multifarious society of different identities and interests. The Government must reach wise decisions according to law in the national interest and the court’s role is to assist it to do so by the examination of a contested decision for compliance with judicial review and related constitutional principles.

25. The conscientious executive has nothing to fear from the judge over the shoulder of the decision-maker (adopting the terminology of the Treasury Solicitors Guide to Judicial Review for civil servants). Rather judicial review helps the decision-maker focus on the essential nature of the decision to be taken: it directs the mind to the relevant evidence that points either way; the need to gather that evidence fairly; to apply the law and to identify the relevant policy. Where the decision involves the resolution of conflicts, the requirement of reasons explains why the proposed course of action is to be taken. In doing so it enables the decision-taker to achieve what is intended by the executive in the first place: it is the executive and not the judiciary that promotes the laws under which its departments work, the policies that it adopts to give effect to them, obtains by consultations or other means the evidence it needs to reach informed good quality decisions and to maintain continued dialogue with civil society and stakeholders.

26. In the case of Pounder v HM Coroner Durham [2009] EWHC 76 (Admin) I had to consider the inter-relation of law and policy concerned with the use of force on child prisoner. I said:
“In my judgment, the principles of good government and human rights march hand in hand on the question of transparency and legal certainty. They may be summarised as "say what you mean and mean what you say".

See also R Limbu v Secretary of State for the Home Department [2008] EWHC 2261 Admin.

27. It is simply not the case that this is an arrogation of substantive decision-making by the judiciary. The professional judge must be conscientious in excluding personal preferences from the process of judgment, and hence the advantage of the kind of proportionality template used in the human rights context. Certainly the principles of judicial review of decisions of public authorities must not be eroded into subjective judicial decision-making substituting itself through the doctrine of irrationality for the views of the elected representatives or their delegates.

28. We can readily agree with those who point out that the rule of law is not rule by judges and lawyers; that would indeed be judicial tyranny and would lead to the province of bad government. Judicial self-restraint - particularly on issues of moral, social and political controversy - is both necessary and desirable in a democratic state with a functioning separation of powers between executive, legislature and judiciary.

29. Judicial oversight of executive decision-making within a structured and coherent set of principles that have been given by both the common law and human rights norms, ensures that government is not arbitrary. Arbitrariness in all its forms is the enemy of justice today as in fourteenth century Siena. Judicial review is the enemy of arbitrariness and should bring with it confidence in institutions, peace, prosperity, public order and harmonious relations between citizens and between the citizen and the state.

Biographical data
Sir Nicholas Blake graduated from Magdalene College, Cambridge where he read History, and the Inns of Court School of Law. He was called to the Bar of England and Wales in 1974 and joined Garden Court Chambers. He was appointed a Queen’s Counsel in 1994, and in that capacity has argued a great many leading cases on immigration, refugee and EU free movement law, and human rights before the most senior Courts in the United Kingdom and in international tribunals in Europe including the European Court of Justice in Luxembourg and the European Court of Human Rights in Strasbourg, as well as the Judicial Committee of the Privy Council, the Inter American Court of Human Rights in San Jose Costa Rica, and some Commonwealth courts including the Hong Kong Final Court of Appeal and the Court of Appeal of Fiji.

In 1997 he was appointed one of the first Special Advocates under the UK’s Special Immigration Appeals Act and performed that role in a number of cases from 1998 to 2006.

He was the Chairman of Immigration Lawyers Practitioners Association from 1994 to 1997. He is a member of Administrative Law Bar Association and Justice (the British affiliate of the International Commission of Jurists).

He was a founder member and first chair of Matrix Chambers in 2000.

He was appointed a Recorder in 2000; a Deputy High Court Judge in 2002 and became a Bencher of the Middle Temple in the same year. In November 2007 he was appointed to the High Court of Justice, Queen’s Bench Division He was a nominated judge of the Administrative Court.

He was appointed first President of the newly created Immigration and Asylum Chamber of the United Kingdom Upper Tribunal with effect from 15 February 2010. From October 2013 he returned full time to the Queen’s Bench Division to undertake the full range of work of a High Court judge.
He has been a participant at many international conferences and seminars on immigration, asylum and free movement law and written extensively on issues of asylum, immigration, and human rights. From January 2014 until May 2017 he represented the judiciary of England and Wales in the International Association of Judges and its regional affiliate the European Association of Judges.

He was a member of the Franco-British-Irish Judicial Colloque from 2013 to 2017.

He retired from the High Court in October 2017 and returned to Matrix Chambers as a consultant. In October 2017 he was appointed a part-time Judicial Commissioner of the Investigatory Powers Commission (IPCO). He is a Trustee of the Slynn Foundation, which works to improve justice systems and the rule of law around the world.
"A JUDICIAL CAREER FROM APPOINTMENT TO POST-RETIREMENT ASSIGNMENT"

By Justice James Dingemans, England and Wales

Introduction
This is a difficult subject to attempt to make interesting. Judges talking to judges about judicial careers is not guaranteed to be a box office success. However, what I wanted to do was to look at the stages in a judicial career and, given the limited time available, make some short points in relation to each stage.

Part time (fee paid) appointments – the first stage
The first stage that I wanted to address was part-time appointments, which are called fee paid appointments in England and Wales, and the first point that I wanted to make in relation to this early stage of a judicial career is that the appointment should be through an independent and transparent process such as a Judicial Appointment or Judicial Service Commission. As fee paid appointments are a gateway to a full-time judicial career it is essential that selection is not exempted from consideration by a Commission, otherwise there is a risk that either the executive appoints those who it prefers or judges appoint those practitioners or academics who reflect their own image. The diversity of the judiciary depends on the involvement of the Appointments Commission at this stage. It is well known that in some jurisdictions “acting” appointments are made. One of the distinct problems with “acting appointments” is that such appointments are not always made by Appointment Commissions. An example of the proper regulation of acting appointments is section 106 of the Constitution of Malawi which requires the involvement of the Judicial Services Commission in the appointment of both full-time and acting Justices of the Appeal.

The second point that I wanted to make in relation to part time appointments is that the terms on which the appointment are made must be compatible with the independence of the part-time judicial office holder. This was a point addressed by the Courts in Scotland in Starrs v Ruxton [2000] JC 208. It was held that a system which provided for part-time annual appointments by a member of the executive was not compatible with the right to a fair trial. This was because there was created the risk that a judge might seek to obtain another appointment by favouring the executive.

Appointment – the second stage
The second stage is the appointment as a full-time Judge. Again in my view such appointments should be by way of Judicial Service Commissions. Written constitutions of Commonwealth states from the 1960’s generally provide for Judicial Service Commissions. Most Commonwealth countries now provide for a Judicial Appointment Commissions. The United Kingdom with its separate legal jurisdictions of Northern Ireland, Scotland and England and Wales was a slow starter but there is now established a functioning and independent Judicial Appointments Commission.

The Commonwealth Magistrates Judges Association, the Commonwealth Lawyers’ Association and the Commonwealth Legal Education Association combined to produce a paper proposing a model clause for a Judicial Appointment Commission. I know that different countries have taken different approaches to Appointment Commissions but a well-resourced, independent and transparent Appointments Commission strengthens the rule of law by ensuring the principled involvement of society at large in the selection of judges. This avoids selection by the executive for its own purposes or selection by judges in their own image. It also avoids the risks of pressure to have elections to the judiciary with all the consequences that can bring.

The work of a judge – the third stage
The third stage that I wanted to address was the work of a judge. If the appointments commission have appointed the right person that judge will be courteous, fair, hard-working and learned in the law but even such a judge cannot know everything. I wanted to address the point about judicial training. Judicial training is still a relatively new concept but training provided by serving judges to other judges can be invaluable.
An academic or a practitioner appointed as a judge will not know how to manage long and complex criminal trials. I still remember attending as a part-time Judge (Recorder) in England and Wales on the long and complex criminal trials seminar. Our syndicate leader, a very experienced Crown Court Judge, made the point that the first thing that a judge must do in a very long case, before the jury is sworn and before any last minute applications about evidence are made, is to timetable the case. This was required to be done even if the parties had lodged draft trial timetables. This was because it was the only time that the judge could get a realistic overview from the parties to ensure that the case would fit within the time allowed. Once the case was started it was too late. This was because it was inevitable that if a case is timetabled after it has started one side or the other would consider that they were being unfairly rushed or penalised for earlier delays in the case. This sharing of this sort of experience is a principled aim of judicial training.

The second point that I wanted to address in relation to the work of the judge was the role of leadership judges. I know that this topic is being addressed in its own right in session 9 on Wednesday morning. All commonwealth legal systems recognise the role of a leadership judge, if only by the appointment of a Chief Justice. The Chief Justice may (and in larger jurisdictions will have to) delegate their leadership responsibilities to other judges. I strongly support the propositions that: (1) judges should be managed and led by judges and not, for example, by managers appointed by the executive; (2) judges who manage judges should sit in Court, rather than become full-time administrators out of touch with the court room; and (3) there should be proper support to enable those leadership judges to carry out their work and leadership roles. Such support is likely to be administrative, for example by providing to the leadership judge a spreadsheet of outstanding judgments so that the leadership judge can speak to any judges who have judgments outstanding for more than 3 months to agree a date for the delivery of any such judgment and the support or training necessary to ensure that the situation does not recur.

The third point that I wanted to make was that the executive has an obligation to provide suitable and sufficient funding to enable the full-time judge to carry out his or her work. This part appears from the Latimer House principles drafted by the CMJA. This topic was specifically addressed in the concurrent panel session 3A on Monday afternoon.

Promotion – the fourth stage
The fourth stage that I wanted to address was promotion within the judiciary. It is well-known that not every judge will not want to be appointed to sit on appeal preferring to sit at first instance, and that there is not enough space for every judge to be appointed to appeal courts. However, selection for any such appointment must again be transparent and fair. The involvement of Appointments Commissions in the promotion of full-time judges ensures that the executive does not promote only those whose worldviews coincide with the executive’s own view, or that judges do not promote other judges in their own image. An important part of the role of leadership judges is to ensure that those judges who do want to be considered for promotion are supported in their aspirations and provided with the opportunity to do work which will enable that judge to demonstrate their ability to be appointed to sit on appeals.

Retirement – the fifth stage
The fifth stage that I address is retirement, and I wanted particularly to consider the issue of retirement ages. In England and Wales there was, as a matter of history, no retirement age. It is well-known that not every great judges continued to sit at a time when their judgment was not what it had been and retirement ages were introduced. There was a retirement age of 75 for the senior judiciary (High Court Judge and above) and 72 for other judges. This retirement age continues to apply to those appointed under the old scheme but the retirement age was lowered for all judges appointed after a certain date to 70. This meant that Lord Neuberger, as President of the Supreme Court, had to retire at 70 and was succeeded by Baroness Hale who was appointed before the change in retirement ages was introduced and so had a retirement age of 75.

This might be interesting as a matter of legal history, but a problem which has been caused in England and Wales by the retirement age being set at 70 has been that there has been an enforced retirement of judges who still have much to give, which has in turn created pressures for the Judicial Appointments Commission
because of the need to replace those judges. There seems to be some prospect that the retirement age may increase.

**Post retirement assignments – the sixth stage**

The final stage to address is post retirement assignments. There were two points I wanted to consider in the short time left to me. The first is the method by which judges are selected for further judicial work. It seems to me that such appointments must be on the recommendation of the Chief Justice or their delegate, or an appointment Commission. If post retirement judicial appointments are to be made by the executive there may be the temptation for the judge coming up to retirement who wishes to continue to work to become executive minded, or (which is as damaging) there may be a perception that such a judge might give judgments in an attempt to obtain such an appointment. I know that in India many retired judges are appointed to chair tribunals. The involvement of an appointment commission or the Chief Justice in the selection process for such judges will mitigate the risks of concerns or criticisms arising from such appointments.

The second point I wanted to highlight was whether retired full-time judges should ever be permitted to return to practice. I know that there is no uniformity of either views or practice about this across the Commonwealth. For what it is worth my own view is that once a person has accepted a full-time judicial position they should not be permitted to return to appear before the courts in which they have sat. I appreciate that this is what fee paid judges do, but there is a principled distinction between a part-time appointment and a full time judge. This is because full time judges have given up practice and should be dedicating themselves full time to the advancement of the rule of law as a judge. Permitting such a judge to return to work creates two important risks. First that such a judge might attempt to rebuild a practice from those appearing before them (or at least that others would think that this is what has occurred). The second risk is that litigants might feel that they should instruct a retired judge because of the advantages of “knowing how it works” that might accrue to the litigant, whether such an advantage is real or imagined. It might inhibit judges talking freely to each other if there is a risk that the retired judge will be back before the other judge in the near future.

However, even if a judge is prevented from appearing before the courts in which they sat, it is known that some judges have given advice on litigation coming before the courts in which they appeared. Mrs Justice Lynne Leitch has very helpfully drawn my attention to a current controversy in Canada where retired Supreme Court Justices have provided advice on issues arising out of a deferred prosecution agreement known as the SNC-Lavalin affair. The fact that the advice has been given has become known and has generated critical media coverage. There are real risks in permitting retired judges to return to practice to provide such advice. This is because the provision of such advice can generate controversy. Further it might mean that politicians would feel entitled to criticise the former judges because they were no longer judges, which risks blurring the lines about permissible and impermissible criticisms of judges. The retired judge might consider that providing private legal advice risks no public harm because they are simply providing their own independent legal analysis. However, it is well known that the privilege in any such legal advice belongs to the client, and clients may want to publicise any favourable advice that they receive. This risks involving retired judges in public relations battles mounted by litigants.

**Conclusion**

1. It is apparent that there are a number of stages of a judicial career, and at each stage of such a career there are issues to be addressed.
By Honorable Mr. Justice Sharad Arvind Bobde, India

Hon’ble Chief Justice Bart Katureebe, Uganda and Lord Justice James Dingemans, England and Wales.

Distinguished Judges from across the globe.

Ladies and Gentlemen

I am delighted to be here at the CMJA Conference. I must take the first opportunity to congratulate the Papua New Guinea Judiciary for hosting this conference in this beautiful port city of Port Moresby. I believe it is the first time they are hosting this conference and I am pleased to be a part of it.

I think we’d all agree that Judges do not have an easy job. They do what the rest of the population avoid doing, i.e. make decisions. There is a joke I read somewhere which went like this “I used to be indecisive, but now I am not sure.”

I will begin with a description of the structure of the judiciary in India and take you through the training academy and appointments including the collegium system- a unique feature of our country, and finally the prospects for judges post retirement.

Structure of Judiciary in India

India is a primarily common-law system bound by a written Constitution, which has been enumerated in great detail. The Supreme Court is placed as the highest court of the land, followed by the High Courts and specialized courts and tribunals, and at the lowest level is the subordinate judiciary.

The fundamental design principle of the Constitution of India is the separation of powers. This separation of powers amongst the legislature, executive and judiciary ensures that power does not get accumulated in any one branch only. This system is based on early ideas of Montesquieu’s ‘checks and balances’ which operates against a tyrannical form of government.

Training of Judges: Judicial Academies

Judges in India are trained through Judicial Academies both at the National and State level. The attempt is to bring together Judges from across the country to jointly identify the major obstacles facing the administration of Justice and develop solutions for it. Through the training, there is an emphatic emphasis on ten ‘core clusters’, including Judging/Judicial Institutions; Court Process and Dispute Settlement; Protection of Vulnerable Groups; Individual Rights and of Environment and Natural Resources; Law, Society and Development; and Emerging Areas, to name a few.

Appointment of judges – Collegium system

The subordinate judiciary is appointed through examinations. For the judges in the higher judiciary, the Constitution had originally envisaged a role for the executive in their appointments through consultations with the judiciary (Art 124 and 217). It was in the year 1999, that the Supreme Court through “the three judges cases” (AIR 1999 SC 1), interpreted the provisions of the constitution to almost completely vest the power of appointment of judges of the higher judiciary in a ‘collegium’ of the five senior-most judges of the Supreme Court.

The collegium procedure is such that upon a resolution of the collegium, the Chief Justice of India recommends the resolution to the Union Minister of Law and Justice. The Minister in turn forwards the recommendation to the Prime Minister who advises the President on it. The power of the executive is limited to asking the collegium to reconsider its decision once. However, if the collegium’s decision is reiterated, the appointment or transfer has to be made.
The collegium system was sought to be reformed by the Parliament through a constitutional amendment. The constitutional amendment introduced federal institution named the National Judicial Appointments Commission (“NJAC”) to take over the powers of the collegium. The NJAC comprised of members of the judiciary, executive and certain nominated members. This constitutional amendment and consequent statute was struck down in judicial review by the Supreme Court as being violative of the ‘basic structure of the Constitution’ (4 judges struck it down and 1 judge dissented). The constitution of India is treated like a living being (Document), the soul being the basic structure of the constitution. The constitution is amenable to amendment but the basic features/structure should remain. Any action of any authority cannot go against the very essence of the constitution. A majority of 4 judges of the Supreme Court held that the independence of the judiciary demanded judicial primacy in the appointment process.

The concept of the basic structure of the constitution has evolved in a famous case called “His holiness Kesavananda Bharati V. State of Kerala” where in swami Kesavananda Bharati (head of a Hindu matt) approached the court, challenging the state of Kerala’s attempts to impose restrictions on the management of the matt’s property through certain land reform acts. 13 judges of the Supreme Court of India dealt with this matter and held that the parliament did not have the power to destroy or emasculate the basic features or elements of the constitution. Concepts such as Independence of Judiciary, Fundamental rights, Democratic form of government etc. are a few basic features of the constitution. All these together constitute the basic structure or rather the soul of the constitution. Since then this doctrine has become the cornerstone of the constitutional law in India. The Supreme Court of India has left it open to the court to include new features into the list of the basic features upon case-to-case basis (para 628 AIR 1973 SC 1461). This exercise represents the true spirit of the guardianship the Judiciary is accorded with.

There have been attempts by various governments to restrict the power of judicial review of court. The parliament had once amended the law to mean that the courts cannot judicially review any law made under the 9th schedule of the constitution. Several laws were passed under the umbrella of 9th schedule and the judiciary was tasked to deal with the question i.e. whether the laws under the 9th schedule are immune from judicial scrutiny. The Supreme Court in the case ‘IR Coelho v. Union of India’ has unanimously held that even the laws under the 9th schedule, if they infringe upon the fundamental rights, can be judicially reviewed and can be struck down.

This power of judicial review can be exercised both by the Supreme Court (under Art 32) and the High Courts (under Art 226) over legislative and administrative actions. The higher judiciary has extensively utilised writ jurisdictions as a very effective means of exercising judicial review in India. However, while the ambit of Art 32 is limited to fundamental rights, the ambit of Art 226 available to the High Courts is wider and extends to not only enforcement of a fundamental right but also enforcement of any legal right to reach injustice wherever found (Anandi Mukhta Smarak Trust & Ors v. V.R.Rudhani & Ors., 1989 AIR 1607, 1989 SCR (2) 697).

The power of judicial review flows through the veins of the constitution. The entire constitutional and political philosophy of the nation of India is founded on rule of law, separation of power and attached to the higher values of constitutionalism mandates the vibrant existence of judicial review as part of the Indian legal system. Dharma is a concept of duty that comes from ancient India. In the Supreme Court of India, right above where the judges are seated, it is inscribed “Yatoh Dharma Tatoh Jayah”. It is the motto of the Supreme Court of India. It means where there is adherence to rule of law, there is victory. The role of the judiciary, particularly the higher judiciary in acting as the guardian of our Constitution and upholding the rule of law cannot be overemphasized.

The substantive provisions of law demanded that the Supreme Court evolve a doctrinal approach to the power of judicial review. Thus, the common-law doctrines of proportionality, legitimate expectations, reasonableness and principles of natural justice have been well entrenched in judicial review of administrative actions. Whereas, the doctrines of eclipse, basic structure, arbitrariness, reasonableness, severability, colourable legislations, and pith and substance are used to review legislative actions.

The court has used the power of interpretation to make Article 21, which protects right to life, meaningful. It has enumerated several facets to this right while saying that the right would include all those aspects of life to make a man’s life complete and worth living. Thus, it would include all that which gives meaning to his life.
i.e. tradition, culture, heritage and protection of that heritage in full measure. An important shift came when the right to life was held to include not only physical existence, but the quality of his life which must be taken as guarantee in a civilized society thus implying the existence of right to food, water and decent environment. This right includes opportunity, economic justice to schedule castes and tribes. Personal liberty has been protected from all encroachments and unsustainable in law unless for a compelling state purpose. Recently, though not expressly conferred by the constitution it was held that the right to privacy was a fundamental right and was spelt out from the various freedoms and rights conferred by the constitution. While dealing with the cases of Indian Young Lawyers Association and Ors. vs. The State Of Kerala (Sabarimala) and Shayara Bano v. UOI (triple talaq) (AIR 2017 SC 4609), the SC historically invalidated age-old customs and beliefs that were adversely affecting the fundamental rights of women. It was in pursuance to the vested power of judicial review that the Supreme Court annulled personal and religious laws that infringed upon basic rights enshrined in the Constitution.

Ordinarily, only concrete reviews are entertained, implying that for a legislative review the law must be in existence and for an administrative review there must be an actual or imminent threat of violation of the rights. Review of hypothetical challenges is not undertaken. The Judiciary has actively tried to desist from determinations of economic policy and political questions unless inextricably intertwined with the issues of constitutional rights.

Economic decisions are made on the basis of an immense amount of technical information, which may be beyond the competence of the Judiciary. (R.K.Garg v. UOI (1981)) Presumption in favour of constitutionality and non-attribution of mala fide are the starting considerations in review proceedings. Unsettling this rebuttable presumption is the burden of the petitioner. (P. Ramachandra Rao v State of Karnataka (2002)

Post Retirement Prospects

The Indian Constitution does not preclude Supreme Court judges from taking up post retirement assignments. It is the very nature and importance of posts may it be constitutional or quasi-judicial in nature that necessitates the appointment of retired judges to supervise them.

Many retired SC judges have taken up assignments in organizations such as National Human Rights Commission which requires the Chairman to be a retired CJI, National Consumer Disputes Redressal Commission, Armed Forces Tribunal and Law Commission of India to name a few. More often than not, companies tend to include an arbitration clause in their contractual agreements to reduce dependency on the courts. In the event of any disputes arising between parties, the courts while invoking the arbitration clause tend to appoint retired Supreme Court or High Court judges to arbitrate disputes because of the vast legal experience they possess.

Two of my former colleagues in the Supreme Court of India have been appointed as judges in courts of other countries post their retirement. Justice Lokur, for example, has been appointed as a Judge of the non-residential panel of the Supreme Court of Fiji. While, Justice Sikri has been appointed as an international judge to the Singapore International Commercial Court.

Conclusion:

The judiciary has evolved far beyond its postcolonial roots and what was envisioned to be by the framers of the Constitution. Today, judge through his/her office plays a crucial role in the maintaining of fundamental values, maintenance of democratic framework, protection of rights, and being the last resort of accountability. The judiciary is seen as a saviour, with the ability to ensure effective working of key institutions of the republic having the capacity to push forward a social agenda centered on welfare of people. Competence and expertise of members of the judiciary could be questioned in instances of its engagement with complex political, social and economic policy matters, but its constitutional legitimacy is rarely challenged. In spite of the ups and downs the judiciary has held fort, guarded the citadel of the fundamental rights of the citizens and is indeed the final arbiter for the constitution and the laws.

Thank you, Jai Hind.
“POLITICIANS AND LAWYERS IN CONFLICT WITH THE JUDICIARY”

By Mr John Carey JP, Papua New Guinea

Abstract
The existence of conflict is evidence of the need for an institution to adjudicate and address matters related to conflict. In this regard, the Judiciary is the institution which was designed to handle clashes within our society. Politicians, many of whom become Parliamentarians, often have a primary responsibility to make laws for the good governance of society. Lawyers, who are officers of the court and trained professionals in the knowledge and practice of law, have a responsibility to their clients and courts. While each has a role to play for an orderly society to thrive there are times when either or all have conflict which potentially give rise to constitutional crises and/or societal predicaments. Having an understanding of the role that each plays is a significant component to ensuring that there is proper behaviour in the execution of duties of politicians, lawyers and the judiciary in our world of conflict.

Key words: Conflict; Judiciary; Politicians and Lawyers

Introduction
Shepard (2014) suggests that the way judges and lawyers relate to each other has not been significantly examined. This session allows for discussion and reflection on this particular area insofar as what are the conflicts that can arise between politicians and lawyers with the judiciary, why do they arise and so what? Further, during the discussion there may be further consideration to the prevention or management of conflict in a manner which does not spiral out of control.

According to Woodhouse (1996), there is an essential tension between judges and the government. She further suggests that Judges generally avoid ‘political controversy’ (p.423). However, there are times when it is not possible to avoid controversy. In the matter of the Articles 15, 20, 21, 23 & 28 of the Constitution of the Commonwealth of the Bahamas (2016/PUB/con0016), Charles J., ruled that the Rule of Law and the Constitution supersede Parliamentary Privilege. This created political controversy at the time because there were public utterances by Parliamentarians that Parliament is supreme and that the Speaker of the House should consider holding the Honourable Justice in contempt of Parliament. In the big picture arguably this ruling by the Bahamas court was not controversial at all, however, because it differed from the views of the Politicians there was conflict. Fortunately, cooler heads prevailed in this case and the Politicians respected the decision of the court and the Rule of Law.

When there is a perception that there is judicial interference in the workings of parliament there is likely to be conflict with the politicians. If there is parliamentary interference in the workings of the judiciary there is also a high likelihood of conflict.

When there is an interpretation by the court of the constitution that is different to the legislator’s intention there may be conflict. In a recent Cayman Islands case in the Grand Court involving same sex marriage which is presently before the Cayman Islands Court of Appeal, Chief Justice Smellie used his powers under the Constitution to rewrite the Marriage Law. He ordered that the clause in the law, specifying that marriage is reserved for heterosexual couples, be altered to state, “‘Marriage’ means the union between two people as one another’s spouses.” The chief justice said it was the court’s duty to intervene to modify laws that did not comply with the constitution, particularly in cases where the state had failed to act. The Premier of the Cayman Islands said that the Cayman Islands’ constitution - which respects the right “to marry a person of the opposite sex” - was designed to reassure Christians that “marriage would retain its traditional definition as the union between a man and a woman.” This is another example of where the executive and legislature conflict with the judiciary, however, in this particular instance, it is clear that that the rule of law is respected by a politician who is the Premier and also a lawyer.
What?
There are instances where lawyers are in conflict with the judiciary. For example, when a lawyer is of the view that he or she cannot get a fair hearing before a particular judge due to accusations of bias which are unfounded. Mere suspicion versus having admissible evidence is insufficient to assert bias or prejudice, however, lawyers may get into conflict with the judiciary when their opinion falls within the suspicion category.

If we examine history, we are able to ascertain that the judiciary created situations of conflict of interest at times. While the UK Act of Settlement of 1701 provided that Judges were to be free of interference from the Legislature and the King, there were exceptions. According to Smellie (2012), ‘Judges in some of the British Colonies were being used as tax collectors for the crown, expanding rather than reducing the crown’s fiscal authority and… were also judges in their own causes as tax collectors to pay themselves (p.2)’. Certainly this created conflict with the public at the time that this happened. However, we have evolved from this time period and approach to blatant conflict of interest to a more impartial and independent judiciary in 2019.

Does an impartial and independent judiciary suggest a role of being a referee void of conflict with politicians and lawyer? Is this even possible? Politicians will argue that the judiciary is to interpret and apply laws that mostly likely and clearly aligns with their intention. There should be no deviation from their intention. This particular point of contention is often the crux of the matter when politicians are in conflict with the judiciary.

There is a prevailing view that Parliament is Supreme. With this view that Parliamentary Sovereignty determines that the exercise of its power ought not to be questioned by any other branch of the government including the judiciary there is the creation of conflict.

Unlike the United Kingdom many Commonwealth Countries have a written constitution. Does having a constitutional court whose legal framework is specifically focused on examining the constitutionality of laws make a difference in minimizing conflict between Politicians and the Judiciary? This is another question that I do not propose to answer however, it would be interesting to hear the views of the audience.

While the courts interpret laws, if the intention of parliament is not aligned with that interpretation, parliament may make laws to ensure the correct intention is enacted.

Why?
In my experience in working with the executive branch of a government, I am reminded of something that a former Prime Minister once said with respect to the appointment process of a Chief Justice. At worst, it is hoped that a Chief Justice would be neutral in a matter that involves the government. More importantly, at best it is anticipated that a Chief Justice would be favourable in a matter that involves the government. The influence of politics affects the outcomes in tribunals (Bolleyer, von Nostitz and Bormann, 2017, p.24).

While independence of the judiciary is paramount to engendering public confidence, there may not be absolutes when it comes to this particular reality.

Waseem (2011) suggests that the conflict in Pakistan ‘between the executive and judiciary’ during former Chief Justice Choudhry tenure produced views that the system of democracy was about to fail. Given that the Commonwealth is based on democracy it is important that conflict, perceived conflict or the threat of conflict between the executive and judicial arms of government does not adversely affect fundamental rule of law to result in chaos.

Kawadza (2018) indicates that the clash between the executive and judiciary is as a result of the impact of judicial decisions and not based on the rationale by which rulings are made. Enweremadu (2011) argues that in Nigeria regardless of the outcome of court decisions the political directorate has learnt to accept the rulings of the court.
Why does conflict happen? I am going to apply the 5-Why method commonly used in the oil and gas industry for incident investigation in my approach to the why.

Is it ego and arrogance? The three branches of government usually believe that they have a claim to true power and/or knowledge if they are honest with themselves. Whether that is so can arguably be relative. However, I believe that conflict happens between politicians and lawyers with the judiciary because of human nature and arrogance. What is arrogance? It is that feeling of superiority over others.

Why are individuals in these positions of authority arrogant? It is because of their lack of respect for the rule of law.

Why is there a lack of respect for the rule of law? It is because they do not have a real understanding of the rule of law.

Why do they not have a real understanding of the rule of law? It is because they are consumed with power. Why are they consumed with power? It is because they do not appreciate why they are here on this earth. When there is no appreciation of why one is here on this earth, then there is no deeper understanding of how to improve access to justice because one is just an operational applicator and not a conceptual designer with a clear direction to fulfilment of purpose. Now what is all this simplified philosophical mumbo jumbo that I am proclaiming in this session?

It is basically that when human beings genuinely seek to achieve an outcome that is fair and just all parties and in this case politicians, lawyers and the judiciary who find themselves in a conflict will work toward achieving a meaningful and lasting solution to the dispute. This may be an idealist view. Should we not all be striving for idealism? Or maybe such a view is so far-fetched that it has no place in a discussion with regard to politicians and lawyers in conflict with the judiciary.

So What?
Have you ever entered your courtroom harbouring an attitude against a lawyer? Shepard (2014) states that most lawyers have had an experience of going to court where the judge appeared to have ‘an animus against a particular lawyer’ (p.231). It is this perceived conflict that may exist that many are totally unaware of or oblivious to. Shepard (2014) also suggest that ‘rarely do Judges make remarks on the record about lawyers’ (p.231).

In Papua New Guinea (PNG), “Lawyer gets into trouble with the Judge” (2018) contends that a lawyer was held in contempt of court for failing to properly represent a client. In another PNG matter, “Stop Wasting the Courts Time Lawyer Told” (2016), a Senior Magistrate said ‘Unless there is special reason to read all counts and make reference to them later, then let it be read, otherwise save the court’s time’. In another matter, “Judge Issues Warning Against Lawyers Filing Vexatious Lawsuits” (2019) Justice Dingake stated that, ‘Judicial time is a national resource’ and issued a stern warning to lawyers about filing vexatious lawsuits. These are three examples of conflicts between lawyers and the judge or magistrate but ultimately the judge or magistrate has the final say.

Are the preceding examples of conflict fair and reasonable? These are the types of conflicts that arise on a daily basis in many of your courts.

If there has been a tribunal in your jurisdiction for the removal a Chief Justice, there has likely been a conflict involving politicians with the judiciary.

In re Reference to Constitution section 19(1) by East Sepik Provincial Executive ([2011] PGSC 41) a decision by the PNG Supreme Court which was opposed by some politicians resulted in a conflict which created a national crisis at the time. Fortunately, PNG has moved forward and the respect for rule of law has prevailed insofar that it can be said that PNG is a very stable democracy which like any other developing country continues to grow and evolve.
The American Philosopher Professor Ronald Dworkin suggests that the judiciary should be the entity that explains the standard and the parliament should be unfettered to enact the rule. Such a position assists with setting out how the powers of one group should be exercised in respect of each other.

**Conclusion**

Politicians, lawyers and judges impact our society in a positive way. Through creating laws that protect our most vulnerable in society, to representing clients who need legal representation or ensuring that there is appropriate compensation for a party that is aggrieved in a dispute, these three groups of persons make a difference. From time to time there is destined to be conflict with politicians and lawyers with the judiciary. In spite of these conflicts which may arise, ensuring that public confidence is not eroded in the judiciary is paramount to support access to justice for all people.

People seek solutions daily from politicians, lawyers and the judiciary. What is interesting about this fact is that there is a general expectation that these three groups of people have the answers or are able to point persons in the right direction with respect to their problems or issues that they are bringing to them for guidance or assistance in resolving.

Just as ordinary people conflict with each other, politicians and lawyers conflict with the judiciary from time to time. Perhaps it may be time to consider whether the judiciary can be more proactive to mitigating against conflict with parliamentarians and lawyers.

**References**


Chairman of the conference, the Chair of this session, the esteemed members of the Judiciary and Office Bearers of the Association, let me first thank the organizers for having given me this opportunity to address this august gathering.

1. The earliest origin in regard to this subject was started in the year 1742 in the famous case In re Read and Huggonson (St. James' Evening Post Case) (1742) 2 Atk. 469, where Lord Hardwicke L.C. said:

   “Nothing is more incumbent upon courts of justice, than to preserve their proceedings from being misrepresented; nor is there any thing of more pernicious consequence, than to prejudice the minds of the public against persons concerned as parties in causes, before the cause is finally heard.”

2. Subsequently in the year 1802 Chief Justice Wilmot reasoned that the Courts had the power to take action as the article was calculated to lower the authority of the Judge. This scandalising of the Court was seen as a mode of lowering the judicial authority of the Presiding Officer. The influence of these decisions on the Indian law of contempt is fairly obvious as is seen from Section 2(1)(c) of the Contempt of Courts Act, 1971 which provides:

   ‘Criminal contempt’ means the publication (whether by words, spoken or written, or by signs, or by visible representations, or otherwise) of any matter or the doing of any other act whatsoever which—

   (i) scandalises or tends to scandalise, or lowers or tends to lower the authority of any court”

3. Lord Russel of Killowen, C.J., in Queen v. Grey [1900 2 QBD 36] reaffirmed that any act done or writing published calculated to bring a court or a Judge of the court in contempt, or to lower his authority, was a contempt of court. The learned Chief Justice made it clear that judges and courts were alike open to criticism and if reasonable argument or expostulation was offered against any judicial act as contrary to law or the public good no court could or would treat that as contempt of court but it was to be remembered that the liberty of the press was not greater and no less than the liberty of every subject. It was held that when there was personal scurrilous abuse of a Judge, then it constituted contempt.

4. In Ambard v The Attorney General [ 1936 AC 322] the Privy Council re-emphasized the public nature of a judge’s office and the right of the public to criticise judicial functions. In a classic passage, Lord Atkin said:

   “But whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way: the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.”

5. Lord Denning, the learned Law Lord, observed the following in Regina v Commissioner of Police Ex P Blackburn No 2 [1968 2 WLR 1204]:

   “...
“Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself”......
“They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not. All we would ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication......”
“So it comes to this: Mr. Quintin Hogg has criticised the court, but in so doing he is exercising his undoubted right. The article contains an error, no doubt, but errors do not make it a contempt of court. We must uphold his right to the uttermost”.

A reading of Lord Denning’s judgment would clearly indicate the position of a Judge who is unable to reply to any in sinuous attack or directed attack. At the same time, we would also have to think that merely because the Judges are not replying, can that be a reason for anyone to attack the very judiciary and whether media could join that process and whether they can say whatever they want. In such cases, when they make a scurrilous attack without any basis, contempt is definitely the only weapon which would safeguard the interest of Judges even though it is rarely used.

6. I may point out that similar sentiments were expressed by the Indian Supreme Court when Gajendragadkar, C.J. in Special Reference No. 1 of 1964, reported in 1965 (1) SCR 413 : (AIR 1965 SC 745):

The then Chief Justice had categorically stated in this case that the frequent or indiscriminate use of the contempt power may have adverse effects and it was held in that decision that,

“Wise Judges never forget that the best way to sustain the dignity and status of their office is to deserve respect from the public at large by the quality of their judgment, the fearlessness, fairness and objectivity of their approach, and by the restraint, dignity and decorum which they observe in their judicial conduct.”

B. SCANDALISING THE COURT – GUIDING PRINCIPLES

1. The decision of the Supreme Court in S. Mulgaonkar [1978 3 SCC 339] is in many ways a landmark. The Court reiterated that the judiciary cannot be immune from criticism. But, when that criticism is based on obvious distortion or gross misstatement and made in a manner which seems designed to lower respect for the judiciary and destroy public confidence in it, it cannot be ignored. The Court reasoned that if fearless and impartial courts of justice are the bulwark of a healthy democracy, confidence in them cannot be permitted to be impaired by malicious attacks upon them.

In the above decision, the matter pertains to a letter of the Chief Justice to all the Chief Justices of the High Courts in various states requesting them to draft a Code of Ethics for themselves so as to prevent possible lapse from the path of rectitude and proprietary on the part of the Judges. One of the newspapers published this very letter making adverse criticism against some of the Supreme Court and High Court Judges which even led to the some of the Judges who drafted the code to disown it. When notice was issued to the newspaper, they conveniently did not apologized originally and even again wrote that the performance of the Supreme Court Judges was far below the High Court Judges as they were “pliant and submissive Judges except for a few”. When specific action was taken for contempt, they conveniently withdrew and the editor pointed out that there was no intention on their part either to injure the dignity or position of the court but only to direct public attention to matters of extreme importance to the nation. The Supreme Court also dropped the contempt accepting the contention.
2. In his concurring opinion Justice V.R Krishna Iyer enlisted six rules which offer invaluable guidance in exercising power in this delicate branch of contempt. The rules are as under:

i. The first rule in this branch of contempt power is a wise economy of use by the Court of this branch of its jurisdiction. “The Court will act with seriousness and severity where justice is jeopardised by a gross and/or unfounded attack on the Judges, where the attack is calculated to obstruct or destroy the judicial process.”

ii. The second principle must be to harmonise the constitutional values of free criticism, the Fourth Estate included, and the need for a fearless curial process and its presiding functionary, the Judge. In this principle he has also stated that even if the contemnor is ever so high, the law – the peoples’ expression of justice is above them.

iii. The third principle is to avoid confusion between personal protection of a libelled Judge and prevention of obstruction of public justice and the community's confidence in that great process. The former is not contempt, the latter is, although overlapping spaces abound.

iv. The fourth functional canon which channels discretionary exercise of the contempt power is that the fourth estate, which is an indispensable intermediary between the State and the people and necessary instrumentality in strengthening the forces of democracy, should be given free play within responsible limits even when the focus of its critical attention is the court, including the highest Court.

v. The fifth normative guideline for the Judges to observe in this jurisdiction is not to be hypersensitive even where distortions and criticisms overstep the limits.....

vi. The sixth consideration is that, after evaluating the totality of factors, if the Court considers the attack on the Judge or Judges scurrilous, offensive, intimidatory or malicious beyond condonable limits, the strong arm of the law must, in the name of public interest and public justice, strike a blow on him who challenges the supremacy of the rule of law by fouling its source and stream.

Let us now consider the relationship between the media and the judicial independence. This has been rightly pointed out in The Madrid Principles.

**C. The Madrid Principles on the Relationship Between the Media and Judicial Independence (1994)**

A group of 40 distinguished Legal Experts and Media representatives, convened by the International Commission of Jurists (ICJ), at its Centre for the Independence of Judges and Lawyers (CIJL) and the Spanish Committee of Unicef met in Madrid, Spain between 18-20, January 1994. The objectives of the meeting were:

i. To examine the relationship between the media and judicial independence as guaranteed by the 1985 UN Principles on the Independence of Judiciary.

ii. To formulate principles addressing the relationship between freedom of expression and judicial independence.

The group of media representatives and jurists while stating in the “Preamble” that the “freedom of the media, which is an integral part of freedom of expression, is essential in a democratic society governed by the Rule of Law and that it is the responsibility of the Judges to recognise and give effect to freedom of the media by applying a basic presumption in their favour and by permitting only such restrictions on freedom of the media as are authorised by the International Covenant on Civil and Political Rights (“International Covenant”) and are specified in precise law, emphasised that:

“`The media have an obligation to respect the rights of individuals, protected by the International Covenant and the independence of the judiciary.”`
It refers to the principles which are drafted as “minimum” standards of protection of the freedom of expression.

The Basic Principle
(1) Freedom of expression (as defined in Art. 19 of the Covenant), including the freedom of the media—constitutes one of the essential foundations of every society which claims to be democratic. It is the function and right of the media to gather and convey information to the public and to comment on the administration of justice, including cases before, during and after trial, without violating the presumption of innocence.

(2) This principle can only be departed from in the circumstances envisaged in the International Covenant on Civil and Political Rights, as interpreted by the 1984 Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (UN Document E/CN/4/1984/4).

(3) The right to comment on the administration of justice shall not be subject to any special restrictions.

Scope of the Basic Principle (deals with media rights during investigation into a crime):
(1)-(3) ***

(4) The Basic Principle does not exclude the preservation by law of secrecy during the investigation of crime even when investigation forms part of the judicial process. Secrecy in such circumstances must be regarded as being mainly for the benefit of persons who are suspected or accused and to preserve the presumption of innocence. It shall not restrict the right of any such person to communicate to the press, information about the investigation or the circumstances being investigated.

(5) The Basic Principle does not exclude the holding of in camera proceedings intended to achieve conciliation or settlement of private disputes.

(6) The Basic Principle does not require a right to broadcast or record court proceedings. Where this is permitted, the Basic Principle shall remain applicable.

Restrictions
(7) Any restriction of the Basic Principle must be strictly prescribed by law. Where any such law confers a discretion or power, that discretion or power must be exercised by a Judge.

(8) Where a Judge has a power to restrict the Basic Principle and is contemplating the exercise of that power, the media (as well as any other person affected) shall have the right to be heard for the purpose of objecting to the course of that power and, if exercised, a right of appeal.

(9) Laws may authorise restrictions of the Basic Principle to the extent necessary in a democratic society for the protection of minors and members of other groups in need of special protection.

(10) Laws may restrict the Basic Principle in relation to the criminal proceedings in the interest of the administration of justice to the extent necessary in a democratic society:
(a) for the prevention of serious prejudice to a defendant;
(b) for the prevention of serious harm to or improper pressure being placed upon a witness, a member of a jury or a victim.

(11) Where a restriction of the Basic Principle is sought on the grounds of national security, this should not jeopardise the rights of the parties, including the rights of the defence. The defence and the media shall have the right, to the greatest extent possible, to know the grounds on which the restriction is sought (subject, if necessary, to a duty of confidentiality if the restriction is imposed) and shall have the right to contest this restriction.

In this connection it is also pertinent to point out here that reasonable restrictions have already been accepted by the Supreme Court of India.
In the latest development when article 370 of the Constitution, which granted many privileges to the state of Jammu and Kashmir, was withdrawn, the Government has totally restricted the print media and electronic media from publishing any articles bringing out any details even in respect of the curfew in the state. This was mainly done in view of the national security and internal safeguard of the state because of the possible intervention of third parties. Such restrictions are allowed where essentially it is needed for the state’s safety. In any view of the matter, this matter is now sub-judice before the Hon’ble Supreme Court of India where even the withdrawal of Article 370 is questioned. Therefore there are sufficient safeguards for the affected people to approach the court for their redressal also is given.

(12) In civil proceedings, restrictions of the Basic Principle may be imposed if authorised by law to the extent necessary in a democratic society to prevent serious harm to the legitimate interests of a private party.

(13) No restriction shall be imposed in an arbitrary or discriminatory manner.

(14) No restriction shall be imposed except strictly to the minimum extent and for the minimum time necessary to achieve its purpose, and no restriction shall be imposed if a more limited restriction would be likely to achieve that purpose. The burden of proof shall rest on the party requesting the restriction. Moreover, the order to restrict shall be subject to review by a Judge.

Strategies for Implementation
The balance between independence of the judiciary, freedom of the press and respect of the rights of the individual—particularly of minors and other persons in need of special protection—is difficult to achieve. Consequently, it is indispensable that one or more of the following measures are placed at the disposal of affected persons or groups; legal recourse, Press Council, Ombudsman for the Press, with the understanding that such circumstances can be avoided to a large extent by establishing a Code of Ethics for the media which should be elaborated by the profession itself.

Siracusa Principles (referred to in Para 2 of Basic Principle of Madrid Principles)
The following are extracts from the Siracusa Principles on the Limitation and Derogation Provision in the International Covenant on Civil and Political Rights. (UN Document E/UN4/1984/4)

The principle refers to limitation clauses, under several headings dealing with the method of interpretation, the meaning of “prescribed by law”, “a democratic society”, “public order”, “public health”, “public morals”, “national security”, “public safety”, “rights and freedom of others” or “rights or reputation of others”, which are used by the ICCPR.

So far as the media and criminal law is concerned the following item “restrictions on public trial” is relevant. It says:

“(IX) Restrictions on Public Trial;
All trials shall be public unless the Court determines in accordance with law that:
(a) the press or the public should be excluded from all or part of a trial on the basis of specific findings announced in open Court showing that the interest of private lives of the parties or their families or of juveniles so requires; or
(b) the exclusion is strictly necessary to avoid publicity prejudicial to the fairness of the trial or endangering public morals, public order or national security in a democratic society.”

D. DOES THE MEDIA INFLUENCE JUDGES?

a. In 2000, the Law Commission of India suo-motu took up a study having regard to the extensive prejudicial coverage of crime and information about suspects and accused, both in the print and electronic media. The Commission reasoned that there was a public feeling that in view of the extensive use of the television and cable services, the whole pattern of publication of news has changed and
several such publications are likely to have prejudicial impact on the suspects, accused, witnesses and even Judges and in general, on the administration of justice.

b. The Law Commission reasoned that sometimes, the media conducts parallel investigations and points its finger at persons who may indeed be innocent. It tries to find fault with the investigation process even before it is completed and this raises suspicions in the minds of the public about the efficiency of the official investigation machinery.

c. It concluded that the print and electronic media have gone into fierce competition, that a multitude of cameras are flashed at the suspects or the accused and the police are not even allowed to take the suspects or accused from their transport vehicles into the courts or vice versa.

d. There is then a nice question whether a media publication can “unconsciously” influence Judges or Juries and whether Judges, as human beings are not susceptible to such indirect influences, at least subconsciously or unconsciously? This question came up before the Supreme Court in Re: P.C Sen (AIR 1970 SC 1821). There was a broadcast by the Chief Minister of West Bengal, who had knowledge of the challenge to the West Bengal Milk Products Control Order, 1965 in a writ petition that was pending in the Calcutta High Court, and the High Court held him to be guilty of contempt for justifying the Control Order in his radio broadcast but let him off without punishment. On appeal, the Supreme Court agreed that the speech of the Chief Minister was ex facie calculated to interfere with the administration of justice. Grover, J who delivered the judgment of the Court, opined as under:

“Speeches or writings misrepresenting the proceedings of the Court or prejudicing the public for or against a party or involving reflections on parties or a proceeding amount to contempt. To make a speech tending to influence the result of a pending trial, whether civil or criminal is a grave contempt. Comments on pending proceedings, if emanating from the parties or their lawyers, are generally a more serious contempt than those coming from independent sources. The question in all cases of comment on pending proceedings is not whether the publication does interfere, but whether it tends to interfere, with the due course of justice. The question is not so much of the intention of the contemner as whether it is calculated to interfere with the administration of justice.”

