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## CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>EDITORIAL</td>
<td>2</td>
</tr>
<tr>
<td>OBITUARY - Justice Charles Quin</td>
<td>6</td>
</tr>
<tr>
<td>ARTICLES</td>
<td>7</td>
</tr>
<tr>
<td>Daniel Musinga</td>
<td>7</td>
</tr>
<tr>
<td>Improving Government Decision-Making and Judicial Review: The Recent Kenyan Experience</td>
<td></td>
</tr>
<tr>
<td>Kwara Giriwa</td>
<td>15</td>
</tr>
<tr>
<td>The Challenges of Criminal Case Tracking</td>
<td></td>
</tr>
<tr>
<td>Anthony Smellie</td>
<td>19</td>
</tr>
<tr>
<td>Managing Modern Criminal Justice: The Cayman Islands Perspective</td>
<td></td>
</tr>
<tr>
<td>Ei Sun Oh</td>
<td>23</td>
</tr>
<tr>
<td>Is it Time to Abolish Blasphemy Offences?</td>
<td></td>
</tr>
<tr>
<td>Anna Dziedzic</td>
<td>26</td>
</tr>
<tr>
<td>Foreign Judges: Pacific Practices and Global Insights</td>
<td></td>
</tr>
<tr>
<td>Laurie Newbook</td>
<td>30</td>
</tr>
<tr>
<td>The Duty or Powers of the Environment Court of New Zealand to Prevent Damage to the Environment</td>
<td></td>
</tr>
<tr>
<td>Mary Arden and Michael Kirby</td>
<td>42</td>
</tr>
<tr>
<td>The Digest Reaches its One Hundredth Year: Centenary Tributes</td>
<td></td>
</tr>
<tr>
<td>LAW REPORTS</td>
<td>47</td>
</tr>
<tr>
<td>Attorney General v Taylor and Others</td>
<td>47</td>
</tr>
<tr>
<td>Visagie v The Government of the Republic of Namibia and Others</td>
<td>48</td>
</tr>
<tr>
<td>Shine v Union of India</td>
<td>49</td>
</tr>
</tbody>
</table>
EDITORIAL

THE CONFERENCE JUST ENDED

This December 2019 issue of the Commonwealth Judicial Journal—volume 24, number 2 that is—comes hard on the heels of a remarkably successful CMJA Conference in Port Moresby, Papua New Guinea. The September conference was exceedingly well-attended and those who were present for it enjoyed a warm welcome from the PNG judiciary and the citizens of Port Moresby generally. It is clear that the people of PNG justly enjoy a reputation for being extraordinarily hospitable. The CMJA extends a big thank-you to all involved in the planning and delivery of the conference programme in Port Moresby, which was a well-organised and fruitful forum for discussion, with sessions led by knowledgeable speakers that touched on many subjects of great importance to judges and magistrates across the Commonwealth.

THE CONFERENCE NEXT YEAR

Before leaving the subject of conferences, allow us to give you, our readers, a gentle nudge to open up your digital or paper calendars and save the dates now for the upcoming CMJA Conference. (We all know how quickly our calendars can fill up.) In 2020—the year that begins the CMJA’s next auspicious half-century—we will be meeting in Cardiff from 13th to 17th September.

Who could ever question the CMJA’s wisdom in selecting Cardiff as the next conference venue at such an important juncture in the association’s history? Readers may recall that the UK Supreme Court convened for the first time in Cardiff for important hearings this past July; thus, in choosing that location for its conference next September, the CMJA finds itself in good company.

As an ancient city, Cardiff has had the Welsh judiciary stitched into its colourful history from very early times. Indeed, the origins of the Great Court of Sessions in Wales (which exercised jurisdiction over serious criminal offences there until 1830) can be traced to the same 1542 statute under which Wales became a full and equal part of what eventually became the UK, and under which Cardiff itself was formally incorporated—that is, the Law in Wales Act 1542 (or Y Deddfau Cyfreithiau yng Nghymru 1542). So... don’t forget to mark your calendars.

WHAT AWAITS YOU IN THIS ISSUE

The December 2019 issue of the Commonwealth Judicial Journal offers content that cuts across a wide range of relevant subjects. Several of the articles were drawn from presentations made (either in person or by video link) by distinguished speakers at the CMJA Conference in Port Moresby in September. But before getting to those substantive articles, we first pause to remember Justice Charlie Quin of the Cayman Islands, a stalwart supporter of the CMJA and a vigorous contributor to many of its initiatives over a period of many years. Dr Karen Brewer, the CMJA’s Secretary-General, has penned a warm and affectionate obituary of Justice Quin that immediately follows this editorial.

Justice Daniel Musinga of the Kenyan Court of Appeal provides an encouraging report on the jurisprudence that has begun to develop in his country over the almost-decade that has passed since the enactment of Kenya’s new Constitution in 2010. Mr Kwara Giriwa explains how the justice system in Papua New Guinea is making use of advances in technology to address a pressing need to reduce case congestion and drive inter-agency co-ordination. In an article based upon a presentation given in Brisbane in 2018, Chief Justice Anthony Smellie of the Cayman Islands also muses about inter-agency coordination, reminding us that the development of improved court-based approaches to managing criminal justice must be accompanied by synchronised efforts between courts and other service providers within society, particularly where youth criminality is concerned.

At the Port Moresby conference, Dr Ei Sun Oh canvassed a number of distinguished attendees and presenters from many Commonwealth countries, seeking their views on the question of whether the time has come for the abolition of the offence of blasphemy from the statute books in their respective jurisdictions. Perhaps not surprisingly, no unifying consensus was found.
to exist. Their differing responses and rationales for them make for interesting reading. Dr Anna Dziedzic, a newly minted PhD graduate of the Melbourne Law School, examines the practice of some Pacific Island states which make use of foreign judges to bring their complements of judicial officers up to a workable number. She explains that while the practice brings many benefits to the otherwise under-resourced states which employ it, it also carries potential problems.

Judge Laurie Newhook has been a judge of the Environment Court of New Zealand since its inception and in his article he outlines the legislative foundation upon which New Zealand’s unique and progressive approach to environmental protection rests, summarising the Environment Court’s role as one component of a comprehensive regime for planning, environmental regulation and environmental protection within New Zealand.

And last, but by no means least, we acknowledge the hundredth anniversary of the publication of The Digest (formerly known as the English and Empire Digest), a venerable resource for generations of students-at-law, barristers, solicitors, magistrates and judges across the Commonwealth. The Rt Hon Lady Arden of Heswall DBE, PC, Justice of the UK Supreme Court, and the Hon Michael Kirby AC CMG, Justice of the High Court of Australia (1996–2009) and President of the Court of Appeal, Solomon Islands (1995–1996), have written fitting and illuminating tributes to celebrate the centenary of The Digest and the foundational place it has occupied over the last century, and still occupies to this day, in the common law world.

**OTHER DEVELOPMENTS WORTHY OF MENTION**

Turning now to more substantive subject matter, mention must be made in this editorial of developments unfolding around the Commonwealth—not all of them positive—which have attracted the CMJA’s attention and concern, given the association’s commitment to the promotion of the rule of law and judicial independence in the justice systems of all Commonwealth nations.

**Funding of the Judiciary in Kenya**

The CMJA monitored developments when the Kenya judiciary’s budget was cut earlier this year.

The Chief Justice, David Maraga, found it necessary to release a public statement on 4 November 2019 in relation to the threat to cut the budget of the Kenyan judiciary by 50%. In that statement the Chief Justice referred to a ‘developing crisis in the Judiciary concerning budget cuts’. He did so in part to dispel confusion created by misleading information on the funding of the judiciary and court system that has recently been circulating within the country. We consider this controversy to be of sufficient importance that we have decided to devote a substantial portion of this editorial to it.

That the funding restraints faced by the Kenyan judiciary are truly severe appears to be incontrovertible. And this is not just the perception of the judiciary itself. In its August 2019 Memorandum to the Building Bridges to Unity Task Force, the Kenyan Judicial Services Commission (which includes judges, magistrates, advocates, the Attorney General, lay members and a nominee of the Public Service Commission) reports that, as a percentage of the country’s entire national budget, funding for the judiciary in Kenya has declined as follows:

- in 2016/2017: 0.99%
- in 2017/2018: 0.69%
- in 2018/2019: 0.43%
- in 2019/2020: 0.44%

Moreover, those declines have come at a time, the commission comments, when ‘there has been a notable upsurge in the number of cases being filed in courts, and a corresponding demand for the establishment of courts in all parts of the country, much of it devolution-driven’. This has prompted the commission to recommend to the Kenyan government:

...that the Constitution be amended to provide that the Judiciary budget should be not less than 3.5% of the total national budget (not revenue). This provision should be similar to Article 203 (2) that guarantees county governments a minimum allocation of 15%. [at page 11]

Chief Justice Maraga’s public statement contains an accessible and eloquently worded primer on the tri-partite system of government to which Kenya has subscribed, constitutionally—a system of government within which, in his words:

...the people of Kenya have delegated the exercise of [the sovereign] power [belonging to the people of Kenya] to the three Arms of Government, that is, the Judiciary, the
Legislature and the Executive as well as to the Independent Commissions established under the Constitution.

The Chief Justice goes on to refer in his public statement to the inescapable constitutional truth that for the different arms of government to function properly, they ‘require to be reasonably funded,’ citing various sections of the Constitution in support. The principle that lies behind that assertion is clear. Again, in the Chief Justice’s own words:

…in all democratic states governed by their respective Constitutions, constitutional power is constrained power. The Judiciary is entrusted with the duty of safeguarding and enforcing constitutionalism. As a result, full autonomy and independence of the Judiciary is guaranteed. This is to enable the Judiciary to function without any interference. [emphasis in original]

As is common in other constitutional democracies, the Kenyan judiciary is from time to time called upon to exercise declaratory and other powers which frustrate the intentions of the executive or legislative branches of government. However, as is less common (though certainly not unheard of) in other constitutional democracies, Kenya is arguably starving its judiciary of the funding that it needs in order to play its constitutional role. As Chief Justice Maraga expresses it (acknowledging a point also made recently by the Kenyan Judicial Services Commission quoted above), there is ‘serious underfunding of core judicial functions’ at a time when the volume of the judiciary’s workload is rising steeply. While salaries have been spared, development and recurrent expenditures have been reduced by 50% in the course of fiscal limitations that the Chief Justice considers amount, in some instances, to ‘deliberate attempts to undermine the Judiciary’. Strong words indeed.

In a press release that was issued in April this year, the World Bank noted that Kenya’s economic outlook for 2019 ‘remains stable amid threats of drought’. It projected that the country’s GDP would grow by 5.7% in 2019, fractionally down from 5.8% in 2018. (These figures compare favourably to those for Canada, for example, where growth in 2019 is estimated to be only 1.6%. Similarly, growth for the UK in 2019 is estimated at only 1.4%. In those statistics, both countries lag behind Kenya.)

Given those figures, it is difficult to accept any suggestion that insufficient government revenues overall are the problem in Kenya that necessitates deep cuts to funding for the judiciary. Resources are not ‘scarce’ there and, as the 2017 Report of the First Study Commission of the International Commission on Judges states:

…where resources are scarce, it should be the judiciary who decide on budget allocation and that the judiciary should work to efficiently manage resources and improve the quality of its workload without inappropriate interference from other branches of government.

The language used in the Chief Justice’s public statement is forceful and virtually unprecedented. It is regrettable that any nation’s most senior judicial officer should find it necessary to speak so plainly and pointedly to the population at large about government action that, it is contended, interferes with the judiciary’s ability properly to fulfil its function.

It hardly needs to be said that government funds comprise a finite resource and that no branch of government in any constitutional democracy, including the judiciary, is entitled to have access to limitless operating monies without any expectation that those monies will be spent prudently and accountably. However, there is no place in a properly constituted democracy for executive or legislative action that effectively prevents or compromises the ability of the judiciary to provide the corrective oversight that it is constitutionally mandated to provide, especially when questions regarding the lawfulness of government action are submitted to the courts for adjudication. (For a survey of some of Kenya’s recent judicial history touching upon such disputes, see the fascinating and inspiring article by Justice Daniel Musinga, of the Kenyan Court of Appeal, published in this issue.)

We are pleased to report that on 8 November the CMJA received notification that the Kenyan government had reversed its decision on the budget of the judiciary. However, the systemic effects of underfunding that were identified by the Kenyan Chief Justice in his statement—resulting from a process that he says amounts to the de facto economic ‘strangling’ of the judiciary in his country—raise concerns as this is not a unique situation around the Commonwealth where states profess to honour, protect and promote the rule of law. The CMJA is currently working on supporting judiciaries that face such challenges and will be developing a set of guidelines on this.
Zambia’s Constitutional Amendment Bill 2019

Much ink has been spilled of late with respect to Zambia’s Constitutional Amendment Bill 2019 and, in particular, the provisions within it that, if enacted, would fundamentally change the criteria governing when judges can be removed from office. Changes are also planned with regard to the composition of the body that makes such removal decisions.

One commentator, Paul Tsunga, Africa Director of the International Commission of Jurists, stated in a recent ICJ press release:

*The ICJ implores the President of Zambia and the Zambian legislature to ensure the alignment of all constitutional amendments with international human rights standards on the independence of the judiciary, the rule of law and the separation of powers.*

Similarly, in ConstitutionNet, an online publication of the International Institute for Democracy and Electoral Assistance, Prof Cephas Limina entitled his recently posted article: ‘Zambia’s proposed constitutional amendments: Sowing the seeds of crisis?’

Under Zambia’s current Constitution, the criteria for the removal of judges from office are set out in clear and relatively conventional language. That is, there must be evidence of: ‘(a) a mental or physical disability that makes the judge incapable of performing judicial functions; (b) incompetence; (c) gross misconduct; or (d) bankruptcy.’ Under the proposed amendment, the wording of criterion (a) would be replaced with ‘legally disqualified from performing judicial functions.’ Moreover, instead of remaining with the present Judicial Complaints Commission, the jurisdiction to remove judges from office would be shifted to a new tribunal to be appointed by the President.

There is reason to be concerned that with such vague wording (where the conduct potentially leading to ‘legal disqualification’ is not specified and where the credentials of the individuals comprising the new tribunal are also not specified), judicial independence and the separation of powers in Zambia could be the casualty of the proposed constitutional amendments.

Other worrisome changes would see the removal of senior administrative rankings within the Supreme Court and Constitutional Court judicial hierarchy and the repeal and replacement of a provision that specifies that a minimum of 11 judges must be appointed to sit on each of those courts.

The CMJA—together with the Commonwealth Lawyers Association, the ICJ, Lawyers Rights Watch Canada, the International Bar Association’s Human Rights Institute, Judges for Judges and the Southern Africa Litigation Centre—is a signatory to a Combined Statement raising concerns about the implications of Zambia’s Constitutional Amendment Bill 2019 for judicial independence and the rule of law in Zambia. In it, the signatories give definition to those concerns and call upon the President of Zambia and the legislature there to ‘…ensure that the proposed Constitutional changes are in line with international human rights standards on the independence of the judiciary and the separation of powers.’

Readers interested in learning more about the troubling situation in Zambia may access the Combined Statement online via:

https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=faad248d-c531-4ec2-9636-9e02afd745e8

**ON A LIGHTER NOTE**

It is our duty at the CJJ to identify and comment upon distressing developments as we see them unfolding. We must raise our voices from time to time in support of our brother and sister judges and magistrates who stand to be affected by such adverse developments and we must call for action to remedy perceived wrongs—action that is consistent with the core values we all cherish. This editorial, unavoidably, has had to dwell somewhat heavily upon that kind of sombre subject matter.

But, despite all of that, there must be room left for some light humour. And, indeed there is. We leave you with a photograph of a sign seen this November on a Vancouver city sidewalk. (To our knowledge, no contempt proceedings have been taken or are contemplated.)
In early June 2019, the CMJA was informed that Justice Charles Quin had passed away. Charlie Quin served the Cayman Islands legal and judicial community for over 30 years. Born in Northern Ireland, Charlie Quin, as he was known to his friends around the Commonwealth, first studied history at Southampton University in England in 1971. He moved to Kenya and taught English as part of Voluntary Service Overseas. He returned to Northern Ireland in 1973 and enrolled at Queen's University to do his Bar exams. He was called to the Bar of Northern Ireland in 1978 and married Diana the same year. In 1981 he took up a role as Crown counsel in Bermuda where his brother was working as a lawyer. After three years in Hamilton, the capital, serving in the attorney-general’s chambers, he moved to the Cayman Islands. He was admitted as a lawyer there in January 1985 and joined Bruce Campbell & Co. In 1992 he helped to establish Paget-Brown Quin & Hampson. He later became president of the Cayman Islands Law Society and was appointed Queen’s Counsel in 2004. He also served as Cayman’s representative of the Royal Commonwealth Society for a decade and was the attorney-general of Montserrat for four months in 2006. He became an acting magistrate of the Summary Court in 1993 where he served intermittently for many years. Due to his experience in complex high-value litigation cases, he was named a judge of the Grand Court in May of 2008. Charlie quickly demonstrated his ability to handle the demanding caseload. His judicial career involved presiding over a wide variety of cases, particularly criminal matters. Justice Quin quickly developed a reputation as being a fair and thoughtful judge, as well as a kind and compassionate one.

