

# CMJA NEWS

The Newsletter of the Commonwealth Magistrates' and Judges' Association

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## EDITORIAL

The CMJA was deeply saddened to hear of the passing of HRH Prince Philip, The Duke of Edinburgh who was a great supporter of the Commonwealth. The CMJA sent its condolences to our Patron, Her Majesty the Queen, Head of the Commonwealth on the passing of her husband. We have also received touching condolences on the passing of the Duke of Edinburgh from around the Commonwealth.

It is over a year now since the world began to feel the effects of the COVID 19 pandemic and life as we knew it has changed beyond imagination. Whilst the CMJA has continued to operate during this time, difficult decisions have had to be taken. In February 2021, the CMJA had to take the difficult decision to convert its Triennial Conference, due to take place in September 2021 in Accra, Ghana into an **Annual Conference** which will take place virtually from **12-15 September 2021**. The Theme of the Conference will be **"Post-Pandemic Innovations"** and members can register online at: [www.cmja.biz](http://www.cmja.biz). We hope that 2022 will bring better news and we can resume in person conferences then, including the holding of the Regional Meetings and General Assembly also postponed from this year.

We are aware that cases of COVID 19 have been on the increase recently in a number of countries, India, Kenya and Papua New Guinea, for example, and a number of courts have been closed as a result of this. Whilst there is light at the end of the tunnel with the rollout of vaccinations across the world, the CMJA President, Justice Charles Mkandawire and Justice Sanji Monageng (former International Court of Justice Judge) in their capacity as Commissioners for the International Commission of Jurists urged the international community to ensure that there was an equitable distribution of vaccines across the world and in particular in Africa. The issue of distribution of vaccines and patent rights was also raised at the extraordinary meeting of Commonwealth Law Ministers



(CLMM) which was held virtually in early February 2021. The CMJA was represented at this meeting by the Secretary General, Dr Karen Brewer. She also represented the CMJA at the Senior Officials of Law Ministers Meeting (SOLM) which was held virtually over two days prior to the CLMM.

The Latimer House Working Group, for whom the CMJA acts as secretariat, have made a submission to the Commonwealth of the Whole (COW) which is meeting in May 2021 prior to the Commonwealth Heads of Government Meeting (CHOGM) due to take place in Kigali in the week of 21 June 2021. The focus of the submission is the implementation of the Principles in the Commonwealth which are part fundamental values of the Commonwealth. Despite its inclusion in the Commonwealth Charter, there continue to be challenges in the relationship between the Judiciary, the Legislature, and the Executive powers across the Commonwealth and these have been exacerbated during the pandemic with emergency and national security legislation in some countries being misused to restrict human rights.

The CMJA has continued to operate despite the restrictions during the most recent lockdowns in the UK and elsewhere. The CMJA President attended the Magistrates and Judges Association of Zambia's Conference in Livingstone in November 2020. The CMJA participated in the virtual

## CONTENTS

- 1 Editorial
- 2 Commonwealth Day Message
- 2 Senior Officials of Law Ministers Meeting
- 3 Virtual Commonwealth Law Ministers Meeting
- 3 ICJ Judges Forum
- 4 SIFoCC Conference
- 4 Judicial Support Network
- 5 Judicial Independence Issues
- 7 New Members
- 7 Diary of Events

International Commission of Jurists Judges' Forum in December 2020. Justice Patrick Kiage, Regional Vice President for East, Central and Southern Africa and Dr Karen Brewer represented the CMJA at this forum. The CMJA together with the UK Civil Service College also ran its first virtual course on Case Management and Ethics in February 2021. We are grateful to the facilitators for taking the time to assist the CMJA with this course. The next **virtual course on Case Management and Ethics will take place from 21- 26 July 2021** (see further details below) and the CMJA/UK CSC will also be running a **virtual Course for Coroners and Judges from 14-18 June 2021** with the kind assistance of Sir Peter Thornton. The CMJA also observed the 3<sup>rd</sup> Conference of the Standing International Forum on Commercial Courts (SIFoCC) hosted by Singapore which took place virtually on 11-12 March 2021.

We hope that all our members are staying safe. The CMJA has continued with its COVID 19 Forum which is still available to members and we would encourage you make your contribution to the Forum or use this to inform us of how you are dealing with all the new issues arising from the pandemic. Please contact the CMJA for information on how to access the Forum.

