CMJA VIRTUAL CONFERENCE
12-15 September 2021
“Post-Pandemic Innovations”

CONFERENCE REPORT
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Foreword

The CMJA held its first Virtual Conference from 12-15 September 2021. This was the first venture of the CMJA into the virtual conference world. The Theme of the Conference was: “Post Pandemic Innovations” and 234 delegates from 43 jurisdictions in the Commonwealth participated in the Conference.

I am very grateful for the support of the Steering Committee, especially our Director of Programme, Judge Shamim Qureshi, in the preparation for the conference. We are deeply grateful for the advice and support of David Smith and his colleagues from VideoGeek without whom we would not have been able to run the Conference. David Smith’s expertise was essential to the success of the Conference. I am also deeply grateful to our Conference Coordinator, Jo Twyman, whose support in the run up and during the Conference was invaluable to the CMJA secretariat.

We are also very grateful to all the speakers, panellists and contributors to this educational programme, some of whom, despite some local technical challenges, persevered and showed how adaptable they could be to the virtual format.

I am also grateful to Bethany Probert for all her assistance in producing this report on behalf of the CMJA.

The Keynote Speaker at the Conference was Her Excellency Paula Mae Weekes ORTT, President of Trinidad and Tobago, spoke about the developments and problems experience with access to justice around the Commonwealth. Whilst applauding the electronic innovations used since the pandemic, Her Excellency pointed out that “Judicial innovation will all come to naught without proper investment by our respective governments” and this included investment in electricity and the internet. Funding of the judiciary was also a theme that was raised at the Chief Justices’ Meeting which took place on 12 September 2021. This meeting was chaired by the Lord Chief Justice of England and Wales, Lord Burnett of Maldon. The meeting was attended by 29 Chief Justices from around the Commonwealth who also discussed practical ways of dealing with the backlogs due to COVID 19 all under the theme of the Rule of Law in a post-COVID 19 era.

In his Closing address, the CMJA President pointed out that “within our Commonwealth Global Village, we are all encountering similar challenges such as:

➢ Inadequate funding for our judiciaries;
➢ Need for training;
➢ Infrastructure development;
➢ Case Management;
➢ Access to Justice.”

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

The CMJA’s virtual conference may not have provided the opportunity to delegates to exchange ideas and experiences over coffee breaks, lunches or dinners. However, in addition to the dynamic question and answer session, the CMJA provided an opportunity for open discussion during the open fora for the six regions of the Commonwealth that were included in the programme. Whilst not the same as an in-person conference, the feedback and suggestions made during the sessions were helpful to the CMJA in formulating its workplan over the coming year.

Dr Karen Brewer
Secretary General
The Steering Committee decided early in 2021 that the annual conference would be held online in order to avoid a late cancellation of an in-person conference for reasons of increased coronavirus activity. This turned out to be a good forecast as an in-person conference would never have got off the ground. The format for this virtual conference resembled our usual conferences except there were no social events. The programme was spread out across three sessions each day, the morning, afternoon and evening in order to allow maximum participation by delegates around the globe. Delegates were able to watch recordings at their leisure if they could not observe live sessions.

People who were invited to chair or speak responded positively as it did not require them to make arrangements about funding and travel. I am grateful for their involvement to make this conference a success. There was very good feedback by everyone afterwards. As mentioned by Dr Brewer, the CMJA used a professional technology company to assist with the arrangements for the conference and there were no issues from their side. It was good to see speakers learning to improvise with local technical issues or power cuts.

The speakers and topics covered at the conference were as follows:

- **Opening of conference by Her Excellency Paula Mae Weekes (President of Trinidad and Tobago)**
- **The Efficient Disposal Of Cases After Covid-19 by Justice Jones Dotse (Ghana), Chief Justice Lord Ian Burnett (England and Wales), Justice John Logan (Australia) and Justice Awa Bah (Gambia)**
- **Access To Virtual Legal Systems by Justice Bernard McCloskey (Northern Ireland), Justice Jacqueline Kamau (Kenya) and Justice Winston Patterson (Guyana)**
- **Problems With Remote Hearings by Chief Magistrate Matankiso Nthunya (Lesotho), Chief Judge Chester Crooks (Jamaica) and Sheriff Donald Corke (Scotland)**
- **Digital Footprints by Dr John Carey (Papua New Guinea) and Judge Barry Clarke (England and Wales)**
- **Creation Of Gender-Based Violence Courts by Rehmat Ali (Pakistan), Magistrate Goabaone Rammapudi-Lesedi (Botswana), and Magistrate Linda Bradford-Morgan (Australia)**
- **Replacing Judges with AI in the Courts by Prof Karen Yeung (England and Wales) and Prof Tania Sourdin (Australia)**
- **Environmental Pollution Litigation And Human Rights by Justice Emmanuel Ugirashebuja (Rwanda) and Recorder Sailesh Mehta (England and Wales)**
- **Business, Human Rights and the Commercial Courts by Chief Justice Brian Moree (Bahamas), Chief Justice Faustin Ntezilyayo (Rwanda), Justice Bobbie Cheema-Grubb (England and Wales)**
- **Criminal Sentencing Guidelines by Justice Elizabeth Musoke (Uganda) and Justice William Young (New Zealand)**
- **Hague Convention Issues in Family Law by Chief Justice Martha Koome (Kenya)**
- **Ensuring Fair Court Procedures For Commonwealth Militaries: A Collective Responsibility by UK Judge Advocate General Alan Large and Justice Chow On Teck (Singapore)**
- **Judicial Wellness For The Restless by Dr Diane Douglas (Trinidad and Tobago) and Judge Kaly Kaul (England and Wales)**

I hope to see everyone attending future conferences again.

Judge Shamim Qureshi,
Director of Programmes, CMJA.
Openning Speech

THE COMMONWEALTH MAGISTRATES’ AND JUDGES’ ASSOCIATION (CMJA) VIRTUAL CONFERENCE 12-15 SEPTEMBER 2021

Hon Justice Charles Mkandawire, Malawi, CMJA President

Your Excellency Paula Mae Weekes, President of Trinidad and Tobago
The Acting Chancellor of the Judiciary from Guyana
Chief Justices from various jurisdictions of the six regions of the CMJA
Justices from Supreme Courts, Constitutional Courts, Appeal Courts, High Courts and Regional Courts/Tribunals
Registrars
Magistrates
Distinguished Delegates
All Protocols Observed
Good Morning in the Atlantic and Mediterranean, the Caribbean, West Africa and East Central and Southern Africa Regions

Good morning and afternoon in the Indian Ocean Region
Good afternoon and evening in the Pacific Region

Since we last met in Papua New Guinea (PNG) in 2019, a lot has happened. We have within this period lost some of our beloved members of the Commonwealth Magistrates’ and Judges’ Association. The following are the ones we have been notified of:

1. Justice Regina Sagu-PNG
2. Sir Nicholas Kirriwom-PNG
3. Chief Justice Irene Mambilima-Zambia
4. Gloria Millwood-Jamaica-former Council Member
5. Lord Justice Cain-Isle of Man

May their souls rest in eternal peace.

The world we all live in today continues to change and change so rapidly that both our intellectual and emotional understanding of it and even of ourselves are changing all the time.

It is just over a year ago that the United Nations General Secretary Antonio Guterres addressed the very first virtual Nelson Mandela Annual Lecture and spoke about the need for a new social order contract in what he called a New Era. The demands of that New Era do indeed continue to exert pressures of various kinds on all peoples around the world.

That this year’s Commonwealth Magistrates’ and Judges’ Association conference also takes place virtually, speaks to the adaptive resourcefulness of the COVID 19 to mutate into new and more deadly strains.

This has forced us into lockdowns of various kinds and simultaneously re-think the way we have lived and how we now face the imperatives to have to cope with a new world based on an understanding clearer to us than never before.

And it is precisely this that we are all equal as human beings perhaps the greatness imperative of the 21st Century emerges from that understanding which is to work together in mutual respect to change the global order profoundly.
In the CMJA we have faced a compelling urgency of the demand to adapt to this new way of doing business.

In light of Covid-19 pandemic, we had to cancel the 2020 Regional Conference which was to be held in Cardiff, Wales. This robbed us of the opportunity to celebrate the 50th Anniversary of the CMJA.

In April this year, we also had to cancel the Triennial Conference scheduled for September 2021 in Accra, Ghana. Today, I should have been delivering this speech in Accra Ghana.

The current Covid-19 outbreak presents an opportunity for the CMJA to explore the various rule of law and judicial independence issues which have been exposed across the Commonwealth as a result of this pandemic. Topical issues are legality of legislative provisions, human rights protections, law enforcement, judicial independence, access to justice. This virtual conference will aim to bring each of these key areas into our discussion as we work through key topic areas of interest.

The theme of this conference is “Post Pandemic Innovations”. The conference has attracted a total of 233 delegates from 43 countries. We have 30 Chief Justices who had confirmed to attend the Chief Justices’ Meeting. We have 22 Chief Justices and VIPs attending the conference. It is not my intention to unpack this theme in my opening remarks. Suffice to say that the theme resonates well with what has been going on globally.

Within the thematic structure of this conference, you will be treated to an impressive array of speakers and presenters some of which will give keynote addresses or presentations while others will speak to more specific aspects of the conference’s theme. The conference program speaks for itself. Over the coming three days, we will be provided with a variety of food for thought. A number of issues will arise for our serious consideration.

These topics are extremely beneficial and informative for the difficulties encountered during this Covid-19 pandemic period and provide efficient and effective means in which to meet these challenges.

I am sure that you will be as excited as I am about the coming three days during which we will have the opportunity to consider and exchange ideas.

This virtual conference has been a particularly challenging conference to organize. I therefore take this opportunity to thank Dr Karen Brewer our Secretary General and Jo Twyman for their great work in putting this conference together. Jo has been of great support especially on the marketing side. Both Jo and Karen were determined to get the numbers up. In a special way, let me thank Speakers, Presenters and Chairpersons of sessions for accepting our invitations to play special roles in this historic virtual conference.

Let me also thank Judge Shamim Qureshi who is Director of Programs, for assembling this formidable conference program. Despite your very busy schedule with judicial work, Judge Qureshi, you have always come to our rescue.

Thanks, should also go to members of the Steering Committee and the Executive Committee of CMJA for the guidance given in order for this virtual conference to be a reality.

I wish you all an enjoyable and rewarding virtual conference.

With these remarks, I officially declare this conference open.

Thank you for your attention and may god bless you.
Her Excellency Paula-Mae Weekes, Trinidad & Tobago

I was so thrilled when invited to address you and participate in this first virtual conference of the Commonwealth Magistrates and Judges Association that I paid no attention to the time difference across our various jurisdictions; it is now approaching 4:00 a.m. in my neck of the woods. I thank the conference organisers and the Chair of this session, for allowing me to appear via video recording.

INTRODUCTION
CMJA’s recourse to a virtual platform is a reminder of the many significant and far-reaching effects of Covid-19, although vaccination has provided some light at the end of the tunnel, it is clear that globally we must learn to live with, respond to and work around the many challenges thrown up by the pandemic. At individual, institutional and governmental levels all are now called to modify how we function or risk becoming irrelevant, moribund or extinct. Judiciaries have not been spared.

Some organisations are by nature flexible, readily able to answer the demands of their customers, but historically judiciaries have been painfully slow to change, more often than not, reacting to situations and crises rather than being proactive in assessing and responding to the needs of their users. Tradition, precedent and the desirability of certainty, all recognisable hallmarks of the judicial process, are not attributes that lend themselves to easy transition. But Covid-19 has compelled a sea-change in operations necessitating POST-PANDEMIC INNOVATIONS. While I will speak to you from a mainly Caribbean perspective (and I am grateful to my neighbouring jurisdictions for their readiness to supply material), I am certain that all across the Commonwealth we share the lived experiences.

To innovate is “to make changes in something established, especially by introducing new methods, ideas, or products.” In January 2020, our various judiciaries were either gazelles, sprinting ahead towards state-of-the-art operations; tortoises, ambling along making incremental changes as they moved in the direction of a more modern judiciary, or sloths, for whatever reason lazily delivering the bare minimum of services. Whichever, all took a hit as Covid-19 affected the core business and function of the institution tasked with upholding individual rights, enforcing laws, providing oversight of government actions and ensuring that the rule of law prevails.

Rapid responsive innovations became crucial if our judiciaries were to continue to fulfil their mandate. I am partial to the way our Kenyan colleagues succinctly express it on their website: “to attain the ideal rule of law”. And we would no doubt agree with Justice Geoffrey Venning, former Chief Judge of the High Court of New Zealand that “Access to Justice is fundamental to the maintenance of the rule of law.” Without it, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable.

ACCESS TO JUSTICE—ORIGINATING PROCESS
The first step in accessing justice is, of course, the ability to initiate proceedings—traditionally done by walking into a courthouse. The health and safety concerns occasioned by the virus closed courthouses to the public, some as early as March 2020, or imposed restrictions on entry, thereby frustrating this customary method.

Certain jurisdictions are fortunate to have Continuity of Operations Planning (COOP) meant to establish policy and guidelines to ensure that essential functions of their judiciary continue in times of crisis. That usually involves a relocation of personnel and resources to an alternative facility, but COOP did not contemplate the absolute unavailability of brick and mortar accommodation.

With approach to registries denied, it became necessary to have all matters filed electronically to ensure uninterrupted access to justice, and e-filing became the order of the day, whether in a simple
form, e.g. email or the more sophisticated e-portal. Gazelles like Singapore and Australia that had largely moved to e-filing pre-Covid suffered the least disruption to their operations and enjoyed a head start. The Eastern Caribbean Supreme Court was a regional front-runner launching its e-filing project in 2014 and engaging since in a continuous roll-out. Trinidad and Tobago’s e-services portal, established in 2019, allows attorneys, self-represented litigants, police officers and other justice sector agencies to file their documents.

The tortoises and sloths found themselves in the unenviable position of having to fast-track systems already in the pipeline or scramble to implement rudimentary electronic filing systems to guarantee the continuous turning of the wheels of justice. In response to Covid-19, Jamaica, Barbados and Guyana implemented simple e-filing systems.

E-filing has proven workable and convenient for the filing of originating process and other documents and surely will become more sophisticated across all jurisdictions in the coming years. There can be no turning back.

ACCESS TO JUSTICE—HEARING

The second step in accessing justice is the hearing of the matter. Pre-Covid, save for limited exceptions, hearings required in-person attendance by judicial officers, court staff, attorneys, litigants and witnesses. The advent of Covid turned this on its head.

Initially, courts adjourned all save the most urgent matters while taking stock of the situation, but as the pandemic dragged on, alternatives to traditional hearings became necessary.

The ideal was to bring all the players together in the same virtual space while preserving the sanctity of the process. Several approaches were adopted with varying degrees of conformity to the old standard. Venue was the first concern. Courthouses, attorneys’ chambers, offsite designated and court-controlled spaces, prison facilities (especially for bail hearings and other matters in which an accused is in custody) and, last but not least, private homes have all been employed—often in combination. As you could well imagine, witnesses testifying from an uncontrolled home environment has given rise to some unusual and amusing situations.

In the Trinidad and Tobago Children Court a witness disappeared from view during a hearing and when asked on her return to explain her absence, responded indignantly that she had gone to see about her pot. In another case, a witness, dressed in a wife beater, paced up and down in his yard, as that was the only place he could get connectivity. The final straw was when he lit a cigarette; that pushed judicial accommodation to the limit and he was unceremoniously put out of court, virtually. I am sure that there are many such tales to be told from other jurisdictions.

There have been in many cases a hither-to unimaginable relaxation of the rules, but what is clear is that each judiciary must establish well-defined protocols, clearly communicated to and understood by attorneys, litigants and witnesses. There is likely to be a degree of trial and error before the optimal practice is settled.

Criminal trials have proven to be a particularly thorny problem, especially in jurisdictions which still have trial by jury. Guyana is one of a few jurisdictions in the region to have resumed jury trials since late 2020, with jurors, court staff and judge appropriately spaced in the courthouse; accused-in-custody joining via a virtual platform, accused-at-large at a location approved by the courts and attorneys given the option to appear virtually. When in Trinidad and Tobago accused have opted for judge-alone trials, the virtual process has operated fairly smoothly, but there has been a complete cessation of trial by jury until we have satisfactorily worked out the logistics. Another difficulty arises with cases in which witnesses pose a security risk, for example, gang members.

An important feature of hearings, especially in the criminal courts, is access to the courtroom by the public and the media—Covid-19 has effectively done away with the familiar phenomenon of court
regulars. In some jurisdictions, including Trinidad and Tobago, members of the public and the media desirous of a virtual seat at a hearing can contact Court Offices and are provided with a link for joining the virtual hearing room. In Barbados, media practitioners are given links to public hearings and they in turn inform the public. Guyana has taken it a step further, livestreaming court matters of national interest through its newly-established website and social media pages.

EQUAL ACCESS TO JUSTICE FOR ALL
As members of jurisdictions committed to achieving the United Nations Sustainable Development Target 16.3—to ‘Promote the rule of law at the national and international levels and ensure equal access to justice for all’—we have a duty to ensure that, Covid-19 notwithstanding, all individuals are able to seek and obtain remedy for their grievances through the courts.

While implementing the necessary changes to ensure that matters can be filed, heard and adjudicated on, judiciaries must remain alert to subtle barriers to justice made even more opaque by the pandemic. Special groups such as domestic violence victims, prisoners, migrants and those without devices or connectivity must be catered for specifically in the post pandemic innovations.

Barbados and Trinidad and Tobago are among many jurisdictions whose courts have provided facilities to enable members of the public without technological resources or know-how to access justice. Botswana kept its courts open for cases involving domestic and family matters, and Trinidad and Tobago established a dedicated Domestic Violence Call Centre and constructed a portal to quickly dispatch Orders, Summons and documents to the Gender-Based Violence Unit of the Police Service.

At the end of the day access to justice is not achieved unless there is access for all.

COURT REGISTRIES
None of this happens without registries which are the engine room of Court machinery, managing cases from filing to disposition. The exigencies of the pandemic upended the usual order of court business and judiciaries have had to find novel ways of discharging their responsibility to ensure that court documents are disseminated in a reasonable timeframe.

Locally, the use of Courtmail to manage and disseminate Court documents began in 2018 and was intensified following the onset of the pandemic and the Trinidad and Tobago Judicial Information Management System, piloted in the Children Court in 2018, was ramped up to meet the demands of Covid-19. Both Jamaica and Guyana have developed and are piloting their own electronic case management systems to address issues arising out of the pandemic. Across the Commonwealth Caribbean, judgments continue to be made available to the public via the judiciaries’ website.

CHALLENGES
Post pandemic innovation has not come without its challenges. Financial resources are critical to the success of measures devised to answer Covid-19. There is equipment and training and we cannot forget the cost of the various health and safety measures. Judicial innovation will all come to naught without proper investment by our respective governments. I trust that this imperative has been recognised.

The shift to virtual proceedings hinges upon the efficacy and efficiency of the technology employed and courts, in this part of the world, are subject to the vagaries of public utilities such as electricity and internet connectivity. Hearings have been disrupted or aborted on multiple occasions as a result of lost internet connections or power outages. And we cannot forget that many jurisdictions in the Caribbean lie within the Hurricane Belt.

The ability of judiciaries to implement strategies depends on an interconnected system of actors including law associations, police and prisons, various agencies and social support groups. Collaboration is critical; courts may be outfitted with the technology to conduct online hearings, but if
police stations and other detention facilities are not, proceedings cannot progress. Guyana’s judiciary was proactive, formulating special teams to not only draft and implement Covid-19 protocols, but also to meet and confer with all stakeholders.

Public trust is essential to an effective judicial system, which trust is built on transparency and accountability, which are in turn premised on unrestricted access to all the business of a court, unless circumstances dictate otherwise.

Covid-19 has, to some extent, temporarily curtailed the former ease of access and judiciaries must take aggressive steps to foster public trust.

With support from JURIST, a Caribbean judicial reform initiative, Guyana has launched a public education campaign on social media titled, ‘We can still hear you’ which advises the public that matters are still being heard in all courts and that all judicial officers are working remotely, using online platforms, or in physical courtrooms.

**CONCLUSION**

All of us who are active in the judicial sphere have had our work affected by the pandemic. Judiciaries, whether gazelle, tortoise or sloth, have been forced to devise new strategies to meet with the unprecedented disruption brought about by Covid-19. I am willing to bet that courts, which have been around from time immemorial, have never moved so far or so fast in such a short span of time.

We are all familiar with the expression “when push comes to shove”, and we have a prime example of that in the effects of the pandemic. Ironically, in the long run, we may well find ourselves indebted to Covid-19 for much needed progress in our respective jurisdictions.

It is my hope that you will enjoy the rest of the conference and leave this 20th gathering of the CMJA edified, energised and resolved to “provide an accountable court system in which timeliness and efficiency are the hallmarks while still protecting integrity, fairness, equality and accessibility and attracting public trust and confidence”.


Session 2: “The Efficient Disposal of Cases after COVID-19”

His Lordship Justice Kwasi Anin-Yeboah, Ghana

Mr. Chairman,
Fellow delegates,

I am immensely grateful for the opportunity to contribute to this discussion; I am especially grateful to the organisers for the invitation and for the great work they have done in putting this event together. Since January 2020, as I am sure all of us are aware, bringing people together for events of this nature has required special skill and inventiveness and I want to congratulate the leadership of the Commonwealth Magistrates' and Judges Association for the great work they have done.

Since 1970, when this organization came into being, with the express aim of “promoting the independence of the judiciary and to advance education in the law, the administration of justice, the treatment of offenders and the prevention of crime within the Commonwealth,” it has been one of the premier platforms for discussions on jurisprudence among our Commonwealth countries. I am sure I speak for many of us, when I express my gratitude to the organization for the contributions it has made to improving the administration of justice in our respective countries. And may I also express the hope that it will continue to do so for many years to come.

Indeed, the nature of our congregation today and the theme that is guiding our deliberations is another way in which the CJMA is playing its role as a forum for ideas and discussions on the future of jurisprudence. In times past, we would have travelled from our respective countries to one location and held these conversations in person. On this occasion, however, we have to do without the hospitality of a host nation and conduct our interactions virtually.

Such are the exigencies that have been placed on us in the wake of the Covid-19 global pandemic. For centuries, we administered justice in very personal and often small courtrooms. Litigants and defendants were required to appear before a judge and make their pleadings. Where necessary, a jury would also be in attendance. In addition, there would be the prosecutors, respective counsel, the orderlies and of course, members of the public with an interest who would make up the audience. Continuing this practice in the face of a highly infectious illness such as Covid-19 would have been a combustible proposition, to put it mildly.

Nevertheless, the law must go on. This was the challenge we faced in Ghana in March 2020, when the first cases were detected in the country. We could not continue as before and yet; we could not have allowed justice to grind to a halt. I am sure that we all have our experiences from our various countries on how the virus first struck and how we have addressed it as administrators of justice. What I intend to do now is to share some of the ways in which we have dealt with the situation in Ghana and from it, I believe we can glean some lessons and ideas on which practices will work best for us and also a vision for the future of jurisprudence in a world that for the foreseeable future, may have to adjust to the presence of Covid-19 in its various variants.

The first measures we took, when Covid-19 became a reality in Ghana, was to limit the number of people that would have to be in the courtroom at any one time. We stepped up our case management procedures and asked Judges to provide specific times for hearings to parties. Parties were then to appear only that time and not before, as was often the case, when they would present themselves in court to wait till their case was called. Further, only the actual parties, witnesses and counsel were allowed to be in court.
We also instructed that cases of only the extreme urgency were to be scheduled. The option to remand was to be exercised with the greatest restraint and appellants in criminal cases already in custody were no longer required to appear in court and were to be represented solely by counsel.

The purpose of these measures was to reduce the possibility of infections on court premises. Along with these, we also drew down staff numbers at our courts. Apart from a skeletal staff of registrars, cashiers, court clerks, interpreters, recorders and bailiffs, Staff were to take their leave. A shift system was later drawn up that is still in use today. Of course, we also provided nose masks, hand washing materials and sanitizers on court premises and their use was insisted on with no exceptions.

These measures were and are important, but in the long term, we need to set up systems that feel less like we are operating at half strength. We do not, for now, know if or when Covid-19 will no longer be the threat that it is today. And even were that to happen, we cannot tell if there is another pandemic lurking that will force us away from the public square and back into our homes.

It is for this reason that I believe that the manner in which we harnessed technology to keep the administration of justice going are the most relevant to our discussion on the post-Covid future of jurisprudence. With the advances in technology over the last decade, we have a unique opportunity to re-imagine the nature of our job and to future-proof it against all eventualities. This was the thinking that drove our approach at the height of the pandemic.

In Ghana, I am proud to say, we had been moving towards the digitization of our court procedures for nearly two decades. From special digital enabled courts in the early 2000s to the more recently operationalized Case Management System, we had been finding ways of easing and speeding up our procedures to ensure that justice was neither delayed nor denied to citizens. So I believe it was relatively easy for us to adopt technology to resolve the challenges of Covid-19.

With assistance from the Ministry of Communications, our Judicial Service was able to set up a system to facilitate virtual hearings of court cases, which began in August 2020. Currently, 138 courts – both superior and lower courts – have been onboarded unto the system and are able to conduct such hearings. This means that lawyers, litigants, witnesses and other parties to any case can participate from wherever they are without travelling to a single location, pretty much as we are doing with this conference. Members of the Ghana Bar Association, officials of the Attorney General’s Office, the Ghana Police Service and the Ghana Prisons Service have all received the requisite training and been actively involved in the implementation.

Another way in which we have deployed the technology is in the Justice for All Programme, which is geared towards easing the overcrowding in our prisons through special in-prison court sittings to adjudicate cases of prisoners who are on remand awaiting their day in court. It would have been an especially tragic casualty of the Covid era had we not, thanks to technology, been able to continue the sittings. The programme now continues through the use of Facebook live, Zoom and Microsoft Teams. Seven of our prisons, I am happy to say, are set to benefit from this, with the Akuse Prison already holding its first ever Virtual Sitting in June this year.

We have also initiated telepresence video conferencing which also serves as a virtual courtroom setting. The system allows us to take evidence and testimony remotely – even from people living abroad – and also deliver judgements. The result has been a drastic improvement in case management in the Kumasi, Cape Coast, Koforidua and Tamale Appeals Courts where it has been currently deployed.

Prior to Covid, we had also initiated an e-justice system, under which we aimed to automate the existing manual filing systems with the Court Registries. With this, lawyers and court users file cases and pay process fees electronically. The idea was once again to speed up trial processes and reduce the backlog in cases that we were faced with. This has been further enhanced with the digitization of court records. Under the National Digitization Project, court processes for the 44 High Courts at the
Law Court Complex in Accra have been digitized, while 3,500,000 documents have been scanned and are now digitally available. With this, we are reducing the need for physical interaction with court documents and thus, cutting off another point of possible Covid infection.

Yet another arm of our digital infrastructure is the Ghana Legal Web Library and E-Judgment System. Through this, we have given digital access to case law, judgements and a trove of relevant materials to lawyers, researchers and other stakeholders, again reducing the need for physical interaction and congregation.

The benefits of these measures, I believe, can be seen in the very low levels of infections that the Judicial Service recorded. We in Ghana can be proud that when the challenge of Covid arose, our Judicial Service stepped up and not only protected lives but also ensured that justice continued to be dispensed.

However, there is no room for complacency, either in Ghana or anywhere else in the world. Even as we ramp up vaccinations and investigate the efficacy of various therapeutics, we have to admit that Covid-19 remains a real and present threat. The lessons from our experience and doubtless from other countries that other panellists will enumerate should guide us as we face down this threat and prepare for future ones.

In the light of these, permit me to commend the following to you.

There is the need for much more efficient case management in our court systems. In Ghana, and I am sure we are not alone, it took the shock of Covid for us to take this as seriously as we do now. Poor management leads to overcrowding and worsens backlogs. We do not intend to return to this. This must be a benefit of the Covid era.

Managers of judicial services need to keep an up-to-date database of litigants and lawyers through which they can quickly contact parties to a case to provide updates on cases, including rulings, adjournments and other status updates. This will further reduce the need for parties to physically come to the court to get this information.

We will also need to increase the use of Alternative Dispute Resolution. We in Ghana have been on this journey for years and the fruits can be seen in the reduction of caseloads in some of our courts. As we seek to further reduce court time for litigants, ADR will be of critical importance.

Most importantly, we have to employ the use of technology. Virtual hearings, e-case management, e-libraries and other digital systems must now be standard appurtenances of any justice system.

Of course, it will not be possible to completely eliminate all physical interactions and so we will need now to factor in disease and infection in our court constructions. We do not only need more courts and court buildings so that no one room has to bear huge loads of people, we need larger and better ventilated court rooms so as to reduce the risk of infection for people who have to appear in them.

After centuries of practice, the manner in which we practice law and administer justice was perhaps overdue for a reckoning. I believe that we must take advantage of this pandemic and speed up our efforts to make the profession 21st century compliant. Many of us have begun to do so and we must keep up the efforts. When the next pandemic comes, we must be ready.

I thank you all for listening.
The Rt Hon The Lord Burnett, England and Wales

Audio Summary Transcript by Bethany Twyman (E&OE)

The title of this session has built-in optimism into it, in talking about the disposal of cases after COVID-19. I suspect that none of us 18 months ago thought that we would still be living in circumstances that curtail normal life in the way that we experience today, this is, of course not over. Nobody can be certain what the coming months will bring. One of the realities that anyone responsible for running complex organisations in the coming months and years, is that we must be ready to adjust to renewed outbreaks of COVID-19 with new variants. Many of the adjustments that were made under great pressure and great haste in the spring and summer of last year to enable our courts to continue to function are likely to become permanent or semi-permanent features and certainly they need to be capable to be reintroduced in the event of unwelcome resurgences in infection rates.

Our title also talks about the efficient disposal of cases which is something we all strive to achieve in our respective jurisdictions, but efficiency in the context of the administration of justice is not the same as in many other walks in life. Our overarching concern is to ensure the interest of justice is served. Our task is to resolve disputes fairly, proportionately and relatively quickly. It is to ensure defendants in criminal trials receive a fair trial, according to the law, whilst the at same time others drawn into the trial process are treated properly. In England and Wales, a number of urgent steps were taken last year to ensure the wheels of justice would continue to turn. I would like to touch on a number of them and consider how they may remain with us for the future. Firstly, legislative change, secondly digitalisation of process, thirdly use of technology to enable remote attendance at hearings, fourthly case management.

Legislation surrounding criminal trials in both magistrates’ courts and crown courts imposed a number of artificial constraints on the ability of defendants, witnesses and other participants in the criminal process to attend remotely. Emergency legislation in the first weeks of the COVID-19 pandemic loosened a number of those restrictions, red lines were drawn entitling defendants in a criminal trial to be present at his trial and in the crown court, jurors had to be present. There isn’t time to explore the details but in broad terms the statutory scheme required a magistrate or judge to allow a participant in criminal proceedings to attend remotely unless it was not in the interests of justice to do so. That legislation enabled advocates, witnesses and defendants to attend remotely in a very broad range of circumstances which would not have been possible before. Legislation currently before parliament will, in broad terms, empower criminal courts to continue the use of remote attendance in the future. The rules in civil, family and tribunals were flexible enough with some tweaks to enable hearings to be conducted remotely, encompassing cases where none of the participants attended the court or hybrid hearings where some are present physically and others come in and out remotely. Legislative change was also needed to enable the principles of open justice to be maintained. Mechanisms were introduced to enable remote viewings of hearings, particularly by members of the press. The welcome consequence of that was that in some high-profile cases the media attendance was substantially more than could have been achieved in an ordinary hearing. These changes are also being made permanent and have been refined in the bill currently before parliament. For the future, rules of court need to be reviewed to ensure they place no inappropriate impediment in the way of using technology when it is in the interest of justice to do so.

Secondly, as far as digitisation is concerned in England and Wales the court service has been undertaking a modernisation programme, since 2015. The aim was always to digitise most jurisdictions and to develop a video hearing platform. For most, the use of a digital process is much more efficient than filling out a long form. The parts of our system that had already made progress towards digitisation fostered better during the COVID-19 emergency than those that had not. In the
crown court, almost all jury trials are conducted without paper. Hundreds of millions of pages have not been printed as a result. The online divorce project provides a useful insight into the gains digitisation can make. Manually completed forms were checked by district judges and deputy district judges and approximately 40% were rejected because of basic error. The digital rejection rate is .5% and that’s because the software insists that each step is completed correctly before the next step is taken.

Our modernisation programme is now in its last two years. The digitisation of county court, where most civil actions are dealt with in England and Wales is advancing and will cover the majority of work in that court. Digitisation is also proceeding in the family courts and tribunals. The plan is not simply to digitise current practices but also to build into the systems processes which would encourage settlement, reduce the number of applications and also the number of hearings necessary to resolve cases. My mantra has been that modernisation and recovery from COVID-19 are not separate concepts, but complementary.

Thirdly, remote attendance. For decades in England and Wales, many short interlocutory hearings have been conducted by telephone. Remote attendance of parties and witnesses was already a feature of some of our courts. Defendants in criminal cases could attend court remotely from prison for routine hearings. Yet the necessary and immediate response to COVID-19 was to conduct an enormous volume of hearings remotely, the telephone was used much more, along with commercially available video platforms. In England and Wales, we settled on a system called ‘cloud video platform’ but that is a stepping stone to the better system we hope will come through our modernisation programme. I have often described the pivot to remote hearings as being the biggest pilot in the history of the courts. I have explained that we took three steps forward, but one step back. But there will be no going back to February 2020. We have found it difficult to draw up definitive lists of the circumstances in which remote attendance is appropriate, and where it is not. Almost everybody agrees that the days of requiring lawyers to attend for procedural hearings have gone. Except perhaps when the procedural hearing provides an opportunity for the final resolution of the case. Equally, almost everybody agrees that there are some witnesses whose evidence cannot be taken, satisfactorily remotely. The guiding principle must be in the interests of justice. I should say that the interests of justice are not the same as the interests of lawyers, nor even dare I say it, the interests of judges. The fact that remote attendance of a particular participant may be in some respects less satisfactory than physical presence, does not necessarily lead to the conclusion that the person should be forced to be present. One of the most difficult tasks that faces us is to allow necessary flexibility in the use of remote attendance, but at the same time provide appropriate consistency across the country and across all our jurisdictions. The practical problems of remote attendance are well known to all of us. There are advantages, and patent disadvantages, I won’t rehearse them, there will of course be continued refinements, but I do enter one word of caution. Remote attendance is not necessarily more efficient. Our experience is that in many instances, the use of video technology slows down the process, particularly in courts dealing with a high volume of short matters.

Finally, a word about case management. As judges, we are constantly striving to streamline practice and procedure and to manage cases in a way that serves the interests of justice. In all jurisdictions we face common problems, too many adjournments, too many interlocutory applications and cases being resolved, not in the early stages but after they’ve consumed a great deal of judge and court resources. We see the enhanced use of alternative dispute resolution as critical to the future disposal of business in many of our jurisdictions. The COVID-19 emergency has certainly refocused our attention on all these issues across the courts and tribunals. We have found for example in the crown court that adjusting the way in which trials are case managed resulted in fewer aborted trials, pleas were flushed out and weaknesses in some cases were exposed long before trial. In several jurisdictions, routine directions are being delegated to legal advisors rather than judges. Steps are being taken to review the circumstances in which some applications or small cases can be dealt with on the papers rather than at an oral hearing. These are examples of practice and procedure that were under review but COVID-19 has provided an added impetus.
In conclusion, I would observe that in many of our jurisdictions in England and Wales the outstanding case load has grown, but our judicial resources have not. It will take hard work and imagination, using all the tools available to us to recover those backlogs. Thank you very much indeed.
Session 2: “The Efficient Disposal of Cases after COVID 19”

Hon Justice John Logan, Australia

“Efficient”, I suspect, is a much-misunderstood word, especially by Treasury or Finance Department officials but also by some in the political class, in the media and perhaps also in the judiciary. That is because it is apt to be assimilated with but one of its measures, economic efficiency. That great repository of the English language we share, the Oxford Dictionary, tells us that, as used adjectively, “efficient” means:

“Making causing to be; that makes (a thing) to be what it is; chiefly in connection with cause.”

Our shared “thing” is the independent exercise of judicial power according to law, without fear, favour, affection or ill-will.

As we each now contemplate the exercise of judicial power in the aftermath of this latest of the many pandemics that have periodically afflicted the human species, it behoves us, I respectfully suggest, first to reflect on that which makes judicial power to be what it is. Only if we truly understand that can we assess what, if anything, the experience of the COVID-19 pandemic offers in relation to the “efficient” disposal of cases after that pandemic has run its course.

My peerless sometime leader and adversary at the Bar, sometime Federal Court of Australia colleague and, as a judge of the High Court of Australia, present hierarchical leader, the Honourable Justice Patrick Keane AC, once pithily observed extra-judicially:

An accused person who is tried, convicted and sentenced is not being provided with a service. And when a civil court resolves a dispute between citizens or between a citizen and the State, the parties are not being rendered a service; they are being governed. And the decision which resolves their dispute is the most concrete expression of the law of the land and saves further litigation because it enables the profession to advise their clients so as to avoid litigation.2

Whatever our position in a judicial hierarchy, we exercise one aspect of the sovereign power of the nation we serve. The display of the national (or State or Provincial) coat of arms and crest in a place where we sit is not for personal aggrandisement but a reminder to each of us and those whose cases come before us of the nature of the power that falls for exercise is sovereign. Within its remit, the judicial branch governs.

This basal feature of judicial power must, I suggest, be the paramount determinative in reflecting on what the efficient disposal of cases holds for us after COVID-19. To ignore this feature by continuing, uncritically, practices the adoption of which emergency dictated during the pandemic may result in our shared “thing” of judicial power no longer being, or being perceived to be, sovereign but merely a service to which one subscribes such as Netflix, Prime, Fox Sport and the like. Indeed, some looking for one of our supposed services may come, unwittingly, to subscribe to the “Discovery Channel”

In Australia, over the course of the last 18 months, successive, pervasive lockdowns of varying duration have been imposed by State and Territory governments for public health reasons. These have been married with international and interstate travel restrictions and related quarantine periods. Even when such draconian measures have not been in place, other public health measures such as spatial separation, “social distancing” as it is called, gathering limits, digital check-ins and the wearing of face masks have been imposed. The impact of these on the manner of exercise of judicial power has varied not just according to the particular public health measures of the time but also according to particular features of the jurisdiction concerned.

In Australia, we have come increasingly to Balkanise the exercise of judicial power between national or “federal” courts and State and Territory courts. The analogy with the United States or Canadian justice systems is an imperfect one, as some federal jurisdiction may still be exercised by State and Territory Courts but, ever increasingly, there are jurisdictional carve outs from these courts to the national courts. Of the national courts, the Federal Court is the principal, national trial and intermediate appellate superior court. There is a separate national, specialist, matrimonial causes court, which also exercises some other federal jurisdictions in more minor cases.

For the Federal Court, the impact of the COVID-19 pandemic has been profound. The court has judges resident in each of the Australian capital cities. The court’s jurisdiction is national. Reflecting this, judges do, as occasion requires, sit interstate to exercise original jurisdiction, especially in particular specialist jurisdictions such as taxation, intellectual property and native title. Even more so in relation to the intermediate appellate jurisdiction exercised by the court do judges travel interstate during appeal sitting periods and for special fixtures so as to constitute a Full Court. Reflecting the national nature of the court’s jurisdiction, it is much more frequent than in State or Territory courts for counsel and often also instructing solicitors whose principal place of practice is interstate to travel for the purpose of appearing in court.

The pandemic has led to prohibition or circumscription of travel for such purposes. Further, prudence occasioned by the unpredictable occasion for the imposition of public health prohibitions and restrictions and quarantine periods has made it fraught in any event to travel interstate.

The necessary, reactive result of this has been a pervasive, sometimes near-exclusive use of audio-visual means to constitute the court and for appearances of practitioners and witnesses before the court. Sometimes, this has been via the use of dedicated video links from one courtroom to another, sometimes via computers linked via “Microsoft Teams”, our preferred software platform, sometimes by a combination of these and sometimes by telephone alone. All Australian courts have used these alternatives at some stage during the pandemic but the more local the jurisdiction exercised, the greater has been the opportunity to retain physical appearance in court houses.

During the more severe lockdowns, the conduct of jury trials in criminal cases had to be suspended. These have returned but, presently, courtrooms have had to be adapted so as to achieve prescribed spatial separation. Jury trials apart, spatial separation and related gathering limits have generally impacted upon the number of persons who can be inside a courtroom at a given time. That has limited the number of members of the general public who can attend so as to observe court proceedings.

Lockdowns have also meant that many judges, registrars, associates, personal secretaries, library and registry staff have been obliged to undertake their duties from home via remote internet links, sometimes for extended periods. Opportunities for direct collegiate contact with fellow judicial officers and informal exchanges with personal and other court staff have become commensurately infrequent during lockdowns.

There is a separate conference session especially devoted to problems with remote hearings. Both for that reason and another, I do not intend to dwell overmuch on that subject.

The other reason is that we all know that a hearing, be that in the exercise of original or appellate jurisdiction, is but one manifestation, an obviously important one, of the disposal of cases in the exercise of judicial power. There are a myriad of pre-hearing and also post-hearing procedures
entailed in the disposal of a case. Indeed, many a case is disposed of without ever proceeding to a
hearing or with only a truncated hearing; in the criminal jurisdiction for example, via a sentence
hearing rather than a trial; in the civil jurisdiction via compromise after some pointed exchanges
about prospects at a first case management hearing, perhaps coupled with an early referral to
mediation.