In 2007 Charlie was diagnosed with prostate cancer. In 2018 he underwent further cancer treatment in the UK, but on learning that the disease had become incurable he returned to Grand Cayman and announced his intention to retire. At the annual opening ceremony of the Grand Court in January 2019, just before Charlie’s retirement, the Chief Justice, Anthony Smellie, paid tribute to his contribution to the Cayman Islands community, declaring that he was fully deserving of the title ‘the world’s nicest judge’. Chief Justice Smellie went on to observe, in a statement issued in June 2019, that:

Justice Quin was very greatly admired and respected within the Judicial Administration, the Cayman Islands legal fraternity and the wider Cayman community, as well as in other jurisdictions around the Commonwealth. He will be greatly missed and the jurisdiction will always be grateful for his service.

Charlie Quin was a promoter of the rule of law, not only in Cayman Islands but around the Commonwealth. Some readers will recall his contributions to the Uganda and Zambia conferences of the CMJA; he also participated in the CMJA’s conference in Tanzania in 2017. He was a regular at Commonwealth Law Conferences until he became ill. He was, overall, a great Commonwealth supporter; his membership in the CMJA, Commonwealth Lawyers Association and as a former Hon. Representative of the Royal Commonwealth Society all vouch for that.

Charlie believed passionately in the Commonwealth and the common legal system that binds the countries that comprise it together. He was a member of the CMJA for a number of years and contributed to the advancement of the objectives of the association through his active participation in conferences and projects on judicial independence. In doing so, he brought his own experience and expertise to bear on issues discussed to enhance the rule of law across the Commonwealth.

Charlie Quin was a keen supporter of the National Trust of Cayman Islands.

His passion for sports was unabated and he avidly played football, and supported his rugby union teams. He also became a member of the Cayman Islands Cricket Association and attended many matches in the West Indies.

Those who knew Charlie Quin will remember him warmly for his enthusiasm, great sense of humour and cheerfulness. He never came to the UK without stopping to paying a visit to us at Uganda House and he will be very much missed by all us who were privileged to know him as a friend. Our condolences have been expressed to his wife, Diana, and his three sons.

Dr Karen Brewer, Secretary General, CMJA
IMPROVING GOVERNMENT DECISION-MAKING AND JUDICIAL REVIEW: THE RECENT KENYAN EXPERIENCE

Mr Justice Daniel Musinga, Justice of the Court of Appeal of Kenya. This article is based upon a paper presented at the CMJA Conference, Port Moresby, PNG, September 2019.

Abstract: The enactment of the Constitution of Kenya 2010 heralded a new era in the governance of the Kenyan people. The new Constitution reflects and entrenches the country's commitment to human rights, freedom, democracy, social justice and the rule of law. Moreover, it contains provisions that have equipped the courts in Kenya with the tools necessary to respond decisively, by way of judicial review and various prerogative and other remedies, if and when government actors conduct themselves in ways that contravene their constitutional obligations. The jurisprudence that has developed in the wake of the enactment of the 2010 Constitution confirms that the courts in Kenya have not shrunk from providing relief to persons and entities affected where government power has been exercised unconstitutionally. By doing so, the courts have contributed significantly to the improvement of government decision-making in Kenya.

Keywords: Constitutional law – constitutional framework in Kenya for judicial review – Kenyan courts’ use of new judicial review powers to give effect to constitutional imperatives – exemplary cases

INTRODUCTION

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

These national values and principles bind all state organs, state officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes any public policy decisions. However, in spite of the express stipulation about the binding nature of these national values and principles, there have been many instances where the government, state organs, state officers and public officers have failed to adhere to constitutional dictates. In a recent paper entitled: ‘The Quest for Constitutionalism in Africa’ delivered by Chief Justice David Maraga of Kenya at the Oxford Union Conference, the Chief Justice stated:

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

Left on their own, however, the Legislative and Executive Arms of Government, often comprised mainly of politicians and the political elites, will implement the Constitution in an arbitrary manner cherry-picking the easier and non-contentious provisions but always safeguarding their personal or sectarian interests. And that
is exactly what they have done in Kenya. In such instances, Kenyans have not shied away from moving to court to seek its intervention by way of judicial review. This paper shall highlight how the judiciary in Kenya, by way of judicial review, has improved government decision-making. I shall first give a general overview of judicial review in Kenya and how it has changed within the last ten years or so. Thereafter, before summing up, I shall cite a few cases to demonstrate that indeed judicial review has improved government decision making in Kenya.

JUDICIAL REVIEW PRIOR TO THE 2010 CONSTITUTION

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

In such applications, the court religiously followed the dictum of Lord Brightman in Chief Constable of the North Wales Police v Evans [1982] 1 WLR 1155, that ‘Judicial review is not an appeal from a decision, but a review of the manner in which the decision was made.’ The court was therefore not concerned with the merits of impugned decisions but with the decision-making process itself. Judicial review was only applicable to check the exercise of powers by public authorities in a public law matter, not the enforcement of private law rights. In Commissioner of Lands v Kunste Hotel Limited [1997] EKLR, the Kenyan Court of Appeal held:

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

According to Michael Fordham QC in the Judicial Review Handbook (6th edn, Hart Publishing 2012) at page 5, judicial review is a central control mechanism of administrative law (public law), by which the judiciary discharges the constitutional responsibility of protecting against abuses of power by public authorities. It constitutes a safeguard which is essential to the rule of law: promoting the public interest; policing parameters and duties imposed by Parliament; guiding public authorities and ensuring that they act lawfully; ensuring that they are accountable to law and not above it; and protecting the rights and interests of those affected by the exercise of public authority power.

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

JUDICIAL REVIEW SINCE THE ENACTMENT OF THE 2010 CONSTITUTION

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

Further, the Constitution has transformed the governmental context of judicial review from
a system of parliamentary sovereignty to one of constitutional supremacy. (See Speaker of the Senate v Attorney General [2013] EKLR.) As a result, every judicial review decision and indeed every court decision ought to reflect the supremacy of the Constitution. In Nairobi City County Government v Chief of Defence Forces [2016] EKLR, the court invoked the concept of the people's sovereignty under Article 1 of the Constitution to grant the public right of access over a disputed public road where the applicant claimed that citizens had been unlawfully blocked by the Kenya Army from accessing essential services, including educational and health facilities. It has been argued that under the old constitutional regime such a decision could not be made; the Army, being an important defence entity of the state, would have successfully raised the issue of national security to override the people's right to access the aforesaid essential services.

Chapter 4 of the Constitution establishes the Bill of Rights as an integral part of Kenya's democratic state. It further stipulates that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice. Article 22 grants every person the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. The Constitution provides that in such proceedings a court may grant an order of judicial review, among other reliefs.

Further, Article 165(6) of the Constitution grants the High Court supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function. It does so by way of judicial review. Article 47(1), which falls under Chapter 4 of the Constitution (Bill of Rights), provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. That the new Constitution transformed judicial review from a mere common law remedy to a constitutional one was recognized by the Kenya Court of Appeal in Judicial Service Commission v Mbalu Mutava [2015] EKLR at para. 23, where Githinji, JA. held that:

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

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

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

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

Therefore, as was stated in *R v Ministry of Defence, ex parte Smith* [1996] QB 517, ‘the court has the constitutional role and duty of ensuring that the rights of citizens are not abused by the unlawful exercise of executive power.’

It is within those prescriptions that judicial review is seen in our context.

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

It must however be pointed out that these are not entirely new grounds or concepts. The House of Lords in *Council of Civil Service Unions v Minister of State for Civil Service* [1984] 3 All ER 935 rationalised the grounds of judicial review and held that the basis of judicial review could be highlighted under three principal heads, namely, illegality, procedural impropriety and irrationality. Illegality as a ground of judicial review, it was held, means that the decision maker must understand correctly the law that regulates his or her decision-making powers and must give effect to it.

Grounds such as acting *ultra vires*, errors of law and/or fact, onerous conditions, improper purpose, relevant and irrelevant factors, acting in bad faith, fettering discretion, unauthorized delegation, and failure to act, fall under the heading, ‘illegality’. Procedural impropriety may be due to the failure to comply with the mandatory procedures such as rules of natural justice, impartiality, the duty to act fairly, breach of legitimate expectations, failure to give reasons, and so on.

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

That a merit review may be undertaken in the course of judicial review was noted by the Court of Appeal in *Suchan Investment Limited v Ministry of National Heritage & Culture & and 3 Others* [2016] EKLR, at paras. 55-58 where the court stated, inter alia, that:

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

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

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

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

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

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

**FOUR CASES DEMONSTRATING IMPROVED GOVERNMENT DECISION-MAKING ATTRIBUTABLE TO JUDICIAL REVIEW**

**The Attorney General/Moriasi Decision**

In *Republic v Attorney General, Law Society of Kenya (Interested Party) Ex parte Francis Andrew Moriasi* [2019] EKLR, the facts (briefly stated) are that the Attorney General (the respondent) directed that the engagement of external lawyers by state corporations, constitutional commissions and independent offices required his written approval and concurrence as relates to their terms of reference and fees payable, to which he must first issue a certificate of appointment. Further, no such legal fees could be processed without the respondent’s approval and authorization. The respondent issued some guidelines in a circular dated 1 March 2018, entitled: ‘Guidelines on Provision of Legal Services by the office of the Attorney General & Department of Justice.’
The ex parte applicant, who was in the panel of external lawyers for various state corporations, argued that the respondent’s directive unlawfully interfered with his legal practice and that officers who engaged legal officers without the Attorney General’s approval were also threatened with personal liability. The ex parte applicant further argued that the respondent’s directives were not based on any constitutional or statutory provisions and that the guidelines were ultra vires as they attempted to undertake a parallel evaluation process (invoking powers the respondent does not have). He further argued that the guidelines reflected an attempt to interfere and control Constitutional Commissions and Independent Offices contrary to Article 249 of the Constitution, that they were illegal as they were not made as required under the Statutory Instruments Act and that they were arbitrary, in violation of the requirements of public participation and of the ex parte applicant’s legitimate expectations. The ex-parte applicant accordingly sought an order of certiorari to remove into the High Court for purpose of being quashed the aforesaid guidelines.

The court held at paras. 40-41 and 70 as follows:

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

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

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

The judicial review orders sought were accordingly granted.

The Firearms Licensing Board/Muthama Decision

In Republic v Secretary of the Firearms Licensing Board & Two Others, Ex parte Senator Johnson Muthama [2018] EKLR, the ex parte applicant was a holder of a Firearms Certificate which was revoked by the secretary of the Firearms Licensing Board by way of a letter dated 30 January 2018. He alleged that his firearms certificate was withdrawn and revoked by the first respondent on grounds that were baseless, without merit and biased, and in contravention of the provisions of the Fair Administrative Action Act, and that his fundamental rights as enshrined in the Constitution had been breached. He sought the following orders:

a. An order of prohibition directed against the respondent and/or officers/personnel working under them from revoking the ex parte applicant’s firearm certificate; and
b. An order of certiorari to bring into the court the above noted letter of firearm certificate revocation dated 30 January 2018 for the purpose of quashing it.

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

One of the issues for determination was whether the respondents had acted ultra vires their powers under the Firearms Act in revoking the applicant’s firearm certificate. In its judgment, the trial court held, inter alia, that there was no justification for withdrawing the applicant’s firearm; and that that administrative act affected the applicant’s right to security of his person. The court went on to state, at paras. 41-42 and 44-45, the following:
It is evident from the provisions of section 5(7) that while the Respondent has power to revoke a Firearms Certificate, there is a statutory pre-condition to the exercise of that power, which is that the Respondent can only revoke after being satisfied that the holder is prohibited under the Act, or has failed to comply with a notice requiring the delivery of the firearm certificate.

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

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

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

The Keroche Breweries Decision

In Keroche Breweries Limited & 6 Others v Attorney General & 10 Others [2016] EKLR, the President of the Republic of Kenya ordered a crackdown on the production and sale of illicit liquor within the country. It was contended by the petitioners that following the said presidential directive, the Cabinet Secretary (‘CS’) drafted and enacted Alcoholic Drinks Control (Supplementary) Licensing Regulations, 2015 that raised serious and fundamental issues of administrative law. Further, the procedure adopted by the CS in enacting the Regulations and directing that they should take effect immediately was procedurally ultra vires as it was contrary to express provisions the Statutory Instruments Act with regard to public participation and consultation with persons likely to be affected by the legislation and Article 10 of the Constitution. The said directive was further faulted on the ground that by it the CS granted unto himself powers that he did not possess at the time of their enactment. In addition, the CS was accused of abusing his powers in directing that the Regulations take effect immediately and requiring a special license without taking into account the licenses that were still in force. The said Regulations were further impugned for providing a blanket ban of certain ready-to-drink alcoholic beverages (also referred to as second- or third-generation alcoholic drinks) without defining what constituted the class of affected beverages and the criteria for identifying them.

The main issues that fell for determination in the Keroche Breweries decision were:

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

It was held:

1. Article 135 of the Constitution requires that ‘a decision of the President in the performance of any function of the President... shall be in writing and shall bear the seal and signature of the President.’
2. The President, like any other human being, has his own human rights, and as such he has freedom of expression and can express himself in respect of any matter. However, that freedom has to be distinguished from the exercise of power under Article 135 of the Constitution as read with Article 132(3)(b).
3. The CS acted ultra vires his statutory power.
4. The decision to cancel all valid licences without considering whether or not the licensees had in their individual capacities broken the law amounted to arbitrariness.

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

The Kenya Forest Services/Kariuki Decision

In Republic v Kenya Forest Services Ex parte Clement Kariuki & 2 Others [2013] EKLR, the ex parte applicants sought court orders to prohibit and quash the decision of the respondent Kenya Forest Service which had advertised in the Kenya Daily Nation newspaper, calling for individuals and interested institutions to apply for concessions in state forest plantations, for parcels of land between 1,000-12,000 hectares each. The applicants complained that if the respondent was allowed to alienate forest land to any individual or private enterprises, it would result in hundreds of thousands of hectares of forest land being allocated to individuals and companies for a period of 30 years and more. This would be ultra vires the spirit of the 2010 Constitution, the Forest Act 2005 and the rules of natural justice. The respondent had also not conducted public consultation prior to the issuance of the notice, nor had it provided any information as to how the decision was arrived at. The respondent had claimed that it was not bound by law to allow for public participation before putting the advertisement to invite concessions in State forest plantations since the act of advertising was intended to evaluate the expression of interest and thereafter call for bids from successful applicants.

The issue for determination by the court was whether the Kenya Forest Services acted in excess of its mandate by denying the Kenyan public a chance to participate in its decision of whether or not to invite bidding concessions for public forest lands and before advertising the forest lands in the daily newspapers. The court found that it had, indeed, done so and held that the people of Kenya had to be given an opportunity to make representations on the issue.

CONCLUSION

Under the new constitutional dispensation, the judiciary in Kenya is playing a critical role in improving government and public decision-making. The government, public and state officers are now more careful in their planning, policy making and execution of their duties. They are conscious of the fact that their decisions are subject to scrutiny by the courts. The review of government decisions has often caused unnecessary tension between the judiciary and the other two arms of government, to the extent of the Judiciary’s budget being slashed by Parliament from time to time. That notwithstanding, the Kenyan judiciary is steadfast in the discharge of its constitutional mandate to the best of its ability.