However, following the departure of our Executive and Admin Officer, Temi Akinwotu, at the end of February 2021, the CMJA is operating with less resources although we are delighted that Jo Twyman, our Conference Coordinator, agreed to revamp our membership database and administer the CMJA's membership going forward for the foreseeable future. We urge members to continue to pay their outstanding memberships as soon as possible.

We were very sad to hear the news that one of our Members, Justice Regina Sagu, former Director of the Judicial Centre for Excellence, from Papua New Guinea, had passed away in March after a long illness. We were also extremely saddened to hear that Mrs Gloria Millwood, former Council Member of the CMJA from Jamaica passed away on Easter Sunday, 4 April 2021. Though she retired from Council in 2003, Gloria continued her interest and support for the CMJA and its activities, including the work on women and girls' rights. She will be sadly missed by all who knew her. We send our deepest condolences to the families of both Justice Sagu and Mrs Millwood.

## PLEASE DON'T FORGET TO PAY YOUR MEMBERSHIP ON TIME

The CMJA is dependent on timely payment of its membership dues in order to undertake its activities in promoting and protecting judicial independence

We urge Member Associations and Individuals to pay their dues on time. You can pay through the CMJA website at:

[www.cmja.org](http://www.cmja.org)

## COMMONWEALTH DAY MESSAGE FROM HER MAJESTY THE QUEEN, HEAD OF THE COMMONWEALTH

*The following message was issued on Commonwealth Day 8 March 2021 by Her Majesty The Queen*

Over the coming week, as we celebrate the friendship, spirit of unity and achievements of the Commonwealth, we have an opportunity to reflect on a time like no other.

Whilst experiences of the last year have been different across the Commonwealth, stirring examples of courage, commitment and selfless dedication to duty have been demonstrated in every Commonwealth nation and territory, notably by those working on the frontline who have been delivering healthcare and other public services in their communities. We have also taken encouragement from remarkable advances in developing new vaccines and treatments.

The testing times experienced by so many have led to a deeper appreciation of the mutual support and spiritual sustenance we enjoy by being connected to others.

The need to maintain greater physical distance, or to live and work largely in isolation, has, for many people across the Commonwealth, been an unusual experience. In our everyday lives, we have had to become more accustomed to connecting and communicating via innovative technology – which has been new to some of us – with conversations and communal gatherings, including Commonwealth meetings, conducted online, enabling people to stay in touch with friends, family, colleagues,

and counterparts, who they have not been able to meet in person. Increasingly, we have found ourselves able to enjoy such communication, as it offers an immediacy that transcends boundaries or division, helping any sense of distance to disappear.

We have all continued to appreciate the support, breadth of experiences and knowledge that working together brings, and I hope we shall maintain this renewed sense of closeness and community. Looking forward, relationships with others across the Commonwealth will remain important, as we strive to deliver a common future that is sustainable and more secure, so that the nations and neighbourhoods in which we live, wherever they are located, become healthier and happier places for us all.

**ELIZABETH R.**

## SENIOR OFFICIALS OF LAW MINISTERS MEETING

The Senior Officials of Law Ministers Meeting (SOLM) took place over two days on 16-17 February 2021. The CMJA was represented at this meeting by Dr Karen Brewer, Secretary General. The agenda focussed on the work that had been undertaken by the Commonwealth Secretariat on rule of law issues since the last Law Ministers Meeting (CLMM) in 2019 in Sri Lanka which the CMJA President had attended. Like many organisations, COVID 19 had impacted the Commonwealth Secretariat and much of the work that was being done had been done virtually. However, they had made use of webinars to raise awareness of some rule of law issues. These webinars on the Rule of Law will feed into the Strategic Plan of the Commonwealth Secretariat which is currently being discussed. They were

