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The CMJA held its Annual Conference in Georgetown, Guyana from 18 to 22 September 2016. The Conference was open to all Commonwealth judicial officers and others interested in the administration of justice in the courts of the Commonwealth. The Conference attracted 225 delegates and 30 accompanying guests from over 33 jurisdictions.

The CMJA is deeply grateful to the Chancellor of the Judiciary (ag), Justice Carl Singh and the Local Organising Committee for making this a most memorable conference.

The CMJA is also extremely grateful for the support assistance provided by the President of Guyana’s Office and the Government of Guyana. His Excellency the Prime Minister and Acting President, The Hon. Nagamootoo opened the Conference following a showcase of the diversity of cultures of the country which included performances by the Surama Cultural Group, the Hebrew Afro-Guyanese Cultural Group and the Nitra Geet Dance Group and the Advent Group who sang “Oh Beautiful Guyana”.

I am very grateful for the support of the Steering Committee and our Executive and Admin Officer Temi Akinwotu in the preparation for the conference as well as our Conference Registrations Coordinator, Jo Twyman. We are also very grateful to the UK Civil Service College for their sponsorship, all the speakers, panellists and contributors to this educational programme. I am also grateful to our intern Jozoe Tay Jing Ni for compiling this Report of the Conference papers presented during the Conference.

The programme comprised keynote speeches, and panel, learning, specialist subjects and breakout sessions. Issues addressed during the sessions included anti-terrorism, capital punishment, domestic violence and sexual abuse, and (lack of) resources allocated to the judiciary. Specialist meetings were also held on cybercrime and ADR amongst others. This report thus contains the texts of the keynote speeches as well as panel and learning papers received to date, and summaries of some of the discussions held during the specialist and breakout sessions.

Dr Karen Brewer,
Secretary General
WELCOME SPEECHES

WORDS OF WELCOME

By His Hon. Chief Judge John Lowndes
President, CMJA

His Excellency the Acting President and Prime Minister the Hon Moses Nagamootoo
His Excellency President Carmona of the Republic of Trinidad and Tobago
The Hon Chancellor Carl Singh of the Supreme Coiry of Guyana
The Hon Speaker of the National Assembly, Dr Barton Scotland
The Hon Chief Justice of Guyana Yonette Cummings – Edwards
The Hon Ministers of Government
The Hon Chief Justices of the Commonwealth and Judges of the Supreme Courts attending this Conference
Members of the Diplomatic Corps
Hon Judges and Magistrates
Ladies and Gentlemen

It is my special pleasure to welcome you to the 2016 Regional Conference of the Commonwealth Magistrates and Judges Conference held here in Georgetown Guyana – the Land of Many Waters.

On behalf of all members of the CMJA and delegates attending this conference I thank the Judiciary of Guyana with the support of the Government of Guyana in hosting this year’s conference.

The Association is grateful to all members of the Local Organising Committee and in particular Chancellor Singh and Justice Brassington for their efforts and hard work in making this conference a reality. There will be an opportunity at the close of the conference to properly thank them.

The theme of this year’s conference is the “Judiciary as the Guarantors of the Rule of Law”. Over the next three days we will explore the important role played by the judiciary in guaranteeing the rule of law across the Commonwealth. No doubt you have seen the stimulating conference program which addresses a number of issues that fall within the overarching theme of the conference.

To set the tone for the conference may I say a few words about the relationship between the rule of law and an independent judiciary.

Although the concept of the rule of law is often difficult to “pin down”, it is essentially concerned with ensuring equality before the law. As succinctly put by AV Dicey the rule of law requires “the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts”. The rule of law does not discriminate between the governed and the governors – it insists that both stand equally before the law. This applies to all manner of disputes that courts are charged with the task of resolving – disputes between the State and citizens as well as disputes between individual citizens.

The importance of the rule of law was highlighted by the former Chief Justice of Australia the Hon Sir Gerard Brennan almost 20 years ago:

“A free society exists only so long as it is governed by the rule of law – the rule which binds the governors and the governed, administered impartially and treating equally all those who seek its remedies or against whom its remedies are sought. However, vaguely it may be perceived, however unarticulated may be the thought, there is an aspiration in the hearts of all men and women for the
rule of law. That aspiration depends for its fulfilment on the competent and impartial application of the law by judges. In order to discharge that responsibility, it is essential that judges be, and be seen to be, independent”.

The effective operation and maintenance of the rule of law depends upon an independent and impartial judiciary. One cannot do without the other. I am reminded of the following observation made in the Final Report of the Australian Constitutional Commission back in 1988:

“The independence of the judiciary and its separation from the legislative and executive arm of government is, of course, an essential feature of the rule of law. It is regarded as of great importance in all democratic societies.”

As one of the branches of government in a democratic society, the judiciary has conferred upon it a very special role, which is to maintain the rule of law. The judiciary is truly the guarantor of the rule of law.

That important role is reflected in the Latimer House Principles which are designed to ensure a system of government whereby citizens, amongst other things, can live in the confidence that they are under the rule of law.

The Latimer House Principles reinforce the role of the judiciary as the guarantor of the rule of law.

The Principles state that the relations between Parliament and the Judiciary should be governed by respect for Parliament’s primary responsibility for law making on the one hand and for the Judiciary’s responsibility for the interpretation and application of the law on the other hand. The Latimer House Principles go on say that judiciaries and parliaments should fulfil their respective but critical roles in the promotion of the rule of law in a complementary and constructive manner.

As a guarantor of the rule of law the judiciary is accountable in the way articulated in the Latimer House Principles., namely:

“Judges are accountable to the Constitution and to the law which they must apply honestly, independently and with integrity. The principles of judicial accountability and independence underpin public confidence in the judicial system and the importance of the judiciary as one of the three pillars upon which a responsible government relies”.

The rule of law is the cornerstone of a responsible government in a free and democratic society.

As guarantor of the rule of law judiciaries across the Commonwealth have a vital role to play in promoting the Latimer House Principles on the separation of powers, thereby protecting the independence of the judiciary and maintaining the rule of law, which is of course a fundamental value of the Commonwealth. As you are well aware the CMJA continues to be active in promoting the Latimer House Principles around the Commonwealth and responding in an appropriate manner to breaches of those principles.

However, the role of the judiciary in preserving the rule of law does not end there.

According to the International Framework For Court Excellence – which is a resource available to courts worldwide by which they can assess the quality of justice they deliver – an excellent court adheres to and applies 10 internationally recognized core values. Those values are:

- Equality before the law
- Fairness
- Impartiality
• Independence of decision making
• Competence
• Integrity
• Transparency
• Accessibility
• Timeliness
• Certainty

These are key values that a court must embrace in order to fulfil its critical role and functions in society. These core values individually and collectively guarantee due process and equal protection of the law to every citizen. By adopting and applying these core values the judiciary can guarantee the rule of law.

With that short introduction, I wish all of you an enjoyable and rewarding conference experience over the ensuing 3 days as you absorb the generous hospitality of our host country.
WELCOME SPEECH

By His Honour, Justice Carl Singh
Chancellor and Head of Judiciary (ag)

I am particularly pleased to extend a very warm welcome to all present here this morning but particularly to our colleagues from overseas who are here with us. To you I say welcome to our beautiful green Guyana.

We are meeting here in Georgetown for this Commonwealth Magistrates’ and Judges’ conference for the first time.

Guyana is pleased to collaborate with the Commonwealth Magistrates’ and Judges’ Association in hosting this conference, which for us, carries much significance, because this year marks our 50th year of independence from Britain. Notwithstanding our independent status, Guyana remains a proud member of the Commonwealth.

From the earliest times of its discovery and even up to now, our main developmental focus over our 83,000 square miles has been along a narrow Atlantic coastal belt stretching from Suriname to the east and Venezuela to the west. Most of our country remains in a green, virgin, pristine state. So while the developed industrialised world continues to poison the environment with toxic emission, Guyana’s rainforests play a significant role as the lungs of the earth in absorbing carbon dioxide in the atmosphere and converting it and releasing into the atmosphere, life-saving oxygen and that is the indisputable contribution we make in our underdeveloped state in this period of damaging climate change, which the world ought to recognise.

So much for Guyana. Of Guyanese; we are a multi-racial society, from diverse backgrounds and with richly varied cultural practices and as the local songwriter Dave Martins says:

“We are a peaceful people. Struggling we struggle.”

You will soon discover that we are also a warm and hospitable people and we have made every effort to make you feel welcome in our country.

There is much here in Guyana that I am sure will interest you. From local food, to shopping for souvenirs, craft and gold jewellery, our rivers, forests and wildlife, our indigenous people and their way of life are worth seeing. We have no white sand beaches nor ink blue sea but our natural, unspoilt attractions should excite your interest.

And so, lest the Director of Tourism begins to see me as a threat to his job, let me turn to the conference. The chosen theme is:

“The judiciary as guarantors of the rule of law.”

A fine theme indeed, but one that gives rise to the consideration of some important issues.

To be able to provide that guarantee for the rule of law, the judiciary must possess certain characteristics and attributes. I speak mainly of judicial independence. I speak of activist judges, who are bold, outspoken and fearless. Judges who are weak timorous souls are less likely to be effective guarantors of the rule of law.

Most Commonwealth states with written constitutions have an established matrix, which establishes the three pillars of the state structure, that is, the legislative, executive and judicial branches of government.
As to the judiciary in our case, our constitution provides that “all courts and all persons presiding over the courts shall exercise their functions independently of the control and direction of any other person or authority and shall be free and independent from political, executive and any other form of direction and control.”

The independence of the judiciary, is buttressed by the provisions of the constitution but equally important is the readiness of judges to assert and protect that independence. Judicial independence may also be discerned from the structure, circumstances and conditions under which we function. These factors have been described by one regional jurist as “the institutional dimension of judicial independence.”

Here in Guyana, our government went a step further in its publicly declared commitment to ensuring the complete independence of the judiciary and to non-interference in judicial affairs by legislative enactments which give, to the local judiciary complete over its financial affairs. So it is not without significance, that in Guyana we can proudly lay claim to having complete independence in the adjudicatory processes of our courts and to institutional and financial independence.

But let me say and what I will say, is not peculiar to Guyana but is a phenomenon which confronts judiciaries around the world. I am referring to tension between the executive judicial branches of government. The reasons for this tension are many and varied. A few years ago, an Attorney-General of Guyana, told me that I was holding out the judiciary as a state within a state. A few years ago also, a now retired Chief Justice publicly chided a Minister of Government for some inappropriate remarks made by the Minister and reminded him that a healthy tension between the executive and the judiciary, was good for our democracy. It is however in the area of judicial review, where a significant cause for tension lies. The ultra vires doctrine is the executive’s nightmare. Many governments have seen, what they perceived to be significant political planks based on elections promise or intended policy, knocked out by judicial decision. Human nature being what it is, a member of the executive may not take kindly to a finding that he or she has acted unlawfully. In other words, members of the executive are especially concerned with checks on administrative decisions that have political consequences. Such a disposition may be tempered by an understanding and appreciation that judges are guided by the law and the constitution and our decisions are not based on whim or fancy but on the law and the constitution.

Of this tension between the executive and the judiciary, addressing the Australian Bar Association Conference in 2002, Justice McHugh noted:

“… If the rule of law is to remain the basis of our democracy, the courts cannot be moved by the political consequences of their decisions. They must maintain an a-political stance. In contrast to the exercise of executive power, judges cannot base their decisions on, or be affected by potential political implications and media pressures. The judges must base their decisions on the law.”

From time to time members of the executive may be tempted to test the waters and attempt incursions into the affairs of the judiciary. These should be firmly but politely resisted.

While it is not my intention not to keep you from hearing the featured speaker this morning, I seek your indulgence to mention one final matter.

Many people see courts as a place of punishment. Scarcely do they see the court as a place where their rights are asserted and established. They are mystified by our legalese, by our robes, by our bands and our wigs. They see the curial process as torturous and costly. The time is probably ripe for us to adopt a broad approach to our role in society, so as to enable the public to understand the importance of our work. We must be able to convey to the wider society that access to justice does not necessarily mean access to the courts and that while the court may satisfactorily resolve many disputes, there is a great number of disputes that can be equally resolved by other methods. This approach would no doubt, in my respectful view, help

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our people to better understand our role as the Guarantors of the rule of law and of their human rights. I wish this conference every success.
KEYNOTE SPEECHES

SPEECH

By His Excellency Acting President and Prime Minister of the Republic of Guyana, Hon Moses Nagamootoo

It is my distinct pleasure to greet you all this morning and to extend a very warm welcome to all our overseas guests to our beautiful country. As the programme of today’s events would have informed you, His Excellency President David Granger, President of the Cooperative Republic of Guyana should have been addressing you this morning. Regrettably, His Excellency has had to travel to New York to represent Guyana’s cause on a matter of grave importance to our country before the United Nations and His Excellency has asked me to convey to you his deep regrets at his inability to be here with you this morning but offers his good wishes for a successful conference.

I have had an opportunity of looking at this conference’s agenda for the next three days and I would like to take this opportunity to congratulate the organiser’s for the choice of themes for the gracious sessions at which you will be engaged. Topics such as “Environmental Law and Sustainable Development”, “Domestic Violence”, “Alternative Dispute Resolution” and “The Rights of Indigenous People” are matters which are given key focus in our governance framework. These topics are extremely relevant and topical and so I offer warm congratulations to the Commonwealth Magistrates’ and Judges’ Association on these choices.

Additionally, let me say, that I took particular note also of the theme of this conference:

“The judiciary as guarantors of the Rule of Law”. In the democracies which constitute the Commonwealth, that guarantee provides a measure of comfort to our people and is an assurance of freedom and stability.

Since my government’s assumption of office in May 2015, we have made a conscious and determined effort at giving recognition and meaning to the Declaration adopted on the 24th September, 2012 by the United Nations General Assembly at the High Level meeting on the Rule of Law which reaffirmed that:

“Human rights, the Rule of Law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations.”

Our government is conscious of the distinction that must be made between “rule by law” whereby law is an instrument of government and government is considered above the law, and the “rule of law” which implies that everybody in society including the government is bound by the law. It is on the latter that we have rested the structure of government, recognising that constitutional limits on the exercise of governmental authority, which is a key feature of any democracy, require adherence to the rule of law. Indeed, it is on observance of the rule of law that the quality of government depends.

Our government has adopted the Diceyan concepts in our approach to governance. First, we recognise that there should be clear limits to the power of the State. That government exercises its authority through publicly disclosed laws that are adopted and enforced by an independent judiciary with established and accepted procedures. We believe that there should be equality before the law. In our view, the law must apply equally to the government and the governed. We recall Lord Denning’s reference in GOURIET V UNION of POST OFFICE WORKERS (1977) to a statement attributed to Dr. Thomas Fuller in 1733:

“Be you never so high, the law is above you.”

And further, we ensure protection of the rights of our citizens.
It is in relation to the latter, that our government led by His Excellency President David Granger has repeatedly and publicly declared that our government is unshaken in the belief that in our state structure, the judiciary should (to the fullest extent of the meaning that can be given to any phrase) be completely independent. Our recognition is that a completely independent judiciary is the strongest guarantee for the protection of the rights of our citizens. We believe that a completely independent judiciary is the bedrock of the stability of our nation. We believe, a completely independent judiciary to be the guarantors of the rule of law.

So, within this focus and within this framework, our government has legislatively created the structure to give effect to true and meaningful judicial independence.

Of course, I would not let the opportunity go by without saying that our judges in their adjudicatory role are not in any way subject to any form of governmental influence. That is a matter of which we in present administration are exceptionally proud, and I make this claim without fear of contradiction. But not only does our judiciary enjoy complete independence when it decides issues between citizen and citizen or between citizen and the state, it also has complete independence over its administrative machinery, its registries and their personnel. More importantly however, as you heard earlier from His Honour the Chancellor, our government by legislative intervention, made provisions for the complete financial independence of the judiciary. In sum, that the judiciary of Guyana, enjoys adjudicatory, institutional and financial independence may be a first for the Commonwealth Caribbean, a matter of which we in government are exceptionally proud.

As I near the end of my presentation, I crave your kind indulgence to raise a matter of national importance with this distinguished gathering of legal minds here this morning. It is a matter which has caused His Excellency President David Granger to be away from this ceremony this morning.

Our oil rich neighbour to the west, Venezuela is making claim to a significant part of our country, in which huge oil deposits have been found. I do not wish to burden or detain you with the details of the history of this spurious claim, which Venezuela, nevertheless offensively and aggressively pursues, save to say that the boundaries between Venezuela and Guyana, were identified and settled as a result of the decision of an international tribunal established to do just that since 1899. It is Guyana’s contention that Venezuela’s aggressive stance towards us and its past incursions into our territory are violative of international law and norms. For us here in Guyana, there is such appeal in the words of Professor William Bishop who, writing in the Michigan Law Review, in an article titled “The International Rule of Law” in answering the question “what do we mean by the International Rule of Law?” explained:

“Without precise definition, I believe we could agree that the concept includes reliance on law as opposed to arbitrary power in international relations; the substitution of settlement by law for settlement by force and the realisation that law can and should be used as an instrumentality for the cooperative international furtherance of social aims, in such fashion as to present and promote the values of freedom and human dignity for individuals.”

Guyana is on the threshold of a prosperous and exciting future. We can do without this irritant confronting us as a boundary dispute. We are pursuing as Professor William Bishop has espoused “settlement by law”. Guyana has proposed to the United Nations a juridical settlement, and this is what has taken our President to the United Nations this week.

I have raised this matter with you our distinguished visitors however because you represent a wide spread of Commonwealth jurisdictions and for our cause we seek your solidary and support. It is a matter that touches the international rule of law.
In closing, I can do no better than repeat the words of Sir Thomas Bingham writing in his book “The Rule of Law” notes:

“The concept of the rule of law is not fixed for all time. Some countries do not subscribe to it fully and some subscribe only in name, if that. Even those who do subscribe to it, find it difficult to apply all its precepts quite all the time. But in a world divided by differences of nationality, race, colour, religion and wealth, it is one of the greatest unifying factors, perhaps the greatest, the nearest we are likely to approach to a universal secular religion. It remains an ideal but an ideal worth striving for, in the interests of good government and peace, at home and in the world at large.”

I trust that your deliberations over the next few days will be meaningful and fruitful. Please take some time to experience the warmth and hospitality of our people and the natural beauty of our country. On my own behalf and on behalf of the Government and people of Guyana I wish this conference every success.
“The Judiciary as Guarantors of the Rule of Law”

By Chief Justice and Bailiff William Bailhache, Jersey

1. Mr Chairman, Chancellor Singh, ladies and gentlemen. First of all can I thank you on behalf of all of us for your splendid welcome to Guyana for this conference. I arrived late on Friday but already I have come to appreciate not only the warmth of your climate but also the warmth of the Guyanese. It is a real pleasure to be here and I know that all of us are looking forward to the next few days.

2. My first thought when asked to speak today was that this is quite a dry subject. My son, who is a commercial lawyer in London helpfully suggested that I should start with a joke – have you heard the one about the rule of law? No, I haven’t either.

3. My next thought was about the title – how do we as judges guarantee the rule of law? Well, we make an order. Prime Minister, you have acted unlawfully; worse still, Prime Minister you are in contempt of one of my orders and will go to prison till that contempt is purged. How many of us think that would be difficult? Would we do it? I will leave that question lurking.

4. A few years ago we had an appeal in the Royal Court in Jersey against an order by the Magistrate that a dog should be destroyed. The dog was a cross between a German Shepherd and a Siberian husky. It was a young dog and generally kept inside but one day it escaped. The two children of the family had a friend playing with them in the garden. The children became excited as did the dog which dog put his paws on the shoulders of the 8 year old girl, a friend of the family, and bit her very severely indeed. Almost certainly there were two bites and the child was left with some serious injury which required stitches. The legal test in Jersey for deciding whether or not a dog should be put down is as follows:

“The test ... is whether the dog is of such a dangerous disposition, on the balance of probabilities, that the risk to the public is such that an order should be made for its destruction. In considering that test the Court has to have regard to all the evidence surrounding the incident itself but also to the evidence of the dog’s general disposition and, if it should be relevant, evidence of the characteristics of the breed in question”

5. The Royal Court reviewed the evidence in the case which included – yes, I am not joking – the evidence of a dog psychologist who had two consultations with the dog and decided that the dog was not a violent creature. On reviewing that and the other evidence, the dog was spared. It was not a decision I personally would have made – after all, it was only a dog – but there is no doubt that the decision was reached by the Court having regard to the evidence on the application of the legal test which existed. The media response was perhaps predictably and fiercely critical, and it is clear that members of the public quickly divided into three classes – those who do not like dogs, who thought the Court had reached a new stage of lunacy, those who did like dogs but fell into my approach of thinking it was just a dog, and those who would not criticise the decision because of all the waggy tails around them. It is probably fair to say that on that occasion the law failed to represent two thirds of public opinion.

6. In Jersey we have a very strict approach to sentencing in drug trafficking cases. The result of that approach is probably that defendants convicted of trafficking in Class A drugs receive prison sentences some 2 or 3 years longer than they would be likely to get in the United Kingdom. By and large, public opinion in Jersey is thought to be supportive of this approach which forms part of a network of steps taken to tackle abuse of drugs in our Island. The steps have been only partially
successful but it is seemingly not possible to establish whether they would be more or less successful without that drug sentencing policy.

7. I have opened with these two examples because I will be returning later in this address to the inter-relationship between the work of the Courts and the work of the media, particularly perhaps these days the work of those on social media.

8. Although it is clear that the expression “the rule of law” is one that is found prior to Dicey’s “Introduction to the Study of the Law of the Constitution” published in 1885, it is Dicey who is generally associated with the expression. He gave it three meanings:-

i. That no man is punishable or can lawfully be made to suffer in body or property except for a distinct breach of the law established in the ordinary legal manner before the ordinary courts of the land.

ii. As a characteristic of the law of the country, not only is no man above the law but also that “every man, whatever his rank or condition, is subject to the ordinary law of the Realm and amenable to the jurisdiction of the ordinary tribunals.”

This has the important effect that not only is everyone subject to the law, but more importantly everyone is subject to the same law administered in the same courts. One of the effects of 9/11 and the other terrorist attacks which have taken place since is the increasing international focus on terrorism and the need to be able to deal with those suspected of committing or planning terrorist acts in an efficient manner with the no doubt laudable intention of keeping the most people secure. Frequently though, it would seem that, by the virtue of the fact that convictions or lesser orders are only possible by adducing evidence of terrorist intelligence, there is a risk that different rules will be applied to those cases—the suspected terrorist does not always see the information which does for him, and indeed he is liable to be tried in a specialist court. This narrow question merits a discussion all of its own and we will have that tomorrow, so I am not going there today.

iii. The constitution of England was “pervaded by the rule of law on the ground that the general principles of the constitution ... are, with us, the result of judicial decisions determining the rights of private persons in particular cases brought before the courts; whereas under many foreign constitutions, the security (such as it is) given to the rights of individuals results or appears to result from the general principles of the constitution”.

9. The third example has sometimes been criticised as representing a rather arrogant approach typical of the great Power that was 19th century England and, undoubtedly, few people would advance the proposition today in quite the same way as Dicey. But the real thrust of it is surely right, however. It is that anarchy is avoided by respect for the law, which is built upon judicial decisions determining the rights of ordinary people, whether as between themselves, or as between them and the organs of the state, and that principle should be at the heart of the constitutional arrangements of the state. It should be inculcated in the thinking of Ministers, legislators, civil servants, and those running public bodies. Our law and custom is that the requirement of legality is an essential component of all out public institutions and it is one of the functions of both judges and lawyers to keep that requirement alive.

10. Perhaps I can divert momentarily. The Rule of Law has become a more popular topic over the last 30 years or so and from time to time it has been given different meanings. In my own jurisdiction, one rather intemperate politician, now no longer in the parliament, tended to use it only to mean that the judges should be dismissed. By taking that step, he argued, the rule of law could be restored. That
counter intuitive approach, which would not fall within Dicey’s proposition, illustrates how right Lord Bingham was when he wrote in his book “The Rule of Law”, that the expression came to have such a wide variety of definition that the time arrived when respective commentators became doubtful as to whether the expression had any meaning at all. Professor Raz commented on the tendency to use the rule of law as a shorthand description of the positive aspects of any given political system in his essays on law and morality (Oxford University Press 1979).

11. Professor Jeremy Waldron noted that in the Supreme Court in Bush v Gore, which decided who had won the Presidential election in 2000, both sides invoked the expression “the rule of law”.

12. Lord Bingham reached this conclusion:-

“The core of the existing principle is, I suggest, that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publically made, taking effect (generally) in the future and publically administered in the courts.”

13. The last 120 years have seen some interesting developments in the structure of law in Jersey, which is the jurisdiction I know most about, but also in the United Kingdom. In the latter, two world wars I think probably had a marked impact in the first 50 or 60 years of the 20th century with the development of executive power, and inevitably the restrictions on liberty which arise as a result. In Jersey for example, there was a housing problem after the Second World War which led to the introduction of restrictions on who could buy property. The purpose of the restriction was to ensure that there would be sufficient properties available for local residents – but achieving that objective of giving the local community the freedom to buy property, meant restricting the rights of others, including those from the other Channel Islands or from other parts of the British Isles from exercising a right to buy. Often therefore one is looking at reconciling the different liberties of citizens, or perhaps even reconciling the restrictions which are imposed.

14. In the kind of political system which most of us understand, the most important freedom is that we can go about our lawful business and enjoy our own possessions without state interference.

15. To achieve that, we accept some restrictions on our freedom. We cannot use our money, in most places, to buy alcohol at 4 o’clock in the morning. We do not permit a person to conduct heart surgery unless he has some form of medical licence. Most of these restrictions come through the elected legislature, which, as a matter of democracy, has the legitimacy to impose these restraints. Applying that philosophy, we have seen the growth and growth of regulations in almost every part of our everyday lives, whether it is giving us limited hours when we can walk our dogs on the beach in the summer or establishing rules which need to be complied with to open a bank account, or to build an extension, or to employ a nonresident or to buy a house. We will all recognise examples of this, depending upon the rules which exist in our different countries.

16. In the early 1920s the then Lord Chief Justice, Lord Hewart wrote a book “The New Despotism” in which he argued that freedom was being stolen from the people by public servants who were using discretionary powers given to them by statute to enable them to become masters of the people.

17. Do we blame the legislators for this? Well, perhaps that is likely to be the conclusion which some will favour. Others will claim that all that is being achieved by the creation of such powers is a structure by which parliament seeks to achieve the maximum good for the most people, even if that involves interfering with the liberty of a few.
18. And where do the civil servants, so blamed by Lord Hewart, fit in with this? Well they are charged by their political masters to ensure that the public gets what it wants. Little by little, the use of executive powers in the 20th century increased. The challenge was met in the United Kingdom, and in Jersey, by either a statutory right of appeal through different vehicles, an ombudsman, or by the courts applying judicial review, the principles of which perhaps are most clearly set out in the GCHQ case where the tests for judicial intervention were set out as resting upon illegality, irrationality and procedural impropriety. In Anisminic, the House of Lords had shown that it was all but impossible to rule out by statutory provision the activity of the judges on judicial review with the inexorable logic that parliament must have intended that the executive body should act in accordance with the law, and if it did not do so, then the courts would naturally be enabled to strike down the abusive action in question.

19. A parallel stream both in the United Kingdom and in Jersey came with the adoption of the European Convention on Human Rights into domestic law. For many years the courts of course had had the power to strike down secondary legislation on the grounds that the principal legislation did not contain adequate vires for what the secondary legislation provided, but now for the first time, the courts had power to strike down secondary legislation as being incompatible with the convention rights. Although parliament baulked at a transfer of power that would enable the courts to strike down primary legislation, it was agreed that the courts would have jurisdiction to make a declaration that the primary legislation was incompatible with the Convention rights in question. This power has been used, albeit sparingly. In the United Kingdom, perhaps the most challenging area has been the question of deportation or extradition to a country with recognised human rights issues such that the person making the order for deportation or extradition would be reasonably sure that in doing so, he was sending a person to almost certain torture and possible execution, in breach of the Convention rights which parliament had adopted as part of the domestic law.

20. Neither the United Kingdom nor the Crown Dependencies (the Channel Islands and the Isle of Man) have a written constitution albeit that one consequence of devolution has inevitably been the requirement to settle in recognisable form the relative jurisdictions of the Scottish Parliament, the Welsh Assembly, the Northern Ireland Assembly and the Westminster Parliament. The interesting constitutional outcome of the adoption of the European Convention of Human Rights into domestic law was that parliament has agreed a set of principles as part of the domestic law against which future decisions of the parliament in passing legislation, and future activity of the executive come to be measured, not by parliament itself or by the executive, but by the judges. Taking a step back therefore, in both the United Kingdom and in the Channel Islands, the upshot is that over the last 120 years we have seen an increased ability in unelected judges to strike down executive and sometimes legislative action.

21. I cannot of course speak with any authority at all in relation to those Commonwealth countries which have written constitutions, but in many cases, I imagine that at least in theory the constitutional courts have got the same or similar rights in relation to legislation which is considered by the judges to breach the constitution.

22. The title to this address is “The Judiciary as Guarantors of the Rule of Law”. If one takes the first two meanings of the expression as defined by Dicey, then it is clear that this must be so in the sense that the activity - punishment, removal of property, everyone equal before the law – takes place in the court room where the judiciary hold the relevant power. I wish to focus though on the third meaning – the pervading of our institutions.

23. The interesting word in that title is Guarantors and no doubt it is because I am a lawyer that I will go at it legalistically, which is quite possibly not what the Secretariat intended. As we all know, a guarantee is not called upon unless the principal debt has not been paid and it follows that, on this
third meaning of the rule of law, the judiciary are not considered to be the first line of defence. Indeed if we all paid our debts on time, there would be no need of guarantors. This really does prompt the question as to what place we expect the judiciary to occupy in the constitutional structures of our different jurisdictions.

24. As Lord Bingham points out, the public have a sometimes quite contradictory view of judges. One minute they are considered to be senile and out of touch, and another they are the very people to conduct an independent enquiry into the conduct of others. Then again, they are extraordinarily conservative, well to do upper middle class people, completely out of touch with what real people have to cope with, and they impose savage sentences on those who do not deserve it – and yet, if the judge exercises a discretion to impose a lenient sentence, particularly these days in relation to any form of sexual offence, he is a wishy-washy liberal, unable to punish anyone properly.

25. It is all very well if observers and academics persuade themselves and their colleagues that one can believe in the rule of law without necessarily admiring either the law or the legal profession or the courts or the judges. The reality, however, is that the need to respect the rule of law is one which requires public endorsement, and that is not achieved by academic argument alone. Of course academic argument is necessary – it is an essential component in being able to persuade the public that the rule of law is an important requirement; that at least our government and legislature should try to act in accordance with it. But the opportunities for trespassing on the power of the courts remain legion. I will divert briefly on this.

26. Many of the most obvious of those opportunities arise in connection with issues relating to the provision of central funds – lucky Guyana, if I may say so, that this appears not to be an issue here because we are told the Judiciary budget is separated from the general State budget. But in other countries, the executive could close a court because it not used sufficiently frequently, or reduce the pay of judges, or scrap judicial pensions or simply effect changes to the budget under which the court system operates. While there is no doubt that any of these steps can be taken for reasons which amount to an assault upon the rule of law, my own view is that, in most of our jurisdictions, they can equally be categorised as legitimate political decisions. There is a limited amount of cash in every jurisdiction’s budget, and it could be said that ultimately the elected politicians are the persons who should determine how it should be allocated. While therefore one should be alert to the possibility that those who have no interest in the rule of law, or are positively hostile to it, might use budgetary constraints as a fig leaf to cover their attack on the judiciary, my own view is that we should appreciate, as judges, that society has changed and judges can no longer simply rely upon their position as a form of res ipsa loquitur when it comes to demanding what they see as appropriate budgets for the administration of justice. Clearly, this will receive more attention this afternoon.

27. The discussion about the sensitive subject of budgets takes us neatly into the question about how the judiciary act as guarantors of the rule of law when one is considering Dicey’s third meaning – inculcating government and public institutions with the respect for the law that is needed, the recognition that it is a constitutional principle that it is the decisions of individual judges in individual cases which maintain the requirement on the executive and public bodies to act lawfully.

28. In my jurisdiction, and in the United Kingdom one hears often twin statements about teachers – the standard of teaching has dropped and teachers are not held in respect by the pupils as they used to be. I am not in a position to comment on the former of those statements, but I rather fear the latter might be true. One could apply the same test to clergymen. The big question is why this is so, if it is, and why judges should assume that the same will not happen to them.

29. The first and obvious point is that one must recruit into the relevant profession – teachers, clergymen, judges – those with high ethical and intellectual abilities. That means that the terms and
conditions of employment must be sufficiently attractive, because if they are not, there is a probability that, following the parable of the sower, the seed will be sown amongst weeds and thistles and what might otherwise grow will be choked by the pressures of business and the financial and other rewards that success in business offers.

30. More importantly, the community must respect what is done. How does one achieve that? In the first place the respect must be earned by the judges who must show that degree of probity, impartiality and ability that minimises the risks of public criticism. It means that decisions must be properly explained, directly and as far as possible avoiding turgid legalese. It means that the right people must be chosen as judges and the structures in place for the selection of judges must be robust. Obviously, all these structures in our different jurisdictions are extremely robust, or we ourselves would not have been appointed!

31. Similarly there must be decent structures for dealing with those occasions where the judges go wrong, either in terms of their conduct with appropriate disciplinary arrangements independent of the state, or in relation to the decisions which they have taken. This is all pretty humdrum stuff. What perhaps as judges we do not focus upon very frequently however, is the next step.

32. The opinion formers in our communities must be broadly on side, and public opinion must therefore be taken to the point of accepting the necessity – not the desirability – the necessity of the other organs of government being subject to the rule of law. It is necessary that the public should see judicial work not as something which is desirable, and must take its place in the list of other services competing for their respective shares of public funds, but as something which is essential, truly an arm of government. I am with Guyana on this. It is wrong in principle for essential work to have to fight in the governmental budget debates with services which are seen by the public as desirable – good pensions for the retired, good health care for all, good education for the young, good care homes for the old. Once the delivery of justice has to fight for funds against the old or the young or the infirm, it is on the back foot.

33. In our Court, and I imagine in courts across the Commonwealth, we still apply the principle of judicial deference in upholding the actions of government if lawful and reasonable, even if they are not actions which we personally would have taken; and we accept the supremacy of the legislature in making laws which it falls to us to apply or interpret, even if sometimes the interpretation is so difficult one fears the legislature cannot have been paying full attention when the law was adopted. In both cases, Judges are right to show that deference because we are neither executive nor legislature.

34. At the same time, the other side of the coin is the need for the executive and the legislature to understand that, powerful though they are, they must not trespass on the powers and duties of the Courts. The business of doing justice is not consistent with the pressures which are put on an elected person. The judge is not concerned with the views of the electorate or the media in the same way that those who are elected may be. He or she is concerned with a higher and objective principle – that of doing justice to the litigants before him in accordance with the law.

35. How do we ensure that both Judges and Parliamentarians reach the right conclusions in their respective spheres of influence? Well, Judges are always subject to the Court of Appeal and in our case, if necessary the Privy Council, a constraint which is not available in the case of Parliamentarians. Judges may be guarantors but the principal debtor is the constraint which operates on Parliamentarians and indeed military forces through public opinion. As guarantors, we have our part to play, not only by applying the principles of the rule of law in our everyday work in the courts but also by speaking about the importance of them. Indeed we should all of us talk about the rule of
We all realise, don’t we, how influential the media can be in informing public opinion, sometimes informing it correctly, sometimes not. In some of our various jurisdictions, particularly the larger ones, I have no doubt that the judiciary has a fully-fledged media department. In Jersey we are too small to have that advantage – but if I go back to my doggy story with which I opened, I can see immediately how the media handling might have been much improved had we gone on the front foot right at the outset. What had in fact happened on that occasion was that, with the vet waiting with the deadly syringe in hand, a decision on whether the dog was to be spared or not had to be made straight away, but the complexity of the evidence was such that the court reserved its reasons. Accordingly the media received the decision (which it thought for the most part was mad) but it did not understand it.

It is not just explaining individual decisions which is important. Where possible, we need to talk about the rule of law regularly. It is not easy, is it? It cannot be said that the media will be very interested in a story about the rule of law. It does not carry such immediate appeal as a story which can obtain the headline “Dog steals vicar’s wallet in back alley” which prompts lots of questions about the dog, the priest and probably the back alley as well. It is rather counter-intuitive for judges, who like to be independent, and perhaps are rather inclined to sitting in ivory tower courts handing down terribly well-reasoned decisions, elegant in their prose and precise in their direction – or am I just speaking about my own dreams? – but it seems to me that one has to engage directly with the media in a way that 50 years ago would have been unthinkable. I think that comes about largely because the media are less willing than previously to accept a status quo which includes having judges towards the top of the respectability tables.

I also think we need to look closely at the way in which we handle social media. Recently in Jersey we had a money laundering case where the defendant had laundered approximately €590,000 over the previous six years, the antecedent offending being drug trafficking. He pleaded guilty, but nonetheless received a sentence of six years imprisonment. Defence counsel had urged us to finish at a lower level, relying on the fact that in one case a business man who had laundered some $30 or $40 million dollars, the proceeds of corruption elsewhere, himself only received six years. The Court considered that first of all there was a limit above which it did not matter very much what the quantity of money laundering was – laundering $40 million is probably not much worse than laundering $10 million – but importantly the Court considered that the relationship with week by week street deals in class A drugs was critical to the sentence which ought to be handed down. The point of the story is not to discuss the sentence but the response to it on social media. As always with that outlet, no one hangs around for reasons and within an hour or so immediate opinions were expressed, nearly all very positive. Six years? Strong decision. Six years? Serves him right, assisting drug trafficking. We can be gratified at the response to that particular decision but there is nonetheless a lesson in the speed with which the reaction to the sentence was passed from pillar to post across the social media networks, and it has to be said read by many people, not only in Jersey but outside the Island as well. It emphasises how I think we should be considering using the social media networks ourselves as judges, not obviously to engage in discussions but as a mechanism for putting out short and pithy messages about the work which the courts are doing.

For many years it has been possible for the judiciary to keep its head down. We could get on with our work quietly and we hope competently and efficiently. We could rely on wigs and gowns, on long words and arcane practices. Although not being arrogant, we could be perceived as such, and possibly get away with it.
If that were so once, I am sure those days are now gone. In order to be guarantors of the rule of law, the principal debtor of public opinion must be in the right place in our society and as judges we are called upon to ensure that is so by fearlessly applying Dicey’s first two principles – no man is to be punished or penalised otherwise than by court process and everyone is subject to the same law, applied in the same courts - and as to the third principle, talking about the rule of law regularly and about the need to protect the courts and the prosecution in the administration of justice, weaving the requirement of lawful activity and only lawful activity into the fabric of all our public institutions. It seems to me that we would need to win hearts and minds week in, week out, and we should not forget that because ultimately it is the law which acts as the cement in our society.
“The Judiciary as Guarantors of the Rule of Law”

By His Excellency Anthony Thomas Aquinas Carmona ORTT, SC
President of the Republic of Trinidad and Tobago

There is no denying that the law must consider the culture of a people in determining avenues, for adaptability of the Rule of Law, in an efficient and progressive way. The artiste in society is the conscience and pulse-beat of a people. I can say without contradiction, that in our neck of the woods, the artiste, whether he be a calypso or reggae singer, poet, dramatist, writer or painter, often captures what is wrong in society, what is right and what should be made right. The lexicon of the artiste is however different from the lexicon of the judge. What is very real is that the artiste in burgeoning societies is often the true messenger of human rights and justice. By condemning what is, he tells us what should be. As one of Trinidad and Tobago’s calypsonians, the Mighty Chalkdust, said just a few days ago, on 16 September 2016 at the Opening of the 2016-2017 law term, “There is law in culture…and culture in law”.

As guarantors of the Rule of Law, the Judiciary is in the business of formal assurance and restitution in the event of default. The poet activist that demands equality of standards and treatment demonstrates a culture at work that often both invokes justice and exposes unfairness. It brings to mind a great son of this soil; a man revered as “Guyana’s poet laureate”; a poet activist whose advocacy and poems about human rights and freedom in colonial and post-colonial Guyana were as deliberate as they were necessary. His work may well have assisted in the deep philosophical underpinnings of the Guyanese Constitution. In the 1960s, in an era of governance transition, Martin Carter’s writings spoke of human rights, the denial of those fundamental rights and the subjugation of a people by those in “boots of steel”.

In a spirited poetic treatise, he demonstrated that culture and cultural expression can be a champion of the Rule of Law. Sometime after the British suspended the Constitution of British Guiana in 1962, Martin Carter lamented:

“This is the dark time, my love
It is the season of oppression, dark metals and tears,
It is the festival of guns, the carnival of misery
Everywhere the faces of men are strained and anxious
Who comes walking in the dark night time?
Whose boot of steel tramps down the slender grass?
It is the man of death my love, the strange invader
Watching you sleep and aiming at your dream.”

It is fair to say that this poet may have understood a thing or two about equality of treatment and respect for universal, human and fundamental rights- indeed, the very basis of the Rule of Law. Today, in more ways than one, the ‘boots of steel’ continue to trample on our fundamental rights, due process and the rules of natural justice and this is often exemplified by the afflictions of mass migration, human displacement, human trafficking and terrorism. In this ever-evolving war, the Judiciary is an important peacemaker and stabilizing force in a country by means of its indomitable adherence to, and furtherance of, the Rule of Law.

Practically and jurisprudentially, the “Rule of Law” is a daily subject matter that infuses the functions and responsibilities of every Judicial Officer- from Magistrates to Judges to Court administrators. Ricardo Gosalbo Bono, Professor of Law and the Director of Legal Services of the Council of the European Union¹

suggested an applicable definition of the Rule of Law that could be applied to maintain the just sustainability of all Nation States, incorporating the following principles:

1) The principle that power may not be encouraged ambitiously. This principle requires a rejection of the rule by man and the notion that laws should be prospective, accessible and clear;
2) The principle of supremacy and independence of law. This principle distinguishes the rule of law and requires acceptance of the principle of the separation of powers, which is the idea that law applies to all, including the sovereign and there must be provisions for an independent institution, such as a judiciary, to apply the law to specific cases;
3) The principle that law must apply equally, offering equal protection without discrimination. This principle requires that law should be of general application and capable of being obeyed and;
   (a catch all)
4) The principle of respect for universal known rights as laid down in the instruments and conventions accepted by the international community as a whole.