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INFO@CMJA.ORG
Abstract: The challenges of case tracking are understood in courts around the world. Judiciaries that embarked on judicial reform in the early 2000s saw a pressing need to address case congestion and to drive inter-agency co-ordination. Investment in information technology was widely promoted as a strategy to address these challenges. In the case of Papua New Guinea, investment in information technology and the introduction of a cross sector inter-agency database has been very valuable in building a central repository for criminal case data entry, from arrest to disposition. However, other critical factors have been identified that need to be addressed to ensure that the full benefits of the IT investment for efficient case tracking can be realised. These factors include governance and policy, tools and training, culture and leadership, connectivity and communication, and the recognition that case tracking systems must be fed with quality data to be effective. Once these factors are addressed, there will then be the opportunity to leverage the emerging disruptive technologies and deliver increasingly successful outcomes for offenders and victims.

Keywords: Use of technology in criminal case tracking – improving the efficiency of the delivery of criminal justice services – identifying needs and means to make electronic case tracking viable in a rugged, culturally and linguistically diverse country – coordinating the efforts of multiple criminal justice system players to improve case tracking – potentially beneficial implications of enhanced case tracking for access to timely justice generally

INTRODUCTION

Keeping track of cases as they pass through the criminal justice system is not a challenge unique to Papua New Guinea (‘PNG’) or the Commonwealth countries, and it is not a new challenge. We are all aware of the problems caused by lack of data or lack of timely data for processing cases. The consequences of missing data are expressed bluntly in a paper from the Records Management Journal, published in 2015. The paper, titled ‘Justice delayed is justice denied’ describes the findings of a study and states that, ‘some criminal cases were withdrawn due to missing dockets or cases not properly registered. In some instances, records were reconstructed, resulting in the travesty of justice.’

Case backlog and delays to court processing are common and recurring themes experienced by Judiciaries internationally. Before the Pakistan Access to Reform Agenda, launched in 1998, the Pakistan Judiciary was suffering a significant backlog of cases, with chronic delays in case disposal of commonly five to 10 years and in some cases over 20 years. There is an instance recorded of grandchildren of original litigants disputing an interest in land, sixty years after the institution of proceedings.

Beyond the Commonwealth, the Philippines Supreme Court commenced the implementation of an action program for judicial reform in 2000 to ensure that ‘property rights could be protected, contracts enforced, abuses checked, and disputes speedily resolved in accordance with the law’.

Focus items for each of these reform programs included addressing case congestion and driving interagency co-ordination.

Using Technology to Address Case Tracking Issues

Back in 1998 when constantly increasing caseloads became a global problem, one of the three main strategies adopted by judiciaries around the world was investment in information and communication technologies. This strategy was later described in the Utrecht Law Review in June 2007 as ‘Reducing delay, improving economy, efficiency and effectiveness and [addressing] the more general objective of promoting confidence in the justice system’. By 2014, technology was seen in South America, for example, as not just assisting the judiciary in isolation, but improving justice sector efficiency, to:

- Improve sectorial planning capacity,
based on reliable, sufficient and timely information that improves the decision-making process;

- Improve the capacity of management analysis at the directive levels of each one of the concerned public institutions, including the courts;
- Improve the knowledge of management in each of the judicial offices, prosecutors’ offices, defence attorneys’ offices, etc. based on specific information and comparable guidelines;
- Consolidate a package of measurements and indicators that may be published in the community as information about the performance of the judiciary and the evolution of that performance;
- Optimise organisational and administrative procedures;
- Improve statistics and make them part of the decision-making process;
- Respond to sectorial studies;
- Differentiate what is typical from what is inconsequential;
- Generalise and forecast.

A TECHNOLOGY SOLUTION FOR PNG

In 2014, the government of Australia reported that ‘improving law and order is a complex challenge for PNG to meet. It not only requires significant resources but is dependent on all of the agencies working efficiently – independently and together.’ Later the same year, a meeting of criminal justice sector agency heads in PNG agreed to the setting up of an integrated/centralised criminal case system database (‘ICCSD’) that would track all criminal cases entering the court system throughout the country, from the point of arrest to disposition by the courts and CIS. It was considered that a modern technology-based information system would be crucial to identifying the nature and extent of the problems faced by the law and justice sector agencies in the processing of cases. Agency heads were asked to commit their agencies to the ICCSD project by signing an agency and a sector wide memorandum of understanding.

By mid-2015, the Judicial Commission of New South Wales had agreed to expand an existing Sentencing Database Project to cover the scope of the proposed ICCSD, with funding provided from the law and justice sector agencies and project management provided by a National Criminal Process Improvement Project (‘NCPIP’) team operating from the judiciary. The NCPIP project was conceived to provide greater efficiency and transparency of the processing of criminal cases by linking together the various law and justice sector agencies responsible for different functions from arrest to disposition. There were many issues to address, including the following:

- Members of individual agencies were aware of their roles, but not always aware of the roles played by other agencies in the sector.
- Cases were often delayed due to lack of accurate information, and this could lead to case backlogs and prisoners held in remand longer than was deemed reasonable.
- Lack of shared records resulted in a disconnect between probation and correction services, with the possibility of prisoners missing out on parole when that came due.
- Lack of digital systems to collect information resulted in delays and errors in transferring information collected by Police and Magisterial Courts to the National Court.
- Lack of systems to support identification resulted in cases of mistaken identity, where the person arrested was not the same person who turned up in court or who ended up in the care of the Correction Services.

The NCPIP Project was launched with a mandate to collect and share offender data across the justice sector. It was predicted that improving the quality and completion levels of data and information coming through to the National Court, would result in a more efficient and effective courts system, with less margin for error, and less time spent preparing and setting up cases to be heard. Feeding this quality data through to Correction Services and on to Parole and Community Bases Services, would result in better outcomes for offenders and victims.

NCPIP Project Pilots

On the 1st of August 2017, NCPIP project pilots were launched in Waigani (Boroko), Lae and
Wewak. The pilots were embraced with great enthusiasm, with agencies working together through the National Court NCPIP Officers to input data into the ICCSD database. However, it was soon evident that technology, training and connectivity would need to be addressed before the project could be rolled out across the country, with each representative agency able to input their own data and able to pull insights and information reliably from the wider database.

The NCPIP Project Team is now in the process of preparing for a second stage roll-out to Madang, Mount Hagen, Alotau and Kokopo, to test and build on the findings from the initial pilot phase. It is anticipated that the reporting and evaluation from this second stage will inform the final roll-out phase which will include deployment to all provinces by 2022. The initial focus will be on getting the mainline courts up and running. However, it is expected that the NCPIP evaluation will uncover tools and processes that could subsequently be implemented on a trial basis at the District and Village Court levels.

The Five Challenges of Case Tracking in PNG

The ICCSD database managed by the NCPIP project team in the PNG judiciary and the NCPIP officers across the law and justice sector agencies, provides potential for delivering significant improvements to case tracking across PNG. However, as we shall see, the challenges of case tracking cannot be met by simply providing a common database accessible by all law and justice sector agencies; there are other factors in play.

Connectivity and communication

Our first challenge is to provide good reliable connectivity across PNG, starting with the provincial law and justice sector hubs. A central database is of little use if users cannot connect to it. The PNG terrain makes connectivity problematic. Possibly in the future we will see a national power grid across the country, with mobile services provided alongside the power infrastructure. In the near term, satellite services, using satellites adapted to minimise rain fade, provide a good solution.

By owning and operating a pool of satellite bandwidth from within the Judiciary, the requirements for database hosting, voice calls and videoconferencing can be balanced on a day-to-day basis. Reliable, stable and robust connectivity opens up the potential for virtual courts and other mechanisms for addressing case processing delays.

Tools and training

Having a central database with good connectivity from every province is very valuable. However, without devices available in each province to enter data, the project would stall. These devices need to be configured to enable easy and quick data collection. They also need to be secured—from a physical standpoint so that they do not go astray, and from a digital standpoint to protect the sensitive data held on them.

Devices that can be ‘locked down’ to enable access to PNG law and the NCPIP project database only, and can be reset remotely, should they go astray, are being evaluated. These devices are lightweight handhelds with touchscreen or detachable keypad data entry.

The majority of our prospective users in the provinces of PNG have never had basic computer training, and in most instances they have picked up data entry skills in an ad hoc manner without fully understanding how the system they are entering data into works. In delivering comprehensive training, there is an opportunity to enhance the skills of staff, and to show how data becomes valuable when the accuracy is known and when the data is entered in a timely fashion. Training can start from where users are, build on the basics and eventually extend to reporting and the interpretation of data.

Governance and policy

Handling sensitive information requires established policy practices and protocols for information security and good information service management.

This challenge is best addressed through the development and deployment of a governance framework that covers all aspects of information and data governance from user authentication and data collection through to data distribution. For example, there will be a need to have policy for the operation of data collection devices, and practice relating to system auditing.
Culture and leadership

Our fourth challenge concerns culture and leadership. In a country where over 800 languages are spoken it should not be surprising that our people are culturally diverse. Building a team of Papua New Guineans from different areas of the country and expecting them to work together seamlessly without direction and interpretation would lead to chaos. Our various people groups have different mindsets, qualities and ways of operating that need to be understood in order to build harmonious teams where everybody is playing to his or her strength.

More pressing than building teams is the challenge of building strong and capable leaders. Without influential leaders in every province, the NCPIP project will not be sustainable.

At this juncture, it would be remiss of me not to thank and acknowledge the extensive and valuable work put in by the former Chief Justice, Sir Salamo Injia, under whose leadership and from whose vision came about the activities and projects mentioned above.

I am delighted to acknowledge that the new leadership under Sir Gibbs Salika has fully embraced the programs and activities and provided their undivided support.

Quality and timeliness

Finally, there is the challenge of ensuring that justice can be delivered through the case handling and administration systems. Unfortunately, it is possible to build a database system that looks impressive but holds inaccurate or insufficient data. Fortunately, a number of mechanisms can be introduced to address issues with inaccuracy or timeliness, as they present.

The Future for NCPIP and the ICCSD

The future for the NCPIP project, the ICCSD database and for case tracking in PNG is very promising. Once the full NCPIP roll-out is complete, with all the challenges listed above addressed, the system will make a significant impact on case tracking. The next challenge will be to add features and services that further enhance the processing of cases. A research project has been initiated to assist with identifying useful features.

CONCLUSIONS

Improving the tracking of cases, and criminal cases specifically, enables us to deliver a fairer, more efficient justice system for victims, offenders and all those involved in the judicial process.

Our experience with NCPIP, conceived by Sir Salamo Injia, supported by Sir Gibbs Salika and led by a judicial committee under the chairmanship of Justice Geita, is that technology plays a key supporting role in reducing delays in processing cases. However, without strong leadership and governance to ensure that the technology is deployed safely, securely and sustainably, the benefits of using technology to address the challenges of case tracking cannot be fully realised.
MANAGING MODERN CRIMINAL JUSTICE: 
THE CAYMAN ISLANDS PERSPECTIVE

The Hon Anthony Smellie, Chief Justice of the Cayman Islands. This article is based upon a panel presentation made by the author at the CMJA Triennial Conference, Brisbane, Australia, September 2018. Footnotes have been omitted to comply with house style.

Abstract: Criminal justice systems do not operate in isolation when addressing issues of crime in society. The development of improved court-based approaches must be accompanied by coordinated efforts between criminal justice and other service providers within society, particularly where youth criminality is concerned. The Cayman Island approach has been informed by approaches pursued in New Zealand, Canada and other Commonwealth countries. While still developing, that approach places emphasis on restorative justice in sentencing and the Cayman Island judiciary actively promotes the adoption of progressive process reforms that call for more integrated action with other state actors tasked with providing prevention, early intervention and intensive intervention programs to support families and youth.

Keywords: Criminal case management – progressive process reforms – restorative justice – youth criminal justice challenges – creating societal resources to foster pro-social behavior and compliment court-based resources

INTRODUCTION

Looked at from the point of view of the judiciary, the subject ‘Managing Modern Criminal Justice’ invites at least two distinct enquiries. I shall deal first with case management initiatives being pursued internally by the courts in the Cayman Islands and then I shall address some substantive process reforms—some of which involve state actors outside the court system—that are illustrative of the direction criminal justice management is taking in the Cayman Islands, particularly with respect to the challenges presented by troubled youth.

CRIMINAL CASE MANAGEMENT INITIATIVES

Under the rubric of ‘criminal case management,’ one would logically consider the systems and practices which would ensure that criminal cases are disposed of in a timely and efficient manner. A foremost and obvious consideration is the availability of legal aid. Without legal representation for those who haven’t the means to pay for it, the courts are left in the invidious and often intractable position of having to try a defendant’s case while at the same time having to guide him or her through the procedural steps of preparing for trial and representing him- or herself at trial. This is a time consuming and inefficient process which only adds to the time and cost of trials. Experience in this regard has revealed the fallacy of the policy of some governments, most notably and controversially the United Kingdom government, of curtailing legal aid entitlements in the hope of curtailing government spending.

There are of course, important rules and practices which courts must put in place to ensure the timely disposal of cases. Modern practices in the Cayman Islands include Case Management Conferences, Plea and Directions Hearings, the regular use of video conferencing for remand hearings and the deployment of the specialist diversionary courts such as the drug treatment, mental health and domestic violence courts.

There is also, as one might expect, a Criminal Justice Reform Committee (‘CJRC’) chaired by the judge who heads the Grand Court Criminal Division and whose mandate is to advise on the ongoing modernization of criminal justice practices and to identify the need for and advise on legislative, procedural and practical reforms. For instance, an important and ongoing function of the CJRC has been the development of Sentencing Guidelines based especially on local sentencing precedents and the UK Sentencing Council Guidelines.

Over the last 15 years or so, the foregoing are practices which have all been introduced at different levels of the court systems and with varying degrees of success in the Cayman Islands, as indeed they have been in many other Commonwealth countries.

In the event that there is material available
from the Cayman Islands that could be of use—especially to the court systems of our sister Commonwealth jurisdictions which have not yet introduced such practices—the Cayman Island courts are very pleased to share their experiences. Access to such material, especially about the diversionary courts, can be found on the Cayman judicial website and will be readily supplemented upon request with any other information that might be available: <www.caymanjudicial-legalinfo.ky>.

Having recognised the importance of modern case management, it is however, with regard to the second line of inquiry—that being progressive process reforms, particularly in relation to young offenders—where I think the Cayman experience might be more informative.

**PROGRESSIVE PROCESS REFORMS**

What progressive process reforms would judges in the Cayman Islands advise, based on their experience and observations about what is being done in other jurisdictions, be adopted to combat crime effectively and, given its ascendancy, youth crime in particular?

‘Restorative justice’ is now a widely known catchphrase for what may be regarded as a more enlightened modern approach to the relationship between crime and punishment. The concept is already familiar around the courts of many of our jurisdictions; it has been described in many different ways. I find the description of criminologist Marin Wright, taken from his volume, *Justice for Victims and Offenders: A Restorative Response to Crime* (Philadelphia: Open University Press, 1991), to be clear and compelling where he states that the new model is one:

> … in which the response to crime would be, not to add to the harm caused by imposing further harm on the offender, but to do as much as possible to restore the situation. The community offers to aid the victim; the offender is held accountable and required to make reparation. Attention would be given not only to the outcome, but also to evolving a process that respected the feelings and humanity of both the victim and the offender.

Thus, the objective is not simply to punish the offender but to recognize and repair as far as possible the impact upon of the offender’s actions upon the victim even while allowing the offender to admit his offence, express his remorse and to the extent possible, make reparations.

An early successful example of the new approach is reported to have come out of the New Zealand experience involving Specialist Youth Courts, the center piece of which is the Family Group Conference (‘FGC’).

Under the New Zealand Children, Young Persons and Their Families Act, offending by young persons (ie: offenders between 14 and 17 years of age), comes within the jurisdiction of a specialist youth court. The court deals with all offences except murder and manslaughter, although very serious offences such as rape are usually referred to the adult courts.

In deciding whether a disputed charge is proved the adversarial system is maintained in full. However, in disposing of admitted or proved offences a radically different system has been adopted. The key component is the FGC, convened and facilitated by a youth justice coordinator, an employee of the Department of Social Welfare.

The FGC is attended by the young offender, members of his family (including his extended family), the victim (often accompanied by supporters), a youth advocate (if requested by the young offender), a police officer, a social worker and anyone else that the family may wish to be there. This last category might include a representative of a community organization, drug addiction agency or community work sponsor seen as potentially helpful to the young person.

Judges do not attend FGCs out of a concern that their presence would disempower others who should attend. Instead, the New Zealand model requires the youth justice coordinator to chair the FGC meeting in such a way as to enable feelings to be expressed and all points of view heard. Victims are encouraged to bring supporters so that they do not feel overwhelmed by a solid turn-out of the offender’s family.