working on a good practice guide for restorative justice and were especially concentrating on traditional customary justice. They were also working on diversity in the judiciary and the over reliance of small states on foreign judicial officers. The Commonwealth Secretariat were currently developing an action plan to take forward the issues included in the [Declaration on Equal Access to Justice](#) approved at the CLMM in Sri Lanka in 2019. The Rule of Law Division has also been working on advancing its work on the [Cyber Declaration](#) agreed at the last Commonwealth Heads of Government Meeting (CHOGM) in 2018 in order to ensure that member states are able to share good practice on cybersecurity. The Commonwealth Secretariat has also developed a Commonwealth Business Law Response Initiative to help mitigate the effects of COVID19 on people's livelihoods and assist governments in adjusting legislation to respond to the pandemic. The [Commonwealth Anti-Corruption Benchmarks](#) which the CMJA contributed to, have now been published online. Further information on the Benchmarks is available on the Commonwealth Secretariat's website at: [Commonwealth benchmarks to help countries fight corruption | The Commonwealth](#). The Office for Criminal and Civil Justice Reform will be working on the use of technology to transform and enhance the administration of justice in the future.

Senior Officials of Law Ministries also discussed the following issues: Model provisions on data protection; Issues in the reform of civil procedure; suppression orders in the Commonwealth; repealing gender discriminatory laws in the Commonwealth and the Singapore Convention on Mediation adopted in 2018. The Senior Officials also discussed in brief the Working Plan of the Working Group on Civil Procedures Law reform. The CMJA has put forward proposed the names of a number of judicial officers across the Commonwealth to assist the Working Group on the different themes they will be discussing as part of their workplan going forward.

Senior Officials also discussed the impact of COVID 19 on the legal systems in their countries during the meeting. The plight of professional journalists in the Commonwealth was discussed at length. Whilst a number of organisations published "[The Principles on the Commonwealth Principles on freedom of expression and the role of the media in governance](#)" in 2018 there has been an increase in attacks on journalists and restrictions imposed on freedom of expression that have been

exacerbated by the pandemic. The CMJA together with the Commonwealth Lawyers Association (CLA), Commonwealth Legal Education Association (CLEA) and Commonwealth Journalists Association (CJA) made a submission to the Commonwealth Secretariat in line with the Commonwealth (Latimer House) Principles, expressing their concerns about the increased and unwarranted curtailment of freedom of the professional media which is deeply affecting the rule of law, democracy, and access to justice for citizens across the Commonwealth. This issue was raised also at the meeting by a number of member states.

The CMJA presented its report on activities since the last meeting, a written report having been circulated to Senior Officials of Law Ministries prior to the Meeting.

## COMMONWEALTH LAW MINISTERS MEETING

A virtual Commonwealth Law Ministers Meeting took place on 18 February and Dr Karen Brewer represented the CMJA at this meeting. This was an extraordinary meeting of Law Ministers which was called to discuss the affect of the pandemic on access to justice and the justice systems. A number of Ministers from the developing Commonwealth expressed their concern about the challenges they faced in the provision and rollout of vaccinations which had been slow due to patent and other copyright restrictions. The concerns expressed regarding freedom of expression and the threats against professional journalists was also raised at this meeting. A copy of the Outcome Statement from the vCLMM is available at: <https://thecommonwealth.org/sites/default/files/inline/VMCLM%202021%20-%20Final%20outcome%20statement.pdf>

## ICJ JUDGES FORUM

The CMJA was represented in December 2020 at the International Commission of Jurists (ICJ) Geneva Forum for Judges and Lawyers. The theme of the meeting was: "**The Role of Indigenous and other Traditional or Customary Justice Systems in Access to Justice, the Rule of Law and Human Rights**". The Forum was attended by the CMJA Secretary General, Dr Karen Brewer and by Justice Patrick Kiage, CMJA Regional Vice President for East, Central and Southern Africa. The ICJ has held a number of fora on traditional and customary justice systems and has worked on the issue for four years and

has published an updated edition of its [Compilation of International Sources on Indigenous and other Traditional or Customary Justice Systems](#), including relevant provisions of global and regional treaties, UN and other inter-governmental declarations, and the jurisprudence and recommendations of expert Committees and Special Procedures established by treaties and the UN Human Rights Council.

There were representatives from a wide variety of countries at the Forum. Equal access to justice was a major concern in some countries with access to state courts being difficult, due to geographical, linguistic or digital isolation (the latter especially since the outbreak of COVID 19) of people wishing to access the courts. In addition, in many jurisdictions, judges or lawyers are not trained in customary law and customary law is not considered an important source of law. A few countries have integrated customary law into the mainstream legal and judicial system but not all have done so.