I do wish to share with you two experiences of a remote hearing.

One occurred last year during the height of lockdown periods in several States in case managing an
application for prerogative, or what we have come latterly to call in Australia, “constitutional” writs
in respect of an exercise of judicial power by an inferior tribunal. A senior officer of the Executive,
represented by senior counsel, was the respondent party. The hearing was conducted via the internet
using Microsoft Teams. As the audio-visual link opened, fortuitously at the appointed time, there was
the Silk, appearing from his chambers. In itself, that was routine enough in those times. What was not
routine, even for a case management hearing, was the sight of counsel wearing, as he was obviously
want to do in his chambers, his favourite cardigan! That casual attire was not deliberate, as his all too
evident, genuine embarrassment demonstrated when I announced I would adjourn briefly so he could
attire himself correctly.

The other experience occurred just last month in relation to an exercise of appellate jurisdiction by a
Full Court. In pre-COVID-19 times, that jurisdiction would have been exercised in person in the State
where the case had arisen. However, travel to that State was subject to the most severe restriction on
public health grounds. The Full Court was constituted virtually by me, resident in Brisbane, another
judge resident in Sydney and another resident in Melbourne. Each of them had to participate from
home, given the lockdowns then in place in those locations. The day prior to the hearing date, I was
rather nonplussed when my Associate relayed to me as presiding judge for answering a question from
the appellant’s counsel as to what was expected to be worn under robes? Lockdowns had also dictated
that counsel appear remotely. He was then based in what was at any time of the year, apt to be a very
hot part of Australia. Briefly and unworthily, the one word answer, “Something” occurred. That was
followed in short order by the recollection that newsreaders under hot studio lights had once adopted
the practice of suitcoat, shirt and tie and football shorts, the latter not visible under the desk to the
viewing public! Regaining composure, I requested my Associate to convey that the tropical rig
adopted in pre-air-conditioned days in Far North Queensland and to this day in Papua New Guinea of
barrister’s robe over long-sleeved white shirt, bands and dark trousers would suffice.

These anecdotes have their humorous side but they also convey a more serious truth, related to the
nature of judicial power. It is not a casual affair. Yet remoteness is conducive to casualization in
ways in which physical attendance is not.

Recognition of this is a deliberate design feature of courthouses. The robes worn by judges and
counsel reinforce this, as does the court officer’s cry, “Silence. All rise. The [named] court is now
in session” (or words to this effect). All of this emphasises that sovereign power falls to be
exercised.

Make no mistake, there will be calls in the aftermath of the current pandemic and under the guise of
the “efficient” disposal of cases and reducing the cost of justice, both from within the executive
branch and even also from within the practising profession, especially from those within the
solicitor’s branch who have come to believe that the practice of a learned profession is measured in
six minute units, that there is no need or a reduced need physically to attend court any longer. It will
be said that the experience of the pandemic has proven that. Courthouses, expensive to build and
maintain, are redundant. Lawyers need no longer spend time in traveling from chambers or office.
Parties and other witnesses can appear remotely. We need to move with the times!

3 See The Hon Justice Melissa Perry, --- "2019 SCCI Architecture Hub, "The architecture of justice"
At best and benignly, this, I suggest, is a call for economic efficiency, not for the efficient disposal of cases.

The judicial branch is not populated by Luddites. Even prior to the pandemic, it was increasingly recognised, and as resources permitted adopted, that there were aspects of the efficient disposal of cases that were enhanced by the adoption of modern technologies. During my judicial lifetime, I have seen not just the Federal Court of Australia but also, truly impressively, the Supreme Court of Papua New Guinea and now, increasingly, the National Court of Papua New Guinea adopt electronic court files.

For some 30 years, the High Court of Australia has offered the alternative of appearances in applications for special leave to appeal by video-link. It has long been routine in pre-trial case management in the Federal Court of Australia for interstate practitioners to appear by video-link. It is likewise hardly unusual to grant applications for particular witnesses based remotely in Australia or abroad to give evidence via video-link. There are challenges in relation to the prepositioning of documents and sometimes as to whether, truly, the witness is quarantined from prompting but nothing which ever has been incapable of resolution on a case specific basis.

All of this has already enhanced economic efficiency in the exercise of judicial power without compromising the efficient disposal of cases.

I am quite sure that the experience of the pandemic will translate into the use of other audio-visual links, some remote from court houses, on a case specific basis and as alternatives for such interactions with the exercise of judicial power, most likely for case management purposes.

Some, supposedly economically efficient aspects of the exercise of judicial power, in my view, already at least had a tendency to compromise the efficient exercise of judicial power. Increasingly in recent years, the Federal Court’s appellate lists are populated by cases brought by failed asylum seekers. Many appear on their own behalf with little understanding of English, let alone of substantive and procedural law. In the original jurisdiction, as a result of legislative change, we are increasingly encountering judicial review cases concerning the deportation of non-citizen offenders, some of whom have lived in Australia for many decades. By the time litigation has been instituted, most of the latter class are in immigration detention.

There is a serious access to justice issue entailed with any adoption of internet based technology for appearances by litigants in person and also as between well-resourced larger law firms or chambers and smaller firms and sole practitioners. It is all too easy to assume that there is ready and general access to computers and reliable internet connections. This is just not so even in generally prosperous Australia, let alone in a developing nation such as Papua New Guinea. Access to and reliability of the internet has greatly improved over the decade I have served in PNG but that access, even access to a computer at all is far from pervasive.

Further and fundamentally, in certain public law cases there can be an inherent tension between the institution of a judicial proceeding challenging the legality

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5 For a critique of the access to justice issues related to proposed introduction of “online courts” in the United Kingdom, see, recently, Catrina Denvir and Amanda Darshini Selvarajah, Safeguarding access to justice in the age of the online court, Modern Law Review, early view, published online 24 August 2021: https://onlinelibrary.wiley.com/doi/10.1111/1468-2230.12670
of a decision grounding executive detention and the retention of the challenger by the executive during the course of a hearing in respect of that challenge. Production of a detainee before a judicial officer in a court house emphasises both to the detainee and to the executive that an independent aspect of sovereign power, judicial power falls to be exercised. Even more so is this true in relation to the production of a prisoner for a criminal trial. Control of the detainee or prisoner is, for the purposes of the exercise of judicial power, passed from the executive to the judicial branch of government.

Even before the pandemic, there were pressures on the judicial branch to yield such control. Economic efficiency and sometimes security issues grounded such pressures. In relation to pre-trial case management including bail proceedings, video link and computer based internet link can serve such grounds without compromising the efficient disposal of cases. But they are not perfect substitutes. A complaint to a judicial officer about conditions of detention or access to lawyers is diminished in its impact or even likelihood, I suggest, if made from the facility where the basis for the complaint, real or imagined, has arisen. The same features can attend a judicial command to remove restraints for the purposes of a hearing, I suggest.

In jurisdictions large and small, judges and magistrates are either out-posted or proceed on circuit, the Assizes of old. Why is this done? It is not just because it enhances access to justice; it is also because justice is best delivered, and just as importantly seen to be delivered not just in public but locally and by physical attendance. In relation to any exercise of sovereign power, there is a qualitative difference between physical and online attendance. The same is true in relation to the observation of cases by the public.

In relation to sovereign power, that is not confined to its judicial aspect. I have taken oaths of office before Vice Regal officers at Government Houses both in Canberra and in Port Moresby. Last year, in respect of my current term of appointment in PNG, the exigencies of the pandemic dictated that this be performed via an internet link to Port Moresby. It was an honour again to take the judicial oath for PNG but the experience was qualitatively different to an attendance in person.

In my home State, Queensland, the most decentralised in Australia, recognition of this desirable, local aspect of the exercise of judicial power has long seen not just magistrates but also judges out-posted to major regional centres. Even more so is this feature recognised and necessary in Papua New Guinea, where rugged terrain greatly impacts on ready regional travel other than by air. Not just in theory but also in practice with the march of technology remote court hearings for many cases great and small were possible even before the pandemic. But as this conference and our experience of it illustrates, the sense and society of a remote hearing is qualitatively different to physical attendance.

We humans are social animals. An exercise of judicial power, civil or criminal, original or appellate, is a very particular form of socialisation. No-one who has experience of appearance in court in practice or in the exercise of judicial power in open court needs any reminding of the force which direct judicial involvement brings to a proceeding. Nor of the tempering quality in terms of judicial behaviour of that power being exercised in public. Many a civil case never proceeds beyond a first case management hearing and many an offender never re-offends because of the experience of the force of judicial power. Commensurate savings in public finds and private angst are the result.

Experienced judicial officers know this. Treasury officials, I suggest, do not.

In modern times, various forms of alternative dispute resolution, mediation especially, have become a feature of the disposal of civil cases. Once again, it needed no pandemic to instruct that in theory and via increasing access to technology in practice mediation could be conducted remotely. Once again, however, the dynamics of a mediation are very different if remote means are adopted rather than physical attendance. The reasons also lie in our in-built disposition to society. A pressure cooker atmosphere is hardly enhanced if a real-life pressure cooker is hissing in the background of a remote attendance!
Each of us also knows from experience the benefit in cases great and small in original and appellate jurisdiction of Socratic dialogue between bench and Bar. Attention can quickly be focussed on the real issues for decision. My experience is that the opportunity for this is invariably diminished, even by the most reliable of internet connections. Non-verbal communication signals are muted; interruption is apt to be difficult. Even more this is so where pandemic necessity and the fallibility or unavailability of the internet has dictated the use of the telephone only. With the latter, I have found that an adaptation of long ago learned military radio procedure -OVER -is the only way efficiently to exercise judicial power. It stops mutually stressful, unintended interruptions, as it does on a military radio net.

In the Federal Court, next year, I expect we shall resume generally the discharge of judicial power via in person hearings for trials and appeals. In Papua New Guinea, that is already occurring in the exercise of original and appellate jurisdiction both at Port Moresby and in provincial centres and will increasingly occur in the forthcoming year.

Over the last 18 months as an emergency measure during lockdowns, the PNG Supreme Court adopted as an alternative when requested by the parties the hearing on the papers of appeals. This method is adequate in an emergency but is not truly efficient. A question which occurs on looking at a written submission and which might be answered instantly by Socratic dialogue must either not be answered or, because of the dictates of natural justice, be posed and answered in writing with attendant delays in the disposal of the appeal.

We should not diminish the value of direct collegiate contact. In court, in the exercise of appellate jurisdiction, this is well-nigh impossible during the hearing of an appeal. Try monitoring a chat line in conjunction with counsel appearing remotely while navigating the PDF appeal book – possible, yes, just, desirable not at all. That is quite apart from the benefit of an informal chat with a colleague over lunch or before or after court, possible via “Teams”, desirable not at all.

I wish to conclude by sharing this thought about the pandemic and the efficient disposal of cases after the pandemic.

None of my Federal Court colleagues or court staff has died as a result of COVID-19. Not so in relation to Papua New Guinea. Two of my PNG-resident judicial colleagues died from that cause earlier this year, one a good friend and contemporary, the other younger but each with a wealth of experience from high level legal practice. There have been deaths due to COVID-19 in the ranks of court officers and administrators and their families in PNG. Thankfully, reports of such occurrences are diminishing, perhaps because the pandemic is running its natural course. Of course, none of us is indispensable and each of us must eventually retire. There is a usual turnover in any judiciary. But the premature loss of experienced judges to a bench which is already challenged in numbers to meet the demands of an increasing and increasingly sophisticated population disrupts that usual turnover and has a magnified impact. Those of us in the judiciaries of developed countries need to be sensitive to this occurrence and ready in lending support as requested to our developing country colleagues to assist them in doing our shared “thing”. That is a good way of enhancing the efficient disposal of cases.

Hon Justice Awa Bah, The Gambia

Introduction:
"Covid 19", the very unexpected and unwelcomed global visitor has left untold damages along its footprints in the sands of our times. Undoubtedly, Covid 19 has adversely affected all works of life, not to mention the huge loss of valuable human lives, its socio-economic effect in our countries, over-stretched burden on our struggling health care systems, and the list goes on. Certainly it has awakened us to the true realities of life. The justice delivery system, especially the courts, is no exception to the havoc caused by Covid 19. The judiciary of The Gambia has not escaped the long tentacles of Covid 19.

This topic under discussion, "The Efficient Disposal of Cases after Covid 19" is not only timely but topical as judiciaries across jurisdictions strive to cope with the effects of Covid 19 and to chart a way for more resilient judiciaries that can withstand such crisis with minimal effects on our justice delivery system and without compromising the adherence to rule of law and access to justice for all.

Discussion:
Access to justice and within reasonable time is a fundamental right which has been guaranteed in the Constitution of The Gambia. Our courts are therefore obliged to ensure that litigants, who seek redress/justice before them, get their matters resolved fairly and justly and within reasonable time. The saying is hallowed that "justice delayed is justice denied" though there is the counter argument to it. Speedy dispensation of cases is a sine qua non for justice to be delivered especially in criminal trials where the liberty of the subject is at stake, taking into cognisance the common law principle that an accused person is innocent until proven guilty. A right also guaranteed in most of our national constitutions.

Covid 19 has brought to the fore the challenges or deficiencies in our judiciaries and has thus become the drive for the necessary improvements in our judiciaries for a more effective and efficient justice delivery system.

Speaking from the Gambian experience, Covid has surely added to the hitherto existing backlog of our cases and we are faced with the challenge of choosing between health and safety on the one hand and the promotion of rule of law and access to speedy justice for all (the expectation of the court users) on the other. Certainly our judiciary was not prepared for such a situation. The first action that came to mind when Covid reared its ugly face on our shores was for the courts to be closed down in order to save the lives of not only the judges, magistrates and other court officials but also that of the litigants, the lawyers and the general public at large.

The machinery of justice was certainly brought to a halt for a short while in the mist of the pandemic and the need arose to strategise the way forward in order to allow the machinery of justice to continue to operate and to do so efficiently. Our Hon. Chief Justice had to be proactive under the circumstances and closed down the courts for at least two months though hesitantly and issued a practice direction for very minimal hearings in a day and only for criminal cases and at scheduled times (to reduce the clogging in our courts by the public). The necessary emergency health and sanitary measures had to be looked into and put in place. However, the civil cases were held at bay and only few criminal cases could proceed because all the stakeholders were hesitant to sit in open court. In addition, only essential admin and court staffs were directed to come to work and on a shift basis, to minimise the spread of infection.
There was the great need for an alternative to the open court hearings if the courts were to continue in operation as Covid showed no signs of relenting. The need for the use of "Technology" came to the fore. Harnessing technology is an absolute necessity in the modern day judiciary. With the initiative and support of the UNDP in The Gambia, the virtual courts were introduced for the remote trials of criminal cases and the judiciary was linked with the Attorney General's Chambers and the Central Prisons remotely. The pilot was for only cases involving bail applications and was subsequently rolled out to other judges. Even the magistracy in the Greater Banjul Area were subsequently linked up in the remote hearings. It became effective that some judges decided to hear some civil cases remotely in very simple matters of applications and were witnesses were not needed, bearing in mind the interest of justice and not only that justice must be done, but must be seen to be done. Platforms such as zoom were being used with the agreement of parties/counsel. In fact the service of processes was at the time done electronically by email and notices were even sent by WhatsApp.

The challenge that arose was that are legislations and rules of court had no provisions for the utilisation of remote hearings and the use of technology in our case management system. There was the need to give the system legitimacy. The Hon. CJ had to pass a practice direction as an interim measure on the modalities for the use of the virtual courts and service by electronic means due to the Covid 19 pandemic. Our rules of court as they were had no provisions for this innovation.

**The lessons learnt:**
What Covid has taught us, is that we need to put in place such resilient systems and structures that will in the future guard the machinery of justice from being brought to a halt even if for a short time. Systems that will ensure the smooth operation of the courts, in any event (come what may). To achieve this objective, there is dire need for cooperation amongst all the stakeholders especially the private bar without whose cooperation it would be difficult for the judiciary to achieve its objective of dispensing justice in an effective, efficient and timely manner. Covid has taught us that:

1. We could actually hear and determine matters remotely and can actually dispense with public hearings in certain cases. This would certainly enhance speed and efficiency in the disposal of cases and reduce to a large extent the challenges faced with physical hearings. Notwithstanding, consideration must be given to those court users without access to technology bearing in mind the principal objective of ensuring access to justice for all. Additionally, there is the need to look at our laws and rules of court and practice directions with a view to making provisions for the use of remote hearings. Thus there is the need to amend our existing laws/rules.

2. We also realised that the lack of automation in our courts is a big challenge. Readily available typed or transcribed records of proceedings are a big hindrance to progress in our courts, especially at the appellate levels. Unfortunately, in our courts we still record proceedings in the long hand. A very onerous task for a judge/magistrate who has a caseload of over 100 cases and has to sit for long hours in a day presiding over cases. The need for harnessing technology became more imminent. Certainly, there is only so such a judge can do in a day if he /she is recording proceedings in the long hand. This is truly not efficient and Covid has made it more apparent. Most appeal trials are held back due to lack of typed records of proceedings. Thus there is the need to automate our courts and our registries (the engines of our judiciaries) and to aim at making our judiciaries work paperless, i.e go E- Judiciary. Automation will certainly enhance efficiency in the justice delivery system. Harnessing technology is as a result a key component in our five year strategy plan for the judiciary to improve on its service delivery.

3. The need for readily available electronic research tools (online law research tools and E-libraries) cannot be over-emphasised. The easy access will surely reduce valuable time spent on manually researching through piles of legal texts. An enriched decision is certainly a mark of efficiency and shows competence in the judge.
4. Another strategy the Hon. CJ has put in place for the efficient disposal of criminal cases is to dedicate a particular month in each term in the legal calendar for the trial and disposal of criminal cases only. This will ensure that maximum progress is achieved in the disposal of criminal cases which are ever on the rise. Likewise the scheduling of call over of criminal cases, in particular remand cases with a view to summarily disposing off as many of them as possible. Let me also mention that we are looking into the creation of divisions in our courts so that cases are assigned to the relevant divisions for more efficiency and speedy dispensation.

5. The need for settlement of disputes out of court has also come to the fore. Alternative Dispute Resolution (ADR) as a tool for dispute settlement comes with huge benefits. It reduces valuable time spent in litigations, saves monies and even cements relationships. Our courts are over inundated with cases that could be easily settled amicably and have no business in our courts. As judges we should be able to quickly identify cases with the potentials of settlement out of court and encourage parties to explore same. We have concurrently reviewed our Court Connected ADR structure, legislation and rules with a view to update and revive the system. We intend to make more good use of the mechanism and to even make it mandatory for parties to explore ADR before trial proper. An efficient use of the mechanism will greatly reduce the workload of the judges whose numbers at present are insufficient. (10 high court judges). It is also a component in our judiciary strategy plan.

6. Another important tool is Case Management. Judges and Magistrates must acquire case management skills for the efficient disposal of cases. Presently there is no such formal electronic case management structure/policy in place in our judiciary but the judges and especially the magistracy have been trained on the requisite skills for the effective and efficient disposal of their cases. A judge must be in control of not only the court, but also the case/trial from beginning to end. One must therefore be well prepared before going to court. Study the case file, refresh on the relevant law, rules and procedures and strictly apply same to avoid delays, impose sanctions for non-compliance by litigants/lawyers, set timelines, give adjournments sparingly, apply more on-the-bench rulings, manage your cause list, set cases that are ready to proceed, set a particular day for motions/interlocutory applications and /rulings to unclog your cause list, etc.

7. All the above laudable initiatives cannot however be achieved without the necessary financing. Our judiciaries must be sufficiently funded if they are to be efficient and effective in the dispensation of justice. Every component of it needs financing and our governments must heavily invest in our judiciaries. The fundamental role the judiciary plays in the democratic governance structure of a state cannot be emphasised, least to say in its socio-economic development. Putting in place the necessary structures and facilities (training, equipment, technology, enabling environment, welfare systems, etc.) requires adequate resources and without which implementation and sustainability would be farfetched.

Conclusion:
In conclusion, I must say that bitter lessons have been learnt from this advent of Covid 19 but need I say that they are all for the better. Our judiciaries have come out to be more the better in terms of efficiency and effectiveness in the justice delivery system. Covid 19 has given us the opportunity to assess our strengths, weaknesses, challenges/threats and the opportunities such as the use of technology in our courts. We have therefore been forced to go back to the drawing board to reflect, adjust and try to improve and build on what we already have. Covid though a crisis has undoubtedly opened our eyes to the realities and needs of a modern day judiciary and there is no turning back.

I THANK YOU ALL.
Hon Justice Jacqueline Kamau, Kenya

(ABSTRACT)

Chief Justice Wille Mutunga (Emeritus) who was appointed as the first Chief Justice and President of the Supreme Court under the dispensation of the Constitution that was promulgated in 2010 formulated what was referred to as Judiciary Transformation Framework (JTF) to facilitate the expeditious and cost effective delivery of justice to all.

He established Integrated Court Management Systems Committee (ICMS) which oversaw the development of systems that would enable judges and judicial officers work online. There was great resistance to this mode of working until Covid-19 pandemic struck. Now every judge and judicial officer is now able to use the virtual platform.

Different courts have embraced different platforms that suit their needs. The Supreme Court and Court of Appeal have been on virtual platforms. Some High Courts have been conducting their cases virtually while others have continued with physical contact with litigants.

The factors that have influenced how courts operate has been greatly influenced by the clientele that accesses each court, nature of cases to be conducted, and the area where the court is situated. It has been easier to conduct civil, commercial, probate cases, mentions and applications and/or motions virtually as compared to conducting cases especially, criminal cases. Socio-economic status of litigants has thus been a factor in access to justice. Litigants in the diaspora have benefitted from the virtual platforms.

Thousands of decisions have been delivered during this Covid-19 pandemic period. This has gone a long way to reduce backlogs in very challenging situation. Kenya will most likely adopt both a hybrid system of delivery of justice to cater for those who are able to access hearings online and physical hearings where litigants are not able to have such access.

Kenya attained its independence from the British on 12th December 1963. The Constitution that was enacted then provided for a one (1) party State. The only political party that was recognised was Kenya African National Union (KANU) party. Although there was a clamour to change the Constitution, it was not until 1991 that the then President of the Republic of Kenya Daniel Arap Moi acceded to the country becoming a multiple party State. The clamour change continued and on 27th August 2010, the Constitution of Kenya was promulgated after years of clamour to change the way Kenyan wanted to be governed in the Judiciary, the Executive and Legislature.

The Judiciary also needed change after years of the judges and judicial officers been seen as an appendage of the Executive. Judges were in fact appointed by the President. Indeed, the urgency to change the way the Judiciary delivered justice was fast tracked after the infamous 2007-2008 post-election violence as the party that lost in the 2007 General elections went to the streets to protest the election results. They did not seek justice in the courts because courts were seen to be corrupt. For a long time, the question was, why hire a lawyer when you can bribe a judge?

Chief Justice Willy Mutunga (Emeritus) was therefore appointed as the first Chief Justice and President of the Supreme Court under the dispensation of the new Constitution. He formulated what was referred to as Judiciary Transformation Framework (JTF) to facilitate the expeditious and cost effective delivery of justice to all. The Kenyan Judiciary also had a duty to be accountable to all those who approached court to access justice.
One of the pillars of the JTF was harnessing ICT to enhance delivery of justice. This is not to say that there were no initiatives to digitise the Judiciary previously. Hundreds of files had been digitised. The World Bank had also installed several video conferencing facilities in the Commercial Division of the High Court at Milimani Law Courts in Nairobi. However, the process of digitisation of files did not appear to have borne much fruit despite a lot of resources having been invested. The video conferencing facilities were also never utilised. Judges, judicial officers, judiciary staff, the advocates, litigants, in fact, the entire chain in the administration of justice were slow in taking up the new processes. This could have been attributed to the fact that not all stakeholders in the chain of administration of justice had the same resources to make the process work. Indeed, training of manpower and physical infrastructure was a critical component. All these required financial resources which were not adequately allocated to the Judiciary.

In 2013 therefore, Chief Justice Willy Mutunga (Emeritus) constituted the Integrated Court Management Systems Committee (ICMS), in which I was a member, to integrate all systems into one so that they could all be accessed in one touch of a button. This Committee oversaw the development of systems that captured daily returns of the work that was done by judges and judicial officers and digitisation of all files so that they could work online without necessarily going to physical courts. This was resisted to a great extent and over the years the said Committee was not a favourite to many for wanting to change the status quo.

After the retirement of Chief Justice Willy Mutunga, Chief Justice David Maraga (now also Emeritus) was appointed as the second Chief Justice of the Republic of Kenya and President of the Supreme Court of Kenya in 2016. He did not re-invent the wheel that had been put in place by Chief Justice Willy Mutunga (Emeritus). He referred his approach as “Sustaining Judiciary Transformation (SJT)” which continued to harness technology as an enabler of justice. However, despite the said Committee pushing for embracing of technology to deliver justice, its attempts to have the judges buy in the delivery of justice through the online platforms were rejected. No one wanted to change the status quo. It had always worked. So why change what was not broken.

Bang…. Covid-19!!!! On 15th March 2020 or thereabouts, the first Corona virus case was reported in Kenya. Within a few days, courts in Kenya were closed. The way justice was to be delivered changed. The ICMS Committee swung into action and created accounts for all judges and judicial officers for the virtual platform accounts. Most judges and judicial officers were scared of technology and were reluctant to embrace the new way of doing business. This time, they were not resisting technology, they were just afraid to use it.

In the Civil Division where I then worked, I volunteered to be the first to try and use the virtual platform to work on applications that had been filed under urgency. The solution of documents being forwarded through a VPN system worked and orders were generated and accessed by litigants and their advocate’s real time. By about August 2020 when superior courts went on Recess, very few judges and judicial officers had embraced this technology. They were apprehensive of trying out the technology as they had previously declined to be trained on how to use the system reasoning that Covid-19 was a passing cloud and normalcy of physical courts would soon resume.

As it became obvious that Covid-19 was not about to go away soon, many judges and judicial officers had no option but to accept to be trained on how to use the virtual platforms to deliver justice. The option of working from home so as to avoid being infected with the disease was also attractive fast tracking the embracing delivery of justice through virtual platforms. Emails were created to enable advocates and litigants file documents. As at April 2020, 2,591 documents had been filed in the High Court. There were challenges in this mode of filing of documents because at times, the same entailed attaching voluminous documentation. There were also challenges in printing bulky documents. In the same month of April 2020, 1,772 Rulings and Judgments were delivered. Often times, decisions could not be delivered because the email addresses of many advocates and litigants were unknown. Notably, the uptake of filing documents and
delivering decisions was initially slow due to frustrations. However, as time went on, the Judiciary and its stakeholders fine-tuned the way the filing and delivery of decisions were done.

Shortly, thereafter, the Case Management System (CMS) which had previously been used to capture data for the filing of the Daily Court Returns (DCR), was re-organised to allow the filing of documents through the platform.

It is important to point out that before Covid-19 struck, the rate of filing and resolution of cases in the Judiciary was very high. The rate of filing and resolution of cases dropped from about 490,000 cases to 340,000 cases. The rate of filing and resolution of cases has started going up and currently, the same stands at over 359,000. What is evident in these numbers is that filing and resolution of cases did not stop after Covid-19 struck. The Judiciary merely innovated new ways of dispensing justice.

Different courts have embraced different platforms that suit their needs. The Supreme Court proceedings have been digitised since its inception. It now conducts all its sessions virtually as does the Court of Appeal. In the Supreme Court building which houses the Court of Appeal, special areas where advocates and litigants who had no access to internet could come and log in for the court sessions were set up.

Some High Courts and subordinate courts have been conducting all their cases virtually. Others have adopted a hybrid system which is both virtual and physical while others have gone back to complete physical contact with litigants. Where courts have conducted hybrid system, there is an ever present threat of judges, judicial officers, judiciary staff, advocates, litigants, prosecutors and witnesses contracting Covid-19 during the court sessions.

The factors that have influenced how courts operate has been greatly influenced by the clientele that accesses each court. The Supreme Court, Court of Appeal and High Court at Milimani Commercial Courts which have been operating in Nairobi have been mainly virtual. This is because they already have the infrastructure to conduct proceedings virtually. Their clientele also majorly has the infrastructure to log into these virtual sessions.

However, there have been difficulties in conducting virtual hearings of criminal cases in Nairobi. The high traffic of people has created a challenge in observing the Covid-19 Ministry of Health Protocols effectively. To ensure that access to justice continued uninterrupted, the Judiciary procured tents which are mounted outside the courts to ensure that hearings continue. In some courts, however, the accused persons in criminal cases have remained behind bars without hearing of their cases going on as directions on hearing of the cases are yet to be given.

There has also been no adequate financial allocation to procure tents. Some courts do not also have enough space to conduct the cases in the court compounds. Virtual platforms have therefore impeded access to justice to many accused persons. There has been a challenge in commencing criminal cases at full throttle as the cases of Covid-19 keep on fluctuating.

In other towns outside Nairobi, some courts have continued to conduct criminal hearings physically but hear civil and commercial matters online. Other courts have only continued to hear mentions and applications and/or motions only with substantive hearings not been listed for hearing. In other courts, no hearings are taking place as guidelines on how hearing should be conducted have not yet been issued. In other courts, guidelines have been issued enabling the hearing of cases.

Notably, the Rent Restriction and Business Tribunals and far flung areas have also not been able to enjoy delivery of justice through virtual platforms for the reason that a majority of its the clientele has no access to infrastructure to log into virtual platforms. They lack laptops, computers and/or smart phones that could assist them to participate in the virtual hearings. Since the physical hearings cannot go on, many of their cases have remained unheard. However, all efforts are being made to ensure
hybrid system of dispensing justice is adopted to ensure that filed matters proceed for hearing and determination.

Having said so, most of the courts even in remote areas of Kenya have Wi-Fi connections. It is important to point out that the internet connectivity and its stability are critical in ensuring that dispensing justice through virtual platforms succeeds. More needs to be done to ensure that all courts have stable and good network to conduct court proceedings.

Courts have unique challenges so guidelines cannot be uniform across the board. Courts are working closely with Court Users Committees (CUCs) which comprise of all actors in the administration of justice and the ICT to come up with guidelines on how to ensure the vulnerable access justice in these challenging times. It is not expected that the Kenyan Judiciary will go back in the innovations that it has made in the dispensation of justice. It is still innovating ways to ensure that the vulnerable are also not being left behind. The Kenyan Judiciary is working on ways to train cybercafé staff who can assist those who have no infrastructure such as laptops, desktops, smart phones to log into court sessions. Having said so, there is need for more resources to be allocated to the Judiciary of Kenya because even utilising cybercafé services requires money which many litigants might not afford.

On the whole, Kenya is a good example to demonstrate that despite challenges during Covid-19 pandemic, innovation in technology had increased and continues to increase the filing and resolution of cases thus ensuring everyone accesses justice remotely as has been enshrined in Article 48 of the Constitution of Kenya, 2010. However, as the Kenyan Judiciary does not work in isolation, the Government needs to allocate more funding to other players in the chain of administration of justice to ensure that all stakeholders move in tandem.
The Rt Hon Lord Justice Bernard McCloskey, Northern Ireland

Preface
I am privileged and honoured to contribute to this prestigious event and, in doing so, to make contact with fellow judicial office holders around the globe. We have so much to learn from each other, especially in pandemic times. I have appended to this paper certain materials which may be of interest.

APPENDIX 1:
The Northern Ireland “Covid” Practice Direction

APPENDIX 2:
Excerpts from R (on the application of Kiarie) (Appellant) v Secretary of State for the Home Department (Respondent) & R (on the application of Byndloss) (Appellant) v Secretary of State for the Home Department [2017] UKSC 42, a decision of the UK Supreme Court.

An Overview
The impact of the pandemic on access to justice generally and judicial adjudication in particular has been manifest in at least two significant respects. First, heavily reduced judicial adjudication services. Second, the emergence of the phenomenon of virtual, remote judicial hearings.

The first of these phenomena, namely heavily reduced judicial adjudication services, threatens and weakens the rule of law. The rule of law is a species of superior medium to which every EU Member States, every state party of the Council of Europe and every developed democracy throughout the modern world subscribes, at least superficially. It is, in short, the cornerstone and the bedrock of every civilised democracy. The second of the new emerging phenomena, linked to the first, namely remote judicial adjudication, poses a series of issues and challenges which are unavoidably evolving in nature.

These twin phenomena clearly have important consequences for those who are entitled to the protection of the rule of law, namely every member of society. Access to justice may be described as the overarching right. The citizen’s right to a fair hearing can be viewed either as an aspect of this overarching right or a self-contained free-standing right. Either way, its content and components are essentially the same.

Given the unprecedented circumstances brought about by the pandemic, it is necessary to, firstly, examine the ingredients of the citizen’s rights of access to justice and a fair hearing. I consider that it is possible for all of us participating in this valuable event to do so through essentially the same legal prism by virtue of what we have in common namely our common law tradition and shared membership of the Commonwealth and the CMJA, together with constitutional principles and international standards recognised by each of our countries. The rights of access to justice and a fair hearing are nothing if not internationally recognised and shared.

The Right To A Fair Trial
Article 6(1) ECHR provides a useful point of reference which is replicated in other human rights instruments, including Art of the ICCPR and many national constitutions:

“Right to a fair trial
In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national
security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

The requirements of Article 6(1) apply to both civil and criminal litigation. In criminal cases there is a suite of additional rights, prescribed by paragraphs (2) and (3). Some of these additional, or enhanced, rights are clearly established by implication – and by domestic legal rules and principles, including constitutional rights in certain instances – in civil cases also: in particular the right to be notified of and understand the other party’s case, the right to adequate time and facilities for the preparation of a party’s case, the right to legal representation, the right to public funding for legal representation in certain cases and the right to examine the evidence of the other party and its witnesses (which plainly requires a species of oral hearing). There is also a right to an interpreter in appropriate cases.

Notably, Article 6(1) does not guarantee an automatic and absolute right to an oral hearing in non-criminal cases. But the principle favouring such a hearing is a powerful one. The Grand Chamber of the ECtHR has formulated the main principle thus:

“47. According to the Court’s established case-law, in proceedings before a court of first and only instance the right to a “public hearing” in the sense of Article 6 § 1 entails an entitlement to an “oral hearing” unless there are exceptional circumstances that justify dispensing with such a hearing (see, for instance, Håkansson and Sturesson v. Sweden, judgment of 21 February 1990, Series A no. 171-A, p. 20, § 64; Fredin v. Sweden, judgment of 23 February 1994, Series A no. 283-A, pp. 10-11, §§ 21-22; and Allan Jacobsson v. Sweden (no. 2) judgment of 19 February 1998, Reports 1998-I, p. 168, § 46).”

A breach of Article 6(1) ECHR was found by a majority of 9/8. The joint dissenting judgment of eight judges is noteworthy for its elaboration of the several governing principles:

“We disagree with our colleagues on one point: we find no violation of Article 6 § 1 of the Convention on account of the lack of a hearing during the domestic proceedings, for several reasons.

In the first place, the Court’s case-law has never required oral proceedings in all circumstances. In many trials a written procedure may be sufficient, for example, where a litigant has expressly or tacitly waived his entitlement to a hearing, or where the dispute does not raise any public-interest issues making oral submissions necessary, or, when there is only one level of jurisdiction – which is not the case here – in exceptional circumstances. Relevant authorities include Håkansson and Sturesson v. Sweden (judgment of 21 February 1990, Series A no. 171-A, pp. 20-21, § 67), which concerned a dispute over the lawfulness of a sale; Schuler-Zgraggen v. Switzerland (judgment of 24 June 1993, Series A no. 263, pp. 19-20, § 58), concerning an appeal to the Federal Insurance Court about an invalidity pension; Allan Jacobsson v. Sweden (no. 2) (judgment of 19 February 1998, Reports of Judgments and Decisions 1998-I, p. 169, § 49), concerning an appeal to the Supreme Administrative Court, ruling at first and last instance, against a refusal of planning permission; and

1 “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. 3 Everyone charged with a criminal offence has the following minimum rights:
(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
(b) to have adequate time and facilities for the preparation of his defence;
(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”
the inadmissibility decision of 25 April 2002 (Third Section) in *Lino Carlos Varela Assalino v. Portugal* (no. 64336/01), concerning an application for a will to be declared null and void and for a declaration of unworthiness to inherit.

That case-law lays down three criteria for determining whether there are “exceptional circumstances” which justify dispensing with a public hearing: there must be no factual or legal issue which requires a hearing; the questions which the court is required to answer must be limited in scope and no public interest must be at stake. In the present case these three conditions were satisfied.”

The following passages from *Martinie v France*¹, another Grand Chamber decision, are equally noteworthy:

“b) The Court’s assessment

(i) Lack of a public hearing before the Court of Audit

The Court reiterates that the public character of proceedings before the judicial bodies referred to in Article 6 § 1 protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention (see, among many other authorities, *Axen v. Germany*, judgment of 8 December 1983, Series A no. 72, § 25).

The right to a public hearing implies a public hearing before the relevant court (see, *inter alia*, *mutatis mutandis* *Fredin v. Sweden* (no. 2), judgment of 23 February 1994, Series A no. 283-A, § 21, and *Fischer v. Austria*, judgment of 26 April 1995, Series A no. 312, § 44). Article 6 § 1 does not, however, prohibit courts from deciding, in the light of the special features of the case submitted to them, to derogate from this principle: in accordance with the actual wording of this provision, “... the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice”; holding proceedings, whether wholly or partly, in camera, must be strictly required by the circumstances of the case (see, for example, *mutatis mutandis*, *Diennet v. France*, judgment of 26 September 1995, Series A no. 325-A, § 34).

Moreover, the Court has held that exceptional circumstances relating to the nature of the issues to be decided by the court in the proceedings concerned (see, *mutatis mutandis*, *Miller v. Sweden*, no. 55853/00, 8 February 2005, § 29), may justify dispensing with a public hearing (see, in particular, *Göç v. Turkey* [GC], no. 36590/97, § 47, ECHR 2002-V). It thus considers, in particular, that social-security proceedings, which are highly technical, are often better dealt with in writing than in oral submissions, and that, as systematically holding hearings may be an obstacle to the particular diligence required in social-security cases, it is understandable that in this sphere the national authorities should have regard to the demands of efficiency and economy (see, for example, *Miller and Schuler-Zgraggen*, cited above). It should be pointed out, however, that in the majority of cases concerning proceedings before “civil” courts ruling on the merits in which it has arrived at that conclusion, the applicant had had the opportunity of requesting a public hearing.

The position is rather different where, both on appeal (if applicable) and at first instance, “civil” proceedings on the merits are conducted in private in accordance with a general and absolute

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principle, without the litigant being able to request a public hearing on the ground that his case presents special features. Proceedings conducted in that way cannot in principle be regarded as compatible with Article 6 § 1 of the Convention (see, for example, *Diennet and Göç*, cited above): other than in wholly exceptional circumstances, litigants must at least have the opportunity of requesting a public hearing, though the court may refuse the request and hold the hearing in private on account of the circumstances of the case and for the aforementioned reasons."

In civil cases the common law, like Article 6(1), does not guarantee an oral hearing in every instance.\(^4\) I would suggest that some care is required in the use and understanding of the familiar expressions “hearing” and “oral hearing”. Reflection on the equivalent expressions in other European jurisdictions is instructive. The favoured Spanish word is *vista*, a noun derived from the verb *ver* namely to see. Although in contrast in other languages the emphasis is on the *auditory*.\(^5\)

**A Commonality of Issues and Challenges**

Some of us may have a specialism—whether as judges, practitioners, academics, legal researchers or public servants - in specific areas of legal practice: criminal, civil, family and children, administrative law, employment, taxation *et al.* Irrespective, I suggest that in the present crisis we have much to learn from each other as many of the issues and challenges posed by the pandemic are common to multiple courts and tribunals in many countries.

One of the most important (and interesting) phenomena thrown up by the pandemic is that of differing legal cultures, systems and traditions. I elaborate thus. In certain contentious litigation matters the established legal tradition, culture and practice of certain countries may entail, or favour, paper judicial adjudication. Broadly, it would seem that in this discrete cohort of cases the pandemic should not pose any major problems other than practical ones – in particular the availability of case papers and supporting staff of court administration, together with facilities for communicating efficiently with parties and their representatives. In principle cases belonging to this category have never required an oral hearing (subject to exceptions and qualifications) and, therefore, should not require any special adjustment in the crisis inflicted by the pandemic. This is the first identifiable category of cases.

Next, there is a category of cases with an already established practice of remote judicial adjudication by whatever means-telephone, skype, video-link etc. In principle, cases belonging to this category should be unaffected by the pandemic, subject of course to logistical considerations – in particular the availability of court administrative staff, the availability of the parties and their legal representatives, the provision of hard copy – or good quality and accessible electronic - case papers and functioning IT systems.

The third identifiable category is cases involving purely procedural and case management orders and the regulation of certain preliminary and ancillary and incidental matters by the court, in both civil and criminal cases.

In a still further category there are cases which the parties are capable of resolving their dispute consensually i.e. without judicial adjudication. Self-evidently this must be strongly encouraged. Furthermore this draws attention to the merits of mediation and the need for strong judicial exhortation and support of this valuable mechanism.\(^6\)

The next category is cases where, normally with appropriate judicial encouragement, the material facts can be agreed between the parties. This mechanism can be tried in every type of case: criminal,

\(^4\) See De Smith’s *Judicial Review* [7th ed], 7-062 ff.

\(^5\) *L’audition, la udienza* and *la audiencia* in French, Italian and Portuguese respectively, while *audiencia* is the interchangeable Spanish word.