The objective of the FGC is to make recommendations to the Youth Justice Court for the disposition of the case. Any recommendation of the FGC requires the agreement of all present, including the young person, the victim and the police representative. Where unanimity is not reached the matter is decided by the court but it is reported
that the court will seldom refuse to adopt a recommendation coming out of the FGC process.

The New Zealand approach to youth justice is one that has found favour with the judiciary of the Cayman Islands and was at the center of recommendations for legislative change made in 2007 by a committee convened and chaired by the judiciary. The report of this Committee resulted in the passage of the Alternative Sentencing Law (the ‘ASL’).

As the title implies, the policy of the ASL is to require the courts, in imposing sentence, to take into account not merely the traditional objectives of deterrence and retribution but also the modern objectives of rehabilitation of the offender as well as reparation of harm done to his victim or to the community. The ASL mandates that a court shall, in imposing a punishment, take into account that:

a. a convicted person should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances; and

b. all available sanctions other than imprisonment that are reasonable in the circumstances of each case should be considered for all convicted persons

The ASL, in keeping with that philosophy, provides the statutory foundation for conditional sentences, leaving the courts with a very wide discretion as to the nature and terms of the conditions to be imposed. Provision is made for the establishment of Restitution Centers at which offenders may be required to attend for the supervised compliance with a restitution order for the reparation of harm to a victim.

The ASL also contemplates the appointment of Justices of the Peace and other volunteers as quasi-probation officers to perform such duties as may be specified under the ASL and as may be prescribed by rules made pursuant to it. Among the duties envisaged are supervision within the community at large of youth who have been placed on conditional sentences. It is anticipated that—when the rules for their adoption in the Youth Justice Court are finally promulgated—FGC meetings will be chaired by youth justice coordinators.

**Building Support for Families**

The foregoing is a brief overview of the Cayman Islands judicial approach to restorative justice, the benefits of which the courts fully accept. The courts have long since recognized, however, that lasting and effective impacts upon the real causes of crime will not be delivered solely through the criminal justice system. The youth criminal cases coming before the courts are a manifestation of societal failures not at the institutional but at the most fundamental level—the breakdown of family life and the impact that has upon the child (especially the male child), leading to criminal behavior.

For this reason, the Cayman judiciary has long been advocating the adoption of the Family Support Model and continues to do so in an ongoing dialogue with the Executive towards criminal justice reform.

The Family Support Model is described as including three major types of services to be delivered by the state: prevention, early intervention and support, and intensive ongoing intervention where needed.

Examples of prevention initiatives include:

- Parent caregiver/child drop-in programs for children up to six years of age
- Parenting education
- Parent peer group support programs
- Support groups for caregivers, grandparents and foster parents
- Informal counseling
- Prenatal classes
- Home visits
- Literacy programs
- Volunteer mentors

Early intervention initiatives include:

- School-based information programs about family support
- Behavioural assessments
- Intervention support services for children and youth attending school
- After-school programs for children and youth
- Short-term counseling
- Youth outreach programs
- Recreation programs
- One-to-one support for parents, children and youth
- School-based programs for students focusing on healthy relationships,
self-esteem, etc.

Intensive intervention initiatives include:

- Providing support and conflict resolution for parent/teen conflict
- Creating restorative justice models especially for young offenders
- Providing short term crisis intervention
- Developing safety plans for the child, youth and family, including residential care for youth and children.

Many of these components are in effect in the Cayman Islands but many others, which are vitally needed, are not. The Cayman judiciary will continue to advocate for their implementation.

Lasting and effective intervention by the state to deal with crime within the youth population are, of course, expensive. But experience in the Cayman Islands has shown, no doubt as it has in other countries, that programs such as the ones noted above are likely in the long run to be far less expensive than imprisonment and far more beneficial in effect both for the youth offender and society as a whole.

Experience throughout North America has shown that Family Support Programs have strengthened families and communities together. In many parts of the United States and Canada, such programs are associated with neighborhood or family resource centers. Where no dedicated building is specially available, schools, churches and community centers are used for the delivery of these programs.

A few churches have taken up the mantle in the Cayman Islands, given the ongoing lack of initiative by government, albeit in some cases with financial support from government.

The family resource centers have been described as welcoming hubs of activity where children of all ages, together at times also with parents and caregivers, participate in various community programs.

IN CONCLUSION

The lesson to be learned from these experiences is that while the criminal justice system is of vital importance to the preservation of law and order, it does not and never has provided answers to all of the problems of youth crime.

The criminal justice system can become more effective in reducing recidivism through restorative justice programs and so by taking a different approach to its treatment of crime and punishment. But truly reformatory programs for the prevention of crime must be found within the society-based programs—those which may effectively operate to prevent young people from coming into contact with the criminal justice system.

Even while the judiciary will heed the modern call for restorative justice, it occupies a uniquely informed position from which to attest to the shortcomings of the criminal justice system as the sole solution to crime.

The modern judiciary is thus well placed to appreciate and advocate for intervention programs of the kinds described above.

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IS IT TIME TO ABOLISH BLASPHEMY OFFENCES?

Dr Ei Sun Oh, Senior Fellow of the Singapore Institute of International Affairs and the Principal Adviser for the Pacific Research Center of Malaysia in Kuala Lumpur.

Abstract: Laws criminalising blasphemy remain in force in many Commonwealth jurisdictions. However, as legal protections (constitutional and non-constitutional) for freedom of speech and freedom of religion have evolved, tensions between those freedoms and the persistence of criminal sanctions for blasphemy have increasingly become visible. Various alternative approaches to reconciling the competing imperatives which give rise to those tensions, all with a view to promoting social harmony and cohesion, are discussed.

Keywords: Blasphemy – freedom of speech – freedom of religion – possible ways of reconciling conflicting freedoms within democratic states – promoting social harmony and cohesion within democratic societies.

INTRODUCTION

Blasphemy offences are those that punish or provide redress for acts of insulting or showing contempt or lack of reverence toward a religion or something considered religiously sacred or inviolable. These offences may include vilification, defamation or denigration of religions or religious groups, or offending the religious feelings of believers and adherents.

Many Commonwealth jurisdictions retain blasphemy offences on their statute books, and some are more assiduous than others in prosecuting such offences. A case study in point is Malaysia, which takes a rather stern view of blasphemy offences. As Malaysia embraces two parallel legal systems of common law and sharia law, blasphemy and related offences are typically dealt with through either one of the two legal avenues available to the relevant Malaysian authorities.

Blasphemous offences involving Muslims in Malaysia are typically handled by the Islamic authorities or by the sharia courts that handle Islamic laws. For examples, in 2006 and 2008, the highest Islamic authority in Malaysia prohibited Muslims from listening to or following Black Metal music. The authority also prohibited Muslims from practising yoga. The former was deemed capable of ‘inciting hatred’ and the latter was deemed ‘blasphemous’. Sharia courts have also imprisoned Muslims adjudged to have veered into deviant beliefs.

For blasphemous offences involving non-Muslims, or when Islamic law is not applicable, secular statutory laws are invoked by the relevant authorities. For example, Articles 295 to 298A of the Malaysian Penal Code set out prison terms and fines for those committing offences against religion.

In 2008, Malaysian authorities ordered the Catholic weekly newspaper, The Herald, to stop using the word ‘Allah’. The order was later revised to permit usage in Christian publications, but each copy was required to bear a notice that it was not intended for Muslims. In the same year, Malaysian officials seized Christian children’s books, alleging that they contained drawings that constituted ‘caricatures of prophets,’ and were offensive to Muslim sensibilities. The books were returned after the Malaysian Council of Churches clarified that they were not meant for Muslims.

It is worth noting that Malaysian blasphemy laws have also being applied in cases involving other religions. In 2007, publication of a Tamil language newspaper, Makkal Osai, was suspended for one month for violating the Printing Presses and Publications Act 1984, as it had published a caricature of Jesus Christ clutching a cigarette and a can of beer.

RECONCILING THE CRIMINALISATION OF BLASPHEMY WITH THE PROTECTION OF OTHER FREEDOMS: DIFFERING SOCIETIES, DIFFERING PERSPECTIVES

During the 2019 CMJA Conference at Port Moresby, Papua New Guinea, a specialist session was convened to discuss a topic which coincides with the title of this article. The session participants, commenting in their personal capacities, hailed from jurisdictions representative of the various regions throughout the Commonwealth.

A brief and informal survey was conducted among the participants as to the current status of blasphemy-related laws in their respective jurisdictions. It was found that in most jurisdictions represented in the session, blasphemy as an offence was still statutorily maintained, but that the prosecution of such offences had become increasingly uncommon. This was the case in Trinidad and Tobago,
Australia and Papua New Guinea (where the depiction or not of blasphemous materials was still considered in the classification of publications).

But there are also jurisdictions where laws prohibiting blasphemy are still rigorously enforced. For example, in Pakistan—where blasphemy is also criminally sanctioned with a maximum six years’ prison term and fine—an anti-terrorism court has sentenced an accused who claimed himself to be a Quranic character to nearly a century in prison. Previously, an accused who was declared a non-Muslim and who was found reading the Quran was acquitted of blasphemy, the judicial reasoning being that ‘people should not be stopped from converting to Islam’.

In the United Kingdom, where blasphemy offences such as insulting Christianity remain on the statute books, successful prosecution for ‘blasphemous libel’ with fines imposed was upheld upon final appeal until late 1970s (Whitehouse v Lemon [1979] 2 WLR 281), although they have now fallen into disuse as basis for prosecution. In 2008, the Archbishop of Canterbury joined the call to remove criminal sanctions for blasphemy offences.

Attempts have been made in the United Kingdom to utilize public-order laws for prosecuting blasphemy, employing arguments (for example) that allegedly hatred-inciting words and behaviors amount to proscribed racially aggravated incitement. However, a religion is not usually considered to be racially based. Hence, some British Muslims’ call for Salman Rushdie to be so prosecuted was unsuccessful. Moreover, there is an ongoing debate in the United Kingdom as to the primacy of free expression versus protection for religion, bearing in mind that the European Court of Human Rights has ruled that practice of religion could be circumscribed (Case of S.A.S. v France [2014] ECHR 695), given that religious belief is not a right so basic that it supersedes the protection of others’ rights and freedoms (see Article 9, European Convention on Human Rights).

Concerns were expressed by session participants regarding the trans-national or trans-jurisdictional aspects of blasphemy offences. Discussion focused in part on the example of the Ahmadi community of Pakistan—a sect considered non-Muslim by some mainstream Muslims. Ahmadi members are thus viewed by some as having committed blasphemous offences under Pakistan’s law, simply by asserting what they claim is their Islamic identity. Some Ahmadis have thus been given sanctuary in the United Kingdom, illustrating the difficulty encountered when attempting to standardize approaches to blasphemy offences across borders.

Session participants also pointed out that blasphemy was meant to cover insults against the established religion of a jurisdiction and belonged to a class of offences against the state (such as treason). They argued that since many jurisdictions have now become multicultural in their social outlook, the abolition of blasphemy was thus timely. It was contended by some that blasphemy laws, as man-made and not divinely ordained laws, should not seek to sanctify one out of multiple religions in a jurisdiction.

Meanwhile, Canada was reported to have done away with blasphemy laws as the country places a high value on freedom of speech—a freedom that, though not wholly unlimited, enjoys strong constitutional protection.

One limiting factor that is commonly seen relates to the proscription of hate speech—that is, speech which foments hatred toward members of identifiable groups. It was argued that hate speech laws should in general protect minorities, including religious ones, without resorting to the criminalization of blasphemy. For example, the desecration of places of worship could be made a specific offence. However, a counterexample was given by some session participants, raising the question as to whether preaching a rival religion on the premises of a place of worship could or should be deemed a ‘desecration’.

Some session participants opined that blasphemy offences should not be abolished, as otherwise contempt of religion could be committed without hindrance. Other participants felt that such ‘contempt’ should be properly defined or specified as to whether it, for example, includes mere criticism.

In Kenya, blasphemy offences are similarly rarely proceeded upon, though they are still statutorily maintained. Incidences such as that of trampling on the Quran in the Islamic part of the country are considered isolated. It may be said that the country has implicitly taken the path that favours freedom of expression in such circumstances. Participants at the aforementioned session at the 2019 CMJA Conference elaborated that the right not to be offended should not be sanctified, and at the least mere words should perhaps be distinguished from more tangible, offensive acts.
Some session participants felt that a distinction, however fine, should be drawn between offending where the point of view expressed might come into collision with the religious ‘sacred space’ upheld by some believers, and insulting where an intention to demean was evident, as in the case of trampling on religious holy books. Other participants found that such fine distinctions are difficult to make in practice, giving as example the satiric depiction of religious figures in the *Jyllands-Posten* (Denmark, 2005) and *Charlie Hebdo* (France, 2012) cases.

Another view was expressed that section 5 of the United Kingdom’s Public Order Act 1986, as amended in 2014, removed references to the ‘insulting’ concept and, thus, now merely criminalises threatening or abusive words or behaviors. Thus, a religious preacher prosecuted for expressing rabid views against another religion was acquitted. It was also pointed out that in Kenya, the statutory language for blasphemy was ‘wounding religious feelings’ (Penal Code, Article 138).

The session moderator raised the question of whether certain expressions could be deemed generally offensive to certain religious groups, and whether such groups or their members would thus be either unduly aggrandized or negatively stigmatized by society at large. He proffered that perhaps a reasonably prudent person-standard should be applied to identify whether a group is too easily provoked. Some session participants agreed that a reasonableness standard should be adopted. Others warned that an ostensibly objective standard could lead to easier conviction for blasphemy offences than a stricter subjective standard. Still other session participants suggested that the normal criminal procedure for the findings of facts should be applied in determining offensiveness. The notion of wilful ignorance in making certain expressions was raised. So were the coverage of section 4 (fear or provocation of violence) and section 4A (intentional harassment, alarm or distress) of the United Kingdom’s Public Order Act 1986.

As an alternative to regulatory or legislative responses to allegedly blasphemous acts, it was suggested that commercial or reputational pressure could in some cases be applied. As an example, members of religious groups feeling offended by religiously provocative art pieces displayed in a gallery could parade with pickets outside the library. Some session participants questioned if many blasphemy laws could be construed so as to be in violation of the spirit or letter of some public international law, such as the relevant International Covenant on Civil and Political Rights, bearing in mind the conflict between Articles 19 (right to freedom of expression) and 20 (prohibition of religious hatred) of the covenant. Other session participants also pointed to the possibility that laws which essentially confer special status for religious beliefs may be in violation of the modern political notion of separation of church and state and are detrimental to the rights of atheists.

Some session participants put forth the suggestion that a jurisdiction where an overwhelming majority worships within a single religion should in particular consider abolishing blasphemy offences, but others felt that it should not make a difference one way or the other. Some session participants emphasized that abolition (or not) of blasphemy offences should focus on protection of minorities in a jurisdiction.

**NO FIRM CONSENSUS BUT SOME INDICATIONS OF THE WAY FORWARD**

While no consensus was reached among the participants of the specialist session as to whether blasphemy offences should be abolished, a few salient points stood out from the discussions held. Among them were the following:

- Blasphemy offences should be carefully and narrowly defined to cover only the most egregious words or deeds.
- Judicial findings of blasphemy where blasphemy is criminalised should similarly be thoughtful and deliberate.
- As blasphemy is a double-edged sword capable of alternately protecting and decimating the rights of the majority or minority, its definition and coverage in any given jurisdiction should be updated periodically to reflect modern views on the interplay between religious sanctity and freedom of expression, always with a view to favouring social harmony and cohesion.
FOREIGN JUDGES: PACIFIC PRACTICES AND GLOBAL INSIGHTS

Dr Anna Dziedzic, a Global Academic Fellow at the Faculty of Law, Hong Kong University. Dr Dziedzic completed her PhD at Melbourne Law School in 2019 with the support of a University of Melbourne Human Rights Scholarship. Her doctoral research was focused upon the subject matter addressed in this article.

Abstract: Circumstances of necessity require some states to fill judicial positions with foreign judges. This practice is most widespread within the Pacific states within the Commonwealth. While the practice brings many benefits to the otherwise under-resourced states which employ it, it also carries potential problems. Questions can arise regarding the nature of the appointment process, the extent to which it too is domestic or foreign to the subject state and the criteria employed when assessing candidates. Fiscal considerations, together with the duration of foreign judge appointments, can potentially prejudice judicial independence. The extent to which foreign judges can realistically be able to acquire a sufficient command of the local law, and a sufficient appreciation of the cultural norms and practices of the states within which the preside temporarily, can also be factors that bear upon the successful use of those foreign judges to fill judicial vacancies.