However, people have had a tendency to turn to traditional justice mechanisms because they are cheaper, geographically more accessible and more flexible in their approaches. There are drawbacks though in that many of these customary systems do not allow for representation by lawyers and many discriminate against women and girls. Rarely do they comply with international human rights norms unless fully integrated into the state legal systems. Some progress has been made and the International Law Development Organisation (IDLO) has been working in this area to improve access to justice especially for vulnerable members of society. In Canada, indigenous law is being taught in some provinces in parallel with state law and universities have developed multi-juridical systems although there continue to be a dearth of indigenous judges at most levels of the state judiciary not only in Canada but elsewhere.

Legal issues affecting women's rights and children's rights can be exacerbated in traditional justice systems where there are few, if any, mechanisms in place to protect these vulnerable communities from violence, forced marriages and custody battles that affect the mental health as well as physical health of those concerned. These vulnerable groups may be reluctant to go to any system of justice as they may find themselves stigmatised or publicly humiliated.

The Forum also discussed the problems that occur with overlapping or conflicting

legal decisions. It was important that any traditional customary justice system should conform to national and international human rights norms and there was a need for more education and training in this field.

The ICJ has put together a number of draft principles which it will use going forward to develop policy and good practice in this area.

## SIFOCC CONFERENCE

The Third Meeting of the Standing International Forum on Commercial Courts (SIFoCC) took place from 11-12 March 2021 virtually and was hosted by the Hon. Chief Justice of Singapore, Justice Sundaresh Menon. The objective of the meeting was to share good practice in commercial courts. Lord Thomas, chair of the SIFoCC Steering Committee, commenting after the event indicated that: *"The meeting provided a forum for the discussion of cross jurisdiction understanding in commercial courts as well as technical development and it is an important step in the collaborative effort of Commercial Courts across the world"*. Issues discussed included Best Practice in Case Management in Commercial Courts, Enforcement of Judgements. There was also an open discussion session on Technology in a new World with a presentation by Lord Geoffrey Vos, Master of the Rolls of England and Wales. The session discussed issues arising from the use of technology – open justice, transparency and security, problems and opportunities presented by data, ethical and regulatory issues arising from artificial intelligence as well as procedural, evidential and substantive questions that face commercial courts in the age of technology in commerce e.g., understanding smart contracts, receiving evidence of what is on a blockchain, intervening in self-executing contract. The Meeting also included two sessions on Funding (third-party) litigation and a session on meeting the needs of court users. Further information on the Meeting and the video of the sessions is available on the SIFoCC YouTube channel at: <https://www.youtube.com/channel/UC3259nSK-bU5fSm9w4L-oMQ>

## JUDICIAL SUPPORT NETWORK

The following is an article by H.H Judge Kalyani Kaul QC, Circuit Court Judge of England and Wales and Founder of the recently launched Judicial Support

Network. [www.judicialsupportnetwork.org](http://www.judicialsupportnetwork.org)

I am the founder of the Judicial Support Network (JSN), which launched for Judges in England and Wales on 18 March 2021. I came to this country at the age of 5 months, from India. I am 60 years old, a single parent, was called to the Bar in 1983, appointed a Recorder in 2009 and a Silk in 2011. I was appointed to the Circuit Bench in 2015. The JSN is at its early stages and hopes to provide support and friendship to other Judges, at any level. It is voluntary, self-funding, non-political and non-hierarchical. Despite a successful 32 years at the Bar, where I built up a great deal of resilience, six very happy years as a Recorder in the Crown Court, I found little if any support in the full time Judiciary. As a woman of colour, I felt the isolation more acutely as I faced challenge after challenge. Over the years that passed I met others of a like mind, who shared similar concerns and experiences, and many others who wanted to help but had no way of doing so and did not want to stand out. So, we are trying to be the group of friends you wish you had in your corner, who won't just listen but will be the voice for those who fear raising theirs. We warmly welcome the initiatives that the Judicial office is launching as well, but we want to help in different way.

With the CMJA our hope is that we can look forward and discuss in a Commonwealth virtual forum what support exists in each of our countries and then put together a 'best practice model' for all jurisdictions which can be adapted to fit rather than looking at

individual cases. We consider that would be a very positive step and that we may be able to make a difference together.

