Conference Aims

- To promote better understanding amongst judicial officers of all ranks and from all parts of the Commonwealth of judicial independence issues and to explore the approach to those issues in different parts of the Commonwealth.
- To promote greater awareness amongst the magistrates & judges of the Commonwealth, of international treaties and law relating to the development and access to justice, and to consider the practical application of that body of law;
- To enhance networking within the Commonwealth Magistrates’ and Judges’ Association on judicial developments;

Commonwealth Magistrates’ and Judges Association

The Association was formed in 1970 as the Commonwealth Magistrates’ Association and in 1988 changed its name to the Commonwealth Magistrates’ and Judges’ Association in order to reflect more accurately its membership.

Most Commonwealth countries and dependencies are represented in full membership which is open to national associations of magistrates, judges and any other judicial body. Associate membership is open to any individual who is a past or present member of any level of the judiciary or has connections with the courts within the Commonwealth.

The aims and objectives of the Association are to:

- Advance the administration of the law by promoting the independence of the judiciary;
- Advance education in the law, the administration of justice, the treatment of offenders and the prevention of crime within the Commonwealth;
- Disseminate information and literature on all matters of interest concerning the legal process within the various countries comprising in the Commonwealth.

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Introduction

By the Secretary General, CMJA

The CMJA’s 18th Triennial Conference was held in the Brisbane Convention and Exhibition Centre in South Brisbane from 9-13 September 2019. The Conference, organised by the CMJA was open to all Commonwealth judicial officers and others interested in justice in the Commonwealth. The Conference attracted over 458 people from 49 jurisdictions in the Commonwealth and beyond. I am very grateful for the support of the Chairperson of the Steering Committee, Sheriff Douglas Allan, and members of the Steering Committee, the Director of Programmes, Judge Shamim Qureshi, our Conference Registrations Officer, Mrs Jo Twyman and our Executive and Admin Officer, Miss Temitayo Akinwotu in the preparation of the Conference as well as the Chairperson of the Local Organising Committee, Chief Magistrate Orazio (Ray) Rinaudo and the members of the Local Organising Committee.

We are also deeply grateful to all those who assisted the CMJA onsite during the Conference, including the members of the Local Organising Committee and judicial staff.

We are also very grateful to all the speakers, panellists and contributors to the educational programme.

I am also grateful to our CAPA intern, Alex Taylor for putting together the report you find below

Dr Karen Brewer

Foreword

By Director of Programmes, CMJA

The CMJA 18th Triennial Conference was held in Brisbane, Queensland, Australia from 9th-14th September 2018 on the theme: “Becoming Stronger Together.” It was the second largest conference for the CMJA in terms of delegates attending. It was held at the Brisbane Convention and Exhibition Centre. The conference was opened by the Governor of Queensland. The topics of the conference were wide and varied. Amongst them were defending judicial independence, judicial wellness, judicial work and domestic life, a comparison of judicial terms and conditions and emoluments around the Commonwealth, judicial education, mentoring new judicial officers, going on strike, co-ordinating international justice systems, fighting corruption, virtual courts and digital filing, handling the media, restorative justice, military justice, coroner courts, countering extremism, international child abduction, climate change.

Not only did we have distinguished speakers from a legal background, we also had two renowned psychologists to talk to us about judicial wellness and the psychological issues of victims of sexual or domestic abuse. The papers incorporated in this conference report make for a fascinating read.

Judge Shamim Qureshi
Message from the Patron

Dear Dr Brewer

Please convey my thanks to the Members of the Commonwealth Magistrates’ and Judges’ Association for their loyal greetings sent on the occasion of their Eighteenth Triennial Conference which is being held from 9th to 14th September.

I was interested to be reminded that this year marks the Fifteenth Anniversary of the endorsement by Heads of Government of the Commonwealth (Latimer House) Principles on the Accountability of and Relationship between the Three Branches of Government.

Your thoughtfulness in writing as you did is much appreciated. As your Patron, I send my best wishes all those gathered in Brisbane, Australia, for a most successful and enjoyable conference programme.

ELIZABETH R.
9th to 14th September, 2018.
WELCOME ADDRESS
By His Honour Chief Judge John Lowndes
President, CMJA

Distinguished guests, delegates and ladies and gentlemen, it is my pleasure to welcome you to the 18th Triennial Conference of the Commonwealth Magistrates and Judges Association.

I acknowledge the Turrbal people as the traditional owners of the land where we gather today, and pay my respect to elders past and present and to emerging community leaders.

At the outset, it is an honour and a privilege to convey a message from Her Majesty the Queen, Honorary Patron of the CMJA.

The CMJA is saddened by the news that Chief Justice Stephen Isaacs of the Bahamas passed away last Friday. On behalf of the CMJA I extend my deepest condolences to the family, friends and colleagues of the Chief Justice.

I am thrilled that the Australian judiciary is hosting this Triennial.

This is an historic occasion. The last time Australia hosted a CMJA conference was way back in 1991 in Sydney.

It would be remiss of me not to mention that at that time David Armati (an Honorary Vice President of the association), who is attending this conference, was President of the association.

The Sydney conference was the first time a CMJA conference was held in the southern hemisphere. That conference was also the first time that both judges and magistrates from 30 Commonwealth countries came together during a conference to exchange views and ideas.

May I say that the return of the CMJA to the shores of the “lucky country” (as Australia is often known) would not have been possible without the support of both the Federal Government and the Queensland State Government, and in particular the Commonwealth and Queensland Attorneys General. On behalf of the CMJA I thank both governments for their very substantial financial support of this very important conference.

I also wish to thank Brisbane Marketing for its generous support of this conference.

I wish to thank the local organising committee chaired by the Chief Magistrate of Queensland, Judge Ray Rinaudo, for their efforts and hard work in making this conference a reality.

In particular, the CMJA is extremely grateful to the Chief Magistrate for his key role in seeking the crucial financial support for this year’s triennial conference.
There will be an opportunity at the close of the conference to properly thank all members of the local organizing committee.

The theme of this conference is “Becoming Stronger Together”.

The judiciary is often perceived to be the weakest and most vulnerable branch of government. Recent developments around the Commonwealth have exposed the vulnerability of the judicial branch of government.

As recently as may this year the CMJA expressed concerns about moves in the Kingdom of Lesotho to remove the Chief Justice for alleged misconduct. The CMJA urged the Executive to abide by constitutional provisions, natural justice and due process in order to safeguard the independence of the judiciary.

At about the same time the CMJA made known its concerns about the establishment of a tribunal in the Seychelles to investigate the question of the removal from office of the Chief Justice. The CMJA urged the Seychelles Government to ensure that the inquiry would be conducted strictly in accordance with the constitution so as to ensure its independence and integrity.

In September last year the CMJA had reason to be extremely concerned by reports of threats issued by the President of Kenya against the Kenyan judiciary, following the decision of the Supreme Court to annul the presidential elections.

I made reference earlier to Australia as the “lucky country”. Perhaps not so lucky. Over the past two years the judiciary has been subjected to a series of attacks which individually and collectively have undermined public confidence in the judiciary and the courts.

Just the other day the Judicial Conference of Australia stated its position on the restructure of the Family and Federal circuit courts, and urged the interested parties not to make unfounded criticism of the judges or group of judges of the affected courts, stating that the “judges of the relevant courts should not be caught in the cross fire of the debate over the restructure”.