Keywords: Appointing foreign judges to meet otherwise unfulfilled needs for judicial officers – Pacific island states of the Commonwealth – potential risks and benefits associated with the use of foreign judges – judicial independence, potential threats to

INTRODUCTION

The use of foreign judges is an exceptional phenomenon in world experience. That judges, particularly on a state’s highest courts, will be citizens is often taken for granted in academic and practice-oriented literature on judging.

However, foreign—or non-citizen—judges sit on domestic courts in over 30 jurisdictions across the world. Given the majority of these jurisdictions are Commonwealth states in Africa, the Caribbean and the Pacific, readers of this journal might comprise one of the rare audiences for whom the use of foreign judges is a familiar practice.

Despite this, the use of foreign judges is a largely under-studied phenomenon. It raises a host of practical and theoretical questions. Just how does foreign judging work in practice? How might the constitutional and judicial systems of states accommodate the use of foreign judges? To what extent, if at all, does the nationality of the judges on a domestic court matter?

This short article outlines some responses to these questions, drawing on experiences from Pacific island states. It summarises some of the findings of my Ph.D. thesis which examined the use of foreign judges in the nine independent Commonwealth states of Fiji, Kiribati, Nauru, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu.

EMPIRICAL DATA FROM NINE PACIFIC STATES

There is little published data on the composition of Pacific courts. As such, a significant part of my research involved collecting and analysing information on the number of foreign judges serving in Pacific states, their nationality and professional background, the processes by which they are recruited, and the terms and conditions of their service.

Between 2000 and 2015, 187 foreign judges sat on the superior domestic courts in the nine Pacific states. Twenty-six of these judges sat in more than one Pacific state. The ratio of foreign to local judges varies between states. In Nauru and Tuvalu, all judges are foreign. In other states, the ratio on the relevant courts is between 71 and 95 percent foreign judges. Papua New Guinea had the lowest proportion of foreign judges with just 21 percent. Across the region, just over three quarters of all judges on the relevant courts during this time were foreign judges.

The majority of foreign judges were from Australia (30%) and New Zealand (32%). Fifteen judges (8%) were from the United Kingdom. These jurisdictions might be described as the traditional donor states
for foreign judges in the Pacific, a position reinforced by historical colonial ties and well-established channels of development aid. There has, however, been recent diversification in the nationalities of the foreign judges serving in the Pacific. Twenty-two percent of the cohort of foreign judges were from Sri Lanka, all of whom served in Fiji after 2009. Four judges from African states served over this time in positions sponsored by the Commonwealth Fund for Technical Cooperation. And in a growing emphasis on inter-regional judicial exchanges, ten of the foreign judges were from other Pacific island states.

In relation to the professional background of foreign judges, approximately 40% of the foreign judges were serving judges in their home jurisdiction at the time of their appointment to a Pacific court. These judges might serve concurrently in the Pacific state and their home jurisdiction or take leave from their home court. About 25% were retired judges and another 25% were recruited from legal practice, generally in their home state.

LAW AND PRACTICE OF FOREIGN JUDGING IN THE PACIFIC

The terms and conditions of judicial service and the procedures by which judges are selected, appointed and removed are important elements of any judicial system. In the Pacific, these processes apply differently to foreign and local judges, sometimes because the law expressly differentiates on the basis of the citizenship of judges, and other times because the use of foreign judges results in different practices.

Appointment

In the nine Pacific states, the formal procedures for appointing foreign judges are no different than those for local judges: judges—foreign and local—are appointed by the head of state, on the advice of a judicial services commission or the executive.

In practice, however, the procedures for appointing a foreign judge are different in two respects. First, the nominating or appointing authority is less likely to have direct knowledge about foreign candidates. This increases reliance on second-hand recommendations (from other foreign judges, or on the basis of connections made at regional judicial conferences) or on formal paper applications. This presents appointing authorities in the Pacific with some challenges in assessing candidates for appointment and in building a judiciary of diverse backgrounds and expertise. Second, the use of foreign judges imports a range of external actors into the recruitment process. For example, where foreign judges are recruited (and paid) by donors such as the Commonwealth or through formal arrangements with overseas courts, external donors may have a hand in shaping the selection criteria and advertising for and recruiting judges, although the final decision is formally in the hands of the Pacific state. In addition, a foreign judge might be subject to additional procedures in his or her home state. For example, a serving judge will often seek the agreement of the head of jurisdiction, and in some cases the executive government, in his or her home state, before accepting a position overseas. Laws and policies in the judge’s home state (and in some cases, a third state) can affect a foreign judge’s ability to travel, work and receive remuneration overseas. International standards emphasise the importance of apolitical appointment procedures in supporting judicial independence but tend to assume that the political branches of the state hold most levers of influence over judicial appointments. The use of foreign judges multiplies the potential sources of influence in appointments, presenting additional challenges on which there is, to date, limited guidance.

Tenure

Tenure is another significant point of distinction between local and foreign judges in the Pacific. In all nine states, the appointment of foreign judges on short, renewable contracts is legally permitted and commonplace. In Fiji and Papua New Guinea, it is legally required that non-citizen judges serve on contracts of terms of no more than three years. In contrast, in most states, citizen judges are appointed for longer terms or until a predetermined age of retirement. There is sometimes good reason why a foreign judge is appointed on a short-term contract. It makes sense where a foreign judge is in effect an acting judge to meet a temporary need for judicial services. It might also support localisation, in that it means that there will positions available for citizens who have attained the required qualifications and experience for judicial appointment.
The practice does, however, come with some risks. One is the element of instability and transience it introduces to the composition of Pacific judiciaries. This in part arises from the use of short-term appointments. It also follows from the fact that foreign judges serving on courts of appeal sit part time, visiting periodically to attend court sittings. In contrast, local judges generally serve on a full-time basis and for longer terms. While there are examples of foreign judges who have been reappointed to their positions and have sat on the same Pacific court for many years, there are also examples of judges who have sat just once and were not invited to return. One potential consequence of this is that foreign judges have limited opportunities to acclimatise to the laws and procedures of a new jurisdiction and legal community. This is arguably more significant when judges are called upon to resolve contentious issues and, if necessary, to extend or reform common law doctrines to meet changing community needs.

A second problem with the widespread appointment of foreign judges on short renewable appointments is the risk to judicial independence. This risk is heightened when most, if not all, judges serve on short renewable appointments; when the individual appointed is reliant on the judicial position for career progression or financial security; and where executives or other appointing authorities have demonstrated that they will act to remove judges who have made decisions that are perceived to be against their interests. As such, the risks associated with short renewable contracts are more pressing in some Pacific jurisdictions than others. Sometimes, short term contractual appointments are preferred for budgetary reasons: it means that states—and the external donors that sometimes fund judicial positions—can commit to funding a judicial position only for the short term. While perhaps understandable, this too comes with risks to judicial independence: in some cases, foreign judges themselves have negotiated for renewed external funding to retain their positions or have continued to sit as judges without the security of a formal appointment.

**INITIATIVES FOR POTENTIAL REFORM**

To be clear, I do not make the foregoing points in order to suggest that the use of foreign judges is improper. Rather, the practice—at least as it arises in Pacific states—raises distinctive challenges that require tailored solutions. In particular, there is scope for incorporating specific processes for assessing foreign candidates in the appointment process, perhaps by expanding the assessment process to consult legal associations in the candidate’s home state. There is also a need for the Pacific states that use foreign judges, and the states and organisations that provide and fund them, to reconsider the almost automatic use of short renewable contracts, and to determine, on a case by case basis, whether a judicial position ought to be filled by a foreign judge on a more secure basis.

As a general policy, the design of laws and procedures for the use of foreign judges ought to be informed by the *rationale* for the use of foreign judges, which in turn relates to the specific *context* in which they are to be used. Are foreign judges intended to provide judicial services until there are enough citizen judges to take their place? Are they providing specific expertise or qualities (such as impartiality or a capacity-building or educative role)? Or is the appointment of foreign judges intended to be symbolic, indicating perhaps a commitment to the idea of a global common law, or common principles of constitutionalism and the rule of law? All such rationales are open to debate and their realisation requires balancing benefits and risks of the kinds outlined here. But clarity about rationale is necessary to the design of effective legal frameworks. For example, the appointment of foreign judges on short renewable contracts might be justified where the rationale for the use of foreign judges is understood as a transitional arrangement, pending the localisation of the courts (which I suggest is the case in some of Pacific island jurisdictions). It has less justification, however, where the policy of localisation is not being seriously pursued or is likely to take many years.

**CONCLUSION: DOES FOREIGNNESS MATTER?**

This article has sought to illustrate some of the ways in which Pacific states accommodate foreign judges in the administration of their national judiciaries and the distinctions that it requires between citizen and non-citizen judges. These issues demonstrate that the nationality of a judge matters, at least at this practical level.

I want to conclude with some provocations
on whether there might be deeper differences between foreign and local judges affecting the role and function of the individual judge in more fundamental ways.

An examination of foreign judges directs attention to the ways in which nationality might be significant to the qualities and expectations of judicial office. One relates to the kinds of knowledge of law and the wider community that judges are expected to bring to the task of adjudication. As a generalisation, foreign judges are unlikely to have the same depth of knowledge about the national law and context as local judges. However, the significance of this ‘knowledge gap’ depends on understandings of what judges do—or ought to do—when deciding cases, itself a contested question. It also depends on the extent to which laws are understood to be distinctively local or converging on common principles. The pluralist legal systems of the Commonwealth Pacific illustrate both dimensions, encompassing a shared common law as well as indigenous and diverse customary laws.

A second reason to value nationality relates to the desirability of a judge’s membership of the national community. The nationality of a judge might be seen as a symbol of sovereignty, in the sense that a court composed of members of the people is a court of the people. Membership might carry a distinctive sense of responsibility: foreign judges will act according to their oath in the best interests of the community they serve, but only citizen judges must truly live with the results of their decisions. A counterpoint to this claim is that a judge who stands outside the community carries a degree of impartiality not available to a member of that community. Again, the significance of membership and distance depends on deeper and contested questions about a judge’s role in adjudication and in the wider constitutional system.

While these questions cannot be resolved here, I hope to have shown how the study of foreign judges is not only of interest to those few jurisdictions in which they are used, but also illuminates deeper theoretical questions about the judicial role.

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THE DUTY OR POWERS OF THE ENVIRONMENT COURT OF NEW ZEALAND TO PREVENT DAMAGE TO THE ENVIRONMENT

Judge Laurie Newhook, judge of the Environment Court of New Zealand since 2001 and the court’s Principal Judge since 2011. Judge Newhook is keen to network with judges, magistrates and tribunal members around the world about adjudication of environmental issues, whether under specialist legislation or civil or criminal legislation that can be brought to bear on environmental issues. Pacific nations are of particular interest to him. He can be contacted via e-mail at <laurencenewhook@gmail.com>.

This article is based upon a paper presented at the CMJA 2019 Conference, Port Moresby, Papua New Guinea, September 2019.

**Abstract:** New Zealand has for many years had a specialist Environmental Court with jurisdiction over matters, including land and water use matters, where issues of environmental protection arise for adjudication. This article outlines the legislative foundation upon which New Zealand’s unique and progressive approach to environmental protection rests and summarises the Environment Court’s role as one component of a comprehensive regime for planning, environmental regulation and environmental protection within the country. The court’s adjudicative and enforcement powers, and its encouragement of recourse by parties to alternative dispute resolution options, are discussed, as are the key aspects of the procedural provisions that govern the proceedings that are taken before it.

**Keywords:** Specialist environmental courts in New Zealand – legislative and regulatory framework governing environmental protection in New Zealand generally – unique substantive and procedural characteristics of specialist environmental courts in New Zealand

**INTRODUCTION**

The conference organisers invited me to speak to the subject ‘The Court’s duty to Prevent Damage to the Environment’. I have slightly recast that mandate by adding ‘or powers’, because few environmental courts or tribunals in the world hold powers to initiate such action, let alone powers of such a broad nature. Notable exceptions may be found in India and China. Most courts receive and entertain actions initiated by citizens in a democracy and their powers will invariably be limited to those prescribed by statute.

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

I should add a further preliminary note to reflect that our powers are more refined than prevention of environmental damage; rather, the powers in New Zealand legislation focus variously on protection, avoidance or mitigation of adverse effects on the environment. Having said that, I believe that the New Zealand approach to environmental regulation, particularly through involvement of my court, is quite cutting edge in international terms. The legislation currently in force for a quarter century was enacted in place of rather more pedestrian town and country planning legislation.

The Environment Court of New Zealand’s duty to prevent damage to the environment needs to be seen in the context of a broad overview of New Zealand’s Resource Management Act 1991 (the ‘RMA’ or the ‘Act’) which is at the heart of planning regulation and environmental law in this country. The constitution, work, powers and practices of the court can only be understood in the context of that Act as a whole, because the court is a part of a large and complex system. Its part is to provide some powerful checks and balances to environmental decision-making and actions by others.

**BACKGROUND AND LEGISLATIVE CONTEXT**

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

Although the Environment Court has some unusual features in its jurisdiction (which I shall describe), it can be recognised as a typical court, and not an environmental protection agency, in that it does not make policy or initiate steps for environmental protection, but adjudicates in cases brought to it by many kinds of parties. New Zealand has an agency called the Environmental Protection Authority, but it is quite unlike EPAs found in other countries, having no powers of broad environmental protection, but instead certain regulatory powers concerning hazardous substances and some kinds of development consenting on land and water. New Zealand also has a Parliamentary Commissioner for the Environment, but the powers of that person, supported by a small research office, are confined to making recommendations to the government on environmental issues, usually after scientific research has been undertaken.

As a New Zealand court, the Environment Court is supported administratively by the Ministry of Justice but confers regularly with the Ministry for the Environment which administers policy in the environmental field. This administrative split can produce some interesting consequences at times, some good and some needing constructive consultation and management.

**New Zealand’s RMA: A Basic Outline**

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

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

**Sustainable Management**

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

The ‘environment’ includes things natural, physical, and people, and includes:

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

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

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

**The Purpose and Principles of the RMA**

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

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

a. Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

b. Safeguarding the life-supporting capacity of air, water, soil and ecosystems; and

c. Avoiding, remedying or mitigating any adverse effects on the environment.

The purpose of the Act is then supported in subsequent sections 6, 7 and 8 concerning matters of national and other importance. The matters of national importance include the preservation of the natural character of the coastal environment, wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use and development; also the protection of outstanding natural features and landscapes from inappropriate subdivision, use and development; also the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna; also the maintenance and enhancement of public access to and along the coastal marine area, lakes and rivers; also relationships and culture of the indigenous people, the Māori.

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

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

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

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

An Overview of Environmental Management Mechanisms Under the RMA

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

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

The national instruments are issued by central government. The regional policy statements are issued by regional councils, and the district plans are issued by district councils. Each of these layers of legislation is required to meet the demands of the layers above it.

I will now describe each of the three areas in which the Environment Court works.

**Forward planning**

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

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

**Applications for consent**

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

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

Each resource consent application must include an assessment of the effects (actual or discretionary activities, the assessment will be limited to the matters over which the rules in the plans direct the discretion be focussed on.

**Enforcement**

The regional and district councils also have functions of enforcement of the plans, and of environmental standards more generally, and they do this by bringing proceedings in the Environment Court.

It is this class of case that can be said to be the closest to an express duty on the court to prevent damage to the environment. That is when a party files a case in the court alleging present or prospective damage to the environment, the court can hear all parties to the case and make decisions. Enforcement orders are akin to civil injunctions in other courts. The court can also make declarations. Enforcement Orders often supplement convictions and penalties imposed after successful prosecutions of environmental wrongdoers.

By enforcement of environmental standards more generally, I am referring to the operation of ss. 15, 15A, 15B, 15C and 16 of the RMA. These deal respectively with general controls over discharge of contaminants into the environment; restrictions on dumping and incineration of waste and other matters in the coastal marine area; discharge of harmful substances from ships and offshore installations; prohibitions in relation to radioactive waste or other radioactive matter, and other waste, in the coastal marine area; and a general duty on people to avoid unreasonable noise. These sections of the Act largely point to duties to comply with regulations, policy statements, and plans, but the obligations concerning noise under s16 go...
even further and cast a more general duty to avoid making unreasonable noise.

Even though it is in the enforcement work that an express duty to help prevent damage to the environment is clearest, the forward planning and consent application jurisdictions carry obligations either to lay suitable foundations for the purpose, or ensure consents are shaped to the same end.