Indeed, many of the principles upon which the Rule of Law is based, are given their life-blood by the Constitutions of our Commonwealth Nations, with special reference to the fundamental rights provisions contained therein. In the Caribbean, the Constitution represents the supreme law; a signal reminder of our independence and institutional sovereignty. It is therefore not in doubt, that our Constitutions seek to establish the Rule of Law as the center of our democratic and dynamic civilisations. The inter-relationship between fundamental rights, the Constitution which guards same and the Rule of Law is therefore certain.

When I was confronted with the theme for this Conference, “The Judiciary as Guarantors of the Rule of Law”, I have to admit that I paused for cause. My academic reaction was to retreat to the often cited dicta in the case of Collymore v. the Attorney General of Trinidad and Tobago (1967) 12 WIR 5, a judicial review case under the new Independence Constitution (1962) of Trinidad and Tobago. The Court of Appeal had to determine the constitutionality of an Act of Parliament which was at variance with the particular provisions of the Constitution. Justice of Appeal Aubrey Fraser stated in Collymore, “No one, not even the Parliament, can disobey the Constitution with impunity.”

In that same case, Chief Justice Wooding famously pronounced, “the Courts are the guardians of the Constitution.” Indeed, His Lordship could equally have intended that the Courts are the guarantors of the Rule of Law.

A the Second Distinguished Lecture Series, hosted by the Trinidad and Tobago Judicial Education Institute, at the Hall of Justice, Port of Spain in 2012, the eminent Justice Adrian Saunders, Judge of the Caribbean Court of Justice, succinctly underscored the guardianship and guarantorship role of the Courts in upholding the Rule of Law. Justice Saunders stated, “This guardianship role [of Courts to the Constitution] is central to the broad role of the Court of Appeal [and I now submit, the Judiciary as a whole] in protecting democracy and advancing the rule of law. The rule of law in this context means a lot more than guaranteting simple adherence to the law. It implies as well legal accountability, fairness, respect for minorities, the observance of human rights, judicial independence, the separation of powers, equality before the law, the absence of arbitrariness."

It is against the background of Justice Saunders’ understanding of the Rule of Law and its encompassing principles, that it becomes immediately apparent, in my humble view, that the Judiciary’s ability to efficiently discharge its role as guardian of the Constitution and guarantor of the Rule of Law, rests primarily on 3 tenets:

(1) Its source of power, that is, its jurisdiction;
(2) Its institutional effectiveness; and
(3) The fair, just, transparent and independent dispensation of said power in its adjudication process. Indeed, I am here reminded of a quote in yesterday’s keynote address by Chief Justice of Jersey, William Bailhache, that “judges must be, and be seen, as being independent.”

On the matter of jurisdiction, any proper claim to the assertion that the Judiciary is the Guarantor of the Rule of Law— a guarantee being a security, whether of money, services or of legal rights— lies in an analysis of the measure of security and rights that are actually, as opposed to ideally, afforded to an individual of the State under the Constitution and its laws. How the Judiciary addresses infractions of rights so fundamental is important in the context of understanding its role as guarantor of the Rule of Law.

A useful example of the gap, that can be created, when constitutional jurisdiction is represented by a functioning Judiciary, in the absence of effective application of law by the Judiciary as deemed Guarantor, is the American experience in its Constitutional development.

Over 200 years ago, Alexander Hamilton, one of the framers of the American Constitution declared “Where the will of the legislation declared in the statutes, stood in opposition to that of the people declared in the Constitution, the Judges ought to be governed by the latter rather than the former.” However, it was the experience of the American people thereafter that the drafters, once elected to Government, were far less comfortable with the impact of their own rhetoric. This is a prime example of implementation deficit in the Rule of Law.

In 1803, the then Chief Justice of the Supreme Court, John Marshall, boldly asserted in his landmark judgment in Marbury v Madison\(^2\), the Court’s right to invalidate unconstitutional legislation. However, the judicial tendency remained to protect the status quo by becoming activist only where Government appeared to encroach on vested interest. As a result, until the mid 1950’s, segregation, the battle of Senator McCarthy against communism, the imprisonment of Japanese Americans were not challenged by the Judiciary. It was only until 1954 in Brown v Board of Education that segregation in schools was banned. Shaken by the horror of World War II and the Holocaust, the International community ushered in the Universal Declaration of Human Rights, which became the forerunner of our Constitution.

The point I am making is that the existence of a jurisdiction, even if expressed in a Constitution, does not necessarily provide an effective guarantee to the Rule of Law. The American Court did not prevent the institution of slavery from subsisting, it did not rule against McCarthyism or internment of Americans based on race or the segregation of schools based on race. Historically, it may be argued that even in the face of overt and covert transgressions of the Rule of Law, the Courts tended to remain within its conservative role, maintaining the status quo, even defending it, and certainly not upsetting it. But judicial attitudes are changing to keep up the needs of a modern society.

The security that is expressed, and indeed, desired, in the guarantorship role of the Courts to the Rule of Law can only be derived from the effective exercise of judicial power and judicial outreach of, and in, its decisions. It is trite that in its simplest form, the Courts guarantee the particular aspects of the Rule of Law over which it adjudicates when its decisions are rendered not only binding, but meaningful and relevant to the affected litigants, and the society as a whole. To a large extent therefore, the effectiveness of the Judiciary goes beyond the question of jurisdiction, to that of management, resources and financial autonomy.

When one speaks of Management, it is often easy to view it as an exercise of power and authority. However, judicial management has both an internal and external component. The Judge is required to be effective in his/her individual time management, whether personal or under the Management function

\(^2\) Marbury v. Madison, 5 U.S. 137 (1803),
envisaged by the Civil Proceeding Rules or similar time and case management mechanisms. There is an expectation more often than not, satisfied that the Judge is a proactive person driving the operation of the Judicial System. The Rule of Law therefore places a personal responsibility on the Judge or Magistrate to further its principles and objectives.

As a result, the Internal Management of the system can be looked at from 2 perspectives. The individual self-management of Judges and Support Staff and the Infrastructural Support System in place to promote the Rule of Law and to deliver the product that we call “Justice”.

There are certain non-negotiable features that must characterise Judiciaries throughout the Commonwealth in order to achieve the type of Internal Management that is required for the protection and support of the Rule of Law:

(1) A Judge must be informed and versed in the laws of the Court over which he presides. That is a given. He must also be knowledgeable of, and concerned with, laws that not only impact his particular jurisdiction, but as well, those laws which may impact the society in which he functions. The Judge must continue to familiarise himself with, for example, international obligatory Rules, Conventions and Protocols on human rights and climate change and cannot be indifferent to those Conventions and Protocols signed on by Nation States. The evolving nature of the Rule of Law demands that judgements and decisions of the Court be steeped in socially conscious attitudes and considerations.

One way of meeting that demand is by continuing education. Continuing education and training in the legal profession is mandatory. To endorse what My Lord the Honourable Chief Justice of Trinidad and Tobago, Ivor Archie, said at the Opening of the 2016/2017 Law Term, “It is accepted international best practice in developed societies for Judiciaries to have continuous training...in order to maintain relevance and effectiveness.”

In this regard, I wish to publicly highlight and commend the extraordinary event and publication that is the Distinguished Lecture Series, since its inauguration 6 years ago to date. This Lecture Series, hosted by the Trinidad and Tobago Judicial Education Institute, is a pillar testament to one of the fundamental conduits for advancing the Rule of Law in any judicial system – that of continuing education for its judges, magistrates and the general Bar Association. It is also significant that the Distinguished Lecture Series are informed by social scientists, anthropologists and other stakeholders in the general administration of justice. At the risk of appearing to advertise, the JEI model of continuing education in Trinidad and Tobago works. Its Lectures are made available in print for public consumption and edification. These Lecture Series breathe fresh life into the Judiciary’s conduct of its affairs in the administration of justice; and ensure that Judges, Magistrates and lawyers are educated, in a practical way, on new developments in the law.

(2) Guaranteeing the Rule of Law requires that judicial independence must never be breached. A Judiciary that is confident in its independence is reflected not only in its decision but also its approach to decision-making. The way the Judicial system deals with persons who appear before it, or even third parties, in the public sphere, often goes a long way in not only reflecting the confidence of the Judiciary but also encourages confidence in members of the public towards the Judiciary. Judicial independence, whether from majority or populist views, pressure from the ‘other Court’ - the ‘Court of Public Opinion’; or from fear, favour or financial gain or indeed, from the dictates of political interference, must always be maintained. A bone of contention, integral to the Judiciary’s independence, is the politically marred issue of financial autonomy. As guarantors of the Rule of Law, it is my respectful view that Judiciaries throughout the Commonwealth Caribbean must pursue financial autonomy in the conduct of their affairs. It is to the credit of the Chief Justice of Trinidad and Tobago, the Honourable Justice of Appeal Ivor Archie and the Chancellor and Head of
the Judiciary of Guyana, the Honourable Carl Singh, that this enviable ideal of financial autonomy has been achieved, in these respective countries, after many long years of struggle and opposition.

(3) In ensuring that the Rule of Law is upheld, a Court must always engage in the required civility and probity, informed by its inherent humility and the necessary courtesies. It is this humility that allows the Judge to listen and learn. That modicum of conduct relates as much to the litigant who appears before the Judge as to the lawyer who has conduct of the particular case. As a Judge, I recall a Senior Counsel who appeared before me in a criminal matter, belligerently seeking the start of his trial, because as I later understood, he was being handsomely paid for his retainer. Five minutes before I entered Court, I received information that the said Senior Counsel’s Practicing Certificate was suspended, pending repayment of fees to another client, based on an inquiry conducted by the then Disciplinary Committee of the Law Association. The Courtroom was packed to capacity-over 100 persons, both comprising the general public and potential jurors. Rather than chastise that Senior Counsel openly in Court, I called him side-bar, informed him of the status and that he needed to seek an adjournment. None was the wiser and the legal profession was not brought into ridicule, and by extension, the legal system and the profession were not further undermined in the eyes of the public. There was nothing wrong, in my view, with preserving the status quo in that case.

In engaging civility and probity, the Judiciary must support genuine inclusivity and be sensitive to all manner of persons who appear before it. Genuine inclusivity means full access to justice by all citizens including the differently-abled. A peculiar situation arose in the Trinidad and Tobago jurisdiction a few years ago where the President of the differently-abled society sued the Judiciary for its lack of physical access to the Hall of Justice since there was no lift available for the differently-abled to access the ground floor. The Court ruled against itself and found in the Claimant’s favour. I can also recall that before the lifts were built in the Hall of Justice, there was a well-established attorney, who with the concurrence of all the Judges, accessed the Courts by using the basement lifts of the Judiciary that were exclusive to Judges. To the credit of the Judiciary of Trinidad and Tobago, wheelchair access is now available.

In another matter, Magistrate Averson Jules of the Judiciary of Trinidad and Tobago, reminded me yesterday how important it is to ensure that the differently-abled litigant feels included in the judicial process. She explained how she took careful time to observe the evidence of a deaf and dumb litigant who appeared before her, notwithstanding the presence of an interpreter. This, ladies and gentlemen is the human touch that is sometimes required, to demystify the Judiciary and allow persons to feel included in the process of the Rule of Law.

(4) The proper promulgation of the Rule of Law requires a Judiciary that is intellectually ambitious. The common law has a continuing relevance in the judicial system, filling the lacuna of statutory provisions. A Judge on a daily basis is asked to decide questions that affect society in general. Transformational judge-made law can only be established where a Judge’s ambition remains focused on the pivotal role of the Judiciary as the guardian of the Constitution. The assumption therefore is that the judge understands the society which, not only exists, but is envisioned by the Constitution. There is therefore a pressing need for Judges and Magistrates to be informed, if only to remain relevant, so that you can secure the application of The Rule of Law. That need to be informed can transcend current law. The Internet and social media challenge the development of the law as they impact the laws of Privacy, Contract Law and Tort. Can Hacking be a tort? Is it part of the law of trespass? When and how do postings on social media impact on the common law or Constitutional law? In many of these areas, judges are required to be activists and not necessarily slaves to precedent to protect the Rule of Law.

In relation to social media, legislation in small island jurisdictions have not been very progressive or timely. At times, judges have had to raise from the dead, archaic laws, that may be invoked either in
its statutory form or by way of common law. A good example of this was in the Trinidad and Tobago decision of Therese Ho and Lendl Simmons. The issue concerned nude photos which the Claimant’s former boyfriend disseminated to his friends. She claimed, inter alia, damages for breach of confidence, succeeded and was awarded aggravated damages. The presiding Judge stated in the judgement:

“It appears that the common law concept of breach of confidence has never been applied in this jurisdiction to deal with a circumstance where intimate photographs taken in private have been distributed without the consent of the other party. In this jurisdiction therefore no action can be founded based on the failure to respect the privacy of a person. Given the rapid pace with which the face and fabric of the society has changed and cognizant of the infinite reach of social media, it cannot be denied that the privacy of the person is under attack and there is dire need for the enactment of statute to afford protection for citizen’s personal privacy.

It must also be recognized that while the Courts in the United Kingdom are now obligated to apply the law in relation to breach of confidence in a manner that is consistent with that Nation’s obligations under the Human Rights Act 1988 and its obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms, no such obligation exists in this jurisdiction.

The instant case reinforces this Court’s belief that it cannot confine itself to a myopic view of the law and in the absence of legislative protection, the common law concept of Breach of Confidence has to be moulded so as to address modern societal demands. The law has to be dynamic and has to develop in such a way to ensure that it remains relevant and it must be recognised that there is an obligation of conscience which requires that videos, photographs and/or recordings that capture private intimate relations, should be clothed with a quality of confidentiality.”

(5) The timely delivery of justice ought to be a matter of priority for every Judiciary. The cries of delay are not unique to any one corner or region of the Commonwealth. The system is simply overwhelmed and suffers from the resource and human capacity needed to drive it. Delay in the judicial system is like a cancer that starves the system of relevance and respect. Some jurisdictions, including Trinidad and Tobago, have employed the use of mediation and Alternative Dispute Resolution (ADR) in cases which qualify. This is a step in the right direction- both for the Court in aiding the efficient disposition of cases and an unburdening of the caseload as well as for the litigants, who may benefit from a just resolution of the case for both parties, enabled by the amicable environment that a mediation/ADR session generally provides. In the criminal law, My Lord Chief Justice of Trinidad and Tobago, the Honourable Ivor Archie, indicated in his Address at the Opening of the Law Term 2016 that the Criminal Procedure Rules are under way for implementation in early 2017. It will bode well for Judiciaries, especially in the Commonwealth Caribbean, to implement similar ADR and case management rules in addressing the issues of delay in the criminal and civil justice systems. In this regard, it will certainly be worth their while to liaise with the TT judiciary so as not to reinvent the wheel and CJ Ivor Archie is only too willing to accede to a request of this nature. I am fearful that my suggestion is not seen as an encroachment- Separation of Powers. I need to emphasise that it is merely an encroachment.

(6) It is imperative that in promoting the Rule of Law, judges promote and articulate as well a clear understanding of the law. Judgments ought to be written in a manner that is easily understood and that is relevant to existing social norms and mores.

An integral part of the communication aspect is the issue of public perception that can become skewed, with the resulting fallout, if not properly done. A judge does not give interviews on his judgment even if it the subject of great criticism in the common law tradition and judges have been...
pillared, if organizations and organizations. In these circumstances the role of the Bar or Law Associations is critical in taking up the mantle of communicating with the public the ramifications in a judgment in circumstances where the Judiciary ought not to defend itself or be seen to be defending itself. This implies that the relationship between Bench and Bar must always be encouraged and cultivated. That relationship is threatened if Bar or Law Associations are perceived as political associations at the executive level.

With respect to the second non-negotiable feature a Judiciary must possess in order to further the Rule of Law, let us turn now to the matter of Resources and Funding. Having regard to the foregoing, it is axiomatic that the ability to act as a Guarantor is heavily dependent on the availability and prudent development of resources to support the work of the judicial system especially in the context of a Constitutional system that establishes the Judiciary as mediator, promotor and protector of rights, freedom and institutional power and authority. The judicial system is in itself, a national support system that can only effectively function if it is provided with management systems human and electronic which allow for production. If resources are absent, the Judiciary is in danger of becoming a façade. The resources and support system must be properly qualified, trained and exhibit an ethos to work that will allow the Judiciary to deliver its Constitutional objective.

I turn now to a matter that is very near and dear to my heart, that of Restorative Justice. It is a matter that is absolutely vital to expediting a Judiciary’s effectiveness and caseload, in an effort to comply with the timely administration of justice. If crime and recidivism are seen as an anathema to the Rule of Law, then solutions with a juridical input must be sought so that there are both sanctions and relief in dispensing criminal matters. The Judge in the criminal court can be the prime mover of ensuring continuance of the Rule of Law through transformational action, some may even say activism. Restorative Justice therefore has an indelible place in the Rule of Law.

It will therefore be important to consider the law not as rigid and inflexible because of precedent, since more often than not, the best decisions on the Bench are made when Judges and indeed, the lawyers who appear before them, consider the human relationships that inevitably inform the justice of the case. Restorative justice in the civil and criminal arena, focuses on restoring the human relationships that are damaged or broken as a result of the misfeasance caused by one party to another. The raison d’être is that if damaged relationships are restored, and the offender is not only made fully aware of the damage caused by actions, but is also given the tools, as well as the opportunity, to address the issues within himself that led to that offending behaviour, then the likelihood of an offence being repeated is drastically reduced.

The retributive approach in the criminal law continues to fail us, in stemming the seemingly endless flow of crime that by extension shake the portals of the Rule of Law. Restorative Justice places on the offender, the responsibility to take active steps for atonement, rather than a passive term of reflection behind prison walls. However, let me disabuse your minds immediately that in any restorative justice system, prison incarceration still has its place.

This ideal of restorative justice requires a combination of social engineering and judicial action, even activism. How can the law therefore be utilized as a transformational tool to promote restorative justice? And what is the role of the Judiciary in that process? The Judiciary may thus be required to take a more activist or interventionist role, not only to preserve the Rule of law in society, but to interpret the law in a manner that promotes Restorative Justice in a way that does not undermine the public’s confidence in the judicial system. Indeed, perceptive confidence in the judicial system is critical to the rule of law, for “Justice must not only be done, but must be seen to be done.”

Judges therefore are required to uphold the law and the Constitution of their respective jurisdictions. Giving effect to the law entails doing what is right and not what is necessarily popular.
In 2009, when I was a Senior Criminal Judge in the Assize, apart from being a trial Judge with criminal overload, I adjudicated in the Bail Court. I had by then, been speaking in my sentencing judgments in trials for some time that the “man child was in crisis,” a type of rally cry from the Bench, to my society to wake up to the reality that we were losing our young men between the ages of 17-30 generally to murder, gang warfare and drugs.

With every young man that came into my courtroom, accused of murder, rape, robbery, with tattooed tears running from their sunken eyes, I felt an increased sense of desperation triggered by the urgency of now. I began the Bail Boys Project as a working component of restorative justice. I am happy to report years on, the Bail Boys Project, now under a new nomenclature, continues to make progress under the stewardship of Justice Malcolm Holdip, who is here with us today. The Bail Boys have been given a second shot at redeeming themselves.

The Bail Act allowed for conditions when an accused person is placed on bail. There is no system in Trinidad and Tobago analogous to Bail Houses in the United States and some parts of the Commonwealth. As a result, there were scores of accused persons awaiting trial for some 8 and 9 years without hope of coming to trial given the overload of case files in the criminal courts. Apart from surety, the conditions were traditionally reporting conditions to police stations and distance orders to stay away from the victims of crime. A prisoner on remand for very serious offences- attempted murder, rape, violent robbery and assaults- was not afforded any structured life skills training or programme whilst in remand yard, primarily because such training was exclusive to the convicted and not to the transient accused. And by “transient” I mean upwards of 5 years.

These remand prisoners appeared before me bitter and vicious. The first thing I did was to apologise to them- these accused young men- for not having an early trial. They were often shocked by that. They were even more shocked when I granted them bail, some of them without surety. Yes, this type of action hovers between judicial perseverance and judicial risk. Instead of reporting conditions in police stations where they were often harassed, verbally and sometimes demeaned, I sent them to probation welfare officers. They were further exposed to psychologist and experts, some who were brought on board voluntarily to deal with anger management, substance abuse, self-esteem issues, sex education, parenting and fiscal management. The Probation Welfare Office at the behest of the Court, sought out jobs and got reports from employers on their industry. They were placed on curfews, required to reside at specific addresses and if illiterate, one of the conditions of bail was to attend literacy classes and if literate, to enroll in courses that were beneficial to them. Absenteeism would result in a breach of bail condition and possible revocation.

There was a reward system in place for obeying curfews and not violating bail conditions. This is not to say that recidivism did not occur- because the runner stumbles- and when they stumbled, bail was revoked for a few months to trigger reflection. I can say that while I presided over the Bail Boys Project on the Bench, out of 35-40 hardcore criminals, only 3 or 4 became repeat offenders. Some got married, formed small contracting firms, even offering their services to the Court to employ other accused persons. In some instances we moved gang members from the streets to upper secondary and tertiary education.

Let me share with you another example where it may be useful for Judges and Magistrates to think outside the box and employ restorative justice mechanisms in the cases before them, by referencing cultural modes of dispute resolution. The Panchite was a system for dispute resolution used by the indentured immigrants from India where generally 3 persons of authority- be it the schoolmaster, the schoolmaster or the pundit- would seek to resolve disputes among those in their community. The decisions were binding and upheld by the community. It has fallen into total disuse with the development of the Court system and the growth of litigation. When I was on the Bench, a family matter came before me. It concerned two brothers, from a very rural village in Trinidad, fighting over land. The Panchite system was used by me in the Criminal High Court before I sentenced the brother who, accused of attempted murder, was found guilty of wounding with intent. It was the first time that a trial judge in Trinidad and Tobago used the Panchite system in determining
the type of sentence that would have met the justice of the case, maintain harmony in the family and the Rule of Law in the community.

By now, you must have realised that Restorative Justice, innovative Judicial Action- and if you prefer, “judicial activism”- can co-exist harmoniously to support the Rule of Law.

Let me lastly turn to this ripe issue of the place of International Law in the Rule of Law. It is often forgotten that the Rule of Law and the rule of the Judiciary is not solely linked to domestic law in the Constitutional context. In his 2004 Report to the United Nation, then Secretary-General Kofi Annan, recognized the international Rule of Law as an important feature of world harmony, which must be “consistent with international human rights norms and standards.”

The International Order is integral to the promotion of the Rule of the Law through the development of an International judicial system- whether by adjudicating on trade issues through the World Trade Organisation (WTO), or the promotion of Human Rights, through the various international Tribunals established under the umbrella of the United Nations dealing with the breach of Human Rights treaties or breach of International Criminal law or Humanitarian Law, the settlement of Investment Disputes through the various Dispute resolution systems established in Bi-Lateral Trade Agreements or International Law Disputes concerning Borders, Environmental issues, the use of Force, all determined through the International Court of Justice.

Respectfully, I feel that Commonwealth Courts have sometimes neglected, even failed, to understand or indeed, are reluctant to appreciate the impact and relevance of the international jurisprudence on our domestic law development. Why is this? All of us in this room have been schooled in the well-worn rules of the common law that the court will always seek to ensure that the common law is in conformity with the State’s international obligations and secondly, that a domestic Statute will always be interpreted in a manner that conforms with a State’s international obligations, unless there are express words in a domestic Statute that demands a contrary interpretation and thirdly, that the Court will resolve any ambiguity in domestic legislation to accord with the State’s international obligations (a useful example is the Australian decision in Minister for Immigration and Ethnic Affairs v Teoh
d. These rules are not new nor are they of recent vintage. These rules have been applied by the English Courts for over a century. However what is striking is the apparent dearth of Commonwealth authority that apply or even accept these long standing common law rules. One only has to look at the Constitutional cases in Human rights issue where the International Treaties are accepted as a source of law in defining the meaning of constitutional rights. These treaty obligations impacted on the Pratt and Morgan Case and The Lewis Decision out of Jamaica, The Hughes, Fox, Reyes and Spence Cases out of the Eastern Caribbean and Belize and the Thomas and Hillaire cases out of Trinidad, to name a few, yet international norms have not received the required momentum in the decisions of some Commonwealth jurisdictions. Is it that that judges are uneasy about the impact of our international obligations on the meaning of our human rights provisions? Are we afraid that such considerations are affected by politics and therefore we avoid the issue that can no longer be avoided? The impact of this approach, especially in the field of Human Rights, is to suggest that the Commonwealth citizen and the non-Commonwealth citizen are entitled to be treated differently. I phrase this in this manner to project the very basic principle that the reason why the field of endeavor, is called “Human Rights” is because it seeks to establish the proposition that humanity is entitled to certain basic rights that are indistinguishable by borders or country. When put in that context, we must consider that guaranteeing

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3 (1995) 183 CLR 273
4 [1993] UKPC 1, [1994] 2 AC 1
5 Lewis -v- The Attorney General of Jamaica [2001] 2 AC 50
6 [2002] 2 AC 249
7 [2000] 2 AC 259
8 [2000] 2 AC 284
9 [2000] 2 AC 284
10 [2002] 2 AC 235
‘Human Rights” means applying Human Rights principles to domestic interpretation, and by so doing, Judges and Magistrates enhance the Rule of Law.

For purposes of economy, to give one example on the issue:

Many Caribbean States are signatories of many bilateral treaties that provide for dispute settlement before the International Centre for the Settlement of Investment Disputed (ICSID). The treaties provide for “full compensation” if an investor’s properties are seized by the State. There is also local legislation that provide for full compensation where an individual’s lands are acquired by the State. Often there is no definition of full compensation. There are several international decisions on the meaning of full compensation by the ICSID and other tribunals, all consistent with each other. In the absence of a local definition, the meaning and application of the term “full compensation” ought to conform with our international obligations. So that the decisions of the ICSID on this issue, though not binding domestically, provides a source of law in interpretation, in accordance with the common law principles.

When we speak of a Judiciary as Guarantor of the Rule of Law, we must now include the International Judiciary that preserves the International desire for peace, development and growth. It is also reflected in the establishment of a new legal system, the International Criminal Court. Its hallowed objective, among many others, is to preserve the international Rule of Law by ensuring that impunity does not go unscathed.

It may be well for us to be reminded that one peculiar feature of a failed State is a failed Judiciary. States fail when the Judiciary fails to uphold and protect the Rule of Law.

Even though all that I have said is devoted to the Judiciary as Guarantor of the Rule of Law, there is a much wider and fundamental issue to consider. Would it not be more accurate to suggest that the true Guarantor of the Rule of Law is not the institution of the Judiciary but the Legal Profession as a whole. Lawyers who are well-trained, effective and committed are the agents of the Rule of Law. They are the Advisers, the Advocates, the Judges, the Magistrates, the drafters, the representatives of every individual and organisation in the system of law.

An important component in the Rule of Law is a vibrant, intellectually energised Bar Association that will fuel jurisprudential debate in the public domain in a manner that does not ridicule the Court but supports it; that seeks to guide rather than punish; to inform rather than misinterpret the law. In the Commonwealth, I have noticed over the years that when lawyers become politicians, to interpret the Constitutions publicly not as lawyers, but as politicians. Lawyer-politicians become individuals of selective, sometimes skewed jurisprudence.

In those circumstances, it may therefore be more accurate to suggest that it is the lawyer at work in society, that promotes the idea that there exists a system that Guarantees the Rule of Law. If we accept this view, we must now ask how do we ensure that the Legal Profession acts as a Guarantor of the Rule of Law? But that is for another day.

As judges we have to engage the esoteric, but the pragmatic is critical for what needs to be done must be done to actualize the philosophical underpinnings of our judicial responsibility and independence, if we are to be truly Guardians and guarantors of the Rule of Law. At times, it may be said that there is an implementation deficit in exercising our wide judicial powers and responsibilities. Not out of indolence or indifference, but out of our guarded, well-intended vision of stewardship as judges, that we must never bend the branch of the law and risk breaking it in the process. In 2016, it may be worth our time to heed the call to arms of Chancellor Carl Singh, and I quote, “To be able to provide that guarantee for the Rule of Law, the Judiciary must possess certain characteristics and attributes. I speak mainly of judicial independence. I speak of activist Judges, who are bold, outspoken and fearless. Judges who are weak, timorous souls are less likely to be effective guarantors of the Rule of Law.”
“Understanding the Underlying Causes of Domestic Violence”
By Dr Dianne Douglas,
Clinical Psychologist, Trinidad and Tobago

This is the transcript of the PowerPoint presentation for this section.

Slide 1
CMJA: The Judiciary as Guarantors of the Rule of Law
Domestic Abuse – The Underlying Causes
Dr. Dianne Douglas,
Douglas and Associates Ltd
ddouglas@douglasassociates.org
www.douglasassociates.org

Slide 2
Defining Domestic Violence

Slide 3
Definition: Domestic Violence
  • Domestic violence constitutes the willful intimidation, assault, battery, sexual assault or other
abusive behavior perpetrated by one family member, household member or intimate partner against
another.
  
  The National Centre for Victims of Crime  www.ncvc.org

Slide 4
Definition: Domestic Violence
  • The relationship necessary for a charge of domestic assault or abuse generally includes a spouse,
former spouse, persons currently or recently residing together, or persons who share a common child.
  
  The National Centre for Victims of Crime  www.ncvc.org

Slide 5
Definition: Domestic Violence
  • Domestic violence is not about isolated incidents of violence, but about a pattern of abusive
behaviors with the purpose of dominance (power) and control.
  
  UN Women’s Partnership for Peace Manual

Slide 6
Types of Violence/Abuse

Slide 7
  • Physical Abuse
  • Sexual Abuse
  • Psychological or Emotional
  • Economic or Financial Abuse
  • Stalking and Cyberstalking
  • Spiritual Abuse
  • Child Abuse
  • Elder abuse

Slide 8
  • Why abuse an intimate partner, a member of your household or a child?
Slide 9
- Culture
- Socialization
- Beliefs
- Attitudes
- Personality

Slide 10
The Gender Lens

Slide 11
Case of the surgeon

Slide 12
What is Gender?
- Gender can be described as the socially constructed behaviors, attitudes and identities associated with masculinity and femininity.

Prof. Rhoda Reddock

Slide 13
Gender Ideologies
- Are those ideas which define acceptable and unacceptable for women and men. They may differ from society to society and from era to era.

Prof. Rhoda Reddock

Slide 14
Gender Expectations
- Refers to the behaviors and attitudes expected of women and men in particular social and cultural contexts.

Prof. Rhoda Reddock

Slide 15
Gender Identities
- Are basic to our understanding of self.
- They are our most fundamental identity and shape how we act in all areas of life.

Slide 16
Who Am I?

Slide 17
The External Environment of the Abuser

Slide 18
The External Environment of the Abuser
- History of colonialism, slavery and indentureship.

Slide 19
The External Environment of the Abuser
- An environment of power, control, intimidation, lack of human rights and boundaries, classism.
Slide 20
The External Environment of the Abuser
- The deep mistrust between men and women.

Slide 21
Social and Cultural Norms
- The acceptance that women are subservient to men and should obey them.

Slide 22
Social and Cultural Norms
- It is wrong for a woman to stand up to a man.

Slide 23
Social and Cultural Norms
- It is the woman who is expected to adjust in a relationship and to make it work.

Slide 24
Social and Cultural Norms
- A woman is expected to sacrifice her interests for the interest of her family.

Slide 25
The Internal World of the Abuser

Slide 26
Possessiveness – view their partner as their property. They do not see their partners as a separate person and equal to them. Their partner is just an extension of who they are. Their partners do not have their own thoughts, feelings, ideas and opinions.

Slide 27
Power and Control – perpetrators believe they have the right to control their partners, tell their partners what to do, and expect obedience; feel justified in using force to maintain power and control over partners and to displace those feelings of low self-esteem, and get them to comply; feel their partners have no right to challenge this.

Slide 28
Externalize Blame – will not assume responsibility for their actions; projects the blame for their anger and violence onto others (especially their partners).

Slide 29
Tendency to justify, deny, minimize or reframe their behaviour, e.g. “someone has to be in charge”, “I have never hit you”, “That’s not the way it happened at all. You are over-reacting!”

Slide 30
Unrealistic expectations of partners to fulfil their needs. Expect their partners to make them feel happy, make them feel complete, high level of dependency on their partner.

Slide 31
Express most feelings as anger in the form of violence.
- Don’t know how to express hurt, frustration, stress, sadness, fear, etc. Poor communicators.
- Displaces anger from other sources (work, finances) on to partner.
Slide 32
Believe in traditional male/female roles.
- A male is breadwinner, ultimate decision-maker, strong, dominant, superior, successful, restricted emotions.

Slide 33
Need to maintain an over-adequate façade – inability to reveal vulnerability or anxiety (with the exception, perhaps, of the period immediately after an abusive incident); avoids their own feelings of independence.

Slide 34
Socialized into Aggression – have been taught directly or indirectly that aggression is an appropriate means of problem-solving. By observing or imitating behaviour, we learn what those around us consider appropriate; victimization and witnessing violence are the most consistent risk factors of adult violence.

Slide 35
Abusive individuals need to be dominant and feel in charge of the relationship.
- They will make decisions for their partner and the family, tell you what to do and expect you to obey without a question. Your abuser may treat you like a child, servant or even his possession.

Slide 36
Intimidation
- Designed to scare their partner into submission like threatening looks or gestures, smashing things in front of them, destroying property, hurting pets, or putting weapons on display. The clear message is that if you don’t obey, there will be violent consequences.

Slide 37
Humiliation
- Will do everything he can to make her feel bad about herself or defective in some way.
- After all, if she believes she is worthless and that no one else will want her, she is less likely to leave.
- Insults, name-calling, shaming, and public put-downs are all weapons of abuse designed to erode her self-esteem and make her feel powerless.

Slide 38
Understanding The Female Victim

Slide 39
The Female Victim:
- “Abused Woman’s Syndrome” or “Battered Woman Syndrome” describes a pattern of psychological and behavioral symptoms found in women living in battering relationships.

Slide 40
4 General Characteristics of the Syndrome:
1. The woman believes that violence was her fault.
2. The woman has an inability to place the responsibility for the violence elsewhere.
3. The woman fears for her life and/or her children’s lives.
4. The woman has an irrational belief that the abuser is omnipresent and omniscient.
PTSD – fear; nightmares and sleep disturbances; anxiety; anger; difficulty concentrating; depression; social withdrawal, feelings of helplessness and hopelessness, numbness, hypervigilance (inability to relax, jumpiness or startle response), chronic physical complaints; substance abuse.

Love for the man and her family.

Fear: #1 Reason
- Threats to harm the victim, loved ones or pets;
- Threats of suicide;
- Believing the abuser will take their children.

Fear of the Unknown

Religious Reasons: the sanctity of marriage and the family.

Pressure from friends and family to stay.

Believing the Abuser will change.

Blaming the abuse on alcohol, financial pressures, or other outside factors.

The word “esteem” comes from a Latin word that means “to estimate”. Self-esteem is how you “estimate” yourself.
- I am not deserving of love.
- He is right. No one else will love me.
- I am unworthy.

An abused woman also has to overcome feeling inadequate, crazy, or stupid – something akin to brainwashing – as a result of having been repeatedly told she was these things while in the relationship.
Slide 52
Financial Dependency
- Women are often dependent on men and earn less than men

Slide 53
Shame and Humiliation
- What will people think?
- Stripped of dignity and privacy.
- Naked and vulnerable.

Slide 54
Companionship
- A woman’s affinity for emotional attachment.
- The belief that a woman needs a man in order to be happy.

Slide 55
Erroneous Beliefs
- I have no identity apart from my husband/partner.
- If I leave him, I lose everything.

Slide 56
The Cycle of Violence (NYS Office for the Prevention of Domestic Violence)

Slide 57
- God’s Richest Blessings
- Thank You

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PANEL SESSIONS

PANEL SESSION 3
“Providing Sufficient Resources for the Courts and Judiciary as a Fundamental Constitutional Obligation”

By Sir Peter Gross, England and Wales

Introduction

1. It is a pleasure to return to Guyana in the 50th anniversary of its independence. I join others in thanking our hosts for the warmth and generosity of their welcome. I was first here over 10 years ago with the current Lord Chief Justice (“LCJ”) and then had the pleasure of meeting the Chancellor of the Judiciary, the Hon. Justice Carl Singh – who I am delighted to see here again. I do hope that we will not let another decade elapse before we next catch up.

2. It is a particular privilege to express my support for the Commonwealth Magistrates’ and Judges’ Association. As a body it has since 1970 been one of the strongest proponents of respect for judicial independence, judicial integrity, the proper administration of justice and the rule of law. As exemplified by its first aim and objective, the CMJA seeks to “advance the administration of the law by promoting the independence of the judiciary”. This is truly important work. More broadly, the CMJA is a facet of the Commonwealth. In an uncertain and troubled world, the Commonwealth, an association of nations with shared values and traditions, notably the common law, is all the more important.

3. It is axiomatic that the two primary functions of the State are Defence of the Realm and the provision of law and justice. If the State succumbs to its external enemies, all is lost. If it does not uphold law and justice, no other rights can be enforced or entitlements enjoyed. Against this background, it is impossible to overestimate the importance of the rule of law and an independent judiciary to our society.

4. To uphold law and justice, a State must secure necessary institutional structures and resources. It is one thing to make a commitment to separation of powers and the rule of law within written constitutions or – as in the United Kingdom – within an uncodified constitution, it is another to render that commitment real. Without the provision of an independent judiciary, properly appointed, well-versed in the law, and with security of tenure and salary, there can be no real commitment to either.

5. A properly independent judiciary is however a necessary but not sufficient condition for a robust commitment to the rule of law. It must be complemented by a properly resourced and accessible infrastructure. That infrastructure must be capable of delivering the proper administration of justice: courts, court buildings, court staff with the relevant expertise and so on. It also requires the provision of sufficient resources for innovation, given the pace of technological and societal change. All this is the topic addressed by the CMJA’s important 2015 Resolution.

6. In England and Wales this aspect of the State’s primary duty is, by statute, placed on the Lord Chancellor – who is under a duty to “ensure that there is an efficient and effective system to support the

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11 I am grateful to John Sorabji, DJ Michael Walker and Ruth Thompson for their assistance with the preparation of this paper.
carrying on of the business of the Courts and that appropriate services are provided for those courts”.

Parliament has thus determined that it is the executive’s responsibility to discharge this duty. The Lord Chancellor, and all government Ministers, are also placed under a statutory duty to uphold the continued independence of the judiciary; the former being under a specific duty in respect of the constitutional principle of the rule of law. As further provided by statute, the Lord Chancellor must “have regard to …the need for the judiciary to have the support necessary to enable them to exercise their functions”. All these matters are brought together in the Lord Chancellor’s oath, whereby he/she swears to:

“…respect the rule of law, defend the independence of the judiciary and discharge my duty to ensure the provision of resources for the efficient and effective support of the courts for which I am responsible…”

7. Now, an obligation to provide resources is one thing, though an indispensable and principled starting point. Performance of that obligation, at a time of financial stringency from which the justice system despite its fundamental importance cannot be wholly immune, is another. In terms of the practical provision of resources to the justice system, in England and Wales, there is (to put it colloquially) only “one game in town”: HMCTS Reform. The Reform Programme is our answer, in England and Wales, to the title of this Paper.

8. To begin with, some context:

(i) As Senior Presiding Judge (“SPJ”) over the period 2013 – 2015, I had the privilege of the closest involvement in the decision to embark on HMCTS Reform and its introductory phases. Subject of course to the Lord Chief Justice (“LCJ”) and the Judicial Executive Board (“JEB”) – the LCJ’s “cabinet” – the SPJ is the judicial lead on HMCTS Reform. My Deputy (Fulford LJ) led on IT and is now, as the current SPJ, the judicial lead on the reform of HMCTS, together with the Senior President of Tribunals (“SPT”), whose role has also been pivotal.

(ii) Secondly, a word as to HMCTS. One of the consequences of the constitutional developments since 2003 has been the formation of what is now HMCTS. This is the body that administers the courts and tribunals. HMCTS is unique because it is a partnership between the Lord Chancellor (“LC”) and the LCJ and SPT – thus a partnership between the Executive and the Judiciary. HMCTS officials have dual duties to the LC and the LCJ.

(iii) Thirdly, the reduction in resources available to the justice system is striking. In terms of funding for the courts, there has been a 25% cut between 2010 – 2015. As to buildings, 636 buildings in 2011 have reduced to 471 by March 2015. Finally, HMCTS staff numbers have reduced from 22,000 in 2009/10 to 17,000 in 2014/15. It is simplistic to regard all reductions as “bad” – some are inevitable and some are “good” as I shall suggest – but (to use one example) there has been a painful loss of institutional knowledge flowing from the departure of some very experienced managers and the downgrading of some posts.

9. Against this background of years of salami sliced reductions in resources, it has been apparent from late 2012 (if not before) that strategic reform was an imperative. The only alternative was decline. Reform has proved as daunting as it is exciting – truly a once in a generation opportunity to provide an improved justice system.

10. HMCTS Reform involves an integrated programme with three strands: (1) transforming our IT; (2) modernising our estate; (3) changes to our working practices. To emphasise: this is a transformational

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12 Courts Act 2003, s.1
13 Constitutional Reform Act 2005, ss.1 and 3.
14 Constitutional Reform Act 2005, s. 3(6)(b)
15 Constitutional Reform Act 2005, s.17(2)
16 I.e., Her Majesty’s Courts and Tribunals Service
17 Framework Document (“FD”), para. 2.4. It may be noted that references in the FD to the LCJ are deemed also to include the SPT (FD, para. 1.4).
programme (truly so called) and an integrated programme; the three strands stand or fall together. With the support and agreement of both the Treasury (“HMT”) and the Ministry of Justice (“MoJ”) and of successive Lord Chancellors,\textsuperscript{18} funding of some £700 million plus has been agreed\textsuperscript{19}. Moreover, HMT has agreed various flexibilities and the “ring fencing” of the proceeds of asset sales\textsuperscript{20}, so that these can be reinvested in the Programme.