“If, therefore, the speech which was broadcast by the Chief Minister was calculated to interfere with the course of justice, it was liable to be declared a contempt of the Court even assuming that he had not intended thereby to interfere with the due course of justice”

Justice Grover then referred to Regina v. Duffey and Ors. Ex Parte Nash, [1960] 2 Q.B.D. 188 where the Court of Appeal in England had to consider the question whether comments made upon a person after his conviction and before his appeal was heard may be regarded as contempt of Court. Lord Parker, C.J., had observed:

"Even if a Judge who eventually sat on the appeal had seen the article in question and had remembered its contents, it is inconceivable that he would be influenced consciously or unconsciously by it. A Judge is in a very different position to a jurymen. Though in no sense superhuman, he has by his training no difficulty in putting out of his mind matters which are not evidence in the case. This, indeed, happens daily to Judges on Assize. This is all the more so in the case of a member of the Court of Criminal Appeal, who, in regard to an appeal against conviction is dealing almost entirely with points of law, and who, in the case of an appeal against sentence is considering whether or not the sentence is correct in principle.”

Referring to the aforesaid passage Justice Grover held that where a proceeding which is tried on evidence in the Court of First Instance, or in the Court of Appeal on questions of fact as well as of law, it would be an over-statement to assert that a Judge may not be influenced even “unconsciously” by what he has read in newspapers. The Supreme Court, thus found that judges may, in certain cases, be influenced by the media.
e. Benjamin Cardozo, one of the greatest Judges of the American Supreme Court, in his “Nature of the Judicial Process” (Lecture IV, Adherence to Precedent: The Subconscious Element in the Judicial Process) (1921) (Yale University Press) referring to the “forces which enter into the conclusions of Judges” observed that “the great tides and currents which engulf the rest of men, do not turn aside in their curse and pass the Judges by”.

f. Another example may be useful to highlight the point. In M.P. Lohia v. State of W.B[2005 2 SCC 686] the facts were that a woman committed suicide in Calcutta in her parents' house but a case was filed against the husband and in-laws under the Indian Penal Code for murder alleging that it was a case of dowry death. The husband (appellant in the Supreme Court) had filed a number of documents to prove that the woman was a schizophrenic psychotic patient. The parents of the woman filed documents to prove their allegations of demand for dowry by the accused. The trial was yet to commence. The courts below refused bail.

g. The Supreme Court granted interim bail to the accused and while passing the final orders, referred very critically to certain news items in the Calcutta magazine. Justice Santhosh Hegde deprecated two articles published in the magazine in a one-sided manner setting out only the allegations made by the woman's parents but not referring to the documents filed by the accused to prove that the lady was a schizophrenic. The Supreme Court observed:

“These type of articles appearing in the media would certainly interfere with the course of administration of justice.”

The Court deprecated the articles and cautioned the Publisher, Editor and Journalist who were responsible for the said articles against “indulging in such trial by media when the issue is sub judice” and observed that all others should take note of the displeasure expressed by the Court.

It is pertinent to point out here that in India because of the advent of the electronic media, nowadays, cases are being discussed in television on the very same day that the trial or arguments are held. The irony is that some of the advocates/lawyers who are conducting the case, are also commenting in the media just for publicity and lay people go to the extent of commenting the way the case should have been taken or to be conducted in the manner as known to them, which has to be necessarily deprecated. They are literally conducting a trial in media thereby trying to influence the minds of the judges.

h. To summarize the position, in India, unlike in the US, the right to free speech is not absolute but is conditional and restricted by Art. 19(2). Treating a publication as criminal contempt under S. 2(c) of the Contempt of Courts Act, 1971 where the Court comes to the conclusion that the publication as to matters pending in Court “tends” to interfere [vide S. 2(c)(iii)] with the administration of justice, amounts to a reasonable restriction on free speech. This is also the view taken by the Law Commission of India. There exists a delicate balance between the right to free speech and the necessity of maintaining a fair and independent judiciary. In Baradakanta Mishra v. Registrar of Orissa High Court (1974) 1 SCC 374, Krishna Iyer, J. speaking for himself and P.N. Bhagwati, J., as he then was, emphasized the necessity of maintaining constitutional balance between two great but occasionally conflicting principles i.e. freedom of expression which is guaranteed under Article 19(1)(a) and fair and fearless justice, and referred to “republican justification” suggested in the American system and observed:

“Maybe, we are nearer the republican justification suggested in the American system:
“In this country, all courts derive their authority from the people, and hold it in trust for their security and benefit. In this state, all judges are elected by the people, and hold their authority, in a double sense, directly from them; the power they exercise is but the authority of the people themselves, exercised through courts as their agents. It is the authority and laws emanating from the people, which the judges sit to exercise and enforce. Contempt against these courts, the administration of their laws, are insults
offered to the authority of the people themselves, and not to the humble agents of the law, whom they employ in the conduct of their Government.”

D. RESTRAINT ORDERS
1. It can hardly be gainsaid that “Open Justice” is the cornerstone of our judicial system. It instils faith in the judicial and legal system. However, the right to open justice is not absolute. It can be restricted by the court in its inherent jurisdiction as done in the Mirajkar case [AIR 1967 SC 1] if the necessities of administration of justice so demand.

2. In Mirajkar [Naresh Shridhar Mirajkar v. Justice Tarkunde, (1965) 67 Bom LR 214], the High Court ordered that the deposition of the defence witness should not be reported in the newspapers. This order of the High Court was challenged in the Supreme Court under Article 32. The Supreme Court held [AIR 1967 SC 1] that apart from Section 151 of the Code of Civil Procedure, the High Court had the inherent power to restrain the press from reporting where administration of justice so demanded. The Court held that evidence of the witness need not receive excessive publicity as fear of such publicity may prevent the witness from speaking the truth. Such orders prohibiting publication for a temporary period during the course of trial are permissible under the inherent powers of the court whenever the court is satisfied that interest of justice so requires. As to whether such a temporary prohibition of publication of court proceedings in the media under the inherent powers of the court can be said to offend Article 19(1)(a) rights (which include freedom of the press to make such publication), the Court held that an order of a court passed to protect the interest of justice and the administration of justice could not be treated as violative of Article 19(1)(a).

3. In 2014, a Constitution Bench in Sahara India Real Estate Corpn. Ltd. v. SEBI, (2012) 10 SCC 603: (2013) 1 SCC (Civ) 173: upheld the validity of postponement orders passed against the press holding that they constituted a reasonable restriction under Article 19(2). Kapadia, CJ held as under:

“Given that the postponement orders curtail the freedom of expression of third parties, such orders have to be passed only in cases in which there is real and substantial risk of prejudice to fairness of the trial or to the proper administration of justice which in the words of Justice Cardozo is “the end and purpose of all laws”. However, such orders of postponement should be ordered for a limited duration and without disturbing the content of the publication. They should be passed only when necessary to prevent real and substantial risk to the fairness of the trial (court proceedings), if reasonable alternative methods or measures such as change of venue or postponement of trial will not prevent the said risk and when the salutary effects of such orders outweigh the deleterious effects to the free expression of those affected by the prior restraint. The order of postponement will only be appropriate in cases where the balancing test otherwise favours non-publication for a limited period. It is not possible for this Court to enumerate categories of publications amounting to contempt. It would require the courts in each case to see the content and the context of the offending publication. There cannot be any straitjacket formula enumerating such categories.”

“In the land of Gautam Buddha, Mahavir and Mahatma Gandhi, the freedom of speech and expression and freedom to speak one’s mind have always been respected. After independence, the Courts have zealously guarded this most precious freedom of every human being. Fair criticism of the system of administration of justice or functioning of institutions or authorities entrusted with the task of deciding rights of the parties gives an opportunity to the operators of the system/institution to remedy the wrong and also bring about improvements. Such criticism cannot be castigated as an attempt to scandalize or lower the authority of the Court or other judicial institutions or as an attempt to interfere with the administration of justice except when such criticism is ill motivated or is construed as a deliberate attempt to run down the institution or an individual Judge is targeted for extraneous reasons. Only when the criticism of judicial institutions transgresses all limits of decency and fairness or there is total lack of objectivity or there is deliberate attempt to denigrate the institution then the Court would use this power.”

CONCLUSION
To conclude, the following observations of the Supreme Court in *Indirect Tax Practitioners Association vs R.K Jain* [Cont P 9 of 2009 decided on 13.08.2010] wherein the Supreme Court [G.S Singhvi and A.K Ganguly, JJ] had examined the need for reform and pragmatism in the approach of Judges to this sensitive area. The observations seem apposite and is a view which I think must commend universal acceptance. The Court held:

“In fact such fair and reasonable criticism must be encouraged because after all no one, much less judges, can claim infallibility. Such a criticism may fairly assert that the judgment is incorrect or an error has been committed both with regard to law or established facts. But when it is said that the judge had a predisposition to convict or deliberately took a turn in discussion of evidence because he had already made up his mind to convict the accused, or has a wayward bend of mind, is attributing motives, lack of dispassionate and objective approach and analysis and prejudging of the issues which would bring administration of justice into ridicule. Criticism of the judges would attract greater attention than others and such criticism sometimes interferes with the administration of justice and that must be judged by the yardstick whether it brings the administration of justice into ridicule or hampers administration of justice. After all it cannot be denied that predisposition or subtle prejudice or unconscious prejudice or what in Indian language is called “sanskar” are inarticulate major premises in decision making process. That element in the decision making process cannot be denied, it should be taken note of.”

Therefore controlling the media cannot be done by merely gagging but it should come through by harmonious approach of the press by themselves in dealing with the matter, taking into consideration, the sensitive nature of the Judges who are unable to reply and retort as by others. Similarly contempt is not the only solution, it has to be rightly taken at the moment when it is felt that the judiciary is scandalized and lowering the authority of the Presiding Officer.
The context

Litigation tends to be a zero-sum game – that is, with as many losers as winners. There are thus a large number of people (conceivably, around half) who are disappointed with court outcomes. A few of these people – fortunately not that many – become obsessed with what they see as the wrong that has been done to them. Because it is the judge who has ultimately decided the case against them, their frustration tends to be aimed at the judge or judiciary more generally; this notwithstanding the fact they may have grievances – legitimate or otherwise – with other actors in the system. As the Court of Appeal noted:51

Doubtless all litigants feel deeply about their cases and they can be bitterly disappointed when a ruling or decision does not go in their favour. What is inexcusable is to assert that the Judge is corrupt or to make what are nothing more than wild-eyed and unsustainable allegations, simply because they lost.

This process of loss provoking feelings of frustration provides the usual context for vituperative attacks on judges and the judiciary as a whole.

Individual judges who are targeted in this way tend to be phlegmatic. They do not usually sue for defamation62 and, except in extreme cases where there is a perceived risk of violence, do not seek the active involvement of the police or the courts. This is because: (a) resort to defamation or harassment litigation will tend to personalise the problem;63 (b) such resort will also provide a privileged forum in which the same allegations can be repeated; and (c) leaving aside demonstrations outside judges’ houses and the involvement of their spouses and children, this sort of behaviour is of limited personal significance; this because people who know the judges will realise that the allegations are untrue.64 Adding to all of this is what might be termed a “convention” that judges should refrain from making extra-judicial comments, which includes responding to criticism.65

Abuse of judges is far more common now than it was in the past.66 It is at least plausible to assume that such abuse tends to create a climate of opinion in which: (a) adverse views about the honestly and impartiality of judges become more widespread; and (b) conduct involving direct harassment or physical violence (for instance, picketing houses, involving partners and children, and assaults in the street) comes to be normalised. So abuse of judges engages public and not just private interests. This warrants brief discussion.

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60 I am excluding cases decided by a jury as these do not tend to produce the same level of frustration on the part of the unsuccessful party at the judge who presided over the matter.
62 Although, see Willy v Fairfax New Zealand Ltd HC Wellington CV-2008-085-1429, 22 July 2009 in which a declaration was made under s 35(2)(a) of the Defamation Act 1992 in order to resolve a defamation dispute between the plaintiff (a Judge) and the defendant (a media company). That said, there “have been a significant number of libel actions over allegations of either incompetence or bias” in the United Kingdom, although none has gone to trial: see Patricia Londono (eds) Arlidge, Eady & Smith on Contempt (5th ed, Sweet & Maxwell, London, 2017) at [5-216]. In Australia, the New South Wales Court of Appeal recently held that the plaintiff, who was a Magistrate, was not barred from bringing defamation proceedings with respect to criticism of the performance of her function as a Magistrate: see O’Shane v Harbour Radio Pty Ltd [2013] NSWCA 315, (2013) 281 FLR 1.
63 For an example of harassment proceedings, see Foskett v Eceingo [2018] EWHC 3694 (QB) where three individual Judges successfully brought contempt of court proceedings for breach of an anti-harassment injunction.
64 This is often because the allegations are “so preposterous that no right-thinking member of society” will take them seriously: see R v Kopyto (1987) 47 DLR (4th) 213 at 290.
65 See Grant Hammond “Judges and Free Speech in New Zealand” (11 March 2010); and JL Caldwell “Is scandalising the Court a scandal?” [1994] NZLJ 442 at 446.
66 See Pamela D Schulz Courts and Judges on Trial: Analysing and Managing the Discourse of Disapproval (Transaction Publishers (UK), London, 2010) at 4. Although the New Zealand Law Society has recently reported that “complaints against judges show decline”, those figures only relate to complaints lodged with the Judicial Conduct Commissioner: see New Zealand Law Society “Complaints against judges show decline” (20 August 2019) <www.lawsociety.org.nz>.

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The underlying premise for treating scandalous allegations about judges as contempt is their tendency to diminish both the independence of the judiciary and the rule of law. Both rely on high level of public confidence in the honesty of judges.67 As Nuno Garoupa and Tom Ginsburg in their recent book Judicial Reputation: A Comparative Theory, note:68

Reputation … is particularly important for courts, which famously lack the purse or the sword. Armed only with pens, judges can only be effective if they are persuasive and authoritative to the parties before them, the legal community, and the public as a whole. To be authoritative requires, at bottom, a reputation for good decision making.

As Garoupa and Ginsburg also make clear, there are feedback loops between justice quality, performance and perception.69 Without a reasonable measure of public confidence in the courts, there will be unwilling participants and limited compliance with court processes and orders.70 A high level of non-compliance with court orders may result in a commensurate increase in enforcement costs. Those with choices may see the judicial system as not fit for purpose and thus will not submit their disputes to the court.71 A poorly regarded judiciary will be difficult to retain and recruit into or, alternatively, a judiciary with a low reputation will attract similarly regarded individuals. Internal morale will be low. Performance will likely be correspondingly poor. In turn, a poor performing judiciary may be allocated fewer resources. This can result in a vicious cycle from which it may be difficult to break out.

In contradistinction, the greater the public confidence in the courts, the better it is for the judiciary as an institution and the public. Judicial decisions will settle controversies and there will be substantial compliance with court processes and orders, which should reduce enforcement costs. The performance of judges will be enhanced by the expectations of both the public and their colleagues. A more credible judiciary will attract candidates with greater skills, knowledge and reputation. In this instance, the feedback loops create a virtuous cycle.

Adding to this, a poorly regarded, and thus poorly performing, judiciary may place the rights of those in society at risk. As JL Caldwell notes “without a respected judiciary, all freedoms, including that of freedom of expression, are vulnerable”.72 He argues that “any impairment of the effective functioning of the Court system must have direct consequential effects on individual citizens”.73

The effect of contemptuous remarks on the judiciary as an institution was highlighted by Sir Victor Windyeder in the following, rather colourful, terms:74

The latitude now allowed to honest criticism of the decisions of courts does not, I suggest, slacken the duty of a judge. He must uphold the dignity and authority of the courts – not only by his own conduct, but by being ready when necessary to suppress contempts. It is not his approval or disapproval of what is said that should count. It is how a publication may affect members of the public, not his opinion of it, that matters. As I see it, he is not free to indulge or display his own tolerance, forbearance or imperturbability in the face of conduct that tends seriously to damage the reputation and authority of the courts. The process of contempt is a power to protect the institution that he serves

69 At 20.
70 As Garoupa and Ginsburg note, compliance with coercive orders made by a court relies, at least in part, on those who are subject to the orders as perceiving courts as a legitimate institution to impose such orders: see 16 and 20.
71 For example, those who prefer arbitration over court processes as a mechanism for settling their disputes; see Ian Barker “Arbitration, mediation and the Courts” [2004] NZLJ 489 at 490.
72 Caldwell, above n 65, at 443.
73 At 443.
and the good name of the brotherhood to which he belongs, to the end always that justice may be administered according to law.

As will be seen, these passages demonstrate that abuse of judges and the judiciary more generally engages broad public interests.

There is some, but only limited, published material as to public perceptions of the New Zealand court system and judges.

There was a survey conducted for the Ministry of Justice over seven years commencing in 1999. Perceptions as to cost and delay were generally negative but others were favourable in particular in response to questions whether the courts: (a) are an important part of the democratic process; (b) provide services for all New Zealanders; (c) are modern in systems and processes; and (d) treat people with respect and are fair. Those responses were before the current patterns of behaviour in respect of judicial criticism emerged. There is a more recent and somewhat broader survey on the operation of the New Zealand justice system which was carried out in 2009 by two academics, Saskia Righarts and Mark Henaghan. Consistently with the Ministry of Justice survey, the results were generally negative as to cost and delay but favourable as to whether: (a) participants would get a fair hearing in a New Zealand court; and (b) judges treat people with respect.

A more recent a Colmar Brunton survey in which members of the public were asked how much trust they had in various groups, “to do the right thing” produced these results for judges and courts:

(a) I have complete trust, 12%;
(b) I have lots of trust, 37%;
(c) I have some trust, 35%;
(d) I have little trust, 12%; and
(e) I have no trust 4%.

Although judges and courts rated higher than schools and colleges, universities, charities, churches, local government, TV/print media and members of parliament, they fared worse than medical practitioners and the police. I see these results as pretty disappointing. One in six of the population have little or no trust in judges doing “the right thing”. Plainly public confidence in the judicial system is thus far from complete and, for the reasons given, this has adverse implications for judicial independence and the rule of law.

The common law
A well-established category of contempt of court encompasses “scurrilous abuse” or “unwarranted attacks upon the integrity or impartiality of a judge or court”, commonly referred to as “scandalising the court”. This branch of the law of contempt can be justified – as I have explained – on the basis that “it is contrary to the public interest that public confidence in the administration of justice should be undermined”. The cases

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75 Ministry of Justice Public Perceptions of the New Zealand Court System and Processes (March 2006).
76 At 12–13 and 23–24.
77 At 11.
78 At 16.
79 At 17.
80 At 19.
82 At 341–342.
83 At 338.
84 At 340.
86 See Londono, above n 63, at [5-211].
87 See Re Read and Huggonson (1742) 2 Atk 469, 26 ER 683 (Ch).
make it clear that the offence does not exist to protect the “individual person of the judge” or the dignity of the judge.\(^{89}\)

The common law contempt of scandalising the court remains – at the time I finalised this paper – part of New Zealand law.\(^{91}\) Thus in Solicitor-General v Radio Avon Ltd,\(^{92}\) a case decided in 1977, the Court of Appeal rejected the submission that it had become obsolete.\(^{93}\) It held that the offence could be made out irrespective of whether the defendant had intended to diminish the authority of the court but,\(^{94}\) on the other hand, indicated that defences of fair comment and justification were available even where impropriety on the part of a judge had been alleged,\(^{95}\) albeit without being specific as to the onus and standard of proof in respect of such defences.

Following Radio Avon Ltd, therefore, the common law offence of scandalising the court is complete where a person knowingly publishes statements which are calculated to undermine public confidence in the proper functioning of the courts.\(^{97}\) The latter element is assessed objectively and liability will only be established where there is a “real risk, as opposed to a remote possibility” that the statements “would undermine public confidence in the administration of justice.”\(^{98}\)

In 2004, the High Court (Wild and MacKenzie JJ) in Solicitor-General v Smith held the offence of scandalising the court had not been abrogated by the enactment of the New Zealand Bill of Rights Act 1990 (and in particular the s 14 right of freedom of expression).\(^{99}\) Instead, it found that the offence of scandalising the court is a justified limitation upon freedom of expression; this for the following reasons:\(^{100}\)

The rights guaranteed by the BORA depend upon the rule of law, the upholding of which is the function of Courts. Courts can only effectively discharge that function if they command the authority and respect of the public. A limit upon conduct which undermines that authority and respect is thus not only commensurate with the rights and freedoms contained in the BORA, but is ultimately necessary to ensure that they are upheld.

The position in Smith that contempt of court is a justified limitation on the right to freedom of expression is consistent with the later approach of the Supreme Court in both Siemer v Solicitor-General cases.\(^{101}\)

**Practical desuetude**

As it has happened, Smith is the last case in which this jurisdiction to punish for scandalising the court has been asserted. As the Law Commission pointed out in a report in 2017, this is not because the abuse of judges has died out.\(^{102}\) In this report the Law Commission provided a number of “recent examples”:\(^{103}\)

- websites with false and egregious criticisms of several judges;
- picketing by the Union of Fathers outside two Family Court Judges’ homes in Hamilton and Auckland in 2006;
- demonstrations outside the private homes of senior judges, upsetting their neighbours and families;
- website blogs and social media entries making derogatory statements against a Family Court Judge and her family and disclosing personal information about them (including photographs of her children and the name and address of their school); and

\(^{89}\) Anissa Pty Ltd v Parsons [1999] VSC 430.
\(^{90}\) Solicitor-General v Smith [2004] 2 NZLR 540 (HC) at [85].
\(^{91}\) See the early cases of Attorney-General v Blundell [1942] NZLR 287 (SC); and Attorney-General v Butler [1953] NZLR 944 (SC).
\(^{92}\) Solicitor-General v Radio Avon Ltd, above n 88.
\(^{93}\) At 238.
\(^{94}\) At 232–233.
\(^{95}\) At 230–231.
\(^{96}\) Caldwell, above n 65, at 446.
\(^{97}\) Radio Avon Ltd, above n 88, at 233.
\(^{98}\) At 234.
\(^{99}\) Solicitor-General v Smith, above n 90.
\(^{100}\) At [133].
\(^{103}\) At [6.23] (footnotes omitted).
• unfounded accusations by a lawyer of racism and corruption against two High Court Judges in complaints to the Judicial Conduct Commissioner.

The Law Commission went on to say:104

None of the criticisms or allegations in the above examples was true. All of the targeted judges remained in office. Yet in none of these cases did the Law Officers of the Crown or the Police take any steps to answer or respond to the allegations. The reasons for taking no steps include uncertainty over the scope and effectiveness of the law in this area and concerns about drawing further attention to the allegations.

I would add additional reasons to those proffered by the Law Commission, both associated with decisions of the Supreme Court – namely, Brooker v Police105 and Siemer v Solicitor General.106

The first, Brooker, arose out of a demonstration by the appellant outside the house of a police constable. The appellant was of the view that he had been unlawfully treated by that constable. Knowing that she had been on night duty, he went to her home in the morning and knocked on her door for some three minutes. Eventually she opened it and told him to leave. He then retreated to a grass verge on the road outside her house and began to protest. He displayed a sign saying, “No more bogus warrants” and, accompanied by a guitar, began singing songs addressed to the constable and referring to her by her first name. Some 15 minutes after he arrived at the constable’s house, police officers turned up. They told him that if he did not leave he would be arrested for intimidation. He would not do so and was arrested. He was later convicted of disorderly behaviour. This conviction was upheld in the High Court 107 and Court of Appeal 108 but was eventually quashed by the Supreme Court in a 3:2 split.109 The approach of the majority was that the offence of disorderly behaviour required proof that the conduct in question was disruptive of public order110 but the judgment has been taken – rightly or wrongly – as indicating judicial tolerance for hostile demonstrations outside the houses of officials. Sauce for the goose being sauce for the gander, the police have subsequently shown little interest in arresting those who demonstrate outside judges’ houses.111

In Siemer the Supreme Court concluded (again 3:2) that the maximum penalty for contempt of court was three months’ imprisonment. This was on the basis that:
(a) the New Zealand Bill of Rights Act then provided a right to trial by jury for offences carrying a maximum sentence in excess of three months’ imprisonment; and
(b) there being no right to trial by jury for contempt, it followed that the maximum sentence which could be imposed was three months.112

Since those serving short terms of imprisonment are required to serve only half the nominal sentence,113 a person found guilty of contempt would face at most just over six weeks in prison.

Given the potential availability of defences of truth and fair comment, the opportunity which prosecution for contempt would provide for privileged repetition of scurrilous allegations and the very limited sanctions which could be imposed, there was little judicial appetite for contempt proceedings. To pick up a metaphor deployed by Lord Wilberforce in an income tax case about New Zealand’s general anti-avoidance rule, New Zealand judges came to see the offence of scandalising the court as “a rusty instrument which breaks in our hands and is no longer capable of repair”.114

104 At [6.24] (footnote omitted).
106 Siemer (No 1), above n 101.
109 Brooker (SC), above n 105, at [49] per Elias CJ, [70] per Blanchard J and [96] per Tipping J.
110 At [24] and [36] per Elias CJ, [56] per Blanchard J and [90] per Tipping J.
111 See Law Commission, above n 102, at [6.49].
112 Siemer (No 1), above n 101, at [66]–[67].
113 Parole Act 2002, ss 9 and 86.
114 See Mangin v Commissioner of Inland Revenue [1971] NZLR 591 (PC) at 603.
As it turned out, the threshold for the right to jury trial was later increased to two years imprisonment\(^\text{115}\) which presumably (although this was never judicially determined) also increased the maximum penalty for contempt to two years imprisonment.\(^\text{116}\) But, by this stage (that is, 2011) the focus was on statutory reform.

**Statutory reform**

*Overview*

Proposals to statutory reform of the law of contempt have been around for approximately a decade. Professor ATH Smith (co-author of *Arlidge, Eady & Smith on Contempt*\(^\text{117}\)) was commissioned by the government to provide a report which he produced in 2011.\(^\text{118}\) This was, at least in part, a response to judicial concern about public attacks on the judiciary. In 2013, the then Minister of Justice commissioned the Law Commission to provide a first principles reform of the law of contempt. An issues paper was released in 2014\(^\text{119}\) and in 2017, the final report was released.\(^\text{120}\) Attached to the report was a draft Bill which, in 2018, was introduced as private member’s Bill.\(^\text{121}\) It was adopted by the government and is now – as I write – in its final parliamentary stages.\(^\text{122}\)

**The Law Commission’s recommendations as reflected in the Bill as introduced**

The Law Commission recommended:

(c) There should be a statutory offence to replace the common law offence of scandalising the court.\(^\text{123}\)

(d) The offence would involve the making of an untrue allegation or accusation against a court or judge involving a real risk of undermining public confidence in the independence, integrity or impartiality of the judiciary,\(^\text{124}\) with a defence of truth being available.\(^\text{125}\)

(e) The maximum penalty should be imprisonment for a term of less than two years’ imprisonment;\(^\text{126}\) this to avoid the new jury trial threshold.

(f) The Solicitor-General should be responsible for investigating and bringing prosecutions for the new offence which would be in the High Court following the filing of charges under the Criminal Procedure Act 2011.\(^\text{127}\)

(g) The High Court should also have power to make orders requiring the retraction or take down of the relevant allegation or accusation.\(^\text{128}\)

**The report of the Select Committee**

The Justice Committee agreed that the common law offence of scandalising the court should be abolished, but proposed that it not be replaced; this on the basis of concerns advanced in submissions that the offence “could prevent robust, legitimate criticism of Judges and courts”.\(^\text{129}\) It did, however, recommend retention of the provision conferring on the High Court power to order the take down (but not retraction) of untrue allegations or accusations about judges or courts,\(^\text{130}\) where, on the balance of probabilities, the information is false and there is a real risk that it could undermine public confidence in the independence, integrity, impartiality, or authority of the judiciary or a court.\(^\text{131}\)

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\(^{115}\) New Zealand Bill of Rights Amendment Act 2011, s 4.

\(^{116}\) See Law Commission, above n 102, at [7.60].

\(^{117}\) See Londono, above n 63.


\(^{119}\) Law Commission *Contempt in Modern New Zealand* (IP 36, May 2014).

\(^{120}\) Law Commission, above n 102.

\(^{121}\) Administration of Justice (Reform of Contempt of Court) Bill 2018 (39-1).

\(^{122}\) The Bill recently passed its third reading: see (20 August 2019) 740 NZPD.

\(^{123}\) Law Commission, above n 102, at [6.70].

\(^{124}\) At [6.70].

\(^{125}\) At [6.76].

\(^{126}\) At [6.94].

\(^{127}\) At [6.89].

\(^{128}\) At [6.83].

\(^{129}\) Administration of Justice (Reform of Contempt of Court) Bill 2018 (39-2) (select committee report) at 9.

\(^{130}\) At 9.

\(^{131}\) At 9.
The Supplementary Order Paper
A Supplementary Order Paper on 6 August 2019 proposed the reinstatement of the offence broadly – but not exactly – as originally recommended by the Law Commission. The proposed offence is in these terms:132

24A Offence to publish false statement about Judge or court

(1) A person commits an offence if—
   (a) the person publishes a false statement about a Judge or court; and
   (b) the person knew or ought reasonably to have known that the statement could undermine public confidence in the independence, integrity, impartiality, or authority of the judiciary or a court; and
   (c) there is a real risk that the statement could undermine public confidence in the independence, integrity, impartiality, or authority of the judiciary or a court.

(2) A person who commits an offence against subsection (1) is liable on conviction,—
   (a) in the case of an individual, to a term of imprisonment not exceeding 6 months or a fine not exceeding $25,000;
   (b) in the case of a body corporate, to a fine not exceeding $100,000.

The differences between the clause as introduced and the clause as proposed in the Supplementary Order Paper are:133
   (h) The clause in Supplementary Order Paper refers to the falsity of the statement rather than an untrue allegation or accusation.
   (i) Clause 24A(1)(b) includes a mental element required to be proven.
   (j) For an individual, the maximum term of imprisonment is six months rather than term of less than two years.

The clause proposed in the Supplementary Order Paper was inserted without change into the Bill.134 The Bill recently passed its third reading.135

For the future
By the time this paper is delivered the contempt of court offence of scandalising the court will have been abrogated, replaced by a statutory offence which I strongly suspect will not, in practice, be relied on. This is because the elements of the offence, as set out in the Bill, are more exacting than the elements of the common law offence, identified above at 0, which by 2011 had fallen into desuetude. By way of example, in respect of the statutory offence, the courts are likely to hold that mens rea (in the form of an awareness that the statement made is untrue) is an element of the offence. The s 24A(1)(b) requirement is itself likely to provide further wriggle room for a defendant and the s 24A(1)(c) requirement is one which may also cause difficulties. As well, a defendant may be minded to take advantage of the opportunity afforded by prosecution to attempt to prove (or at least re-ventilate) the offending statement about the judge.
“SCANDALISING THE COURTS AND JUDICIARY – CONTROLLING THE MEDIA”

By His Lordship Justice Constant K. Hometowu, Ghana

Introduction

According to Black’s Law Dictionary, the word “scandal” means “Disgraceful, shameful, or degrading acts or conducts; defamatory reports or rumours, especially slander”.

Similarly, the expression “scandalous matter” is defined as “A matter that is both grossly disgraceful (or defamatory) and irrelevant to the action or defence”.

The same Dictionary quotes Eugene A. Jones’ “Manual of Equity Pleadings and Practice 50-51 (1916)” in the following words “Scandal consists in the allegation of anything which is unbecoming the dignity of the court to hear, or is contrary to decency or good manners, or which charges some person with a crime not necessary to be shown in the cause, to which may be added that any unnecessary allegation, bearing cruelly upon the moral character of any individual, is also scandalous. The matter alleged, however, may not only be offensive, but also irrelevant to the cause, for however offensive it be, if it be pertinent and material to the cause, the party has the right to plead it. It may often be necessary to charge false representations, fraud and immorality, and the pleadings will not be open to objection of scandal, if the facts justify the charge.”

It also defines ‘scandalum magnatum” as “[a]ctionable slander of powerful people, specifically defamatory comments regarding high rank, such as peers, judges, or state officials.”

Illustrating this phenomenon, the author/editor quotes 3 William Blackstone’s “Commentaries on the Laws of England” which also refers to “scandalum magnatum” as “Words spoken in derogation of a peer, a judge, or other great officer of the realm, which are called scandalum magnatum, are held to be more heinous; and, though they be such as would not be actionable in the case of a common person, yet when spoken in disgrace of such a high and respectable characters, they amount to an atrocious injury; which is redressed by an action on the case founded on many ancient statutes; as well as on behalf of the slanderer, as on behalf of the party, to recover damages for the injury sustained”.

From the definition above, a reasonable inference can be drawn to mean that scandalizing the judiciary and the courts by the media is any action embarked upon by the media, in the print, electronic mainstream and social media outlets, aimed at tarnishing the image of the judiciary, denigrating members of the judiciary and bringing the reputation of the judge and or the judiciary into disrepute, in the eyes of the right thinking members of the society.

Constitutional Mandates of the Judiciary and the Media

The judicial power of Ghana is vested in the Judiciary. Article 125 (1) of the 1992 Constitution provides that “Justice emanates from the people and shall be administered in the name of the Republic by the Judiciary which shall be independent and subject to only this Constitution”. Clearly, in the exercise of judicial power, the judiciary and the courts derive authority from this provision as well as article 127 (1) which makes clear and unambiguous provision for the independence of the judiciary, explaining further that in the performance of its judicial and administrative functions, the judiciary “shall not be subject to the control or direction of any person or authority”. Embedded in the principle of judicial independence is that of decisional independence, accorded to individual judges who are empowered to take judicial decisions on issues brought before them, in accordance with relevant statutory and regulatory provisions, without interference whatsoever. It is, therefore, an understatement to say that in the performance of their functions, Judges take

inspiration from their Judicial Oath, sworn to on appointment, which stipulates that they shall “...truly and faithfully perform the functions of my office without fear or favor, affection or ill-will; and that I will at all times uphold, preserve, protect and defend the constitution and laws of the Republic of Ghana. So help me God.”

Equally important are the Constitutional provisions on the freedom and independence of the media, as guaranteed by article 162 of the same Constitution. Article 162 (5) provides that:

“All agencies of the mass media shall, at all times, be free to uphold the principles, provisions and objectives of the Constitution, and shall uphold the responsibility and accountability of the Government to the people of Ghana”.

The requirement of accountability imposes on the media a duty to ensure that the good people of Ghana are well informed about issues happening in the country. It is a Constitutional duty which the media is not expected to derogate from. However, these rights and freedoms have limitations, prescribed by the same Constitution, which specifically provides, at Article 164, that:

“The provisions of articles 162 and 163 of this Constitution are subject to the laws that are reasonably required in the interest of national security, public order, public morality and for the purpose of protecting the reputations, rights and freedoms of other persons”. [Emphasis added]

It is clear from these provisions that the intendment of the framers of the Constitution is to strengthen the institutions of state, in furtherance of democratic credentials as essential for the development of states, maintenance of safety and security of individuals in the state. The role of the media as the fourth estate of governance, entails the singular duty to “contribute to uplifting the consciousness of the citizenry and national ethos”.

These constitutional mandates are complemented by other regulatory instruments, such as the Code of Conduct of both institutions, rules of court and the principles of sanctity of the courts. There are also important international principles such as the Bangalore Principles of Judicial Conduct and Basic Principles on the Independence of the Judiciary.

In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.

Be that as it may, it appears there is misunderstanding of the rules of court and the body of laws on how to deal with cases, on the part of both the “uninformed” educated and worse of all the uneducated, including the unrepresented accused persons in court. This situation, coupled with the fact that, by their codes of conduct, judges are not permitted to deal directly with the press on cases before them – even when the cases have been adjudicated upon to finality – deepens the misunderstanding, leading to a misrepresentation that judicial processes are shrouded in mystery.

Thus, the lack or absence of “legal advice” from the bench to the media has created a situation where the later intentionally refrain from extending “kudos” to the Bench, even where sound decisions of lasting effect on members of the society in general are made.

Under these circumstances, in its avowed aim to adequately “inform” the public, many Court Correspondents, consciously or unconsciously, propagate misinformation or incomplete information relating

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138 GJA Code of Revised Code of Ethics
139 Basic Principles on the Independence of the Judiciary
to court cases, causing disaffection for the Judiciary. We must not lose sight of the fact that some members of the media display a propensity towards what can aptly be described as “sensationalism”.

Contrary to the ethics of their profession:

“The Code is meant to ensure that members of the Ghana Journalists Association adhere to the highest ethical standards, professional competence, and good behaviour in carrying out their duties.”

Also, the last of the requirements of a good journalist, according to the Ghana Journalists Association (GJA) Revised Code of Ethics, is that “A journalist shows good taste, avoids vulgarity and the use of indecent language and images”

**Scandalising the Courts in Ghana**

Mr. Chairman, permit me, at this stage, to mention some instances where the Judiciary and the Courts have been subjected to *scandalum magnatum*.

### The Ohene-Djan case

In this case, the press accused the Presiding Judge of bias, alleging that he favoured the 1st accused person, a Lawyer, by accepting a plea offer submitted by Counsel on his behalf which resulted in a conviction of manslaughter, instead of murder. It was their thinking that the Judge was motivated by considerations other than purely judicial and professional, and called for his resignation from the Bench.

### Name-calling of Judges

The description of a retired female Judge by the media as “ugly”, and giving her judgment a political coloration, a clear attack on her person, bearing no link with the substantive matter before her;

The labelling of all judges as corrupt following a judicial corruption expose in 2015 where Judges were openly insulted by the media as corrupt public officers, alleging that all Judges are corrupt, and accept bribe offers of goat and chicken.

Again, mention must be made of the recent case of a Magistrate, who complained to the Chief Justice that her court lacked adequate facilities required for the proper administration of justice, among which she mentioned lack of proper toilet facilities to ensure personal hygiene. This complain was highlighted on the airwaves, deriding the Magistrate with a nickname, “the Chamber Pot” Judge, with cartoons of a female using a “Chamber Pot”, making the rounds in both the print and social media.

### The Montie 3 case

Last but not the least, is the Montie 3 case. For purposes of brevity, I will only provide the brief facts of the Montie 3 case, which, in my humble opinion, squarely responds to the issues under discussion.

The case was presided over by the Honourable Lady Chief Justice of the Republic of Ghana, Justice Sophia A. B. Akuffo, who incidentally and happily is in our midst. It succinctly digests the question of scandalizing the Judiciary and the Courts.

In that case, the 3rd and 4th contemnors, wilfully, attacked the then Chief Justice, whom they mentioned by name, and accusing her and the rest of the court of favoring the plaintiffs in *Abu Ramadan & Anor v Electoral Commission & Anor* while exhibiting bias against the Electoral Commission. They alleged that the Court was motivated by a desire to assist the opposition New Patriotic Party (NPP) in the forthcoming elections. They defied, insulted and lowered the authority of the Court when they stated that they will not accept the decision of the court on the voters’ register and they incited listeners in the general public to reject it. Statements that attempt to dictate the orders or other dispositions that a Court should make or should not make are calculated to interfere with and obstruct the course of justice and thereby bring the authority of the

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140 Paragraph 2 of the Preamble to the GJA Revised Code of Ethics
141 The Republic v. Ohene-Djan and Another, 7 Rev. Ghana L. 183 (1975)
court and the administration of justice into disrepute. That is exactly what the 3rd and 4th contemnors did when they threatened to deal with the judges if, in a motion filed by the applicants in CM/J/108/2016 intituled Abu Ramadan & Anor v Electoral Commission & Anor, the Court delivered a verdict that displeased them. They cruelly and callously reminded the justices of the murder of three High Court Judges on 30th June, 1982 (a day that will forever remain in the annals of this country as a day of infamy). This was, doubtlessly, intended to browbeat and prevent the court from performing its duty to administer justice as it deemed fit.

Worst of all, they used and directed unprintable words against the person of the then Chief Justice. Obviously, the attack, which was directed at the Chief Justice of the Republic of Ghana and the Supreme Court of the land, amounts to criminal contempt of the Judiciary.

They were arraigned before the apex court, on charges of contempt of court, whereupon they accepted criminal liability. The Court sentenced the 2nd, 3rd and 4th contemnors to four (4) months imprisonment each. In addition, the contemnors were each ordered to pay a fine of Gh Cedis 10,000.00 or in default serve another period of one (1) month imprisonment, to run concurrently.

In its ruling, and giving reasons for the length of sentence imposed on the contemnors, the Court observed as follows:

“…we realize that reckless attacks on judges of this court in particular and the Judiciary in general have become rampant in recent times and appear to be escalating in outrageousness and temerity. We need to make it universally unattractive for any person to indulge in such conduct. Despite the fact that four persons were punished for contempt of this Court during the Presidential Election Petition hearings in 2013, we have noticed a resurgence of contumacious statements about the court that have the tendency to bring the administration of justice into disrepute. We need to remind people who decide to criticize the Judiciary that within the right to publish and transmit, within the freedom of expression, there is a line that ought not to be crossed. This is encapsulated in the Directive Principles of State Policy, Article 41 which states, inter alia, that:

“The exercise and enjoyment of rights and freedoms is inseparable from the performance of duties and obligations, and accordingly, it shall be the duty of every citizen -

a) to promote the prestige and good name of Ghana and respect the symbols of the nation;
b) to uphold and defend this Constitution and the law;
c) to foster national unity and live in harmony with others;
d) to respect the rights, freedoms and legitimate interests of others, and generally to refrain from doing acts detrimental to the welfare of other persons;
e) to work conscientiously in his lawfully chosen occupation;
   i. to co-operate with lawful agencies in the maintenance of law and order

In these regards the contemnors have failed dismally. It is on account of the preceding observations that we sentence the contemnors herein”.

Following this case, other situations have arisen which seem to support the view that incidences of scandalizing the judiciary and the courts in Ghana is on the increase. It is unclear what accounts for this state of affairs. One can only draw inferences therefrom.

Inference
The following are some of the inferences that can be drawn from such activities: love for sensationalism by the media; bias; propaganda; ignorance; financial considerations and political reasons.

The consequences of these activities by the media on the judiciary and the courts are grave and serious. They include, but not limited to, lack of trust in the judiciary and the courts, disaffection towards members of the Bench, and exposing the judiciary and the courts to public ridicule.

May I pause here and ask the nagging question whether or not the sanctity of the courts and judges no longer matter.
Permit me to indicate that, in the words of Honourable Lady Chief Justice of the Republic of Ghana, Her Ladyship Justice Sophia A. B. Akuffo, “Law is the noble profession; not a noble profession” [Emphasis added]. Judgeship is therefore the practice of the noble profession and as such, Judges should be held in high esteem by members of the public.

Similarly, Solomon Kwami Tetteh cited the dictum of Crampton J in the case of *R. v O’Connel*, in his book “Civil Procedure: A Practical Approach”, in the following words:

“This court in which we sit is a temple of justice; and the advocates at the Bar as well as the judge upon the Bench are equally ministers in that temple. The object of all equally should be the attainment of justice; now justice is only to be reached through the ascertained of the truth, and the instrument which our law presents to us for the ascertained of the truth … is the trial…; the trial is the process by which we endeavor to find out the truth. Slow and laborious, and perplexed and doubtful in its issue that pursuit often proves; but we all are – Judges… Advocates and Attorneys – together concerned in the search for the truth; the pursuit is a noble one, and those are honored who are the instruments engaged in it…The infirmity of human nature, and the strength of human passion, may lead us to take false views, and sometimes to embarrass and retard rather than to assist in attaining the great object; the imagination and the feelings may all lead us in the chase – but let us never forget our high vocation as ministers of justice and interpreters of the law; let us never forget that the advancement of justice and the ascertained of the truth are higher objects and nobler results than any which in this place we can propose to ourselves. Let us never forget the Christian maxim, “That we should not do evil that good may come of it”

Scandalizing the judiciary and the courts is therefore a serious attack on the exercise of judicial power, an affront to the high position of judges in Ghana. This calls for decisive actions to nip the practice in the bud. The ruling of the Supreme Court in Ghana is a glaring example and I hail the bench that took such a bold decision.

**Recommendations:**
The following additional measures may be considered in ensuring that the judiciary and the courts are held in high esteem, for the protection, safety, security of citizens.

1. There is the need to advocate for responsible journalism, through capacity building of members of the media, not only during school lessons, but also as part of the continuing media education, that should engage the attention of the Ghana Journalists Association (GJA).
2. Strict enforcement of the code of ethics of the GJA, with the objective of promoting accountability, building trust and adding value to the output of journalism and media organizations, and subsequently raising the image of the profession.
3. Strategic collaboration and partnership between the two very important institutions of state, namely the judiciary and the media, will enhance the much-needed understanding of the rules of court, court procedures and access to record of proceedings to ensure accurate reportage by court correspondents and the media in general.
4. Issuance of Practice Directions to court users and the general public on how to access court proceedings, the use of cameras in court, inter alia, to address areas of friction between the judiciary and the press;
5. Journalists must be encouraged to be guided by their codes of ethics, decency, decorum and the highest standards of profession. They must be circumspect in their reportage, measured in their utterances, in tandem with their code of ethics, which prescribes, inter alia, that “The performance of the media should also ensure the preservation of law and order and provide the platform for free expression for all citizens, and not only the privileged few. This should be done with a high sense of responsibility without infringing on the rights of individuals and the society in general.”
6. Journalists who report on legal matters, including judicial proceedings, should be taken through the basics of legal education to be able to understand how the law works.
Conclusion.
Mr. Chairman, permit me to conclude my presentation by referring to the dictum of the Court in the case of Republic v Liberty Press Ltd and Ors [1968] GLR 123, at page 135, where the Court, in explaining the rationale for the power of the courts to commit for contempt of court, said as follows;

“……the important position of the Judiciary in any democratic set-up must be fully appreciated. Performing, as they are called upon to do, the sacred duty of holding the scales between the executive power of the state and the subject and protecting the fundamental liberties of the individual, the courts must not only enjoy the respect and confidence of the people among whom they operate, but also must have the means to protect that respect and confidence in order to maintain their authority. For this reason, any conduct that tends to bring the authority and administration of the law into disrespect or disregard or to interfere in any way with the course of justice becomes an offence not only against the courts but against the entire community which the courts serve.” (emphasis supplied).

In the interests of judicial accountability, I also totally subscribe to the observation made by Lord Atkin in the case of Ambard v Attorney-General of Trinidad and Tobago [1936] AC 322 at 335;

“Justice is not a cloistered virtue, she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.”

It is in this regard it becomes my thinking that it is only a strategic collaboration between the Judiciary and the Media that will advance the course of justice.

Long live Ghana; Long Live the Judiciary; Long Live CMJA!!!
Ladies and gentlemen, good afternoon.

I am very happy to be here to speak to you about the importance of non-adversarial ways of managing and resolving legal disputes, which can arise out of a whole range of transactions and interactions we have with one another every day. These can happen in different contexts, from commercial arrangements to consumer contracts, from workplace injuries to neighbour disputes. More specifically, I would like to share with you about the experience of the Singapore judiciary in employing what some would regard as non-traditional, judge-driven methods of managing disputes which end up litigated before the courts. These case management strategies have proved effective in achieving an early, cost-proportionate resolution of these cases. While the Singapore courts utilise a variety of case management tools to achieve the desired outcome of resolving disputes without the need for a trial, I shall focus on the role judicial mediation plays today.

Singapore’s integrated dispute resolution services and the role of Alternative Dispute Resolution (“ADR”)

Singapore is a thriving international dispute resolution hub. Over the years, the Singapore government has put in place policies and programmes to develop a suite of dispute resolution options to cater to the needs and priorities of different sectors and users of dispute resolution services. We have the Singapore International Commercial Court, with a panel of distinguished judges from across the common and civil law jurisdictions, to hear cross-border commercial disputes. Alternative Dispute Resolution (“ADR”) is an equally important component of the Singapore dispute resolution ecosystem, the most prominent being arbitration and mediation. In the field of arbitration, the Singapore International Arbitration Centre, has been ranked as the most preferred arbitral institution in Asia, and third out of the top 5 arbitral institutions in the world144. The Singapore Mediation Centre (SMC) and the Singapore International Mediation Centre (SIMC) are the leading private mediation service providers in Singapore.