Central government roles

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

THE ENVIRONMENT COURT OF NEW ZEALAND

There is one Environment Court for the whole of New Zealand. For a commentary on contemporary work of the Court and some comparative institutions in New Zealand, see a paper by this author and two colleagues entitled, ‘Issues of Access to Justice in the Environment Court of New Zealand’ delivered at an international symposium organised in April 2017 at Auckland, the proceedings of which were published in 2017 in a special issue of volume 29 of the journal Environmental Law and Management.

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

Exceptions to this general policy of transparency include that a judge of the court may make an order for confidentiality of certain aspects of proceedings, usually on the grounds of commercial sensitivity (but with carefully prescribed rights of access by parties in the case or their representatives); and judges in all courts have rights to limit the search-ability of materials that have not yet been used in open court.

Environment Judges

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

Environment Commissioners

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

a. Economic, commercial and business affairs, local government and community affairs;

b. Planning, resource management and heritage protection;

c. Environmental science, including the physical and social sciences;

d. Architecture, engineering, surveying, minerals technology, and building construction;

e. (da) Alternative dispute resolution processes

f. Maori cultural matters’ (section 253 RMA)

There are currently ten environment commissioners. There are also five deputy environment commissioners who participate in the work of the court part-time, and who also have specialist skills that are of considerable value in the work of the court. This is also pursuant to section 253 RMA.

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

**Locations**

The court operates registries in three cities: Auckland, Wellington and Christchurch. It has a registrar overseeing the administration on a national basis, and a deputy registrar in each of the three centres.

The court’s registry staff are usually law graduates with specialist knowledge in environmental law, which considerably assists the work of the judges and commissioners.

The court maintains courtrooms in each of those three centres, and a fairly high percentage of the business of the court is conducted at those three bases. Nevertheless, a considerable amount of the hearing and mediation work of the court is conducted at circuit locations around the country, both in and out of courthouses. Section 271 directs the court to conduct hearings and conferences at a place as near to the locality of the subject-matter to which the proceedings relate as the court considers convenient unless the parties otherwise agree. For instance, the court often sits in courthouses of the District Court and the Maori Land Court, and also in hotel conference rooms, community halls, and similar venues. Such places are used for court sittings, conferences, and for the alternative dispute resolution functions of the court, of which more, later. Section 271 of the RMA (‘Local hearings’) essentially provides that the court shall conduct any conference or hearing at a place as near to the locality of the subject-matter as possible. A consequence of this is that we travel extensively for our work around New Zealand. For instance, my division last year heard an appeal about a proposal for a vast water storage dam in the South Island, and another concerning a proposal for a boat marina in a bay at Waiheke Island near Auckland.

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

**The Court’s Duty or Powers to Prevent Damage to the Environment**

**An Introduction to the Court’s Processes**

Most cases filed in the Environment Court are appeals against decisions of councils. Some other cases are ‘originating’, for instance seeking interpretation of the RMA or national, regional or local plans, or enforcement of plans or environmental duties. The court therefore has wide powers to review decisions of councils and to interpret legislation.

In the last five years the court has also held a ‘first instance’ jurisdiction, called ‘direct referral’, where an applicant for resource consent persuades a council to move the case directly to the court for hearing purposes. This usually results in the court managing and hearing larger numbers of parties than get involved in appeals from council decisions. We have developed many techniques to maintain efficiency as well as good access to justice. Some of these techniques are electronic, and I addressed a conference of courts administrators in Australia in recent times about them, with emphasis on avoiding injustice to self-represented litigants who have limited access to computers or limited computer skills. This is a significant topic on its own.

The cases heard on their merits by the Environment Court are proving, increasingly, to be large and complex. They can involve dozens or hundreds of parties, and very many topics. The marina case just mentioned was a direct referral case in which there were 310 parties, but the great majority thankfully joined forces under the umbrella of a local community group.

Cases lodged in the Environment Court involve more than contests of private disputes. They invariably focus at least equally, and often to a greater extent, on issues of public interest. At the same time, the subject-matter of cases is often valued in the millions or even billions of dollars, particularly those concerned with large developments or infrastructure.

The Environment Court also has enforcement powers, similar to the issuing of injunctions in the general civil courts. Environment judges also sit in another court, the District Court, to hear criminal prosecutions under the RMA for alleged wrongdoings, for instance alleged breaches of the Act or of regional or district plans.
The court has extremely wide powers of procedure. I set out s. 269 of the RMA in its entirety, before commenting on it:

269 Environment Court Procedure
1. Except as expressly provided in this Act, the Environment Court may regulate its own proceedings in such a manner as it thinks fit.
2. Environment Court proceedings may be conducted without procedural formality where this is consistent with fairness and efficiency.
3. The Environment Court shall recognise tikanga Maori where appropriate.
4. The Environment Court may use or allow the use in any proceedings, or conference under s. 267, of any telecommunication facility which will assist in a fair and efficient determination of the proceedings or conference.

The judges of the court have interpreted s. 269 as meaning that the court is publicly accessible or ‘user friendly’, commensurate nevertheless with efficiency, fairness to all and due respect to the institution.

This means that court sittings will to a degree follow the format found in other New Zealand civil courts, but sometimes with a little less formality. For instance, rules about hearsay concerning factual evidence are often less rigidly applied. So, while reasonable decorum will attach to the running of hearings, there may be less formality and legalism than can be found in other courts. This can be helpful to self-represented parties.

Court hearings on appeals from decisions of councils are conducted ‘afresh’, so that the court will want to receive the evidence and submissions presented to it and will be little interested in what was said by any of the parties in the earlier hearing before the council. (The court is, however, by s. 290A of the RMA, required to have regard to the decision of the council or its hearing commissioners).

Independence
The court is to provide a fully independent system of appeals from decisions of councils. Like all New Zealand courts, the Environment Court has no links whatever with other bodies, political or otherwise. Hence it has no links with councils, government departments, other authorities, infrastructure providers, and the like. Courts are a constitutionally separate arm of our system of government, and once set up by Parliament through relevant statutes such as the RMA (and subject to legitimate amendment by legislation), are generally free from intervention and direction by the central government executive.

Some parties not represented by a lawyer or another professional come to court with an expectation that the judge will offer them a high level of assistance in the presentation of their case, because of a perceived imbalance of money and power between themselves and those who are represented by professionals. This is a difficult issue for us, as courts are not constituted to offer free legal aid services. We recognise the imbalance and will offer limited advice in the interests of keeping hearings moving efficiently and without undue delay. Fairness to all parties is important. There is a legal assistance fund, run by a committee of experienced practitioners supported and funded by the Ministry for the Environment. Community groups may apply to that fund for assistance, and the strength and public interest aspects of their cases will be examined by the committee when their application is considered. The fund is however quite small.

In recent times in direct referral cases, we have engaged independent process advisors (at the cost of applicants), in the same way as occurs before boards of inquiry into matters of national significance supported by the Environmental Protection Authority. This has worked particularly well in some very large cases, a notable example of which was the marina case, (with the majority of the 310 parties, mostly self-represented, being persuaded by the process advisors to coalesce under the banner of a well-funded community group). The process advisors also offer considerable advice about court processes, pre-hearing and hearing.

Parties in the Cases
Who can file an appeal in the court, and who can become a party?

A person or body that made an application to a council or sought a plan change, can, if they do not like the council’s decision, file an appeal with the Environment Court. So too can other parties who were involved in the case before the council.

The council is of course authorised to defend its decision, so is automatically a party.
Other people or bodies can join the appeal proceedings as parties if they had been a party (‘submitter’) before the council or can demonstrate that they have a relevant interest in the case that is greater than the general public. These rights of entry to proceedings are carefully limited by the Act and are further restricted by legislation from time to time. Rights of access to justice in the Environment Court are an interesting topic in their own right beyond the scope of this paper.

The 2014 Environment Court Practice Note

Over the years the Environment Court (and its predecessor, the Planning Tribunal) has issued Practice Notes. These have been consolidated in recent years, the latest having been published in 2014 after public consultation was conducted. The consolidation is updated reasonably regularly as processes evolve and are refined, and members of the court are currently reviewing it and preparing changes that it will publicly consult on.

The current (2014) Practice Note is available on the website of the Environment Court at:


Its introductory provisions record that it does not prescribe a set of inflexible rules but is a guide to the practice of the court to be followed unless there is good reason to do otherwise.

The topics addressed in the 2014 Practice Note are, broadly:

- Communication with the court and amongst parties;
- Lodging appeals and applications;
- Direct referrals;
- Case management;
- Alternative dispute resolution;
- Procedure at hearings;
- Expert witnesses;
- Access to court records;
- Glossary of terms.

There are three Appendices:

- Lodgement and use of electronic documents;
- Protocol for court-assisted mediation;
- Protocol for expert witness conferences.

Case management by the Judges (the Pre-trial Work of the Court)

Part 4 of the 2014 Practice Note concerns case management.

Case management is a relatively modern concept in courts internationally and has been strongly embraced in the New Zealand Environment Court in the interests of prompt and efficient resolution of cases, and cost efficiency. The judges, with the support of registry staff, operate a closely diarised system by which the various steps in a case will be the subject of directions from the judge, and actions by parties so directed.

Case management tracks

The court operates case management tracks, a standard track for straightforward cases, a priority track, the name of which is self-explanatory; and a parties’ hold track, to which a case may be adjourned by agreement of the parties or direction of a judge, for other proceedings to catch up, or during mediation, or for other purposes.

Every case filed in the court will be allocated to one or other of these tracks as soon as it arrives. A case can be moved from one track to another during the life of the proceeding.

Greater detail concerning the three tracks can be found in paragraphs 4.4, 4.5 and 4.6 of the 2014 Practice Note.

Judicial conferences

Paragraphs 4.7 and 4.8 of the 2014 Practice Note cover judicial or ‘pre-hearing’ conferences. These are usually conducted by telephone at an appointed time, or in a courtroom if the parties are too numerous for a phone conference or if the issues are particularly complex.

Virtually all aspects of judicial conferences are designed to keep proceedings moving fairly and efficiently, particularly if it appears that there will be a need for a hearing.

Some of the business conducted in judicial conferences can amount to the conduct of an interlocutory hearing (held to enable determination of a preliminary point that will assist the proceeding overall, such as, for instance, a party’s application for a time waiver, or an application to strike out a party or a topic, or to resolve a legal jurisdictional issue).

Sometimes interlocutory arguments will be dealt with ‘on the papers,’ which means no hearing or conference, but instead parties filing submissions, and a judge considering those submissions and issuing a written decision.
The Role of Expert Witnesses

Most cases in the Environment Court now involve many topics in respect of which specialist professional advice is available, and evidence offered by experts in many fields. Examples include engineering in its many branches, landscape, economics, Maori cultural issues, ecology in its many branches, social issues, and so forth.

The court has high expectations for the quality of work by expert witnesses, and there is an entire section in the 2014 Practice Note (Part 7) setting these out.

In addition, many papers have been written about the topic, and most professionals in New Zealand who are regular expert witnesses before the Environment Court are familiar with both the relevant provisions of the Practice Note and the aforementioned papers.

The court has an expectation that an expert called by a party will be independent, objective, and entirely professional. Questions can also arise as to the extent of relevant expertise and experience in relation to any given topic in the case. Experts are required to avoid being advocates, and to provide their own professional opinions, not that of the party who hires them. Conflicts of interest must be avoided.

Expert witnesses have an overriding duty to assist the court impartially, free from direction from their client.

Increasingly, groups of expert witnesses are required to conduct a conference, often facilitated by an environment commissioner, to endeavour to reach professional agreements where possible, and narrow issues. This is to cut down the length of hearings, and so reduce the cost of cases. These conferences are held during the operation of a timetable for preparation for hearing, often between the evidence-in-chief stage and that of rebuttal evidence.

The 2014 Practice Note has, as an Appendix, a protocol for the conduct of these conferences.

Processes for the conferral of groups of expert witnesses have become more refined in recent times. In 2012 the court conducted workshops with the Resource Management Law Association in 11 centres around New Zealand for the purpose of refreshing the 2014 Practice Note and issuing some guidelines about process for expert conferencing. A paper on that subject can be found on the court’s website. The ‘learnings’ from those road-show sessions substantially informed the content of the Part 7 and Appendix 3 of the 2014 Practice Note.

The Conduct of Hearings (the Trial Practices of the Court)

I refer to Part 6 of the 2014 Practice Note, entitled Procedure at Hearings. I will set out some of its paragraphs and offer commentary.

Paragraph 6.1 deals with the order of presentation by parties in a hearing. It reads as follows:

The Court usually conducts an appeal against a decision on an application for a consent or permit as a complete rehearing. In the case of a directly referred application, the hearing will be the first occasion on which the evidence has been heard and been available for challenge by opposing parties. The Court will normally hear first the person who applied for the consent or permit - followed by the parties who support the grant. Then the Court will hear the parties who oppose the grant of the consent, approval, or permit.

The order of parties in complex cases can vary, and is a matter for the hearing Judge. Wherever possible, the order of parties should be discussed at a pre-hearing conference, or made the subject of prior directions. If in respect of a particular appeal or group of appeals it appears that it will be helpful for the Court to first hear the Council before the applicants or other parties who would ordinarily commence, the Court may so direct. This will often occur in hearings on plan or policy statement appeals.

In proceedings where there is a burden of proof upon a particular party, for instance enforcement proceedings, the Court will usually hear that party first.

Presentation of evidence

Clause 6.3 of the 2014 Practice Note concerns the presentation of evidence. It provides for use of electronic or hard copy statements, directions about the manner in which evidence will be given, likelihood of the court pre-reading the evidence before commencement of the hearing rather than having witnesses read their statements aloud in court, and other matters.

Where the court pre-reads the evidence, the witness, when called, will confirm his or her statement of evidence as correct, and cross-
examination will immediately follow unless there are corrections to be made and/or supplementary matters that have arisen earlier in the hearing which the witness should have the opportunity to address.

It has become the invariable practice for the court to pre-read all the evidence pre-lodged in the case, rather than having each witness read out his or her prepared statement in open court. The court will therefore hear submissions from the advocates, and then the questioning of the witnesses. The court will also question most witnesses itself after the advocates have done so.

Questioning of witnesses is one of the areas of some complexity and difficulty not only for parties who are not represented by a professional, but even for professionals themselves at times. Another issue is that the time for questioning witnesses is not the time for making statements. Self-represented parties not familiar with court processes often struggle with this.

Paragraph 6.4 of the 2014 Practice Note concerns the viewing by the court of a site or area at issue, and it provides as follows:

> In many cases, it is helpful for the members of the Court to view the site and locality at issue. In general, the taking of a view assists the Court to better understand the evidence presented in Court. The Court will normally confer with the parties about visiting the site, timing, a suggested itinerary, and other relevant details that the parties or the Court may raise.

> If the taking of a view presents the Court with additional or different information to that provided in Court, or information that no witness has correctly or accurately addressed in evidence, and the Court considers that the information might influence it in making its decision, the parties will be consulted to ensure that they have an opportunity to explain or comment upon the information concerned before the case is determined.

The court will discuss in conference with the parties in open court the details for inspection of sites and localities, particularly in cases where the court will undertake those inspections without being accompanied by the parties (in the majority of cases). Care must be taken to ensure that the process is open, thorough and fair.

**Exhibits**

Paragraph 4.17 of the 2014 Practice Note deals with the issue of exhibits, and stresses a common approach by parties where possible, with respect to quality, manageable presentation, indexing and the like.

**What the Court Considers in Reaching a Decision**

The guiding principles on this are found in many sections of the RMA that provide matters to be considered concerning the preparation of Policy Statements and Plans, and consideration of resource consent applications and enforcement applications. Above all is Part 2 of the Act, the purpose and principles of the legislation.

For today’s purposes, let me summarise and say that beyond the legal technical requirements, the court will confine its inquiry to the evidence of fact and expert opinion presented to it, the submissions, and exhibits lodged, to the extent that they are relevant to the jurisdiction of the case. The jurisdiction of any case is set largely by the primary documentation which includes the appeal document, relevant submissions and further submissions filed previously with a council, the Reply document filed by the council, the notices by other parties under s. 274 of the RMA (again to the extent that the matters covered in those notices are relevant to the case at hand), and relevant provisions of policy statements, plans, and other statutory instruments.

I stress that the court will be considering only matters of relevance that are offered to it in evidence and submissions that can be tested in court. Members of the court are however entitled to bring their own worldly experience to a case, but in doing so must put the issues to the parties and relevant witnesses in open court. The court is, and must always be trusted to be, a truly independent body.