11. Three matters need to be emphasised at the outset. First (as the LCJ has put it), this is not “reform done to” the Judiciary; quite the contrary. HMCTS Reform can only be successfully accomplished with judicial participation, nationally, at Circuit level and locally – hence the establishment of Local Leadership Groups, now coming into their own. By its nature, much of the programme must be judicially led. Because of the need for engagement by the judiciary across the country, much judicial leadership time has been invested in road shows; my then Deputy and I undertook more than 30 in 2015 and found them, without exception, valuable and stimulating. Communication between the SPJ and judges across the country is an essential part of the process and a matter to which my successor has devoted much attention. Judicial involvement and leadership must also be jurisdictionally based; proposals for reform must satisfy those with practical experience of the jurisdictions in question. For this reason, Judicial Engagement Groups (JEGs) were established\textsuperscript{21}, as the fora for testing innovative ideas against the wisdom of practical experience – and have already repeatedly proved their worth.

12. Secondly, the Reform Programme is not a cost cutting programme. Its objective is a modernised and improved justice system. It will deliver savings – but it will do so through efficiencies. It is right that it does so; HMT like any other investor expects a return on its investment. The savings, however, come as part of a strategy for the future; not as a slash and burn exercise.

13. Thirdly, in designing the justice system for the future, we are anxious to put court users at the centre of our considerations. Hitherto, we have been more producer/supplier oriented. We really do need to grapple more with that which is in the best interests of those who use the courts.

14. Elaborating on the three strands, the first concerns IT transformation. In one sense, there is nothing remarkable about this – in an age when so many people do so much online: think about Amazon, grocery deliveries and flight bookings. For the Courts, though, this will be a major change – from a paper based system to one which is digital by default. In terms of HMCTS staffing, there is no gainsaying that a good number of jobs will be lost: if there is no paper to shift, you do not need employees to shift it. But, importantly, there will also be a need for higher grade staff. If we are to be digital by default, it is essential that the IT works and can be rapidly repaired when, inevitably, there are breakdowns. No airline could function if its ticketing operations at a major airport went down for an extended period; nor will the Courts system. Moreover, there will be a need for higher grade staff to assist those members of the public who struggle with IT or lack access to it. We cannot exclude anyone, let alone some of the most vulnerable in society, from the Justice System. An essentially digital system will free acres of space, so bringing me to the second strand – estate rationalisation.

15. The blunt truth is that we have had too many buildings and certainly far more than we can afford to maintain. I am familiar with cities with a number of courts and tribunals buildings, in close proximity to one another, none of them satisfactory. Furthermore, Courts must command respect; from my own experience, by no means all have been maintained in a condition to do so. We need a smaller estate – but an improved estate. We must maintain what we retain. This is not an exercise in squashing Judges into less space; we will have to invest in an upgraded estate, fit for purpose in a digital age. We can use the

\textsuperscript{18} The Rt Hon. Chris Grayling MP, the Rt Hon. Michael Gove MP and, more recently, the Rt Hon. Elizabeth Truss MP, who said at her swearing in: “I am a great supporter of reform and modernisation throughout the courts and tribunals system; and that urgent task will be high on my agenda in the months ahead, as I know it is for senior members of the judiciary.”

\textsuperscript{19} The figure rises to £1 billion plus if various other criminal justice reform moneys are aggregated as well.

\textsuperscript{20} Themselves an important part of the Reform Programme.

\textsuperscript{21} Civil (CJEG), Tribunals (TJEG), Family, Magistrates and Crime and, more recently still, a “Delegated Case Officer JEG”.

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space freed up by losing mountains of paper. We can also improve courtroom utilisation – not by suggesting that individual Judges work longer hours but by improving our listing practices and recognising that, for some users, courts and tribunals, early morning or evening sittings may be preferable to the customary 10.00 – 16.30 or thereabouts. One particular matter requires emphasis. Local justice is and will continue to be an imperative. There cannot be a justice postcode lottery, excluding remote rural areas. Local justice is therefore a given; what is not a given is how best to deliver local justice. It is anything but self-evident that the right course is to spend significant sums on keeping small, under-utilised, poorly maintained courts in service. Instead, we are right to explore alternative options: public buildings which we can use from time to time (so-called “pop-up courts”) together with increased use of technology, permitting evidence to be given by way of remote links, saving much unnecessary travel but preserving (and, hopefully, improving) access to justice.

16. Finally, changed working practices. Our default position has hitherto involved a presumption in favour of face to face hearings. That is not, necessarily, beneficial either to legal professionals or other court users. For many a professional, the ability to conduct pre-trial hearings from the office or chambers improves productivity. Court users cannot be assumed to relish a visit to a court, where there are suitable online or remote alternatives. The upshot is that in a digital system we should anticipate less face to face hearings, more work being done on screen and more use made of technology. Naturally, we will need in all this to safeguard the needs of open justice but that is perfectly feasible. A striking innovation is the recommendation for an “Online Court”, one of the fruits of the Civil Courts Structure Review, conducted by Briggs LJ. In a nutshell, this “…offers a radically new and different procedural and cultural approach to the resolution of civil disputes …..to resolve money claims up to £25,000 subject to substantial exclusions.”

17. Even this brief outline of the Reform programme serves to illustrate the sheer scale of the judicial leadership task, perhaps best exemplified (if I may say so) by the tireless commitment, drive and energy displayed by the LCJ personally to ensure its progress. That said, judicial leadership is a necessary but not sufficient condition for success. HMCTS Reform could not be accomplished without the closest cooperation between the Judiciary and HMCTS – joint working at its best - involving the complete commitment of the HMCTS senior management team, together with support and guidance from the HMCTS Board, under its universally respected and independent Chairman. Importantly, this is an HMCTS programme, as reflected by the governance arrangements under the overall aegis of the HMCTS Board, always subject of course to the Board needing to report to its principals: the Lord Chancellor and the Lord Chief Justice, together with the SPT.

18. Significant progress has already been made; the Reform Programme is real – it is not aspirational or theoretical. By way of examples only, our criminal courts are now largely equipped to work digitally, a notable development being the Digital Case File. For certain traffic offences, there is the facility for online pleas. The first automated rotas for magistrates have been introduced. The Divorce Online project has commenced. The crime Wi-Fi solution will in due course be extended to Civil Family and Tribunal (CFT) hearing venues. The rationalisation of the estate has begun, with the close and continuous involvement of the Judiciary, both nationally and locally. This is exciting; it is also – as I have already said – daunting. We need to get it right. If we do, it will be a legacy for the future. The foundations are sound; we need to press on, “full ahead” to implement the programme as a whole.

19. Only last week all these propositions were reiterated and reinforced in the Joint Statement of the LC, the LCJ and SPT, Transforming Our Justice System (September 2016), highlighting the three core principles

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22 Such as much of Wales, Cumbria, East Anglia, Devon and Cornwall.
24 Briggs, at para. 12.6
25 Under its Chief Executives, Peter Handcock, Natalie Ceeney and, pro tem, Kevin Sadler.
26 Mr Robert Aylng, another to whom I owe a great debt.
27 See the very interesting recent Report by JUSTICE, What is a Court? (Alexandra Marks et al, 2016)
forming the basis of the Reform Programme, namely, just, proportionate and accessible. Reform is to be achieved by combining our “respected traditions” – and established strengths – with the “enabling power of technology”. As the Joint Statement concluded:

“These reforms build on what we already have – a justice system that is revered around the world for its excellence. But they also recognise something important in that system’s unique history. It has always evolved. ….. Our times – with the advent of the internet and an explosion in new technology – provide the opportunity for radical change…..”

20. Pulling the threads together: we have had to make do with less resources, a matter of grave concern given the vital importance of the justice system. The Reform Programme is a necessary response to this financial stringency, the alternative being decline by many salami slices. But, more importantly, the Reform Programme is something we should be doing anyway: using the resources available to us, strategically and imaginatively, with a view to devising a user-oriented, modernised and improved justice system, while preserving the brand of trust, confidence, integrity and expertise it has historically enjoyed and continues to enjoy. The stakes are high. There is no Plan B.
PANEL SESSION 3
“Providing Sufficient Resources for the Courts and Judiciary as a Fundamental Constitutional Obligation”

By District Judge Jasbendar Kaur, State Courts, Singapore

This is the transcript of the PowerPoint presentation for this section.

Slide 1
Delivery Excellent Court Services with Limited Manpower Resources

Slide 2
The Singapore Judiciary

Slide 3
State Courts Singapore
- **Shared Vision** – Inspiring public trust and confidence through an effective and accessible justice system
- **Mission** – Serving society with quality judgments, timely dispute resolution and excellent court services
- **Core Values** – Fairness, Accessibility, Independence, Integrity, Impartiality, Responsiveness

Slide 4
Court Excellence in State Courts
i. Advance excellence in administration of justice and provision of court services
ii. To meet the needs and demands of the court users and the public
iii. To achieve our mission to provide an accessible and effective system of justice

Slide 5
Court Excellence in State Courts
- **Our Main Challenges:**
  - Rising public demands
  - Significant number of Litigants in Person
  - Increasing caseloads and services
    - Two new justice divisions and tribunals being set up
  - Shortage of Resources
- Lack of physical space for more courtrooms, tribunal hearing rooms, hearing chambers, offices, registries, etc.
- Difficulty in obtaining increased manpower due to budgetary and headcount constraints.

Slide 6 – Slide 7
- *Pictures of the courts in the and the present*

Slide 8
Court Excellence in State Courts
- Our Approach in Managing the Challenges:
  - It is not about using the resources to be efficient. It is about doing the right things right and doing the right things well.

Slide 9
Court Excellence in State Courts
- Doing the Right Things & Doing Them Well
  - Endeavour to do more with the same resources or where possible, innovate:
    - By improving or streamlining processes
    - By introducing and optimising IT solutions
  - Develop and optimise the existing manpower to make best use of each and every headcount.
- To meet the needs and demands of the court users and the public by providing excellent services.

Slide 10
Court Excellence in State Courts
- In order to do the right things right and well, we do not just improve our systems and processes.
- We develop our most important and valuable resource, that is our people.
- With good and skilled judges and court administrators, we are able to respond and deal with the challenges effectively – do the right things right and do them well.

Slide 11
Court Excellence in State Courts
- Strong emphasis on maximising potential and development of our people.

Slide 12
Background: Manpower Situation
- Past 10 years, government-wide measures introduced to limit growth of headcount. Judiciary also affected by this.
- Extremely challenging to obtain additional headcount even with increasing caseloads or when new services are introduced.
- The Judiciary is expected to do more with the available headcount.

Slide 13
Background: Manpower Situation
- Response to Shortage:
  - Develop and equip existing manpower:
    - Skills and expertise to be competent and high performing employees; and
    - Requisite values (teamwork, commitment, ownership and pride) and ethics
  - Introduce a rigorous recruitment process to employ the best candidates
  - Be responsive to a job/skill-mismatch to ensure best use of each and every headcount
  - Introduce programmes to encourage development of cross-functional/practice areas skills
Slide 14
Strategy 1: Robust Manpower Planning
- Regularly review manpower planning and staffing plans to meet both short and long term needs and to address challenges in the operating environment:
  - Operational manpower requirements
  - Structured Career Development and Talent Management Programmes
  - Succession planning
  - Career Developing (Posting) Framework – expose officers to diverse roles/job scopes to develop a pool of officers who have the expertise to take on various job functions in the organisation
  - Outsourcing non-core functions & engaging temporary staff for non-critical work

Slide 15
Strategy 2: Training & Development
- As a Learning Organisation, State Courts aims to develop and maximise the potential of all officers.
- Every year, a Master Learning Plan is planned and issued that sets the direction for the whole organisation:
  - Orientation/Induction
  - Continuous Training
  - Specialist Training
  - Leadership Training

Slide 16
Overall Training Strategy
- Organisational Objectives
- Core Competencies
- Learning Needs
- Develop core competencies and fulfil the learning needs of all ranks of officers and to help them become better officers.

Slide 17
Training for Judicial Officers
- The Singapore Judicial College was established in 2014 to take charge of the training of all Judges and Judicial Officers.
- It oversees the needs of the Singapore Judiciary, from induction to continuing education to developmental programmes.
- Its main aim is to enhance the competency and professionalism of Judges and Judicial Officers.

Slide 18
Singapore Judicial College’s Judicial Education Strategy
Training for Judicial Officers

- State Courts has the “Judicial Education Framework – Framework of Core Judicial Abilities & Qualities”
  - A planning tool
  - A guide for Judicial Officers
- Ownership of personal development is encouraged through the preparation of the Individual Judicial Training Plans.
- Training programmes are now planned at the organisational and divisional levels.

State Courts Judicial Educational Framework

Overview of Judicial Training Programmes:
- 2 weeks Orientation & 6-month Experiential Induction Programme for new JOs
- Continuous Training Programmes
- Specialised Training Programmes
- Leadership and Management Training Programmes

Continuous Training Programmes for all JOs
- Training programmes organised by Organisation
  - JOs Refreshers Programme
  - In-house customised training workshops/seminars
  - Learning Journeys
- Training programmes organised by Divisions
  - JOs Lunchtime Refreshers
  - Briefings
  - Email informational blasts/alerts
- Training programmes organised by College
  - An extensive suite of programmes focusing on 6 main training areas
  - See SJC’s Local Training Forecast 2016
- External Local Training programmes
  - Local Conferences/Seminars
  - Civil Service College programmes
  - Singapore Academy of Law programmes
- Overseas Training Programmes
  - Training programmes organised foreign judicial colleges in Australia, Canada, USA and UK
  - Conferences/Workshops
  - Study Trips

Slide 23
Training for Judicial Officers
- Leadership and Management Training
  - For JOs holding leadership positions or those with potential to do so in the near future (talent).
  - Necessary to invest in leadership training since JOs are appointed for excellent legal and judicial skills and not for leadership skills.
  - JOs are sent to the best executive leadership programmes (local and overseas) to learn latest skills in leadership and management.
  - Judicial Leadership Mentoring Programme.
  - Rotation of judicial leaders.

Slide 24
Training for Court Administrators
- Main focus of the Training Strategy for Courts Administrators:
  - To develop:
    - Generic Skills
    - Core Skills
    - Functional Areas/Role-based Specialised Skills
    - Acquisition of technical/specialised knowledge through certification

Slide 25
Framework of Competencies and Assessment Qualities for State Courts Court Administrators (Adapted from Civil Service College, Singapore (CSC))
Training for Court Administrators

- All Court Administrators are allocated an Individual Training Budget; of which 60% must be used for professional development and the rest on their personal development.
- They have to plan and submit their Individual Training Plans every year – to encourage ownership.
- All Court Administrators are encouraged to achieve 100 training hours every year.
- Training is part of the Performance Management Process.

A customised Learning Directory available to guide Court Administrators to find appropriate programmes to match their competencies and training targets.

The programmes in the Learning Directory are segmented into three training areas:
- Core & Generic Skills Programmes
- Functional Areas/Role-based Skills Programmes
- Certification/Legal Knowledge Programmes

Training Focus Areas for Court Administrators

- All:
  - Para-Legal Skills
  - Public service values
  - Service Excellence
  - Analytical Thinking
  - Budget management
  - Effective Communication
  - Innovation and Creativity
- Division-specific
  - People Management
  - Conflict Management
  - Case Assessment
  - Mediation Skills
- Senior Officers
  - Supervisory and Leadership Skills
  - Data Analytics
  - Mentoring

State Courts Sponsorship Scheme
- Introduced to encourage and support Court Administrators at all levels who are keen to upgrade themselves academically or in technical skills
- Degree, Diploma or Certificate-level studies related to their work
- It offers financial assistance and study leave
  - 50% if work-related & 70% if law-related studies

Leadership and Management Training
- For Court Administrators who are holding supervisory or leadership positions or those with potential to do so in the near future.
To develop them as leaders, they are nominated to attend milestone leadership training programmes run by the Civil Service College and the local universities.

Slide 31
Milestone and Leadership Training Programmes
- Leadership Development Programme (NUS Business School)
- Strategic Management Programme (NUS Business School)
- Emerging Leaders Programme (NUS Business School)
- Leadership Communication Programme (SMU)

Slide 32
Training for Court Administrators
- The State Courts Scholarship Scheme
  - The Court Administrators who are in the “talent pool” can apply for a scholarship to pursue the following postgraduate programmes to prepare them for future leadership roles:
    - Master in Public Administration (MPA) degree offered by the NUS Lee Kuan Yew School of Public Policy
    - Master of Science in Data Analytics (NTU)
    - Master in International Relationships (NTU)
    - Master of Mass Communication (NTU)
    - Master of Statistics (NUS)
    - Master of Science in CFO Leadership (SMU)

Slide 33
Training for Court Administrators
- Executive Leadership Programme for Court and Tribunal Administrators
- Lee Kuan Yew School of Public Policy, NUS
- 16 – 20 January 2017

Slide 34
Executive Leadership Programme for Court Administrators 2017
- 5-day Executive Leadership Programme is organised by the State Courts in collaboration with the Lee Kuan Yew School of Public Policy, National University of Singapore.
- Specially designed and contextualized for Court and Tribunal Administrators holding leadership positions.
- It aims to provide deeper insights into the complex issues governing the management of Courts and Tribunals and to equip the participants with key interdisciplinary leadership skills to run the Courts and Tribunals effectively and efficiently.

Slide 35
Executive Leadership Programme for Court Administrators 2017
- Key Topics:
  - Leadership & Strategic Planning
  - Measuring Court Performance
  - Strategies for Effective Public Communications
  - Ethics & Values for Public Officers
  - Implications of Data Analytics
  - Human Resource Management
  - Managing Court Resources
  - Process Innovation & Management
Strategy 3: Staff Accountability & Governance

- Common Core Values
  - Fairness
  - Accessibility
  - Independence
  - Integrity
  - Impartiality
  - Responsiveness

- Code of Conduct & Ethics for Court Administrators
- Code of Conduct for Judicial Officers
- Judicial Conduct/Ethics Advisory Committee set up to deal with complaints against JOs
- Established Internal Audit Group
- Government Instruction Manuals
- Regular Seminars and Workshops to increase awareness of “Values & Ethics”
1. Background
Not a week goes by these days without an act of terrorism somewhere in the world. The UK has had to deal with the problem of terrorism for many centuries. Guy Fawkes was ahead of his times in trying to blow up Parliament 400 years ago and no doubt someone somewhere would say he was a martyr. The Irish home-rule problem has been around for a long time too and terrorism led to the Explosives Act 1875 and then Explosive Substances Act 1883. Fast forward a century and more terrorism in the 1970s and 1980s led to further legislation eg. Suppression of Terrorism Act 1978, Aviation Security Act 1982, Taking of Hostages Act 1982, and various Terrorism Acts. The Northern Ireland issue was supposed to have been resolved with the Good Friday Agreement in 1998 but many years later there are still killings of police officers and many arrests for terrorism-related activity by Northern Ireland paramilitary organisations. In Europe the largest number of terrorist incidents are down to separatist movements (mainly Spain and France) or left-wing or anarchist groups (mainly Greece and Spain). Apart from separatist movements, there has been a prominence of worldwide Islamic extremism since 2001.

In 2009 there were 11,000 terrorist incidents in the world causing nearly 15,000 casualties. In 2010 there were 11,500 incidents causing more than 13,000 casualties. In 2014 there were 13,500 incidents causing 32,700 deaths and 34,700 injured. In 2015 in the UK there were 103 terror attacks either carried out, planned or foiled. These were mostly related to Northern Ireland. From Mar 2014 - Feb 2015 in Northern Ireland there were 71 shootings, 44 bombings, 3 deaths and 49 casualties. In the 10 years from the 7/7 bombings in 2005 up to 2014 just 2 people have been killed in mainland Britain by terrorists (Mohamed Salim and Lee Rigby, both in 2013).

The global threat primarily comes from Al-Qaida, ISIS/ISIL/Daesh, and their affiliate groups. Many hundreds of nationals from Europe, Asia and Africa have left their home countries to join such groups (600 from UK). The threat of terrorist incidents has shifted from just Pakistan, Afghanistan, Iraq and Syria to everywhere in the world.

We also have the "lone wolf" syndrome where individuals resort to terrorist activity sometimes for a cause and sometimes due to mental health problems. Recently there is a case of a man who had been caught with strong evidence of preparing for terrorist activity but before the investigation was complete, he had been sectioned under the Mental Health Act by a number of doctors.

In 2008 Nicky Reilly aged 22 years had a mental age of 10 and suffered from Asperger’s syndrome. He was recruited on internet chat-rooms by extremists. He left a note at home that the west must withdraw their support for Israel and leave Muslim countries. He took a rucksack with six bottles of nail-bombs and home-made explosives to a restaurant in Exeter where there were 44 other diners and 11 staff. He went to the toilet but the device exploded prematurely causing injury to him only. He was sentenced to life imprisonment. His barrister said on his behalf, "He may comfortably be deemed to be the least cunning person to have ever come before this court for this type of offence."

Another threat of terrorism is from extreme right-wing movements based on racism, fascism and intolerance. In 2007 Martin Gillear'd's house was searched by police looking for child pornography. They found that material but also discovered 4 nail bombs and weapons hidden under his young son's bed, along with white extremist literature. He was sentenced to 16 years imprisonment.
2. What is "terrorism"?
"Terrorism" is defined in the UK as:

(i) the use or threat of action such as serious violence against people or endangering life or serious damage to property or interfering with or disrupting an electronic system, and
(ii) which is designed to influence the government (here or abroad) or intimidate the public, and
(iii) which is for the purpose of advancing a political, religious, racial or ideological cause.

It is important to note that holding extremist views is not a criminal offence in itself and is certainly not defined as terrorism. It is part of the balance of the public’s right to freedom of speech and freedom of thought. In order to become terrorism, it needs to be accompanied by elements of violence or intimidation or the planning of it.

One problem is caused by politicians blurring the definition. Some British politicians have said there is no place for people in UK who do not respect "British values". Donald Trump has also referred to it in a similar sort of way. Such general political statements have been used when talking about some Muslims in UK and discussing their personal views such as same-sex marriages. The result can be that if a Christian is against same-sex marriage, that is freedom of speech and freedom of religion, but if a prominent Muslim says it, he is against British values and therefore needs to be investigated by counter-terrorism police as a possible extremist or terrorist. Such a person has in August 2016 started a court case against the Home Office for labelling him publicly as an extremist for holding such views. He had stated his views on a website "Islam in the 21st century."

The government or police can sometimes stretch the anti-terrorism laws to stifle public opinion. For example, at the Labour Party conference in 2005 (when Tony Blair was the Prime Minister) 600 people were detained under the Terrorism Act by the police and searched. Not a single one was then arrested or charged with any offence. Walter Wolfgang, then aged 82 years, was a Labour Party member who heckled Jack Straw when he was talking about the war in Iraq. Mr Wolfgang was ejected by security guards and his conference pass was confiscated. When he tried to re-enter the hall, police detained him under s44 of the Terrorism Act (as it then was and has now been amended). There was a public outcry and he was allowed to return to the press conference the next day, but not before the government, the police and the Terrorism Act had been discredited by the media for misusing the law. A human rights organisation, Liberty, described s44 as “a good example of all that was wrong with counter terrorism legislation that trod all over our rights and freedoms” and “it cost us dearly by clamping down on peaceful protestors and disproportionately targeting young Black and Asian men.”

It is interesting that the anti-terrorism law extends the meaning of the "government" to be influenced or overthrown from the UK government to all governments in the world, thus protecting them whether they be democratic or dictatorship. In the case of R v F [ 2007] EWCA Crim 243 the Court of Appeal held that it covered actions against foreign governments run by tyrants and dictators such as Libya in that particular case. There is no exemption for the moral justification by the nobility of the cause. The appellate court noted that the Universal Declaration of Human Rights 1948 acknowledges that citizens might resort to rebellion as a last resort against tyranny and oppression. We know from history that a person might once have been labelled as a terrorist and then be re-badge as a freedom fighter, even becoming a revered statesman such as Nelson Mandela. Of course violence is not the only way to remove the government. Mahatma Gandhi preached non-violence and asked the question, "What difference does it make to the dead, the orphans and the homeless, whether the mad destruction is wrought under the name of totalitarianism or the holy name of liberty or democracy?"

In R v Gul [2013] UKSC 64 the defendant in England had uploaded videos onto YouTube praising attacks on Coalition forces in Afghanistan and Iraq. D, a Libyan again, argued freedom of speech and justified comment about the self-defence of people resisting the invasion of their country but this was rejected by the
court which confirmed all governments are protected by the terrorism legislation. The jury asked an interesting question to the judge - "Would the use of force by Coalition forces be classed as terrorism?" The judge said no because they are covered by combat immunity and were ordered there by the UK and US governments. The jury then convicted on those videos but they acquitted D on videos concerning the Israeli-Palestinian conflict in Gaza.

The aims of the UK government are at home to disrupt terrorist-related activity and prosecute the perpetrators; overseas to reduce the threat from Al-Qaida and Daesh; and to ensure that the counter-terrorism work is effective, proportionate and consistent with human rights. That is a huge task and is where the problem lies. How do you ensure public safety and safeguard the human rights of the general public at the same time? How far can the government go in stopping people in the street to question and search them, to search their homes, to change the court procedure to keep certain information confidential, to control the behaviour and limit the free movement of those persons who are not prosecuted?

Ultimately it is left to the discretion of the prosecuting authority to decide when to prosecute someone who goes abroad to assist rebels fighting against their government. Today we sometimes have a difficult time distinguishing between good and bad rebel groups as they tend to be fluid and change their character during the period of hostilities. The subjective concept of noble cause still comes into play but it is irrelevant to mitigation and sentencing if prosecuted.

You may have heard about mothers taking their children with them to Turkey in order to reach Syria. One mother from Leicester tried to take her children to go to the war zone in Syria whilst her husband was fighting in Chechnya. Her plan was to go to Munich and then Istanbul, where her husband would join her and they would all travel to Syria. She was not prosecuted for criminal offences but social workers took her three children (aged from 4 to 12 years) away from her and gave them to the grandmother to look after. The Family Court rejected the mother's attempt to get her children back and approved the arrangement with the grandmother. In a separate civil case, she had to go to court to recover her monies that were seized upon her detention at the airport. Since it was going to be used as expenditure in Syria, it was held under Proceeds of Crime Act. On the day of the contested hearing, she gave up and consented to the cash being forfeited but she then ended up having a costs order against her on top of all her woes.

3. Warrants to search premises
In England the police cannot just do raids on people's houses. They need a search warrant issued by a magistrate or judge. Therefore there is judicial control over the issue of search warrants under Terrorism legislation. This has now been limited to a small number of judges so as to ensure consistency in the approach to issuing warrants. In practice, the information supplied in the request for a search warrant is so compelling each time that the application is almost never refused. When someone watches the illegal videos on the internet through their computer or mobile phone, they leave a digital footprint which leads the police straight to the offender. The police clearly need a warrant to search for the electronic equipment. The problem with a mobile phone is that it will be with the person who might be elsewhere when the warrant is executed by the police. As a result, a warrant might need to be issued for other addresses where he spends his time so that the police can do simultaneous searches for him and his phone. There is a sad but inevitable consequence that law-abiding parents end up having their house searched under anti-terrorism laws because of their son or daughter downloading and watching such videos.

4. Powers to control behaviour of individuals.
First of all, freedom of speech had to be, justifiably, controlled by limiting which political or separatist groups a person can belong to or associate with. The UK has proscribed 81 groups including 14 Northern Irish organisations, various separatist groups from Sri Lanka, India, Basque, Greece, Palestine, Turkey, and numerous Islamic groups. Some of these are just separatist groups which have inserted the word Islam in their name, but the majority are well known international terrorist groups.
The UK government has tried control orders severely restricting the movement and behaviour of individuals. T-Pims – Terrorism Prevention and Investigation Measures – are the toughest tool the government has to restrict the activities of suspected extremists. T-Pims are supposed to ensure that the police and MI5 can protect the public from British-based persons who cannot yet be prosecuted or deported by placing curbs on their movements and activities. As of the end of May 2016, only one is now in force (for EB, see below). By contrast, in the months after the Paris attacks last November, almost 400 people were placed under house arrest in France by the authorities there.

An Algerian national, known as EB, was granted legal aid help to challenge his T-Pim control order after complaining about the conditions. He is subject to the T-Pim until April 2017 after being released from a three year-jail term in 2015 over a plan to attack London in 2013 in which he was monitored visiting Egypt and Syria, planning to buy a gun and holding explosives. The convicted terrorist was unhappy that his night time curfew prevented him from leaving home between 9pm and 7am, and was only being given £50 cash a week by the government. The High Court ruled he would get £75 a week and be allowed to stay out until 11pm instead of 9pm.

5. Prosecution
There are wide-ranging offences created under the Terrorism Acts. It is not proposed to discuss them in detail here. Obvious offences are preparation and training for terrorist activities. Others include encouraging such activity, collecting information for terrorism, fundraising, sending money to anyone doing terrorism activity. In England two parents have recently been taken to court for sending £1,700 to their son who is with Daesh in Syria.

Proceedings in the courtroom for terrorism cases are conducted in the usual way as any criminal trial. One particular exception to this was the case of R v Erol Incedal and Mounir Rarmout-Bouhadjar. The prosecution wanted the whole trial in secret in the interests of national security. They had previously warned that they may have to abandon the prosecution if judges did not ban the press and the public from every part of the proceedings against the two defendants who they did not want to be named publicly. There was an appeal to the Court of Appeal (which included one of our delegates at this conference). This led to a ruling that the defendants could be named in the media but the "core" of the terrorism trial could be partly heard in secret whilst the rest of the trial must be in public. The judges said that the media and public would be allowed to attend the swearing-in of the jury, parts of the prosecution's introductory remarks setting out the case, the verdicts and, where there are convictions, the sentencing. The court added that a small number of journalists could be allowed to attend the closed parts of the trial, subject to agreement relating to the confidentiality of the proceedings. Their notes would be securely stored until the end of the trial when the trial judge would rule on what notes could be reported in the newspapers.

6. Interpretation of legislation – “Reading Down, Reading Broadly, Reading In”
The English courts have strongly indicated that consideration of human rights instruments will be on the basis that they should be given a “generous and purposive interpretation” in the light of their object and purpose due to the UK subscribing to the European Convention on Human Rights. The result can be that a bold approach may justify a considerable departure from the words of the provision under consideration in order to give individuals the full measure of their fundamental rights and freedoms. This far-reaching approach is achieved by the court “reading down” words in a provision to give them a narrow meaning, “reading broadly” the words in a provision to give them a wider meaning than at first sight, and “reading in” by adding words to a provision to give it a meaning suitable to the circumstances. However this is all subject to the rider that the process of interpretation does not contradict the essential principles and scope of the legislation or instrument that was passed by Parliament.

7. Sentencing guidelines
In Mohammed Kahar and others [2016] EWCA Crim 568, a 5-judge Court of Appeal stated that “so-called just or noble cause terrorism is irrelevant to sentencing and does not provide any mitigation” and “those who
involve themselves in terrorism, whether by commission, the provision of assistance, or engaging in conduct in preparation must expect a severe sentence.”

Sentencing for terrorism offences fell into six levels which are differentiated by the culpability of the offender to proximity to carrying out the intended act or acts, and the harm caused on immediate victims and the wider public. Whilst some cases might involve multiple offenders, a lone wolf offender's offence may be just as serious. Equally, there is a degree of overlap between the levels, and aggravating and mitigating features may move the ultimate sentence up or down within a level, or may move it to another level:

**Level 1**
The highest level is where the offender has taken steps which amount to attempted multiple murder or to a conspiracy to commit multiple murder where no physical harm has been caused. The court said it would have included the circumstances in *Ibrahim & others* [2008] EWCA Crim 880 (Conspiracy to murder - the 21/7 plot in which four bombs were detonated on the London Underground but failed to explode, and life sentences with minimum terms of 40 years, imposed after trial, were upheld on appeal); *Abdullah Ahmed Ali & others* [2011] 2 Cr App R 22 (Conspiracy to murder by causing explosions on transatlantic airliners - where life sentences with minimum terms of between 32 and 40 years were imposed after trial and the sole appeal against sentence was dismissed); and *Barot* (conspiracy to murder, where the minimum term which this court imposed, after a plea attracting 10% discount, was 30 years). For such an offence a sentence of life imprisonment with a minimum term of 30 to 40 years or more is appropriate.

**Level 2**
A little below on the scale are those who may not get quite so near in preparation or where the harm which might have been caused was not quite as serious. Examples include *Khyam & others* [2009] 1 Cr App R (S) 77 (Conspiracy to cause explosions intended to result in multiple deaths, in which some of the offenders had received explosives training - where life sentences with minimum terms from 17½ to 20 years, imposed on conviction, were upheld; *Islam & others* (Conspiracy to murder in which the objective was to blow up an uncertain but potentially large number of victims - where life sentences with minimum terms from 18-22 years, imposed after a trial on offenders in the role of foot soldiers, were upheld); *Asiedu* [2008] EWCA Crim 1725 (Conspiracy to cause explosions, in which the offender had purchased 450 litres of hydrogen peroxide for the 21/7 plot, had taken part in boiling it down, but had abandoned his bomb on the day - where 33 years' imprisonment, imposed after an eventual plea, was upheld on appeal); *Karim* [2012] 1 Cr.App.R.(S.) 85 (Pleaded guilty to five terrorist offences and found guilty of four, the most serious of which were concerned with him being a long-term sleeper at British Airways - where an extended sentence involving a custodial term of 30 years was upheld on appeal); *Jail & others* [2009] 2 Cr.App.R.(S.) 40 (The co-defendants of *Barot* who pleaded guilty to conspiracy to cause explosions of a nature likely to endanger life, who did not intend to kill, but in relation to whose intended explosions the potential for loss of life and massive injury was significant - where extended sentences with custodial terms from 15-26 years were upheld). In such a case a life sentence will generally be called for with a minimum term in the range of 21-30 years or a very long determinate sentence.

**Level 3**
A little further down the scale are cases in which the offender travels abroad and participates in actual combat. The offender will invariably be dangerous. In such cases we consider that the appropriate sentence will be a life sentence with a minimum term of 15-20 years or a long determinate sentence of 20-30 years.

Examples include *Parviz Khan* [2010] Cr App R (S) 35 (The offender, who pleaded guilty, was a fanatic with a leadership and recruiting role, and had planned to identify, kidnap and murder a soldier, to film the murder and to distribute the film. He also pleaded guilty to a further offence involving the supply of equipment to those fighting in Afghanistan/Pakistan - which took the overall offending into Level 2 and resulted in a sentence of life imprisonment which was upheld on appeal); *Usman Khan & others* (offences where the Cardiff and London offenders were planning a pipe bomb attack on the London Stock Exchange
in order to cause terror, damage to property and economic harm, but had yet to acquire the necessary materials; and the Stoke offenders were trying to raise funds to build a madrassa in Kashmir, to enable men, including one of the Stoke offenders, to undergo firearms training there before joining the fighting in Kashmir, and contemplated that, in due course some of the trained men might return to the UK and engage in some sort of terrorist activity here - where following pleas by all the offenders, the Cardiff and London offenders were sentenced to extended sentences with custodial terms from 17 years to 21 years 10 months, against which they did not appeal, and from 16 years to 17 years 8 months on the Stoke offenders).

**Level 4**
The typical case will be an offender who joins, or otherwise supports, a terrorist organisation, usually engaged in a conflict overseas, and either participates on the periphery of the actual combat or trains, whether in the UK or abroad, to that end, or with a view to carrying one or more acts in the UK out at some point in the future. Examples are *Sarwar and Ahmed* (where the intended act was to assist the Al-Nusra group in Syria, the offenders received limited firearms training there and had handled firearms, for example, on patrol close to the combat zone - where following pleas of guilty that attracted a 20% discount, there were custodial terms of 10 years and 3 months); and *Dart & others* (the offenders Iqbal and Ahmed each intended to commit an act of terrorism himself and to assist others to do so. Iqbal assisted Ahmed to travel to Pakistan to attempt to obtain terrorist training with a view to terrorist action, gave Ahmed £850 to be passed on, they each downloaded electronic files containing practical instructions for terrorist attacks and took part in serious discussions in relation to targets in this country and intended, until prevented, to go for terrorist training with a view terrorist action, with Ahmed £850 to be passed on, where following pleas of guilty, there were custodial terms of 11 years and 3 months were upheld. In the same case the offender Dart pleaded guilty to travelling to Pakistan for terrorist training and to commit acts of terrorism abroad, as well as assisting others by providing information to them about travel to Pakistan and terrorism training and operational security whilst there. He and another offender Alom had been stopped at Heathrow and Dart was found to be in possession of £4,800 in cash – following a plea of guilty a custodial term of 6 years was upheld). The Court of Appeal now took the view that a significantly longer notional custodial term would be appropriate in Dart's case. Such an offender is likely to be dangerous and a determinate sentence in the range of 10-20 years or more would be appropriate.

**Level 5**
The typical case is an offender who sets out to join a terrorist organisation engaged in a conflict overseas but does not complete his journey or an offender who makes extensive preparations with a real commitment, but does not get very far, or who does not get very far in his preparations for an intended act, which will usually be in the lower realms of seriousness, in the UK. Examples would include *Tabbakh* [2009] EWCA Crim 464 (the offender who had mental health issues, did his best to make a bomb, but did not have the right grade of ingredients or a detonator - his sentence of 7 years' imprisonment was upheld); *Attorney General's Reference (No.7 of 2008)* (the offender, who had jihadist material on his computer, was arrested as he was about to board a flight to Islamabad with equipment and £9,000 in cash, but where he was a Walter Mitty character and it was not clear precisely where he was going or what he was going to do, or whether he himself was to act or whether he was assisting others - following a plea of guilty a sentence of 4½ years' imprisonment.

In such a case, where the offender is not dangerous, the range of a determinate sentence is likely to be 5-10 years.

**Level 6**
The typical offender will be one who never sets out or who sets out, but the circumstances are such where it is unlikely that he will go very far, or returns without going far, or who has a minor role in relation to intended acts at the lowest end of seriousness in the UK. Sentences in the range of 21 months to 5 years are likely to be appropriate.

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1.0 Introduction
“…we look forward to a world founded upon four essential human freedoms. The first is freedom of speech and expression — everywhere in the world. The second is freedom of every person to worship God in his own way — everywhere in the world. The third is freedom from want … everywhere in the world. The fourth is freedom from fear … anywhere in the world.” Franklin Roosevelt’s Message to Congress, The Four Freedoms (January 6, 1941)

“In England, amidst the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons, and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.” Lord Atkin in Liversidge vs Anderson [1942] AC 206.

2.0 Fundamental Rights and Freedoms
Human rights are universal values and legal guarantees that protect individuals and groups against actions and omissions primarily by State agents that interfere with fundamental freedoms, entitlements and human dignity. The full spectrum of human rights involves respect for, and protection and fulfilment of, civil, cultural, economic, political and social rights, as well as the right to development. Human rights are universal, interdependent and indivisible.

Human rights law obliges States, primarily, to do certain things and prevents them from doing others. States have a duty to respect, protect, promote and fulfil human rights. Respect for human rights primarily involves not interfering with their enjoyment. Protection is focused on taking positive steps to ensure that others do not interfere with the enjoyment of rights. Promotion is focused on sensitizing citizens on their human rights and requiring them to be involved in decisions that affect them. The fulfilment of human rights requires States to adopt appropriate measures, including legislative, judicial, administrative or educative measures, in order to fulfil their legal obligations.

3.0 Anti-terrorism Legislation in Kenya
There are various pieces of legislation that deal with the issue of terrorism in Kenya. However, the main legislation is the Prevention of Terrorism Act No. 30 of 2012 which commenced on 24th October, 2012. The main objective of the Act is to provide measures for detection and prevention of terrorist activities.

Section 2 of the Act defines what constitutes a terrorist act is while Part III provides for offences under the Act. Section 35 provides for limitation of certain fundamental rights subject to Article 24 of the Constitution for purposes of:-

1. Investigations of a terrorist act;
2. The detection and prevention of a terrorist act; or

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28Office of the United Nations High Commissioner for Human Rights, ‘Human rights, terrorism and counter-terrorism,’ Fact Sheet No. 32

29Ibid.
3. That the enjoyment of the rights and fundamental freedoms by an individual does not prejudice the rights and fundamental freedom of others.

Section 38 provides that offences under the Act shall be prosecuted in the subordinate courts.

4.0 Balancing rights of an individual vis-à-vis the actions of the state to ensure national security:

In times of stress, history has shown that it may be necessary to re-evaluate priorities in order to decide which values are more important. The age of “megalomaniac” hyper-terrorism and the reactive war against terror have been a catalyst for the realignment of society’s values. They make us consider the extent to which we are willing to tolerate the diminution of personal liberties in favour of collective security. Some jurists find such a balancing exercise to be inherently dangerous and intrinsically wrong.

Benjamin Franklin, in his historical review of Pennsylvania (1759), cautioned that a society which “gives up essential liberty to obtain a little temporary safety deserves neither liberty nor safety.” Similarly, Jenny Hocking, in an article in an edition of the University of New South Wales Law Journal especially dedicated to the counter terrorism laws, derided the idea of balancing rights, arguing that the preservation of rights and liberties is the *sine qua non* of democracies precisely because of their non-negotiability. Since it is these rights and responsibilities that define us as a democracy, she argued, their diminution is the diminution of democracy itself.

The contrary view has been put forth with equal clarity. The 18th century English Judge and jurist Sir William Blackstone noted, in relation to the power of Parliament to suspend an applicant’s right to habeas corpus, that “sometimes it may be necessary for a nation to part with its liberty for a while, in order to preserve it forever.” This is because the right to life, and in particular a life bereft of the fear of anarchy and violence, cannot exist without the protection of the state whose primary role is to maintain law and order. President of the Supreme Court of Israel, Aharon Barak stated:-

“A constitution is not a prescription for suicide, and civil rights are not an altar for national destruction…. The laws of a people should be interpreted on the basis of the assumption that it wants to continue to exist. Civil rights derive from the existence of the State, and they should not be made into a spade with which to bury it.”