\(^6\) See further the thoughtful publication of Emma McIlveen, a practising NI barrister and accredited mediator, on the Ireland Legal News website [24/04/20]
civil, administrative et al. Once again, the judge has an important role. Cases belonging to this category are in principle suitable for remote judicial adjudication, whether purely on paper or with some Video-link remote hearing supplement.

I turn to the subject of appeals. In many jurisdictions appeals do not normally involve the reception of oral evidence. Hence these cases also are in principle candidates for remote judicial adjudication, whether on paper or supplemented by a Video-link facility.

All of our jurisdictions are, I believe, familiar with the phenomenon of bail. Very recent experience in my jurisdiction demonstrates that such cases do not necessarily require a conventional oral hearing. The alternative, normally paper adjudication, is more laborious, resource intensive and time consuming. It is, however, viable in practice.

In another distinct category, the litigant is a person in custody awaiting sentencing by a criminal court. As sentencing cases can normally be conducted on the basis of the prosecution and defence written submissions and evidence of a purely documentary kind, these are in principle suitable candidates for remote judicial adjudication.

Appeals against sentence and appeals against conviction are also, again in principle, suitable candidates for this form of disposal as they rarely require oral evidence. Ditto extradition appeals, to be contrasted with first instance hearings.

At the highest level of the judicial system namely at Supreme Court (or equivalent – e.g. Constitutional Court) level remote hearings should be feasible in most countries. The UKSC has transacted all of its cases remotely from the inception of the pandemic.

**The Prioritising of Cases**

To summarise, in principle it should be possible for many courts and tribunals to continue to provide a reasonable, though reduced, level of services to the public by the twin media of paper adjudication and orders and remote hearing mechanisms. Each national legal system and, within each national legal system, every court and tribunal will identify what it considers to be priority cases and examine if and to what extent these can be managed in the prevailing extraordinary circumstances. These arrangements will obviously be informed by available human and technological resources.

An inexhaustive list of priority cases would be expected to include the following: cases involving the liberty of the citizen, Urgent family cases, particularly those where children are at risk, Urgent human rights cases for example involving issues under Articles two and three of the Human Rights Convention, together with all kinds of cases in various fields involving vulnerable persons such as children and the mentally ill: the contexts in which such cases arise (again inexhaustively) include prisons, hospitals, nursing homes and schools.

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7 **One concrete example:** On 3 April 2020 – for the first time in history – the Supreme Court of Norway handed down a judgment in a criminal case after a written hearing. A written hearing means that counsel for both sides make written submissions instead of arguing their cases before the justices at the Supreme Court Building. The case concerned penalty for sexual assault. The Supreme Court was composed of Chief Justice Øie and Justices Webster, Bergsjø, Bergh and Thyness. After having studied the written submissions, the Supreme Court assembled as usual for deliberations. In these days, such deliberations take place by way of video conference. Written hearings in the Supreme Court are permitted under the newly adopted Corona Virus Act and pertaining Regulations, and may only be conducted in cases where this is considered expedient. Before the court decides on a written hearing, the parties are invited to make a statement.
Specific Issues
I turn to consider briefly some specific access to justice and fair hearing issues. These are in particular:

i. The right to a hearing within a reasonable time.

ii. The requirement that the hearing be public.

iii. The requirement that the decision of the court be pronounced in public.

iv. The scope of the exception to the public principle.

v. The need for interpreters in appropriate cases.

vi. The right to legal representation.

vii. The right to publicly funded and legal assistance in appropriate cases.

viii. The provision of special facilities for persons lacking legal capacity and other vulnerable persons.

ix. Facilities for physically disabled persons: parties, witnesses, lawyers, family members/carers and others.

Judicial Concerns
In addition to the foregoing, many issues of particular concern to judges (not necessarily exclusively) arise. These include the following:

I. Limited judicial control over events at the distant location and remote arrangements generally.

II. Preventing any misuse of the process of the court. Two examples may be considered. First, the unseen prompting or assisting of a party or witness giving oral evidence. Second, Misbehaving parties, witnesses and lawyers.

III. Efficient live communication with the judge, particularly where everyone involved is referring to documentary evidence, formal court papers et al.

IV. The use of mobile phones, laptops and other devices by parties, witnesses and lawyers at the remote location.

V. The confidentiality of solicitor/client communications at the remote location.

VI. The judge’s ability to properly assess the demeanour of parties and witnesses giving oral evidence – a challenging task in the most ideal of hearing conditions.

VII. The security of the remote hearing technical mechanism in cases where either a provision of the law or the court, by order, requires limited public access and restricted reporting of the proceedings.

VIII. The fatigue factor: it is well recognised that remote hearings are more tiring than conventional hearings.
IX. Fair hearings for the physically and mentally disabled and the accommodation of other vulnerable persons.

X. Remote hearing etiquette

**Some Concluding Comments.**

I would offer the following final observations:

1) It seems likely that there will be heavier reliance by judges on legal representatives than ever before. The duties owed by lawyers to the courts will assume ever greater importance.

2) The investment by governments of financial resources in the necessary technology is essential.

3) Judges everywhere are on a learning curve involving unpredictable outcomes and developments. So too are lawyers, administrators, academics and politicians. There shall be much trial and error. We shall all learn much from the experience of judicial colleagues in other jurisdictions.

4) Imagination and flexibility are indispensable.

5) The choice is not the binary one of physical in-person hearings and remote hearings: a hybrid model, incorporating elements of both, is also feasible in many instances.

6) A constant alertness to the basic principles of access to justice and fair hearing is indispensable. The application of these principles in the context of the pandemic will require imagination and flexibility on the part of judges, court administrators, parties and legal representatives.

7) The fundamental principle that the specific requirements of a fair hearing vary according to the individual features of each particular case is likely to emerge as one of the dominant principles.

In their efforts to ensure ongoing access to justice, governments and judiciaries are rapidly introducing various forms of remote court - audio hearings (largely by telephone), video hearings (for example, by Skype and Zoom), and paper hearings (decisions delivered on the basis of paper submissions). Rapidly new methods and techniques are being developed. This is unfolding without adequate planning, testing and training. There is a danger that the wheel is being reinvented. A concerted, uniform approach among states, with all appropriate local adjustments, has much to commend itself. This must involve close cooperation with the legal profession.
APPENDIX 1

COURT OF JUDICATURE OF NORTHERN IRELAND
INTERIM PRACTICE DIRECTION 01/2020 [REV 1]
REMOTE HEARINGS

Preface

This is the first revision of Practice Direction 01/2020, which came into operation on 29 May 2020. This revised version is effective from 29 January, 2021. The changes are found at:

- Paragraph 4.11
- Paragraph 4.14
- Paragraph 4.15
- Appendix 3

SIGNED: …………………………………
SIR DECLAN MORGAN
LORD CHIEF JUSTICE OF NORTHERN IRELAND
DATED: 22 JANUARY 2021

1. Definition and Scope

1.1 A remote hearing is one in which judges, parties, legal representatives and/or witnesses (“participants”) do not gather physically at the same location and normally involves some species of video link facility or telephonic mechanism. This is not intended to be an exhaustive definition and the term “remote hearing” will be construed and applied liberally, flexibly and responsively.

2. Overarching Principles

2.1 Every remote hearing will be planned and conducted in a manner designed to secure every party’s right to a fair hearing.

2.2 The planning and conduct of every remote hearing will replicate, insofar as possible and with all modifications deemed appropriate by the court, the conventional form of hearing in the court or court division in question.

2.3 The duties owed to the court by every party, legal representative and other participants will apply fully in the planning and conduct of every remote hearing.

2.4 Every remote location attended by the participants in a remote hearing forms part and is an extension of the court. All participants must conduct themselves accordingly.

2.5 Scrupulous compliance with all regulatory and procedural requirements, all provisions of this Protocol, all pre-hearing orders and directions and all directions of the presiding judge is essential.

2.6 The overriding objective in Order 1, Rule 1A of the Rules of the Court of Judicature applies to the planning and conduct of every remote hearing. Thus the court’s duty to deal with every case justly will include, so far as practicable:

   (a) Ensuring that the parties are on an equal footing;

   (b) Saving expense;
(c) Dealing with the case in ways which are proportionate to –

(i) The amount of money involved;
(ii) The importance of the case;
(iii) The complexity of the issues; and
(iv) The financial position of each party.

(d) Ensuring that it is dealt with expeditiously and fairly; and

(e) Allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases.

2.7 The ability of the court to give full effect to the overriding objective may sometimes be somewhat impaired having regard to inter alia limited human, logistical and technological support and facilities. This does not detract from Overarching Principle 2.1 above.

2.8 The Rules of the Court of Judicature apply fully to every remote hearing.

3. Procedures

3.1 Any relevant Practice Direction (“PD”) applies fully to every remote hearing, subject to such modifications as may be specified in this Protocol or in any order or direction of the court whether upon the application of any party or upon the court’s own motion.

3.2 Thus PD6/2011 (as amended) applies fully to every remote hearing in the Court of Appeal (Civil and Criminal Divisions), Chancery Division, Queen’s Bench Division and Family Division other than cases which are managed in the Commercial Hub in accordance with PD 1/2019 (as amended), subject to any modification specified herein or in any order or direction of the court.

3.3 The court does not have the capacity or resources to make printed versions of any document sent electronically and no such document shall be printed for the judge/s or for any other purpose, with the exception of any document specifically authorised by this Protocol or by order or direction of the court to be provided electronically.

3.4 Hearing bundles and authorities’ bundles must, therefore, continue to be delivered physically to the court, in appropriate numbers, in the usual way.

3.5 Every skeleton argument, in a form compliant with paragraphs 8 and 9 of PD6/2011 (as amended), to include the requisite schedules, will be sent electronically to the court.

3.6 Parties and legal representatives are reminded that, in accordance with PD6/2011 (as amended):

(a) The skeleton argument of the plaintiff/applicant/appellant must be provided at least 13 working days before the hearing date.

(b) The replying skeleton argument of other parties must be provided at least 8 working days before the said date.
(c) Hearing bundles and authorities’ bundles must be provided, in appropriate numbers, *i.e.* 4 in Court of Appeal and Divisional Court cases, at least 7 working days before the said date.

(d) The provision of any additional skeleton argument or bundle requires the prior leave of the court.

(e) The proposition of law which every party seeks to draw from a core authority will be clearly stated in the skeleton argument.

(f) The relevant passages in every authority shall be clearly highlighted, normally with yellow highlighting.

3.7 **Criminal cases.** The provisions of PD6/2011 (as amended) relating specifically to criminal appeals apply fully.

3.8 **Extradition appeals.** The provisions of PD6/2011 (as amended) relating specifically to extradition appeals apply fully.

4. **Technical and Other Matters**

4.1 The court will provide parties and legal representatives with the necessary technical information and details relating to a forthcoming remote hearing in advance.

4.2 Every proposed remote hearing participant (using the technology for the first time) will preferably test the relevant technical mechanism where feasible in advance of the scheduled remote hearing date and will advise the court of any technical or kindred problems by email or telephone forthwith.

4.3 The location for the conduct of every remote hearing will be selected with a view to ensuring the recognition and promotion of the integrity of the court, the formality and solemnity of court proceedings and the administration of justice generally. For legal representatives’ suitable locations would include a solicitor’s office, a private study or a private room in The Bar Library.

4.4 The judge/s and counsel will be robed appropriately in all Court of Appeal (Criminal) cases and bail matters unless the exigencies of the situation render this not feasible, in which case business attire shall apply.

4.5 Subject to paragraph 4.4, business attire is required of all legal practitioners.

4.6 For all other participants, either business attire or other attire suitable for court proceedings is required.

4.7 The names and contact particulars of every proposed participant will be provided (a) in every completed Business Continuity Form (“BCF”) and (b) at the conclusion of each party’s skeleton argument. This may be amended in advance of the remote hearing with the leave of the court and on notice to every other party.

4.8 Where practicable, at the beginning of every remote hearing legal representatives announcing their appearance will also provide particulars of every other person attending at the remote location.
Where practicable, the relevant legal representative, or party, will also inform the court of (a) the arrival of any person not present at the beginning of the remote hearing and (b) the proposed departure of any participant from the remote hearing prior to its conclusion.

The “presence” of every participant in a remote hearing entails physical attendance at the relevant distant location/s and visible participation from beginning to end unless otherwise authorised by the presiding judge.

Earphones or headphones with a microphone may be worn by participants and must be worn by every person addressing the court directly in order to enhance the quality of communication.

Microphones must be muted when another person is speaking.

At the outset of every remote hearing the presiding judge will normally summarise orally the basic protocol to be observed.

In all appeals to the Court of Appeal and in any other case where directed by the court, the conventional sequence of oral presentations to the court shall, unless otherwise directed in advance or by the presiding judge, be modified to operate in tandem with the statement of issues and each party’s core propositions and speaking note (see Appendix 3), as follows:

i. Each party shall provide a speaking note, as per Appendix 3. The plaintiff’s/appellant’s representative will address the court first, with minimal judicial intervention.

ii. The court may then retire.

iv. Judicial questions will then be addressed.

v. The same sequence will be replicated regarding the defendant’s/respondent’s representative.

vi. The court will consider whether to permit a brief reply on behalf of the plaintiff/appellant

Where a party or legal representative has a compelling reason to make an intervention, permission should be sought by raising one’s hand or other discreet mechanism, to include technical mechanisms such as “Reactions” or “Chat”.

Each participant is at liberty to use the mechanisms of “gallery view” and “speaker view” or comparable mechanisms.

All participants will address the court seated, unless otherwise directed by the court.

Where the court considers it appropriate to do so, the affirmation/oath will be administered from the remote court location.

As in the context of conventional hearings, permission to confer privately may be requested of the presiding judge by a participant at any stage. In such event the presiding judge will make appropriate directions to ensure the privacy of such communications.

In courts of record the only permanent recording of the proceedings will be that made by the court. Thus no-one is permitted to make any video or audio or other recording
or image whatsoever of any part of the proceedings. This absolute prohibition includes a ‘screenshot’ or ‘screengrab’ and all like or related mechanisms.

4.21 Any violation of the foregoing absolute prohibition is likely to be considered a contempt of the court in question with possible resulting imprisonment or other penalty and/or a criminal offence under The Coronavirus Act 2020.

4.22 The court audio recording of remote hearings can be bespoken, procured and utilised in accordance with existing arrangements.

4.23 The court will take reasonable steps to ensure that the hearing is of an open and public character, including by seeking to give notice to the media and providing the option of personal or remote attendance.

4.24 The customary arrangements and requirements relating to the confidentiality of family and children’s cases shall apply unless otherwise directed.

4.25 Further details of the protocol which will normally apply are contained in Appendix 1 hereto and the standard Notice of Hearing at Appendix 2.

5. Commencement and Review

5.1 Certain elements of this Interim Practice Direction have already been in practical operation in some cases recently.

5.2 The formal commencement date of this Practice Direction is 29th May 2020. It shall apply to every remote hearing thereafter. [AND SEE PREFACE ABOVE]

5.3 The content and operation of this Interim Practice Direction shall be reviewed from time to time taking into account inter alia any comments and suggestions by parties, legal representatives, professional bodies and others.

Sir Declan Morgan
Lord Chief Justice of Northern Ireland

Dated this 29 day of May 2020
APPENDIX 1

[1] It must be remembered that even when business is conducted remotely by telephone or live video link it is still a court hearing and the usual rules about rights of audience continue to apply.

i. Thus if counsel appears with an instructing solicitor it is important that the usual proprieties are observed and that the court is ordinarily only addressed by counsel unless otherwise invited by the judge.

ii. As regards court attire and formalities the judges and legal representatives should dress in accordance with the directions set out in paragraphs 4.4, 4.5 & 4.6 of PD 01/2020 unless the court directs otherwise in which case the direction should be notified to the participants well in advance of the hearing.

iii. The language and forms of address used should continue to be that of the court – including the manner of addressing the bench and referring to the other party’s representatives, as should any remarks or asides. It may occasionally be appropriate to remind participants of this.

iv. The oath/affirmation should be administered remotely in the hearing of all participants by the clerk who will have received instructions on how that should be done.

v. The court should be afforded the courtesy of being informed what method is being used to obtain instructions from the client during the course of the remote hearing – WhatsApp closed groups or Facebook Messenger are among the means which can be employed for these purposes. These should be disclosed at the outset.

vi. While it will be important to carry out the business of the hearing efficiently and within a reasonable timeframe it should also be borne in mind – particularly in hearings of longer duration – that it may be appropriate to build in regular breaks in the proceedings especially where non-lawyers are active participants.

When the hearing commences

[2] The presiding judge shall at the commencement of the hearing convene, formally, the business of the hearing. The judge will wish to address, *inter alia*, the following issues in any initial comments:

- Confirm all present are those expected to be so (as on the list) and no unauthorised person is on the call;
- Confirm all can hear you but remind them to have their devices on mute at all times until invited by you to speak;
- Confirm all representatives are in a quiet and private space;
- Confirm all representatives are fully instructed;
- Confirm what the specific scope and purpose of the convened hearing is (if there are issues not previously adverted to which the judge wishes to have addressed during the hearing the judge should state these clearly at this point);
- Remind all that it is an offence under the Coronavirus Act 2020 to make any unauthorised recording of the proceedings and that no screenshots, screengrabs or other images should be taken of what is on the screen during the hearing;
- Remind all that only representatives should speak unless invited to by the court;
- Remind all that the remote hearing is still a hearing in court and that all usual rules apply including those relating to contempt of court;
- Make it clear in a hybrid remote hearing where some are physically before the court that no hard copy documentation will be accepted by the court if a party attempts to hand it in during the course of the hearing§;

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§ Legal practitioners and court users are encouraged to exchange all papers/documents and provide them to the court in advance of the hearing. If you are handling papers you should follow the hygiene measures recommended by the PHA including frequent hand washing and the use of hand sanitiser (which is available in all courts and to all court users).
• Indicate that late submission of documents without some extenuating reason may mean they will not be considered; and,
• Confirm the ground rules for the hearing including:
  1. No one to speak when someone else is speaking – no interruptions – and microphones should be on mute when a participant is not speaking (however ways are currently being explored to facilitate a legitimate intervention on the part of counsel or a litigant in person during the course of another’s submissions);
  2. Only start speaking when invited to by the judge.
  3. Documents referred to should be identified by title and then page/tab number, where appropriate.
  4. While it is impossible to verify this beyond doubt the judge should also ask the parties who will give evidence in the proceedings to confirm that they are alone in the room from which they are giving evidence and that there is no one at hand physically or by some electronic means to prompt them with the answers that they give under examination.

When the hearing concludes

[3] At the conclusion of the remote hearing the presiding judge will ordinarily:
• Confirm with representatives that all issues have been covered;
• Confirm there are no matters not yet covered;
• Pronounce the full particulars of the decision/order of the court
• Alternatively, inform the parties/legal (or other) representatives of the timetable of any reserved or more fully reasoned decision or order.
• Formally direct that the remote hearing is concluded and require all participants to disconnect forthwith.
Appendix 2
NOTICE OF REMOTE HEARING

Dear

Re: [Title of Case]

TAKE NOTICE that the court has determined that a [preliminary/case management review/substantive] hearing will take place by SIGHTLINK (insert number)

<table>
<thead>
<tr>
<th>Your hearing details</th>
</tr>
</thead>
<tbody>
<tr>
<td>The hearing will take place on</td>
</tr>
<tr>
<td>Date:</td>
</tr>
<tr>
<td>Time:</td>
</tr>
<tr>
<td>You must be ready to join Sightlink at the time of the hearing and are advised to do so at least 10 minutes in advance.</td>
</tr>
</tbody>
</table>

What you need to do now
You must read the attached guidance on how to connect to SIGHTLINK (Insert number)

You must also familiarise yourself fully with the Court of Judicature Interim Practice Direction 01/2020 [REV 1] – Remote Hearings

Tell us:
- The names of all the legal representatives who will be joining the hearing, with email and telephone contact details
- Whether you need an interpreter, or other support to join via Sightlink

If you intend to call any witnesses or are proposing the remote attendance of any other person (e.g. an apprentice solicitor, an employed secretary, the relative of a litigant etc.); you need to:
- Tell us their full names
- Send them the guidance on how to connect to Sightlink and PD 1/20
- Ensure they are available from the notified commencement time for the entirety of the ensuing hearing
- Notify us of the envisaged total number of remote hearing locations; AND
- Provide any application for anonymity or other protective measure in respect of any person.

By sending all of the above information, together with any other relevant information, by email to XXX by 15.00 hours on XXX at latest.

Please include your case number and hearing date when you contact us.
Yours sincerely

<User_Print_Name>
Appendix 3

Pro-forma Case Management Direction in All Appeals to the Court of Appeal (and in any other case where directed by the court)

Without prejudice to the requirements of PD 06/2011 (as amended) [save as to Chronology – see [1] below] and the Remote Hearings Interim PD 01/2020 [REV 1], except as modified below:

[1] The appellant will furnish with its skeleton argument a Schedule of [proposed] Agreed Material Facts in chronological order, its core propositions [2 pp max] and draft issues for the court’s determination [2 pp max], in three separate electronic documents, by … (being at latest 13 working days pre-hearing, as per para 10, PD 06/2011 as amended)

[2] The respondent will do likewise with its skeleton argument, utilising the same three electronic documents, by … (being at latest 8 working days pre-hearing, as per para 10, PD 06/2011 as amended).

[3] The appellant’s speaking note [10 pp max, unless otherwise directed] will be provided by … at latest [not later than five working days pre-hearing].

[4] The respondent’s speaking note [10 pp max, unless otherwise directed] shall be provided by … at latest [not later than three working days pre-hearing].

[5] The backstop dates for all hearing and authorities bundles are //21 (hearing bundle/s, being at latest 13 days pre-hearing) and //21 (authorities bundle/s, being at latest seven days pre-hearing), as per PD 06/2011 as amended.

[6] There shall be an agreed core authorities bundle, comprising 12 components maximum, with all material passages highlighted, to be lodged at latest seven days pre-hearing.

[7] There shall in principle be an equal allocation of court time to the parties on the hearing date.

[8] Having regard to current public health circumstances and requirements, the hearing of this appeal and any preliminary/ancillary listings shall be by remote mode.
APPENDIX 2

R (on the application of Kiarie) (Appellant) v Secretary of State for the Home Department (Respondent)

R (on the application of Byndloss) (Appellant) v Secretary of State for the Home Department (Respondent) [2017] UKSC 42

60. The first question is whether an appellant is likely to be legally represented before the tribunal at the hearing of an appeal brought from abroad. Legal aid is not generally available to an appellant who contends that his right to remain in the UK arises out of article 8: para 30, Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012. So, in order to obtain legal aid, he must secure an “exceptional case determination” under section 10 of that Act. Although an appeal brought from abroad is in principle as eligible for such a determination as an appeal brought from within the UK, the determination cannot be made unless either the absence of legal aid would breach his rights under article 8 or it might breach them and provision of it is appropriate in all the circumstances: section 10(3). It suffices to say for present purposes that it is far from clear that an appellant relying on article 8 would be granted legal aid. One can say only that, were he required to bring his appeal from abroad, he might conceivably be represented on legal aid; that alternatively he might conceivably have the funds to secure private legal representation; that alternatively he might conceivably be able to secure representation from one of the specialist bodies who are committed to providing free legal assistance to immigrants (such as Bail for Immigration Detainees: see para 70 below); but that possibly, or, as many might consider, probably, he would need to represent himself in the appeal. Even if an appellant abroad secured legal representation from one source or another, he and his lawyer would face formidable difficulties in giving and receiving instructions both prior to the hearing and in particular (as I will explain) during the hearing. The issue for this court is not whether article 8 requires a lawyer to be made available to represent an appellant who has been removed abroad in advance of his appeal but whether, irrespective of whether a lawyer would be available to represent him, article 8 requires that he be not removed abroad in advance of it.

61. The next question is whether, if he is to stand any worthwhile chance of winning his appeal, an appellant needs to give oral evidence to the tribunal and to respond to whatever is there said on behalf of the Home Secretary and by the tribunal itself. By definition, he has a bad criminal record. One of his contentions will surely have to be that he is a reformed character. To that contention the tribunal will bring a healthy scepticism to bear. He needs to surmount it. I have grave doubts as to whether he can ordinarily do so without giving oral evidence to the tribunal. In a witness statement he may or may not be able to express to best advantage his resolution to forsake his criminal past. In any event, however, I cannot imagine that, on its own, the statement will generally cut much ice with the tribunal. Apart from the assistance that it might gain from expert evidence on that point (see para 74 below), the tribunal will want to hear how he explains himself orally and, in particular, will want to assess whether he can survive cross-examination in relation to it. Another strand of his case is likely to be the quality of his relationship with others living in the UK, in particular with any child, partner or other family member. The Home Secretary contends that, at least in this respect, it is the evidence of the adult family members which will most assist the tribunal. But I am unpersuaded that the tribunal will usually be able properly to conduct the assessment without oral evidence from the appellant whose relationships are under scrutiny; and the evidence of the adult family members may either leave gaps which he would need to fill or betray perceived errors which he would seek to correct.

62. When the power to certify under section 94B was inserted into the 2002 Act, an analogous power was inserted into the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003) (“the 2006 Regulations”), now recently replaced. Regulation 24AA(2) enabled the Home Secretary to add to an order that an EEA national be deported from the UK a certificate that his removal pending any appeal on his part would not be unlawful under section 6 of the 1998 Act. But regulation 24AA(4) enabled him to apply “to the appropriate court or tribunal (whether by means of judicial review or otherwise) for an interim order to suspend enforcement of the removal decision”. In Secretary of State
for the Home Department v Gheorghiu [2016] UKUT 24 (IAC), the Upper Tribunal (Blake J and UTJ Goldstein) observed at para 22 that, on an application for an order to suspend enforcement, the court or tribunal would take due account of four factors. The fourth was

“that in cases where the central issue is whether the offender has sufficiently been rehabilitated to diminish the risk to the public from his behaviour, the experience of immigration judges has been that hearing and seeing the offender give live evidence and the enhanced ability to assess the sincerity of that evidence is an important part of the fact-finding process ...”

It is also worthwhile to note that, even if an EEA national was removed from the UK in advance of his appeal, he had, save in exceptional circumstances, a right under regulation 29AA of the 2006 Regulations (reflective of article 31(4) of Directive 2004/58/EC) to require the Home Secretary to enable him to return temporarily to the UK in order to give evidence in person to the tribunal.

against deportation brought by a foreign criminal is highly unlikely to turn on the ability of the appellant to give oral evidence; and that therefore the determination of the issues raised in such an appeal is likely to require his live evidence only exceptionally. No doubt this submission reflects much of the thinking which led the Home Secretary to propose the insertion of section 94B into the 2002 Act. I am, however, driven to conclude that the submission is unsound and that the suggested unlikelihood runs in the opposite direction, namely that in many cases an arguable appeal against deportation is unlikely to be effective unless there is a facility for the appellant to give live evidence to the tribunal.

But in any event, suggests the Home Secretary, there is, in each of two respects, a facility for an appellant in an appeal brought from abroad to give live evidence.

The first suggested respect was the subject of a curious submission on the part of the Home Secretary to the Court of Appeal. It was that from abroad the appellant could apply for, or that the tribunal could on its own initiative issue, a summons requiring his attendance as a witness at the hearing pursuant to rule 15(1) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (SI 2014/2604) (“the 2014 Rules”). The curiosity of the submission is that such a summons is not enforceable in respect of a person outside the UK. Nevertheless the Court of Appeal held that the issue of a summons would be a legitimate way of putting pressure on the Home Secretary to allow the appellant to return to the UK to give oral evidence. Before this court the Home Secretary does not continue to contend for the suitability of a summons under rule 15(1). She nevertheless suggests that the tribunal could, by direction, stress the desirability of the appellant’s attendance before it and that, were she thereupon to fail to facilitate his attendance, the appellant could seek judicial review of the certificate under section 94B and, if successful, a consequential order for his return at least pending the appeal. But whether the tribunal could, or if so would, give such a direction in the teeth of a subsisting certificate is doubtful; and in any event it seems entirely impractical for an appellant abroad to apply first for the unenforceable direction and then for judicial review of any failure to comply with it.

The second suggested respect has been the subject of lengthy and lively argument. The suggestion is that the appellant can seek to persuade the tribunal to permit him to give live evidence from abroad by video link or, in particular nowadays, by Skype.

There is no doubt that, in the context of many appeals against immigration decisions, live evidence on screen is not as satisfactory as live evidence given in person from the witness box. The recent decision of the Upper Tribunal (McCloskey P and UTJ Rintoul) in R (Mohibullah) v Secretary of State for the Home Department [2016] UKUT 561 (IAC) concerned a claim for judicial review of the Home Secretary’s decision to curtail a student’s leave to remain in the UK on the grounds that he had obtained it by deception. The Upper Tribunal quashed the decision but, in a footnote, suggested that the facility for a statutory appeal would have been preferable to the mechanism of judicial review and that it would be preferable for any statutory appeal to be able to be brought from within the UK. It said:  

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“(90) Experience has demonstrated that in such cases detailed scrutiny of the demeanour and general presentation of parties and witnesses is a highly important factor. So too is close quarters assessment of how the proceedings are being conducted - for example, unscheduled requests for the production of further documents, the response thereto, the conduct of all present in the courtroom, the taking of further instructions in the heat of battle and related matters. These examples could be multiplied. I have found the mechanism of evidence by video link to be quite unsatisfactory in other contexts, both civil and criminal. It is not clear whether the aforementioned essential judicial exercises could be conducted satisfactorily in an out of country appeal. Furthermore, there would be a loss of judicial control and supervision of events in the distant, remote location, with associated potential for misuse of the judicial process.”

Although the Home Secretary stresses that the Upper Tribunal was addressing the determination of issues relating to deception, its reservations about the giving of evidence by electronic link seem equally apt to appeals under article 8 against deportation orders. Indeed one might add that the ability of a witness on screen to navigate his way around bundles is also often problematic, as is his ability to address cross-examination delivered to him remotely, perhaps by someone whom he cannot properly see. But, although the giving of evidence on screen is not optimum, it might well be enough to render the appeal effective for the purposes of article 8, provided only that the appellant’s opportunity to give evidence in that way was realistically available to him.

68. Inquiry into the realistic availability of giving evidence on screen to the tribunal gets off to a questionable start: for in her report entitled “2016 UK Judicial Attitude Survey”, Professor Thomas, UCL Judicial Institute, records that 98% of the judges of the First-tier Tribunal throughout the UK responded to her survey and that, of them, 66% rated as poor the standard of IT equipment used in the tribunal.
Good evening. I come from a small jurisdiction. Most of it, maybe two thirds, is just mountains and inhabitable, so it is divided into ten districts and in each district, we have a magistrate court and several local courts. Traditional and customary law courts spread all over the country dealing with customary law issues, but each district has a magistrate court. We only have one High Court in the country which sits in Maseru and one Court of Appeal which also sits in Maseru. But because of the number of cases coming to the High Court, not as many cases go to the court of appeal and judges of the court of appeal, save for the president of the court of appeal are mostly foreign judges. The challenge is service providers do not cover the whole country, most of our people live in remote areas of the country where there is no electricity, no telecommunication and so on and so forth and this is where the majority of our courts are. So, the first challenge we have as a country is that of internet connection, some of our courts, and obviously some litigants and their lawyers as well who cannot access the internet. So, we still continue with physical hearings of course, being mindful of COVID-19 and trying to follow the protocols.

The second challenge would be that of changed management, we have judges who are technologically illiterate and when you bring in things like remote hearings you have to start with the judges and make them at least appreciate a computer and how it works, this has proven to be quite difficult. But we are working on that one. Thirdly, as I said most of our courts have no internet connection but very few of our courts do have the internet connection but most of them are in the districts mainly in towns. This is where you’ll find that there is internet. We do have in the High Court of Lesotho and the Court of Appeal and the Maseru Magistrate Court in the capital do have electronic case management, it was a donation from the American government. So, in those courts we are able to record electronically, although the system cannot allow electronic filing, cases are being registered electronically and as well as being allocated electronically. The problem with this is that the system is a standalone system and does not connect with other systems such as what the police have. Apparently the Americans came in and helped each one of our departments come up with their own electronic systems so they are not integrated, in other words, if you have to remand someone in prison, they have to come physically to court, as although the correctional services has a system, it is not connected to the one in the courts. So that still poses a problem, this only happens in Maseru.

Now the other problem is that of the legislation. In terms of our constitution and of course the criminal procedure and evidence act, here things have to be open, unless they of such a nature they have to be held, rather the accused makes it impossible for him to be present before the court. Justice is expensive, clients have to pay for internet connection, ended up avoiding or resisting those types of hearings. They contracted an independent service provider, Microsoft, whose internet is more reliable and with that we’ve made it possible for lawyers, and every other court user to come to court, they have special rooms they can sit in, and proceed, and the judiciary bears the burden for that. So that’s how we have tried to circumvent some of the problems that we are having about people being resistant to remote hearings.

The chief justice came up with practice directions and an amendment of both the High Court rules and the subordinate court rules to support remote hearings, and that’s how we have been able to do that. Though we are now moving permanently to actually have legislation to allow for this to continue, because we are afraid that some lawyer, some way, if they lose their case, they can take that one up and then challenge what we are doing. Adding that, we too have done that, however again, only in Maseru. In the rest of the country, they cannot do that because of the remoteness of being in rural areas where there is no infrastructure. And frankly speaking the government does not provide the judiciary with sufficient budget for us to do as the High Court have done. So, it’s only the High Court and the court of appeal who have been able to do that.
Greetings all, all protocols observed. I’m here to speak on the problems with remote hearings from the Jamaican perspective. The first ever business plan for the Jamaican judiciary was launched in January 2020, however this was a work in progress from the previous year. The key facets of this plan were and are easier access to justice for all court users, backlog reduction, and more efficient record keeping and data management among other things. Then, along came the first reported case of COVID-19 and the subsequent lockdown in Jamaica in March 2020. The rapid spread and ease of transmission of this disease coupled with the severe health and high fatality risk subsequently necessitated the curtailment of the operations of all the courts across Jamaica as of March 2020. Nonetheless, under the stewardship of the Chief Justice, Mr Justice Bryan Sykes, it was recognised very early on that the continuity of its operations was critical for the rule of law, the protection of human rights and the preservation of our democracy. The major difficulty that arose here was balancing this mandate of the judiciary and the court with ensuring the protection and wellbeing of judicial personnel, court staff, lawyers, defendants, litigants, witnesses, police and all other stakeholders involved in court proceedings. Consequently, it became clear that increased use of technology was, and is essential to get us through this crisis. Coincidentally, and perhaps ironically, prior to the advent of COVID-19 in Jamaica, we were well on our way to putting in these measures which have now become essential in tackling this crisis. Examples being, a digital case filing system, a digital case management system, technological interlinking of all the courts to facilitate updating and exchanging of data in real time and of course to improve access to all the court users and various stakeholders within Jamaica.

In terms of remote hearings, we feel there are definitely some advantages and disadvantages. Generally speaking, the advantages found were that remote hearings were arguably quicker, cheaper and more convenient to conduct as parties were not necessarily required to attend court in certain instances, thus reducing time and costs. Overall, given the legal landscape in Jamaica as it is, the experience could prove less stressful for witnesses especially vulnerable witnesses, children or other significantly traumatised witnesses or where certain security concerns may exist. Examples of this, highly complex criminal matters, for instance on the calendar of the supreme court we have a relatively new anti-gang legislation, where I think we have tried two such matters before, and the number of defendants only seemed to increase with every matter, I think the first one was about twenty defendants and the next one that’s upcoming is somewhere in the region of 30. Of course, we are also talking about the numbers of attorneys, the witnesses and so on. Even before the advent of COVID-19, plans were being put in place for these matters to be facilitated via remote hearings.

Now, general disadvantages, remote hearings as I and some of my colleagues have painfully found out, are at the mercy of the technological infrastructure in place, we need ready and easy access to the internet and strong and reliable connections. Stakeholder scepticism still exists, especially from some defence attorneys and even some prosecutors who may argue that there is no way to guarantee that the witnesses giving evidence are the actual witnesses giving evidence in a sterile environment, free from undue influence or interference. Another major disadvantage is what I like to call tech bloopers, for example frozen screens, background noise, unexpected internet outage and dropped calls. Also, in Jamaica, the cost of access to the internet may be prohibitive to some court users, especially unrepresented court users re e-filing, attendance for court users remotely, access to our ownership of appropriate internet ready devices. In Jamaica, the education system has been hardest hit, the relevant ministry and the teachers admirably have rise to the challenge, parents however are having challenges providing the necessary instruments for their children to access the internet. Of course, you have to appreciate the geographical dynamic of Jamaica, we have fourteen parishes but not all parishes are created equally in terms of the geographical landscape, and the technological infrastructure to allow...
ready and easy internet access for all. There are some places we call dead zones, where there are no
signals getting through even before the advent of COVID-19. The service providers have in response
increased their capacity, but again, ironically, they are often the victims of thieves who pilfer their
internet cables over and over, so they keep having to replace them over and over which is a significant
loss for the company but also it has a wide reaching ripple effect for some communities who have to
be without internet coverages for days, weeks, sometimes in extreme cases months.

In terms of remote hearings in Jamaica, it is still a work in progress that has been somewhat driven by
trial and error, as we adapt to the everchanging landscape caused by the pandemic and the related
need for increased reliance on technology. Another disadvantage in terms of remote hearings in
Jamaica, are those of the unrepresented litigant, especially those with no access to the internet. We
also have, and I say this with the greatest respect as I know this exists at all levels, the technologically
illiterate person or persons who have a general discomfort and fear of technology. There’s also the
added disadvantage of persons feeling that they are unable to fully participate or understand what’s
happening, so ironically, they feel even more disconnected in an era where we are emphasising
increased connection. The importance of maintaining the trust of court users in the judiciary in terms
of being treated fairly and access to justice, we cannot discount persons who feel this way. I know
some of us as judges we are on the learning curve with technology, speaking for myself, I think in
long hand so when for me the computer replicates what I have written in mind or physically, and I
have had to adapt, and luckily we have a court administration division with an IT department which
has given us all a crash course in information technology, for the better I would say.

Luckily in Jamaica, I would say that the parish courts especially, for which I have overall
administrative responsibility, has risen to the occasion in terms of dealing with the access to justice in
the face of curtailment of operations. There has been increased trust from the powers that be, to make
all, or as many of the courts as possible internet compliant and ready to allow for access to all. The
Parish Judges cannot really conduct court from their home, so even if the parties are not there, the
lawyers and the litigants, at least for now the Judges and the relevant staff have to be at a court
building so that will maintain the gravitas of the proceedings, also establish a jurisdiction for which a
matter is being dealt with.

A proposed solution for the unrepresented litigant is creating what we call data centres that we
recognise as an offshoot of the court building where persons who might not have access to the internet
or relevant instruments can go there and be assisted by a member of the court staff to not only file
documents but also have access to the courts, but this is a work in progress.

The template was laid some time ago in 2012 with the passing of the Evidence (Special Measures) act
which facilitated the giving of live link evidence and video link evidence for vulnerable witnesses,
especially children, both for accused persons and witnesses and also for evidence to be given in
Jamaica from a court abroad once the necessary protocol had been established and everyone was in
agreement. Funnily enough, when this came to be there was significant resistance in court when the
prosecution would make an application for special measures under this act, but I would say with the
advent of the pandemic most of these arguments have been rendered moot because it has now
necessitated the need for us to function effectively and to maintain the rule of law and access for
justice to all.

Ultimately, the issues we are facing has led to the creation, at the behest of the Chief Justice, of
remote hearing guidelines which was born in part by our experience, trial and error, this is about 98%
completed and will be rolled out shortly, disseminated to all the courts and among the various
stakeholders and made available to the public and all court users both in soft and hard copy.
Sheriff Donald Corke, Scotland

It is a privilege to be able to contribute my views to this discussion about problems with remote hearings.

Even before the introduction of COVID-19 restrictions some 18 months ago, there was a shift from paper to electronic processes and away from personal appearances in the Scottish courts. A 5 year Digital Strategy published by the Scottish Courts and Tribunal Service in 2018 anticipated an increasing reliance on technology and a reduction in the number of people physically attending court. That coincided with the closure of many smaller courts and the concomitant problems of access to physical courts for rural populations not well served by public transport. What could not be anticipated was the pace of change that has been required as a result of the pandemic. Those charged with delivering change have risen to the challenge and can be justifiably proud of the way that the infrastructure and equipment has been adapted in order to accommodate the considerable upsurge in remote hearings.

In saying that, I am acutely aware that many other countries in the Commonwealth will be at different stages of COVID-19 control, the opening of courts and of the provision of the infrastructure required in order to run a successful system of remote hearings. This conference is itself an example of how technology can enable communication in very difficult circumstances, though hopefully few would argue that it should remain as the default format when it becomes possible to travel freely once more.

Since the COVID-19 crisis unfolded, much of the civil work of the courts has been by way of remote hearings, at first by telephone and then increasingly via a remote platform called WebEx. Criminal matters have largely been of a hybrid nature as the reopening of courts has allowed, for example with juries appearing remotely from remote cinema locations. I am really dealing here with remote civil hearings, rather than criminal proceedings.

There are some positive aspects to remote civil hearings. Such hearings have allowed a significant amount of business to proceed while appearances in court were impossible due to COVID-19. There are also problems, which after all is the topic upon which I have been asked to speak. Now that restrictions on personal appearances in court are easing in Scotland, it gives us an opportunity to consider where the problems lie and to what extent hearings can remain online and which are better suited to a hybrid or in-person approach.

Many judges do not feel comfortable with the pace or direction of change. They prefer the familiar formality of in-person hearings in Court and doubt whether that can be adequately replicated remotely. There are discussions to be had about the courthouse as a place and symbol within the community, and the quality of justice that can be delivered virtually. The question of open justice is not easily resolved. However, what I am considering here are the practical problems, which if overcome can go some way to providing a satisfactory alternative to the in-person model that a substantial proportion of the judiciary seems to prefer. There is no going back to how things were.