The UNODC's Global Judicial Integrity Network, the International Women Judges Associations and many other organisations have recognised the impact of bullying/harassment/discrimination within our legal systems, whether that is by Judges in relation to the parties, or Judges in relation to each other. There have been instances of advocates bullying and acting discourteously towards Judges in more than one jurisdiction. That conduct undermines the Rule of law and respect for the Court.

### What is the point?

- There is no such policy or 'best practice'; In England and Wales, the Bar and Solicitors have an anti-bullying policy, but Judges have a very limited paragraph in the guide to conduct. We have a brilliant Equal Treatment Bench book, but there is no chapter for Judges and little if any training on workplace issues and recognising barriers to advancement and unfair but traditional advancement 'practices'. I am not sure what the situation is in other parts of the Commonwealth.
- Bullying, harassment, discrimination can and does occur in any jurisdiction. It is wholly inconsistent with our Oaths of Office and the Bangalore principles.
- There is no longer time to wait for change to happen 'organically'.

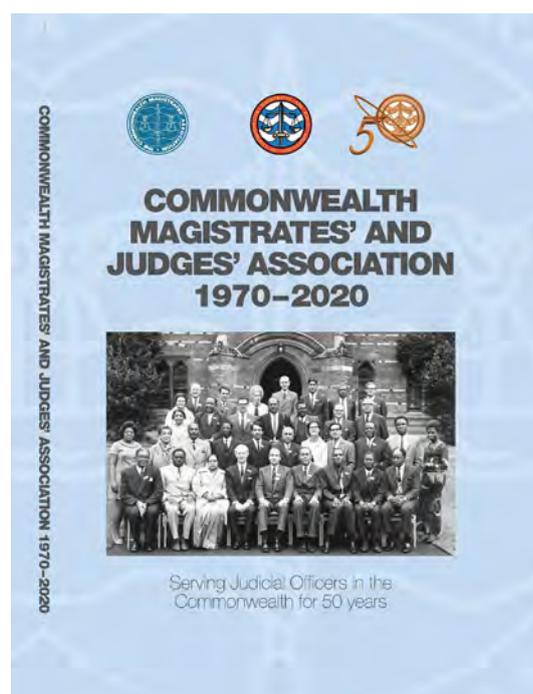
## CMJA 50 YEARS OF HISTORY

The CMJA is publishing a historical record of its work compiled and edited by Dr Karen Brewer and Hon. Dr John Lowndes OAM, facilitated by a kind donation from Mr Michael Lambert CBE, Hon. Life President of the CMJA.

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In the age of 'Me too', of Black Lives matter, and of the issues that plagued us when we began practice in the 1980s' continuing to blight the lives of lawyers and Judges in 2021, we would hope that our Commonwealth judiciaries could lead reform in this area with concrete reforms and practice models, not just another report. Transparency and fairness in all matters.

- d. The Judiciary should be leading reform, not reluctantly following initiatives of others, and either denying that there is a problem or attacking those that complain of such issues affecting them.
- e. Our aim is that we have a set of principles to support the Bangalore principles but that deal with these important issues, including whistleblowing.

We are all Judges, each as important as the other, and equal, regardless of role, background, or any other factor. We all have shared concerns and the same ideals. If you are interested in such a project, my JSN email is on our website. [jsn.kkqc.info@protonmail.com](mailto:jsn.kkqc.info@protonmail.com)

H.H Judge Kalyani Kaul QC,

## JUDICIAL INDEPENDENCE ISSUES

### ENGLAND AND WALES

In November 2020, the Lord Chief Justice of England and Wales had to admonish six MPs for writing to a judge hearing a case involving former MP Charlie Elphicke expressing concern that "matters of principle" should first be considered by senior members of the judiciary and parliament. The Lord Chief Justice indicated that such action was improper, and the judge would be ruling on the basis of evidence and arguments presented in court. He stated, "It is all the more regrettable when representatives of the legislature, writing on House of Commons notepaper, seek to influence a judge in a private letter and do so without regard for the separation of powers and the independence of the judiciary."