Lord Nicholls of Birkenhead in _A vs Secretary for the Home Department_ (2005) 2 AC 68 having particular concerns with the government’s tortuous logic stated:-

“All courts are very much aware of the heavy burden, resting on the elected government and not the judiciary, to protect the security of this country and all who live here. All courts are acutely conscious that the government is able to evaluate and decide what counterterrorism steps will suffice. Courts are not equipped to make such decisions, nor are they charged with that responsibility.

But Parliament has charged the courts with a particular responsibility. It is a responsibility as much applicable to the 2001 Act and the Human Rights Act 1998 (Designated Derogation) Order 2001 as it is to all other legislation and ministers’ decisions. The duty of the courts is to check that legislation and ministerial decisions do not overlook the human rights of persons adversely affected. In enacting legislation and reaching decisions, Parliament and ministers must give due weight to fundamental rights and freedoms. For their part, when carrying out their assigned task they will accord to Parliament and Ministers, as primary decision makers, an appropriate degree"
of latitude. The latitude will vary according to the subject matter under consideration, the importance of the human right in question, and the extent of the encroachment upon that right. The courts will intervene only when it is apparent that, in balancing the various considerations involved, the primary decision maker must have given insufficient weight to the human factor.

In the present case I see no escape from the conclusion that Parliament must be regarded as having attached insufficient weight to human rights of non-nationals. The subject matter of the legislation is the needs of national security. This subject matter dictates that, in the ordinary course, substantial latitude should be accorded to the legislature. But the human right in question, the right to individual liberty, is one of the most fundamental of human rights. Indefinite detention without trial wholly negates that right for an indefinite period. With one exception all the individuals currently detained may have been imprisoned now for three years and there is no prospect of imminent release. It is true that those detained may at any time walk away from their place of detention if they leave this country. Their prison, it is said, has only three walls.

But this freedom is more theoretical than real....They prefer to stay in prison rather than face the prospect of ill treatment in any country willing to admit them.........

The difficulty with according to Parliament substantial latitude normally to be given to decisions on national security is the weakness already mentioned: security considerations have not prompted a similar negation of the right to personal liberty in the case of nationals who pose a similar security risk. The government, indeed, has expressed the view that a “draconian” power to detain British citizens who may be involved in international terrorism “would be difficult to justify”...But, in practical terms, power to detain indefinitely is no more draconian in the case of a British citizen than in the case of a non-national.”

Justice Dorit Beinisch, another Judge in the Supreme Court of Israel, said:

“We live in a period of constant tension and contradictions. The public demands security and the government is under pressure to protect the public and ensure them peaceful and safe lives. The court is part of Israeli society. As judges, we share its concerns, yet we recognize our role and responsibilities. We acknowledge the duty of the executive to protect its citizens and preserve their right to life against the threat of terrorism. We also recognize, however, that it is the duty of the judiciary to help guarantee that a nation fighting for its survival will not sacrifice those very values that make the fight worthwhile. In times of emergency it is difficult role of the judiciary to guard against the disproportional limitations on the basic human rights of every individual, including terrorists. In today’s reality, the Court confronts the challenge of balancing these twin values of security and human rights on a daily basis. Our point of departure- our guiding principle- is that the battle against terrorism must be fought within the law, and that no war may take place outside the boundaries prescribed by the law.”

4.1 Bail and Bond

Courts in Kenya have in recent times been faced with scenarios that have called for the application of Art. 24 in their pronouncements. The crime of terrorism presents certain peculiarities, which result into serious issues of national security, peace and unity. The granting or denial of bail to individuals arrested on suspicion of terrorist activities, calls on the courts to exercise care and due diligence when making such orders so as to strike a balance between the freedoms and rights of suspects and state security. Courts must take into account the possible effect of the court order on the well-being of individual suspects, their families, their communities and the nation at large.34

34 Ibid
The prosecution must present compelling reasons to the court before the right to bail can be limited. The accused person and his legal representative must not only be present at the bail hearing, but must be accorded an opportunity to listen, understand and interrogate the evidence presented in favour of limiting the right to bail. It is only after such thorough hearing that the court can make a decision as to whether or not the right to bail for terrorism suspects should be limited.

In *Republic vs. Francis Kariko Kimani*, the accused persons applied to the court to be released on bail pending trial. The court stated that the grounds stated in section 123 of the Criminal Procedure Code provide compelling reasons such as those envisaged in Article 49(1) (h) for which bail would not be granted. The court stated that acts of terrorism could also be added to that list and that as such, persons charged with committing various acts of terrorism should not be entitled to bail. Subsequently, the court denied the bail application and held that the accused person be held in custody pending the trial. In this case, the court exercised its law making function.

In *Abdikadir Aden Alias Tullu & 2 Others vs. Republic* & *Aboud Rogo Mohammed & Anor vs. Republic* the High Court in granting the accused persons bail found that the prosecution had failed to give compelling reasons as to why the same should have been denied. In both cases, the accused persons were facing terrorism-related charges. Article 49(1) (h) requires the demonstration of compelling reasons why bail should not be granted.

In the *Aboud Rogo case*, the court stated that the granting of bail entails the balance of proportionality in considering the rights of the applicant who enjoys the presumption of innocence on the one hand, and the public interest on the other. The court further observed that denial of bail when justified in accordance with the law does not amount to the applicants’ loss of their right to the presumption of innocence or to a fair hearing. In arguing that the interest of justice must be served, the court denied bail to the first applicant on the ground that he had previously been charged with terrorism related offences. The court, however, granted bail to the second applicant on the basis that this was the first time he faced terrorism related offences. In this case, the court established the fact that one of the compelling reasons to deny a suspect bail is the likelihood of committing the offence again.

In *Republic v Muneer Ismail* the applicant was found with a large cache of military ammunition. Justice Warsame rejected the state’s application for denial of bail on national security grounds. He stated that there was no formula for determining public security and safety. Specific cogent and strong evidence to support existence of threats to public safety must be disclosed to court because pre-trial detention is an assault to liberty which should not be curtailed ordinarily except on consideration of public interest. In essence Justice Warsame noted that we do not believe that we need to sacrifice our liberties for our security. The mere fact that Muneer Ismail was found with military ammunition wasn’t enough to prove he was a threat to National Security.

In *Republic vs. Ahmad Abolafathi Mohamed & another* this was an application by the state seeking the reversing of the orders by a lower court which had granted bail to the respondents. The respondents were two Iranians who had led police to a place where they recovered 15 kilograms of explosive material. This was after intelligence reports from the National Intelligence Service showed that 100kgs of explosive material had been shipped into the country through the port of Mombasa. The police had tracked the movements of the two respondents who after being arrested led the police to the recovery of the 15kgs of explosives, leaving about 85kgs still unaccounted for. The state argued that the lower court had on two
occasions refused to grant the applicants bail as they had no fixed abode, had no known hosts in Kenya and were likely to escape from the country. However, on making a third application for bail, the lower court granted the respondents bail despite the fact that the reasons for not granting them bail initially were still present. The high court reversed the decision of the lower court and denied the respondents bail. The high court agreed that the reasons provided by the state were compelling enough to deny the accused persons bail. Justice Achode asserted that while the respondents had a right to enjoy their fundamental rights and freedom, Kenyans and aliens of good will also had a right to the quiet enjoyment of their rights, and to go about their daily business without threat to life or limb, and without being placed in harm’s way.

She went further to state that:

“I take judicial notice of the circumstances prevailing at the time of the arrest of the respondents, when there were explosions going off in various parts of the country injuring, maiming and even killing people. I also note that the recovery of the 15kg of explosive material was made possible by the respondents, and their arrest was as a result of intelligence reports which showed that 100kg of dangerous explosive material had been shipped into the country from Iran through the Port of Mombasa. This lends credence to the intelligence report which indicates that a consignment of 85 kg of explosives remains unrecovered and may be accessed and used by the respondents to harm innocent Kenyans. The fact that the respondents had led police to recover 15 kilograms of explosives while another 85 kilograms was still missing was a compelling reason to deny the respondents bail.

In Mahadi Swaleh Mahadi v Republic the applicant had been charged with sixty counts of murder contrary to s.203 of the Penal Code in relation to the attacks in Lamu during the period of 15th to 17th June 2014. The applicant sought to be released on bond pending trial and relied on Article 49(1) (h) of the constitution. The applicant argued that the fact applicant had been charged with capital offences was not a compelling reason to deny him bail. He argued that denial of bail would amount to a breach of the presumption of innocence since his guilt or innocence was yet to be determined. On its part, the state argued that releasing the accused person on bail would embolden other suspects who were still at large. The state urged the court to balance the rights of an individual against the rights of the society. In denying the accused person bail, the court argued such a denial does not necessarily mean that the court has already made a decision that the accused person is guilty as charged. The court argued that there were compelling reasons not to grant the accused person bail under Article 49(1) (h). The compelling reasons according to the court were the likelihood of the accused absconding bail if granted as the charges that he faced were very grave and their punishment was death.

In Republic vs. Issa Timamy the state applied to the court to be granted an extra fourteen days to hold the respondent in custody until investigations were complete. The state argued that if granted bail, the suspect was to interfere with investigations and was a threat to witnesses. The application of bail was premised on the fact that the applicant was being investigated in connection with murder, forcible transfer of population and other terrorism related offences within Lamu County. The court declined the application and stated that the investigating agencies already had enough time to carry out investigations and were not limited in their investigations in the future. Consequently, the court admitted the accused person to bail as there were no compelling reasons why he should continue being held in custody.

In Hussein Abdillahi Ndei Nyambu vs Inspector-General of Police & Anor the petitioner challenged his detention for more than 24 hours without either being taken to court or being released. Justice Majanja found in his favour and held that liability of the state arises once the clock strikes 24 hours and the suspect is still in police custody without being released or taken to court.

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40 Criminal Case no 23 of 2014 [2014] eKLR.
41 Criminal Miscellaneous case no 52 of 2014 [2014] eKLR.
42 (2014) eKLR
Article 23(6) (a) of the Ugandan Constitution grants a suspect arrested of a criminal offence the right to be released on bail. The Article also grants the court discretion on whether or not to grant bail on conditions it considers reasonable. In Uganda (DPP) –vs- Col. (Rtd) Dr. Kiiza Besigye the Constitutional Court set out the following conditions which a court ought to consider when faced with an application for bail:

“While considering bail, the court would need to balance the Constitutional rights of the Applicant. The needs of society to be protected from lawlessness and the considerations which flow from people being remanded in prison custody which adversely affects their welfare and that of their families and not least the effect on prison remand conditions if large numbers of unconvicted people are remanded in custody. In this respect various factors have to be borne in mind such as the risk of absconding and interfering with the course of justice. Where there is a substantial likelihood of the applicant failing to surrender for turn up for trial, bail may be granted for less serious offences. The court must weigh the gravity of the offence and all the other factors of the case against the likelihood of the applicant absconding. When facts come to light and it appears that there is substantial likelihood of the applicant offending while on bail, it would be inadvisable to grant bail to such a person.

Similarly, where there is a substantial likelihood of interference with witnesses, this is usually relevant when the alleged offence is comparatively serious and there is some other indication of violence or threatening behavior by the accused, this would be a very strong ground for refusing bail.

Bail could also be refused according to the status of the offence and the stage in the proceedings. The extent to which evidence pointing to proof of guilt or innocence of the applicant would seem to be one of degree in the circumstances of a particular case. There is no rule that such evidence cannot be placed before court. An investigating officer giving evidence of arrest often be to connect the applicant sufficiently with the offence, as much as to claim that he or she may fail to surrender for trial.

While the seriousness of the offence and the possible penalty which could be meted out are considerations to be taken into account in deciding whether or not to grant bail, applicants must be presumed innocent until proved guilty or until that person has pleaded guilty. The court has to be satisfied that the applicant will appear for trial and would not abscond. The applicant should not be deprived of his/her freedom merely as a punishment as this would conflict with the presumption of innocence. The court must consider and give the applicant the full benefit of his/her Constitutional rights and freedom by exercising its discretion judicially. Bail should not be refused mechanically simply because the state wants such orders. The refusal to grant bail should not be based on mere allegations. The grounds must be substantial. Remanding a person in custody is a judicial act and as such the court should summon its judicial mind to bear on the matter before depriving the applicant of their liberty. What we have outlined above is by no means exhaustive. The court should consider all other relevant circumstances.

All in all both the High Court and the subordinate courts have wide discretionary powers to set bail conditions which they deem reasonable, though we would caution this must be done judiciously”.

43 Constitutional Reference No. 20 of 2005. See High Court Criminal Misc. Applic. No. 004 of 2011 (wherein the relevant passage is flagged). The conditions appear to be more or less similar to those applied in Kenya.
4.2 Security Laws Amendment Act

In *Coalition for Reform and Democracy (CORD) & Anor v Republic of Kenya & Anor* the High Court was faced with the determination of whether various sections of the Security Laws (Amendment) Act No. 19 of 2014 were unconstitutional for violation of:

a. The right to freedom of expression and the right to freedom of the media guaranteed under Articles 33 and 34;
b. The right to privacy under Article 31;
c. The rights of an arrested person under Article 49 and the right to fair trial under Article 50;
d. Entitlement to citizenship and registration of persons under Article 12;
e. The right to freedom of movement under Article 39 and the rights of refugees under Articles 2(5) and 2(6) of the Constitution and International Conventions.

On the question whether the impugned provisions of SLAA were unconstitutional for violating the Bill of Rights, the High Court found:

(i) Section 12 of SLAA and Section 66A of the Penal Code are unconstitutional for violating the freedom of expression and the media guaranteed under Articles 33 and 34 of the Constitution.
(ii) Section 34 of SLAA is unconstitutional in so far as it includes “telescopes” in Section 2 of the Firearms Act.
(iii) Section 16 of SLAA and Section 42A of CPC are unconstitutional as they violate the right of an accused person to be informed in advance of the evidence the prosecution intends to rely on as provided under Article 50(2) (j) of the Constitution.
(iv) Section 20 of SLAA which introduced Section 364A to the CPC is unconstitutional for being in conflict with the right to be released on bond or bail on reasonable conditions as provided for under Article 49(1) (h) of the Constitution.
(v) Section 26 of SLAA which introduced Section 26A to the Evidence Act is unconstitutional for violating the right to remain silent during proceedings as guaranteed under Article 50(2) (i) of the Constitution.
(vi) Section 48 of SLAA which introduced Section 18A to the Refugee Act, 2006 is unconstitutional for violating principle of non-refoulment as recognized under the 1951 United Nations Convention on the Status of the Refugees which is part of the laws of Kenya by dint of Article 2(5) and (6) of the Constitution.

In its pronouncement, the High Court found that the State had

“…not demonstrated the rational nexus between the limitation and its purpose, which, we reiterate, has been stated to be national security and counter-terrorism; has not sought to limit the right in clear and specific terms nor expressed the intention to limit the right and the nature and extent of the limitation…”

The Court of Appeal in *AG & Anor Vs CORD & others* was faced with an application seeking to stay the orders of the High Court which had suspended various sections of the Security Laws (Amendment) Act pending the hearing and determination of the main petition. In dismissing the application, the Court stated:

“….that in enacting or amending any law that touches on national security (or any other law for that matter), Parliament (i.e. the National Assembly and the Senate) must ensure that there is no violation of the people’s rights and freedoms that are spelt out in the Bill of Rights and which are, moreover, part and parcel of what national security entails as per the Constitutional definition. …. It must always be borne in mind that the rights and fundamental freedoms in the Bill of Rights are not granted by the State and therefore the State and/or any of its organs cannot purport to make any law

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44 [2015] eKLR
or policy that deliberately or otherwise takes away any of them or limits their enjoyment, except as permitted by the Constitution. They are not low-value optional extras to be easily trumped or shunted aside at the altar of interests perceived to be of greater moment in moments such as this. Article 20 of the Constitution is explicit that the Bill of Rights applies to all law and binds all State organs and all persons. The interplay between State security and citizens’ enjoyment of their rights and freedoms in a suit challenging the constitutionality of a key statute such as SLAA, particularly in turbulent times as we are living in, calls for a very careful navigation by the Court.”

4.3 Extradition of suspects
Where a suspect is brought before a court through unlawful rendition without proper extradition procedures being followed raises a major issue, that is, what is the effect of the ensuing trial against the suspect?

Various jurisdictions over the world have dealt with this issue in different ways. Some jurisdictions are not concerned with how a suspect was placed before the court for trial while others take issue with how the suspect was arrested and brought before the court.

The Uganda Constitutional Court was faced with such an issue in Petition No. 55 & 56 of 2011- Omar Awadh Omar & 10 others -vs- Attorney General. This case was in respect of twin attacks which occurred on 11th July, 2010 in Kampala, Uganda. The petitioners were arrested from several jurisdictions like Kenya, Uganda, Tanzania, Somalia, United Kingdom and charged in Uganda. Some of the suspects challenged the validity of the trial against them on the ground that they had been abducted from various jurisdictions and handed over to the Ugandan authorities contrary to extradition laws. Therefore, they filed their petitions seeking inter alia stay of the trial against them. While considering that issue the Uganda Constitutional Court considered decisions from other jurisdictions as follows:

United States: In US v. Dr. Humberto Alvarez-Machain Supreme Court of the United States 31 ILM 902 (1992, the Supreme Court expressed itself as herein below:-

“The question of how far his forcible seizure in another country, and transfer by violence, force, or fraud, to this country, could be made available to resist trial in the State court, for the offence now charged upon him, is one which we do not feel called upon to decide, for in that transaction we do not see that the Constitution, or laws, or treaties, of the United States guarantee him any protection. There are authorities of the highest respectability which hold that such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offence, and presents no valid objection to this trial in such court.”

South Africa: The approach by the South African Courts is different from that of the US. In State v. Ibrahim [1991] (2) S.A.553, the Court of Appeal pronounced thus,

“Several fundamental legal principles are implicit in those rules (of the Roman Dutch law), namely, the preservation and promotion of human rights, good international relations, and the sound administration of justice. The individual must be protected against unlawful detention and against abduction, the boundaries of jurisdiction must not be violated, state sovereignty must be respected, the legal process must be fair towards those who are affected by it and the misuse of the legal process must be avoided in order to protect and promote the dignity and integrity of the administration of justice. The state is also bound thereby. When the state itself is a party to a case, as for example in criminal cases, it must as it were come to court with ‘clean hands’. When the state is itself involved in abduction over territorial boundaries, as in the present case, its hands are not clean(emphasis added). Rules such as those mentioned are evidence of sound legal development of high quality.”
**Zimbabwe:** The position is that the fact that the extradition process was flawed does not nullify the trial before Zimbabwean courts where the authorities of the country are not involved in the illegal abduction of a suspect to face trial. In the Supreme Court decision in *Beahan v. State* [1992] LRC (Crim), Gubbay CJ. stated:

"In my opinion it is essential that in order to promote confidence in and respect for the administration of justice and preserve the judicial process from contamination, a court should decline to compel an accused person to undergo a trial in circumstances where his appearance before it has been facilitated by an act of abduction undertaken by the prosecuting state. (Emphasis ours). There is an inherent objection to such a course both on grounds of public policy pertaining to international ethical norms and because it imperils and corrodes the peaceful co-existence and mutual respect of sovereign nations. For abduction is illegal under international law, provided the abductor was not acting on his own initiative and without authority or connivance of his government (sic). A contrary view would amount to a declaration that the end justifies the means, thereby encouraging states to become law-breakers in order to secure the conviction of a private individual".

**United Kingdom:** In *Regina v. Horseferry Road Magistrates Court ex parte Bennett No. 1* [1993] 3 WLR 90, [1994] 1 A.C. 42 Lord Bridge of Harwich held,

"Whatever differences there may be between the legal systems of South Africa, the United States, New Zealand and this country, many basic principles to which they seek to give effect stem from common roots. There is, I think, no principle more basic to any proper system of law than the maintenance of the rule of law itself. When it is shown that the law enforcement agency responsible for bringing a prosecution has only been enabled to do so by participating in violations of international law and of the laws of another state in order to secure the presence of the accused within the territorial jurisdiction of the court, I think that respect for the rule of law demands that the court take cognizance of that circumstance. (Emphasis added). To hold that the court may turn a blind eye to executive lawlessness it would again appear to me to be a wholly inadequate response for the court to hold that the only remedy lies in civil proceedings against the individual officers of the law enforcement agency who were concerned in the illegal action taken. Since the prosecution could never have been brought if the defendant had not been illegally abducted, the whole proceeding is tainted...To hold that in these circumstances the court may decline to exercise its jurisdiction on the ground that its process has been abused may be an extension of the doctrine of abuse of process but is, in my view a wholly proper and necessary one."

Taking into account the foregoing, the Ugandan Constitutional Court adopted the principle that a court may stay proceedings brought against a person who has been unlawfully abducted in a foreign country by the security, police or prosecuting authorities of the prosecuting state as this offends the court’s conscience for being contrary to the rule of law. The Court went further and set out the following guiding principles in considering an application for stay of trial:-

- Courts must guard not only against an abuse of the law that has been put in place to facilitate the determination of a criminal charge but must also guard against the much wider and more serious abuse of the criminal jurisdiction in general.
- The jurisdiction to stay proceedings must be exercised carefully and sparingly and only for very compelling reasons
- There must be cogent evidence that the suspect(s) was/were abducted from a foreign country, and there must be proof of participation of either the Police or Prosecution of the prosecuting state, covert or overt in the abduction.
Certainty of guilt cannot displace the essential feature of this kind of abuse of process, namely the degradation of the lawful administration of justice.

In *Zuhura Suleiman –vs- The Commissioner of Police & 2 Others* the subject was arrested in Kenya and extra-judicially removed to Uganda without extradition proceedings. In holding that the removal was unlawful and unjustifiable and thus a violation of his fundamental rights, even on the ground of suspicion of engaging in terror activities, Muchelule J stated as follows:

“The subject was arrested at 10.30 p.m on Friday and on the following day, a Saturday, he was in Uganda being handed over. He had been collected from Kasarani Police Station, where he had slept, at 7.55 a.m. There was certainly no opportunity afforded for him to apply to the Kenyan courts for release, for instance. There was no formal communication with his family or information that he was being taken out of jurisdiction. He is a Kenyan citizen who had immunity against expulsion. There was no formal request by the Ugandan authorities for him. There was no warrant issued by a court in Uganda seeking his arrest. All extradition provisions were disobeyed in his connection. In short, all the evidence indicates he was illegally arrested, detained and removed from Kenya. Whether one is a terror suspect or an ordinary suspect, he is not exempted from the ordinary protection of the law. Whatever the security considerations the Police had in this case, the recognition and preservation of the liberties of this subject was the only way to reinforce this country’s commitment to the rule of law and human rights……..I find that no exceptional circumstances, whether state of war or terrorist actions, can be invoked to justify the treatment handed down to the subject herein by the Respondents. I find that the return made by Inspector Ogeto was not sufficient and that the arrest, detention and removal of the subject from Kenya to Uganda were illegal and transgressed his fundamental rights and liberties. These rights and liberties cannot be given up for expedience’s sake.”

**Arraignment in Court:**
The rule of law requires that a suspect or accused person ought to be arraigned in court as soon as reasonably practicable to answer to charges against him. Various jurisdictions set in law the period within which such arraignment ought to take place. In case of terrorist suspects there have numerous breach of this requirement.

In Kenya the majority view is that regardless of the fact that a suspect is faced with terrorism charges he/she is entitled to equal protection of the law as other suspects. In *Salim Awadh Salim & 10 others –vs- Commissioner of Police & 3 others*– Petition No. 822 of 2008, the High Court held,

“Whether the petitioners were citizens or nationals of other states, were the 1st and 2nd respondents entitled to arrest them and hold them in custody for the periods that they did? The petitioners were constitutionally entitled, if suspected to have committed criminal offences, to be produced in court within 24 hours of their arrest, for it has not been alleged that they were suspected of having committed offences that carried the capital penalty which would have justified their being held for 14 days. They were not charged in court following their arrest, nor were they ever charged in court. It is conceded that after they were released from Ethiopia, they were either taken to their homes in Mombasa or left free to return to their countries, and they have never been charged with any offence.”

**Damages for violation of suspects rights:**
In most jurisdictions where the courts have found that the rights of terror suspects had been violated, for instance delay in being arraigned in court, have awarded costs as compensation for the said violation. In the

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46 High Court Misc. Application No. 441 of 2010
Kenyan case of Salim Awadh Salim & 10 others –vs- Commissioner of Police & 3 others\textsuperscript{47} the High Court while awarding the petitioners damages was guided by Peters v. Marksman and Another [2001] 1 LRC where the court quoted with approval the words of Patterson JA in Fuller v A-G of Jamaica (Civil Appeal 91/1995, unreported):

“\textit{It is incumbent on the courts to develop appropriate principles and guidelines as to the quantum of awards of compensation where applicable………………Where an award of monetary compensation is appropriate the crucial question must be what is a reasonable amount in the circumstances of the particular case. The infringement should be viewed in its true perspective as an infringement of the sacrosanct fundamental rights and freedoms of the individual and a breach of the supreme law of the land by the state itself. But that does not mean that the infringement should be blown out of all proportion to reality nor does it mean that it should be trivialized. In like manner the award should not be so large as to be a windfall nor should it be so small as to be nugatory.”}

\textbf{Conclusion}

In the configuration of government, the Judiciary naturally plays the role of the custodian of the rule of law and respect for fundamental rights and freedoms. There is therefore an obvious need for courts to function as a check against executive and legislative decisions made with a view to achieve and sustain state security. Hon. Justice Michael Kirby on this issue expressed himself as follows:-

\textit{“The great power of the idea of independent judicial examination of “control orders” and other decisions, made under the foregoing legislation shows, once again, the potent metaphor that judicial review represents in modern democratic constitutional arrangements. It is as if many people recognize the need to counter-balance the swift, decisive, resolute and opinionated actions of officers of the Executive government with the slower, more reflective, principled and independent scrutiny by the judicial branch, performed against the timeless criteria of justice and due process.”}\textsuperscript{48}

Times of insecurity create dilemmas in a constitutional legal system that honors and protects its individual human rights. Perhaps, somewhat paradoxically, it is times of crisis that bring individual human rights to full focus, enhancing the formation of safeguards to protect from infringement of basic freedoms. Acute life and death situations often bring about the need to combine social goals with individual rights which strengthen the fabric of democratic life.

\textquote{“We, Judges, are part of our society. We feel its sensitivities and grief. We are part of its achievements and struggles.” Ayala Procaccia, SCJ \textit{“The Role of the Supreme Court of Israel in Protecting Human Rights,”} 2005.}

\textsuperscript{47} Supra. \textit{See the Ugandan case of Constitution Petition No. 55 & 56 of 2011- Omar Awadh Omar & 10 others –vs- Attorney General (supra) wherein the petitioners were awarded damages for violation of their rights to be arraigned in court within 48 hours of their arrest.}

\textsuperscript{48} Judicial Review in a time of terrorism- Business as usual (speech delivered at the University of the Witwatersrand School of Law & South African Journal of Human rights, Johannesburg, South Africa, 25\textsuperscript{th} November, 2005}
Today I am going to talk to you about anti-terrorism legislation and civil rights in Australia. In the first part of my speech I will provide a brief chronology of Australia’s anti-terrorism legislation. I will then outline the principles and safeguards that assist in preventing the erosion of civil rights by anti-terrorism legislation. In the third part of my speech I will assess how Australia has fared in protecting those civil rights.

Part I
So, turning to part 1: an overview of anti-terrorism legislation in Australia.

The September 11, 2001 terrorist attack provided the catalyst for the enactment of anti-terrorism legislation in Australia, as it did in numerous other countries. Prior to September 11, there were no national terrorism laws in Australia. Politically motivated violence was dealt with under traditional criminal law. Since September 11, anti-terrorism law has deviated from traditional criminal law that focuses on punishing individuals for the past commission of crimes, to focusing on the prevention of terrorist acts.

Australian anti-terrorism legislation introduced in the past 15 years can broadly be characterised as legislation that creates new criminal offences, police and national security powers, restricts liberty and privacy, extends the law of evidence, restricts speech, movement and association, introduces preventative detention and affects citizenship. This speech focuses on a handful of key pieces of anti-terrorism legislation.

Shortly after the September 11 terrorist attack, Australia enacted the Security Legislation Amendment (Terrorism) Act 2002 which inserted a number of provisions into the Criminal Code, criminalising terrorist acts.

A terrorist act, as defined by section 100.1 of the Criminal Code, is an action or threat of action which is done or made with the intention of:

i. coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or

ii. intimidating the public or a section of the public.

Action will only be defined as a terrorist act if it:

a. causes serious harm that is physical harm to a person; or
b. causes serious damage to property; or
c. causes a person's death; or
d. endangers a person's life, other than the life of the person taking the action; or
e. creates a serious risk to the health or safety of the public or a section of the public; or
f. seriously interferes with, seriously disrupts, or destroys, an electronic system

There are various exceptions to the definition of a terrorist act.

In October 2002, days after the Bali terrorist attack that claimed the lives of 87 Australians, the government introduced a further major package of anti-terrorism legislation. The Australian Security Intelligence
Organisation Legislation Amendment (Terrorism) Act 2003 was passed in June 2003 and it gave the Australia Security Intelligence Organisation, or ASIO, numerous powers including the power to obtain questioning and detention warrants in order to collect information about the planning or commission of a terrorist attack. Under those laws, a person could be detained for up to 24 hours if they were able to “substantially assist in the collection of intelligence that is important in relation to a terrorism offence”. The warrant could be issued to a child between 16 and 18, a journalist or an innocent bystander. It is not a requirement that the person be a suspect. It is an offence punishable by five years’ imprisonment to refuse to answer ASIO’s questions or give false or misleading information. These powers were originally subject to a sunset clause that was set to expire several times and has recently been renewed until 7 September 2018.

In 2005, in response to the London terrorist attacks, Parliament enacted the Anti-Terrorism Act (No 2) 2005 which introduced control orders, preventative detention orders, new police powers to stop, search and question persons in relation to terrorist acts and a new sedition offence.

Turning first to control orders, Division 104 of the Criminal Code creates a control order regime in which individuals not suspected of an offence can be subject to a wide range of restrictions, including de facto house arrest, if those restrictions are “reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist attack”.

Division 105 of the Code creates a “preventative detention order” whereby individuals can be detained for a maximum of 48 hours (or 14 days under state law) where reasonably necessary to prevent an “imminent” terrorist act from occurring or to preserve evidence relating to a recent terrorist act.

In February 2010, the Counter-Terrorism White Paper was released. In it, the then Prime Minister Kevin Rudd declared “terrorism has become a persistent and permanent feature of Australia’s security environment”.

In November 2010, the National Security Legislation Amendment Bill 2010 was passed, conferring extensive search and seizure powers upon police, enabling them to enter premises without a warrant in emergency situations related to terrorism offences.

Australia’s national security laws were subject to annual reviews by the National Security Legislation Monitor from 2011 onwards and a review by the Council of Australian Governments Review Committee in 2012. Both reviews concluded that preventative detention orders should be abolished. The National Security Legislation Monitor found that there was no evidence that Australia was made appreciably safer by control orders and it followed that it was not reasonably necessary for the protection of Australians from a terrorist act. The Council of Australian Governments, or COAG, delivered its report in 2013 with 47 recommendations, 13 of which related to control orders. It concluded that control orders should be maintained but that they needed substantial change to safeguard against abuse and to ensure fairness. For example, it was suggested that “special advocates” should be appointed, who would be security-cleared lawyers available to represent people in closed hearings where sensitive material was discussed.

On 12 September 2014, Australia’s terrorist alert level was raised from medium to high, under recommendation from Australia’s security agencies citing concerns that there were Australians fighting with and supporting terrorist groups in the Middle East.

Partly in response to mounting concerns about a domestic terrorist attack, the Australian government introduced three tranches of anti-terrorism and security legislation in 2014. The National Security Legislation Amendment Bill (No 1) 2014 passed parliament on 25 September 2014. It conferred a range of powers on ASIO including the power to target a whole computer network with one warrant. It also granted ASIO officers criminal and civil immunity from prosecution. On 29 October 2014, further legislation made it easier to identify, charge and prosecute Australians who had been engaged in terrorist activities overseas,
suspend a person’s passport for 14 days and broaden the application of law from a “terrorism activity” to “terrorism”. It also made it an offence to “advocate terrorism”. The third stage of the security legislation passed in 2015. It permitted the retention of all Australians’ phone and computer metadata for 2 years. Metadata is, for example, not the content of a text message but the address from which it was sent, the time it was sent and who it was sent to. Security agencies are permitted access to that data if it is “reasonably necessary” to an investigation.

The government introduced the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015 on 12 November 2015. It proposed extending control orders to persons as young as 14 and broadening the monitoring of individuals subject to control orders. The proposed extension of these orders came in part as a response to the fear of the growing radicalisation of young people and in particular the murder of an unarmed police civilian worker in Sydney by a 15 year old boy who was said to have been recently radicalised by an extremist group. The bill was referred to the Parliamentary Joint Committee and a report was provided which endorsed the extension of control orders to 14 year olds and recommended that the young person the subject of an interim control order be told about the allegations against them so that they can be defended. The committee also recommended that an annual report be prepared on the number of control orders issued. The federal and state Attorneys General are currently considering the committee’s recommendations.

Part II
I turn now to part two of my speech where I will canvass three key principles or mechanisms that assist in striking an appropriate balance between security and civil rights.

It is widely accepted that any anti-terrorism legislation should be proportionate. As Professor George Williams states, “the litmus test for the human rights compatibility of counter terrorism is proportionality”. The question is: is the limiting measure the least restrictive means of achieving the relevant purpose?

The second key principle relates to independent oversight of anti-terrorism legislation. This oversight is necessary to ensure that the anti-terrorism legislation remains relevant and proportionate to the threat at hand. Independent oversight may take the form of judicial review, merits review and/or the appointment of an independent reviewer.

The third key principle flows from the former two. It is that prior to the enactment of any anti-terrorism legislation consideration should be given to including in the legislation a mechanism for its review and automatic expiry. This is necessary to guard against the incidental commoditisation of personal rights and freedoms that can be traded for security in a time of need and not reversed later. This may take the form of automatic sunset clauses whereby certain exceptional powers lapse unless reviewed and intentionally extended.

Part III
In this third and final component of my speech I will compare the principles just mentioned against Australia’s response to terrorism and assess the appropriateness of the balance struck between civil rights and security in Australia.

As I have outlined, over the past 15 years Australia has become a hyper-legislator in the area of anti-terrorism. Nicholas Cowdery QC, former NSW Director of Public Prosecutions, wrote in October 2015 that “Australia’s legislative response to terrorism has far outstripped that of any other country”. This “hyper-legislation” may be in part because Australia does not have a federal bill of rights and as such, Australian governments are not concerned about the possibility of the courts striking down anti-terrorism legislation. The absence of a Bill of Rights means that Australia lacks a comprehensive legal framework to promote the balance between the need for anti-terrorism laws and human rights.
Australia is a signatory to the International Covenant on Civil and Political Rights, however the ICCPR has not been incorporated into domestic law and therefore Australian courts are not bound to apply it. Australia has thus far managed to maintain a reasonable human rights record as a result of a combination of the constitutional protection of implied freedom of political communication, legislation dealing with specific issues such as anti-discrimination and principles of administrative law that require procedural fairness.

A further reason for Australia’s frequent enactment of anti-terrorism legislation is that anti-terrorism legislation has historically received bipartisan support. This means that it has not been subject to significant scrutiny.

So, how does the legislation mentioned in part one impinge upon civil liberties?

First, ASIO detention warrants and control orders can be used to detain a non-suspect or otherwise curtail their freedom of movement for days if it is considered reasonably necessary to do so. This is a remarkable incursion on a person’s liberty in circumstances where he or she may be an innocent bystander.

Secondly, the 2014 anti-terrorism legislation is a sweeping expansion of surveillance powers that impinges upon personal privacy by retaining metadata from devices used by all Australians. This data is stored for two years and all state and federal police and ASIO can access it without a warrant for permitted purposes.

Thirdly, the right to a fair trial has been compromised by the control order legislation as interim orders can be issued ex parte and without notice to the affected person. Information may be withheld from the person the subject of the order on the basis of national security concerns. This means that such persons are likely to be restricted in their abilities to defend the making of control orders and properly instruct legal counsel.

Fourthly, there is limited judicial review of anti-terrorism legislation. For example any decision made by ASIO pursuant to the ASIO Act or decisions to suspend passports are not capable of judicial review. The increase of executive power to restrict movement of Australian citizens without a corresponding mechanism for judicial oversight is a matter of great concern. There is a degree of oversight provided for by the Independent National Security Legislation Monitor, however his recommendations have frequently been ignored, suggesting that the position is a tokenistic commitment to oversight. The government has been traditionally slow to respond to the findings of the Independent Monitor’s reviews and other reviews conducted by other bodies, and when they have done so they have selectively implemented those recommendations that expand executive power and not those that create safeguards.

Finally, having regard to the safeguards mentioned in part two of this speech, the reactive nature of Australia’s response to the threat of terrorism has meant that legislation impinging on civil liberties is rarely transient. Most anti-terrorism laws in Australia do not have sunset clauses that could see them lapse after a definite period. Thus, what is deemed an appropriate response to an immediate threat can lead to an unchecked corrosion of fundamental rights at a later time when such protections are not warranted.

There is no doubt that the introduction of successive pieces of anti-terrorism legislation has led to the diminution of civil liberties in Australia, and in particular the right to not be subjected to arbitrary detention. The challenge is now to encourage a holistic review of that legislation and repeal that which is no longer proportionate to the terrorist threat in Australia.
Protocol

Introduction

The Environment comprises of man’s surrounding, that is the air, water, soil, plant and fauna. It is the responsibility of the various world leaders to ensure that the industrial activities in their countries do not undermine and degrade the environment so that future generation will not hold the present generation responsible for environmental degradation and climatic change. Small wonder various treaties on environmental preservation are being signed frequently to protect the environment. In developed countries of the world, efforts are presently being made to replace poisonous gases like hydrocarbons and lead for environmental friendly gasses like alcohol and methanol, in the bid to preserve the depleting environment. Stringent legal framework/standards and policies have been put in place not only to check/prevent environmental degradation but to sanction defaulters who are liable.

Nigeria is an oil producing country and derives most of her revenue from oil exploration activities by multinational oil companies in the Niger Delta region. While the benefits of oil and gas exploration and production in the country are not in doubt, the impact of environmental degradation of oil companies leaves much to be desired. Nigerian Laws tend to agree with the view that, in the event of oil spills arising from oil exploration, oil companies may not pay compensations to the affected community, but are enjoined to clean up the environment where such spills occur, which more often than not they do not adhere to, because implementing environmental laws has never been taken serious in Nigeria. When oil spills occur, these oil companies adopt the most direct and inexpensive methods of waste disposal into major natural water sources. They in fact, do little or nothing to develop the communities that have provided them with so much wealth. This indifference have left oil communities underdeveloped and poor in infrastructure and economic growth, leading to crisis and conflict arising from oil exploration in the Niger Delta region.

This paper will limit itself to the natural environmental problems peculiar to the Niger Delta region, the effect of oil exploration on the natural environment, conflict that have arisen as a result of their oil exploration activities that has drastically hampered human and socio-economic development in the region. It will also be necessary to discuss the effectiveness of the environmental laws/institutions in place and government’s efforts to tackle environmental crises and the various initiative indices for sustainable development in the region, solutions and the way forward in tackling environmental problems in the region, with the view of ending or reducing drastically, environmental crisis that have existed for so long in the region.

Peculiar Natural Environmental Problems Facing The Niger Delta Region

The Niger Delta is one of the world’s largest wetland and largest in Africa. It covers over 2000 square kilometers. It is a vast flood plain, built up by accumulation of centuries of silt washed down the Niger and Benue mangroves, fresh water swamp forest and low land rain forest whose boundaries vary according to the patterns of seasonal flooding. The mangrove forests are about the most extensive in Africa and the region has high biodiversity characteristics of extensive swamp forest areas with many unique species of plants and animals.

The major problem facing the region is coastal erosion. This poses serious problem for economic activities, especially for natural sectors like farming and fishing. About 90% of fishes consumed in Nigeria come from the region. Coastal vegetation and mangroves have been lost to coastal erosion (Awosika 1995). In future if
nothing is done to check coastal erosion, as a result of the low level of the region, sea level will increase salinity of both surface and underground water. This will lead to death of aquatic plants and animals. Flooding has negative impact on the livelihood of many communities in the region as it removes top soil, destroys roads, affects fresh water resources and threatens lives and properties.

Meteorological Data have indicated change in the rainfall pattern in the past decade. For instance, in the 1960s, wet season in the region occur between May-September, while the dry season occur between October-April. Presently, the region has no rainfall pattern, because of these environmental concerns.

The map of Nigeria numerically shows from Wikipedia – the free encyclopedia, that nine states in Nigeria, make up the Niger Delta region. They include Abia, Akwa Ibom, Bayelsa, Cross River, Delta, Edo, Imo, Ondo and Rivers States.

According to the findings of the Royal Swedish Academy of Science, the region is the richest part of Nigeria in terms of natural resources and covers large oil and gas deposits as well as extensive forests, good agricultural land, abundant fish resources. Despite the tremendous natural and human resource base, the region’s potential for sustainable development remains unfulfilled and its future, threatened by environmental degradation and deteriorating economic conditions which are not being addressed by past and present policies and action after 50 years of oil exploration and exploitation of the region.

In his edition of series of articles on the region, John Wangbu entitled the collection paradoxically as “Niger Delta, Rich Region Poor People” giving the chilling conclusion that the Niger Delta accounts for about 90% of Nigeria’s foreign exchange earnings, yet the people have known nothing but underdevelopment, poverty and deprivation. The United Nation Conference on Human Development further supported this assertion by naming the region, its coastal rain forest and mangrove habitat, as the most endangered river delta in the world. The region has also been referred to as poor, backward and neglected. Ray Ekpu’s analysis observation of the region is that the region is “rich and poor, whose squalor is the fallout of its splendor, whose poverty is a product of its wealth”. These chilling descriptions of a region that has brought so much fortune in Nigeria, leaves much to be desired. In fact the international communities and Human Right Commission have through conferences and treaties, alerted the Federal Government to tackle the environmental problems facing the region before it becomes too late.

