



University of Brighton

2010 CMJA CONFERENCE PAPERS

*“Community Justice and Judicial
Independence:
Local Issues, Commonwealth
Standards”*

Papers and Outlines received prior to the Conference

Introduction

The Commonwealth Magistrates' and Judges' Association, together with the University of Brighton, held its annual conference in Brighton from 13-16 September 2010. The Conference was attended by over 200 judicial officers and academics at all levels from 35 jurisdictions in the Commonwealth. We are very grateful to the Business School and other departments of Brighton University for their generosity and hospitality without which the conference would not have been such a success. We are particularly grateful to the staff of the University led by Chris Matthews who was the main coordinator for the conference at the Business School.

The Conference was opened by the President of the CMJA, Mrs Justice Norma Wade Miller of Bermuda and Prof. Julian Crampton, Vice Chancellor of the University of Brighton. The conference also celebrated the 40th Anniversary of the Association and a Gala Dinner was held at the Corn Exchange in Brighton to mark this important milestone in the CMJA's history.

The Conference delegates paid a visit to the newly opened Supreme Court in London and were given a presentation by Lord David Hope of Craighead PC, second Senior Lord of Appeal and former President of the Association. We are very grateful to the Supreme Court for their generosity and to the Supreme Court staff for all their help. Particular thanks go to Lord and Lady Hope for their assistance.

At the end of the Conference, delegates agreed the following statement:

“Noting the objective of the Commonwealth (Latimer House) Principles endorsed in November 2003,

Agreed with a view to strengthening the independence of the judiciary to undertaken an audit of adherence to these principles amongst member countries of the Commonwealth Magistrates' and Judges' Association”.

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Welcome Address

Community Justice and Judicial Independence: Local Issues, Commonwealth Standards

By

Justice Norma M. Wade-Miller

President, CMJA

Colleagues, Ladies and Gentlemen, welcome to the University of Brighton, the setting for the 40th anniversary conference of the CMJA.

I bring you Greetings from Chief Justice Banda, my predecessor. Some of you may recall that he had taken ill on his way to our triennial conference held in Turks and Caicos Islands in September, 2009. Happily I can report that he is recovering.

We meet, for many of us, in the climatically interesting uncertainty of a UK Autumn (but with a very welcome break from hurricanes, we hope!) to discuss in detail some of the most important themes affecting the judiciary at all levels in all the countries represented here this morning. At this conference we shall be looking with concern and care at two of the most fundamental components in any democracy, Judicial Independence and Human Rights.

Our Director of Programmes and his planning committee have assembled an impressive roster of speakers and timely topics under the theme of “Commonwealth Justice and Judicial Independence: Local Issues, Commonwealth Standards”. This is a title rich in potential for exploration, touching on themes which lie at the heart of what we do every day. In the 40 years that CMJA has been in existence, it has always been so.

Our programme is wide ranging but thematically coherent. We begin by getting to the heart of things with a keynote speech on Judicial Independence to be delivered by Lord Judge, the Lord Chief Justice of England and Wales. We shall be able to explore the topic in the two following sessions, in the first looking practically at how we handle judicial appointments in our jurisdictions, and how our practices stand up to the test of independence. This will lead to a very interesting and pertinent jurisprudential theme which asks just what kind of office is held by the judiciary. Is it a body within the civil service as some governments believe, or is it an independent office within a national structure?

I am grateful to the Director of Programmes for bringing discussion on these themes to a conclusion by focusing in the last session on a category which many will consider to be more fundamental still, namely human rights. In the first of a number of interesting combinations of themes, the last topic today examines human rights in relation to the magistracy and other courts of first instance, asking the question how are human rights protected there, in the first point of contact with the judicial legal system.

In what might be a fascinating second day, we shall look at the individual and his or her liberty under the law, but then we move into the field of international law with discussions on the place of independence and liberty in military settings such as war crime tribunals, and to the problems which arise in bringing legal control to lawless situations such as that so vividly exemplified by acts of piracy in Somalia.

Judicial independence is closely related to a number of topics, one of which is that of equal opportunity. CMJA has always taken a close interest in matters of discrimination whether by gender, race or disability and the closing session on day two will focus on these issues. So each day ends with consideration of an aspect of human rights.

Day three, a short day, turns to the Courts of Appeal. Within the entire judicial system there can be no place more defining of both the values of judicial independence and human rights than these courts. We shall spend the morning debating the important issues that arise from their activities in different countries.

After an afternoon excursion to the new Supreme Court in the capital, we move to the final day where the themes are once again large and diverse. Providenciales has provided us with an opportunity to consider how our topics at this conference, of community justice and judicial independence, can be taken forward to the next generation. How do we hand on the baton safely and ensure that the values that we have created in our different jurisdictions are safeguarded and made even more effective in the decades ahead?

We conclude by bringing the notion of community justice to the fore by discussing some of the most pertinent issues which face modern communities in so many countries. Violence in relationships is probably one of the key indicators of the health of a society. Add to that the disturbing phenomenon of forced relationships, such as in marriage, and we find ourselves in an area where human rights are held in low regard, and where judicial independence may be the only protection available to vulnerable people. We shall be looking at experiences in the Caribbean, Africa and here in the UK.

This is an important and hopefully stimulating conference. CMJA as we all know is a small organisation, but from the beginning it has always punched above its weight by focusing on major themes concerning law and society.

The Commonwealth Judicial Journal (CJJ), our association's main publication, can lay claim to being a highly authoritative contemporary archive. Its articles show that we have never shied away from addressing the major issues of the day. In an interesting article written to celebrate 30 years of publishing in 2003, Nicola Padfield, CJJ's fourth editor, gives a useful summary of the range and quality of the journal's output.

She writes that between 1973 and 1976, when Eric Crowther was Editor, articles covered diverse subjects, 'juvenile crime; bail; the use of both capital and corporal punishment; the admission of confessions in evidence;... criminal law in Northern Nigeria; tackling delay in court proceedings and family law in Ghana'. Padfield suggests that many articles and themes in the CJJ merit re-reading. She notes how the journal dealt in detail with human rights issues, for example, a cause celebre of a case in 'the worst days of apartheid South Africa' (the issue being the conviction of a Dr Naude for refusing to testify under oath before a tribunal that was meeting in secret), and quoting on the subject from the late Lord Scarman: 'human rights are those which governments must respect and protect if they are to remain lawful governments...the ultimate legal problem of our generation is to reconcile our civil and political rights with our social and economic rights' so that freedom and justice are not sacrificed as a result of a failure to do so¹.

Our organisation was created to do something important for the people of the Commonwealth. Today, some of us will take for granted the independence of our office, but it is worth noting that in our 40 years and in some of our countries, it continues to be something we cannot always rely upon and we must never be complacent and remain vigilant in order to preserve our independence.

In our conference title we are focusing on a number of fundamental relationships and we are invited to address them in the context of law and the role of the judiciary. Let us quickly look at these both historically and contemporaneously.

We are, first, talking about Community and Justice. This will need thinking about – what is a Community? Is it our country, our family, our local area, our political party, our church group, our school? In reality it is all of these things, all of the time, and our application of judicial standards has to be relevant to all of these, and more. Many of us may think about this topic in relation to sentencing options. We might see it as having to do with communities having some input into criminal justice with schemes such as community payback, restorative schemes, and non-custodial alternatives to custody and so on. What can we learn from each other here this week?

We are also highlighting the link between law and community life. I suggest that law is the bedrock on which communities are built. Communities need other things than law, of course, but without it they will weaken and ultimately they may collapse. Such vulnerabilities will not always be evident as societies change slowly. I am more concerned about this silent process which I would like to describe as social decay.

Laws take time to be enacted, time to embed and time to adapt. The same applies to communities. They can be destroyed, occasionally dramatically but often through breakdown over time. In my own jurisdiction, one of the wealthy, economically well regulated countries in the world and one where stability and community values are highly prized, the stealth by which collapse extends itself is now, I think, visible. We might notice things with concern, but we adapt and carry on not fully recognising that things are getting worse. In Bermuda, and I am sure in other countries too community tension, violence, disaffected groups, family feuds and so on are becoming more prevalent. In Bermuda in 2010 there have been 7 gang related murders already by this third quarter, and in the year from May 2009 to the present the total is a sombre 15 people dead, with 42 victims of shooting incidents. The total number of murders in 2009 was 6, giving a murder rate of 9.2 per 100,000 people. In 2004, the rate had been assessed at just 1.1 per 100,000.

In countries where judicial independence is established, the criminal justice system will have early indication of this in many cases, and the way we understand and respond to the cases brought before us will be an important part of the response of our community.

The second part of our title is 'Judicial independence', a recurrent theme in our 40 year history. In 1990 Nicola Padfield, asked Professor Tony Allott to write an editorial on 'An Independent Judiciary' and he reports that he asked members of the CMJA to answer a number of questions for him:

- 'How stands judicial independence in commonwealth countries today;
- How can invasions of the independence of the judiciary in member countries be brought to public notice;
- What can be done to reduce or eliminate threats to judicial independence in member countries?'

In a telling comment, Padfield reports that 'the paucity of responses was a great disappointment to Professor Allott'.

In that one aside I would like to suggest to you this morning that it is time for our membership on our 40th anniversary to respond unequivocally, if a little belatedly, to the spirit of that invitation. Judicial independence is a major component in any democracy. Without it, communities suffer and the quality of justice is compromised, and in some cases even judges' fall short of the standards expected of them. There have been disturbing reports of judicial malfunction in a number of jurisdictions, such as Gibraltar, Tonga, the Cayman Islands and the Maldives. Indeed, the UK has not been exempt.

CMJA stands for protecting the standards of justice in communities around the world, and for upholding the highest standards of judicial practice in the lower and higher courts. This is not a passive process; it is dynamic and requires effort. If we fail in this duty both individuals and whole communities will suffer, and if they suffer, so will democracy. In our 40 years we have seen the departure of some oppressive political regimes, but we have also seen the strengthening of other undemocratic regimes. Sadly, we now see the emergence of new trends such as an increase in violence in normally peaceful societies. In failing to respond to Tony Allott, or to engage with the work of CMJA we are doing more than making a personal choice to be more or less active in the organisation.

We may be failing in our duty as custodians of the values of judicial independence and all that it means. We may also be putting at risk the enviable reputation that we have built up, namely that as a small organisation we deal well with big issues. It is our responsibility to work and honour our predecessors by improving standards across the Commonwealth. This can only be done with the support of you as judicial officers practising in the Commonwealth. Without adequate funds we are unable to effect the necessary changes and improve the administration of justice efficiently in the 21st century across the Commonwealth. We need to be able to continue to do that, indeed to do it better. Our central charge as an organization is our responsibility to work and honour our predecessors' vision for the organisation.

These are challenging times but I have no doubt as a body we can respond successfully to all of the challenges we are facing and will continue to face. One of these challenges is of course how we finance ourselves. It may well be that we should each consider what Sir Henry Brooke has previously proposed, namely that each judge should become an individual member of CMJA. This is over and above being a member by virtue of your country's membership of the Association.

If each one of you were to join as an individual member that would significantly improve our financial position, and would help to alleviate the financial strain that the Association is currently experiencing. So can I encourage you to join as an individual member this week if you aren't already a member? Karen and Kate will be delighted to take your subscription at the CMJA stand next to the Registration Desk at any point this week and why not buy some of our valuable educational reports at the same time!

In this conference, whilst we deal with these major themes, I would ask you to think about how in 2010 we can punch even more above our weight.

I would like to thank the staff of the University of Brighton (Business school and law faculty) for their warm welcome, assistance and generous hospitality. I particularly extend special thanks to Karen Brewer and Kate Hubbard who are at head office and have done all the tedious work of ensuring that the records are kept straight; and to Paul Norton our Treasurer who makes sure that we remain afloat.

I would like to extend a welcome too, to those of you who are accompanying delegates to the conference.

And finally, to all of you who have given your valuable time and effort to supporting this Conference, and who have in many cases travelled long distances to be here, I offer my thanks.

It is now, with great pleasure that I declare the conference open.

Keynote Speeches

Judicial Independence

By

Lord Igor Judge, Honourable Chief Justice
England and Wales

This is a gathering of my brother and sister judges and magistrates, and some of their partners, from thirty five nations of the Commonwealth. I thank the organisers for allowing me the privilege of addressing the meeting. As I have said, you are all most welcome, but perhaps you will not take offence if I particularly welcome our brother judge from Malta, Justice Filletti.

Most of you will assume that the Lord Chief Justice of England and Wales is English, and therefore would speak and think from an exclusively English perspective, but the fact is, not only was I born in Malta, as the generous introduction said, but I am half English, and proud of it, but also half Maltese, and equally proud of that. My mother is Maltese. I was indeed born there during the war, born in the George Cross island, a special decoration awarded by the King to bear witness to the heroism of a small island people in what was the most bombed place on earth. As a child I lived there: I understand the language: I speak it, but ungrammatically. The Maltese are a proud independent nation, small, indeed by the standards of virtually every country here, very small indeed, but it is a nation with a proud history.

Large or small, the issues for judges and magistrates in every country are identical. Each of our jurisdictions is where it is today as a result of its history. And all our histories are different, whether we come from Britain or Barbados or the Bahamas, or for that matter from Malta or Malawi. So the communities which we serve as judges are different. We have arrived where we are because of where we have come from. Our constitutional arrangements, secured by commitment to democracy, are different. The democratic processes by which our governments are elected vary. The political arrangements are different. And even in the same country, they vary. In this country alone, the government of the United Kingdom was, until May this year, the responsibility of the Labour Party. Now it is based on a Conservative and Liberal Democrat coalition. In Scotland, the Scottish Nationalists are the ruling party, while in Wales there is a coalition between Labour and Plaid Cymru, or Welsh Nationalists. There is much diversity. And that indeed is healthy. But what all our communities have in common includes a passionate belief, desire, and I like to think, expectation that justice shall be done in all our courts. They want and expect fair dealing for all who appear in them, equality of treatment for everyone, and justice to be administered firmly according to law, not according to judicial prejudice, or for that matter, political pressures.

And we know, and deep down every man and woman in all our communities appreciate that the first ingredient of the fulfillment of these expectations is an independent judiciary. When brother and sister judges meet on occasions like these they frequently speak of, discuss, and ponder together the issue of judicial independence.

We do so in part because all of us know that it is unwise to take judicial independence for granted: but a brief look around the world shows us countries which do not enjoy the privilege of an independent judiciary; and, worse, countries which have enjoyed that privilege but which have lost it, for whatever shift of the political pendulum, or the ill fortunes of war. For proof that it happens, look around mainland Europe. These are mature democracies. They were mature democracies many years ago. But on mainland Europe you are very pushed to find a single country which on at least one occasion during the last century was not deprived of the privilege of an independent judiciary, sometimes through war, and sometimes through perversion of the democratic process.

In other words, society does not evolve to a particular point of perfection whether democratic process has produced a government and community committed to the rule of law, as applied by an independent judiciary, and then having reached that point of perfection, freezes, so that everyone can sit back and take it for granted. As the President's wise observations about some of our troubled jurisdictions indicated, that is a mistake which it is easy but foolish to make.

But there is another aspect to the question. Our independence is an essential ingredient in our abilities as judges to fulfill our responsibilities. Sitting in our courts we must, adapting the works of Edmund Burke is sure that we can offer the litigant seeking justice, the calm neutrality of the impartial judge. Throughout the world justice is symbolised as a blind folded goddess, weighing the scales, but blind folded. And that is why the oaths that we take on assuming office all involve language very like my own in England, where I swear that I will do right to all manner of people, and that I will do it without fear or favour, affection or ill will. As Lord Chief Justice one of my duties is to swear in all newly appointed Circuit and High Court Judges. So I hear men and women take the same oath. When I listen, it never fails to charge me. And I believe that it has the same electrifying effect on all those members of the family of the new judge, whether parents or children, spouses or partners, as they hear the words spoken by the man or woman they love.

When I was invited to address this meeting on the subject, and I had agreed to do so, I had not appreciated that this meeting last year had had the advantage of receiving the scholarly and learned observations of Sir David Simmons, Chief Justice of Barbados, on this very topic. You will find his speech at page 23 of the 2009 Conference Report- and I respectfully but admiringly recommend you to study it. When I had read it, I realised that I could not improve on his formulation of the principles, besides which Sir David had used all my favourite quotations from around the Commonwealth.

So I have decided to identify three features which are sometimes mistakenly believed to be involved in the concept of judicial independence. And to examine them. Before doing so, however, can we just reflect on the fact that judicial independence has two manifestations? First there is the independence of the judiciary as an institution, which is a concept well understood by right thinking men and woman within our communities.

What is much more difficult to understand and to convey is that the concept of judicial independence means the independence of every individual judge from one another. It is indeed sometimes more difficult to grasp that we are indeed all independent of each other. Whether we are sitting in a court of three judges, say in the Court of Appeal, we have our individual responsibility to disagree- to dissent- if in the end we cannot conscientiously agree with our colleagues. But more important, and even harder for others to grasp is that even in a hierarchical system, the independence of each judge from each other judge means that no judge, however senior, can seek to influence the decision of any other judge however new, however junior. If there is an appeal, of course, then the judges hearing the appeal must do whatever they believe to be right, but that is not the same. The decision under appeal must and must only be the decision of the newest most junior judge himself or herself, totally uninfluenced by anyone else, including a more senior judge. I think it is sometimes difficult for politicians and administrators to appreciate that even in a hierarchical institution, for the purposes of our decisions in court we are all entirely equal. We can only be equal if we are fully independent of each other. And our independence of each other reinforces our independence of everyone else. So it is an essential ingredient of the independence of the judiciary as an institution, and it must be appreciated for the important foundation of judicial independence that it is.

Of course, just as our independence has both an institutional and an individual aspect, so too we have a collective as well as an individual responsibility for the efficient and economic administration of justice. I am on record advancing and shall repeat here what I regard as self evident: the principle of judicial independence is not and cannot be an excuse, let alone a justification, for judicial inefficiency or idleness. Between us, in the countries represented here today, we have hundreds if not thousands of judges who serve their own communities. The vast, overwhelming majority are hard working dedicated men and women doing their very best on each and every occasion that they sit to achieve a just result according to the laws of the country. As ever, in a human institution, there are a few who for whatever reason do not pull their full weight, who sometimes always manage to finish their lists early, and do not offer to help the other judges who are busily getting on with their lists, and who,

despite good health, and the absence of any particular disturbing personal worry, somehow avoid any reserved judgments, and who never take on any side of the additional responsibilities that increasingly have to be shared by judges out of the court process itself. When called to account, as they should be, the principle of judicial independence cannot be invoked as an answer, let alone a defence. If we allow it to constitute an answer or a defence, we shall end up by sacrificing the very principle of judicial independence itself. As advocates we all once knew that the fastest way to lose a good case was to advance a thoroughly bad point. If you advance the principle of judicial independence to protect the idle judge, you weaken its legitimacy when it is needed to protect the decent hard working man or woman who happens to be unpopular with the government or the institutions of the day. So if we do not address it ourselves, others may question it, questions which ultimately undermine the principle of security of tenure. So, just as our independence is collective as well as individual, the discharge of our responsibilities is collective as well as individual. Collectively we have to work together to provide an efficient system by which justice is administered in the courts of our respective countries. That too is part of the price which we must contribute to sustain our independence.

Next, I do not believe that the principle of judicial independence necessarily and inevitably leads to judicial isolationism. Whatever may have been the views of an earlier generation, and their views are well known and well documented, we cannot be divorced from the realities of the world we live in, and in particular the new methods of communication with their inevitable impact on public thinking and public perception, nor can we assume that our adherence to the principles of judicial independence will be understood if they are never explained. There are times when the judiciary should be accessible beyond and over and above the pronouncements that individual judges make in court. I am not suggesting that every judge should automatically make him or her available for interview with any media representative. And we must beware the judge who is seeking headlines for himself or herself. But there is room for avoiding isolationism.

I shall speak for myself, giving examples from my own commitments to reduce judicial isolationism.

Last autumn I gave an address at the Annual Conference of the Society of Editors. We judges have to understand the pressures under which the media and the press in particular are operating, and if we listen to their concerns and convey ours to them, we do not in my view compromise either their independence of us or our independence of them. We must surely respect this, and understand that if it is believed that criticism of a judge is appropriate, the editors will not hesitate to make the criticism. But what am I driving at? One of my constant refrains is that our judicial independence and the existence of an independent press are mutually self supporting. Find me, I ask, a society or state in which you have an independent judiciary and a subservient media, or a subservient judiciary and an independent media. The short answer is that the pressures that would remove the independence of the judiciary are identical to the same pressures that would remove the independence of the media. Either both institutions are independent, to the public advantage, or both are cowed or subservient, to the great public disadvantage.

Editors over the years have expressed concern at the number of orders made in courts up and down this country which restrict publication of those proceedings. The principle of open justice is paramount. But there are exceptions, in our country, the result of statute, or the exercise of a discretion granted to the judge by statute.

But editors from newspapers from around the country cannot afford to go to London, to the High Court, every time a magistrates' Court makes an inappropriate order restricting publication. So, the result is a handbook prepared for use by the Crown Court and the Magistrates' Court as a mutual operation, with the clear understanding that the handbook may be used by any journalist in court, without the need for him to obtain legal representation, to point out why, in his submission, a restriction order would be inappropriate or wrong as a matter of law. Provided the journalist acts with appropriate respect and courtesy, and in my experience this invariably happens, it is open to the court to reconsider its decision, or indeed to ask for assistance before making it. So, together, judges and the media have worked together and produced a better system. I do not believe that this arrangement demeans the judiciary.

My observations about the absence of any necessary link between judicial independence and what I have endeavored to identify as judicial isolationism lead me to my third area for exclusion from the concept of judicial independence. If we are not clear about what the principle means it can sound like special pleading, almost like trade union activity for groups of judges simply asserting the principles. But for our purposes mere assertion will not do. We must understand that judicial independence is a prize enjoyed by our communities. It is their privilege. Of course, the principle of independence properly understood in the community advantages the individual judge sitting in judgment in a particular case, reaching the conclusion that provides justice according to the law, but it is not really about us. If I may rephrase something I have said before, when we as judges sit at these meetings advocating and defending the principle we are not, are we? talking about a piece of flummery or privilege which goes with our offices. Our objective is to assert that the community as a whole, and each individual citizen in it, is entitled to have its disputes, particularly when it is in dispute with the government of the day, or any of the large institutions which play a dominating part in our lives, decided by an impartial judge, independent of all of them. It is after all our responsibility to see that the rule of law applies to every single litigant equally and without distinction or discrimination or prejudice, favourable or unfavourable to one side or the other. So when we are discussing judicial independence we are doing no more but no less than cherishing a crucial ingredient of any community that truly embraces the rule of law.

Pirates of the Caribbean Arrive of Somalia

By

Mrs. Rosemelle Mutoka

Chief Justice, Mombasa Magistrates Court, Kenya

1. INTRODUCTION

“The accused persons are 1st offenders. They have never been arrested there before and are very remorseful. They express regret in having found themselves involved in this. They are in a very delicate situation. They are all Somalis and are all young men. They have lived and grown up in a country which is at war, has not known peace, where it is impossible to go to school and one just has to struggle to survive. Their circumstances are special and require leniency. Each one has a responsibility. Accused 1 is only 24 years old. He has a wife and 2 children at the time of his arrest. The eldest child was 2 years and the younger one had just been born. They all depended on him. Accused 2 is 25 years old, has a wife and 3 children. The eldest is 5 years old and the youngest 1 year. The 3rd is 26 years old with a wife and 2 children – 5 years and 5 months respectively. The 4th is 26 years old. Have a wife and 3 children – 4 years, 2 years and 4 months. The 5th is 29 years and has 6 children. The eldest is 7 years old and the youngest 1 year. The 6th accused is 30 years old and has 6 children the oldest being 9 years and the youngest was just recently born. The 7th is 26 years old. He has a wife and his wife was pregnant when he was arrested. They are thus young men, energetic but with no education. Have been in Kenya for 1 year. Their stay in (Shimo La Tewa) remand prison is their first experience with real order. If given an opportunity, they can learn. Considering they are foreigners and since they have been feeding and living off our tax and we have little of it, it is reasonable not to keep them here any longer. It will give a contribution towards international efforts to reduce piracy and contribute to our economy. Musa (1st accused) the captain told me that he is ready to go home and engage in a serious campaign against piracy. That it is possible to lead organized lives, to reflect on their lives, look at their lives and live a crime free life. This trial has achieved what a sentence could have. They are remorseful, rehabilitated and have paid for their sins for the 1 year they have been in custody. Section 35 (1) of the Criminal Procedure Code had such people in mind”.

Above is a synopsis of the mitigation offered by the defence counsel in the most recently concluded case - **Republic v Musa and 6 others**- Mombasa Chief Magistrate Court Case No. 1184 of 2009. The accused persons were charged with the offence of piracy contrary to section 69 of the Penal Code Chapter 63 Laws of Kenya. The details of the offence are that the accused persons while armed with five AK 47 rifles, one RPG launcher, one SAR 80 rifle, two pistols make Tokalev, and one knife attacked a German ship named SPESSART and at the

time of such act, put in fear the lives of the crewmen of the said vessel. I convicted the seven on 6th September 2010, and sentenced each one to five years imprisonment.

Piracy is a crime that has been with us for a long time. The origins of piracy can be traced to as early as 75 BC when Julius Caesar of the Roman Empire was hijacked and held hostage by Cicilian Pirates on the way to Rhodes in the Aegean Sea now named the Mediterranean Sea. While on the way to his Empire (Roman Empire) the hijackers (Pirates) demanded ransom and the Roman Empire paid double the demanded ransom. He was released but later in an act of retaliation he sent his soldiers who arrested the pirates. They were hanged in public. In the Atlantic the origins were the Corsairs and Privateers who in their normal operations would deviate and engage in pirate activities but not only demand ransom but also carry the goods on the ship (ship robbery).

In the 11th century- 19th century Barbary pirate activity work spread to North Africa- Tripoli (now Libya), Algeria, Tunisia and Morocco targeting the ships from the Suez Canal and/or the Far East passing through the Red Sea (now known as the Gulf of Aden) and the Mediterranean Sea. This was during the Ottoman Empire and they were demanding taxes for safe passage of crew and cargo. The demand for taxes was used as an excuse to rob the ships. In 1803 an American naval ship with 300 naval officers was sent to guard American merchant ships against attacks only for the said ship to be hijacked and the pirates used the weapons on board to attack and rob other ships until the American ship was grounded and America sent reinforcements. In 1785 Maria of Boston and Dauphia of Philadelphia (ships) were seized and cargo sold, crew were enslaved and held for ransom. In the said period the Barbary and Corsair captured 800,000 to 1.25 million Europeans as slaves in Italy, Portugal, Spain, France, England, Netherlands, Ireland, Iceland and North America. These incidents of piracy started to spread to the Far East thus interfering with sea lanes of communication both economically and in terms of security. This prompted the League of Nations to pass a resolution defining piracy as a commercial crime threatening marine life and the lives of seamen, passengers and the also maritime security and world economy. The League of Nations demanded that maritime nations put in place a proper legal framework to curb sea piracy. This led to the exodus of pirates from the Atlantic to the Indian Ocean. They hid in the Islands of Seychelles, Madagascar, Mauritius among others which they used as their bases to carry out their piracy activities.

Meanwhile terrorist activities started spreading in the sea. In the early 1970 the Palestinian Liberation Front hijacked an oil tanker at the sea near Bar-el-Mandeb and demanded that Israel not be supplied with crude oil.

Many ships could not pass through the Suez Canal. Trade in the Aden area was affected. There was international concern leading to the United Nations Convention on the Law of the Sea (UNCLOS). There were however, problems with the definition of piracy, whose responsibility it was to arrest the pirates, the place of trial for pirates, the applicable law, who to prosecute the pirates and after the trial and sentence of pirates in which country they would serve it. These legal problems have persisted for a long time and Kenya was no exception when the first reported case was prosecuted in Kenya.

2. BACKGROUND

Piracy is an international crime and has been criminalized by many countries including Kenya under their domestic law. Under international law, it is the UNCLOS which sets out the legal framework applicable in combating piracy. State parties to the said convention, Kenya included, have an obligation under it and under the customary international organizations to build capacity for the prosecution of suspected pirates. Kenya's participation in counter-piracy activities is in line with the spirit of the 1988 Convention For The Suppression Of Unlawful Acts(SUA) Against the safety of maritime navigation which requires:-

'Parties to it to create criminal offences, establish jurisdiction and accept delivery of persons responsible for or suspected of seizing or exercising control over ships by force or threat thereof.'