ADR as part of the litigation process

Leaving aside arbitration, mediation is well-entrenched and developed within Singapore’s dispute resolution ecosystem.

Singapore’s ADR landscape is broadly divided into two parts: ADR processes outside the court system and ADR within the court system. Within the court system itself, ADR is deployed in conjunction with two case management regimes. The first regime is the Court Dispute Resolution regime, or CDR for short, which is helmed by judges and is a part of the case management framework in the State Courts. As an aside, I should add that the notion of judges conducting the mediation proper or presiding over the settlement negotiations between parties is not unique to Singapore – this is also done in both common law and civil law countries, including Australia (Federal Court of Australia), New Zealand, Canada (Ontario), Japan, Korea and Germany. Of course, the judge presiding over the mediation or negotiation process cannot go on to hear the trial should the case not be resolved.

The second regime operates in the Supreme Court of Singapore, which comprises the High Court and the Court of Appeal, and entails the referral of suitable cases for mediation. One key difference between the two

144 According to the Queen Mary University of London International Arbitration Survey (QMUL Survey) released on 9 May 2018.
regimes is that judges conduct the mediation themselves as part of the CDR process in the State Courts, while in the Supreme Court, judges do not do so.

I shall elaborate on the two regimes later in my talk, but before that, it will be useful to explain the background to the institutional push for the amicable, non-adversarial resolution of claims filed in court.

Advent of judicial mediation as a case management strategy
As they say, necessity is the mother of all invention. The introduction of ADR and judicial mediation as a case management tool had its genesis in the need to clear the staggering backlog of cases which had clogged up the Singapore court system by the late 1980s. In tandem with other measures to clear the backlog such as pre-trial conferences and the introduction of the night courts, mediation was introduced as one of the case management measures to facilitate the early resolution of cases without the need for a trial.

To this end, judicial mediation was initiated as a pilot project in the then-Subordinate Courts in 1994. This allowed for mediations in civil cases to be conducted by judges in the then-Subordinate Courts as part of the pre-trial management process known as the CDR process. The project was a success and over the years, the range of CDR tools such as early neutral evaluation and facilitated negotiation was expanded and integrated into the judicial process. The State Courts have since institutionalised the CDR process as a case management strategy to facilitate the resolution of civil, community and relational disputes without the need for a trial. Mediation, early neutral evaluation and other CDR modalities are utilised during the CDR process, undergirded by the robust management of the case. To underscore the importance of the CDR process in the administration of justice, the State Courts Centre for Dispute Resolution (‘SCCDR’) was established as a separate Justice Division in 2015 to focus on the management of cases to achieve early resolution of disputes. Judges in the SCCDR, who are all experienced trial judges, undertake the case management of approximately 40% of the civil cases filed in the State Courts, and use a toolbox of case management strategies, including mediation, neutral evaluation and conciliation, to settle more than 85% of the cases SCCDR manages.

There is also pro-active management of civil cases filed in the High Court. While mediation is conducted by judges in cases filed in the District Court and the Magistrate’s Court, mediation is not led by judges in the High Court. Instead, cases which are found suitable for mediation are referred to the Singapore Mediation Centre (SMC) with the consent of parties.

The CDR process and judicial mediation
As I mentioned earlier, in the State Courts, the Court Dispute Resolution process lies at the heart of our case management strategy. What is the CDR process? Simply put, it refers to the judge-driven management of cases, with the aim of resolving disputes which are filed in court without the need for a trial. Everything that we do during the CDR process is with one objective in mind: to facilitate the amicable resolution of disputes between litigating parties.

Now, you will ask, why is there a singular emphasis on resolving cases without trial? After all, parties should be able to have their day in court if they wish to. That is so, but the fact of the matter is that the vast majority of the civil claims filed in the State Courts are low or lower value claims where there is a real risk of the cost of litigation being disproportionate to, or sometimes being higher than, the value of the claim itself. The CDR process seeks to manage costs for parties. Above all, we believe that an outcome which is voluntarily reached by parties is a more ideal one than an outcome “imposed on them” by the court.

Having spoken about our philosophical thinking behind the CDR process, I shall set out some of the practical advantages of resolving disputes in court through the CDR process. First, cases are resolved earlier. This means parties get closure earlier. Second, with earlier resolution of cases, the cost of litigation for parties will be less. Third, the uncertainty of a trial is avoided. There is hence certainty of outcome for parties. Fourth, the outcome reached by parties during the CDR process is directly enforceable – parties do not need to commence fresh proceedings to enforce the settlement agreement.
As I stated, about 40% of the civil cases in the State Courts are managed through the CDR process, including all tortious claims. Out of this group of cases, we regularly conduct early neutral evaluation for personal injury cases, including those involving medical and professional negligence, motor accident and workplace injuries. Judicial mediation is conducted for contractual disputes, trust and related claims involving family members, harassment claims, neighbour disputes and other relational and community disputes.

**Advantages of judicial mediation**

Judicial mediation presents significant advantages over an adversarial trial process. Often, the legal dispute is a manifestation of a relationship which has turned sour. Mediation seeks to preserve the relationship between parties as much as possible, and contain the conflict such that the hostility common in litigation can be avoided or minimised.\(^{145}\) In contrast, the trial process is a zero-sum game – there will always be winners and losers.

Mediation also provides flexibility by allowing for creative solutions in settling cases.\(^{146}\) It is not hampered by procedural formalities, laws and regulations that the trial process requires, thereby allowing parties to find solutions tailored to their own case.\(^{147}\)

**Legal framework to support judicial mediation**

The importance of the role of judicial mediation in the management of cases in the lower courts is reflected in the Practice Directions and the Rules of Court. The Practice Directions prescribe that a presumption of CDR or ADR applies for all civil cases\(^ {148}\). Parties can choose to opt out of the CDR or ADR process, although costs sanctions may be imposed under the Rules of Court where parties unreasonably refuse to consider mediation.\(^ {149}\)

For civil claims filed in the Magistrate’s Court, which has a jurisdiction of up to S$60,000, Order 108 Rule 3(3) of the Rules of Court also empowers the court to make an order directing that a Magistrate’s Court action be referred for resolution by an ADR process (usually mediation) if the court is of the view that doing so would facilitate the resolution of the dispute between the parties.

Statutory backing to support judicial mediation is also given in respect of other types of claims. For instance, minor criminal offences brought by way of Magistrate’s Complaints are also regularly referred for judicial mediation pursuant to the powers under the Criminal Procedure Code\(^ {150}\). The Registrar or tribunal judge is also statutorily empowered to refer parties involved in community disputes to go for mediation even without the consent of the parties to the claim.\(^ {151}\) The court also has the power to direct parties to proceed for mediation\(^ {152}\) for cases filed under the Protection from Harassment Act (“POHA”).

**Role of mediation in high-value claims**

I have thus far focused on how judicial mediation facilitates the resolution of lower-value or high-street claims and relational disputes, which form the bread and butter of the work of the State Courts.

Although in-house judicial mediation is not conducted for high-value claims, the emphasis placed on mediation as an ADR modality equally applies to claims filed in the High Court. Where mediation is deemed suitable, the registrar or judge overseeing the management of the case will refer it to the Singapore Mediation Centre (“SMC) for mediation.

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148 State Courts Practice Directions paragraph 35(9).

149 See Order 59, rule 5(c) of the Rules of Court and the State Courts Practice Directions paragraph 36(12).


151 Community Disputes Resolution Act 2015 (No.7 of 2015) s 30(1).

152 See s 12(3) POHA.
There is a close partnership between the SMC and the Supreme Court, with a High Court Judge as Chairperson of the SMC. In 2017, more than half of the cases that proceeded to mediation at the SMC were referrals from the Supreme Court. From 1997 to 2018, 2,285 matters from the High Court were referred to the SMC, of which 69.3% were settled. 79 cases were also referred from the Court of Appeal to the SMC, of which 40.79% were settled.

Like in the State Courts, in exercising its discretion as to costs, the High Court and the Court of Appeal can take into account the parties’ conduct in relation to any attempt at resolving the dispute through mediation or other forms of ADR. This empowers the court to impose cost sanctions should a party unjustifiably refuse mediation or has attempted mediation in bad faith. In fact, the Court of Appeal, which is the highest court of the land, did just that in one case by ordering each party to bear its own costs for the entire proceedings “in light of the questionable conduct of both of the Parties that has in turn stoked sterile litigation”.

The SMC has a strong track record in mediation. More than 4,000 matters have been mediated at the SMC, with a settlement rate of 70%, of which 90% of settled cases were resolved within one working day. Of the over 1,700 disputants who participated in mediations at the SMC, over 84% reported saving costs, and over 88% reported saving time.

Apart from conducting mediations for Supreme Court cases and other private disputes outside the court system, the SMC is also the main mediation and training accreditation centre in Singapore. The SMC conducts training courses, which lead to accreditation with the SMC as well as the Singapore International Mediation Institute.

You would have received a fact sheet on the SMC in your conference package, which provides more information about the SMC’s services.

**Looking ahead – the future of mediation as a dispute resolution modality of choice**

Having mapped the mediation landscape both within and outside the judicial system, what then lies ahead for the role of mediation in the resolution of disputes?

**Singapore Convention on Mediation**

As you might have read in the news, the United Nations Convention on International Settlement Agreements Resulting from Mediation – also known as the Singapore Convention on Mediation - was signed in Singapore on 7 August 2019 by 46 countries, including many member countries of the CMJA. The Singapore Convention seeks to improve cross-jurisdictional enforceability of mediated agreements, and allows parties to invoke settlement agreements in courts of other jurisdictions to prove that matters have already been resolved. This Convention will boost the role of mediation in solving high-value, cross-border commercial disputes.

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**Mediation Act**

Under Singapore law, with the enactment of the Mediation Act in 2017, mediated settlements of disputes outside the court system can also be enforced as consent orders. The Act also helps to provide clarity in the areas of confidentiality of mediation communications, and the possibility of a stay of legal proceedings pending mediation.\(^{161}\)

**International Framework for Court Excellence**

The central importance of the CDR process, including judicial mediation, is enshrined in the Singapore model of the International Framework for Court Excellence (IFCE). The IFCE is a framework of values, concepts and tools with which courts can assess themselves with the aim of improving the administration of justice. The IFCE was developed by the State Courts of Singapore, together with the Australasian Institute of Judicial Administration, the United States’ Federal Judicial Centre and the United States National Centre for State Courts. Under the Singapore model of the IFCE, the effectiveness of the use of the CDR process and related modalities is one of the key outcomes of the court process which is measured in assessing if the courts are keeping abreast with societal needs. I shall be happy to share more about IFCE framework during our discussion after my talk.

With all these measures both at the domestic and international levels, I am confident that the role of the Court Dispute Resolution process, and that of mediation, in particular, as a modality of choice in the dispute resolution landscape, will continue to increase.

To complement the CDR process, the State Courts have embarked on the development of an Online Dispute Resolution system or ODR system to manage motor accident claims, which make up almost 30% of the civil caseload in the State Courts. The ODR platform will comprise an outcome predictor or simulator, as well as a negotiating platform for settlement, to help parties to settle their disputes even before the claim is filed in court. Should they need to take their case further by filing a writ in court, the ODR system will allow pre-trial case management conferences, or CDR sessions as they are known, to be conducted by judges online without the need for counsel and the parties to attend personally in court. The ODR system represents the next phase of the Singapore’s judiciary journey in utilising non-adversarial methods to settle disputes without the need for a trial. This and other technology initiatives will further modernise and digitalise the court’s services, and in turn increase access to justice by simplifying processes and reducing costs for parties.

**Concluding remarks**

In the final analysis, I am confident that the problem-solving, non-adversarial approach to dealing with disputes, both big and small, will play an increasingly significant role around the world. On our part, the Singapore judiciary will be happy to share more with the members of the CMJA on our experience in this area. We also hope to link up with all like-minded judiciaries and judicial officers to form a network or community of practice in the area of judge-led court dispute resolution and judicial mediation.

I hope to be able to continue this conversation with my fellow judges and magistrates in the days and years to come.

Thank you for your time.

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\(^{161}\) See Mediation Act 2017 (No.1 of 2017) s 8, 9, 10 and 12.
GRASSROOT AND RELIGIOUS COURTS – DO THEY DISPENSE JUSTICE?

By His Worship Eric Daning, Ghana

This presentation was made on behalf of Justice Daning.

Chairperson distinguished ladies and gentlemen, all protocol observed. Honorable chair, permit me to state that it is indeed commendable that the organizers of this year's conference designed the programs to include this all important topic. This is because all we do as Judges and Magistrates of the commonwealth is to dispense justice.

WHAT THEN IS JUSTICE
Justice is one of the most important moral and political concepts. The word comes from the Latin ius, meaning right or law. The Oxford Dictionary defines the “just” person as one who typically does what is morally “right” and is disposed to giving everyone his or her due, offering the word fair as a synonym. But philosophers want to get beyond etymology and dictionary definitions to consider for example, the nature of justice as both a moral virtue of character and a desirable quality of political society as well as how it applies to ethical and social decision making.

According to Aristotle, justice consists in what is lawful and fair, with fairness involving equitable distributions and the correction of what is inequitable. We often hear the much talk about justice without discrimination and in some cases the saying that justice must not only be done but it must be seen to be done – in other words, justice when done must be felt by the people or institutions who seek justice.

Justice therefore is dispensed by people and institutions varying from one geographical area to the other or from one environment to another and deeply rooted in justice delivery is the socio-political culture of any group of people be it family, ethnic group, religious organization, social grouping or even a county. In the contemporary era justice delivery seems to be centered around the Courts and the judicial system and one can go, or is allowed to pursue his/her right from the lowest Court of the land to the highest Court of the land, i.e. from the first Court of instance to the final appellate Court beyond which one may not be able to pursue any further.

Under the traditional adversarial Court system, the application of the substantive law and the procedural law have always provided standards which require strict adherence and observance by the various stakeholders who risk losing their cases not necessarily on merit but sometimes due painfully to technicalities. Justice which must be seen to be done can only be seen to have been done depending on the orientation of the person(S) assessing justice, the culture of the people and other social norms. So the institutions delivering justice therefore become as important as the word justice itself.

Whether or not justice can be dispensed only by the Courts is not a question which is difficult to answer because in times before the traditional Court system, disputes were resolved through other means and processes distinct from the application of substantive and procedural laws in dispensing justice. The role of justice delivery prior to the introduction of the adversarial Court system was to a large extent played by the Court system that can best be described as the GRASSROOT COURTS OR THE RELIGIOUS COURTS where the disputes involved persons of the same family, community, faith, the clergy or church property or property belonging to the religious group and inheritance.

COMPOSITION/JURISDICTION
The Grassroot Courts, which are basically part of communities in the early days, was constituted by family heads, opinion leaders, elders of local communities, kings and queens. Their area of jurisdiction covered both civil and criminal matters such as divorce, chieftaincy, adultery, inheritance, succession, property rights, slander, chieftaincy, assault and stealing. At the time prior to the introduction of the modern Court system,
Grassroot Courts administered justice strictly by the application of natural wisdom and common sense and one could become a ‘judge’ over his people not because he/she has qualified from any formal training but simply by the fact that he is either an elder in a family or community or comes from the royal family or is even the chief or queen of the community. The Grassroot Courts still operates in a similar fashion in some parts of the modern society.

**PUNISHMENT**

The Grassroot Courts in the medieval era did have various forms of punishments depending on the civil wrong or the crime and also on the severity of one’s crime according to the consideration by the various communities and the punishment ranges from fines, imprisonment, restitution, pacifying the ‘gods’, banishment or even death penalty.

In the modern constitutional era the criminal jurisdiction has been taken away from the Grassroot Courts leaving it mostly with only civil jurisdiction over matters such as land disputes, customary marriage, divorces, slander and chieftaincy matters strictly by the application of customary laws. The Grassroot Courts do not have unified rules with which they dispense justice because they are largely community or ethnic based and the norms, values and cultures that influence the decisions differ from one community to the other. This practice has existed long before the colonial era in Ghana and even with the introduction of the modern Court system, the practice is still very prevalent in the judicial system of Ghana.

In 1915, a case of breach of promise to marry involving two Ghanaians was decided by a chief called Nana Sir Ofori Atta I, the then paramount chief of the Akim Abuakwa traditional area. In that case the plaintiff lodged a complaint before the Court of the paramount chief on 24th April 1915. The plaintiff and defendant had orally agreed to get married under customary law in the hope that the marriage would take place. The plaintiff presented to the defendant a necklace but the defendant refused to marry the plaintiff and so the plaintiff brought an action before the chief’s Court claiming damages. The Court awarded damages and ordered the return of the necklace to the plaintiff. With the advent of the modern Court system the customary laws as applicable to the various communities of Ghana did not have recognition and acceptance at courts and at best the customary law could be considered as a statement of fact to be presented by a member of the community who is believed to have a better understanding of the customary law of the area. However in today Ghana, customary law is a matter of law to be determined by the Court and so its recognition and acceptance is not in dispute since it has been given both legislative and constitutional backing. Section 54 of Ghana’s Courts Act,1993 (Act 459) as amended provided the legislative backing to or customary laws and Article 11 of Ghana’s 1992 constitution makes the customary laws of Ghana a part of the laws of Ghana and in the same constitution in its articles 270(1), 273(1) and (2) and 274(4) and (5) as well as Section 29 of the chieftaincy Act, 2008 (Act 759) have provided the necessary guarantees and safeguards for the operation of customary laws and its application over matters of custom and chieftaincy using these for the resolution of disputes which when are validly done are not merely recognized by the Courts but enforceable at the Courts. The Grassroot Courts apply basically customary arbitration, settlement and negotiated settlement in resolving disputes. To some extent, the principle of the audi alteram patem is practiced and has been practiced over the years at least because a person was not and is not to be condemned unheard. The elders or chiefs who preside over disputes sometimes visit the locus to ascertain boundary features to inform their decisions. Consent fees are paid to signify one’s consent to be bound by the award when it is made and witnesses are allowed to testify. Also cross examinations are allowed and in some cases documents are inspected if any as well as proceedings recorded in written forms to ensure their permanence. The customary law practices in Ghana, which is very similar to the customary laws of Nigeria, have been maintained over the years especially in the areas of marriage, divorce and child custody. In the ‘frafra’ custom of Ghana as well as some parts of Nigeria, a married woman who without divorcing the husband goes to have children outside the marriage is under custom to give custody of the said children to the original husband since the custom recognizes him as the father of the children from the other man. If such a situation should come before the traditional court the justice expected in that case is that the husband must be declared the father which is still in practice except where one seeks redress at the law Court where paternity is determined not by the application of custom but by the strict application of the law and evidence.
On the other hand, the religious Courts which are presided over by priests, Islamic leaders and scholars also dispense justice either by the application of settlement procedures or the Shariah law. The Christian religion largely apply the rules of settlement and arbitration without criminal jurisdiction in modern era and it basically deals with marriage, maintenance, property rights and other matters covered by the particular faith. To a large extent, the Christian Courts do not have any kind of criminal punishment except to excommunicate a defaulter at the worst case scenario or sometimes suspension for some period. It is more of civil nature without any criminal jurisdiction but it is largely effective when it deals with matters involving the priests and church property. The Roman Catholic Church claims competence to judge cases or matters which are spiritual or linked to the spiritual (canon 1401,19) and cases involving violation of ecclesiastical laws to determine guilt and impose penalties. However only Roman Catholics are bound by or subject of the Code of Canon law.

Under the Canon law a person charged can respond personally unless the judge considers the services of an advocate to be necessary. However in penal trials the accused must be invited to appoint an advocate within a specified time limit. Strictly speaking Christian religious Courts apply largely the system of adjudication similar to that of the Grassroot Courts with the difference coming from the Individuals who preside over these Courts. The religious Courts have trained personnel to act as judges with some qualifying experts either in Canon laws or the ecclesiastical Court or the Shariah law.

The Shariah law is quite popular due largely to what many consider as harsh punishments. The punishments at Shariah Courts ranges from corporal punishment, amputations, stoning to death etc. the evidence of a male witness in a Shariah Court is worth that of two women and in some instances female witnesses are not allowed to testify except in cases relating to childbirth or pregnancy.

In the Islamic Shariah Courts the laws are based on the Quran and the Hadith which are interpreted by the MUFTIS (jurists) using what is called the Fiqhi. From the interpretations by the MUFTIS certain crimes considered to be against God such as the crime of unlawful sex (zina) including fornication, adultery, drinking alcohol, stealing or robbery attract the worse form of punishments. Stealing may attract the amputation of one’s arm and an adulterous woman can be stoned to death even though it is not commonly practiced, a good number of Shariah law practicing countries have the laws in place with the commonest one being the lashing or flocking of offenders.

- If these are indeed aimed at dispensing justice then why will any man or group of persons try to punish others for sinning against God or Allah?
- Is this God incapable of fighting or punishing for himself?

The answers to these questions raise some serious justice issues when justice is viewed in the universal sense as against the relativity argument.

In Quran Chapter 4 the male child is to be given twice the property to be given to his sister and he is expected to support the sister financially. The world having become a global unit universalism of cultures which included justice delivery in my candid opinion is preferable to cultural relativism. In the light of this universalism Brunei’s death penalty at the Shariah Court for homosexuals received worldwide condemnation mostly from human rights organizations which succeeded in causing its application to be somehow suspended if not discontinued. Countries such as India, Pakistan, Saudi Arabia and Nigeria all practice Shariah and these punishments are all applicable excerpt to say that in recent years its applicability in the face of international condemnation has been slow. In Quarter, flocking is still the punishment for alcohol consumption by Muslims or sexual offences. In Nigeria 12 out of its 36 states practice Shariah law.

**ARE THERE ANY BENEFITS FROM THE PROCESSES BY WHICH THE GRASSROOT AND THE RELIGIOUS COURTS DISPENSE JUSTICE?**

- The Grassroot Courts deals with disputes so expeditiously that persons who patronize them get results within record times.
- It is less expensive and easily accessible by all regardless of one’s education or social status.
• It does justice without acrimony.
• The Grassroot Court environment is more user friendly.
• It is more participatory.
• It is devoid of technicalities.
• Users easily appreciate the proceedings and therefore have confidence and trust in the outcome.
• It serves as an avenue to unite disputing family members.
• It does not lead to loss of properties through needless injunctions.
• The Grassroot and religious Courts through their dispute resolution mechanism contribute to the efficient and effective case management of the traditional Courts by reducing case loads of these Courts.

DRAWBACKS AND CHALLENGES
• Can we say that Grassroot and religious Courts dispense justice only because to some extent the audi alterem pertem is applied?
• How come that in some instances females are not allowed to testify?
• How come that even where female witnesses are allowed a male’s testimony is worth the testimony of two females?
• How come the male child under Islamic law gets twice that of a female child in the distribution of properties from their deceased parents?
• How is Nemo Judex in causa sua applied especially in the Grassroot Courts?
• What is the standard of behavior expected of a judge of the Grassroot Courts?
• At what point must a judge of the Grassroot Court recuse himself?
• How is conflict of interest determined at the Grassroot and religious Courts?
• How can a person appeal against the decision of the first Court when it is handled by the king or paramount chief?
• How and where were these judges of the Grassroot Courts trained to sit in judgment over their people?
• Are the bishops of the churches and jurists of the shariah Courts or the chiefs, queens and kings subject to the same set of laws?
• Is equality before the law applicable?

The challenges of the Grassroot and religious Courts as envisaged by the answers to the above questions notwithstanding, it is still an integral part of the judicial system of many countries especially in Africa. It dispense some form of justice but as to what extent must be the subject for global conversation for the benefit of mankind.

The Grassroot Courts as it operates in Ghana has had its rules codified under part III of the Alternative Dispute Resolution Act 2010 (Act 798) and some of the practices have found its way into the resolution of commercial disputes in Ghana under the High Court civil procedure rules, 2004 (CI 47).

In conclusion, Grassroot and Religious court can be said to be dispensing justice to some extent but the need for reforms cannot in any way and by any measure be underestimated. This calls for a concerted collaboration in a global sense to improve on the gains so far achieved because injustice anywhere is said to be injustice everywhere.

Thank you.
“HUMAN RIGHTS ABUSE AND WITCHCRAFT VIOLENCE”

By Justice Agudo Taiwo, Nigeria

INTRODUCTION
Witchcraft-related violence is an ongoing human rights issue throughout the world. Witch-hunting and witchcraft related crimes are found in more than 70 developing and in some developed countries. Epidemics of violence against alleged witches, mainly women, the elderly children and the mentally disturbed is on the increase in some parts of the world. Evidence from Africa over the past couple of centuries show no sign that witchcraft narratives lose their plausibility as a result of people being told that witches do not exist. Accusations of witchcraft are occurring today in communities around the globe. Startling accounts of torture, starvation, abandonment and deaths have been documented.

What are human rights?
Human rights are the basic rights and freedoms, which belong to every person in the world from birth until death. These basic rights are based on shared values like dignity, fairness, equality, respect and independence. They are moral principles or norms that describe that certain standards of human behaviour are regularly protected as natural and legal rights in municipal and international law. For example, in Britain human rights are protected by the Human Rights Act 1998. They are fundamental rights, which are international, universal inherent in all human beings regardless of their nation, sex, colour, language, religion, ethnic origin or any other status.

All men are created equal, that they are endowed by certain unalienable rights (such as life, liberty and the pursuit of happiness) that can never be taken away although they can be sometimes restricted for example when the person breaks the law, or in the interest of national security.

The term “Human rights” encompasses a wide variety of rights such as right to a fair trial, right to life, liberty, personal security, freedom from torture and degrading treatment, the right to equality before the law, freedom of speech, right to education, freedom of movement etc.

The atrocities of the Second World War made the protection of Human Rights an international priority which in turn allowed 50 member States to contribute to the Universal Declaration of Human Rights (UDHR) adopted by the United Nations in 1948. It is the first comprehensive human rights instrument to be proclaimed by a universal international organization bill that enumerates human rights and fundamental freedoms. Since then many countries have accepted the provisions of the UDHR and have codified such provisions as their domestic laws.

Human Rights in Nigeria are fundamental in that they are entrenched and protected under Chapter IV Sections 33 to 44 of the amended 1999 Nigeria Constitution. The Constitution guarantees fundamental rights that are constantly in violation.

What is human rights abuse?
Merriam-Webster dictionary defines human rights abuse as a violation of the basic rights of people by treating them wrongly. Human rights advocates agree that 60 years after, the issue of Universal Declaration of Human Rights is still more of a dream than a reality.

Examples of human rights abuse and violations in Nigeria
There is intensified violence by Boko Haram (an Islamic terrorist group that focuses its attacks on government officials, Christians and fellow Muslims who cite corruption committed by the national Government as well as increased Western influence as the primary reason for their violent actions). This sect is responsible for killings, bombings and other attacks throughout the country, resulting in numerous deaths,
injuries and widespread destruction of properties. In 2014, Boko Haram drew international attention from its April 14 kidnap of over 200 Chibog schoolgirls from a school. According to UNICEF report, Boko Haram abducted more than 1000 children between 2013 and 2018. Over 100 girls are yet to return home even after five years of the incident.

Human right abuse by the Government of Nigeria
Nigeria security forces are frequently alleged to carry out arbitrary arrests, torture, killings, beatings, arbitrary detentions, forced disappearance, assassinations and extra judicial summary executions. These abuses typically, are directed against political and sometimes religious organisations and individuals. Other serious human rights abuse includes abridgment of citizens right to change their government due to election fraud and other irregularities, prolonged pre-trial detention, denial of fair public trial, executive influence on the judiciary and judicial corruption, restriction of freedom of speech, assembly, religion and movement; official corruption, violence and discrimination against women, killing of children suspected of witchcraft, child sexual exploitation, ethnic, regional and religious discrimination, trafficking in persons for the purpose of prostitution and forced labour and discrimination against persons with disabilities.

Twelve Northern States of Nigeria adopted some form of Sharia into their criminal statutes.

Human rights abuse by men of the Police force
The Nigeria Police force has been viewed generally as inefficient and corrupt. The recent reorganization of the Nigeria Police force has now improved the situation. There is now better response by the Police Force to the Boko Haram attacks. In other areas, the heavy-handed approach by members of the Police Force violates human rights with lack of access to a fair trial and use of discriminatory techniques to determine perpetrators of violence. Within the Police Force there is corruption which includes extortions and embezzlement.

Women’s rights abuse
Women in Nigeria face various human rights violations despite the provisions granted unto them in the 1999 Constitution. Women are subject to cultural pressures which are inconsistent with human rights. Generally, women do not take the opportunity provided to challenge the violations in courts. Traditionally, the Nigeria society dictates that the woman’s primary role in the family is that of mother or housewife rather than as a career person. In some cultures when a man dies his wife must initially go into seclusion, they are not allowed to shower, shave or change their clothing. These practises are prevalent more in the South-East of Nigeria particularly in Imo, Abia and Anambra States. Culturally in some cases women are viewed as property that can be inherited like the rest of the husband’s estate. Sometimes a widow is required to drink the water used in washing the husband’s corpse, and swear to an oath that she was not responsible for his death.

Performance of widowhood rites and denial from inheriting husband’s property constitute another infringement of the woman’s rights to dignity and freedom from discrimination based on sex as provided for under the Nigeria Constitution. For example, Section 33 of the Constitution states that “every person has a right to life” while Section 34 provides that “no person shall be subjected to torture or to inhuman and degrading treatment”. These practises which infringe on the human rights of women are however declining.

Women’s property (ownership and inheritance) rights
Women’s property rights are property and inheritance rights enjoyed by them within the society. Under customary law only men have the right to own land and a widow cannot inherit marital property. Sharia law does not allow women access to real property. However, in certain States women are given the right to own and dispose of property including land and are allowed equal access to courts of law for justice and legal remedies. The patterns and rights of property ownership vary between societies and are influenced by cultural, racial, political and legal factors. Section 43 of the Nigeria Constitution provides that every citizen (irrespective of sex) of Nigeria shall have the right to acquire and own immovable property anywhere in Nigeria while Section 42 of the Constitution prohibits discrimination based on sex.
The Nigeria Supreme Court on the 14th of April 2014 in a unanimous decision confirmed decisions of two lower courts which had found unconstitutional an Igbo customary law of succession excluding female offspring from eligibility to inherit the property of their fathers.

**Child labour and child marriage**

According to the U.S. Department of Labour, 31% of Nigeria children aged 5 to 14 years old are engaged in forced labour in various sectors. They take part in the production of cocoa, cassava and sometimes they are in the mining industry and quarry crushing gravel and granite. Rather than attend school 50% of children living in the rural areas spend an average of 20 hours a week working.

Early marriage is also prevalent in Nigeria especially amongst the Muslims in the north due to the belief that early marriage prevents promiscuity whereas the real reason is poverty. When children aged 9, are married away they are susceptible to diseases and domestic violence. The Nigeria Child Rights Act 2003 Sections 21 and 23 thereof makes it illegal to marry a child below the age of 18. This Act competes with Sharia Law in some states as well with customs and cultural expectations in different regions. The Child Right Act has not been enacted in 13 out of the 36 States of Nigeria.

**Corruption**

Nigeria has been labelled as having one of the world’s highest levels of corruption. Politicians also often siphon public funds to further their political careers and pay people to aid them in rigging elections. Elections during the military rule occurring in 1999, 2003 and 2007 were bloody affairs and were openly rigged. There was ballot snatching, ballot box stuffing and making up of results. The Human Rights Watch stated that violence and intimidations discouraged the general public from voting. However, the Fourth Republic of Nigeria has strengthened the laws against corruption with the establishment of the ICPC (Independent Corrupt Practices Commission and the EFCC (Economic and Financial Crimes Commission). Though these anti-corruption institutions have been attempting to combat corruption they have not been very heavy handed in terms of punishment.

**Violence**

Despite intensive lobbying efforts of women’s rights organisations in Nigeria, the legislature has yet to pass into law 9 draft bills on violence against women, including bills prohibiting domestic violence, female mutilation and sexual offences. It is estimated that 20% of women are victims of domestic violence and such violence is condoned by the society. There is no specific legislation sanctioning domestic violence and marital rape is not criminalised. Despite passage of laws in many States prohibiting female genital mutilation (FGM) the practise remains widespread. It is estimated in the 2007 World Health Organisation study which reported that across the country 20% of women aged 15 - 49 have undergone some form of FGM and the area with the highest prevalence is the Southern Nigeria. Examples of female genital mutilations still occur in different cultures in Africa, Asia and South America.

**Human trafficking**

Similarly, we hear of women who travel from Kenya to work as maids in the Middle East. Mary, a Kenyan woman, was sent to work as maid and was burnt while working as a maid. She was sent back home but died eventually of injuries one month after she was sent back to Kenya. Travelling out of Kenya by women working as domestic workers was banned in 2012. When the ban was lifted recently agents entered new deals and took the women to work in Saudi Arabia, Jordan, and Lebanon where women were raped and sexually abused. These abuses are usually unreported.

In Nigeria human traffickers (who come mainly from Edo and Delta States of Nigeria) use cultural beliefs in juju to blackmail their victims. Traditional priests are paid to carry out ceremonies where the victims are made to swear and undergo juju ritual in shrines as they take oath of obedience to the trafficker. The belief by the victim that she is being watched is so powerful so she feels compelled to comply with the instructions and that to do otherwise would risk death. We have Nigerian women travelling by sea to Italy as sex workers. The work of the IOC (International Organization for Migration) has been stretched to its limits.
In 2016 one Lizzy Idahosa was jailed for 8 years for human trafficking. She arranged with a Nigerian witch doctor who made women take off their clothes, eat snakes and snails after which they were sent to Brighton brothel in Britain to have sex with up to 8 strangers a day believing that the black magic curses would make them go insane or die if they refused.

Attention is now being drawn to the role that Nollywood (Nigeria Theatre Practitioners) play in promoting harmful beliefs and practises in witchcraft, juju and ritual killings across Africa. The fact that many of the movies are made in English contribute to their wide appeal. While some of the movies promote Christian and Islamic faiths, many also focus on the power of witchcraft and juju.

WITCHCRAFT AND HUMAN RIGHTS
Definition of “Witch” and “Witchcraft”
The words ‘witch’ and ‘witchcraft’ is synonymous with evil spirit, sorcery, back magic, the occult or occultism, wizardry, spell casting, magic, witching, voodoo etc. A witch can be described as “a person believed to be incorrigible, with conscious tendency to kill or disable others by magical means, or someone who “secretly uses supernatural power for nefarious purposes”.

In its study on contemporary practises in Africa, UNICEF provides various definitions of witchcraft. Scholars Sally F. Moore and Todd Sanders define witchcraft as “set of discourses on morality, sociality and humanity. Far from being a set of irrational belief, they are a form of historical consciousness, a sort of social diagnostic”.

Witchcraft is also explained by Adam Ashforth, as “human activities carried out by persons presumed to have access to supernatural powers”. Some people believe that it is the practice of magic, especially black magic and the use of spells. It is not uncommon to rely on witchcraft to explain why a female passenger escaped unhurt and for that matter the only survivor in a gory accident which claimed the lives of all passengers on board a vehicle. In comparison with the Western world, Africa may be regarded as the epicentre of witchcraft and other supernatural belief systems. Primitiveness, backwardness, high illiteracy rates and low levels of scientific knowledge are partly used to explain the high presence in these beliefs in the continent. However, witchcraft is also practised in the UK, India, Tanzania, Ghana, Uganda, Papua New Guinea and many other African countries. Between the 17th and 19th Centuries witchcraft had existed in Europe, America and Africa.

FAITH BASED PERSPECTIVES ON WITCHCRAFT BELIEFS AND PRACTISES
Some religious leaders, mostly pastors in African Pentecostal churches, continue to promote the belief in witchcraft and their ability to cleanse or “deliver” people from it to enrich themselves. Children are the primary targets of such persons and the boom in revivalist churches is undoubtedly closely related to the accusations of witchcraft against children. It goes this way. A pastor is paid to deliver a child accused of witchcraft usually by means of exorcism or deliverance ceremony which is often violent and abusive. They are also forced to drink dangerous substances in order to purge themselves of the perceived evil.

A very good example is that of a Nigerian Pastor Helen Ukpabio of the Liberty Gospel Church, Lagos who says that there is hardly any family without witchcraft possession. She therefore encourages her congregation to seek spiritual warfare by making offerings to her ever-growing church. Despite large scale international attention of her activities and being deported from the UK due to preaching about witchcraft she continues to deliver “special warfare programmes” in Nigeria.

Some Christian pastors in Nigeria were reported in 2009 of being involved in the torturing and killing of children accused of witchcraft. The Telegraph reported by Katharine Houreld on the 20th of October 2009 that a church burned witchcraft children. It was reported that a 9-year-old boy was accused of being a witch by the family doctor. The boy’s father tried to force acid down his throat as an exorcism. In the process his face and eyes were burnt. He stated that Mount Zion Lighthouse denounced him. Pastors were involved in a large number of cases of “witchcraft children”. The parishioners take literally the Biblical exhortation, “Thou
shall not suffer a witch to live”. The families where the alleged exist are often extremely poor and sometimes relieved to have one less mouth to feed.

In Ghana the elderly women, disabled women and girls rather than men are being targeted because they are the most poor and vulnerable in the community. Suspicions are so common (at least in the rural areas) that everyone knows an elderly woman who has been suspected of being a witch. If an alleged witch is confronted with exorcism, she may confess, reveal the source of her power and surrender a witchcraft substance which will be destroyed by the exorcist. At times women are subjected to witch hunts, often resulting in violent abuse, torture and death. The occurrences are many in African countries like Angola, Cameroon, Liberia, Tanzania, Uganda and Zambia. In Nigeria, many suspected witch children have been bathed in acid or lynched to death by their parents.

Attacks on perceived witches are torturous, being aimed at extracting confessions from the person. In many countries around the world, witchcraft related beliefs and practices have resulted in serious violations of human rights including beatings, banishment, cutting of body parts and amputation of limbs, torture and murder stigmatization, public disgrace, trafficking for forced labour, stoning, burning by fire, starvation burying the accused alive, abandonment and other inhuman treatments. Women, children, people with various disabilities and persons with albinism are the most vulnerable. These forms of violence can safely be described as infringements of human rights.

Despite the seriousness of these human rights abuses few judicial systems have taken steps to prevent, investigate or prosecute human rights abuses linked to beliefs in witchcraft. Beliefs and practises related to witchcraft vary considerably between different countries and even within ethnicities in the same country. There is, overall, a limited understanding of belief in witchcraft, how and why it is practised in some cultures. There are difficulties in defining ‘witches’ and ‘witchcraft’ across cultures. For example, in Nigeria ‘witches’ are usually associated with women while men are referred to as ‘wizards. Unfortunately, there is no formal mechanism put in place to monitor or respond to human right abuses associated with the belief that some persons are witches or wizards who practice witchcraft. The reports of abuses related to such practises are few while the exact number of victims of such abuses is unknown because the figure is widely believed to be under-reported. It is believed that, each year, there are at the very least thousands of cases of people accused of witchcraft globally, often with fatal consequences, and others are mutilated and killed for witchcraft-related rituals. There are reports, though not readily verifiable, that these numbers are increasing, with cases becoming more violent, the practices spreading with new classes of victims being created. Poverty, conflict and poor education lay the foundation for accusations which are triggered by the death of a relative or the loss of a job. When a family or community is under pressure it is associated with beliefs that someone is responsible for the negative changes; usually they are children who are defenceless. Where in Nigeria so many children are accused of witchcraft many have been murdered or set on fire.

The idea of witchcraft is not new but has taken more dramatic dimensions recently because of rapid growth in evangelical Christianity, especially the Pentecostal churches. Nigeria is one of the countries with high rates of right abuse in relation to witchcraft. UNICEF says tens of thousands of children are been targeted throughout Africa.

EXAMPLES OF HUMAN RIGHTS VIOLATIONS, PERSECUTIONS AND ACCUSATIONS OF WITCHCRAFT
Persons accused of witchcraft have been executed by hanging, burying alive, drowning and burning with paraffin or petrol thrown at them. In Ghana, Adinkrah writing on the topic “Child Witch Hunts in Contemporary Ghana 2011” stated that roughly 90% of Ghanaians possess some type of belief in witchcraft. 60% of its population identify as Christians, 15% Muslims while the remainder identify with animism and ancestor veneration. Ghana (Northern) is the only country in the world where “witch camps” can be found housing those accused, mostly elderly women. There is respect for traditional beliefs and the spiritual realm. These women are taken through the process of exorcism by the shrine or priest and live in the camps. While in the camps they are exposed to all kinds of maltreatment and exploitation thereby resulting in unjustifiable suffering by the inhabitants. In Southern Ghana there are established Christian prayer camps where people
accused of witchcraft are sent for prayers and exorcism after which they are brought back to live with their families. In Ghana 2 groups profess different belief systems about witchcraft while among the Nupe witches are believed to be women, among the Gwari there is no sex polarity.

The Democratic Republic of Congo is the home to thousands of homeless children who are suspected witches.

Recently in Zambia 28 people died after drinking Jik bleach. A prophet told his church congregants during an altar call that the people were possessed with the demons. About 40 people came out allegedly possessed. The prophet convinced the people to drink bleach. After taking a sip, the people started falling and died. Surprisingly, about 2 nurses and 4 teachers were amongst those who took the bleach and died amongst the congregations. There is no record that the prophet had been apprehended. The people believed the prophet. Religion is wreaking havoc on the people who perish due to lack of knowledge.

In Yenogoa Bayelsa State of Nigeria a 42 years old man Samuel Otasi 42 stated that he was in a church when he received a prophecy that his children were bewitched. At the time, he was separated from the children’s mother. Otasi thereafter murdered two of his children by tying up the children aged 10, 12 and 14 in a bush and forcing them to drink an insecticide called ‘Snipper’. Miraculously the eldest child survived the lethal dose of the liquid.

In Calabar in South Eastern Nigeria we hear of children labelled as witches living on the Lemma dumpsite on the outskirt of the town. A young boy of 14 called Godbless, stated that his grandmother said he was responsible for her swollen leg and that he was a witch. He was taken to the family local church where a pastor confirmed the grandmother’s worst fears that he was indeed a witch. He was driven out of home and now lives with some other boys smoking cannabis and making money by recycling plastic bottles and cans. When he refused to leave the home, he showed a scar that was inflicted in him when his auntie heated up a knife on the fire and put it on him. When these children are thrown out of the house it is as good as killing them.

There was another report in June 2016 in Calabar, Nigeria that a Pastor tied up children to a tree assaulted them with machete over alleged witchcraft. Some children aged 10 and 7 were accused by their cousin of being witches and snatching her baby in her dream were rescued from being murdered by some members of Divine Zion Church led by one Prophet David Effiom Zion.

Whilst majority of cases of abuse relate to Christian faith leaders, a handful of cases linked to Islamic faith were also recorded in Pakistan, Ghana and Malawi.

In the Niger Delta area of Nigeria accusations of witchcraft have created a generation of outcasts who lived in a system ill equipped to protect them. Children and babies who were branded as witches have been chained up starved and even set on fire.

In August 2016 in Enugu State of Nigeria, a woman caged a 4-year-old girl in a bush for 5 months because of her swollen legs she suspected that the child was a witch and had HIV. There was then a need to keep her away from the public to avoid the spread of the virus. She also stated that she was unable to take her to the hospital due to lack of funds.

In May 2016, the London UK Metropolitan Police stated that the number of child abuse cases investigated rose to over 50% in three years. They stated that Scotland Yard investigated 60 cases where youths had been accused of being possessed by evil spirits, the children were beaten and had chilli rubbed in their eyes. In Nigeria now there is a drive for individuals who seek to enrich themselves in the spheres of business, politics, money or sex. Witch doctors are then commissioned to assist them. Usually human beings are among the ingredients used to make ‘medicine’ of black magic or juju. The perpetrators are usually men. The men are referred to as “Yahoo boys”. In a haste to get rich by supernatural means the men kill young girls or even their girlfriends acting upon instructions of some juju men. There is a belief that the bodies of young
children contain strong magical powers. Sometimes the victim may be purchased or abducted. The victim is then mutilated while still conscious so that the medicine can be more potent through the noises made by the victim while in agony. The victim will eventually die of the wounds. Soft tissue body parts are cut, such as the lips, eyes plucked out, the scrota, female genitals; nails and hair are used to make medicine for money. Sometimes the entire limbs and head are severed.

Body parts of PWA (People with Albinism) are believed to be especially powerful. Their blood, skin, eyes and genitals when removed are mixed with medicinal plants to create medicine considered most potent for the purpose. For this reason, a few murders of albinos took place in 2016 in Malawi.

**Political intimidation**

Witchcraft threats are also used to intimidate voters, threaten opponents and, for some candidates, provide claims of special powers. Basic democracy evaporates when witchcraft threats are used to influence elections. Voting is no longer ‘secret’ because individuals may believe that a candidate may be able to know the number of his votes and foretell the voting pattern. Several elections in Kenya have been nullified by the courts based on undue threats of witchcraft.

**Expert workshop on Witchcraft and Human Rights**

Witchcraft beliefs, practices and related consequences have been reported in the United Nations by various high-level officials and experts.

In September 2017 the Witchcraft and Human Rights Information Network (WHIRIN), the UN Independent Expert on Albinism and Lancaster University, England organised the first ever UN Expert Workshop on Witchcraft and Human Rights at the UN Human Rights Council. The workshop brought together UN experts, members of Civil Societies and academics to discuss the violence associated with such beliefs and practises, and groups that are particularly vulnerable. The workshop associated the various manifestations of witchcraft related beliefs and practices.

Despite the seriousness of these Human Rights abuses there is often no robust state response. The judicial systems do not act to prevent, investigate or prosecute human rights abuses linked to beliefs in witchcraft. A report of the Independent expert workshop that took place on 21st and 22nd of September 2017 in Geneva on the enjoyment of human rights by persons with albinism on the expert workshop on witchcraft and human rights was transmitted at the 37th Session of the Human Rights Council in March 2018.

Its objective was to advance the discourse on the phenomena of witchcraft and its various manifestations, both generally and in the context of harmful practices, to ultimately ensure the enjoyment of human rights by all victims. The expert workshop was organized with a view to enabling greater understanding of witchcraft-related beliefs and practices and their impact on the enjoyment of human rights, and to develop solutions to prevent further abuses from taking place.

The core concern of the workshop was the harm, not beliefs, and deeds, not thoughts. Whatever the justification — witchcraft, spirituality, religion, political ideology, ignorance, tradition or fad — beatings, banishment, cutting off body parts of people with albinism, amputation of limbs, torture and murder constituted appalling and serious violations of human rights. It is hard to see why the belief in witchcraft continues, but the belief is that certain people can cast curses or spells that cause bad things to happen to other people. This belief is a major cause of violence all over the world where accusations are often sparked be personal conflicts or family disputes. There is a link between all forms of discriminations against women, belief in witchcraft in and lack of trust. The effects of these beliefs slow down economic growth and lead communities to break down while social interactions are kept to a minimum. There is a suggestion that greater education in the realities of witchcraft in these countries could help foster improved trust, which would help economies grow.
LEGISLATIONS AND LEGAL MECHANISMS PUT IN PLACE TO COMBAT HUMAN RIGHTS ABUSES RELATED TO WITCHCRAFT VIOLENCE

Nigeria Legislation

Section 210 of the Criminal Code (applicable to Southern Nigeria) prohibits persons from committing offences relating to witchcraft. Anybody associated with human sacrifice or other unlawful practice is guilty of a misdemeanour and liable to imprisonment for two years. For the infringement of fundamental human rights where violence and bodily injury is involved those affected may institute actions for the enforcement of their rights.