In recent times the JCA has expressed concern over repeated personal attacks on judges and magistrates in Victoria that are occurring as part of the political dispute between the Federal and Victorian governments over law and order in that State.

The JCA has also had cause to come to the defence of unfair and unwarranted attacks on judicial officers – perhaps the most concerning was the “grossly improper and unfair attack on judges of the Supreme Court of Victoria by three Federal Ministers in mid-2017.

These recent attacks on members of the judiciary in Australia and on the African continent raise grave concerns. If there were ever a time for the judiciary to become stronger together – it is now.

This conference will address and explore the various ways in which the judiciary can become stronger as a separate, but equal, branch of government whose primary function is to administer justice according to law.
Over the coming four days the conference will hear from three keynote speakers and a number of other distinguished speakers and presenters.

We will hear about:

- The ways in which the judiciary can play a vital role in strengthening and defending judicial independence;
- The relationship between the judiciary and the other branches of government and the relationship of the judiciary to the community it serves;
- How the judiciary can maintain, promote and improve the quality of the judicial system;
- The ways in which the judiciary can promote a better understanding and appreciation of the role of the judiciary in the administration of justice; and
- How the judiciary can foster public confidence in the courts.

All of the conference sessions will in some way relate to these four sub-themes which fall under the general theme of “Becoming Stronger Together”.

I am sure that you will be excited as I am about the conference program. I am equally sure that you are looking forward to the opportunity of discussing over the next four days and afterwards the views expressed by the various speakers and presenters.

It is now an honour and a privilege to invite the Governor of the State of Queensland, His Excellency the Honourable Paul de Jersey AC, to officially open this conference.
WELCOME SPEECH
By His Excellency Governor of the State of Queensland, Hon Paul de Jersey, AC

The President of Trinidad and Tobago, Her Excellency Ms Paula-Mae Weeks ORTT; Chief Justices – national and State; Your Honours – of whom I am pleased to see there are many joining us from both Australia and beyond; distinguished guests; ladies and gentlemen.

May I acknowledge the Traditional Custodians of the lands on which we gather, the Turrbul and Jagera peoples, with my expression of respect for their Elders past and present, and my expression of encouragement for their young emerging leaders.

Thank you, Uncle Albert, for your characteristically thoughtful Welcome to Country. I admired your reference to the resilience and determination of the Indigenous people of this nation, qualities which will continue to be important as our unified nation progresses.

Those qualities are these days raised also in a different but defining context, and that is our persisting drought, with 100 per cent of the State of New South Wales drought declared, and 57 per cent of Queensland. This crippling drought has persisted now for as long as seven years.

Our empathy lies particularly with our pastoralists, as they exhibit extraordinary resilience and determination.

I congratulate the boys of Brisbane Grammar School, for the parade of Commonwealth flags, and master Exodus Lale for his rendition of the National Anthem: both of them most moving experiences.

After earlier this year having the privilege of attending the highly successful Commonwealth Games – centred on our Gold Coast but extending throughout this vast State – I am so pleased to be associated with another, though rather different, Commonwealth initiative.

While we eschew smugness, we are in truth the most grateful beneficiaries of systems of law which are about the best there could be; and I have in mind Winston Churchill’s comment on the democratic system.

The Commonwealth of Nations is a remarkable phenomenon, and one of which Her Majesty is justly proud; and to have spawned legal systems marked by independence, predictability and for the most part stability, is a quite extraordinary hallmark.

I won’t say any more about the legal systems, because today I am speaking to the converted, but I do want to comment on two aspects of your being here.

The first is to proclaim the wonders of the location, already no doubt self-evident to the many visitors joining us for this international conference – the first held in Australia since 1991.
This State is a gem, and its capital city surpasses the semi-precious. During your stay I hope you all have the opportunity to trespass beyond the conference venue into Brisbane, into Queensland.

Second, I applaud the concept of this long-standing conference.

When I joined the Supreme Court of Queensland in 1985, my wife and I – to that point regular overseas travellers, were reconciled to ‘staying-put’ – itself an attractive position.

But then within a couple of years Queensland judges were given a monetary travelling allowance, and the broadening of all of our horizons soon became apparent. Sharing experiences and views away from home can be immensely valuable in improving the local product.

The development of outward looking judiciaries is to be strongly encouraged.

I did not as a Judge have the opportunity to attend this important conference, though over about 11 years I chaired the Lawasia-affiliated Conference of Chief Justices of Asia and the Pacific.

And so I need no persuading of the high value of conferences like this, especially for the collegiality they engender.

By way of formally opening the conference may I warmly welcome you all to Queensland, and wish you the very best during your visit here – may it be engaging, informative, and entertaining.

Thank you, and welcome.
Introduction
It is a great honour and real pleasure to have been asked to give the opening speech this morning. This year’s conference theme, and the focus of my talk, is ‘Becoming Stronger Together’. We were all probably taught from an early age that there is strength in numbers, that a rope made of interwoven strands is stronger than strands unwoven, that a successful team is more than the sum of its individual parts.

Superficially, these ideas would seem to stand in opposition to a fundamental principle that underpins all that we do as judges, namely judicial independence. As an institution the judiciary must stand apart and separate from the executive and Parliament. We must be institutionally independent. As individual judges we must decide our cases alone or only with those with whom we sit to hear a case. We do not seek outside opinion. We reach our decisions independently and uninfluenced by external pressure.

This might seem then to suggest that the judiciary and individual judges must exist in splendid isolation. If that were the case there might well be more to the claim of Alexander Hamilton that the judiciary is the weakest of the ‘three departments of power’ than even he suspected. He warned that ‘as from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced . . .’ The judiciary is separate from the executive and Parliament and without their resources. Without an ability to implement our own decisions and, as Hamilton well knew, where necessary to coerce. We can easily see why he was concerned.

Hamilton’s focus was largely on the influence or pressure that could be brought to bear by the other two departments of power, as he called them, on the judiciary. Today we would also be concerned with other sources of power or influence within the State: corporations, often multinational, organised labour, political parties or groupings and the media, including social media. They all may challenge the judiciary, or seek to influence it in a way which undermines independence and even threatens to undermine the rule of law. That is entirely different from criticism of our decisions, or the way in which we work, which is entirely legitimate, indeed not unwelcome.

The question I have posed for myself is this: how can we become stronger together while remaining committed to institutional and individual judicial independence? I propose to explore that question today through four short topics:

- first, independence and interdependence;
- secondly, independence and cultural norms;
- thirdly, independence and moral courage; and
- fourthly, the judiciary standing together.

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1 I wish to thank John Sorabji for his invaluable assistance in preparing this lecture.
Taken together these four points (there may be more) should show how as judges, as the judiciary, we can maintain a proper commitment to the separation of powers and the rule of law, while not standing in splendid isolation. Maintaining effective judicial independence is an absolute necessity. Without it we imperil our commitment to the rule of law and constitutional government. As Lord Reed memorably put it last year when giving judgment in the United Kingdom Supreme Court in the Unison case, which involved the substantial increase in court fees,

‘At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other.'

Without judicial independence, courts and judges could not provide that public service that is like no other.

**Independence and interdependence**

My starting point is the nature of judicial independence. Some question its meaning. One scholar described it as being like the terms, free speech, equality, liberty or freedom. You could add ‘the rule of law’. They each mean different things to different people. But in a penetrating lecture given in 2016, Lord Hodge identified ten pillars which between them support and explain the concept of judicial independence.