The purpose of the UNCLOS as stated in its preamble is set out as:

“Prompted by the desire to settle, in a spirit of mutual understanding and co-operation, all issues relating to the law of the sea and aware of the historic significance of this Convention as an important contribution to the maintenance of peace, justice and progress for all peoples of the world.”

Further it establishes a legal order for the seas and the oceans. It seeks to promote the peaceful usage of the seas and oceans and the equitable and efficient utilization of these resources. And that the achievement of these goals will contribute to the realization of a just and equitable international economic order, the interests and needs of mankind as a whole, and the special interest and needs of developing countries whether coastal or land-locked.

The convention also desires to develop the principles embodied in resolution 2749 of the 1970 declaration by the U.N. General assembly that the area of the seabed and ocean floor and the subsoil thereof, beyond the tenets of national jurisdiction, are the common heritage of mankind the exploration and exploitation of which shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of the state.

And finally the belief that codification and progressive development of the law of the sea would contribute to the strengthening of peace, security, cooperation and friendly relations among all nations in conformity with the principles of justice and equal rights.

Prior to the common element of the UNCLOS and at the time of the exploration age [finding of new lands], the traditional maritime making nations were:-

- (1) Britain
- (2) Deutschland [the Netherlands]
- (3) Portugal
- (4) Spain
- (5) Greece

On finding new lands, the traditional Maritime Nations become colonizers [European Scramble for Africa and hence sea trade with foreign lands increased. Shipment of raw materials led to territorial conflicts especially during the period of the industrial revolution where the need for raw materials for industrial production increased and underwater exploration [scientific research] for oil intensified. Sea carriage became the vogue as it covered 90% of world transport.

This convention did not receive overwhelming acceptance. Out of the membership of 168 states of the International Maritime Organization (IMO), the signatories to the said convention today stand at 143. The reasons for not ratifying the convention are varied but as usual politics runs through all the reasons. For example, Kenya took a long time to sign the convention due to lack of political will. She only became a member of IMO in 1973 then ratified the convention in the mid 90's and only domesticated it in September, 2009, a period of over 45 years since independence. The United States of America, using the apparent self serving and camouflaged excuse of “American interests’ refused to date, to remove its naval bases in foreign territorial waters and has not signed the convention. Other countries have simply refused to ratify for unexplained reasons.

While international law allows any State to exercise jurisdiction over acts of piracy, UNCLOS does not expressly require them to do so. Many factors can influence whether a State chooses to undertake a prosecution of a suspected pirate, including the availability of a legal basis to do so under national law, the sufficiency of the evidence collected, the availability of alternative for a for prosecution, political will and practical considerations. The reluctance of the Tanzanian Government which sites several of the above reasons as well as inadequate judicial resources is an example.

At the Eastern Africa regional level where Somalia is situated, the Djibouti Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden, a non-binding cooperative mechanism for States in the region concluded under IMO auspices on 29 January 2009, is noteworthy. It has been signed by Comoros, Djibouti, Egypt, Ethiopia, Jordan, Kenya, Madagascar, Maldives,

Seychelles, Somalia, Sudan, the United Republic of Tanzania and Yemen. Signatories to the Code commit to reviewing their national legislation with a view towards ensuring that there are national laws in place to criminalize piracy and armed robbery against ships, and adequate guidelines for the exercise of jurisdiction, conduct of investigations and prosecutions of alleged offenders. The Code includes provisions relating to capacity-building whereby signatories undertake to cooperate in the repression of piracy and armed robbery and to share information via national focal points and information centres. The Code also envisages the establishment of a regional training centre. IMO has undertaken a broad capacity-building initiative to assist signatories to the Djibouti Code in its implementation. For example, IMO convened a workshop in Seychelles in October 2009 and plans to organize more workshops and meetings in 2010 in furtherance of the activities pursuant to the Code.

3. UN SECURITY COUNCIL RESOLUTIONS ON PIRACY OFF THE COAST OF SOMALIA

In 2008 and 2009, the Security Council, after determining that “the incidents of piracy and armed robbery against vessels in the territorial waters of Somalia and the high seas off the coast of Somalia exacerbate the situation in Somalia which continues to constitute a threat to international peace and security in the region”, adopted a series of resolutions under Chapter VII of the Charter of the United Nations addressing the situation in that region. These resolutions, namely resolutions 1816 (2008), 1838 (2008), 1846 (2008), 1851 (2008) and 1897 (2009), set forth a framework for enhanced cooperation in the repression of piracy and armed robbery off the coast of Somalia. The Security Council expressly provided in these resolutions that they apply only with respect to the situation in Somalia and shall not affect the rights or obligations or responsibilities of Member States under international law including any rights and obligations under UNCLOS, with respect to any other situation, and underscored in particular that they shall not be considered as establishing customary international law. The present report will not analyze these resolutions in depth, but only highlight some key elements that may be relevant in the context of exploring options for the prosecution of suspected pirates.

In resolution 1816 (2008), the Security Council, *inter alia*, decided that for a period of six months, States cooperating with the TFG in the fight against piracy and armed robbery at sea off the coast of Somalia, for which advance notification has been provided by the TFG to the Secretary-General, may:

- “(a) Enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law; and
- (b) Use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery”

This authorization was extended for successive one-year periods pursuant to Security Council resolutions 1846 (2008) and 1897 (2009). In resolution 1816 (2008), the Security Council also called on all States to “cooperate in determining jurisdiction, and in the investigation and prosecution of persons responsible for acts of piracy and armed robbery off the coast of Somalia,” consistent with applicable international law.

In resolution 1846 (2008), the Security Council, *inter alia*, noted that the SUA Convention provides for Parties to create criminal offences, establish jurisdiction, and accept delivery of persons responsible for or suspected of seizing or exercising control over a ship by force or threat thereof or any other form of intimidation. It urged State parties to the SUA Convention to fully implement their obligations under the said Convention and cooperate with the Secretary-General and the IMO to build judicial capacity for the successful prosecution of persons suspected of piracy and armed robbery at sea off the coast of Somalia.

In resolution 1851 (2008), the Security Council, *inter alia*, decided that for 12 months, States and regional organizations cooperating in the fight against piracy and armed robbery at sea off Somalia’s coast, for which prior notification had been provided by Somalia’s Transitional Federal Government to the Secretary-General, could “undertake all necessary measures that are appropriate in Somalia for the purposes of suppressing acts of

piracy and armed robbery at sea” in accordance with “applicable international humanitarian and human rights law”. By virtue of paragraph 7 of resolution 1897 (2009), this authorization has been extended until the end of November 2010. The latter resolution also called on member States to strengthen Somalia, including regional authorities, to bring to justice those who are using Somali territory to plan facilitate, or undertake criminal acts of piracy and armed robbery at sea, consistent with applicable international human rights law.

4. HISTORICAL BACKGROUND

Anarchy has reigned in Somalia since 1991 when warlords overthrew the regime of long time dictator Siad Barre and then turned on each other. Somalia is a country without navy coastguard since 1991, a permanent national government to secure and protect waters of its coast and neither does it have a national security force, a national police force to do so nor a legal system with the capacity to arrest and prosecute criminals.

Piracy as a feature of criminal activity in Somalia emerged in the 1980's. Those who have been tracking piracy in the region for some time say it started because the Somali fishermen intended to stop the rampant illegal fishing and dumping that was and still is perpetuated by trawlers operated mainly by people from the developed countries. That however piracy escalated after the fall of the Somali government in the early 90's and flourished after shipping companies started paying ransoms running into millions of dollars. The available evidence shows that in 2009, pirates working the waters off Eastern Africa raked in a record \$90 million. Yet the fact is that none of those prosecuted before us are the masterminds of piracy even though they are the ones caught in the act. They are 'legmen' whose common profile is male, young, illiterate youth ranging in age between 14 to 32, poor and involved in fishing and or transportation of illegal immigrants by sea. The standard average fee offered to them from the masterminds is between \$20 000 to \$50 000 dollars payable to their families on the accomplishment of the task. The risks of being annihilated at sea are very high indeed. The structure of the Somali community being based on clan, all who are intercepted will invariably, be closely related. The circumstances of these youth are often compared to that of the Nigerian '419' email scammers and the Cameroonian '*feymen*' (swindlers and confidence tricksters). These networks have been, for two decades, the emblematic figures of economic adventurers and subversive 'criminal' entrepreneurship that transcend national boundaries and operate both in Africa and in the West. Their unconventional business activities are the embodiment of the growing economy of hoodwinking, deceit and trickery, which today enables many marginalized urban youths in Africa to gain access to financial and material resources from which they have been excluded. The circumstances of each accused person set out before me in mitigation perfectly illustrate this.

5. THE REGIONAL EXPERIENCE (KENYAN PERSPECTIVE) CHALLENGES

The Kenya Government played a key role in efforts to find lasting peace in Somalia leading to the formation of the Transitional Federal Government (TFG) of Somalia which event was hosted in Kenya. Due to an increase of attacks on ships in the Gulf of Aden region in 2003, the Maritime Bureau recommended that ships stay 50 nautical miles off the Somali coast. By 2009, the caution was extended to 200 nautical miles because of the escalation of the attacks affecting both commercial and humanitarian ships sailing close to the Somalia coastline. Lately, the pirates are attacking ships deeper and deeper in the ocean and it is being contemplated that the IMO could issue a ban on the passage of vessels off the coast of Somalia altogether as increasingly, commercial cargo vessels are being diverted to go through the Persian Gulf to reduce the risk of attacks. In 2008, about 149 ships were approached and 39 attacked. The International Maritime Organization report further stated that 30 attacks led to successful hijacks.

Kenya has borne the brunt of these developments leading to a reduction in the cruise industry, an increase in commodity, food and fuel prices as well as a reduction in commercial activity and slowdown in the distribution of food aid in Somalia especially in the south where famine is critical, and increase in the cost of such operation. Due to several attacks of these ships, the UN food program has opted to transport relief food by road in the region leading to wear and tear to the already insufficient road infrastructure as well as to the ever present threat of attacks by terror gangs on dangerous roads. Anecdotal evidence is that the sudden upward increase in the value of real estate in Kenya is because the pirates (masterminds and their lawyers) are laundering the ransom money

by purchasing the same at three or more times the value. Internationally, navies from various countries have to patrol the International Recommended Traffic Corridor (IRTC) at enormous costs instead of engaging in beneficial humanitarian activities. The only positive effect of piracy (apart from the increased fish stocks in the East African coastline) is the urgent need by other countries to assist Somalia gain political stability and the attendant peace.

As a maritime nation, Kenya has faced many challenges from its geographical proximity to Somalia. Due to the Kenya government's interests, it has joined in international efforts in the fight against piracy by for instance deploying its naval force to escort merchant ships and also the prosecution of pirates it has accepted to have tried among many other efforts. To this end, it entered into a memorandum of understanding/exchange of letters with the EU, UK, US among others with naval ships in Gulf of Aden which was concluded in January, 2009, and reviewed in April 2010 on the transfer, investigation and prosecution of suspected pirates intercepted at sea by their naval forces. So far, the trials are being conducted at Mombasa Law Courts only in the Kenyan coastal town where I'm currently the Chief Magistrate in charge.

To date there have been twelve piracy cases filed from 2008 at the court, with 118 accused persons and so far three have been concluded with only the first one being appealed against. In the Chief Magistrate's Criminal Case No. 434 of 2006, R vs. Hassan Muhammed Ahmed 9 Others, the ten suspected pirates were charged with the offence of piracy contrary to section 69 (1) as read with s. 69 (3) of the Penal Code, chapter 63 of the Laws of Kenya. The particulars of the offense were that the suspected pirates, upon the High Seas of the Indian Ocean jointly attacked and detained a machine sailing vessel called Safina Al Bisarat M.N.V- 723 (Indian Ship), assaulted and put fear into the lives of the crew of the said vessel and made demands for a ransom payment of USD 50,000. Upon full trial the accused were each convicted and sentenced to 7 years imprisonment. The ten pirates appealed their convictions and sentences to the High Court. The appeals were dismissed for lack of merit. Although 6 grounds of appeal were put forward, 2 of these are of international character and relevant to this conference:

- That the trial court had no jurisdiction to try the case,
- That the trial court erred in law in finding that the offence could be tried under the Penal Code even when the offence was committed miles away from Kenyan Coast.

The issue of jurisdiction has been a thorny one. Some people have argued that the Kenyan courts have no jurisdiction to try piracy suspects from Somalia or any other country and others have argued that the Kenyan courts have jurisdiction to do so under the doctrine of Universal jurisdiction. Under this doctrine, piracy is justiciable by the courts of every nation. In the case stated above, the High Court used the doctrine of universal jurisdiction in finding that piracy cases can be prosecuted in Kenyan courts. This decision is binding on the subordinate courts which try cases of piracy.

6. DEFINITION AND JURISDICTION

Article 101 of the UNCLOS defines piracy as follows:

“Piracy consists of any of the following acts:

- Any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or passenger of private ends by the crew or passengers of a private ship of a private aircraft, and directed:
- On the high seas against another ship or aircraft, or against persons or property on board such ship or aircraft,
- Against a ship, aircraft, persons or property in a place outside the jurisdiction of any state.
- Any act of voluntary participation in the operation of a ship or an aircraft with knowledge of facts making it a pirate ship or aircraft.

- Any act of inciting or of intentionally facilitating an act described in paragraph (a) or (b).

The definition of piracy contained in UNCLOS has been incorporated into a number of binding and non-binding international instruments. When acts akin to piracy are committed within the territorial sea of a State, they are termed “armed robbery against ships”. UNCLOS stipulates that “all States shall cooperate to the fullest possible extent in the repression of piracy” (art. 100). The International Law Commission, in its commentary observed that:

“Any State having an opportunity of taking measures against piracy, and neglecting to do so, would be failing in a duty laid upon it by international law. Obviously, the State must be allowed certain latitude as to the measures it should take to this end in any individual case.”

Article 105 of UNCLOS and customary international law provides that all States may exercise universal jurisdiction over acts of piracy. Universal jurisdiction is criminal jurisdiction which is based solely on the nature of the crime (in this case, piracy), and does not have regard to where the crime was committed, to the nationality of the alleged or convicted perpetrator, to the nationality of the victim, or require any other connection to the State exercising such jurisdiction. In the case of piracy, this means that any State may apprehend pirates or pirate ships or aircraft in areas beyond the territorial sea of any State, arrest the suspects and seize the property on board, and prosecute the suspects, as appropriate. All the cases in our courts have been due to arrests carried out by warships belonging to international countries.

7. KENYAN LAWS

The Kenyan Penal Code at sections 69 (1), (2) and (3) only makes piracy an offence and prescribes the punishment as life sentence. The Penal Code does not define the offence. It talks of the ‘act of piracy *jure gentium*’ yet this term is not defined. One therefore has to look for the definition of piracy outside the Kenyan statutes and yet the trials are proceeding on meanwhile.

The substantive law relating to maritime industry in Kenya was the Merchant Shipping Act of 1967, derived from the British Merchant Shipping Act (before repeal). It never mentioned piracy nor did it define what constituted piracy. The said Act is completely silent on the issue of piracy. The Kenyan Act borrowed heavily from the outdated British Merchant Shipping Act of 1894 which for over 100 years has undergone amendments at least 30 times, and though the Kenyan law has been amended four times (1967, 1968, 1973 and 1981) none of the amendments touched on piracy. Additionally, even though Kenya subsequently ratified the UNCLOS it never domesticated the Convention in relation to piracy into the Kenyan laws until the commencement of the new Merchant Shipping Act, 2009 on the 1st day of September 2009. By then 11 of the 12 piracy cases pending trial had already commenced before the Kenyan courts.

Part XVI of the new Act under the heading ‘Maritime Security’ for the first time defines the offence of piracy thus:

- *Any act of violence or detention, or any act of depredation, committed for private ends by the crew or passengers of a private ship, private aircraft, and directed:-*
- *Against another ship or aircraft, or against persons or property on board such ship or aircraft; or*
- *Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;*
- *Any voluntary act of participation in the operation of a ship or of an aircraft with the knowledge of facts making it a pirate ship or aircraft; or*
- *Any act of inciting or of intentionally facilitating an act described in paragraph (a) or (b).*

Under s.369 (1), (Interpretations), ‘UNCLOS’ means the United Nations Convention on the Law of the Sea’. Hence the new Act now domesticates the United Nations Convention on the Law of the Sea. Without the definitional aspects of the Act being made bare, the drafters of the charges would have difficulties drafting the charges and if any aspects of the charge are challenged it would be difficult to interpret it legally in the absence

of the definitions/meanings. The repeal of S.69 (1) of the Kenya Penal Code by the new Merchant Shipping Act of 2009 confirmed the legal position that the repealed law had inadequate legal framework to try the offence of piracy.

7.1 RIGHTS OF THE ACCUSED

Under Kenyan law, like most other commonwealth countries, an accused person is deemed innocent until proved guilty. The accused persons being foreigners with scant personal details have to date never been admitted to bail in all the cases before us even though piracy is a bailable offence. Under the new Constitution, all offences are bailable and will only be denied an accused person for compelling reasons. To date the subordinate court orders on bail have not been challenged before the High court.

The right to legal representation in the new constitution is now guaranteed. Yet about a year ago, most of these accused persons had no legal representation and the trial was so skewed in favour of the prosecution which were and still are conducted by the State Law Office that is heavily facilitated by UNODC (United Nations Office on Drugs and Crime) that manages funding on the fight against piracy by the international community. On the intervention by the courts, UNODC funded the representation of those who had none. In a recent case though, the defence counsel who had been retained by the accused persons withdrew from acting for them and the trial court directed that the A-G provides the accused persons with a lawyer. The legal position then was that only those charged with murder were entitled to legal representation and the decision was reviewed by the High court. In any case UNODC did provide the accused persons with a lawyer who they rejected in open court.

7.2 INVESTIGATIONS

In Kenya, once a suspect has been arrested and the fact of his arrest recorded in the Occurrence Book (OB), the suspect is handed over to an Investigating Officer for further investigations. The principle is to guarantee fair and impartial investigations. In piracy cases, once the naval ships have intercepted the pirate ships, the International Water Coast Guards (Petty Crime Officers) are the first persons to assess whether there is enough evidence for piracy and then make a formal request through the Ministry of Foreign Affairs for prosecution. The said naval officers are not trained on Kenyan laws. In the circumstances it would perhaps be necessary that Kenya enters into a Ship Riders Agreement with the EU, UK and USA and countries involved in the Atlanta mission to enable Kenyan law enforcement officers to be stationed in their naval ships to ensure that the recording of statements, the collection of evidence and the arrest of suspects meets Kenyan legal standards. Additionally, the Investigating Officer, who is a Kenyan, has never visited the *locus in quo*.

7.3 TECHNICALITIES IN THE SUBJECT MATTER

Piracy is an offence committed at sea. The language of the sea, the language of the naval officers, and the language of the crew has technical meaning. Language such as ‘port side’ (left side of the ship); ‘starboard side’ (right); ‘fore peak’ (star front); ‘aft peak’ (far hind); ship communication; bridge to bridge communication; ‘horse shoe formation’ e.g. circling the suspect pirate boat, and others if not translated accurately give a totally different meaning.

7.4 LANGUAGE BARRIER

Under the Kenyan law an accused person is entitled to the conduct of the trial in a language he/she understands. A situation arises where there is a Swedish witness in the witness box – the prosecutor communicates in English to that witness through a Swedish interpreter at the same time a Somali interpreter communicates the same issues to the accused person then waits for that communication to finish. This slows the trial process extremely and is susceptible to mistakes as the court (Magistrate, prosecutor, defence counsels) and by extension the public in attendance are strangers to both languages (Somali & Swedish). The only way trials can be sped up and mistakes that could occasion miscarriage of justice avoided is if such trials should take place where either

language is understood ordinarily and/ or the need to form a specialized tribunal within the region which has special facilities to address trial issues such as this.

7.5 LACK OF FACILITIES

In Kenyan courts, like in most African courts, the trial judicial officer records the proceedings manually and the Prosecutor and defence counsel has to adjust his/her pace to match the speed of each magistrate. Given that up to early this year it was only Kenya that was handling these cases and is still the one with the highest number, the pace of the trials is inevitably slowed down especially since the magistrates handling them also handles other cases without exception. Without the assistance of stenographers, there is no other way of counter-checking the way the record is taken to ensure that all the material aspects of the case have been recorded. This could occasion miscarriage of justice. Stenographers, computer systems and video links facilities would drastically reduce the prosecutorial burdens and witness costs.

Secondly magistrates in Kenya are not provided with security and it is only in the capital city Nairobi that there is electronic security installed. This is a constant concern for magistrates handling piracy cases which they always raise in staff meetings especially considering that terrorism is perpetuated by certain militia groups in Somalia which is next door to Somalia.

Thirdly, all piracy trials are in a coastal town with hot humid weather most of the year and the courts are not adequately fitted with equipment to make them bearably cool. Most pirate trials involve large groups in one case and due to their tediousness; it gets very uncomfortable for all involved in the trial.

Fifthly, there is need for capacity building for all those involved in the trial to ensure effectiveness. The Magistrates have been neglected in the area of training and opportunities to interact with others who deal with piracy issues.

UNODC has been involved in ensuring the improvement of the facilities, among other improvements, set out above and has carried out infrastructural improvements in the courts and prisons and recently completed the construction of a courthouse at the largest prison in Mombasa to ease the burden of transporting pirates and others facing serious cases to the court 15 kilometres away. Their intention is to replicate this in most of the large prison facilities in the country.

8. CONCLUSION AND WAY FORWARD

The Kenyan justice system is already overburdened. The backlog of cases stands at 875,000 and is alarming. The prison facilities are overstretched with a population of 53,000 against a national capacity of 16,000 contrary to international standards.

Fundamentally though, it is not in doubt that acts of piracy at sea off the coast of Somalia will continue as long as it does not have a stable government which can police its borders and/or suppress acts of piracy. Ransom payments to pirates must also be stopped if acts of piracy are to be suppressed. Pending the establishment of a stable government in Somalia, the international community should do the following:

Create a regional piracy information centre where information on counter-piracy measures can be received, shared and processed; the centre can also be used to train personnel on counter-piracy operations.

Create a regional court to try suspected pirates on full time basis. This court will send a signal to potential pirates that the world is determined to suppress acts of piracy. This will address the legal, infrastructural and other concerns like that raised after the recent acquittal of a pirate by a Virginia court that dismissed piracy charges against a Somali accused of an attack on a US warship. The Judge said that those who captured the accused violated international law. In his article titled "Disaster in US Courts –Somali pirates set free" Eugene

Kontrovich stated that the decision threw the international campaign against Somali piracy into jeopardy and that:

“The court ruling will foil already strained relationship with Kenya and Sychelles, the only countries that have proven willing to prosecute pirates. These poor states have always been reluctant about bearing the burden of dealing with pirates. Presumably it won’t sit any better with them when US courts declare that they will not hear similar cases.”

Finally, it is important that the root causes of piracy be addressed. The accused persons, it is my observation, genuinely believe they are exacting justice and compensation for the marine resources stolen and the ecosystem destroyed over the years. Research indicates that there is merit in this statement. Without it being addressed therefore, it is possible that citizens of other countries, who find themselves in similar situations, will respond in the same way and thereby escalate the problem of piracy and other global crimes.

I wish to express my gratitude to all those who gave me invaluable assistance as I prepared the presentation.

Thank you for your audience.

The Role of the Appellate Court

By

The Honourable Madam Justice D.P. Bernard O.R. C.C.H.
Judge, Caribbean Court of Justice

1. INTRODUCTION

The topic of this address is multi-jurisdictional and multi-dimensional. As such it involves discussion of court systems which are jurisdictionally different even among countries which share a common law history. Primarily appellate courts are courts of review of the decisions of lower courts, and may be intermediate courts or courts of last resort with a power of review only on points of law where the leave of such a court is obtained or courts whose sole function is review of decisions concerning a country's constitution or basic law.¹

Discussion of the appellate courts of a few selected Commonwealth countries (England and Wales, Canada, Australia, India, South Africa, New Zealand and the Caribbean) will form the basis of this paper, with some comparative reference to the United States Supreme Court. One of the enduring legacies of British colonialism being the court and judicial systems, it is appropriate to commence our journey with a historical tour of the systems of England and Wales.

2. ENGLAND AND WALES

From the earliest years of trial by ordeal, the passage of the Judicature Act 1873 was transformational in the judicial system of England and Wales merging as it did the common law and equity, and establishing the High Court and the Court of Appeal. The Criminal Appeal Act 1907 brought into being the Court of Criminal Appeal, the jurisdiction of which later passed to the Court of Appeal under the Criminal Appeal Act 1966.

The House of Lords in addition to its legislative function, was vested with a judicial function as a court of last resort, its jurisdiction being regulated by the Appellate Jurisdiction Act 1874 and later Acts; its original jurisdiction is confined to peerage claims. The Court's appellate jurisdiction covers appeals from the Court of Appeal of England and Wales and Northern Ireland, civil appeals from the Court of Session of Scotland, appeals directly from the High Court of England and Wales and Northern Ireland "leapfrogging" the Court of Appeal, and appeals from the Court Martial Appeal Court. An appeal from a lower court is accepted only with leave of that court or of the House of Lords except an appeal from the Court of Session of Scotland which requires only to be certified that there are reasonable grounds for the appeal.

With the new Supreme Court (formerly the House of Lords) at the apex of the hierarchy of the English court system, the Divisions of the High Court (Queen's Bench, Family and Chancery) exercise appellate jurisdiction as administrative and divisional courts hearing appeals from crown courts, county courts, magistrates' courts and tribunals.

2.1 DOCTRINE OF PRECEDENT

Inevitably any discussion on appellate courts involves the applicability of the doctrine of precedent which in one sense depends on the hierarchy of courts, and in another on whether an appellate court is bound by its own decisions known as "*stare decisis*." The hierarchy of courts dictates that the decisions of higher courts are binding on courts of lower jurisdiction, for example, decisions of the Supreme Court, Court of Appeal and High Courts bind the magistrates, crown and county courts in England and Wales. An appellate court such as the Court of Appeal may also be bound by its own decisions as was first decided in **Young v Bristol Aeroplane Co. Ltd.**² In that case the Court of Appeal held that it was bound to follow its own decisions and those of courts of co-ordinate jurisdiction, the only exceptions being (1) to decide which of two conflicting decisions of its own it will follow, (2) to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords, and (3) not to follow a decision of its own if it is satisfied that the decision was given *per incuriam*.³ A fourth exception where a law was assumed to exist in a previous

¹ See the Constitutional Court of South Africa which will be discussed in greater detail later.

² [1944]K.B., 718

³ Re-affirmed By Lord Diplock in **Davis v Johnson** [1978] UKHL 1, [1979] AC 264

case, but did not, was established in **R (on the application of Kadhim) v Brent London Borough Housing Benefit Review Board**.⁴

Lord Denning, that illustrious and renowned jurist of revered memory and who acquired the reputation of being the great dissenter while in the Court of Appeal (and also while in the House of Lords), expressed strong views against rigidly following **Young**, and found ways of getting around a previous decision if he felt that it was wrongly decided, sometimes by distinguishing it either on the facts or the law.

Unusually, the Criminal Division is not bound by its previous decisions, no doubt placing the need to be fair and just above the need to be certain and rigid.

Prior to 1966, the House of Lords like the Court of Appeal was bound by its own decisions; in fact as far back as 1898 in **London Street Tramways Company Ltd v The London County Council**⁵ the House held that a decision upon a question of law is conclusive and binds the House in subsequent cases. The Earl of Halsbury, L.C. reasoned that although cases of individual hardship may arise after a judgment is given and which the profession may find to be erroneous, greater inconvenience would ensue in having each question subject to be re-argued and “the dealings of mankind rendered doubtful by reason of different decisions so that in truth and in fact there would be no real final Court of Appeal.”

This continued to be the position until 1966 when a Practice Statement (Judicial Precedent)⁶ was issued in which the learned Law Lords recognised that “too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law.” They reserved the right to depart from a previous decision whenever it appeared right to do so.⁷ This did not affect the value of precedent in cases in lower courts, and all other courts that recognised the House of Lords as the court of last resort. So far the position seems to be the same in relation to the new Supreme Court of England and Wales.

Before leaving the discussion on precedent mention should be made of the European Court of Justice in relation to the House of Lords and its successor, the new Supreme Court. This Court, now part of the English legal system by virtue of the European Communities Act 1972, and established under the Treaty of Rome 1957, is clothed with jurisdiction to determine questions of law pertaining to any Community instrument, and as such can overrule all other national courts including the Supreme Court (and former House of Lords) on matters of Community law. Only in this regard does the Supreme Court yield to any other court as the final arbiter of issues affecting nationals of England and Wales.