The problem is the enforcement and implementation of the law. Both the Criminal Code of Nigeria and the Child Rights act outlaw not only degrading treatment but even accusing someone of witchcraft. Only Akwa Ibom State in Nigeria has included specific provisions concerning the abuse of alleged child witches. In 2008, Governor Goodwill Akpabio signed the Child Rights Bill into Law which criminalized the act of accusing children of witchcraft. Despite this Act and the fact that the UN Committee on the Rights of Child highlighted this issue in their 2010 report on Nigeria, reports of horrific cases of child rights abuses continue in the State till date.

At the National and global levels, legal mechanisms have been put in place to protect the constitutional rights and civil liberties of women and children who are usually the target of witchcraft accusations. Over the years the United Nations ensured the protection of women and children’s right through the establishment of legal structures such as;

1) Universal Declaration on Human Rights 1948, 1984  
2) The Convention on the Elimination of all forms of Discriminations Against Women (CEDAW) 1981,  
3) United Nation Convention against Torture (CAT) adopted in 1984  
5) The United Convention on the Right of Persons with Disabilities (CDPD)

India has the largest recorded number of cases of abuses linked to witchcraft accusations and persecutions. It is also the country with the largest number of states with specific legislations in place to prevent such abuse from taking place. Apart from the provisions under the India Penal code different states have come up with different legislations to tackle the problem of witch-hunting. There are agitations that legislations would end the age long practices because the people who practice witch-hunting are so illiterate that unless efforts are made to enlighten the people about the laws and the consequences of their actions the legislations will make no effect.

In 2012 the UK government developed the National action plan to tackle child abuse linked to faith or belief. The National Action plan focuses on 4 areas; which are

1) Engaging communities,  
2) Empowering practitioners,  
3) Supporting victims and witnesses and  
4) Communicating key messages.

Unfortunately, the UK Government failed to assign any funding to this project, while Female Genital Mutilation (FGM) have received significant funding in recent years, the Government is yet to show any sign of providing such support to implement the National Action Plan.

In Ghana there is no explicit legal framework that addresses the problem of witchcraft since its independence in 1957. Unfortunately, violations of human rights of the accused persists in the African continent, despite the various attempts made in putting in place the legal frameworks at national, regional and international levels to deal with such aberrations.
Papua New Guinea
In 2013, there was widespread publicity given to the deaths of two women accused of witchcraft in PNG. This drew international and national attention to the problem of WAP (Witchcraft Accusations and Persecutions) in the country. The Government repealed the Sorcery Act of 1971 and created new provision in the Criminal Code 1974 (Chapter 262). Section 229 A of the Criminal Code provides that any person that intentionally kills another person on account of sorcery is guilty of wilful murder for which the penalty is death. Then there was the draft of the Sorcery National Action Plan (SNAP) which began in 2014. By 2016 SNAP is still being finalised and awaiting implementation. Like the UK Action Plan, lack of funds hindered the efforts of the NGOs, Faith Day Groups and the academics to implement SNAP. In 2016 for example there were cases of women who were tied up naked, burned and cut to pieces for practising sorcery. However, in March 2017 some people were charged over the killings of 7 people who they believed were practising sorcery. The WHRIN (Witchcraft and Human Rights Information Network) hopes that the UN Expert workshop on Witchcraft and Human Right will provide a good platform for the good work that has been carried to date.

For the people with albinism in Malawi and Tanzania on the 18th of December, 2014, the General Assembly of the United Nations Human Right’s Council and the African Commission on Human and People’s Rights adopted the resolutions of 2013 and 2014 calling for the prevention of attacks and discriminations against persons with albinism. They proclaimed June 13, 2015 as International Albinism Awareness Day. Despite this step, people with albinism are still living in fear particularly in the rural areas of Tanzania.

According to Al-Jazeera’s report in October 2016, Sierra Leone Government has taken the lead in the fight against Muti murders of the people for their body parts in the country by pursuing a case against one of the most powerful witch doctors in the country Bimba Moi Foray who was found guilty of killing Sydney Buckle – one of Sierra Leone’s popular radio personalities – and sentenced to death with one of his body guards by hanging. Muti murder, which is also termed medicine murder or ritual murder, is the murder of human beings for their body parts which are excised and used as medicine or for magical purposes in witchcraft. There are reported cases of illegal organ trade because of worldwide demand of organs for transplant and organ donors.

WHRIN sees the action taken by the Government of Sierra Leone as being significant while the country is seen as one of the leaders in the fight to eradicate such harmful beliefs and practices.

Barriers to enforcement
There are barriers to the enforcement of laws enacted to confront the scourge of human rights abuse and witchcraft violence, amongst which are:

1) Fear of reprisals from the community for protecting an alleged witch,
2) Weak judicial system due to under-developed and poorly sourced justice systems which cannot cope with the number of cases before them,
3) Majority of people accused of witchcraft are poor and vulnerable and cannot access legal system,
4) Many people may not have faith in the legal system as a way of resolving their problems,
5) In some countries corruption in the legal system can prevent enforcement of the law where there may be financial gains for accusing or persecuting someone for being an alleged witch and lastly
6) The reluctance to enforce inherited legislations at odds with popular belief.

Conclusion

1) NGOs Community Based Organizations and Faith Based Organizations should raise awareness of the negative impact of violence against accusers.
2) Deliberate and concerted efforts to educate and change the attitude of the populace about the erroneous beliefs in witchcraft practises.
3) Education of persons, particularly women, about the enforcement of their rights.
4) Enacting Legislation that would prohibit of torturing of persons accused of witchcraft
5) Urgent need for countries over the world to formulate policies on the issue of abuse.
"THE COURT’S DUTY TO PREVENT DAMAGE TO THE ENVIRONMENT"

"INTRODUCTION"

By His Hon. Chief Justice James Lewis (Falkland Islands, South Georgia, British Indian Ocean Territory, British Antarctic Territory)

Good morning. I am somewhat surprised at the number of delegates in this session as I had anticipated with witchcraft going on next door to have a more sedate meeting.

Anyway, as you will have seen from your program we have three speakers this morning, Judge Laurie Newhook, Justice Dr. Emmanuel Ugirashebuja, and Judge Toby Confirmed.

For my sins, the CMJA has also given me the only session involving video conferencing and a video presentation. I am not sure if your experience with video equipment and video links is the same as mine, if it is I commiserate with you, but if it’s just me jinxing the equipment then I will (pop next door to get Dale) ask Dale to perform his magic.

Turning to the topic. “The court’s duty to prevent damage to the environment”. When asked to chair the meeting, I was not really sure how it applied to my work as a judge. But it soon became clear how important this topic really is.

Some jurisdictions have specific laws and courts that are aimed at preventing damage to the environment. In New Zealand there is the Resource Management Act 1991, whose purpose, set out in s.5, is to promote the sustainable management of natural and physical resources. It includes safeguarding the life-supporting capacity of air, water, soil and ecosystems. It aims to avoid, remedy or mitigate any adverse effects of activities on the environment.

In fact, after a little digging I found that there are over 1200 environmental courts and tribunals operating worldwide. The UN has issued a guide for policy makers in relation to Environmental Courts and Tribunals. In my jurisdictions and in England & Wales there is no such specialist court. So any environmental duty falls on each and every judge because of the common law.

The ‘no harm’ rule is part of Customary International Law. Every state must ensure that activities within their jurisdiction or control do not cause damage to the environments of other states or areas beyond the limits of national jurisdiction. In my jurisdictions, as in England and Wales, Customary International Law is part of the common law. That will also be the case in many Commonwealth jurisdictions.

It follows there is a positive duty imposed by domestic law or Customary International Law to prevent such damage.

Climate change may fall fairly and squarely within that duty. The rule of environmental law impacts us all as surely as it impacts our human rights. So the importance of this topic becomes clear. However, since there are some potential pending decisions on that subject, I understand Justice Ugirashebuja is currently reserving his public opinion on that particular issue.

So to further educate us on this important topic, I can turn to our speakers.

The first is Judge Laurie Newhook who graduated from Auckland University in 1972 and from 1976 he was a partner of Brookfields practicing in resource management, local government and general litigation with an
emphasis on land, maritime matters, construction law and mediation/arbitration work. In 2001 he was appointed as a Judge of the New Zealand Environment Court and since 2011 has been the Principal Judge of that Court.

Judge Newhook has presented at many national and international conferences on the themes of environmental adjudication and has written multiple papers on the subjects. He has hosted international delegations to his Court from many parts of the World; chaired and presented at the ‘International Forum for Environment Judges’, Oslo, Norway, June 2016; and chaired and addressed plenary sessions at IUCN Academy of Environmental Law Colloquia and other international conferences. He is clearly an expert jurist on Environmental law.

The second is Justice Dr. Emmanuel Uginashebuja who graduated from the University of Rwanda and took a PhD in Law from the University of Edinburgh. He was Legal Advisor at the Rwanda Environment Authority from 2001-2003 and from 2009 to 2014 he was Dean of the Law School, University of Rwanda. In 2013 he was appointed as a Judge of the East Africa Court of Justice and is currently the President of the East Africa Court of Justice. Another jurist with clear expertise in Environmental law.
“THE COURT’S DUTY TO PREVENT DAMAGE TO THE ENVIRONMENT”

“THE NZ ENVIRONMENT COURT’S DUTY OR POWERS TO PREVENT DAMAGE TO THE ENVIRONMENT”

The constitution, work, powers and practises of the Environment Court of New Zealand

By Principal Environment Judge Laurie Newhook, New Zealand via AVL

Introduction
The conference organisers invited me to speak to the subject “The Court’s duty to Prevent Damage to the Environment”. I have slightly recast it by adding “or powers”, because few environmental Courts or Tribunals in the World hold powers to initiate such action, let alone of such a broad nature, except for some notable exceptions in India and China (about which members of those Courts are better placed than me to speak). Most Courts receive and entertain actions initiated by citizens in a democracy. And their powers will invariably be limited to those prescribed by statute.

I will focus mainly on the jurisdiction of my own Court, because although I have studied comparative systems, that is what I am most familiar with.

I should add a further preliminary note to reflect that our powers are more refined than prevention of environmental damage; rather the powers in New Zealand legislation focus variously on protection, avoidance or mitigation of adverse effects on the environment.

Having said that, I believe that the New Zealand approach to environmental regulation, particularly through involvement of my Court, is quite cutting edge in international terms. The legislation currently in force for a quarter century was enacted in place of rather more pedestrian town and country planning legislation. The Environment Court of New Zealand’s duty to prevent damage to the environment needs to be seen in the context of a broad overview of New Zealand’s Resource Management Act 1991 (the “RMA”) which is at the heart of planning regulation and environmental law in this country. The constitution, work, powers and practices of the Court can only be understood in the context of that Act as a whole because the Court is a part of a large and complex system. Its part is to provide some powerful checks and balances to environmental decision-making and actions by others.

Background – the legislative context
The Court is established by this overall legislation, as successor to earlier tribunals and Courts established by successive acts of parliament since the early 1950s. It is probably one of the oldest Environment Courts and Tribunals (‘ECTs’) in the World. The Court operates as an integrated but (importantly) independent part of the whole resource management system. The Court does not have its own separate Act as occurs in some countries. This integration brings with it considerable advantages for efficiency and relevance of the work of the Court within the overall system.

Although the Environment Court has some unusual features in its jurisdiction (which I shall describe), it can be recognised as a typical Court, and not an environmental protection agency, in that it does not make policy or initiate steps for environmental protection, but adjudicates in cases brought to it by many kinds of parties. New Zealand has an agency called the Environmental Protection Authority, but it is quite unlike EPAs found in other countries, having no powers of broad environmental protection, but instead certain regulatory powers concerning hazardous substances and some kinds of development consenting on land and water. New Zealand also has Parliamentary Commissioner for the Environment, but the powers of that person, supported by a small research office, are confined to making recommendations to the Government on environmental issues, usually after scientific research has been undertaken.
As a New Zealand Court, the Environment Court is supported administratively by the Ministry of Justice, but confers regularly with the Ministry for the Environment which administers policy in the environmental field. This administrative split can produce some interesting consequences at times, some good and some needing constructive consultation and management.

**New Zealand’s Resource Management Act 1991 – a relatively sophisticated regime for planning and environmental regulation and protection**

The RMA was passed into law by the New Zealand Government in 1991. It took the place of longstanding planning legislation (one main act and about 50 other pieces of legislation) and is broader than the regulation of planning seen in many other countries. The RMA governs the environmental management of land, air, water, soil, and eco-systems throughout New Zealand’s land mass, and its territorial sea (out to 12 miles from the coast). It applies the concept of sustainable management of natural and physical resources to planning and decision-making. It is quite a complex piece of legislation, with strong, holistic environmental and inter-generational emphasis.

Our decision-making is necessarily predictive of future states and risks, and is therefore significantly less dependent on evidence of historical fact than is the case in other areas of law.

**Sustainable management**

Essentially the approach of the RMA is to provide for a balance between environmental protection, and development and human use of land, air, water and soil.

The “environment” includes things natural, physical, and people, and includes:

(a) Eco-systems and their constituent parts, including people and communities; and  
(b) All natural and physical resources; and  
(c) Amenity values; and  
(d) The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition, or which are affected by those matters.

It is important to realise that all matters the Act sets out to govern are treated in an integrated fashion. Decision-making (which I shall describe in detail later) therefore involves a careful weighing of all matters against each other, and the making of value judgements. Many decisions of our Courts confirm this, and are consistent with occasional public Ministerial statements that some important economic endeavours such as tourism in New Zealand’s breath-taking landscapes rely on wise stewardship of our environment.

The RMA focuses on managing the effects of activities, rather than regulating the activities themselves. This was a major change from the earlier planning legislation. The Act takes quite an enabling approach for developments and infrastructure and prescribes intervention only when environmental impacts would reach an unaccepteable level. This can lead to some quite innovative approaches in environmental planning but can produce complexities as well.

**The purpose and principles of the RMA**

The ultimate purpose of the RMA (at the heart of all that is done under this legislation) is to “promote the sustainable management of natural and physical resources.” Put simply, it can be regarded as inter-generational environmental protection. This is established in section 5(2) of the Act with these words:

Managing the use, development and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while –

(a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and  
(b) Safeguarding the life-supporting capacity of air, water, soil and ecosystems; and  
(c) Avoiding, remedying or mitigating any adverse effects on the environment.
The purpose of the Act is then supported in subsequent sections 6, 7 and 8 concerning matters of *national and other importance*. The matters of national importance include the preservation of the natural character of the coastal environment, wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use and development; also the protection of outstanding natural features and landscapes from inappropriate subdivision, use and development; also the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna; also the maintenance and enhancement of public access to and along the coastal marine area, lakes and rivers; also relationships and culture of the indigenous people, the Māori.

The other matters of importance include other indigenous cultural matters, the maintenance and enhancement of amenity values, the intrinsic values of eco-systems, the maintenance and enhancement of the quality of the environment, any finite characteristics of natural and physical resources, the effects of climate change, and the benefits to be derived from the use and development of renewable energy.

When passed into law as legislation governing planning, it was ground-breaking internationally in the sense that it provided these powerful messages about environmental protection. I am not aware of legislation in other countries that is as comprehensive for regulating both planning and environmental protection, although it is known that it has been the envy of some groups in society around the World.

It needs to be said that the RMA, being over a quarter of a century old, is regarded by some commentators as somewhat out of date in various ways. It is described by some as inadequate in its environmental protection ethic, including as to setting of environmental bottom lines; on the other hand, some regard it as unnecessarily restrictive of urban development and industry. I do not express views about that in this paper but must observe that during its life it has been amended almost annually, and has become something of a “patchwork quilt” and suffers from needless complexity and internal inconsistencies.

Our current government has embarked on a programme of substantial reform of the RMA and some related statutes. A Bill is to enter Parliament in September 2019 making a small suite of urgent amendments; a larger body of work has just been announced, the setting up of an independent RMA Review Panel to work with many stakeholders and report to the Minister for the Environment on suggested reforms by May 2020. The scope of the review has been broadly set and is being refined over coming weeks. Out of scope, interestingly, is full repeal of the RMA. (As of yet, it is not known whether the scope will include a topic currently beyond jurisdiction, that decision-makers (including my Court) may not consider adverse effects on climate change of any development proposal.)

**An overview of New Zealand’s environmental management mechanisms: plans, consents, and enforcement: the place of the Environment Court in the system**

Environmental management under the Act is underpinned by the purpose and principles that I have described, and given effect through detailed provisions in the Act itself, and subsidiary layers of legislation issued by the central NZ Government and Councils. The latter comprise a hierarchy of policy statements and plans as follows:

- **National Policy Statements**
- **National Environmental Standards**
- **Regional Policy Statements**
- **Regional Plans**
- **District Plans**

The *National* instruments are issued by the central Government. The *regional* policy statements are issued by regional councils, and the *district* plans are issued by district councils.

Each of these layers of legislation is required to meet the demands of the layers above it.
I will now describe each of the 3 areas in which the Environment Court works: 1. policy statements and plans; 2. consenting of development proposals; and 3. enforcement.

1. Forward planning
Forward planning is a feature of New Zealand environmental law that ensures great proactivity of practice. A key consequence of this is that the work of the Court is very different from almost all others in New Zealand, because it is predictive, proactive and involves assessing future states and levels of risk from human endeavours. Most evidence in Environment Court hearings is from expert witnesses in a great many specialist fields including environmental sciences. Evidence of historical fact has less emphasis than in general (non-specialist) jurisdictions.

Central Government, regional and district councils each have a role in forward planning. That is, they issue draft policy statements and plans for public comment and submission (and in the case of the regional and district instruments, appeals can subsequently be made to the Environment Court by people dissatisfied with a council’s decision on their submissions). Although appeals can be taken to senior Courts above the Environment Court on points of law, the Environment Court is the final forum for adjudication on fact and expert opinion.

2. Applications for consent
The councils also have a role in receiving applications for resource consents and making decisions on those applications, sometimes by administrative function without inviting comment from other parties, and sometimes after public notification and invitation to other parties to make submissions. (There are rights of appeal to the Environment Court in the latter case).

When administering applications for resource consent, the councils (and the Environment Court if there are appeals) have the potential to consider several different levels of activity status, prescribed in the regional or district plans. These levels are “permitted”, “controlled”, “restricted discretionary”, “discretionary,” “non-complying” and “prohibited.” In very simple terms, the lower down that list an activity status is, the harder it will be to get consent. Indeed, a consent cannot be granted at all for an activity that is described as prohibited in a regional or district plan.

Each resource consent application must include an assessment of the effects (actual or potential) of the proposal on the environment. In the instances of controlled and restricted discretionary activities, the assessment will be limited to the matters over which the rules in the plans direct the discretion be focussed on.

3. Enforcement
The regional and district councils also have functions of enforcement of the plans, and of environmental standards more generally, and they do this by bringing proceedings in the Environment Court. It is this class of case that can be said to be the closest to an express duty on the Court to prevent damage to the environment. That is when a party files a case in the Court alleging present or prospective damage to the environment, the Court can hear all parties to the case and make decisions. Enforcement Orders are akin to civil injunctions in other Courts. The Court can also make Declarations. Enforcement Orders often supplement convictions and penalties imposed after successful prosecutions of environmental wrong-doers. By enforcement of environmental standards more generally, I am referring to the operation of ss15, 15A, 15B, 15C and 16 of the Act. These deal respectively with general controls over discharge of contaminants into the environment; restrictions on dumping and incineration of waste and other matters in the coastal marine area; discharge of harmful substances from ships and offshore installations; prohibitions in relation to radioactive waste or other radioactive matter, and other waste, in the coastal marine area; and a general duty on people to avoid unreasonable noise. These sections of the Act largely point to duties to comply with regulations, policy statements, and plans, but the obligations concerning noise under s16 go even further, and cast a more general duty to avoid making unreasonable noise.
Even though it is in the enforcement work that an express duty to help prevent damage to the environment is clearest, the forward planning and consent application jurisdictions carry obligations either to lay suitable foundations for the purpose, or ensure consents are shaped to the same end.

Central Government roles

Central government has two roles under the RMA. Parliament passed the Act into law, and initiates and passes amendments. General administration, preparation of the National Policy Statements and Environmental Standards, and supervision of the work of Councils, is undertaken by a government ministry called the Ministry for the Environment (“MfE”). That Ministry provides policy advice, and works with councils and other agencies, to improve environmental outcomes. It has a staff of over 200. As noted already, while the Environment Court operates in the MfE’s policy space, it receives its administrative support and working resources from the Ministry of Justice.

The Environment Court of New Zealand

There is one Environment Court for the whole of New Zealand. For a commentary on contemporary work of the Court and some comparative institutions in New Zealand, see a paper by this author and two colleagues which was titled “Issues of Access to Justice in the Environment Court of New Zealand” and was delivered at an international symposium we organised in April 2017 at Auckland, the proceedings of which were published in a special issue of the journal Environmental Law and Management cited as (2017) 29 EML 00.

By s 247 of the Resource Management Act 1991 (“RMA”), the Environment Court is a Court of record. “Court of record” means that the whole of the proceedings of the Court comprise a record that is publicly accessible. With exceptions that I shall describe, that means that all documentation filed with the Court, including evidence and exhibits in cases, and transcripts of proceedings heard in open Court, are fully available to parties in the case, members of the Court, and superior Courts on appeal, and to some degree for access by the public.

Exceptions include that a Judge of the Court may make an order for confidentiality of certain aspects of proceedings, usually on the grounds of commercial sensitivity (but with carefully prescribed rights of access by parties in the case or their representatives); and Judges in all Courts have rights to limit the search-ability of materials that have not yet been used in Open Court.

Environment Judges

Under s 250 of the RMA, the Environment Court can have, at any time, up to 10 full-time Environment Judges (presently there are 9) and some alternate Environment Judges (who sit with us occasionally and are otherwise members of other Courts such as the Maori Land Court and the District Court). The Judges have all previously been lawyers, mostly working in environmental regulation and other litigation.

Environment Commissioners

Environment Commissioners are appointed to the Court under the RMA, as “persons possessing a mix of knowledge and experience in matters coming before the Court, including knowledge and experience in:

(a) Economic, commercial and business affairs, local government and community affairs.
(b) Planning, resource management and heritage protection.
(c) Environmental science, including the physical and social sciences.
(d) Architecture, engineering, surveying, minerals technology, and building construction.
(da) Alternative dispute resolution processes.
(e) Māori cultural matters’ (section 253 RMA).

There are presently 10 Environment Commissioners. There are also 5 Deputy Environment Commissioners who participate in the work of the Court part time, and who also have specialist skills that are of considerable value in the work of the Court. This is also pursuant to section 253 RMA.

Section 259 RMA authorises the Principal Environment Judge to appoint as a special advisor a person to assist the Court in any proceeding before it. That person is not a member of the Court (in the deliberative
sense) but “may sit with it and assist it in any way the Court determines”, which offers quite a bit of scope in the process sense.

**Locations**
The Court operates registries in three main cities: Auckland, Wellington and Christchurch. It has a Registrar overseeing the administration on a national basis, and a Deputy Registrar in each of the 3 centres.
The Court’s Registry staff are usually law graduates with specialist knowledge in environmental law, which considerably assists the work of the Judges and Commissioners.

The Court maintains courtrooms in each of those 3 centres, and a fairly high percentage of the business of the Court is conducted at those 3 bases. Nevertheless, a considerable amount of the hearings and mediation work of the Court is conducted at circuit locations around the country, both in and out of courthouses.

Section 271 requires (“shall”) the Court to conduct hearings and conferences at a place as near to the locality of the subject-matter to which the proceedings relate as the Court considers convenient unless the parties otherwise agree. For instance, the Court often sits in courthouses of the District Court and the Māori Land Court, and also in hotel conference rooms, community halls, and similar venues. Such places are used for Court sittings, conferences, and for the Alternative Dispute Resolution functions of the Court, of which more, later. Section 271 RMA (“Local hearings”) essentially provides that the Court shall conduct any conference or hearing at a place as near to the locality of the subject-matter as possible. A consequence of this is that we travel extensively for our work around NZ, for instance my division last year heard an appeal about a proposal for a vast water storage dam in the South Island, and another concerning a proposal for a boat marina in a bay at Waiheke Island near Auckland.

It is worth noting that a very small proportion of the cases filed in Court (less than 5%) are ever the subject of a full hearing on the merits. Most cases are settled during the process of mediation, or by direct negotiation amongst parties, or are simply withdrawn for one reason or another. Mediation in fact resolves about 75% of all cases that arrive in the Court.

**The Court’s duty to prevent damage to the environment - an introduction to its processes**

Most cases filed in the Environment Court are appeals against decisions of councils. Some other cases are “originating”, for instance seeking interpretation of the RMA or national, regional or local plans, or enforcement of plans or environmental duties. The Court therefore has wide powers to review decisions of councils and to interpret legislation.

In the last 5 years the Court has also held a “first instance” jurisdiction called Direct Referral, where an applicant for resource consent persuades a council to move the case directly to the Court for hearing purposes. This usually results in the Court managing and hearing larger numbers of parties than get involved in appeals from council decisions. We have developed many techniques to maintain efficiency as well as good access to justice. Some of these techniques are electronic, and I addressed a conference of Courts administrators in Australia in recent times about them, with emphasis on avoiding injustice to self-represented litigants who have limited access to computers or limited skills. This is a significant topic on its own.

There is a strong trend in recent years to the cases being heard on the merits being large and complex. They can involve dozens or hundreds of parties, and very many topics. The marina case just mentioned was a Direct Referral case in which there were 310 parties, but the great majority thankfully joined forces under the umbrella of a local community group.

Cases lodged in the Environment Court involve more than contests of private disputes. They invariably focus at least equally, and often to a greater extent, on issues of public interest. At the same time, the subject-matter of cases is often valued in the millions or even billions of dollars, particularly those concerned with large developments or infrastructure.
The Environment Court also has enforcement powers, similar to the issuing of injunctions in the general civil courts. Environment Judges also sit in another court, the District Court, to hear criminal prosecutions under the RMA for alleged wrongdoings, for instance alleged breaches of the Act or of regional or district plans. The Court has extremely wide powers of procedure. I set out s 269 RMA in its entirety, before commenting on it:

**269 Environment Court Procedure**

(1) Except as expressly provided in this Act, the Environment Court may regulate its own proceedings in such a manner as it thinks fit.

(2) Environment Court proceedings may be conducted without procedural formality where this is consistent with fairness and efficiency.

(3) The Environment Court shall recognise *tikanga Māori* where appropriate.

(4) The Environment Court may use or allow the use in any proceedings, or conference under s267, of any telecommunication facility which will assist in a fair and efficient determination of the proceedings or conference.

The Judges of the Court have interpreted s 269 as meaning that the Court is publicly accessible or “user friendly”, commensurate nevertheless with efficiency, fairness to all, and due respect to the institution.

This means that Court sittings will to a degree follow the format found in other New Zealand civil Courts, but sometimes with a little less formality. For instance, rules about hearsay of factual evidence are often less rigidly applied. So, while reasonable decorum will attach to the running of hearings, there may be less formality and legalism than can be found in other Courts. This can be helpful to self-represented parties.

Court hearings on appeals from decisions of councils are conducted “afresh”, so that the Court will want to receive the evidence and submissions presented to it, and will be little interested in what was said by any of the parties in the earlier hearing before the council. (The Court is however, by s 290A RMA, required to have regard to the decision of the council or its hearing commissioners).

**Independence**

The Court is to provide a *fully independent system of appeals from decisions of councils*. Like all New Zealand Courts, the Environment Court has no links whatsoever with other bodies, political or otherwise. Hence it has no links with councils, government departments, other authorities, infrastructure providers, and the like. Courts are a constitutionally separate arm of our system of government, and once set up by Parliament through relevant statutes such as the Resource Management Act (and subject to legitimate amendment by legislation), are generally free from intervention and direction by Central Government Executive.

Some parties not represented by a lawyer or another professional come to Court with an expectation that the Judge will offer them a high level of assistance in the presentation of their case, because of a perceived imbalance of money and power between themselves and those who are represented by professionals. This is a difficult issue for us, as Courts are not constituted to offer free legal aid services. We recognise the imbalance, and will offer limited advice in the interests of keeping hearings moving efficiently and without undue delay. Fairness to all parties is important. There is a legal assistance fund, run by a committee of experienced practitioners supported and funded by the Ministry for the Environment. Community groups may apply to that fund for assistance, and the strength and public interest aspects of their cases will be examined by the committee when their application is considered. The fund is, however, quite small.

In recent times in Direct Referral cases, we have engaged independent Process Advisors to submitters (at the cost of applicants), in the same way as occurs before Boards of Inquiry into matters of national significance supported by the Environmental Protection Authority. This has worked particularly well in some very large cases, a notable example of which was the marina case, (with the majority of the 310 parties, mostly self-represented, being persuaded by the Process Advisors to coalesce under the banner of a well-funded community group). The Process Advisors also offer considerable advice about Court processes, pre-hearing and hearing.
**Parties in the cases**
Who can file an appeal in the Court, and who can become a party?

A person or body that made an application to a council or sought a plan change, can, if they do not like the council’s decision, file an appeal with the Environment Court. So too can other parties who were involved in the case before the council.

The council is of course authorised to defend its decision, so it is automatically a party.

Other people or bodies can join the appeal proceedings as parties if they had been a party (“submitter”) before the council, or can demonstrate that they have a relevant interest in the case that is greater than the general public. These rights of entry to proceedings are carefully limited by the Act, and are further restricted by legislation from time to time. Rights of access to justice in the Environment Court are an interesting topic in their own right beyond the scope of this paper.

**The Environment Court Practice Note**
Over the years, the Environment Court (and its predecessor the Planning Tribunal) has issued Practice Notes. These have been consolidated in recent years, the latest having been published in 2014 after public consultation was conducted. It is updated reasonably regularly as processes evolve and are refined, and members of the Court are currently reviewing it and preparing changes that it will publicly consult on.

The current Practice Note is available on the website of the Environment Court at: [https://www.environmentcourt.govt.nz/about/practice-note/](https://www.environmentcourt.govt.nz/about/practice-note/). Its introductory provisions record that it is not a set of inflexible rules but is a guide to the practice of the Court to be followed unless there is good reason to do otherwise.

The topics addressed in the Practice Note are, broadly:

- Communication with the Court and amongst parties;
- Lodging appeals and applications;
- Direct referrals;
- Case management;
- Alternative dispute resolution;
- Procedure at hearings;
- Expert witnesses;
- Access to court records;
- Glossary of terms.

There are three appendices:

- Lodgement and use of electronic documents;
- Protocol for court-assisted mediation;
- Protocol for expert witness conferences.

**Case management by the Judges (the pre-trial work of the Court)**

Part 4 of the Practice Note concerns case management.

Case management is a relatively modern concept in courts internationally, and has been strongly embraced in the New Zealand Environment Court in the interests of prompt and efficient resolution of cases, and cost efficiency. The Judges, with the support of Registry staff, operate a closely diarised system by which the various steps in a case will be the subject of directions from the Judge, and actions by parties so directed.

**Case management tracks**
The Court operates case management tracks, a **Standard Track** for straightforward cases, a **Priority Track**, the name of which is self-explanatory; and a **Parties’ Hold Track**, to which a case may be adjourned by...
agreement of the parties or direction of a Judge, for other proceedings to catch up, or during mediation, or for other purposes.

Every case filed in the Court will be allocated to one or other of these tracks as soon as it arrives. A case can be moved from one track to another during the life of the proceeding.

Greater detail concerning the three tracks can be found in paragraphs 4.4, 4.5 and 4.6 of the 2014 Practice Note.

Judicial conferences
Clause 4.7 and 4.8 of the 2014 Practice Note cover Judicial or “pre-hearing” conferences. These are usually conducted by telephone at an appointed time, or in a courtroom if the parties are too numerous for a phone conference or if the issues are particularly complex.

Virtually all aspects of judicial conferences are designed to keep proceedings moving fairly and efficiently, particularly if it appears that there will be a need for a hearing.

Some of the business conducted in judicial conferences can amount to the conduct of an interlocutory hearing (held to enable determination of a preliminary point that will assist the proceeding overall; for instance, concerning somebody’s application for a time waiver, or an application to strike out a party or a topic, or to resolve a legal jurisdictional issue).

Sometimes interlocutory arguments will be dealt with “on the papers,” which means no hearing or conference, but instead parties filing submissions, and a Judge considering those submissions and issuing a written decision.

The role of expert witnesses
Most cases in the Environment Court these days involve many topics in respect of which specialist professional advice is available, and evidence offered by experts in many fields. Examples include engineering in its many branches, landscape, economics, Maori cultural issues, ecology in its many branches, social issues, and many others.

The Court has high expectations for the quality of work by expert witnesses, and there is an entire section in the Practice Note (Part 7) setting these out.

In addition, many papers have been written about the topic, and most professionals in New Zealand who are regular expert witnesses before the Environment Court are familiar with both the relevant provisions of the Practice Note, and these papers.

The Court has an expectation that an expert called by a party will be independent, objective, and entirely professional. Questions can also arise as to the extent of relevant expertise and experience in relation to any given topic in the case. Experts are required to avoid being advocates, and to provide their own professional opinions, not that of the party who hires them. Conflicts of interest must be avoided.

Expert witnesses have an overriding duty to assist the Court impartially, free from direction from their client. Increasingly, groups of expert witnesses are required to conduct a conference, often facilitated by an Environment Commissioner, to endeavour to reach professional agreements where possible, and narrow issues. This is to cut down the length of hearings, and so reduce the cost of cases. These conferences are held during the operation of a timetable for preparation for hearing, often between the evidence-in-chief stage and that of rebuttal evidence.

The 2014 Practice Note has as an Appendix, a protocol for the conduct of these conferences.
Processes for the conferral of groups of expert witnesses have become more refined in recent times. In 2012 the Court conducted workshops with the Resource Management Law Association in 11 centres around New Zealand for the purpose of refreshing the Practice Note and issuing some guidelines about process for expert conferencing. A paper on that subject can be found on the Court’s website. The “learnings” from those road-show sessions substantially informed the content of the Part 7 and Appendix 3 of the 2014 Practice Note.

The conduct of hearings (the trial practices of the Court).

I refer to Part 6 of the 2014 Practice Note, entitled Procedure at Hearings. I will set out some of its paragraphs and offer commentary.

Paragraph 6.1 deals with the order of presentation by parties in a hearing. It reads as follows:

4.1.1 The Court usually conducts an appeal against a decision on an application for a consent or permit as a complete rehearing. In the case of a directly referred application, the hearing will be the first occasion on which the evidence has been heard and been available for challenge by opposing parties. The Court will normally hear first the person who applied for the consent or permit - followed by the parties who support the grant. Then the Court will hear the parties who oppose the grant of the consent, approval, or permit.

The order of parties in complex cases can vary, and is a matter for the hearing Judge. Wherever possible, the order of parties should be discussed at a pre-hearing conference, or made the subject of prior directions. If in respect of a particular appeal or group of appeals it appears that it will be helpful for the Court to first hear the Council before the applicants or other parties who would ordinarily commence, the Court may so direct. This will often occur in hearings on plan or policy statement appeals.

4.1.2 In proceedings where there is a burden of proof upon a particular party, for instance enforcement proceedings, the Court will usually hear that party first.

Presentation of evidence

Clause 6.3 of the 2014 Practice Note concerns the presentation of evidence. It provides for use of electronic or hard copy statements, directions about the manner in which evidence will be given, likelihood of the Court pre-reading the evidence before commencement of the hearing rather than having witnesses read their statements aloud in Court, and other matters.

When the Court pre-reads the evidence, the witness, when called, will confirm his or her statement of evidence as correct, and cross-examination will immediately follow unless there are corrections to be made and/or supplementary matters that have arisen earlier in the hearing which the witness should have the opportunity to address.

It has become the invariable practice for the Court to pre-read all the evidence pre-lodged in the case, rather than having each witness read out his or her prepared statement in open court. The court will therefore hear submissions from the advocates, and then the questioning of the witnesses. The court will also question most witnesses itself after the advocates have done so.

Questioning of witnesses is one of the areas of some complexity and difficulty not only for parties who are not represented by a professional, but even for professionals themselves at times! Another issue is that the time for questioning witnesses is not the time for making statements. Self-represented parties not familiar with Court processes often struggle with this.

Paragraph 4.4 of the 2011 Practice Note concerns the viewing by the Court of a site or area at issue, and it provides as follows:
4.4.1. In many cases, it is helpful for the members of the Court to view the site and locality at issue. In general, the taking of a view assists the Court to better understand the evidence presented in Court. The Court will normally confer with the parties about visiting the site, timing, a suggested itinerary, and other relevant details that the parties or the Court may raise.

4.4.2. If the taking of a view presents the Court with additional or different information to that provided in Court, or information that no witness has correctly or accurately addressed in evidence, and the Court considers that the information might influence it in making its decision, the parties will be consulted to ensure that they have an opportunity to explain or comment upon the information concerned before the case is determined.

The Court will discuss in conference with the parties in open Court, the details for inspection of sites and localities, particularly in cases where the Court will undertake those inspections without being accompanied by the parties (in the majority of cases). Care must be taken to ensure that the process is open, thorough and fair.

Exhibits
Paragraph 4.17 of the 2014 Practice Note deals with the issue of exhibits, and stresses a common approach by parties where possible, quality, manageable presentation, indexing and the like.

What the Court considers in reaching a decision
The guiding principles on this are found in many sections of the Resource Management Act that provide matters to be considered concerning the preparation of Policy Statements and Plans, and consideration of resource consent applications and enforcement applications. Above all is Part 2 of the Act, the purpose and principles of the legislation.

For today’s purposes, let me summarise and say that beyond the legal technical requirements, the Court will confine its inquiry to the evidence of fact and expert opinion presented to it, the submissions, and exhibits lodged, to the extent that they are relevant to the jurisdiction of the case. The jurisdiction of any case is set largely by the primary documentation which includes the appeal document, relevant submissions and further submissions filed previously with a Council, the Reply document filed by the Council, the notices by other parties under s274 RMA (again to the extent that the matters covered in those notices are relevant to the case at hand), and relevant provisions of Policy Statements, Plans, and other statutory instruments. I stress that the Court will be considering only matters of relevance that are offered to it in evidence and submissions that can be tested in Court. Members of the Court are however entitled to bring their own worldly experience to a case, but in doing so must put the issues to the parties and relevant witnesses in open Court. The Court is, and must be trusted to be, a truly independent body.

The Court’s cost regime and security for costs
By section 285 RMA, the Court may order any party to pay costs to another party, or to the Crown, to help offset expenses incurred in the hearing. Any party can make an application for costs, and any party involved in an Environment Court appeal can be liable for costs. Unlike in other Courts, there is no rule or general practice that says that an unsuccessful party to an appeal must pay the other party’s costs. However, in the case of matters that are directly referred to the Court, there is a presumption that a significant portion of the cost to the Court of the process will met by the applicant.

In determining an application for costs, the Court has discretion to decide whether it is reasonable to award costs, and to determine the appropriate amount. Costs awards are based on the costs actually incurred, and a party applying for costs will usually be asked to provide the Court with the relevant invoices setting out the costs and expenses incurred. Costs can be indemnity costs (full costs) or a lesser amount of costs awarded at the Court’s discretion. Fairly common awards (where it is necessary to award costs at all) amount to approximately 25% to 33% of proved and relevant costs incurred by another party or parties.
The purpose of awarding costs is to compensate a party for costs incurred where it is fair to do so. Costs are not intended to penalise an unsuccessful party or to discourage people from participating in appeals. The Court will only award costs if it decides that is justified in the circumstances of the case, and will determine each costs application based on its merits.

The Act provides for the Court to make an order for security for costs. Security for costs may be requested if it is suspected that the person bringing the appeal may not have sufficient financial resources to pay costs should their appeal be unsuccessful, and an award of costs later made against them. The Court does not have to grant any request for security for costs and will consider the interests of all parties before doing so. Even if an order for security of costs is granted and the appeal is lost, this does not automatically mean that costs will be awarded. Some commentators consider that there are issues for access to justice in the Court’s costs regime and filing fees, set by Parliament. It is beyond the scope of this paper to explore those. One such commentary was by Justice Stephen Kos, President of the New Zealand Court of Appeal, at the international symposium on environmental adjudication referred to paragraph [27] above.

**Alternative Dispute Resolution in the Environment Court (primarily mediation).**

Mediation is a largely voluntary process for parties in dispute to come to a solution with help from a facilitator, and is therefore quite different to hearings or trials that impose solutions. Mediation is authorised by s268 RMA, and is a free service of the Court. Although, a degree of compulsion entered the law by amendment to the RMA in 2017, whereby any party not wishing to attend mediation is compelled to seek leave from a Judge. It is conducted by the Court’s Commissioners, who are fully trained in the technique and very experienced. Mediation is conducted very early in the life of most cases, and results in resolution of approximately 75% of all cases filed in the Court.

There is an extensive section in the 2014 Practice Note on “Alternative Dispute Resolution” (of which mediation is the principal type in the Environment Court). There is also an Appendix containing a Protocol for Court Assisted mediation.

Mediation is strongly encouraged by the Judges because, even if a case is not capable of full settlement, some aspects can get resolved, thus narrowing issues in dispute and reducing Court hearing time and cost to all parties. Furthermore, the Court encourages parties to understand that there are often many ways of viewing any particular problem and how it might be resolved. Resolution of cases can sometimes be quite innovative. For instance, side agreements on matters outside the dispute (that do not get shown to the Judge) are sometimes entered into.

Matters discussed during mediation are confidential to the parties. Only the written signed outcome from mediation can be reported to the Court. This confidentiality is important for the process. It means a party can make offers or suggestions aimed at resolving the matters without fear of later adverse consequences. If agreement on all matters is reached, a Consent Memorandum is drawn up either at the mediation or afterwards by one of the lawyers or parties present. Once the wording is agreed by all the parties and signed, it is sent to a Judge requesting that a Consent Order be made. In considering a draft consent order the Court will ensure that the result conforms to the requirements of the Resource Management Act, and on rare occasions is not signed off by the Judge.

Mediation is certainly much less expensive than a court hearing with its witness expenses, legal costs and the risk of an award of costs by the Court. Mediation is a process that also offers opportunity for a wider range of solutions than are possible in a Court decision.

Parties can represent themselves and often do. They can bring supporters to help them, and they can bring expert witnesses and their lawyer.

**Conclusion**

I believe that the New Zealand Resource Management system is almost unique in the world as a regime for governance of planning of land, water, and air, based on the principle of sustainable management of natural
and physical resources for the future. The Environment Court has a major part to play in its administration. There is now a considerable body of case law that has developed over the 28 years since the Act was first passed.

The Environment Court is a specialist Court whose Judges were previously lawyers practicing in the resource management field, and whose Commissioners were professionals in their own fields like engineering, planning, ecology, economics and the like. In my view, specialisation is important for good environmental regulation and for advancement of knowledge about it.

Also of importance for our system is having (hopefully) clear legislation and national, regional and district planning instruments. The Court has also set up detailed rules about its procedures published in its Practice Note, so that parties can work efficiently, and cases can be resolved as quickly as possible.

The duty of the Court to help prevent environmental damage is most clearly seen in its Enforcement Order jurisdiction, and prosecutions, but it can also be seen in the Court’s pro-active plan appeal work which includes its assistance in the setting of objectives, policies and methods in plans for these purposes and in cases involving applications for resource consents. In other words, the concept pervades much of the work of the Court either directly or indirectly, ultimately to serve the purpose of the RMA, the promotion of sustainable management of natural and physical resources.

Laurie Newhook,
Principal Environment Judge, Environment Court of New Zealand,
September 2019.

Website reference for Environment Court of New Zealand: 
https://www.environmentcourt.govt.nz/

I am keen to network with Judges, Magistrates and Tribunal members around the world, about adjudication of environmental issues, whether under specialist legislation or civil or criminal legislation that can be brought to bear on environmental issues. Pacific nations are of particular interest to me, but I maintain links with people in many countries around the World.
I can be contacted on laurencenewhook@gmail.com or newhook@courts.govt.nz
“JUDICIAL INVOLVEMENT IN THE WIDER COMMUNITY”

By Justice John Logan, Australia

For judicial officers in the Antipodes, definitive guidance as to involvement with the wider community is to be found in Chapters Five (Activities outside the courtroom), Six (Non-judicial activities and conduct) and Seven (Post-judicial activities) of the Australasian Institute of Judicial Administration’s (AIJA) Guide to Judicial Conduct (3rd Edition). I use the adjective, “definitive”, because those guidelines have been approved by the Council of Chief Justices of Australia and New Zealand. They are available on the AIJA’s website.163 A retired judge of the Queensland Court of Appeal, the Honourable J B Thomas AM, has given detailed consideration to each of these subjects, and much more, in his book, Judicial Ethics in Australia.164

Neither those guidelines nor that book is an Australasian idiosyncrasy. Subject, of course, to particular local circumstances, the guidance there to be found is relevant to each jurisdiction within the Commonwealth. I respectfully commend each of them to you.

In these circumstances, it would be an impertinence for me even to purport to offer any definitive views about judicial involvement in the wider community. All that I seek to do in this paper is to offer a personal perspective, based on my own reading and experience, gained on the subject over the past four decades, initially as a barrister and, more latterly, a judge in Australia, supplemented by judicial experience in Papua New Guinea and experience in case specific practice in Fiji.

An opening thought I wish to share is based on the following exchange which occurred between my daughter, then in early adulthood, on the one hand and two similarly aged friends on the other. The exchange occurred shortly after my appointment in September 2007 as a judge of the Federal Court of Australia. Her friends were the children of then judges of another Australian superior court. Upon meeting socially, my daughter’s friends greeted her with this salutation, “Welcome to the restricted world of a judge’s child.” That went on to explain the restrictions with which they had been living for some years in relation to their behaviours in public.

The point of beginning with this anecdote is to provoke the thought that, as never before, the subject of judicial involvement with the wider community entails more than just one’s own involvement. A judge’s adolescent or young adult son or daughter who misbehaves in public is not usually at risk of being the subject of any media attention. But if that adolescent or young adult has a judicial officer parent that same conduct is much more likely to be considered newsworthy.

That likelihood is not unique to the children of judicial officers. It is shared with the members of the families of those who hold other public offices. For example, many of us will recall this headline, or others like it, in relation to the youngest son of the United Kingdom’s then Prime Minister, the Right Honourable Tony Blair, “Blair’s son says sorry after 'drunk and incapable' arrest”4165

Nor is such derivative attention confined to the children of those in public office. That same Prime Minister’s wife found this after her unwitting involvement of the notorious Peter Foster in a property purchase, “Cherie says sorry over conman ‘lie’”.5166 That same type of attention might well, I suggest, have been visited on, say, a judge’s wife in similar circumstances. This likelihood is not just a risk faced those by in high public office. The controversial conduct of a child or spouse of a local magistrate or district judge carries with it a related risk of attracting at least local if not wider publicity.

These same considerations attend the conduct in the wider community of a member of a judge or magistrate’s staff.

The point of this familial anecdote and those examples is to suggest that none of us should view the subject of involvement in the wider community just through the prism of our own conduct and associations. Like it or not, in today’s times, assumption of public office is inherently likely also to entail interest in the activities of our immediate family members, and personal staff. However unfair the interest or a related perception, familial or staff conduct can affect our personal reputation and that of the court of which we are members in the eyes of the wider community. Or, I suggest, at least that is a perception sought to be engendered by such publicity. Why otherwise publish such reports?

Further, lapses in conduct in public aside, the use of social media by younger generations is pervasive. The photo of a judge captured in a moment of levity at a private function, once found only on film with a photo held only within family circles, may now be posted to the world at large via a social media platform. Another opening thought is that a feature of judicial, as opposed to political, public office is that a judge or magistrate must not only not be partisan but must be seen not to be partisan. An association which might pass unremarked or at least expected with a politician might, with a judge or magistrate, give rise to a perception that he or she decided a case or is likely to decide a case in a particular way because of a particular community association.

Ongoing membership of a political party after assumption of judicial office is, for this reason, so obviously fraught as, necessarily, to be impossible. But there is an almost infinite variety of other associations, particularly if they are not declared before the hearing and determination of a particular case, which can also be fraught for a judicial officer.