The first pillar is a ‘clear constitutional commitment to the independence of the judiciary and the rule of law’. At first blush this may seem to assume what it seeks to describe but further explanation can be found elsewhere in his lecture. The essential point here concerns the public and constitutional commitment to those concepts. It is not enough to assert, in a constitutional document for instance, judicial independence, separation of powers and the rule of law. The greatest tyrannies are often underpinned by constitutions containing generous but empty guarantees.

The position in the United Kingdom has, as ever, been unusual. The security of tenure of judges was recognised by Parliament as part of the constitutional settlement following the Glorious Revolution in 1688 which brought William and Mary to the throne and deposed her father, James II. But until the Constitutional Reform Act 2005 there was no statutory acknowledgement

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6 Lord Hodge ibid at [12].

12
of judicial independence or the rule of law. That did not mean that before 2005 there was no rule of law and no judicial independence in the United Kingdom. On the contrary, they were deeply embedded, fundamental constitutional principles, both as constitutional practice, and political and public understanding and acceptance. The Act simply acknowledged that to be the case, as part of a shake-up of our structural arrangements which saw the replacement of the judicial committee of the House of Lords by the Supreme Court and substantial changes to the anomalous roles of the Lord Chancellor.

Linked to this is Lord Hodge’s sixth pillar: the separation of powers. This refers to both the formal separation of powers – institutional independence – and also functional separation of powers. By this he means the constitutional convention that Parliament and the executive do not seek to influence judicial decisions other than through advocacy in open court as parties to, or intervenors in, litigation. Not for them, the approach said to have been taken in a case by President Lyndon Johnson in 1966. The US Supreme Court had before it a case concerning the merger of two railway companies. President Johnson wanted it to go ahead. Johnson phoned his friend, Abe Fortas, a justice who was hearing the case. He advised the President on the approach to take before the court. The judge is reported to have telephoned the lawyer instructed and told him how to make his submissions. Justice Fortas was the only judge to decide the case in the way Johnson desired when the Supreme Court ruled.7

In the United Kingdom the idea of a member of the government, never mind the Prime Minister, telephoning a Court of Appeal or Supreme Court judge for advice in respect of litigation the government was involved in, is unheard of. It could not happen. Nor would any minister seek to influence a judge in any case under consideration. Such behaviour could not occur because of the longstanding commitment to, and understanding of, this aspect of the separation of powers and judicial independence.

The separation of powers means that judges cannot advise the government on policy, draft legislation or give a view in advance about what would be lawful and what would not. That has, in the past, frustrated government, as was well known when Lord Bingham declined the invitation of the then Home Secretary to help arrive at counter-terrorism legislation that would satisfy the European Convention on Human Rights and the Human Rights Act 1998.8 Government and independently instructed lawyers provide legal advice. In the United Kingdom, judges have not done so for almost 200 years. In other words not since the separation of powers and judicial independence became fully established.

But in the United Kingdom the expertise of judges is occasionally made available to Government, through officials, to explain what the practical consequences for the operation of the courts would be were a particular policy adopted in legislation.

The separation of powers in the United Kingdom before the 2005 Act, a classic British evolutionary muddle, achieved a new purity when our highest court was physically and structurally removed from the legislature, the Lord Chancellor stripped of his roles as head of the judiciary and speaker of the House of Lords and the few judges who are members of the House of Lords were barred from taking part in its proceedings whilst serving as judges.

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8 Lord Hodge ibid at [22].
Judicial independence goes further than simply placing limits on what the executive and Parliament can properly do in their dealings with the judiciary. It also places limits on the judiciary. This is what Lord Hodge describes as ‘role recognition’: his eighth pillar. Just as the executive and Parliament should ensure they remain within their provinces, so too must the judiciary as an institution and as individuals recognise the limits of our constitutional role.

Engagement in politics is thus forbidden to judges, unlike previous 18th and early 19th century Lord Chief Justices, including the great Lord Mansfield, who sat in the cabinet.\(^9\) Equally, it is not for judges to comment on matters of political controversy either in their judgments or extra-judicially. It is important to maintain a mutual respect for the proper roles of Parliament and the executive. As judges we avoid intruding on the proper sphere of activity of the other organs of the state. In different countries the boundaries may well be drawn differently depending on the constitutional arrangements. In each case though, role recognition requires the judiciary to ensure that courts remain courts of law and not courts of politics.

Both Lord Hodge’s first and sixth pillars illustrate essential elements of institutional independence. They also underscore the importance of institutional interdependence. For Alexander Hamilton, the judiciary was the weakest branch due to the separation of powers, and the inherent nature of the judicial power of the State. Nonetheless, there is a fundamental constitutional interdependence between judiciary, executive and Parliament.\(^10\) They collectively secure the rule of law; and in doing so they must provide each other with necessary support. The judiciary by applying and upholding the law: Lord Reed’s point from the *Unison* case. The executive by acting within and enforcing the law. Parliament and the executive by supporting the judiciary to ensure that it has sufficient resources to carry out its responsibilities.

Here we see Lord Hodge’s third pillar of judicial independence; that the judiciary is remunerated properly to support its integrity, impartiality and quality; that the judiciary is given sufficient resources to carry out its functions; and, that judges are provided with adequate security of tenure.\(^11\) Each of these three is necessary in support of institutional and individual judicial independence; and each depends on co-operation with, and support of, the judiciary by the executive and Parliament. If the judiciary is to be able properly to carry out its role, then it must have this support. Just as importantly, without that proper support, the other branches of the state will be unable effectively to discharge their responsibilities. An effective judiciary underpins, indeed is essential to, the rule of law, and the rule of law underpins the well-being, prosperity and development of society. This is interdependence, or rather the three branches standing strong together by maintaining ‘the mutual respect which each institution has for the other’\(^12\) as Lord Hope put it. Respect for their different constitutional roles; respect for the mutual support they must provide each other in order to enable each to carry out their roles, and secure the rule of law.

**Independence and cultural norms**

\(^9\) See the debate in the House of Lords on Lord Ellenborough’s position as Lord Chief Justice and Cabinet Minister, HL Deb 3 March 1806 Vol 16 Col 253 to 284.


\(^11\) Lord Hodge ibid at [15].

\(^12\) *R (Jackson & Ors) v Her Majesty’s Attorney General* [2005] UKHL 56; [2006] 1 AC 262 at [125].
Institutional interdependence requires more than role recognition and interdependence. It requires the existence of ‘political and public understanding and support’ for judicial independence: Lord Hodge’s tenth pillar.13

Judicial independence, like democracy and the rule of law, is dependent on the existence of strong cultural norms. The concepts need to be understood. Society, as a whole, must believe in them and they must be supported by society. In the United Kingdom their evolution was the product of the development of our uncodified constitution over centuries.

The cultural norms which support judicial independence are not immutable and cannot be taken for granted. At the present time we can see developing in some countries what appears to be a gentle erosion of support. We have seen judges referred to as ‘so-called judges’. We see judges being criticised because their decisions fail to match the popular mood. I shall return to that issue in a moment. We have seen, as happened in England and Wales recently, privacy injunctions being undermined by widespread publication on the Internet; and even Members of Parliament using, or abusing, parliamentary privilege to do so. If we start to see more broadly a culture of non-compliance with court orders, we may see a culture of contempt for the judiciary, judicial independence and the rule of law develop. Such a culture does not just harm the judiciary. It harms society because it is incompatible with the rule of law.