2.3 THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

The Privy Council as it is familiarly known (and will hereafter be so described) can be said to be the most multi-faceted court in the judicial system of the United Kingdom since its establishment by the Judicial Committee Act 1833. Besides being one of the highest courts in the United Kingdom it is also the court of last resort for several Commonwealth countries which were former colonies of Great Britain. In addition to jurisdiction in some domestic matters, the Government may refer any issue to the Committee for “consideration and report.” Additionally, it is the court of final resort for the Church of England.

2.3.1 PRECEDENT

Judgments of the Privy Council in cases from overseas Commonwealth jurisdictions are only persuasive in courts of the United Kingdom, but are binding precedent in the lower courts of the jurisdiction from which they emanate.

⁴ [2001] QB 955

⁵ [1898] A.C. 375

⁶ [1966] 1 WLR 1234

⁷ [Lord Reid stated in **R v National Insurance Commissioner, Exp Hudson** [1972] AC 944, 966 “the practice will be used “sparingly” when the previous wrong decision is thought to be impeding the proper development of the law or to have led to results which were unjust or contrary to public policy.”

Some examples where previous decisions of the House were overruled are **Conway V Rimmer** [1968] AC 910 overruling **Duncan v Cammell Laird** [1942] AC 624, **Milangos v George Frank (Textiles) Ltd** [1976] AC 443 overruling **In Re United Railways of Havana and Regla Warehouses Ltd** [1961] AC 1007. In the criminal jurisdiction **R v Howe** [1987] AC 417 overruling **DPP for Northern Ireland v Lynch** [1975] AC 653.

Not unlike the former House of Lords the Privy Council never regarded itself bound by its own decisions, and this was held to be so in three cases from the Caribbean.⁸ Lord Hoffmann, however, in one instance was of the opinion that the fact that the Board has the power to depart from earlier decisions does not mean that there are no principles which should guide it in deciding whether to do so. He went on to state that “*if the Board feels able to depart from a previous decision simply because its members on a given occasion have a doctrinal disposition ‘to come out differently,’ the rule of law itself will be damaged and there will be no stability in the administration of justice*”

Further reference will be made later about the impact of the judgments of the Privy Council when discussing the appellate courts in the selected jurisdictions.

3. CANADA

Within the hierarchy of the Canadian judicial system the Supreme Court of Canada which came into being in 1875 by an Act of Parliament, and is now governed by the Supreme Court Act, stands at the apex of a structure which is multi-dimensional. It comprises both federal and provincial court systems as well as military courts and tribunals. The Federal Court of Appeal hears and determines appeals from the federal court trial division and federal administrative tribunals, and the Provincial Courts of Appeal function as appellate courts for provincial, superior courts and provincial administrative tribunals. The Supreme Court is the ultimate court of appeal for all of these courts including the military courts.

Leave to appeal to the Supreme Court is given if the case involves issues of law or a question of great public importance that warrants consideration. In addition, the Court can hear references from the Governor in Council for opinions on the constitutionality or interpretation of federal or provincial legislation.

The early beginnings of the Supreme Court did not augur well for its future. Its first case in April 1876 was a reference sent from the Senate requesting the Court’s opinion on a private bill; it was not until one year after its first sitting that the Court began to sit regularly.

Despite the creation of the Supreme Court in 1875 the Privy Council continued to be the court of last resort for Canada until 1933 for criminal appeals, and 1949 for civil appeals.

3.1 PRECEDENT

Shortly after appeals to the Privy Council were abolished, the Supreme Court’s approach to decisions emanating from the House of Lords began to change, and their relevance to Canadian jurisprudence was called into question. Illustrative of this is the case of **Fleming v Atkinson**⁹ involving a collision between a motor car and cattle on the municipal highway and consideration of the right of an adjoining landowner to permit cows to run at large on the highway. The question arose whether an English common law rule was applicable. It was held by a majority of the Supreme Court that the injured motorist was entitled to succeed. Reference was made to an English case of **Searle v Wallbank**¹⁰ that the English common law rule was to the effect that highways in England having come into existence by dedication rather than by governmental action there was formerly no real risk of damage from the presence of straying animals, hence no duty of care to users of the highway. This had been followed in one case in Ontario of **Noble v Calder**¹¹ in which the English common law position as defined in **Searle v Wallbank** (supra) had been applied. Judson, J writing the majority judgment reasoned that the historical basis for the rule in **Searle** was dependent upon the peculiarities of highway dedication in England which had never existed in Ontario; the public right of passage on the highways of Ontario was never subject to the risk of stray animals as the highways were created by the province and vests in the province. He concluded that this alone was sufficient to distinguish the law of Ontario from the law of England and to render the principle stated in **Searle** inapplicable to Ontario.

⁸ **Neville Lewis v Attorney General of Jamaica** (2000) 57 WIR 275; [2000] UKPC 35C; **Charles Mathew v The State** (2003) 64 (WIR) 270; 2004] UKPC 33C; **Lemuel Gibson v The Government of the United States of America (The Bahamas)** 70 WIR 34; [2007] UKPC 52.

⁹ [1959] 18 DLR (2^d) 81

¹⁰ [1947] A.C. 341

¹¹ [1952] 3 DLR 651

Later in **Ares v Venner**¹² the issue of the admissibility of hospital records and exceptions to the hearsay rule arose for consideration and involved discussion of the House of Lords decision in **Myers v Director of Public Prosecutions**¹³ and whether extension of the exceptions to the hearsay rule should involve a legislative or judicial solution. Hall J in delivering the judgment of the Court adopted and followed the minority views of Lords Donovan and Pearce in **Myers** which supported a judicial solution rather than a legislative one. Lord Donovan had expressed the view that “the common law is moulded by the judges and it is still their province to adapt it from time to time so as to make it serve the interests of those it binds.” The opposite view was taken by Lord Reid who posited that “the most powerful argument of those who support the strict doctrine of precedent is that if it is relaxed judges will be tempted to encroach on the proper field of the legislature.”

Hall, J’s opinion was that the Court (the Supreme Court) should adopt and follow the minority view rather than resort to saying in effect: “This judge-made law needs to be restated to meet modern conditions, but we must leave it to Parliament and the ten legislatures to do the job.” This indicated a pragmatic and less rigid approach to precedent commensurate with modern conditions.

The scope of the Canadian Bill of Rights enacted in 1960 as a federal statute was limited, and rarely were such statutes deemed to be inoperative by the Supreme Court. However, in **R. v. Drybones**,¹⁴ a landmark decision, the Court held that Section 94(b) of the Indian Act which prohibited Indians from being intoxicated off a reserve, was inoperative being in violation of Section 1 of the Bill of Rights which recognised the enjoyment of certain rights without discrimination based on race, colour or national origin.

However, in **Attorney General of Canada v. Lavell**¹⁵ the Court held that the enfranchisement of Indian women for marrying a non-Indian as provided under Section 12(1)(b) of the Indian Act did not violate the respondent’s right to equality before the law under Section 1 (b) of the Bill of Rights and so the impugned Section of the Indian Act was not inoperative.

Dissatisfaction with the Bill of Rights eventually led to the adoption in 1982 of the Canadian Charter of Rights and Freedoms which was entrenched in the constitution of Canada. It broadened the scope of the fundamental rights and freedoms with wide powers of interpretation and enforcement being given to the courts, the Supreme Court of Canada being the ultimate authority. This mandate was utilised by the Supreme Court in several cases, two of them being foremost in mind – **R. v. Morgentaler**¹⁶ (involving abortion rights) when the Court found that Section 251 of the Criminal Code violated a woman’s right to security of the person under Section 7 of the Charter. The other was **Vriend v Alberta**¹⁷ in which the Supreme Court held that a legislative omission regarding sexual orientation in the Alberta Individual Rights Protection Act violated Section 15 of the Charter.

4. AUSTRALIA

Provision in Section 71 of the Constitution of Australia led to the establishment in 1901 of an appellate court known as the High Court of Australia with its first sitting taking place in 1903 and comprising jurists from the newly created Commonwealth of Australia with a jurisdiction embracing the state supreme courts. In **Dalgarno v Hannah**¹⁸ (among the first cases decided by the High Court on appeal from the Supreme Court of New South Wales) the Court expressly stated that Section 73 of the constitution “provides that the High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes to hear and determine appeals from all judgments, decrees, orders and sentences of any federal court, or court exercising federal jurisdiction, or of the Supreme Court of a state.” Defying critics who at the time feared that the Court would be a tribunal with no real status, the Court spoke through its judgments and over the years gained a reputation for judicial excellence.

¹² [1970] SCR 608

¹³ [1965] A.C. 1001

¹⁴ [1970] SCR. 282

¹⁵ [1973]SCR 1349

¹⁶ [1988] 1 SCR 30

¹⁷ [1998] 1 SCR 493

¹⁸ [1903] HCA 1, [1903] 1 CLR 1

The High Court stands at the pinnacle in the hierarchy of courts in Australia with two streams – the superior courts which comprise the supreme courts in each state and territory and which normally hear appeals from inferior courts in their area, and federal courts which are superior courts with jurisdiction over laws made by the federal Parliament, and from the family court. Appeals to the High Court are by special leave only; hence for most cases the appellate divisions of the supreme courts of each state and the federal court are the ultimate appellate courts. The Full Court of the High Court is now the court of last resort for the whole of Australia.

4.1 THE HIGH COURT AND THE PRIVY COUNCIL

Section 74 of the Constitution prohibited appeals to the Privy Council on constitutional matters involving disputes about the limits of Commonwealth or state powers except where the High Court certified the appeal which occurred only once. In **Kirmani v Captain Cook Cruises Pty Ltd (No. 2)**¹⁹ the High Court explained the reason for this to be that it rigorously insisted on maintaining its ultimate constitutional responsibility to decide conflicts between the Commonwealth and the states without the intervention of Her Majesty in Council; in fact, the Court felt that by granting a certificate for the appeal it would be abdicating its responsibility to decide finally questions concerning the limits of Commonwealth and state powers, questions which had a peculiarly Australian character and were of fundamental concern to the Australian people.

In 1968 by the Privy Council (Limitation of Appeals) Act all appeals to the Privy Council involving federal legislation were discontinued, and in 1975 the Privy Council (Appeals from the High Court) Act closed the door on all appeals to the Privy Council. In 1986 with the passage of the Australia Acts all appeals from state supreme courts to the Privy Council were finally terminated, leaving the High Court as the only court of last resort for all Australian courts.

4.1.1 PRECEDENT

The question whether the High Court should be bound by its own decisions (*stare decisis*) was decided as far back as 1913 when, in **Australian Agricultural Company v Federated Engine-Drivers**²⁰ Isaacs, J reasoned that “where the prior decision is manifestly wrong, then, irrespective of consequences, it is the paramount and sworn duty of the Court to declare the law truly.” This liberal approach to precedent preceded the House of Lords Practice Statement (Judicial Precedent) by thirty-three years, and is consistent with the approach of the Australian courts to eschew rigidity in interpretation of the law in favour of pragmatism and practicality.

With the severing of ties to the Privy Council in 1968 and 1975 Gibbs, J in **Viro v R**²¹ articulated the view that “*The Court was not bound by decisions of the Privy Council, which no longer occupied a position above the High Court in the judicial hierarchy. As such it was for the High Court to assess the needs of Australian society and to expound and develop the law for Australia in the light of that assessment.*”

Similar sentiments indicative of the Australian High Court’s intention to create a jurisprudence relevant to the needs of its people and the development of the law in Australia were expressed by Barwick, C.J. in the said case, and repeated twenty-five years later by Kirby, J in **Barns v Barns**.²² The High Court over the years has indeed fulfilled its mandate and continues to do so.

5. INDIA

The Supreme Court of India which was inaugurated on 28 January 1950 as the highest court in the judicial system has a tri-partite jurisdiction – original, appellate and advisory. The exclusive original jurisdiction relates to disputes between Government and one or more states or between states involving any question on the

¹⁹ [1985] HCA 27, 159 CLR 461

²⁰ [1913] 17 CLR 261

²¹ [1978] 141 CLR 88

²² [2003] CLR 169: “Although this Court continues to pay respect to the judicial reasons of the Privy Council, especially in respect of Australian appeals at a time when the Privy Council was a court within the Australian judicial hierarchy, we are not bound by such reasons.” See also similar views of Crane J.A. in the Court of Appeal of Guyana in **Peter Persaud and Others v Pln. Versailles & Schoon Ord., Ltd** (1971) WIR 107 at 132 to this effect: “It is my considered opinion that consequent on the removal of the Privy Council as our final court of appeal, the doctrine of *stare decisis* ... is a dead letter with us; its former judgments are now only of persuasive authority. Of course, we shall continue to cite, apply and to follow them, and when we do so, they will thereafter speak with our authority.”

existence or extent of legal rights or the enforcement of fundamental rights. The appellate jurisdiction covers judgments of one or more of the twenty-one high courts in civil and criminal cases, and the special advisory jurisdiction may be invoked by the President of India by specific referral to it according to the constitution.

One unique feature of the Supreme Court's jurisdiction is the somewhat recent innovation of entertaining and deciding matters of public interest sent to it by members of the public either by writ petition or a simple letter addressed to the Chief Justice of the Court. This "public interest litigation" has led to several landmark cases being decided by the Court.

Lower down the hierarchy in the judicial system are the high courts of each state, and below them subordinate district courts all dealing with civil, criminal and family litigation. The high courts serve primarily as appellate courts hearing appeals from lower courts although they have an original jurisdiction in civil and criminal matters specifically conferred on them by a state or under federal law. Constitutionally all inferior courts including the high courts are bound by the decisions of the Supreme Court.

The relationship between the executive and judicial arms of the State has not been without some degree of conflict since the establishment of the Supreme Court. One area of law which gave rise to a confrontation was the executive's attempt to abridge the fundamental rights provisions in the constitution by the passage of amendments to implement land distribution and which affected one's right to property. In **Golaknath and others v The State of Punjab**²³ the Court held that fundamental rights could not be abridged or taken away by amending legislation. In the course of one of the judgments the learned Justices opined that fundamental rights are the primordial rights necessary for the development of human personality, and were rights which enabled a man "to chalk out his own life in the manner he likes best."

Similarly in **Kesavananda Bharati v The State of Kerala**²⁴ the learned Chief Justice in his judgment emphasised the importance of the preservation of the freedom of the individual which could not be amended out of existence; therefore the fundamental rights conferred by the constitution cannot be abrogated, though a reasonable abridgement of those rights could be effected in the public interest. The judgments of the other justices reflected the same opinion that amendments to the constitution could be made providing the basic structure remains intact. The fallout from this decision was that during a state of emergency in 1975 an amendment to the constitution was passed which nullified the effect of the decision. However, a few years after the emergency the Supreme Court reaffirmed its power of judicial review in another case.

5.1 PRECEDENT

For the Supreme Court of India like other final appellate courts "stare decisis" arose for determination in the case of **The Bengal Immunity Co. Ltd v The State of Bihar and Others**.²⁵ In doing so reference was made to decisions of the English and Australian courts as well as the Supreme Court of the United States of America. In the course of his judgment Das, CJ (ag.) concluded that there was nothing in the Indian constitution which prevented the Supreme Court from departing from a previous decision if it was convinced of its error and baneful effect on the general interests of the public. He articulated the view that in considering the applicability of English decisions it should be borne in mind that those decisions may well have been influenced by considerations which could no longer apply to the circumstances then prevailing in India. Bhagwati, J., another member of the Court, adopted the reasoning of other final courts that the only safeguard which should be put on the exercise of the power of reconsideration of earlier decisions was that the earlier decision should be manifestly wrong or erroneous particularly when the court is concerned with the construction of provisions of a constitution (as was the case before them) which cannot be easily amended. The Court ultimately decided to review an earlier decision in order to rectify an erroneous interpretation of the constitution which had resulted in considerable inconvenience and hardship.

On this issue the dissenting opinion of Ramaswami, J in **Golaknath and Others v The State of Punjab** (supra) was that even though the constitution is an organic document intended to serve as a guide to the solution of changing problems which the Court may have to face from time to time, the Court must be reluctant to accede to the suggestion that its earlier decisions should be frequently reviewed or departed from. He opined that in such a

²³ [1967] AIR 1643

²⁴ [1973] AIR SC 1461

²⁵ [1954] INSC 120

case the test should be what is the nature of the error alleged in the earlier decision and its impact on the public good; further, it is also a relevant factor that the earlier decision had been followed in a large number of cases and multitude of rights and obligations had been created.

6. SOUTH AFRICA

With the establishment of the Constitutional Court in 1994, South Africa now boasts of two courts of last resort in its judicial system, the other being the Supreme Court of Appeal. The Constitutional Court, however, is regarded as the highest court, and is the final court for appeals relating to the constitution. In this regard its decisions are binding on all other courts, and it has exclusive jurisdiction to declare any Act of Parliament invalid or unconstitutional.

The Supreme Court of Appeal formerly referred to as “The Appellate Division” which was first established in 1910 when the Union of South Africa was created, had a change of name under the constitution of 1996. It is the final court of appeal in all matters from the high courts and lower courts except those concerning the constitution when it gives way to the Constitutional Court.

In addition to its function as an appellate court in civil and criminal matters from the high courts, there is a special procedure for referrals to be made to the Supreme Court of Appeal by the Minister for Justice and Constitutional Development whenever there is any doubt as to the correctness of a high court decision in a criminal case on a question of law or where such a decision is in conflict with a decision given by another high court. The Supreme Court of Appeal may hear arguments in order to determine the issue for future guidance of all of the courts. Similar referrals may be made by the Minister to the Supreme Court after consultation with the South African Law Reform Commission where there are conflicting decisions in civil matters from different high courts.

In relation to constitutional matters, although the Supreme Court of Appeal may make orders upholding the validity of Acts of Parliament or concerning conduct of the President, an order of constitutional invalidity has no force unless confirmed by the Constitutional Court. The importance and ultimate authority of the Constitutional Court as the final arbiter on all issues pertaining to the constitution was emphasised in the judgment of Chaskalson, P in **Re Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa**²⁶ which raised the question whether a court has the power to review and set aside a decision made by the President of South Africa to bring an Act of Parliament into force. The Transvaal High Court was requested to review and set aside the President’s decision to bring a 1998 Act into operation in order to govern the registration and control of medicines for human and animal use. The High Court declared the decision of the President null and void, and referred it to the Constitutional Court for confirmation of its order. The Constitutional Court confirmed the order of the High Court but for different reasons raising the issue of whether the High Court’s order setting aside the President’s decision was a finding of constitutional invalidity that required confirmation by the Constitutional Court under section 172(2)(a) of the constitution.

In the course of his judgment Chaskalson, P stated that the Constitutional Court occupies a special place in the new constitutional order, and was established as part of that order as a new court to be the highest court in respect of all constitutional matters, and as such, the guardian of the constitution; it has exclusive jurisdiction in respect of certain constitutional matters, and makes the final decision on those constitutional matters that are also within the jurisdiction of other courts. He went on to say that that was the context within which Section 172(2)(a) provides that an order made by the Supreme Court of Appeal, a high court or a court of similar status concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President has no force unless confirmed by the Constitutional Court.

The constitution of South Africa has been regarded within legal circles as one of the most progressive within recent times particularly with regard to the protection of fundamental rights and freedoms, formulated as it was to correct the harsh abuses of the apartheid system. In this regard the role of the Constitutional Court was defined as protector and enforcer of the Bill of Rights embodied in the Interim Constitution of 1994. That Bill of Rights applied to all law, and Section 173 of the Constitution gives to all higher courts (the Constitutional Court, the Supreme Court of Appeal and the high courts) “the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.”

²⁶ [2000]2ACC 1

A very interesting case which exemplifies the Constitutional Court's obligation to develop the common law in order to promote the objects of the Bill of Rights is **Alix Jean Carmichele v The Minister for Safety and Security and Another**.²⁷ The applicant sued the respondents for damages arising out of an attack on her by a man who was awaiting trial for attempted rape on another woman, and who was granted bail despite his history of sexual violence. Both the High Court and the Supreme Court of Appeal dismissed her claim on the ground that she had failed to establish a legal duty specifically owed to her by the police and prosecutor who could not therefore be liable to her for damages. In a unanimous decision the constitutional Court upheld an appeal against the decisions of the lower courts. In the course of a most enlightening judgment Ackerman and Goldstone JJ remarked that under the constitution of South Africa the duty cast upon judges is different in degree to that which the Canadian Charter of Rights casts upon Canadian judges. The South African constitution brought into operation, "in one fell swoop," a completely new and different set of rights imposing on all of the courts a general duty to develop the common law where it deviates from the spirit, purport and objects of the Bill of Rights. This duty upon the judges arises in respect of both the civil and criminal law whether or not the parties in any particular case request the court to develop the common law.

The Constitutional Court remains unswerving in its mandate to uphold the law and the constitution of South Africa.

7. NEW ZEALAND

The Supreme Court of New Zealand (like the Caribbean Court of Justice) is one of the newest courts of final resort among other such courts having come into existence on 1st January 2004 by virtue of the Supreme Court Act 2003 replacing the Privy Council as New Zealand's final appellate court. Appeals to the Supreme Court in civil matters only are by leave of the court if it is satisfied that is in the interests of justice to give such leave, and in the criminal matters specifically authorised by statute. Generally appeals are heard from the Court of Appeal only, but in exceptional circumstances the court may give leave to appeal from a decision of a lower court.

Prior to the establishment of the Supreme Court, the Court of Appeal of New Zealand had existed since 1862 hearing appeals from the High Court, then called the Supreme Court.

7.1 PRECEDENT

A discussion on precedent in the court system of New Zealand should centre mainly around the decisions of the Court of Appeal having regard to its long existence and the more recent establishment of the Supreme Court which is now the final appellate court.

After the English decision in **Young v Bristol Aeroplane Co. Ltd** (supra) in which the Court of Appeal held that it was bound by its own decisions the Court of Appeal of New Zealand in **Re Rayner (deceased), Daniell and Others v Rayner and Others**²⁸ in a majority decision held that:

"the Court of Appeal is free to overrule a judgment of that Court which is contrary to the current of New Zealand authority theretofore existing, or which, though not expressly overruled, is, in principle, in conflict with a decision of the House of Lords or the Privy Council or inconsistent with a judgment of the High Court of Australia."

The issue of *stare decisis* arose on several occasions after **Rayner** but with no definitive position taken.²⁹ In **Collector of Customs v Lawrence Publishing Co. Ltd.**,³⁰ Richardson J, stated that while the Court had not pronounced in any definite way on the circumstances in which it would reconsider an earlier decision the practice of the Court indicated a cautious willingness to review earlier decisions in perceived appropriate cases, and a reluctance to be completely fettered by its own past decisions. He conceded that adherence to past decisions promotes certainty and stability, but concluded that the Court had the final responsibility within New Zealand for the administration of the laws of New Zealand, and while its decisions are subject to review by the Privy Council

²⁷ [2001] CCT 48/00

²⁸ [1948] NZLR 455

²⁹ See **Preston v Preston** [1955] NZLR 1251; **Re Manson** [1964] NZLR 257; **Mc Farlane v Sharp** [1972] NZLR 838

³⁰ [1986] NZLR 404

few litigants who are unsuccessful in the Court of Appeal feel able to follow that path; hence he thought it unwise to formulate any absolute rule.

Finlay, J in **Re Rayner** (supra) had stated in his judgment that "the Court of Appeal in New Zealand occupied a position in the judicial hierarchy which differed very materially from that of the Court of Appeal in England, and it followed consequently that the Court of Appeal was in effect, in nearly all cases, the final court of New Zealand. This was based on the fact of the final court (the Privy Council) being thousands of miles away. With the establishment of the Supreme Court of New Zealand this is no longer the position, and in light of this a more definitive position of the effect of *stare decisis* on the Court of Appeal inevitably will change if it has not done so already. The focus of the doctrine now shifts to the Supreme Court.

7.2 THE PRIVY COUNCIL AND NEW ZEALAND

This can best be addressed by reference to a speech given by Chief Justice Dame Sian Elias to the 13th Commonwealth Law Conference held in Melbourne, Australia, in April, 2003 before the establishment of the new Supreme Court.³¹ While agreeing that the real benefit obtained by New Zealand's legal system from appeals to the Privy Council was the benefit of a second appeal, albeit in a tiny number of cases, Dame Elias posited the view that in some cases where the New Zealand Court of Appeal was rightly reversed, the same result would have been achieved on further appeal within New Zealand. She went on to state that the main reason that there were so few landmark decisions on appeal from New Zealand was that in the common law world such decisions were landmarks for all countries in that the common law tradition tended to pull all countries together in most cases. This meant that the landmark decisions of the House of Lords, or the High Court of Australia, or the Supreme Court of Canada generally gained acceptance in New Zealand and throughout the common law world as much as or even more than those of the Privy Council.

Dame Elias observed that the Privy Council had increasingly accepted that local conditions justify different treatment. Two cases amply exemplify this point of view. In **Invercargill City Council v Hamlin**³² the Privy Council held that although inheriting English common law, it did not follow that New Zealand common law would develop identically. The Court of Appeal should not be deflected from developing New Zealand common law merely because the House of Lords had not regarded an identical development as appropriate in England. Accordingly, the Court of Appeal was entitled consciously to depart from English case law on the ground that conditions in New Zealand were different.

Similarly in **Lange v Atkinson**³³ the Board noted that for some years it had recognised the limitations on its role as an appellate tribunal in cases where the decision depends upon considerations of local public policy. It concluded that the courts of New Zealand were much better placed to assess the requirements of the public interest in New Zealand than the Board, and accordingly on the particular issue it would not substitute its own views, if different, from those of the New Zealand Court of Appeal.

Since its establishment the Supreme Court decisions have covered a varied spectrum of issues. In **Ngan v R**.³⁴ the Court had to consider the scope and application of Section 21 of the New Zealand Bill of Rights Act 1990 regarding the right to be free of unreasonable search and seizure, and held that evidence of a crime discovered incidental to an inventory search of a car involved in an accident was admissible in court. The Court found that the Act did not make the search of **Ngan's** property unlawful.

Another decision of the Supreme Court delivered recently in the case of **Jeffries v The Privacy Commissioner**³⁵ involved the question of whether privilege is capable of applying to unsolicited communications and information, and whether the identity of the informant is capable of being within the scope of the privilege.

The Supreme Court of New Zealand seems well on its way to developing its own jurisprudence and carving a niche for itself among the final appellate courts both within and outside of the Commonwealth.

³¹ Parliamentary Library -background information service for members of Parliament 2003/02 8 May 2003

³² [1996] NZLR 513

³³ [2000] NZLR 257

³⁴ [2007] NZSC 105

³⁵ [2010] NZSC 99

8. CARIBBEAN APPELLATE COURTS

The grant of independence to the former British colonies of the Caribbean led to the establishment of appellate courts within their jurisdictions with the Privy Council retaining its status as the court of last resort for all except one.³⁶ The inauguration of the Caribbean Court of Justice in April 2005 has seen three Caribbean states, Barbados, Guyana and recently Belize, accepting this Court as their final appellate court.³⁷

The appellate courts in the Caribbean³⁸ hear and determine appeals from their domestic courts, and have over the years sought to develop a jurisprudence which reflects the mores and customs of their societies while applying the common law which for all former colonies has been the common law of England. This was preserved legislatively after the attainment of independence, for example, in Trinidad and Tobago³⁹ and Guyana.⁴⁰

However, in some instances, the common law did not always square with local circumstances and situations. Crane J.A. sitting in the Court of Appeal of Guyana in the case of **Peter Persaud and Others v Pln. Versailles & Schoon Ord Ltd**⁴¹ expressed strong views that despite the fact that statute stipulated that the common law of the (then) Colony was to be the common law of England, this in no way fettered the jurisdiction of the Guyana Court from itself developing and expanding the common law to meet the justice of the case when necessary.

8.1 EFFECT OF DECISIONS OF THE PRIVY COUNCIL IN THE CARIBBEAN

Apart from a few dependencies and small colonies in world-wide geographical locations the Privy Council's greatest remaining influence is felt within the Commonwealth Caribbean region comprising in some instances states that have shed the colonial mantle for over forty years. Being the court of final jurisdiction for these states their courts are bound by decisions emanating from the Privy Council with results which are oft times baffling and bewildering to citizens and which run counter to accepted norms in their societies.