First and foremost, there is the issue of technology. This has had to develop rapidly for virtual hearings over the last 18 months in order to deal with COVID-19. The use and accessibility of online documents has had to be expanded, while the courts at first resorted to telephone conferencing facilities.

I did experience hearings by way of telephone in the early days, supplemented by written submissions. That worked well enough in motions, debates and the like. It was less suited, and rather alienating, for matters involving party litigants and in particular anxious family matters. Obviously, the clerk has to be on the line as well. There are problems with not knowing who is speaking, the lack
of a public element, and the distinct possibility that unauthorised persons are assisting parties or that recording is going on. That said, where there is no alternative the use of the telephone is better than nothing.

WebEx has taken over as the platform of choice. It works particularly well in procedural matters, appeals, in all Scotland personal injury court and in commercial cases. It is a similar platform to Zoom or Teams, though I could not expound on their relative technical merits. WebEx is preferable in every way to the telephone. It does however rely on equipment and infrastructure. The judiciary here tend to have their laptop and at least one other screen with a stable wired connection to the internet in their chambers. The same equipment can be set up at home, that being an advantage (and at the same time a disadvantage) of remote access. My own preference is for three screens in order to deal with documents, emails and the participants. Others take notes on their laptop and require multiple screens for that reason.

I do understand that not everyone has the same access. Even lawyers sometimes operate with a single screen and erratic Wi-Fi connections. I expect that to improve. There are also issues of digital poverty and exclusion. When they do have a device, litigants and witnesses often rely on their smartphone. That means that when documents are shared, they can be too small to read on that small screen. While lawyers may be educated (or even subsidised) into upgrading their equipment, there is likely to be a continuing problem of access to justice for ordinary people caught up in the legal process if they are expected to join in online.

You also have to watch out for odd behaviour. Not every user lacks equipment. I had experience of a witness looking off-camera and giving evidence with uncanny precision as to dates and values. When I challenged him, it turned out he was reading from another screen with notes on it. It could just as well have been from written notes. On another occasion, I strongly suspected a witness was being coached off-camera. Without a supplementary camera giving a view of the whole room, that kind of behaviour is difficult to combat. It is possible, in my experience, for ignorant or malicious witnesses to come online to listen to the evidence of others when they are not supposed to do so.

Remote hearings rely on parties being able to use the equipment and on the software behaving. The microphone can be unexpectedly live. I have had experience of someone having ostensibly left, but later chiming in to say that she could still hear everything – nothing bad, I am glad to say. Others have not been so lucky, there having been a high profile case in another jurisdiction where the judge’s overheard comments were found to be grounds for recusal. Parties and their agents can make inappropriate or damaging remarks without realising they can be heard. It is not advisable to say anything to your clerk save what is strictly necessary or completely anodyne, in case it is overheard and lead to trouble. That can lead to a more formal and stilted relationship with the clerk and can, in its own small way, contribute to a sense of judicial isolation. When there is to be an extended break in proceedings, like over lunch, I prefer to leave the meeting and sign on again. That way I am not potentially bugging my own chambers. Others are fearful of losing their connection altogether once they know it works. Less seriously, many of us will have seen the video of the Texan lawyer whose Zoom filter had him stuck in the form of a cat during a court appearance. The lesson is to know your platform. Easier said than done.

The dignity of the court can be hard to maintain. Lawyers have to be reminded to dress appropriately and to speak appropriately. They will no doubt adapt with time and guidance. I would not wish lawyers saying “hello” or “bye” to become a permanent feature. Litigants and witnesses can also not appreciate the need to be alone and not to record proceedings. They can be tempted to slump in their seat, balancing their smartphone, or wander about. Everyone has to know not to blur their background or substitute a false background, concealing what is going on around them. The expectations of the court have to be set out at the start along with appropriate warnings where required.

A difficulty that arises alongside remote hearings is an increased dependence on electronic documents (in my case, open on another screen). All our documents are migrating to a digital platform which not
yet user friendly. The result is that more work is put upon the judiciary, there is a time lag in finding and accessing the document and no choice of simply leaving it to the clerk or court officer to locate the document and hand it up in the usual way. Preparation of such courts is particularly difficult for those members of the judiciary who have spent their professional life dealing with paper. Work formerly done by the clerk is necessarily being imposed upon the judge. On the other hand, without electronic bundles or the ability to share documents onscreen, there are logistical and security implications in sending papers to remote sites.

Cases involving even a single interpreter can cause problems, especially where there is feedback or delay, as has been known to happen. No doubt there are jurisdictions where several interpreters may be required at once on a regular basis.

Most of my colleagues find virtual courts to be more tiring and difficult. That is not something that can be dealt with simply by having more breaks. Judicial respondents commented in a recent survey about eyestrain, increased fatigue, low morale, isolation, and loss of job satisfaction. It is certainly the case that many would struggle to come out of a long court day of remote hearings online and find much motivation to then catch up with their writing on screen at night. Clearly issues of judicial welfare and morale are of the utmost importance in making any such system work in the long term.

The quality of evidence in remote hearings is perceived by some to be a problem. Evidence in chief is increasingly captured by way of affidavits, but these can be heavily influenced by the lawyer who has taken it. Cross examination becomes particularly important where the evidence is contentious, but remote hearings give little chance for skilful cross examination. Many feel that the witness needs to be out of their comfort zone and in a court setting for the best results to be obtained. There is room for disagreement on whether credibility and reliability can adequately be assessed on screen. The presence in person of witnesses speaking to contentious matters also makes it easier to deal with issues of contempt and prevarication. Experts, on the other hand, are ideally suited to remote hearings as it allows them to get on with their professional lives. Vulnerable witnesses find the experience less intimidating.

Some family law decisions, especially in adoption, permanence and children’s referral cases, really require the birth parents to be present in order to participate fully and to be fully supported by their lawyer. They are very likely to be experiencing digital poverty or exclusion, and to have had adverse life experiences. They deserve the compassionate delivery of crucial decisions about their family life in a form they can understand, rather than the potentially depersonalising and inhumane delivery of such news to their mobile phone screen, or even worse as a disembodied voice down the phone.

To conclude, then, soon criminal courts will largely revert to how they were but with increased use of remote links for professionals and for vulnerable witnesses. Remote juries, though effective, will no longer be required.

With experience of the problems and challenges has come a realisation that remote hearings for civil cases are not always the answer. The Scottish Civil Justice Council has very recently published a consultation on rules covering the mode of attendance at court hearings. The draft rules provide for different default modes of attendance for civil hearings, according to the category of case. Those are an in-person hearing; a hearing with attendance by electronic means; and a hybrid hearing. So, for example, the default position would be attendance in person where there is a significant issue of credibility of a party or witness and in most family actions. Hearings most suitable for electronic means would include procedural and non-witness business. There is provision for the mode of attendance to be changed by the court on application or at its own hand based on a reasonableness test. From a judicial point of view, having that flexibility will be very welcome and bodes well for the future. Ultimately it is up to the judiciary to deliver the best possible outcome. Hopefully the sharing of experiences will assist in that task.
Dr John Carey, Papua New Guinea

When we think of the concept of Digital Footprints we have a wide scope to examine. For my presentation I want to focus on the lasting impact of what we do with information that reflects our reality and life. Digital footprints relate to information that is available online about us, personal messages and electronic communication. Being vulnerable is a reality that can happen when digital footprints are terribly managed.

According to Micheli, Lutz and Buchi (2018) digital footprints come from data that is generated by our own doing. Hence, we are a major factor in the ability of digital footprints to exist. The behaviour of others is something that we have less control of but the behaviour of ourselves we have absolute control over.

Privacy concerns and data protection arise when we consider our digital footprint. For many lawyers who regularly post comments or views online, once a Judicial appointment happens they suddenly recognize that some of their views that are now in the public domain digitally, could become embarrassing or detrimental to engendering public confidence and/or trust in their ability to be independent or impartial. Should they then attempt to remove what has been in the public domain or should they allow these digitally verifiable statements remain as part of their public record of who they are and potentially bring embarrassment to the judiciary? These are questions that judiciaries grapple with as with most judicial application processes there is a section that refers to disclosure of anything that may cause consternation for the judiciary if you are appointed.

On another perspective of digital footprints in the world of evidence having information that is easily verifiable and credible becomes more attractive for courts to consider. Without getting into the wrangling of admissibility of evidence and presuming the material that is digitally posted is admissible evidence, it becomes more challenging for a defendant to attack the veracity of a claim on the digital footprint as the record of such is credible and lasting. Digital footprints therefore provide courts with an avenue for which they may exercise their discretion in being able to improve access to justice. In looking at the 21st century experience of the judiciary when we consider that less than 35 years ago the use of computers in tertiary education was a luxury and not readily available, it must be acknowledged that digital footprints provide a real benefit that courts have never had at their disposal in human history.

When we examine case management and the ability to become more efficient in procedural justice which is the aspect of case management that is most likely affected by court staff and support services digital footprints help to identify where the prospect of improvement is more likely. Within the case management system we could argue that there is substantive justice which is solely within the purview of the Judge or Magistrate which is the aspect of the decision making process which is jealously guarded under the independence of the judiciary. However, in order for the substantive justice to occur the procedural justice must take place where the matter is filed with the court and it is progressed in the judicial system. Admittedly, while Judges and Magistrates may have a significant role in this procedural justice, court staff historically could have adversely affected case management where files are misplaced or documents are missing thereby creating delays in the matter being disposed of in a timely manner. Digital footprints from a case management system that allows Judges and Magistrates to identify where the bottleneck is in the procedural justice process can positively impact case management.

We also know that digital footprints can be misapplied to perpetrate Fraud as well as do harm to judicial institutions when matters such as Hacking occur. A few years ago, a ransomware attack affected the IT system of the National Judicial Staff Services in Papua New Guinea. Fortunately, the Judiciary’s IT team responded in such a way as to mitigate this problem and have since put in place...
systems that minimize the potential for recurrence. The information from the digital footprints in the hands of people who were not a part of the judiciary could have potentially undermined public confidence. However, the Judiciary’s full and frank disclosure on what happened and its swift counter measures to thwart the criminal efforts of a few unknown misfits preserve the judicial integrity and ensured any further loss of data that could have happened.

Whenever you use an online service you leave a digital footprint. If you are using WhatsApp or making a debit card payment at a store, you are building a digital footprint that can inform users about your behavior over a period of time. Kellitz and others (2019) argue that the judiciary today has to be ready for more risky dynamics of an uncertain world when it comes to data management. They examined what happened after the civil war in Kosovo where so much data was lost which included case files and registers. When your court system disappears and in the absence of alternative back up, storage or avenues inclusive of the cloud and other capable mechanisms where is the digital footprint that is now an essential part of the court’s work. Cybercrime and its risk are real and there are attempts to hold many courts hostage around the world. While in PNG in 2019 we had a ransomware attack, so did courts in the USA specifically in Georgia where the computer system experienced cyberattack (Murdoch, 2019 or in Philadelphia where the court’s email accounts and website were shut down due to minimize the impact of a virus (Shaw, 2019).

Managing your digital footprints as Judges and Magistrates is appropriately captured in the “Non-Binding Guidelines on The Use of Social Media By Judges” published by the United Nations Office on Drugs and Crime in 2018. This document is readily available at no cost by a google search. According to McDermot (2018) even when you delete information that was provided by you through the internet it is never truly withdrawn or taken away from the internet. It is a reminder that we must be sensitive to what we put in the public domain. And while Judges and Magistrates are normally the least likely to be unaware of this reality, it is a noteworthy reminder. Earlier in this year the Papua New Guinea Centre for Judicial Excellence (PNGCJE) in collaboration with the Council of Europe held a Cybercrime and Electronic Evidence workshop for Judges. This workshop provided a pragmatic approach in looking at Papua New Guinea’s cybercrime legislation with a view of providing more insight into the application of the legislation in the courts and evidence gathering inter alia along with international best practices in other jurisdictions including in Europe. The fact that such Judicial Education and training took place in 2021 when if we examine the evolution of technology in our global community, such a reality would not have been possible thirty years ago or even twenty years ago. My proposition to you is that changes that are happening in our world dictate that we must be more open minded, and practical in how digital footprints are here to stay in the courts, in governments and in daily life.

I am not suggesting that all of you Judges and Magistrates go and sign up for an Instagram, Facebook or Twitter Account. However, I am proposing that all of us become more informed about how digital footprints can assist us in our daily work activities to become more efficient and effective. In the Caribbean, I note that the Council of Legal Education is now conducting a survey to determine whether to develop an online Legal Education Certificate program for the next generation of Lawyers and Practitioners in the Commonwealth Caribbean. Such a proposition would mean that an entire training program for lawyers in the Caribbean region would be fully digital with a footprint that is not retractable. In the Pacific Islands, we have court staff in Papua New Guinea and in the 14 other Pacific Island Countries who are currently doing the one year Certificate Course in Justice taught by the University of the South Pacific (one of my alma maters) which is fully online with no face to face component. These are court staff who support Judges and Magistrates like you to effect the proper administration of justice in their jurisdictions. Their learning program has created a digital footprint that is not retractable.

The PNGCE and Pacific Centre for Judicial Excellence (PCJE) which is a sub-division of the PNGCJE with focus on Judicial Education and Training for Pacific Island Courts are now implementing a Learning Management System which upon completion of our implementation phase will assure that we have a digital footprint that provides hundreds of relevant courses, webinars and
podcasts which can be accessed by Judges, Magistrates, Court Staff and the Law and Justice Sector of the Pacific Islands and eventually the entire Commonwealth on areas of substantive law, procedures and practice, general knowledge, skills and awareness that ensure that we have a bespoke experience created.

We see digital footprints as the reflection of what is and we are even more aware of the significance of having digital footprints that add value and support the rule of law in improving access to justice. From my perspective, this discussion is not just an academic exercise to test the mettle of learned people who desire intellectual gymnastics as a form of a mental workout. As I recall my days in law school, one of my professors told us that “law is not for the intellectually deficient”. That same Professor also said, “we are training you so that you can make lots of money”. I am not quite sure that most Judges and Magistrates and practicing lawyers would agree with that last quote. However, I think most would agree with the former quote that law is not for the intellectually deficient and digital footprints and the pathway that we lead in building our footprints require thought and consideration because it is not retractable.

The future of judiciaries is intertwined with the digital footprints that we create, evaluate and pass judgement on. It is essential that all Judiciaries examine where they are in the spectrum of digital footprints in terms of are they markedly ensuring that what is reflected in domains in this era of digital transformation is consistent with values that uphold the rule of law. Moreover, to the extent that access to justice is strengthened by digital footprints, which supports the notion that the rule of law prevails in a just and fairer society public confidence in judiciaries will be enhanced and preserved. The public has the expectation that Judiciaries uphold the highest standards possible. Integrity should buttress Digital footprints in the Judiciary.

Thank you for listening to my remarks. It is always a pleasure to present to this august body of great men and women that reflect the strength of justice in the Commonwealth.

References
https://doi.org/10.1108/JICES-02-2018-0014

Session 5: “Digital Footprints”

Link to the “Non-Binding Guidelines on The Use of Social Media By Judges” published by the United Nations
First of all, I am going to cover some brief words about how far we have come in the past 20-25 years in order to having a discussion on a topic like this. I'll then talk about judicial security and how that is potentially threatened by issues such as jigsaw research. I’ll spend some time talking about big data and predictive analytics and then I’ll talk a little bit about a new consideration which is the way in which remote hearings have changed the way we operate and how that interplays with the digital footprints that we, as judges create. I’ll end with some observations about how we can best protect ourselves and guide you towards a document that I think you will find both useful and informative.

Let’s start with how far we have come over the last 20-25 years, I’ve chosen six events which I think are particularly relevant to the presentation I am making today. I have to say to you, 1998 doesn’t really feel that long ago at all, but when one thinks about the innovations in technology over the last 20 years it seems like several lifetimes ago, was it ever the case that we lived in a world before Google, Facebook and smart phones? The first item I have chosen on this timeline is the launch of Google in 1998, but the more relevant point is how google has expanded its reach into various other products and services in the years since and is no longer known simply as the go to search engine for people who wish to access information that is held on the world wide web. I’ve also mentioned Facebook on this timeline as its probably the best-known social media website in the world but also, similar to Alphabet who own and operate Google, Facebook has expanded its reach into many other products and services and it also happens to own WhatsApp and Instagram. So, when you are sending a WhatsApp message you may not know, but you are actually using a Facebook service. The smartphone market has become crowded in recent years, but I have mentioned the iPhone launch in 2007 because really it was the first touchscreen iPhone that really caught the public imagination, even calling it a phone is probably a bit of a misnomer because it is a computing device in our pocket. It’s the way we interact, in many respects with the world around us, it now takes photographs, it helps us navigate our way around streets and countries in place of maps. It provides us with access to the world’s information through the search engines that it itself uses. It’s probably the most popular gaming platform that exists in the world, and for present purposes what’s particularly important is that it tracks our location, or at least the apps it uses do, and so your iPhone will know better than you know where you have been in the years that you have owned it and had it in your pocket.

There’s lots more I could say about all of those innovations, but of course this is a presentation is to judges, so I have mentioned there on the timeline the early part of the 2010’s when judicial materials first started mentioning social media and online security issues. It is perhaps not surprising that it took a few years for the judiciary to catch up with the developments in wider society, that’s often the case. But generally speaking, the policies that have emerged tend to cover two points. As the timeline indicates one point, they tend to cover is judicial conduct, and by that, I mean the ethical considerations of judicial use of social media websites. Someone’s postings online clearly give you an insight into their personality, their hobbies and their character. Therefore, it is no surprise that over the years most jurisdictions have developed codes of conduct or guidance documents that provide advice to judges over what they should or shouldn’t do online. But the second type of policy that we have developed relates to judicial security. The job that we do is an important one, it’s a powerful one in the sense that we have significant control and influence over peoples’ lives. Inevitably then, they will become interested in us, look us up online and find out more information about us and therefore policies have also emerged that seek to protect judges from obsessive interference by people who have used the courts and tribunals in the country in place. Now some of you may have heard of LexisNexis, but I’m not sure how many of you will have heard of Lex Machina. LexisNexis is of course one of the world’s biggest companies dealing with the management and curation of legal information. People pay a subscription to it in order to have access to precedents, case law, statutes and other sorts of materials of use to lawyers. Lex Machina was developed by Stanford University.
and it was acquired by LexisNexis in 2015. It’s Latin for law machine, but it’s a play on words that comes from Dues Ex Machina which means God from the machine. Lex Machina is now one of the leading predictive analytics companies that deals with the analysis of judicial activity in order to help predict judicial decision making. The last development is 2019, in which the United Nations Office of Drugs and Crime, as the relevant part of the UN that deals with judicial ethics issued non-binding guidelines on the use of social media by judges. It’s a very useful document that is going to be circulated with this presentation. I’ve included it, not just from a selfish perspective because I was lucky enough to be part of the working group that produced those guidelines but also because I think it’s a really excellent document that will help judges the world over, navigate some of these issues that this presentation discusses.

The next issue I want to raise is the question of how judicial security is impacted by the possibility of jigsaw research. In face to face training I have delivered on this topic, the part of the session that has the most impact is where I demonstrate the ready online availability of sensitive personal data about individual judges. I might just pick on someone in the audience who is attending the session, and show what I’ve been able to find out about them in a couple of hours, sometimes only a couple of minutes research ahead of the session. I utilise in conducting that jigsaw research, purely public information, births, marriages, deaths, electoral registers, data aggregation websites, social media websites where there may be reduced privacy settings and I can often locate when I have done this session, particularly in Britain, the judges’ home address, the year of birth, sometimes the precise date of birth. I have on occasion obtained the members of a judges family, the judges mother’s maiden name which is often used as a password for banking websites, I’ve been able to discover the schools that judges children attend, the parks where they might regularly run a race, or the clubs of which they are members, and I’ve even managed to find pictures of peoples’ homes. Now, before 1998 and the launch of Google and search engines and the like it would have taken a private detective to find this information, now anyone can do it from a desk with a computer. You have to know what you are doing, but essentially, you can do it for free. That means that because judges carry out sensitive, confidential and sometimes lifechanging work, we need to learn how to protect ourselves, and develop wisdom about how we interact with new technology. I recommend that you spend some time on websites that talk about maximising your online security and try to minimise the digital footprints that you leave with your online activity, whether that’s shopping, banking, entertainment services or all the other things for which people nowadays use the internet. Simple security measures, like two-step verification for website access, changing passwords regularly and maximising privacy settings on a smart phone are all sensible steps to make it more difficult for an opportunist to find out who you are, where you live and other things about you if they are dissatisfied with a judgement that you have issued.

Every piece of online activity that you perform leaves a trail of data, and an industry has emerged that analyses that data and tries to draw inferences from that data about how people will behave in the future and that is known as predictive analytics. Therefore, this is not simply about leaving the digital footprint behind, its companies that look at the footprint and work out where it has come from and draw conclusions about where it might be heading. Reflecting back on Lex Machina and their main webpage, and what this service offers its customers to “predict the behaviours of courts, judges, lawyers and parties with Legal Analytics”, in other words by reference to all of the judgements that you have issued, that will be studied and analysed to try and offer clients in response for a subscription fee, a prediction of what you would likely decide in a future case. In short, predictive data analytics is a big business and it is a big business in the area of law.

During the pandemic, most jurisdictions have tried to keep justice on the move by trying to utilise new technologies, and video hearings or remote hearings have become a popular way of doing so in some jurisdictions. The picture on the left is of Rishi Sunak, he is the main finance minister, the Chancellor of the Exchequer in Britain, but I’ve drawn a picture of him as it is very easy to look at the books on the shelves behind him and work out his interests, and indeed there are many judges who have had their bookshelves behind them, pictures of their family and so on who have therefore provided a window into their private lives by participating in video hearings from home. On the right,
is the standard wallpaper that many judges use in England and Wales, as a virtual background when they are participating in video hearings and the only point I want to make here is that in trying to minimise your digital footprint it is sensible to have a backdrop in order to limit the insights that people who are looking at you might then draw into your private life.

Towards the end of 2019, the group of judges drawn from around the world, and as I have previously said I was very fortunate to be a member of, formed a working party that met in Vienna in order to draw up non-binding guidelines, as of course they couldn’t be binding as that’s a matter for individual judiciaries on the use of social media by judges and it produced the document which will be circulated with this presentation. Which is intended to provide guidance to both to judges and judiciaries as well as other judicial office holders and court personnel where appropriate and delineate a broad and useful framework on how to guide and train judges on the use of different social media platforms consistent with international and regional standards of judicial conduct and ethics, whilst also having regard to the importance of judicial security. Guidelines 32-37 deal specifically with privacy and security and therefore relate to the digital footprints that judges leave behind. They recommend for example that judges should acquaint themselves with security and privacy policies, rules, and settings of the various platforms they use and periodically review them in order to ensure their own personal protection as well as ensuring that they are acting with personal and professional integrity. It is also interesting to note that it is recommended that judges in various jurisdictions are also trained on the effective use of social media and other online platforms.
Judge Rehmat Ali Malik, Pakistan

1- Introduction:
With the unprecedented global pandemic there has been a worldwide rise in Gender-Based Violence. All members of the criminal justice system need to aware of the impact and engage on the issue for the good of society now and in the future. GBV is an act of violence that results in or is likely to result in physical, sexual, psychological and economic harm or suffering committed on the victim by reason of the sex or gender. It includes threats of such acts, coercion or arbitrary deprivations or liberty whether they or in private and it includes domestic violence and the victims include women, children and other vulnerable witnesses, including persons who may regard themselves as having a different gender identity. Punjab established the first model GBV court of Pakistan at Sessions Court Lahore to hear GBV cases in November 2017 and has been operational ever since.

2- Establishment of GBV court:
Having said that, although the trial GBV Court was set up at unprecedented speed, regard was had to international principles and also international best practices for the operation of such a Court. Importantly it was set up in a way which had regard to the unique Pakistan situation, including its cultural, religious and legal features. It relied on the experience and wisdom of the Judges. It was a collective development, with the ADB consultant and Judges working collaboratively. Where possible there was also consultation, albeit limited, with the Public Prosecution, Police and some defence lawyers and the Bar Association. Discussions had also occurred with the Punjab Commission for women, but only of an informal nature.

3- Role and guidelines of Superior Courts in GBV cases.
In Salman Akram Raja case (2013 SCMR 201, PLJ 2013 107), Supreme Court laid down the following recommendations:
1. Every police station that receives rape complaint, should involve reputable civil society organizations for the purpose of legal help and counselling and the list of such organizations will be maintained at each police station.

2. Administration of DNA test and preservation of DNA evidence should be made mandatory in rape cases.

3. As soon as the victim is composed her statement should be recorded u/s 164 Cr.P.C. preferably by a female Magistrate.

4. Trial of rape cases should be conducted in camera and after regular court hours.

5. During a rape trial, screens or other arrangements should be made so that victims and vulnerable witnesses do not have to face the accused persons.

6. Evidence of the rape cases should be recorded, in appropriate cases, through video conferencing, so that the victims, particularly juvenile victims, do not need to be present in the Court.

1 Writer is Additional District & Sessions Judge and first GBV judge of Pakistan.
The Hon’ble Lahore High Court approved a Practice Note in 2017 for the working of GBV Court which is to be applied flexibly in order to maintain the purpose and principles of the guidelines and applies both to witnesses and accused, with the principle of fair trial being fundamental. It is important for all witnesses in the court to have the best conditions be able to give their best evidence.

4- **Holistic approach:**
   It is also apparent that the GBV Court by itself cannot achieve the outputs and impacts expected of it, without the assistance of appropriately trained and dedicated Police, appropriately trained and dedicated Public Prosecutors, and also defence counsel who have received appropriate gender sensitization training and relevant training for the cross-examination of GBV victims including children. Each of these major stakeholders needs not only specific training but to be committee to the overall human rights principle of access to justice for victims of gender-based violence cases. All successful specialized courts on GBV require a holistic collaborative approach with all stakeholders through regular meetings to discuss mutual issues related to the operation of the GBV Court and any modifications which may be needed to make it more effective and efficient. These meetings should be both separate and collective. This would additionally require developing focus groups of GBV victims and witnesses, victim NGOs, shelters, etc., who could also provide information about their experiences of GBV and also of the GBV Court. The setting up of the focus groups could potentially be facilitated through the Punjab commission for women.

5- **Object of the GBV court:**
The purpose of the GBV Court is to enable cases which concern gender-based violence offences to be prioritised and conducted in a gender-sensitive manner. The GBV Court applies to the victims of gender-based violence which include women, children, and other vulnerable witnesses such as persons who may regard themselves as having a different gender identity. There is a recognition that victims of GBV often do not report violence against them for fear of retribution, humiliation, shame, social stigma and loss of honour. During the coronavirus pandemic it is even more difficult to report violence and the victims are usually locked down with the perpetrators for longer with less ability to escape for respite to the shops or relatives.

Before a victim gives evidence in a GBV court the Judge will introduce himself or herself to victim and explain who the other persons in the court room are. Questions asked by the Judge would include security concerns, the importance of the evidence and any other problems faced by the victim. The trial will be proceed without any unnecessary adjournments, the questions in cross examination to the victim will be in written form duly vetted by the Presiding Officer in order to check the humiliation to the victim and in a gender sensitive manner keeping in view the sex, age and mental ability of the victim and in an appropriate tone. The court may limit the questions and in case of insecurity to the victim, the GBV Judge can issue appropriate protection orders to the Superintendent of Police.

In case of resiling by the victim/witnesses from their previous statements, the GBV court may adopt a number of procedures which the Judge considers appropriate to address the issue, including clearing the court to assess the reason for the resiling, adjourn the case to make appropriate protection orders or direct the Sub-Divisional Police Officer concerned to look into the matter. Where the court insists that the trial be continued, and the victim and witnesses still wish to resile, it will be explained to them they will be declared hostile and liable to be cross examined from both sides. In case of victim, cross-examination will be in written question answer manner in order to avoid the undue pressure and intimidation. After recording the evidence, the Court will decide the case in the light of assessment of the evidence in totality.

6- **Gender Stereotyping, in legal and factual issues in GBV cases, role of court:**
Commonly held stereotyped views of judges on legal factual issues cover the following topics

a. Delay by victim in reporting rape cases.
b. Moral character of the complainant and virginity.

c. Actions of women, whether they indicate consent to sexual assault/rape.

d. Whether absence of visible injury negates rape.

e. Whether women victims are unreliable, and their oral evidence requires corroboration.

7- Practical difference b/w GBV and ordinary court:
There are a number of differences between GBV Court and other Courts dealing with the same cases including speedy trial, more comfortable atmosphere, a maximum of 10 cases fixed per day, separate room for victim/witnesses for their preparation by prosecutor and counselling, audio/video trial facility, female Support Officer in attendance, female prosecutors and protection to the victim and witnesses in shape of Protection Orders, inside and outside of the court.

As a whole this allows for greater confidence, peace of mind and protection for victim and witnesses over shorter quicker trials, in more comfortable surroundings with female support and facilities available as like E-video trial and witness screening. The better quality of evidence also leads to an increased conviction rate than other courts. In GBV Court, 80 cases have been decided out of which 13 convictions awarded by this Court including death penalty, whereas the other three Courts adjudicating same cases but there is very low conviction rate.

<table>
<thead>
<tr>
<th>Number of Decided Cases</th>
<th>Number of Convictions</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>GBV Court</td>
<td>80</td>
<td>13</td>
</tr>
<tr>
<td>Other three Courts</td>
<td>137</td>
<td>2</td>
</tr>
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</table>

Conclusion:
GBV cases are very sensitive, which require certain precautionary measures at investigation, prosecution as well as at trial stage. For this purpose, certain special measures are to be used by the Court at trial stage while recording the evidence of minor and vulnerable witnesses. These precautionary steps adopted by the court and have enhanced the confidence level of the victims and witnesses, which has resulted into the higher conviction rate but the convictions rates are still poor and a lot more needs to be done, especially as Pakistan comes out of the pandemic, to protect the vulnerable victim.
1. INTRODUCTION:
In the month of December 2020, His Lordship the Chief Justice of the Republic of Botswana directed that Molepolole Magistrates’ Court head of station set up a specialized Gender Based Violence Court in Molepolole Magistrates’ Court. Molepolole Magistrate Court is located in the Kweneng Administrative District of the Republic of Botswana. Overall there are thirty-six Magisterial Courts in the Republic of Botswana.

The decision was prompted by a concerning surge in the incidence of violent or heinous crimes based on gender, especially committed against innocent women and children and to address public outcry in our jurisdiction.

2. SETTING UP:
As the Chief Magistrate and the head of station I was specially assigned the task to set up. Molepolole Magistrates’ court at the time had four judicial officers sitting in four mainstream courts. The Chief Magistrate’s Court was then converted into a GBV court. Three additional magistrates were initially attached on relief duties, albeit for a period of 3 months, to support the Chief Magistrate’s Court in the speedy disposal of these cases.

Thereafter the expiry of the three months’ period, a permanent additional magistrate was posted to the station.

Therefore, in a nutshell, we currently have two fully operational permanent specialized GBV Courts premised on Molepolole Magistrates’ Court. It is worth noting, on the time the court was set up, that our court is still young.

3. DEFINITION AND TYPES OF GBV CASES IN OUR COURTS:
Gender based violence is a serious form of human rights violations and is commonly defined as violence that is directed against another person on account of their gender or based on their gender. In our Courts experience has shown that women (in intimate relationships and non-intimate relationships) and young girls are the most affected by the scourge.

Furthermore, although there are various known forms of Gender based violence, the most prevalent in criminal proceedings present themselves in the form of sexual abuse, physical abuse and emotional abuse. The case types are:

a) Threat to kill
b) Rape
c) Defilement of girls under the age of 18 years
d) Murder
e) Aggravated Assault
a) Physical abuse
b) Financial abuse
4. STATISTICS:
CIVIL MATTERS (Computed from the 1st December 2020 to 31st May 2021)

<table>
<thead>
<tr>
<th>Brought forward</th>
<th>Registered</th>
<th>Completed</th>
<th>Pending</th>
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</thead>
<tbody>
<tr>
<td>20</td>
<td>44</td>
<td>43</td>
<td>21</td>
</tr>
</tbody>
</table>

CRIMINAL MATTERS : (Computed from 1st December 2020 to 31st May 2021)

<table>
<thead>
<tr>
<th>Brought forward</th>
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<th>Completed</th>
<th>Convicted</th>
<th>Acquitted</th>
<th>Withdrawn</th>
<th>Murder cases committed to the High Court</th>
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<tbody>
<tr>
<td>201</td>
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<td>157</td>
<td>37</td>
<td>10</td>
<td>100</td>
<td>10</td>
<td>404</td>
</tr>
</tbody>
</table>

5. PRE AND POST LOCKDOWN ERA:
In the month of April 2020 - May 2020 a country -wide lockdown was imposed due to the Covid 19 pandemic. It is during this period that we saw a sharp rise of GBV criminal cases particularly the offence of Threat to kill. After the easing of the lockdown, the Court began to register a large number of these cases and the numbers are still worrisomely growing. The current statistic of the offence of Threat to kill is 140 cases. It follows that of the offence of Rape which is 152. Pre- lockdown Threat to kill offences were quite low; below 30. The offence of rape was still prevalent.

Victims whose lives are threatened are primarily women, including the elderly. The perpetrators are either their intimate partners or their sons. This is so because we live in difficult times due to the pandemic and some relationships have, due to economic reasons, suffered a knock.

In civil matters pre-lockdown, we had very few applications for protection orders. However, after the lockdown, we began to notice an increase in these applications. The statistics will show that after the establishment of the GBV court we registered 44 new cases.

Victims are largely elderly parents mostly mothers and also women in intimate relationships. Cases are often unopposed as such are speedily resolved. Very few are opposed

6. LEGISLATION:
In criminal proceedings, the primary legislation under which offenders are charged and penalized is the Penal Code Cap 08:01 of the Laws of Botswana

In civil proceedings the Courts hear applications under the Domestic Violence Act Cap 28:05 of the Laws of Botswana. It provides for the protection of survivors in a domestic relationship. A domestic relationship in terms of the Act means a relationship between the parties present or past in any of the following ways married, cohabiting, engaged, dating, shared residence, family or a child.

The Act clearly has its shortfalls. It does not provide for survivors who were not or are not in a domestic relationship but have survived GBV.I am thinking of a scenario where a male student in a tertiary school sexually abuses a female teacher. Does it mean the teacher is not entitled to the protection of the law under this Act?

7. CASES INVOLVING MEN AS SURVORS:
In criminal proceedings we had only one case in which a male was said to be a survivor. The case has been resolved. In civil proceedings 8 cases were registered and 3 have been resolved.
8. CASES INVOLVING CHILDREN AS SURVIVORS:
Children are predominantly sexually abused. I have observed that the State prefers to register the cases as criminal cases. We currently have 49 cases of Defilement of young persons under the age of 18 years registered in our Court. There are three (3) or less cases of Rape that involve minor children.

Maintenance cases are heard and resolved in mainstream courts

9. ACHIEVEMENTS CHALLENGES:
We have achieved some milestones in the setting up the GBV court as demonstrated above. There is a speedy disposal of cases especially in civil matters. However, this is not without challenges.

a) Criminal Matters
The Gender Based Violence Court faces an array of problems in its day to day running of the business of the Court, primarily the challenges that shall follow below:

i) Limitations in Legislation:
The Domestic Violence Act is limited only to domestic relationships. It has thus limited relief to cases where there is a domestic relationship.

ii) Shortage of prosecutors:
There is a visible shortage of prosecutors in our Court. As a result, thereof the court has not been assigned specializing prosecutors. Consequently, the Court is hampered from speedy disposal of GBV cases as prosecutors contend with high caseloads emanating from mainstream Courts as well.

iii) Locality:
Molepolole GBV Court serves five major villages and settlements surrounding such villages. The catchment area is quite large. In the result, complainants or witnesses are on a daily basis fetched by the police from such places or travel on their own to Court which impacts negatively on the operation of the Court, particularly on the disposal rate. It can also discourage them from appearing before Court. Some prosecutors are stationed at such villages and therefore travel long distances to Court which gets to affect the quality of prosecution and time.

iv) Plea Bargaining:
Our legislation is silent on plea bargaining. However, in a jurisdiction experiencing a high prevalence of such cases, it is ideal to entrench this important aspect of law in our law to help the courts to quickly dispose of cases and to reduce backlog

v) Withdrawals:
A very large number of cases are withdrawn by the prosecution either for lack of evidence or after parties have reconciled out of court. The complainants tend to quickly reconcile with offenders largely in Threat to kill cases. This is so as victims in most of these cases depend on the offenders for their upkeep or welfare. Therefore, they quickly reconcile so that they continue to benefit from perpetrators.

vi) Backlog:
After the establishment of the GBV court we saw a large number of criminal cases being registered. Some of the cases are very old cases allegedly committed in Years 2014 and 2015. Therefore not every case registered was committed during the lockdown or post lockdown or is recent.

b) Civil Proceedings:

i) Representation
The parties are mostly self-actors. The quality of representation is often poor. Parties more often than not fail to identify the relevant facts to place before the court and the real issues for determination by the court.
ii) Poorly Coordinated Institutions:
There is no good coordination between Courts and Institutions that offer counselling. Courts may order counselling but the victim may not easily access the service because of the congested schedule of government counsellors.

Over and above that the police are often engaged to serve the Respondents. However, they may not have the resources to do so on time which tends to affect the pace of the case.

SOLUTIONS/RECOMMENDATION:

i) There are times when we operate a mobile Court to improve access to justice

ii) We issue orders to the police and to social welfare officers to give GBV cases due attention

We recommend that

i) Parliament legislates on plea- bargaining and amend the Domestic Violence Act to remove the limitations and cover all types of GBV matters

ii) Courts be provided with in-house social welfare officers/counsellors

iii) Special units be set in police stations to deal with GBV matters

iv) Specializing prosecutors be assigned to GBV Courts

v) Empowerment of survivors so that they do not withdraw cases for economic reasons.
Session 6A: “Creation of Gender-Based Violence Courts”

Hon Ms Linda Bradford-Morgan, Australia

(ABSTRACT)

Preventing Domestic Homicides: Lesson Learned from Tragedies

Domestic homicides are an extreme form of violence against women and children across the commonwealth. Many of these deaths appear predictable and preventable with hindsight. Some of this hindsight has come from various death review processes across Canada, the US, Europe, Australia and New Zealand that have developed in the past decade. These reviews by interdisciplinary committees shed light on what transpired and how to prevent the same outcome in similar circumstances in the future. These reviews often highlight patterns of known risk factors prior to the homicide as well as shortcomings in inter-agency collaboration with health, social services, and education and justice professionals. There may be multiple systems and organizations who miss opportunities to share information and develop effective intervention strategies in the community and the justice system. This presentation outlines the often-repeated lessons learned from these tragedies that include the need for enhanced professional and public education to save lives. Future directions are discussed in terms of the need for better risk assessment, safety planning and risk management by legal and mental health professionals.

GENDER-BASED VIOLENCE AGAINST WOMEN AND GIRLS
UNODC HANDBOOK

Linda Bradford-Morgan
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The CEDAW Committee General recommendation 35 on Gender Based Violence.

The obligation to respect, protect and fulfil

- Judges have an obligation to respect, protect and fulfil women’s rights to non-discrimination and the enjoyment of de jure (in law) and de facto (in practice) equality. For judges this means:
- Respecting women’s rights to live free of violence and free of the fear of violence. Judges need to respect victims who are before them in criminal court and refraining from an interpretation of the criminal laws and procedures in such a way that does not allow her to enjoy such a right.
- Protecting women’s rights, including preventing private actors or third parties from violating her rights.
- Fulfilling women’s rights by taking such judicial measures that will ensure her realization of her rights.

The obligation to exercise due diligence

- Judges, as state actors, are required to exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women whether those actions are perpetrated by the State or by private person. The failure of a State Party to take all appropriate measures to prevent acts of violence against women when its authorities know or should know of the danger of violence, or a failure to investigate, prosecute and punish, and to provide reparation to victims of such acts, provides tacit permission or encouragement to acts of violence against women. For judges this means:
BE AN OPTIMIST: WHAT YOU SAY AND DO MAKES A DIFFERENCE

Judges as leaders in overcoming systems abuse and structural discrimination.

THE TRAUMA INFORMED JUDGE

UNODC page 10: extract from Canadian publication “The Inhospitable Court”

The hierarchical manifestation of gender as a principle of social organization and control, through constructs such as the moral, mental, and physical inferiority of women and the construction of women as not to be trusted make it likely that victims will question their own complicity in the violence they experience.

National Action Plan 2010-2022 Australia removing Institutional barriers

• In 2015 the Queensland Government committed to implementing the recommendations in the “Not Now Not Ever Taskforce report: Delivering fairness and Accountability: An Enhanced law and justice framework for domestic and family violence “. This included the creation of specialist domestic and family violence courts and the appointment and professional development of specialist magistrates.
• Legislative reform civil Protection Order hearings are not to be adjourned pending trial of related criminal proceedings.
• Bail Act reforms required defendants to show cause why they should be granted bail on violent intimate partner offences and/or they had prior convictions for contraventions of Orders or offences of violence.
• In Victoria the Royal Commission Report following the death of Luke Batty identified the importance of having courts that were cognizant of the power imbalance between victims and perpetrators; and the risk factors that are known precursors to the use of lethal force.
• Specialist family violence lists operate in most capital cities and large regional centers in Australia.