**The Court’s Cost Regime and Security for Costs**

By way of section 285 of the RMA, the court may order any party to pay costs to another party, or to the Crown, to help offset expenses incurred in the hearing. Any party can make an application for costs, and any party involved in an Environment Court appeal can be liable for costs. Unlike in other courts, there is no rule or general practice that says that an unsuccessful party to an appeal must pay the other party’s costs. However, in the case of matters that are directly referred to the court, there is a presumption that a significant portion of the cost to the court of the process will met by the applicant.
In determining an application for costs, the court has discretion to decide whether it is reasonable to award costs, and to determine the appropriate amount. Costs awards are based on the costs actually incurred, and a party applying for costs will usually be asked to provide the court with the relevant invoices setting out the costs and expenses incurred. Costs can be indemnity costs (full costs) or a lesser amount of costs awarded at the court’s discretion. Fairly common awards (where it is necessary to award costs at all) amount to approximately 25% to 33% of proved and relevant costs incurred by another party or parties.

The purpose of awarding costs is to compensate a party for costs incurred where it is fair to do so. Costs are not intended to penalise an unsuccessful party or to discourage people from participating in appeals. The court will only award costs if it decides that is justified in the circumstances of the case and will determine each costs application based on its merits.

The Act provides for the court to make orders for security for costs. Security for costs may be requested if it is suspected that the person bringing the appeal may not have sufficient financial resources to pay costs should their appeal be unsuccessful, and an award of costs later made against them. The court is not obliged to grant any request for security for costs and will consider the interests of all parties before doing so. Even if an order for security for costs is granted and the appeal is lost, this does not automatically mean that costs will be awarded. Some commentators consider that the court’s costs regime and filing fees, set by Parliament, raises access to justice issues. It is beyond the scope of this paper to explore those.

**Alternative Dispute Resolution in the Environment Court (Primarily Mediation)**

Mediation is a largely voluntary process for parties in dispute to come a resolution with help from a facilitator and is therefore quite different from hearings or trials that impose solutions. Mediation is authorised by s. 268 of the RMA and is a free service of the court. I say that mediation is a largely voluntary process because a degree of compulsion entered the law by amendment to the RMA in 2017, whereby any party not wishing to attend mediation is compelled to seek leave from a judge.

Mediation is conducted by the court’s commissioners, who are fully trained in the technique and very experienced. Mediation is conducted very early in the life of most cases, and results in resolution of approximately 75% of all cases filed in the court.

There is an extensive section in the 2014 Practice Note on ‘Alternative Dispute Resolution’ (of which mediation is the principal type in the Environment Court). There is also an Appendix containing a Protocol for Court-Assisted Mediation.

Mediation is strongly encouraged by the judges because, even if a case is not capable of full settlement, some aspects can generally be resolved, thus narrowing the issues in dispute and reducing court hearing time and cost to all parties. Furthermore, the court encourages parties to understand that there are often many ways of viewing any particular problem and how it might be resolved. Resolution of cases can sometimes be quite innovative. For instance, side agreements on matters outside the dispute (that are not shown to the judge) are sometimes entered into.

Matters discussed during mediation are confidential to the parties. Only the written signed outcome from mediation can be reported to the court. This confidentiality is important to the process. It means a party can make offers or suggestions aimed at resolving the matters without fear of, later, facing adverse consequences.

If agreement on all matters is reached during mediation, a consent memorandum is drawn up either at the mediation session or afterwards by one of the lawyers or parties present. Once the wording is agreed by all the parties and signed, it is sent to a judge with a request that a Consent Order be made. In considering a draft Consent Order the court will ensure that the result conforms with the requirements of the RMA. It is only on rare occasions that such orders are not signed by the judge.

Mediation is certainly much less expensive than a court hearing with its witness expenses, legal costs and the risk of an award of costs by the court. Mediation is a process that also offers opportunities for a wider range of solutions than are available in a court decision.

Parties can represent themselves and often do at mediations. They can bring supporters to help them, and they can bring expert witnesses and their lawyers.

**CONCLUSION**

I believe that the New Zealand resource management system is almost unique in the
world as a regime for governing the planning of land, water, and air use, based on the principle of sustainable management of natural and physical resources for the future. The Environment Court has a major part to play in its administration. There is now a considerable body of case law that has developed over the 28 years since the RMA was first passed.

The Environment Court is a specialist court whose judges were previously lawyers practising in the resource management field, and whose commissioners were professionals in their own fields, such as engineering, planning, ecology, economics and the like. In my view, specialisation is important for good environmental regulation and for advancement of knowledge about it.

It is also of importance to our system that we have (we hope) clear legislation and national, regional and district planning instruments. The court has also set up detailed rules about its procedures which are published in its 2014 Practice Note, so that parties can work efficiently, and cases can be resolved as quickly as possible.

The duty of the court to help prevent environmental damage is most clearly seen in its Enforcement Order jurisdiction, and prosecutions, but can also be seen in the pro-active plan appeal work, assisting in the setting of objectives, policies and methods in plans for these purposes. It can also be seen in cases involving applications for resource consents. In other words, the concept pervades much of the work of the court either directly or indirectly, ultimately to serve the purpose of the RMA, namely, the promotion of sustainable management of natural and physical resources.
THE DIGEST REACHES ITS ONE HUNDREDTH YEAR: CENTENARY TRIBUTES

The Rt Hon Lady Arden of Heswall DBE, PC, Justice of the UK Supreme Court, and The Hon Michael Kirby AC CMG, Justice of the High Court of Australia (1996–2009) and President of the Court of Appeal, Solomon Islands (1995–1996). These centenary tributes first appeared in The Digest, Volume 6(1) (4th Reissue) (May 2019) and in a separate centenary booklet published by LexisNexis. The Commonwealth Judicial Journal is honoured to reprint them for the benefit of its readers. In a rare departure from the journal’s house style, endnotes included in the tributes as originally published have been preserved.

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Abstract: The Digest, formerly known as the English and Empire Digest, commenced publication in 1919 and, thus, has now reached its centenary year. On any view, this is a momentous anniversary for one of the most venerated legal research resources in the common law world. Now published by LexisNexis, The Digest is an encyclopaedia of case law which contains summaries of English, Scottish, Irish, Commonwealth and European cases. They are arranged by subject area and are further subdivided so those dealing with similar points of law appear together, regardless of their date. The first edition was published in 49 volumes between 1919 and 1932 under the direction of the Board of Editors, headed by The Rt Hon The Earl of Halsbury, Lord High Chancellor of Great Britain, and Sir Thomas Willes Chitty, Managing Editor.

The authors of the centenary tributes discuss the storied history of The Digest and its predecessor, acknowledging and summarising the extraordinary contributions both have made, over a century, to the growth and evolution of the law across the common law world.

Keywords: The Digest – The English and Empire Digest – Centenary of, – impact upon the evolution of the law of, – impact upon the dissemination of the law of, – contribution to the principle of open justice of,

The Rt Hon Lady Arden of Heswall DPE, PC

Congratulations to The Digest on attaining its centenary! There cannot be many law books, save perhaps Halsbury’s Laws of England which celebrated its centenary in 2007, which are still in print, updated and revised, a hundred years after their first publication.

What makes The Digest so special? I can recall as a student, studying at Harvard Law School in the United States, going down into the basement of the library to find the volumes of The Digest and opening up an unparalleled treasure trove of cases on every conceivable topic. They were exactly what I then needed to provide an explanation of the law of (as it happened) the United Kingdom in a distant place. I can imagine other people in faraway places, without any law reports to consult, also finding them invaluable as giving them immediate access to the common law in several jurisdictions.

The Digest is the continuation of an essential tradition of the common law, that of summarising cases in order to show the development of the law and the limits of any principle or rule of the common law. The tradition started with the Yearbooks and has continued ever since through the dedicated work of jurists down the centuries. The common law is not built on philosophical norms but winnowed out in decided cases through the white heat of litigation. The Digest has the advantage over the old abridgments of cases in that it is not only organised into different subjects; it is also subdivided many times into different subdivisions of topics to make the vast treasure trove of case law more accessible to the busy reader.

It is difficult to know in how many different ways The Digest has been used over the last century, or who the users of The Digest have been. Some current series of law reports across the Commonwealth use The Digest as an alternative reference for cases which are cited in the law reports. This alone suggests that this information is likely to be of use to those who read these law reports. There are also cases where advocates have used references to The Digest to explain relevant UK law in cases in other jurisdictions (see, for example, Esquire Electronics Ltd v Roopanand Bros [1991] RPC 425 from the Supreme Court of Appeal of South Africa). In the case of New Zealand, the Chief
Justice, the Rt Hon Dame Sian Elias, speaking to the American Law Institute in 2007, noted how:

...[i]n 1920, publication of the English and Empire Digest accelerated the trend away from citation of American material. It not only filled the need earlier supplied by American digests but also made accessible for the first time the case law of other countries in the British Empire, most notably Canada and Australia. Certainly, the citation of Canadian and Australian authorities in New Zealand courts flourished from that time, and the cases in which United States authorities were cited dwindled.

The importance of The Digest may well also have been the subtle one over the years of encouraging users to look for some comparative law from some other jurisdiction. It may be a coincidence or not that, before the publication of The Digest there were hardly any citations in UK case law, other than in the Privy Council, from decisions of (for example) the High Court of Australia (created in 1901) or of the Supreme Court of Canada (established in 1875), even though those courts were certainly in operation before The Digest was produced.

The common law lends itself to borrowing, or even simply gaining inspiration, from other jurisdictions, which is very convenient because the law develops at different rates in different environments and the experience of other jurisdictions is useful to judges having to deal with problems for the first time.

The emphasis of The Digest on case law is consistent with the empirical approach of the common law or its propensity and ability to evolve. Principles of law in a common law system generally do not emerge in an oracular form from the mouths of judges. They usually are only articulated when it is clear from a series of cases that such a principle exists. It is, moreover, the continual role of common law courts in every era to keep the common law up to date and to apply its principles in new circumstances.

Its evolution can be seen in the principle of open justice. It is an important value of the common law that judicial proceedings should be conducted in an open and transparent way. The court process is largely oral or built around the oral model. This distinguishes common law jurisdictions from most civil law systems where the process is largely written and may not involve any hearing. Open justice means that the courts so far as possible sit in public so that members of the public and the media can hear what is happening. In a common law system, cases are fought out in open court by fearless advocates before independent judges. Court proceedings are very much a part of the national conversation in common law countries.

The common law brought together all these features of court proceedings as they developed over time under the umbrella of the open justice principle. But this principle has to be applied today in new ways. The process is becoming increasingly written in the interests of efficiency and written documents are handed to the judge where in the past evidence or arguments would have been presented orally. People increasingly observe or hear about proceedings, not by personally attending the court, but through the media or by media reports. The media in turn is increasingly reliant on the records of the court and the documents which the parties prepare for use in the court. There are fewer journalists in court now as there are more cases on which they should report happening at the same time than there are journalists able to attend them. Greater use is made of information technology. In considering how the open justice principle should apply in these circumstances, the courts of the United Kingdom have referred to decisions of other Commonwealth courts (see for example Khuja v Times Newspapers Ltd [2017] UKSC 49). The Supreme Court of the United Kingdom, which this year celebrates the tenth anniversary of its creation as a body separate from the House of Lords, and of which I am honoured to form part, endeavours to lead the way in the United Kingdom by referring to the decisions of other leading Commonwealth courts.

One of the great events at the end of the twentieth century was the end of apartheid in South Africa. When that occurred, President FW de Klerk, obviously an experienced hiker, memorably said that when a person gets to the top of a hill, he can sit down and admire the view. A person of destiny, on the other hand, “knows that beyond the hill lies another and another. The journey is never complete.” Similarly, with problems in society and the ensuing complications in the legal world, there are always more. It has been ever thus, and will ever thus be, with the development of the common law. The common law is an institution of destiny. So, there will be more and more case law to fill the volumes of The Digest.

I am delighted to write a Foreword on this important occasion alongside the Hon Michael
Kirby AC CMG. He and I have travelled the road together at legal celebrations around the Commonwealth, and his Foreword to this centenary edition of The Digest has so admirably covered many points, including The Digest from the historical perspective.

The invention of The Digest was not only breath-taking and ambitious, but visionary. We are all indebted to its distinguished editors and contributors and to its publishers. Again, I warmly congratulate The Digest on its centenary.

Mary Arden
Justice of the Supreme Court of the United Kingdom
London
February 2019
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The Hon Michael Kirby AC, CMG

A lot was happening in the world one hundred years ago. After the Armistice of 11 November 1918, the guns fell silent on the battlefields of the Great War (1914–18). In Germany, Austria-Hungary and Russia, the rulers of three mighty empires, had been overthrown and their empires dismantled. The successful Allies, led by the United Kingdom, France and the United States of America summoned the defeated Central Powers to learn the terms of the peace treaties. In 1919, the world hoped that the “war to end wars” would bring peace and a restoration of order to the international community.

Some hopeful developments quickly followed the end of the war. By 1919, the British Empire appeared to have emerged from the Great War with its territories enhanced and its authority increased. Most of its dominions and colonies had contributed to the success of the Allies on the battlefield. Many were beginning to think in terms of greater legal and political independence. So this was the environment in which, on 1 February 1919, Butterworth & Co in London launched their new, bold project The English and Empire Digest (E & ED). It had taken five years to get it ready for publication. Whilst Britain’s fate hung in the balance, this astonishing work of taxonomy and legal analysis was being assembled. It was designed to share with judges and lawyers in the United Kingdom, the Empire of India, the Dominions and other territories beyond the seas the shared blessings of English law and British justice.

The E & ED offered succinct, accurate and informative summaries of judicial decisions which encapsulated the principles of the English common law. That was the law substantially applied throughout the Empire on which ‘the sun never set’. Most of the law in the Empire was still, in 1919, declared by the judges, not made by parliaments. The judges were men (and there were no women at that time) professionally trained, uncorrupted by personal interest and skilled in the analysis and exposition of the law that proceeded, as Tennyson had put it, “from precedent to precedent”. The judge-made law was conceived as an integral body of rules to be discovered and expounded by judges, assisted by trained lawyers.

In the Introduction to the new E & ED, the managing editor of the new project captured the symbolism of moving from war to law:

[I]t was in order to uphold… freedom and all the principles of right which are so dear to the Empire, that her sons came together from all quarters of the world and fought and learned to appreciate more fully the sterling qualities of each other during the great War that has ravaged the world for the last four years. Now, when the dawn of Peace has arisen and the bonds of friendship… are daily becoming more secure, it is a fitting moment to produce a work that… will trace the source and growth of the law of England and of the Empire… in the era of Peace we hope is now opening out before us.

The cases recorded in the first years of the E & ED included many that reminded the readers of the impact of the recent war on the law’s discipline. Whilst the orders and reasoning of the Judicial Committee of the Privy Council were legally binding in nearly all of the British dominions and colonies at that time, formally the decisions and reasoning of the House of Lords in English cases were not. This notwithstanding, even in the 1960s many judges in Australia and other lands still treated the House of Lords’ decisions as binding on them. In the far flung Empire, judges and lawyers pored over the reasoning of the Privy Council because, until the middle of the 20th century, its judges at Westminster had the final say over most (or all) areas of their law. Soon, however, the judges were beginning, for their differing reasons, to question and challenge this obedience.

Notwithstanding formal constitutional independence and the partially liberating provisions of the Statute of Westminster, the decisions of the English judges continued to
have a huge influence on the judges and lawyers of the Empire and later Commonwealth. They would consult the E & ED to find what the English judges were saying. In consequence, their reasoning provided a market for the E & ED even in fully independent countries. Subsequently, when the English judges occasionally acknowledged errors in their past reasoning (for example on advocates’ immunity from suit in negligence or on joint criminal responsibility of co-offenders), these revelations persuaded independent courts elsewhere to follow their lead. However, sometimes judges (especially in Australia) declined to see the light.

However, the outcome of particular cases were less important than the recognition that a global conversation was continuing between courts and judges in Commonwealth countries, especially over the content of the basic principles of the common law. The decisions of the senior judges of the United Kingdom continue to this day to influence high courts of the former British Empire. In earlier decades (except in Privy Council decisions arising from the jurisdiction in question) it was rare to see references by English judges to judicial reasoning in Commonwealth countries. However, in more recent times the conversation of shared ideas has become much more reciprocal. This phenomenon, led by Lord Bingham of Cornhill and his successors, has made awareness of comparative constitutionalism, comparative treatment of human rights law and of other fields of legal doctrine valuable and influential. It enhanced the value of a global digest. That value continues and increases, with the aid of new technology.