The Trinidadian case of **Kizza Sealey and Marvin Headley v The State**⁴² provides an apt illustration. The two appellants who were charged and convicted of murder appealed to the Court of Appeal of Trinidad and Tobago who dismissed the appeal whereupon they appealed to the Privy Council. The prosecution's case rested mainly on the testimony and positive identification of the appellants at the scene by an off-duty corporal of police who knew both of them from childhood and lived in the same neighbourhood; in fact one of the appellants under cross-examination at the trial admitted that he knew the police corporal who lived next to him. Their Lordships of the Privy Council at the hearing recognised that the case against the two appellants was a very strong one and that from a reading of the transcript the alibi evidence appeared unimpressive. However, allowing the appeal, a majority of the Board concluded that there was an omission of a good character direction by the trial judge which was a defect in the conduct of the trial despite the fact that the omission was not attributable to the trial judge, but the fault of defence counsel who did not raise it in evidence. They reasoned that whilst it appeared probable that the jury would have convicted they were unable to conclude that the jury would inevitably have convicted. Both the majority and the minority of the Board agreed that the alibi evidence was in reality very weak as against the strength of the evidence of the police corporal. In the opinion of the minority the appellants had had the benefit of the usual directions on the presumption of innocence and of the approach which must be taken to defence evidence; also it was stretching imagination too far to suppose that a good character direction would have made any difference to the result of the case.

The acquittal of the appellants still remains inexplicable to the average citizen of Trinidad and Tobago who cannot comprehend that two men who were positively identified by a reliable witness were freed despite the failure of their defence counsel to lead evidence of their good character. Such are the vagaries of the law.

³⁶ Guyana severed ties with the Privy Council in 1970.

³⁷ Antigua & Barbuda, The Bahamas, Dominica, Grenada, Jamaica, St Christopher & St. Nevis, St Lucia, St Vincent & The Grenadines, Trinidad and Tobago have still retained the Privy Council as their final appellate court.

³⁸ The Bahamas, Barbados, Belize, Guyana, Jamaica, Trinidad and Tobago, and the Eastern Caribbean Court of Appeal for Anguilla, Antigua & Barbuda, British Virgin Islands, Dominica, Grenada, Montserrat, St. Christopher & Nevis, St Lucia, and St Vincent & the Grenadines.

³⁹ See Section 12 of Trinidad and Tobago Supreme Court of Judicature Act, Chap. 4:01

⁴⁰ See Section 3(b) of the Civil Law of Guyana Act, Cap. 6:01 in relation to immovable property.

⁴¹ (1970) 17 WIR 107

⁴² (2002) 61 WIR 491; [2002] UKPC 52

There have been instances when the Law Lords of the Privy Council have conceded that judges of the domestic courts are in a better position to determine certain issues based on their knowledge of local conditions and their experience as happened in **Peter Seepersad v Theophilus Persad & Capital Insurance Co Ltd**⁴³ when the Board expressed the view that the amount determined by the Trinidad and Tobago Court of Appeal as damages for pain and suffering in an accident claim was the product of the views of appellate judges on a topic peculiarly within their own experience and their Lordships were not disposed to amend it. A similar approach was taken in **Basdeo Panday v Kenneth Gordon**⁴⁴ in a libel suit when the Board opined that how words of the alleged character would be understood and what effect such words would have on those who heard them are matters on which local courts are far better placed than their Lordships.⁴⁵

8.2 CARIBBEAN COURT OF JUSTICE

For the past five years since its inauguration on April 16, 2005 the Caribbean Court of Justice has sought as its mission to foster the development of an indigenous Caribbean jurisprudence, and visualises an accessible, innovative and impartial justice system reflective of the Region's history, values and traditions. This Court is regarded as being unique in that it seeks to combine in twin jurisdictions, appellate and original, the Caribbean Region's need for a court of last resort for domestic appellate courts as well as an international court with a mandate to interpret and apply, where necessary, provisions of a regional economic treaty.

Within one year of its inauguration the Caribbean Court was required to decide an appeal from a decision of the Court of Appeal of Barbados⁴⁶ on a constitutional motion involving, *inter alia*, whether, and in what manner unincorporated international human rights treaties which give a right of access to international tribunals affect the rights and status of a person convicted of murder and sentenced to a mandatory death penalty. The Court of Appeal of Barbados relied on a decision of the Privy Council in **Neville Lewis v the Attorney General**⁴⁷ (an appeal from Jamaica) by which it was bound, the Privy Council being at that time its final appellate court. The Caribbean Court felt obliged to determine whether **Lewis** should or should not continue to be the law of Barbados, and this required a re-examination of other judgments of the Privy Council. The Court was mindful of the fact that its establishment has given rise to speculation concerning its approach to judgments of the Privy Council. In deciding what this approach ought to be one has to bear in mind the stated mission of the Court which is to foster the development of an indigenous Caribbean jurisprudence. In pursuing this goal the Court in **Joseph and Boyce** postulated the view that it will consider the opinions of the final courts of other Commonwealth countries and particularly the judgments of the Privy Council which determine the law for those Caribbean states that accept the Privy Council as their final appellate court. It stated further that in this connection it accepted that decisions made by the Privy Council in appeals from other Caribbean countries while it was still the final appellate court for Barbados were binding in Barbados in the absence of any material difference between the written law of the respective countries from which the appeals emanated and the written law of Barbados. Further the Caribbean Court stipulated that these decisions continue to be binding in Barbados notwithstanding the replacement of the Privy Council unless and until they are overruled by the Caribbean Court.

After extensive consideration and deliberation of the case law drawn from several jurisdictions on the issue mentioned earlier the Caribbean Court concluded that the result which it arrived at was not dissimilar to that reached by the Privy Council in **Lewis**, albeit by a different route, and saw no reason to disagree with the Board's conclusions.

Over the past five years of the Court's existence several other cases provided the opportunity to elucidate and interpret some troubling points of law particularly in cases concerning title to land in Guyana. In **Harrinauth Ramdass v Salim Jairam**⁴⁸ an appeal from the Court of Appeal of Guyana, the issues related to the ongoing debate of whether equitable interests in land are recognised in Guyana having regard to the development of the law governing immovable property and its Roman-Dutch history. A review and analysis of the relevant case law led to a final conclusion that equitable interests in land are not recognisable in Guyana. This was followed by

⁴³ (2004) 64 WIR 378; [2004] UKPC 19

⁴⁴ (2005) 67 WIR 290; [2005] UKPC 36

⁴⁵ Similar approach adopted in New Zealand cases of **Invercargill City Council v Hamlin** (supra) and **Lange v Atkinson** (supra)

⁴⁶ **Attorney General and Others v Jeffrey Joseph and Lennox Ricardo Boyce** (2006) 69 WIR 104

⁴⁷ (1999) 57 WIR 275, [2001] 2 AC 50

⁴⁸ (2008) 72 WIR 270

another Guyanese appeal, **Jassoda Ramkishun v Conrad Ashford Fung-Kee-Fung**,⁴⁹ concerning the concept of fraud in relation to immovable property, the relevance of South African case law as well as the position of heirs as volunteer transferees and the grant of specific performance against a volunteer both in English law and Roman-Dutch law, issues which are of extreme importance to the development of land law in Guyana.

The Caribbean Court is still in its infancy when compared with other appellate courts with a final jurisdiction; hence it may be too early for it to decide whether it will be bound by its own decisions, which though it may result in certainty and stability may give rise to rigidity and inflexibility when later cases require the Court to revise its thinking on a particular precedent. However, a final court's review of its earlier decisions ought not to be undertaken whimsically or fancifully, but must be taken after careful consideration and a conviction that the earlier decision was completely erroneous.⁵⁰ A change in the composition of the court ought not to be good reason to depart from an earlier decision. However, in **Charles Mathew v The State**⁵¹ the Privy Council with an enlarged Board overruled **Balkissoon Roodal v The State**⁵² (both cases from the Court of Appeal of Trinidad and Tobago) the purpose being to decide whether **Roodal** should be followed not only in Trinidad and Tobago but also in other Caribbean states which have similar constitutions and a right of appeal to the Privy Council. Their Lordships considered that "*it would be impossible to apply it to other countries merely for conformity with Trinidad and Tobago but equally impossible to declare that it was not the law in other countries but still formed part of the law of Trinidad and Tobago.*" These are situations with which the Caribbean Court of Justice will have to grapple in the years ahead as it strives to develop its own jurisprudence.

9. SUPREME COURT OF THE UNITED STATES

Although this paper is directed mainly at the role of appellate courts of Commonwealth jurisdictions, it can only be enhanced by a comparison with the court of final jurisdiction of the United States of America where there are more similarities than differences, the common law being the *fons et origo* of both jurisdictions.

Like any court newly constituted the Supreme Court established in 1789 in its early era heard few cases, the first being **West v Barnes**⁵³ argued in 1791 before the Jay Court (Chief Justice John Jay), two years later. It involved a procedural issue where the Court was required to overrule a Rhode Island state statute. However, **Marbury v Madison**⁵⁴ is regarded as the landmark case (Marshall Court) which formed the basis for the exercise of judicial review in the United States under Article 111 of the constitution, and which declared the Court to be the supreme arbiter of the constitution.

The Supreme Court's main jurisdiction is appellate although it may exercise an original jurisdiction involving disputes between two or more states much like the Caribbean Court of Justice, but which it rarely exercises.

The United States court structure comprises courts of appeals which are intermediate appellate courts of the federal court system. These courts hear appeals from district courts within the federal judicial circuit, and review decisions serving as the final court in most federal cases. This is primarily due to the fact that fewer than 100 cases are heard annually by the Supreme Court which stands at the apex of the federal court system. On matters concerning interpretation of federal law and statutes, including the U.S. constitution, decisions of the Supreme Court are binding on all lower courts even on state courts which are not part of the federal system.

The Supreme Court has to its credit several important decisions handed down over the years during the tenure of various Chief Justices, the most notable being by the Warren Court (1953 - 1969) in **Brown v Board of Education of Topeka**⁵⁵ when it held segregation in public schools to be unconstitutional, and the Burger Court (1969-1986) in **Roe v Wade**⁵⁶ which ruled that the constitution protected a woman's right to privacy and control over her body thereby removing bans on abortion.

⁴⁹ CCJ Appeal CV 14/2007

⁵⁰ See *The Bengal Immunity Co. Ltd v State of Bihar* [1954] INSC 120; *Queensland v Commonwealth* [1977] 139 CLR 585

⁵¹ (2004) 64 WIR 412; [2004] 33 JCPC

⁵² (2003) 64 WIR 270; [2003] 78 JCPC

⁵³ 2 US 401 (1791)

⁵⁴ 5 US (1 Cranch) 137 (1803)

⁵⁵ 347 US 483 (1954)

⁵⁶ 410 US 113 (1973)

9.1 PRECEDENT

With jurisdiction of courts within the United States judicial system comprising state and federal courts the doctrine of precedent follows the same pattern. As is generally accepted courts of lower jurisdiction are bound by the decisions of courts of higher jurisdiction, with the decisions of courts of last resort normally binding all courts within a court system. Within the states court systems, decisions of state appellate courts bind only courts of lower jurisdiction within that state, but not those of other states. Within the federal system higher federal courts bind lower federal courts within their jurisdiction. Conflicting decisions within federal courts as to the meaning of federal laws are usually resolved by the Supreme Court whose decision is binding on all courts.

What will now be considered is the Supreme Court's approach to precedent in relation to its own decisions. In **Burnet v Coronado Oil & Gas Co.**⁵⁷ Brandeis, J in a dissenting opinion expressed the view that "*stare decisis* is usually the wise policy because in most matters it is more important that the applicable rule of law be settled than that it be settled right ... But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions." He went on to say that "the reasons why this Court should refuse to follow an earlier constitutional decision which it deems erroneous are particularly strong where the question presented is one of applying, as distinguished from what may accurately be called interpreting the Constitution."

One can conclude that in constitutional matters the Supreme Court exercises more flexibility in applying the doctrine of *stare decisis*. In **Smith v Allwright**⁵⁸ the Court postulated that when convinced of former error it has never felt constrained to follow precedent, and where constitutional questions were concerned with corrections depending upon amendment rather than upon legislative action, the Court throughout its history has freely exercised its power to re-examine the basis of its constitutional decisions. There have been opinions expressed which indicate that while adherence to precedent is not to be applied rigidly in constitutional matters, any departure from the doctrine of *stare decisis* demands special justification. This was the view of O'Connor, J in **Arizona v Rumsey**.⁵⁹ Later in **Planned Parenthood of Southeastern Pa. v Casey**⁶⁰ together with Kennedy and Souter JJ, O'Connor J reiterated that view when seeking to uphold the earlier decision in **Roe v Wade** (supra) that "only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure and an unjustified repudiation of the principle on which the Court staked its authority in the first instance."

10. CONCLUSION

An assessment of the role of appellate courts in the jurisdictional hierarchy of any court system indicates that even though they are mainly courts of review of decisions of lower courts, in discharging this mandate one of the main objectives is ensuring stability in and conformity with the law even though not always resolutely adhering to consistency in their decisions. The waning influence of the House of Lords and the Privy Council on former colonies was aptly demonstrated when a majority of these independent states former colonies unapologetically indicated that the development of the law in their countries depended solely on the crafting of their own jurisprudence and not on one moulded in the traditions of their former masters. Unfortunately this approach has not been adopted by all of the newly independent states.

One feature common to all appellate courts in whatever jurisdiction is the doctrine of *stare decisis* which has been discussed. While its binding force affects lower courts in a judicial hierarchy, and is generally immutable, courts of last resort enjoy much more flexibility and freedom to effect change in their decisions. This sometimes depends on the composition of a final appellate court or the need for review if circumstances of a later case require that the relevant law be elucidated. One commendable aspect of a final court's decision not to be bound by its own decisions is that it is utilised sparingly and with special justification bearing in mind that such courts should be perceived as fulfilling their objectives of achieving judicial consistency and certainty in their decisions without making them the sacrificial lambs on the altar of expediency. This will always be the role of an appellate court in every jurisdiction where the common law is applied in whatever form peculiar to the needs and traditions of the people of that jurisdiction.

⁵⁷ 285 US 393 (1932) [1]

⁵⁸ 321 US 649 (1944)

⁵⁹ 467 U.S. 203 (1984)

⁶⁰ 505 U.S. 833 (1992)

With the establishment of indigenous final appellate courts in most of the former colonies of Great Britain the judgments of these courts are often cited as persuasive authority in judgments of fellow appellate courts, and even in judgments of the House of Lords and Privy Council. This cross - fertilisation can only enhance and enrich the development of jurisprudence based on the common law across borders and continents within the Commonwealth.

I shall end this presentation by making reference to a lecture given by Sir Shridath Ramphal, former Commonwealth Secretary General, in 2009 entitled "*A Commonwealth of Laws: At 60 and Beyond*" and reported in the CMJA Commonwealth Judicial Journal of 3 June, 2010 which most of, if not all of us must have read. During the course of the lecture he made reference to the fact that strange as it may seem now, the issue of a Commonwealth Court of Appeal as a final court of appeal for all Commonwealth countries, including Britain, was prominently addressed at 1965 Commonwealth and Empire Law Conference held in Sydney, Australia. Sir Shridath quoted from a background paper prepared by Lord Gardiner, then Britain's Lord Chancellor, when he was silk together with R. Graham Page, who put the case for a Supreme Court of the Commonwealth in terms which he said may surprise us today. One paragraph urged that with such a court Commonwealth countries would influence each other in the development of Commonwealth law. All countries submitting to the jurisdiction would in every way be treated on an equal basis, subordinating their own final courts of appeal to the overriding appellate jurisdiction of the Supreme Court of the Commonwealth.

Sir Shridath's opinion was that it was too late, and for all its merits, he believed it still is, at least today. He expressed the hope that if the Commonwealth itself prospers, some such collective judicial forum may one day become more generally acceptable. This may seem an impossible dream as we gather here today discussing the role of appellate courts in our various jurisdictions, but we can at least revel in the dream that at some distant futuristic day that dream may somehow become a reality. We can dream, can't we?

Panelist Papers

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SESSION 2: PRESERVING JUDICIAL INDEPENDENCE IN JUDICIAL APPOINTMENTS

Preserving Judicial Independence in Judicial Appointments

By
Her Honour Mrs. Justice Henriette Abban
Ghana

1. INTRODUCTION

The independence of the Judiciary is the principle that the Judiciary should be politically insulated from the power of the Legislature and Executive. That is to say, the courts should not be subject to improper influence from the other branches of government or from private or partisan interests.

Virtually all constitutions have due regard for the principle of separation of powers and this principle can only have true meaning if the institutions in which power is vested, i.e. the Legislature, Executive and Judiciary are truly independent.

The extent to which a country's constitution guarantees the independence of the Judiciary is usually a good measure of the seriousness with which the principle of separation of powers is taken.

A number of features determine the extent of Judicial Independence prevailing in a country. These include the method of appointment of judges, the removal of judges from office; whether or not the Judiciary has exclusive jurisdiction over "Judicial" matters and the questions of salaries payable to judges.

The above aspects are also underscored in the Latimer House Guidelines which identify the following aspects as key components of preserving the independence of the Judiciary¹.

- An independent process of appointment
- Permanent tenure of office for judges
- Sufficient funding for the Judiciary

The majority of countries in the world have relevant constitutional provisions which expressly refer to judicial independence, e. g Article 151 of the Belgian Constitution, Article 97 (1) of the German Constitution, Section 165 of the South African Constitution, Article 76 of the Japanese Constitution, Article III, 64 of the Danish Constitution, Art 127 of Ghana's Constitution.

2. QUALIFICATION FOR APPOINTMENT

In most countries, entry into the Judiciary requires a basic legal education followed by a period of specific training involving a probationary status.

¹ Commonwealth (Latimer House) Principles on the Three Branches of Government

In countries like Belgium, Denmark, Japan, Serbia, Montenegro and Spain, there is an open competition among law graduates for judicial appointments. Success in the competition is followed by a programme of appropriate training.

In most common law countries, the essential qualification is a prescribed period of professional practice as a lawyer.

3. POWER OF APPOINTMENT AND PROCEDURE

In certain countries, special selection and appointment bodies play a key role in filling judicial vacancies.

In Denmark, an appointment of Judges Council, made up of the Judiciary, lawyers and public representatives, interview applicants and make one nomination per vacancy for appointment by the Minister of Justice.

In Serbia, Judges are appointed by the National Assembly on the proposition of the High Judicial Council. The core membership of that body is the President of the Supreme Court, the Chief Prosecutor, and the Minister of Justice, a representative of the Bar and a representative of the National Assembly. When appointing judges, that membership is joined by six judges.

In the book “Appointing Judges in an Age of Judicial Power: Critical perspectives from around the world”, the editors, Kate Malleson and Peter Russel provided an overview of judicial appointment systems in established Western democratic systems such as (Scotland, United States, New Zealand, Australia, the Netherlands, Italy, France & Germany), international courts and emerging democracies as well as transitional states such as (Israel, Egypt, South Africa, Namibia, Zimbabwe, Japan & South East Asia, Russia and China)².

The method of judicial appointment employed in a country in which there is an active Judiciary, especially one with the power of judicial review, is often subject to greater scrutiny than is the case in systems in which the Judiciary is more passive and lacks the authority to review statutes or actions of a popularly elected legislature.

What these many (19) accounts of judicial appointment systems around the world demonstrate is that certain issues are prominent regardless of the appointment method used and that a country’s culture, experiences and institutional political structure influence the mechanisms of judicial appointment and its citizens’ assessment of the Judiciary’s legitimacy.

Malleson emphasizes that countries at differing stages of democratic development and with Judiciaries that are more or less well established have a different set of concerns in terms of their judicial appointment system and these concerns cannot be divorced from the country’s culture, history and institutional structure².

4. JUDICIAL APPOINTMENT COMMISSIONS IN NEW DEMOCRACIES

Nations that have adopted judicial appointment commissions have incorporated only the first half of the Missouri Plan also known as Merit Plan (a method for meritorious selection of judges currently used in several other US States and in other countries)³. It is a method of judicial accountability to the electorate to combine election and appointment of judges. Under the plan, candidates for judicial vacancies are first selected by commissions. They forward a short list of names to the governor who has sixty days to select. If the governor does not select one of these names to fill the position within sixty days, the committee will then make the selection. At the general election, immediately after the completion of one year’s service, the judge must stand in a retention election. If a majority votes against the Judge’s retention, he/she is removed from office and the process starts anew.

² Appointing Judges in an Age of Judicial Power (Kate Malleson & Peter Russell)

³ Exporting the Missouri Plan: Judicial Appointment Commissions: (Mary L Volcansek)

Israel has the oldest judicial appointment commission that names judges to the civil courts and the Supreme Court. It comprises nine members that select judges for all levels of courts in Israel. It consists of the President of the Supreme Court, two other Supreme Court Judges, the Minister of Justice (Attorney General), another Cabinet Minister, two members of the legislature (one of whom has traditionally been selected from the opposition ranks) and two representatives of the Israeli Bar.

Candidates may be nominated by the Minister of Justice, the President of the Supreme Court or any three members of the committee, but in practice nominees are people upon whom the Minister of Justice and the President of the Supreme Court agree. The commission screens and selects the judges. All judges at all levels serve for life, until the mandatory retirement age of seventy.

The Israeli system has all the hallmarks of an apolitical system of appointing Judges, but there have been occasions where political considerations have entered the process. For e.g. in one case, the mandatory retirement age was changed to ensure that retiring judges could remain on the court to preside over the potentially tricky trial of Adolf Eichmann.

Judicial appointment commissions have become common in other places. In Latin America, since the mid 1980's, they have been found in Argentina, Bolivia, Colombia, Mexico, Guatemala etc. However, they were not capable of blocking the will of a determined executive.

The commission is composed of eight legislators, one executive representative, and one Supreme Court judge, two academics elected by their colleagues, four lawyers and four regular judges. In 2006, the commission's size was reduced to thirteen and the number of positions relative to the lawyers, academics and judges was increased, leaving the politicians in the majority.

Mexico undertook Judicial Reform in 1994 and transferred the responsibility for appointment promotion and discipline of judges from the Supreme Court to a new federal Judicial Council.

Judicial appointment commissions have also appeared in Africa. In Zimbabwe, a judicial appointment commission also operates, but since 1980 President Robert Mugabe has successfully subverted the process to maintain a subservient Judiciary. The commission is composed of the Chief Justice of the Supreme Court or the most senior judges of the court, the chair of the Public Services Commission, the Attorney General and two or three other members appointed by the President. Therefore, the President is able to appoint three or possibly even four of the members of the commission. Candidates who reach the commission have been proposed by the Ministry of Justice, which attempts to locate people who will be acceptable to the President. Should an undesirable judge be appointed, the President can name people whom he appoints to investigate a too-independent Judge? The tribunal meets privately and makes no public recommendation on removal.

The West African nation of Ghana also uses a judicial appointment commission, a permanent body created by the 1992 constitution that makes recommendations to the Chief Justice of the Supreme Court or to the President, depending on the court to which the appointment is made.

The composition of the commission, which also has control over removals from judicial office, consists of a majority of lawyers.

The jurisdiction should have an appropriate independent process in place for judicial appointment. Where no independent system already exists, appointments should be made by a Judicial Services Commission (established by the Constitution or by statute) or by an appointing officer of state acting on the recommendation of such a commission.

The appointment process, whether or not involving an appropriately constituted and representative Judicial Services Commission, should be designed to guarantee the quality and independence of mind of those selected

for appointment at all levels of the Judiciary⁴. Whatever mechanism is chosen for judicial appointment, the process of selection, by whosoever must be guided by the proposition that judicial virtues are required so that laws are administered fairly, rationally, predictably, consistently and impartially. These are the requirements of the rule of law.

Judicial appointments should normally be permanent; whilst in some jurisdictions, contract appointment may be inevitable, such appointments should be subject to appropriate security of tenure. Additionally judicial vacancies should be advertised.

⁴ Judicial Appointments and Judicial Independence: Address by the Honorable J J Spigelman A C (Lawlink NSW)

SESSION 4: PROMOTING HUMAN RIGHTS IN THE LOCAL COURT OF FIRST INSTANCE

Promoting Human Rights in the Local Court of First Instance

By

Mr Peter C. Jukes OBE, JP

Chairman of the Central Sussex Bench, United Kingdom

1. INTRODUCTION

Good afternoon, my name is Peter Jukes and I have been invited to speak to you today as one of the nearly 30,000 volunteer and, let me stress, unpaid magistrates who sit as the judicial members of the courts of first instance throughout England and Wales, with similar arrangements in other parts of the UK. Magistrates are not required to be legally qualified or trained other than undertaking on the job training after appointment and with regular refresher training subsequently. They can be any age between 18 and 70. Astonishingly, these volunteer magistrates dispose of some 95% of cases before the criminal courts in England and Wales. We do of course have very formally proscribed roles and those cases which exceed our remit or sentencing powers are referred by us to a crown court where they will be heard by a judge and jury. In the magistrates courts we sit without a jury, but almost always as a bench of three, permitting majority decisions. I should mention that there are also just 300 professional magistrates with the title of district judge (magistrates courts) who have identical powers and responsibilities as the volunteer magistrates and sit in the same courts, the principal difference being that they sit alone.

Given the numbers, by far the greatest part of the work before magistrates courts is disposed of by the volunteer magistrates whose role I am principally describing today.

The volunteer magistrates are appointed through a vigorous public selection process of submission of written applications, followed by 2 searching interviews conducted by joint panels of existing magistrates and specially appointed members of the public, the fundamental principle being that members of the community appearing in magistrates courts are judged by their peers from within that community. Those magistrate applicants who come successfully through the selection process are appointed by the Lord Chancellor as Justices of the Peace, JP's.

The office of justice of the peace is first mentioned in English statute in 1361, so it is of extremely long standing, and indeed, in the precise terms in which it currently exists, the volunteer magistracy is about to celebrate its 650th anniversary.

2. LOCAL MANAGEMENT OF MAGISTRATES

Magistrates are managed in groups, known as benches, within geographic boundaries which are termed local justice areas. The recruitment process endeavours to appoint individuals who together, represent a cross-section of all significant elements of the local community. Each bench of magistrates appoints officers from within its own membership, led by a bench chairman.

I address you today as chairman of the 220-strong, Central Sussex Bench which mans the magistrates courts here in the city of Brighton & Hove, as well as in the East Sussex county town of Lewes which is 10 miles away. Most of our activity does take place

here in Brighton & Hove where we have a single court building containing 8 courtrooms, any or all of which may be in operation on any one day. Most of our cases are in the adult courts although we do sub-specialise and sit also in specialist courts dealing with youths, ie those aged 10 to 17, and with family matters. The fact that we are not legal professionals is recognised in that we are supported in court by a professionally qualified legal

advisor who, while not party in any way at all to the benches' consideration of innocence or guilt or of the choice of sentencing disposal, can and does offer advice to the bench if it appears to be proceeding in any way inappropriately or outwith the relevant legislation.

I am not only a local magistrate, I am also a resident of the city, so it is a great pleasure for me to address this conference of distinguished world-wide delegates and indeed to have the opportunity to welcome you all to "my city" which I hope you will take the opportunity to explore. The royal pavilion, for example, is quite extraordinary and an absolute "must-see" while you are here.

3. PROMOTING HUMAN RIGHTS

Turning specifically to the promotion of human rights, the observation and promotion of human rights are fundamental to everything we do in Magistrates courts. In particular, we have a duty to act compatibly with the European Convention on Human Rights which is enshrined in English law through the human rights act of 1998. This requires that the practices, procedures and decisions of the courts shall be carried out in such a way so as not to breach an individual's human rights. This applies to all those affected by the criminal justice system in any capacity, whether defendants, victims, witnesses or whoever.

In particular, article 6 of the European convention enshrines the right to a fair trial, the implications of which are wide. Ranging across many aspects such as the right to a trial within a reasonable time, adequate time to prepare a defence, the right to be represented, the right to call witnesses and the right to cross-examine witnesses for the other side. All of course within a more general right for the accused to participate effectively in the proceedings. Issues under the act and the convention can arise at any stage of the criminal justice process from arrest through to sentence.

An accused has the right to defend himself in person or through legal assistance of his own choosing, that legal assistance being publicly funded if he has insufficient means to pay for it. The right of a defendant to represent himself rather than have professional legal representation can create particular problems and impose obligations on the court to ensure the equality of arms, i.e. that the defendant is not disadvantaged as compared with the prosecution and that he is if necessary advised by the bench or the court's legal advisor, particularly for example if the defendant appears to be making what may appear to be an equivocal plea of guilty, when it could be more appropriate to advise that a not guilty plea would actually be appropriate and best serve the interests of justice.

4. YOUTH COURTS

Young people in the 10-17 age bracket are dealt with in separate youth courts by specially selected and trained magistrates whose primary remit is to endeavour to reduce re-offending among the young.