Perhaps the most dramatic example of this in modern times is offered by R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2) (Pinochet No 2). That case was a sequel to an earlier proceeding by which, by a bare majority, the House of Lords had restored an extradition warrant in respect of a request by Spain for the extradition of Chile’s former Head of State, Senator Pinochet to answer criminal charges in Spain. In that earlier proceeding, Amnesty International (AI) had sought and been granted leave to make submissions in support of the extradition request. In the aftermath of the Home Secretary’s signing an authority to proceed with the extradition, it was discovered that one of the judges who had been part of the majority, Lord Hoffmann was, although not a member of A.I., an unpaid director and chairman of Amnesty International Charity Ltd (A.I.C. Ltd). A.I.C. Ltd was a charity which was wholly controlled by A.I. and carried on that part of its work which was charitable. One of the objects of A.I.C. Ltd. was to procure the abolition of torture, extrajudicial execution and disappearance. Lord Hoffmann had not disclosed his office holding in A.I.C. Ltd at any stage during the hearing of the earlier proceeding. Also undisclosed was that, although she had had no involvement in relation to AI’s intervention, Lady Hoffmann had been employed ever since 1977 in various administrative capacities by AI.

The conclusion unanimously reached in Pinochet No 2 was that Lord Hoffmann had, in the circumstances, in effect been judge in his own cause such that his Lordship was automatically disqualified from adjudicating the proceeding. That conclusion rendered it unnecessary to consider whether Lady Hoffmann’s employment might itself have occasioned a reasonable apprehension (or as the English authorities then termed it, a “reasonable suspicion”) of bias.

Pinochet No 2 offers a salutary reminder not just of an actuality of the risk which wider community involvement of a judge can entail but also of the potentiality of risk presented by the activities of one’s spouse.

167 [2000] 1 AC 119
168 R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 1) [2000] 1 AC 61.
Does this mean that a judicial officer and his or her immediate family must lead a virtually hermit like existence, dissociating themselves from almost all community inter-actions? My experience is that some do this but I am not one of them. While isolation from the community might seem to the judicial hermit as a sanctuary, it is, in the eyes of some, especially certain politicians who find humane sentencing or judicial review of the lawfulness of their actions irritating, the aloofness of the ivory tower.

Like many around the Commonwealth, I am a member of the Scottish diaspora. Long ago, that status provoked me to join the local St Andrew’s Society. Membership of that society is confined to men of Scottish ancestry. I was still in practice when I joined and later became a life member, so Pinochet No 2 was of no relevance at the time. Nevertheless, that case did give pause for thought about maintaining membership after I assumed judicial office. The Society promotes links with Scotland and undertakes some educational charitable activities necessarily limited by the limits of its available funds. Its activities and advocacy are much more modest and muted than those of AI. I had no great difficulty in deciding to remain a member after judicial appointment. But even that association is not truly risk-free.

The Society holds an annual dinner. That dinner draws a large attendance. Quite a few of the attendees are members of the Bar. I was one of them when in practice. I continue to attend that dinner, now with my adult son. I have never taken the view that the presence of members of the Bar should preclude my attendance. Nor have many other Queensland judicial officers. When in practice, I never presumed to raise any litigious subject with an attending judge. My successors at the Bar who attend observe that same stricture now. At every dinner, a prominent member of the community, often but not invariably of Scottish association, is invited to be guest speaker. The coincidence of judicial office and ancestry led to my receiving such an invitation a few years ago. Other judges had earlier received and accepted such invitations, which comforted my decision to accept. Less easy was whether to just deliver an asinine monologue incorporating such humour of which I was capable. As it happened, the dinner at which I was to speak occurred just after the Scottish independence referendum. The speech which I delivered did include an attempt at humour and reference to my family’s Scots origins and occasion for migration to Australia. But I also interwove into that an historical survey of how it might be thought that Union had operated for the benefit of Scotland and, with that, a ready ability to settle and prosper, as had my family, in then or former British colonies. Even from a distance of half a world away, I doubt that I would have included that interweaving prior to the referendum, however tenuous the possibility may have been of a view by an Australian judge attracting any interest in Scotland. I most certainly would not have broached the subject had I been a member of the Court of Session, the equivalent judicial office in Scotland to mine. Even to canvas the subject afterwards might perhaps be thought controversial. I certainly had that feeling when I noticed that the then President of the Society was wearing a white cockade, the symbol of the Jacobites in his bonnet and when he mentioned in his introduction how he couldn’t understand the result of the referendum. But by then the die was cast in terms of content and, at the time, the referendum result looked to have settled at least for a generation, the political controversy about Scottish independence. Now, with the promotion by some of “IndeRef 2” we know differently. That hindsight wisdom is nonetheless instructive about assumptions concerning the risks of commenting on particular subjects.

Judicial service in Papua New Guinea has brought with it for me striking parallels with the Scotland of yesteryear. Like Scotland, PNG has both Highlanders and Lowlanders. The clan system in Scotland still engenders at least some sentimental ties both in that part of the United Kingdom and amongst the Scottish diaspora. In PNG, clan ties are much stronger, rather as they were in Scotland prior to the penal laws that followed the final Jacobite defeat at Culloden in 1746.

Were I a resident judge in PNG, or a resident magistrate, I would certainly not deny my membership of a clan but would, necessarily, never advocate the merits of particular clan claims, be it to land or any societal pre-eminence. And the need for a scrupulous declaration of clan membership and, very likely, voluntary disqualification is obvious in relation to any case touching upon asserted title to particular land by one’s clan. I have always thought that my PNG judicial colleague, Justice Kassman, struck the right balance on the day we were welcomed after our initial appointments to the bench in PNG. His clan was, justifiably, proud that

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one of its members had attained high judicial office. Some attended in clan ceremonial dress. Justice Kassman embraced in public the honour thereby done to him but there the association rested. On many occasions, it is best for a judge to embrace the “healing light of truth” about such wider community association rather than be secretive.

If, however, a judge or magistrate wishes actively to participate in domestic political debates, the only principled course to take is to resign from office. Justice H V Evatt of the High Court of Australia adopted just this course in 1940. After serving for a decade on that court throughout the 1930’s, he resigned his judicial office and stood for and secured election to the Australian parliament. In that later political life he was notably successful, serving as Attorney-General, Minister for External Affairs and Leader of the Opposition, although the ultimate prize of Prime Minister proved elusive. My sometime PNG resident judicial colleague, the Honourable Don Sawong MBE adopted the same principled course of action when he decided to stand for parliament.

While Evatt held high office in the Executive after resigning from the High Court, some of his contemporaries on that court also came to hold high office in the Executive but did not first resign from that court. But these were not political offices in the Executive. Justice (later Chief Justice) Owen Dixon served as Australian Minister to the United States of America during the Second World War. Also during that war but prior to the entry of Japan into hostilities, the Chief Justice, Sir John Latham, served as Australia’s Minister to Japan. Each did so upon leave of absence from the court. Each gave singular service to Australia and her allies in his diplomatic role. Some in modern times put the judicial propriety of that service down to the exigencies of global conflict and question whether it would ever be undertaken again. But history has a habit of repeating itself in unexpected ways and times. Like that of Australia, the United States Constitution enshrines an express separation of legislative, executive and judicial power. Notwithstanding that separation, the sometime United States Circuit Appeals Court judge, the Honourable Richard Posner, in a book of that title, has observed of that constitution that it is “not a suicide pact”. The same observation may be made of Australia’s constitution and the legality and propriety, in singular circumstances, of judicial officers undertaking roles akin to those of Dixon and Latham.

Necessarily, Dixon and Latham each had contact with senior politicians when undertaking their diplomatic roles. They also had such contact when each, as Chief Justice, was a head of jurisdiction. The usual communication point between the judiciary and the Executive is via the relevant head of jurisdiction. But what of associations which predate judicial office? Sir Owen Dixon and Prime Minister Sir Robert Menzies had been in chambers together at the Victorian Bar. Each had a high regard for the other’s abilities and were longstanding friends. Complete dissociation was impossible. In smaller jurisdictions where there may perhaps be only one law school, acquaintance or friendship between one student who later pursues a career which results in judicial office and another whose career results in high political office is inherently likely. I have certainly experienced this. Some might think severance of longstanding ties is necessary. My experience is that this is not necessary, providing the associations are infrequent and each scrupulously observes the proprieties of the separation of powers and the need for judicial independence. There is undoubtedly a need for vigilance in any contact with politicians. In his recently published memoir, Lord Dyson, a former Master of the Rolls offers a number of reminders of this from the perspective of a head of jurisdiction. One example, as related in a review of his book in The Guardian, serves to highlight this:

At another dinner in 2012, to celebrate the 800th anniversary of Magna Carta, Dyson sat next to [the Rt Hon Philip] Hammond, then defence secretary, who was critical of a supreme court decision that the Ministry of Defence could be sued for providing soldiers with inadequate equipment.

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169 The office is now termed, Minister for Foreign Affairs.
170 Now termed Ambassador.
Hammond insisted that the judgment showed “a complete lack of understanding of the practicalities and difficulties facing the military”, Dyson writes. “He offered to meet me in order to educate me and explain why the decision was so bad. I did not take up the offer.”

Singular circumstances apart, the holding of judicial office is not regarded in Australia as incompatible with the holding of a commission in the Australian Defence Force (ADF). The absence of incompatibility is because of legislative recognition. Legislative authorisation thus makes such involvement lawful but it does not remove the potentiality of controversy attending it. One only needs, for example, to reflect on the scrutiny and publicity that might attend a decision by a judge advocate drawn from the judiciary to direct an acquittal in respect of an alleged “war crime” by a member of the ADF to appreciate this.

Australian superior court judges have and continue to give valuable service in the role of Judge Advocate General and other judges and magistrates as judge advocates. Some judges and magistrates even serve as general service officers. At present, none of these judicial officers serves on full time duty. Further, that service is wholly voluntary and undertaken only with the permission of a relevant head of jurisdiction. The duties of the Judge Advocate General and judge advocates are undertaken independently of the ADF chain of command. They form an integral part of the military justice system. Even so, in Australia, unlike, for example, in the United Kingdom, they are uniformed appointments. The United Kingdom’s non-uniformed approach to the holding of analogous offices may well reflect the influence of express human rights norms not found in Australian domestic law but it also highlights how reasonable people can reasonably differ about the extent to which judicial office is compatible with military service.

It is not only military service that is a subject upon which reasonable people can reasonably differ in relation to the boundaries of wider community engagement by serving judicial officers.

In my home State of Queensland, judicial officers of past and present generations have served and continue to serve in a variety of roles in the community. I serve on the board of my old residential college, Cromwell College, within the University of Queensland. Colleagues have undertaken like roles at other university colleges, sometimes as chair of the board. Such roles are not risk-free in terms of controversy. Student orientation programmes and social functions have on occasion attracted adverse publicity either in the popular press or with neighbours. The board of which I am a member has adopted very particular college policies to minimise such risks and we at Cromwell are blessed with a wise and prudent college principal. But relations between a college principal and a college board may not always be harmonious, as one of my colleagues found when chair of the board of another college. At that other college, the principal chose to institute litigation against the college. My colleague, quite properly, given that the litigation was instituted in the court of which he was a member, felt compelled to resign from the board. Happily, that litigation has since been compromised. Other judges have served on the Senate of the University of Queensland, some as Chancellor or Deputy Chancellor of that institution.

University colleges and certainly the universities with which they are affiliated are not just educational institutions. They major business undertakings. The same may be said of the secondary schools on the governing boards of which judges have sat over the years.

Some of these educational appointments are the gift of the Executive via statutory provisions that provide for Ministerial appointment of some members of a board. Usually, that is an unremarkable formality. But in the hands of an unscrupulous or just ignorant Executive that may not be so, especially if it is known that a judicial officer has a particular attachment to his or her old school or university. Appointments in the form of a gift of the Executive offer opportunities for subtle influences to be brought to bear on a judge. Or for payback. I have, for example, always wondered whether one judicial colleague who gave devoted and

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173 Defence Force Discipline Act 1982 (Cth), s 180, “Qualifications for appointment”.

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valuable service to the board of his old school was not reappointed because of government displeasure about a principled application of the law by him in relation to the misbehaviour of certain government officers.

One way of reducing the prospect of such appointments being perceived as attempts at influence is to insist that any offers be made not directly to the judge or magistrate concerned but rather via his or her head of jurisdiction. That practice distances the individual judicial officer from the Executive. It also allows the head of jurisdiction, before acceptance of an offer, to consult with the judicial officer concerned about the compatibility demands of the proposed appointment and raise in advance any other concerns about the proposed appointment.

Some Queensland resident judges serve on the board of the Royal National Agricultural and Industrial Association (RNA). The RNA conducts the annual exhibition in Brisbane and rents out its exhibition spaces for other activities outside the annual show period. It, too, is a major undertaking. Successive generations of Queensland judges have also served on the board of the Queensland Cancer Fund. It conducts active fund raising in the community for cancer research.

There is a unifying theme to all of these community engagements by judges. Each is voluntary, not personally financially rewarding and each involves charitable or educational pursuits. I cannot say there is consensus amongst all of the Queensland resident judiciary about the appropriateness of each of these community involvements. Some point to the scale of activities and to the prospect of industrial or workplace health and safety controversy. Others, with the hindsight wisdom of the later exposure of shameful child sexual abuse by staff that went unreported by some schools in the past, point to the prospect of embarrassment from school board service. These are, with respect, legitimate concerns but my personal view is that they should not prevent judges from community service in charitable or educational pursuits.

Worthy though community service via lending time and talent to charitable and educational pursuits may be, care must be taken in relation to related fund raising activities. I have not, and would not, as a serving judge, author letters soliciting funds either from the school or wider community and certainly not from the government. My view is that, however one might think otherwise, such authorship inevitably lends to the solicitation the prestige and authority of judicial office. Even if one had a different view about disclosure of one’s office on such a letter, it is axiomatic that no use should be made for that purpose of an official court letterhead.

In Queensland, judicial officers have also held unremunerated office in sporting bodies. Turf clubs come readily to mind in this regard. Once again, these are hardly minor enterprises. Once again also, there is no consensus in my experience amongst the judges about whether this is appropriate.

Long ago, well before judicial life, I held office as the President of the Parents’ and Citizens’ Association of the local primary school which our children attended. Sometimes, judges or magistrates are appointed when they still have children at primary or secondary school. Should they not take up such an office for that reason? I know of at least one judicial officer who undertook such a role while a child was at secondary school. I consider that type of engagement entirely appropriate, even desirable if so disposed. Aloofness from one’s local community solely on the basis of judicial office can turn the political critical rhetoric of the ivory tower into demonstrated reality.

There is, within the Anglican Diocese in Brisbane, a long history of judges serving as Chancellor of the Diocese. One of the duties of that lay ecclesiastical office is to provide legal advice to the Archbishop. Other judges who are members of different branches of the Christian faith serve as church elders or on the boards of church affiliated charities of one sort or another. I do not consider that a judicial officer cannot undertake these activities any more than he or she must deny or renounce his or her faith upon judicial appointment. Such activities may require disclosure or perhaps even voluntary disqualification in the circumstances of a particular case. But that contingency is no reason not ever to undertake them.
In respect of each of these activities, there is, I think, a judicial consensus that none should be undertaken if the nature and extent of involvement hinders the discharge of judicial duties. Only community activities compatible with the efficient discharge of these judicial duties should be undertaken. I think that there is also consensus that one should consult one’s head of jurisdiction in advance for advice before undertaking such activities.

Charitable or educational institutional involvement is to be contrasted with purely commercial activities. There is doubtless an exception in relation to the recreational hobby farm which may entail some minor commercial activity. But a judge ought, in my view, to withdraw from any active involvement in large commercial activities, rural or otherwise, even those held within a family. In some jurisdictions, leadership codes make this decision for a judge by limiting or even prohibiting such activities. But even in the absence of such prescription, active managerial roles in business are not, in my view, compatible with full time judicial office.

I have already referred to social media. The digital age and with it the near universal possession of digital cameras from which a myriad of photographs can be posted forthwith to a worldwide audience via the internet means that each of us discharges judicial duties and engages with our wider communities against a very different background to earlier generations of judicial officers. The internet and the persistence of images and articles on websites is a related part of that different background. The mad, the bad and the unscrupulous judicial critic, or just the well-intentioned zealot now have a platform enabling near instant and universal communication, whereas their predecessors had only that which they could hand out physically on a street corner or paint as graffiti. The same may be said of sensationalist media publishers. Once their offerings wrapped tomorrow’s fish and chips; now they can linger in the electronic ether for eternity, especially where the platform is offshore.

My experience is that certain elements of the media stalk functions attended by judges actively seeking out images of a judge or magistrate in casual attire or in an unguarded moment for the purpose of appending the resultant photo, not an official photo, to an article about some judgement. To my mind, the disjunct between a photo taken when engaged in a casual activity and an article about a judgement given in the discharge of a public office is solely intended to diminish respect for that office and its holder.

Sometimes that stalking extends to the judge’s home. The more innovative trawl social media platforms looking for such photos of judicial officers. For such reasons, I post no photos on social media and caution my adult children about what they post of me.

And it is not just activities conducted in the community with one’s clothes on to which a new dimension has been introduced by the digital age. In the age of “revenge porn”, private consensual sexual activities of which digital photos are taken consensually can introduce a new terror for a judge, perhaps years after the event. Whatever rights and wrongs, if any of the latter at all, attended the experience earlier this decade of the senior Canadian provincial judge, the Honourable Lori Douglas after nude digital photos of her came to light, the saga serves as a reminder to judicial officers of the threat presented even by digital imagery thought at the time to have been taken wholly for private consumption.

Does the position change after retirement from judicial office in respect of some or any of these activities? In my view, there is much wisdom in the adage, “Once a judge, always a judge.” The inhibitions or prohibitions about involvement in commercial activities doubtless do greatly diminish. But I doubt, for example, it would be appropriate to describe oneself as retired judge or magistrate if promoting the sale of a particular real estate development or superannuation product. Retired judicial officers have participated in a prominent way in relation to controversial subjects ranging from whether Australia should become a republic to whether there should be any specially reserved indigenous voice in parliament. There is certainly nothing which expressly prohibits such activities. And past holding of judicial offices greater and lesser can offer the community an invaluable source of experience from an individual. Perhaps all that can be said is that care must be taken to not bring into disrespect a present institution via a past association.
Such then is a personal perspective on the restricted world of both the judicial officer and his or her family in relation to wider community engagements. My closing commendation is always to consult in advance with one’s head of jurisdiction, if available or at least a senior colleague before accepting any ongoing role in the wider community. I also commend this course of action to you in relation to one-off engagements about which you feel some apprehension. The odds are that apprehension will not be misplaced. Further, there is much wisdom in the adage, “A problem shared is a problem halved.”

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GOOD JUDGEMENT: JUDICIAL INVOLVEMENT IN THE COMMUNITY

By Justice Malcolm Rowe, Canada

Good Judgment: Judicial Involvement in the Community

Introduction
Judges have long had to grapple with the limits of their community involvement. Few professionals would ask themselves whether they are to “behave like a monk [or] be a eunuch [or] live in silent solitude [or] embark…to live on a planet other than the earth” (Rifkind at 62). Yet, for many years, we as judges have, in effect, been asking such questions of ourselves. Often, judges are chosen in recognition of their significant contributions to their communities. Yet, upon appointment, many have been concerned with whether continuing to make these same contributions would call into question our impartiality, our independence, and even our integrity.

In considering the proper limits of our involvement in the community, I will not focus on a judge’s public behaviour. That is simple; we should never undermine the offices we hold by our behaviour in public. Instead, this paper examines the degree to which judges should engage, if at all, in voluntary associations, in political organizations, in matters of public controversy, and in advocating their private interests. Guidance is available, usually in written codes of conduct put in place by bodies overseeing judicial conduct. As well, there is the less formal but quite important guidance provided by one’s chief judge. But, much is left to our own good judgment. Judges have much to offer their communities, but a “line”…however difficult to draw…exists between acceptable and unacceptable community involvement. This line is “not capable of mathematical determination” (Rifkind at 66): yet, each judge must take care not to cross it.

I will proceed in three stages, beginning with a brief overview of the appointment and removal processes for Canadian judges. Next, I describe key elements of the ethical principles established by the Canadian Judicial Council [CJC]. Finally, I will illustrate various types of community involvement through case studies. Being common law judges, we want case studies.

Appointment and Removal of Canadian Judges
For the sake of simplicity, I will focus on superior courts. These courts are referenced in the Canadian Constitution. They hear serious criminal cases and civil matters. However, the discussion applies with slight modifications to other courts, notably provincial courts, which deal with less serious criminal and civil matters. In the 1970s, provincial courts replaced magistrates courts. In Canada, by far the majority of cases are heard by provincial courts.

Judges of the superior courts are appointed by the federal Cabinet (Constitution Act, 1867, s. 96). Judges of the provincial courts are appointed by the Cabinet in each of the ten provinces (ibid, s. 92(14)). At both levels, appointments are made very largely on the recommendation of the Attorney General, who draws on lists of candidates prepared by independent advisory committees comprised of judges, lawyers, and laypersons.

In Canada, as in many of our countries throughout the Commonwealth, judges have security of tenure. This has a long history, dating back to the Act of Settlement of 1701 and the Commissions and Salaries of Judges Act of 1760. These statutes established that judges would remain in office “during good behaviour,” rather than at the pleasure of the monarch, and that judges would continue to hold office notwithstanding the death of the monarch (van Zyl Smit at 59–60; Shetreet at 10–11). As we all understand, security of tenure allows judges to decide cases independently, notwithstanding government or public disapproval (Friedland, A Place Apart at 41).
In Canada, superior court judges can be removed only by a vote of both Houses of Parliament, the Senate and the Commons (Constitution Act, 1867, s. 99(1)). No judge since 1867 has been removed by this process, albeit a few have resigned in the face of this eventuality (Friedland, “Appointment, Discipline and Removal of Judges in Canada” at 58–59).

In recent decades, Parliament has made clear that it will act only on the recommendation of the CJC. This body is comprised of chief justices from the superior courts in all the provinces and is chaired by the Chief Justice of Canada (Judges Act, s. 59(1)). Through a committee structure, the CJC investigates complaints made against federally appointed judges; such complaints can be made by a member of the public or by the Attorney General (ibid, s. 63). Most complaints are ill-founded and are speedily dismissed. Those that warrant investigation trigger procedures aimed at ensuring fairness to the judge. In serious cases, the committee can recommend to the CJC that a judge be removed for reasons of (a) infirmity; (b) misconduct; (c) failing to undertake his or her duties; or (d) otherwise having been placed in a position incompatible with the due execution of his or her office (ibid, s. 65(2)). The CJC has interpreted its task as involving two steps:

1. Determining if the judge has become “incapacitated or disabled from the due execution of their office”; and
2. Determining if public confidence in the judge’s ability to discharge the duties of his or her office has been undermined to such an extent that a recommendation for removal is warranted.

(CJC, Review of the Judicial Conduct Process at 18–19)

The test at the second step is the following: “Is the conduct so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office?” (CJC, Review of the Judicial Conduct Process at 19). Given the stringency of that test, it is difficult to imagine how a judge’s involvement in a community organization or the like could warrant a recommendation for removal.

While the Judges Act does not contemplate lesser sanctions, in practice such sanctions are imposed. These can be quite mild, in effect words of guidance or caution set out in correspondence from the CJC. It may call for counselling or additional training. In more serious circumstances, a reprimand may issue. In almost all instances, the goal is to restore the judge to the proper conduct of his or her role. The approach is strongly oriented to be supportive and remedial, while at the same time providing clear guidance as to conduct.

Of course, the vast majority of situations where conduct may be questioned never get to the CJC. They are dealt with informally by the Chief Judge. But, if more formal measures appear warranted, they are undertaken by the CJC as a group and not by the individual Chief Judge.

Ethical Guidelines and Principles
Guidance for federally appointed judges is provided in the Judges Act and in a set of principles developed by the CJC called Ethical Principles for Judges (“Principles”). Provincial judicial councils operate in a parallel way for provincially appointed judges; they have adopted similar principles to guide conduct (e.g., Ontario Court of Justice, Principles of Judicial Office; Provincial Court of British Columbia, Code of Judicial Ethics).

The Judges Act contains an overarching rule:

No judge shall, either directly or indirectly, for himself or herself or others, engage in any occupation or business other than his or her judicial duties, but every judge shall devote himself or herself exclusively to those judicial duties.

(Judges Act, s. 55)

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The Act also creates the CJC, authorizes it to investigate complaints, and empowers it to recommend removal (Judges Act, ss. 59–70). The CJC has authority over more than 1100 federally appointed judges (CJC, “Mandate and Powers”). The CJC’s Principles are advisory: they are not a list of prohibited behaviours (Principles, Pr. 1(2)). However, they are a “useful touchstone of generally accepted ethical standards in the judicial community guiding judges in how they should act on and off the Bench” and set out a general framework that is relevant to assessing allegations of improper conduct (CJC, Matlow Report, Majority Reasons at paras 95, 99).

The limitations set out in the Judges Act and the Principles stem from the twin requirements of independence and impartiality. As a former Chief Justice of Canada put it, judicial independence is not a privilege that appertains to the holder of a judicial office; rather, it is a guarantee to citizens that there is an impartial adjudicator to resolve their disputes or hear their challenges to abuse of authority (Fauteux at 4). The limitations on judicial conduct call for a higher standard than is expected from other citizens. A judge’s conduct must be “free from impropriety or the suggestion of impropriety; it should be, as far as is humanly possible, beyond reproach” (Wilson at 4). Judges are expected to tolerate restrictions on the rights of the individual that other citizens do not (Principles, Pr. 3, Comm. 5). However, judges are entitled to expect as few restrictions on their freedoms as is possible and consistent with proper conduct, given their office (CJC, Commentaries on Judicial Conduct at 8).

The Tension Underlying Community Involvement
Regarding community involvement by judges, two competing considerations are at play. On the one hand, a judge should not be isolated from his or her community. On the other hand, community involvement must be modulated so as to avoid negatively affecting the standing of the judge and the judiciary. What is the right balance is somewhat contextual.

In 2015, in the context of an allegation of judicial bias, the Supreme Court of Canada wrote that judges can and should participate in their communities:

Membership in an association affiliated with the interests of a particular race, nationality, religion, or language is not, without more, a basis for concluding that a perception of bias can reasonably be said to arise.

(Yukon Francophone School Board at para 61)

The Supreme Court recognized the value of such experiences:

A judge’s identity and experiences are an important part of who he or she is, and neither neutrality nor impartiality is inherently compromised by them. Justice is the aspirational application of law to life. Judges should be encouraged to experience, learn and understand “life” — their own and those whose lives reflect different realities.

(Yukon Francophone School Board at para 34)

Withdrawal from the community can hinder a judge’s ability to carry out his or her duties. Judges are called on to make decisions mindful of the standards of the community; thus, to render decisions regarding fundamental freedoms requires an understanding of societal attitudes and competing interests (CJC, Commentaries on Judicial Conduct at 8–9). Assessing damages, sentencing offenders, and giving effect to the “public interest” all require knowledge of the community (Thomas at 93). A judge who is withdrawn from the community would undertake all these tasks with less understanding. Put another way, isolation can result in “judicial shortsightedness and unresponsiveness to the changing needs of society” (Shetreet at 324).

Community involvement has other positive effects. First, it fulfils the public’s expectation that professionals should be active members of their communities. Second, it “personalize[s] judges as sincere and caring
family members, volunteers, and community leaders.” Finally, it contributes to a judge’s well-being and consequently to improved judicial demeanour and performance (McKoski at 4–6).

Nonetheless, inappropriate involvement can be detrimental. The abiding concern is to ensure an independent and impartial judiciary. The range of issues that can come before the courts is as diverse as is life; judges must be careful not to indicate predispositions on potential controversies. As a result, involvement in causes or organizations likely to be involved in litigation is to be avoided (Principles, Pr. 6(C)(1)). Similarly, judges should avoid groups whose purposes include exerting pressure on government or attempting to effect social change (Wilson at 8; Thomas at 97). Community involvement also runs the risk of causing frequent recusal of a judge (McKoski at 46–47; Principles, Pr. 6, Comm. C.3). Additionally, it may lead to improper use of the prestige of the judge’s office (McKoski at 48).

In practice, how does one decide which activities are acceptable and which are not? The case studies that follow illustrate inherent difficulties in this demarcation; they demonstrate that new and unforeseen situations continue to arise. As jurists, we know that the genius of the law is experience. As is life, the law is ever changing.

The CJC’s Principles and Case Studies
The CJC’s overarching guidance on extra-judicial activity is this: subject to limitations imposed by the Judges Act and the nature of the office, judges can participate in activities that do not detract from the performance of their duties (Principles, Pr. 4, Comm. 2). The Principles then provide advice on various types of community involvement.

Political activity
The most definitive of the principles relates to political activity: it is prohibited. Judges must not: be members of political parties; engage in political fundraising; attend political events; make contributions to political parties or campaigns; or sign petitions to influence a political decision (Principles, Pr. 6(D)(3)).

This is an absolute ban; judges can have no association with any political group nor can they publicly express any political opinions (Wilson at 7).

This prohibition stems from concerns relating to the separation of powers between the three arms of the state: the legislature, the executive, and the judiciary. The judiciary “provide[s] an impartial check to other powers at work in the rule of law” (Soeharno at 94). The recurring concerns of impartiality and independence are in play. A judge who engages in partisan political activity or makes out-of-court statements on issues of public controversy is “by definition…choosing one side of a debate over another” (Principles, Pr. 6, Comm. D.2).

Moreover, if the judge’s activities attract criticism and/or rebuttal, judicial independence is undermined (ibid). Political activity of any kind is to be avoided.

Civic and charitable activities
The Principles authorize involvement in civic and charitable activities, with certain limitations:

Judges are free to participate in civic, charitable and religious activities subject to the following considerations:

a) Judges should avoid any activity or association that could reflect adversely on their impartiality or interfere with the performance of judicial duties.

b) Judges should not solicit funds (except from judicial colleagues or for appropriate judicial purposes) or lend the prestige of judicial office to such solicitations.

c) Judges should avoid involvement in causes or organizations that are likely to be engaged in litigation.

d) Judges should not give legal or investment advice.

(Principles, Pr. 6(C)(1))
This guidance provides useful parameters within which judges can organize their affairs. Yet, it is not always clear, as the cases of Justice Ted Matlow and Judge Donald McLeod demonstrate.

Justice Matlow was a judge of the Ontario Superior Court. In 1999, he became involved in a public controversy relating to a municipal development project (the “Thelma Road Project”) near his home in Toronto. Justice Matlow and his neighbours formed a neighbourhood community group called The Friends of the Village (the “Friends”); their purpose was to oppose the project. Justice Matlow became one of the group’s leaders. He sought standing in a hearing before an administrative tribunal, the Ontario Municipal Board, with respect to the legality of the proposed development. He also engaged in email correspondence and meetings with elected officials and city employees. He made comments to the media setting out his reasons for opposing the project; in these, he expressed his views on legal issues relating to the project. His correspondence indicated he was a judge. His language could be considered inflammatory.

Justice Matlow continued these activities for several years. In 2005, a development project was being contemplated elsewhere in Toronto relating to streetcars (the “St. Clair Project”). The project was controversial; a community organization called SOS-Save Our St. Clair Inc. (“SOS”) formed in opposition to it. SOS applied to the Divisional Court (a division of the Superior Court in which panels of three Superior Court judges hear judicial review applications) for a declaration that the project breached municipal planning laws and failed to accord with environmental assessments.

Justice Matlow was assigned to the panel hearing the application. The panel unanimously granted the application, in effect stopping the project. The City of Toronto became aware of Justice Matlow’s involvement in the Thelma Road Project, which was quite similar to the St. Clair Project. The City brought a motion requesting that Justice Matlow recuse himself and that there be a new hearing. The Court granted the motion, with Justice Matlow dissenting. The City then made a complaint to the CJC.

An inquiry committee of the CJC found that Justice Matlow had placed himself in a position incompatible with the office of judge, that he was guilty of misconduct, and that he had failed in the due execution of his office. It found that, taken together, Justice Matlow’s actions had rendered him incapable of executing his judicial office and recommended his removal (CJC, Matlow Report, Majority Reasons at para 45).

The report of the inquiry committee was considered by the full CJC. The majority of the CJC found that Justice Matlow’s involvement in the Friends, his meetings with officials on behalf of the Friends, and his interactions with the media were not problematic on their own (CJC, Matlow Report, Majority Reasons at paras 107–14). However, the manner in which he carried out these activities was problematic. The majority of the CJC concluded:

In summary, while judges who have personal interests, such as home ownership, that can be affected by government action have the right, in their private capacity, to contest, as do other Canadians, decisions that affect those interests as do other Canadians, there are limits as to what a judge might do. A judge is not entitled to use the prestige of judicial office to advance his or her private interests. Nor should a judge use intemperate language where others would likely know, or could be expected to know, that he or she was a judge. And under no circumstances is a judge entitled to act as a legal advisor for individuals opposing government action.

(CJC, Matlow Report, Majority Reasons at para 123)

The majority of the CJC found that some of Justice Matlow’s actions constituted judicial misconduct and placed him in a position incompatible with the due execution of his office (CJC, Matlow Report, Majority Reasons at para 176). However, it found that removal was not warranted given his expressions of regret, his 27-year career on the bench without other incidents, and the fact that the misconduct did not occur during the performance of his judicial duties (ibid at paras 179–84). The majority did, however, strongly disapprove of his actions and set out three directions: apologizing to specified individuals, attending a judicial ethics
seminar, and obtaining prior approval should he wish to participate in a public debate in future (ibid at para 186).

A minority of the CJC found that the conduct was sufficiently serious to undermine public confidence and, accordingly, would have recommended Justice Matlow’s removal (CJC, Matlow Report, Minority Reasons at para 9).

Justice Matlow’s situation is interesting in that he was advocating for his property rights. His involvement in a community organization was not per se to contribute to the community but rather to advocate for his interests and those of his neighbours. The majority’s view concludes, implicitly, that judges should be able to advocate for their own interests as private citizens—but they must truly do so as private citizens, without identifying themselves as judges or providing any kind of legal advice. Moreover…as was stated explicitly…a judge should act in line with the dignity of his or her office, avoiding intemperate language.

A recent case before the Ontario Judicial Council [OJC] illustrates the difficult distinction between community involvement that is educational and that which is advocacy. Judge Donald McLeod is a judge of the Ontario provincial court. As a Black judge who grew up in subsidized housing and with limited resources, he sought to assist others in overcoming similar barriers; he wished to be a leader for Black youth. Before his appointment, he was involved in community initiatives relating to education and mentorship of Black youth. One can readily conclude that this commendable commitment was a factor favouring his appointment. After his appointment, he sought to create a national organization called the Federation of Black Canadians [FBC] with a mandate to advance the social, economic, political, and cultural interests of Canadians of African descent. He became the Chair of the FBC’s Interim Steering Committee. Was this compatible with his new role as a judge?

The Associate Chief Judge of the Ontario Court of Justice expressed concerns. Judge McLeod and the Associate Chief Judge agreed to consult the Court’s Judicial Ethics Committee. The Committee approved his involvement with limitations: notably, he was not to be involved in fundraising or lobbying. However, after a time, the FBC began to engage in activities in which members, including Judge McLeod, would meet with politicians and government officials. Critiques started to emerge in the media about his participation, and a complaint was made to the OJC. Judge McLeod ultimately stepped down from his position at the FBC.

The OJC found that his conduct had been incompatible with judicial office, but it did not amount to judicial misconduct. It recognized that the FBC’s goals and Judge McLeod’s motivations were laudable:

Justice McLeod is rightly seen as a leader in his community. As a racialized judge, he has a moral obligation as a leader and role model in the Black community. As he noted in his response to the complaint, his community involvement was an important factor when he was appointed. There is no reason why it should have entirely ended when he assumed judicial office. He is to be commended for leaving his court room and judicial chambers from time to time in order to present to the public a positive and inspiring vision of what young Black Canadians can aspire to.

(OJC, McLeod Report at para 73)

However, his activities had crossed the line into advocacy on public policy. In his meeting with government officials and politicians, he “not only provided information but also advocated specific policy changes and the allocation of government resources to achieve those policy changes” (OJC, McLeod Report at para 75). He was also publicly identified as a judge. These activities were not, the OJC found, “merely educative or intended to inform politicians of the difficulties facing Black Canadians” (ibid at para 76). The OJC emphasized that “[i]t is incompatible with the separation of powers for a judge to enter the fray and ask political actors for policy changes and the allocation of resources, however worthwhile the judge’s motivating cause” (ibid at para 84). His actions were therefore incompatible with judicial office. The OJC did note, however, that Judge McLeod likely would not have crossed the line “had he restricted his efforts to educating members of the public about these issues” (ibid at para 88).
While Judge McLeod’s actions were incompatible with judicial office, the OJC concluded that they did not amount to misconduct (OJC, *McLeod Report* at para 94). The OJC noted there was no evidence that Judge McLeod had been involved in partisan political activity or fundraising. He had also contacted his court’s Ethics Committee and spoken with his Associate Chief Judge (*ibid* at paras 95–100). Overall, he had been motivated to promote public confidence in the judicial system, which was “relevant precisely because the aim of judicial misconduct proceedings is to maintain public confidence in judicial institutions” (*ibid* at para 103).

Judge McLeod’s situation illustrates that judges inevitably sacrifice certain aspects of full citizenship. However, the OJC made clear that a judge need not be a recluse. Rather, judges can contribute to their communities in many ways, including education as to policy issues. The OJC’s decision is notable in that it explicitly evaluated Judge McLeod’s conduct in light of the racial dynamics in Ontario (OJC, *McLeod Report* at para 102). It noted that many Black people mistrust the criminal justice system, that they are overrepresented in that system, and that they are disproportionately arrested and searched by police. Judge McLeod’s life experiences, the OJC held, made him uniquely aware of these issues, and his presence on the bench promotes the public’s confidence in the administration of justice (*ibid* at paras 102–103). This explicit acknowledgment by the OJC of the context of the complaint recognizes the legitimate and important role that judges can play in addressing inequities.

**Fundraising**

The *Principles* are clear that fundraising should be avoided by judges. They prohibit judges from soliciting funds “except from judicial colleagues or for appropriate judicial purposes” (*Principles*, Pr. 6(C)(1)(b)). Judges are also not to lend the prestige of their office to such solicitations (*ibid*).

Fundraising is different from other forms of community involvement: “It moves beyond one’s own individual support to the active seeking out of expressions of support from others. It encompasses an advocacy function, championing the cause and seeking to rally others to it” (Pitel & Malecki at 530). Fundraising also raises a real risk that the public will consider a judge to be affected by contributions made in response to their solicitation (*ibid* at 531). The perceived effects on the impartiality and independence of the judge require a complete ban.

**Membership on Boards**

Judges are prohibited from serving on the boards of commercial enterprises (*Principles*, Pr. 6, Comm. C.7). They are also discouraged from membership on boards of bodies such as universities, dioceses, schools, hospitals, and charitable foundations (*Principles*, Pr. 6, Comm. C.9; Wilson at 8). While such positions may seem harmless, it is not uncommon for such bodies to be involved in litigation, as well as in matters of public controversy. Being on such a board could disqualify a judge from sitting; in addition, it can raise concerns about impartiality.

Justice Georgina Jackson has provided a helpful set of questions that judges can ask themselves when considering whether to be a member of a board:

1. Would association with this board reflect adversely on the judge’s impartiality?
2. Would this activity interfere with the performance of his or her judicial duties?
3. Is the judge being asked to join this board to lend the prestige of the judicial office to fundraising?
4. Is this board likely to be involved in litigation?
5. Is the judge being asked to play a role in the expectation that he or she will give legal or investment advice?

(*Jackson* at 9)
These questions provide a useful framework. However, as we will see, this too is an area where judges can find themselves uncertain as to what is appropriate.

In the *Yukon Francophone School Board* case referred to above, the Supreme Court of Canada addressed a bias claim against a judge. The judge had heard a case in which the school board sued the territorial government for deficiencies in the provision of minority language education. The judge ruled in the Board’s favour on most issues. The Court of Appeal found a reasonable apprehension of bias based on (1) incidents at trial and (2) the judge’s involvement as governor of a philanthropic Francophone community organization.

The Supreme Court upheld the bias findings based on the incidents at trial, but it set aside the findings relating to the judge’s position in the philanthropic organization. The Court explained:

> Judicial impartiality and neutrality do not mean that a judge must have no prior conceptions, opinions or sensibilities. Rather, they require that the judge’s identity and experiences not close his or her mind to the evidence and issues. There is, in other words, a crucial difference between an open mind and empty one.

(*Yukon Francophone School Board* at para 33)

As this case did not arise in the context of a complaint to the CJC, it is unclear what the CJC’s views would be. However, the *Principles* seem to suggest that the main considerations would be whether the Foundation was likely to be involved in litigation or in matters of public controversy, both of which arose here. The case presents an interesting perspective on the interaction of the law of reasonable apprehension of bias with the ethical principles established by the CJC.

This kind of participation has recently been the subject of a case that is currently before the courts. Justice Patrick Smith of the Ontario Superior Court was asked to be the interim dean of the law faculty at Lakehead University in Ontario. That faculty has, as an important part of its mandate, the study of Aboriginal and Indigenous Law (Lakehead University, “Bora Laskin Faculty of Law”). The law school cited Justice Smith’s experience with Indigenous communities and publications on Aboriginal law as its reasons for asking him to take the position on an interim basis, as the dean had left her position unexpectedly.

Justice Smith spoke to his Chief Justice about the invitation to serve as interim dean. They both sought approval from the federal Attorney General for a six-month leave of absence, noting that Justice Smith’s responsibilities would be confined to academic leadership, that he would delegate administrative responsibilities to other personnel, and that he would not be remunerated (beyond his judge’s salary). The Minister…who was herself Indigenous…granted the leave of absence. Nonetheless, the CJC had concerns about the appointment and initiated an inquiry, ultimately finding Justice Smith should not have accepted it, as doing so was in contravention of the *Judges Act*. However, the CJC found the actions were not serious enough to warrant removal (*CJC, Smith Report* at paras 76–78). Justice Smith is currently challenging the CJC’s decision before the Federal Court. Accordingly, I will make no further comment.

**Matters of public controversy**

The *Principles* refer to the need to avoid involvement in matters of public controversy as a reason *not* to become involved in organizations or causes likely to be drawn into such controversies. The oft-cited case of Justice Thomas Berger provides a prime example of what can happen when a judge does become involved in such matters.

Justice Berger was a judge of the Superior Court of British Columbia. Before his appointment, he was a leading lawyer in Aboriginal law and represented Indigenous people in landmark cases. In 1981, he made a speech and wrote an article in a newspaper criticizing proposed constitutional changes for their failure to protect Aboriginal and treaty rights. He also criticized the absence of a veto by the province of Quebec on future constitutional changes, a matter of intense controversy.
Prime Minister Pierre Elliott Trudeau stated that it was improper for a sitting judge to make such comments. A judge of the Federal Court made a complaint to the CJC, and an inquiry panel was formed. The panel discussed the independence of the judiciary in detail, noting:

The history of the long struggle for separation of powers and the independence of the judiciary, not only establishes that the judge must be free from political interference, but that politicians must be free from judicial intermeddling in political activities. This carries with it the important and necessary concomitant result – public confidence in the impartiality of judges – both in fact and appearance.

(Robinette, Berger Case Report at 389)

The inquiry panel found Justice Berger had “intervened in a matter of serious political concern and division when that division or controversy was at its height” (Robinette, Berger Case Report at 389). It rejected Justice Berger’s argument that his remarks related to matters of conscience rather than politics. The panel suggested that he should resign as a judge if he wanted to comment on such matters (ibid at 390–92). It concluded:

Judges, of necessity, must be divorced from all politics. That does not prevent them from holding strong views on matters of great national importance but they are gagged by the very nature of their independent office, difficult as that may seem.

(Robinette, Berger Case Report at 391)

However, the inquiry panel refrained from recommending that Justice Berger be removed, as this was the first situation of this kind to come before the CJC (Robinette, Berger Case Report at 392).

Other members of the CJC were less critical than the inquiry committee. They concluded that Justice Berger’s actions were “indiscreet,” but did not warrant removal. The CJC did, however, state that judges should not take part in controversial political discussions, except as they relate to the operations of the courts (Robinette, Berger Case Report at 379).

The Chief Justice of Canada, Bora Laskin, made the following comments about Justice Berger in a speech:

[U]nbelievably, some members of the press and some in public office in this country, seem to think that freedom of speech for the judges gave them the full scope of participation and comment on current political controversies, on current social, and political issues. Was there ever such ignorance of history or principle?

(As quoted in Roach at 179)

Chief Justice Laskin further stated that any judge wanting to comment on political issues should resign from the bench (Roach at 179). Both Chief Justice Laskin’s comments and the views expressed by the CJC have been commented on unfavourably by academics (ibid at 179–80). However, it is the judges, not the academics, that have the last word.

Social media
The Principles are currently under review. One topic is the use of social media. Most lawyers have an online presence before appointment to the bench. After appointment, is an online presence comparable to involvement in a community group or organization? As social media use increases, this is an important area for the CJC to provide guidance.

Conclusion
In summary, in Canada the key ethical considerations for judges regarding involvement in the community are:

- Judges must weigh the benefits of community involvement against the potential risks to impartiality and independence;
- Judges must not engage in political activity of any kind;
- Judges may engage in civic and charitable activities, provided they do not reflect adversely on their impartiality or interfere with the performance of their judicial duties;
- Judges should be wary of involvement in organizations or causes that are likely to be engaged in litigation or matters of public controversy;
- Judges may advocate for their own private interests, provided they do not use the prestige of their office inappropriately;
- Judges must not engage in fundraising;
- Judges should avoid membership on boards of schools, charitable foundations, and the like, as they are increasingly involved in litigation and matters of controversy; and
- Judges should refrain from commenting on matters of public controversy.

I expect that in all our jurisdictions, the situation is broadly similar. There may well be differences in how these ethical standards are given effect, for example regarding the role of Chief Judges. In any case, this is an overview of how things work in Canada. I look forward to an exchange of views, notably as to similarities and differences in our various jurisdictions.

Works Cited

Judicial Council Reports & Case Law

In the Matter of a complaint respecting The Honourable Justice Donald McLeod (Ontario Judicial Council, 2018).

In the Matter of Section 65 of the Judges Act, R.S., 1985, c. J-1, and of the Inquiry Committee convened by the Canadian Judicial Council to review the conduct of the Honourable Theodore Matlow of the Ontario Superior Court of Justice: Report of the Canadian Judicial Council to the Minister of Justice (Ottawa: Canadian Judicial Council, 2008).


Yukon Francophone School Board, Education Area #23 v Yukon (AG), 2015 SCC 25.

Legislation

Act of Settlement (UK), 1700 & 1701, 12 & 13 Will 3, c 2.

Commissions and Salaries of Judges Act, 1760, 1 Geo 3, c 23.


Principles of Judicial Councils

Ethical Principles for Judges (Ottawa: Canadian Judicial Council, 1998).
**Principles of Judicial Office** (Ontario Court of Justice), online: <http://www.ontariocourts.ca>.


**Secondary Sources**


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


Lakehead University. “Bora Laskin Faculty of Law” (2019), online: <https://www.lakeheadu.ca/academics/departments/law>.


Thomas, Justice JB. *Judicial Ethics in Australia*, 2d ed (Sydney: LBC Information Services, 1997).


Wilson, the Honourable JO. *A Book for Judges* (Canadian Judicial Council, 1980).
“JUDICIAL ACCOUNTABILITY TO PARLIAMENT?”