Legal reforms

• In 2016 Queensland a criminal offence of non-lethal strangulation in a domestic setting was introduced.
• In 2017 Protection Orders were increased from 2 to 5 years unless written reasons are given for a shorter duration.
• Changes to the presumption that bail should be granted on violent intimate partner offences and victims were required to be notified of applications for bail that may impact on their safety.
• Cross-examination of a DFV victim by a self-represented respondent is prohibited in civil hearings - declared a protected witness
• The Victorian Law Reform Commission in August 2021 concluded consultation for the revision of Jury directions in Sexual assault trials.
DOMESTIC AND FAMILY VIOLENCE PROTECTION ACT
People who experience DV should be treated with respect and disruption to their lives should be minimized. If people have characteristics that make them particularly vulnerable any response should take account of those characteristics.

MEANING OF Domestic Violence –
Physical or sexual abuse; emotional or psychological abuse; economic abuse; threatening behavior; coercive behavior;
Behavior that in any other way controls or dominates a person and causes that person to fear for their safety or wellbeing or that of someone else.
Personal injury; coercion to engage in sexual activity; damage to property; depriving a person of their liberty; threats to kill or injure that person; a child of the person or someone else; threats to commit suicide;
Causing or threatening to cause the death or injury of an animal; unauthorized surveillance; unlawful stalking.

DOMESTIC VIOLENCE DEATH REVIEW REPORT QUEENSLAND 2018 CASE STUDY: Vivian

- Vivian, a female in her early 40s, was the victim of a severe and prolonged physical assault, including acts perpetrated by her husband, Harry, after she expressed an intent to end the relationship.
- Harry was subsequently arrested and remanded in custody until he was released on bail some weeks later, with a protection order prohibiting him from contacting or approaching Vivian, and bail undertakings requiring him to reside at a specified location and report to police weekly.
- Several weeks after being released on bail, Harry killed Vivian before taking his own life.
- In the lead up to her death, Vivian was supported by several specialist domestic violence services and had contact with police and primary health care providers in response to financial, accommodation and counselling needs. Harry maintained contact with police pursuant to bail undertakings, as well as a primary health care provider for chronic health and mental health issues. He was noted to be non-compliant with his medication regime in the lead up to both assaults.
- One of the couple’s children was also admitted to a mental health facility in the lead up to the deaths because they were exhibiting signs of psychological trauma associated with their exposure to parental domestic and family violence.
- While there is limited evidence of prior physical violence outside of these two abusive episodes, it is clear that Harry adhered to rigid gender roles within the family. Upon losing his capacity to work some years prior due to health issues, he struggled with Vivian being required to return to work and study to support the family.

Gender stereotypes and domestic violence
The gender violence epidemic – combating cultural norms

- Domestic violence has a specific set of markers that challenge criminal courts. Complainants recant- fear of repetition of trauma in court; fear of reprisal; fear of consequences for defendant.
- There is a power imbalance in the relationship between victims and perpetrators.
- Cultural barriers from colonisation for indigenous women - fear of State agencies removing children
- Culturally and linguistically different women have an increased vulnerability in reporting gender violence as interpreters are known in their community. Many women rely on their spouses to sponsor visa applications.
- Judges cognisant of barriers are critical to improving the court’s response to gendered crime.
- Jury directions that dispel gender myths and stereotyping of victims and perpetrators’ behaviours (recent complaint and avoidance).
Imaging structural and functional brain development in early childhood

VIOLENCE FACILITATING ATTITUDES

when he says your choker looks nice but you're too shy to tell him his hands would look nicer.
Extract from Australian Institute of Health and Welfare: Family, Domestic & Sexual Violence in Australia 2018

The Young and the Vulnerable - Remember how Romeo & Juliet Ends


You ever love somebody so much
You can barely breathe, when you're with them, you meet And neither one of you, even know what hit 'em,
Got that warm fuzzy feeling, yeah them chills, used to get 'em
Now you're getting f…g sick, of looking at 'em
You swore you've never hit 'em, never do nothing to hurt 'em,
Now you're in each others face,
Spewing venom, and these words, when you spit 'em
You push, pull each other's hair, scratch, claw, bit 'em,
Throw 'em down, pin 'em, so lost in the moments, when you're in 'em
It's the rage that's the culprit, it controls you both
So they say it's best, to go your separate ways,
Guess that they don't know ya 'cause today, that was yesterday Yesterday is over, it's a different day
Sound like broken records, playin' over, but you promised her
Next time you'll show restraint
You don't get another chance,
Life is no Nintendo game, but you lied again
Now you get to watch her leave,
Out the window, guess that's why they call it window pane
Now I know we said things, did things
That we didn't mean and we fall back into the same patterns
Same routine, but your temper's just as bad, as mine is
You're the same as me, but when it comes to love, you're just as blinded
Baby please come back, it wasn't you,
Baby it was me, maybe our relationship isn't as crazy as it seems
Maybe that's what happens When a tornado meets a volcano
All I know is I love you too much, to walk away now
Come inside, pick up your bags off the sidewalk
Don't you hear sincerity, in my voice when I talk,
Told you this is my fault, look me in the eyeball
Next time I'm pissed, I'll aim my fist at the dry wall
Next time, there will be no next time
I apologize even though I know it's lies
I'm tired of the games, I just want her back, I know I'm a liar
If she ever tries to fucking leave again
I'm a tie her to the bed and set this house on fire

The Volcano v Tornado Myth
In popular culture obsessive controlling “love” is portrayed as passionate romantic love. Eminem : “Love the way you lie”

• Domestic violence is a gendered phenomenon. It is not culturally specific. Traditional gender roles reinforce norms that create a power imbalance in relationships.
• In 2018 the Australian Human Rights Commission recorded that women were over-represented as part-time workers in low paid industries and spent 64% of their working week performing unpaid care work. 1 in 3 experience physical or sexual violence in their lifetime. 2 women die in Australia every week.
• In Queensland there were 294 deaths between 1 July 2006 and 30 June 2018. One half of the homicides involved the death of children. The highest proportion of fatalities were women aged between 35-44 years old (47) and children under 5 (44) [Domestic Violence Death Review Report 2018].
• We cannot predict who will kill. In assessing safety risks we know that the point of separation is the most dangerous time. Coercive and controlling behaviour is a high risk factor. Pregnancy is a vulnerable time. Threats to kill or suicide is a risk factor.
• Many applications for protection orders involve reports of women being punched in the face or having their partners grabbing them around the throat. It frequently starts with a partner taking the aggrieved’s phone and reading her texts or social media posts. A struggle to retrieve the phone triggers a physical altercation which escalates rapidly – not only is the aggrieved physically overpowered but she has no means to call out for help or telephone for police assistance.

Category 1 – Risk Factors - Protective Assessment Framework
• Frequency
• Pregnancy
• Previous incident(s)/contravention(s)
• Separation
• Severity
• Sexual Violence
• Significant change in circumstances
• Strangulation/suffocation
• Threats to kill
• Use of Weapons

Category 2 – Risk Factors - Protective Assessment Framework
• Alcohol/drug misuse
• Animal cruelty
• Child abuse
• Controlling behaviour
• Cultural considerations
• Mental health issues
• Respondent history of violence
• Ongoing conflict
• Significant damage/destruction of property
• Stalking
• Suicidal
• Violent threats

Community Expectations
CANADIAN MEDIA PRIOR TO LEGISLATIVE REFORM
In Newfoundland a defendant was sentenced to 14 days house arrest for an assault that included strangulation in a domestic setting. The judicial decision was the subject of criticism as failing to understand the trauma of family violence:
“He didn’t want his girlfriend to go out with her friends, they argued and he choked her. (The Judge) downplayed the strangulation, deciding it only happened or a brief period and the woman wasn’t injured…How long do you have to be strangled to make it meaningful?…11 pounds of pressure for 10 seconds can cause unconsciousness, while brain death can occur after only a few minutes. In 2010…New York introduced a new law around strangulation, which said, “strangulation…offenses epitomize the power dynamic…because these acts send a message to the victim that the batterer holds the power to take the victim’s life, with little effort, in a short period of time, and in a manner that may leave little evidence of an altercation” .(the judge) said the assault happened in the home and Lockhart is not a threat to the public. A huge barrier to addressing domestic violence is the belief that (it) is a “private” matter. Being a Royal Canadian Mounted Police officer gives him a high degree of privilege and opportunity to use force or threaten people with less power than he has…That Canadian judges are still defining male pattern violence against women as a “private” matter is extremely alarming”
(From Wong,K “Courts failing to fight male violence against women” 8 April 2017 CBC News www.cbc.ca)
Report card on specialist courts

- Specialist courts extend support services to victims and perpetrators to manage safety risks.
- Legislative frameworks require women to be consulted on the conditions of Court Protection orders (including ouster orders).
• Engagement with Domestic Violence agencies provides important feedback on court processes.
• Multi-disciplinary judicial education promotes gender responsive courts.

Unconscious gender bias and stereotypes – Interdisciplinary education
Thank you to the CMJA for the Brisbane 2018 Red Rose Foundation keynote address by Dr Dianne Douglas, clinical psychologist, Trinidad and Tobago, regional consultant UN

RED ROSE FOUNDATION – DEADLY ROMANCE VIDEO
COERCIVE AND CONTROLLINGBEHAVIOUR * https://youtu.be/Ek2ToCZYQPg

Be a context driven judicial officer - A community responsibility for men and women

A little less conversation please - a little more action
Session 6B: “Replacing Judges with AI in the Courts?”

Audio Summary of Prof Karen Yeung, England and Wales
Transcript by Bethany Twyman (E&OE)

Let me start first by going right back to the basics, and clarifying what we mean when we talk about artificial intelligence (AI), as it is really important that we understand what we are talking about when we use this term in order to understand what AI technology can and cannot do, at least under current state of the art. A starting point is that you often hear a lot of talk and sometimes fear about the rise of the machines and the onslaught of general AI. This is the idea that one day we might have machines that are capable of acting entirely autonomously for their own independent purposes, and this has generated debate about whether or not the machines are coming and that they are going to extinguish us. There is a fear that this might put the entire human race at risk, but I want to reassure you that we are a very very long way from developing that kind of technological capacity and a considerable number of experts believe that we will never get there, so please put all of those fears aside.

What I want to focus on today is what we do have, and what we do have is still very powerful, but nothing like general AI. What we have are machine learning techniques which have rapidly grown in power and sophistication in recent years, partly as a product of the vast amounts of digital data that we now produce in contemporary life and machine learning algorithms have enabled the development of very powerful task specific AI that can undertake tasks at a level where it is very difficult to detect if there is any differences between the way in which humans may produce the same outcomes. For example, in speech and image recognition we now have technologies which are both extremely fast and highly accurate and many of these are now claimed to outperform humans in relation to those particular domains. It is these machine learning tools I want to base my talk on today. The second thing it’s important to understand is that when we are talking about machine learning, it is important to recognise that it doesn’t work on the basis of conventional software programming rules that work on a ‘if X, then Y’ basis. Instead, machine learning techniques are based on software that basically search for patterns in large datasets, typically of past behaviour, in order to make predictions about future behaviour. These predictions are generated by passing large volumes of data through these algorithms to identify the relevant thing that the machine is trying to predict. These applications have proliferated across a wide range of domains that we now encounter in everyday life. I’m sure you are very familiar with the Amazon product recommendations system, and you might be wondering ‘How does Amazon know that I’m likely to be interested in these products?’ Well actually it is not rocket science, it closely tracks the items that you’ve bought and looked at before and then it compares all of those items, the profile of your spending and browsing behaviour, with all the other profiles of the entire population of Amazon users to find people with similar spending and browsing patterns to you and then shows you automatically similar kinds of products. This is a nice illustration of the way machine learning works, by looking for patterns in the data and making predictions based on those past patterns.

The other thing that’s important to recognise is that many of these software systems are actually being driven by private sector developers and these are the ones that public service providers are increasingly trying to embrace as they look to machine learning to make the delivery of public services more efficient and that’s also true in the domain of justice but it does have implications for how we think about basic principles associated with judicial integrity and the principles of open justice and so on and so forth.

Now that I have set out the background, I just want to cover specifically how these applications are being used in the criminal justice system. So, I will not be concerned with how judges might be replaced but instead the possibility that these systems might be able to make predictions about individuals, and those individuals want to challenge those predictions and bring them before a court, and I want to raise some queries, or alarm bells, to encourage you to be alert to if these kind of challenges to those predictions come before you in court. But before that, it is important again to
make a further set of distinctions because we are using digital technologies increasingly in criminal justice contexts, and for this purpose I want to encourage you to think, or distinguish between digital automation on the one hand, and the use of machine learning tools and techniques on the other and my concern today is on the use of machine learning tools rather than automation. At the same time, it’s also helpful to realise that we are already using some of these tools today in criminal justice administration, particularly for crime prevention purposes, biometric identification systems and the use of predictive policing are very well used in the US for example. But the ones I want to focus on today are the use of machine learning predictors to assess an individual’s risk of ‘recidivism’, this names a little bit misleading as often individuals who are subjected to these assessments haven’t actually any committed any crime at all, so it is a little bit of a misnomer to refer to it as recidivism. None the less, that is the label that is attached to these tools, and some of this work is a product of ongoing investigations with Dr Emma Harkens, on a big project funded by the Volkswagen foundation, with a number of other investigators in Germany.

The first thing to understand is this is not magic, there tends to be an aura of magic around these tools when really in practice what they are is very sophisticated statistical tools used to generate predictions of all kinds, the ones I’m concerned with today are predictions about future crime, whether that be predictive policing or assessments of individual risk. Some of you might already be familiar with tools used to assist legal decision making in legal services industry more generally such as eDiscovery however I am not going to be talking about those today. Rather my focus is essentially on what are decision support tools that are built using these machine learning methods, and sometimes we can just call them machine predictions. The aim of these predictions is to assist human decision makers who need to make a decision about how a particular individual should be treated in the criminal justice system particularly in relation to custody decisions. For example, a person might be arrested and brought into a police station, and the question has to be made about how should we treat this individual? Should we retain them in custody, or should we release them on bail? Or a person might be already serving some kind of sentence for a convicted crime and the question comes about whether we should give them early release on parole. In these cases, one of the things that policy makers are rightly attuned to is what is the likelihood that a particular individual will commit some kind of unwanted event in the future. For example, perhaps committing a serious crime in the future, or in the case of bail failing to appear before the court. It is in these contexts that these kinds of machine predictions are being used, to assist criminal justice officials. Let’s say an individual comes up and applies for early release or wants to be released into the public, and the predictor says “no, this person is not a safe bet, we think you should hold them in custody” and this person wants to appeal against that decision. Let’s say that question comes before you, as a judge and this person is seeking to challenge the machine prediction, so how should judges respond when the predictions are challenged? I want to dig a little more into some of the fundamental constitutional principles that are implicated by the use of these tools and want to encourage you to be alert to when these predictions are challenged in court. I am going to suggest that there are several basic constitutional principles that are of vital importance to judicial integrity and the rule of law, but this has been overlooked in a lot of the ongoing debates about AI in the justice system. Those principles are the principle of open justice, basic rights to due process and the respect for the rule of law and the need for legal authorisation.

Let me begin with the principle of open justice, I’m sure you know that this requirement means among other things that legal decisions that affect the rights of individuals must be transparent and able to be explained, both to the affected individual and the to the public at large in terms that they can understand and that are open to public scrutiny. These are essential so that the affected individual and the broader community can have confidence in the integrity of judicial decisions. But these machine learning tools threaten the open justice principle in a number of ways. Firstly, not all machine learning techniques are capable of providing explanations for how they have arrived at and that’s because these techniques work by finding patterns in large datasets and there are many different kinds of techniques in use and some of them are explainable in functional terms, such as decision trees but there are other kinds like deep neural network, where the underlying logic by which they arrive at their outcomes cannot be explained in comprehensible human terms and even computer scientists don’t understand how they generate their outcomes. My own view is that if we cannot
explain how an output of an algorithmic tool that makes a recommendation about how an individual should be treated by the legal system then we should not be using them. For example, if a tool recommends that a particular offender seeking release on probation should not be released and that person says ‘Why?’, I don’t think it is adequate to simply say, “The computer says no.”, if we cannot explain and justify the decision, then the decision might as well be arbitrary and this as you know is the complete antithesis of a fair and just decision.

Secondly, because these tools are built by private software developers, they’ve often sought to invoke their IP rights to keep their algorithms secret, and the underlying training data and as a result the underlying algorithms are not open to challenge by the affected individual, not open to public scrutiny, and in my view this also is a clear violation of the principle of open justice as well as the right to due process and fair procedures, so in my view the IP rights of software companies should not be trumping the human rights of individuals who are subjected to outputs that have a direct bearing on the way in which their rights are given protection.

Finally, in relation to the right to due process, this is an important way in which we are failing to respect rights to due process in relation to these predictors. It is important to recognise that the content of these rights to due process partly arise because mistakes sometimes happen in the legal decision-making process, and the more serious the consequences of the mistake, the more demanding the procedural safeguards must be. That means we need to attend to the consequences, what substantive decisions flow from an AI generated prediction, and here we need to be thinking about what is the impact on an individual’s rights and interests? In ongoing policy and academic discussions there has been a very strong tendency to decouple the prediction from the substantive intervention that follows the assessment and focus just on the prediction and its accuracy in itself. For me, this is fundamentally wrong and we need to consider the predictive tool and the substantive intervention together in the context in which it is applied, and its only considering both these together that we can evaluate the consequences of mistaken prediction. Consider for example your Amazon product recommendations, do we need legal safeguards if Amazon recommends to us a product of which we have no interest? No, because the mistake is trivial. But do we need legal safeguards if an AI tool used in the criminal justice system recommends that an individual rated as high risk should be retained in state custody then we most certainly do, because the result is to deprive them of their liberty. This means that we need to attend carefully to the consequences of mistakes in decisions about the way we use tools and to scrutinise very carefully claims about performance are based on accuracy, and in the criminal justice system these predictions are based on accurately predicting the likelihood of a person committing a future crime. But we do not have a universe of reliable, comprehensive crime data because we simply do not know the entire universe of crimes committed. Instead what happens, is that we use arrest data as a proxy for crimes, but we know that arrest data is an extremely misleading indicator of crimes that are committed because not all arrested individuals are charged, and not all charged individuals are convicted, and there are many crimes for which no arrests are made. When we see tools that proport to predict future crimes, we need to bear in mind that actually they are not predicting future crime, they are predicting future arrest. These two things are not the same and effective legal safeguards are essential and we must have due process rights that enable individuals to challenge, contest and appeals these kinds of outputs.

This brings me to my final point, which is the principle of legality. In democratic legal systems, it is a basic requirement of the rule of law that all actions by government bodies must be authorised by law. Yet until recently there has been a basic failure to ensure that the use of these tools in the criminal justice context is authorised by law. Instead there is a common claim that we have always assessed individuals for risk in the criminal justice context and these are just a more advanced way of doing it. But this claim doesn’t withstand critical scrutiny, just because we are pursuing a well-known and legitimate policy objective, doesn’t mean we can use any means at our disposal to achieve it. In other words, the means that we use to achieve our legitimate objectives matter and examples of mechanisms and institutional constraints that we use to reduce the spread of COVID-19 are a classic example. It’s a perfectly good and important public health objective, but it doesn’t mean the state can do anything it
likes to reduce the spread of COVID-19. Just because a policy objective is legitimate, doesn’t mean that anything goes.

I want to draw attention to a couple of features of these tools, that mean we need to be very careful about the extent to which we use them. Because these tools are complex, they are opaque, they are often unable to provide clear comprehensible reasons for their output, they are probabilistic so mistakes are inevitable, and the consequences that follow from their predictions can be very serious indeed. We need explicit law authorisation for their use, we need to set limits on the extent to which they can be acceptably used in the criminal justice process, and we need to have safeguards to ensure that there are proper procedures in place so that one can challenge and contest the judgements involved.

In conclusion, I want to sum up by saying that what we need to attend to is the importance of thinking about our basic constitutional principles and to take these into account when we are thinking about the implications of these rules instead of focusing only on issues of bias and discrimination, which are important but in some ways they miss the more foundational point, which is whether or not they are constitutionally acceptable at all. If they don’t meet our basic constitutional principles of open justice and due process and the rule of law, then we shouldn’t be using them.
Session 6B: “Replacing Judges with AI in the Courts?”

Professor Tania Sourdin, Australia

Judges, AI and Technology – Dystopia or Opportunity?

Three Levels of Change
Mainly lower levels of change for the next 5-10 years.

Supportive Technology
Technology is assisting to inform, support and advise people involved in justice activities. Remote conferences, vid hearings, apps, websites, info, e-forms, justice café.

Replacement Technology
Technology is replacing functions and activities that were previously carried out by humans, Case management, letters, listing, sharing, TDRS, ODR, Modria add ons. See BC. Apps again! Platforms and supportive apps.

Disruptive Technology
Technology is changing the way that determination, advisory and facilitative processes work and informing the system reform through the use of big data sets and more complex knowledge generation. AI replacing some decision making. AI and analytics. Apps again!

What is Driving Change? The Digital Age
We are more connected than ever before

- Large percentage of population are online – all the time – COVID shifts
- Scope and potential for EDR and related ODR in modern online environment – cost and time
- EDR and ODR are being used in a wider range of disputes – convenience and user comfort.
- Significant obstacles in justice reform
- What happens when judicial reform clashes with disruptive technology?
- Rapid changes in service delivery (e.g. Uber) gives rise to unexpected results.
- UK reforms, BC reforms, EU reforms.

- Need for Reform
  - How will judicial processes change in the era of technological disruption?
Not so good Technology Decisions – Yahoo!
- 1998 – Chooses not to acquire Google for $1 million.
- 2002 – Realises their mistake and offers $3 Billion. Does not acquire for $5 Billion (Google now worth $927 Billion).
- 2008 – Microsoft makes a £40 Billion offer to buy Yahoo and Yahoo declines.
- 2016 – Yahoo accepts a $4.48 Billion purchase from Verizon

Supportive Technology
First Level of Change
Low level changes for the next 5-10 years

In 2008, entrepreneur Charley Moore founded online legal services provider Rocket Lawyer. It now boasts 30 million users. Subscribers pay a monthly fee for instant access to pre-prepared documents and tutorials, as well as online legal advice from experts at participating firms. In 2020 a number of regulatory sandbox programs set up.

Replacement Technologies
Second Level of Change
Significant Growth
- Large Scale ODR
- Modria – More than a billion disputes (Tyler – Modria). Chatbot plus systems. Virtual assistant to bot.

E-Courts & E-Arbitration
- US, Canada and UK.
• Sometimes linked with the big providers. HMOC. E-Discovery.

**Boutique Providers**
• Guided Resolution – Adieu.
• Apps, apps and more apps – over 280 justice and ADR apps.

**Govt Initiatives**
• Administrative decision making, Robotdebt, visa plus policy e.g. EU changes rolled out from the beginning of 2016.

**Second Level of Change**

**Disruptive Technology**

**Third Level of Change**

Disruptive Technologies can help, hinder and will change

**Possible Benefits**
Technological change was intended to provide many benefits. More access, ease of management but stress, disconnection issues and increased hostility issues.

**Job Loss**
Many jobs will not exist in the same way in 10-20 years. Although the jobs may exist, they will be ‘altered’. Significant social disruption and changes in courts.

**Threats to Privacy**
Significant threats to privacy. Justice systems have not yet grappled with this (social credit scores). How are litigants behaving? Use of recordings now common in family disputes.

**Loss of Social Interaction**
What do the new ways of communication mean for social interaction? What does happen when rapport is created? Apology by text? Alexa or Siri?

**Evolution of AI**

**Third Level of Change**
Artificial intelligence us ab evolving concept – the creation of ‘intelligent machines’ will replace many traditional human labour intensive jobs in the future.
What will a judge look like in 10, 20- or 30-years’ time?
• Role of AI in judging – to support, replace or disrupt judicial processes?
• What impact will AI have on adjudicative processes?

Recent developments indicate that there is change in how lawyers, courts and others use technology, shifting to enhance and make processes more time efficient and predict the outcome of litigation?

**AI – At the Simple Level**

![Diagram of AI-related processes]

**Role of Judges in the Era of Technology**

The increasing use and development of AI leads to the question: Will some judges be ‘phased out’ by AI?

• Complex interactions with people
• Case management
• Interaction with experts and lay people
• Communication and skills growth
• The importance of responsiveness

Role of a Judge – It is not just ‘supporting decision making’ – multi tasking – democratic realities.

Judges use empathy and intuition, taking into account the social factors in decision making.
These are important functions for which AI may be both rigid and inflexible.

**Artificial Intelligence**

**Displacement**
Technology will develop to a point where AI will replace some simple adjudicatory functions?

**Control**
The impact of displacement will vary. Judges are likely to stay in control in most democratic countries.

**Issues Remain**
- Legality of decisions made by ‘AI’
- Translating law into code
- Discretionary judgements

**Review**
Will review of AI decisions by human decision makers be necessary?

**Role of a Judge in the era of technology**
As society moves into the era of technology, how will the role and nature of the Judge change? How independent is a judge? What data (decisions and other file material) can be used to train Judge AI? Who drives reform?

**Some AI Issues**
1. **Legal Authority**
   Can a computer program or automated process possess legal authority to make decisions?

2. **Translating Law into Code**
   Computer programmers and IT professionals lack knowledge of the law and legal qualifications yet they are tasked with translating law into code. Significant Law as Code Movement.

3. **Discretionary Judgement**
   Lack of discretion may lead to unfair or arbitrary decisions with a lack of individualism, consideration of the circumstances or a lack of understanding of nuance in law (‘weak’ and ‘strong’ discretion).

**Three Key Questions:**
1. Who is the decision maker?
2. Who possesses the legal authority to make such a decision?
3. How is the decision explained (explainability)?

Law is complex, includes statutory presumptions and discretion – with coding these intricacies may prove to be a challenge.

The ever-changing nature of law as a result of enactment, interpretation and amendments means constant updates.

Discretionary decisions will need to take into consideration:
- Community values
- Subjective features of the parties
- Other surrounding circumstances

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Developments in some jurisdictions may not be appropriate in others: ‘On one hand, many local courts in China are developing a “similar case pushing” system based on this database, which can push the judgements of similar cases to judges for reference. On the other hand, some courts have tried to develop an “abnormal judgement warning” function based on this database – that is, if a judgement significantly differs from the judgements of similar cases, the system will automatically send a warning to the judge’s superiors, prompting them to initiate a supervision mechanism on the judge concerned. At present, this function is mainly used in criminal cases to monitor whether the judge’s sentencing is reasonable.”

### Conclusion

**Changing Processes**
- Using technology as a medium to ‘support or supplant’ processes – e.g./ Apps, user friendly referral systems with automation.
- Use of ‘advisory’ AI to reshape new alternative understandings and potentially replace some advisory and determinative practitioners.

**Changing Styles of Interaction**
- Collaborative techniques and predictive technology to provide more support and referral avenues for disputants. AI replacing some decision making.

**Improving case management, reporting and data collection**
- Use of disputant-focused inputs and tracking technologies – rise of trip advisor style inputs (mapped with data preferences)

**Using data in different ways (changing the nature of data retention and collection)**
- Use of ‘big data’ to link dispute criteria and data fields or to map and promote transparency or comparability

**Create new research**
- Micro expression tracking…

Video analytics can be achieved based on data curation, sentiment analysis and other advanced solutions. Expressions like “happy”, “sad”, “angry”, “scared”, “surprised” or “neutral” form the basis of video analytics.
In December last year, in a landmark decision, a coroner in the United Kingdom concluded that a young girl known as Ella Adoo-Kissi-Debrah lost her life to a fatal asthma attack aged 9 years, died largely due to air pollution which was a significant contributory factor to both the induction and exasperation of her asthma. Ella became the first person to have air pollution officially recognised by a coroner as cause of death in the United Kingdom. Another inquest ruling from 2014 which found that she died from acute respiratory failure was quashed by the high court following new evidence regarding the dangerous levels of air pollution close to the home and this led to a new inquest. The deputy coroner Phillip Barlow found that Ella was exposed to levels of air pollution that were above legal limits for nitrogen dioxide, and above the World Health Organisation (WHO) guidelines for particulate matter which the United Kingdom law had not yet reflected. He concluded that high exposure to this excessive pollution contributed to the asthma that led to her death. According to the coroner, the way to school for Ella was clogged with a thick cloud of toxic pollution from south circular road in London. The coroner recognised that vehicles were the main source of pollution that contributed to her death, the coroner also said that during Ella’s life, nitrogen dioxide emissions in Lewisham, where she lived, exceeded legal limits under the European union national levels, and particulate matter levels were also above the guidelines provided by the WHO. This ground-breaking decision could pave the way for other individuals to use the law to fight for their right to breathe clean air.

For the many people who suffer as a result of breathing the polluted air around them, the possibility of making the link between excessive pollution and damage to their health in a court of law now seems like a possibility that wasn’t a possibility before this case. When judges are not bound by the reasoning set out by the coroner and any case would depend on the specific circumstances, the result of this inquest signals that our current scientific knowledge of the impacts of air pollution could be strong enough to establish a causal link in courts. The inquest into Ella’s death has highlighted the governments legal duty to protect people’s lives from the threat of air pollution. I do believe that the story of Ella is the story of many young girls, boys, men and women around the globe. Pollution levels have been the cause of untimely death and yet the deaths have been attributed to acute respiratory failures and not to pollution. Ella’s story also reveals that many governments are far from committing to legally binding laws to achieve the WHO guidelines. According to the WHO, air pollution is a major environmental risk to health, by reducing air pollution levels, countries can reduce the burden of disease of strokes, heart disease, lung cancer and both chronic and acute respiratory diseases including asthma. According to a recent WHO report (2019), air pollution is the fourth greatest overall risk factor for human health worldwide, after high blood pressure, dietary risks and smoking. The WHO also notes that ambient or outdoor air pollution in both cities and rural areas has accounted for 6.2million premature deaths worldwide in 2019, and that this mortality is due to exposure to small particulate matter which causes cardiovascular and respiratory disease and cancers.

Air pollution with its adverse impact on health is transforming how lawyers and judges address cases involving pollution. The vital question relevant to this, what role can the judiciary play in ensuring the right to clean air is protected, thereby ensuring a safe and just space for humanity. It has been at a time in the game where judiciaries have neither the sword of the executive or the pass of the legislature, but merely judgments. The role of the judiciary is limited to application of the law, to cases brought before the court. Judges can contribute to ensuring that the right to clear air is preserved and protected, and judges are central to doing one of two things. Firstly, holding governments accountable, for meeting policy commitments, and complying with legal obligations on clean air, the
environment and sustainable development, thereby shaping legal and policy frameworks. Judges can play a central role in admitting relevant and credible scientific evidence of pollution into courtrooms and making judicial findings of facts about pollution which will elevate the national discourse regarding rights to clean air, and indeed courts have successfully incorporated international scientific consensus synthesised by the WHO, into domestic legal common ground ensuring the advancement in pollution filter, into local discourse. The judges can also balance outcomes and protect citizens' fundamental constitutional and other legal rights, frequently closing the gaps in which people and legal systems fall.

From a practical point of view, let me illustrate some environmental cases that have come before the courts. The first is constitutional rights litigation, a number of constitutions have an explicit right to environment, and many commonwealth countries also fall within this group of countries with a right to a clean environment. Others have provisions which give implied rights to a clean environment. This environment has been inferred from existing rights; due to time limitation I will deal with cases where the environmental rights have been extrapolated from existing legal rights. In the Attakoya vs Union of India case, the high court of India held that the right to unpolluted water attributes to the right to life, for these are the basic elements which sustain life itself. The Indian high court extrapolated the right of unpolluted water from an existing right to life. In another case, which is the Social and Economic Rights Action Center v. Nigeria which was before the African court of Human and Peoples’ rights. The African court held the view that if environment is degraded by pollution, and it affects the quality and safety of life protected by such rights as the right to life, the right to health, and the right to satisfactory living conditions then the rights themselves are breached, thus the right to a clean environment can be extrapolated from existing rights. No one captured the nexus between human rights and environment better than Judge Weeramantry of the international court of justice who in a separate opinion in the famous gabicikovo-nagymaros project case opined that the protection of the environment is likewise a vital part of contemporary human rights, for it is a sine qua non for numerous human rights such as the right to health, the right to life itself and it is necessary to elaborate on this as damage to the environment can impair and undermine the human rights spoken of in universal declaration of human rights as well other human rights views.

When you look at the general comment No. 36 on the right to life of the international, civil and political rights published by United Nations Human Rights committee in 2019, it is crystal clear that the protection of human rights is a vital part of the right to life. The general comment provides in paragraph 62 that environmental degradation, climate change, and unsustainable development constitutes some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life. The obligations of state parties and international environmental law will thus inform the content of Article 6. Article 6 deals with the right to life and the obligation of states parties to respect and ensure the right to life but also inform the relevant obligations and international law. This is what the United Nations Human Rights commission speaks of a link between existing human rights such as the right to life to environmental rights. Another way that cases have come before the courts is a traditional way, actions in courts, this is the most common and traditional way that environmental cases are brought before the court. Especially so in common law jurisdictions, actions in tort law generally include nuisance, negligence, and trespass. In actions in torts, parties generally seek damages and injunctions to stop particular actions which specifically affect them, and by extension degrade the environment. Another way that cases have come before the court, both in common law jurisdictions as well as other jurisdictions is actions challenging the government and actions in areas of environment. This includes actions that are of the government, actions also including action delay and a number of legal issues unique to this type of litigation include the standard of review. The amount of difference given to a court in reviewing decisions of government and its agencies, such as environmental agencies and over the years, courts have adopted a systematic balance analysis which includes a high standard of consideration of environmental factors as standard, which must be rigorously enforced by reviewing courts. Obviously, the courts also look at this review which includes the extent to which judicial review of government in environmental matters. Under this form of litigation, the time frame of the review is also key, the statutory time limitations must be taken into consideration.
Finally, another way that cases have come before the courts is criminal prosecutions. Criminal prosecutions maximise the message, remedies often include imprisonment and fines. There is a question of standard of proof which is beyond reasonable doubt. It is more demanding than the civil standards. Most environmental crimes require proof of pollution event, and proof of criminal intent. In most cases the government proves the intent by showing that the defendant acted knowingly. That is the government must show intentional conduct not conduct that is the result of an accident. For other crimes involving asbestos removal, or pollution from ships in international waters the intentional failure to comply with workplace safety standards or the intentional falsification of records may be what drives the analysis of intent in cases involving criminal prosecutions.

I want to conclude by dealing with some important environmental procedures. Firstly, the question on access to justice, when it comes to cases dealing with environmental pollutions, there are questions on standing rules, are they restrictive or broad, are public interest litigations or class actions permitted, these are questions that we should ask ourselves as judges. Are there financial or technical barriers to justice in our own jurisdictions? For example, is the court at liberty to invite experts or to admit friends of the court who specialise in environmental matters? These are questions that should be at the back of different jurisdictions, is there a legal aid, or technical assistance with evidence, because we are talking about scientific evidence here. Another important procedural question that comes before the judges most of the time is the question of forum non conveniens, in law the term forum non conveniens refers to the discretionary power of a court to not hear a case that may be more appropriately or more conveniently heard in another court. The exercise of forum non conveniens results in dismissal of some of the cases but does not prevent the plaintiff from filing the case in a different court, usually the one that original court recommends. The question of forum non conveniens has caused quite a lot of a problems in cases before the courts, one of the cases which comes to mind. re Union Carbide Corp. Gas Plant Disaster in 1986, where there was a gas explosion in India. The American owned Union Carbide Corp. was undertaking chemical industry works in India due to irregularities it culminated in the disaster on the night of the 3rd December 1984, when a toxic gas leak from tank e610 really caused a lot of havoc. The deadly chemical cloud was quickly blown by the wind to the densely populated neighbourhood next to a railway station. The controversy towards the exact number of deaths that occurred that night still continues today. Union Carbide Corp. acknowledges that 3800 deaths, but impartial investigators have estimated that there were 8000 dead, and at least 150,000 injured. However, the case came before the Southern District of New York, the court decided that it was not the best forum to deal with the case and forum non conveniens was applied, because the Indian courts were considered adequate for trying the case thereby avoiding all the evidence maintained by one Professor Galanter, which was very overwhelming before case.

In a case which happened in India, Lungowe v. Vedanta before the United Kingdom, the high court and the court of appeal grappled with the question of the most appropriate case, but because the United Kingdom was still in the European Union then, it was bound by a European Union law that courts cannot dismiss cases on the principle of forum non conveniens and this is article 4 of this particular agreement for this jurisdiction. Ultimately, the courts in the UK had this case which involved pollution of a river in India which affected a lot of people.
Session 7A: “Environmental Pollution Litigation and Human Rights”

Audio Summary of Judge Sailesh Mehta, England and Wales
Transcript by Bethany Twyman (E&OE)

A lot of things have changed when it comes to environmental law and human rights, in some ways my own practice might be seen to be a weathervane for it. I remember about 30 years ago as a young barrister, in front of a judge in one of my first environmental cases in the crown court, I thought it was serious for a young barrister, and the judge looked at the papers and said why is this even in my court? Is this a criminal matter? Now, roll forward 30 years, the environmental cases that I prosecute when I am not wearing my wig as a judge, are often reserved for the most senior high court judges, almost always in the more senior courts in this country and now attract some of the largest fines and also publicity. It is an example of how the public now are much more aware of environmental pollution and legislation and much more interested in what individuals can do to stop pollution and what the state can do. Reflecting back to Emmanuel’s example of the Union Carbide case, I was fortunate enough to meet one of the prosecutors in that case from 1986 and 87, he tells an interesting story that the development of way that judges and courts view with seriousness, environmental matters. When the first cloud of pollution started drifting after the explosion, at Union Carbide, the company would you believe wouldn’t stop works. This particular prosecutor, my namesake as it happens, Mr Mehta, turned up at the high court in Dehli, and said “There is a noxious cloud coming out of that area. We want an injunction to stop the company”, “No” said the court, roll forward two or three days and the young Mehta went back to the high court, the same judge and said “I’m now personally concerned about you my lord, and all the other judges in the building because the wind has changed and the gas cloud is coming your way” and an immediate injunction was granted. Now of course, maybe that is an unfair tale to tell, but that wouldn’t happen these days. Therefore, the point of what I am saying in my introductory remarks is that things have changed greatly in the last 20 or 30 years, a number of countries have constitutions that guarantee the right to clean water, the right to clean air, almost every country has internal legislation which gives similar guarantees, not perfect across the board but certainly better than it used to be many years ago. There are international regulations and international treaties that deal with controlling the amount of pollution that we put into the air, so things are getting better. The problem is according to the scientists, we may be a little too late.

Now to briefly discuss what I consider the main areas, the main battlefronts that are going to produce the big legislation, the big conflicts between individuals and large corporations, individuals and the state, and also more and more frequently between one state and another. As I go through these potential battlefronts with you, can I ask you to bear in mind this one concept or question with each of the areas that I cover, ask yourself this. Is there a need for an international court for the environment, and if there was such a court could the particular area that I am discussing assist better or worse if that court existed? Let me start with the first area of dispute that’s going to take place between countries and corporations and individuals, the oceans water. Water pollution has been as concern for decades, we all know that the temperature of certain waters is increasing as a result, we know that marine wildlife is moving, or being destroyed, we know that plastics are being put into the oceans by the millions of tons. The first area of dispute in relation to this is what will countries do for particular populations who are reliant on certain fish, certain marine life when that fish stock, or that marine life is destroyed because pollution of a particular corporation or an industry or the country next door that is further upstream, what right does that country have when all of its fish stock of a particular type is decimated? What about the millions of tonnes of plastics, something like 10-15 million tonnes of plastic end up in our oceans, and its growing? Sadly, the plastic does not stay near the country that deposits it as the ocean’s current carries it because of the ebbs and flow of the ocean often the plastic gets trapped within an area of a few hundred kilometres and that greatly affects a particular group of islands or a particular coast line. Now, imagine if you were an individual fisherman who suffered that,
how on earth are you going to take to task the company that has been polluting your coast line? How will you take on the state that’s allowing it to happen? How do you take on the neighbouring country that is causing the decimation of your lifestyle? and also for your people, you may want to think about whether there may be a solution with the rise of an international court for the environment. But that’s going to be a rich battleground for cases nationally, and internationally in the future. One of the cases that I have recently finished prosecuting involves pollution of the rivers, and of course that is a local problem and maybe a national problem particularly if it is the river Thames, one of the bigger rivers in the UK, but all of the pollution, all of the effluent and the chemicals goes straight into the sea. Therefore, goodness knows how many other people are being affected beyond London where most of the pollution from the river Thames goes. That’s one battleground, deforestation is another.

We only have to look at a map of the world from the satellite to know that there are vast areas, hundreds of square kilometres per week that are being destroyed. The effect of that is landslides, is that the soil becoming poorer and poorer in certain areas, the increase of air pollution as a result of deforestation. In a particular country, that may make economic sense but what about the neighbouring country? What about particular individual tribes or local people who are affected? What about the flora and fauna upon which many of the trees and plants depend elsewhere? What about the rights that those people have in relation to deforestation? Again, expect particularly in South America some international litigation relating to that area.

Air pollution is another battleground, as Emmanuel has said, some countries are beginning to recognise the right to clean air. This country has, in the case that Emmanuel said, there was a case in France that was not dissimilar involving immigration law in France, that the applicant had argued that because he was going he was going to be extradited, or sent back to the Indian subcontinent where because of the lung problem he had, he would almost certainly die back in the city that he was going to be sent to. The French court, for a number of reasons decided to let him stay, but one of them was to protect his health because he was particularly vulnerable to air pollution in the country in which he originated. One of the major problems is the thinning of the ozone layer, and that’s a feeling that takes place beyond the borders of the big polluters, and what future generations will be affected by that? Will there be a right for a child to sue a country that is a major polluter on the basis that the ozone layer is going to destroy that community’s livelihood and right to clean environment in the future? What about the right of wildlife when it comes to clean air? Again, expect that to be a major battleground amongst individuals in particular states and corporations, but also amongst countries.