The protocol for the conduct of youth courts is quite different from an adult court in being less formal while preserving the dignity of the court. There is not the same public right of access to proceedings and while the young defendant is generally accompanied by a parent, guardian or other appropriate adult, other members of the public are usually excluded. There are also limitations on press reporting compared with adult courts, to avoid personal details of young offenders appearing in the press, save in the terms of a specific court order.

5. FAMILY COURTS

Finally, there are family courts of first instance, which take place within the context of article 8 of the European Convention on Human Rights which enshrines the right to family life. Although these family courts are also manned by magistrates, they address civil rather than criminal issues. They deal with 2 categories of cases. The first category can be described as public law where the state, through the local authority, asks the court to decide, when doubt has been raised for some significant reason, whether the parenting of a child is "good enough" for the child to remain with the parents. If it is not, the court then decides whether the local authority should share the

care of a child with its parents or should remove the child from the family home to foster care or a permanent new placement. In these cases, every party to the case is separately legally represented to ensure thorough evidential scrutiny from every viewpoint.

The second category of family cases is termed private law cases, i.e. where the parents have separated and cannot resolve the child-care issues between them e.g. where the child or children should live or the access arrangements for the non-resident parent. The court again hears evidence from both parties and unusually in magistrate's courts, adopts an investigatory role, questioning both parties and all other witnesses to ensure that every issue relating to the future welfare of every child involved is thoroughly explored.

5. CONCLUSION

So to summarise, courts of first instance in England and Wales are the province of 30,000 volunteer magistrates and 300 district judges who deal with the vast majority of criminal cases brought before the courts and also with the civil cases brought before family courts. The observance and promotion of human rights are fundamental considerations in all our magistrates courts with the aim of striking a fair balance between the state and the individual. In the criminal justice system it is all about proper and equal treatment for all, from the investigation of offences through to charging, trial and where applicable, sentence. I have no doubt that this is a responsibility which all my 30,000 or so justice of the peace colleagues around the country observe extremely conscientiously.

Promoting human rights in the Magistrates' Courts in Uganda

By

Mr Frank Nigel Othembi

Secretary/CEO Ugandan Law Reform Commission

1. INTRODUCTION

It is universally recognized that there are fundamental human rights that should be enjoyed by all persons living in a free and just society. Every human being is entitled to such rights. The legal regime in Uganda offers comprehensive protection of fundamental human rights. These protections are to be found in various laws including:

- The Constitution of the Republic of Uganda, 1995. This is the principal Law of Uganda. Chapter 4 of the Constitution provided for 'Protection and promotion of fundamental and other human rights and freedoms'. The main universally recognized human rights are all protected. Some rights cannot be derogated from while other rights can only be restricted in exceptional circumstances.
- The Children Act, Chapter 59. This provided for children's rights.
- Trial on Indictment Act (TIA), Chapter 23. The TIA provides for criminal trial procedure in the High Court that is designed to protect and promote rights e.g. the right to a fair hearing.
- Magistrates Courts Act (MCA), Chapter 16. The MCA provides for criminal trial procedure in the magistrates' courts. It has in-built rights protections.

Persons in conflict with the law are charged in the first instance in the Magistrates Court. They require protection and promotion of their human rights. The Courts of first instance have a duty to ensure that such persons enjoy their rights to the full.

2. THE NEED FOR PROTECTION

Ignorance of the Law & human rights: most persons appearing in Court are ignorant about the law in general and human rights protections in particular. It is necessary for them to be informed of their rights.

Lack of legal representation: most accused persons in Uganda defend themselves as they cannot afford to pay for representation. Opportunities for legal aid are limited.

Complexity of the law & legal language: the law is written in complex legal language. It cannot be understood by the mostly uneducated peasant population.

3. THE ROLE OF THE COURTS OF FIRST INSTANCE

Information: courts can inform court users of their basic rights. One of the fundamental rights Court is obliged to inform an accused person when produced for plea is the Constitutional right to bail. Courts must themselves be well informed and provided with appropriate legal reference materials.

Probing and questioning: without descending into the arena of litigation and prosecution, Courts can probe and get information from court users to determine rights that are due to them.

Interpretation: the language of Court in Uganda is English. Many Court users don't understand English. Courts facilitate interpretation from English into indigenous/local languages that are understood by court users.

Speedy trial: the old adage 'justice delayed is justice denied' is particularly true when fundamental rights are denied as a result of delays in the Court process. The right to liberty may be lost by a person who is on remand pending trial. Judicial Officers must be in control of their Courts and the trial process to ensure that there are no undue delays.

Adherence to procedure: the criminal trial procedures are inherently designed to protect and promote human rights. For instance when the charges against an accused person are amended he is required to enter a fresh plea and has a right to re-call witnesses. Courts need to be conscious of the rules of procedure and apply them to give full effect to rights.

Judicial activism: the legal regime in Uganda gives Courts a lot of discretion in deciding cases and in sentencing. Courts can exercise judicial activism in favour of rights by giving interpretations that protect and promote human rights.

Human Rights in the Local Zambian Courts

By

Mrs Arida Mercy Chulu

Senior Resident Magistrate.

1. INTRODUCTION

It gives me great pleasure to stand before this distinguished gathering to share the Zambian perspective as regards human rights in the Zambian Local Courts.

In this paper, I will discuss human rights from the perspective of their application and observation in the Local Courts in Zambia. Although the Local Courts are the least in the Zambian judicial hierarchy, they are nonetheless important when it comes to the administration of justice to the litigants and society at large. A few questions may be asked about how these courts handle cases that have human rights connotations. How consistent are they in the dispensation of justice, and of course how quick do Local Courts dispose of these matters.

Article 91(1) of the Zambian Constitution (hereinafter called 'the Constitution') Chapter 1 of the Laws of Zambia provides that the Judicature of the Republic shall consist of:

The Supreme Court of Zambia;
The High Court of Zambia;
The Industrial Relations Court;
The Subordinate Courts
The Local Courts; and
Such lower Courts as may be prescribed by an Act of Parliament.

Clause (2) of the Constitution further provides that: The Judges, members, magistrates and justices, as the case may be, of the courts mentioned in Clause (1) shall be independent, impartial and subject only to this Constitution and the law and shall conduct themselves in accordance with a code of conduct promulgated by Parliament.¹ It is clear from the above Constitutional provisions, that Local Courts are recognised by the Supreme Law of the Land and that Local Court Magistrates must therefore be independent.

The Local Courts, previously known as native courts, are recognized and established by the Local Court Act, Chapter 29 of the Laws of Zambia. It is important to mention that decisions from the Local Courts are appealable to the Subordinate Courts. It is therefore very common for Magistrates in the Subordinate Courts to hear matters de-nova. Recognition of Customary law in Zambia is given by statutes, which provide that the Local Courts shall administer African customary law in so far as it is not repugnant to natural justice, morality or incompatible with any written law. The Local Courts have original jurisdiction in matters of customary law.

2. THE APPLICATION OF CUSTOMARY LAW AND HUMAN RIGHTS LAW

The application of customary law is compounded, in many cases, by the fact that the Local Courts adjudicators do not have any formal legal qualifications. As a result, they are frequently unaware of developments in human rights law that need to be considered in the application of customary law. The Local Courts are charged with the application of customary laws in relation to non-statutory marriages, divorce, reconciliation, child custody, property settlement and succession. While Local Court magistrates are well-versed in the various customary laws, they are not trained in human rights law. The result is that they seldom take into consideration the gender dimensions or criminal aspects of the cases before them. This often prejudices the litigants, in particular women, who cannot even seek legal representation as lawyers have no right of audience in the Local Courts.

3. CASE STUDIES

At this juncture, let me share with you some of the typical cases that have been handled by the untrained Local Courts Magistrates.

The first case is an extract from one of our local daily newspapers, 'The Sunday Mail' of 8th August, 2010 which covers Local Court proceedings. A man divorced his wife in the Local Court whom he blamed for the deaths of their children at infancy. The man said that he could not continue in marriage with a woman who had failed to ensure that their children lived on. The Court granted them divorce, and further ordered that property acquired during the subsistence of their marriage be shared equally. This is one typical case where the right to property as enshrined in Article 16 of the Constitution was upheld. Nobody walked away empty handed after the marriage was dissolved. An important attribute in a democracy is the equality of all persons before the law. I will cite one instance where gender has a bearing on legal remedies in the Local Court. A common civil action in the Local Court is a claim of damages for adultery. A man whose wife has committed adultery is entitled to claim damages against the person who committed adultery with his wife. On the other hand, a wife cannot claim damages against a woman who has committed adultery with her husband. There is no good reason for this disparity. There is no single case in the Local Courts where a woman has claimed for damages against a woman who committed

adultery with her husband. Further, this situation is only applied in the strict sense by Local Courts where the Plaintiff is male.

The second case to be shared, is the case of ALFONSINA MWALE, a woman who was happily married. Alfonsina moved to her husband's village in another province of Zambia. They had seven children, a big house and two hectares of cotton field. After eighteen years of marriage, Mr. Mwale passed away. His relatives chased Alfonsina and the children out of the matrimonial home, seized all her property apart from the pots and pans and told her to return to her parents.

The third interesting case, is known as 'THE CASE OF THE SEVENTEEN GRAVES'. This is a case of CHILALA v MILIMO LAT 099/1999. This case illustrates instances where widows normally return to their natal villages where they start cultivating land that belongs to their matrilineal male relatives. Women who remain in their husbands' villages labour on their in-laws land where they work at their mercy and can be chased away at any time. Some of the customs related to access or ownership of land include widow inheritance which is a practice where the widow becomes the wife of the successor of the deceased. This trend has declined due to the HIV/AIDS Pandemic. In the case of CHILALA v MILIMO, the Chilalas had been married for over thirty years when the husband died. The estate which she had developed with her husband was legally her matrimonial home. She could not reasonably be expected to return to a natal home that she had left so long ago. In addition, the pension of her husband had been used to develop this land which was her home prior to his death. In this case, Mrs. Chilala was forced out of her husband's land after his death by the successor whom she had refused to marry. The land was held under customary tenure and the custom required widows who were not inherited to return to their respective natal homes. The successor turned Mrs. Chilala's front yard into a burial ground. By the time the decision of the Lands Tribunal was made a total of seventeen bodies had been buried there. The Lands Tribunal was unable to adjudge the case on grounds that it was a matter concerning customary land. The burying of deceased persons only stopped after mediation by the Royal Foundation of Zambia. Thanks to the intervention by the Royal Foundation, otherwise Mrs. Chilala would have been deprived of massive investment jointly made in developing their property. The attempted act of being inherited by her in-law was a clear violation of her human rights. The decision to deprive the survivors of their matrimonial homes is against the Constitution which guarantees and protects an individual's fundamental rights and freedoms, including the right to own and use land without arbitrary interference.

In accordance with the provisions of Section 38 of the Local Court Act, the High Court receives and adjudicates over matters of administration of intestate estates referred to it by the Local Courts. Where an application is transferred to the High Court, the High Court shall make such order or give such directions in relation thereto as it shall think fit. However, the High Court Act does not provide for a time limit within which such applications should be disposed of. This may be a cost on the estate which would adversely affect the interests of the beneficiaries. Further, if the proceedings are lengthy they may affect the size of the estate to be distributed.

4. CONCLUSION

In conclusion, it will be seen that the lack of strict application or observation of human rights by Local Court Magistrates is not deliberate, but is due to inadequate training on the part of these adjudicators. This notwithstanding, Local Courts Magistrates nonetheless exercise some sort of rights when it comes to the sharing of property upon dissolution of marriage, divorce or death of a spouse.

SESSION 6: ISSUES OF HUMAN RIGHTS IN THE ICC, MILITARY AND WAR CRIMES TRIBUNALS AND COURTS

Issues of Human Rights in the ICC, Military and War Crimes Tribunals and Courts

By

Judge Jeff Blackett

Judge Advocate General, United Kingdom

1. INTRODUCTION

The British military justice system is fortunate not in recent times to have been called upon to deal with the kind of gross genocide crimes tackled by earlier generations, and even recently in certain parts of the world. The effects of human rights issues on our jurisdiction have been at what one might call the more sophisticated end of the scale.

I would like to look at the issue of human rights from two very different perspectives. The first is in relation to the right to a fair trial of an accused person in the Court Martial, and the second looks at how we have dealt with soldiers accused of what amount to human rights abuses committed against the civilian population during operations.

I will, of course, only scratch the surface because each speaker has only 20 minutes or so. I will not spend too long on the changes to the Services Justice System but I hope there will be time to expand in questions at the end if anyone is interested.

2. INFLUENCE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ON THE BRITISH SERVICES JUSTICE SYSTEM¹

Although the United Kingdom was an original signatory to the European Convention on Human Rights, convention rights were not incorporated directly into UK law until the Human Rights Act 1998. Until the early 1990s the British Court Martial system had remained virtually untouched since the reforms of 40 years previously. It was a system for the military, controlled by the military, focussed upon supporting the operational effectiveness of the Armed Forces and maintaining discipline. There was very little external interference. The supervisory role of the Court of Appeal (sitting as the Courts-Martial Appeal Court) was effectively a very light hand on the tiller and there was no right of appeal on sentence.

In 1991 a British soldier, Lance Sergeant Findlay, appeared at a court-martial which turned out to be the trigger for significant change. In 1990 he had held members of his unit at pistol point and threatened to kill himself and them; he pleaded guilty at a General Court-Martial to seven charges, including two of threats to kill. The sentence included imprisonment for two years. He appealed on the basis that he had not had a fair trial and after its passage through the domestic courts his case reached the European Court of Human Rights in 1997. In a landmark judgment, that court concluded that the court-martial had violated his right to a fair trial under Article 6(1) of the Convention².

This was not the shock it might have been, because in 1995 the European Commission of Human Rights had already expressed the unanimous opinion that there had been a violation of Article 6(1) in that the applicant was not given a fair hearing by an independent and impartial tribunal and the Ministry of Defence had already set about addressing the criticisms.

¹ See also *Rant on the Court Martial and Service Law* Third Edition by HHJ Jeff Blackett. OUP. ISBN 978-0-19-953468-

² *Findlay v UK* (1997) 24 EHRR 221

Although the Commission found it unnecessary to examine the further specific complaints as to the fairness of the court-martial proceedings generally, the system of subsequent reviews of proceedings by the Executive, the reasonableness of the decisions taken against him; and the sentencing options available, the writing was on the wall. The Ministry of Defence realised that Findlay's challenge would succeed. So work had started to identify weaknesses in the system and propose changes to make it compliant with the European Convention.

The Armed Forces Act 1996 introduced the first round of changes and by the time of Findlay's judgment in 1997 many of its criticisms were already being addressed. There had been an officer in the chain of command known as the Convening Authority, who decided whether charges would be brought, convened the court-martial, appointed the president and members, appointed the prosecutor, and at the conclusion confirmed the court's finding and sentence. The Act abolished the Convening Authority, separated these functions and vested them in independent authorities.

Three court administration officers, one for each Service, were established. They were civil servants who became responsible for convening trials and appointing the lay military members to them. Lay members could no longer come from the same command as the defendant. Three Prosecuting Authorities were established, separate from the chain of command, each under the superintendence of the Attorney General like the Crown Prosecution Service, and required to make the decision to prosecute in each case without any interference from the chain of command.

The most important change was the enhancement of the role of the judge advocate. No longer was he a quasi-magistrates' clerk who in theory 'provided advice' to the president and the board; instead he became a proper judge who directed the board and presided over the proceedings. The independence of the Judge Advocate General as judicial head was emphasised further as he ended his previous role of providing general legal advice to the Secretary of State for Defence.³

Unfortunately it took the Ministry of Defence some years to grasp the full significance of this shift in authority. Some policy decisions would reflect increasing tensions between the executive and the judiciary as the Services came to terms with the loss of control over the legal aspects of their disciplinary system.

In 2002 came the case of *Morris v UK*⁴. The European Court of Human Rights found that there were still insufficient guarantees of the independence and impartiality of the junior lay members of a court-martial board, and the post-trial review system compromised the court-martial's independence. Even though the chain of command could only quash a conviction or reduce a sentence, executive interference in a court's decision after the event was unsatisfactory. Adequate written protection against outside influence was lacking, and the absence of legal training was significant.

This led to the next tranche of changes. In each trial now the judge advocate begins with a homily (known as the *Morris* Direction) reminding the board members of their duties, the fact that they are not reported on for their performance during the trial, and that they must report any external attempts to influence them to the judge.⁵ Queen's Regulations were amended to guarantee that no reports would be made on board members concerning their duties in the court martial.

Then in 2003 came the cases of *Grievés v UK*⁶ and *Cooper v UK*. *Grievés* was a Royal Navy case in which the European Court concluded that the presence of a uniformed judge advocate (a serving naval officer who was also a barrister) did not provide sufficient guarantees of independence. The lack of a civilian in that pivotal role deprived the naval court-martial of the independence enjoyed by courts-martial in the Army and RAF. As a

³ AFA 1996 Sch I Pt III, ss 19, 25 and 27

⁴ (2002) 34 EHRR 1253

⁵ See Practice in Courts Martial: Collected Memoranda Section 4 for the exact terms of the judge advocates direction.

⁶ [2003] ECHR 57067/00

result the long tradition of naval officers sitting as judge advocates was abolished and Royal Navy courts-martial were aligned with the other Services.

The case of *Cooper*, however, was a significant endorsement of the court-martial system. The court held that there was nothing in Article 6 which would, in principle, exclude the determination by service tribunals of criminal charges against service personnel. Thus the court-martial was not inherently unfair. There was a proper separation between the prosecuting, convening and judicial roles in the system. The decision to prosecute was made by the independent prosecuting authority, the presence of an independent civilian judge at every trial constituted an important safeguard and significant guarantee of the independence of the proceedings, and there were sufficient safeguards in place to ensure the independence of the lay members of the court.

This restored confidence and stability to the Services Justice System which had become weary of constant challenges in the European Court and it affirmed the court-martial system to be compliant with the European Convention on Human Rights. That compliance depends on a number of safeguards, the fundamental one being the presence of an independent civilian judge to preside over the proceedings. In a little over ten years the whole tenor of courts-martial shifted from a military or naval run internal tribunal to a judicially controlled independent court.

Civilians who accompany British Armed Forces overseas are also subject to the jurisdiction of the Service courts, although the European Court ruled in 2006 that civilians should be tried before military courts only in exceptional circumstances.⁷ If a civilian is tried in the Court Martial today, the Board comprises civilians (rather than Service officers) and the trial is very similar to a Crown Court trial.

While challenges to the Service justice system concentrated on courts-martial the Ministry of Defence became concerned that their system of summary justice exercised by Commanding Officers as a disciplinary function was not compliant with the European Convention on Human Rights and might also be challenged successfully.

The Services considered the power of a Commanding Officer to punish personnel summarily to be essential to their operational effectiveness: discipline being an essential element of Command. However they were aware that summary dealing did not comply with the requirements of Article 6: a commanding officer cannot be an independent and impartial tribunal and lawyers are not permitted at summary hearings which are not held in public.

The Armed Forces Discipline Act 2000 was designed to meet those requirements and came into force on the same day as the Human Rights Act 1998. It established the Summary Appeal Court, to which all service personnel gained the unfettered right of appeal from a decision of their commanding officer. This is a standing court comprising a judge advocate and two lay service members, to hear appeals from a summary hearing⁸. The Act also introduced a universal right to elect trial by court martial instead of a commanding officer hearing a case summarily.

This scheme was designed to provide sufficient safeguards to ensure that the whole summary trial system is compliant with Article 6, even though the Commanding Officer is not as such a compliant court *per se*. This principle has not yet been challenged in the European Court and is based on legal advice to the Ministry of Defence but it would appear to be a valid way of reconciling military discipline with the right of a fair trial under Article 6.

The services justice system has faced a number of significant challenges in the European Court of Human Rights and has had to change to reflect those challenges. However the European Court has made it clear that a separate system of service justice can be justified and, provided sufficient safeguards exist to guarantee the independence of the process, can be compliant. The Armed Forces Act 2006 made a number of further changes to strengthen

⁷ [ECHR] 40426 Martin v UK (24 October 2006)

⁸ Armed Forces Discipline Act 2000 s 14

the independence of the system. Most importantly it established the Court Martial as a standing court, so that each trial does not now have to be convened and dissolved in the former *ad hoc* way.

Members of the Armed Forces can have confidence that their system of justice is fair and compliant.

Nevertheless, further challenges to the Court Martial, and perhaps summary, system may be expected from defendants represented by lawyers who believe that the rights of service personnel accused of crimes can be guaranteed only if they are tried in a civilian court by judge and jury rather than a separate service tribunal. That view has been rejected by European and domestic courts, and in my view such challenges would have very little chance of future success.

3. RECENT CASES OF INTEREST

I turn now to the second area of interest, which is how we have dealt with soldiers accused of human rights abuses committed against the civilian population during operations. These allegations have arisen mainly in Iraq (and might arise in Afghanistan).

Many allegations have been made, and the British Army has been punctilious in investigating every one. Most of the accusations appear to have lacked substance, and some were blatantly designed to support false compensation claims.

However there have been some cases where British soldiers have treated detainees inappropriately, and in some instances detainees are known to have died in British custody. The Court Martial had to deal with allegations that British service personnel had abused the rights of detainees. In the three example cases I now describe, allegations were made, investigations carried out, and British servicemen accused and tried in the Court Martial.

Breadbasket. In May 2003 a unit was responsible for the custody and distribution of food aid to the local Iraqi population from a storage base known as Camp Breadbasket. Some local people broke in to steal stores. When caught they were handed over to the Iraqi authorities who released them. Many then went back to Breadbasket to attempt to steal more stores. The unit became pretty fed up with this and the CO told his soldiers that if they caught local thieves they should “give them a good beating” before releasing them. Several months later a soldier from that unit took a roll of photographic film into a shop in England to be developed. The pictures showed what appeared to be the abuse of detainees, and they were investigated by the Military Police. The Iraqis had been subjected to humiliating and risky actions, including being forced to pose naked in a way which simulated sex, and being placed in a net being dangled from a fork lift truck. The Iraqis were all released soon afterwards, apparently without injury or any lasting harm, and had made no complaint.

Four soldiers were charged with various offences under the Army Act 1955, principally disgraceful conduct of a cruel or indecent kind. Each was convicted of at least one charge, but there were acquittals on other charges. All those found guilty were dismissed with disgrace from the Service and served custodial sentences ranging from five months to two years. Although none of the detainees who had been abused were identified, and there was no evidence of any permanent injury, the British Army dealt severely and openly with those soldiers who had been involved.

The other cases were more problematic.

3 Para. The second (“the 3 Para case”) involved an allegation that seven members of the third battalion of the Parachute Regiment had murdered a young Iraqi man in March 2003 in a rural part of Helmand province. The soldiers had stopped an Iraqi vehicle and the occupants were ordered to get out, but one had an altercation with some of the troops. The allegation was that they beat him to death with rifle butts, helmets and boots. All seven paratroopers were charged with murder but the case against all defendants was dismissed at the end of the prosecution case because there was insufficient evidence to prove beyond reasonable doubt that each had been

involved in the enterprise, even though the Iraqi man had probably died as a result of his contact with one or some of the British soldiers.

This case highlighted a number of difficulties. The victim was buried soon after the incident and the family would not allow his exhumation for examination. The evidence of local Iraqi eye witnesses as given in statements to investigators was not matched in court under oath. It became clear that members of the village had decided between them what had occurred and then they clearly exaggerated to the court and lied about their own involvement. Family members of the victim were focussed on claiming blood money, rather than on establishing the truth. Police investigators were operating under great difficulties in a chaotic and dangerous area, with limited resources. And soldiers in a unit who have been on dangerous operations together tend to develop regimental amnesia – a reluctance to testify against fellow soldiers. Nevertheless, despite the eventual lack of any conviction, there was no attempt at a cover-up by the British military that investigated and brought to trial the allegations in the full glare of publicity.

Baha Mousa. In 2003 an Iraqi receptionist named Baha Mousa died whilst in the custody of British forces, inside a British base in Basra. He had been held for about 48 hours after arrest and he was systematically beaten to death. Seven soldiers were tried for various offences, including Corporal Donald Payne and Colonel Jorge Mendonça. Payne was the first person in Britain to be tried under the International Criminal Court Act 2001. He pleaded guilty to the war crime of Inhuman Treatment of a person protected under the provisions of the Fourth Geneva Convention 1949, for which he was sentenced to 12 months imprisonment and dismissal. The other charges faced by Payne and the other six defendants variously included Manslaughter, Negligently Performing a Duty, Assault occasioning Actual Bodily Harm, Battery, and attempting to pervert the course of Justice, but those charges all resulted in acquittals. A significant effort was made to deal with the case thoroughly and fairly. A long and difficult investigation was followed by a trial taking 97 court days and costing several million pounds.

This was not the British Army's finest hour. It was clear that Baha Mousa was fit and well when detained and that he was killed by British soldiers. However, regimental amnesia again thwarted the attempts to find out what had actually occurred and there was genuine concern that those responsible had not been brought to account. This was not the end of the matter because the Army conducted an internal inquiry into the events, and the government has subsequently set up a public inquiry – the results of which are not yet known. But the continuing search for the truth is testimony to the British wish to find out what occurred and take the appropriate action.

The cases I have mentioned have made the point that British authorities are in principle and in practice willing to prosecute British personnel for any kind of offence against the human rights of those under their control, including alleged war crimes, and to devote substantial legal resources to doing so. At the same time, the rights of the accused persons are also protected by compliant processes and an independent court.

There is a tension between the rights of the individual, his obligations to society and the policies of the government of the day, and the courts often find themselves trying to reconcile those tensions. The Court Martial ensures that anyone who is tried is always guaranteed a fair trial – but that can lead to an unsatisfactory result where evidence is scarce or weak and the court is unable to determine culpability, even though there has clearly been abuse. Nevertheless, the Service Justice System has achieved significant success and continues in the area of safeguarding human rights and punishing those who abuse the rights of others.

Human Rights at the ICC

By

Her Honour Judge Sanji Mmasenono Monageng
International Criminal Court

1. ROME STATUTE

The Rome Statute recognises the paramount significance of human rights and requires that the application and interpretation of law by the Court should be consistent with internationally recognised human rights¹. Reference to human rights is also made in the context of admissibility of evidence. Article 69 (7) provides that evidence obtained by means of a violation of the Statute or internationally recognised human rights shall not be admissible if such violation casts substantial doubt on the reliability of the evidence, or the admission of the evidence would be anti ethical to and would seriously damage the integrity of the proceedings.

2. PARTICIPATION OF VICTIMS IN THE PROCEEDINGS

The Rome statute, in its article 68 (3) provides for the rights of victims to participate in proceeding, for the first time in international criminal proceedings. A person may participate as a victim if he or she suffered harm as a result of a crime within the jurisdiction of the Court. The harm suffered by a victim may be physical injury, as well as economic loss or emotional suffering, usually caused by the death of a relative. I chose to mention the rights of victims in my presentation because the crimes within the Courts jurisdiction are usually attacks on the values protected by human rights law: dignity, life, freedom etc. It is thus often the case that victims of these crimes are at the same time victims of human rights' violations.

The victims participate in proceedings before the Court by presenting "their views and concerns", as provided in article 68 (3) of the Rome Statute. This can be effected by means of written or oral submissions, prepared by legal representatives of victims. Such submissions may relate to the admissibility and relevance of the evidence adduced by the Prosecution and Defence. The victims, pursuant to rule 91 of the Rules and subject to the Chambers' leave, may examine witnesses through their legal representatives. The victims can also tender evidence, when authorised by the Chamber. Although neither the Statute nor the Rules expressly provide for a victims' right to tender evidence, in a judgment given in the *Lubanga* case the Appeals Chamber held that in order to make the victims' right to participate meaningful, the Rome Statute should be interpreted as leaving open the possibility for victims to tender evidence².

It must be stressed that in the manner in which victims exercise their procedural rights should not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial³.

3. RIGHTS OF THE SUSPECTS AND ACCUSED IN THE ROME STATUTE

The rights of suspects during investigations are guaranteed in Article 55 of the Statute. The Statute⁴ ensures, *inter alia*, that the suspect is not compelled to make incriminating statements or confessions of guilt and is not coerced, tortured or treated inhumanely. He or she has the right to be informed that there are grounds to believe that he or she has committed a crime, to remain silent, to have legal assistance and to be questioned in the

¹ Article 21 (3) of the Rome Statute of International Criminal Court.

² *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, "Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432, paras 97-99.