More worrying are the indications that following the high profile Brexit cases of Miller and Cherry, the government is proposing to limit the scope of judicial review, and maybe even reduce the numbers of Judges on the Supreme Court. The Ministry of Justice has launched its Independent

Review of Administrative Law. Mark Guthrie, former Legal Advisor at the Commonwealth Secretariat and CMJA member, Mr Sailesh Mehta wrote an article in November 2020 for Counsel Magazine and this is available at: <https://www.counselmagazine.co.uk/articles/opinion-promoting-and-protecting-judicial-independence>

In another development, former Court of Appeal Judge, Sir Peter Gross has been tasked with heading the Review of the Human Rights Act in England and Wales. The Human Rights Act of 1998 integrated the European Convention of Human Rights into domestic legislation. The panel of eight legal experts will report back mid-2021.

### KENYA

Chief Justice Maraga retired in December 2020. Since then, the appointment of a new Chief Justice has been the priority of the Judicial Services Commission. However, there continues to be tension between the Executive, Legislature and the Judiciary. The President has still to approve the list of 40 judicial officers put forward by the JSC for appointment in August 2019.

On 22 April 2021 the High Court issued orders to stay the issuance of the name of the nominee for Chief Justice following the interviews that were held in mid-April 2021 for the post of Chief Justice. Ten candidates were being interviewed for the post of Chief Justice and a number of other candidates were being interviewed for the Supreme Court. However, on 22 April, the High Court ordered that the JSC could not announce the nomination of the chosen candidate until the completion of an investigation into whether or not the chairman of the interview panel was legally able to chair the panel. The issue centres around the position of Acting Chief Justice Philomena Mwilu, whose own appointment as ACJ has been opposed by some as there are outstanding petitions against her taking up the post in the first place. A number of petitions were made to the high court stating that the chairperson of the interview panel, Professor Mugenda, did not have the right to chair the interview panel and stating that the candidates had not declared their assets before applying for the posts. The JSC had approached the Constitutional Court to stay the orders made by the High Court on 22 April. However, the Constitutional Court declined to stay the order on 23 April 2021. In its judgment on 23 April, the Constitutional Court indicated that: "We are of the very considered position that there is ample time for the 1st respondent [the JSC] to approach

the court of Appeal before the orders issued by this Court take effect, it is for this reason the court declines the invitation to issue an interim stay order," the three-judge bench noted". The JSC appealed the issue to the Court of Appeal and on 27 April 2021, the Court of Appeal stayed the order. The JSC then announced that Justice Martha Koome had been selected as the Chief Justice nominee which has to be confirmed by Parliament. She will then become the first female Chief Justice of Kenya.

### KIRIBATI

On 16 April 2021, the CMJA, CLA and CLEA issued a Statement expressing their concerns about the Proposed amendments to the High Court Judges (Salaries and Allowances) Amendment Bill 2021. Please see the High Court (Salaries and Allowances) Amendment Bill 2021. The current (and only) high court judge has been stranded in Fiji since the borders closed due to COVID 19 last year and the High Court has been unable to function since the Chief Justice, Sir John Muria, retired on 31 December 2021. Currently a Chief Justice is being recruited but has not yet been appointed. Although the High Court judge was appointed some years ago, the government claims that the judge does not have a contract although a contract is not required under the terms of the Constitution and 2017 legislation which govern the terms and conditions of appointment to the High Court in Kiribati. The high court judge's instrument of appointment does not mention a fixed term. The proposed legislation includes a provision that henceforth all high court judges (newly appointed or existing) would be appointed on a contract basis only. This provision is contrary to the Latimer House Principles which provide that: "Arrangements for appropriate security of tenure and protection of levels of remuneration must be in place" and to the Basic Principles on the Independence of Judges (1985) which state that: "The Independence of the Judiciary shall be guaranteed by the State and enshrined in the Constitutional or the law of the country. It is a duty of all governmental and other institutions to respect and observe the independence of the Judiciary". The Basic Principles further state: "The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.....Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists."

The full joint Statement can be found on the CMJA's website at: [www.cmja.org](http://www.cmja.org)

## NIGERIA

In early April, the judicial staff at the National Judicial Council (NJC) and Federal Judicial Services Commission (FJSC) commenced a strike in protest at the non-compliance with three high court judgments of 2014 which granted financial autonomy to the judiciary at both the state and federal level. The Judicial Staff Union of Nigeria (JUSUN) had previously given the government an ultimatum to enforce the judgement. The deadline passed in early April and the JUSUN called the strike. In a judgement on 13 January 2014 (HC/ABJ/CS/667/13) Justice Adeniyi Ademola (now retired) held that the provisions of Sections 83(1), 121(3) and 162(9) of the Constitution should therefore be complied with. The judge said: *"The Attorney General of the Federation and the states should act responsibly and promptly to avoid constitutional crisis in this country, by ensuring financial autonomy for the judiciary."*