We can also see the potential for eroding the support for security of tenure and judicial immunity from suit: Lord Hodge’s fourth and fifth pillars.14 Historic examples are not difficult to find of judges removed from office because they acted with impartiality and independence, or sued by the executive because they failed to decide cases in the ‘right’ way. In 2006, for instance, there was a public campaign in one US State called ‘Jail 4 Judges’. It sought a constitutional amendment that would enable the investigation and criminal prosecution of judges.15 It was animated by unhappiness with some judicial decisions. As two American academics have recently noted, the judiciary is an institution within the State designed to act as a neutral arbiter. Such institutions pose significant problems, as they put it, to ‘would-be authoritarians’.16 And so, security of tenure, and immunity from suit, will be the first thing to be eroded, or removed. Eroded to place improper pressure on judges. Removed to make the judge entirely dependent on maintaining favour with those in power.

Judicial independence begins with the way in which judges are appointed: Lord Hodge’s second pillar.17 Another means to produce a quiescent judiciary is to ensure that judicial appointments are made on a political basis. In many countries, appointment is an apolitical matter made by independent bodies, in others appointments are made on the recommendation of the judiciary itself. In the past, judicial appointments in England and Wales, even though made by the Lord Chancellor, who was deeply personally involved in senior appointments, were not politically motivated. But the creation of the Judicial Appointments Commission by the Constitutional Reform Act in 2005 put the matter beyond doubt. Appointments are made on merit, using criteria widely recognised in the Commonwealth and beyond. Transparent appointment on merit

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13 Lord Hodge ibid at [33].
14 Lord Hodge ibid at [20].
16 S. Levitsky & D Ziblatt, How democracies die, (Viking, 2018) at 78ff.
17 Lord Hodge ibid at [15].
helps to develop and maintain public confidence in the judiciary as individuals and as an institution. Its erosion could not but weaken that confidence, and weaken the judiciary.

Each of these pillars ultimately does not depend on a country’s institutional structures, although the right structures are important. They depend on the health of cultural norms, civic norms in support of the structures and the proper operation of the systems they create. That culture depends on institutional interdependence with the other departments of state unequivocally subscribing to and supporting judicial independence. More fundamentally however it depends upon public understanding and public support. That in turn depends upon public, civic education. In other words judicial independence is strong, when the public understands its importance and supports it.

There are two ways in which, as judiciaries, we can work to secure effective public understanding of our role. The first and most obvious is through our commitment to the constitutional principle of open justice. Our judgments, rulings, sentencing remarks and so forth are given in open court and may be reported. The advent of the internet has made it possible to make reserved judgments and transcripts widely available. The public is unlikely to hang on our every word, but the results of cases of significance, of controversy or simply of notoriety can be available readily to all.

All professions develop their own languages which can become impenetrable to outsiders. Lawyers are no different. In England and Wales there has been a concerted effort by many judges to make our judgments more understandable to non-lawyers by simplifying legal terminology and using straightforward language. There are efforts to avoid judgments that are needlessly long. Equally, our judgments need to contain sufficient information to provide clarity of exposition and show that they involve real people. There is a move in some jurisdictions, based perhaps on a technical interpretation of developments in data protection law, to anonymise almost all judgments. Doing so would seem to me to lead to a regrettable degree of abstraction in the law. Abstraction that undermines the accessibility of proceedings and abstraction that leaches democratic and public accountability from the law. That is Lord Hodge’s seventh pillar:18 that effective public access is essential for the proper administration of justice. We should seek to reinvigorate public accessibility, subject to any necessary restrictions where openness would itself undermine the administration of justice. Reinvigoration may be done through the greater use of online publication of judgments, and online broadcasting of hearings. In the United Kingdom we are by no means in the vanguard of broadcasting but almost all Supreme Court hearings are broadcast. Many of those in the Court of Appeal can be broadcast. I look forward to a measured expansion of livestreaming and broadcasting of proceedings more widely.

The second thing we can do is promote education though engagement with schools by judges and lawyers and by helping to provide materials on the legal system for use in schools. The English and Welsh judiciary and Magistracy are very actively engaged in this work for the benefit of the schools they visit and the judges who visit them. We cannot complain that the public does not understand what we do, and its importance, if we do not take steps to lift the veil a little more and explain what we do. More broadly, we should be less retiring than has traditionally been the case in our dealings with the media. Whilst we cannot engage in political

18 Lord Hodge ibid at [26].
discussion, or discuss individual cases we can explain our role and the place of the judiciary and court system in upholding the rule of law, and why that matters. The judiciary invites misunderstanding or incomprehension if it stands completely apart and aloof from society. Engagement within proper constitutional bounds will benefit society and the judiciary.

**Independence and moral courage**

This leads me to my final point concerning independence. It is one that does not primarily focus on institutional independence. It looks to individual judges. It does so because institutions are only as effective as the individuals who operate them. An effective judiciary is one constituted of effective judges. That, most obviously, means judges who are well-qualified and appointed on merit. But it means more than that. A judge with these essential characteristics is not necessarily a good judge if he or she is not willing, when necessary, to make difficult decisions which upset powerful people and may be unpopular. A good judge will not let ambition influence the outcome of a case or play to the crowd in the expectation of praise. A good judge must demonstrate good character beyond the sense of an absence of questionable behaviour. He or she must be capable of showing moral courage when making difficult decisions.

Lord Clarke of Stone-cum-Ebony explained:

‘individuals who are likely to be swayed by public opinion, who might not make the right, the just decision because it is an unpopular decision or because it is adverse to their interests cannot properly be seen as having good character.’

Judges who allow their decision-making to be swayed in order to maintain their popularity or to protect their own interests singularly fail to demonstrate good character in this broader sense. But, he added, that good character centres on one particular aspect of individual independence: moral courage. Its importance cannot be understated. Lord Judge, as Lord Chief Justice, stressed its importance when he said:

‘Judges must also have moral courage — it is a very important judicial attribute — to make decisions that will be unpopular whether with politicians or the media, or indeed the public, and perhaps most important of all, to defend the right to equality and fair treatment before the law of those who are unpopular at any given time, indeed particularly those who for any reason are unpopular.’

In 2016 there was a judicial review claim about the process through which the United Kingdom’s withdrawal from the European Union could be effected lawfully. The judges, and the parties, were concerned with the legal question and only the legal question. It raised profound, controversial and not altogether easy constitutional issues. The academics had a field day.

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Outside the proceedings, there was a febrile public atmosphere. The decision to withdraw had been the subject of a national referendum. The judicial decisions arising from the case produced the type of comment that had previously been unheard of in the United Kingdom. The judges involved at first instance (my predecessor, Lord Thomas, the Master of the Rolls and Sales LJ) were referred to in the media as ‘ Enemies of the People’, a phrase used by tyrants throughout history to justify the persecution and death of those who do not toe the line. There were other remarkably inappropriate things said by people who should have known better.

There was one telling element in all this. A newspaper ran a story, with pictures of all the Supreme Court Justices who were to hear the appeal, exploring their supposed European links. The simplistic, indeed facile, point apparently being made was that the judges in question could be expected to decide the case in line with the strength of those links. The way in which the majority and minority opinions lined up, in the result, did not support that analysis.