³ Article 68 (3) of the Rome Statute.

⁴ Article 55 of the Rome Statute

⁵ Article 60 (1) of the Rome Statute

⁶ *The Prosecutor v. Germain Katanga*, Pre-Trial Chamber I, "Decision on the Defence Request Concerning Languages", 21 December 2007, ICC-01/04-01/07-127.

presence of legal counsel. The Statute also guarantees to a person subject to a warrant of arrest the right to apply for provisional release⁵.

Similarly, the Rome Statute provides the accused with a number of fair trial guarantees, which are consistent with major human rights treaties. Article 67 (1) of the Statute grants to the accused the right to a public and fair hearing conducted impartially. It sets out a number of “minimum guarantees”, such as:

- The right to be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks
- The right to have adequate time and facilities for the preparation of the defence
- The right to be tried without undue delay
- The right to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it; and
- The right to remain silent.

Article 85 of the Statute provides for a person who has been unlawfully arrested or detained to have a right to compensation, which he or she can enforce in Court. Further, when a person has by a final decision been convicted of a criminal offence, and subsequently has his or her conviction reversed on the ground of a new or newly discovered fact that proves the occurrence of a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.

4. DISCLOSURE

(a) Translation of documents and interpretations of proceedings

Article 67 (1) (a) of the Rome Statute provides for the accused’s right to be informed of the nature, cause and content of the charge “in a language which the accused fully understands and speaks.” In addition, he has the right, pursuant to article 67 (1) (f), to have the assistance of an interpreter and such translations as are necessary to meet the requirements of fairness. In the *Katanga* case, the suspect requested that translation of documents and interpretation to the Lingala language be provided to him. However, the Single Judge, found on basis of enquiries made by the Registry, that the suspect’s competency in the French language met the standard set by the Statute, that is the standard of “fully” understanding and speaking the language⁶. The Single Judge noted that the statute did not grant the suspect the right to choose the language in which he was to be informed of the charges against him and in which translation and interpretation should be provided. The Single Judge recalled that a proposal to this effect had been rejected in the negotiations leading to the adoption of the Rome Statute. The suspect appealed the decision. Meanwhile, he altered his position and only sought interpretation into Lingala and reserved the right to seek the translation of some documents.

On May 27, 2008 the Appeals Chamber gave judgement on the matter⁷. It reversed the decision of the Single Judge. The Appeals Chamber found that the standard of “fully” understanding and speaking the language is very high. It emphasised the importance of the right to interpretation which, it considered, was an “essential component” of a fair trial. The Appeals Chambers compared the language of the Statute with that of documents relating to other courts to conclude that there seems to have been an intention to grant to the accused before the Court, rights of a higher degree than in other courts. While acknowledging that a proposal to allow for the language of choice was not adopted, the Appeals Chamber Rules that the language requested by the accused should be granted, unless it is absolutely clear that the person fully understands and speaks one of the working languages of the Court and is abusing his or her right under Article 67 of the Statute. The Appeals Chamber held

⁷ *The Prosecutor v. Germain Katanga*, Appeals Chamber, “Judgement on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled “Decision on the Defence Request Concerning Languages”, 27 May 2008, ICC-01/04-01/07/522

⁸ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Pre Trial Chamber III, “Decision on the Defence’s Request Related to Language Issues in the Proceedings, 4 December 2008, ICC01/05-01/08-307

that an accused fully understands and speaks a language when he or she is completely fluent in the language in ordinary, non technical conversation.

In implementing the judgment of the Appeals Chamber, the Single Judge ordered that interpretation into Lingala should be provided to the suspect. Interestingly, the Single Judge chose not to conduct further enquiries into whether his command of French met the required standard, because that would have required a postponement of the confirmation hearing, which might be incompatible with the accused's right to have that hearing within a reasonable time from the date of his surrender to the Court.

Another interesting issue relating to the translation of documents arose in the *Bemba* case. On 4 December 2008, the Single Judge ruled on a request of the suspect to have *all* documents in the case translated into French⁸. The Single Judge noted that, while the right to interpretation, set out in Statute, has no limitations, there is no absolute right to have all documents translated into a language which the suspect fully understands and speaks. The Single Judge held that only those documents that are essential for the accused's proper preparation to face the charges should be served him in a language he fully understands and speaks.

(b) Provisional Release from Detention

Requirements under Article 58 (1) of the Statute for the arrest of the person, in conjunction with article 60 (2) of the Statute, equally apply to the detention of the person before the Court⁹. In this regard, Article 60 of the Rome Statute allows the Pre-Trial Chamber to modify its ruling as to detention, release or conditions of release if it is satisfied that changed circumstances so require. In a decision regarding interim release in the *Bemba* case, the Single Judge concluded that the continued detention of Bemba was not necessitated by any of the three legitimate purposes of detention set out in Article 58 (1) (b) of the Statute, and thus Bemba was to be released, albeit under conditions¹⁰.

In reaching her conclusion, the Single Judge referred to internationally recognised human rights, as required by Article 21 (3) of the Statute, mentioned earlier. The Single Judge referred to the right of an arrested person to have access to a judicial authority vested with the power to adjudicate upon the lawfulness and justification of his or her detention¹¹, as well as to the right to liberty and the related principle that deprivation of liberty should be

⁹ Article 58 of the Rome Statute provides, in so far as relevant:

"1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:

(a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the court; and

(b) The arrest of the person appears necessary:

(i) To ensure the person's appearance at trial;

(ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or

(iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which was within the jurisdiction of the court and which arises out of the same circumstances".

¹⁰ *The Prosecutor v. Jean-Pierre Gombo*, Pre Trial Chamber II, "Decision on the Interim Release of Jean-Pierre Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic and the Republic of South Africa", 14 August 2009, ICC-01/05-01/08-475

¹¹ Reference was made to: Article 9 of the Universal Declaration of Human Rights, article 9 of the International Covenant on Civil and Political Rights, article 5 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6 of the African Charter on Human and Peoples' Rights and Article 7 of the American Convention on Human Rights.

¹² Reference was made to Article 3 of the Universal Declaration of Human Rights, Article 9 of the International Covenant on Civil and Political Rights, Article 5 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6 of the African Charter on Human and Peoples' Rights and Article 7 of the American Convention on Human Rights.

¹³ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Appeals Chamber, "Judgement on the appeal of the Prosecutor against Pre-Trial Chamber II's "Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa", 2 December 2009, ICC-01/05-01/08-631-Red.

an exception and not a rule¹². The Single Judge held that the implementation of the decision would be deferred pending a decision to which state Bemba should be released and what conditions should be imposed on him.

The Appeals Chamber, however, reversed the Single Judge's decision¹³. The Appeals Chamber found that the Single Judge has misappreciated and disregarded relevant facts in reaching her conclusion that the entirety of factors before it reflected a "substantial change of circumstances". In particular, the Single Judge should have analysed Bemba's international contacts and his financial situation, as well as the heightened risk of him absconding in view of the fact that the charges against him had been confirmed. The Appeals Chamber further pointed out that in granting conditional release, it is necessary to specify the appropriate conditions that make such release feasible, identify the State to which the person would be released and whether the State would be released and whether that State would be able to enforce conditions imposed by the Court. The decision of the Single Judge according to the Appeals Chamber, failed to meet these requirements.

5. TREATMENT OF ICC DETAINEES

Persons detained at the Court's instance, are held in a Dutch detention centre in Scheveningen, in the outskirts of Hague, Netherlands and are the responsibility of the ICC Registrar who in furtherance of this duty, tries to guarantee the total welfare of the person of the detainees, taking into consideration their cultural diversity and individual development. Practical steps taken in this direction include the daily programme of the Detention Centre that permits access to fresh air; recreational time and sports activities; library books; news and television; computer facilities to work on their own cases, linked to a computer at the Court which only the Defence can access; privileged communication with the Defence and the consular or diplomatic representative of his/her country of origin; visits by a minister or spiritual advisor of their religion or belief; visits by the family, the wife or partner of the detained persons; suitably prepared food that satisfies their quality, quantity and standards of dietetics and modern hygiene or permission to cook for themselves according to their taste and cultural requirements¹⁴.

Finally, the International Committee of the Red Cross ("ICRC") has unlimited access to the Detention Centre, where its delegates pay inspection visits unannounced, to ascertain that the physical, psychological and living conditions of the detainees conform to widely accepted international standards governing the treatment of persons deprived of liberty, in accordance with the agreement between the ICC and ICRC of 29 March, 2006¹⁵.

¹⁴ Information available at: <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Detention/>

¹⁵ ICC-PRES/02-01-06. Agreement between the International Criminal Court and the International Committee of the Red Cross on Visits to Persons deprived of Liberty Pursuant to the Jurisdiction of the International Criminal Court.

SESSION 11: IMPLEMENTATION OF THE PROVIDENCIALES RESOLUTION ON JUSTICE FOR THE NEXT GENERATION

Child Rights Implementation – A Challenge

By

His Honour Justice S Sriskandarajah

Court of Appeal Judge, Sri Lanka

1. INTRODUCTION

In the pre-United Nations era, the rights of children were seen primarily in the context of measures to be taken against slavery, child labour, traffic and prostitution of minors. In that regard, the League of Nations adopted in 1924 the Geneva Declaration on the Rights of the Child. The Declaration has been a guide to private and public action in the interest of children and it has laid down a moral framework for children's rights. The Convention on the Rights of the Child adopted by the United Nations General Assembly by resolution 44/25 in 1990 goes further than the Declaration by making States which accept the Convention, legally accountable for their actions towards the children. The Convention goes beyond existing legal standards and practices. These includes its provisions on the right to life, survival and development; the right to a name and nationality from birth; regarding adoption; the right of disabled and refugee children as well as those in trouble with the law. The convention also emphasise that when courts, welfare institutions or administrative authorities deal with children, the child's best interests shall be a primary consideration. A child is defined in the Convention as a person under the age of 18, unless national laws fix an earlier age of majority.

The deprivation of liberty for a child and administration of juvenile justice are dealt with in Article 37 and 40 of the Convention on the Rights of the Child. The provisions of these articles are elaborated by international documents¹ and guidelines² for the care, protection and treatment of children coming into conflict with or at risk of coming into conflict with the law. The responsibility for ensuring compliance of governments with the provisions of these Articles, Rules and Guidelines is vested with the Committee on the Rights of the Child which consist of 10 independent experts elected in their personal capacity to four-year term by State Parties. It has a permanent secretariat at the Office of the High Commissioner for Human Rights, in Geneva. State Parties to the Convention on the Rights of the Child regularly prepare reports on how they are implementing its principles and provisions. The periodic reports provided an opportunity for a regular review of the situation, for updating the progress made and for a continuing dialogue with the Committee. While the reporting process is an important opportunity for governments to demonstrate their commitment to, and actual progress in, implementing the Convention, but it cannot hold governments accountable for their actions or non-actions with regard to children. In other words, there is no assurance that State Parties will follow up on the Committee's recommendations, or that they will take a board, participatory approach to implement the Convention.

Ultimately the Committee has not achieved its objective even though it has prepared extensive guidelines to help governments. In reality most countries around the world have not reached the international standards in establishing a system of administration of juvenile justice. To address this issue the Commonwealth Magistrates' and Judges' Association and United Nations Children's Fund on the occasion of the Colloquium on the Child and the Law in Providenciales, Turks and Caicos Islands, 1-2 October 2009 resolved by urging the Governments of the Commonwealth to take urgent steps to introduce and implement child justice systems in line with International Standards as established through the United Nations.

¹ United Nations Minimum Rules for the Administration of Juvenile Justice The Beijing Rules (1985), United Nations Rules for the Protection of Juveniles Deprived of their Liberty: JDLs (1990)

² United Nations Guidelines for the prevention of Juvenile Delinquency: The Riyadh guidelines (1990)

The promotion and protection of the rights of children in contact with the law has to be dealt with in relation to the specific category of children who are in need of legal assistance or involved in legal proceedings. These children can be broadly categorised as follows;

- Juvenile delinquency
- Victims of crimes
- In need of care or protection
- Affected by armed conflict
- Subject matter of custody disputes
- Children with imprisoned mothers
- Witness in civil and criminal cases

When introducing and implementing a child justice system the respective governments should take into consideration the welfare of all the children who fall into different categories stated above. Most of the Juvenile Justice systems that are in place are focussed on the treatment of children in conflict with the law as provided by Articles, 3, 37 and 40. A child who commits an offence is a victim of circumstances and this child need treatment and protection in order to bring the child back to the society as a useful citizen. But in case of other categories of children mentioned above as provided by Article 3 and 38 they have to be cared and assisted in view of protecting them from any harm being caused to them due to the vulnerability of their position. The interpretation of the above articles provides two approaches namely; the ethic of justice and the ethic of care. The former stands for treatment based on moral worth and legal justice, the later stands for non-judgementalism, social inclusion and social justice. Both the ethic of justice and the ethic of care stress caring as the core value based on a pro-active and a long term vision concerning the next generation.

2. THE ETHIC OF JUSTICE

The ethic of justice stresses the need for legal systems to respond to youth crime by respecting the legal status of juveniles and promoting their overall welfare. The Convention on the Rights of the Child³ and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985 (the Beijing Rules) provide a complete and detailed framework for the operation of a national juvenile justice system emphasizing the importance of dealing with juvenile offenders fairly and humanly. The overall aim of these two international instruments is to ensure that young offenders are themselves protected from harm, treated justly and diverted from imprisonment and punishment into treatment and rehabilitation. But the view that the type of measures appropriate for young offenders are similar to those appropriate abused children has lost favour and the emphasis is that juvenile delinquency is, in most cases, no more than a phase in a child's normal development, but it needs checking in a way that will not merely reinforce his or her criminal tendencies.

In dealing with young offenders international instruments stress the importance of diverting young offenders out of the courts, whenever possible, without resorting to formal trial. They aim to ensure that youth justice system should not only take account of society's needs for protection from juvenile lawlessness, but also a child capacity to change. Those children who enter criminal justice system are unlikely to emerge reformed characters, particularly if they receive institutional care or custody. The police at the conclusion of the investigation must be given authority in appropriate cases to caution or warn and discharge the offenders. But in exercising this power the police should take adequate care in identifying the appropriate cases suitable to be treated in this manner. By this process the police could reduce the number of juveniles entering the criminal justice system. It is not practicable to have separate police divisions to deal with young offenders hence all the police officers in charge of crime prevention has to be educated and trained in child rights principles.

In Sri Lanka, The Children and Young Persons Ordinance No.48 of 1939 (CYPO), brought into operation in 1952, is the main enactment making provision for juvenile justice. For the purpose of Juvenile Justice only

³ Art 40

children under 14 years of age are considered as children: children between 14-16 years are considered as young persons, Children between 16 – 18 years are considered by penal law as adults. This law has given wide discretion to the Juvenile Court to treat a child offender sympathetically without separating from his family. A child or young person found guilty of an offence punishable with imprisonment may be: delivered to parent or guardian on conviction of keeping good behaviour for one year or place him in charge of some fit person, or; conditionally release him; fine him (fine may be paid by the parent or guardian in certain circumstances)⁴, or discharge him after due admonition⁵.

The Convention on the Rights of the Child insists that the use of deprivation of liberty of children only as a measure of last resort and for the shortest appropriate period of time⁶. A child or young person committed to custody in recognised welfare institutions cause adverse influence on treatment effort. Due to their early stage development the children could develop acute negative effect due to the loss of liberty and the separation from the usual social environment. The child could absorb a criminal identity and an expectation to lead a criminal way of life. Juveniles who are isolated from the community are at greater risk of re-offending. Thereby de-institutionalisation of every child who comes into contact with the law should be taken into serious consideration by the justice system. For this purpose the state could support the family support system by ensuring care and protection to the children within their natural environment, at home, at school and in their community.

The judges could also play a major role in the establishment and enhancement of child justice system as they are free in their court to control the proceedings subject to the procedural laws governing a particular case. Each judge could adopt appropriate procedures in trying juvenile offenders depending on the facilities available to him keeping in mind the best interest of the child. The judges when convicting a juvenile offender should consider alternative punishments and the use of deprivation of liberty of a child should be the last resort and for a shortest possible time.

3. THE ETHIC OF CARE

I wish to emphasize in this paper that justice for the next generation should not only be viewed in the context of Juvenile delinquency but it should also be viewed in a broader prospective encompassing the category of children mentioned above namely:

Children who are; victims of crimes, in need of care or protection, affected by armed conflict, subject matter of custody disputes, children with imprisoned mothers, and witness in civil and criminal cases. I think this category of children comprises more in number than that of children of criminal behaviour. These children need social inclusion and social justice.

In relation to children who are victim of crimes special protection has to be taken by the State Authorities. In this regard Sri Lanka has established a National Child Protection Authority⁷ for the purpose of formulating a national policy on the prevention of child abuse and the protection and treatment of children who are victim of such abuse.

The Children and Young Persons Ordinance of Sri Lanka defines a child or young person in need of care or protection as who having no parent or guardian or a parent or guardian unfit to exercise care and guardianship or not exercising proper care and guardianship, is either falling into bad associations, or exposed to moral danger, or beyond control. The phrase 'a child or young person exposed to moral danger' is defined as a child or young person is found destitute, or is found wandering without any settled place of abode and without visible means of subsistence, or found begging or receiving alms (whether or not there is any pretence of singing, playing, performing or offering anything for sale) or is found loitering for the purpose of so begging or receiving alms.

⁴ S 28(1) CYPO

⁵ S30 CYPO

⁶ CRC 37(b)

⁷ National Child Protection Authority Act, No. 50 of 1998.

The children are in greater need of the rights when armed conflicts transform their environment but adequate consideration was not given to them in The Convention on the Rights of the Child. It is necessary to impose additional obligation on the State to look after the welfare of these children. The Optional Protocol 2000 entered into force in February 2002 does not deal with the wider interest of children affected by war but it deals with 'child soldiers'. Even in regard to child soldiers its approach is formal and narrow.

The children who become the subject matter of custody disputes; the children whose parents were married and who now intend to divorce has a narrow advantage over the children of cohabiting couples. The former group has a limited protection as the divorce has to be obtained by a procedure in court. But there could be no support offered to the children of unmarried parents who separate. It will be ideal for divorcing parents talk to their children about their breakup before they apply for divorce. To look after the interest of these children there has to be some legislation to ensure that the children are consulted in relation to their future. In Scotland, the aim of Article 12 of the Convention on the Rights of the Child is taken extremely serious. Scottish law obliges parents, depending on their children's age and maturity, to consult them over any major decision within their parental responsibility⁸.

Children (infant) with imprisoned mothers are subjected to harmful and negative impacts of being brought up in a prison environment in addition to their exposure to unhygienic and other unsuitable conditions. Thereby all possible steps must be taken to prevent the incarceration of mothers with infant child or in the alternative the health and development of the child should be monitored by some health authorities.

Witness in Civil and Criminal cases; the children who are required to give evidence in cases are victimized by being examined and cross-examined at length in open court. There is no special restriction on the nature and the extent of cross-examination to which a child can be subjected. Though the court has wide powers to prevent irrelevant, indecent, scandalous and annoying questions from being put to a witness judges seldom intervene. This situation is minimised in many jurisdictions by accepting video-recorded statements of children admissible in evidence against the accused.

The welfare institutions those are established for the protection and care of children are housing children irrespective of the purpose of which they were established. All types of children coming to courts-whether they are produced as children in need of care and protection, or victims of child abuse, or witness in cases, or children in conflict with the law are either placed or remanded in one institution together or transported to courts together. As a result child victims come in contact with child offenders and are influenced by them. Most judges are not aware the condition existing in these institutions. As there are only few institutions available for remanding or placing children coming before the courts, the judges has no option but to send the children to these remand homes. These institutions lack the capacity to promote physical and psychological recovery and social reintegration of a child victim. Children who are witnesses in cases and who are placed in children's homes on court orders are brought to court and taken back from court in prison vehicles together with other adult suspects. Children in need for care and protection and victim of child abuse should not be kept together with juvenile offenders in the same place and they should not be treated in the same manner.

The respective governments should take adequate measures to provide resources and training to the Police Officers and other Officers who are responsible for the care and protection of children. The governments and the civil societies must engage in bringing public awareness on children's rights. The Human Rights Commissions that are established in pursuance of the Covenant on Civil and Political Right and the Covenant on Economic Social and Cultural Right adopted by UN General Assembly in December 1965 could play a major role in implementation of child justice system in line with international standards. It should engage in supervising the institutions that are responsible for the promotion and protection of the rights of children including the Police. If the existing statutes of the States does not have provisions empowering the Human Rights Commissions to perform such task the respective Governments should make statutory provisions empowering Human Rights

⁸ Children (Scotland) Act 1995, s 6(1) There is a legal presumption that a child of 12 years age or more is 'of sufficient age and maturity to form a view'.

Commissions for the investigation and supervision of the said Institutions. Even though there are internal mechanism of supervision of the institutions that are in charge for the promotion and protection of rights of children, a supervision on these institutions by the Human Rights Commission and recommending measures of correction and improvement to the respective Governments will undoubtedly have a significant impact on the promotion and protection of the rights of children.

4. CONCLUSION

The Convention on the Rights of the Child which provides a vision for human caring society is only a foundation to be built upon. It includes human inter dependence and give greater premium to responsibilities, relationship, corporation and communication. For the Convention to work it requires a genuine commitment and partnership between the State and the Civil Society. While the Governments are accountable for their actions or non –actions with regard to children all members of society, families, schools communities, religious and social organisations, the media and children themselves must be involved and committed to make children’s right a reality.

The Promotion and Protection of the Rights of Children in Contact with the Law

By

Ms. Caroline Bakker

Sub Regional Child Protection Advisor, UNICEF Barbados and Eastern Caribbean

1. INTRODUCTION

Madam President, Distinguished Council Members, Honourables Magistrates’ and Judges,

It is a great pleasure to be with you again at the CMJA Conference, one year after the adoption of the Providenciales Resolution of the Commonwealth Magistrates’ and Judges’ Association and UNICEF in Turks and Caicos Islands on the 2nd of October 2009. The Providenciales Resolution is the outcome of the 2 day jointly organised CMJA-UNICEF Colloquium on “Justice for the Next Generations: The Promotion and Protection of the Rights of Children in contact with the Law” which held back to back with the Fifteenth CMJA Triennial Conference.

The Providenciales Resolution is recalling the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Convention of the Right of the Child, with particular reference to articles 3, 12, 37, 39 and 40 dealing with respectively the best interest of the child, children’s views appropriately respected in any proceedings, torture/degrading treatment and deprivation of liberty of children, rehabilitation of child victims, and administration of juvenile justice. It is also nothing the International Standards and Norms on Justice in Matters Involving Child Victims and Witnesses of Crime and all the rules on Juvenile Justice Administration(1) .

All of these international legislation forms the frameworks providing direct support to children in contact and conflict with the law.

Access to Justice for children is fundamental to the fulfillment of their rights and reinforces their status as subjects of rights. Judicial intervention is central to the implementation of the CRC and CEDAW and their Optional Protocols as well as other state treaty obligations and will enable the environment for children to have their right fulfilled.

¹ United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”); United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines); and UN Guidelines on the Administration of Juvenile Justice.

2. WHO IS UNICEF AND HOW DO WE FUNCTION?

UNICEF's mandate UNICEF is mandated by the United Nations General Assembly to advocate for the protection of children's rights, to help meet their basic needs and to expand their opportunities to reach their full potential.

UNICEF is guided by the Convention on the Rights of the Child and strives to establish children's rights as enduring ethical principles and international standards of behaviour towards children.

UNICEF insists that the survival, protection and development of children are universal development imperatives that are integral to human progress.

UNICEF has a presence in 162 countries and is governed by an Executive Board composed of 36 members. The Board establishes policies, approves programmes, and decides on administrative and financial budgets. Members are elected by the UN Economic and Social Council, and normally serve a three-year term. UNICEF is internally organized in three levels - Country, Regional and Headquarters.

UNICEF has three levels of Management:

- **Country level:** Supports the planning, implementation and monitoring of programmes in collaboration with national governments and other partners, advise representatives on policies, strategies, human and financial resources allocations
- **Regional level:** Offers advice in technical and management areas to Country Office in that region and provides oversight for company programmes and budgets
- **Headquarters level:** Sets overall strategic direction, policy and guidance to UNICEF's programmes, coordinates resources mobilization, and global communication, advises the Executive Director on major organization priorities, optimizes use and allocation of resources and assesses organizational performance

At the country level, UNICEF consists of 126 offices that carry out the organization's mission through a programme of cooperation developed with the host government. They exist in countries where UNICEF signed a legal agreement with the Government.

In addition, there are 37 National Committees for UNICEF. These committees promote children's rights, raise funds, and sell UNICEF greeting cards and products, as well as create key partnerships, and provide other invaluable support.

UNICEF's Programme

The Medium-Term Strategic Plan (MTSP) is UNICEF's Organizational Plan which establishes an overall framework for UNICEF's work for the 2006-2013 period. The MTSP is based on a set of guiding principles drawn from the 1996 UNICEF Mission Statement, the Convention on the Rights of the Child, the Millennium Summit Declaration and the World Fit for Children Declaration and Plan of Action.

Proposed focus of attention

With the CMJA taking the lead, UNICEF proposes three broad areas of work and thematic areas of concentration and focus by the CMJA.

3. CAPACITY DEVELOPMENT FOR LEGAL PROFESSIONALS IN COMMONWEALTH COUNTRIES

Children and women's rights should be ingrained into short and long term professional development of judges and magistrates. This could be achieved through comprehensive and tailored curriculum design for professional and non-professional judicial staff.

Linkages with other human rights institutions such as the IPU and the OHCHR would be critical for the growth of the CMJA.

The IPU is the international organization of Parliaments established in 1889 and has had long standing experience in working with Parliamentarians with the aim of advancing the cause of women and children in their work. The Union is the focal point for world-wide parliamentary dialogue and works for peace and co-operation among peoples and for the firm establishment of representative democracy and to that end, contributes to the defence and promotion of human rights.²

The OHCHR is mandated by the General Assembly to protect and promote all human rights for all through engagement with state and non-state actors and therefore serves as an important source of support to the judicial arm of countries. Under its special procedures, a Special Rapporteur on the Independence of Lawyers and Judges has been appointed on the basis of conviction of the Human Rights Council that that an independent and impartial judiciary are essential prerequisites for the protection of human rights.³ The core mandate of the Special Rapporture is to identify and record not only attacks on the independence of the judiciary, lawyers and court officials but also progress achieved in protecting and enhancing their independence. The OHCHR also serves as a reservoir of valuable resources and technical support in the field of human rights jurisprudence.

As part of the objective of accelerating the administration of justice and further towards improving access and efficiency, efforts could be made to promote formal and informal Alternative Dispute Resolution processes mechanisms. Children's legislation of some countries such as Ghana and Uganda provide for the establishment of Children's panels with mandates to adjudicate on minor criminal and civil matters affecting children. These are intended to increase children's access to justice and promote community participation in the well being of children.

Judges can break new ground within the ambit of the law. The issue of justiciability of social and economic rights has been subject to immense debate. Treaty bodies such as the Committee on Economic and Social Rights have indicated through various instruments such as General Comment 14 that rights such as access to health are justiciable.

References to international standards affecting women and children tend to be low in jurisprudential text of many countries. Through new legislation and rules of procedure, the judiciary could encourage the general utilization and integration of international human rights standards and principles affecting children into judicial practice and interpretation.

4. KNOWLEDGE MANAGEMENT ON APPROACHES AND JURISPRUDENCE ON CHILDREN AND THE LAW IN COMMONWEALTH COUNTRIES

Updated knowledge and progressive sharing of what exists in addition to potential areas of change will be key to a relevant and dynamic CMJA. In furtherance of this, it would be critical to consider the creation of E-net works between jurisdictions for knowledge expansion and sharing.

² See <http://www.ipu.org/english/whatipu.htm>

³ See: Human Rights Council Resolution 8/6. Mandate of the Special Rapporteur on the independence of judges and lawyers

This needs to be enhanced by the regular and systematic documentation of women and child-related case law in different languages for sharing across states for referencing, adaptation and adoption, using applicable rules of *stare decisis*.

Judges and magistrates must be up to date not only in relation to legal and juridical matters affecting women and children but also the economic, social and cultural issues affecting them, with the view that their judgments would reflect both legal and social realities. Hence their knowledge of issues such as the impacts of HIV/AIDS, climate change, economic recession on women and children should be updated through regular capacity building.

5. ENCOURAGING LEGAL PROFESSIONALS AS A CONSTITUENCY IN COMMONWEALTH COUNTRIES TO ACT AS ADVOCATES MORE BROADLY ON CHILD RIGHTS

The impartiality of judges and magistrates is to be respected and observed at all times and in all situations. This does not imply that they cannot be creative and pro-active.