By Chancellor Yonnette Cummings-Edwards, Guyana

This paper was presented at the Conference on behalf of Chancellor Cummings-Edwards by Justice Winston Patterson

The early writings of political philosophers like John Locke and Montesquieu formed the basis of the doctrine of separation of powers. They have also set the basis for entrenchment of that principle in various constitutions such as the United States and Commonwealth Countries. Yet, the ethos of parliamentary supremacy has flourished in some parts and the question arises whether there should be judicial accountability to parliament?

At first blush, this question seems repugnant to the doctrine of separation of powers. That there should be judicial accountability to parliament seems incompatible with the concept of judicial independence. However, on closer examination, an interesting array of ideas for efficient performance and better delivery of justice bring to the discussion a richness that is worthy of consideration. There is legislation in Australia, for example (Judicial Officers Act of 1986), which allows for judicial accountability to parliament and the community.

To delve deeper in the topic, the respective functions of the judiciary and parliament must be considered. This in turn leads to the discussion of the constitutional limitations involved in the doctrine of separation of powers. Thus leading to a further discussion of Parliamentary sovereignty versus Constitutional supremacy. The very nature of accountability begs the question of whether the judiciary should be subordinate to the will of parliament or be controlled by parliament.

**Functions of the Judiciary**

It is a trite expression that courts exist to do justice. In so doing they are required to be independent and impartial. “Decisional independence” and “Decisional authority”. These latter terms refer to the ability of the courts to “Interpret and Apply rather than create, substantive legal principles in the specific context of an individual adjudication, free from control or interference by the political branches”. See discussion by Martin Redish: Federal Judicial Independence: Constitutional and Political Perspective (1995) 46 Mercer law Review 697 at 698 – 699.

Parliament should therefore not trench upon the preserves of the judiciary. While they may be a symbiotic relationship between the Executive and Legislature, the same ought not to be in relation to the Judiciary. It is conceded that it may be necessary for the smooth flow of governmental machinery for there to be a fusion of the Executive and the Legislature. The Judiciary nonetheless should stand apart to do justice between the citizen and the state/government.

**Functions of Parliament**

The basic functions of Parliament consist of making laws, controlling the national expenditure and taxation, and scrutinizing the government and national administration. In the various constitutions of the Commonwealth Caribbean states, it is provided that parliament may make laws for the peace, order, and good government of the country. This has been subject to debate whether parliament power is restricted in that regard only. (C. Bowen V Attorney General of Belize).

**Separation of Powers**

Montesquieu in his book L’Esprit De Lois expressed the view that there can be no liberty if there is no division between the judicial branch on one side and the executive and legislative arms on the other side. The classic doctrine of Separation of Powers seem to have been qualified in recent times by the need to appreciate the core functions of the three branches of government in relation to the principles of democracy. Dr. Fiadjoe in his Commonwealth Caribbean Public Law has suggested that the
doctrine no longer bears the same meaning, which earlier writers conceived it to be. He said that in the context of the times then, the doctrine addressed the legitimate concern of the day, which was the fear of arbitrary rule. He submitted that in today’s world the new meaning of the doctrine maybe stated in two senses. “First, the doctrine helps us to appreciate that in the complexities of modern government, there can only be shared powers among separate and quasi-autonomous yet inter-dependent State organs”. Secondly, the doctrine helps us to appreciate the truisms that the system of government which we operate works on the assumption that there are core functions which are classified as legislative, executive and judicial. These functions belong to their respective branches. Thirdly, the doctrine helps us to realize that government involves the blending of the respective power of the principle organs of state. It is Dr. Fiadjoe’s view that experiences shows that we cannot have watertight compartments in government.

Discussion
It is perceived that under the system of parliamentary supremacy, parliament can make any law and those laws must be followed. This view finds expression in City of London V. Wood (1701) 12 Mod Rep 669, where Holt CJ said (p687): “An Act of Parliament can do no wrong though it may do several things that look pretty odd.”

If parliament is supreme and has full plenitude of power to do as it wishes this would be a recipe for disaster as it could lead to arbitrary rule and the erosion of democracy and stability. Justice Pierre JJ Olivier depicted clear instances of judges in pre-apartheid South Africa having to apply oppressive laws passed by parliament and for which judicial review was not available. (See Parliamentary Supremacy and Judicial Independence: A Commonwealth Approach: edited by John Hatchhard and Peter Slinn). Such a state of affairs is incompatible with constitutional supremacy.

The right of Parliament to make laws that cannot be reviewed goes against the grain of constitutional sovereignty. Dicey’s view that the legislature “has a right to make or unmake any law whatever” and no person or court outside parliament “is recognize by the law of England as having a right to over ride or set aside the legislation of parliament”, may be out dated.

Many Commonwealth States have abandoned the doctrine of parliamentary sovereignty and replaced it with the doctrine of constitutional supremacy. The various Commonwealth Caribbean Constitutions contain a supreme law clause, which recites that the constitution is supreme and any law that is inconsistent with it is void to the extent of its inconsistency. Thus, the courts can and do review laws enacted by parliament and pronounce on their constitutionality.

Given the power of the judiciary in that sense, should it be made accountable to parliament? Should parliament be able to dictate the works of the court or set parameters under which it must operate? In an absolute sense this cannot be tolerated, as it would be an erosion of the principles of judicial independence and separation of powers. To maintain that necessary division between the two branches, judges must be able to constitutionally review the work of parliament, without themselves encroaching on the boundaries of parliamentary “independence”. This necessary distinction in the respective functions of the judiciary and parliament are illustrated in the Latimer House guidelines.

Guideline I stipulates that:

“The legislative function is the primary responsibility of parliament as the elected body representing the people. Judges may be constructive and purposive in the interpretation of legislation but must not usurp parliament’s legislative function. Courts should have the power to declare legislation to be unconstitutional and of no legal effect. However, they may be circumstances where the appropriate remedy would be for the court to declare the incompatibility of a statute with the Constitution, leaving it to the legislature to take remedial legislative measures.”
Judges must be independent and carry out their functions without fear or favour. If they are required to strike down legislation that is inconsistent with the constitution, it must be done boldly. It is significant, as O’Brien noted, that Commonwealth Caribbean parliaments have been obliged to function within a constitutional system where parliament is no longer sovereign but is subject to the provision of the Constitution. (Derick O’Brien, The Constitutional Systems of the Commonwealth Caribbean).

O’Brien further observed that: (p196)
“Judicial independence takes on a critical significance when one of the parties to the proceeding is the government. If judges are to hold government and legislatures to account when they transgress the limits placed upon their actions by the constitution, it is, therefore, essential that they are not predisposed to decide the outcome of the proceeding in favour of the government because they have been subjected to threats, interference or manipulation by the latter.”

The concept of accountability denotes justifying one’s actions or decisions. It connotes the state of being answerable or responsible to someone. It is best explained by Prezeworski et al, in the book “Democracy, Accountability and Representation (P55) thus:

“The concept of accountability is not by itself problematic, or at least it should not be. We say that one person, A, is accountable to one person, B, if two conditions are met. First, there is an understanding that A is obliged to act in some way on behalf of B. second, B is empowered by some formal institutional or perhaps informal rules to sanction or reward A for her activities or performance.”

If the judiciary is accountable to parliament in the manner delineated above, and a particular decision of the court frustrates the wishes of parliament, the judiciary can be sanctioned. If parliament’s power is not circumscribed, it may reverse the court’s decision by legislative means. A poignant example of legislative interference with a judicial decision has been provided in the case of Burmah Oil Co. Ltd v. Bank of England (1979) 3 All ER 700.

In his text, The separation of Powers and Legislative Interference in Judicial Process, Peter Gerangelos opined that the integrity of the decisional independence of the judicial branch is most likely to be compromised by two scenarios. The first, ‘the pending case scenario’, concerns legislative interference, whether inadvertent or intentional, with the resolution of cases pending within the judicial system. The second, the final judgment scenario, arises where the legal controversies have been finally decided and the legislature attempts to interfere with the particular outcome. The judicial power examined in both scenarios is the conclusive adjudication of controversies between parties in litigation, particularly in cases where the government is a party to the litigant or has an interest and there is a binding declaration of respective rights and duties according to existing law. Dr. Gerangelos sees this, rightfully so, as a core aspect of judicial power which must be protected by an entrenched separation doctrine. He added that the search for separation of powers principles regulating those scenarios invariably involves the identification of constitutional limitations on the legislature.

In order to guard against such legislative interferences or even usurpation of judicial powers, and restriction of the court’s power of judicial review, judicial accountability to parliament must not be readily accepted.

It has been argued by some academics that individual judges and the judiciary should be subjected to accountability. It has been further said that accountability is not inimical to the independence of the judiciary. It has been suggested also that accountability is necessary in most areas of public life and the judiciary, given the importance of their functions, ought not to be exempted from this rule. Professor Stephen Colbran has suggested that there are benefits for the judiciary in this regard, as high levels of judicial performance has been encouraged by accountability.

Within the commonwealth Caribbean, there are some requirements on the part of the judiciary which may be viewed as forms of judicial accountability. The laying of annual reports of the judiciary in parliament and the request for annual budgetary and financial allocation from the parliament are considered. These activities, in
so far as they may provide limits to judicial responsibility or independence of the judiciary, need to be revised. The concern here is that any impingement on the insularity of the judiciary in this regard may cause further inroads over time. Therefore significant checks and balances must be in place. There is the Judicial Service Commission, which regulates appointments, conditions of service, discipline and security of tenure for judges. However, the Commissions owe their existence to an Act of Parliament and their repeal can be achieved in like manner.

Similarly, there is legislation in some countries providing time frames for judges to render their decisions after the completion of cases. (See the Time Limits for Judicial Decisions Act, 2009, Guyana). Penalties may be imposed for infringement of time lines. There also exist informal mechanisms for judicial accountability. The need for judges to give reasons for their decisions and the system of appeal by which a higher court reviews the decisions of the lower courts, provide examples. While some may argue that it is not a full avenue for accountability, the fact that judges must render a decision, which is subject to review, allows for enhanced performance without accountability to Parliament. This avenue does not allow a breach of the independence of the judiciary. The higher judiciary reviews the cases rather than parliament, thus providing no infringement of the doctrine of separation of powers. In relation to the core function of the court therefore, judges must exercise these without fear of sanction or hopes of reward by parliament. There must be not be any impingement of the doctrine of separation of powers.

This is not to say that judges are a distinct or separate specie, having a special law unto themselves. It is not that judicial independence must be seen in absolute terms. Rather, it is that in carrying out the core functions effectively, particularly constitutional and judicial review, the judiciary must be independent. Independence and impartiality are necessary for the rule of law to be upheld. It is therefore necessary that the judiciary be not accountable to parliament. Even if it is felt that in a democratic environment, there should be some form of accountability, this may be achieved through public institution or body or commission other than parliament or the executive. Any mechanism therefore, for fostering judicial accountability must not in any way derogate from the principles of separation of power and judicial independence.

Conclusion
The core function of the judiciary in providing impartial and fair decisions in accordance with the constitution, the statutes and the common law, must not be compromised. Parliament however well-intentioned ought not to be the authority to which judicial accountability should be reposed. The present hierarchical system within the judiciary best serves as a mechanism for judicial accountability. Indeed, as Lord Cooke noted, ‘judicial accountability has to be mainly a matter of self-policing: otherwise the very purpose of entrusting some decisions to judges is jeopardized. (Robin Cook, “Empowerment and Accountability the quest for Administrative Justice” (1992) 18 Commonwealth Law Bulletin). This is the best form of accountability.
At the heart of the operation of our legal systems across the world, in every type of jurisdiction, is US, the judicial officers.

We may work in grandiose buildings with well-resourced technology and staff or far more humble settings with little in the way of resources or staff, but WE are the universal, crucial feature of the delivery of that justice system.

Without us, the justice system has no capacity to function.

That makes us the most precious part of the justice system and obviously therefore, the resource that must be the most protected.

Our traditional way of thinking about this “protection” is to couch it in terms of institutional protection via the separation of powers, the need for judicial independence, and the need to maintain standards of conduct both in and out of court to maintain the public’s confidence.

Until very recently in the history of the law, scant if any attention has been directed to the protection of our individual functioning and well-being as judicial officers engaged in the tough, unrelenting and potentially emotionally, physically and psychologically risky work that we do.

Even as awareness more generally of the risks of chronic stress, vicarious trauma, compassion fatigue and burn out have become better understood and accepted, we have been slow to face the reality of these risks to us in our workplaces.

Recognition/awareness

In my opinion there are some reasons why we judicial officers have been somewhat slower than other workplaces to focus on our psychological health and wellbeing and the potential risks to it as a result of our work. It is necessary to examine some of these reasons to address specific aspects of our culture that have been, and, in some places, remain resistant to change, including those deep pockets of resistance built into us.

In my view the maintenance of well-being in our work places necessitates acknowledgement of a range of issues that impact on us, both structurally and individually which have contributed to a culture of silence, denial and suppression as a way – albeit maladaptive in the long term – to manage and respond to the impact of our work upon us.

As a group, we face barriers to addressing well-being issues.

1. Our training and discipline:

Our first problem is that we have been taught to deny our emotions. Indeed, we have been taught and trained and disciplined that to have an emotional response in law means that you have lost that most prized of essential qualities of the lawyer: objectivity.

Emotion has been seen as the extinguisher of reason, unprofessional and therefore it could not be spoken of as part of our vocabulary.

Indeed, some of you will remember that the very reason that women were initially denied the right to enter the practice of law was because we were considered too emotional and therefore could not obtain the objectivity necessary to practice law.

Therefore, the corollary of this has been that admitting to an emotional or psychological impact from the work, be it exposure to traumatic material and/or traumatized people or feelings of stress and overload have been seen as signs of failing at legal practice. Weakness means that one is “not
managing”, not coping, or simply not suited to the work. Just one of the problems with this reasoning is that it locates the problem in the individual, not in the work or the workplace.

2. Public criticism of the Courts/tribunals more generally
As a group, we regularly experience criticism and sometimes scorn. We can be the easy targets for people (including governments) to blame, abuse and criticise. We can be perceived in some jurisdictions as highly paid and privileged.

I see this as relevant because as the discussions about the nature and causes of vicarious trauma have emerged over the last decade or so, we have featured in those groups exposed to considerable vicarious trauma. However, most of the other groups who are exposed to vicarious trauma like nurses, paramedics, psychiatric nurses, fireman, counsellors, all enjoy high degrees of community support and praise. By contrast, we often do not, as a cohort enjoy high degrees of praise or encouragement from anywhere. These are factors that can have a silencing affect upon us.

3. Competitive nature of our work environments
Unlike many other professions, our practice environments are highly combative and highly competitive and this will often permeate into our judicial environments.

Our work has centred around pulling each other’s arguments apart and this can sometimes cross over into pulling each other apart.

Whether criticism comes from the court above or from our peers, it can have a considerable impact upon us and detrimentally affect our well-being. It can also act as a barrier to us feeling able to speak of a difficult period because our culture has instilled in us that we must not let our “competitor” see any vulnerability.

Similarly, our cultures inside courts have, traditionally, been not only un-informed about these risks and challenges in our workplaces, but have often allowed negative attitudes to flourish about anyone who has been or is being impacted by the work in this injurious way. This too has a silencing effect on the ability to speak up when in difficulty.

I hasten to say I think we are generally good at giving each other practical help and advice about what to do in a particular case or situation, but in the trickier territory of feelings/emotions/well-being, we are generally far less well-equipped to handle these issues for ourselves and each other.

Personality types
I don’t think it is too sweeping a generalisation to say that our workplaces tend to attract personality types who would be described as driven, work focused, intense and perhaps even impatient; unable to “take the foot off the pedal”, perfectionists inclined to work obsession and therefore not able to easily relax or let go. These characteristics en masse inside an institution will not be conducive to engaging in discussions about self-care and well-being.

These I identify as just some of the reasons that have caused us to be slow to address the risks to us in our workplace. You may well identify others.

What are these risks and where do they come from?
The literature is replete now with research about the range of risks to us in our workplaces. Let me turn to a very brief overview of those relevant to us.

Vicarious or secondary trauma is generally defined as a condition which can be experienced as a result of being constantly exposed to distressing material and distressed people or their traumatic experiences. Our workplaces are obviously filled with such exposure.

Some of the signs and symptoms of vicarious trauma are sleep disturbance and anxiety, hypervigilance, loss of enjoyment and emotional numbing, intrusive images and memories, increased stress on family and relationships, and increased substance use.

Compassion fatigue is exhaustion experienced as a reaction to the constant and on-going expenditure of empathy, sympathy or emotional engagement which risks a reduction in the capacity or interest in being empathetic to others, irritability, depression, numbing and avoidant behaviour.
**Burnout** prolonged demanding work with accompanying stressors which creates the risk of emotional exhaustion, cynicism, irritability and feelings of disconnection to others.

Chronic stress needs little definition and, of course, is often the practical reality of our daily lives. Unrelenting workloads with ever burgeoning lists and pressure on us to work quicker and harder; that includes the weight of outstanding judgments, fear of making a mistake, the constant pressure of needing to keep up with the ever-changing laws, litigants in person in a system not designed for unrepresented persons, poorly prepared cases that burden the judicial officer in an adversarial system, and under resourced courts, controlling threatening and distressing situations in courts…. The list goes on and on.

We all know about the importance of that elusive thing called work/life balance, but once one starts getting exposed to the rudimentary science of what chronic stress is doing to us, it behoves us to stop and listen.

A brief refresher about our nervous system: we know our nervous system has evolved to ensure our survival and beyond that, to try and create the necessary balance to keep us well and functioning effectively. Most importantly, the sympathetic and parasympathetic aspects of our autonomic nervous system are generally described as having these balancing functions. The sympathetic nervous system is engaged in preparing us for intense physical activity including responding to threats, no doubt familiar to you as our “flight or fight” response.

The parasympathetic nervous system has almost the exact opposite function - engaged in relaxing us and sometimes referred to as the “rest and digest” response.

Stress stimulates the sympathetic nervous system. It was built to respond to acute stress or threat. When its functions are constantly on, many basic body functions are inhibited such as our digestive system or our immune systems. This is why all the personal health advice we get is to engage in techniques and activities that deactivate our sympathetic nervous system and activate our “rest and digest” mode. Just think about how much of your day, week, life is spent with your sympathetic nervous system in “alert” or “high alert” mode.

**Personal factors which can affect well being too**

1. **Personal issues, health and relationships**
   Just like every other human being, what we have or are experiencing in our personal lives will have an impact on our wellbeing as will our particular personalities.

   Included in this, some of us will be more prone to feelings of self-doubt, have that nasty, loud self-critical voice that refuses to be turned off, feelings of inadequacy, prone to depression and anxiety as a result of our personal histories which we may have kept hidden for fear of perception that everybody else around is handling themselves, so you have too also.

2. **Our expectations in the job**
   Some of us will have come from busy and demanding practices that had us working long hours and feeling considerable stress, both acute and chronic. So, one’s perception of work inside the court or tribunal may initially feel much less pressured due to not having to answer to clients, write bills and invoices, get last minute briefs, or front up to difficult benches.

   My perception is that this may create a resistance to acknowledging that life on the bench has a different set of stressors that may not be apparent when you first step into the work. And then, a bit like the frog in the pot of water that is gradually heating up, it is much harder to come to a realization that things are getting a bit too hot to handle, but what to do about it?

3. **Longer service increases the risk**
   The state of the research, such as it is at present, (Canadian study 2002) and an American study 2006 (Jaffe, Zimmerman et al) both found that vicarious trauma is more likely to be reported with length of experience.

   This makes sense as to the cumulative effect of what we are exposed to. However, it is important for us all to remember the stressors of that first year or two when one is learning the job and adjusting one’s life to being an inhabitant of a totally different world.

4. **Personal triggers**
We were taught at the beginning of our Royal Commission that we would all experience aspects of our work differently because our life experiences, personal experiences, and histories were different. This would mean that a particular aspect of an account we hear may suddenly trigger a strong emotional response, maybe even unexpectedly, even when you think you have prepared and read what you are about to hear. We were taught that it may be because it touches upon a personal memory, traumatic or otherwise; it may be because the person has some characteristic which reminds you of, for example, your mother, your daughter, your son, your brother, or yourself or a particular fear or personal concern.

The trigger can cause you to feel very distracted and sometimes unable to concentrate as you have been taken into your own thoughts or struggle to override it and concentrate on the task at hand.

**Summary of the risks to us of all of the above**

So, the behavioural science experts tell us that constant exposure to traumatic material and traumatised people together with all of the other chronic stressors of our work may manifest in us in a range of ways such as sleep disturbance including nightmares, irritability, loss of appetite or overeating, a range of somatic symptoms and illnesses, difficulties with concentration, obsessive or avoidant behaviour which may include finding it difficult to get into the courtroom, social withdrawal, a sense of powerlessness, hyper vigilance, flashbacks, chronic fatigue, lowered immune system, blunted emotions and substance abuse, through to lowered mood, anxiety and depression.

As if that is not enough, we are told that the risk of burnout increases in such circumstances and can leave us with a pervasive sense of emotional exhaustion, cynicism and feelings of disconnection from others.

So, what to do about these risks?

In our work in the law it is not possible to remove our exposure to traumatic material, distressed or traumatised people and the range of general pressures of workloads. So how can we and our workplaces best manage the risks this poses to us?

**General advice:** We all know about the need to eat a well-balanced diet, get enough sleep, not drink too much, try and get enough exercise and relaxation time and rest your mind in whatever way best works for you. These are all important things to remember and try and stick with, but given what I have said about the barriers we face to self-care, there are some very particular aspects of us and our workplace which I want to present to you as important to address for your well-being and enjoyment of your work.

1. **A culture of acknowledgment of the risks to us in our workplace and giving us an awareness of those risks and strategies and supports to address those risks.**

We come from an array of different jurisdictions and different levels of resourcing, but a culture of raising awareness about the risks to us in our workplace is important because it is the antidote to the denial, suppression and silencing that has long been our only strategy.

I learned about the importance of such a culture during my five years on our Royal Commission into institutional responses to child sexual abuse.

Right at the very beginning of our Commission, we discussed the potential toll on each of us from the work we were about to undertake and what we should do about it. We agreed we needed to take some expert advice about how best to manage our exposure to the content, the anticipated heavy workload, the public pressure including potential controversy and being away from home and on the road for much of the time.

So, in our first weeks, we had a psychiatrist specializing in trauma and vicarious trauma come in to have a discussion with us about risks, signs and symptoms and the science of how we would be put at risk and what the early warning signs were and how we should structure our work to minimise risks to us.

I found that a better understanding of what our body is doing when put under sustained stress and activated into high alert mode for weeks, months, and years was very valuable; in particular, the information helped combat the outdated notion that if we are suited to the work, we will deal with all of this because we are “trained” for it. (Of course, we were not.)
We got advice about how we should structure our work to cushion the impact on us. Whilst we were not able to stick to that advice by sheer weight of numbers and deadlines, the acknowledgment that we had of the strain on us and the support provided through the availability of regular “debriefing” was of great assistance.

We started from this understanding and I am convinced that it helped immeasurably for a few reasons. First, it was a clear acknowledgement of the risks to us of the work, the signs and symptoms of those risks and a validation of the pressures that we would be under. In turn, this provided space for us to talk with and be open and supportive with each other. Indeed, I think it helped us feel closer to each other and more understanding and caring and supportive towards each other, Commissioners and staff alike.

In my view, this was a very important factor in supporting our psychological health and resilience and I think it is a crucial factor in support of all judicial officers.

Working in such a culture addresses the potential fear and isolation that one can experience if one starts to feel an impact on their psychological wellbeing. That is, if your induction into the work place makes you aware there are these potential risks, not only will it assist you to recognise the symptoms more readily and therefore reduce the sense of fear and isolation caused by a culture of silence, you will be more likely to take some early action.

Importantly, the emphasis in such a culture is the proactive “stay healthy” approach. That is, there are risks to all of us in the work we do and we need to engage in a range of strategies to assist in maintaining our wellbeing.

2. Fostering and maintaining a culture of self-care

We learned much about institutional cultures on the Commission. I translate some of that learning into concluding quite confidently that the culture of our courts and tribunals can encourage and support good self-care and judicial well-being, or undermine it.

If the underlying culture, whether spoken or not is, is that if you are not seen to be keeping up or you are experiencing difficulty, for whatever reason, it can translate into an individual sense of shame or failure, a sense of not “coping”. If the culture is one that does not speak openly about the risks, potential warning signs and what to do about them, then this can have a silencing, isolating and therefore destructive effect on us as individuals.

Our courts need overt policies and practices that not only identify the risks, but teach the risks, actively address isolation, promote the value of peer support, and provide on-going professional development on promoting well-being and stigma reduction strategies.

In turn, this promotes a sense of organisational belongingness and interconnection which tends to have a healthy impact on morale and in turn bolster personal resilience. That is, if we feel personally accepted, respected, included and supported by others and doing good and valuable work, it promotes a powerful sense of resilience to help endure the dark days.

In primitive scientific terms, what I have learned is that it helps to calm that part of the autonomous nervous system that feels the need to keep us in high alert, because such a culture will help us feel safe and supported and deactivate the “alert/alarm” mode.

Taught to identify risks

It should be part of induction and on-going professional development for all entering courts and tribunals to be taught how to maintain our well-being in the face of what needs to be acknowledged and taught as the risks.

None of us would accept that a worker must discover for herself or himself what the strategies and requirements are for how to stay safe at work and what the risks in the workplace are.

Denial, suppression and minimisation run the risk that we will simply end up engaging in maladaptive behaviour ranging from experiencing high levels of irritation which we take out on others, sometimes in the courtroom or the workplace to other possible serious impacts such as substances abuse, loss of enjoyment of life, emotional numbing, anxiety and depression.
Having an understanding and appreciation of the risks of vicarious trauma and chronic stress means that we are able to identify early warning signs for ourselves and engage in both work practices and personal behaviour that helps to reduce the risks and helps keep healthy and productive and enjoying work and assisting colleagues to do so too.

3. The provision of a respectful space to talk and debrief: both peer to peer and with the professionals

During our Commission, we were all supported and encouraged to engage in the professional debriefing we had available to us. I had participated in debriefing previously as a State Coroner, and had learned there is actual science to the value of debriefing, whether it be with your peers or with a professional. It is best summed up in the expression, “Language is the digestive juice of the mind” and warns against swallowing our emotions or experiences without chewing them first.

Using my understanding of this, I would sometimes stay on with the debriefers after a gruelling day on the Commission and “chew over” what had happened that day before going home. I found that helpful. The Victorian Judicial College has also just commenced a peer to peer support program now assisting judicial officers to learn techniques for supporting each other.

A final word on culture

A court culture which fosters and recognizes the value of the work we do, and the value of us to that work will help maintain resilience and wellbeing in its workforce. It will be a buffer to the sense of powerlessness one can feel in the face of an unrelenting workload.

The encouragement, emotional support and positive feedback that we got all the way through the Commission served to cushion us considerably during the difficult times.

There is plenty of emerging research which can demonstrate the importance of this.

So, our Courts need to foster a sense of value and purpose for what we are doing. Our leaders can and should play a role in doing this in many and varied ways. That cultural validation and acknowledgement is important to both individual and cultural wellbeing.

I will stop with these words ……

We all need to support each other to create a culture which recognises the value of the work we do and the value of us to the work.
“JUDICIAL WELLNESS – KEEPING FIT AND STAYING ALIVE”

By His Worship Godfrey Kaweesa, Uganda

INTRODUCTION:
I bring you warm greetings from the pearl of Africa, Uganda once again. I am privileged and humbled to address the CMJA once again in this beautiful country Papau New Guinea (PNG)

According to Mike Adams:

“Today, more than 95% of all chronic diseases are caused by food choice, toxic food ingredients, nutritional deficiencies and lack of physical exercise”.

Before delving into this subject, I have crafted the following questions to set the ball rolling; by show of hands:

- How many of us have tested for non-communicable diseases like diabetes, hypertension e.t.c?
- How many of us know about our HIV sero status?
- How many of us are nutritionists i.e. feed according to our blood groups?
- How many of us have witnessed violence being committed against a fellow judicial officer in the course of executing their mandate?
- How many of us undertake routine exercises?
- How many come from Judiciaries that have wellness programs for judicial officers and staff?

The Oxford advanced learners Dictionary defines “Wellness” as the state of someone being healthy. “Fitness” is the state of being physically healthy and strong and in our context being suitable to execute the judicial function.

“Staying alive” connotes continuing to exist full of emotion, excitement, and activity. My task today is to unpack some of the factors that fetter Judicial wellness and then suggest ways of how judicial officers can remain fit for their purpose and alive. I will look at developed economies like the US and the UK and compare it with upcoming economies like Uganda and most African nations. A number of scholarly works have been reviewed to inform this presentation which is also in line with requirements of the CMJA’s Editorial Board on the use of footnotes.

Being a judge can have many perks including prestige, self-satisfaction, and the opportunity to provide a community service in the judicial system. At the same time, being a judge can be lonely, stressful, and can carry a burden shared by a few.

In short, wellness connotes taking care of yourself. It connotes the attitude of self-care, a practice of health maintenance, the management of stress, and an enjoyment of life. The practice of wellness incorporates emotional, physical and spiritual elements, all of which are designed to help judicial officers take care of themselves in healthier ways.

Studies in this area have been limited especially in developing jurisdictions like Uganda. Traditionally, topics like Judicial stress have been unmentionable – pointing to the “traditionally stress denying” culture of the Judiciary. The judicial function imposes superhuman expectations on Judicial officers to represent perfect wisdom, temperance, and insight, and restore justice and truth to complex and broken human circumstances.

It is unthinkable that those who stand in judgment on others might themselves be human, and subject to human vulnerabilities. In their concern to preserve public confidence in the courts, judges may not have felt free to explore the psychological impact of judicial work. Perhaps for this reason, the mental wellbeing of
judicial officers has received virtually no scholastic or policy attention dispute the large and growing body of research revealing alarmingly high rates of anxiety and depression among legal professionals.

**Inhibitors of judicial wellness: Judicial stressors: Mental health of judicial officers:**
Judicial officers are subject to a normal spectrum of psychological issues, including depression, anxiety, and midlife crisis. These can underlie a reduction in productivity, tardiness in opinion/judgment writing, clashes within the judicial administration and hierarchy, and intertemperate and inappropriate behaviour on or off the bench.

According to an Annual profession survey of over 7500 Australian professionals in 2006, statistical analysis demonstrated that respondents from legal professionals were most likely to report moderate to severe symptoms of depression when compared with the total sample.

**Substance abuse and addiction:**
The same Australian study found that legal professionals were more likely to use alcohol and other drugs to reduce or manage feeling of sadness and depression when compared with other professional groups.

**Vicarious Trauma in judicial officers:**
Peter G. and Claire V Crooks in their paper “Vicarious Trauma in judges: The personal challenges of Dispensing justice”, wonder how judicial officers can balance the need to be human and engaged in their work with the need to maintain professional distance. Becoming a judge is considered the pinnacle of one’s professional achievement in the field of law. Literally and symbolically, judges are the face of justice in many aspects of their community. Judges must model fairness, impartiality, patience, dignity and courtesy to all with whom they come in contact, in contrast to the often rough and tumble environment that constitutes the courtroom.

Matters of domestic violence, murder, rape, child neglect and abuse, divorce and child custody, mental illness, sentencing and more play out daily while the media, families of the parties, victims and others often observe and comment. The combination of factual circumstances and emotions that are displayed, together with the sheer volume of cases would test any judge’s patience.

Vicarious trauma (sometimes referred to as compassion fatigue, secondary trauma or insidious trauma) is most often related to the experience of being exposed to stories of cruel and inhuman acts perpetrated by and toward people in some society (Richardson 2001). In Uganda just like I warned earlier, no studies have been conducted on the subject. But according to a survey of 105 judges in 2003, that was published in the Juvenile and Family Court Journal in Canada, overall 63% of judges reported experiencing one or more short or long term symptoms of vicarious trauma (short term symptoms include sleep disturbances, intolerance of others physical complaints). Long terms symptoms include sleep disturbances, depression, and a sense of isolation. Female judges were significantly more likely than male judges (73% Vs 54%) to report the presence of one or more symptoms. The same study advanced the ABC model as a coping strategy i.e. Awareness (being attuned to ones needs, limits, emotions and resources), Balance (i.e. among activities, especially work, play and rest) and Connection (to oneself, others and to something larger). (Saakvithe and Pearlman 1996).

**Career and Organizational Stressors:**
In mid-career a number of judicial officers experience a kind of pause.

They know their options to re-enter law practice, government service, or academic life are waning. They have fully experienced the rewards as well as the vicissitudes of the judicial career. They also ask themselves “what have I achieved? Was the financial and family sacrifice all worth it? Will it get any better in the second half of my career?”

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Another area in which judicial officers seek help is organizational and collegial conflict. The issues range from pure personality clashes with a colleague or appellate panel, to power struggles with the administrative office or the presiding judge. Gossip may appear in local bar publications, and can be quite nasty. The obtaining of assistance and calm guidance in these circumstances is invaluable and discretion is absolutely essential.

**Marital and family issues:**
When a judicial officer experiences mental and family conflicts, the size of his or her community matters. In smaller and rural communities, judges have little or no privacy outside of their homes. A judge in a one judge court is especially vulnerable. In larger or metropolitan jurisdictions the media are interested in publicizing what may be occurring in the life of the judge and court. For instance in certain legal proceedings such as divorce, a judge may tend to appease the spouse in contested custody and financial matters to minimize public scrutiny. Children of Judicial officers may face challenges at school and in the playground because they are held to a higher standard by teachers and couches. Peer pressure may involve them in delinquent behaviour. In rebellious teenage years, a judge’s child may engage in problem behaviour to embarrass the parents. Disputes with neighbours can be compromised.

A judicial officer may choose not to sue or dispute a problem with a neighbour over a property line or with a local contractor.

The life of an unmarried judicial officer is another area that sometimes can benefit from counselling. The single woman on the bench is often an object of outright curiosity and chatter. Who does she date? If she doesn’t date, is she a gay or are there other issues? In certain patriarchal jurisdictions, female judicial officers on the bench are frowned at and may be resisted.

**Aging and retirement:**
In developed jurisdictions like the Canada, the US, UK, State Judiciaries may offer pre-retirement orientation concerning benefits, health insurance, and options for senior status and part time judicial studies as well as the new field of private judging and mediation. A number of programmes include information for spouses, as well as briefing on the personal emotional transition from active, fulltime judging to retired or substitute status.

For a number of judicial officers, however, retirement prevents a serious tipping point in self-image and public esteem. Though it may be scoffed at and treated as unimportant, most deeply enjoy and covet their esteemed title of judge or justice as well as their standing in community. Specific needs of a retired judicial officer may not be understood. A judicial officer may need support and soothing but society usually has a mixed image of judges;

“The judge needs so much support and soothing All on a high salary ..what on earth does he or she need help for? .. Ridiculous!”

 Assistance to judicial officers does not gather sympathy from the press, legislators, or even the majority of lawyers. Aging judicial officers who are still serving may suffer for a considerable period and operate marginally and in denial before help arrives. A wellness-based judge-to-judge assistance programme might help the spouse or family of the judge in question to obtain discreet medical and psychological guidance for to deal with the massive denial and indignation often involved.

**Judicial culture and self-identity:**
Generally the public and bar have little accurate information about what it is like to be a judicial officer. Fictional accounts about judicial officers abound, but very little is to be found about the realities of judicial life. As a result judicial officers are distanced from the very groups from which they originate. Further, there is widespread duality in how judicial officers and judicial systems are perceived. On the other hand, great respect is shown to judges and many lawyers aspire to that status despite the obvious hurdles and costs. At the same time, the lawyer-judge relationship is ambivalent and burdened by formality and
structures of ethical code. Thus, even long-standing friends can feel a subtle inhibition in their relationship. Figures of power and importance often inspire both envy and criticism. The media are quick to report questionable behaviour or decisions. Practicing lawyers keenly observe and comment on all aspects of court life and share their opinions of sitting judges. Lawyers who become judicial officers gradually lose the empathy and collegiality of most lawyers. While the judicial career is deeply satisfying and rewarding, it also includes the accumulation of feelings of guardedness, isolation, and vulnerability, all of which are kept hidden behind the public persona. Often times the fear of loss of privacy and the spectre of shame, of being found unworthy of the title and office, and of public humiliation makes judges with medical, emotional, family or career difficulties soldier on without help. Politicians can strike back in word and print if attacked, but Judicial officers do not. Others can socialize and behave with greater latitude, judges do not. Most Judicial officers gradually experience an irreducible isolation and restriction in their public speech and behaviour. This also extends to their families to some degree. As official problem solvers and models of wisdom, judicial officers are presumed to have little need of therapy or other help, because they are expected to self-correct if troubled or over-burdened.

Financial Hardships:
There is no doubt that any judicial officer who is financially hard up will definitely be stressed and lead to job dissatisfaction. Such was the finding according to a pilot study of job satisfaction in Massachusetts judges (summer 2011) in the Journal of Psychiatry and Law vol7, 39; the study examined the overall job satisfaction of Massachusetts judges, and additionally addressed their views of what might serve to increase their job satisfaction. Results indicated that these judges were highly satisfied with their jobs and that they viewed increased pay as the most important contributor to increased job satisfaction, followed by improvements in professional support staff.

In the United Kingdom, according to the first survey of salaried judges commissioned by the Senior Salaries Review Body (SSRB), almost two thirds of those on the bench felt less respected by society than they were 15 years ago and many said they were at breaking point. Although gross salaries ranged from about 108000 pounds (for the lowest paid) to 252000 pounds for the Lord Chief Justice, the major complaint that resulted in disillusionment was reduction in pension entitlements (76%) and reduction in income (64%). By contrast, in a developing country like Uganda, the Lord Chief Justice who is the highest paid judicial officer grosses about 60,000 pounds to 4000 pounds for a Grade II Magistrate. (per annum).

In the United States, it has been found that low judicial salaries lead to divorce, crippling loans, early retirement, reduced pensions and impeded retaining qualified and experienced judges, let alone attracting the best and brightest attorneys to the bench.

Acts of violence and threats against judicial officers:
According to the terms and conditions of service survey of 87 respondents from the breakout session at the CMJA Triennial conference in Brisbane Australia in 2018, only 38 out of 87 (44%) stated that the benefits of the judiciary in their country included security. According to judge Gerald Lebovits in his article “Judicial Wellness: The ups and downs of sitting New York judges” which was published in volume 89 June 2017 by the New York State Bar Association, acts of violence against judges, which were on the rise, have resulted in the murders of judges and their loved ones like judge John H Wood Jr, Richard J Daronco, Robert Smith Vance, John Roll, and others.

Judicial officers are more visible, susceptible, and vulnerable than other public figures because of their decisions. It is simple for judges to collect enemies. Judicial officers are twice as likely to be killed when an act of courtroom violence is committed against them. We have witnessed a number of courtroom shootings in countries like South Africa. In the Philippines the shooting of Judge Lacaya Reyma this year became the fifth since President Rodrigo Duterte came into office in 2016, and the 30th since 1999.

In Uganda in 1972, the country’s first black Chief Justice Benedict Kiwanuka was dragged from his chambers by operatives of Field Marshal Idi Amin Dada and brutally murdered for defending the
independence of the Judiciary (The Ugandan Judiciary annually celebrates its first judicial martyr on the 20th of September in a memorial lecture).

We have also witnessed judges and magistrates being beaten in court, the most recent incident taking place in July 2019 when a magistrate was hit with a bottle after sentencing Dr. Stella Nyanzi who was an activist in Uganda. In the first week of September 2019 unknown persons left two bullets and a note warning the chief Magistrate from Rukungiri District in Uganda to stop trying certain land cases if he wanted life. Stressors that impact on judicial wellness are hard to exhaust given the limited time allocated, but members are encouraged to research further.

**Strategies for judicial officers to keep fit and stay alive:**
Justice Gerald Lebovits (supra) an acting Supreme Court Justice in New York County and other scholars who have studied the subject advance certain strategies that may be replicated among Commonwealth judiciaries.

**Sustained cultural shift by leaders:**
A profound culture shift has to be gradually installed and promoted by our leaders the Chief Justices and the policy markers especially in developing countries like Uganda.

The goal would be established a “wellness initiative”, a gradual and sustained culture change in the way assistance to judicial officers is viewed and delivered.

A wellness programme is an employer approach to improving employee health, deploying activities such as institution sponsored exercises, weight loss competitions, educational seminars, tobacco – cessation programmes, and health screenings that are designed to help employees eat better, loss weight, and improve their overall physical health. They also include lower health insurances premiums. Financial health, work life balance and other such initiatives.

The key message would be to ensure that all judges and their close family members can get assistance for a wide range of problems in total confidentiality.

This policy would be rooted in a positive wellness model that promotes preventive practices for health positive collegiality and early provision of help in a program specifically designed for the judicial ethos. In New York they have the judges’ Assistance Program (JAP) under the Lawyers Assistance Programme (LAP) of the New York State Bar Association Judicial Wellness Committee. These Committees are made up of judges who assist fellow judges with stress related concerns. The committee formulates and recommends policies and procedures to help judges deal with problems like alcoholism, gambling, drug abuse, stress and depression in confidence.

In New York, judges may also call the American Bar Association’s national hotline for judges with mental health conditions and addiction problems. The hotline is confidential and pairs judges with local resources and peer support judges who may have been through similar issues. Australia has adopted a similar judicial wellness programme.

**Time out of the court room:**
It is a fact that judicial officers tend to constantly focus on others’ lives while ignoring theirs. Many judges dedicate insufficient time to their feelings. A chronic disregard of one’s own feelings negatively affects social, cognitive and physical wellbeing. Judges who suppress their emotions might engage in a “repressive coping style” like substance abuse, bullying and other undesirable practices.

When judges become agitated or overwhelmed, they should get up and go for a walk, drink water, take coffee breaks, eat health lunches and enjoy vacations. Judges must find time for family and friends.
Socializing with other judges will reduce compassion fatigue, stress and other judicial challenges. Judges should attend such events as judicial conferences, judge lunches, dinners, Bar Association meetings and judicial education programmes.

After work, extracurricular activities can increase the brains plasticity and ultimately the quality of work while increasing resilience to stressful material. Physical activity, rest, relaxation and social activity are among the most useful strategies to cope with bench related stress.

Finding a judicial mentor can provide judicial officers with insight into maintaining a healthy career. Research has shown that new judges who participate in a mentoring programme show a statistically significant reduction in the stress domains of role overload, role boundary and psychological strain. Older judges can pass down their techniques to mentees that minimize stress. These relationships give experienced judges an opportunity to give back to the judicial community and find satisfaction helping other judicial officers.

Community events foster a positive relationship between the judiciary and the public, let alone breaking the chain of isolation of judges. Judicial officers may participate in local school mock trials, and law school moot competitions, teach write or volunteer.

Organization at work:
Judicial officers must create daily routines that make their lives easier, and must deploy effective control strategies. Judges can lighten their workloads by delegating some of their work to other staff like research assistants to draft opinions/judgments as long as control is not lost. Correspondences at work must be attended quickly and judges should learn to say no if they already have enough on their plate. Judicial officers should decide cases without necessarily perfecting decisions. Judges should not live in fear of getting reversed on appeal because reversals are healthy in a democracy and offer a learning experience. Judicial officers must always do their homework well and be prepared for court. They must be in control of their courtrooms and manage litigants, advocates and staff appropriately.

Judicial officers should embrace alternative dispute resolution techniques like mediation and plea bargaining as much as it is practicable.

Legal regimes that tend to clog the justice system must be reformed to enhance judicial performance. In Uganda, as recent as April 2019, the Chief Justice Hon. Bart Katureebe has through the Rules Committee amended a number of civil and criminal procedures enacted during the colonial days.

Uphold the judicial image by abiding by the judicial codes of conduct:
The Bangalore Principles of Judicial Conduct espouse the six core judicial values of independence, impartiality, personal integrity, propriety, equality, and due diligence and competence and these must be adhered to by judicial officers. Fortunately, I believe every commonwealth nation must have domesticated the judicial code of conduct. Once observed, judicial officers will avoid controversy and remain safe. They will become law abiding citizens and enjoy long careers on the bench.

Healthy living initiatives:
Physical fitness, diet and strong supportive social networks outside work will keep mental health on track.

Studies have shown that intervening psychosocial variables, such as tardiness, type A and type B personality styles, sense of humour, social support and coping help moderate stress.

Regular exercise increases a judicial officer’s ability to perform at optimal levels, think better, and build immunity to disease and illness.

Judicial officers should first take fitness tests before embarking on an exercise programme. Those with a history of physical activity are ideal candidates for high-intensity training (HIIT), which involves quick
bursts of intense work out in 20 minutes. HIIT isn’t suitable for judicial officers with a history of coronary disease, smoking, hypertension, diabetes, abnormal cholesterol levels and obesity. But all judicial officers will benefit from a well-rounded physical activity programme comprised of aerobics exercises and strength training exercises of moderate intensity for 30 minutes, five days a week. In Uganda our new Permanent Secretary Mr. Pius Bigirimana has introduced exercises for judicial officers and staff every Friday afternoon.

Exposure to stress can also alter the metabolic and behavioural state of human and have detrimental effects on diet and wellbeing. As a result of heavy caseloads and demanding nature of being a judicial officer, they tend to skip meals, overreact, or develop other unsavoury dietary habits. Maintaining a healthy diet is crucial in controlling stress levels. Healthful eating can be a preventive strategy and provide a therapeutic strategy for those with existing depression.

Complaints against judicial officers:
In Uganda complaints against judicial officers are handled by the Judicial Service Commission which was established under the 1995 constitution. Its proceedings are confidential to allow innocent judicial officers to keep their reputations intact and to prevent unfair allegations from tarnishing the judiciary as a whole.

Judicial officers are always slow to seek help, for fear that they will be perceived as not being calm or in control. However, judicial officers against whom complaints are filed should immediately retain an affordable advocate and be honest to them. Judicial officers may not be suited to best represent themselves under such circumstances. In certain jurisdictions judicial stresses may be considered as a mitigating factor in less serious cases of possible misconduct. Judges should raise all the defences they have.

A judicial officer who can project a serious commitment to duty, a capacity not to reoffend and who admits their errors and apologize may be treated leniently and even in a close case avoid removal. That said, the goal of judicial discipline is not to punish the judicial officers but to protect the public. The court of Appeal in New York in re Restaario articulated a standard of behaviour higher for judicial officers. The court also found that stressors offer no defence to judicial officers in serious instances of misconduct and that the gravity of proven wrongdoing is of ultimate importance in calculating fitness to serve.

Conclusion:
Judgecraft is a special calling from God. It’s both prestigious and challenging at the same time. Yet judicial officers remain human with imperfections that come with that. Commonwealth judiciaries need to adopt robust wellness programmes if their judicial officers are to keep fit and remain alive to effectively execute their mandates. Belief in the almighty God and hope in life after death can influence a fulfilled life while on planet earth.
RECOGNISING THE STATUS OF INDUSTRIAL LABOUR COURTS

By Justice Harold Ruhukya, Botswana

The Botswana Story

- Prior to 1994, the concept of an Industrial Court was unknown in our country. Labour matters were justiciable like all other legal disputes before the High Court.
- In 1992, as a result of social dialogue and the recognition of tri-partism, the legislature moved to create for the first time a court which would specially be empowered to adjudicate industrial and labour disputes.
- Enabling legislation pronounced the clear intention of this being a court of both law and equity.
- For the first time equity was specifically recognized in the enabling Act.
- The purpose was to ensure that, this being for all intents and purposes a unique branch of administrative law, the legal principles governing administrative tribunals would be brought to bear in the process of adjudication of disputes before the court.
- With this new creature (as with all new things) the original enabling statute faced a wide array of legal attacks.
- Challenges such as if this was a creature of statute was it proper to call it a court?
- Can a court be established outside the domain of the constitution and proceed to be afforded all the decorum that comes with the institution of a court?
- In 1998 our Court of Appeal settled the question of whether or not the Industrial Court was a subordinate court or a superior court of record. It found that given the way the enabling Act was drafted the court was a subordinate court.
- This caused major problems as that was not the intention of the legislature.
- The Act was redrafted and changes to the law right from the Constitution were included so that the court was recognized as a superior court, with exclusive jurisdiction over matters brought properly before it.
- The Act specified that appeals lay directly to the Court of Appeal.
- The Act specified that judges appointed to the court would be pooled from the same persons qualified for appointment to the High Court with similar terms and conditions of appointment.