In two other cases (FHC/ABJ/CS/63/2013 and NAD/56/2013) brought by the then President of the Bar association, the court declared that by Section 81(2) and Section 84 (1), (2), (3), (4) and 7 of the Constitution of the Federal Republic of Nigeria 1999 relating to the remuneration, salaries, allowances and recurrent expenditures of the judiciary, the Consolidated Revenue Fund of the Federation was not part of the estimates that should be included in the Appropriation Bill submitted by the Executive annually to parliament for budgetary resources. Rather the NJC should send its budget directly to the National Assembly for approval and it should also receive the funds directly and not through any ministry or agency of the Executive. The court also found that due to this dependency on the Executive, the judiciary had been severely underfunded for many years, and this opened the floodgates to delays, low productivity and delivery, as well as potential for corrupt activity .

In 2018, the Fourth Alteration Act extended financial autonomy to the judiciary and Section 121(3) of the act was altered to provide that *"Any amount standing to the credit of the House of Assembly of a state and Judiciary in the Consolidated Revenue Fund shall be paid directly to the said bodies respectively; in the case of the judiciary, such amount shall be paid directly to the heads of the courts concerned."* President Buhari constituted a Presidential Implementation Committee on Autonomy of the State Legislature

and State Judiciary in March 2019.

Finally in May 2020, President Buhari issued an Executive order under Section 5 of the Constitution stating that financial autonomy of the state legislature and state judiciary would strengthen the institutions and make them more independent and accountable. However, a number of state governors opposed the Executive order on their own financial grounds stating that it was the Federal Government's constitutional responsibility to fund recurrent and capital expenditure in the high courts, sharia courts of appeal and customary courts as well as expenditure on everything except the salaries of judicial officers. Whilst they agreed eventually to work with the Implementation Committee, these talks stalled and led in turn to the current strike by judicial staff.

## SAMOA

In January 2021, it was announced that three controversial bills had been passed by parliament which will have profound effect on the judiciary. These are the Lands and Titles Bill 2020, the Constitutional Amendment Bill 2020, and the Judicature Bill 2020. The new acts allow for the separation of the Land and Titles Court from the protection of the constitution and divides the judiciary into two parallel systems. Previously, rulings of the Land and Titles Court could be appealed to the Supreme Court of Samoa. The new acts provides for a parallel system with an appellate court which has "supreme authority over Samoan custom and usage". The new laws include a provision that Samoan courts would have to take account of custom and require the Court of Appeal to be composed of two Samoan judges and one "overseas non-Samoan". There has been a number of protests against the legislation creating this court system as new system is seen to take away some of the rights under the constitution, and in particular the right to a fair trial. Judicial officers appointed to the Land and Titles Court will not have guaranteed security of tenure and can be removed, thus affecting their judicial independence. The judiciary and the legal profession in Samoa had expressed their concerns prior to the parliament passing the bills. In their submission prior to the passing of bills, the judiciary stated that:

*"...the proposed structure will inevitably create two different and potentially conflicting interpretations of the Constitution and its application to fundamental rights guaranteed by Part II of the Constitution which is our Supreme Law." "This poses a serious risk to consistency and conformity in the*

*application of the fundamental rights provisions of the Constitution and their interpretation. Second, there is likely to be many circumstances where parties in a dispute will bring proceedings touching on the same or similar issues in both jurisdictions in circumstances where the Supreme Court rules it has the jurisdiction and the Land and Titles Court rules it has jurisdiction, which decision prevails? The structure without a single Apex Court to resolve the conflict between the "two Court system" is unworkable. A single unified Court system with one Apex Court is critical to a functioning and unified judicial system."*

The Judges also expressed their concerns about the constitutional reforms:

*"The laws of Samoa passed by the Parliament of Samoa and Samoa's jurisprudence already recognizes customs and usages and strikes a good balance between the protection of fundamental rights and decisions of the Village Fono and customs and usages..."*