Judges and magistrates can use the ambit of the law and their mandates to advance the cause of women and children. Examples include providing rulings for the extension of legal aid to indigent women and children in appropriate cases and moving the court to appropriate locations to ascertain violations of a sensitive nature, such as FGM and early marriage.

Be aware of and support constitutional litigation affecting women and how these are being spearheaded in other parts of Africa.

I think I have given you some food for thought on our collaboration which can take place at country level between you as Judges and magistrates in country and our UNICEF country offices present in your countries, at regional level with the regional branches of the CMJA and UNICEF regional offices as well as at a global level between the CMJA and UNICEF HQ. UNICEF is looking forward to this partnership and appreciate your interest and engagements to discuss, reflect and judge in accordance with the CRC.

Thank you.

SESSION 12: DEALING WITH VIOLENCE IN THE FAMILY AND FORCED MARRIAGES

Dealing with Violence in the Family and Forced Marriages

By

Justice Mary Ang'awa

Judge, Kenya

1. ABSTRACT

Key words: Gender based Violence, Forced Marriages, Family law, judicial system in Kenya

This paper attempts to bring out the fact that Violence against Women and Forced Marriages in Kenya is ongoing. Great strides have been gained in Kenya by the domestication of part of the United Nations conventions through Kenya's Children's Act 2001 and The Sexual Offences Act 2006¹. The vice still continues due to inadequate laws being enacted by Parliament, such as the Family Protection Bill 2007. The question is whether this analogy would be overcome when Kenya becomes a Monistic state with the enactment of the proposed new constitution? The challenge would be in the implementation, more so in the rural areas and regions where negative customary law is practiced. The paper concludes with proposed solutions seeking a genuine implementation of Kenya's proposed constitution, civic awareness, training, attitudinal change and vigorous stance against corruption by all stake holders.

2. INTRODUCTION

Kenya is a member of the commonwealth, has a vibrant economy and diverse society. Seventy per cent of the society is land based. Issues of gender based violence and forced marriages are endemic. If you look for it you will find it! This paper looks at gender based violence and forced marriages and how the victims of this violence can access the court system.

3. GENDER BASED VIOLENCE

Gender based violence that occurs in the family are normally hidden, taboo and in some cases perceived as a sign of affection of Love. 'It would involve physically, sexual and psychological violence' against adults, children and the vulnerable.

4. CASE IN POINT

In a criminal murder case dealt with by the author, *The Republic Versus Emily Ruto, eklr 2010* which involved a female adult (the accused)². One fatal night her husband came home and began to assault her. He took a cutlass (a sharp sword locally known as a panga) to cut her. She managed to take it away from him and throw it at him. She ran out of the house to call for help. When she returned with neighbours to the house, her husband was found dead from the cut wounds sustained. She was charged with murder. The facts revealed that he had consistently assaulted her for over 17 years but the prosecution case put forward a case for murder.

If Kenya's Family Protection Bill 2007, formerly the Domestic Violence (Family Protection Bill) 2002, had been enacted, perhaps her marriage would have been saved or alternatively her husband would have still been alive.

² See Appendix 1.

The Bill provided for counselling, shelter for the battered victim and access to court. In this case the accused was too scared to walk out of her marriage, due to African customary law and the stigma of rejection. The accused, therefore, bore the long years of misery and violence.

5. FORCED MARRIAGES

Though forced marriages occur in the rural areas due to negative practices of customary law and Kenya's diverse ethnic culture, the problem Kenya faces are similar to some commonwealth countries.

In a program of the Jurisprudence of Equality conducted by the Kenya Women Judges Association (KWJA) in collaboration with the International Association of Women Judges (IAWJ), the author came across an experience by one of the judicial officer in Kenya. Two young sisters were informed by their father that they would be withdrawn from school and undergo female genital mutilation (FGM) in preparation of marriage.

With the assistance of a non – governmental organisation (NGO) the two sisters were able to access the courts and obtain redress. They were fortunate to find a gender sensitive judicial officer.

Since that incident, new laws in Kenya have been enacted. This included two very important acts: The Children's Act 2001 and The Sexual Offences Act 2006.

That gave wide powers to the courts in Kenya to be able to deal adequately with cases of gender based violence and protection of children.

A law that is still waiting to be enacted, as stated above, is the Domestic Violence (Family Protection Bill) 2002. It has since been replaced with another bill that broadens the scope of protection against violence and is now known as The Family Protection Bill 2007.

6. WHAT IS WRONG WITH THE KENYAN LAWS?

The challenge in Kenya is the enactment of the relevant laws, and where the laws have been enacted - its implementation³.

There are still evidence of forced marriages, including girls below the age of 14 years (the legal age of marriage in Kenya is 18 years), Female genital mutilation (FGM), and violence in the family.

There is no verifiable evidence of honour killings in Kenya, during the research of this paper.

In the Urban areas, young people are liberal and may not adhere to the strict religious and moral standards observed by their counter parts in the rural areas.

There are groups of people and organisations in Kenya who are of the opinion, that gender violence should and does include men as victims.

6. UNITED NATIONS ON THE DECLARATION OF ELIMINATION OF VIOLENCE AGAINST WOMEN (DEVAW)

The Declaration on Elimination of Violence against Women (DEVAW) was proclaimed by the General Assembly resolution 48/104 of 20 December 1993. It describes in Article 1:

³ Ang'awa, Mary (2010), 'The United Nations International Instruments and Criminal Justice In Kenya,' Paper Prepared For The Legal Resources Foundation Trust.

'any act of gender based violence that results in or is 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 in public or private life.'

In Article 2:

"Violence against women shall be understood to encompass, but not be limited to, the following:

(a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;

(b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;

*(c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.'*⁴

International instruments' and conventions' do not automatically become part of the National laws in Kenya unless Parliament domesticates, that is, the law is adopted as part of Kenyan Law through an act of parliament, therefore, making many of the gender sensitive law inapplicable.

The proposed constitution of Kenya (published on 6 May 2010 and has been presented to the Kenyan public in a referendum on the 4 August 2010) has in its preamble in the clause that:

*'Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this constitution'*⁵.

This very important clause means that Kenya will now no longer be a dualistic country but monistic. All laws ratified at the United Nations need not wait to be enacted into law but would now automatically be part of Kenyan laws. This will be a giant step for women and the vulnerable in society.

Why then after the enactment of the Children's' Act 2001 and the Sexual offences Act 2006 which are in part are domesticated United Nations conventions, are we still seeing gender based violence in Kenya?

This could be explained as being due to the lack of awareness, sensitization and civic education of the various acts mentioned. Therefore, the structure is in place, for example:

- The Sexual Offences Act 2006, that provides minimum sentence to offenders, has a committee to implement the Act to make it work⁶.
- Education of the members of public, the victims, the police and the judicial officers is required to be on going.
- Many ordinary Kenyans would be surprised to know:
- The Kenya Police have a Gender Desk
- The existence of a special Women's Hospital and a dedicated wing in a government hospital in Nairobi specifically dealing with Gender violence

⁴ United Nations (1993), '48/104. Declaration on the Elimination of Violence against Women: 85th Plenary Meeting 20th December 1993 <http://www.un.org/documents/ga/res/48/a48r104.htm> (accessed 20 August 2010)

⁵ Parliament of The Republic Of Kenya, 'The Proposed Constitution Of Kenya 6 May 2010,' Published by the Attorney General in accordance with section 34 of the Constitution of Kenya Review Act, 2008 (No. 9 Act 2008). (www.bunge.go.ke accessed 20 August 2010)

⁶ Kenya Women Judges Association (2007), 'KWJA Handbook: The Sexual Offences Act 2006,

A Court Users Committee comprising the Judiciary, Kenya Police, Kenya Prisons, Kenya Probations Service, Children's Department, Civil Society who deliberate on the short comings of the Criminal Justice System, for instance access to a medical doctor after an assault. This was once a problem but is now settled within such forums.

Fight against Corruption Formation of the Kenya Anti Corruption Commission established to investigate instances of corruption within public offices.

Most of the services mentioned above are mainly in the capital city of Nairobi and are lacking or are inadequate in other locations, including the family courts.

7. WHAT ARE THE SOLUTIONS?

The Enactment of the Proposed New Kenya Constitution making Kenya a monistic state.

The recognition of Civil Society and the Non Governmental Organizations playing an integral part prior to victims of gender based violence and forced marriages accessing the court system.

Attitude by society must change to use good customary law practices and discard the bad.

Raising awareness and sensitizing judicial officers through training and Advocates of the High Court of Kenya in their Continued Legal Education (CLE) programs, on gender based violence and forced marriages, and on the available laws.

Vigorous stance against corruption by the stakeholders. For example, where someone is charged with simple assault, but the facts reveal a more serious offence of grievous harm or where a person is charged with manslaughter whilst he or she should be charged with murder often occurs thereby compromising justice.

References

Ang'awa, Mary (2010), 'The United Nations International Instruments and Criminal Justice In Kenya,' Paper Prepared For The Legal Resources Foundation Trust.

Commonwealth Secretariat, The Commonwealth Parliamentary Association, The Commonwealth Legal Education Association, The Commonwealth Magistrates' and Judges Association and Commonwealth Lawyers Association (2005) 'Commonwealth (Latimer House) Principles On The Accountability of and The Relationship Between The Three Branches of Government,'

Kenya Women Judges Association (2007), 'KWJA Handbook: The Sexual Offences Act 2006,'

United Nations (1993), '48/104. Declaration on the Elimination of Violence against Women: 85th Plenary Meeting 20th December 1993

<http://www.un.org/documents/ga/res/48/a48r104.htm> (accessed 20 August 2010)

Parliament of The Republic of Kenya, 'The Constitution Of Kenya Revised Edition (2001) (1998)'

(www.bunge.go.ke accessed 20 August 2010)

Parliament of The Republic Of Kenya, 'The Proposed Constitution Of Kenya 6 May 2010,' Published by the Attorney General in accordance with section 34 of the Constitution of Kenya Review Act, 2008 (No. 9 Act 2008). (www.bunge.go.ke accessed 20 August 2010)

The Universal Declaration Of Human Rights

<http://www.un.org/en/rights/> (accessed 20 August 2010)

Case Law

The Republic Versus Emily Ruto

Kenya Statutes

Children's Act (Act No. 8 of 2001)

The Sexual Offences Act 2006
The Domestic (Family Protection) Bill 2002
The Family Protection Bill 2007
The Penal Code Cap 63 Laws of Kenya

Appendix. 1: “Emily Ruto v. Republic of Kenya Case Transcript”

1. Criminal Law

2. Subject of main case

I) Murder -*contrary to Section 203 as read with Section 204 of the Penal code.*Particulars of Offence: -*that on the 2nd day of January, 2009 at Soin location in Kericho district of the Rift Valley Province murdered Paul Ruto.*

Plea:

II.) i. Not guilty

-(3rd February, 2009 (Ang’awa, J))

-Trial hearing 18th January, 2010, 20th January 2010, 10th February 2010, 23rd February 2010 and 25th February 2010

ii. Accused female adult related to the deceased as wife, now widow

a.) accused awoke PW1 to say she had been battered by her husband

b.) At the house deceased found dead with cut to his neck

c.) accused tied by neighbours arrested and handed to the police

III.) i. accused admits to have cut the deceased. This was due to the frequent beating and being battered by the accused.

ii. On the material night the beatings were excessive. In the process of defending herself cut the deceased.

3. Submission by advocate for accused

i. there was no malice aforethought. The accused out of fear for her own life inflicted the injury upon the deceased at the span of the moment.

ii. Robert Kinuthia Mungai V R

(1982-88) 1KAR 611

(Kneller, Hancox JJa and Nyarangi Ag Ja)

(Palmer V R (1971) 1 all ER 1077)

4. Submission by advocate for Republic

i. to consider offence of manslaughter

5. Held

a) Accused victim of domestic violence for seventeen (17) years.

6. Findings

a) Self defence

b) Acquitted charges of murder

7. Case Law

a.) Robert Kinuthia Mungai v R

(1982-88) 1KAR 6111

(Kneller Hancox, JJa and Myarangi Ag Ja)

b.)Njoroge V R

(1988) KLR 752

(Gachui Ja, Gicheru and Kwach Ag JJa)

c. Palmer V R (1971) 1 all ER 1077

8. State Law - Section 17 Penal Code/Principles of English Common Law

9. Advocates

a.) S.K. Oboso advocate instructed by the firm of M/S S.K. Oboso & Co Advocates for the accused-present.

b.) P. Kiprop State Counsel instructed by the Attorney General for the state-present

Republic of Kenya in the High Court of Kenya at Kericho
Criminal Case No. 3 of 2009

Republic Prosecutor v Emily Ruto Accused

JUDGEMENT

1. Procedure - Emily Ruto, a female adult was charged with the offence of Murder - Contrary to Section 203 as read with section 204 of the Penal Code. Particulars of Offence: *On the 2nd January, 2009 at Soin location in Kericho District of the Rift Valley Province murdered Paul Ruto.*

2. The accused was brought to the High court on 16th January, 2009. She took her pleas on the 3rd February, 2009 before this Court. A plea of not guilty to the offence was entered. The hearing date was set for 18th, January 2010. The trial commenced on the said dates and subsequently on the 20th January 2010, 10th February, 2010, 23rd February, 2010 and 25th February, 2010.

II. Background

3. The relationship between the accused and the deceased was that of man and wife. The accused had been married to the deceased for 17 years, since 1992. She had six children with him. All along the marriage had been stormy.

4. On the night (10.00pm) of the 2nd January 2009 the accused accompanied with another woke PW1 up. She informed him that her husband and she had fought. That her husband had beaten her up. At the time he had taken a spear and arrow to assault her with. He finally took out a cutlass (*Panga*) which he then used to attack the accused. The accused struggled took the weapon and cut or inflicted injury on the husband. PW1 was requested to go and see how he could assist. When PW1 entered the house he saw the deceased had fallen down with a cut on his neck. He then ran out and called people to come. The accused was then arrested.

5. It was PW3, John Kiprono Sigei on being called to go to the accused house that on seeing the deceased dead took a rope and tied the accused putting her under arrest.

6. PW2 Susan Bett was called at about 10.00 pm and she too went over to the house and confirmed that the deceased had been cut at the neck lying on the ground. She too confirmed to court that the relationship between the two couple was very bad. "*They did not live well [together]*".

7. By midnight PW4 Sgt. Jackson Mwaidoma had arrived and caused the scene to be photographed (*although no evidence of the photographs was produced*). The investigating officer PW6 Ag. Inspector of police Andrew Kuvindyo on visiting the scene preferred charges against the accused.

8. A medical doctor, PW5, Wendoh Boniface Serim attached to the government hospital at Kericho, one Dr. Ochieng, whom he knew whilst working at Kericho, performed a post-mortem on 5th January, 2009 and confirmed there was a deep cut wound on the lateral neck according to the post mortem report.

III. Defence

9. The accused went directly to her defence. She informed this court that indeed her marriage was a difficult one. Despite this she remained in their marriage. She would be frequently beaten by the deceased. Having married in 1992 and having had six children she bore the cruelty inflicted on her.

10. On the material night of 25th February, 2010 the deceased returned to their house at 10.00 pm. He picked a quarrel with her. At first he took a stick to beat her, this broke. He then took a spear and in the struggle between the two of them this too broke. He then took arrows with the intention of stabbing her. They struggled. On seeing that he was not succeeding he took all her clothes and burnt them, including her underwear.

11. On seeing he had nothing else to use against her he took a cutlass (*panga*). By now she was in pain. They struggled until he threw her down. They struggled as he pushed her and struggled, she was able to get hold of the cutlass. She saw he wanted to kill her. She took hold of the panga, threw it at him and ran out for help, not

looking back. When she awoke the neighbours and returned to the house, she did not go inside but those who did came out. One neighbour said there was nothing he could do as the deceased had already died.

12. She had recently given birth by caesarean section. The people who gathered refused her to take her baby. She was arrested and charged.

13. In the past, she added, the deceased had caused her bodily harm. He once cut her at the ear and arm. He injured her chest where she had to be taken to hospital. She had given birth in June, 2009.

14. The deceased parents had both died. Despite the mistreatment she remained in her marriage.

IV. Submission

15. The advocate for the accused stated that no malice aforethought had been established. It was the deceased who picked a quarrel with the accused. She herself sustained injuries. *(The advocate's intention was for the accused to show the court her injuries. She wore trousers and this court adjourned so she could borrow a dress/skirt. She did not disclose her injuries to court).*

16. The advocate then relied on the case law of: Robert Mungai V R (1982-88) 1 KAR 611, (Kneller Hancox JJa and Nyarangi Ag Ja)

In the above case law the appellant had been convicted of manslaughter of killing the deceased. The deceased had gone into his girlfriend's house and found the appellant together with his girlfriend of whom the appellant had a child with aged 13 years. A fight broke out. The appellant shot in the air and then went outside. The deceased fought the girlfriend. They too came out. The appellant short to disarm the deceased and apparently the injuries inflicted was to be the thigh. The deceased died a day or two later from blood loss. The hospital had failed to give blood transfusion and when they did it was too late.

17. The authority dealt with Section 17 of the Penal Code: the advocate in this murder case for the accused tried to persuade the court that under the said Section "*Criminal responsibilities for the use of force in the defence of the person and of property are to be determined according to the principles of English Common Law*".

18. The jury counsel in the decision of Palmer V R that there is no rule under common law of an accused who goes beyond what is reasonably should be convicted of manslaughter.

19. The advocate in this case prayed that the accused be acquitted.

20. In reply the state prayed that the Palmer case (*supra*) referred to in the case of Robert Mungai V R (*supra*) stated that if some defended having an intention to cause serious injury or even to kill, the intention of defending themselves eliminates the question of self defence. The prosecution then prayed that a conviction of manslaughter should be preferred.

V. Opinion

21. The facts of this case in this murder trial are clear. The accused in the course of being physically beaten by her late husband and in the process of struggling inflicted fatal injuries to the deceased.

22. The question therefore arises "*whether this was a case of self-defence or provocation*". As stated in the state Laws of Kenya and in the Robert Mungai v Republic case (*supra*) where a person relies on self defence of that person or property, then Section 17 Penal Code Cap 63 laws of Kenya as earlier provided reads:

"Subject to any express provision in this code or any other law in operation in Kenya crucial responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law".

Whilst provocation Section 207 and 208 of the Penal Code defines provocation as

“The term provocation means and includes except as hereafter stated any wrong act or insult of such a nature as to be likely when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care or to whom he stands in a conjugal, parental filial or fraternal relation or in the relation of master or servant to deprive him of the power of self control and induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered”

23. In this murder case the focus is not on provocation. (It plays an important part) but is on self defence. The issue being that the accused being beaten by her husband was under the apprehension that she would be killed. Her husband tried to assault her using various weapons the last being a cutlass (panga). By taking the panga away from him throw it at him and the resultant being a cut to the deceased throat, does this mean there was excessive force? According to the English Common Law if the force was excessive causing fatal injuries then this would amount to an offence of manslaughter and not murder. The issue in this case is the English Common Law has not specifically stated it should be manslaughter. Each case has its merits. In the circumstances of this case the accused should be acquitted as did the case of Robert Mungai v Republic by the Court of Appeal. In the case law of Njoroge V Republic (1988) KLR 752. (Gachui Ja, Gicheru Kwach Ag JJa) the appellant under the influence of alcohol stabbed the deceased at the thigh with a spear. The deceased died of excessive bleeding. The charge of manslaughter was preferred.

24. Each case has its circumstances. In this murder case the medical examination of the accused P3 form of 2nd January, 2009 disclosed that the accused physical condition reflected healed scars of artificial bruises, tenderness of the left wrist joint. She had a healing fracture of the distal ulna. There were healed scars to her lower limbs on the lateral aspect of the distal thigh about three years old. There was tenderness on the upper part of her right knee area.

25. This is a woman who had been afflicted with constant battering from the deceased as confirmed from the evidence of PW1 and PW3. The laws in Kenya are absent in protecting abuses of domestic violence. An attempt to bring up a Bill was made in 2002 in the Domestic violence (*Family Protection*) Bill. It remained inactive until the year 2007 when another Bill to replace it which was more elaborate than the first was made known as the Family Protection Bill.

26. The United Nations recognizes that violence against women exists and retards the family and development in a country. The well being of the whole nation depends on lack of violence in the family. The Family Protection Bill 2007 is a domestication of the international instrument. Without the laws being domesticated or enacted by parliament the courts can only mention them.

27. In this case I find that if the said law had been in place, the accused would not have undergone the physical violence that she did. The law would have allowed her to just write a letter of her difficult situation abuse. A file by court would be opened. The couple would have been referred to counselling. Part of the reason why the accused failed to leave the marriage was that she had nowhere to go. The new Bill provides for Shelter whilst the couples are being counselled.

28. In this murder case the accused used excessive force to defend herself. Nonetheless the circumstances of her case which would see her be considered for a conviction for manslaughter would not stand in this case. Her continuous abuse and especially the material night, the horrific assault on her by the deceased who used a stick, a spear, bows and finally a cutlass to assault her resulting to her using the same cutlass on him due to the great fear that she too would be killed, would not allow this court to convict her of murder or manslaughter.

29. This court accordingly acquits the accused of the offence of murder. She is set at liberty unless otherwise lawfully held.

Widows Rights

By

Dr Karen Brewer

Secretary General, Commonwealth Magistrates' and Judges' Association

1. INTRODUCTION

Over the last thirty years, since the adoption of the Convention on the Elimination of all Forms of Discrimination Against women, the international community has made great strides to improve the status of women around the globe. However, around the world, a woman's well being continues to be tied to her marital status whether she is single, divorced or widowed.

Widows remain amongst the most vulnerable members of society. A recent study by the Loomba Foundation, estimates the numbers of widows around the world to be in the region of 245 Million, of which 115 Million live in poverty. They face discrimination across the globe, irrespective of cultures, religion, ethnicity or whether they live in developed or developing countries.

Although the CEDAW convention, the Beijing Platform of Action and subsequent instruments have gone a long way to improve gender equality, widows suffer a higher level of poverty and social exclusion. It is a fallacy to believe that all widows are looked after their sons or daughters. Between 15 and 20% of widows are under the age of 40. Many have young families to look after, or are caring for elderly parents. They are excluded from communities and may suffer from harmful, degrading traditional practices.

2. WIDOWS IN CONFLICT SITUATIONS

We are all aware that conflicts across the globe and HIV/AIDS have had a detrimental effect on the development of women's rights and have largely contributed to the creation of widows. In Iraq, it is estimated that there are about 70,000 widows in the conflict zones. Widows are often the target of sexual abuse being deemed "fair game" by soldiers seeking the spoils of war. They are easy targets as they don't have protection. War has other economic, social and legal implications especially when husbands are declared missing in action as the widow's right to inherit or receive a pension as a war widow may be affected by the lack of proof of death.

Despite the fact that the UN Security Council has passed numerous resolutions on Women, Peace and Security (Resolution 1325, 1820, 1889, and 1890), widows have never been specifically mentioned. As a consequence very little data, except anecdotal, has been gathered on the situation and the numbers of widows affected by conflict (or who are vulnerable to violent abuse during conflicts) remain uncertain. Widows are usually unrepresented in peace-building processes even though they constitute the majority of any displaced populations. For ex: In Rwanda, the newest member of the Commonwealth, 10 times more widows survived the genocide because the genocidaires targeted able bodied men and boys. One study found that in a sample of 1125 widows in Rwanda, 805 were traumatised in some shape or form and 67% had been infected with HIV/AIDS from violent abuse.

3. DISREGARD FOR THE RIGHTS OF WIDOWS

But there is also evidence that even in countries where there is NO conflict and despite all the international provisions protecting the rights of women, the rights of widows, as women and members of the human race are disregarded. Constitutional and legislative protections afforded to women are more often than not ignored and customary law prevails.

The continued practice of dowry payments for brides affects widows. Historically dowries in some parts of the Commonwealth were a woman's safety net in case her husband died but it also implied that a woman was

nothing without a man to support her and that she made no contribution to the family home and therefore was not entitled to any benefit if her husband died. Our social structures still in part reflect that patriarchal view with women continuing to be “dependent” on their husbands- for tax benefits, health insurance and income- ultimately this leaves the women in a weakened position if the husband dies. Even those who had a comfortable life end up with a lower standard of income not to mention the emotional trauma that widows suffer on the death of their husband. Even in the UK, the bureaucratic hurdles involved in settling an estate (in relation to tax and probate) when someone dies can be traumatic for someone who has just lost a loved one or who cannot afford to appoint a solicitor to deal with such issues.

In many countries, the inheritance laws still favour the patriarchal system.

In the 1990s, there a number of countries enacted legislation to reform inheritance of land and property so as to enable women to inherit these (Ghana, Malawi, Tanzania, Zambia etc...). However, discrimination persists when it comes to the practice. Widows continue to be excluded from inheriting land and property and in some cases they are forced to leave their homes by their husband’s relatives who lay claim to the property. This has devastating consequences especially in communities which depend on agriculture to survive.

Widows can even be evicted from their communities and striped of their belongings. In Swaziland for example, the increasing numbers of women widowed by HIV/AIDS and in need of family property on which to raise their children is on the increase. Those who were married through customary law, about 80%, are still considered minors under their parents’ tutelage until they go to their husband’s home. At the death of the husband the property is inherited by the husband’s family. Widows are often left destitute and the whole family suffers because custom dictates that a widow must mourn at least six months, during which time she is forbidden to leave her home and prevented from working to support her children.

Widows are regarded by communities with suspicion. Despite the fact that we live in the 21st century, local superstitions persist and widows are often accused of being witches. In one case in Uganda, an illiterate housewife and mother of 4 children was widowed when her husband was murdered. She was accused of conniving with the killers in order to take over her husband’s property. She was branded a “witch and a harlot” and was told by her husband’s relatives that since she killed their son, she would not inherit any property. She was then forced to marry a relative of her husband’s.

In India, widows are often regarded as having the “evil eye” and many are abandoned at temples where they have to eke out a beggar’s life. They are very vulnerable, especially the younger ones, to sexual exploitation. HelpAge International research has revealed that over 500 older women, mostly widows, are killed every year following accusations of being witches.

In a number of countries forced marriage is the norm for widows, especially young widows. In some cases custom demands that wives should be inherited by the brothers of the deceased. Refusal means persecution (regular beatings or emotional blackmail), but agreement may also bring other traumas into the life of the widow when she becomes little more than a slave for the rest of the family especially if the person is being married into a polygamous family.

Widows may lose their rights to custody of their children. In one case in the Cameroon, a widow saw her two sons taken away. When the widow finally managed to get help from a local charity, it was discovered that one of her sons had become severely disabled after the people he had been sent to have physically abused him by kicking him in the knee-caps for helping himself to food when he was hungry.

Widows may lose their place in society –i.e.: they are often excluded from politics or positions of power; they are denied access to medical care and become socially and financially isolated.

The children of widows can suffer exclusion, having to abandon schooling to help their mothers financially, having to work at early ages and sometimes, in the case of girls, they are forced into early marriage, prostitution

or worse to help the family make ends meet or because they cannot turn to their fathers to protect them from what I will call “sexual predators”.

4. ABUSE OF WIDOWS

In addition to their rights being disregarded, widows, in many traditional communities, may suffer inhumane and degrading mourning rites.

We are all aware of the Hindu practice of sati (the burning of widows) which is the most extreme form of violence against women and which has now been banned in India. Unfortunately despite legislation, sati and violence against women still prevail in some parts of India. In other parts of the Commonwealth there are other mourning rites which are equally humiliating to widows. The husband may have died but the marriage is deemed to continue.

Widows may be forced to drink the water their dead husbands have been washed in; they may be forced to sit with their husband’s dead body for days on end.

They may be forced to undergo life threatening cleansing rites in the misguided belief that “the beauty of a woman is her husband” and when he dies the wife has to be “purified”. These practices constitute human rights violations and compound the physical and emotional trauma that the death of a loved one already brings. It may involve the stripping naked of the widow, clean-shaving her, causing her to sit or sleep on a bare floor for weeks, restricting her movements. In some cases these rites are considered a test of the loyalty of the wife. The widow is isolated and neglected at a time when support and comfort from relatives is needed the most.