It took moral courage in the face of such comments before and after the various hearings to apply the law without fear or favour. Without it, the decisions made would not have been based on an application of the law. Justice would not have been done. And the institutional independence of the judiciary, and of our democratic structures would have been weakened. As an institution the judiciary would have been seen to be capable of being swayed by public and political opinion; along that road lies arbitrary justice – which is no form of justice at all.

Moral courage by individual judges is also required to protect the institutional integrity of the judiciary in another way. A clear example of this was Sir Edward Coke’s clash with the King whose Attorney-General he had been earlier. In the Case of Prohibitions in 1607 Coke, one of the greatest of Chief Justices, took a stand against James I.22 Contrary to any (still to be properly developed) notions of judicial independence or separation of powers, James as sovereign – as the Executive – took it upon himself to sit in adjudication in a property dispute. Sir Edward Coke overturned the decision because the King was not a judge and not learned in the law. As Montesquieu would later put it, ‘ . . . there is no liberty, if the judicial power be not separated from the legislative and executive. . . Were it joined to the executive power, the judge might behave with violence and oppression. ’23

Sir Edward lost his job but lived to fight another day. His courageous stand was mirrored 70 years later by one of his successors as Chief Justice of the Common Pleas, Sir Thomas Jones, under James II. The King wanted a unanimous decision in a court packed with quiescent judges, rather than attempt to act as a judge himself. James II exerted pressure on the court to secure a judgment that would have given him free reign to dispense with the law at his pleasure. Jones stood firm.24 He was the only one of twelve judges who did so.

These were shining examples of moral courage in support of judicial independence and the rule of law at a time when the potential consequences for not following the instructions given by the executive were severe and could have been fatal, yet his is not just an historical problem. I have deliberately used historical examples to avoid straying into contemporary controversy. Nevertheless, each of us will be able to recall recent instances around the world where judges

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22 Prohibitions del Roy (1607) 12 Co Rep 63.
23 Montesquieu, De L’Esprit des Lois (1748), (Cambridge), Book XI, 6.
24 Godden v Hales (1666) 11 St Tr 1166.
have found themselves in conflict with executives seeking to usurp or expand power. Or having to make very difficult decisions in heated political circumstances. There are examples of judges showing moral courage in support of the rule of law, notably in the Commonwealth. Equally and regrettably there are countries where the judges appear not to enjoy institutional or personal independence.

There is another side to taking a stand by making a difficult decision which involves resisting pressure. It may be difficult on occasion to do nothing when doing something would undermine judicial independence or trespass into areas reserved for the executive or Parliament.

It can be tempting for a judge to consider straying into such areas from the perceived safety of a judgment, or a lecture. It can be particularly tempting when public opinion, or at least voluble parts of it, seems to suggest that a judicial view would be welcome. But that cannot justify a judge in going beyond the proper, constitutional, boundaries and straying into political matters. This may lead to criticism. But the damage that it can do to the judge – in terms of public confidence in his or her ability impartially to exercise the judicial function – and for the judiciary as a whole can be serious. Judges inevitably hold opinions; and on many subjects of controversy our judicial work provides insights not widely available. Yet there may be times where the courageous thing to do is to remain silent. A recent example arose in our Supreme Court concerning the availability of divorce to a separated couple where one refuses consent. The law in England and Wales allows a divorce after two years with consent but five years without consent unless a conduct-based ground for divorce is established. There has been a long running campaign to replace the current arrangements with no-fault divorce, the details of which have generated keen debate. The Supreme Court contented itself with suggesting that the time had come for Parliament to look again at what is now rather antique legislation given developments in society over the last 50 years rather than prescribing a suggested policy solution.

So, if the judiciary is to maintain its moral authority, Lord Hodge’s ninth pillar, it must maintain its moral courage. Sir Edward Coke and Sir Thomas Jones stood alone. If collectively we are to ensure that judges and judiciaries are able to act with moral courage in the exercise of their duties, we must stand together. We must do so within our respective jurisdictions. Judges in positions of leadership will set the tone. They can lead by example in court and outside it; in their relations with Parliaments and governments. They can build and maintain a judicial culture which encourages independence, which provides support for judges and helps maintain their individual resilience; which helps foster collegiality, and in these ways helps to secure the rule of law. In that way, individual judges will be able to demonstrate moral courage safe in the knowledge that they do so with unequivocal support.

**Conclusion – Judiciaries standing together**

Yet we can do more. We can help each other to maintain moral courage throughout our judiciaries by continuing to work together across the Commonwealth and across the wider world.

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26 Lord Hodge ibid at [31].
Just as individual judges standing together are better able to support each other so too can judiciaries support each other. We have seen examples of this recently where in Europe judicial organisations have expressed their support for the judicial independence in Poland. I say no more about it because there is a process underway according to European Union law which will seek to adjudicate the question of judicial independence. But should the judges in any jurisdiction find themselves under attack, their independence imperilled and the rule of law undermined, the support of fellow judges around the world would be of profound significance. It would show that individual judges and judiciaries do not stand alone. Courage can be drawn from that.

Equally, we can stand together, in less pressing circumstances. We can support each other through the promotion of judicial exchanges. Through sharing ideas, expertise and experiences on how best to operate our systems of justice. Through learning from each other’s jurisprudence. We welcome judges from around the world to England and Wales and assist with their training. We hope to provide insight into lessons we have learned on how to improve practice and procedure and obtain valuable insights in return. We have been able to provide support for training in a number of jurisdictions through our Judicial College; and we have established the Standing International Forum on Commercial Courts whose Commonwealth and non-Commonwealth membership continues to grow. Its purposes are to share best practice to ensure that all our courts keep pace with rapid commercial change; to enhance the rule of law internationally; and to assist in maintaining confidence for investors in developing countries that they offer an effective means of resolving disputes.

The judiciaries of the Commonwealth have a special affinity, a collegiality, not least because we share the traditions and strengths of the Common Law. This was apparent when those judiciaries, through the Commonwealth Magistrates and Judges Association, played a crucial role in the development of the Latimer House Principles, developing and then helping each other to maintain a common framework to understand judicial independence. That common understanding flows through the appointments process and then into our conduct as judges.

Our Judicial Appointments Commission is refining its process with Commonwealth principles particularly in mind. And we may more readily come to the aid of the judges in other jurisdictions if under attack when they can show adherence to the high common standards of behaviour that the Latimer House principles promote. We demonstrate our interdependence through conferences such as this, and I do not doubt that the many jurisdictions of the Commonwealth can work together for our mutual benefit.

However we do it, if we stand together in our pursuit of judicial independence – as individuals and as institutions – we help maintain the rule of law. When we work effectively with the executive and Parliament, each of us within our own constitutional sphere, and garner the understanding and support of the public for what we do, collectively we sustain something that is precious – liberty under the rule of law.

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INTRODUCTION

“The State of Justice in the Commonwealth” was the rather all-encompassing, comprehensive title suggested to me for this address. Where does one begin? The state of justice in Scotland may be quite different from the state of justice in Queensland or the state of justice in Kiribati; for that matter it may even be different from that in England and Wales just over the border! From what angle does one approach it? From notions of a fair trial? From the process of sentencing, and detention? The provision of legal aid?