*"The Land and Titles Court is a Court made up of local judges. That is also the case for all of the Judges of the Supreme Court and District Court with local judges now also presiding in the Court of Appeal. It is regrettable to read in various publications and reports suggestions that these Courts are not "Samoan Courts" nor capable of interpreting nor should they deal with matters pertaining to Samoan customs and usages. These are after all Samoan Courts presided over by Samoans all of whom are matai and well versed in our tu ma aganuu; and*

*"That the mechanism for the removal of a Supreme Court Justice remain as currently provided by the Constitution and the word "dismissing" be deleted from draft Article 80(4). The CAB and JB effectively destroy the Independence of the Judiciary and brings the Supreme Court directly under the control of the Executive branch of Government. This is completely unacceptable..."*

The United Nations Office of High Commissioner for Human Rights is currently undertaking a review of the legislation and asked the CMJA earlier this year for their assistance in the nomination of a judicial officer to undertake this task.

## SOUTH AFRICA

In February 2021, it was reported that the Judicial Conduct Committee (JCC), which is a Committee of the JSC, found that Chief Justice Mogoeng Mogoeng had contravened judicial ethical rules

and in particular failed to respect the separation of powers. The Chief Justice had firstly made a comment in June 2020 in webinar with the *Jerusalem Post* in which he indicated that he believed the South African government should be more even-handed in the Israeli-Palestinian dispute. The second comment was a response to the complaints against him for making the first comment: *"I stand by my refusal to retract or apologise for any part of what I said during the webinar. Even if 50 million people were to march every day for 10 years for me to do so, I would not apologise. If I perish, I perish."*

The JCC indicated that the Chief

Justice would need to make a public apology for his comments and retract the initial comment. The Chief Justice is currently appealing the ruling of the JCC on the basis that his rights to freedom of expression, and freedom of religion, belief, thought and opinion had been disregarded. He further stated that the JSC had misinterpreted the Judicial Code of Conduct and that his constitutional rights overrode the Judicial Code of Conduct.

In a separate issue, after 12 years of court cases, Cape Town Judge President John Hlophe was found guilty of gross misconduct by a Judicial Conduct Tribunal on 11 April 2021.

As readers may recall, Judge Hlophe was charged with trying to influence the Constitutional Court in a pending judgement against Jacob Zuma having approached a number of Constitutional Judges about the matter who in turn made an official complaint to the JSC. The Judicial Services Commission will have to confirm the findings of the tribunal, it will then be up to parliament to decide on his impeachment although a 2/3<sup>rd</sup> majority would be required for this. In the meantime Judge Hlophe has not been suspended as some had anticipated but has continued in his role as Cape Town Judge President until such time as the JSC

## NEW MEMBERS

We welcome the following new Individual Members to the CMJA:

### Antigua And Barbuda

- Hon. Judge Anne Marie Smith

### Canada

- Ms Sonia Aleong
- Hon. Justice David Berg
- Hon. Justice Todd Ducharme
- Hon. Chief Justice Robert Richards

### India

- Mr Robert Prince

### Kenya

- Hon. Justice Edward Muthoga Muriithi

### England And Wales

- Dame Bobbie Cheema-Grubb
- Master John M A Dagnall
- Sir Michael Fordham

- Sir Michael Green
- HH Judge Catherine Richards
- Ms Sally Rossecornes

### New Zealand

- Judge William Hastings

### Nigeria

- Mr Nosiri Adaego

### Trinidad And Tobago

- Master Vigel Paul

## DIARY OF EVENTS

14-18 JUNE 2021

### CMJA/CSC PRACTICAL VIRTUAL COURSE FOR CORONERS AND JUDGES

Please contact Andrea Davis for further information at [andrea@civilservicecollege.org.uk](mailto:andrea@civilservicecollege.org.uk)

21- 26 JULY 2021

### CMJA/CSC JUDICIAL CASE MANAGEMENT AND ETHICS VIRTUAL COURSE

Please contact Andrea Davis for further information at [andrea@civilservicecollege.org.uk](mailto:andrea@civilservicecollege.org.uk)

12 SEPTEMBER 2021

### CMJA VIRTUAL CHIEF JUSTICES MEETING

12-15 SEPTEMBER 2021

CMJA VIRTUAL CONFERENCE: "POST PANDEMIC INNOVATIONS"- Registration now open at: [www.cmja.biz](http://www.cmja.biz)

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