In her article “Continuing values in a Changing World”⁷ Pingpoh Margaret Hongwe, on behalf of the Cameroon Association of University Women described the situation as follows:

“From the day a husband dies, his wife is forbidden from wearing clothes, except rags. In some cultures, the widow is expected to undress before men. She is clean shaven wherever there is hair on the body. She is not allowed to bathe; instead she is rubbed with cam wood from head to toes. Rope made from the back of a fig tree is rubbed with cam wood and palm oil and tied around her waist. The poor woman is given a staff made from bamboo which she takes along wherever she goes. Her belongings are taboo to touch except by other widows. She is neglected, dejected and isolated. She is not allowed to cook, but food is served to her on a plantain leave as a plate by older widows. [For fear she will taint the food of the village⁸]. On the final day of mourning, she is obliged to move her buttocks on the ground round the celebration yard.”

This process takes place over a seven week period after which the widow has to wear mourning for one year.

In some cases the cleansing rites involve forced sexual contact with a male relative of the husband or a “professional cleanser”, this in itself can lead to other traumas for the widow- who may be infected with HIV/AIDS or even suffer an unwanted pregnancy and increase the ostracization already felt by the widow in question.

5. SO WHAT IS BEING DONE TO STOP THIS PARTICULAR HORRENDOUS FORM OF ABUSE OF WOMEN?

On a local level, it falls mainly to charitable and non-governmental organisations to deal with the consequences of such abuse as the cases rarely get to court because widows are unaware of their rights under the law or are too traumatised or frightened to protest. Some of these charities, such as Woman of Purpose in Eastern Uganda, provide access to training so that widows can gain new skills; provide homes so that widows and children have

⁷ www.widowsrights.org/ArticleCameroon.htm

⁸ Clarification added by author

shelter and cows so that they have access to food for their families by selling milk at the markets. They also work with local community leaders to increase awareness of the rights of widows but there is still a lot of work to do.

Most governments still ignore the issue mainly because there is a lack of data available, except anecdotal, as to the status of widows and their struggle remains invisible. The census records do not provide enough statistical data on the issue.

As we have said the CEDAW convention does not specifically mention widows. Only one of the General Recommendations made by the Committee on the Elimination of all forms of discrimination against women mentions widows specifically (Article 16(1) h)-and this is only in the context of inheritance rights.

“Often inheritance rights for widows do not reflect the principles of equal ownership of property acquired during marriage. Such provisions contravene the Convention and should be abolished”.

The only international convention which specifically targets the rights of widows is Article 20 of the Protocol to the African Charter on Human and People’s Rights which states:

“State parties shall take appropriate legal measures to ensure that widows enjoy all human rights through the implementation of the following:

- a) That widows are not subjected to inhuman, humiliating and degrading treatment;*
- b) That a widow shall automatically become the guardian and custodian of her children, after the death of her husband, unless this is contrary to the interests and the welfare of the children;*
- c) That a widow shall have the right to remarry, and in that event, to marry a person of her choice”.*

It is important that other regional, Commonwealth and international conventions incorporate similar protocols and specifically put in place criminal penalties for inhuman, degrading and life-threatening mourning rites and for any traditional cultural practice which restricts the liberty, mobility and financial independence of widows.

Judicial officers also have an important role to play. To date, very few cases have come to court and the perpetrators very often escape punishment. More often than not, especially in the case of widows in conflict situations, this is because they do not know their rights or because they have suffered too much violence already it is essential that all members of society are treated equally whatever the marital status of the person in question. Better understanding is required of the violence endured, the humiliation experienced and the vulnerability and poverty that widows often find themselves in so that when cases do come to court, widows are given the same rights as all human beings. The legal, cultural and social status of widows should be mainstreamed in all discussions on the status of women.

Forced Marriage

By

Honourable Judge Martin Cardinal

United Kingdom

1. INTRODUCTION

*Forced marriage is a gross abuse of human rights. .. It is a form of domestic violence that dehumanises people by denying them their right to choose how to live their lives...no social or cultural imperative can extenuate and no pretended recourse to religious belief can possibly justify forced marriage*⁹.

Thank you for the privilege of addressing you at this Conference. I am a Circuit Judge sitting at Birmingham Civil Justice Centre, in the centre of Birmingham, a city with a wide variety of ethnic and religious groups settled within its borders. I deal with mostly family law matters full time and in addition to that am the Diversity and Community Relations Judge for Birmingham so have many opportunities to meet with differing ethnic and religious groups and to see the interface between British law and cultural practices from elsewhere mainly though not entirely in the Commonwealth.

Arranged Marriage [in contrast to forced marriage] has an honourable tradition. Where it is practiced with the agreement of all it is very often successful, and entirely appropriate. Parties consent to the family making arrangements for them and are content to fit in with cultural and religious traditions. There is no intention in applying the Forced Marriage legislation of denigrating or demeaning religious customs and cultural norms. This is something the English judiciary entirely accept. *Forced is always different from arranged* as Singer J said in *Re SK (An Adult) (Forced Marriage: Appropriate Relief)*¹⁰.

Just occasionally parents and families go too far- a party [mostly a woman but on occasion it has been a man] does not want to abide by the family tradition. He or she may have already chosen their intended life partner and/or in any event does not wish to have to marry the spouse chosen for them. On some ghastly occasions, violence, injury or even death is threatened to the party refusing the union arranged by the family. There are some spectacular examples in the UK of these so called honour crimes being perpetrated. They have one thing in common- they are matters of shame and not honour at all.

As a result, the Forced Marriage Civil Protection Act came into force on 25th November 2008. It amended our legislation about domestic violence between spouses or those living together or indeed even between formerly engaged parties and inserted a new Part 4A into the 1996 Family Law Act. It protects both those who are facing being forced into marriage and those who already have been.

Birmingham Civil Justice Centre is one of the limited numbers of courts with jurisdiction at present to hear applications; and it so happens that I have heard the majority of applications at Birmingham to date. Indeed it appears that I have dealt with a large number of injunctions compared with many and certainly at one point more than any other Circuit Judge – hence it falling to me to speak to yourselves about this.

2. WHAT IS A FORCED MARRIAGE?

Section 63A (4) of the Family Law Act says that a person is forced into marriage if another person [whether their intended spouse or otherwise] forces them to enter into a marriage without their free and full consent. The force, the coercion, need not be against the victim of the forced marriage- it could be by way of a threat to another- and

⁹ Munby J in *Re K, A Local Authority v N* [2007] FLR 399

¹⁰ *Re SK (An Adult) (Forced Marriage: Appropriate Relief)*¹⁰ [2005] 2 FLR 230

forced includes coercion by threats or other psychological means. So it is not simply a case of the proverbial pistol applied to the head!

3. HOW DO FORCED MARRIAGES COME ABOUT?

The aim may begin by being laudable enough- there may be a desire to protect family land in the country of origin perhaps by marrying a relation; there may be general family pressure; a desire to stop unsuitable relationships especially where a child has become more westernised than the family is comfortable with; there is a desire to protect religious and cultural traditions or even prevent a trans racial or trans religious marriage. Sometimes the reasons may be wholly well intentioned- to protect a disabled son or daughter after the parents have lived their lives and are no longer on this earth- there can be genuine concern as to the welfare of the person involved.

How are forced marriages discovered? They are discovered through a school, a college, a hospital report or a complaint to a social worker or the police. Hopefully they are discovered before they take place but inevitably this is not always so. How are they arranged? The victim of the forced marriage may be told his/her education cannot continue if they do not marry; or there is an excuse for a trip abroad, sometimes with only one parent aware of the plans; the victim may be told he or she is to see a sick relative; there can be threats, beatings or even drugs administered; above all the fear of being ostracised and omitted from a tight and otherwise loving family may be sufficient. The majority of those who are victims are under 18- but it need not be so. Quite independent adults may be involved and coerced.

4. HOW DO CASES COME BEFORE THE COURTS?

Applications can be made ex parte to the court i.e. with no notice at first to the family from whom the victim is estranged or with who he or she is in disagreement. The procedure is fairly simple and judges have a tick box form dealing with the available orders that can be made. Who can bring applications? Parties themselves, Local Authority and others with leave of the court such as the Police etc

Most applications to date have been to date brought by the Police. Progress in some Local Authorities has been a little slow and pressures of work have meant that often it has fallen to the Police to undertake protective work. Applications by parties themselves are rare though I have seen them with the benefit usually of a conscientious social worker's support and guidance

West Midlands Police [the force with whom I deal] have throughout endeavoured to be supportive of and encouraging to the protected party to the proposed or actual forced marriage. At the hearings before me, the Police attend usually together with the protected party [with the exception of cases where that party is mentally disabled and cannot leave the family home or the Care Home where he/she lives – or is missing] and as applicants they stay of course until the application is fully considered, collecting the order themselves and arranging for service. My experience is that they clearly have come expeditiously and only when seriously concerned; the local vulnerable protected parties unit is well 'geared up' to assisting protected parties. Nearly every case involves that ex parte application requiring the family to know of the injunction only after it has been granted but giving them a chance to oppose it at a second hearing.

I have never to date refused the Police permission to bring an application and have granted a Forced Marriage Protection Order though one of my colleagues in an application before her advised a later application on one occasion. Inevitably their preparation is limited to completing the application form and the leave form and we rarely have witness statements though on occasion section 9 statements [statements in a form usually seen in a magistrates' court] have been tendered as evidence. But the local police have intervened timeously for example in a case where a family were to take a disabled man from his Care Home to get married abroad and where a young girl had been taken against her will to Pakistan.

The lack of a full witness statement inevitably means I have to hear some oral evidence, and where appropriate I follow the guidance of Munby J. and recite a summary of the evidence I have heard in the ex parte injunction order.

5. WHAT SORT OF CASES DO YOU ENCOUNTER?

Provincial centres do not generally see cases where a victim has already been spirited abroad- for the very good reason that it is appropriate to have an order by a High Court Judge and only the RCJ can guarantee having a Judge of the Family Division sitting all the year round in London.

That said I have had such cases on occasion. In one case the distraught parent reported her Husband had just taken the daughter out of the country to Dubai and there was little prospect of the order of a mere Circuit Judge counting for much; so I immediately directed the case referred to a High Court Judge in London. I understand an order was made overnight though with what result I do not know. In another the parents of the girl victim had arranged for an aunt to take her abroad and they remained in the UK. Since they were within the jurisdiction I ordered them to secure her immediate return and listed the matter next week before a Family Division Judge- I am glad to say she was returned within the week.

6. WHAT SORT OF PROBLEMS DO WE ENCOUNTER?

In many cases the protected party is under the age of 18. Provided he/she is Gillick competent, I take the view that the child should be a party; on occasion I have arranged for a member of the Law Society Children Act Panel to represent the child- indeed on one occasion a local solicitor even attended before the child left the court that very afternoon. Children are entitled to their own voice.

In some cases the protected parties have been incapable of handling their own affairs because of mental incapacity. As a result I have again made them a party and invited the Official Solicitor to act for them, an invitation he has taken up on every occasion. Indeed he is usually able to arrange representation via a local solicitor agent within 8 days or so where the matter is urgent. I have the advantage of being a nominated Circuit Judge at the Court of Protection who deals with health and welfare issues, so I have on occasion had the forced marriage return date on the same date as the directions in the Court of Protection.

7. WHAT OF THE ROLE OF SOCIAL SERVICES?

Dealing with these cases is a relatively new task for social workers and giving full support to the protected party and the family places a heavy demand upon a social worker at time when social services are much stretched. You may know that care applications have substantially increased last year. There are substantial training needs- Moreover a protocol has recently been negotiated between Birmingham City Council and West Midlands Police. I believe that the implementation of such a protocol may well see an increase in applications before the court as will the sort of training that is necessary.

How do I involve social services? Where I am dealing with the cases of mentally incapacitated adults I have made an order making the Local Authority a party, directing the named social worker to attend and asking when a health and welfare application will be made to the Court of Protection. This has resulted in two such applications to date. Where I am dealing other children cases I still make the Local Authority a party and seek the attendance of a suitable social worker. I may for instance wish to obtain a report from the Local Authority as to the possibility of care proceedings being issued, as they have been in more than one case.

Where parties are over 18 I take the view that if social services are not aware and if the party consents then the Local Authority should be informed; for social workers can provide valuable resources for re-housing and protection.

8. ARE PROCEEDINGS CONTESTED?

Only on one occasion have I had to date to list a matter for a disputed hearing but that did not proceed because the parents were unable to secure public funding. Frequently the family [and remember that Respondents are not just Mother and Father but often members of the extended family and friends] will attend to say that whereas they do not accept they behaved in this way they will not contest the application.

9. HOW HAVE PROCEEDINGS SETTLED?

On a few occasions the protected party has assured me through a social worker or via his/her solicitor that the matter was in fact a family dispute and the injunction may be lifted. On two occasions the parents of the protected party have separated and the proposed forced marriage plan was the trigger for that- the child has gone with the parent not agreeing to the marriage and again the injunction has by consent been withdrawn. I confess I have been anxious about settlements: - it is plain that resisting a family's marriage plans for him/her puts immense cultural and familial strain upon the protected party of the plan. Resistance inevitably means a breaking with the family and maybe with a close-knit network. Where a child of the relationship has been conceived that adds to the pressure. But the best the Judge can do is to ensure the protected party has been spoken to carefully by a social worker with appropriate skills and that he/she is convinced the decision has been reached by them of their own free will. Likewise I have had young people come and ask for their passports back after the court has had them securely and I for my part ensure that the police are served before they are returned so investigations can be undertaken. It is often a pleasure to see young women now free of the burden of a threatened marriage they did not want.

10. WHAT ARE MY POWERS?

The Forced Marriage Protection Order may contain (a) such prohibitions restrictions and requirements; and (b) such other terms as the court consider appropriate for the purposes of the order[s 63B]. Accordingly even in the county court I have wide powers usually associated with the High Court. So I can order the return of a protected person to the United Kingdom by the family and have done so. In my view however there are cases which can and should go to the High Court simply because many jurisdictions regard a High Court Judge's order with very considerable seriousness, as indeed they should.

Briefly then on an injunction application I can make protective directions that no steps be taken to secure the betrothal, engagement or marriage of the person involved, no steps to obtain a passport or other travel documents be taken, the passport or passports that are currently held be lodged at the court, that the protected party not be assaulted or indeed harassed or molested in any way...

I add of course a power of arrest to any order in accordance with my powers under the Act where appropriate.

11. THE ROLE OF THE HIGH COURT

What should be sent up to a High Court Judge? Where the protected party has produced a child who may not be in the jurisdiction a High Court Judge has wider power of intervention than a mere County Court Judge. Where the protected party is abroad already a High Court order is needed generally.

In addition certain evidential matters may need yet to be considered. If for example a protected party has married and has a sexual relationship with the person whom she did not wish to marry or perhaps when she has a mental disability then there are questions of possible prosecution- and decisions as to the release of evidence into Crown Court proceedings are in my view for the High Court judiciary. Again the initial orders can be in the county court but I will transfer up.

12. WHAT COULD WE DO BETTER?

Over the last two years I have sought to assist Local Authority training needs, I have attended a meeting to draft the Local Authority protocol with the Police; I have attended training sessions at several of our principal family barristers' chambers in Birmingham. In short I am anxious that lawyers and Local Authorities are on top of what they have to do.

I would like to see more widespread publicity of a potential victim's rights in schools and in hospital in particular

13. SOME EXAMPLES OF FORCED MARRIAGE

I think of three instances:

The first is the reported case of *B v I [Forced Marriage]*¹¹. Baron J. was faced with a case where a girl had in effect been kept prisoner by her family who had forced her into a marriage ceremony abroad with a cousin; although the marriage was over three years old in the circumstances [where there was a threat of physical danger to the girl] a declaration inter alia was made in the High Court that there had never been a marriage capable of recognition within the jurisdiction. That case came before the Court under the Inherent Jurisdiction of the High Court rather than under the forced marriage legislation as the court needed to exercise its powers as to the status of the marriage.

In a case before me, a young lady had been married off to a man 5 years ago despite the fact that she has a mental age of 8 although she is in her twenties. Despite the time that had elapsed I made a forced marriage order to protect her from her husband and required the Local Authority to show me why they had not instituted a Court of Protection application. One followed and there are issues as to possible criminal offences and immigration offences to be resolved. I have sent that case to a Family Division Judge who will doubtless consider the status of the marriage

A more usual application involved a frightened young woman of 17 who had been threatened by her Father and brother than unless she married her cousin she would be seriously injured- believing them, she had the sense to contact the Police. I made the appropriate ex parte orders and arranged for her to be legally represented. The family attended on the return day of my injunction but did not oppose the order in the end though they made unconvincing denials. 12 months later the young lady came to see me requesting the return of her passport which at my direction had been lodged at the court. The withdrawn and terrified young lady had become a mature and confident woman. She had been re-housed; she was at college training for a profession and had a boyfriend whom she wanted to marry one day. She no longer, sadly, saw her family and wanted her passport so she could go on a college trip to France which she was looking forward to. She thanked me very warmly for protecting her from her family- and hoped that one day they would see her but she would keep away for the moment. It is a case such as that which makes doing this work worthwhile. Her independence and her right to choose arranged marriage or not, had been restored to her.

14. WHAT MORE CAN BE DONE TO PROTECT VULNERABLE PROTECTED PARTIES?

It seems to me that the following are very necessary:

- Early applications to court.
- Effective consultations between the police and Local Authorities
- The obtaining of evidence by statement where time permits to be filed with the applications for leave and the application for an order

¹¹ *B v I [Forced Marriage]* [2010] 1 FLR 1721

- Effective training, not just of social workers but also of teachers [who often see distressed pupils before their removal from school] and health workers too who may see injuries on occasion or be suspicious about the way a person is watched in hospital.
- The encouragement of the police vulnerable persons units
- Communication in those communities where forced marriage has been practised so that the potential victims get to know their rights.
- Important steps to protect the young person. I am aware of what breaking away from a tightly knit family/community might mean; this issue needs to be carefully addressed by those with responsibility for protecting not just young persons but adults too in this very sad situation.

Above all else these cases need to be handled with sensitivity and understanding. I hope that the path we are treading in Birmingham is doing just that

Background Papers

Judicial Independence as a Prelude to the Administration of Justice

By

Mrs Maryam Ahmed Sabo

Kano, Nigeria

The Judiciary in many parts of the world is one of the three arms of government especially in countries that are practicing federalism as a system of government. It is one of the 3 arms of government in a democratic setting Nigeria inclusive.

Promoting and protecting the independence of Judiciary from the interference of other arms of government i.e. the executive and the legislature is of paramount importance. This is so, as a prelude for “the judge” to be able to discharge his/her duties without fear or favour.

Equally the maxim for the rule of law to reign can only be achieved if the 3 arms of government (The executive, the legislature and the judiciary) work independently of one another, **thus promoting the rule of checks and balances.**

Unless a judicial officer is free from interference by the executive arm of government in the administration of justice, the Judiciary wouldn't be able to administer justice without fear or favour to litigants before it.

While speaking on promoting and protecting Judicial Independence, it can be classified into 2 broad based:

- Independence of the Judiciary (Financially) to promote it and
- Judicial Independence in protecting and Implementing Judicial Pronouncements.

Independence of the Judiciary is of course the freedom from Interference from the other arms of government, i.e. the Legislative and the executive. It relates to the institutions itself, while Judicial Independence relates to the attitudinal posture and behaviour of Judicial Officers to the functions. By extension it connotes the ability to decide a matter on the merits without fear or favour. Therefore, judges must be above board at all times.

Appointments and promotion of Judges should always be on merit as against who you know. A writer on American constitutional law Schwarks (1955) said;

“The quality of Justice depends on the quality of men who administer the law and the content of the law they administer. Unless those appointed to the bench are competent, upright and free to judge without fear or favour, any judicial system however, sound its structure on paper is bound to function poorly in practice”

Independence of Judiciary and the qualities of a judicial officer are inseparable. There is no way you can have an independent judiciary without a competent, transparent, upright and bold judicial officers.

In order to promote and protect Judicial Independence, financial autonomy is necessary. It is the bedrock of fairness and Justice for all and for the rule of law to function effectively.

In Nigeria, a nation where I come from which is situated in West Africa has a population of over 140 million people making it the most populace African country is now practicing democratic system of government for over 10 years on a stretch now, has in its constitution the 3 arms of government and the doctrine of separation of powers.

At Federal level, there is Judicial Independence. The National Judicial Council (NJC) is financially autonomous and funded from the consolidated revenue of the federation to cater for its needs and services in all the courts of records at various locations and states in the country. Conditions and welfare of judges were improved and enhanced to enable officer's discharge their duties effectively.

Whereas at the state level, judicial Independence is about 70%, state Judiciary are not financially Independent, it largely depends on the executives of the state for the running of the Judicial arm, as such it is not free from interference and Interpolation by the executives arms of government, for example; in Local government election tribunals, the executive Indirectly Interfere with the proceedings by appointing assumed loyalists.

It is the order of the day that in most states in Nigeria the power that be sweeps the other parties leaving no single seat for opposition.

And if a petition is filed, it will continue to be sabotaged by incessant Interference or in some cases sabotage the Judiciary by withholding its grant subvention and sometimes refuse to release money for its capital project by way of signaling that, it caused the shorts.

Promotion and protection of Judicial Independence is a matter of urgency for the rule of law to strive. The executive at Federal and state level must always respect and comply with judgments and orders of the court. This is because the bedrock of a viable democracy solely depends on a viable Judiciary which has the autonomy to correct the executive at any point in time, so that the legal adage that says

“The judiciary is the last hope of the common man can be promoted to read the last hope of every man as presidents are sometimes beneficiaries “.

Where Justice is compromised the wellbeing of the people is invariably devalued In my country Nigeria, which practices presidential system of government is blessed with both human and natural resources. Ensuring judicial Independence is an urgent need in an under develop country like mine. It will be of great importance in achieving social justice, security and infrastructural development to ensure justice for all and sundry as Injustice breeds Insecurity.

Finally, the most viable way of ensuring promotion and protection of judicial Independence all over the world is for the Judiciary to be financially Independent at all levels and for the executive to be mindful of the fact that the world social order squarely rests on equity, equality, good governance and free Judiciary to reign to ensure; Justice between man and man and government and its citizens. An effective and efficient Justice sector is a sine qua non for a healthy and sustainable democracy.

40th Anniversary Dinner Speech

By
CMJA President Justice Norma Wade-Miller

To our distinguished invitees who have graciously accepted our invitation to be here (forgive me if I do not identify individually each of you): it would add considerably to the four hours or so that this speech will last)

Ladies and Gentlemen, I would like to take this moment to acknowledge my colleagues from Bermuda - Justice Carlisle Greaves, the Senior Magistrate Mr. Warner and The Worshipful Mr. Tokunbo. I appreciate your special support.

I would like to acknowledge the special guests we have with us this evening:

A warm welcome to the President and Secretary General of Institute of Legal Executives (ILEX), the Hon. Life Vice President of the Commonwealth Lawyers Association (CLA), the Deputy Secretary General of the Commonwealth Foundation, the Director of the Commonwealth Foundation, the new Head of the Justice Section of the Commonwealth Secretariat and all Chief Justices among us – from Uganda, Lesotho, Papua New Guinea, the Turks and Caicos Islands, the Ugandan High Commissioner and Retired Chief Justice Mr. David Simmons. I hope I have not omitted anyone.

I give special mention to Dr. Clover Thompson Gordon and Mr. Michael Lambert who have been with CMJA for many years and have played central roles in energizing the organization.

We are also fortunate to have with us this evening three former distinguished Presidents of the CMJA. Please give a warm welcome to Lord Hope and Judge Oxner and Judge Kipling Douglas.

In applauding them, I ask you also to acknowledge the many lawyers, editors and administrators who throughout their years of office, have selflessly served on Council and behind the scenes in bringing the work of the CMJA to the attention of the world wide legal community. Most important this evening I would like to thank all the delegates' spouses and guests who by their attendance make this occasion possible.

40 years! Looked at in one way that is a long time. Of course, looked at in another way it is but the blink of an eye. CMJA has an impressive history; it is one of the most vital, enduring and a productive organization in the Commonwealth and it has the potential to influence the development of important institutions in a meaningful way.

And it started with Magistrates...

This week we are focusing attention for much of our time on the theme of independence. It is worth recalling that concern with this topic was the actual stimulus which led to the establishment of our organization as the Commonwealth Magistrates' Association:

The CMJA was originally set up 40 years ago by Sir Thomas Skyrme as the Commonwealth Magistrates' Association because, as Sir Thomas himself notes,

“Notwithstanding the impressive powers which they could exercise and the fact that many Commonwealth Magistrates worked under heavy pressure their security and independence left much to be desired and in some places the conditions under which they had to operate were appalling”

So much starts with the Magistrates. In the UK, and Sir Henry knows this well, there is a very famous charity called the Howard League for Penal Reform. It started in 1776, stimulated by the great reformer, John Howard. You may not know this, but the high point for the organization was in the 1900's, when the Director of the Howard League was one Margery Fry. This redoubtable lady was responsible in a few short years for:

Shaping the legislation which led to the Criminal Justice Act of 1938, by negotiations held across a table with the Home Secretary of the day (name check);

Being a prime mover in bringing women into the Metropolitan Police; Being a prime mover, again, in setting up the Probation Service in England and Wales, and; She was a founder member of the UK Magistrates' Association. Our own organization started with the Commonwealth Magistrates Association.

What was it, I wonder, that brought a group of Commonwealth Magistrates together? I would like to think that, there was vision and foresight, passion and commitment to bring ideas to fruition and to ensure that a Commonwealth voice on justice was heard and that it would become a strong influence on the development of our judicial systems. It may, of course, have been nothing of the sort, for we, as lawyers, are trained to think of facts, but tonight let us think and hope that it might have been something like that; vision and ideas are so important.

I think that the founders of CMA had in common an interest in promoting and enhancing the betterment of the profession, the judiciary and the society in which they functioned. An interest in education for the profession and standards generally, was no doubt equally important. And out of that group of visionaries, came the first association.

Somewhere along the line the Judges joined in.

Tonight, it does not matter so much how this happened, but it does matter that it did.

We are the only judicial organisation bringing together judicial officers at all levels - this has been the great feature of the CMJA, as it allows us to speak on behalf of the whole of the judiciary when we consider that judicial independence is being eroded, and it provides us with a unique opportunity to cross fertilise ideas and experience which enhance judicial practice across the Commonwealth.

The issues which have been so important to us resonate as strongly today as at any time. I have just presented my Report to Council on matters currently being considered. Listen if you will to this short quote from that Report:

The status of magistrates was an issue which provoked passionate debate at the 15th Triennial Conference. The General Assembly adopted the following resolution:

“This General Assembly deplores that in parts of the Commonwealth, the independence of the magistracy is inadequately safeguarded, and requests Council together with the Commonwealth Secretariat to take positive steps to eliminate these breaches of the Latimer House Principles wherever they occur.”

Following the adoption of the resolution, a task force chaired by Justice Leona Theron was set up, and we anticipate receiving their report. This is one of the benefits of free and open discussions at the conferences, and it remains to be seen how the report which the task force produce can be translated into meaningful administrative change.

It is to be hoped that those members most concerned about this issue will take steps in their own jurisdiction as and when they consider it appropriate. The CMJA stands ready to support them.'

You see, Ladies and Gentlemen, we have to continue to be vigilant.

In 40 years our Association has played a major role in speaking for people who, because of disadvantage one way or another, do not really have a voice to speak for themselves. We have taken a part in speaking for them and thereby for the community generally.

I think that it is very important that our organization continues to act in this way, especially so given the many challenges faced by all our countries in the modern world.

In our time we have created programmes of training and we have founded and published a major international jurisprudential journal which has raised issues and commented upon legal themes with great authority. We hope that we make a difference and that we will continue to do so.

How does this all happen? Well it happens of course because of the massive amount of work that is done magnanimously by volunteers. The General Secretary and their assistants over the years, people like the Treasurer, the Directors of Programmes and Members of Council. I include the staff, who are not of course volunteers but who do an enormous amount of work, often above and beyond the call of duty. Then there is the profession generally in various roles, committees, and so on who devote their very valuable time to enhancing the Association, neither asking nor expecting any reward.

That is some of the history I want to acknowledge tonight and it is a history of which I believe we should all be proud.

Our special thanks tonight go to:

Karen Brewer, Kate Hubbard, Keith Hollis and Shamim Qureshi and all the members of the Local Organising Committee for their unstinting effort in organizing this conference
All former distinguished Presidents and Vice-Presidents of the CMJA
All council members, past and present
The University of Brighton for its hospitality and generosity
The caterers, Red Anywhere, for the catering and Brighton Dome, for the assistance with the venue
The Martin Jenkins Quartet for their excellent music

And to all of you for being here to celebrate a truly great organization.

Thank you for being here. Enjoy the evening.