There may indeed be very many barometers of the state of justice in the Commonwealth. It seems to me, however, that a good indicator of progress in any legal system, is likely to be the way in which the most vulnerable and maligned members of society are treated. After all, it is against those people that the powers of the state may be most keenly felt, and perhaps most easily exceeded or abused. Those who fall foul of the criminal justice system are most obviously at the mercy of the exercise of punitive state powers, which may be subject to little in the way of public scrutiny or appetite to protect against possible injustice. The champions of the criminally accused, far less convicted, have, traditionally, been few. In the present day, however, there has been an increasing focus on the needs of vulnerable participants in our criminal justice system, beyond the narrow focus of offenders, proven or accused. In particular, the participation and treatment of children in criminal justice systems – whether as offenders, victims or witnesses – is now recognised as a matter of significant concern. For that reason, the “barometer” I have chosen to focus is that of the treatment of children in modern criminal justice systems.

In the Commonwealth context, there is clear recognition of the need for progress in the establishment of functioning juvenile justice systems. A Commonwealth Basic Framework has recently been designed “to guide member countries as to the key achievable elements that a juvenile justice system should include” in line with United Nations international standards, recognising that all Commonwealth countries are parties to the United Nations Convention on the Rights of the Child. Citing the Beijing Rules, the Basic Framework suggests a number of “necessary components” for an effective system, including the setting of a minimum age of “criminal responsibility”, and the implementation of sentencing according to the primary aim of rehabilitation rather than punishment. It is thought to be important, too, that the public understands the principles applicable to juvenile justice. Special arrangements should also be

1 “The degree of civilization in a society can be judged by entering its prisons.” – F. Dostoyevsky, The House of the Dead (1862).
2 The Commonwealth Basic Framework for the Implementation of a Functional Juvenile Justice System (Office of Civil and Criminal Justice Reform, 2017) available at: http://thecommonwealth.org/sites/default/files/key_reform_pdfs/P15370_18_ROL_Impl_Functional_Juvenile_Justice_System_0.pdf. (The revised draft was presented to Commonwealth Law Ministers at their meeting held 7 to 10 July 2008 in Edinburgh.) The OCCJR was launched in July 2017 in order to meet “the clear need for support to law reform, including implementation of international legal standards”: www.thecommonwealth.org/media/news/praise-commonwealths-new-momentous-justice-reform-office.
4 Ibid, p 3
5 Ibid, p 7, citing Rule 4: Beijing Rules. Rule 4 provides: “4.1 In those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.”
6 Ibid, p 6
7 Ibid, p 8, para 5 (iv): “In too many situations vocal groups are advocating that juveniles be treated in the same manner as adults… The principles that apply to juvenile justice are not only designed to protect and rehabilitate the juvenile but also protect the public from ongoing
made to ensure that child offenders are not “spectators in their own trial”\(^8\) and to deal with juvenile victims of crime, particularly in the giving of evidence in court, such as enabling them “to give evidence in another room within the courthouse using video links”\(^9\) in order to avoid adversely affecting the quality of their evidence. A number of factors may be relevant, therefore, in considering whether children are afforded appropriate treatment as an important aspect of any civilised justice system.

In Scotland, an uneasy dichotomy exists between the treatment of children under our substantive criminal law on the one hand, and the procedures applicable to our criminal justice system on the other. For many years, we have been in the somewhat unenviable position of recognising the lowest age of criminal responsibility in Europe, if not the wider Commonwealth.\(^10\) At present, at least, that age is 8 years.\(^11\) By contrast, however, significant and ongoing procedural developments in recent years have arguably placed us at the cutting edge of progress towards the enlightened treatment of children and other vulnerable witnesses in the course of criminal proceedings.

It is proposed, therefore, to consider the Scottish experience in the wider context of the Commonwealth’s aspirations regarding the functioning of juvenile justice systems, in the hope that to do so might assist and inform similar progress in other member countries. In the course of doing so, and bearing in mind the observations already made as to the state of juvenile justice in Scotland, it will be suggested that it is necessary to adopt a holistic approach to the evaluation of any legal system, in order to ascertain whether acceptable standards have been met, rather than focus on only one element.

Two particular themes will be explored: first, the significance of the minimum age of criminal responsibility; and secondly, the development of supportive and technological measures that may be employed to ensure the effective participation and fair treatment of children in criminal proceedings. Some related observations will be made on matters of sentencing.

**“CHILD OFFENDERS”: THE AGE OF CRIMINAL RESPONSIBILITY**

The Basic Framework applicable to the development of juvenile justice systems across the Commonwealth states\(^12\) that:

“A minimum age of criminal responsibility should…be set… The age of criminal responsibility should not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity…”

There is here a legal question to be answered, namely what is meant by criminal responsibility in this context? But allied to that legal question is the moral question of whether it is

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\(^8\) See, also, D Cipriani, *Children’s Rights and the Minimum Age of Criminal Responsibility: A Global Perspective* (2009), p 114 et seq (Downward Pressures: Isolated Crimes and Widespread Hype): “Even though movements to reduce MACRs are in the minority…related dynamics are particularly unwieldy. Case studies suggest that media and political grandstanding and other factors prey upon isolated cases of juvenile crime…”

\(^9\) *Ibid.*, p 6; see, eg, T v UK, V v UK (2000) 30 EHRR 121 (re the trial of two 11 year-olds for the murder, whilst aged 10, of 2 year-old James Bulger)


\(^12\) *Supra*, para 5 (i)
appropriate, in the present day, to recognise the existence of such a thing as a “child offender” at all. Might this be a phrase that ought, according to our contemporary conceptions of childhood, to be consigned to the history books alongside similarly punitive and outmoded concepts as child labour in developed societies? It may not be possible to resolve such an enquiry without also considering the consequences that might, or ought to flow from such a status. Such questions challenge us to consider our parallel conceptions of childhood and criminality, to interrogate our views as to the nature of “offending” behaviour that ought to merit criminal sanction, and perhaps also to strive for conclusions as to the proper basis upon which children may or may not be deemed responsible for their actions, whether criminally or otherwise. The age of criminal responsibility may denote the age at which a child may be deemed too young to be able to commit a crime, on the basis of their inability to form the necessary “evil” criminal intent. That may be due to a perceived inability to distinguish right from wrong, or naughtiness from serious wrongdoing; or to appreciate the basic causative potency of their actions, and exercise autonomous decision-making accordingly. Alternatively, it may simply indicate the age at which a child offender ought not to be subject to the full rigours of the system of prosecution or punishment for adults. In that case, the minimum age limit might indicate nothing more than a general view, on the grounds of public policy that, however egregious the offending conduct, a child ought never to be subject to criminal punishment. Whether on grounds of morality, or simple expediency in the avoidance of recidivism, it may be thought that children ought instead to be given every opportunity to redeem their lives, through education and rehabilitation, following upon any early misadventures. Thus, it has been suggested that rather than addressing issues of capacity, the age of criminal responsibility “is better conceptualised as relating to immunity from prosecution”13 albeit that the extent to which there is a practical difference amongst such notions may be uncertain. The issues which arise in this context have memorably been described by Lord Justice Gillen, of Northern Ireland, as “The Frontier between Care and Justice”14.