Eventually, the word “Empire” in the title of the old E & ED came to appear anachronistic. The age of authority and obedience gave way to the age of persuasion and influence. This is still with us.

It would be a mistake to think that everything about the English common law in the early days of the E & ED was good and just. There were, for example, many decisions demonstrating ingrained discrimination against women, even the refusal to include them in the statutory word “person”, as Baroness Hale and many others have pointed out. Just as surprising to today’s eyes, were the numbers of cases reported in the first volumes of the E & ED showing hostility towards sexual minorities in the judicial rulings digested there. Yet arguably, the worst forms of discrimination, contained in the early volumes, were on the grounds of race. Including the race of Indigenous people in settled colonies.

Just weeks after the launch of the E & ED in February 1919, the Amritsar Massacre occurred at the Jallianwala Bagh in April 1919. More than a thousand peaceful demonstrators were shot dead at close range on the orders of Colonel Reginald Dyer of the British Army in India. In the House of Commons Winston Churchill denounced this action as “monstrous”. Prime Minister H.H. Asquith described it as “one of the worst outrages in the whole of our history”. The Queen, as Head of the Commonwealth, on a visit to India in 1997, paid respects to the memory of the dead and injured. Many historians trace the beginning of the end of the British Empire to the shots that rang out from Amritsar. Those shots proclaimed that non-settler territories would have to struggle and fight for the freedoms and liberties taken for granted by subjects and settlers of British stock. “British justice”, in and after 1919, was sometimes selective.

This makes all the more remarkable the continuing global power and influence of the ideas of English law and the shared work of the judges and lawyers writing in the English language. Two series published by LexisNexis (the successor to Butterworth & Co) contribute to this legacy to this day. These are The Digest (successor of the E & ED) and the Law Reports of the Commonwealth (LRC) (a series of leading judicial decisions of general interest and value from all Commonwealth countries, published since 1985).

Those who launched the E & ED a hundred years ago, and the LRC more recently, gave substance to the idea of a peaceful association amongst nations and lawyers, linked ultimately not by guns and power but by reason, a common language, and shared ideas of law, justice and fair procedures, upheld before independent decisionmakers that would be more enduring. The publisher in London and those who conceived and implemented these series, and who adapt and preserve them worldwide for the current age, deserve our grateful thanks and heartfelt praise. With enthusiasm and pride I join in the words of Lady Arden, celebrating this remarkable centenary.

Michael Kirby
Justice of the High Court of Australia (1996-2009)
President of the Court of Appeal of the Solomon Islands (1995-96)
Chair, Consultative Committee, Law Reports of the Commonwealth (1985-present)


4. Skelton v Collins (1966) 115 CLR 94 at 104. See also M.D. Kirby “Australia” in Blom-Cooper and Ors ibid n. 1, at 342 fn 27.

5. Parker v R (1963) 111 CLR 610 at 632–633, per Dixon CJ.


10. Adarsh Sein Anand, “India”, in Blom-Cooper, ibid, 367 at 369

11. M.D. Kirby, “Australia” in Blom-Cooper, ibid at 338 at 345. See also the influence of the Supreme Court of India on the House of Lords in Anand, ibid, 367 at 375.


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The Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 amended the Electoral Act 1993 so as to extend the prohibition on voting, formerly confined to prisoners sentenced to a term of three or more years’ imprisonment, to all prisoners. The respondent prisoners sought a declaration that the 2010 amendment was inconsistent with the right to vote contained in s 12(a) of the New Zealand Bill of Rights Act 1990 (‘the Bill of Rights’). An application to strike out the proceedings on the basis that there was no jurisdiction to make such a declaration was dismissed, and the High Court granted the declaratory relief sought. The Attorney General appealed to the Court of Appeal on the jurisdiction point. The Court of Appeal dismissed the appeal on the basis that there was a power to make a declaration and, with one qualification, considered it was not unreasonable to make a declaration in the instant case. That qualification concerned one respondent, T, who was held not to have standing as he would have been prevented from voting by the earlier legislation. The Attorney General appealed, and T cross-appealed. The submissions for the Attorney General in support of the proposition that the High Court did not have power to make a formal declaration focused on the language of the Bill of Rights, on its legislative history and on the nature of the judicial function. The argument was made, first, that in preserving parliamentary sovereignty, s 4 of the Bill of Rights contemplated enactments the courts could consider were inconsistent with the rights and freedoms in the Bill of Rights; it was accordingly not correct to treat that situation as a breach of the Bill of Rights requiring remedy. Secondly, it was contended that the making of a declaration was an advisory opinion and thus outside the judicial function. It was accepted on the appeal that the 2010 amendment was inconsistent with s 12(a) of the Bill of Rights.

HELD: Appeal dismissed, cross-appeal allowed.

(1) (William Young and O’Regan JJ dissenting) An effective remedy should be available for a breach of the Bill of Rights and the courts could draw upon the ordinary range of judicial remedies to provide such a remedy. Such an approach was not inconsistent with the terms of the Bill of Rights, but, on the contrary, was a means of meeting its stated objectives. Those purposes included protecting the rights and freedoms contained within it as well as affirming New Zealand’s commitment to international human rights instruments, which required those whose rights were violated to have an effective remedy. In a situation such as that of the instant case, there was no effective remedy. The importance of the rights suggested that, unless granting such a remedy was inconsistent with the statutory language, the courts should provide the usual approach and provide a remedy. The Bill of Rights expressly recognised that it applied to the legislative branch. The effect of s 4 was that the courts could not, for example, refuse to apply the voter disqualification only because of inconsistency with the Bill of Rights, but said nothing about the issue in the instant case. It was clear that the scheme of the Bill of Rights preserved Parliament’s ability to legislate inconsistently with rights. However, a formal declaration to the same effect was not in conflict with that. Rather, the Bill of Rights remained as the standard or palimpsest albeit Parliament had exercised its power to legislate inconsistently with that standard. That analysis was not inconsistent with the legislative history of the Bill of Rights, including that it was enacted as an ordinary statute rather than as supreme law. Moreover, the declaration granted by the High Court was a formal declaration of law, and, in particular, of the effect of the 2010 amendment, on the respondents’ rights and status. It provided formal confirmation that they were persons who were disqualified to vote by a provision inconsistent with their rights. The making of such a declaration was not inconsistent with the judicial function of the courts. The appeal would, accordingly, be dismissed (see [38]–[41], [43]–[44], [46], [48], [53]–[56], [65], [71], [74], [95], [101], [104],
The appellant was tried and convicted in the magistrate’s court and sentenced to three years’ imprisonment. He was subsequently released by an order of the High Court, which held that the second respondent magistrate (‘the magistrate’) had attempted to intervene to prevent the state from closing its case; did not inform the appellant, his legal representatives or the prosecutor that the state’s case had been closed on a previous occasion; had unduly interfered with the state’s case; and had thereby denied the appellant a fair trial. The appellant issued a combined summons against the first respondent Government of the Republic of Namibia, the magistrate, the third respondent Magistrates Commission and the fourth respondent Attorney-General. The appellant contended that the manner of his conviction had deprived him of his personal liberty otherwise than by the due process of the law and in conflict with the Constitution of the Republic of Namibia (‘the Constitution’). The appellant alleged that the respondents were liable to him jointly and severally, the one paying, the others to be absolved in the amounts of N$2m being damages for contumelia, deprivation of freedom and discomfort, and N$100,000 being costs reasonably expended to approach the High Court to secure his release. The parties chose to have the matter determined in the High Court by way of a stated case and agreed that, for the purposes of deciding the case, the court should assume that the magistrate had acted unlawfully and wrongfully during the appellant’s trial, and that her conduct had been actuated by bad faith, malice of fraud. The parties asked the court to determine three questions: (i) whether the state could be held liable for the judicial acts of a magistrate because, while presiding over the case of the appellant, the magistrate was exercising the judicial power of the state? (ii) whether the answer to that question was affected by the constitutionally entrenched principles of the independence of the judiciary, the rule of law and the separation of powers doctrine? (iii) whether, on the assumption that the allegations pleaded by the appellant against the magistrate were established, the government and/or the Magistrates Commission and/or the Attorney-General would be liable? A majority of the High Court answered ‘No’ to question (i), ‘Yes’ to question (ii) and ‘No’ to question (iii), and held that it would not be appropriate to create essentially a new remedy in cases where adequate provision was made by both statutory law and the common law, and that the provisions of the Constitution which enforced the separation of powers between organs of state militated against the recognition of state liability for the actions of the judiciary. The appellant appealed, asking the court to find that the Constitution recognised state liability for the delicts of judicial officers whilst performing judicial functions.

HELD: Appeal dismissed.

It was not necessary to extend liability to the state for the mala fide, malicious or fraudulent conduct of a judicial officer. Doing so might create a far worse mischief than not extending it. Therefore, the court below had been correct in answering the first and second questions posed in the stated case in the negative and affirmative respectively. The damages claimed by the appellant against the state organs as compensation were identical in nature and purpose to that which was claimable from the alleged actual wrongdoer. When there was an existing remedy under the ordinary law, the court had to be satisfied of the merits of recognising a new remedy against the state under the Constitution, especially if doing so posed a risk of undermining a foundational amendment expressly continued the prohibition on voting for long-term prisoners especially in the context of a case focused on the jurisdiction of the court to make a declaration of the type sought. The cross-appeal would, accordingly, be allowed (see paras. [69], [71], [120], [145]).
value of the Constitution—that of an impartial and independent judiciary subject only to the Constitution and the law. The most compelling argument in favour of extending liability to the state was that the latter was a more reliable defendant for full and certain recovery than an individual judicial officer. Absent that justification, it could not be seen what other compelling reason there was to extend liability, for there was an existing recognised right of recourse against an individual judicial officer. An effective remedy did not equate to full satisfaction of the loss that had been suffered. No authority had been cited in support of such a proposition. In addition to the cause of action both in delict and under the Constitution against a rogue judicial officer, in the criminal context, the Namibian legal system afforded an aggrieved person such as the appellant a whole range of remedies to deal with a deprivation of the right to liberty otherwise than according to procedures established by law (see [110], [113]–[115], [117]). Maharaj v A-G of Trinidad and Tobago (No 2) [1978] 2 All ER 670 and A-G v Chapman [2012] 1 LRC 418 distinguished. Gurirab v Government of the Republic of Namibia 2006 (2) NR 485 (SC); on appeal from 2002 NR 114 (HC) applied. Kemmy v Ireland [2009] 4 IR 74 adopted.

Shine v Union of India
27 September 2018
Supreme Court of India [2019] 3 LRC 15
Dipak Misra CJI, AM Khanwilkar, RF Nariman, Dr Dhananjaya Y Chandrachud and Indu Malhotra JJ

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The petitioner, in public interest litigation filed under art 32 of the Constitution of the Republic of India 1950, challenged the constitutionality of the offence of adultery set out under s 497 of the Indian Penal Code 1860 (‘the IPC’) read with s 198(2) of the Code of Criminal Procedure 1973 (‘the CrPC’). Section 497 of the IPC provided: ‘Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.’ Section 198 of the CrPC provided, so far as material: ‘(1) No Court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code (45 of 1860) except upon a complaint made by some person aggrieved by the offence ... (2) For the purposes of sub-section (1), no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable under section 497 or section 498 of the said Code: Provided that in the absence of the husband, some person who had care of the woman on his behalf at the time when such offence was committed may, with the leave of the Court, make a complaint on his behalf’. The petitioner contended that s 497 of the IPC and s 198(2) of the CrPC were arbitrary and violated fundamental rights protected under the Constitution, namely the right to equality (art 14), the right to freedom from discrimination (art 15) and the right to personal liberty (art 21).


(Per Dipak Misra CJI and AM Khanwilkar J) Section 497 of the IPC treated a married woman as a property of the husband. Section 497 of the IPC did not bring within its purview an extra-marital relationship with an unmarried woman or a widow. Section 198(2) of the CrPC also treated the husband of the woman as deemed to be aggrieved by an offence committed under s 497 of the IPC. It did not consider the wife of the adulterer as an aggrieved person. The offence and the deeming definition of an aggrieved person was absolutely and manifestly arbitrary. If the entire provision was scanned on the one hand, it protected a woman and on the other, it did not protect the other woman. The rationale of the provision suffered from the absence of logicality of approach and, therefore, suffered from the vice of art 14 of the Constitution being manifestly arbitrary. The court, with the passage of time, had recognised the conceptual equality of woman and the essential dignity which a woman was entitled to have. There could be no curtailment of the
same. However, s 497 of the IPC effectively did the same by creating invidious distinctions based on gender stereotypes which created a dent in the individual dignity of women. Moreover, the emphasis on the element of connivance or consent of the husband tantamounted to subordination of women. Therefore, the same offended art 21 of the Constitution. Adultery stood on a different footing from other criminal offences. If it was treated as a crime, there would be immense intrusion into the extreme privacy of the matrimonial sphere. To treat it as a criminal offence would offend the two facets of privacy of the Constitution. Adultery subordinated women. Therefore, the same or consent of the husband tantamounted to the emphasis on the element of connivance of women. Moreover, on gender stereotypes which created a dent in the Constitution. Adultery subordinated women. Therefore, the same

(Per RF Nariman J (concurring)) The ostensible object of s 497 of the IPC, as pleaded by the state, being to protect and preserve the sanctity of marriage, was not in fact the object of s 497 at all. The sanctity of marriage could be utterly destroyed by a married man having sexual intercourse with an unmarried woman or a widow. Also, if the husband consented or connived at such sexual intercourse, the offence was not committed, thereby showing that it was not sanctity of marriage which was sought to be protected and preserved, but a proprietary right of a husband. In addition, no deterrent effect had been shown to exist, or to ever have existed, which could be a legitimate consideration for a state enacting criminal law. Section 497 was also discriminatory and violative of arts 14 and 15(1) of the Constitution. In treating a woman as chattel, it was clear that s 497 discriminated against women on grounds of sex only, and had to be struck down on that ground as well. Section 198 of the CrPC was also a blatantly discriminatory provision, in that it was the husband alone or somebody on his behalf who could file a complaint against another man for that offence. Consequently, s 198 also had to be held constitutionally infirm (see [24]–[25] of the judgment of RF Nariman J).

(Per Dr Dhananjaya Y Chandrachud J (concurring)) Criminal law had to be in consonance with constitutional morality. The law on adultery enforced a construct of marriage where one partner was to cede her sexual autonomy to the other. Being antithetical to the constitutional guarantees of liberty, dignity and equality, s 497 of the IPC did not pass constitutional muster. It followed that:

(i) s 497 lacked an adequately determining principle to criminalise consensual sexual activity and was manifestly arbitrary. Section 497 was a denial of the constitutional guarantees of dignity, liberty, privacy and sexual autonomy which were intrinsic to art 21 of the Constitution; (ii) s 497 was based on gender stereotypes about the role of women and violated the non-discrimination principle embodied in art 15 of the Constitution; (iii) s 497 was a denial of the constitutional guarantees of dignity, liberty, privacy and sexual autonomy which were intrinsic to art 21 of the Constitution; and (iv) s 497 was unconstitutional (see [67] of the judgment of Dr Dhananjaya Y Chandrachud J).

(Per Indu Malhotra J (concurring)) The provision of s 497 of the IPC was replete with anomalies and incongruities. First, under s 497, it was only the male-paramour who was punishable for the offence of adultery. The woman who was pari delicto with the adulterous male, was not punishable, even as an ‘abettor’. The adulterous woman was excluded solely on the basis of gender, and could not be prosecuted for adultery. Secondly, the section only gave the right to prosecute to the husband of the adulterous wife. On the other hand, the wife of the adulterous man had no similar right to prosecute her husband or his paramour. Thirdly, s 497 of the IPC read with s 198(2) of the CrPC only empowered the aggrieved husband of a married wife who had entered into the adulterous relationship to initiate proceedings for the offence of adultery. Fourthly, the act of a married man engaging in sexual intercourse with an unmarried or divorced woman did not constitute ‘adultery’ under s 497. Fifthly, if the adulterous relationship between a man and a married woman took place with the consent and connivance of her husband, it would not constitute the offence of adultery. Those anomalies and inconsistencies rendered the provision liable to be struck down on the ground of it being arbitrary and discriminatory (see [11] of the judgment of Indu Malhotra J).