Current Challenges

- The creation of a parallel jurisdiction in that litigants still have a choice between litigating the labour matters before the High Court or the Industrial Court (See Botswana National Youth Council vs. Goitse Mpolokang and Another and Barclays Bank vs Chakalisa both decided in 2018 by the Court of Appeal)
- The Court is set up as a department under the ministry of Labour and not under the Administration of Justice in the Ministry of Defense Justice & Security. As a result, in some quarters the court is not seen by some as a court.
- Limited resources by virtue of operating as a department.
- Always playing catch up.
**Why Recognition is Important**

- The question of exclusive jurisdiction can be settled once and for all through legislative drafting (see National Labour Court of Nigeria).
- It instils a sense of confidence in the general public.
- It effectively kills the “demon” of parallel jurisdiction where two competing bodies of jurisprudence are developed.
- Equity will not be seen as a loophole through which litigants can do wrong and hope that under its equitable jurisdiction they can get away with it.
- As obtains in South Africa we are now starting to have the long overdue discussion that perhaps the time has come for the creation of an Industrial Court of Appeal as the final appellate court in these matters with appeals lying to the Court of Appeal only when there are constitutional issues arising.
"CHALLENGES OF CASE TRACKING"

By Mr. Kwara Guria, Papua New Guinea

Abstract
The challenges of case tracking are understood in courts around the world. Judiciarys that embarked on Judicial Reform in the early 2000s saw a pressing need to address case congestion & to drive inter-agency (Law and Justice sector agency) co-ordination. Investment in information technology was widely promoted as a strategy to address these challenges.

In the case of Papua New Guinea, investment in information technology and the introduction of a cross sector inter-agency database has been very valuable in building a central repository for case data entry, from arrest to disposition.

However, other critical factors have been identified that need to be addressed to ensure that the full benefits of the IT investment for efficient case tracking can be realised. These factors include governance & policy, tools & training, culture & leadership, connectivity & communication, and the recognition that case tracking systems must be fed with quality data to be effective. Once these factors are addressed, there will then be the opportunity to leverage the emerging disruptive technologies and deliver increasingly better outcomes for offenders and victims.

Introduction
Keeping track of cases as they pass through the criminal justice system is not a challenge unique to Papua New Guinea or the Commonwealth countries, and it is not a new challenge. We are all aware of the problems caused by lack of data or lack of timely data for processing cases. The consequences of missing data are expressed bluntly in a paper from the Records Management Journal, 2015. The paper, titled “Justice delayed is justice denied” describes the findings of a study and states that, “some criminal cases were withdrawn due to missing dockets or cases not properly registered. In some instances, records were reconstructed, resulting in the travesty of justice.”

Case backlog and delays to court processing are common and recurring themes experienced by Judiciaries internationally. Before the Pakistan Access to Reform Agenda, launched in 1998, the Pakistan Judiciary was suffering a significant backlog of cases, with chronic delays in case disposal of commonly 5 to 10 years and in some cases over 20 years. There is an instance recorded of grandchildren of original litigants disputing an interest in land, sixty years after the institution of proceedings.

Beyond the Commonwealth, the Philippines Supreme Court commenced the implementation of an Action Program for Judicial Reform in 2000 to ensure that “property rights could be protected, contracts enforced, abuses checked, and disputes speedily resolved in accordance with the law”.

Focus items for each of these reform programs included addressing case congestion and driving interagency co-ordination.

Using Technology to Address Case Tracking Issues
Back in 1998 when constantly increasing caseloads became a global problem, one of the three main strategies adopted by Judiciaries around the world, was the investment in information and communication technologies. This strategy was later described in the Utrecht Law Review in June 2007 as “Reducing delay, improving economy, efficiency and effectiveness and (addressing) the more general objective of promoting confidence in the justice system”. By 2014, technology was seen in South America as not just assisting a Judiciary in isolation, but improving Justice sector efficiency, to:

- “Improve sectorial planning capacity, cased on reliable, sufficient and timely information, that improves the decision-making process;
- Improve the capacity of management analysis at the directive levels of each one of the public institutions including the courts;
- Improve the knowledge of management in each one of the judicial offices, prosecutor’s offices, defense attorney’s offices, etc. based on specific information and comparable guidelines;
- Consolidate a package of measurements and indicators that may be published in the community, as information about the performance of the judiciary and its evolution;
- Optimise the organisation and administrative procedures;
- Improve statistics and make them part of the decision-making process;
- Respond to sectorial studies;
- Differentiate what is typical from what is inconsequential;
- Generalise and forecast.”

A Technology Solution for PNG
In 2014, the Government of Australia reported that “improving law and order is a complex challenge for PNG to meet. It not only requires significant resources but is dependent on all of the agencies working efficiently – independently and together.” Later the same year, a meeting of criminal justice sector agency heads in Papua New Guinea agreed to the setting up of an integrated/centralised criminal case system database (ICCSD) that would track all criminal cases entering the court system throughout the country, from the point of arrest to disposition by the Courts and CIS. It was considered that a modern technology-based information system would be crucial to identifying the nature and extent of the problems faced by the law and justice sector agencies in the processing of cases. Agency heads were asked to commit their agencies to the ICCSD project by signing an agency and a sector wide Memorandum of Understanding.

By mid-2015, the Judicial Commission of New South Wales had agreed to expand an existing Sentencing Database Project to cover the scope of the proposed ICCSD, with funding provided from the Law and Justice Sector agencies and project management provided by a National Criminal Process Improvement Project (NCPIP) team operating from the Judiciary. The NCPIP project was conceived to provide greater efficiency and transparency of the processing of criminal cases by linking together the various Law and Justice sector agencies responsible for different functions from arrest to incarceration. There were many issues to address, including the following:

❖ Members of individual agencies were aware of their role, but not always aware of the roles played by other agencies in the sector.
❖ Cases were often delayed due to lack of accurate information, and this could lead to case backlogs and prisoners held in remand longer than was deemed reasonable.
❖ Lack of shared records resulted in a disjoint between Probation and Correction Services, with the possibility of prisoners missing out on parole when that came due.
❖ Lack of digital systems to collect information resulted in delays and errors in transferring information collected by Police and Magisterial Courts to the National Court.
❖ Lack of systems to support identification resulted in cases of mistaken identity, where the person arrested was not the same person who turned up in court or who ended up in the care of the Correction Services.

The NCPIP Project was launched with a mandate to collect and share offender data across the justice sector. It was predicted that improving the quality and completion levels of data and information coming through to the National Court would result in a more efficient and effective courts system, with less margin for error, and less time spent preparing and setting up cases to be heard. Feeding this quality data through to Correction Services and onto Parole and Community Bases Services, would result in better outcomes for offenders and victims.

NCPIP Project Pilots
On the 1st of August 2017, NCPIP project pilots were launched in Waigani (Boroko), Lae and Wewak. The pilots were embraced with great enthusiasm, with agencies working together through the National Court NCPIP Officers to input data into the ICCSD (Integrated Criminal Case System Database) database. However, it was soon evident that technology, training and connectivity would need to be addressed before
the project could be rolled out across the country, with each representative agency able to input their own data and able to pull insights and information reliably from the wider database.

The NCPIP Project Team is now in the process of preparing for a second stage roll out to Madang, Mount Hagen, Alotau and Kokopo, to test and build on the findings from the initial pilot phase. It is anticipated that the reporting and evaluation from this second stage will inform the final roll out phase which will include deployment to all Provinces by 2022. The initial focus will be on getting the mainline courts up and running. However, it is expected that the NCPIP evaluation will uncover tools and processes that could subsequently be trialled at the District and Village Court levels.

**The 5 Challenges of Case Tracking**

The ICCSD database managed by the NCPIP project team in the PNG Judiciary and the NCPIP officers across the Law and Justice sector agencies, provides potential for delivering significant improvements to case tracking across Papua New Guinea. However, as we shall see, the challenges of case tracking cannot be met by simply providing a common database accessible by all Law and Justice sector agencies – there are other factors in play.

**Challenge 1 - Connectivity & Communication**
Our first challenge is to provide good reliable connectivity across Papua New Guinea, starting with the provincial law and justice sector hubs. A central database is of little use if users cannot connect to it. The Papua New Guinea terrain makes connectivity problematic. Possibly in the future we will see a national power grid across the country, with mobile services provided alongside the power infrastructure. In the near term, satellite services, using satellites adapted to minimise rain fade, provide a good solution.

By owning and operating a pool of satellite bandwidth from within the Judiciary, the requirements for database hosting, voice calls and videoconferencing can be balanced on a day-to-day basis. Reliable, stable and robust connectivity opens up the potential for virtual courts and other mechanisms for addressing case processing delays.

**Challenge 2 – Tools & Training**
Having a central database with good connectivity from every Province is very valuable. However, without devices available in each Province to enter data, the project would be stalled. These devices need to be configured to enable easy and quick data collection. They also need to be secured – from a physical viewpoint so that they do not go astray, and from a digital viewpoint to protect the sensitive data held on them.

Devices that can be “locked down” to enable access to PNG law and the NCPIP project database only, and can be reset remotely, should they go astray, are being evaluated. These devices are lightweight handhelds with touchscreen or detachable keypad data entry.

The majority of our prospective users out in the Provinces have never had basic computer training, and in most instances they have picked up data entry skills in an ad hoc manner without fully understanding how the system they are entering data into works. In delivering comprehensive training, there is an opportunity to upskill staff, and to show how data becomes valuable when the accuracy is known and when the data is entered in a timely fashion. Training can start from where users are, build on the basics and eventually extend to reporting and the interpretation of data.

**Challenge 3 – Governance & Policy**
Handling sensitive information requires established policy practices and protocols for information security and good information service management.

This challenge is best addressed through the development and deployment of a governance framework that covers all aspects of information and data governance from user authentication and data collection through to
data distribution. For example, there will be a need to have policy for the operation of data collection devices, and practice relating to system audit.

**Challenge 4 – Culture & Leadership**

Our fourth challenge concerns culture and leadership. In a country where over 800 languages are spoken it cannot be a surprise that our people are culturally diverse. Building a team of Papua New Guineans from different areas of the country and expecting them to work together seamlessly without direction and interpretation would lead to chaos. Our various people groups have different mind-sets, qualities and ways of operating that need to be understood to build harmonious teams where everybody is playing to his or her strength.

More pressing than building teams, is the challenge to build strong and capable leaders. Without influential leaders in every Province, the NCPIP project will not be sustainable.

At this juncture, it would be remiss of me not to thank and acknowledge the tremendous work put in by the former Chief Justice, Sir Salamo Injia, under whose leadership and from whose vision came about the activities and projects mentioned above.

I am delighted to acknowledge that the new leadership under Sir Gibbs Salika has fully embraced the programs and activities and provided their undivided support.

**Challenge 5 – Quality & Timeliness**

And finally, there is the challenge of ensuring that Justice can be delivered through the case handling and administration systems. Unfortunately, it is possible to build a database system that looks impressive but holds inaccurate or insufficient data. Fortunately, there are a number of mechanisms that can be introduced to address issues with inaccuracy or timeliness, as they present.

**The Future for NCPIP and the ICCSD**

The future for the NCPIP project, the ICCSD database and for case tracking in Papua New Guinea is very promising. Once the full NCPIP roll out is complete, with all the challenges listed above addressed, the system will make a significant impact on case tracking. The next challenge will be to add features and services that further enhance the processing of cases. A research project has been initiated to assist with identifying useful features.

**Conclusions**

Improving the tracking of cases, and criminal cases specifically, enables us to deliver a fairer, more efficient justice system for victims, offenders & all those involved in the judicial process.

Our experience with the National Criminal Process Improvement Project (NCPIP), conceived by Sir Salamo Injia, supported by Sir Gibbs Salika & led by a Judicial Committee under the Chairmanship of Justice Geita, is that technology plays a key supporting role in reducing delays in processing cases. However, without strong leadership & governance to ensure that the technology is deployed safely, securely and sustainably, the benefits of using technology to address the challenges of case tracking cannot be fully realised.

**References**


*International Network to Promote the Rule of Law, Practitioner’s Guide, Mapping the Justice System and Legal Framework in a Conflict-Affected Country, August 2015, Dr. Vivienne O’Connor*

*Records Management Journal, 16 November 2015, Justice delayed is justice denied, Mpho Ngoepe, Salmon Makhubela*

Integrated Justice: An Information Systems Approach to Justice Sector Case Management and Information Sharing

Case Study of the Integrated Electronic Case Management System for the Ministry of Justice in Rwanda, Adam Watson, Regis Rukundakuvuga, Khachatur Matevosyan


Pakistan’s Law and Justice Sector Reform Experience: Some Lessons, Livingston Armytage, Director, Centre for Judicial Studies and Armytage Consulting, 2004


Case Management and Reform in the Administration of Justice in Latin America, Carlos G. Gergorio, Inter-American Development Bank


Australian High Commission Papua New Guinea, 140829 – Factsheet – Law & Justice Sector


SSRN Journal of Judicial Administration (Volume 25,2) Justice and Technological Innovation, 2016, Tania Sourdin
ESSENTIAL FEATURES OF AN INDEPENDENT MILITARY JUSTICE SYSTEM

By Judge Advocate Alan Large, England & Wales

1. In 2018 the UK civil liberties and human rights organisation Liberty published a report into military justice in the British Armed Forces. It was entitled “Military Justice – Second-rate Justice” and was very critical of aspects of the UK’s Military Justice System. The Judge Advocate General, His Honour Judge Jeff Blackett, wrote back to Liberty complaining that the report was ill-informed and, in many areas, simply wrong, but the report remains published in its original form.

2. Military courts, no doubt because of their very nature, regularly come under close scrutiny by human rights organisations such as Liberty, and it is essential that military justice systems are able to show that they are fit for purpose. If they are not, then the state concerned is failing to provide an effective justice system for its armed forces and letting down potential victims of offences committed by service personnel.

3. As with their civilian equivalents, military courts come in many shapes and sizes. Some seek to mirror the civilian courts in their country, others are very different. Some appear very military, with military judges, lawyers and, where they have them, jurors; others will have civilian judges and lawyers and at least some civilian representation on the jury if one is used. Some try only military disciplinary offences, others the full range of criminal conduct; and some can try civilians, usually in very constrained circumstances. Although I intend to set out what I consider are the essential features of a Military Justice System, I certainly do not intend to suggest that there is necessarily one correct model. In Engel v. Netherlands (1979) 1 EHRR 647 at 59, the European Court of Human Rights stated: ‘Each State is competent to organise its own system of military discipline and enjoys in the matter a certain margin of appreciation’.

4. Each country must decide what suits its needs and its constitution but, whatever the model, it does, I suggest, have to comply with certain fundamental requirements in order to be fit for purpose.

5. The modern starting point for the key characteristics of any justice system is perhaps the European Convention on Human Rights which came into force in 1953 and which states at Article 6:

   In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...

6. This is echoed, and slightly expanded upon, in the International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations on 19 December 1966 at Article 14:

   All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...

7. This is further echoed in the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa issued by the African Commission on Human and Peoples’ Rights in 2003 which states:

   In the determination of any criminal charge against a person, or of a person’s rights and obligations, everyone shall be entitled to a fair and public hearing by a legally constituted competent, independent and impartial judicial body.

8. It is those last few words – a public hearing by a competent, independent and impartial tribunal – which are most often cited when criticism is levied at military courts, and it is fair to say that the UK has, over the years, had its fair share of scrutiny by the European Court of Human Rights in cases involving the independence and impartiality of military courts. These cases led to a fundamental overhaul of the UK’s military justice system during the late 1990s and reforming Armed Forces Act 2006, since when our involvement in the ECHR has been, I am happy to say, considerably less frequent!
9. As you would expect, there has been also been a good deal of work done at the UN in relation to the need for independent and impartial tribunals and in giving guidance and direction to states as to how to structure their military justice systems. One of the key studies, although often overlooked, came in 2006 when Emmanuel Decaux, the UN Special Rapporteur of the UN Sub-Commission on the Promotion and Protection of Human Rights, prepared Draft Basic Principles Governing the Administration of Justice through Military Tribunals (The Decaux Principles). The Decaux Principles were created in consultation with human rights experts, jurists and military personnel from around the world and are based on the principle that military justice should be an integral part of the normal judicial system and should operate in a way that guarantees full compliance with internationally protected human rights.

10. The original intention was that these principles would eventually be adopted by the General Assembly, but they were never put forward for adoption. Concerns were expressed by member states: some where the military is very powerful and influential in internal affairs and where military tribunals are widely used to try civilians; others from more liberal democracies who saw them as too restrictive. Nevertheless, they do provide a valuable reference document for reviewing a state’s military justice system.

11. In 2018 the UN Special Rapporteur on Independence of Judges and Lawyers asked American Military Law expert Professor Eugene Fidell to review the Decaux principles and make any proposals for improvements so that they could be revitalised and, perhaps, eventually adopted by the General Assembly. Professor Fidell and a number of renowned experts in military justice (both civilian and uniformed) from around the world have updated the original Decaux principles drafted 12 years earlier. I want to approach the subject of the essentials of an independent military justice system from these redrafted and modernised Decaux Principles and try to identify where, in practice, problems may lie, and where you, particularly those of you who are senior judges, may wish to focus your scrutiny when you consider your own military justice systems.

12. There are 20 principles, but 9 are of particular relevance to the topic here. Of those 9, I am going to deal with 3 in detail and touch on the other 6. Those I am not mentioning are nonetheless important – for example the right to habeas corpus – but time prevents discussion of every principle today. I am also focussing on military courts and not dealing at all with the issue of summary military justice delivered by the Commanding Officer, again for reasons of time, but it is an area where, unless carefully regulated, injustices may well occur. Maybe one for next year in Cardiff!

13. Principles 1 and 2 are, you would think, uncontroversial and obvious:

   **Military tribunals, when they exist, may be established only by the constitution or the law, respecting the principle of the separation of powers. They must be an integral part of the general judicial system.**

   **Military tribunals must in all circumstances afford the fair trial rights guaranteed by the International Covenant on Civil and Political Rights, including Article 14, and apply any other standards and procedures internationally recognized as guarantees of a fair trial, including the rules of international humanitarian law.**

An obvious example of a state contravening these fundamental principles was, I suggest, the US establishment of the military commission at Guantanamo by President Bush following 9/11. Whilst the Decaux principles recognise that there is no perfect model for a military judicial system, many would agree that the Guantanamo military commissions clearly fall far beneath any modern notion of a genuine judicial process.

14. **Principle 3** deals with the functional authority of military courts and I want to look at this with you in some detail.

   **In a state that has separate civilian and military courts, the civilian court has primary jurisdiction over all criminal offences committed by persons subject to military jurisdiction. The purpose of military courts is to contribute to the maintenance of military discipline inside the rule of law through the fair administration of justice. Military courts should only try cases that have a direct and substantial connection with that purpose,**
unless the accused is deployed overseas and it would not be appropriate to subject him or her to the jurisdiction of the ordinary courts of the sending or receiving States.

15. This is an issue which is currently receiving a lot of attention in the UK, where our military justice system is undergoing a major review of its procedures and practice. There is an influential body of opinion that all murder, manslaughter, rape and domestic violence cases involving accused service personnel should be tried in the civilian courts, and that military courts should only try less serious civilian offences with a military nexus as well as specific disciplinary offences such as disobedience, absence and the like. The counter argument is that a case, whatever its nature or gravity, should be tried in the most appropriate court, and if there is a direct and substantial connection with the maintenance of military discipline then the military court should try the case.

16. Let’s look at some examples. It is not uncommon, certainly in the UK sadly, for the complainant and accused in a rape case both to be serving soldiers who, usually after consuming a significant quantity of alcohol, have ended up in bed together in an accommodation block in barracks. Next morning, if a rape allegation is made, the case is investigated and moves on to trial. Where should this be tried? It’s a rape case – so some argue it automatically must be tried in the civilian court. I suggest this case should be tried in a military court. The military nexus is clear – both the parties and the venue are 100% military, and trying the case in a military court contributes to the maintenance of military discipline by making it clear to those concerned and the wider military audience that the military justice system deals effectively with such serious breaches of the standards of behaviour expect from and between service personnel - but you may not agree. What about the shooting of an officer by an armed sailor on duty onboard a Royal Navy submarine when she was alongside in a UK port? A clear case, you might think, be tried in a military court, but Able Seaman Donovan was tried in a civilian court.

17. Some states try every case involving a soldier, whatever the offence, in their military courts (not a position I, respectfully, consider consistent with this revised Decaux principle); others, for example the Netherlands and Argentina, have gone in the other direction and try all offences committed by service personnel, be they civilian or military offences, in their civilian courts.

18. This issue, albeit for different reasons, is at the heart of a landmark case in the Canadian Supreme Court. Master Corporal Raphael Beaudry, who was charged with sexual assault, is arguing that his rights under s 11(f) of the Canadian Charter of Rights and Freedoms have been violated. The Section states that any person charged with an offence has the right:

Except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment.

Canada’s CMAC agreed with Beaudry that “civil offences [such as sexual assault] are not offences under military law”, and therefore he should have had the option of having his trial before a jury. At the time of writing, the decision of the Supreme Court of Canada is awaited – the consequences for the Canadian military justice system could be considerable.

19. As I have already said, there is, of course, no right model, and public policy will play a significant part, but the key issue in the revised Decaux principles is military justice systems should be subject to some limitation and there must be a direct and substantial connection between the case and the maintenance of military discipline. If your military courts are trying cases of a soldier assaulting a civilian on a night out in town or stealing property from his or her neighbour, you might want to consider whether that is the proper exercise of the authority of a military court.

20. **Principle 4** is vital to the independence of a military justice system. It reads:

The organization and operation of military courts should fully ensure the right of everyone to a competent, independent and impartial tribunal at every stage of legal proceedings from initial investigation to trial. The persons selected to perform the functions of judges in military courts must display integrity and competence and show proof of the necessary legal training and qualifications. Military judges should have a
status guaranteeing their independence and impartiality, in particular vis-à-vis the military hierarchy.

21. There are those key words again – a competent, independent and impartial tribunal – taken directly from the International Covenant on Civil and Political Rights. But the principle is expanded in the revised draft to reinforce the message that the right covers every stage of legal proceedings from initial investigation to trial. It focusses on the very real concern of command influence and says:

Commanders, senior military and civilian officials (including legislators) should not seek to influence the administration of justice in particular cases directly or indirectly. Attempts to do so should expose them to criminal sanctions and possible removal from office. Military courts should scrupulously police and rectify any instance of unlawful influence.

22. It is important to remember here that we are concerned both with the reality – what is actually happening – and the perception of the reality – “justice should be seen to be done”. A tale from close to home: in the early 1990s I was a Lieutenant Commander in the Royal Navy, serving as the lawyer on the Admiral’s staff in Plymouth. I worked directly for the Admiral. As such, I prosecuted cases in the Court Martial in Plymouth, drafting the appropriate charges. The court to try those charges was convened by the same Admiral. My staff (one Chief Petty Officer!) were responsible for selecting the Board members – the jury, if you like. After the trial the Admiral was responsible for reviewing the conviction, if there was one, and he could vary the sentence. The Judge was a serving naval lawyer, almost always junior to the President of the court, the most senior board member, sometimes by two ranks. It all seemed fine at the time; in reality, there was no command influence; the Admiral never told me who or who not to prosecute or what charges to select, and the selection of Board members was based primarily on trying to get bodies of the right rank on empty seats and never on who might have a particular view of a case. Presidents and Board members listened to naval judges and followed their directions. But, looking back now, it is difficult to believe how such a system can have lasted for so long without the inevitable challenges which came in the European Court of Human Rights in 1997 and the years which followed.

23. Reform of the UK system started then and was further advanced in the Armed Forces Act 2006, which sought to mirror as far as possible the military justice system with its civilian counterpart. The Court Martial is now a standing court. There is still a military police force for each arm of the Service, but each has its own chain of command rather than influence from individual garrison commanders. There is now an independent Service Prosecuting Authority with a civilian Director who answers only to the Attorney General and not to any military figure. Military Judges like me are all civilians, although most have some experience of Service life, and we are appointed like all judges through open competition via the Judicial Appointments Commission. We all sit in both the civilian Crown Court as well as the Court Martial. Decisions of the Court Martial are considered by the Court Martial Appeal Court, which is made up of the same civilian Court of Appeal judges who sit in civilian cases, and appeals can only be brought on the same grounds as in civilian cases.

24. It is my view that the UK system is, now, compliant with this fundamental principle set out in the International Convention and elsewhere, but there are jurisdictions within the Commonwealth which are still embroiled in debate on whether and how to restructure their military justice systems to make them compliant with this internationally accepted requirement.

25. In November last year, the Court of Appeal of Uganda handed down the unanimous decision in Ogwang v. Uganda, Crim. App. No. 107 of 2013 [2018] UGCA 82 (Uganda Ct. App. 2018). The accused, a Lieutenant in the Army, had been convicted in 2010 by a court-martial of murder and robbery. The Court Martial Appeal Court upheld the convictions. The Ugandan Court of Appeal, perhaps unsurprisingly, overturned the 2013 judgment of the Court Martial Appeal Court when it was appreciated that one of the members of the original court-martial panel had directly participated in the investigation of the case and the accused's arrest, and had been replaced by another member only after a considerable amount of evidence had been given. I suspect all would agree that a court which had a finder-of-fact who had been involved in the investigation of the offence is far from impartial.
26. But the Court of Appeal went much further and stated that, whilst it would ordinarily have sent the matter back to the court-martial for retrial, there were “fundamental constitutional barriers” preventing them from taking that course and instead referred the case to civilian prosecutors on the ground that the court-martial lacked independence. The judgement of the Ugandan Court of Appeal cited Article 128(1) of the Ugandan Constitution which states that in the exercise of judicial power, the courts shall be independent and shall not be subject to the control or direction of any person or authority. The Court of Appeal continued:

37...The judges of an independent court cannot be under the administrative control of the authority that brings the charges. In order to secure the independence of the courts, the courts are placed under a different arm of the state known as the Judiciary with security of tenure and insulation from control of the Executive which originates criminal charges with the exception of private prosecutions which are brought by private individuals.

38. Military Courts, appointed by the High Command, are basically organs of the Army intended to ensure operational efficiency and discipline of officers and militants of the Uganda Peoples Defence Forces. That is the purpose and thrust of military justice....

41...Military courts are manned by military personnel, inclusive of the judges, the prosecutors and, at times, defence counsel. The military courts are not independent of the Executive. They belong to the Executive. The charges are brought by the Army the institution to which they belong.

27. As at June 2019, I understand this decision is being considered for appeal. If the decision stands then, as in the Canadian case of Beaudry, the military courts’ power to try cases involving civilian offences will be severely curtailed. This time last year in Brisbane I was asked a question by Uganda’s Chief Justice about the increase in civilians being tried in military courts in relation to firearms offences. An unintended consequence of the Ogwang case may serve to allay his concerns.

28. I should also mention Canada again and a further case where the Court Martial system has been drawn into the limelight. I am referring to the trial of the Chief Military Judge Colonel Mario Dutil, which was being held in the Court Martial. When I wrote this talk in June, the case had just collapsed because the presiding judge and other military judge of the Bench recused themselves. Canada’s Lawyer’s Daily observed:

“The aborted court martial of Judge Dutil has already laid bare major structural and organizational defects of courts martial as well as major issues concerning the discernment of the military prosecution in deciding to prosecute Judge Dutil before a court martial as well as the independence of the military judiciary. This can only lead to a severe loss of confidence and trust in the fairness of the military justice system. What is certain; the military justice system is not established, controlled and managed in a way that conforms to expected 21st century norms. There is an urgent need for reform.”

29. I am sorry if Canadian colleagues feel they have been singled out – I can reassure them that the UK has been through it and emerged in a better place but, as I have already said, there is still pressure from powerful figures in the House of Lords and elsewhere to limit the practical scope of the jurisdiction of military courts. There are significant concerns elsewhere in the world about command influence, for example in the US, particularly in the prosecution of sexual assaults on service personnel, and there are again loud calls for reform.

30. Moving on to Principle 6, which concerns the jurisdiction of military courts to try civilians. Military courts have no jurisdiction to try civilians except where there are very exceptional circumstances and compelling reasons based on a clear and foreseeable legal basis, made as a matter of record, justifying such a military trial. Those circumstances only exist, where:

(a) Such a trial is explicitly permitted or required by international humanitarian law;

(b) The civilian is serving with or accompanying a force deployed outside the territory of the sending State and there is no appropriate civilian court available; or
31. The civilian who is no longer subject to military law is to be tried in respect of an offence allegedly committed while he or she was serving as a uniformed member of the armed forces or he or she was a civilian subject to military law under paragraph (b). I have already mentioned the concerns of the Chief Justice of Uganda, who was concerned about developments in his country to try civilians in military courts on firearms offences. From what I can glean, it remains a concern in many jurisdictions. In the UK we still do have a few cases involving civilian defendants, which come within the exceptions I have read out – for example, historic sex offences committed by a civilian when he was living with his family accompanying the British Army outside the UK. No civilian court has jurisdiction to try the case so the case must be heard in the Court Martial. In other cases, where civilians accompany the military overseas, then it is both necessary and appropriate for civilians to be triable in a military court, not least because it is usually included in the Status of Forces Agreement, and it is designed to protect civilians (rather than oppress them) from trial in foreign non-ECHR compliant jurisdictions. Other than those limited exceptions, there is, I suggest, no justification for trying civilians in military courts for offences committed in the civilian jurisdiction. In order to replicate as best we can the civilian courts, we replace the military Board with civilians and they appoint a foreman as with a civilian jury.

32. There is, of course, the counter argument that if a court is good enough to try our servicemen then it should also be good enough, in appropriate case, to try our civilians. I know I would say this wouldn’t I, but I am confident that justice is done in our military courts and therefore would not be concerned about unjust results if more civilians were to be tried in the UK Court Martial, but the issue is one of principle rather than practice and I respectfully suggest that the Decaux Principles are right – as is general international humanitarian law – in stating that civilians should not be tried in military courts and the trial of civilians in military courts should be very much the exception to the rule.

33. Principle 11 deals with the regime in military prisons and I want to touch on that briefly. It states that military prisons must comply with international standards and must be accessible to domestic and international inspection bodies. This applies to disciplinary blocks as well as military prisons or other internment camps under military supervision, and to all prisoners, whether in pretrial detention or serving sentence after conviction for a military offence. Civilians convicted by military courts should in all cases be confined in civilian prisons. Adapting, if I may, a phrase of Nelson Mandela’s, “It is said that no one truly knows a military justice system until one has been inside its jails.”

34. Principle No. 13 relates to the public nature of hearings.

As in matters of ordinary law, public hearings must be the rule, and the holding of sessions in camera should be altogether exceptional and be authorized by a specific, well-grounded decision the legality of which is subject to review.

Transparency is essential to public confidence in the administration of military justice. Case information, including charges, pleadings, transcripts, and court decisions should be made public promptly and in any event at least as quickly as comparable civilian court documents. Name suppression should be directed in military cases according to the same standards the State’s civilian criminal courts apply.

35. Public hearings are one of the fundamental elements of a fair trial. The only restrictions on this principle are those laid down in ordinary law, interpreted according to the law in the military context such as national security – but that must be exercised with caution and only when strictly necessary. Military courts must be alive to the perhaps understandable tendency of the armed forces to over-egg the effect on national security of information reaching the public domain and only hold hearings in private when absolutely necessary. It is not uncommon for the reporting of a case in the press to lead to the discovery of new witnesses, be they for the prosecution or defence.

36. In the UK we now have two permanent military court centres both built “on the wire” to allow open access to the public in exactly the same way as civilian courts – indeed the security in military courts is usually significantly less than that in our civilian counterparts unless a particular case involves national security or special forces personnel. As well as being a fundamental principle of justice, allowing free access to the public and, importantly, the press significantly undermines the criticism often aimed at military justice that it is not transparent and open.
37. Principle No. 14 guarantees the rights of the defence and the right to a just and fair trial. It covers fundamentals such as being presumed innocent until proved guilty and the right to be tried without undue delay and in his or her presence. Importantly, it reinforces the right for everyone charged with a criminal offence to have the right to defend himself or herself in person or through legal assistance of his or her own choosing and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it.

38. The accused should be represented by defence counsel who are competent and independent, whether they are civilian or military. Anyone who has seen the court martial in the comedy series Blackadder will know what I mean. Even in cases tried extraterritorially, the principle of free choice of defence counsel should be maintained and the state should take responsibility for the transport of defence lawyers to the court, wherever it may be.

39. The final principle, Principle 20, deals with the need for periodic review of codes of military justice. It states that codes of military justice should be subject to periodic systematic review, conducted in an independent and transparent manner, so as to ensure that the authority of military tribunals corresponds to strict functional necessity, without encroaching on the jurisdiction that can and should belong to ordinary civil courts.

40. The Principle continues by stating that, since the sole justification for the existence of military tribunals has to do with practical eventualities, such as those related to peacekeeping operations or extraterritorial situations, there is a need to check periodically whether this functional requirement still prevails. Each such review of codes of military justice should be carried out by an independent body, in public, with input from the armed forces and ministry of defence as well as other stakeholders.

41. It is compliance with this Principle which has led to the current review of the UK military justice system by a team led by HH Shaun Lyons, once Chief Naval Judge Advocate and thereafter a civilian Circuit Judge. His review has led to lively debate about a number of issues which I have raised today and, once his recommendations have been considered and implemented, the UK’s military justice system ought to be fully fit for purpose as it enters the 2020s. A further review will be needed in due course, I suggest in 10 years’ time, unless the landscape within which our military justice system operate changes significantly more quickly. In the world in which we all live, you may agree with me that that is entirely possible.
“CYBERCRIME”

By Justice Kumudini Wickramasinghe, Sri Lanka

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• Introduction
• The International dimension of Cybercrime
• Budapest Convention
• Mutual Legal Assistance Treaties & Laws
• Some practical issues regarding international cybercrime investigations

Introduction

• The internet is globally available, creating more opportunities for criminals.
• It is used by almost everybody on the planet and enables some to commit crimes remotely.
• Cybercrime is the most transnational of all crimes.
• The main cause of data breaches are malicious or criminal attacks — and they are responsible for 48 percent of all data breaches.
• Cybercrime affects the right to private life of hundreds of millions of individuals whose personal data are stolen.
• Cybercrime can be an attack against the dignity and the integrity of individuals.
• Investigating cybercrime requires efficient international cooperation.
• Without such cooperation, investigations are unlikely to succeed.
• Cybercrime must be approached as a global phenomenon.
• The international dimension is essential for a proper understanding of the whole reality of computer criminality.

Trojan Horse

The term comes from a Greek story of the Trojan War, in which the Greeks give a giant wooden horse to the Trojans as a peace offering. But after the Trojans drag the horse inside their city walls, Greek soldiers sneak out of the horse's hollow belly and open the city gates, allowing their compatriots to pour in and capture Troy.

Trojan Horse (Virus)

• A malicious program disguised as legitimate software.
• Trojan programmes work in a similar way of classical myth of the Trojan horse: they look useful or interesting to an unsuspecting user, but harmful when executed.
• Trojans can be employed by cyber-thieves and hackers trying to gain access to users' systems.
• Users are typically tricked by some form of social engineering into loading and executing Trojans on their systems.

Bodies/Agencies that have developed mechanisms for formal international cooperation include:-

- United Nations (UN)
- Council of Europe
- International Telecommunication Union (ITU)
- African Union
- The Commonwealth
- United Nations Office on Drugs and Crime

INTERPOL

- Law enforcement agencies
- 194 members (as of 2019)
- Objective
  - to enhance and facilitate international police co-operation
  - to organize a global police communication system
  - to develop specific databases and police information analyses
- To provide assistance to its members
- On a permanent basis (24 hours a day, 7 days a week)
- Web based communication system
- Network for informal request of cooperation
- Objective
  - To enable police to immediately identify experts in other countries

The “Budapest” Convention on Cybercrime of the Council of Europe

- Opened for signature on 23 November 2001 in Budapest, Entered into force in 2004
- Followed by Cybercrime Convention Committee (T-CY)
- Open for accession by any State – 64 Ratifications so far (most recent ‘Peru’)
- Many more have used the Budapest Convention as a guideline for domestic legislation
- As of today, the only international Treaty on cybercrime and electronic evidence
- In concrete investigations
  - New and very innovative investigative tools
    - mainly when international cooperation is needed
    - when the crime under investigation is one of the offences described in the Convention
    - also in any other case, if the crime was committed by the means of a computer system or the evidence of the crime is recorded in digital storage
- Minimum standard of crimes, intended to be common to all the countries in the world.
- New channels to international cooperation
  - Innovative and exceptional provisions
- The first time that international community made efforts to draft a universal treaty on cybercrime matters
- **Purpose**
  - to be accepted by most of the States in the world
- Each Party will be able to use it as a framework for international cooperation

International co-operation tools

- Operational and procedural rules
- Common to other international conventions
- Some of them, very innovative
Mutual Legal Assistance Treaties

• Formal cooperation between two or more countries
• Usually include provisions for gathering and exchange of information
• Usually provide for situations in which requests may be refused
• Usually provide for requirements that request for assistance must comply with

Mutual Legal Assistance Laws

• Domestic legislation may provide for mechanisms to cooperate with countries, whether or not there is an MLAT with them
• These laws may contain provisions that enable cooperation in different areas, including realizing or making requests for expedited preservation of stored data, search and seizure of data, interception of content data and collection of traffic data
• In Sri Lanka - Mutual Legal Assistance in Criminal Matters Act No. 25 of 2002

Skype Case

• The ruling of 19/02/2019 of the Belgian Court of Cassation in the Skype-case.
• The conviction of Skype has been affirmed.
• The Highest Belgian Court affirms the concept of jurisdiction developed in the Yahoo-case, which according to the Court is also applicable for traffic data and real time interception.
• The obligation to make the requested information, data or technical support available to the investigators in Belgium does not in any way entail an obligation for the service provider to have a registered office, infrastructure or physical presence in Belgium.
• It is by no means the case that the Royal Decree of 9 January 2003 would oblige the operators or service providers to have infrastructure in Belgium, from which cooperation should be provided; this is too narrow a reading of that Royal Decree.
• The plaintiff is prosecuted for failure to communicate the required information in accordance with Article 88bis of the Code of Criminal Procedure and for failure to provide technical assistance with the wiretapping measure of Article 90quater of that Code, but not for not having a technical infrastructure on Belgian territory.

Yahoo Case

• A State imposes a measure of coercion on its own territory as far as there is a sufficient territorial link.
• Article 03 of the Belgian Penal Code – Crime or offence committed on Belgian territory by Belgians or foreigners, shall be punished according to dispositions of Belgian Law.
• The crime or offence in the sense of Belgian Rules of Criminal Procedure shall be committed in the place where the requested data have to be obtained and received.
• The operator that refuses to furnish these data is punishable in Belgium, without regard to the place where he has established his office or domicile.
• Yahoo, as a supplier of free webmail service, is present on Belgian territory and voluntarily subjects himself to Belgian law.

Some practical issues regarding international cybercrime investigations

• The level of knowledge and experience of police officers and prosecutors when reporting and filling charges to them could be of crucial importance for proper understanding of the case and for the timely and adequate actions to be taken in order to preserve and obtain evidence.
• Police officers and prosecutors may need to seek additional assistance when needed, both from within “the house” as well as from the outside, including cooperation and contribution by the victim who will naturally have an interest in solving the case.

• Specifying the legal instrument used to seek assistance – treaty, convention or other instrument of cooperation.

• Identifying clearly who is conducting the investigation/prosecution. Provide all necessary contact details and preferred means of communication.

• Lack of reliable reporting systems and centralized collection of statistics.

• Summarizing the case – provide a detailed outline of the case under investigation or prosecution, including a summary of the evidence that supports the investigation/prosecution. Explain rationale for evidence and actions being sought in regard to the ongoing investigation.

• Reference to the applicable national legal provisions – full text of all relevant legal provisions under investigation/prosecution, including applicable sentencing provisions.

• Legislation not always in line with recognized international standards.

• The lack of collaboration with Service Providers.

• Precise identification of the assistance being sought - what are you seeking exactly.

Provide the following information:

• For witness statement/testimony:
  – Whereabouts of the person
  – National procedural rules related to the witnesses
  – The specific information and list of questions sought from the witnesses

• For documentary evidence:
  – A clear indication of the documents to acquire
  – A clear indication as to the place where the documents/items/evidence can be found or the person or the entity which detains them

• For electronic evidence:
  – Specify as many details as possible related to electronic evidence to acquire, provide necessary technical information on sought evidence if available (server/system time, time framework, identification details such as IP and MAC addresses, email address, user account details, etc.)
  – Indicate the place and details where the assets can be found or the person or the entity which detains them

• For execution of a search warrant:
  – enclose valid search warrant issued by domestic judicial authority
  – provide precise indications of the places and objects to be searched
  – specify detailed rules to follow in executing the search
  – provide accurate indications on the evidence to be searched

• For seizure/confiscation:
  – provide a copy of the valid seizure or confiscation order issued by the domestic judicial authority
  – precise indications of the items to be seized/confiscated
  – indicate any specific rules if needed in executing the search

• For special investigative measures:
  – provide a copy of the valid warrant for SIMs issued by the competent domestic judicial authority
  – specify the scope and nature of actions to be taken
specify the special conditions to be observed – **identity/anonymity of undercover agents**, technical and logistics requirements, covering of costs and expenses, **channels of communications specified**, etc.

• Highlight any specific **confidentiality requirements**.
• Set out and specify urgency level in the execution of the request as well as the time limits.
• Proper and as accurate as possible identification of the suspect(s) – bear in mind this is a virtual world – identity could be easily hidden, altered, stolen.
• Proper identification and **prioritization** of evidence to be requested by MLAT – setting up priorities – choosing only the vital ones for the investigation – rationalisation of resources and increasing efficiency.
• **Identifying appropriate point of contact in other countries** – 24/7 points in light of Budapest Convention, Interpol channels, etc. – especially for “**hot pursuit**” cases where immediate action is to be taken in order to secure and preserve digital data (electronic evidence).
• Needs to have an effective coordination of cross-border cybercrime investigations.
• **Establishing informal contacts with appropriate counterparts prior to submitting formal MLAT** in order to inform them about the upcoming MLAT, conducting operational checks in order to specify the request as detailed as possible.
• Making sure the **jurisdiction** was properly identified in terms of where **evidence/offenders/victims are located** bearing in mind purely technological matters such as **ownership of electronic data**, server/provider physical location and legal residence of the server/provider owner(s) – i.e. servers located in one country or cloud-computing case with owners registered and operating from different jurisdiction.
• **Different time zones** – difficulties in establishing contacts even when using modern means of communication (i.e. teleconferences) – it could delay investigation/MLAT requests and increase of costs – there are still police and prosecution offices with no access to international phone calls!
• **Translation** of documents – many states require MLATs translated into their official language(s).
• Language barriers during direct and informal contacts between law enforcement officials, prosecutors and judges.
• **Be prepared for delays** due to the different importance levels of cybercrime investigations in different countries.
• Consider providing technical and expert support if requested party has no own capacities to execute your request.
• **Consider requesting and deploying conventional/traditional investigative tools and measures whenever possible** – police officers/prosecutors more used to it, could sometimes equally serve the purpose and provide sufficient evidence for successful investigation and criminal proceeding.
• Most problems are related to procedural law.
• Implementation of the procedural law provisions.
• General powers vs. specific measures
• Need to fully implement the Budapest Convention
• Additional Protocol will largely be built on existing provisions and standards
• Need new measures and additional safeguards
• Cooperation with the EU Member States – data protection.
BREAKOUT SESSIONS

“SEXUAL HARASSMENT IN THE JUDICIARY”
By Her Worship Naume Sikhoya, Uganda

The Employment Act (2006) in Uganda defines sexual harassment as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature. Sexual harassment is committed against an employee if the employer or the representative of an employer does any of the following: Directly or indirectly makes a request of that employee for sexual intercourse, sexual contact, or any other form of sexual activity that contains; an implied or express promise of preferential treatment in employment; an implied or express threat of detrimental treatment of employment; an implied or express threat about the present or future employment status of the employee; uses language, whether written or spoken, of a sexual nature; uses visual materials of sexual nature; shows physical behavior of sexual nature.

Therefore, sexual harassment may include inappropriate sexual remarks or physical advances both in public and private settings. Public places may entail: work places, places of worship, educational institutions, markets, walk ways, and social media communications, among others. Private places include homes. Sexual harassment behaviors range from mild transgressions to physical sexual abuse or assault. Anyone can become a victim of sexual harassment regardless of race, gender, sex, age, class, and status. The social vice has far reaching effects. Such actions directly or indirectly subject the employee to behavior that is unwelcome or offensive to him/her and that either by nature or through repetition, has a detrimental effect on his/ her employment, job performance, or job satisfaction. A victim stands high chances of losing confidence, performing below expectations at the workplace or school, losing a job, failing to advance in educational pursuit, and sustaining physical harm.

There are three main elements of sexual harassment: Quid pro quo harassment, Environmental harassment, and a violation of human rights. Quid pro quo harassment occurs when someone in a position of authority asks for sex-related favours in exchange for work related favours. It must be noted that this is the most widespread, and the most commonly understood by the public, and is an overt abuse of power by a person in authority. Environmental harassment occurs when the place of work is made unbearable for an individual on the basis of their sex. And at the heart of sexual harassment, lies a violation of human rights—mostly women’s dignity and self-worth.

Standard of proof in sexual harassment inquiries was set in the case of prof Serajul Islam vs. Jahangirnagar University, 61 DLR (200) 752. In this case, the Court held that the corroboration is not always required to prove allegations of sexual violence, and further that the criminal standard of proof beyond a reasonable doubt could not be applicable in cases relating to disciplinary inquiries regarding allegations of sexual harassment and that instead the test of ‘balance of probabilities’ should be applicable.

The above notwithstanding, an assessment of the magnitude of sexual harassment and a glance at the available mechanisms to fight this vice in Uganda is worth noting; firstly, an examination of the magnitude of Sexual harassment in Uganda is serious. According to the report on the legal framework of sexual harassment in Uganda by the National Association of Women Judges Uganda NAWJU, it indicated that a poll commissioned by the New Vision newspaper in 2011 showed that 16% of workers in Uganda, both male and female are sexually harassed. However, more women (86.5%) had experienced sexual harassment than men. Central Uganda topped the list at 19.3%, followed by the West at 17.9%, the East at 17.3% and the North at 9%.

In relation to Laws and Policies on sexual harassment in Uganda, Uganda has ratified international human rights law and regional treaties, policies and guidelines all of which recognize sex discrimination that includes sexual harassment. These international and regional human rights instruments enjoin States parties to deal with sexual harassment cases through drafting of legislation. Such treaties include the Convention on
the Elimination of all forms of Discrimination against Women (CEDAW) and the International Covenant on Civil and Political Rights (ICCPR) which guided the drafting of the 1995 Constitution.

The main provision against all kinds of discrimination is Article 21 of the Constitution of the Republic of Uganda which guarantees ‘equality and freedom from discrimination’. The Penal Code Act (Cap 120) Act criminalizes the more extreme forms of sexual abuse that take place at workplaces. In its Sections 123 and 124, it provides for rape as an offence, punishable by death. It is noted that this provision is relevant if the harasser’s conduct does go beyond sexual harassment to unlawful carnal knowledge. Section 128 provides for indecent assault. These are relevant for the more extreme forms of sexual harassment that happen at the workplace.