From the above cited accounts of the region, it will be safe to conclude that despite the economic wealth the region produces for the country, the Niger Delta Region has remained underdeveloped and endangered and in dire need of sustainable development. By sustainable development, this writer means the pursuit of appropriate current development in the region that will take care of the survival of this generation and future generations, applicable developmental actions that can bring about the survivability of the people, their destinies and resolution of the environmental crises raging in the region. This is in line with the view of the World Summit for sustainable development which identifies development to include projects that will come from the people that do not distort the ecosystem, managed, owned and serviced by the people.

**Effect of Oil Exploration in the Niger Delta Region**

Until recently, Nigeria was rated as the world’s thirteenth, OPEC’s sixth, and Sub-Saharan Arica’s largest producer of crude oil and the Niger Delta region produces the bulk of Nigeria’s foreign exchange. Oil mineral revenue, consists about 80% of Gross Domestic Product (GDP), about 95% of national budget and over 80% of the nation’s wealth. The Guardian of June 28, 2008 at page 15, reported that the nation is reputed to have earned about $55billion from oil exports. Existing literatures on the region, have shown that in spite of the vast earnings from the rich oil and gas deposits of the region, it remains one of the poorest and most backward region in the nation today unlike what obtains in developed countries.

The World Bank and United Nation data, have rated the region low in every known indicator of wellbeing, like good roads, electricity, portable drinking water, housing, education, medical care facilities etc. As at 1994, only about 27% and 30% of households in the region, have access to safe drinking water and
electricity below the national averages of 32% and 34%. For instance, there was one doctor per 132,600 inhabitants as against the national average of one doctor per 39,455 people.

Human Right Watch findings in 1999, noted that the gross National income per capita, was below the national average of $260. Educational level in the region, was also below average. The 2006 UNDP’s Niger Delta Human Report recorded high level of youth unemployment in the region after a study tour of nine oil-bearing communities in Rivers, Delta and Bayelsa states. In the visited communities, it was observed that the people use drinking water in the same stream that serves as their lavatories, with life expectancy on the low side.

From the above accounts, the question that will come to mind is why this region that has brought so much wealth to the nation still remains underdeveloped and poor? It is naturally expected that such a region should be basking in human and infrastructural development to compensate for being the “economic bone” of the nation; instead, the reverse is the case. Oil exploration is not only dirty, but generates waste that cause environmental degradation that has and is still ravaging farm lands, rivers/streams and mangrove in the region. As a result of oil exploration, gas flaring, oil spills and pipe line vandalization in the region, various harmful and toxic organic compounds, have been introduced to the natural environment, changing the geochemical composition of the soil and rivers, causing serious health issues like cancer and other terminal illnesses, still birth, dwarfism and general low life expectancy in the region. The historical neglect of the region’s development, also poses a steep barrier to attaining socio-economic transformation and poverty alleviation the region deserves.

Conflicts that have arisen as a Result of Oil Exploration in the Niger Delta Region

The Niger Delta region, according to the Niger Delta Development Commission has steadily growing population of about thirty million people as at 2005. This population is expanding at a rapid speed of 3% a year. Poverty and urbanization are also on the rise with no accompanying economic growth to provide jobs for the unending flow of graduates from the higher institutions of learning in the country. In the region, the abundance of oil reserves has resulted in widespread exploitation by the numerous multinational oil companies, the Federal Government and some powerful Nigerians who enjoy the oil wealth as a result of owning oil blocks. For long, the Government has been paying lip services towards developing the communities in the region. Funds earmarked for developing the region, are high jacked by powerful individuals in the communities who end up settling selected few, leaving the vulnerable peasant farmer and fisher men to a bleak future.

When it became obvious that little or nothing is being done by the Nigerian Government to develop the region, the people started agitating for resource control of the proceeds of the oil wealth, compensation and cleanup of waste land by the oil companies. For instance, one and half million tons of oil, have been discharged into Delta farms, forests, and rivers since 1956. This has led to a section of the growing populace join in the destruction of the ecosystem that they ought to protect. To sustain themselves, they now engage in pipeline vandalism, oil bunkering, piracy and kidnap of oil workers of the oil companies, resulting in serious conflict in the region that is affecting drastically, the economic growth of the region and the nation.

The current conflict in the Niger Delta arose in the early 1990s over tension between foreign oil corporations and a number of the Niger Delta’s minority ethnic groups, who feel they are being exploited particularly in Ogoni and the Ijaw. This has led to so many reckless killings of some prominent sons of the region agitating for development of the region.

From 2004, competition for oil wealth has fueled violence between various ethnic communities in the region causing militarization of almost the entire region by militia groups, piracy at the high seas, pipeline vandalism and bombing, bunkering and kidnappings. The people of the region as time went on, started seeing the government’s empty promises of benefit for them coupled with the provisions of the Nigerian Constitution which afforded the Federal Government full ownership and rights to all Nigerian territory and
the power to distribute land to oil companies as deemed fit. This led to the establishment of various movement groups like the Movement for the survival of the Ogoni people by late Ken Sarowiwa. Ijaw Youth Congress, The Niger Delta People’s Volunteer Force led by Mujahid Dokubo-Asari, Niger Delta Vigilante led by Ateke Tom, Movement for the emancipation of the Niger Delta and recently, the Niger Delta Avengers.

In August 2008, the Nigerian Government launched a massive military crackdown on militants and patrolled the waters and hideouts in the region, hunting for militants, searching all civilian’s boats for weapons. In response to the kidnapping of some Nigerian soldiers and foreign sailors in the region sometime in May, 2009, a military operation by a Joint Task Force (JTF) began against MEND. This led to thousands of the people in the region fleeing from their villages and the death of many innocent and harmless civilians.

On June 26th, 2009, Late Nigerian President, His Excellency Umaru Musa Yar’Adua announced that the Nigerian Government will grant Amnesty and unconditional pardon to militants in the Niger Delta which would last for 60 days from August 2009 to end 4th October, 2009. It was also agreed that during the period, armed youths are required to surrender their weapons to Government and in return, the government will train and rehabilitate them to earn vocational skills, reintegrate them into productive society by sponsoring them in higher education courses in Nigeria and abroad. Over 30,000 militants, led by their group heads, submitted weapons like rocket-propelled grenades, explosives, ammunitions and gun boats between the period. Violence and spate of kidnapping reduced drastically, while petroleum production and exports, increased from 700,000 barrels per day to 2.4 million barrels per day.

In time, the program became costly, chronic poverty and catastrophic oil pollution which was not addressed by government again, fueled violence in the region. Presently, not much is being done to rejuvenate the amnesty program or the seemingly unending crises and violence that has become the order of the day in the Niger Delta.

Recently, the Federal Government announced that Shell BP has agreed to clean up over fifty years of oil spills activities of their company in Ogoni town. This would not have been achievable but for a two year case study of oil pollution in Ogoni town by some United Nation scientist from the United Nation Environmental Program - UNEP. To show how devastating their oil activities have caused the town, the cleanup will last for thirty years. However, the success of this laudable project depends on incoming government prioritizing and monitoring the cleanup exercise throughout the thirty years period.

To emphasize increasing conflict in the region, the recent bombing of oil wells/pipelines by the Niger Delta Avengers, is not only crippling the already dwindling oil price, but affecting the economic growth of Nigeria that depends solely on oil for her economic growth. As is stands presently, sooner or later, agricultural and fishing activities will soon become a thing of the past if nothing is done to prevent the environmental problems in the region. The Federal Government has threatened to use force to stop the destruction of oil wells, if the Niger Delta Avengers continue the bombing of oil pipe lines. This writer views dialogue with genuine stake holders with the Federal Government as the only solution to resolving the conflict in the region.

**Environmental Laws and Institutions in Nigeria and their Effectiveness in Tackling Environmental Degradation in the Niger Delta Region**

Until 1988, when heaps of hazardous waste substances was deposited in Koko Town in Niger Delta, by an Italian Company, there was no adequate legal and institutional frame work to tackle environmental pollution and degradation in Nigeria. In other words, adequate national attention was not given to the incessant problem of oil spillage, gas flaring and environmental pollution/destruction of the ecosystem in the region. The Constitution of the Federal Republic of Nigeria in Section 20, only provided that the state shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria and nothing more. The land Use Act, vested ownership of land on Federal and state government by empowering
government to acquire and give license to multinational oil companies to drill oil and other mineral resources in the Niger Delta without recourse to the impact such activities will have on the people as it concerns development and economic growth of their communities. Adequate policies were not in place to tackle environmental problems. In other words, government has given the oil companies the legal laxity to appropriate peasant land of the people, without adequate compensation for environmental pollution arising from their oil activities in the region.

For instance, the Petroleum Act of 1969 among other things, empowers the Commissioner in charge of Petroleum, to make regulation on the prevention of pollution of water courses and the atmosphere. The Act also provided that in accordance with “good oil field practices”, owners of license and lease, take all practical steps to prevent the escape of petroleum into water ways and cause as little damage as possible to the surface condition (Aghalin 2004). This Law, to the writer’s view is vague and ambiguous.

Another law in place then, was the Associated Gas Re-injection Act Cap 26 Laws of the Federation, 1980, which compels oil and gas producing companies in Nigeria to submit preliminary program for gas reinjection. These laws has neither been effective in curbing ecological damage caused by gas flaring, nor prevented activities deleterious to the environment, as they tend to deal with only measures to prevent pollution but under estimated the long term problems of environmental damage.

The Harmful waste (Special Criminal Provision) Decree No. 42 of 1998, seemed a well-articulated policy on environmental degradation as it prohibits the purchase, sale, importation, transit, transportation and storage of harmful waste in the country. It further provides a sentence of life imprisonment for contraveners of the provisions of the Decree. As a follow up, Decree No. 58 of 1988 established the

Federal Environmental Protection Agency (FEPA), charged with the responsibility of protection and development of the environment in general (Ndukwe, 2000) and initiating policies in relation to environmental research and technology. Its function also included, establishing standard for water and air quality, atmospheric protection, noise and hazardous substances.

Though the FEPA succeeded in issuing about eight guidelines and regulations dealing with different aspect of the Nigerian environment and became one of the boldest and most comprehensive framework to tackle environmental issues, it has not carried out initial baseline ecological audit of oil-bearing enclave of the Niger Delta, without which it is impossible to monitor the impact of oil and gas exploration and production in the region, not to talk of applying legal sanctions on defaulting oil firms in Nigeria.

With the coming of the Federal (and states) Ministry of environment in 1999, FEPA was absorbed into it with the aim of bringing together all activities within the government machinery relating to environmental issues and sustainable development, so as to give environmental concerns top priority attention in the developmental agenda of government to avoid overlap of functions of stake holders in environmental matters. Since its establishment, the Ministry has been saddled with all manner of environmental issues of the Nigerian environment (especially in the Niger Delta Region).

Nigerian Laws relating to environmental problems only seem to provide that in the event of oil spillage, oil companies are not liable to pay compensation but are enjoined to clean up the environment where such spills occur (Etikerentse, 1985). These oil companies have taken advantage of the absence of effective legislation, to perpetrate irresponsible practice by adopting methods that maximize profit and minimize investment in environmental safety.

From the foregoing, it will be correct to say that the effectiveness of environmental policies could be asserted from the comprehensiveness of its environmental regimes. In practice, their effectiveness has not done much to protect the environmental problems in the Niger Delta till date. Also the dearth of qualified staff and the political will on the part of Government to tackle these problems that may lead to total closure
of the oil firms is a plausible explanation for the ineptitude of the Ministry and the Nigerian Government to
give legal teeth to environmental legislations.

**Government Effort to Tackle Environmental Conflict in the Niger Delta Region**
The Niger Delta Development Commission (NDDC) was established by the Federal Government in the
year 2000 to tackle environmental issues and formulate policies and guidelines for the development of the
region. Through the commission, the Government has provided funds for economic, social and educational
development of the area. The Commission in a bid to solve environmental issues in the region, developed
the Niger Delta Regional Development Master Plan.

The report that emanated from the plan, sought to package cross-sectoral mutually supportive measures that
would effectively address the region’s environmental challenges while taking full advantage of the region’s
opportunities by focusing on wealth creation, employment generation, poverty reduction and value re-
orientation. This is to be facilitated by the private sector, government reforms and development of social
development charter. Unfortunately, only surface attempts at reaching its goals were achieved as these plans,
report and regulation frame works, have failed to address the issue of militarism in the region.
Government’s effort to develop the region is being thwarted by greedy contractors who collect money for
developmental projects they had no intention of completing. The result is that, despite the huge amount of
money being pumped into the Commission to develop the region, it still remains underdeveloped because
the funds end up in the pocket of some individuals who are only interested in their personal gain as against
developing the region for the general good of all.

The Federal Government also established the National Environmental Standards and Regulations
Enforcement Agency (NESREA), responsible for enforcing all environmental laws, guidelines, policies,
standards and regulation relating to environmental pollution and degradation. The National Oil Spills
Detection and Response Agency (NODSRA) was also established to coordinate and implement oil spill
contingency plans and to establish mechanisms for cleanup. These institutions have yet to record laudable
sanctions on oil companies with regard to oil spills and gas flaring in the region.

Other legal frameworks on environmental concerns include Environmental Impact Assessment Act of 2005,
Pollution Abatement in Industries and Facilities Generating Waste Regulation. The impact assessment of so
many projects in the region, are not conduct before construction, despite the existence of these laws.

Special Task Forces and Oil Pipe line Act, Cap 338 LFN, 1990 enacted by the Federal Government, have
failed to address or resolve the conflicts and problems of environmental degradation in the region. This can
be seen from the activities of the Niger Delta Avengers who are blowing up major oil facilities in the region
with the sole intention of crippling the economic growth of the nation as a whole.

The persisting crisis growing day by day in the region, have shown that these legal and institutional frame
works, are not being implemented in practice and have not done much to tackle the environmental pollution
in the region.

The Government urgently needs to go back to the drawing table and dialogue with all stake holders in
environmental concerns in other to come up with more realistic approach and mechanisms of reducing the
conflicts arising from environmental issues in the Niger Delta.

**Indices for Sustainable Development in the Region**
Sustainable development as it applies to this paper is the pursuit of appropriate current developments in the
Niger Delta region that should also take care of the survival of future generation and applicable
developmental options that can bring about the survivability of the people of Niger Delta region, their
religion, destinies and the resolution of the crisis in the region.
In line with the view of the World summit for sustainable development, these include projects that will come from the people that will not distort the ecosystem, managed, serviced and owned by the people. In this regard, the United Nation Declaration of 1986 conceived development to include a development strategy that takes care of the social, economic, cultural and political essence of the people, where such strategies apply effectively to the wellbeing of the people which ensure their active participation in the developmental process and the distribution of the accompanying benefits in the locality, where the process is contemplated for application.

Akpotaire in his article “Sustainable Development and Environmental Law” considered the need for sound legal regime in Nigeria in areas of Urbanization, human settlements and their environmental problems, health care, oil pollution, industrialization, coastal erosion, pollution of inland and underground water in other to attain sustainable development. He further opined that so far, various governments have only paid lips service to the need for the application of the sustainability principle.

Ondku in his article “Sustainable development as a strategy for Conflict Prevention: the case of the Niger Delta”, submitted that successive governments in Nigeria, oil companies and the international community, are yet to fashion out sustainable development options for the survivability of the people in the region. This can be deduced from, militarization, poverty, underdevelopment, unemployment and environmental problems that continues to ravage the region as against, good health facilities, employment for the graduates, good road, water, electricity and economic growth of the region, which from this writers point of view is still far from being achieved in this generation, not to talk of meeting the developmental needs of future generation.

It is time for government to come up with workable strategies whereby the region will be developed directly with the contribution of the people, instead of doing so, through greedy and unscrupulous contractors who work hand in hand with corrupt officers of agencies, saddled with responsibility of developing the region to the detriment of the people.

**Searching for Solution of the Environmental Crises and the Way Forward**

To tackle the environmental problems in the Niger Delta Region, it is of utmost importance to take into consideration the active participation of the people in the region, the Government and multinational companies and other stake holders like civil societies, nongovernmental organizations and academia, towards bringing a lasting solution to environmental issues of the region.

An integrated approach towards developing the region should be adopted to accommodate combination of several development strategies packaged into one piece in a way that it becomes more effective. The locals who are the primary target of development should participate in defining developmental policies that will meet their needs. Thus each side will make gains at certain times, by transitioning view points away from zero-sum attitudes so that all participants will realize that development and regional stabilization are for their overall benefit.

There will be need to shift the parties from conflicting to accommodative attitude whereby there will be a better understanding of each other’s view point and to achieve the ultimate goal of arriving at a more comprehensive and mutually beneficial solution of conflicts in the region.

The Government, oil companies and the people should dialogue more frequently on facilities to be put in place that will benefit the various communities in the region who may have different priority needs, instead of government choosing or imposing a particular strategy that may not be beneficial to the people in the long run.

Industrial development in the region should be accompanied by environmental friendly techniques that is sustainable which will minimize the impact of their activities on the environment.
There will be need to introduce new gas flaring methods that are environmental friendly capable of converting gas to other useful products like alcohol that can be put into diverse use as against the old fashion gas flaring method that is harmful to the environment.

Recognizing the importance of tactics in achieving basic socio-economic needs and grievances of the people, will allow each side understand the best overall methods to achieve mutual goals in new positive sum and accommodative environment.

Patriotism of the militant groups who are primarily fighting for their own selfish individual enrichment should be encouraged by ensuring that their sole objective is to better the lives of their brothers and sisters in the region.

Environmental restoration activities like forestation for sustainable agricultural and fishing establishment should be encouraged by establishing environmental management institutions and research centers that will train capable hands in environmental concerns.

The people should be able to have reasonable control over their resources in line with the objective of the world summit for sustainable development. This should include projects that will come from the people that will not distort the ecosystem, managed, serviced and owned by the people.

Multi-track diplomatic approach to developing the region should be encouraged. This should involve the government, civil society groups, elders and youths of the region and international oil community with a view of creating jobs for the unemployed youths in the region. This will drastically reduce militancy and other vices that will prevent development.

Vanguard Newspaper of 19th July 2016, suggested the need to revamp the Calabar, Warri, Port Harcourt, Koko, Burutu Ports, Aladja Steel and Rolling Mill industries and Aluminum Smelting Companies so as to open employment opportunities for graduates and development.

There will be need for the youths to stop bombing and vandalization and in its place, embrace dialogue and constructive approach in making their grievances known. The current bombing of oil pipe lines and killings in the region, is only increasing the already existing conflict and further degradation of the environment in the region, which will only worsen the plight of the locals whose major occupation are peasant farmers and fishermen.

Government on the other hand, should train environmental experts abroad who will be afforded the opportunity to learn developmental strategies of other developed countries on environment management and impact them on their successors.

Environmental studies should be included in our schools curriculum from primary school level, to create early awareness on the need to protect the environment.

Mainstreaming environmental needs into development policies and action plan should be imbibed by the government, to tackle ecological problems arising from oil and mineral exploration in the region.

Environmental Institutions should be strengthened to implement the existing environmental laws in place, while new ones that will prevent environmental degradation should be considered and enacted by the National Assembly. These institutions should be able to collate data on environmental problem within the region with the view of solving them timeously.

There must be continuity by succeeding governments to implement environmental policies of previous government, while developing new ones to tackle environmental issues in the region. In other words, environmental concerns should not be politicized but should be given the priority it deserves when they come into power.
Conclusion
From the foregoing, it will be proper to say that oil exploration in the Niger Delta ought to be a blessing in Nigeria and especially in the region. But because of Government neglect in implementing existing laws that ought to tackle oil spillage arising from the activities of Oil Companies in the region which, has led to the destruction of the ecosystem of the region, unemployment and the perception of hopelessness, the youths have decided to take their destiny in their hand by militarization and activism to force the oil companies to either develop their communities or leave the region. This is because all stake holders in environmental issues have not been sincere to themselves by creating an avenue to come together to dialogue and tackle these conflicts and crises effectively. It is the view of this writer, that if they all come together and listen to each other on suggestions on the way forward in bringing peace, sustainable development, agricultural and socio economic development in the region, environmental development will be achieved in the Niger Delta region.

Thanks for tolerating me.

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The Paris agreement reached in December 2015 was described by UN Secretary General Ban Ki-moon as a “monumental triumph”. I visited Paris briefly during the period of the negotiations for a seminar on the role of the courts. I was struck first by the scale of the operation. It was not just the representatives of the 194 nations who were directly involved, but the many other representatives of interest groups who wanted to participate. The other striking thing was the relatively light touch of the security forces, remarkable in view of the terrorist atrocities in Paris only two weeks before. It may have been the fresh memory of those terrible events that helped to concentrate the minds of the participants and made failure unthinkable. In the words of one commentator, Lavanya Rajamani (also a member of the UNFCCC core drafting and advisory team in Paris), the agreement achieved “a remarkably delicate balance between the collective ambition of global efforts to lower greenhouse gas emissions, differentiation between developed and developing countries and mobilisation of the financial resources needed for support”.

The agreement of course was no more than an important first step on a long road. It was subject to ratification by individual states. It will not enter into force until ratified by at least 55 parties representing at least 55% of global greenhouse gas emissions.

First the background. The international climate change regime is comprised principally of the 1992 United Nations Framework Convention on Climate Change, the 1997 Kyoto Protocol and the decisions of Parties under these instruments. It was at the Durban Conference in 2011, that the Parties launched a process to negotiate a new climate agreement by 2015 that would come into effect from 2020. There was little guidance at that stage as to the likely form or content of the agreement save that it should take the form of a “Protocol, another legal instrument or agreed outcome with legal force”, that it should be “applicable to all”. A key step was made at the Warsaw Conference in 2013, when it was established that the Parties would be expected to prepare and submit “intended nationally determined contributions” in 2015. This marked a clear break from the approach of the Kyoto protocol which had been based on top-down prescriptive limits for the developed countries. The move to a bottom-up approach, based on contributions initially determined by the parties, and applicable to all countries, developed and developing, came to be seen as one of the main contributors to the success of the Paris negotiations.

Perhaps the most important thing that came out of Paris was the global consensus on the reality of climate change and the urgent need to address it. For the moment the voices of the climate-change sceptics, which had been loud in the run-up to the conference, were forgotten. Thus the preamble begins by recognising the need for an effective and progressive response to the “urgent threat of climate change”, which is acknowledged as “a common concern of humankind”. There was ultimately no dissent from the agreed objective of limiting global average temperature to “well below above pre-industrial levels” and “to pursue efforts to limit the temperature increase to 1.5°C” (art 2). The inclusion of a specific reference to 1.5°C, albeit as an aspiration, was a triumph for the small island states, for whom even an increase limited to 2°C could have catastrophic effects.

This ambitious long-term temperature goal is to be achieved through “global peaking of greenhouse gas emissions as soon as possible” and “rapid reductions thereafter in accordance with best available science” so as to achieve “a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century” (art 4.1) In other words, no net increase in greenhouse gases after 2050.
The content of the agreement

The key individual obligation comes in article 4; each party “shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve”, and “shall pursue domestic mitigation measures with the aim of achieving the objectives of such contributions” (art 4.2). The language is unequivocally that of a legal duty. And the duty is continuing: each party “shall communicate a nationally determined contribution every five years…” (art 4.9).

The content of the NDCs is left to the individual states, but there is to be progressive improvement and no backsliding: each successive NDC “will represent a progression beyond the Party’s then (NDC)” and should reflect “its highest possible ambition…” (4.3)

In relation to finance, the primary obligation is placed on developed countries as a continuation of existing obligations under the Convention (art 9). Developed countries are required to continue to assist developing country Parties with respect to both mitigation and adaptation, and biennially to communicate “indicative quantitative and qualitative information” on the provision of finance. The agreement itself does not give any figures. But the obligations under article 9 must be read with the accompanying decision of the Conference, which is more specific (para 53). It provides that prior to 2025 the Conference “shall set a new collective quantified goal from a floor of USD 100 billion per year, taking into account the needs and priorities of developing countries”.

The agreement also deals with adaptation but in less peremptory terms. Adaptation is recognised as “a global challenge faced by all…” and as “a key component” of the long-term global response to climate change, taking account particularly of “the urgent and immediate needs” of developing countries particularly vulnerable to the adverse effects of climate change (art 7(2)). Parties “should strengthen their cooperation on enhancing action on adaptation” (7.7) and each party “should, as appropriate” submit and update an “adaptation communication” including its “priorities, implementation and support needs, plans and actions” (7.10).

Critically important are the provisions governing transparency. When communicating their NDCs all parties “shall provide the information necessary for clarity, transparency and understanding… (4.8). Article 13 fills in the detail of what is described as “an enhanced transparency framework”, with “built-in flexibility which takes into account Parties’ different capacities and builds upon collective experience”. In particular, each party “shall regularly provide” national inventory report of anthropogenic emissions by sources and removals”, prepared using agreed methodologies, and information necessary to track progress in implementing and achieving its NDC.

The transparency framework is designed to feed into a “global stocktake” to be undertaken every five years by the Conference of the Parties. This is a vital part of the machinery for ensuring that not only that the individual parties live up to their commitments and responsibilities, but that collectively their efforts will be sufficient. The stated purpose is to “take stock” of the implementation of the agreement “to assess the collective progress” towards achieving its purpose and its long-term goals. The stocktake is to be “comprehensive and facilitative” taking account of “mitigation, adaptation and the means of implementation and support”, and also of financial provision (under art 9) and is to be conducted in the light of “equity and the best available science” (art 14(1)). The first stocktake is to be in 2023.

Enforcement

Apart from the global stocktake, the agreement says little about enforcement as such. Article 15 establishes “a mechanism to facilitate implementation of and promote compliance”. This is said to consist of a committee which is “expert-based and facilitative in nature” and is to function in a manner that is “transparent, non-adversarial and non-punitive”. The detail of its “modalities and procedures” are left to be settled by the Conference of the Parties in the future.
However the strength of the agreement is likely to be found not in legal enforcement mechanisms, but in the combination of clear commitments, voluntarily undertaken at national level, and the detailed arrangements for transparency and accountability at international level. Jacob Werksman, Principal Adviser, DG-CLIMA, European Commission, has commented –

“Together these rules and procedures will:

- Provide an evidence base of whether Parties are performing against their commitments;
- Create regular moments of institutionalised political accountability, at the international and domestic level for progress made;
- Build capacity at the country level to measure and to manage emissions.

While there are no ‘consequences’ for non-compliance identified in the Paris Agreement… together these elements add up to one of the most robust and comprehensive transparency and accountability frameworks of any international environmental agreement….”

The role of the courts

There is nothing in the agreement about the role of the national courts, past or future. But it is difficult to believe that they will not have part to play, positively or negatively. The most dramatic illustration of this is the decision of the US Supreme Court which provided the legal platform for the strong climate-change policies adopted by President Obama and the lead he was able to give to other countries. That was the judgment of the Supreme Court in 2007 in *Environmental Protection Agency v Massachusetts.* The court held by 5-4 that the agency’s duties to regulate “air-pollutants” under the existing Clean Air Act included responsibilities for greenhouse gases, and that the agency’s failure to take any action was “arbitrary and capricious” and therefore unlawful. A strong minority (led by Chief Justice Roberts) would have held that the issues raised by the action because the issues were “non-justiciable”. He thought the petitioners’ victory would be little more than symbolic. But he was wrong. That majority judgment paved the way for a radical change in the approach of the EPA, and in due course for the ambitious programme of President Obama, which provided a crucial lead in the run-up to Paris. If the Paris agreement achieves its objectives, we may look back on the *Massachusetts* judgment as one of the most important court decisions in history.

Now of course the future direction of American policy, and its willingness or ability to lead the world, are once again in the balance. This is not only the effect of the Presidential elections. The Supreme Court seems to have signalled a possible move in the other direction. In February, less than two months after the Paris agreement, it ordered (by 5-4) a stay of the President’s most recent Clean Air Plan governing power station emissions, pending a full hearing of legal challenges. The death of Justice Scalia, only three days later, and the heated arguments about the appointment of his successor, throw yet further uncertainty about how this dispute will work out, whatever the inclinations of the new President.

More positively, I think there will in due course be a role for national courts in holding governments to their Paris commitments. Technically of course they are commitments under international law, but there is a clear obligation on national governments to convert those commitments into “domestic mitigation measures”. It will be for national legislatures in the first instance to determine the nature of those measures. My own country, the UK, is well-advanced in this respect. The Climate Change Act 2008, which was passed in the House of Commons with only five votes against, provides a clear legal framework for giving effect to our obligations under the Paris agreement. It imposes a duty on the Secretary of State to ensure that the net emissions of greenhouse gases for the year 2050 are at least 80% lower than the 1990 baseline. It provides the machinery for the Secretary of State to set statutory “carbon budgets” for successive five year periods,

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49 *Massachusetts v EPA* 549 US 497 (2007)
starting from 2008-12. The Act established an independent Climate Change Committee to give expert advice under the Act, including on the setting of the carbon budgets. Four budgets have already been set on the basis of a reduction of emissions by at least 50% in 2025 compared to 1990.

But what if national legislatures fail to give effect to those commitments, perhaps following a change of government? Depending on the legal system, there may be means by which the courts can fill the gap. This is illustrated by two recent cases, from countries with very different legal systems, considered even before the Paris agreement. In May last year the Hague District Court gave judgment in an action brought by the Dutch Urgenda Foundation and 886 individual citizens to compel the government to comply with its Kyoto commitments. During the 2010 climate conference in Cancun, the Netherlands along with other EU states had acknowledged the need by 2020 to limit their emissions by 25-40%, compared to 1990. Yet the State’s evidence confirmed that the expected reduction under its current plans was no more than 14 to 17%. The court held that, given the undisputed evidence as to the serious threat to man and the environment posed by climate change, and even without specific legislation, the government had a duty to take appropriate mitigation measures in its own territory to address it. Its failure to do so amounted under Dutch law to “unlawful hazardous negligence”. The court rejected the argument that Holland’s contribution to the global problem was relatively small. “Climate change” it said was “a global problem and therefore requires global accountability”. The decision is under appeal, one of the grounds being “the interference of the judiciary into the discretionary power of the government”.

In September 2015 there was another, perhaps even more striking, example from the High Court of Lahore.50 As the judge said, the case was brought against the background of Pakistan’s experience of the impact of climate change, including devastating floods with serious economic costs. He founded his jurisdiction on the court’s constitutional obligation to protect the fundamental rights of the people to life, health and property. The government had in 2012 adopted its own National Climate Change Policy, and a Framework for its Implementation. But, as the judge found, having heard representatives of the Ministries and Provincial Departments, it was clear that nothing had been done on the ground. He ordered the establishment of a Climate Change Commission, and named its members. They included an independent chairman, representatives of relevant government departments, and other experts. The government has accepted the decision and is participating in the commission.

Of particular interest to judges and lawyers in other countries is the legal basis on which each court felt able to intervene. The Urgenda decision turned on a particular doctrine of Dutch law which may not find parallels in other jurisdictions. But the Lahore decision was based much more generally on the court’s constitutional obligation, as the judge described it, to protect the fundamental rights of the people to life, health and property. Thus the global consensus on the need for action on climate change may be reflected in environmental guarantees under national constitutional law.

I conclude by again quoting Jacob Werksman final comment on the Paris agreement:

“Is this a ground breaking and bold experiment, pragmatic and functional hybrid, a model for other areas of multilateral negotiations that need to capture ambition across very diverse Parties? Or is it an expedient fudge made necessary to accommodate the constitutional dysfunction of one country and its continued reluctance and that of many others to fully embrace the need for change?

Perhaps the Paris agreement is both. But with the Paris COP only weeks behind us, I am hopeful that we landed upon a unique compromise in which international obligations to prepare, communicate, pursue, account for, track and successively and progressively update targets will, in the bright light of regular international attention.

50 Leghari v Federation of Pakistan WP 25501/2015
and in the heat of a warming planet, sink deep roots into domestic legal and political systems…”

Only time will tell if he is right.
Addressing Victim Dissatisfaction in Cases of Domestic Violence and Sexual Offences – A Gendered Access to Justice Issue

We have been discussing our theme “The Judiciary as Guarantors of the Rule of Law” at length. I need not burden you with any academic definitions of rule of law, when so many other speakers have done so with great scholarship. However, it bears reminding that it is the business of judges to uphold the rule of law, and to protect and promote access to justice. As it relates to this presentation, I wish to highlight certain core principles of the rule of law which demand adherence, particularly, equality before the law, participation in decision-making and fairness in the application of the law. As we continue to discuss our roles as judges, I wish to raise a gendered access to justice issue – victim dissatisfaction in cases of domestic violence and sexual offences.

Domestic Violence

The year was 1868 and a man was on trial for repeatedly whipping his wife. The Supreme Court of North Carolina refused to convict saying,

“We will not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence… [H]owever great are the evils of ill temper, quarrels, and even personal conflicts inflicting only temporary pain, they are not comparable with the evils which would result from raising the curtain, and exposing to public curiosity and criticism, the nursery and the bed chamber. Every household has and must have, a government of its own, modeled to suit the temper, disposition and condition of its inmates. Mere ebullitions of passion, impulsive violence, and temporary pain, affection will soon forget and forgive.”

*The State v Rhodes* 61 N.C. 458 (1868)

That was just about 150 years ago. Thanks to the work of the battered women’s movement in the 60s and 70s, we’ve come a long way and it is accurate to say that contemporary societies have revolutionized their approach to gendered violence, in this case, intimate partner violence or domestic violence (DV). Indeed, it would be equally accurate to say that in removing the shield of privacy and exposing DV to the public realm, with a State remit to provide women with safety, the law has been quite aggressive. Today, the most popular method for securing women in DV cases is the provision of injunctive relief in the form of Protection Orders, which have proven to be highly effective in most instances. Yet, victim dissatisfaction continues to be a major feature in DV cases. I propose to outline my own views on some of what this dissatisfaction may be attributed to and further, to make a few suggestions as to changes which may be implemented. For me, the starting point and the bottom line can be found in the opening lines of the Preamble to the Domestic Violence Act of Trinidad and Tobago

“incidents of domestic violence continue to occur with alarming frequency and deadly consequences”

An Outline of the Process

Let’s start with a snapshot of the T&T DV landscape. The DV application and trial process is largely driven by the victim herself. In general, she is unrepresented when she first approaches the Court seeking relief. She has no benefit of legal counsel and therefore is unaware that she should give detailed particulars of the Respondent’s behaviour on the Application Form. This potentially hurts her later during the trial. Where
there is no need for urgency (in the opinion of the Clerk of the Peace, a primarily administrative officer), she is given a court date within 7 days’ time. She must take the Notice of Proceedings to the police station and simultaneously hope and dread that the Respondent will be served. After all, they live in the same household and she made this application secretly. She attends Court at the appointed time and realizes that he had not been served. The Magistrate makes her enquiries and determines that the case warrants the grant of ex-parte injunctive relief. She gets an Interim Order, but the Magistrate tells her to take the Order and another Notice of Proceedings back to the police station and cautions further that until he is served, that order is unenforceable. Eventually, service is effected and the trial date arrives. They arrive at the Courthouse for the same time, but because the law treats DV cases with deserving sensitivity and conducts the hearings in camera, she is forced to sit in the same waiting area with the Respondent and his family of supporters. The tension is palpable. As her name is called, he looks at her and gesticulates by making a cutting motion across his neck with his finger. Before she even utters her first word in the trial, she is terrified of the consequences to follow. The evidence reveals the brutal reality that she is badly beaten every Friday when he gets paid and invariably ends up in a drunken stupor. Her testimony reveals stories of physical blows, name-calling, obscenities, threats, forced sexual encounters and financial deprivation. In absolute righteous indignation, the Magistrate grants a Protection Order which, amongst other things, ejects the Respondent from the home. As she walks out of the Courtroom, she wonders how to tell the Magistrate that they live downstairs of her in-laws’ house. All she wanted the Magistrate to do was to make him stop drinking. The snapshot is significant because it is so often the case. I have done DV cases for the last ten years and though I have made several such orders in my time, I have come to realize that we must change the way things are done. My comments here are not intended to undermine the severity of those cases where the lethality factor is high, but rather to address the majority of applications in the system.

Some Recommendations
In DV cases, we must implement changes to effect two results:

- Provide a courtroom environment which permits the victim to give the best possible evidence;
- Afford the victim greater autonomy in the relief she seeks.

1) Legal Aid services must be made available at the earliest opportunity. Often, the victim simply does not know that she can apply for representation. In fact, ideally, she should be provided with the ability to have representation on her first date of hearing. Indeed, an appreciation of the fact that DV cases inherently involve power imbalances, would easily recognize the benefit of early legal representation as an initial step in addressing this imbalance.

2) She should not be burdened with the need to assist in the service of process. Process service should be court-driven and not left to the vulnerable, weary, poorly-resourced DV applicant.

3) Separate waiting areas should be provided. Where physical plant is entirely prohibitive, the cases can be scheduled on a staggered basis, to reduce the exposure to intimidatory tactics while waiting for the case to be called. Court attendance itself poses great risk, as the abuser is provided with a precise date, place and time to find the target of his abuse.

4) Where possible, CCTV technology should be implemented. I recall visiting a DV Court in Washington DC earlier this year and observed as the Judge conducted her cases using CCTV technology. At no point in time were the victim and abuser in the courtroom together. The victim made her presence remotely via CCTV from another room in the Courthouse and trials proceeded in the ordinary fashion. In our courtrooms, victim and abuser are often less than ten feet apart during these sometimes contentious proceedings.

5) Clustering or consolidating connected matters is critical. Even as the Court contemplates the grant of prohibitive injunctive relief, consideration must be given to the need for financial arrangements,
custody and access of children and living accommodation in real, practical terms. The temptation to ‘put the man out’ is often not the most viable option. I can’t stress this point enough. The reality is that in some countries, the social support services are simply inadequate or non-existent. T&T has too few shelters and they are generally under-resourced. Extended family homes are common and the woman often lives with her in-laws. Ejecting the abuser from the home may exacerbate her suffering.

6) Above all, victims need to have greater autonomy in the type of relief which the Court eventually grants. Truth be told, many victims approach the Court in the hope to mobilize resources which will restrain the abuser and establish/re-establish a healthier power balance in the relationship. Indeed, the obdurate question, “Why doesn’t she just leave him?” betrays a complete lack of understanding of the complexity involved in intimate partner violence. In most cases, the victims hope to salvage their flawed relationships. Forgive me for being provocative by suggesting that we may be too comfortably ensconced in ivory towers, basking in our pharisaic indignation and zero-tolerance policies and we utterly ignore the women in front of us who lay bare their hope for our help in achieving redemption and restoration. When a DV victim eventually sums up the courage to seek judicial assistance, she is praying for reliefs that provide enhanced safety for her, security for her children’s welfare, economic viability and more particularly, for the abuser to be forced into treatment and rehabilitation programs. More often than not, the relief we think she needs is an exit strategy from the relationship.

7) The focus of DV orders must shift from an imperious assumption that the victim is incapable of ascertaining what is in her actual best interests. She goes from one power imbalance, a private one, directly into another one, this time institutional.

8) Needless to say, the autonomy I recommend is also relevant when treating with criminal charges for breaches of protection orders. Too often, we see victims exhibiting recantation or unwillingness to cooperate with the trial process. Judicial officers have been known to remark, “Well why you bother to report the breach?” or, “So, what is the point of having the order?” or even, “Madam, you just wasting the Court’s time!” Often, if we enquired, we would realize that her reticence is based on a number of factors, not the least of which is fear of retaliation and financial dependence on the abuser. Indeed, the financial constraint may be the factor most at odds with a strictly punitive approach when dealing with breaches. In one case, the Court noted,

“By curious irony those who were victims of the offence were more likely to suffer the most by the penalty which has been imposed on the perpetrator.”

R v S [1996] 2 Cr App R 256

In the absence of a sound social structure to encourage and safely facilitate separation, judicial officers must listen more carefully to what the victims ask for. And even, where we believe that discontinuing the case is not in her best interest, our language ought always to suggest that the Court is ready, willing and able to assist her. We can never afford to grow weary ourselves with what we know to be cyclical behaviour characteristic of DV abusers and victims. To say anything to the contrary is a blatant access to justice issue and, if said in the presence of the abuser, causes much more harm.

**Sexual Offence Cases**

Let me turn briefly to cases of sexual offences where likewise, much change is required in the Courtroom environment. These cases too, begin with and inherently involve gendered power imbalances. Too often, the justice system is accused of raping the victim all over again. Greater vigilance must be paid to affording dignity to victims in sexual offence cases. Admittedly, judicial officers become quite shy if they believe that ordinary human compassion is in conflict with their perceptions of impartiality and the presumption of innocence. I heard one victim put it this way, “The way I was treated, it was as if I was on trial. How is it that I was not presumed innocent as well?” I suggest that...
there are ways to more comfortably afford victims the ability to give their best evidence without compromising our judicial remit.

**A Snapshot**

Here’s another snapshot. A woman is violently raped by a strange man. This she reports to the police and the investigation leads to the charge of the accused. A compassionate prosecutor assures her that the hearings are conducted in camera. On the first date in Court, she hears the Magistrate call the name of the accused and, there he is. Terror sets in. The prosecutor motions for her to come over and stand next to him. She is less than 20 feet away from her attacker. The Magistrate proceeds to read the charge out loud alleging that the man has raped a woman, and calls her by name. It seems to her that all eyes in the Courtroom focus on her. For those who didn’t already connect the dots, the Magistrate asks “Is this the victim?” She feels exposed, vulnerable and humiliated. And this, is only the reading of the charge. More than three years later, she is called to give evidence. No-one told her that the accused is now on bail. Too late, she realizes that he is sitting right behind her in the public gallery. She can almost feel his breath on her neck, just as she did that fateful day. The case is put off and that scene repeats itself for a couple more years. Eventually, she decides that she can no longer endure the trauma and tells the Magistrate that she no longer wishes to proceed with the case and is firmly rebuked, “Madam, this is not a private prosecution. You are but a witness in this case. As a matter of fact, if you fail to return to Court, I can order a warrant for your arrest.”

**Suggested Improvements**

1) There are some aspects of the trial process which cannot easily be sanitised with the comfort of victims in mind. For example, cross-examination, no matter how brief or kind, will prove challenging. There is no easy way to avoid a defence lawyer saying, “I put it to you that you are a liar.” However, the Court can and must guard against excessively aggressive cross examinations. By all means, test the victim’s credibility and the reliability of her evidence. But certainly, the Court can intervene to reign in repeated questions and character assassinating remarks, which serve no useful purpose apart from traumatising victims.