Climate change and rising oceans, we have been watching with horror in this country, and I suspect all of the world, some of what is going on in Afghanistan and the increase in refugees I fear that with the rise of temperatures throughout the world, and particularly parts of Africa there will be decimation of land for crops and therefore there are likely to be refugees as a result of climate change. With the rising oceans that climate change has produced has caused existential problems for a number of islands that are very close to sea levels. In the 1990s, sea levels were rising by approximately 1.1 millimetre a year throughout that decade, now the rise is three times that to about 3.2 millimetres each year and that is growing in millimetres per year. Many countries and many islands, even London is very close to sea level, and therefore, whole cities throughout the world are going to be threatened as sea levels rise. What will individuals and communities be able to do? Will they be able to sue their own governments for not stopping pollution? For not having barriers for stopping the rise of the sea from drowning their communities, or their businesses? Will one country be able to sue another that is causing the rise in the oceans? Again, you might want to ask yourself, can we do anything quickly? Would there be a place for an international court for the environment that might be able to act quickly and decisively, if of course enough countries sign up to it. What about water quality and supply? Well, in one of the cases that I have just prosecuted, a multibillion pound corporation that has been polluting our rivers and I have about 10 more cases relating to that particular corporation, so nationally you will find that there is a rise in prosecutions and of course civil suits in relation to the worsening supply of water. I am aware of a number of civil actions in India and also in the United States relating to water quality. But what if a river is being polluted upstream and downstream it goes to another country? Will the country downstream have a right to sue, or bring to court the country
further upstream? Again, you might want to consider whether an international court that’s designed to
deal with disputes of this sort might be useful.

Food production is tied hand in hand with deforestation, and with the rise in temperature as well.
What right do communities or countries have to their own food supplies not being ruined by an
increase in air pollution or temperature? What rights do developing countries have against countries
that have for the last 50 years been the chief polluters and have therefore started the ball rolling at the
rate that it is now going. Again, consider whether there may be a simple solution only if
internationally there was a sign up to start a court.

I dealt briefly with climate refugees, but biodiversity, we can see in the oceans and on the land, we
can see that there is possibly the largest attack on biodiversity that has been man-made ever in the
history of our species. When will we stop this? How do we stop it? What are the knock on effects?
Are our national courts equipped to deal with the international attack on diversity, particularly in
relation to deforestation? Can an individual do anything? Can an individual in fact get the disclosure,
not only from his own country but from abroad so that a case can be proven nationally or is this a case
in which we really do need an international intervention through a court? What about climate illnesses
generally? We have heard from Emmanuel that the last estimate from 2019 I think was about 6.1
million people die from air pollution every year, when one looks at all the pollution that is causing
deaths, I suspect that figure is manyfold. That doesn’t include the illnesses that pollution of our air or
our water causes. Again, what are the rights of the victims of such pollution? How do they prove their
case? Where do they wherewithal, the finances, as well as the information to do that? Will their own
states assist them when their own states might be in the firing line for this?

What about wildfires? Another area for potential dispute in the future. We only need to look at our
newspapers to see wildfires in California, in Florida and now that the summer has started in Australia,
we will no doubt have another season of wildfires in various parts of Australia and parts of Africa as
well. The knock-on effect that the wildfires will have, not just for their own local community but for
the pollution internationally.

Those are in my view the key battlegrounds, the areas that are going to affect not only national courts
but the international courts as well. A measure of what we can achieve in the future, and whether we
can actually succeed in making sure we do not have any conflict between states is the effectiveness of
our international organisations. If we did have robust international organisations, such as an
international court that everyone signed up to then there is much less likelihood for conflict between
countries as a result of an environmental disaster.
Over the past, approximately ten years or so, there has been a movement in the law towards increased corporate responsibility, to respect human rights within the conduct of transnational business, based on global standards of expected conduct for all business enterprises, wherever they operate. This is particularly relevant to us in the Bahamas because being an international financial centre, we do have many companies and business enterprises which are registered or incorporated in our jurisdiction which have business operations all over the world. This recent movement towards this corporate responsibility has brought into focus the complex interactions between business enterprises, ethics and human rights. Clearly, in many instances business enterprises impact in a very direct way the human rights of their employees, of their consumers and customers, and of the communities in which they operate. There are many examples but just to mention a few, the operations of a business may well result in a positive sense with upgrading public services, or increasing employment opportunities. However, on the other side of that coin in the negative sense, the activities of the business may pollute the environment, or they may be engaged in activities which accelerate global warming, or may even result unlawful trafficking, or by exploiting workers by underpaying them. We have all heard, of what is colloquially called sweatshops, in numerous jurisdictions with regards to the supply chain or manufacturers.

It has been suggested, in this climate that it is the responsibility of companies to manage these and other adverse impacts. To quote from a notable source, it was suggested that companies must know their actual, or potential impacts, prevent and mitigate abuses, and address adverse impacts with which they are involved. In other words, companies must know and show that they respect human rights in all their operations. These developments have had a profound effect on corporate governance and the role of directors, in the oversight of the operations of business enterprises. There is a real connectivity between business, human rights and commercial courts which requires our attention if we are to navigate the increasingly complex world of international commerce and trade. For that reason, I think this is a very topical discussion for which I look forward to participating in.
Holding corporations accountable for either direct conduct or complicity for human rights violations has become an increasing area of attention in promoting human rights. In this regard, different activities undertaken seek to reduce the likelihood of abuse and ensure that victims have access to remedy. It is admitted that demonstrating respect for human rights is now seen as a corporate responsibility, critical to a company’s social license to operate. The introduction of the United Nations Guiding Principles on Business and Human Rights has entrenched this.\footnote{Clare Connellan and Tallan Husain, Business and Human Rights in Africa, 27 September 2018, https://www.whitecase.com/publications/insight/business-and-human-rights-africa}

In fact, considered to be a foundational tool in realizing the United Nations Sustainable Development Goals, the UNGPs have a tripartite framework and contain three chapters, or pillars: Pillar I: State duty to protect human rights; Pillar II: Corporate responsibility to respect human rights; Pillar III: Access to remedy. Each Pillar defines concrete, actionable steps for governments and companies to meet their respective duties and responsibilities to prevent human rights abuses in company operations and provide remedies if such abuses take place.

Under the Protect, Respect and Remedy framework of the Guiding Principles, States have a duty to protect human rights, but businesses are also expected to respect the entire spectrum of the internationally recognized human rights wherever they operate, to avoid infringing on the human rights of others and to address adverse human rights impacts.\footnote{Idem}

It is worth noting that many sectors with a high risk of human rights impacts are important to African economies including commercial agriculture, manufacturing, the extraction industry, infrastructure projects, utilities and power generation. Companies operating in these sectors should be conscious of the human rights issues and opportunities that could arise through, or affect, their activities and business relationship, including matters related to labour standards, socio-economics, security and environmental impacts.\footnote{Idem}

Many transnational corporations often operate in Africa through their subsidiaries. Courts have begun to consider complex jurisdictional and legal arguments in proceedings against parent companies for human rights issues involving their foreign subsidiaries operating in Africa. The matter was recently considered by the United Kingdom Supreme Court which, in “Okapi v. Royal Dutch Shell [2021] UKSC 3 (February 12), reaffirmed that a British parent company may in certain circumstances owe a duty of care, for purposes of liability in a suit of negligence, toward persons affected by the operation of its foreign subsidiary. Specifically, the court found a real issue to be tried as to whether Shell owed a duty of care to persons affected by spills from its subsidiary’s oil pipeline in Nigeria.”\footnote{See Doug Cassel, UK Supreme Court in Okpabi Clarifies Parent Company Duty of Care Toward Persons Allegedly Harmed by Subsidiaries, https://www.business-humanrights.org/en/latest-news/uk-supreme-court-in-okpabi-clarifies-parent-company-duty-of-care-toward-persons-allegedly-harmed-by-subsidiaries/}
Another well-known case is *Talisman Energy, Inc.* v. *the Presbyterian Church of Sudan.* The case establishes corporate liability for serious human rights violations and was brought about by former residents of Sudan in a class action against Talisman Energy Inc. and the Government of Sudan. The case alleges that the company's oil exploration activities have led to violation of international law, including theft and destruction of property, forced displacement, kidnapping, slavery, rape, war crimes and extrajudicial killing.

Apart from lawsuits against corporations to hold them accountable for human rights abuses, there are also cases related mainly to the extractive sector against governments whereby Non-Governmental Organizations (NGOs) seek to stop extractive resource projects often to be executed by multinational corporations, alleging that they pose serious environmental, social and climate risks. An illustration of such cases is the case of Centre for Food and Adequate Living Rights (CEFROHT) Limited & 3 Others v. The Attorney General of the Republic of Uganda, The Attorney General of the United Republic of Tanzania, and The Secretary General of the East African Community. The lawsuit filed by four NGOs⁶ before the East African Court of Justice,⁷ challenging a decision to construct an East African Crude Oil Pipeline (EACOP)⁸ in the Republic of Uganda and in the United Republic of Tanzania for undue regard to East African law, international environment and human rights law. The project is alleged to be environmentally untenable and will transverse protected areas in East Africa, with undue regard to livelihoods, gender, food security, children and public health of East Africans. That, the pipeline will pass through areas of settlements, farmlands and water sources for thousands of indigenous people and there has been no regard to their rights and will transverse legally protected forest reserves, rivers and lakes that are water sources for thousands of people, animals and wildlife habitats.⁹ The case is still pending before the East African Court of Justice.

Adjudicating corporate human rights violations, and associated climate change or related environmental disputes has been quite challenging for some judiciaries who have yet to develop competency and expertise to deal with such complex disputes. Nevertheless, courts of law in many countries are increasingly demonstrating sensitivity to promoting the rule of law in this field through their judgments and pronouncements, as a legal process to balance between the imperatives of environmental management and of economic development.¹⁰

Increasing judicial awareness on issues pertaining to business and human rights, human rights and environment is of paramount importance in order to ensure active and progressive adjudication of disputes in these emerging fields.

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⁵ Talisman Energy Inc. was a Canadian multinational oil and gas exploration and production company

⁶ The NGOs are: The Centre for Food and Adequate Living Rights (CEFROHT) Ltd and the African Institute for Energy Governance (AFIEGO) both based in Kampala-Uganda; the Natural Justice – Kenya in Nairobi and the Center for Strategic Litigation based in Zanzibar.

⁷ The East African Court of Justice is the judicial organ of the East African Community, a regional economic community comprising Burundi, Kenya, Rwanda, South Sudan, Uganda and Tanzania

⁸ It is worth noting that without the successful completion of the pipeline, Total and China National Offshore Oil Corporation Ltd will not be able to begin commercial production at two oil fields in the Albertine Graben in Uganda.


As an example of such a judicial awareness, recently a virtual seminar was jointly organized for senior judges in Rwanda by the Commonwealth Judges and Magistrates Association and the Standing International Forum of Commercial Courts on the theme: *The United Nations Guiding Principles on Business and Human Rights and what they mean for judges*. The seminar focused on the genesis and origin of the UN Guiding Principles on Business and Human Rights; and on remedies, challenges in access to remedies, and the gender and marginalized person dimension. Interactive discussions that ensued focused on better understanding the judicial role in upholding the UNGP on business and human rights.

There are also numerous programs being carried out in Africa to advance the practical protection of human rights by business entities, for example, by documenting the fraught relationship between mining, financing, commodities, and energy, and development and the imperious need to hold multinational corporations operating in Africa accountable for their human rights violations.\(^{11}\)

It is admitted that to be sustainable, the potential for investment in major business sectors in Africa (i.e. mining, oil and gas, agribusiness, Information and Communication Technology, etc.) to help to fulfil economic and social rights by contributing to improvement in health, education and standards of living has to be considered in line with the need to respect the rights of the people most directly affected by those investments.

Session 7B: “Business, Human Rights and the Commercial Courts”

Audio Summary of Mrs Justice Bobbie Cheema-Grubb, England and Wales
Transcript by Bethany Twyman (E&OE)

As we know, judges sitting in business and commercial courts can come under pressure from economic and other interests whether those are state actors or business agents. Training judges to address business related human rights abuses, and provide enforcement for those rights promotes judicial independence, which as we all know is the key to maintaining the rule of law. There are several relevant models of judicial training employed across the commonwealth and delegates will be familiar with the three main models. I call them the leadership model, where the messages are delivered from the front, setting the tone, building confidence; the specialist programme model where a specific course covers the subject with a combination of plenary sessions and small group work tackling realistic scenarios; and then the embedded model in which rights issues would be implanted in the scenarios used as part of regular updating training. National jurisdiction perhaps dependant on the maturity of their courts, this has just been recognised, use their own balance across different model, within today’s topic, each has a place. We are discovering as well that there is a role for informal familiarisation events too, such as collegiate discussion, sometimes perhaps across jurisdictions. We may discuss all of these further, especially in light of our recent crisis led technological experiences.

I would say that leadership is crucial, vital for the most senior judges in the jurisdiction to expressly align their jurisdiction with the United Nations (UN) guiding principles for business and human rights and be seen to do so. Because that enables those values to filter through to the rest of the judiciary, particularly when innovative subjects are emerging such as climate change, they’ve not previously needed judicial attention. As the Chief Justice said, there is no contradiction between fair dispute resolution that encourages investment for deals effectively with rights violations. That kind of leadership steer, supports and protects more junior judges. Practical applications of the principles could be included in such a speech from a senior judge, a strong push to enforcement of anti-bribery laws for example, will provide judges with powerful tools in the environmental damage context. When dealing with a multinational parent company for example, how should junior judges interpret legal liability, if the corporate structure is designed to avoid accountability in your jurisdiction, which works of course to the disadvantage of less powerful parties and individuals. A leadership judge can also say something about how appellate court might respond to challenges to decisions made by judges consistent with the guiding principles, all of these things build confidence.

A key tool in business and commercial courts is innovative case management, flagging up where these relevant issues arise. Some of our jurisdictions have dedicated cadres of pretrial case management judges, and offering them dedicated, specialist training should lead to effective dissemination of the principles and the messages you want to convey. These things help judges to get a grip of the issues at an early stage, beyond these, most of us know, who are involved in training judges that actually embedding human rights issues directly into our regular training programmes, providing realistic case studies delivered in an interactive format will be better than treating these topics as standalone issues. We may discuss how to formulate scenarios later, but by way of an example, the protection of victims of modern slavery throws up many potential scenarios in a training context. For example, a case study could prepare judges to be alert to identifying businesses which may be using forced labour, for example by reference to any national anti-slavery initiatives, such as labour abuse authorities. We could also convey in that scenario moving on the courts powers to make reparation, or make prevention orders and curtail the activities of businesses in certain circumstances.

We are aware that there is a range of obstacles obstructing access to justice for victims of human rights abuses by companies, we could train judges through special case studies in how they might
handle the economic imbalance between businesses and those who may have had their human rights abused. Actions against large companies are of course expensive, and they can drag out for a very long time. No win, no fee lawyers tend to work for smaller firms and they face major cash flow problems if litigation takes years to be resolved. A scenario question could look at the use of cost capping orders to limit the money that the financially stronger side will recover, or the way that court procedures make it difficult to obtain access to corporate documents. To deliver effective sessions, working through case scenarios requires a cadre of skilled trainers, the England and Wales judicial college has an advanced specialist ‘training the trainers’ programme and that’s aimed at capacity building with being deployed in various parts of the commonwealth including Nigeria and Zambia.
Session 7B: “Business, Human Rights and the Commercial Courts”

Audio Summary of Justice Elizabeth Tanui, Kenya
Transcript by Bethany Twyman (E&OE)

Business undertakings have tremendous contributions to the realisation of economic, social and cultural rights through the creation of employment opportunities and private investments. But we also know that these business undertakings have vast effects on human rights, we have some of the examples of adverse effects including community displacement, child labour, and environmental degradation. There is a wide array of business and human rights violations from companies operating in Kenya, to cure this Kenya was the first country to develop a national action plan to implement the United Nations Guiding Principles on a national level. The constitution of Kenya lays the basis of protection of business and human rights through its fourth Chapter on the Bill of Rights and article 260. As an avenue for judicial and non-judicial remedies, the constitution of Kenya affords every person the right to institute court proceedings if a right or fundamental freedom in Chapter 4 has been denied, violated, threatened or infringed and encourages the use of alternative dispute resolutions mechanisms. The United Nations (UN) Guiding Principles have three pillars, of course the states duty to protect against human rights abuses, the responsibility of businesses to respect human rights, and the obligation of the state and the responsibility of businesses to ensure that victims of human rights abuses by businesses have access to both judicial and non-judicial remedies.

I will be discussing briefly about the struggle that can be seen in the judicial landscape to answer the question as to who it is that is to be held responsible for the human rights violations by companies. I will be sharing the Kenyan experience of before the constitution of Kenya in 2010 and after. Before the constitution of Kenya in 2010, the extent to which the Bill of Rights could be applied in private disputes was not stated expressly or otherwise. This constitution was rather limited in its application and scope. It limited those it protected, the rights that were protected and those who were bound by the rights contained therein. I will be sharing the decision in Kenya by Services Ltd and two others, vs the Attorney General, where justice Nyamu stated as follows, fundamental rights and freedoms are contained within the constitution and are principally available against the states because the constitution’s function is to define what constitutes government and it regulates the relationship between the government and the governed. On the other hand, the rights of individual interests are taken care of in the province of private law, and are invariably addressed as such. So, you can see there was no horizontal application of the Bill of Rights. Following that case, there was another case in which the petitioners brought a constitutional petition against the respondents to seek redress for a late delay in payment of salaries and subsequent termination of employment contracts. Outright, the judge dismissed the petitioners claim, for a number of reasons including the fact that claims were based on the petitioner’s respective contracts of employment which were in the private sphere and had nothing to do with the public. The respondent, a company incorporated under the company’s law, was found not liable for any violations of rights under the repealed constitutions as it was not a guarantor of such rights. Now, after enacting the constitution in 2010, operating under a robust constitution that contains a Bill of Rights in its fourth chapter, and imposes an obligation to the Kenyan states and its organs to ensure the rights and fundamental freedoms in the Bill of Rights are not only observed, but respected, protected and promoted. These obligations extend the human rights that may be threatened by private actors including business enterprises.

The Kenyan constitution affords every person the right to institute court proceedings when a right or fundamental freedom from Chapter 4 has been denied, violated, threatened or infringed. Business undertakings have tremendous contributions to the realisation of economic, social and other rights through the question of employment opportunities and investments. The uptake of the business and human rights in Kenya after the constitution in 2010 has had its challenges with various courts decisions depicting the relaxion of the horizontal applications of these rights. In another case in
determining whether our constitutions petition could be applied between private persons, and held that constitutional obligations were not placed on individuals, and that private law is only in the realm that could handle complaints between individual persons. But now we have a case, which has applied the Bill of Rights horizontally, in dismissing the line of reasoning, it cannot be safe in a progressive democratic society to arrive at a finding that allows private entities to hide behind the cloak of privacy to escape constitutional accountability. I just am laying the basis for placing liability on corporations for business and human rights violations. With this, we can see that Kenya is the first African country to develop a national action plan, and among the 23 countries that have a national action plan after the UN Guiding Principles on Business and Human Rights have been issued, that even the judicial landscape is that to navigate through the national action plan and actually bring it to life. The national action plan has been prioritised and has five thematic areas dealing with land and natural resources, labour rights, revenue transparency, environmental protection and access to remedy. So, we see the commercial courts engaging with a Kenyan national action plan on revenue transparency, dealing with issues of public procurement, public licensing, taxation and human rights and ease of doing business incentives including transfer pricing.
Specialist Meeting A: “Criminal Sentencing Guidelines”

Hon Justice Elizabeth Musoke, Uganda

1. Introduction
Ladies and gentlemen, I thank the Commonwealth Magistrates and Judges Association (CMJA) for inviting me to speak at this conference which marks the 50th Anniversary of CMJA.

Apart from my duties as a Justice in the Court of Appeal/Constitutional Court of Uganda, I have the privilege of representing the Court of Appeal on the Sentencing Guidelines Committee which was established by the Hon. the Chief Justice of Uganda and is chaired by the Hon. the Principal Judge. The Committee reports to the Judiciary Rules Committee which is chaired by the Chief Justice and deputised by the Deputy Chief Justice. Other members include officials from Uganda Law Society and Law Development Centre. The Committee is mandated to monitor the effective implementation of the Sentencing Guidelines and make proposals for improvement.

The Case for Sentencing Guidelines in Uganda

I will begin by quoting the often-cited passage from R v James Henry Sergeant1:

“The classical principles of sentencing are summed up in four words: retribution, deterrence, prevention and rehabilitation. Any judge who comes to sentence ought always to have those four classical principles in mind and to apply them to the facts of the case to see which of them has the greatest importance in the case with which he is dealing”

These four classical principles of sentencing appear simple enough as a good starting point for determining any sentence. The challenge however lies in identifying which of these principles are most pertinent for the case at hand, and which will achieve a proper balance in determining the type and extent of the sentence to be imposed. There is a public dimension to sentencing, and as pertinently observed by Lord Bingham CJ in R v Howells2:

“Courts should always bear in mind that criminal sentences are in almost every case intended to protect the public, whether by punishing the offender or reforming him and others, or all of these things. Courts cannot and should not be unmindful of the important public dimension of criminal sentencing and the importance of maintaining public confidence in the sentencing system”

Prior to the coming into effect of the Sentencing Guidelines in Uganda, trial Judges wielded the sentencing power with essentially unfettered discretion, but the system had drawbacks. Judges approached sentencing differently: Some saw incarceration as rehabilitative, while others saw it as retribution, or as a deterrent, or as a way to segregate dangerous people from society. Since judges were not immune to the vicissitudes of public opinion, the potential for abuse of power in some cases was patent. They came up with widely divergent sentences for cases with almost similar facts.

Indeed, if the many judges who sit on criminal cases were polled as to what was the most trying facet of their jobs, the vast majority would almost certainly answer ‘sentencing.’ With all the advances in behavioural science, there was need for some sort of guide.

1 (1974) 60 Cr App R 71 (per Lawton, LJ)
2 [1999] 1 WLR 307
It was, and still is, a fact that sentences handed down by different judges for the same crimes varied so widely that the disparities could not simply be explained by the contexts of the cases. A Task Force was set up by the Hon. the Chief Justice to make proposals for the Guidelines.

2. Constitutional Sentencing Guidelines Practice Direction No.8 of 2013

As correctly stated in an edition\(^3\) of the CMJA Journal, in Uganda, general sentencing principles and guidelines are contained in The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013. They provide that when sentencing offenders every court shall take into account: (a) the gravity of the offence, including the degree of culpability of the offender; (b) the nature of the offence; (c) the need for consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offences committed in similar circumstances; (d) any information provided to the court concerning the effect of the offence on the victim or the community, including victim impact statement or community impact statement; (e) the offender’s personal, family, community, or cultural background; (f) any outcomes of restorative justice processes that have occurred, or are likely to occur; (g) the circumstances prevailing at the time the offence was committed up to the time of sentencing; (h) any previous convictions of the offender; and (i) any other circumstances the court considers relevant.

The Directions also set out ranges of sentence for specific offences such as capital offences, manslaughter, robbery, defilement, criminal trespass, corruption and theft. New, expanded guidelines covering Magistrates Courts have been drafted with the assistance of Role UK. The intention is that guidelines will cover all criminal offences. However, the statutory instrument introducing the new Guidelines has not yet been signed due to the COVID-19 challenges.

Methodology used by the Taskforce

a) The taskforce formed committees on different topical areas which included:

   (i) **Sentencing policy and principles**;

   (ii) **Format of the guidelines**;

   (iii) **Sentencing options**;

   (iv) **The death penalty**;

   (v) **Sentencing procedures and community Service**.

Each committee conducted desk research and prepared recommendations on its topic. A Sentencing Guidance Select Committee was then formed to study those recommendations and prepare draft Guidelines which were discussed by the taskforce at its plenary meetings.

The taskforce also digested court decisions in order to identify sentencing patterns, and reasons for the sentences in similar offences committed under similar circumstances with a view of developing starting points and sentencing ranges. To achieve this objective, the taskforce commissioned a statistical study on sentencing in Uganda. The study focused on ten (10) offences and considered the particulars, the mitigating and aggravating factors, the sentences given, and the reason for the sentences and then created starting points and sentencing ranges for the ten (10) offences. These offences are: **Murder, Manslaughter, Defilement, Robbery, Corruption related offences, obtaining money by false pretences, Theft, Criminal trespass, Grievous Bodily Harm and**

\(^3\) Journal of the CMJA Vol 25 No. 2 (2020)
Assault. In its entirety, one thousand (1,000) court cases were sampled with one hundred (100) cases per offence.

b) Study tours to South Africa and the United Kingdom were undertaken by the taskforce for purposes of benchmarking. South Africa was by then the only country in Africa whose Law Reform Commission had conducted a study on sentencing and prepared a draft Bill on Sentencing Guidelines. The United Kingdom in contrast, had an established sentencing legal regime that had been in place over time. Clearly, there were lessons to be learnt from both the South African and the British experience, especially the composition of a Sentencing Council, and how to avoid fettering judicial discretion in the Practice Directions.

c) Consensus building workshops were held at which the taskforce adopted a self-critical approach to the guidelines. The document was divided into two, that is to say, the Draft Sentencing Reform Bill and Sentencing Guidelines in the form of Practice Directions.

d) In addition, validation workshops were held at which the two documents were subjected to external scrutiny by some members of the judiciary, civil society, academia and private legal practitioners among others.

Though the guidelines are a step in the right direction, a lot more needs to be done to facilitate effective implementation.

The guidelines should of course not be taken to be a restatement of legal principles of our criminal law. They should be understood as ‘guidelines’ for the judicial officers when imposing punishment. Time, circumstances, nature of the offence and a host of other factors ought to influence the type of sentence to be imposed.

Salient features of the guidelines

We have tried our level best to meet the expectations of the various players in the justice system. It was the hope that with the introduction of Sentencing Guidelines, sentences passed would be more humane, predictable, uniform and effective. We have done this through:

- Allowing active participation of convicts, victims, public etc. in the sentencing process.
- Promoting non-custodial sentences, a departure from the culture of incarceration even in non-deserving cases.
- Developing Guidelines which are well structured, not too long, repetitive or verbose.
- Encouraging sentences that are guided by starting points and sentence ranges.
- Sentences that will depend on well researched aggravating and mitigating factors.
- Sentences that will not be rushed but imposed after a reasonable ‘cool’ off period.
- Sentences that will enhance access to justice to the children, the marginalized, the sick and the aged.

With the guidelines now in place:

- Plea bargains are being encouraged
• Sentencing Judgements are gradually being published so that judicial officers who are able to use ICT can refer to them under the ongoing Electronic Court Case Management Information System project [ECCMIS].

• Courts are now deducting the period spent on remand from the sentence considered appropriate after all the factors, mitigating and aggravating, have been taken into account.

• Suspects are making informed decisions as to whether to plead guilty or not since they know the sentence ranges for each offence.

Status of implementation of the Guidelines in Uganda

Generally, the Sentencing Guidelines constitute excellent material for achieving consistency in sentencing. They also set out the principles to be applied or considered in arriving at an appropriate sentence and generally to ensure that the gravest offences attract the severest penalties while the lesser offenses attract lesser penalties.

Guidelines suggest a sentencing range, inclusive of starting points for minimum and maximum sentences for specific offences. The maximum is set by the Penal Code Act\(^4\). The setting of minimum ranges by the Guidelines may impinge on the sentencing discretion of a trial judge, yet the Constitutional Court decision in *Susan Kigali and others V Attorney General*,\(^5\) which was affirmed on appeal to the Supreme Court, emphasized the importance of a judge’s sentencing discretion. Sentencing discretion allows a trial judge, for instance in capital offences, to weigh the multifarious mitigating and aggravating factors peculiar to the circumstances of each case and to arrive at an appropriate sentence. This may include the age, the manner of commission of the offence, antecedents, previous conviction record, the behaviour and attitude of the convict, the programme for reform et cetera. No hard and fast rule can be laid down for a uniform way in which certain minimum sentences have to be imposed. The prescription of minimum sentences did not therefore go well with judicial officers.

Sentencing Guidelines vs. Death Penalty

Prior to the case of *Attorney General vs. Susan Kigali*\(^6\) (supra), there was a mandatory death penalty upon conviction for any of the capital offences. However, the Constitutional Court in the Kigali case, struck down the mandatory death penalty as a violation of fundamental human rights and gave the government two years to resentence everyone on death row. The Supreme Court affirmed the decision.

Impact of the Kigali Judgment

In the *Kigali case*, the Supreme Court\(^7\) was asked to overturn the findings of the Constitutional Court, which had found that imposition of a legislation-mandated death sentence, contravened the accused person’s right to a fair trial under Article 28 and equality rights under Article 21. The Constitutional Court had reasoned\(^8\) (per Okello, JCC) as follows:

\(^4\) Chapter 120 of the Laws of Uganda 2000

\(^5\) Constitutional Court-Petition No. 6 of 2003; Supreme Court-Appeal No. 3 of 2006 (both unreported)

\(^6\) Supreme Court Constitutional Appeal No. 6 of 2006 (unreported)

\(^7\) Ibid. no. 7-Supreme Court decision

\(^8\) Constitutional Court Petition No. 6 of 2003
“That procedure which denies the court opportunity to inform itself on any mitigating factors regarding sentence of death, deprives the court the chance to exercise its discretion to determine the appropriateness of the sentence. It compels the court to impose the sentence of death merely because the law directs it to do so. This is an intrusion by the legislature into the realm of the Judiciary. Our Constitution has spelt out the powers of the three organs of the State; namely, the Executive, the Legislature and the Judiciary. It gives the Judiciary the power to adjudicate. Therefore, for the legislature to define the offence and prescribe the only sentence which the court must impose on conviction without affording the court opportunity to exercise it discretion to determine the appropriateness of the sentence, is clearly a violation of the principle of separation of power. A similar conclusion was arrived at by the Supreme Court of India in Mithu vs State of Punjab (supra).”

The Supreme Court held that the where a sentence has already been pre-ordained by legislation, as it was in capital cases, the principle of a fair trial is compromised. The Court concluded that the prohibition on conducting a sentence hearing in capital offences, yet such a hearing was allowed in a non-capital offences amounted to non-equal treatment in contravention of Article 21 of the 1995 Constitution.

The Kigali decision restored judges’ discretion, in that they are no longer bound by law to hand down the death penalty for capital offences. They can now exercise discretion to determine the suitable punishment for each case by examining the mitigating and aggravating factors among other things. As a result of the Supreme Court’s ruling, inmates whose petitions for mercy could not be heard within two years of that decision, have had their death sentences commuted to imprisonment for life without remission.

Since the Kigali decision scrapped mandatory death sentences, the Guidelines have provided that a death sentence should only be handed down in the rarest of rare cases where the alternatives of life imprisonment or other custodial sentences, are demonstrably inadequate.

Promotion of Reconciliation

Sentencing discretion is made more fluid under article 126 (2) (c) and (d) of the Constitution of Uganda, which encourages reconciliation between parties. Depending on the circumstances, sentencing discretion and the Constitutional principles under Article 126 may allow a trial judge to, for instance, impose a sentence of 5 years’ imprisonment for murder while in another case, a sentence of death or life imprisonment may be imposed. This range of possible sentencing discretion allows the judge to promote reconciliation and to determine whether the community affected by the offence would be satisfied by the compensation or sentence arrived at. The trial judge may find that a stiff sentence of imprisonment would lead to more conflict between parties namely the victims’ family and the offenders’ family and create more breach of the peace while reconciliation resolves the problem among the parties not just the convict and the victim but wider and significantly affected community. The Constitution allows the trial Judge to take into account various factors which may be relevant in arriving at an appropriate decision. A good example is from among the Acholi from Northern Uganda for whom Mato Pout is one of the accepted mechanisms for forgiveness and reconciliation. Mato Pout literary means to drink a bitter portion made from the leaves of the “Pout” tree.

Status of implementation of Guidelines

In many Uganda Courts, when the Guidelines were introduced in 2013, trial Judges felt obligated to sentence within the ranges set out in the Guidelines. The result was that generally the sentences meted out were high pitched; some going up to 60 years for capital offences. The appellate Courts, on the other hand felt that the Guidelines had ignored earlier sentences (precedents) and proposed excessively harsh punishments. The appellate Courts ended up interfering with sentences which they considered manifestly excessive, and instead opted to follow sentences imposed in precedents of the Court of Appeal and the Supreme Court, considered to be more appropriate.
The above practice has been hugely influential and has caused a shift in the attitudes of trial Judges, who have paid less and less deference to the Guidelines. Most trial Judges now go about sentencing with the mind-set that an appropriate sentence ought to be the product of their discretion. The facts, circumstances of each case such as the aggravating and mitigating factors, among others guide the exercise of that discretion. Therefore, while the Guidelines contain material that may be useful in sentencing, the feeling is that they cannot limit the discretion of trial Courts to determine an appropriate sentence in each case, by stipulating minimum sentences as they currently do. The power to limit judicial discretion may only be validly exercised by Parliament.

In the United States, the Statutory minimums in the Sentencing Guidelines were at one time obligatory and sentences that ignored these would go under review. The Federal Sentencing Scheme changed in 2005, when the US Supreme Court decided\(^9\) that so long as the guidelines were considered mandatory, they were unconstitutional. But, wrote Steven Brayer in the opinion that saved the system he helped create, the guidelines would stand if they were viewed as purely advisory, a baseline from which judges could depart at will. This means judges must still refer to the guidelines during sentencing, but they are allowed to sentence outside of them—provided they give a good reason for the departure.

In Uganda, the American approach appears to be the one adopted by trial Judges. It is worth noting that sentences have not been reversed for failure to abide by the Sentencing Guidelines. The Director of Public Prosecutions, however, in a bid to maintain the high sentences on appeal, always relies on the Sentencing Guidelines to persuade the Court.

3. The role of the Appellate Courts in sentencing and setting of Sentencing Guidelines

I have had the opportunity to hear numerous appeals against the sentences passed by the High Court which has original jurisdiction in capital offences. It is clear that sentencing is not a mechanistic and mathematical exercise, but a very delicate qualitative and quantitative exercise. This is where the challenge lies.

The principles which govern an appellate court in reviewing the sentence passed by a lower court are uncontroversial: an appellate court does not have an unfettered discretion to determine the sentence afresh. The scope for intervention is limited, because sentencing is largely a matter of judicial discretion and requires a fine balancing of myriad considerations. The very concept of judicial discretion involves the right to choose between more than one possible outcome, and there is room for different reasonable people to hold different opinions. For this reason, the appellate court’s prerogative to correct sentences is tempered by a significant degree of deference to the trial /sentencing judge’s discretion.

Accordingly, our appellate courts can and will interfere in a sentence imposed by the lower court only if it is satisfied that any of the following four grounds are made out:

(a) first, the sentencing judge has made a wrong decision as to the proper factual basis for the sentence;

(b) second, there has been an error on the part of the trial judge in appreciating the material placed before him;

(c) third, the sentence was illegal or wrong in principle;

(d) fourth, the sentence imposed was manifestly excessive or inadequate

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\(^9\) United States vs Booker 543 U.S 220
The fourth ground, namely that the sentence imposed was manifestly excessive or inadequate, is most commonly used to mount an appeal against the lower court’s sentence. Since sentencing is not a mechanical process but a matter of judicial discretion, perfect uniformity is hardly possible. Therefore, a sentence imposed by a judge below will not be interfered with merely because it is inadequate or excessive - it has to be manifestly inadequate or manifestly excessive before interference is justified. In other words, an appellate court will intervene only where the sentence imposed exceeds the permissible range or sentence variation, and substantial alterations rather than minute corrections are required to remedy any injustice. This shows that a high threshold has to be met before intervention is warranted. (See: Kalima Edward vs. Uganda\textsuperscript{10} quoting from R vs. De Haviland\textsuperscript{11}. Since a sentence is imposed following exercise of discretion, an appellate Court may only interfere with the sentence imposed by a trial Court in limited circumstances, which are now settled. In Kizito Sinkula vs. Uganda,\textsuperscript{12} the Supreme Court quoted with approval from Goal s/o Owoura vs. R\textsuperscript{13}, for the holding that:

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“In exercising its jurisdiction to review sentence, an appellate Court does not alter a sentence on the mere ground that if the members of the appellate Court had been trying the appellant, they might have passed a somewhat different sentence; an appellate Court will not ordinarily interfere with the discretion exercised by the trial judge unless as was said in James vs R (1950) 18 EACA 147, it is evident that the learned trial Judge acted upon some wrong principle or overlooked some material factor or that the sentence is harsh and manifestly excessive in view of the circumstances of the case.”

Having said that, I should also mention that in accordance with the doctrine of stare decisis, decisions of the appellate courts are binding on the lower courts. Such precedents and any principles articulated therein act as sentencing guidelines to the lower courts for cases involving similar facts or offences because these precedents provide an indication on the appropriate sentence to be imposed. Instead of being cursory, judgements of appellate courts are often substantial and consider sentencing for a whole category of similar offences including the particular offence committed by the accused, list down factors which may appropriately be considered to aggravate or mitigate the seriousness of an offence and state the proper range of sentences for the relevant offence.

While references to judgments of appellate Courts facilitate consistency and fairness by providing a focal point against which subsequent cases with differing degrees of culpability can be accurately compared and determined, the sentencing benchmarks laid down in such precedents are not cast in stone. They are intended to be indicative only, structuring rather than restricting discretion. This is because no matter how much thought has gone into the formulation of a particular sentencing regime, there will always be a prospect of justice. Each case ultimately turns on its own facts and a sentencing judge must respond appropriately to all the circumstances of a particular case. As Lord Woolf commented in R v Mulberry\textsuperscript{14} on the use and limitations of guidelines:

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“...guidelines such as we have set out above can produce sentences which are inappropriately high or inappropriately low if sentencers adopt a mechanistic approach to the guidelines. It is essential that having taken the guidelines into account, sentencers stand back and look at the circumstances as a whole and impose the sentence which is appropriate having regard to all circumstances. Double accounting must be avoided and can be a result

\footnotesize{\textsuperscript{10} Criminal Appeal No. 10 of 1995 (Supreme Court)}
\footnotesize{\textsuperscript{11} (1983) 5 Cr. App R (s) 109}
\footnotesize{\textsuperscript{12} Supreme Court Criminal Appeal No. 24 of 2001 (unreported)}
\footnotesize{\textsuperscript{13} (1954) 24 EACA 27}
\footnotesize{\textsuperscript{14} [2003] 1 Cr.App.R. 396 at 407}

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of guidelines if they are applied indiscriminately. Guideline judgements are intended to assist the judge to arrive at the correct sentence. They do not purport to identify the correct sentence. Doing so is the task of the trial judge.”

In the pursuit of equal justice, therefore, individualised justice must still be done.

CONCLUSION

Sentencing Guidelines have been an effective means of establishing sentencing policies that reflect many varied sentencing philosophies. Guideline systems are defined and based on a set of core principles: proportionality, consistency/uniformity and rationality/transparency in sentencing. These principles seem to be at odds with new concepts of sentencing and corrections specifically restorative justice. Restorative justice promotes reparation over retribution.

As rightly pointed out by Robin L. Lubitz and Thomas W. Ross in their Article\textsuperscript{15} while summarizing the future of Sentencing Guidelines, the most compelling reasons to expect that they will continue to be widely accepted and applied are their adaptability and ideological neutrality. And it is of critical importance that the internal integrity of the Sentencing Guidelines remains intact.

Finally, training Judges and Magistrates is very essential in ensuring consistency of approach. Amendments to the Guidelines were drafted by the Sentencing Guidelines Committee and were in the final process of being passed to replace the earlier ones, but the COVID-19 pandemic interrupted the process. These new guidelines (yet to be published are intended to offer a more acceptable approach to sentencing without unduly fettering the discretion of Judges. As it has been said\textsuperscript{16}, there can be no doubt that the promulgation of agreed principles and guidelines to be followed when sentencing leads to a more consistent approach and reduces unacceptable disparity. It is vital, though, that experienced judges play a role in devising such guidelines and that those guidelines are drafted in such a way that sentencers may, provided that they give reasons, depart from them when justice demands it.

\textsuperscript{15} Sentencing Guidelines: Reflections on the future.

\textsuperscript{16} Ibid. no. 4 at page 50
Specialist Meeting A: “Criminal Sentencing Guidelines”

Hon Justice William Young, New Zealand

The Sentencing Council Act 2007 provided for the establishment of a Sentencing Council with the function of publishing sentencing guidelines. This statute was modelled on legislation operating in England and Wales. It was politically controversial and never brought into effect. After some years on the statute book as a dead letter, it was eventually repealed.¹ A three strikes sentencing regime was introduced in 2010.² This, too, has been politically controversial and is now apparently to be repealed. That aside, legislative guidance in relation to sentencing – currently provided via the Sentencing Act 2002 – is predominantly at a reasonably high level (in terms of purposes and principles of sentencing) and sentencing practice has generally been left to the courts.

In this century, the Court of Appeal has required sentencing judges to follow a sentencing methodology in serious cases – broadly those cases where imprisonment is in issue. I was heavily involved in the process as a Judge of the Court of Appeal from 2004 to 2010 and as President of that Court from 2006 to 2010.