Returning to the legal question, the UN Convention on the Rights of the Child requires state parties to promote the establishment of “a minimum age below which children shall be presumed not to have the capacity to infringe the penal law”.15 Notwithstanding that reference to capacity, it is arguable that the wider context in which this article appears suggests that the issue should nevertheless be seen as one relating to the age of entry into the criminal justice system, rather than as a presumption against capacity. In Scotland, the relevant statutory provision is framed in terms of an irrebuttable presumption as to whether a child under a certain age “can be guilty of any offence”.16 It has been suggested17 that the statutory genesis of this provision18 tended to reflect the English approach to this issue, the Scots common law approach having concentrated not on deeming children incapable of guilt but as not being the suitable object for punishment. Similarly, for the purposes of the European Convention on Human Rights, it has been suggested19 that the Strasbourg court uses the concept of age of criminal responsibility “not in the sense of mens rea but as concerned with the appropriate methods of dealing with children who commit crimes. The focus of the Convention is with protecting

13 Scot Law Com report, para 1.5
14 Speech, Children Law UK Conference, Belfast, 2006
15 The UN Convention on the Rights of the Child (“UNCRC”), art.40(3)(a) requires State Parties “to promote the establishment of laws, procedures, authorities and institutions, specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law, and, in particular (a) the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law...” (emphasis added)
16 Criminal Procedure (Scotland) Act 1995, s 41 (Age of criminal responsibility), supra.
17 Scot Law Com report, para 2.5
18 Children and Young Persons (Scotland) Act 1932, section 14
19 ibid, para 2.18 under reference to T v UK; V v UK (supra)
children from the full rigours of criminal prosecution.” From these various perspectives it can be seen that the pursuit of the meaning of “criminal responsibility” in any particular legal system is not mere jurisprudential folly, but may be a significant aspect of ascertaining the scope of related international obligations, and the extent or appropriate methods of compliance.

What of those jurisdictions that do not recognise a minimum age of criminal responsibility at all?\(^\text{20}\) In such systems, criminal responsibility may simply follow upon personhood. Yet similar underlying factors may apply, at least for the purposes of ascertaining individualised rather than presumptive criminal responsibility in the circumstances of a particular case. Related questions may arise as to whether presumptions of criminal responsibility at any particular age are conclusive, or may be rebutted in certain circumstances. A rebuttable presumption of *doli incapax* operated, at least until relatively recently, in respect of children between the ages of 10 and 14 in England and Wales.\(^\text{21}\) Operation of that presumption had increasingly been the subject of judicial criticism as being inconsistently applied and capable of leading to unjust results, criticism most notably focused, perhaps, in *C (A Minor) v DPP*\(^\text{22}\). In a government consultation paper\(^\text{23}\) the presumption was described as archaic, illogical and unfair in practice.

In short, then, the criminal responsibility of children may be viewed as an aspect of substantive, procedural or evidentiary law, depending upon the nature of the underlying principles. Such rules may be formulated on the basis of innumerable underlying non-legal reasons, not only an increasing understanding of child developmental psychology, but also the emerging recognition of the need for the protection of vulnerable individuals in the criminal justice system, and of the related benefits of individualised, rehabilitative sentencing. On any view, these are complex issues, the relevance of which may differ according to societal norms across member countries.

It is necessary to exercise caution, therefore, in assessing the position of children in any criminal justice system merely by identifying the age at which, on whatever underlying legal basis, they may be held criminally liable for their actions. Whilst such an analysis may be superficially attractive for the purposes of comparative study, it is likely to reveal little of practical substance as to the treatment of children across different legal systems. A minimum age of criminal responsibility below the age of 12 may be deemed “not internationally acceptable”\(^\text{24}\): thus, the United Kingdom has been entreated to comply with “acceptable international standards”\(^\text{25}\). However, the ostensibly laudable imposition of a higher age limit\(^\text{26}\) might simply conceal, or at least fail to address the possibility of wider shortcomings in the treatment of qualifying children in subsequent criminal proceedings. The fact that fewer children may have attained sufficient age to be subject to such proceedings would hardly excuse broader procedural unfairness. Similarly, those few convicted as a result of such proceedings, as child offenders, may be

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juvenile-justice.html.
21 Crime and Disorder Act 1998, s 34 (Abolition of rebuttable presumption that a child is *doli incapax*) – “The rebuttable presumption of criminal law that a child aged 10 or over is incapable of committing an offence is hereby abolished.” For the purposes of the 1998 Act, a “child” is defined as “a person under the age of 14”: s 117.
22 [1995] 1 Cr App R 118; 1997 AC 1
26 See, eg, the Rome Statute of the International Criminal Court, art. 26 (Exclusion of jurisdiction over persons under eighteen): “The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.” But see, eg, Penal Reform International (PRI) Justice for Children Briefing No. 4, *The minimum age of criminal responsibility* (February 2013), p 2, available at: https://www.penalreform.org/wp-content/uploads/2013/05/justice-for-children-briefing-4-v6-web_0.pdf: “This is a jurisdictional provision and in effect defers the issue to national law.”
subject to excessively harsh punishment upon sentencing. A judicial system may recognise a lower age of criminal responsibility, yet provide for additional procedural safeguards of fairness during the trial process, including special youth courts and other protective measures, and subsequent offender-focused, rehabilitative dispositions upon sentencing. Thus, in the particular context of article 3 ECHR, the European Court has observed that:

“The effect upon a child of attributing criminal responsibility to him will depend primarily upon the nature of the trial procedure and sentences applicable to such a child under domestic law.”

A more nuanced comparison of different systems may render the apparent protection of a higher age of criminal responsibility largely illusory, at least when considered in isolation. Ultimately, what must be required of any legal system is a well-balanced combination of factors, not only the fixing of a suitable minimum age of criminal responsibility, whatever the legal basis for doing so, but also the provision of suitably child-focused measures for determining the extent of that responsibility, with appropriate safeguarding measures during the subsequent trial process, and the availability of a variety of sentencing options upon disposal, according to, inter alia, the age of the offender at the relevant time. There are many options, and opportunities, for reform: it is not a case of “one size fits all”.

There is of course, a contrary view, that whilst a particularly low age of criminal responsibility might appear to be undesirable, it allows greater scope for the individualised assessment of the “emotional, mental and intellectual maturity” of child offenders beyond any specified age, insofar as relevant to the particular circumstances of the alleged offending behaviour. The fixing of an appropriate age limit is likely to remain dependent, at least in part, on the extent to which the particular member country has sufficient resources available in order to allow the proper assessment of these aspects of a particular offender’s level of criminal responsibility, in the case of those offenders falling beyond the scope of any minimum age limit so fixed. It must be recognised that, in reality, an individualised approach to the assessment of the criminal responsibility of children is likely to be problematic, particularly where the infrastructure of the underlying legal system is insufficiently developed. As the Commonwealth law reformers have recently observed:

“Not all member countries have, for example, dedicated juvenile justice systems… Many countries also have outdated legislation relating to juvenile justice or no relevant legislation at all.”

The individualised assessment of criminal responsibility, according to the characteristics of the particular child, is likely to be possible only in those systems where significant investment towards the development and implementation of such outcomes is possible.

In Scotland, for example, recent developments in respect of the individualised, risk-based sentencing of adults have required significant investments of time and money in order to create

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27 Historically, the differential treatment of child offenders in Scotland involved consideration of the circumstances in which children could be liable to capital punishment: see, eg, annotations to the Children and Young Persons (Scotland) Act 1937, s 55 (Age of criminal responsibility, re-enacting section 14(1) of the 1932 Act) in Trotter, The Law as to Children and Young Persons (1938), p 104, citing Alison, vol 1, p 665: “Pupils, though below fourteen years of age, nay though only nine, ten, or eleven years of age, may be subjected to an arbitrary punishment, if they appear qualified to distinguish right from wrong, but not to the pain of death.” See, now, art.37 of the UNCRC: “Neither capital punishment nor life imprisonment shall be imposed for offences committed by persons below eighteen years of age… The arrest, detention or imprisonment of a child…shall be used only as a measure of last resort and for the shortest appropriate period of time”.