2) Of course, proper seating arrangements, just as for DV cases is necessary. More and more, it is becoming painfully obvious that courts must be purpose-built.

3) Delay must be avoided at all costs. This has to be the most critical consideration. Cases simply take too long to go to trial. Apart from the general issues brought about by the effluxion of time, such as memory lapses, victims in sexual offences cases endure other hardships due to delay. In one case, for example, a victim said she was now married, some 8 years later and did not wish to give evidence, as to do so, would not only embarrass her new family, but would re-open wounds after she has successfully managed to move on. One victim said, “I would rather that he had killed me. If this were a murder case, as a victim, I would be dead and therefore free. But, I have to spend the rest of my life living with what happened.”

4) Indeed, firm criminal procedure rules can adequately safeguard against such trial abuses by ensuring that all aspects of the case receive due preparation, facilitating the early identification of the real issues, ensuring that evidence, whether disputed or not will be presented in the best, clearest and shortest way, thereby avoiding unnecessary hearings and delay.

5) One new feature particularly in relation to cases involving vulnerable witnesses is the development of Ground Rules Hearings (GRHs), which allow the trial judge and the advocates to discuss in advance the manner in which the trial is conducted. This of course includes agreement on the length of time to be allotted to cross examination.
Conclusion
The snapshots presented here represent the ills in the Trinidad and Tobago context. They are certainly not the worst case scenarios, but admittedly, several judicial officers have responded to training in this area with sensitivity. It certainly is much easier for Judges in superior courts of record to use their inherent jurisdiction, but unfortunately, Magistrates remain bound as ‘creatures of statute’.

Nonetheless, victim dissatisfaction must be addressed because it negatively influences access to justice for these very vulnerable victims. They must feel free to approach the Court, whether as first time applicants or in relation to future help-seeking behaviour. Changes must be made if we are to engender public confidence in societies where underreporting of both domestic violence and sexual offences is due primarily to negative impressions of the trial process.

Too often judicial officers believe that the problem is institutional and therefore out of their control or influence. However, the management and control of the trial process is firmly within the remit of the judicial officer and this responsibility is one which demands fairness to all parties appearing before us. My encouragement therefore is to urge us all to consider, in our own courtrooms, in the absence of systemic improvements and increased resources, what can we do differently to ensure that victims of DV and in sexual offence cases are afforded dignity, autonomy and the ability to give their best evidence? Are we not all implicated when a victim feels further mistreated by the very court system from which she seeks relief?
Notes: I am going to talk about the rapidly changing landscape of the trial process with regard to vulnerable witnesses. The fact that the court process has to be attuned to the needs of the vulnerable is not a recent concept but the manifestation of that in practical terms is gaining pace. Two areas in particular present challenges – sexual crime and domestic violence – but it is an issue relevant for the criminal process across the board. Obviously I am speaking from a British perspective and in the context of a jury trial process but there are many aspects in respect of how our system has developed so as to better accommodate the vulnerable that could be of value to other jurisdictions even where juries do not feature.

Notes: So as I say there is in fact noting very new or revolutionary about the idea that court processes should be adjusted so as to allow vulnerable witnesses to participate in a meaningful and worthwhile manner. Certainly at the time of the Pigot report the focus up until then had been very firmly on the rights of the accused and the need to protect the accused from anything that might be thought had the potential to imperil a fair trial – even at a cost that had to be borne by those who said they had been the victims of crime. The 1988 legislation is but one of the steps along the road to a rather different approach.

Notes: The changes proposed in the Pigot report were not rushed in to put it mildly. 10 years after the Report legislation was passed allowing for video evidence in chief but even more fundamentally an arrangement whereby a complainant could be cross examined prior to a jury ever being sworn and the product of that process captured and in due course used as evidence at trial. S.27 was introduced but s.28 has been left in abeyance for very many years – and, it has to be said, for no very good reason.
Slide 4
The Need for Change
- Court processes that fail to accommodate the needs of vulnerable witnesses and defendants cannot be considered fit for purpose
- Vulnerability may manifest itself in many ways – some obvious and others less so
- Vulnerability simply by reason of age is easy to identify but other forms of vulnerability may be far from obvious

Notes: The clamour for change has been growing for many years. Studies have identified the negative experience of vulnerable witnesses who have been involved in the court process. And this is not simply an issue in respect of prosecution witnesses – many vulnerable Defendants are just as disadvantaged by a trial process that does not adequately protect them although they at least are represented at trial and have someone to speak for them.

Slide 5
Triggers for Change
- Baby P and related rape case
- Publicity highlighting the negative experience of complainants in the trial process – in particular the ‘Stafford case’
- Studies and reports by bodies such as the NSPCC and consequent public disquiet

Notes: There have been many well publicised cases that have acted as triggers for change. The appeal process arising from the prosecution of those concerned in the terrible Baby P case provided an opportunity for the then LCJ to introduce changes. Even before that the Bulger case focused attention on how children should participate in court processes whether as Defendants or witnesses. The Stafford case and reporting of that by the Times journalist Andrew Norfolk promoted much debate.

Slide 6
The Pace of Change
- Increasingly rapid and radical
- Barker [2010] EWCA Crim 4 – para 42
- Lubemba [2014] EWCA Crim 2064
- Jonas [2015] EWCA Crim 562
- Additional judicial training
- Advocates Gateway toolkits
- Consolidated Criminal Practice Direction
- Criminal Procedure Rules

Notes: Read sections from the cases. The learning from those decisions came to feature in the Practice Direction and the CPR. The Advocates Gateway website provides tools that judges and advocates need in order to ensure that the trial process is suitable. All judges who try...

Slide 7
Changes in Practice
- Grounds Rules Hearings
- Restriction in length of cross-examination
- Prevention of repetitive cross-examination
- Controls imposed as to the nature of cross-examination
- Prevention of repetitive cross-examination
- Compulsory use of the relevant toolkit
Notes: GRHs – one of the most valuable changes. As a way of achieving practical and effective improvements they have substantial value. A GRH does not require much by way of resources and doesn’t have to involve technology. It does require us as judges to roll up our sleeves and take rigorous control of the trial process but that is something in which I am in favour. Judges in my jurisdiction are becoming increasingly comfortable in imposing a sensible discipline on how witnesses are cross examined and are being supported in so doing by the Court of Appeal. It is standard practice now for judges to order the advocates to cross examine in accordance with the relevant tool kit and to stop them if they fail so to do. I will regularly tell an advocate that they have 20 minutes or whatever is reasonable in which to ask questions and to impose a guillotine.

Plotnikoff examples - identify

Slide 8

Resources
- [http://www.theadvocatesgateway.org/toolkits](http://www.theadvocatesgateway.org/toolkits)
- Consolidated Practice Direction 3E
- Criminal Procedure Rules – the ‘overriding objective’ and Rules 18.8-13
- Review of Efficiency in Criminal Proceedings 8.2.2-8.3.2

Slide 9

Further Change
- Finally the ‘full Pigot’!
- The s.28 pilot experience
- Submission of questions to be asked in cross-examination for judicial scrutiny – the impact
- Tactics

Notes: 27 years after the s.28 approach was recommended and 17 years after the legislation that would allow for that found its way into an Act of parliament the change is about to be rushed into effect! The evaluation of the pilots demonstrated that there was support for the change from witnesses, judges and advocates. Nothing we can do can ever prevent the process of giving evidence being anything other than very difficult for a victim. EXPLAIN HOW IT WORKS. There is still a significant time lag from first complaint to the cross examination but it is still very much shorter than the current system. Even with efforts at prioritising cases involving vulnerable witnesses I regularly preside over trials that have taken a year from first complaint to the jury trial. That is just far too long. The s.28 experience and in particular judicial editing of cross examination is having an effect in all cases involving vulnerable witnesses.

Slide 10

Myths and Stereotypes
- Understanding the evidence of vulnerable witnesses
- Situational vulnerability
- Directing the jury/fact finder directing self
- The issue of expert evidence
- The US approach
- The NZ proposal

Notes: The vulnerability of the witness does not just impact in respect of their perceived experience of the trial process but it can also carry over into the assessment of their evidence. Jurors may struggle to understand why child victims only come to complain years after the event. Juries may struggle to understand why a rape victim does not try to physically resist an attack. Jurors lack insight into the subconscious survival mechanisms that come into play when victims are attacked. Jurors may struggle to understand the way in which children come to be conditioned to accept abusive behaviour on the part of a family member,
So this can represent a bit of a double whammy for the vulnerable victim – a process that is deeply challenging and fact finders ill equipped to understand the way in which their vulnerability led them to behave. There is a belief in some quarters that misleading myths and stereotypes may impact upon the assessment of evidence in way that promotes injustice. The degree to which that happens in reality is difficult to determine. I do provide juries with directions that seek to ensure that they do not apply wrongful thinking on their part. Recent changes in the Criminal procedure Rules allow for judges to provide such directions to a jury at the start of the trial process which must be a good thing. There is an issue in respect of the potential for expert evidence to be introduced that might explain how particular vulnerabilities or well-known psychological issues might impact upon behaviour in a way that an uneducated jury could struggle to understand. The approach in England and Wales is to resist the introduction of such evidence but to allow for judges to give directions to jurors that are designed to convey much of the message that an expert might provide. The Court of Appeal rejected a challenge based upon the premise that this amounted to judicial evidence giving on the basis that a judge was simply explaining matters that were of common knowledge and experience but it is a fine line to draw it might be thought. The potential disadvantage of judicial directions designed to address myths and stereotypes is that they are expressly NOT based upon expert evidence – so what credence do juries give them? The answer is we do not know because we cannot ask them. In the US the Supreme Court had occasion to look at their version of a Turnbull direction in respect of the dangers of identification evidence and concluded that judges should start to direct juries telling them not that experience showed that mistakes could be made by way of visual identification but rather that research demonstrated that fact. The Supreme Court concluded that needed to know that there was a proper basis for the direction founded upon empirical evidence in order to ensure that the jury took sufficiently into account the need for caution. I believe thought needs to be given as to how we explain such issues to juries or ourselves as fact finders. In this context the New Zealand Law Commission has suggested in a report that consideration should be given to removing cases of sexual crime and domestic violence from jury process. That is a debate being had at the moment in New Zealand. Involved in research project seeking to identify the best medium by which to provide juries with assistance as to the avoidance of myths and stereotypes.

Slide 11

**Domestic Violence**

- Example of situational vulnerability
- Psychological damage the result of repeated abuse
- Subconscious survival instinct
- Lack of realistic alternatives
- Delay in coming to trial
- Witness wastage

**Notes:** The vulnerability of the victims of domestic violence often has a significant impact on the trial process. They are cases wherein the result is often dictated not by the quality of the evidence but rather its absence in the sense that victims often find it hard to engage with the trial process. It is an area where myths and stereotypes come into play in certain quarters with investigators sometimes engaging in a degree of victim blaming due to frustrations that may be felt born of ignorance as to how difficult a victim of domestic violence my find the process of investigation and trial. There are well established psychological reasons why victims return to their abusers and why they struggle to get into the witness box. Delay is one of the factors with which they struggle.

Slide 12

**What can be done?**

- Support groups/agencies
- Places of safety
- Refusal of bail/application of effective bail conditions
• Education of police to combat witness blaming attitudes
• All of the above may help

Slide 13
Practical Options
• Early trial
• S.28 applied in such cases?
• Treat as hostile witness?
• C [2007] EWCA Crim 3463
• Admission of hearsay?
• Use of res gestate – preserved by the Criminal Justice Act 2003
• Barnaby [2015] EWHC 232 (Admin)

Slide 14
What not to do!
• A singular US approach: https://www.youtube.com/watch?v=t-9jhOajftc

Slide 15
Education Education Education
• Work of the Judicial College
• Specific training on VW issues
• Advocacy Training Council

Slide 16
Impact of Use of ‘Special Measures’
• Need for research – ‘gut reaction’ a poor measure in this regard
• Does evidence given through the medium of a television link have the same persuasive impact?
• Does the imposition of strict controls on cross-examination impact adversely on fairness?
• Are jurors/fact finders influenced by misleading myths and stereotypes?

Notes: Research on this is required.
PANEL SESSION 10
“Capital Punishment – To Abolish or Not to Abolish, That is the Question”

By Justice B. Rajendran, India

Evolution of Capital Punishment in India

The debate on the infliction of capital punishment is not of recent vintage. The imposition of a sentence of death has remained a central feature of the criminal justice system for over 2000 years. History reveals that at various periods in the history of ancient India, capital punishment was one of the recognized modes of punishment.

Capital Punishment in Ancient India

i. The Vedic period (1500-600 BC) recognized the divine right of Kings to rule over their subjects. This right was coupled with the obligation of the ruler to protect his subjects. In order to effectuate this obligation, the King was vested with “Danda” or a coercive authority to enforce his law. This coercive authority of the King was recognized as the cause for Dharma.

ii. The pre-Mauryan period (600 to 325 BC), one of the earliest Smritis lists out the offences punishable with death. The offences included injury to the seven constituents of the State, and those who forged royal edicts. A King who fails to inflict punishment (danda) on a guilty man or who punished an innocent man, was, required to undergo a fasting 51.

iii. Classification of Punishment in Hindu Law: In his treatise on Hindu law, Dr. P.K. Sen points out that punishment under the Hindu law was fourfold, viz., admonition, reproof, fine and corporal. Punishment was to be administered after considering the offender, his pecuniary condition, and the crime committed by him.

iv. The scriptures also recognize the imposition of the Angaccheda, or mutilation which may be of different limbs and organs of the body. Brahaspati prescribes fourteen, referring to fourteen parts of the body which may be mutilated, namely, hand, leg, organ of generation, eye, tongue, ear, nose, half-tongue, half-leg, thumb and the index finger taken together, forehead, upper lip, rectum and waist.

v. Capital punishment or Pramapana could be of a pure and the mixed variety i.e. in the latter case mutilation or some other form of punishment may be combined with the death sentence. The pure variety, the execution was either ordinary (avictram) or extraordinary (vicitram). The ordinary form of execution is by means of ordinary weapons such as sword and the like; the extraordinary is by means of impaling, or other awe-inspiring methods.

Capital Punishment for Various Crimes in Hindu Law

i. From the Manusmriti it appears that capital punishment was awarded for the following offences
   a) Theft of more than 10 “kumbhas”.
   b) Rape by a man of the lower caste with a woman of the higher caste.
   c) Forging of royal grants and even of private documents is punished by death (Vi. 5, 9f; M.9, 232);
   d) No distinction was made between robbery and theft as regards punishment and moreover taking part in these crimes, abetting of every kind or refusing to render help is regarded as equally criminal.
      Brahmans were not subject to the death penalty

Capital Punishment and Buddhist Rulers

In its 35th report the Law Commission points out that in the Buddhist period the propagation of the doctrine of Ahimsa (non-violence) did not deter Emperor Asoka to abolish capital punishment. Rejecting the notion

51 Dr. P.N. Sen, Hindu Jurisprudence, (TLL 1909) 1918 Edn. pp. 550-551
that Ashoka had abolished capital punishment, the Commission, after referring to authoritative sources and the edicts of Ashoka confirmed that the death penalty was very much in vogue during the Buddhist era.

**Capital Punishment during Muslim Rule**

Under the Mughals, the criminal law administered in India was the Quranic one. The system had originated and grown outside India. Its main sources were the Quran as supplemented and interpreted by case law and opinions of jurists. Since all the three sources were “trans-Indian”, it became necessary for Indian Qazis to have a digest of Islamic law. The last such digest was the *Fatawa-i-Alamgiri* compiled by a syndicate of theologians under the orders of Aurangzeb. That portion of the Islamic Criminal Law which constituted the crimes in the estimation of all nations, was applied to Muslims and non-Muslims alike, e.g. adultery, murder, theft, etc.

In the Mughal period, Muslim sovereigns used to administer justice in person. Thus, Sultan Muhammad Tughlaq constituted himself the Supreme Court of Appeal and used to keep four Muftis, to whom he used to say that they should be careful in speaking that which they considered right, because if anyone should be put to death wrongfully the blood of that man would be upon their head. If they convicted the prisoner after long discussion, he would pass orders for the execution of the prisoner.

Akbar’s idea of justice may be gathered from his instructions to the Governor of Gujarat that he should not take away life till after the most mature deliberations. The Emperor himself was the final Court of Appeal, and when he appeared in front of his window every morning, it was open to anyone to demand justice personally—though the demand was seldom made.

Akbar was keen to lay down, that capital punishment was not to be accompanied with mutilation or other cruelty, and that, except in cases of dangerous sedition, the Governor should not inflict capital punishment until the proceedings were sent to the Emperor and confirmed by him. This is perhaps an early example of the mandatory confirmation hearings prescribed under Section 366 of the Cr.P.C. This practice continued in the time of Jehangir, and no sentence of death could be carried out without the confirmation of the Emperor.

**Capital Punishment under Muslim Law**

**Capital Sentence**

The capital sentence (qatl) was inflicted, after the offence has been legally proved, in the following cases:

a) When the next of kin of a murdered person demands the life of the murderer (qisas) and refuses to accept the alternative of money compensation (diya or ‘price of blood’);

b) in certain cases of immorality; the woman sinner is stoned to death by the public (Ency. 1st, s.v zina, iv. 1227);

c) on highway robbers…

**Homicide**

i. In cases of homicide, Abu Hanifa, whose opinions were generally accepted by the Bengal Judges, had drawn a sharp distinction between the two kinds of homicide known by the terms Amd (willful murder) and Shabih-amd (culpable homicide not amounting to murder), although such distinction was not recognised by the Quran. The distinction was based on the method by which the crime was committed. If a man killed another by striking him with his fists, throwing him from the upper floors of a house, throwing him down a well or into a river, strangling him, or with a stick, stone, club, or any other weapon on which there was no iron and which would not draw blood, he was guilty only of shabih-amd, not of murder, and he could not be capitaly punished. A man was guilty of murder only if he used a dah (knife) or some other blood-drawing instrument, and was liable to be sentenced to death.
ii. Persons guilty of shabih-amd were merely sentenced to pay the blood-fine to their victims' relatives if those relatives chose to accept it. Abu Hanifa, however, had declared that if a man repeatedly committed murder by strangling, he might be executed.

iii. The Muslim law of homicide (as administered at the advent of the British rule) seems to have been elaborate. Certain types of homicide were regarded as lawful and justified. Further, “retaliation” for the murder was allowed in certain cases. Homicide in self-defence or in the prevention of adultery, rape or other serious offences or at the express desire of the person killed was excusable, and so was homicide committed under threat of death. Apart from these, and apart from specified cases, homicide was an offence and “willful homicide”—Qatl-i-Amd—was punishable with death or retaliation where permissible. The other types of illegal homicide were punishable with “fine of blood” (Diyut), and, in certain cases, by expiation and exclusion from the inheritance.

The Bengal Regulations and the Indian Penal Code

i. Until enactment the Penal Code the substantive law of the criminal courts consisted of the Muslim law, with modification made in some respects by the Regulations of the East India Company.

ii. Thus the general criminal law enforced in the Upper Provinces also (until the Indian Penal Code was enacted) was the Muhammadan law as altered by British regulations and judicial decisions. Even in Madras, “for want of anything better” the Muhammadan criminal law as interpreted by law officers and modified by enactment was applied until the Penal Code came into force. At Madras, in 1802, provisions were made respecting the administration of the Muhammadan Criminal law in the Courts of the East-India Company, similar to those enacted in Bengal by Regulation 9 of 1703. It was only in Bombay that an attempt had been made to codify the criminal law in 1827 by a Regulation.

Capital Punishment in British India

- In 1772, for suppressing robbery, a provision was made that dacoits were to be executed in their villages, the villagers were to be fined and the families of the dacoits were to become the slaves of the State.
- Cornwallis, introduced a number of changes in criminal law by the “Cornwallis Code”. (The Cornwallis Code, 1793 really comprised 48 regulations dealing with various aspects of revenue, civil and judicial administration, including jurisdiction and procedure of Civil and Criminal Codes.)
- Cornwallis altered the course of Muslim law and deprived the relatives of a murdered man of their power to pardon the criminal, and the law was allowed to take its course.
- Under the Bengal Regulations of 1797 in cases of willful murder, judgment was to be given on the assumption that “retaliation” had been claimed. The sentence could extend to death if that was the prescribed sentence under Mahommedan Law. As regards “fine of blood”, the Judges were directed to commute the punishment to imprisonment— which could extend to life imprisonment.
- Certain homicides which were regarded as justifiable homicides under the Muslim Law, were considered as opposed to public justice, and by Bengal Regulation 8 of 1799, such cases were declared liable for capital punishment. These included such cases as the prisoners being one of ancestors of the slain, or being the master of the deceased etc. Death sentence could be passed provided if the court saw no circumstance which may render the prisoner a proper object of mercy.
- Death sentence was prescribed by Bengal Regulation VIII of 1801 for accidental homicide (as known to Muslim law) occurring in the prosecution of unlawful murderous intention, e.g., shooting at A with intention to kill A and by accident killing. The present incarnation of this rule is found in Section 301 of the IPC, deploying what is commonly known as the rule of transfer of malice.
- By Bengal Regulation VI of 1802, the practice of infanticide by drowning was declared to be willful murder punishable with death. It was stated that the practice of killing female children had been widely prevalent in India, and the object was to stop that practice.
- By Bengal Regulation 53 of 1803, death sentence was provided for all cases of murder committed in the prosecution of robbery, or aiding, or abetting the same, etc.
Under the same Regulation, convicts escaping from their places of transportation, if apprehended, were directed to be tried, and on conviction, were to be sentenced to death, “if no circumstances appear to the Court to render such convict an object of mercy”.

By Bengal Regulation XVIII of 1817, persons convicted of murder in prosecution of robbery, burglary or theft were made liable to face the sentence of death. By S. 15 of the same Regulation, exemption of Brahmins of Benaras from capital punishment was abolished.

In 1857, the First War of Independence and its ensuing effects drove the British to penalize the offence of intentionally seducing or endeavouring to seduce any officer or soldier from his allegiance to British Government or duty to East India Company, exciting or causing others to excite mutiny or sedition in the army was made liable to the punishment of death or transportation for life or imprisonment with hard labour up to 14 years, besides forfeiture, etc.

From the Report No. 31 of the Indian Law Commissioners to the Governor General, dated 4th November, 1843 it would appear, that they were regarded as governed by the English law. Act 31 of 1838 embodying the provisions of criminal law passed in the first year of Queen Victoria amended the law on the subject. Its principal object was to take away capital punishment in certain cases, and to mitigate the rigor of the law in other respects.

Recommendations of the Indian Law Commissioners

Draft Penal Code, 1837

The Draft Penal Code (First Report) was prepared by the Indian Law Commissioners and submitted in 1837. Under Cl. 40, one of the punishments to which offenders were liable was death. The next was transportation. Cl. 41 gave power to commute the sentence of death to the Government of the Presidency without the offender's consent. The offences which were made capital seem to be the following:

i. Clause 109—waging war, etc.—(death or transportation for life or imprisonment of either description for life and also forfeiture of all property).

ii. Clause 191—Giving, etc., false evidence with the intention, etc., that any person may be convicted of capital offence—transportation for life or rigorous imprisonment not less than 7 years, etc. But where innocent person was executed, it was regarded as culpable homicide.

iii. Perjury.

iv. Clause 306—Previously abetting by aiding the commission of suicide by any child under 12 years of age, any insane person, any delirious person, any idiot or any person in the state of intoxication—death or transportation for life, or rigorous imprisonment for life and also fine.

v. Clauses 308, 309 read with Clause 320—voluntary causing hurt in an attempt to commit murder—transportation for life, or rigorous imprisonment for a term which may extend to life but not less than 7 years and also fine).

vi. Clause 380—Dacoity with murder—If any one of six or more persons who are conjunctly committing dacoity commits murder in so committing dacoity, every one of those persons shall be punished with death or transportation for life, or rigorous imprisonment for a term which may extend to life and must not be less than 7 years and shall also be liable for fine.

Singling Out Capital Punishment as an Exceptional Form of Punishment

The Commissioners were unanimous in their opinion that capital punishment was to be inflicted sparingly and only in cases involving grave offences. They concluded “First among the punishments provided for offences by this Code stands death. No argument that has been brought to our notice has satisfied us that it would be desirable wholly to dispense with this punishment. But we are convinced that it ought to be very sparingly inflicted, and we propose to employ it only in cases where either murder or the highest offence against the State has been committed.”

It is notable that the Commissioners did not put robbery and rape on the same footing as murder. They reasoned as follows
“These are doubtless offences which, if we looked only at their enormity, at the evil which they produce, at the terror which they spread through society, at the depravity... which they indicate, we might be included to punish capitaly. But atrocities as they are, they cannot, as it appears to us, be placed in the same class with murder.” “To the great majority of mankind, nothing is so dear as life. And we are of opinion that to put robbers ravishers, and mutilators on the same footing with murderers is an arrangement which diminishes the security of life.”

Commuation – regarding the power of commutation it was observed that it was evidently fit that the Government should be empowered to commute the sentence of death (without consent of the offender) for any other punishment.
The abolition of capital punishment and the removal of the death penalty from the statutes of countries which still retain it has given rise to extensive discussion and controversy whenever and wherever it is mentioned.

My presentation today will be in support of its abolition. I begin by referring to a comment attributed to the Secretary General of the United Nations, Mr. Ban Ki Moon, in New York on 3 July, 2012, and reported in an Amnesty International article on the Death Penalty in the Caribbean – A Human Rights Issue, which is to this effect:

“The right to life is the most fundamental of all human rights...
The taking of life is too absolute, too irreversible, for one human being to inflict it on another even when backed by legal process.”

Within the Caribbean Region all of the English-speaking countries which inherited the English legal system in colonial times provide in their criminal statutes for the imposition of the death penalty as punishment upon conviction for the offence of murder and treason.

Significantly although sentences of death continue to be passed in some of these countries executions have not been carried out for several years. The following table indicates the year when the last execution took place:

<table>
<thead>
<tr>
<th>Country</th>
<th>Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>Antigua &amp; Barbuda</td>
<td>1991</td>
</tr>
<tr>
<td>Bahamas</td>
<td>2000</td>
</tr>
<tr>
<td>Barbados</td>
<td>1984</td>
</tr>
<tr>
<td>Belize</td>
<td>1985</td>
</tr>
<tr>
<td>Grenada</td>
<td>1978</td>
</tr>
<tr>
<td>Guyana</td>
<td>1997</td>
</tr>
<tr>
<td>Jamaica</td>
<td>1985</td>
</tr>
<tr>
<td>St. Kitts/Nevis</td>
<td>2008</td>
</tr>
<tr>
<td>St. Lucia</td>
<td>1995</td>
</tr>
</tbody>
</table>

Article 3 of the Universal Declaration of Human Rights which is generally regarded as the cornerstone of the protection of human rights and was accepted by the General Assembly of the United Nations on 10th December, 1948, provides that everyone has the right to life, liberty and the security of person.

Its later offspring, were the twin treaties – the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights – both adopted by the United Nations in 1966. Article 6 of the ICCPR gave rise to two Protocols, the second being directly pertinent to the death penalty, and adopted by the United Nations on 15th December, 1989. Article 1 of that Protocol provides that no one within the jurisdiction of a state party shall be executed, and each state party shall take all necessary measures to abolish the death penalty within its jurisdiction. This Protocol is the only international treaty aiming to provide for total abolition of the death penalty, but three others have regional scope, for example, the Protocol to the American Convention on Human Rights to Abolish the Death Penalty which was adopted by the General Assembly of the Organisation of American States in 1990, and which has relevance for states within the Caribbean Region. Five states have ratified the Convention; none has signed or ratified the Protocol.
Article 4(6) of the Convention gives a person sentenced to death the right to apply for amnesty, pardon or commutation of sentence, and specifies that capital punishment shall not be imposed while a petition is pending. The petition is not admissible unless all local remedies under domestic law have been exhausted, and is filed within six months from the date of dismissal of the petitioner’s final domestic appeal.

**Mandatory Death Penalty**

A significant feature of capital punishment is its mandatory nature and irreversible effect. Judges or officials who impose the penalty have no discretion to be lenient. There are no mitigating factors which can be considered; it is final and irrevocable except where applications can be made in some countries to a committee on the prerogative of mercy which is empowered to commute the penalty to life imprisonment when all appeals against sentence have been exhausted.

The mandatory nature of the death penalty has been challenged both before regional courts and international fora. In 2002 the Inter-American Commission on Human Rights in the case of *Hilaire Constantine & Benjamin v. Trinidad & Tobago* held that the mandatory imposition of the death penalty constituted an arbitrary deprivation of the right to life in violation of the American Convention on Human Rights. Regional appellate courts have also held that the mandatory death penalty in domestic constitutions was inhumane and degrading.

The last person executed by hanging in the English-speaking Caribbean was Charles Elroy Laplace of St. Kitts/Nevis on 19th December, 2008 for the murder of his wife. Mr. Laplace’s case illustrates the challenges that retentionist countries face in ensuring adequate legal representation for persons facing a death sentence. The United Nations Human Rights Committee comments that capital defendants should be provided with counsel “at all stages of the proceedings”. Yet it appears that Laplace lacked the needed legal representation throughout critical stages of his post-conviction case. The Eastern Caribbean Supreme Court dismissed his appeal on the grounds that he filed it past the deadline and although he could have made a final appeal to the Judicial Committee of the Privy Council he did not do so. It appeared likely that the Government did not provide him with the necessary legal representation to assist him in filing an appeal. Amnesty International calls attention to the question of whether Laplace’s right to apply for an amnesty, pardon or commutation would have been upheld.

Progress has been made within the English-speaking Caribbean during the last decade due in large measure to the judgments of the aforementioned courts and tribunals. Below is the present position in the Caribbean states:

<table>
<thead>
<tr>
<th>Country</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Antigua &amp; Barbuda</td>
<td>now discretionary; retained only for aggravated murder</td>
</tr>
<tr>
<td>Bahamas</td>
<td>retained only for certain types of murder</td>
</tr>
<tr>
<td>Belize</td>
<td>no longer mandatory</td>
</tr>
<tr>
<td>Dominica</td>
<td>no longer mandatory; no legislation as yet</td>
</tr>
<tr>
<td>Grenada</td>
<td>no longer mandatory; discretionary for aggravated murder</td>
</tr>
<tr>
<td>Guyana</td>
<td>no longer mandatory under legislation</td>
</tr>
<tr>
<td>Jamaica</td>
<td>no longer mandatory</td>
</tr>
<tr>
<td>St. Kitts/Nevis</td>
<td>no longer mandatory</td>
</tr>
<tr>
<td>St. Lucia</td>
<td>no longer mandatory</td>
</tr>
<tr>
<td>St. Vincent</td>
<td>no longer mandatory</td>
</tr>
<tr>
<td>Trinidad &amp; Tobago</td>
<td>still mandatory</td>
</tr>
</tbody>
</table>

Although according to Amnesty International over 140 countries have abolished the death penalty in law or in practice, and over 97 had removed it from their statutes, the English-speaking Caribbean states continue
to retain it. This could be attributed to the ever-increasing rise in violent crime resulting in death particularly when one considers the size and population of these states. Popular opinion regards the death penalty as a deterrent and solution to the problem although studies and statistics do not always support this view. Politicians are somewhat hesitant to abolish it lest they seem to be soft on serious crime. A sentence of life imprisonment for murder would be regarded as being light by a populace nurtured in the expectation of hanging being the penalty for taking someone’s life unlawfully.

As mentioned at the beginning of this presentation executions have not been carried out for several years in the English-speaking Caribbean states. This may be due in large measure to the judgment of the English Judicial Committee of the Privy Council in the case of Pratt & Morgan v. Attorney General of Jamaica (1994)2A.C. 1; (1993) 43 WIR, 340 which held that it was unconstitutional to execute the Appellants who had been on death row for nearly 14 years. Because the Constitution of Jamaica prohibits inhuman and degrading punishment, excessive delays ought not to occur between sentencing and execution of the punishment. In cases of such excessive delay, the death sentence should be commuted to life imprisonment. The JCPC further held that any delay of more than five years between sentencing and execution was prima facie evidence that carrying out the sentence would constitute inhuman and degrading punishment.

The constitutions of most, if not all, of the former colonies of Great Britain contain similar provisions, and the JCPC was until 2005 for some of the states, the court of final resort, and therefore binding. Since its inauguration in 2005 the Caribbean Court of Justice is now the final appellate court for Barbados, Guyana, Belize and Dominica. The effect of this development and how earlier precedents of the JCPC would be regarded was discussed in the case of Attorney General of Barbados et al –v- Jeffrey Joseph & Lennox Ricardo Boyce (2006) 69 WIR,104. It was agreed that decisions of the JCPC handed down while it was still the final court of appeal for the states which now have the Caribbean Court of Justice as its final court would be binding and continue to be so in the absence of any material difference between the written law of the respective countries from which the appeals emanated and the written law of the case before the Court, in this case Barbados, unless they are overruled by the CCJ.

I commend to you all of the five judgments in this case which deals with the various aspects of the death penalty and its execution. The following excerpt from the joint judgment of President Michael de la Bastide and Justice Adrian Saunders is both interesting and informative:

“With the exception of the British Dependent territories, the laws of all the countries of the Commonwealth Caribbean make provision for capital punishment. We recognise that the death penalty is a constitutionally sanctioned punishment for murder and falls within internationally accepted conduct on the part of civilised States. The death penalty, however, should not be carried out without scrupulous care being taken to ensure that there is procedural propriety and that in the process fundamental human rights are not violated. Death is a punishment which is irrevocable. Amidst deep and continuing controversy over the death penalty, it must be acknowledged that several court decisions in the Caribbean over the last two or three decades have done much to humanise the law and to improve the administration of justice in this area.”
The judgment of Wit, J in the same case summarised the substance of the decision in *Pratt v Morgan* in this way:

“A State that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve. It is part of the human condition that a condemned man will take every opportunity to save his life through use of the appellate procedure. If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it.”

This echoes dicta of Lord Griffiths who delivered the judgment of the JCPC, and should be regarded as a realistic approach to the issue of whether capital punishment should be abolished. If governments wish to retain the death penalty, it behoves them to ensure that the domestic appellate process is accelerated. Admittedly they may have no control over the international appellate process, but these bodies should be persuaded to conclude their decisions within a period of at least eighteen months as suggested by Justice David Hayton in his judgment in the CCJ Barbados case of *Joseph & Boyce* referred to earlier. The prisoner is entitled to utilise every available process and cannot be blamed if this segment of the appellate process usurps an inordinately long period of time.

The prospect of having the death penalty and capital punishment removed from the statutes of the English-speaking Caribbean states is encouraging, even though progress may be slow due to a rising murder rate in states such as Trinidad & Tobago where the death penalty is perceived to be the solution for reducing it. Preserving the status quo is the easy way; re-educating the populace is much more difficult. Introducing life imprisonment will be regarded as being soft on crimes involving death. It is reported recently that Guyana is considering discussion on the issue, and a referendum may be contemplated.

If the replacement for the death penalty is life imprisonment, discussion will arise as to whether such imprisonment will be interpreted literally or continue to be a specified period of years as it is in some countries at present. Deprivation of one’s liberty for as long as you live may be worse than execution.

That is the question!
1. Ladies and gentlemen, friends.

2. Some of you will think that talking about money immediately after breakfast is indigestible and to you I apologise in advance – think of it only as a discussion about principle. We are all used to that in our respective courts, but I was struck by His Excellency’s comment yesterday morning that the courts sometimes needed to find against themselves as in his wheelchair example, where the Court had found that access to the Court by those in wheelchairs was inadequate.

3. So I have a high risk question to put to you. Are you only here to have fun? If the answer to that is yes, please hold up your hands and I will write to your governments who have funded you to confirm that you are having a very good time. But I know that while you are enjoying the conference that is not your only reason for coming. You come to learn from our meeting and to support the CMJA. The association does give us support back, not only through its organised conferences, but through training sessions in different Commonwealth countries and in public support where the judiciary of a country, or an individual judge, is oppressed. You heard from Judge Shamin Qureshi, the Director of Programmes, and Judge Tim Workman on Monday about this, and details are on the CMJA website. You also heard from Tim that some association members have not paid their dues. He was very polite about that – and as an individual member and not on the council, I can be less polite because gaining a benefit on the basis of a subscription and then not paying it is to my mind completely unacceptable in principle. We would not stand for it with litigants in our courts.

4. May I add that it’s great to see more red lanyards, indicating that many of you have now joined the Association as individual members!

5. I have been Chairman of the CMJA Endowment Trust for the last two years or so. It is an English law trust, registered with the Charities Commission in London. The majority of the trustees are not on the CMJA council. Again there is information about the trust on the CMJA website and if you want to know more, please do not hesitate to ask either our Secretary General Karen Brewer or Temi or me.

6. Its purpose is to support the CMJA. As its name makes clear, it is an endowment trust. We want to raise capital so that annual income can be a permanent support.

7. This is why I describe this fifteen minutes as a discussion of principle. As judges we accept principles and make orders. This affects the litigants but it does not affect us. So taking the wheelchair access example from yesterday, I ask you to accept the principle of the endowment trust and make a payment into it.

8. You may ask why there is an endowment trust separate from the CMJA itself. There are several reasons, and they are all practical:

   (i) Some CMJA members as already mentioned do not pay their subscriptions at the moment. If they see a wad of capital available in the CMJA bank accounts, they may be less willing to see the need and urgency of raising money for the continued operation of the CMJA, and therefore less willing to honour their commitment.
(ii) The CMJA should seek to cover its own annual costs by its subscription and conference income, but this is not permanent capital. Experience shows that some years there will be a shortfall. Once fully capitalised, the endowment trust will be able to help.

(iii) The CMJA will look for other sources of funds, whether from the Commonwealth secretariat or from national governments. It used to receive such monies, in small measure, but does not do so any longer. If there is any chance of doing so in the future, that chance will be reduced if not removed by the fact of a substantial bank balance sitting in the CMJA account because again it will lead to misunderstanding about the purpose of gathering in funds. The purpose is to raise endowment capital so that income can be applied, and not have the capital itself used up in payment of annual expenses.

(iv) Importantly, the existence of the trust means that there will be, as it were, a keeper of the trust money which has to be convinced by the merits of any proposal which the council or the secretariat have for spending it.


10. It sounds unattainable, doesn’t it? But it is not. You can help in two ways – and you will want to do so if you accept the principle that the CMJA is an important organisation:

   (a) You can make a donation. I am sure many of you make charitable donations every year. Why not a gift to the endowment trust? Sometimes I have heard it said it would not be tax efficient giving. With the greatest respect, I don’t see that as relevant. Did the Good Samaritan get tax relief on his outlay? No - you give because the recipient needs it.
   (b) You ask your fellow judges when you get home to make a donation as well. Let a trickle become a flood! Let us be awash with judicial giving!

11. I put it this way because I do not expect – I can hope – to raise five million pounds from judges. But I think there is a core minimum support we need to have from judges before we can approach the third sector or the private sector, for funds, which I hope to do later. Judges however must get us to that level first. Why should others believe in us if we do not believe in ourselves?

12. So far we have raised about £75,000. I am proud but a little ashamed to say that my tiny little island with its fifteen to twenty permanent judicial positions has raised about £60,000 of that. If the wealthy jurisdictions here represented feel a little uncomfortable at that statistic, there is a way of feeling better. If you accept the principle, pay up and look good. Think also of this – if the average contribution from those attending this conference was £100, we would be £25,000 better off by this end of this week. For those who live in London, £100 represents less than the cost of a decent meal for two.

13. What we are hoping to do with so much income from such a fund? One of the core purposes of the CMJA is to advance education in the law. The intention is to help the training of judges and the dissemination of legal information; and, quite obviously from the present conference, to support the rule of law. That will be the basis of the appeal to the private sector. Commonwealth countries will have their economies improved by foreign investment, but that will only happen when the private sector is satisfied that their investment is made safely in the sense that governments will not expropriate the assets in question, and that the rule of law applies so that disputes will be settled properly in actions before the court. There is a direct connection between the rule of law and the success of an economy. A donation to the Endowment Trust is not a donation to judges, but to facilitate the growth of Commonwealth economies. So I ask you to look in your hearts and give the
trust your support. The Secretary General, Dr Karen Brewer, will have the details as to how you can go about that.
“Your Digital Footprint: A Lesson in Judicial Internet Security”

By Regional Employment Judge Barry Clarke, England and Wales

Seven Reasons Why Judges Need to Understand Technology and Social Media

1. The World is Changing – and Judges are Part of It

We are judges of 2016, not of 2006 (pre-social media), 1996 (widespread commercial adoption of email) or 1986 (Filofaxes). The law adapts to cultural and societal changes, including those prompted by technology, and judges must likewise adapt. Fear in the face of technology is not a function of age; it is a state of mind.

We need to understand ‘big data’: the process by which the online activities of ourselves (and our friends and family) is aggregated, repackaged and sold on, giving a real commercial value to our ‘digital footprint’.

Technology and social media has pros and cons, but it is here to stay. It cannot be ignored.

2. Social Media Generates Evidence

An increasing number of trials involve evidence that is generated electronically. This is no longer just about emails, but instant messaging, texting, blogging and social media content. It involves numerous platforms (Facebook, Twitter, Instagram, Snapchat, Vine, iMessage, WhatsApp, Reddit, Tumblr, Kick, etc.).

Traditional commercial services are becoming intertwined with (and transformed by) social media (e.g. shopping and reviews of the seller; news media and ‘below the line’ comments; tourism and TripAdvisor).

Some examples of the interface between social media and law:

- Crime – Grossly offensive content can attract criminal sanctions; ‘trolling’ can be a form of harassment.
- Defamation online – including cyber-bullying.
- Immigration – WhatsApp is a free texting service hugely popular around the world and the principal app relied on by couples who wish to prove a genuine subsisting marriage.
- Employment – Increasing number of individuals losing their jobs through inappropriate social media content that may cause disrepute to their employers.
- Commercial – proliferation of methods for sharing commercial information.

Corporations involved in social media learned from the internet boom & bust of ten+ years ago and are busy buying up tech start-ups to spread risk (AI, facial recognition, search engine algorithm analysis, data aggregation).