As this methodology was first developed, it involved:

(a) Stage one – a starting point sentence reflecting the inherent culpability of the offending.³ This was usually fixed by reference to tariff cases or, in the absence of such guidance, from sentencing decisions in like cases, sometimes with top-down guidance from the Court of Appeal.

(b) Stage two – modifications, usually modest, for circumstances personal to the offender;⁴ upwards for say prior offending or offending while on bail⁵ and downwards for previous good character.⁶

(c) Stage three – an adjustment to the modified figure to allow for a plea of guilty or assistance to authorities.⁷ This adjustment would produce the final sentence imposed.

I usually refer to this methodology as structured sentencing.

The high water mark of structured sentencing was reached in 2009 in a Court of Appeal decision (Hessell v R⁸) which insisted on a highly utilitarian approach to discounts for pleas of guilty with the size of the discount directly referable to the point in the process at which it came (for example, one third for a plea at the first opportunity).⁹ An appeal against this judgment was dismissed, but the Supreme Court was critical of, and rejected, the rigidity of the Court of Appeal approach.¹⁰ The Supreme Court judgment has generally been interpreted as not addressing stage one of the process (starting point). It provided for a slightly lower maximum discount for a plea of guilty (25 per cent rather than one third), more flexibility in relation to timing of a plea and greater other leeway in adjusting sentences down from the starting point.¹¹

¹ Statutes Repeal Act 2017, s 3(1) and sch 1, Part 1.
³ See R v Taueki [2005] 3 NZLR 372(CA) at [8].
⁴ At [44].
⁵ See, for example, Mohi v R [2019] NZCA 441 at [38]; and Clunie v R [2013] NZCA 110 at [22].
⁶ See, for example, R v Findlay [2007] NZCA 553 at [91].
⁸ Hessell (CA), above n 7.
⁹ At [15].
¹¹ At [73]– [77].
In the comparatively brief period between the Court of Appeal and Supreme Court judgment, there may have been more flexibility in the application of the Court of Appeal approach than had been envisaged. In its judgment, the Supreme Court explained that it had received evidence as to this:

This information indicates that in some regions considerable latitude is extended to those defendants who appear to be taking a realistic attitude, as to when they may plead while still receiving a full discount, as long as the plea is entered before committal. Late pleas, entered even a week or less before trial, still attract generous discounts. Some judges are said to consider it unrealistic to expect pleas to serious charges on the basis of initial disclosure.

In one region, the judges have set up a case review evaluation process for jury trials. This was seen as an opportunity to request a sentencing indication from the Court and be advised of the terms of the Hessell judgment. Any plea thereafter entered prior to committal was being treated as at the earliest opportunity and attracted a full one-third credit. While the information comes before the court at an early stage, it casts doubt on whether the rigidity of the guideline on guilty pleas is working as the Court of Appeal intended.

The view that it is “unrealistic to expect pleas to serious charges on the basis of initial disclosure” is illustrative of one of the key differences between the Court of Appeal and Supreme Court approaches in Hessell. Implicit pressure on defendants to plead guilty before full disclosure was available was the corollary of the Court of Appeal approach. Understandably, this was opposed by the defence bar and many judges had sympathy for that opposition. On the other hand, I confess to thinking that there is something to be said for the views that:

a) those who have committed crimes do not need disclosure to know that they are guilty; and

b) a plea before the prosecution has complied with full disclosure obligations is of more value, both utilitarian, in terms of saving expense, and moral, as indicative of remorse, than a plea which comes late in the piece and only when the defendant knows that the game is up.

The Supreme Court judgment (along perhaps with some changes in judicial personnel) marked a more general move towards flexibility. As part of this, structured sentencing methodology has evolved so that:

(a) Delayed pleas of guilty attract substantial discounts, up to the 25 per cent maximum allowed by the Supreme Court judgment in Hessell. To the extent to which this is driven by utilitarian considerations, I suspect that the focus may be on avoiding the trial at hand rather than the system as a whole, which is much better off if those who are going to plead guilty do so as soon as possible.

(b) The three stages have been reduced to two (with adjustments for the plea of guilty going into the second stage).

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12 At [68]–[69].
13 There is sometimes room for debate whether a plea which comes late in the piece is nonetheless made at the first reasonable opportunity, for instance where some charges are dropped. But even where that argument is not available, discounts of 10 per cent or more are sometimes given for pleas on the morning of the trial; this presumably on the basis of better late than never.
There has been increasing weight (in the form of reductions) placed on mitigating factors personal to the offender, including material revealed by cultural reports provided under s 27 of the Sentencing Act.\(^\text{15}\) As well, there has been limited reconsideration of starting point sentences, most significantly in relation to methamphetamine offending.\(^\text{16}\) My impression is that the combined effect of these changes has been a general reduction in sentence, achieved mainly by larger discounts off starting point sentences.

I saw the purposes of structured sentencing as two-fold. First, it promoted consistency of sentencing which I regard as an advantage in itself. Secondly, there are utilitarian considerations which I have touched on, including, but not confined to, promoting early pleas. On the Court of Appeal approach in Hessell (at least if applied as intended), a criminal lawyer should have been able to predict with reasonable accuracy the sentence which would be imposed should the defendant be convicted. Predictability promotes well-informed and thus sensible decision-making. And, of course, in the case of discounts for pleas of guilty, this predictability can encourage prompt resolution of cases.

There are countervailing considerations:

\begin{itemize}
\item \textbf{c)} My impression is that structured sentencing, at least as initially applied, may have resulted in longer sentences. This is because structured sentencing methodology made it hard for sentencing judges to talk tough in relation to inherent culpability but sentence leniently by reference to considerations personal to the defendant. It is not possible to be confident whether my impression is correct as there are many factors which drive criminal justice outcomes. Penal populism was a strong force in New Zealand in the first decade of this century and there were a number of legislative changes which had the effect of nudging sentences up.\(^\text{17}\)

\item \textbf{d)} The profoundly utilitarian character of structured sentencing raised issues of principle which are well reviewed in the Supreme Court judgment in Hessell. I saw structured sentencing as consistent with the Sentencing Act, but it was certainly not mandated by it. It involved placing far more significance on some relevant factors (such as inherent culpability and pleas of guilty) than on others which are more particular to the offender and thus more difficult to weigh and assess consistently (such as remorse and background).

\item \textbf{e)} The corollary of a one third discount for a plea of guilty at the first available opportunity was that a defendant who went to trial and was found guilty received a sentence 50 per cent higher than would have been imposed for a prompt plea. This necessarily put considerable pressure on defendants to plead guilty early in the process (as the discount for a plea reduced in direct relation to how late it came). Sentences of two years’ imprisonment or less can be commuted to home detention.\(^\text{18}\) In cases in which the final sentence was likely to be just over, or just under, two years’ imprisonment, this pressure was accentuated. Despite generally favouring a utilitarian approach, I accept that there is scope for doubt whether pressure at this level is appropriate.
\end{itemize}

\(^{15}\) See Carr v R [2020] NZCA 357 at [60] and [65]–[66].


\(^{17}\) For example, the Misuse of Drugs (Changes to Controlled Drugs) Order 2003 reclassified methamphetamine from a class B controlled drug to a class A controlled drug, with a consequential increase in maximum penalties from 14 years’ to life imprisonment, and s 7 of the Crimes Amendment Act 2005 increased the maximum penalty for sexual violation from 14 years’ to 20 years’ imprisonment.

\(^{18}\) Sentencing Act 2002, s 15A.
Trial by jury is a central feature of the criminal trial process in New Zealand. The dynamics of jury trial involve continuity – once a trial starts it proceeds in an uninterrupted way to verdict – and significant numbers of people in courtrooms in close physical proximity to each other. COVID lockdowns and associated public health restrictions have caused severe disruptions. The criminal trial process was already under pressure and a significant contributor has been late pleas of guilty. In this context, utilitarianism may assume greater salience.

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Hon Chief Justice Martha Koome, Kenya

Brother and Sister Judges and Magistrates from various Jurisdictions:

A. INTRODUCTION

With globalization has come increased opportunity for travel to other countries for various reasons, including studies, tourism, employment, and business purposes. These opportunities for increased interaction have led to increased incidents of marriage or other relationships by people from different nationalities or countries.

The spouses from these “international” marriages must contend with different questions once they have children. On the breakup of a marriage or other relationship, through either divorce or separation, the question often arises as to which parent should assume custody of children of the relationship.

An abduction occurs when a parent on separating unilaterally deprives the other parent of custody of the child(ren). This is the case when a parent unilaterally deprives the other parent of custody of the subject child(ren) thereby terminating the de facto, consensual or court ordered custodial arrangement.

The international abduction of child(ren) occurs in at least four (4) situations:

i. the removal of children to another jurisdiction by a parent when marriage breakdown is occurring while technically both parents still have equal custody rights.

ii. the actual "stealing" or clandestine removal of the child from his judicially determined custodian.

iii. the retention of the child by the non-custodial parent beyond a legal visitation period; and

iv. attempts to gain legal custody during a period of legally permitted visitation.

The root of the problem of the abduction of children by a parent is that where both parents have a strong desire to exercise control and custody over their children, the parent who has lost, or feels that he or she is about to lose, a custody action may surreptitiously remove the child from the country of habitual residence to another Country.

The consequences of such international abduction include denying the other parent custody, access or visitation rights; the other parent has to face an alien legal system, social structure, culture and language and attendant costs of seeking return of a child; and the child may suffer loss of contact with the other parent and his or her home environment due to being transplanted in a different culture where they had no ties.

It is in this context that the 1980 Hague Convention on the Civil Aspects of International Child Abduction; and the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children were negotiated as multilateral treaties with the overarching aim of providing legal framework to safeguard the rights and interests of the children who are often abducted to a foreign country by one of the contending parents. The goal of these legal instruments is to secure the prompt
return of children wrongfully removed to or retained in any Contracting State and to ensure that rights of custody or of access under the law of one Contracting State are effectively respected in the other Contracting States.

The Hague Conventions aim to avoid court orders being made in any other state other than the state in which the child is habitually resident. They also allow court orders made in the child's state of habitual residence to be registered and made enforceable in other Convention countries. They establish a framework for the prompt and easier return of such children to the state of their habitual residence.

However, Kenya is not a Contracting State to the Hague Conventions and thus faces the challenge of absence of a multilateral international legal framework that would offer an optimal regime for addressing the problem of international child abduction.

B. THE PRACTICE OF INTERNATIONAL ABDUCTION IN NON-HAGUE COUNTRIES: THE KENYAN EXPERIENCE

Given the problem of the absence of a multilateral legal framework on international child abduction applicable to Kenya, the regulation of international child abduction is currently guided by Legislation, particularly the Children’s Act.

Legislative Intervention through the Children’s Act

The Children’s Act, No. 8 of 2001 provides a legal regime that helps fill in some of the lacuna brought about by Kenya staying out of the Hague Conventions arrangements on international child abduction. This statute is intended to give effect to the principles of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.

It should be pointed out at the outset that the Children’s Act has no explicit provision or procedures on international child abduction—the only provision mentioning abduction is Section 13(1) of the Act that provides that a child shall be entitled to protection from abduction.

However, the Children’s Act provides general principles that are applicable to the context of child abduction. Indeed, this was the position adopted by the Kenyan Court of Appeal in A.O.G. v S.A.J. & another [2011] eKLR where the Court held that: “The relevant Act in this matter is the Children Act 2001. It has given effect to the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, which Conventions have been ratified by Kenya. The written law on children is therefore codified in that Act and is for application under the Judicature Act unless it does not accord with the provisions of the Constitution. It says nothing about the Hague Convention or the principles there under and it follows therefore that abduction cases, if they arise in the country under section 13 (1) of the Act, shall be dealt with on first principles”.

The two principles that Kenyan courts have applied in determining international child abduction cases are: the principle on the best interest of the child; and the right to parental care and protection.

(i) The Best Interests of the Child

The cardinal rule of custody law in many jurisdictions is that the court in custody determinations must be governed above all else by a concern for the best interests or welfare of the child.

In Kenya, this principle is codified in Section 4(2) of the Children’s Act, which provides that in all actions concerning children, “the best interests of the child shall be a primary consideration”.

This principle is also reiterated in Article 53(2) of the Constitution of Kenya of 2010 which provides that “a child’s best interests are of paramount importance in every matter concerning the child”.

In terms of Section 4(3) of the Children’s Act, Judicial and administrative institutions, and all persons acting in the name of these institutions, are expected to treat the interests of the child as the first and
 paramount consideration to safeguard and promote the rights and welfare of the child, and conserve
and promote the welfare of the child.

In addition, Section 4(4) of the Children’s Act envisages that in any matters of procedure affecting a
child, the child shall be accorded an opportunity to express his or her opinion, and that opinion shall be considered as may be appropriate considering the child’s age and the degree of maturity.

In the context of international child abduction, the “best interest of the child” includes the right to be cared for by and to maintain contact with their parents, the right for children and their parents to leave and enter their country for the purpose of maintaining contact with one another, and the right for children to be heard and to participate in matters that affect their lives. This means that the desire to protect children and their true interests should be of paramount importance in matters related to their custody.

The “best interest of the child” consideration therefore ensures prompt return of children in so far as it enables the ill effects of the abduction to be reversed quickly as possibly by restoring the status quo before the abduction.

The deployment and use of the principle of “the best interest of the child” in international child abduction cases in Kenya is illustrated by the case of SAJ V AOG & Another [2019] EKLR (Miscellaneous Civil Application 15 of 2009); which was a case of alleged international child abduction where the child had been relocated to Kenya by the mother from the United Kingdom. The applicant, who was the father of the child is a citizen of the United Kingdom while the 1st respondent, the mother of the child is a Kenyan citizen.

The two got married on 26th April 2003 in Nairobi and settled in the United Kingdom and on 5th May, 2005, they were blessed with a son [ZAJ]. On 30th November 2007, the mother travelled to Kenya with the child. The father’s effort to have the child returned to the UK and the mothers’ intention to have the child remain in Kenya under her custody, gave rise to the subject suit.

The father of the child (the petitioner) made an application to the High Court of Kenya sitting in Nairobi and sought prayers that the child-ZAJ, the subject of the proceedings, be returned to the High Court of Justice, Family Division, England within three days; that the 2nd respondent liaises with the United Kingdom’s Central Authority to the intent that the child be placed under the ward-ship of the High Court of Justice, Family Division, England; a declaration that the habitual residence of the child prior and up to his wrongful removal from Bolton United Kingdom in 2007 was Bolton United Kingdom; and a declaration that the removal of the child from Bolton United Kingdom was wrongful and in breach of the petitioner’s rights as his biological father and in breach of the child’s rights to parental rights and affection.

In opposing the application, the respondent stated that ZAJ was habitually resident in Kenya, and in addition, that Kenya was not a signatory to the Hague Conventions and could not issue orders under the Hague Conventions, and that the best interests of the child should prevail.

In effect the rival arguments before the High Court raised the issue of whether the removal of ZAJ from the United Kingdom was wrongful and in breach of the petitioner’s rights as his biological father and in breach of the child’s right to parental affection.

(The father’s effort to have the child returned to the UK and the mothers’ intention to have the child remain in Kenya under her custody, gave rise to several suits. Two suits filed before the Children’s Court in Nairobi and in Kiambu, a petition in the High Court, proceedings before an English Family Court in the UK, an appeal before the Court of Appeal, and an application before the Court of Appeal for leave to appeal in the Supreme Court.
The father of the child tried to enforce the return order from the UK High Court of Justice Family Division, a Judge of the High Court based in the family division made an order on 17th March 2009 to the effect that the child should be returned to the UK within 72 hours of making the order in line with the provisions of the Convention.

The mother of the minor appealed to the Court of Appeal that allowed the appeal and set aside the order of return.

The appeal by the father of the child before the Supreme Court was dismissed on the grounds that the matter was not of public interest and the Children’s Court. High Court had not determined the substantive issue on whether the child was abducted from the United Kingdom.

When the matter was eventually determined by the High Court in 2019, the High Court held that in determining allegations of abduction, the court was required to assume jurisdiction to determine whether to send the children back to the jurisdiction from whence they came without going into the details of the dispute between the parents, and without more than such investigations as satisfied the court that the children would come to no harm.

The High Court proceeded to hold that it was not enough for the petitioner to claim that the 1st respondent abducted the child. He had to go further and demonstrate that the child had suffered prejudice as a result of his continued retention in Kenya. This was so given that in all matters involving a child, the best interest of the child had to be given paramount consideration.

The High Court found that though Kenya was not a signatory to the Hague Convention of 1980; the Convention’s provisions could be employed to ensure that the best interest of the child was given primary consideration. However, in the instant case, the custody case in the United Kingdom was yet to be determined and the provisions of the Convention could not apply. In addition, the High Court was of the view that even if the provisions on the Hague Convention applied, they had to be measured against the best interest of the child.

It is noteworthy that the principle of the “best interest of the child” can also work in the reverse and provide a defence against attempts to promptly return a child to the country of habitual residence. The need to protect a child from actual harm will override the need to protect them from child abduction. A child’s best interests will not be promoted by prompt return where the ill effects of return are clearly worse than the ill effects of the abduction in the first place. However, the courts should require very clear evidence of the risk of harm.

In SAJ V AOG & Another [2019] EKLR (Miscellaneous Civil Application 15 of 2009) the High Court held that given that almost ten years had lapsed since the 1st respondent ‘abducted’ the child as alleged, (the litigation in the matter was long running from the High Court, Court of Appeal, Supreme Court and back to the High Court leading to delayed determination of the case) it was most probable that the child was settled in his new environment and an order for his return would only jeopardize his welfare and benefit the petitioner. Thus, “the best interest of the child” being the primary consideration in the matter trumped the need for prompt return to country of habitual residence.

Having analysed the circumstances of the case, the High Court found that the application for return of the child lacked merit. In the Court’s view, it would only work to the advantage of the petitioner and interfere with the wellbeing of the child. The Court proceeded to dismiss the application on this basis to await the proceedings in the Children’s court to determine the question of custody of the child.

(ii) Right to Parental Care and Protection

Section 6 of the Children’s Act provides that a child has the right to live with and to be cared for by his/her parents. Section 6(3) of the Act proceeds to indicate that where a child is separated from his family without the leave of the court, the government shall aid with reunification of the child with his family.
In addition, the Constitution of Kenya at Article 53(e) provides that every child has the right to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married or not.

In SAJ V AOG & Another [2019] EKLR (Miscellaneous Civil Application 15 of 2009) the applicant who was the subject child’s father alleged that the abduction of the child breached his rights as the child’s biological father and was also in breach of the child’s rights to parental rights and affection. Although the High Court found that parental rights were a consideration, they were trumped by the best interest of the child.

C. CHALLENGES IN PROTECTION OF CHILDREN IN NON-CONTRACTING STATES - LESSONS FROM KENYA

(i) Failure to Raise Issues on Child Abduction in Court in cases that are by nature concerned with International Child Abduction

Lack of appreciation and awareness by the legal community (Lawyers and Judges) about the legal regime on international child abduction often lead to cases that involve child abduction being resolved without the law and procedures on international child abduction being raised and addressed.

This was evident in the case of B versus Attorney General. The background of this case is that it involved custody dispute of three minor children between a Kenyan mother (MB) and a Belgian father (OPC). The parents were divorced at the Court of First Instance in Belgium on 23rd December 1997.

On the basis of an agreement between the two parents, a ruling was handed down by the Belgian Justice of the Peace in February 1995: custody of the three children was given to the father, in Belgium, where they were born and grew up; the children would join their mother in Kenya for the holidays (6 weeks during the summer, 2 weeks at Christmas and Easter, and/or one week at the half terms). The Court of First Instance of Nivelles, Belgium in 1996 and the Brussels Court of Appeal in 1997 upheld this agreement granting custody of the children to father.

From 1995 to 1998 the children visited their mother for most of the school holidays without any incident. However, from August 1998, the mother refused to return the children to their father in Belgium and prevented any contact between the children on the one hand and their father and close relatives in Belgium. On 9 November 1999 the Criminal Court of Appeal in Brussels sentenced the mother of the children to one year's imprisonment for child abduction and issued an international warrant for her arrest.

On 23rd August 1998, MB filed a suit in the High Court in Kenya, custody of the three minor children of marriage aged at the time, between 12, 7 and 2 years respectively. She also sought orders of injunction to restrain the husband from removing the children from the jurisdiction of the court. The order was issued and the children were also made wards of the court.

It is noteworthy that the order by the High Court placing the three children “under the protection of the court” was made despite the fact that a number of decisions regarding custody of the children had been made by courts in Belgium.

The husband unsuccessfully appealed against the orders in the Court of Appeal. In September 2001, the three children were arrested at school in Nairobi by Immigration Officials working in collaboration with the police. MB managed to wrest the control of the youngest child (SPL), the other two children deported. All along the three children were wards of the court and were in possession of valid dependent’s passes.
MB filed an application seeking to stop the Government from deporting the minor child. During the hearing, there was counsel watching brief on behalf of the Embassy of the Kingdom of Belgium in Nairobi.

Issues of abduction of children from their habitual country of residence were not put before the court. The Judge dismissed the arguments put forward by the Attorney General in execution of the deportation order pending the hearing and determination of the substantive suit. The Attorney General was trying to enforce a return order for abducted children on behalf of the Belgium courts, the procedure followed was wrong.

It is noteworthy that the issue of child abduction which was crucial to the satisfactory determination of the dispute was not brought to the attention of the Court. Arguments by the Attorney General were based on legal technicalities despite application of mother being on child retention. Had the Kenyan courts been addressed and considered the terms of the Hague Conventions on child abduction they would have respected the custody orders made by the Belgian courts.

(ii) Exercise of Overlapping Jurisdiction in Custody Disputes
At the present time given that Kenya is not a party to the Hague Conventions and is therefore not bound to recognise custody decisions by courts in other jurisdictions, there is the ever-looming possibility that a Kenyan court may assume jurisdiction to entertain a custody proceeding despite the existence of custody orders from a court in a different jurisdiction in relation to a particular child at any one time.

In Kenya, a court has jurisdiction if the child is physically present within the boundaries of the country even though the child may have been clandestinely brought into the country to avoid proceedings in another jurisdiction. Mere presence of the child within the country is usually enough to ground the jurisdiction of the court, notwithstanding that the child is neither resident nor domiciled within the country, on the basis that the State has a responsibility and vital interest in the welfare of children within the borders of the State (parents patriae doctrine). (This is a position adopted by the Court of Appeal in A.O.G. VS. S.A.J. & ANOTHER [2011] eKLR at paragraph 46 and the High Court in Republic v Senior Resident Magistrate Mombasa ex parte H L & another [2016] eKLR at paragraph 44).

On the other hand, the child's physical presence in the country is not a prerequisite to a court having custody jurisdiction. If the child is outside the country, a court may still exercise jurisdiction if the parent or person exercising actual control over the child is within the country as that person could be ordered to return the child to the country or be liable for contempt proceedings.

Although a court may decline to exercise its custody jurisdiction, the fact that concurrent jurisdiction often exists, due to the varying grounds for assuming custody jurisdiction, makes forum shopping by the parents feasible.

This concern is illustrated with the case of MAK v RMAA & 4 others [2020] eKLR (Civil Case 1 of 2016 (Formerly Petition 139 of 2016) where the Petitioner while aware that she had physically and emotionally abused her child who had consequently persuaded the Family Court in the United Kingdom to find that she was not a fit parent to participate in the upbringing of the child, brought a petition before the High Court in Kenya seeking orders for the custody of the child. She claimed that the orders by the United Kingdom Court were malicious and in total disregard of the sovereignty of the Kenyan legal system over its nationals, and consequently it was just that the High Court of Kenya intervenes to remedy the situation and return the matter to the parental responsibility arrangement orders that had been given by the Children Court in Kenya following the divorce by the two parents to the subject child. However, the High Court of Kenya rightly dismissed the application.
(iii) **Lack of Recognition and Enforceability of Foreign Custody Orders**

Section 3(3) (e) of the *Foreign Judgments (Reciprocal Enforcement) Act (Chapter 43, Laws of Kenya)* exempts the reciprocal enforcement of the judgment or order in proceedings in connection with custody or guardianship of children.

Parliament in its wisdom thought it wise to exclude such judgments from enforcement and reciprocity. This means that where a child is brought to Kenya from the country of habitual residence, Kenyan courts can consider the case on its merits and form an independent judgment on what custodial arrangements would be in the best interests of the child. This is so even if the child was clandestinely brought into Kenya solely to avoid the custody order from the “previous” jurisdiction.

The fact that the custody issue can be re-litigated consecutively by courts in different jurisdictions with each court considering the case as essentially one of first instance encourages a disappointed parent to abduct the child across borders in search of a court that will exercise custody jurisdiction and whose outlook, it is felt, differs from that of the courts where the child is presently residing.

(iv) **Abductive parent has a good chance of obtaining a custody award in his (her) favour**

The parent who removes his (her) child from the state of habitual residence to Kenya could in some cases be rewarded with a favourable custody determination. The emerging approach by Kenyan courts is that they tend to be inclined to grant a custody hearing on the mere physical presence of the child within the boundaries of the state, despite the parent's defiance of another jurisdiction's decree or a child custody agreement between the parents. This judicial inclination encourages child abductions and forum shopping by parents who are disappointed with judicial determinations in other states.

This is illustrated in *SAJ V AOG & Another [2019] EKLR (Miscellaneous Civil Application 15 of 2009)* where the High Court held that given that almost ten years had lapsed since the 1st respondent ‘abducted’ the child as alleged, it was most probable that the child was settled in his new environment and an order for his return would only jeopardize his welfare and benefit the petitioner. Thus, “the best interest of the child” being the primary consideration in the matter trumped the need for prompt return to country of habitual residence.

Such an approach has the effect of encouraging a parent to abduct a child from a different jurisdiction and bring the child to Kenya with the hope of obtaining a favourable decision.

(v) **Lack of effective criminal or civil sanctions imposed on abducting parents**

There is no effective sanction against parental kidnapping at the present time in Kenyan laws. Under the existing laws, child snatching by a parent is usually condoned, often rewarded, and rarely punished.

As both parents generally under Kenyan law have equal rights to the custody of their children until a court decree orders otherwise, there has never been a criminal conviction of a parent in Kenya for abduction of his(her) child except in cases where there was an order of a court of competent jurisdiction granting custody to the other parent prior to the abduction of the child. Even in cases where there is such an existing custody order, it is difficult to motivate police and prosecutors to lay charges and judges and magistrates to convict because of a widespread belief that the criminal law is an inappropriate method of resolving what are essentially domestic disputes of a civil nature are.

D. **JUDICIAL INNOVATIONS TO CURTAIL CHILD ABDUCTIONS BY A PARENT IN NON-CONTRACTING STATES**

First judicial innovation worth exploring to curb child abduction, is that courts should consider inserting clauses into their custody orders that prohibit the removal of the child from the jurisdiction without the consent of the court and that require the non-custodial parent who is awarded out of State visitation rights to post a bond to ensure that the child will be returned to the jurisdiction following the visitation period.
Second judicial innovation worth exploring is that courts in non-contracting states should decline to exercise their jurisdiction to hear a custody application made by an abducting parent, even though the child is physically present within the geographic confines of that area over which the court can effectively exercise control, unless the court is the convenient forum to hear the custody dispute. Courts in such instances ought to order that the child be sent back to the country where the original custody order was made or where the child is ordinarily resident. The court in such a case will only examine the merits of the case to the extent that it is necessary to satisfy the court that the child will not suffer serious harm by being returned which is substantially different from the court examining whether in light of all the evidence, the custody arrangement is the one that it would have ordered as being in the best interests of the child. Such an approach takes into account the fact that the abducting parent may gain an unfair advantage from his wrongdoing if the case is delayed for a full enquiry into the merits of the case as the child may begin to acquire roots in the new jurisdiction which it then might be in the best interests of the child not to sever.

E. CONCLUSION
The conclusion drawn from the Kenyan experience is that the regime on international child abduction is not operating optimally in Kenya with respect to the returning of children. A major reason for the difficulty in getting prompt return of children and ensuring that children are returned only where it is appropriate to return them is that Kenya is not a party to the multilateral framework on international child abduction i.e. the Hague Conventions. It follows that the first step towards reforming this situation is getting the Kenyan government to ratify the Hague Conventions.

The Judiciary in collaboration with Director of Children Services, and all the stake holders should establish procedures that can facilitate and coordinate immediate communication between International Hague Network of Judges (IHNJ) to and from contracting states regarding abduction or trafficking of children.

In addition, there is need to create awareness among Judges and Magistrates across board on The Hague Conventions and the procedures thereto. This is so given that the High Court in SAJ V AOG & Another [2019] EKLR has held that though Kenya is not a party to the Hague Conventions, the procedures and principles under these Conventions are applicable in Kenya in furtherance of the “best interest of the child”.

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Hon Justice Choo Han Teck, Singapore

Policy decisions of courts martial made during peace time must be made with an eye on how courts martial are conducted in times of war. A court martial for military offences during times of peace invariably functions under little duress in the sense that the prosecution has time to prepare its charges against the accused. The soldier charged will have time to prepare his defence, and the court has the time to hear all arguments in full and thereafter to deliberate on the outcome of the case.

The distinguishing factor between a court martial and a civilian trial is that underlying the legalities of the offence in question upon which the soldier is being court martialled, the court martial, in coming to its verdict and sentence, has to keep a balance between morale and discipline.

In theory, morale and discipline are straightforward concepts and should have no separate meanings in times of peace and in times of war or conflict. But as the world has recently seen, when the Americans and their allies were evacuating Afghanistan, events on the ground may be unforeseen and occur spontaneously outside all military planning.

Eventually, we will learn more as further facts and observations emerge from those last days of urgency in Kabul, but for now we need only look back to a similar event in Saigon on 30 April 1975, when the American military was evacuating Americans and their Vietnamese allies. Not only were there not much operating procedure, but whatever there were, did not seem to help because in the crisis of the moment, people forget, or simply have no time to adhere to general orders.

In fact, it transpired that many orders from Graham Martin, the American ambassador, and even, at the last minute, a Presidential order from President Ford, were not obeyed. Those orders came swiftly one after the other. Initially, Ambassador Martin, for several reasons, mostly noble ones, refused to give the orders to evacuate.

He had himself lost a son in Vietnam. He felt personally attached to the land and to the cause. Thus, there was perhaps, a reluctance on his part to accept that all the efforts of the American and South Vietnamese military had come to naught. Furthermore, he did not want to create a panic before they had even heard the rumble of a North Vietnamese tank in Saigon.

The unfortunate result was a frantic effort by those on the ground, both by the embassy staff and the military and intelligence staff, to make hasty arrangements, contrary to instructions, for evacuation. Finally, on the last day, when President Ford gave the order for the last helicopter flight out, the men on the ground defied the order and continued to try and save more Vietnamese.

The point of the events in Saigon and Kabul is that under war and conflict situations, there may be no time for anyone to ponder about the niceties of a court martial protocol. What is morale and what is discipline become gut issues depending on whether the soldiers in the field had guts or not.

No one was court martialled for what they did in Saigon in the last days in Saigon. But the point is that what goes on in the battlefield should be matters that military justice must contemplate long before the battle begins. Not every battlefield situation exudes a sense of nobility as saving comrades, friends, and allies. Again, in Vietnam, for example, distressed soldiers were known to have hazed their own officers, sometimes even shooting them in the back.
Conversely, the fact that there is no time for a court martial in the heat of battle, soldiers who retreat against orders might find themselves shot by their own officers — as had happened in the Korean war. The problem with what soldiers do in the heat of battle and against orders, is that in some cases, the action cannot be condoned. Cowardice in the face of the enemy is the most obvious. In other cases, such as the actions of soldiers in rescue situations may, in hindsight, be viewed as heroism.

There are situations in which soldiers operate not in the heat of battle, such as when launching a missile strike from hundreds or thousands of miles away from the target. Two sets of soldiers are involved — the ones who are ordered to fire, and the ones who give the order to fire. In the case of the former, the soldier may have no information himself to determine whether his missile is likely to injure civilians.

The officer ordering the fire may sometimes have information that the target may not be a military one, and he may have been pressured into making the wrong decision. The New York Times reported in its 13 September 2021 edition that there is evidence that the US drone strike on a car might have injured and killed civilians, and it also cast doubt as to whether the car was a correct military target.

An article by Isaac Stanley-Becker, appeared in the Washington Post this morning, 15 September, reporting on a book published this year by Bob Woodward and Albert Costa. It is an extraordinary account about how the highest military officer of the United States, General Mark A Milley, the Chairman of the Joint Chiefs of Staff, had contacted his counterpart in the People’s Liberation Army, General Li Zuochang. Twice, during the presidency of Donald Trump, General Milley called to assure the Chinese that the United States was stable and that it would not strike China. General Milley was quoted as saying, ‘General Li, I want to assure you that the American government is stable and everything is going to be okay…General Li, you and I have known each other for now five years. If we are going to attack, I’m going to call you ahead of time. It’s not going to be a surprise.’

It was reported that General Milley acted out of fear that President Trump might spark war with China. Whether the incidents are true is not the concern of this conference, but even if untrue, it serves as an illustration that even when there is no conflict or war, a soldier may take it upon himself to act in a manner which, if court martialed, emphasises the need for clear jurisprudential thinking. In a situation like this, would General Milley’s conduct be regarded as sensible and heroic, or as unpatriotic and even treacherous? Would his conduct be subject to proceedings in a civilian or military court?

When soldiers disobey orders under stressful circumstances, in conflict or war, or even in peacetime when the stakes are raised, how should a military tribunal decide should those soldiers be court-martialed? From the perspective of the military courts, the criteria for amnesty may have to be examined critically so that the conduct of soldiers who defy orders may be carefully and fairly judged — and properly determined as to whether that conduct deserves or does not deserve prosecution, or whether deserving of prosecution but meriting light punishment. Although amnesty is a political pardon, it has a place in military jurisprudence (apart from supporting a political pardon) by the prosecutors declining to press charges. That brings us to the full circle — how does a military prosecutor determine conduct that may be exempt from prosecution when in normal circumstances they would not be so?

Similarly, from the point of view of a military tribunal, depending on the jurisdiction conferred upon it (and that varies from country to country) it may have no power to grant an acquittal and absolute discharge. In which case, should the tribunal may only impose the lightest possible punishment?
It is therefore, imperative that military justice must be considered from the practical aspects of morale and discipline in the heat of battle, or in the heart of a conflict, so that decisions relating to a court martial for events that take place under those circumstances can be jurisprudentially justified. Discussions on this subject may also need to be expanded to include training in areas such as psychology, and even ideology for justice to be meaningful. And most importantly, so that field officers may make the right decisions in the heat of battle.
Specialist Meeting C: “ Ensuring Fair Court Procedures for Commonwealth Militaries: a Collective Responsibility”

Audio Summary of Ms Francisca Pretorius, England and Wales
Transcript by Bethany Twyman (E&OE)

Two disclaimers before I start. I am not an expert on military law but I am really passionate about law reform, and the second one is I will be telling you how we can help other countries. I will be talking about a proposed project for military law reform. At the Commonwealth Secretariat we operate on the basis of mandates that we receive from our member countries so in order to kick this project off we need the mandate first, and we have received some expressions of interest but this project has not kicked off yet. We are however commencing a full scoping exercise to understand the needs of member states.

Bit of background, you have heard a little bit about military justice from both Judge Large and Justice Choo, of course it’s military justice or military law, it’s a body of law concerned with governing members of country’s armed forces and it is generally accepted that there are several fundamental requirements for a fair, independent and impartial military system and these stem from various sources including international humanitarian law, international human rights law, and these were collated into something called the Decaux Principles of 2005. Examples of these principles are the establishment of military tribunals by the constitutions of the law, compliance with international standards for due process and fair trials, the right to a competent, independent and impartial tribunal, application of humanitarian law, public nature of hearings, guaranteed of the rights of the defence and the right to a just and fair trial, access of victims to proceedings, non-imposition of the death penalty, and regular review of codes of military justice. While many military justice systems in the commonwealth strive broadly to follow these principles, others prescribe the different procedures or practices in relation to some of these areas I have mentioned. The position occupied by military criminal jurisdictions within a state’s structure often differs from one common law country to another, many countries have separate and distinct bodies of law that govern their armed forces and use special judicial arrangements to enforce those laws, others use the civil justice system to enforce laws. The result is that there are areas upon which international norms, such as the principles I just mentioned, and practice are divergent. Such areas include the trials of civilians in military court, the independence of military judges from interference, and access to legal representation. Military justice, like any justice system must develop and evolve in order to remain fit for purpose, and as we heard from Justice Choo, fit for peace time and for active service. Justice should be public, visible, transparent, accessible and equitable. Some military justice systems at present do not meet all of these requirements.

At the core of the office for civil and criminal justice reform are the Commonwealth Secretariat’s obligations to ensure access to justice to all, so building capacity in the space of military justice, focusing on military justice reform means we can widen the canopy of justice, and in widening the canopy of justice our objective is to support the transformation of military justice systems in commonwealth countries. While you may ask the commonwealth “why should we take on this responsibility to support the capacity building in military justice systems?” Well, many countries in the commonwealth have a common British heritage military justice system and this allows the commonwealth to be uniquely positioned and ideally placed to act as a bridge between countries such as the UK and Australia with updated and fit for purpose military justice systems and countries that require support to reform their military justice systems, as Judge Large said do not have the institutional capacity to do so. With our internal legal expertise and the support of Judge advocate generals of countries such as the UK and their respective teams, the Commonwealth Secretariat’s governance and peace directorate is uniquely positioned to create an active and ongoing forum for military justice to create meaningful knowledge products, to provide bespoke assistance to member
countries, and hopefully to become the preferred partner for military justice reform in the commonwealth.

We really hope the commonwealth countries will benefit from a space where they can learn from each other, share knowledge and information, and they can deliberate on these issues. Being able to address this together is not only bound to make the process a little bit easier, but also promises to streamline the approaches concerning military justice reform in the commonwealth. It can also aid in the development of a coherent legal tradition among commonwealth countries with respecting military justice systems and continue the harmonisation of legal systems across the commonwealth in accordance with internationally accepted norms. In much broader terms, we have to continue the process of making military law more transparent and provide equal access to justice for all. To be a little bit more granular, I propose that a few of the things we would love to achieve, and I will take you through it step by step, the first action that we want to take is to contact all of the judge advocate generals in the commonwealth member countries and conduct a needs assessment survey to really understand what kind of support is required. If it is determined that there is a need, then we will establish a working group of judge advocate generals and other experts to guide this project. Thirdly, we will conduct comprehensive empirical research and mapping of military justice systems in commonwealth member countries, and we want to use that research and the mapping exercise to establish a database of military justice systems in commonwealth countries setting out their broad procedures and principles. Then we also want to create regional working groups of experts to provide a space for different working groups to share research and good practice in military justice. Last week, the commonwealth lawyers conference was in the Bahamas and it was fascinating to speak with some people there in the military systems. There are similar problems in some of the Caribbean countries and we think that we can learn from each other and then share all of the military justice reform work amongst a group in a region. We also want to organise pan-commonwealth military justice forums for judge advocate generals and other stakeholders to raise these issues, of course meeting the staff’s topics of interests, sharing knowledge and experience, and even discussing things like digitalisation of digital processes. Eventually we want to come up with an agreed set of principles to guide commonwealth military justice systems, so these will be the commonwealth model military justice principles. We also want to, at a later stage when this project is well up and running possibly provide awareness programmes for law professors in defence and other relevant subjects, and support updating legal curricula based on this and offer and provide bespoke assistance and training in military justice for judges, prosecutors and advocates to align practice with the standards set out in the military justice principles. If we determine a need, we may also consider creating a model law on military justice.

I would like to pause on the commonwealth model military justice principles, I think this will be the heart of the project and these principles will identify the critical basic minimum requirements that commonwealth member states agree to meet regarding military justice systems, to guide countries self-evaluation of their military justice practices, to serve as a basis for discussions on reform, to inform a countries decision to request the Commonwealth Secretariat for assistance in reforming their military justice systems, and to guide the commonwealths approach when assisting member countries to reform their systems. I also would like to add that of course this will need to be fit for purpose in the specific justice system and that’s why I think a principled approach will be a really good way to go about this. We really look forward to working with all of you on this call, and others in member countries in exploring and learning and hopefully creating a new space for military justice in the commonwealth and really elevating military justice a bit, and in so doing really ensuring fair court procedures for commonwealth militaries. I really believe this is our collective responsibility.
Professor Peter Jaffe, Canada

Learning Objectives
Domestic homicides/Intimate Partner homicides are significant problems and an extreme form of violence against women and children across the commonwealth. These deaths appear predictable and preventable with hindsight. Consistent patterns of known risk factors prior to the homicide as well as shortcomings in inter-agency collaboration with health, social services, and education and justice professionals. Multiple systems miss opportunities to share information and develop effective intervention strategies.