The Employment Act (2006) is the only law in Uganda that prohibits sexual harassment in the workplace. It is the law which defines what comprises sexual harassment. S.7 of the act implores all employers with more than 25 employees to put in place measures to prevent sexual harassment occurring in work place. This is no exception to the judiciary and this does not mean that employers with less than 25 employees need not to have such measures to prevent sexual harassment in their work place. It’s the duty of the employer in a workplace to prevent the commission of acts of sexual harassment and to provide for resolution and settlement. S.7 (2) deals with mechanism for handling sexual harassment cases. It’s to the effect that if an employee is sexually harassed in any way under subsection (1) by the employer or employer’s representative, the employee has a right to lodge a complaint with the labour officer who shall make all the orders he or she could have made if the complaint was one about unjustified disciplinary penalty or unjustified dismissal. This section suggests that employees can only be sexually harassed by an employer or his representative yet the representative is a person who is employed by the employer with authority over the employee alleging harassment. S.14 of the Act provides that the courts are entrusted with the jurisdiction to entertain cases of sexual harassment under the instigation of the labour officer.

The Act only makes an attempt at complying with the international standards on sexual harassment in the workplace in addition to its other limitations. It only applies to civilian employees employed in Uganda by an employer under a contract of service and states that a person shall not be employed under a contract of service except in accordance with the Employment Act.

The 2012 Employment (Sexual Harassment) Regulations are hailed for being simple to follow and protective of the victims or the would-be victims of sexual harassment.

The regulation defines both the phenomenon and at the same time compels the employers to adopt anti-sexual harassment policies to combat sexual harassment. Regulation 3 in particular states that an employer with more than 25 employees shall adopt a written policy against sexual harassment which shall include the following: notice to employees that sexual harassment at workplace is unlawful; a statement that it is unlawful to retaliate against an employee for filing a complaint of sexual harassment or for co-operating in an investigation of sexual harassment complaint; a description and examples of sexual harassment; a statement of consequences of employers who are found to have committed sexual harassment; a description of the process of filing a sexual harassment complaint and the address and telephone contacts of the persons to whom complaints should be made; education and training programmes on sexual harassment for all employees on regular basis; and additional training for the sexual harassment committee on sexual harassment, supervisory and managerial employees.

Anti- Sexual harassment policies in public entities in Uganda among others include the Bank of Uganda Policy on Sexual Harassment, the Makerere University Policy and Regulations on Sexual Harassment Prevention was approved by Council in 2006 and the Code of Conduct and Ethics for the Uganda Public Service.

There are also a number of cases that have dealt with the issue of sexual harassment in Uganda. In the case of Attorney General Vs Florence Baliraine. Civil Appeal No. 79 of 2003(Arising out of Civil Suit No. 12 of 2001) the judge upheld the grounds of sexual harassment that the respondent gave which included the persistent sexual advances by her boss Sseta Ssozi who demanded to have a good time with her for a long time, demanded to have sex with her on the eve of the referendum election day, and grabbed keys to her home. The respondent also described how she asked for one day leave to pray for salvation and how upon
her return she was terminated on claims that she had failed to trace a personal fax message to Mr. Ssozi's wife. The learned trial judge correctly found that the respondent had been sexually harassed.

In *Grace Kamihanda Maguru vs Kamutumi Fast Foods (U) Ltd & Akhram Khan Mital High Court Civil Suit NO 158/2007*, it was opined that the failure by the 1st defendant to protect the plaintiff from sexual harassment by the 2nd defendant, its employee, amounted to a violation of its obligation under Section 7 of the Employment Act, 2006, and also a violation of her right.

Besides having the above provisions in place, there is a Lacuna in sexual harassment laws and policies in Uganda – particularly the Judiciary; Uganda Code of Judicial Conduct calls for judicial integrity and requires more than not violating the law. Judges and Magistrates (Judicial officers) are also expected to serve as models of integrity, propriety, fairness, and impartiality within their communities. In addressing gender-related integrity issues, it is appropriate to consider all unwanted gender-based conduct, whether or not it is legally actionable. Such unwanted conduct is often of a sexual nature and may include unwelcome sexual advances, requests for sexual favours, and other verbal or physical harassment of a sexual nature. The Uganda Code of Judicial Conduct is silent on sexual harassment in the workplace, yet in the Judiciary Integrity Committee report of 2011 nationwide field visits, there were reports of sexual harassment of litigants by Judicial officers, lower rank Judicial officers and support staff by higher rank Judicial officers. There is no known anti-sexual harassment policy in the judiciary and no specific complaints mechanism.

The (2006) Act does not apply to employers and their dependent relatives when dependent relatives are the only employees in a family undertaking as long as the total number of dependent relatives does not exceed five. The Employment Act also does not apply to other security forces like the Uganda People’s Defence Forces, except the civilian employees as it’s guided by its own Act of 2005 which offers no protection from sexual harassment among the ranks. Further the Act provides that the Minister may, after consultation with the Labour Advisory Board, exclude the application of all or part of the Act to categories of employed persons whose terms and conditions of employment are governed by special provisions like the Uganda Police Force and the Uganda Prisons Services which is dangerous since sexual harassment is not proscribed in their Acts.

Although the (2012) regulations are simple and clear to understand, they have been criticized heavily for failing to cover small institutions and covering only those with over 25 employees. The regulations have not also been given enough publicity so many workplaces have not complied.

The following administrative mechanisms to fight sexual harassment are available in Uganda; recently, sexual harassment allegations were raised at the Judicial Service Commission performance management workshop, the lower judicial officers decried excessive work and sexual harassment by some of their superiors. In her letter, the Chief Registrar of Courts of Judicature, urged all the affected officials to register their complaints in confidence with Judicial Service Commissioner or principal legal officer.

Gender trainings are ongoing as an eye-opener and Judicial officers are now empowered to speak out issues of sexual harassment.

The judicial administration in 2018, set up special courts on Sexual and Gender Based Violence to improve access to justice for the victims. A pilot project has seen these special courts set up in the High Court Criminal Division in Kampala and other High Court Circuits around the country. The judicial officers who sit in these courts have undergone training to prepare them in handling cases that involve acts of sexual and gender based violence.

The ground has now been set to see how these courts will fare in advancing gender related issues that have often been neglected and thus affecting access to justice for the victims.

In conclusion, the existing legislation in Uganda relating to sexual harassment at the workplace is still lacking as seen above. The relevant authorities need to work on reform of the law to include more comprehensive legislation and guidelines or regulations to deal with sexual harassment and provide for working mechanisms to address the issue, as required by the several international instruments that have been ratified and the Constitution of Uganda, 1995.
The Judiciary as an employment institution should have a policy and a mechanism for dealing with sexual harassment cases. The policy could be a detailed standalone policy or included in the Human Resource Manual which is distributed to every employee at the time of employment. During training of Judicial Officers, the Judicial Training Institute and others entities involved in training them should create awareness in Judicial Officers to apply a wider interpretation to cases involving sexual harassment.
“SEXUAL HARASSMENT IN THE JUDICIARY”

By His Hon. Justice Winston Patterson, Guyana

The judiciary is not immune from sexual harassment allegations since it is constituted by men and women (human beings). While there may be deliberate and evil intentions orchestrated by unsuspecting persons with sinister motives who lures the victim, a sexual harassment claim may properly be made. However, there may be persons who are innocent and well intentioned without any ulterior motive. Being a judge is honourable and noble; thus it is an embodiment of trust a kin to “in loco parentis”, clothed with pristine impeccable character which should not be tarnished by anyone without just cause or legal justification more so by the Honourable Judge him/herself.

Sexual harassment may take different forms e.g. abuse or misuse of power, coercion and dominance over the other sex or offensive gender harassment. Judicial integrity should be jealously guarded since Judges around the world are deemed to be clothed with integrity, imbued with fairness and impartiality and are considered guardians of peoples’ welfare since the Courts are the bastion of fairness and justice. Maturity, humility and the zeal to be a role model on the bench and within the community should circumscribe a Judges’ character. Depending on the circumstances, a thin line is all that separates a perceived sexual harassment from a genuine, innocent, unintended act or negligent omission.

Women in particular have experienced a range of sexual misconduct by men in positions who wield power and the judiciary is no exception. Judges however, are on a lower scale when compared to some other categories of professionals in positions of trust and power; but, be that as it may, such conduct should not be allowed to continue with impunity.

Quite interestingly, the International Association of Women Judges (IAWJ), describe “the abuse of power to obtain a sexual benefit or advantage as sextortion… In effect, sextortion is said to be a form of corruption in which sex rather than money is the currency of the bribe.”

It is expected that Judges set an example for the rest of society and they are held to a higher standard of conduct that is defined, not only by what is lawful or intentional, but also by what is ethical.

Any engagement in a pattern of conduct by Judge A to Madam X which is unwelcomed, undignified, discourteous and offensive, could reasonably be perceived as sexual harassment, a fortiori, if patterned over a period considered long by any standard: whether weeks, months or years. Being a colleague or on the same level is no excuse. It must be noted that the gravamen of the offence of sexual harassment is not the violation of Madam X sexually but the abuse of power and trust by judge A.

The Bangalore Principles of Judicial Conduct has established a high bar and underscore that Judges should, among other principles, promote high standards of conduct in and out of court in order to reinforce public confidence in the judiciary. Judges are obligated to conduct themselves in an ethical manner which encompasses virtually any conduct that might be perceived to be inappropriate though on the flick side of the coin, no sufficiently precise guidance as to what is deemed inappropriate may be provided.

It must be noted therefore that Judges should conduct themselves in such a manner as to preserve the dignity of their offices. Very instructive in this regard, is the Bangalore Principles of Judicial Conduct which provides inter alia; extensive guidance for Judges on the kind of conduct that is to be expected from them in order to maintain their integrity and enhance public confidence in the Judicial System.
“SEXUAL HARASSMENT IN THE JUDICIARY - A CARIBBEAN PERSPECTIVE”

By Justice Hilary Phillips, Jamaica

From whichever standpoint one approaches the subject or from whichever country, the definition of sexual harassment is clear. Succinctly, it is unwanted, uninvited and/or unwelcome sexual advances (however described as various types of behaviour of a sexual nature) when submission or rejection of such conduct affects an individual's employment or participation in a programme or activity. It may also affect a person's performance or create a hostile work environment.

Sexual harassment is generally considered in the context of a relationship where there is an imbalance of power between individuals. In the context of the judiciary, it is likely to take place between the Judge and someone in a lesser position such as a court clerk, registrar, or court reporter, where an imbalance of power may exist between the judicial officer and the employee. This can also occur even if both persons are judicial officers as one may have influence over the advancement of the other. There are even cases where it has occurred between judicial officers on equal footing.

It is to be appreciated that whilst most reported instances of sexual harassment involve males harassing females, there are instances where the reverse has occurred. Sexual harassment has also been reported where both individuals are of the same gender.

Sexual Harassment Legislations in the Caribbean
This concept has not been an easy one to gain general acceptance of understanding, and certainly in Jamaica, my country of origin, in spite of it being years in the making, Parliament has yet to promulgate legislation in the area. There is a comprehensive Bill entitled, the “Sexual Harassment Act 2019”. The Bill was first laid in 2015. Several years later, in July 2019, it was updated. The Memorandum of Objects and Reasons stated that currently sexual harassment was not specifically recognised in any legislation in Jamaica. However, there was consensus that legislation was necessary to address concerns about sexual harassment which was employment related, occurring in institutions or arising in the landlord and tenant relationship. The Bill was therefore to address the types of conduct which would constitute sexual harassment and would prohibit certain related conduct. It would also make further provisions for the making of complaints for persons who consider themselves aggrieved by sexual harassment and those complaints would be heard by the newly created Sexual Harassment Tribunal.

I thought it may be useful, speaking as I am from the perspective of a Caribbean national, to indicate that there are several countries in the Caribbean which have been forerunners in the promulgation of legislation dealing with these matters. A short summary of those countries and their approach to the topic is set out below.

It is of some significance, and deserving of mention, that, in Saint Lucia, a small island in the Lesser Antilles, in the south east of the Caribbean islands, their Parliament has taken the position to create a criminal offence out of certain circumstances relative to conduct that constitutes sexual harassment.

That is also the case with the special group of islands to the north, the Commonwealth of the Bahamas which makes sexual harassment an offence punishable by a fine, imprisonment, or both.

In Guyana, the Prevention of Discrimination Act makes any act of sexual harassment against an employee by an employer, managerial employee or co-worker an act of unlawful discrimination based on sex. That Act also makes discrimination based on sex an offence and prescribes fines for breaches of those provisions.

The Protection Against Sexual Harassment Act in Belize outlines a list of circumstances which constitute sexual harassment. Under this Act, any person who considers that he or she has been sexually harassed may apply in writing to a court of summary jurisdiction indicating that he has been harassed within the meaning of the Act. That court may investigate the complaint and if the complaint is made out the Act prescribes a number of remedies which include compensation that could be made to a victim.
Barbados has extensive definition of sexual harassment in The Employment Sexual Harassment (Prevention) Act 2017, which even includes making sexually offensive telephone calls to a person in the workplace. That Act outlines the process by which a sexual harassment complaint is lodged with an employer and provides that an employer may take disciplinary or any action he considers appropriate where he finds that sexual harassment has been committed.

As indicated, Jamaica has a bill entitled the “Sexual Harassment Act 2019”. It defines sexual harassment as the unwelcome sexual advance towards any person, by another person which is reasonably regarded as offensive, humiliating or has the effect of interfering with the victims work performance or creating and intimidating, offensive or hostile work environment.

As the definition indicates, it occurs in two forms:

(i) ‘quid pro quo’ - where decisions regarding employment are based on whether sexually oriented conduct is accepted or rejected; and

(ii) where unwelcome sexual advances creates a hostile work environment.

The Bill also illustrates circumstances which may give rise to sexual harassment.

The Bill, if made law, would place an obligation on employers to:

(i) ensure that the work environment is free from sexual harassment;

(ii) issue a policy statement on sexual harassment; and

(iii) take action to deal with sexual harassment of a worker.

Any person who believes that he or she is a victim of sexual assault will be able to make a complaint to the Sexual Harassment Tribunal who is empowered to hear and determine these complaints. The Tribunal may dismiss the complaint or make awards to the victim which includes a declaration, give directions, make compensation, or any other award it deems appropriate. In making these awards, the Tribunal is empowered to consider the complainant’s feelings or humiliation.

Under this bill, the act of sexual harassment itself is not an offence. However, the following will be offenses under the Act punishable with a fine or imprisonment not exceeding three months in default thereof:

(i) the failure to attend a hearing of the Tribunal;

(ii) the failure to furnish the Tribunal with information;

(iii) the refusal to be sworn, affirmed or to answer questions before the tribunal;

(iv) obstructing the Tribunal in its investigations; and

(v) making a false complaint.

Perspectives on Sexual Harassment

There have been many scholarly articles over the years examining the historical and societal development of sexual harassment at the workplace. There have been surveys undertaken with regard to the awareness of the public; whether there should be policies implemented at the workplace; what should the obligations of employers be; should there be regulations to set out the procedures for the written complaints to be made and acted on; also for the hearing of the said complaints and the punishment that should be imposed once the complaints had been properly made out.

In an article found in the Journal of International Women Studies, written in May 2006 by Jimmy Tindigurukayo, he set out certain circumstances (which were not exhaustive), in which sexual harassment could occur. I have set them out below as being relevant for the discussions which will take place later:
(i) The victim as well as the harasser may be a woman or a man. The victim does not have to be of the opposite sex.

(ii) The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee.

(iii) The victim does not have to be the person harassed but could be anyone affected by the offensive conduct.

(iv) Unlawful sexual harassment may occur without economic injury to or discharge of the victim.

(v) The harasser's conduct must be unwelcome.

He also referred to the Equal Employment Commission 1980 which had indicated that sexual harassment fell into two main categories:

"(1) quid pro quo: which occurs when decisions regarding employment are promised, given or threatened based on condition that an individual submits to sexually-oriented conduct, and where the rejection of such conduct is used as a basis for employment decisions affecting an individual; and

(2) hostile environment: which occurs when unwelcome sexual advances, requests for sexual favours, and other verbal or physical conduct of a sexual nature (eg. uninvited regular physical contact, unwanted touching or fondling, unwelcome sexual materials like cartoons or posters of a sexual nature, vulgar comments or jokes, etc) create an offensive and unpleasant working environment."

Studies have been pursued in Jamaica to discuss the extent of sexual harassment in institutions, both governmental and non-governmental. Any study of this kind must perforce start with a discussion on gender inequality. Historically, with similar backgrounds in the Caribbean with the experience of slavery throughout hundreds of years, which itself made slow evolution of women's rights, men tended to have greater power privilege status over women. It had always been accepted that the average earnings of women in male dominated industries was less than what men earned and women needed far more education to obtain comparable incomes. As stated in Tracy Robinson's legal submission to the Bar conference held some time ago, a study of unemployment in Jamaica in 1911 stated that of the 163,500 unemployed, 98,500 were women. That suggested that gender segregation in women employment still exists. It also would lay the foundation for abuse and for circumstances which would support the quid pro quo opportunities to thrive, and/or provide opportunities for the development of hostile environments at the workplace.

Of course, with wider access to education, we have seen some changes substantially over the years, certain glass ceilings have been shattered in many jurisdictions, and continue to be broken in others. In Jamaica we are able to boast of having had a female Prime Minister, Chief Justice, Attorney General and Director of Public Prosecutions, and several members of the Judiciary, and Parish Court Judges. However, we still do not have several major commercial and financial institutions being led by women. Whether this poses a problem for the development in the law on sexual harassment remains to be seen, for, at the moment, as indicated, the proposed legislation is only looking at the protection of men and women at the workplace and in other institutions. Of note, there does not seem to be any focus at all on sexual harassment in the judiciary.

I certainly was unable to find any reported cases of sexual harassment occurring in the judiciary in the Caribbean. In fact, there was not a wealth of empirical research on sexual harassment in the Caribbean in general, but there was no doubt a developing concern for the protection of workers in "strongly gender segregated workplaces", as Tracy Robinson put it in her presentation, such as in professions dominated by men like the police force, and ones dominated by women with male managers e.g. factories. It seems clear that generally in Jamaica persons identify with the concept of sexual harassment in the workplace and that legislation is required.

In developing the legislation, one could discern that concern was the obligation on the employer to provide a safe system of work, as opposed to a hostile environment, so as not to damage the relationship of trust and confidence that ought to exist between the employee and the employer and to ensure equality at the
workplace with just and effective remedies when the duties imposed on the employer were not implemented or when breaches had occurred.

The legislation was therefore required to:

(i) to define the prohibited conduct, and the commitment to an acceptable work environment, and work ethic;
(ii) provide a mechanism for preventing harassment,
(iii) provide an early response to any complaint; and
(iv) provide fair treatment of the harasser and the harassed at the workplace.

The process should involve workers being aware of any policy being developed so that no issue of ignorance of the situation could be taken subsequently, and to ensure that the remedy and the punishment would fit the crime. The real question was, was it an offence referable to employment legislation, or was it a crime against the state? The legislation would then be dealing with more that employment.

I say that to say that as judicial officers, we are subject to a higher code of ethics. When we take that oath of judicial office (where although the words vary from country to country, the meaning and concept is the same) - it must mean something. The oath reads:

“...I swear that I will be faithful and bear true allegiance to my country, that I will uphold and defend the Constitution of Jamaica that I will administer justice to all persons alike in accordance with the laws and usages of Jamaica without fear and favour affection or ill will.”

As judicial officers we must adhere to high principles of moral and ethical conduct.

The Bangalore principles, which guide judicial conduct came out of the meetings of the Judicial Integrity Group of the United Nations Office on Drugs and Crime (UNODC), commencing in 15 April 2000, are well known. Jamaica has established its own Guidelines for Judicial Conduct that adopts these principles; they fall under six main heads:

(i) independence;
(ii) impartiality;
(iii) integrity;
(iv) propriety;
(v) equality; and
(vi) competence and diligence.

The most essential for our purposes at this conference are integrity and propriety. The principle of integrity is stated as being “essential to the proper discharge of the judicial office”.

The commentary to the Bangalore principles of judicial conduct issued by UNODC, on integrity states:

“101. Integrity is the attribute of rectitude and righteousness. The components of integrity are honesty and judicial morality. A judge should always, not only in the discharge of official duties, act honorably and in a manner befitting the judicial office; be free from fraud, deceit and falsehood; and be good and virtuous in behaviour and in character. There are no degrees of integrity. Integrity is absolute. In the judiciary, integrity is more than a virtue, it is a necessity.”

The commentary continues to inform that it is important always to conduct oneself in a manner which would be acceptable by any community, and is such that the community's respect of the judge and the judiciary as a whole would not be diminished.

In the application of the principle the following was stated:

"3.1 A judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer."
High standards are expected of the conduct of a judge both in his/her private and public life, and of course scrupulous respect of the law is required.

It was also noted in the application of the principle relating to integrity that:

"3.2 The behaviour and conduct of a judge must reaffirm the people's faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done."

And so the commentary maintains that "the personal conduct of a judge affects the whole judicial system" and reinforces that tenet by these statements:

“109. Confidence in the judiciary is founded not only on competence and diligence of its members but also on their integrity and moral uprightness. A judge must not only be a "good judge", but also a "good person", even if views about what that means may vary in different quarters of society... he must endeavour not only to pledge and serve the ideals of justice and truth and the rule of law, but must also embody them...”

Accordingly, the personal qualities conduct and image that a judge projects affects the judicial system as a whole and, consequently, the confidence that the public places in it. The public demands of the judge's conduct is far above that which is demanded of fellow citizens. In fact the standards of conduct are much higher than those demanded of society as a whole. The public actually expects virtually irreproachable conduct from a judge...

Indeed, the commentary continues under the heading that justice must be seen to be done:

"110. Because appearance is as important as reality in the performance of judicial functions, a judge must be beyond suspicion. The judge must not only be honest, but also appear to be so....."

Value (iv) of the Bangalore principles is “propriety”. It is described thus:

“Propriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge.”

In the Commentary it states:

“111. Propriety and the appearance of propriety, both professional and personal, are essential elements of a judge's life. What matters more is not what a judge does or does not do, but what others think the judge has done or might do...”

In all activities of the judge, one must always be mindful of and ask the question, “How might this look in the eyes of the public?”

Under this head there are many applications of the principle enunciated, but for the purpose of these deliberations I will only draw attention to a few of them. They read as follows:

“4.1 A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

4.2 As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office.”

The Commentary on the value “propriety” includes further statements such as:

“...So... a judge is required to live an exemplary life off the bench as well as on it. A judge must behave in public with the sensitivity and self-control demanded of judicial office, because a display of injudicious temperament is demeaning of the process of justice and inconsistent with the dignity of judicial office...”

The criteria for the appointment of judges are in keeping with these high ideals, and have embraced the standards that a judge must have the intellectual capacity independence, judgment, objectivity and ability to understand and deal fairly with all persons and communities served by the courts. He must be able to exhibit
community skills effectively. Integrity and honesty are the benchmarks of a good judge. In fact, a judge's moral and practical skills are considered relevant to the determination of merit.

As we all know, there are several different mechanisms in place in various jurisdictions in order to arrive at the modus operandi for the selection and appointment of judges. Equally, there are mechanisms usually embodied in the Constitutions in those countries which have one, for the removal of judges from office. The main grounds for removal from office are usually:

(i) that the grounds are discernible;
(ii) there must be some incapacity or misconduct; and
(iii) the degree and level of misconduct must be serious.

In Jamaica sections 98-106 of the Constitution deal with the appointment and removal from office of Judges of the Supreme Court and the Court of Appeal.

Acts of sexual harassment may not rise to the level that requires removal from office as a judge. One may therefore consider amending the Constitution to introduce intermediate sanctions for misconduct ranging from public reprimand, public apology, fine, suspension, counselling, completing anti-sexual harassment courses or other appropriate sanctions as alternatives to removal from office.

**What can be done?**

As a victim of sexual harassment from a judge, going to a trusted colleague is usually the easiest route. It is important that the person receiving the complaint acts on the information received expeditiously and tactfully. Reporting the judge to the Registrar or the Chief Justice could be effective.

It is better to be proactive by taking steps to avoid accusations of sexual harassment. If in a supervisory position, it may be advisable to speak with persons with the door open once confidentiality can be maintained if confidentiality is required. If there is attraction, one should try to reduce one and one contact. If it is suspected that the person has committed acts of sexual harassment in the past, then having a third party present may be a last resort. As the Jamaican saying goes, “prevention better than cure.”

Judiciaries should also develop their own sexual harassment policies in keeping with the principles of judicial accountability. In Jamaica, a committee has been established to develop such a policy for the judiciary for discussion and dissemination.

**Examples of sexual harassment or misconduct in the judiciary**

Although there have not been any recorded cases of judicial misconduct by way of sexual harassment in the Caribbean, there have been a few cases in other jurisdictions.

The People v Esteban, Crim. Cases Nos. 24490, 24702-04 (Sandiganbayan, Quezon City, first Division, April 15, 2008) was a “quid pro quo” type of case out of the Philippines. In that case, a judge, having failed to sign the appointment papers for a bookbinder in a Municipal Trial Court in the Philippines, eventually offered to do so, but asked her to indicate to him what she would do for his signature. He stated that she would have to be his girlfriend, and he expected her to visit his office every day, and give him a kiss. She attempted thereafter to avoid him. When he later discovered that she had received the increased salary, he queried how that could have occurred, as having become his girlfriend she had not attended on his chambers. He kissed her, and touched her breasts. He was later convicted of sexual harassment. The court said that:

“The gravamen of the offence of sexual harassment was not the violation of the employee's sexuality but the abuse of power by the employer or superior...”

The court fined Judge Esteban and sentenced him to more than two years in prison. The Supreme Court of the Philippines subsequently found that his conduct violated the Code of Judicial Conduct and dismissed him from the service, with forfeiture of all retirement benefits and leave credits and with prejudice to reemployment in any branch or instrumentality of the government.

It was clear the court was not going to tolerate circumstances where a judge abused his superior position to take advantage of someone by way of sexual misconduct amounting to harassment.
There are also cases of uninvited sexual activity, unwanted and unwelcome touching and instances of sexual comments all of which have created hostile environments, and which have had the attention of the courts.

The case of **In re Johnson**, Notice of Formal Proceedings (California Commission on Judicial Performance Jan 4, 2019) concerned Justice Jeffrey Johnson, a justice of the Court of Appeal of the Second Appellate of the State of California, who went before the Commission on Judicial Performance on nine counts, on a preliminary investigation as to whether formal proceedings should be instituted against him. The decision was taken to do so. Amongst the sundry complaints were repeated unwelcome overtures to a fellow judge, Justice Chaney. He told her that she was "beautiful"; when they had attended a judicial college for appellate justices in Reno, Nevada on one occasion at dinner, he became intoxicated, and on another, he entered Justice Chaney’s room after dinner and would not return to his own room even though requested to do so; he indicated to her that they were "perfect together" and although rebuffed by her, he later indicated to her that he wished to have an affair with her; on another occasion after a difficult day in court Justice Chaney commented on the difficult day that she had experienced in court to him, and his response was "well I should kiss and squeeze your titties to make you feel better"; he proceeded to squeeze one of her breasts; he repeatedly patted Justice Chaney on her buttocks at the courthouse; he made explicitly sexual comments to her and then stated that "it can't be sexual harassment because we're both on the same level"; later he queried whether she would ever report him?

The remaining charges against Justice Johnson included some of the following instances:

1) On occasion with a California Highway Patrol officer, who had been assigned to him as a driver to take him to functions and to the airport, he told her how good she looked in the clothing that she was wearing; on another occasion he told her that he wished her to pull over the vehicle, so that he could have sex with her; on another occasion he placed his hand on her thigh; and on several occasions he commented on her appearance, made comments of a sexual nature to her including that he would like to take her clothes off, see her without her uniform, bend her over and "fuck her from behind."

2) Against attorneys there were unwelcome discourteous comments requesting hugs and commenting on their looks.

3) With other staff personnel he made personal comments such as "they look hot', and that " they were fantastic" and that he "loved them".

4) He became angry when his colleagues had a different opinion from his own.

5) He appeared to offer a job to a young attorney, whom he had mentored by making sexual suggestions including a suggestion that she must "give him something".

6) He officiated at a wedding ceremony of an Assistant United States Attorney, and became so intoxicated at the reception that took place later in the evening, that a staff member of the venue asked him to leave the reception and he yelled at the staff member.

7) On more than one occasion he had been observed with slurred speech due to having been intoxicated.

8) He asked court clerks if he could touch their breasts, and those requests were accompanied by laudatory remarks that the clerks were smart and beautiful.

This case was a clear example of a judge's consistent abuse of his colleague with whom he worked at his level, and persistent unwanted and unwelcome sexual advances of persons with whom he worked who were on an inferior level. He had created a hostile environment at the work place which surrounded him. These actions could not escape examination by the Commission in respect of sexual harassment charges and as expected an order to that effect was made. In fact, disciplinary proceedings against him were commenced in August 2019, with his fellow judge testifying against him, and they are set to continue.

**In re LoRusso**, Determination (New York Commission on Judicial Conduct June 8, 1993), Anthony LoRusso, a Judge of the Family Court, from Erie County in the State of New York, was before the
Commission on Judicial Conduct for subjecting female employees to unwelcome sexual advances and acts of lasciviousness. He was accused of calling one such employee into his chambers firstly, allegedly to alleviate a condition being experienced by her that she felt bloated, by removing her panty hose, lifting her skirts, and pressing her thighs and rubbing her legs. On subsequent occasions he later had oral sex with her, and had her perform oral sex on him; he then later had sex with her. He conducted an enema on her and subsequently had anal intercourse with her. The incidents took place near the end of the work day after court sessions, and the young woman stated that she merely did what she was told to do by the judge. Prior to those experiences with the judge she had never experienced anything like that before. On several occasions she had cried after leaving the judge, as she had experienced discomfort either during or after each incident. She was concerned that she could lose her job if she failed to comply with his instructions.

There were also other complaints from certain clerks which were also before the Commission: in one instance, the complaint was touching her buttocks; and with regard to others, it was making suggestive, unpleasant sexual statements.

The commission found that the judge was guilty of the charges set out above. With regard to the court reporter, the judge had taken advantage of his superior position at the workplace. She was an innocent unsophisticated sexually inexperienced young woman. The commission examined the various responses of the victims in the circumstances, and stated that "sexual harassment in the work place is among the most offensive and demeaning torments an employee an undergo...' (Petties v State Department of Mental Retardation and Developmental Disabilities 93AD 2nd 960,961). The Commission made this powerful statement:

“a woman who does not protest does not necessarily acquiesce. There is a power imbalance between employer and employee that often makes a worker in need of her job feel she must swallow such indignities... The employee suddenly finds herself treated not as a worker, but rather as a sexual being; yet the advances take place in the context of a work interaction, where the employer-employee relationship limits the acceptable responses. She may well become angry and wish to lash out, yet she reasonably fears adverse job consequences if she protests, even though no such overt threat is made.” (Rudow v New York City Commission on Human Rights, 124 Misc 2 d 709,713 affd 109 AD2nd 1111 1v denied 66 NY 2nd 605) The respondent never explicitly told the women who were subjected to his unwelcome conduct that their jobs were at stake but there was always the implicit threat that a person in his position could impair their job security."

The judge resigned from his post. The Commission, therefore, was limited in terms of the sanction as to whether to make a determination of removal from office or dismissal of the complaint. However, in view of the serious misconduct of the judge and the fact that there had been a prior censure by the commission, the commission voted for a determination of his removal from office. There was a dissenting opinion and some other support for that dissenting opinion in part but the majority voted for his removal from office.

In an article taken from the Washington Post, authored by Matt Zapotosky, the headnote stated "Prominent appeals court judge Alex Kozinski accused of sexual misconduct." A former clerk for the "powerful and well known jurist" Judge Alex Kozinski who had served on the US Court of Appeal for the 9th Circuit, made the allegation that Judge Kozinski had called her into his office on several occasions and had pulled up pornography on his computer, asking her if it aroused her sexually. The images shown were not related to any case, but contained persons naked and others not. The allegations were that the learned judge had also made a range of some unwelcome and inappropriate sexual comments to other clerks. Unfortunately, these matters never became the subject of any charges before the court. It appeared perhaps persons feared reprisal. The judge however seemed to understand and recognise what could be considered inappropriate behaviour, as on one occasion, many years previously, he had written this statement:

“men must be aware of the boundaries of propriety and learn to stay well within them,” while women "must be vigilant of their rights, but must also have some forgiveness for human foibles: misplaced humor, misunderstanding, or just plain stupidity.”

This article highlights some of the difficulties individuals may experience with persons in much superior positions. Serious acts of sexual harassment can be accorded much less significance, and in some cases
completely overlooked. Happily, education on the subject, and the advent of policies in institutions, and legislation in other countries has changed the general approach to complaints and resultant outcomes.

Finally, the worst set of facts come from the consolidated case from the Philippines of Tan and Villafraca v Judge Rexel M Pacuribot, Regional Trial Court, Branch 27, Gingoog City. In this case, the Judge consistently and repeatedly pursued and raped these two young women. In the case of Tan, he carried and displayed a firearm with him in order to instil abject fear in her and to obtain her submission. In the case of Villafraca, he took pictures of her half naked body in order to blackmail her and to bring shame on her family who were prominent members of the society. In the case of Tan, he hijacked her at a function and forced her to leave with him to go to a motel room and have sex with him. After that first occasion, that modus was repeated often. He treated both women to great indignities as it appeared he was unable to have a complete erection, so he behaved in a most outrageous and disgraceful manner, requiring them to perform distasteful acts which were repeated. Both women were married. He taunted them with that situation. Ultimately, through his machinations, he ruined both marriages, caused one to incur the wrath of her husband which resulted in him beating her, and in the case of the other her family life was ruined.

He was found guilty of rape and repeated sexual harassment. The penalty was dismissal from service with forfeiture of retirement benefits, except accrued leave credits. The court referred to the Bangalore principles with particular regard to the values of integrity and propriety. In delivering the judgment the tribunal said this:

“"The integrity of the Judiciary rests not only upon the fact that it is able to administer justice, but also upon the perception and confidence of the community that the people who run the system have administered justice. At times, the strict manner by which we apply the law may, in fact, do justice but may not necessarily create confidence, among the people that justice, indeed has been served. Hence, in order to create such confidence, the people who run the judiciary, particularly judges and justices, must not only be proficient in both the substantive and procedural aspects of the law, but more importantly, they must possess the highest integrity, probity, and unquestionable moral uprightness, both in their public and in their private lives. Only then can the people be reassured that the wheels of justice in this country run with fairness and equity, thus creating confidence in the judicial system.""

Conclusion
In my opinion, that passage by the Philippine Supreme Court embraces the relevant principles adequately. It is incumbent on every judge to conduct him/herself in a manner that is beyond reproach. With regard to the issue of sexual harassment he/she must ensure that he/she does not abuse the superior position that he/she holds, to use unwanted and unwelcome sexual conduct to take advantage of persons over whom he/she has suzerainty. We must adhere to the guidelines or codes of judicial conduct and comply with whatever sexual harassment policies that have been established.

He/She must also guard against the request of unwanted and unwelcome sexual activities from his/her co-workers and those who are lower in the hierarchy at the workplace, as the court abhors the creation by anyone of a hostile environment. A judge should also be proactive and take steps to avoid accusations of sexual harassment.

A judge who engages in either sexual activity for the purposes as set out above, then depending on the atrocity or depravity and or the seriousness of the same, could face a range of sanctions. These could range from public reprimand, being sent on sexual harassment sensitization courses to being found guilty of criminal offences which may warrant a fine and or imprisonment. The activities may also call upon the Commission in charge of judicial conduct to recommend dismissal from office with forfeiture of pension and all other attendant benefits. We must be guided accordingly.

It is important therefore that we, as judges, continuously and persistently uphold always the dignity of our office. As the Bangalore principles state, which bears repeating:

""There are no degrees of integrity. Integrity is absolute. In the judiciary, integrity is more than a virtue, it is a necessity""."
“Sexual Harassment in the Judiciary”

By Mrs. Grace Ukeje, Nigeria

Notes from the Breakout Session chaired by Mrs Ukeje

INTRODUCTION:
The topic for which I was called upon to facilitate is titled; Sexual Harassment in the Judiciary. It is common knowledge that in contemporary times, sexual harassment in the work place has been on the rise. This fact has engaged contemplative minds as to how to curb this vice; particularly when conservatively about 80% of victims are females and the judiciary is being looked upon and saddled with the responsibility of applying the law to salvage this ill. However, it becomes very disconcerting when the judiciary, the adjudged salvager of the victims of sexual harassment with the sacred duty to preserve the victim’s right to dignity of the person and labor, is suspected to be a predator or harbinger of predators. This concern informed the decision of the Director of Programs of the CMJA and his team to bring this pervasive conduct ascribed to some judicial officers on the front burner to access and address the issue in the just concluded Conference in Port Moresby Papua New Guinea.

METHODOLOGY
The attendees were split into groups in a breakout session. I facilitated Group F which met in Kokoda Room 3-4 of Stanley’s Hotel and Suites on Tuesday, 10th September, 2019 with 27 delegates in attendance. A delegate from the Judiciary of Papua New Guinea was appointed as the rapporteur. The session was interactive, and based on the 7 point questionnaire given to the facilitators as a lead and which I hereby attach for ease of reference and taken seriatim. However, other issues ancillary to the subject matter were also discussed.

ISSUE NO 1: The general consensus is that sexual harassment can only be defined in terms of the ingredients of the conduct to wit:

- The conduct must be of a sexual nature.
- The sexual conduct must constitute an irritation or to the victim.
- The harasser or victim may be of any gender.
- The harassment must not be a one–off thing, but a repeated, offensive or irritating sexual conduct.
- The harasser must hold a dominating position in the office - the existence of a quid pro quo situation.
- The conduct shall consist of unwelcome sexual advances or request for sexual favors, and shall range from mild transgression, sexual abuse to sexual assault.
- The alleged conduct could be verbal, physical or nonverbal. Where it is nonverbal, the offensive attitude should be deduced from the conduct of the harasser.
- Submission is either explicitly or impliedly a condition that affects decisions of the victim’s employment and must create an offensive or intimidating work environment.
- The behavior must persist despite objections by the victim. The objection must be positive and not implied from conduct.
- Examples given were such as: unwelcome sexual statements or compliments which tend to embarrass the victim, dirty jokes which are unsolicited, kissing, pressure for dates, or writing evincing sexual desires.

CONSENSUS:
The consensus opinion is that sexual harassment is a form of sex discrimination that violates the right to dignity of the person, dignity of labor, freedom of association and expression, work place intimidation and unfair treatment.
EXCEPTIONS:

- Where the harassment is unsolicited, but the recipient subsequently condones it. This clothes the harassment with consent by reason of acquiescence.

- Complimentary sexual remarks, simplicita without repetition or objection.

- Where the recipient objects to the harassment, but subsequently benefits from the conduct in terms of preferential treatment in the work place, any subsequent objection is deemed an acquiescence.

- A delegate from Papua New Guinea informed us about an existing local culture, which permits a brother-in-law to sexually touch any part of his brother’s wife without consent, whether in the work place or at home. It will not, therefore, be considered harassment of a sexual nature despite the fact that it took place repeatedly in the work place and without consent.

ISSUE NO 2:

- The group unanimously agreed that where a male judge simply makes complimentary remarks to a female judge or staff about their nice clothes or looks, and whether he refers to her as “my dear” or not, does not constitute harassment of a sexual nature. They considered such conduct as a harmless compliment; and that would not cross the red line if a particular male judge makes such remarks to a particular female judge or staff member at various times.

- Participants were of the view that they would do nothing if they become aware that someone in the court is being complimented always by a particular male judge, which frequency may give rise to suspicion of sexual harassment but the fact that the female judge or staff condoned it without express rejection is indicative of acquiescence. And in the circumstance they would rather mind their business.

ISSUE NO 3:

- A delegate from Nigeria narrated a story about a Chief Magistrate who after court session invited the daughter of a female litigant to his chambers through his court detail. While the mother waited outside, he pressed the girl against the wall, kissed and squeezed her breast. Upon her release, the victim immediately reported the matter to her mother who lodged the complaint to her by virtue of her position as the harasser’s superior. She invited the male Magistrate, confronted him with the complaint and cautioned him against such despicable conduct. All participants were of the view that the conduct amounted to sexual harassment in the judiciary, the perpetrator, being a judicial officer with implied condition of an advantage to the girl with regard to her pending suit. This is because he intended to use his position to compromise the pending matter in favor of the girl’s mother if she had acquiesced to the conduct. However, majority were of the view that the proper step would have been to report the officer to the head of courts for proper disciplinary measures instead of condoning the conduct. Some were of the view that her actions brought her within the definition of an accomplice or concealer.

ISSUE NO 4:

- There is consensus of opinion that sexual harassment is prevalent in their jurisdictions aside the delegate from Australia, and which is based on gender imbalance arising from traditional stereotype and the assumption that any highflyer female is engaged in institutional promiscuity or “sex donations”.

ISSUE NO 5:

- The majority of the participants in this group were from African jurisdictions aside from one participant from Australia who felt strange about its existence. To all, there is no criminal code dealing with the offence of sexual harassment but all were of the considered view that sexual harassment should be treated as a sexual offence of indecent assault which is a crime, and harassers charged accordingly. However, the majority view is that perpetrators are highly male judicial officers who are equally tainted and consequently lack the moral fiber to decisively punish harassers of such conducts. They see sexual harassment as a crime that thrives in silence because of the fear of secondary victimization and societal apathy in a male dominated workplace. This factor is responsible for the dearth of reported cases, more so, when there is still this stereotype in
African setup that most highflyer professional and business women searched enviable heights through sexual manipulation of the men.

ISSUE NO 6:
Many participants from African Jurisdiction concede the fact that there exists gender imbalance in the judiciary due to old stereotypes which is contributory to the phenomenon of sexual harassment and the pervasive and permissible notion of females being chattel for men whose primary function is to massage male egos.

ISSUE NO 7:
Participants are of the view that sexual harassment in this judiciary cannot be eliminated or combated but could be minimized in the following ways:

- Since some of them take place at work, there is the need to install Close Circuit Television in chambers to monitor activities therein.
- Continuous legal education on the effects of sexual harassment on the corporate image of the judiciary and all reported cases should be investigated as a matter of policy to discourage females who would also exploit males’ sexual weaknesses to their own advantage.
- All appointments, promotions and transfers are to be guided by strict rules which implementation should be monitored by a credible independent body.
- Failure to report cases of sexual harassment should be criminalized and the victim disengaged from service.

CONCLUSION:
Participants concluded that since sexual harassment is a crime that thrives in silence, senior judicial officers should from time to time be schooled and counseled on the need to employ high ethical standards in the work place and be like Caesar’s wife who should live above suspicion.

Thank you.
GENDER SECTION PRESENTATION

“Women’s Rights to Autonomy ‘Marital Rape’”

By Justice Kumundini Wickramasinghe

Outline

➢ What is meant by ‘Marital Rape’?
➢ International background of Marital Rape?
➢ Consent in a relationship or marriage
➢ Why is it an important societal problem?
➢ International legal provisions
➢ What are the promoting factors for Marital Rape?
➢ What is the role of a judge in enhancing normative protections?
➢ Prosecuting Marital rape cases without victim participation

What is meant by “Marital Rape”?
➢ The forcible, sexual intercourse with one’s wife or the penetration of the body of the wife of the perpetrator.
➢ Art.1: Any act of GBV that results in or likely to result in physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life. [Decl. on the elimination of violence against women (UN, 1993)]
➢ It is being recognized as a form of discrimination.
➢ Family violence          *Domestic violence
                             *Marital rape.
                             *Child abuse and rape.

International background of Marital Rape.
➢ The scope and seriousness of Domestic Violence is increasingly becoming known in our society.
➢ It is an extremely prevalent form of violence.
➢ Women who are involved in physically abusive relationships are especially vulnerable to rape by their partners.

A woman’s right to autonomy
➢ Articles 3 and 17 of the ICCPR

“The right of a woman or girl to make autonomous decisions about her own body and reproductive functions is at the very core of her fundamental right to equality and privacy, concerning intimate matters of physical and psychological integrity”

-Women’s Autonomy, Equality and Reproductive Health in International Human Rights: Between Recognition, Backlash and Regressive Trends by Frances Raday.

Consent in a Relationship or a Marriage
➢ It is a societal problem- Sir Mathew Hale, Chief Justice, England (17th Century.)
➢ “The husband cannot be guilty of a rape committed by him self upon his lawful wife, for by their mutual matrimonial consent and contract, the wife have given up herself in this kind unto the husband which she cannot retract”

Why is it an important societal problem?
➢ This provides husbands with an exemption from prosecution for raping their wives – a "license to rape”.
➢ In Sri Lanka "marital rape" is an offence only if the perpetrator is legally separated from the victim.

International legal provisions relevant to Autonomy of Women
➢ The UDHR Proclaims that all persons are entitled to Human Rights without distinctions to sex, equal before the law, and entitled without any discrimination to equal protection law.
➢ It relates to gender equality (CEDAW 2(e), 2(f) Equality before law (ICCPR art. 14).
➢ DEDAW (art. 1 & 2)- [explicitly all necessary steps what state parties should take]
➢ Women to enjoy full enjoyment of economic Social and cultural rights. (ICCPR Art. 2(2) & 4)

What are the promoting factors for Marital Rape?
➢ The state is not taking action against the perpetrators.
➢ Long standing traditions where women are subordinate to men.
➢ Male dominated society.
➢ Sole bread winner of the family is the husband/father.
➢ Society looks down upon women who take action against their husbands.
➢ Moral resistance/reluctance to leave the family.
➢ Police try to soft peddle the problems.
➢ Practical problems when it comes to trial.
➢ Case where the wife committed murder of the husband.
➢ No special measures have been taken, appropriate of achieving de facto equality.

What is the role of a Judge in enhancing normative protections?
1. Cannot expect every witness to act the same way in Court room.
2. Sometimes Judges make (inappropriate) comments in trial and in Judgments - ex: Poison case.
3. Should exercise judicial mind
   • Beware of false allegations
4. Demeanour of the witness is very essential. When it comes to a Court of Appeal it is very difficult to consider that because a Court of Appeal only has the written proceedings.
   • The best person to decide on the credibility of a witness is the trial Judge.
5. Reluctant witnesses.
5A. Must consider the background of a witness – should not be very technical.

The specific Judicial role is two fold:

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1. To physically restrain the offender by separating him from the family home if necessary
2. To ensure and facilitate necessary social and economic supports for the continued functioning of the family unit

Prosecuting Marital rape cases without victim participation

1. Prosecution will have to decide whether there is sufficient evidence to support the case before forwarding charges.
2. Very rarely/occasionally will police officers make great effort to continue with a case after the victim had decided to withdraw.
3. Even then the evidential value will not be there.
4. Domestic violence/Marital Rape victims are generally viewed as undependable and even hostile
5. Research shows that the ordeal of rape complainants is frequently exacerbated by their experience of the criminal trial process.
   • Described their experience of cross-examination as;
     a) Patronizing
     b) Humiliating and traumatic
     c) Being made to feel as if they were on trial
     d) Worse than the rape
   • Defence lawyers were criticized for being unduly aggressive and intimidating / asking inappropriate and insinuating questions
   • Complainants in rape cases are treated differently than complainants of non-sexual offences; the type of questions routinely put to rape complainants during cross-examination would be unacceptable in other trial contexts.

Cross – Examination in Rape Trials by Louise Ellison (Criminal Law Review – 1998)

What needs to be done?

➢ Educate the general public with regard to the new provisions and women's right not to be raped even by her husband.
➢ Condemn such acts committed, through media by way of posters, television newspapers and special announcements.
➢ Educate the younger generation on Gender based violence/Marital Rape.
➢ Open shelters for women who have been victimized.
➢ Hold the court proceedings of such cases in camera.
➢ Constitute special tribunals for offences committed against women.
➢ Educate Judiciary/Police officers in order to get a fair and a justifiable result.
➢ Stop delaying justice at any cost.
➢ Stop buying over witnesses for the prosecution.
➢ Open shelters for the children of the victims.
➢ Organize legal aid schemes for the victims.