3. Social Media Creates Noise around the Legal Process

There are numerous examples of parties in litigation using social media to harangue and bully each other, not realising it is disclosable. Its existence provides a huge temptation to jurors to ‘look up’ online the judge, the advocates and the defendant, all posing a risk to the principle that their findings of fact should be based solely on the evidence presented during the trial.
4. Social Media may be the Key to the Online Court

Adults in the UK spend an average of 24 hours a week online, mostly on social media sites. An increasing proportion of web content is accessed through a small number of dominant search engines and via social media links. If we expect litigants to engage online with the court and tribunal system over the next 5+ years, we need to communicate with them via the platforms they use and in formats with which they are familiar.

For example, why not use Facebook sites and YouTube or Vimeo channels to produce educational videos that assist litigants in person (and, if done carefully, jurors)? Why not develop smartphone apps that allow a person to track the progress of their case in the same way a person can track the progress of their order on Amazon (or even to upload evidence)?

5. Social Media Erodes Courteous and Informed Public Debate

We must engage with questions such as:

- Why do people create online personas?
- Why are people so addicted to their smartphones?
- Why do people say such stupid or hateful things online?

The answers matter to us as judges, but also as parents and citizens.

We must understand the role of social media algorithms in generating ‘echo chambers’ that serve to reinforce preconceived views (a form of confirmation bias) and which can influence political debate. We must be wary of the results produced by Google searches and user-generated content on the likes of Wikipedia.

6. Loss of Privacy

We are sleepwalking into a society where we put much of our personal data online; where some of that data might be processed outside of ‘safe harbours’; where data can be exposed through hacking; whereby we lose our ‘safe space’ or ‘sanctuary’ to have thoughts or hold views which are known to only our closest loved ones. Such data is willingly and unquestioningly uploaded to social media with a royalty-free worldwide licence to use it and sell it.

Many people are already creating a digital footprint for their children, which those children may come to resent when they grow to adulthood. And children are creating a digital footprint for their parents and grandparents (such as today’s judges) without them necessarily knowing about it.

7. Judges Need Protection

Much can be gleaned about a judge’s identity by online tracking methods and ‘jigsaw research’: home address, mother’s maiden name, birth year, directorships, property history, family relationships. There are some easy steps that can be taken (e.g. to remove details from www.192.com). It will become impossible – if it is not already – to ban judges from using social media (giving it a broad definition). We have an obligation to help our judges understand new technologies and social media better: to make them better-informed judges, to help them embrace online methods of resolution but, perhaps most importantly of all, to teach them wisdom in what they themselves post online.
Barry’s Top Tips

1. Find out what information about you is public and remove/amend where you can. Make every effort to ensure that your home address and telephone number are not online.

2. When signing up for online services, enter the minimum amount of authentic information possible.

3. If you don’t use social media, protect yourself by speaking to and educating those who do. If you do use social media, use common sense:
   - Take care of your privacy. Who can see what you post: friends, friends of friends, everyone? Don’t announce your holiday plans, your new address. Be careful of the photographs you share and the information you place online.
   - Do not post anything that would damage public confidence in the impartiality of the judiciary, e.g. political views, matters of public debate.
   - Do not identify yourself as a judge. Do not discuss your cases.
   - Consider using a pseudonym.

4. Check the default settings of websites and browsers you use. Can you increase the privacy settings? Be wary of signing up to websites using your social media profiles.

5. Change your passwords regularly. Don’t use the same password for everything. Make sure they are good passwords. If you need to set security questions (e.g. the name of your first pet), make up something ridiculous.

6. Maximise privacy on your smartphones. Turn off location services. Don’t allow apps to access all your contacts. Back up your data. Use encryption services. Use anti-virus and anti-spyware software. Keep software up to date.

7. Be wary of using free public WiFi, which is usually not encrypted, for work use.

8. Buy (and use) a shredder.

9. Consider using more than one email address. For personal use, consider an email address that does not contain your name.

10. Treat unsolicited texts and emails warily. Do not reply. Do not open attachments if you are not confident that the source is safe.

Finally: Put your phones down. Tell your children to do the same. Life is too short to spend time engaging with gadgets rather than people.
SPECIALIST SUBJECTS SESSION 8B
“Alternative Dispute Resolution – Is it as Good as They Say?”

By Justice Ambeng Kandakasi, Papua New Guinea

1. Alternative Dispute Resolution (ADR) in all its forms is a relatively a new way of resolving disputes in the formal Courts. This marks a shift from the traditional role of a judge of conducting trials, making decisions on the relevant facts and finally giving a final binding decision on the issues in a lawsuit to one of facilitating settlement of disputes both in and out of Court. This new way is has been and is forced on by steps taken by the litigants and modern Courts worldwide efforts to stay on top of their respective case lists, achieve quality and increased case dispositions both efficiently and effectively with less costs and resources outlay. Some, like the East Malaysian Judiciary have turned to information technology while others have gone into the creation of specialist courts by deliberate legislation as is the case in Australia or judicial administrative decisions as is the case for the Judiciary in PNG. Appointing more Judges has been the path for some others. A large number of countries have opted for Court Annexed Mediation, Judicial Dispute Resolution, Judicial Settlement Conference and other forms of ADR with active support, promotion and use of them. The results is increased and quality disposition of cases. A few smart ones have combine all or most of these measures with some judges becoming specialists in what they do in enabling parties to resolve their disputes through processes and concepts such as JDR in addition to Court Annexed Mediation. This paper will try to show that mediation and other forms of ADR if appropriately adopted and sufficiently used, can meaningful contribute to achieving the twin objectives of increased and quality disposition of cases and therefore dispensation of quality justice. To do that, the paper will briefly cover current world trends on mediation and ADR, what is driving them, why the Courts need to make more use of them, then turn to the question of how mediation and ADR can assist the Courts and finally mention PNG’s experience as a case study which will be followed by a few suggestions in an attempt at answering the question.

Mediation and ADR World Trends

2. In recent times, ADR, especially mediation, has taken the world by storm. At the highest, on 23rd May 2012, Secretary General of the United Nations, Ban Ki-moon issued a circular asking member states to embrace and use mediation as a preferred form of conflict resolution. Earlier, on 13th June 2008, the European Union issued a directive in similar terms. Following the EU directive, Italy enacted legislation for compulsory mediation before litigation. Canada allows filing before mediation but requires mediation before trial. In 2011, Australia past its Civil Procedure Act 2011, requiring litigants to attempt to resolve their disputes through mediation first before litigation. This is in addition to other legislation in certain specific areas like the family law area providing for compulsory mediation before litigation. There is a very active ADR practice with some emphasis on mediation in New Zealand. In small PNG, between 2008 and 2010, through a combination of amendments to its National Court Act and Rules Relating to the

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52 JDR is defined as a voluntary dispute resolution process. Its primary purpose is reaching a settlement on some or all of the issues in a lawsuit, with the assistance of a judge. The process involves the parties to a lawsuit and their lawyers meeting with a judge. The exact format of each JDR will vary depending on the current practice for the court involved and the preferences of the parties and the judge conducting the JDR. In general, the judge will hear the parties on written submissions filed earlier and the judge will then tell the parties what ruling the he would have made, if the evidence and argument presented to him had been presented at trial, and give reasons for the judge’s decision. The judge’s view and reasons given will assist the parties to engage in settlement negotiations and reach an agreement if they can. If however, the parties agree, the judge’s opinion can be made binding: http://www.fieldlaw.com/articles/lit_cg_judicial_dispute_resolution.pdf. In PNG we are using this term broadly to describe the important role a judge plays in and out of court to help litigants to have their disputes resolved promptly and finally through direct or facilitated negotiations between the parties in dispute using any of the forms of ADR.
53 “Saying an ‘An Ounce of Prevention is Worth a Pound of Remedy’, Secretary General” UN General Assembly GA/11242 (found at http://www.un.org/News/Press/docs/2012/ga11242.doc.htm
55 “Mandatory” Mediation: LC Paper No. CB(2)1574/01-02(01).

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Accreditation, Regulation, and Conduct of Mediators, promulgated under the amended National Court Act, the Judges are empowered to order mediation at any stage of the proceedings, with or without the consent of the parties and allow for a serious consideration in favour of mediation before proceeding with the usual litigation process. Almost all of the South Pacific Island countries have embraced ADR, particularly mediation, with some mediation skills training and awareness workshops provided. Many Courts now have judges who facilitate settlements both in and out of Court through court annexed mediation, settlement conferences or JDRs. This is possible through the use of a combination of appropriate Court rules, Court orders and directions and engaging in meaningful settlement talks with the parties and their lawyers which encourages and enables the parties to reach full and final settlement of their disputes.

What is driving ADR?

3. When humans were fewer in number and resources were in abundance, there were fewer conflicts which got resolved through more informal and flexible forms of conflict resolution. Those process involved direct negotiations between the parties or negotiations facilitated by a third party. Failing resolution through those process, people in some cases, resorted to self helps resulting in bloodshed and destruction to lives and properties. Later, as the human society advanced and became sophisticated with increases in population placing serious strain on limited resources worldwide, conflicts increased in complexity and the kind of processes and procedures put in place to resolve them. The Courts globally had their case lists become and continue to be too long with lengthy delays in disposition of cases. This effectively endorses and give real meaning to the unfortunate derogatory statement against the formal Courts “justice delayed is justice denied” with many of their stake holders questioning the relevance and necessity for the existence of the judiciary in society. With a desire to reduce or eliminate the Courts long lists and effectively deal with the associated delays in getting to final disposition of cases and the criticisms, many Courts globally accepted, adopted and are now meaningfully continuing to apply ADR in the management of their respective lists. At the same time more and more business and people in dispute have and continue turn to mediation or other forms of ADR to have their disputes resolved. These developments have seen an increased used of mediation and ADR which is making mediation and other forms of ADR more prominent.

4. The rise to prominence and us of ADR is also driven by a desire to arrive at a final and lasting resolution of conflicts in ways that are less time consuming, less costly through processes that a free and easily accessible for many in conflicts. Litigation by far is the most expensive, time consuming and most stressful process of conflict resolution with a forced sense of finality. On the other hand, some forms of ADR, such as mediation, early neutral evaluation and expert case appraisals deliver expedited, less costly, less stressful and most definitely lasting outcomes which the disputing parties can live with. Accessiblity of the processes by the disputing parties, meaningfully and directly participating in and taking ownership of the outcome are other serious and important factors too. Whilst the formal processes and those behind it speak for and consider their processes accessible, only those who have the money and or who know their way around have and can have real access. Even in those cases, only lawyers, judges and magistrates do most of the talking and determine the final outcome. Parties hardly play any significant role in that except only to instruct lawyers and give evidence when called upon. On the other hand, mediation and other forms of ADR recognize that the parties own the dispute and they have the power and ability to consider all settlement options open to them and arrive at an outcome that best meets their needs. Mediation and ADR allow access for even impecunious disputants and enable them to finally resolve their disputes at less costs and within shorter time frames, as opposed to highly legalise processes and procedures with terminologies that are strange to them at costs beyond their reach.

56 Graham Hassall “Alternative Dispute Resolution in Pacific Islands Countries” located at http://www.pacilii.org/journals/JSPL/vol09no2/4.shtml
57 These were mainly sponsored by the World Bank through its business arm, the International Finance Corporation (IFC) and the Pacific Judicial Development Program with funding from the Australian and New Zealand Governments.
Why Courts should support and use mediation and ADR more?

(a) Same principles

5. It is now no longer a question of why the Courts should support and use more of mediation and ADR. Instead, it is accepted globally that the Courts should use mediation and ADR more. Here is why that is the case. Both the formal court process and the mediation process have certain fundamental features in common. One of the most important features is the element or the requirement for impartiality which features very firmly in both cases. Impartiality is required as a matter of necessity and as an integral part of both processes. It is this which gives people choosing to use the processes the confidence and an assurance that, the outcome will be based on merit and not by virtue of the facilitator’s interest in the matter or his or her relationship or connection with either of the parties.

6. Another important feature includes the requirement for fairness. That element of course is an inseparable twin to the principle of impartiality. Both the Court and Mediation and ADR processes endeavour to be fair to all parties. The concept of fairness here is in terms of both the process and an ultimate decision or resolution of a dispute or conflict. Both the formal courts and mediation try to achieve fairness through rules, practices and procedures that apply equally to all the parties. A good example is the right of address in Court as well as in mediation. Also both processes work hard to ensure that each of the parties that go before them have equal time and opportunity to present their cases. This highlights another important factor which is equality. Both processes endeavour to grant equal opportunity to those who have conflicts or disputes to have equal access to their processes and participate equally to ultimately arrive at an outcome that takes into account all of their (parties) positions, arguments or interests. Additionally, both process, try to bring about prompt resolution of the disputes brought before them and in so doing minimize the time and costs it takes for the parties and those involved in the processes. Finally, both processes try to ensure that the decisions or the outcome arrived at finally resolves all matters in dispute between the parties.

7. However, when one closely examines each of the above factors, mediation stands out way ahead of the formal courts when it comes to prompt resolution of conflicts, less costs, equal access to justice and fair participation and finality in the outcome. Of course this requires further clarification. In PNG, we have had histories of litigation running over 10 to 25 years with deaths on either side in some cases. When court annexed mediation was finally introduced, those cases resolved within a matter of hours to just a few days depending on the nature of the cases and the number of parties involved.59 Parties had spent over millions of Kina in legal and other fees and charges and took a very long time without getting close to a final and lasting outcome. On the other hand, mediation costs were far less and took a lot less time, resulting in clear, certain and lasting outcomes. In those mediations as is the case with all other mediations, the people who stood to be affected, (from the adults including females to younger adults and children who could otherwise have been suppressed or prevented) were involved. The process allowed for their views to be aired and considered, or permitted them to simply witness and be part of the process. In one case, we had a young man convincingly represent his family business. When the dispute started, he was around 2 or 3 years old. About 26 years later he had grown up into a fine young man and was able to represent his father and his family business. It took literally 2 hours to commence and concluded the mediation fully resolving the dispute. Through the mediations, outcomes or resolutions that accommodated most of the parties concerns and

56 An example is the requirement to put in cross-examination one’s case to the other going by the centuries old authority of Browne v. Dunn (1893) 6 R 67 HL. Another example is the principles built around the principles of natural justice, which essentially requires a person to be heard in his or her defence before judgement. See also the decision of the PNG Supreme Court in Dr Allan Marat v. Hanjung Power Ltd (2014) SC1357 citing the decision of the Australian High Court in Fai Insurances Ltd v. Winneke (1982) 151 CLR 342 for elaboration on this principle and the decision in PNG Supreme Court decision in PNG Power Ltd v. Ian Augerea (2013) SC1335 which highlights the point that the principle entails “the duty to act fairly and be seen to be acting fairly.”

59 These are based on mediations this author has successfully conducted and resolved the matters in dispute. In one matter an individual was up against a provincial government and its business arm. The case had its rounds before the National and Supreme Courts and then back to the National court spreading over a period of 15 years. Mediation took only 3 hours to arrive at a final resolution. The other cases was more involved, which involved thousands of landowners in mining and petroleum areas where involved in litigation for over 17 years. These got resolved within 4 days of mediation.
interests were reached. This was possible with the processes taking place in their own setting and safe avenues provided by the mediation process.

8. What happened in those mediations and other mediations makes the mediation process completely different from the Courts. In the Courts, a person with a dispute goes to a lawyer if he can afford one and the lawyer then determines how the client’s case is to be pleaded and run in Court from start to finish. The lawyer does all of the talking and the process is concluded by a judge or magistrate making a final decision. The client or the parties in dispute hardly have a direct say in the final outcome in their cases. Even the lawyer is restricted in what he can do and put before a court on behalf of his client because for instance, he has to work within the technical requires of say the law of evidence or the law and practice on pleadings and so on.

9. The most important feature that sets mediation or ADR apart as a better form of dispute resolution compared to the court in all cases, except for a few clearly identifiable cases, is its ability to bring about finality in the outcome. Mediation enables the parties in dispute to explore all possible options for an efficient and effective resolution of their dispute and settle upon one that best meets both of their needs and interests and one they can live with. Hence a majority of mediated outcomes last longer and do not return to the courts. On the other hand the court process will usually have expressed legislative provisions that prevent appeals or reviews once a final court of appeal or reviewed has considered the matter and has come to a decision. If it were not for the written law, well accepted legal principles like res judicata or issue estoppel which ensure finality in litigation, court proceedings would go on for ever. If it were not for these principles or kinds of legislative provisions, there would be endless appeals upon appeals or reviews upon reviews given that people usually do not readily accept a defeat. Hence, finality is reached only as a matter of procedure rather than as final outcome on the merits from the respective parties view point.

(b) Only Certain Cases Suitable for Judicial Hearing and Determination

10. Research and experience around the world demonstrate that, nearly all kinds of cases are suitable for mediation. Accepting and moving from that position, most of the discussions worldwide is around the kind of factors that render a matter not suitable for mediation. The list of cases inappropriate for mediation and therefore only for resolution by judicial consideration and determination is relatively very short. Based on statements or provisions made in the UK Civil Court Mediation Manuel, the Hong Kong Judiciary’s website covering amongst others ADR and other sources, the National Court in PNG in the case of Abel Constructions Ltd v. W.R. Carpenter (PNG) Ltd, expressed the view that all cases are capable of resolution by mediation. At the same time, it pointed out that there is a small number of exceptions to that. These are cases in which there is a case of:

- a real possibility of setting a legal precedent is presented; or
- any out of court settlement is not in the public interest; or
- urgent protective orders such as injunctions are required; or
- there is a clear case warranting summary judgment; or

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60 For a decision of the Supreme Court that discusses the relevant statutory provisions and the cases law develop around that in terms of further appeals or review by the Supreme Court in PNG see Review pursuant to Constitution Section 155(2)(B) and Section 155(4) Application by Joseph Kintau, Acting Director, Civil Aviation Authority of Papua New Guinea (2011) SC1125
61 For a discussion of these principles see the PNG Supreme Court decision in Telikom PNG Limited v. Independent Consumer and Competition Commission and Digicel (PNG) Limited (2008) SC906
62 Statement in these terms “Most mediation providers suggest that nearly all cases are suitable for mediation. However, as a general rule, the following cases are generally regarded as inappropriate for mediation and should therefore not be considered for mediation at allocation stage:
• where a legal precedent is needed to clarify the law or inform policy;
• where settlement would not be in the public interest;
• where protective proceedings are required, such as injunctions; or
• where summary judgment is appropriate.”
63 Found at Hong Kong Judiciary’s website covering amongst others ADR, found at http://mediation.judiciary.gov.hk/en/mediation_faq.html#05.
64 (2014) N5636
• there is a genuine dispute requiring the Court to give a declaratory relief with the facts not seriously in contest; or
• there is a family dispute especially involving child abuse, domestic violence; or
• the parties are in a severely disturbed emotional or psychological state that they cannot negotiate for themselves or others; or
• there is a genuine dispute requiring interpretation of a Constitutional or other statutory provision not previously interpreted; or
• there is a genuine dispute over the meaning and application of a particular provision in a contract or an instrument, a determination of which will help finally determine the dispute; or
• a preliminary issue, such as, questions on jurisdiction, condition precedents, statutory time bars and a failure to disclose a valid cause of action is presented; or
• there is a need for public sanction as in a criminal case for public health, safety and good order.”

11. The National Court also noted in that case and elsewhere that, in some cases, and more so after a determination of preliminary issues such as the ones presented in the second listed item in the above list, the substantive matters could still be referred to and resolved by mediation. We can add to that list, cases in which there is an application for interim injunction, once such an application is determined. In a number of cases, this author has granted interim injunctive orders and directed the parties to resolve their substantive issues through mediation. The mediations in each of those cases did result in a successful resolution of the substantive issues. All these took place and concluded within two to four months from the date of their respective filings.

12. Paula Young in what could be taken as detailed look at this aspect in her article “The ‘What’ of Mediation: When Is Mediation the Right Process Choice?” concludes and this author agrees that:

“As mediators, lawyers, and their clients gain more experience with mediation, fewer and fewer types of disputes will seem less amenable to the process. Even if mediation only succeeds in improving the parties’ communication, in identifying their underlying interests, in narrowing the issues in conflict, or in helping them more carefully evaluate their litigation option, it can move the dispute towards a quicker, more cost effective resolution.”

Imperative for Cooperation

13. People all over the world like to have no disputes with anybody and like to pursue fun and happiness and that which is good. Unfortunately, it is part of human nature to have disputes which are brought upon humanity by many factors, such as claims of interest and rights over land, basic human needs, rights and freedoms and many more. Once caught up in a dispute, many prefer an early, if not, an immediate resolution of their disputes, if that were possible at little or no costs so they can move on in life, their employment, business and other enjoyable pursuits. The formal courts, as already noted, demonstrate a clear slowness in delivering on that wish or aspiration of our people. It is this author’s submission that, this has been the case not because the formal system is incapable of delivering on that objective. Instead, the main contributing factor has been inundation of the formal courts’ lists with matters that should not have entered the court system at the first place. Clear examples of these are for instance, simple debt claims, simple and straight forward breach of contract and all other claims that require the people involved telling the truth or a better understanding of the reasons for the conflict and resolving them through direct or assisted negotiations. Hence, there is an inevitable imperative for each of the processes to work collaboratively and cooperatively to channel the cases to the appropriate process for an expedited resolution of the disputes. This cooperation could work well in the area of identifying cases suitable for mediation or other forms of ADR and those that

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66 See the decision of the PNG Supreme Court in Heni Totona v Alex Tongayu (2012) SC1182 as an example.
are suitable for judicial determination, identifying the real issues for trial or resolution and ensuring that the parties use the correct process rather than overloading only the Courts as is the case now.

14. This imperative to work collaboratively and cooperatively is necessitated by the fact that the formal courts and the various forms of ADR and more so mediation have only one destination to arrive at and that destination is called, justice. That destination can easily be reached because the formal courts and the various ADR processes all have the following set of indispensable principles and objectives like a set of traffic rules, which, if followed, can enable us to reach our ultimate destinations safely:

(1) Impartiality in the process and one facilitating or presiding;
(2) Fairness in the processes and administration of them and the eventual outcomes;
(3) Equality in both access to justice and participation in the process by those affected by the dispute and having a meaningful say in its resolution;
(4) Promptness with little or no delays in delivering the final outcome;
(5) Less costly from filing to final disposition; and
(6) Real finality in the resolution of the problem.

15. As already noted, encouragement and use of mediation and ADR has been able to and has the ability to deliver to our clients as well as the Courts the following:

(1) Speedy resolution of disputes;
(2) No unnecessary delays;
(3) No backlogs;
(4) Less costs to resolve and arrive at final and lasting outcomes;
(5) Less harm and less damage to personal and business interests;
(6) An opportunity to choose either one or a combination of a number dispute resolutions process that best meets the parties’ needs;
(7) An opportunity given to the parties to have a real say and choice in the outcomes that would better meet their needs which a formal court might not be able to grant;
(8) Allows for equal access to justice and eventual outcomes; and
(9) In most cases, finality in the resolution.

16. As was said by the PNG National Court in *Koitaki Plantations Ltd v. Charlton Ltd*:68

“The Courts time and resources are limited and very precious. That limited time and resources should be used to deal with cases that are genuinely inappropriate for mediations ... Courts do not exists to reward people who are determined to be unreasonable and seek to avoid having their disputes resolved, either by direct negotiations or through facilitated negotiations as in mediations. Such people become an unnecessary burden on the Courts and the tax payers who fund the Courts and become serious impediments to all stakeholders’ calls for expedited resolutions of matters entering the formal court system at less costs. If the Courts are serious about delivering on that call, they have to seriously deal with litigants who have or display [this] kind of attitude.”

17. Through a proper channelling of cases for resolution by mediation and ADR, more time and resources of the Courts can be freed up. The time and resource thus freed up can be applied to quality judicial consideration, research, write up and delivery of quality judicial pronouncements and judgments in Court for the cases that need to be resolved judicially. Undoubtedly, the kinds of results thus far achieved in real cases have indeed freed up time and costs for the parties who in some cases have to make critical investment decisions which have been held up or locked up in litigation. In this way, parties have been enabled to apply their time and money to generate more income and increased productivity in business and other important and beneficial pursuits. These developments have consequently led stakeholders and the

68 (2014) N5656
courts clients to have increased confidence and trust in the judicial system. This is not surprising because, the combined efforts of the courts and mediation and other forms of ADR have delivered on the parties wish to have their disputes resolved promptly with the involvement of a respectable and impartial third party, mediators or providers of other forms of ADR at less cost with outcomes that last. More importantly, these developments are fast bringing to the fore the broader role of our judicial systems. That broader role is one of promoting peace and nation building.

**Broader role of the Judiciary**

18. Traditionally, the formal court process has always locked the parties in their respective positions and kept them in a repeated cycle of conflict by deciding who is right and wrong. The losing party would often go away unsatisfied even if he or she is wrong which causes him or her to find a way to be victorious against the winner in one way or form in the same matter or in other matters in future. The great display of leadership through a clear demonstration of forgiveness and a willingness to work together with his former aggressors and violators by the late Nelson Mandela, is a living testimony of how a process that is not necessarily focused on finding fault and being vindictive can do a lot for our people, their hurts and wishes and aspirations which informs design and arrives at an outcome that is future focused. It is well accepted that the formal courts exist for the peaceful resolution of disputes in society. The developments brought to bear upon the Judiciary by the developments in the mediation and ADR areas provides the Judiciary with the necessary keys and or tools to truly become peace builders in our respective, communities, nations and ultimately the world apart from the traditional role deciding who is right and wrong in a dispute.

19. Judges and hence the Courts role in that respect would be most critical and important. It is accepted the world over that Judges and Courts are important gate keepers. For it is the Judges and the Courts that can choose to allow the unnecessary overloading problem and its consequences to continue or welcome and embrace the intervention of the important tool of mediation and other forms ADR and use them to their advantage. Opting for the latter comes with the opportunity to bring the backlog problem under control. The Courts would also be enabled to proceed onto delivering on our people’s objective of prompt resolution of their disputes at less costs and within shorter timeframes and effectively contribute to each of our countries peace and security and thereby contribute to nation building. Earlier on, many judges were opposed to mediation and there was a serious debate on the question of whether Judges should support mediation and other forms of ADR. As already mentioned, it is now no longer an issue because undoubtedly, and as noted, mediation and other forms of ADR can assist the Courts to reach their desire to get rid of backlogs in their respective lists and increase case dispositions in a timely and costs efficient and effective manner with quality of justice elevated. The challenge now is more on how can the Courts make effective use of mediation and other forms of ADR. The full potential of mediation and other forms of ADR can be realized through a properly developed, managed and run system of Court Annexed ADR by the Courts. This requires good leadership and commitment from the Chief Justices and all judges.

**How Mediation and ADR Can Assist the Courts?**

**(a) PNG’s Mediation and ADR Experience**

20. The judiciary in PNG is encouraged by the good results that are coming through its Court Annexed ADR program. The program has the necessary legislative foundation and framework and is led by its Chief Justice Sir Salamo Injia Kt., with the professional support of its ADR Committee which amongst others.

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69 Others include professionals like lawyers, accountants, psychologist, doctors and others to whom people turn to with their problem those may in turn refer their client to go to mediation or a form of ADR. For more information on how lawyers are gatekeepers and how they have discharged that role see: http://www.ncl.ac.uk/cfla/news/documents/gatekeepers.pdf; http://www.law.stanford.edu/sites/default/files/biblio/108/138070/doc/slspublic/AyeletSela-ttt2009.pdf

70 See Ambeng Kandakasi, Developing A System Of Court Annexed ADR In AN Ever Increasing Litigious Society: (Paper delivered at the Asia Pacific Mediation Conference in Suva Fiji June 2006 and published in the Malayan Law Journal)

71 Initiated by the Judiciary, in terms of draft the relevant legislative provisions and passing it onto the legislature which enacted them.

72 The Committee comprises of the Deputy Chief Justice, other Judges, magistrates, private and public sector lawyers, and the academia with room for ordinary members of the public to participate.
has the Deputy Chief Justice and another Judge (this author) as chair of the Committee with a dedicated ADR Division of the National Court.

21. With some support from the International Finance Corporation initial and later on the judiciary’s own funding, a number of basic mediation skills trainings have been packaged and delivered to all of the judges, magistrates, some lawyers and other professionals. We now have a total of 105 mediators who are accredited both in PNG and Australia. Out of that, 27 are fully accredited and 79 are provisionally accredited. Programs are now well in place to help get the 79 provisionally accredited mediators to fully accredited mediators through co-mediating with experienced mediators in real cases. Through a dedicated and focused workings of at least 5 out of the 27 fully accredited mediators, we have been able to dispose of more cases by mediation and ADR with more than 80 - 90% success rate. The Chief Justice has directed the ADR Committee to focus more on this program with a view to getting the remaining 79 provisionally accredited mediators to full accreditation by or before the end of the year. This has come about after the Judges have resolved to have 60% of the cases pending on the court’s list disposed of by mediation. The ADR Committee is already taking steps to give effect to this important decision, which includes advanced planes to have more cases resolved by mediation before or by the end of the year through the co-mediation program. Most importantly, the Chief Justice has been able to secure sufficient funding for this and other projects in addition to the judiciary’s normal operational budget. The Committee has been working on having a Mediators’ Hand book to assist mediators and a Judges’ Mediation Bench Book to assist Judges in their task of referring cases to mediation and dealing with “bad faith” at mediation. These projects have been delayed pending a promulgation of a set of revised ADR Rules. The Committee has produced a draft and will shortly be submitted to the Chief Justice to consult with the Judges to and have them formally promulgated and operationalized. Upon that happening, the Mediators’ Handbook and the Judges’ Mediation Bench Book will be published.

22. The ADR Project has already packaged and delivered over a number of ADR awareness workshops throughout the country. That has attracted interest in using mediation and expression of interests from both the private and the public sectors for assistance in designing and implementing their own internal conflict resolution process featuring mainly mediation. More and more litigations are seeking a resolution of their disputes through mediation. The focus at the moment is on the full accreditation of the provisionally accredited mediators. At the same time we are taking a few steps to pick up on the interests that are being expressed and appropriately respond. Present results indicate a constant increase in the use of mediation and other forms of ADR resulting in more and more final resolution of conflicts. The aim is to reach the target as quickly as is possible to resolve 60% of the cases on the National Court’s list by mediation and or a form of ADR. It is hoped that through these efforts, the Judges will be assisted greatly to discharge their duties and responsibilities with increase competence, quality and in ways that are less time consuming and very cost effective. Ultimately this will enable the judiciary to stay on top of its list from around a 5 years delay on average to hopefully disposal of cases within the same year of filing. This is a marked improvement form years of say twenty (20) plus years of delay in some cases.

23. Since its formal adoption and use of Court Annexed ADR with focus on mediation in 2010, more than a 1000 cases have been resolved by mediation and other forms of ADR. The number of cases referred to and resolved by mediation is steadily increasing each year. This is due to a small number of Judges consistently requiring the parties to use mediation and other forms of ADR to resolve their disputes. With this consistency it is becoming predictable for most parties that they will be directed to settle, through direct or facilitated negotiations or a form of ADR or the Court through JDR. Certainly and predictability in the kinds of questions that will be asked and orders that will be made eventually has reached a point at least in

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73 In short often referred to as the “IFC” which is the business arm of the World Bank.
74 Last two conducted at end of July for 21 State lawyers and the second on in the first week of August for private lawyers and other key persons in the private corporate sector.
75 Except only of newly appointed judges and magistrates.
76 This includes a recent training in August 2016 that included 18 State lawyers.
77 Including disputes identified in the course of mediating in cases in Court such as those in the extractive industry cases like the LNG cases.
one Court where a good number of lawyers are coming with draft consent orders or directions that will take
the parties to settlement through direct or facilitated negotiations, or JDR. The Court in question consistently
talks about and promotes settlement of the matters in Court by the parties’ own direct negotiations,
mediations or a form of ADR and or JDR or a combination of them, which is already bringing about
predictability and expedited resolutions.

24. The Court referred to above is constantly working with its clerical staff to ensure every case on the
Court’s list has a return date and monitors the list to avoid a case not receiving the Courts attention. On the
first mention of a case in that Court, the Judge who is an experienced practicing mediator, tries to use his
mediation skills to ask the parties and their lawyers open ended as opposed to closed cross examination type
questions most of the time. In this way the Court is able to bring out the real issues between the parties,
prepare them for mediation or a form of ADR and send them off on a path of guided direct negotiations or
mediation. If direct negotiations fail, or the mediation is not successful, the issues return to Court for JDR or
a trial in the traditional way. The JDR might take the form of submissions only on the issues the parties have
come back to Court with or an open discussion of the issues with the parties. In most cases this results in
settlement or, failing agreement, a brief hearing is conducted on the issues, usually with the consent of the
parties. The Court would then issue a binding opinion which finally resolves the matter. There are many
good examples to talk about but a better example comes from customary land-based development, be it
mining, oil and gas or other natural resources extractive development related cases. The following are the
kinds of questions that could be put to the parties:

Plaintiffs:
(1) What is this case really about?
(2) What is your main concern?
(3) Are you opposed to the project?
(4) Are your relatives or clansmen aware of this proceeding and what you are seeking to do?
(5) If you win the case, what does that mean for you in the eyes of your people?
(6) Or if you lose the case, what does that mean for you in the eyes of your people and the
community?

Defendants:
(1) What do you say about the plaintiffs claim and his real reasons for coming to Court?
(2) Do you need and have the support of the community for your project from the start to its
future existence?
(3) Can you function without the support of the community?
(4) What would losing this case mean to you?
(5) Do you have sufficient time, resources and patience to defend this proceeding for at least
more than 5 years?
(6) How about an opportunity for you to find out what would make the plaintiff support
your project and see if you can accommodate that in you plans and or activities?

To both
(1) How is this a case that warrants a long drawn out trial with one of you winning and the other
loosing?
(2) How can both of you be sure of winning the way each of you want?
(3) If you will be the winner when will that be the case and at what costs will that be and are you
prepared to live with the loss if you lose?
(4) Are you aware that the Court has a long list and it may not be possible to have this matter
listed until all of the interlocutories are satisfactorily completed which may take a couple of
months to the whole of next year and after a hearing the decision may not come out until
another year or so?
(4) Have you had the opportunity to sit down and consider the prospects of having this matter resolved out of Court?

(5) What does the community expect of you both, do they prefer you to be engaged in a long drawn out Court battle or have this matter resolved promptly and allow the project to be delivered without delay?

(6) How about the Court giving you both an opportunity to meet and discuss the relevant issues between yourselves and come to an agreement that addresses all of your issues and concerns even if those are not in the pleadings and in that way both of you win?

(7) And if you do not reach a full and final resolution of the matters in issue, how about giving mediation a go and failing that return to this Court with an agreement on the relevant facts and the points in contention for the Court to consider and issue a binding opinion, which will mean an expedited outcome as opposed to the usual long drawn out process of resolution by trial?

25. In most cases after much questioning reflective of the nature of the case, a lot of litigants have agreed to explore prospects of having their matters settled through their own direct negotiations and, failing that, mediation. In the event that both process fail to arrive at an agreed outcome, most have also accepted suggestions for parties to agree on the relevant facts and address the Court on the points in contention for the Court to issue a binding opinion. Where this happens or where the parties fail to agree, coupled with a failure to make out their case as falling under the category of cases that should be resolved by trial, specific orders for the parties to have their matter resolved by direct negotiation, mediation and or failing mediation, resolution by JDR orders would be issued. Typically, this would specify a timeframe usually not exceeding two months depending on what is required for the parties to comply with the orders and specify them. The specific steps will be for the plaintiff to forward his or her settlement proposal within a specific timeframe to the defendant. The defendants will then be directed or ordered to consider the plaintiff’s settlement proposal also within a specified timeframe and responded to by way of counter proposal for settlement by the defendant. Upon that happening, there would be a clear revelation of what aspects of a claim is in contention and what is not. Therefore an order requiring the parties to meet in conference and enter into face to face settlement discussions with a view to resolving the matters in contention between them again within a specific timeframe would invariably be included. Provision would also be made for the parties to return to Court on a date specified in the order either with a draft order finalizing the proceedings, or a draft consent order for mediation, or statement of agreed facts and issues for the Court to consider and issue a binding opinion. To date, this has resulted in settlements or, failing that, orders for mediation. If there is no settlement or order for mediations, the court generates a statement of agreed facts and issues for the Court to consider and issue a binding opinion or a short trial on a specific fact or issue or both. This year, in this author’s Court track, only three cases have been confirmed to go for a full trial but on a specific factual or legal issues with most of the facts agreed. Applying this process has seen the final disposition of over 190 cases this year to date.

26. In order to monitor performance and to better improve the process and service delivery, the ADR Committee has been running a system of monitoring and evaluation through the web-based Survey Monkey analysis. A sample analysis of feedback from 90 mediation users reveal the following.78

(1) 73.33% stated that mediation increased their trust and confidence in the court system while the balance stated their level of trust and confidence remained unchanged;
(2) 26.67% stated their trust and confidence in the Court system remained unchanged;
(3) 98.80% stated that the Courts should support and use mediation more;
(4) 100% stated going to mediation was safe, comfortable, user friendly and more secure;
(5) 95.79% stated that if they were involved in another dispute they would refer the matter to mediation;

78 I understand similar surveys and analysis in New Zealand has produced similar results
(5) 98.97% stated they would recommend mediation to a colleague, friend or a relative as a good way to resolving their conflicts;

(6) 93.94% thought the mediation process assisted in identifying the real issues in dispute between parties.

(7) 97.89% thought that the mediation process assisted them to understand the other party’s views well;

(8) 92.78% thought that the mediation process gave them opportunities to develop options for settlement;

(10) Parties and lawyers surveyed estimated that settling the case through mediation resulted in a free up of millions to billions of either locked or affected by the matters being in Court.

27. Additionally, a research report from a Fulbright scholar showed that out of three major agriculture project cases that went to mediation removed at least six additional cases on the court's list. Also, the process provided the parties with a forum to discuss and generate mutually agreeable solutions built around present and future risks. The research then noted that the value added by successful mediations could not be underestimated in that:

(1) **Presence matters.** Every party stated that this was the first face-to-face conversation held between the parties and each party stated they learned new and critical information about the dispute from the conversation;

(2) **The negotiations dispelled disinformation or misinformation.** Each corporate party found that the negotiations provided them with an opportunity to correct disinformation and or misinformation and make known their own interests and problems to the landowners;

(3) **The mediation improved the “social license” between landowners and companies.** Each company stated that the informal agreement with landowners, allowed and significantly enabled them to peacefully carry out business and reduce delay, cost, and risks and improve relationships;

(4) **The mediation forum gives landowners a sense of ownership over the dispute and its resolution.** Nearly every landowner interviewed expressed that they were able to express themselves and be a part of solving the problem, and expressed a vested sense of responsibility in implementing the solution agreed upon; and

(5) **The mediations are teaching participants methods for resolving future disputes.** Two of the three company representatives, and all of the lawyers and parties involved, stated that they would try to resolve future disputes through face-to-face conversations before going to court.

28. In addition to the mediation and ADR developments, the Chief Justice, Sir Salamo Injia Kt., introduced a case docketing system in 2012. That saw Judges being allocated cases for each of them to manage from beginning to final disposition. Most judges were not able to go past 200 cases in 2014 except for two judges who disposed of more than 800 cases each. Of the two, one of them used mediation and ADR processes and skills to bring about final outcomes without long drawn-out trials. The other’s large number of disposition was on account of summary determinations of cases for want of prosecution. Most of the cases resolved through mediation have not been the subject of any appeals or reviews.

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29. The year to date this year as we speak has one judge having dispose of 815 cases and four others have respectively disposed of 474, 197, 194 and 193 cases. It is understood the first two with over 400 and 800 dispositions had much to do with dismissal of cases for want of prosecution. The one disposing off 197 and 194 were with trials and a few summary determinations. Finally, the one disposition of 193 was mainly by applied ADR or JDR in court. Pure mediation has resolved over 200 cases this year to date. The number that got resolved by mediation and ADR are cases not likely to enter the Supreme Court on appeal, except only on grounds of fraud, misrepresentation or such like at mediation which is rear.

**How Mediation and ADR Can Assist the Courts?**

**(b) Some Suggestions**

30. ADR with its special features and advantages offers a very useful case management tool and where adopted, it plays a critical role in determining whether a case should be resolved judicially or by some other means, for example, mediation. As Chief Justice Clifford Wallace\(^80\) said:

> "The use of ADR has come to the forefront in the recent years because it is often less expensive, speedier, and more efficient than trial… ADR is something that the courts should encourage litigants to do. Because the court is acting as an objective third party, the parties are apt to take its suggestions seriously. It is essential, therefore, that the court devotes some attention to this issue during the pretrial process. Rather than merely reminding the parties that ADR is available, the court should aid the litigants by identifying the issues, claims and cases that may be amenable to ADR."\(^81\)

31. As already noted, most of the cases that get into the court system are capable of settlement by the parties themselves or through the assistance of an impartial third party. The court should thus be reserved for matters the parties are not themselves able to resolve. Formal and deliberate judgments of the courts have endorsed that position in these terms:

> "The Courts are there only to help determine or resolve disputes the parties themselves cannot resolve using the best of their endeavors. The Courts should be reserved for those matters that cannot be resolved by the parties themselves. They should not be used for every dispute there is.\)\(^82\)

32. Again as already noted, almost all of the disputes that go before the courts are capable of resolution by the parties’ direct or assisted negotiations. Further, as also noted already, instead of acting in good faith and endeavoring to resolve their own disputes, some parties continue to maintain their respective positions. Many jurisdictions have been able to get around this difficulty by deliberately designing and adopting in their case flow management system (CFMS) mediation and other forms of ADR. Where that has happened, mediation and ADR has enabled the parties to reach settlement without the need for a trial or waiting for a decision from the court and or failing settlement help them to narrow down to the real issues for adjudication.

33. Mediation and ADR as part of the CFMS enables the parties to disclose the basis of their claims or defense much earlier on in the process. In that way, the Court enables the parties to make a critical assessment of their possible success or failure, with the prompting of the judge. Out of their respect for the Judges, many litigants often come prepared to accept what a judge says in their respective case. Hence, the role a judge plays in discussing and enabling parties to have their dispute resolved by their own direct negotiations or failing that mediation and if that fails JDR will greatly assist in the dispensation of more cases at less costs and time. A judiciary having such a CFMS is likely to see more cases being referred to

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\(^80\) Senior US Circuit Judge and Chief Justice Emeritus, Senior Adviser for Judicial Administration to the Asia Pacific Foundation Conference of Chief Justices of Asia and the Pacific, September 1999, Seoul Korea.