Repeated lessons learned from these tragedies:
- enhanced professional and public education
- risk assessment, safety planning and risk management by legal and mental health professionals

Global Stats on Violence Against Women
736 million women have been subjected to IPV and/or non-partner SV at least once in their life (30% of women)
Over 640 million women have been subjected to IPV (26% of women).
In 2017 approximately 30,000 women were killed by an intimate partner across the globe, which is a little over 82 women per day


This map shows regional variations between lifetime and past 12 months prevalence of physical and/or sexual intimate partner violence among ever-married/partnered women aged 15-49 for SDG regions.
### Estimated prevalence (%) of lifetime and past 12 months IPV among ever-married/partnered women, age 15-49, 2000-2018

<table>
<thead>
<tr>
<th>Region</th>
<th>Country</th>
<th>Lifetime</th>
<th>Past 12 months</th>
</tr>
</thead>
<tbody>
<tr>
<td>Africa</td>
<td>Botswana</td>
<td>34</td>
<td>17</td>
</tr>
<tr>
<td></td>
<td>Burundi</td>
<td>40</td>
<td>22</td>
</tr>
<tr>
<td></td>
<td>eSwatini (Swaziland)</td>
<td>N/A</td>
<td>18</td>
</tr>
<tr>
<td></td>
<td>Gambia</td>
<td>25</td>
<td>10</td>
</tr>
<tr>
<td></td>
<td>Ghana</td>
<td>24</td>
<td>10</td>
</tr>
<tr>
<td></td>
<td>Kenya</td>
<td>38</td>
<td>23</td>
</tr>
<tr>
<td></td>
<td>Lesotho</td>
<td>40</td>
<td>16</td>
</tr>
<tr>
<td></td>
<td>Malawi</td>
<td>30</td>
<td>17</td>
</tr>
<tr>
<td></td>
<td>Nigeria</td>
<td>24</td>
<td>13</td>
</tr>
<tr>
<td></td>
<td>Rwanda</td>
<td>38</td>
<td>23</td>
</tr>
<tr>
<td></td>
<td>Uganda</td>
<td>45</td>
<td>26</td>
</tr>
<tr>
<td>Caribbean</td>
<td>Jamaica</td>
<td>24</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td>Trinidad &amp; Tobago</td>
<td>28</td>
<td>7</td>
</tr>
<tr>
<td>Europe</td>
<td>United Kingdom</td>
<td>24</td>
<td>4</td>
</tr>
<tr>
<td>South-East Asia</td>
<td>India</td>
<td>35</td>
<td>18</td>
</tr>
</tbody>
</table>

*World Intimate Partner Homicide (United Nations Office on Drugs and Crime 2018)*

![Chart showing prevalence of IPV among ever-married/partnered women](chart.png)
Male and female victims of IPFM homicides as a percentage of total homicide victims, by country

<table>
<thead>
<tr>
<th>Commonwealth Country</th>
<th>Women</th>
<th>Men</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia*</td>
<td>76%</td>
<td>27%</td>
</tr>
<tr>
<td>Bahamas</td>
<td>19%</td>
<td>10%</td>
</tr>
<tr>
<td>Canada</td>
<td>60%</td>
<td>14%</td>
</tr>
<tr>
<td>England and Wales</td>
<td>68%</td>
<td>14%</td>
</tr>
<tr>
<td>Jamaica</td>
<td>26%</td>
<td>7%</td>
</tr>
<tr>
<td>New Zealand</td>
<td>67%</td>
<td>21%</td>
</tr>
<tr>
<td>Trinidad and Tobago</td>
<td>24%</td>
<td>4%</td>
</tr>
</tbody>
</table>

*Data from 2009. Source: UNODC homicide statistics, 2013

Canadian Domestic Homicides

**Annual distribution of domestic homicide victims, Canada, 2010-2019 (N=815)**

![Graph showing annual distribution of domestic homicide victims, Canada, 2010-2019](image)

The number of domestic homicide victims killed each year ranged from 64 to 98, with an average of 82 victims per year. Specifically, the chart displayed shows that 2010 was a particularly deadly year in terms of domestic violence and 2016 saw the fewest victims.

**Demographic characteristics**

- Most adult victims were female (79%)
  - Average age of 41 years
- Most accused were male (86%)
  - Average age of 14 years

**Vulnerable Populations**

- Of the 815 domestic homicide victims, 439 (54%) were identified as belonging to one or more of the four focal populations:
  - Indigenous (N = 103)
    - 66% were killed in an RRN area
• 10% were children
• Immigrant/Refugee (N = 128)
  • 5% lived in an RRN area
  • 5% were children
• Rural, remote, northern (N = 252)
  • 27% were Indigenous
  • 3% were immigrants/refugees
  • 13% were children
• Children (N = 74)
  • 46% lived in an RRN area
  • 14% were Indigenous
  • 8% were immigrant/refugees

Risk Factors

The risk factors are from our literature review identify a number of unique as well as intersecting risk factors among the four populations that increase their vulnerability to DV and DH.

Very briefly, the literature suggests that Indigenous Populations experience historical and current injustices such as the residential school system, colonization, and continued discrimination. Largely as a result of these injustices, they also often experience substance abuse and mental health issues, and all of these can impact their domestic violence risk and experiences.

Rural, Remote, & Northern populations often experience a lack of privacy, anonymity, and confidentiality and have strong traditions around firearms.

Immigrants and refugees experience migration and acculturation stressors, language barriers, and limited knowledge of Canadian systems, laws, and culture.

Finally, Children Exposed to Domestic Violence may be unable or reluctant to report domestic violence in the home, they may be dependent on the perpetrator, and both they and their parent who is the victim of domestic violence may be concerned that the child could be taken away if they report domestic violence.

We are using these findings to guide our framework – First, the risk factors from the literature review identify a number of community and societal level factors present among the four vulnerable
populations, however, there is greater emphasis for research to focus on individual and relationship/family level factors when examining the violence against women literature that uses the Social Ecological Model.

Second, there are difficulties in terms of how the risk factors are conceptualized and placed within the Social Ecological Model. The placement of risk factors can vary, with different risk factors being placed at multiple levels by researchers. For example, one study may identify language barriers as individual factor while another may identify it as a community factor. (bring in the conceptual work that Danielle is doing now for the first paper with the chart)

Our goal: To understand how levels are being used (named), where risk factors are primarily being slotted, and how common the classifications are. This will help to more clearly identify common approaches and gaps when using the Social Ecological Model to place risk factors for DV and DH.

**Unique Issues for Immigrant Perpetrators & Victims of Domestic Homicide**

- Not a higher level of domestic violence but more barriers to reporting
- Social isolation, language and cultural barriers
- Family may be barrier rather than support
- Reluctance to engage police and courts
- Impact of pre-migration trauma and post-migration stressors

**Learning from Tragedies**

**We Speak for the Dead to Protect the Living**

**Not a Blaming & Shaming Exercise**

What can we do to prevent a tragedy in similar circumstances in the future?
The Ontario Domestic Violence Death Review Committee (DVDRC)

- **Multi-disciplinary** advisory committee of experts established in 2003 in response to two major inquests into the deaths of Arlene May and Gillian Hadley, by their intimate partners.
- Committee consists of representatives with expertise in domestic violence from law enforcement, criminal justice, healthcare, academia, social services, victim services and other public safety agencies and organizations (as needed).

The DVDRC currently has representation from:

- University of Guelph
- University of Western Ontario
- Victim Services of York Region
- Correctional Services Canada
- Ontario Provincial Police
- Children’s Aid Society
- Peel Regional Police
- Ministry of the Attorney General
- Office of the Chief Coroner

The DVDRC is chaired by Dr. William Lucas, Regional Supervising Coroner for Central Region – Brampton Office.

2003-2017

- Reviewed 311 cases involving 445 deaths
- 65% were homicides & 35% were homicide – suicides
- 72% had a history of domestic violence
- 67% had and actual or pending separation
- 71% had seven or more risk factors

Are DV Homicides Predictable & Preventable?

- 71% of the cases had at least 7 risk markers
- Critical information held by family, work colleagues, front-line professionals
- Children are the victims in a number of ways
- Critical need to collaborate between child protection and VAW services as well as the justice system (criminal and family court)

Methods of coercion:

- Use of myths (expectations in relationships); gender and gender identity, race, class, disability
- Negative verbal persuasion
- Social status & power imbalance
- Social intersections
- Systems of discrimination
- Trafficking
- Substance-facilitated sexual assault
- Cyber harassment

Common Risk Markers

- 74% - Prior history of domestic violence
- 72% - Actual or pending separation
- 56% - Obsessive behavior (including stalking)
- 56% - Depression (or other MH problems)
- 51% - Prior threats to commit suicide or attempt
- 47% - Escalation of violence
Who Knows What?
- Family 73%
- Friends 65%
- Police 57%
- Lawyer 42%
- Co-workers 33%
- Medical 22%
- Domestic Violence agency 15%
- Child Protection 10%
- Clergy 4%

Harm to Children
- 10-20% of domestic homicide victims are children (based on Canada, US, NZ and AU Fatality Reviews)
- Many are eye witnesses to horrific tragedy and trauma
- Many lose one or both parents – some are caught in subsequent custody disputes between paternal and maternal family systems – few receive counselling

Children Killed in the Context of Domestic Violence
- Based on DVDRC reports (US/Canada) 3 situations in which children were killed within the context of domestic violence
  - Indirectly as a result of attempting to protect a parent during a violent episode
  - Directly as part of an overall murder-suicide plan by a parent who decides to kill the entire family
  - Directly as revenge against the partner who decided to end the relationship or for some other perceived betrayal.

Are Child Homicides in the Context of DV Predictable & Preventable?
- 76% of the cases had at least 7 risk markers
- Critical information held by family & friends, work colleagues, front-line professionals
- Children are the victims in a number of ways
- Collaboration amongst professionals & agencies is critical - including the justice system (criminal and family court)

Between 2002 and 2009 there have been 28 child homicides that occurred in the context of domestic violence.

Children can be affected by domestic homicide in a number of ways: exposed to homicide (witnessing or hearing); indirect victims while attempting to intervene and protect parent from violence; direct targets of the perpetrator as a form of revenge or as a victim of familicide

Why is Domestic Violence Relevant in Custody/Parenting Disputes?
- Abuse Does Not End With Separation
- Overlap Between Child Abuse and Domestic Violence
- Children’s Exposure to an Inappropriate Role Model
- Undermining of Non-Abusive Parent
- New Relationships Potentially Violent
- Perpetual Litigation as Form of On-Going Control
- Extreme Cases - Homicides and Abductions
Changes to Canada’s Divorce Act

Family violence can take many forms and can harm people whether they
• directly experience it themselves
• see or hear it
• know it is happening

Under the new Divorce Act, family violence is any behaviour that is
• violent, or
• threatening, or
• a pattern of coercive and controlling behaviour, or
• behaviour that causes a family member to fear for their safety or the safety of another person

While many types of abuse are criminal offences, some non-criminal behaviours are still considered family violence under the Divorce Act.
• Children can experience family violence in different ways, such as
  • having violence and abuse directed at them
  • seeing or hearing someone being violent towards a family member
  • seeing a family member scared or injured

All of this is considered to be family violence and child abuse under the new Divorce Act.
• For more information see https://www.justice.gc.ca/eng/fl-df/fsdfv-fidvf.html#s1

Assessing Coercive Control

See https://oavi.tcnj.edu/power-and-control-wheel/
https://www.theduluthmodel.org/wheels/understanding-power-control-wheel/

Implications for Judges – Accountability

“[W]hile there has been a marked ideological shift in the ways Judges adjudicate matters relating to gender-based violence and femicide in recent times … the fate of these victims should not be left to the off-chance that the individual Judges hearing their cases will be attuned to the sensitivities. There should be a formalization and standardization of these norms so that it is incumbent on the Courts to pay particular attention to the treatment of victims in these cases.” President of the Supreme Court of Appeal in South Africa, statement of Justice Mandisa Maya, at the Gender Violence and Femicide Summit, Pretoria, 1 November 2018.
Implications for Judges - Trauma-Informed

Trauma-Informed Principles

- Safety
- Trust
- Collaboration
- Choice and Empowerment
- Recognition of Intersectionality

The Legal Context

**Figure IV: International law concepts that can assist the judiciary**

- Gender equality and non-discrimination
- Balancing rights of victim and defendant
- International law concepts that can assist the judiciary
- Not condoning gender stereotypes
- Victim-centred approaches that promote offender accountability

Implications for Judges – Saving Lives

- There are lessons learned from domestic homicides
- Judges make life and death decisions in hearing domestic violence cases = Judges depend on well-informed court-related and community service for victims, perpetrators and their children
- Court findings and sentences communicate the recognition of the seriousness of domestic violence
- Judges must demand better risk assessment and risk management strategies
- Understand that domestic violence is more than physical violence
- Enhancing judicial skills in domestic violence cases is essential across the Commonwealth

Peter Jaffe
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Centre for Research and Education on Violence Against Women and Children
www.learningtoendabuse.ca
Canadian Domestic Homicide Prevention Initiative
www.cdhpi.ca
Session 9: “Judicial Wellness for The Restless”

Her Hon Judge Kaly Kaul, England & Wales

1. ‘Restlessness’
   The Oxford English Dictionary defines the word ‘restless’ as ‘unable to rest or relax as a result of anxiety or boredom’, the Cambridge dictionary defines ‘restlessness’ as ‘the quality of being unwilling or unable to stay still or be quiet and calm, because you are worried or bored’.

   So, are you or are your colleagues ‘Restless Judges’? ‘Anything from regularly experiencing boredom in your role, to frustration, to anxiety, to depression or suffering from trauma conditions which can arise from the work we do, the working relationships we endure, our home/ life experiences or a combination of the above. If you are, what can you do about it or are you afraid to ask? Do you or may you have or have had in the past, mental health conditions, which perhaps have physical manifestations, that you haven’t felt able to talk about for fear of being ‘labelled’ and of that affecting your office, and the respect of those who appear in front of you and work with you? A unique office and a uniquely vicious circle.

   I am deeply honoured to be asked to speak at this Conference, and when I was told of the subject matter decided that Dr Karen Brewer and the Committee has chosen either the most suitable or the most unsuitable Judge, depending on how one views this person, who after becoming a Judge with no more than a compulsion for overeating all forms of carbohydrates and sugar when under stress (which I have been doing since I was 8 years old), has been turned into someone else completely but who is determined to try anything she can to try and get back to as near as possible the person she once was and took for granted, and is ‘game’ for almost anything! Not quite what I had expected when I was appointed a salaried Judge in 2015.

   The causes of the conditions are the subject of complaint and litigation and are, in any event, irrelevant to this talk. Rather it is the effect of what happened and what methods I have tried, and which may help Judges in your jurisdictions.

   I have been greatly inspired by Professor Gordon Turnbull, his book is in the source material and links section. He was formerly in the RAF, and went on to treat people such as Terry Waite, John McCarthy and Jackie Mann, to treat the survivors of Lockerbie and of 7/7 and he is the most wonderful man. So please will you do this basic exercise during this talk. Gordon’s rule of 5.

   We all aspire to the ‘gold standard’, good health, exercise, a moderate diet, and good sleep regimes, with a supportive work and family environment, and regular health checks. I am 60 and have not achieved any of it!

2. A little History – who is this Restless Judge?

   I am 60 years old, I came to the UK in May 1961, my parents worked for Voice of America, and my father was asked to join the World Service of the BBC, along with my mother. My mother was the first woman to read the news in Hindi for the BBC. I was five months old. I have no siblings, studied Law at the LSE and was delighted to be called to the Bar in 1983 at 22. I had decided at the age of 3 that I wanted a wig, so I had to be a barrister. I have been in 8 sets of Chambers (signs of restlessness – started early), I have two children, have been a single parent since 1997 when my Children were 4 and 22 months, I worked throughout their lives as the breadwinner, returning to work when my son was 2 weeks old. I did cases involving everything from murders to genocide, war crimes, to serial rape and everything else in between. I travelled from one end of the country to the other, undertaking difficult cases and encountering lots of obstacles on the way. I saw my children very little but there was no choice. I loved the Bar and
really enjoyed it despite the ridiculous levels of pressure under which we often had to work. I was very resilient, very committed to the Bar and cheerful. My best time was being appointed a Recorder sitting in Crime (part time Crown Court Judge) in 2009, a Silk (QC) in 2011 and for me, being able to defend, to prosecute and to sit as a very happy and settled part time Judge from 2009-2015 was everything. I had parents who had very difficult health conditions and if you know Indians born in the 1920’s, their attitudes emanate from a world that no longer exists. That was tough but had been for decades, and I was fine. My idea of work stress was appearing in the Court of Criminal Appeal (Criminal Division) in London, in front of a hostile Bench of Judges, who wanted to make sure this brave barrister was told in no uncertain terms, that her appeal was without merit, and so was she. From a work point of that was as bad as it got, and a night’s sleep, my friends to complain to, and a Chinese Takeaway, perhaps a jam doughnut and I was restored.

As a result of the events of 2016, I developed PTSD, and other events which have taken place from then to now and continue, aggravate and trigger my existing conditions, which encompasses under its generous umbrella: an anxiety disorder, clinical depression and chronic fatigue. I think the exhaustion emanates from suppressing everything, and just carrying on working whatever happens, as I am willing to bet most Judges do. Again, without unnecessary detail, I am described by my list officer, Lisa, who knew me very well, in my Judicial capacity, since 2011, as a ‘shell’ of my former confident self. Sadly, she is right. I tried hard to get better and I was making some progress, but 2018 saw more events which seriously exacerbated the condition and resulted in a ‘nose dive’ downwards, which is essentially where I remained until this year, when I think there have been a few improvements resulting from the treatment I am having, the advice I am being given, and in setting up a Network to help other Judges who need support.

3. 2016 – to the Present
The British Judiciary is truly blessed therefore with a dedicated Judge and one who is truly diverse in terms of race, gender, background, disability (one eye and PTSD). Luckily, I am able to work and have learnt coping strategies, but I have to be careful to take into account that which I can no longer do. However, there is no point crying about it, much worse happens around us every day, and if I can never be the confident, successful, outgoing, dedicated shopper, who loved crowds, new experiences, parties, events, attending concerts and the theatre, then I have to accept that. First world problems. As an illustration, on a day-to-day basis it has meant that I have only slept through the night 4 times since 2016, that I suffer from painful neuropathy, caused by my brain but producing real pain, my skin burns all the time, back, arms, fingers, feet, it wakes me up. Those are normal good days. That and a plethora of other delights await me. Everything has to be planned for and thought about, even a visit to a tube station, or petrol station.

4. Disabilities – hidden or not, how do we stop playing the ‘shame game’?
Last week Dr Brewer told me of a Kenyan Judge, a story published widely in the media, both nationally and internationally, who was subject of a tribunal inquiring into whether she may continue to hold office given claims of mental illness. Kenya’s constitution allows for the removal of Judges who are unable to perform the functions of office arising from physical and mental incapacity. The Judge was named in every report, and it meant that those who appeared in front of her were able to mention it. Is that the way of dealing with such sensitive issues? Would it be helpful for this Association to develop a best practice model that we can adopt in all our jurisdictions? It has happened in the UK too, to District Judge Claire Gilham, who reported a member of the Bar who sought to remove her from presiding over the case and made reference to her conditions in an effort to ensure that she recused herself. because of her condition which had been referred to in a different context and was known of. It has happened to others too and feeds into the perception that we must be ashamed, we must cover up, questions as to whether we are ‘fit’ to be Judges. In England and Wales, we have the wonderful Equal Treatment Bench Book, full of learning and real awareness, which guides us Judges to treat those who appear in front of us with real understanding and to encourage effective participation by all who find themselves before a Court in any capacity. It has specific sections on mental health, including anxiety,
depression and PTSD. However, sadly, it does not appear to inform our treatment of one another. Stop the ‘shame game’.

The second main point I wish to make is a respectful request. Please, those of you who have suffered, have the courage to speak out, the more senior and influential you are the better. If you have depression, an anxiety condition, or have had – talk about it. We are human beings, we suffer cancer, bereavement, marriage breakups, Covid and long Covid, and other terrible events as often as anyone else in our society. To me, talking about it demonstrates true bravery and true Leadership. In the meantime, please read a great book by Alistair Campbell, former spin doctor to former Prime Minister Tony Blair, who was at the heart of government and politics at a very important time. Whatever your own politics, it will help you. He held such a pivotal role in that administration, was in regular contact with the most important people, and yet he had a serious depression and anxiety condition for most of his life. It called ‘Living Better: How I learned to Survive Depression’. As a result of reading that book in September 2020, I knew for sure that I could still do my job and do it well, it really put the conditions into the context in which they belong. The fact that his colleagues, including the Prime Minister himself knew of Mr Campbell’s darkest days and still wanted him to work in that role made me realise that is what we all need to do. Not hide it, accept it and support those people in a practical and sensible way. However, we, in the Judiciary, need our own Alistair Campbells, we need our own senior Judges to talk about these things. So, in whatever country and jurisdiction you are in, please have the courage to do that and encourage others. It will make us better Judges.

5. Going back to your ‘real world’

Third message, after this Conference, when you return to work, speak to your staff and to your colleague Judges. Be open, allow them to talk to you. Don’t turn your back, don’t disparage and undermine, don’t assume that those who have conditions are weak, not up to the job, or not as good as you. Two examples from my own life in the last fortnight:

So, I have one eye, I can still see, I have a limp but it’s in my brain, so I can do my job but that’s often all I can do, and the energy and spirit is gone, and the pain and lack of sleep means I am always tired. I put work first, always. I don’t affect the mood of others, I am inevitably the most cheerful, and try hard to hide what I am actually feeling. That doesn’t mean I am not feeling it, but I am not bothering my colleagues or my family. Don’t look to how you can manage those colleagues out of their jobs or down in the pecking order, look for how you can manage them inwards and upwards. Remember that our self-esteem can also be badly affected too and look for chances to assist in rebuilding that important attribute in any Judge. Of course, there may be a few that use their conditions for advantage, but most of us just want to work and do our jobs well and be treated with respect and warmth by our colleagues.

6. Would it be good to get help? What help?

Fourth message, try to get some help or treatment, it can work, or it may not, but isn’t it worth a go. This is from someone quite determined to do this on her own, I have got through everything else in my life, so I will be fine. This time I am not fine, and I am fortunate enough to have been treated by Professor Gordon Turnbull and a very good Senior Psychotherapist, called Malcolm Smith. The latter was engaged via Judicial HR.

I have found it embarrassing and humiliating that Professor Turnbull, who treated the survivors of Lockerbie and 7/7 is treating me. Why on earth did this event and those that followed it affect me in this way? Until this year I did not understand. Once he had explained it to me, then the blame/shame game stopped. I had always known that the conduct causing it was not my fault, it couldn’t have been. The events started when I was a Judge of just 9 days, and I always did exactly as I had been told by those seniors to me. I do not blame myself anymore. Professor Turnbull also explained, in simple terms, what I could do to try and manage better and be happier. He explained about the importance of the vagus nerve and how to stimulate it, he explained that chronic fatigue was the result of the effect of all these years of unending extreme stress on the mitochondria. He
explained why my skin burned, why my hair fell out, and my teeth, why I never slept because the burning skin would wake me up. He explained why my personality had changed, why I had nightmares and what he called ‘day mares’, why I was so anxious about crowds, about underground trains, about anything that was different? He explained why I spent so much of my life staying safely at home and avoiding any triggers that I could. He explained why I was fine in Court but nowhere else. He explained that our ability as Lawyers/Judges to compartmentalise, and to carry on regardless is our strength and our also a weakness. By carrying on, each experience that occurs after the original trauma gets stuck in the left side of the brain, and there it stays, and is built on, and does not pass to the right side of the brain where it would leave. By simply carrying on and on, enduring event after event this dense area carries on causing the conditions.

He can be contacted by anyone as he has an international patient base. We tried a very new method of seeking to try and break up the lump, using a method discovered by Professor Kindt from the University of Amsterdam involving the use of beta- blockers and thinking through the event that resulted in the condition, and others that followed. I don’t really know if it has worked. However, it was good to try and to do something positive. Malcolm Smith has been treating me for two years and he has also been a great help in dealing with the ongoing events and how best to deal with those. You will have many brilliant people in your jurisdictions but those are mine.

7. Is this it?
Next message, try things that may help, don’t just suppress and get on. My own first attempt at writing this in June was so bland and so boring, I sounded like a ‘happy clappy’ woman’s magazine, so what I have tried to do in the list that is attached, is to tell you just some of things I have tried, attach a two minute read to it, and the offer to all of you that if you want to know more or talk about it then feel free to contact me. I will take you swiftly through that list now. My daughter created the links, so I hope they work. She also cut out my section on crystals, saying ‘exactly how mad do you want them to think you are?’.

8. What now? The Judicial Support Network and Carbs. The way forward?
Lastly, find something that can help you, and others. We all have a responsibility to make things better for the next generation, that isn’t undermining tradition, it is improving on it. I have no idea what the future will bring for me, and the one thing that has made a huge difference to me this year, is setting up the Judicial Support Network www.judicialsupportnetwork.org. I and a group of fellow travellers have set up an organisation to support Judges, as what we had was, we felt, wholly inadequate and failed to recognise and understand the culture that the Judiciary engenders, making asking for help a real issue. We have helped some who are lonely or feel isolated, those who are bullied, feel discriminated against and those who have lost interest in their roles having been persistently overlooked in their work, and become bitter and unhappy, resenting their situation. As I address you there is a case going on in the Reading Employment Tribunal, an able but dyslexic fee paid Judge, of some 10 years in standing, representing herself against the Ministry of Justice in relation to issues arising from the failure to provide the equipment that she needed as her condition was known of at the time of her appointment. The result is for the Tribunal, sadly she cannot afford representation but at least she has us, and a number of us, to support her as she prepared for the hearing and to listen. There really was no support available to her. Hopefully there will be some now. Can we fix all of it? No, can we try and help? Absolutely. In addition, we can be the voice of those who want to raise issues and fear repercussions for so doing, and that is something that our members value.

We have had mothers with young children, Judges with caring responsibilities, loneliness, disability (mental/physical), bullying, the financial implications of Covid on the Fee paid judiciary, Long Covid, ‘whistleblowing’ and alleged unfairness in Judicial Appointments. Judges have raised many different areas of concern. There have been times when it feels like a full-time job, and I am privileged to be able to do it. It provides a great distraction from my own troubles and has helped to restore some of the self-esteem destroyed by the events in my last six years. I hope we can keep going for as long as we are needed. If you could see some of the wonderful
feedback, we have had from those who have sought our help, it is really very gratifying. It has made me remember that I still have some attributes, including courage, which I may as well use.

9. Please keep in touch, my JSN email is jsn.kkqc.info@protonmail.com

If you can, please set up your own support networks, work with us, it would be great to have a Commonwealth Support Network, whether it’s a Judge in Pakistan who had a chair thrown at him by the advocates, whether it’s a woman Judge in any number of jurisdictions who feels the unpleasantness of misogyny, whether it is the Judge in Kenya who needs to know that she has many friends and supporters that she has not yet met, but we are here. Some of the more traditional amongst us would say it lets down the dignity of public office, that we should remain strong, silent, and almost invisible. I wholeheartedly disagree. We must move with the times. If we are truly to act in accordance with our oaths and with the Bangalore Principles, then we must apply them to one other. The best Judges, at any level or from any background, are those who understand the needs of those around them and treat everyone with dignity and fairness, those who recognise areas that require reform and get on with it with sincerity and courage. The Commonwealth and this honourable Association should lead in this area as part of the family of all Commonwealth Judges, I am proud to be a member of the family.

HHJ Kaly Kaul QC
Wood Green Crown Court
London.
14.9.21

Please see second documents for links.

HHJ KALY KAUL QC – LINKS AND RESOURCES. ‘The Restless Judge’ 15.9.21

These are my own ideas, I have no medical qualifications, and so before you try anything you may want to consult a doctor or other healthcare practitioner.

If you need to know more about the people I have mentioned, please email.

Books that I have found really helpful:
Living Better: How I learned to survive depression, Alastair Campbell

Trauma: From Lockerbie to 7/7: How Trauma affects our mind and how we fight back, Professor Gordon Turnbull

The PTSD Workbook, Simple, Effective Techniques for Overcoming Traumatic Stress Symptoms, Mary Beth Williams

Mind over Mood: Change How you Feel by Changing the Way You Think, Dennis Greenberger

The Book of Joy, Dalai Lama and Desmond Tutu
The penultimate chapter I have read many many times. It is a brilliant book.

Further Information sources:
The Vagus Nerve
Exploring and Explaining the Functions of the Vagus Nerve

Strengthening your mitochondria
19 ways to Boost Mitochondria Health and Live Longer
Acupuncture
Acupuncture for Anxiety: Benefits, Side Effects

Ayurveda
The Best Herbs for Anxiety in Ayurveda: Effective and Easy to Use

Traditional Chinese Medicine
How Emotions and Organs Are Connected in Chinese Medicine

Reiki
How to Heal Depression with Reiki: Fight Sadness with Transformative Power

Kinesiology
Applied Kinesiology for Mental Health Conditions

Herbs
The Perfect Herbal Remedy for Anxiety and Stress

Apps for the Smart phone:
Headspace
Calm
Ten Percent Happier

Gadgets
Arc4health
What I have yet to try! (contra indicated during litigation)

EMDR
The basics-EMDR Association UK-Overcoming trauma with expert help

Hypnosis
Hypnosis for anxiety, depression and fear: Does it work?

What I do every day? Eat Carbs, What’s App my many friends, and PRAY!

KK QC 14.9.21
To add to the topic, ‘Judicial Wellness for the Restless’ and also for the deeply wounded. We are existing at a time that has never happened in the world before. It is called the Covid-19 pandemic, it is the first time in history that there has been a global pandemic and we exist at this point in time. If you did not believe that you were important, I am sure you do now because in every single country and every single jurisdiction you have been identified as part of the essential services, sometimes they throw in the psychologists with essential, and they throw in the medical practitioners but there is no question that the judiciary was considered to be an essential service and so because most of the people you serve do not say thank you, I want to say thank you. Thank you for your service. Thank you for what you do. Thank you for standing up for the rule of law because when you do so and you take that pounding, I sleep well at night, because there are rules and because there are laws. You fascinate me you know; you really do because you do this work by choice, you decided that you wanted to do this and because your work is so different than the work of a psychologist, I look on sometimes in fascination at the work that you do. You are required to be people of moral stability, and you are required to be analytical, required to be decisive, required to be empathic, creative, courageous, impartial and trustworthy, and all these requirements and sometimes you forget that you are human too. Sometimes you buy into the concept that many do, that you are above the fray, and that you are not touched by the infirmities of others, and that you breathe the air that is rare. It’s so rare that some believe that they are gods. Some try their very best to keep up the image that they are. So, after that wonderful presentation by Justice Kaul, I hope we are at the point where you are in touch once again with your humanity. Because you have blessed me, by taking the stand that you do, by choosing to uphold the rule of law in all our countries, in the many jurisdictions, I want to give back the blessing today.

I want to talk about a number of things that judges and magistrates face. Let’s talk first about burnout, it is when you are overwhelmed, your system is overwhelmed, your senses are overwhelmed and you start to shut down. Many of you experience burnout, especially during the pandemic, and the burnout has come with some humiliation, and embarrassment because now you are not only required to be your competent selves and deal with the law but you are now required to be IT technicians. You are now required to have savvy when it comes to technology, and because many of you are as young as me, you have realised that you may not have the savvy that some teenagers have and you have found yourself in many embarrassing situations, because you don’t know how to work the technology for those online systems that you have been required to use. So, you have struggled with that throughout the pandemic, feeling doubtful, feeling incompetent, second guessing yourself as you deal with the burnout. What about secondary trauma? When you sit and listen every day to pain, hurt, trauma, abuse, for those persons who seek legal redress, you forget that you are affected by what you hear. That little child who was raped several times, that person who was stabbed several times and survived, that person whose loved one was murdered, and they come before you to seek legal redress and you hear the stories and you watch the pictures, and it starts to hook into your own trauma because you are human, your own personal stories, and you don’t realise sometimes because you do it every day, the pounding that your system receives because of that trauma. It is not direct trauma to you, but secondary trauma because you are exposed to listening over and over again to the pain of others.

What about the abuse that you suffer sometimes? You make decisions, and the decisions are unpopular sometimes in your jurisdiction and you are vilified in the press because of it. There are some jurisdictions where the judges and magistrates are not as far removed from the population as in others, and they get that onslaught without much protection of their judgements which might seem unpopular to the society. People rioting sometimes, people protesting, and being vilified in the newspapers, being vilified in the press and you have to get up every day and still come out, I was
going to say with guns blazing but that does not sound too right when you are talking to judges and magistrates, with all your faculties intact and work. You press through, as justice can call towards us. What about your own post-traumatic stress? And your own grief and loss? The godly judge told us about the death of her mother, and her being at a distance. What about divorce also? What about terminal illness when you find out that you have a terminal illness? The loss of a child? Yes, because you are human you go through these things. So many judges and magistrates have shared stories of rape, of stabbings, of violation, of robberies and break ins, of threats to their lives, and they keep pressing on.

So, today, just as our first speaker did, I want to talk with you about a few steps in taking care of you. I am so proud also of the CMJA, of taking a stand to have sessions on judicial wellness. I bless you for the conference you have had. I sat in and I listened to some of the sessions, they were fantastic, and so I bless you for what you have done in the midst of the pandemic. So, let’s talk about what you can do. Remember to look on the delegates section and get all that lovely material that our first speaker shared with you. I want to start off by talking about making a decision, make a decision. You will say “what does that have to do with wellness?” but the thing is you make decisions all day for other people that determine the course of their lives. Now make a decision for you, don’t doubt it, don’t second guess it, make a decision for you. Make a decision that you are going to thrive, not just survive but that you are going to thrive. What we have found as psychologists, is that when you make a decision it starts to align your entire body and your entire being, and so it makes everything become congruent. So, in that congruence, you have better opportunity to survive, and then thrive. So, my dear honourable judges and magistrates, make a decision. After you make that decision, in this time of the global pandemic, it is important also to start looking at your family, your support system, that place that you live. You know many judges and magistrates because of the authority they feel think they are more than sliced bread, they think they are all that and sometimes become very arrogant and hard to live with, so the families are sometimes not happy to have you around. Then, there comes a pandemic and you are locked in with these very persons that you have not treated very well for many years, being so very proud of your prowess in the bench. Then there are those who are on the other end of the spectrum, where you feel overwhelmed and you feel broken, and you really do need your households to be places of sanctuary and peace.

In this pandemic, more than any other time, it is important to attend to your relationships with your loved ones, sit with them, talk with them, sometimes ask forgiveness, sometimes ask for help, tell them what you need. Many of you are dealing with cases from the privacy of your bedrooms turned into offices, turned into courtrooms as you work online. So, attend to the relationships in your households. Can I also talk about your intimate relationships? For those who are in long term relationships, marriages, have partners, children, those intimate relationships, especially your love and romantic relationships, please attend to that. Do not let the stacks of paper that you carry home squeeze out your wellbeing, some of them you should not take home if you are back out into the live courtroom. So we have learnt as psychologists, that the relationships that tend to survive the most, that there are issues of commitment, you commit, you are intimate, you have a relationship where the person can see into your heart, and they are not so impressed by what you do on the bench, that they don’t see you as human and they don’t allow you to break down and need comfort at times. Then it talks about being passionate, some of us have lost our passion you know, we are dry, and as we say in my country get hard, and your face is always looking like you’re sucking a lime. Nobody wants to be around you because you are so hard to live with, be passionate, soften those features, get in touch with your kind side, get in touch with being a child, that childlike part of you, and enjoy. So you must attend to your intimate relationships, not just the people you are romantic with or in love with but also the people who are part of your inner circle. So I applaud the judicial support network that our dear judge spoke about, that network that supports you as a human person in the bench where there is no blame, where there is no shame, where you are given the privilege that you give to others of having a network of support that is full of kindness. A safe space where you do not see support as weakness. We talk about trauma informed services, and so in that network that is provided for you. Every single judicial officer must have an EAP, an employee assistance programme that they are attached to, where the judiciary funds it and it does not come out of your pocket, where you have safe spaces and
skilled professionals like psychologists of course, to be able to work with you in difficulties. Some of you might say “Dr Douglas, my jurisdiction is so small, everybody knows everybody and there will be no privacy, no safe space for me to be able to get the support, confidentiality, guarding my dignity, and guarding my privacy, what do I do?”. The beauty of the pandemic, because there are some good things that come out of it, is that you can go online and find throughout the globe, the international arena, spaces where professionals who are not part of your jurisdiction can work with you from the comfort of your home, in privacy and confidentiality. We do this for a lot of judicial officers, and they are not in our country.

The last thing I want to say, I want you as you take care of you, make that decision and support one another, I want you to keep one eye on your administrative team and another eye on the prison system. What do I mean by that? We have many court officers, administrative officers who are also burnt out as well, and they need your sensitivity and kindness to be able to do their jobs well, so that your demands on them will not be as you do yourself and forget that you are human and then you forget that they are human. But on the other end of the spectrum, there are those administrators who take over your court and sometimes ill-treat others, and sometimes ill-treat judges and magistrates, for they behave as if the court belongs to them, and so keep an eye on that to make sure there is balance. That not from the very systems of justice, from the very bowels of justice, you have administrators terrorising people because they have taken and they know, and are smart, they treat you well and they treat everyone else badly. On the other end of the spectrum, where you are so demanding that they are burnt out.

Then, the prison system, the prison system depends on you and so not only are you expected to have efficiency in disposal of cases, but even as you deal with sentencing, maybe there should be a review. Because after you have been locked down, after you have had the experience of your freedom curtailed, after those restrictions due to Covid-19 and you have to stay at home and social distance, and you see what it feels like to be confined at home, could you imagine confinement to prison? Sometimes, the cases take a long time to be disposed, so keep an eye on those people please as you do your job. Remember, make a decision, attend to your family, household and intimate relationships, support one another, have an EAP and keep your eye on your administrative team, and also on the prison system.
Closing Ceremony

Hon Justice Charles Mkandawire, Malawi, CMJA President

Your Excellency Paula Mae Weekes, President of Trinidad and Tobago
The Acting Chancellor of the Judiciary of Guyana
Chief Justices
Justices from Supreme Courts, Constitutional Courts, Appeal Courts, High Courts and Regional Courts/Tribunals
Registrars
Magistrates
Distinguished Ladies and Gentlemen
All Protocols observed.

Today is International Day of Democracy or World Democracy Day. It was declared by the United Nations in 2008. The theme this year is “Strengthening Democratic Resilience in the face of future crisis”. The objective of our celebration today is to review state of democracy in the world. Judiciaries in the Commonwealth have a pivotal role to play in the consolidation of democracy. You will agree with me that in recent years, our judiciaries have experienced increased case load when it comes to electoral justice. This is not only in the Commonwealth. We recently saw how election disputes in the United States ended up in the courts.

In the Commonwealth, we have recent examples of Presidential Election Disputes brought before courts in Kenya, Malawi and Uganda. We have also witnessed an influx of Electoral Disputes in Zambia.

It is therefore clear that our society has trust in our courts to adjudicate in these very contentious disputes. We should seize this opportunity to consolidate democracy in the Commonwealth.

When the idea of holding the CMJA Virtual Conference was mooted in 2021, we were all left shaken. We did not believe that it was possible.

Little did we know that CMJA members would be enthusiastic to attend such a conference. It was indeed an ambitious venture to embark on.

I would therefore like to whole heartedly thank the delegates for supporting your Association. Your positive response to register for the conference manifests your beliefs in the objectives of CMJA.

CMJA has grown from strength to strength because of your unwavering support.

Your active participation during the three days despite different time zones has made this conference a huge success.

Thanks, should also go to the technical team. In particular, to David Smith from VideoGeek who has been in charge of all our technical side of things. To James your Assistant, I also say thank you so much. Your technical facilitation has been fantastic.

This conference was a big venture and all has gone according to our wishes because of your technical knowhow.

Special thanks should go to Her Excellency Paula Mae Weeks for the Keynote Address. It really set down the tone for the conference. I also thank our esteemed Speakers and Chairpersons of various sessions. You all displayed exceptional talent and skills.
To Dr Karen Brewer and Jo Twyman, as I had said during my opening remarks, this conference could not have been a reality if it were for the numbers of the delegates who you managed to register. Thank you so much.

Behind a successful conference program is the Director of Programs Judge Shamim Qureshi. Judge Qureshi, you are an amazing organizer!!!!!!

Let me in absentia thank our IT staff from our chambers and family members who have been helping some of us to cope with this virtue conference. You will agree with me that issues of IT can at times puzzle Judicial officers. Some of us literally relied on our family members to assist us join zoom. Once in a while, I could see some of these people on some screens coming to our aide. Please convey my best regards to them.

During the three days, we have gained valuable knowledge from the various presentations. There has been cross pollination of ideas and we return to our bench work sufficiently enriched.

This conference has given us opportunity on how we can encounter some of the challenges confronting us during this COVID 19 pandemic period. We came to this conference with shuttered minds thinking that the COVID 19 pandemic period had disintegrated our judicial systems.

We however realise that within our Commonwealth Global Village, we are all encountering similar challenges such as:

- Inadequate funding for our judiciaries
- Need for training
- Infrastructure development
- Case Management
- Access to Justice

During our deliberations, it became clearer than before that we need training in so many areas. There is unanimity that we all require judicial education in areas such as Digital Footprints, Artificial Intelligence. Remote Hearings, Virtual Legal Systems and Judicial Wellness to the Restress.

The COVID 19 pandemic has tested the durability of our Strategic Plans and this has given most of our judiciaries an opportunity to conduct institutional audit of our plans and how we can deal with future pandemics.

On the critical issue of funding, the CMJA has been concerned about the funding of the judiciary for a number of years. Delegates may recall the Resolution on Resourcing of the Judiciary agreed at the CMJA’s Triennial Conference in Wellington, New Zealand in 2015.

The CMJA has also published the “Principles on the Funding and Resourcing of the Judiciary” in July 2021.

Following the CJ’s meeting held earlier this week and which also discussed the issue, it has been suggested that a Working Group should be set up to discuss how best these issues can be approached. The CMJA will be taking this issue forward.
The Judiciary is an essential service. Any attempts to decrease the funding of this independent organ of the State adversely affects access to justice which is the right of every citizen in the Commonwealth.

Ordinarily today we would have been announcing venue of the next conference. However, as we are not able to do this, all I can say is that we will announce the location of the next conference very soon although we are aware that we continue to live in uncertain times.

With these few remarks, I declare this virtual conference officially closed.

I thank you for your attention.

May god bless you all.