\(^82\) Beecraft No. 20 Ltd v. Dr. Pok & The State (05/04/01) N2125 which the Supreme Court endorsed subsequently in its judgment in *POSF v. Sailas Imanakuan* (09/11/01) SC677.
and resolved through mediation or a form of ADR. This would no doubt free up judicial time and resources which the Court could appropriately allocate to cases which do require judicial consideration and determine. As noted already, the time and resources freed up in this way could be used by the Courts to produce quality judgments and dispose of the cases on their list expeditiously at less costs.

34. Given the foregoing, I would like to make a number of suggestions as to how the Judges or the Courts could make more meaningful use of mediation or other forms of ADR. My first suggestion is for the Courts to critically consider and make an important decision. That decision should be for a resolution of all matters on their pending and future lists by mediation/ADR at the first instance if the parties fail to settle their dispute through their direct negotiations within certain specified timeframes. In order to give meaning to that decision or resolve, the Courts could be better advised to publish a list of the cases or the kind of issues that are inappropriate for resolution by mediation or a form of ADR and thus most appropriate for judicial consideration and determination.

35. If the first suggestion is accepted, may I secondly suggest that the Courts take real and meaningful steps to ensuring compliance of the decision and is enforced in a way that is consistent and predictable. Such consistency and predictability is needed to bring about the required changes and more and more lawyers and parties will use mediation and ADR readily. As noted it is already happening in at least one Court in PNG. If more and more Judges do the same, the PNG Judiciary’s decision to dispose of 60% of its cases by mediation will be achieved. This will enable the Judges and the Courts to devote more quality time to hearing cases that need to be judicially considered, engage in quality research and writing that results in both higher quality judgments and better dispensation of justice.

36. The first and second suggestions can only be achieved through a well-structured approach, which contributes to the need for consistency and predictability in the application of the mediation and ADR tools. May I therefore make the third suggestion, which is for the Courts represented here to adopt or modify their respective CFMS to incorporate mediation and ADR if not already done. Such a system should reflect the fact that CFMS concerns the Court’s supervision or management of the time and events involved in the movement of a case through its system from the point of filing to final disposition. The emphasis should be on the Court’s management rather than the parties, of the series of events a case has to go through until final disposition. The aim should be to make the sequence and timing of these events more predictable and timelier. The critical factor therefore, should be the element of timing for each of the events under the courts process that must take place for each case that is before the court and the court’s management of that process. The process should ensure there is a sufficient length of time to prepare and to ensure compliance of the courts directions and orders and short enough to enable expedited hearings and determination of the dispute. Such a system should help avoid the unnecessary wastage of the courts time so that the court can reach cases and deliver timely decisions. Further, the system should ensure that all cases get equal and appropriate attention from the date of filing to the final disposition.

37. Hence, if the system is well designed and applied it should ensure that each case receives the type and amount of court attention required, by its nature and complexity. Toward that end, the system should help identify the kinds of issues presented and the kind of time and resources required to deal with the case and appropriately allow for it earlier on in the litigation process issues rather than say, at the trial of a matter. Through such a CFMS the Court should be enabled to produce at least four important outcomes. Firstly, an equal treatment of the litigants and their disputes. Secondly, a timely disposition of cases suit the particular circumstances of each case. Thirdly, enhance quality in the litigation process. Finally, it should

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83 Solomon and Somerlot, Opt Cit n 7 at 3.
84 Ibid
85 Ibid.
86 Ibid at 4.
87 Ibid.
88 Ibid.
89 Ibid.
provide the necessary foundation regain and retain public confidence in the courts integrity as an institution playing an important part in the society.  

38. In jurisdictions where a good CFMS have been adopted and implemented successfully, at least seven fundament elements clearly stand out. The first and foremost is a strong and determined judicial commitment and leadership from the Chief Justice down to the end of the process. The second is a close and or strong working relationship between the bar and the Courts in the area of appropriate education, devising, modifying and or implementation of the CFMS. The third is in the courts retaining supervision of every step or process all the way until final hearing and disposition. The fourth is in the Court as the supervisor of its process, sets the standards and goals that must be meet within a specified time frame. The fifth is in the Court devising and maintaining a system of monitoring and information system to monitor both what it is doing, detect any weakness and improve the system constantly to deliver quality justice. The sixth is in the area of the Courts controlling adjournments in order to ensure the CFMS meeting its objective, which is deliver timely and quality justice in cost effective manner. The final fundamental element lies in the CFMS allowing for scheduling for credible and reasonably certain trial dates by assigning cases according to specialization or expertise where possible and in any case allows for a better utilization of the limited judicial resources, namely judges and time.

39. In order for the first to the third suggestions and more so a CFMS to achieve their intended purpose, may I fourthly suggest that, the CFMS be managed by a person or persons who have the necessary training, experience and skills in case management and mediation and ADR. The training should be in the area of effective case management and mediation in particular and where possible in the other forms of ADR. They should also be appropriately and sufficiently equipped to assist in due and proper discharge of their duties. Such persons should be able to set quality and time standards the parties and their lawyers must be able to accept and follow. This are all necessary because without them, there will be a failure to deliver on talking about and having a CFMS at the first place. Modern Courts have judges as CFMS managers. Not all judges come with training, experience and skills in mediation or a form of ADR and CFMSs. The good news is, these are skills they can acquire whilst on the job through appropriately packaged and delivered training and mentoring with the more experienced and skilled. In time, they will become experts in what they do resulting increased quality disposition of cases and hence justice.

Conclusion

40. For a long time, the formal Court system has been the main process for resolving disputes. They have been overburdened with backlogs giving rise to criticisms to the point of questioning their relevance in society. This has given rise to mediation and forms of ADR, which are fast becoming accepted worldwide as preferred forms of dispute resolution. All these have one destination to reach. That destination is to deliver quality justice to our people expeditiously and do so at less costs and time. That being the case, there is an imperative for collaboration and cooperation between the formal Courts and mediation and other forms of ADR to enable us to better share and discharge our respective duties to enable our peoples to reach their destination, quality justice. Mediation and other forms of ADR are very useful tools that can produce outcomes which can speak well of the judicial system provided it is properly developed and applied correctly as part of their CFMS with good and strong judicial leadership. There is enough experience and knowledge in this room to draw from and make better use of mediation and other forms of ADR. This will in turn enable the courts to discharge their broader role of promoting peace and nation building in addition to staying on top of their case lists. A failure to appreciate the goodness of mediation and other forms of ADR either by inadvertence or by deliberate choice and failing to make maximum use of it, is a choice to remain with the problems of backlog and its related consequences. PNG stands ready widen its use of ADR both internally and externally to share its experience with anyone who might be interested in following her

90 Ibid at 5.
91 Ibid at 7-31.
footsteps and wishes you all well in your endeavours to stay on top of our case lists and deliver expedited and quality judgments or decisions in our respective jurisdictions.
SPECIALIST SUBJECTS SESSION 8B
“Alternative Dispute Resolution – Is it as Good as They Say?”

By Justice Ambeng Kandakasi, Papua New Guinea and District Court Judge
David Lim, Singapore

This is the transcript of the PowerPoint presentation for this section.

Slide 1
CMJA Conference 2016
“Alternative Dispute Resolution: Is it as good as they say?”
Justice Ambeng Kandakasi (Papua New Guinea) & District Court Judge David Lim (Singapore)
20 September 2016

Slide 2
Synopsis
- Overview of ADR
- Adjudication – Pros & Cons
- ADR – Key Features
- ADR – Papua New Guinea’s Experience
- ADR – Singapore’s Experience
- Limitations of ADR
- Open Discussion:
  - Some Common Criticisms of ADR: Are they really valid?
  - Open Discussion:
  - How can we make ADR even better than it currently is?

Slide 3
ADR – Overview
- Modalities: Mediation/Conciliation/Neutral Evaluation, etc.
- Arbitration?
- “Alternative” or “Appropriate” Dispute Resolution?
- Aim: Help disputants resolve their dispute in a private, confidential, flexible, less stressful and non-confrontational, mutually acceptable manner, so that they can save their time, money and relationship.
- ADR is still the alternative to adjudication.
- If ADR fails, the fallback is still adjudication.

Slide 4
Adjudication
- Pros:
  - Formal, institutionalized process
  - Transparency
  - Compulsory attendance/participation
  - Binding, enforceable judgment
  - Judicial precedent established
- Cons:
  - Expensive
  - Lengthy
Slide 5
ADR – Key Features
- Gives parties the ownership and responsibility in the resolution of their dispute.
- 3 Pillars:
  - Confidentiality;
  - Voluntariness in participation;
  - Party Autonomy in deciding whether & how to resolve their dispute.
- Allows parties to work out between themselves a suitable, holistic, mutually acceptable solution to the dispute (given their respective wants, needs, interests, concerns, circumstances and situations) as opposed to having a judge-made decision imposed on them.

Slide 6
ADR – Key Features
- Less austere/formal than a trial
- Customizable process (including language used)
- Maximum party participation
- Private and confidential
- Non-confrontational
- Focuses on Interests, Solutions & the Future
- Allows for creative solutions
- Parties are the Decision Makers
- End result is a consensual agreement

Slide 7
ADR – Key Features
- Key advantages:
  - Private and confidential
  - Relatively swift
  - Relatively inexpensive
  - Procedurally simple
  - Saves face
  - Protects reputation/secrets
  - Saves relationships
  - Allows for creative problem-solving
  - Party have control over outcomes
  - Higher party satisfaction
  - More holistic (e.g. can address emotional/relational issues)

Slide 8
ADR – Papua New Guinea’s Experience
- Sharing by Justice Ambeng Kandakasi
Slide 9
Lessons from Pacific Judicial Conference
- Quality Justice, an achievable reality and not a myth
- Separation of Powers & Judicial Independence Central
- Risk of erosion is also real
- Safeguard is in the Judiciary delivering on the people’s expectation on:
  - No delays
  - No backlogs
  - Less costs
  - No wastage of time; and
  - Delivering quality judgments
- Judges judge once they are judged daily

Slide 10
Lessons from Pacific Judicial Conference
- Secure our people’s trust and confidence daily
- How?
- Subscribe to and live up to:
  - International best practices and framework for judicial excellence
  - Judicial Code of Conduct and oath of office
- Effective Judicial Case Management
- Appropriate use of technology:
  - Effectively manage cases
  - Dissemination of Court information
- More use of ADR under Judicial leadership

Slide 11
ADR Drivers
- Delays & Backlogs
  - Work – Health Balance

Slide 12
- Too Costly

Slide 13
- Delay + Costs = Losses & endings

Slide 14
- Self-help takes over = victims

Slide 15
- Winners & losers a constant reality

Slide 16
- Finality an elusive dream

Slide 17
- Mediation – PNG Experience
Slide 19
PNG’S Mediation Experience
- Chief Justice and Judges led
  - Legislative foundation
  - Training & awareness
  - Support facilities and resources
  - 105 Mediators
  - More than 1000 cases disposed

Slide 20
Feedback from Users
- Sample survey of 90 users
  - 73.33% increased trust and confidence in the court system;
  - 26.67% trust and confidence remain remained unchanged;
  - 98.80% Courts should support and use mediation more;
  - 100% mediation was safe, comfortable, user-friendly and more secure;
  - 95.79% use mediation again.

Slide 21
Feedback from Users
- 98.97% recommend mediation to others;
- 93.94% assisted in identifying the real issues;
- 97.89% assisted in understanding the other party’s views well;
- 92.78% gave them opportunities to develop options for settlement;
- Costs saved, funds freed up and value of projects affected ran into millions of Kina or dollars.

Slide 22
Consider
- Formal courts:
  - Impartial
  - Fair
  - Prompt?
  - Less costs?
  - Equal in:
    - Access?
    - Participation?
    - Finality?
- Mediation:
  - Impartial
  - Fair
  - Prompt
  - Less costs
  - Equal in:
    - Access
    - Participation
    - Finality
Slide 23
Clients’ preference

Slide 24
Many ways to Justice

Slide 25
Consequence of overloading

Slide 26
Imperative to spread
- Courts
  - Statutory interpretation
  - Precedent setting
  - Conflicting authorities
  - Public sanction
  - Protective orders
  - Preliminary Issues
- Mediation
  - Everything missing on the Courts’ menu

Slide 27
Result
- No delays
- Prompt resolutions
- No backlog
- Less costs
- Less harm and less damage
- Equality in:
  - Access to justice
  - Participation
- Finality
- Confidence and trust
- Better choice
- Better outcomes
- More time for:
  - Business
  - National building
- Peaceful nations world and peoples

Slide 28
Broader Role – Peace & Nation Builders

Slide 29
Conclusion
- ADR is as GOOD as they say because
- ADR provides useful tools
- Courts and litigants can use them to their advantage
- Failure to use ADR = decisions to retain delays, backlogs and associated problems.
Slide 30
Be rest assured
- It’s about doing our jobs smartly and being on top of our lists

Slide 31
ADR – Singapore’s Experience
- Sharing by District Judge David Lim

Slide 32
ADR – Singapore’s Experience
- Provision & promotion of Mediation by the State Courts:
  - The State Courts handle more than 90% of the Judiciary’s caseload.
  - Many of the cases filed –
    - are of small values;
    - involve parties with some relationship (e.g. family, neighbors, co-workers, business associates);
    - have self-represented parties.
  - For such cases –
    - litigation is inappropriate because of the time, costs and publicness of the process;
    - justice is best served by helping the parties achieve consensual outcomes and closure in an expedient and affordable way;
    - Mediation is promoted as a first choice.

Slide 33
ADR – Singapore’s Experience
- Provision & promotion of Mediation in the State Courts:
  - Mid 1990s – Mediation introduced & promoted as an ADR modality
  - 1994 – Pilot project for mediations of selected civil cases by selected District Judges
  - 1995 – Court Mediation Centre established
  - 1997 – Singapore Mediation Centre established under the Singapore Academy of Law
  - 1998 – Court Mediation Centre renamed as the Primary Dispute Resolution Centre (PDRC), and mediation made available to a wider range of cases
  - 2012 – “Presumption of ADR” (a scheme where ADR applies unless parties opt out with possible costs consequences) implemented for civil cases
  - 11/2014 –
    - Singapore International Mediation Institute (SIMI) & Singapore International Mediation Centre (SIMC) established
    - Simplified Civil Procedure introduced for small value civil cases (early discovery, collaborative case management, neutral evaluation & ADR)
  - 4/3/2015 – State Courts Centre for Dispute Resolution (SCCDR) established

Slide 34
ADR – Singapore’s Experience
- ADR Modalities used at the State Courts:
  - Mediation (Judge-led/volunteer mediators/referrals to external mediator)/Conciliation
  - Neutral Evaluation (Judge-led: binding/non-binding)
  - Case Management Conference (for small value cases)
  - Counseling (for family/community disputes)
Slide 35
ADR – Singapore’s Experience

- ADR in the State Courts –
  - is available only for cases that have been filed in the State Courts;
  - is provided as part of the case management process;
  - is provided for free for Magistrate’s Court cases, and for a nominal fee for District Court cases;
  - is normally scheduled for half a day (although adjourned sessions may be granted if necessary);
  - is conducted by a District Judge or a volunteer mediator.

Slide 36
ADR – Singapore’s Experience

- Motor Accident Cases
  - Claims for damage to vehicles, personal injuries & wrongful death
  - Accounts for nearly 30% of civil cases in the District & Magistrates’ Courts
  - A single motor accident between just 2 motor vehicles can spawn several lawsuits (owner’s/driver’s/passenger’s pedestrian’s claim)

Slide 37
ADR – Singapore’s Experience

- Motor Accident Cases
  - Pre-action Protocols (via Practice Directions) requiring
    - Early exchange of information & evidence,
    - Pre-Filing attempts at private negotiation or settlement.
  - Motor Accident Guide: sets out most common traffic accident scenarios and the usual apportionments of liability by the Courts.
  - Cases that cannot be settled before filing are channeled for Neutral Evaluation of Liability & Quantum Apportionments by a District Judge (who gives an indication).
  - Parties are then given some time to try to settle on the basis of the indication given, failing which the matter is sent for a full trial.

Slide 38
ADR – Singapore’s Experience

- Motor Accident Cases
  - The Motor Accident Guide

Slide 39
ADR – Singapore’s Experience

- Caseload of the State Courts: 2013 – 2015 (excluding criminal proceedings instituted by the Public Prosecutor)

<table>
<thead>
<tr>
<th>Type/Year</th>
<th>2013</th>
<th>2014</th>
<th>2015</th>
</tr>
</thead>
<tbody>
<tr>
<td>No. of Civil Writs filed</td>
<td>31,722</td>
<td>28,810</td>
<td>28,984</td>
</tr>
<tr>
<td>No. of Civil Originating Summonses filed</td>
<td>448</td>
<td>408</td>
<td>586</td>
</tr>
<tr>
<td>No. of private Magistrate’s Complaints filed</td>
<td>2,151</td>
<td>1,858</td>
<td>1,834</td>
</tr>
<tr>
<td>No. of Civil Harassment Complaints filed</td>
<td>-</td>
<td>11 (wef 5 Nov 2014)</td>
<td>159</td>
</tr>
<tr>
<td>Total</td>
<td>34,321</td>
<td>31,087</td>
<td>31,563</td>
</tr>
</tbody>
</table>
Slide 40
ADR – Singapore’s Experience
- 2015 Civil Caseload of the State Courts Centre for Dispute Resolution

Slide 41
ADR – Singapore’s Experience
- Statistics & Surveys of the State Courts Centre for Dispute Resolution
  - Cases mediated in 2015 & settlement rate:

<table>
<thead>
<tr>
<th>Year</th>
<th>Civil Case</th>
<th>Magistrate’s Complaints</th>
<th>Civil Harassment Complaints</th>
<th>Overall</th>
</tr>
</thead>
<tbody>
<tr>
<td>2015</td>
<td>5,692</td>
<td>355</td>
<td>18</td>
<td>6,065</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>4,982</td>
<td>314</td>
<td>12</td>
<td>5,308</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Settlement Rate</td>
<td>87.5%</td>
<td>88.5%</td>
<td>66.7%</td>
<td>87.5%</td>
</tr>
</tbody>
</table>

Slide 42
ADR – Singapore’s Experience
- Statistics & Surveys of the State Courts Centre for Dispute Resolution
  - Mediation feedback survey for lawyers & parties: 2014 – 2016:

<table>
<thead>
<tr>
<th>Persons surveyed</th>
<th>Survey statement</th>
<th>Strongly Agree</th>
<th>Agree</th>
<th>Total in Agreement</th>
</tr>
</thead>
<tbody>
<tr>
<td>139 Lawyers &amp; 139 Parties</td>
<td>1. Mediation has helped me/my client save costs.</td>
<td>L 75</td>
<td>59</td>
<td>134 96%</td>
</tr>
<tr>
<td></td>
<td>2. Mediation is a better approach than a trial for resolving disputes.</td>
<td>P 71</td>
<td>55</td>
<td>126 90%</td>
</tr>
<tr>
<td></td>
<td>3. I would resort to mediation again if necessary.</td>
<td>L 72</td>
<td>61</td>
<td>133 96%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>P 62</td>
<td>71</td>
<td>133 96%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>L 97</td>
<td>42</td>
<td>139 100%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>P 69</td>
<td>57</td>
<td>126 90%</td>
</tr>
</tbody>
</table>

Slide 43
ADR – Singapore’s Experience
- Summary:
  - Singapore’s experience with the introduction and use of ADR has so far been very good, as seen from –
    - the high settlement rates at the State Courts Centre for Dispute Resolution; and
    - the very positive feedback from the surveys conducted.
Besides helping parties save time, costs & relationships and avoid the stresses of litigation, ADR has been a very useful case management tool and has helped to avoid the build-up of any backlog for the trial courts leaving them to be able to hear and dispose of trials expeditiously.

For Singapore, ADR has thus been “as good as they say”.

Slide 44
ADR – Limitations

- ADR/Mediation is not a panacea for solving every type of dispute.
- ADR does not work if any of the parties –
  - is unwilling to participate;
  - does not come/act in good faith;
  - is not prepared to be reasonable.
- ADR is not suitable if –
  - a judicial decision is required on a particular issue/the interpretation of a Constitutional or statutory provision;
  - the power imbalance is so great as to prevent fair/meaningful negotiation;
  - the dispute is too long-drawn or deep-seated to allow for meaningful, constructive negotiation;
  - any party is suffering from any mental or personality disorder;
  - where a private settlement would contrary to the public interest;
  - where protective proceedings are required (e.g. injunctions);
  - where the case involves child abuse, domestic violence, etc.
- For some cases, justice is better served by a trial resulting in a judgment/court order, than by ADR.

Slide 45
Open Discussion: Common Criticisms of ADR: Are they really valid?
- Let’s discuss and share our views:
  1. ADR does not work unless parties are committed to make it work.
  2. ADR lacks transparency (justice is not seen to be done).
  3. The outcome of a mediation depends on each party’s risk appetite as opposed to a proper determination of the parties’ rights and obligations.
  4. ADR may result in unfairness to disadvantaged disputants.
  5. Settlement agreements are not convenient to enforce.
  6. There is a risk of breach of confidentiality.
  7. In ADR, disputants may settle on terms that are illegal/contrary to public interests.
  8. ADR deprives the courts of the chance to develop case law.
  9. ADR deprives lawyers of litigation business.

Slide 46
Open Discussion: How can we make ADR even better than it currently is?
- Let’s discuss and share our views:
  1. Is there anything particular about ADR that you’d like to raise for discussion with everyone here?
  2. What new form of ADR has your country used and how successful has it been?
  3. How have litigants & lawyers responded to ADR in your country?
  4. How can we encourage the use of ADR as a first choice for resolving disputes?
  5. Is compulsory mediation necessarily a bad thing?
  6. What can be done to help litigants & lawyers better prepare for ADR so as to make the best use of it?
7. What challenges are there to the promotion & use of ADR and how could these challenges be dealt with?
8. How should the question of costs be dealt with at a mediation?
9. Should judges be mediators?
10. Are there any special advantages in judge-led mediation and how can we capitalize on these advantages?
BREAKOUT SESSION
“ELEMENTS OF UNFAIR TRIALS”
DISCUSSION QUESTIONS

Question 1 – Defendant’s Appearance in Court
Historically, defendants have appeared in a dock, whether they are on bail or in custody. The dock may be insecure or it may be surrounded by metal bars or security glass to prevent the defendant from escaping. A defendant in custody will appear in handcuffs, and sometimes leg chains, which are then taken off in the courtroom.

a) What would you do if the security escorts ask you for permission to keep his handcuffs on at all times as he is a flight risk and might try to escape otherwise?

b) If you decide he stays in handcuffs during the hearing, what do you think would be the perception of the accused or an independent member of the public as to whether he is having a fair trial in front of you or a jury?

c) The defendant’s lawyer asks you to permit him to sit alongside his lawyer so as to be able to give instructions more readily. From your vantage position on the Bench, you can observe that this lawyer has not brought any legal textbooks into court with him, so you mischievously ask if he has any legal authorities to quote on this. The lawyer accepts he does not but states that during his law studies he had seen this happening in American television courtroom dramas and wonders why we cannot do it. Apart from sighing or rolling your eyes up to the heavens, wondering whatever do they teach young lawyers these days, what would you decide about the request?

Question 2 - Legal representation of his own choice
An accused on a charge of murder (or any serious offence) is unable to afford legal representation. The judge is adamant that the trial must begin. The state assigns a lawyer to the accused. The accused rejects the state-assigned attorney and demands a particular Senior Counsel. Would the Judge be unfair to the accused to begin trial without the lawyer of his own choice? What if the defendant refuses to engage in the trial process unless you grant him the lawyer of his choice?

Note from DoP: Free legal representation is a vexed issue. Of course anyone who pays for their legal team can afford to choose them, but why should someone, for whom the public purse pays for the legal representation, have a right to quibble over who the advocate is going to be? Does he not realise how lucky he is to have free representation? It might be said that over decades of free legal aid, some criminals have got used to the luxury of choosing their “brief” and sacking any lawyer who does not come up to their expectations. They are quick to request a transfer of their free legal aid. This is often granted because the first lawyer will say that the professional relationship has broken down. The cost of free legal aid (in civil and criminal cases) has gone up enormously in the UK and is now becoming a luxury that the government is keen to curb. By abolishing it in certain types of civil cases and private family law cases, and changing the criteria of eligibility in criminal cases, there has already been a large saving of public money but a substantial increase of litigants in person. This means judges have to learn to be courteous to those who appear in front of them and hearings take much longer to deal with.

In the UK anyone accused of murder used to get a solicitor and two counsel, a senior and a junior barrister. Now they will often get a solicitor and one counsel unless there are good reasons to have two counsel. Nevertheless this is still a luxury compared to many countries. In South Africa murder trials are routinely conducted before experienced professional magistrates and occasionally in the High Court. During a visit I have seen a prosecutor handed the docket or file for a murder case just before court began. Upon asking for an adjournment to prepare, he was given an hour and then the murder trial commenced!
**Question 3 - The right to an Interpreter**
Two women from rural Brazil are placed before an English-speaking Guyanese court. They speak a native indigenous language with which the court’s interpreter is not familiar. How can the Magistrate safeguard their right to a fair trial? What measures can the Magistrate take to ensure that a fair trial is conducted?

*Note from DoP: In the UK, interpreting for the courts has become a full-time occupation for many bilingual people and the associated costs of hiring them have risen substantially. We still come across the occasional person who speaks a rare language and it is a challenge to find an interpreter for them, but we somehow manage. Perhaps the Embassy or High Commission can suggest or find someone. But what if there is no one at all? Who will pay for an interpreter to travel from abroad to assist in the hearing?*

**Question 4 - Presence of Parents/Guardians at Juvenile Proceedings**
Criminal proceedings against children are usually held in camera so that members of the public and persons who are not connected to the case, or who are not needed, cannot be present when the Court hears matters requiring the protection of children. For good reason parents and guardians of juveniles who find themselves before the courts are excepted from such prohibition.
a) How does the presence of a parent or legal guardian at proceedings against a juvenile contribute to the fairness of the process?
b) How critical is such presence to the guarantee of the fairness of the trial of a juvenile.
c) Should parents/guardians be permitted at all times to be present during the trial of juveniles?
d) What if a parent is to be a defence witness, they will not be allowed into the courtroom until the appropriate moment to give evidence, which is near the end of the whole trial?
e) Consider where the accused is a 15 year old, is an immigrant and the parent who attends does not speak the English language – what protection would the parent be offering their child in that situation?

*Note from DoP: In England and Wales the Youth Court deals with criminal cases against those aged 10-17 inclusive and the public is not permitted to sit in. However if the child or young person is in the Crown Court, either for their trial or for an appeal against conviction or sentence, the public are allowed! Is this inconsistent approach justifiable?*

**Question 5 – Disclosure by the Prosecution and Defence**
a) Trials by ambush are really a thing of the past in Commonwealth jurisdictions - how true is this statement in your jurisdiction? What duty of disclosure lies upon the prosecution? What, if anything, precludes the local police/prosecutor from serving defendants with copies of all witness statements in their possession?
b) Conventionally however in some jurisdictions, statements are still not in practice served on defendants who face summary charges in a magistrates’ court. Would a Magistrate be acting outside of his/her remit by ordering that statements be served on defendants in proceedings that are tried summarily?
c) In your jurisdiction, does any duty of disclosure lies upon the defendant? If the procedure is changed to require the defendant to disclose information before the trial, is this consistent with his right to a fair trial?

*Note from DoP: Domestic Legislation (eg. Guyana Administration of Justice Act) expressly requires the police to serve witness statements on defendants in hybrid offences (i.e. can be tried either way) even where charges are pursued summarily.*

*In England and Wales, since the mid-1980s the prosecution has been required to serve witness statements or at the very least a case summary upon the defendant so that he has an idea of the case against him. Before that time, in a summary trial the defendant had no idea what the witnesses would say against him until they...*
went into the witness box. The defence lawyer would then ask for a short break to take instructions from the client before starting the cross examination. By way of contrast, in a trial by jury, there have been committal proceedings so the defendant has known full well what the witnesses would allege against him. This two-tier system (with its obvious unfairness and injustice) survived scrutiny by legal luminaries around the Commonwealth for hundreds of years and has only begun to change in the last few decades. Almost overnight the concept of a fair trial in England has changed so that even the defence are not allowed to surprise the prosecution. Now the defendant has to disclose the nature and details of his defence and names and addresses of his witnesses that he will call to give evidence; this must be in writing and signed by the defendant in a “defence case statement” and can be used by the jury to draw an adverse inference against him in a trial if he fails to comply with this requirement on the basis that only an accused with something to hide would refuse to comply or would change his defence to tailor the prosecution’s case or hide the details of his witness.

**Question 6: Dealing with Unrepresented Accused**

a) How should the court resolve any doubt it has that a plea of “guilty” by an unrepresented offender is an unequivocal one?

b) Should the likely penalty be communicated to the defendant before the plea is taken so that he knows what might happen?

c) Where the unrepresented defendant is charged with a more serious offence, should the court advise him that he might wish to offer to plead to a lesser charge which the prosecutor will consider?

d) You decide in your own mind that you are quite a down-to-earth sort of judge who the defendant will appreciate talking to and can explain the legal issues in simple terms. In the course of your engagement with the defendant, the defendant relaxes and makes a significant incriminating comment whereupon the prosecutor decides not to agree any plea-bargain and wishes to use the comment in court as evidence at trial – apart from being red-faced, what would you do?

e) What would you do if the defendant, unrepresented, attends for sentencing and complains that he was put under pressure by his former lawyer or by the court into pleading guilty at the last hearing and wants to change his plea to not guilty?

**Question 7: Recusal**

A defendant appears before the sole Magistrate in the local or district court. He is well known to the police and the Magistrate as a repeat offender.

a) Should the same Magistrate try him on the new charge?

b) Is there a risk of actual or perceived bias against him? What is the test for recusal in your country?

c) What is the position if the Magistrate is to recuse him/herself and the only alternative is to roster another magistrate elsewhere in the country to try the case but the cost of doing so is almost prohibitive and might lead to considerable delay?

d) In a different scenario, one party in a civil litigation case before you is a large company that provides a service. You have purchased such a service from them and were badly let down as a result of which you have been regularly complaining to them without a satisfactory response. Their advocate applies for you to recuse yourself from the case because of your correspondence. Being a judge who is regularly in the media, members of the press are sitting in court to report the case. What would you do?

*Note from DoP: Paragraph 2.5 of the Bangalore Principles of Judicial Conduct states: “A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially.”*
**Question 8 - Trial within a reasonable time**

In Guyana, an accused in a serious criminal matter has argued that his constitutionally protected right to a trial within a reasonable time has been violated by the court’s inability to commence his trial within a reasonable time. What constitutes trial within a reasonable time in your jurisdiction? Should the concept in a jurisdiction vary from region to region?

*Note from DoP: Historically trials were conducted very quickly and punishment was swift, but when the revolutionary notion of a fair trial gripped the world’s judiciary, this led to slower progress. With an increase in workloads the delays in commencing trials began to grow longer. This is bad enough for someone on bail but unacceptable for those remanded in custody until their trial. In India in 2014/15 it was reported that there were one and half million prisoners in custody waiting for their trials. There are now “custody time limits” in the English courts whereby anyone in custody must have their trial within 8 weeks in the magistrates’ court or 26 weeks in the crown court; these limits can only be extended by the court otherwise the accused is granted bail pending the trial.*
Introduction
Overview of the Latimer House principles – Commonwealth Countries

Structure – Country will be identified in bold followed by summary narrative.

The accused/defendant will be referred to as he/him for simplicity

Question 1
(a) Court room is an environment where each individual expect justice.

Barbados – There is case law authority that Defendants should not be handcuffed during trial but in certain situations the Presiding Judge has discretion to allow it. It is imperative that the prison officer, undertake a risk assessment on whether the accused is a security and/or flight risk. The Judge should be informed on whether the accused handcuff should remain in place.

The group noted that it is not a criminal offence for an accused/defendant to be in handcuffs

India – The accused/defendant is not handcuffed whilst in the court. If the accused was perceived to be of flight risk, then more prison officers will be detailed to guard him.

There was a general consensus to preserve the accused Human Rights because there is a Presumption of innocence until proven guilty. Justice is to be preserved and the accused/defendant should not be made to feel otherwise.

(b) Answered

(c) It is not the general practice for the accused to leave the dock and sit next to his lawyer. Lawyers sit in a different position in the courtroom.

The lawyer should never have made the request. The Judge has discretion but is not in common practice. It is an expectation that the lawyer should walk to the dock and take instructions. Leaving he dock will be removing him from the protection of the prison officer.

Permission should not be granted unless of extreme importance to exercise discretion.

Question 2
Trinidad and Tobago – The accused should not have an opportunity to window shop. Legal aid is available and he has a right to be assigned a state appointed attorney. It is not right to window shop.

Barbados – There was an example whereby a defendant ‘sacked’ four lawyers. The judge intervened and informed the defendant that he cannot ‘play’ the system and refuse his lawyer in an attempt to delay/frustrate proceedings.
Ghana – If the accused cannot afford to pay for his legal representation, then the court will appoint a lawyer. If the accused rejected this lawyer, it will be problematic. For example if he is charged for an offence, which attracts a sentence of death penalty, he has a right to legal representation to preserve justice and a fair trial.

There was discussion on the circumstances in which the court appointed a state – counsel and the defendant declined but the counsel he wished to represent him was not available and whether it was appropriate to delay proceedings to appoint the Defendant’s Counsel of choice.

The group acknowledged that constitutionally, one should grant the accused Counsel of his choice.

Question 3
The group was unanimous that the accused has a right to understand court proceedings. Every attempt should be made to ensure that an interpreter is available in the language of the accused.

This is a mandatory requirement in the interest of justice and achieving a fair trial.

Question 4
(a) – (e) Parents are the guardians and protectors of a child and are allowed in court when their wards are testifying.

Nigeria – Parents and guardians are allowed to be present in court when their ward is giving evidence. This is informed by the fact that in the juvenile courts the child is surrounded often by people he does not know, this may interfere with the quality of his evidence. It does not disqualify that parent from giving evidence except to say that the weight to be attached to her testimony will be under scrutiny as a result.

Guyana – if the child has both parents, if one parent was a witness then in that situation that parent can be excused. If a parent was a contentious witness then their presence will change the dynamics of the trial. On one hand their presence as support for their child and on the other a contentious witness. A Probation Officer should in a position to advise the court on the presence of the parents or guardians.

Question 5
(a) Disclosure of prosecution/claimant evidence is mandatory. However, there was distinct variation within different jurisdictions.

The defendant/respondent is entitled to know the case in which he has to respond/defend himself.

Question 6
(a) Unequivocal – not guilty plea entered

Nigeria – Summary of facts from the prosecution together with statements of the witnesses tendered. This is in the Magistrates court. The judge will consider and ask the accused whether he accepted the prosecution case. If the accused answers in the affirmative, then his Guilty plea will be accepted. If the Judge considered that the prosecution’s case raised a defence then a not guilty plea will be entered.

Ghana – The Defendant can enter a plea of ‘Guilty with explanation’.

Cameroon – The accused may plead guilty to attract a lighter sentence. If the Defendant pleads Guilty, then the state Counsel presents the summary of the facts.

(b) No
(c) General consensus that there was a discretion that prosecution and defence negotiated ‘plea –bargain’ on offences
(d) Discussion between Defence and prosecution in this negotiation ‘plea – bargain’ process should not be used against the defendants. The conversation is privileged. The prosecution cannot be use this information to withdraw the agreed offence which was ’plea-bargained’.
(e) Allowed

**Question 7**
(a) Yes, impartial. Judged on the facts on the same case.
(c) Agreed
(d) Recused

*Judges are independent, impartial and make a decision based on the evidence before the court*

**Question 8**
Initially there was a discussion on the evidential difficulties resulting from delay to trial; such as, quality of evidence by virtue of the passage of time; locating witnesses etc.

**Guyana** – In the recent past 5 years was considered a reasonable time from arrest to trial. This has now been reduced to 2 years.

**Ghana** – Reasonable time is interpreted to be 3 years. Accused is innocent until proved guilty and there is no law, which prevent the granting bail. Applied to minimum standards.

**Trinidad and Tobago** – Reported that there are serious issues with delay in criminal justice system. A murder defendant arrested to trial can take as many as 13 -14 years. Over 600 persons are presently on remand for murder in Trinidad & Tobago awaiting Trial. It will take at least 15 years to clear the backlog of trials. It is not ideal and there are Judicial Review on the quality of the evidence after such a long delay.

**Barbados** – If a preliminary hearing had not been listed within 2 years, for serious crimes, some judges are now exercising discretion taking balancing judicial perseverance and judicial risk to grant bail. The decision for the grant of bail to Defendant’ who were charged for serious crimes such as murder caused some public criticism.

**India** – There is a Fast track system – from charges to trial the courts; 3 -4 months. In the High Court there are about 300 - 400 pending and bail applications per day. If the Charges sheet is not filed within 90 days of arrest then bail is automatic.

**Ghana** – every person is presumed his innocence until proved guilty.

**Summary**
There was interesting and stimulating discussion on all of the eight questions, which occasionally provoked more questions than answers.

It was concluded that there was phenomenal differences in the subject matter discussed within different commonwealth jurisdictions. However, the common thread filtering through were commitment to Latimer House principles and the corner stone of the natural justice. There is ‘presumption of innocence until proved guilty and the Defendant’s right to a fair trial to achieve justice’.

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Question 1: Defendants Appearance in Court
(a) To keep the handcuffs on would create a misperception of bias:
   i. The judge could call for the handcuffs to be removed but have the security guards stand close behind him to prevent escape/misbehavior.
   ii. Judges should make an assessment whether in the circumstances the handcuffing of the defendant is necessary – e.g. by reference to prior behavior.
   iii. The judge has to be concerned not only of the public’s safety but also the accused’s – e.g. don’t want police to shoot him.
   iv. Attorney might use the handcuffing as a ground for appeal – i.e. that the judge is biased.
   v. To leave the accused on chains give the impression that they have already been found guilty when they have not.
   vi. The court should not give the impression that it has prejudged the guiltiness of the accused.
   vii. Whatever the resources, the court must give the impression it is fair.
   viii. The judge has responsibility to ensure the safety of everyone in the courtroom. A judge could, in the presence of the accused, ask the security officers whether they think he is a flight risk and if they say no, then the judge could order the handcuffs removed.
(b) Defendant’s lawyer wants to sit next to his client:
   i. It is better not to allow the lawyer to sit next to the accused but to allow him some time later to take instructions from his clients.
   ii. It could also be disruptive for the lawyer/client to be whispering or talking during the proceedings.
   iii. Some judges however don’t think “it’s a big deal”.
   iv. Judges could give writing material to the accused to let him write his instructions to pass them to the lawyer later on.

Question 2: Where Accused Demands Lawyer of Own Choice
(a) Constitution only allows an accused the right to an attorney, not right to a particular attorney.
(b) It might be prudent to give the accused a limited time to get counsel of his choice, and if he can’t by then, to go on with the trial.
(c) It might be a violation of the accused rights not to allow him the counsel of his choice.
(d) A concern of state-sponsored lawyer is who is going to pay for the lawyer’s fees.
(e) An accused should bear the costs of the counsel of his choice.
(f) If he can’t afford then he will have to accept whichever counsel is assigned to him.
(g) So long as an accused is assigned to a competent counsel, then should be sufficient.
Caribbean Case:  
Kallus Rogers v Queen  
Court of Appeal discussed the issue at length. Court did not allow an accused who insists on having the counsel he wanted.

Question 3: Rights to Interpreter  
(a) Court must make sure that a competent interpreter to ensure a fair trial.  
(b) Costs should not be a concern.

Question 4: Parents/ Guardians at Juvenile Proceedings  
(a) A child is vulnerable.  
(b) The presence of their parents is important as support.  
(c) The choice of which parent/guardian to be present is also important, as some parents/guardians might be intimidating to or unsupportive of the child.  
(d) The parents/guardians should be allowed to be present throughout the entire process from investigation to charge to trial to rehabilitation.  
(e) Some parents/guardians may be obstructive and if so, the counsellor or school welfare officer should be present.  
(f) Parents/guardians should be allowed to be present at all times of the trial, even if part of the proceedings deals only with legal issues.  
(g) If parent is a witness for the defence, the parent should be excluded and some other parent or relative allowed to sit with the accused.  
(h) The credibility issue is of paramount importance.  
(i) The accused should not be given an unfair advantage.  
(j) It is best to explain to the parent upfront that he cannot sit in the proceedings and to arrange for another suitable person to sit with the accused as support.  
(k) The best interest of the child is paramount and so it is alright to allow the parent to sit in, but the court should assign the appropriate weight to the parent’s evidence. In any case, the case is to be proven on the strength of the Prosecution’s evidence. As such, it doesn’t really matter for the parent to sit through the proceedings.  
(l) To allow the parent to sit through will not result in a fair trial.  
(m) It might do harm to the accused’s case by weakening his parent’s evidence.  
(n) If accused and parent does not speak/understand the proceedings in English, it would be unhelpful for the parent to be present.

Question 5: Disclosure by Prosecution and Defence  
(a) Disclosure should be allowed if requested.  
(b) If Prosecution refuses disclosure, judge should find out why, to ensure a fair trial.  
(c) It is for Prosecution to prove the case against the accused beyond a reasonable doubt if they should disclose.  
(d) There may be good reasons why rape victims may not lodge a complaint immediately and as such in Scotland, the fact that the victim did not immediately make the complaint is not immediately taken to mean that victim is an unreliable witness.  
(e) Judges should have the discretion as to whether, and if so what, directions be given to a jury, and not be required to give direction sin every case.  
(f) In the UK, there is already a requirement for accused to disclose, as otherwise adverse inferences will be drawn/judge can make adverse comment to the jury.

Question 6: Unrepresented Accused
Question 7: Repeat Offender

(a) There is no reason why the Magistrate cannot try out new offence, but should decide purely on the evidence on the new case.
(b) For justice to be seen to be done, the judge should give a reasoned decision.