28 T v UK; V v UK (2000) 30 EHR 121, concurring opinion of Lord Reed at 192

29 Basic Framework, supra, para 5 (i)

30 Basic Framework, supra, Introduction, p 1
the necessary infrastructure to support and implement the underlying risk assessment process.\textsuperscript{31} Related pressures may arise in relation to the provision of reasonable opportunities for rehabilitation, as a necessary corollary to individualised risk-based detention.\textsuperscript{32} That being so, it is likely to be desirable, at least in the first instance, for member countries lacking such resources to focus on the age of minimum criminal responsibility as a critical safeguard and foundation for further development.

Opinion in Scotland as to the correct approach to the imposition of criminal responsibility remains divided. The repeated recommendation of the law reformers (in 1964, and in 2002\textsuperscript{33}) has been that, due to the existence of a well-established “welfare-oriented system”\textsuperscript{34} to deal with the majority of child offenders, as exists in Scotland in the form of the Children’s Hearing system, there should be no need to retain a minimum age of criminal responsibility, in the sense of capacity to commit crime; instead, “the idea of age of criminal responsibility should be based on freedom from criminal prosecution.”\textsuperscript{35} Such a bold approach has not, however, found favour with the governments of the day. Tentative steps of a different kind, reflecting the approach advocated in the wider Commonwealth context, are now being taken. In March of this year, draft legislation was introduced to the Scottish Parliament, which would raise the age of criminal responsibility from 8 to 12 years, and prohibit the reference to a Children’s Hearing of a child under that age on offence based grounds.\textsuperscript{36} Similar legislative proposals have been made elsewhere in the United Kingdom, although progress has been slow.\textsuperscript{37} The current version of the draft legislation for England and Wales would raise the age of criminal responsibility from 10 to 12\textsuperscript{38}, reflecting increasing trends elsewhere.\textsuperscript{39}

Nonetheless, it remains of some significance that, according to the current law in Scotland, offences committed by under-12s are not subject to prosecution through the adult criminal justice system\textsuperscript{40}, and children aged between 12 and 16 may be prosecuted only by the special authority of the Lord Advocate, Scotland’s chief prosecutor, where to do so would be in the public interest\textsuperscript{41}. The public interest is likely to favour the prosecution of children only in the

\begin{itemize}
\item A new public body – the Risk Management Authority (RMA) was created for such purposes: Criminal Justice (Scotland) Act 2003, s 3.
\item Brown v Parole Board for Scotland [2018] UKSC 69.
\item Scots Law Com report, para 2.13, expressing agreement with the earlier recommendations of the Kilbrandon Committee, supra.
\item A new public body – the Risk Management Authority (RMA) was created for such purposes: Criminal Justice (Scotland) Act 2003, s 3.
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rarest of cases. Instead, any alleged child offending is likely to be referred to so-called “children’s hearings”, which are expressly required to take place within accommodation and facilities “dissociated from courts exercising criminal jurisdiction and police stations” and with a statutory injunction “to regard the need to safeguard and promote the welfare of the child throughout the child’s childhood as the paramount consideration” upon disposal. Children must be given the opportunity to express views, to which the children’s hearing must have regard, so far as practicable and taking account of the age and maturity of the child. A children’s hearing must also consider whether to appoint a “safeguarder” in the interests of the child to whom the hearing relates, and may do so at any time during the proceedings. Such appointments are made from a panel of suitable persons, who have undergone adequate specialist training in relation to, inter alia, how best to elicit the views of the child.

This “welfare principle” has been a feature of the treatment of child offenders in Scots law, and enshrined in statute, since at least the 1930s. In terms of the current legislative provisions, however, what may perhaps be most remarkable about the children’s hearings system, from an international perspective, is that it provides for the unified treatment of both child offenders, and those children against whom offences may have been committed. If it is determined that a child is in need of compulsory measures of care, a compulsory supervision order will be imposed, in terms of which a number of measures deemed necessary for the child’s welfare may be made. For example, the order may regulate contact with parents, guardians or other adults; may direct the local authority to arrange any medical or other examination or treatment of the child that may be required; and may require the child to be placed in foster care, or residential, or even secure, accommodation. Ultimately, the child may be required to comply with “any other specified condition”, thereby allowing maximum flexibility to address the particular circumstances of any offending behaviour and the needs of the particular child in question.

The children's hearing is a lay tribunal, and does not constitute criminal proceedings leading to conviction, although the same age of criminal responsibility applies to any allegations of criminal behaviour which may lie behind the referral. The courts merely play a secondary,

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42 See, eg, Scot Law Com report, para 3.8 and 3.9 in respect of the exercise of prosecutorial discretion, and the presumption of non-prosecution of under-16s. See, also, para 3.16: “...no other European legal system permits the prosecution of children to be based entirely on discretion without also an absolute prohibition on the prosecution of children below a defined age.”

43 Children’s Hearings (Scotland) Act 2011, s 21(3)

44 See, eg, the Children and Young Persons (Scotland) Act 1937, section 49(1): “Every court in dealing with a child or young person who is brought before it, either as being in need of care or protection or as an offender or otherwise, shall have regard to the welfare of the child or young person and shall in a proper case take steps for removing him from undesirable surroundings, and for securing that proper provision is made for his education and training.” (emphasis added) Trotter (supra), p 87 observes (n 4) that: “This important section sets forth the principles upon which the court must act when dealing with a child or young person whom they find guilty of an offence… The reformation and well-being of the juvenile must be the aim of the court. To that end, the court is vested with ample powers…to deal with neglectful parents…for lack of parental responsibility is a factor in juvenile delinquency.”

45 Norrie, Children’s Hearings in Scotland (W Green, 2013), p.5: “The unusual feature lies in the fact that it is the same tribunal, operating under the same procedural rules and having the same disposals available, that deals with all children identified as being in need of help, whether because they have committed an offence or because they have been abused or neglected.” The author continues: “Even more remarkable, perhaps, is the fact that Scotland retains this grasp on reality in the face of near universal retreat from it elsewhere in the developed world.”, citing Hallett, Ahead of the game or behind the times? The Scottish Children’s Hearings System in international perspective (2000) 14 Int J Law Pol & Fam 31. The Scottish system has been described as “progressive” in an international context: UNICEF Innocenti Digest, supra, p 5.

46 2011 Act, s 83(6)

47 See, eg, Merrin v S 1987 SLT 193, Lord Justice Clerk (Ross) at 196: “A child under the age of eight years cannot have mens rea.” Thus, a 7 year old child could not be referred for compulsory measures of care on the basis of alleged criminal offending, being of nonage in terms of criminal capacity. Nonetheless, a child referred on offence grounds is not thereby “charged with a criminal offence” for the purposes of art.6 ECHR: S v Principal Reporter (No 1) 2001 SC 977.

48 Norrie (supra), p 51 citing McGregor v T 1975 SLT 76, Lord President Emslie at 81, and S v Miller 2001 SLT 531. Thus, a child may be referred to a children’s hearing in respect of alleged criminal offending from the age of 8, albeit no criminal prosecution may proceed until the age of 12: Criminal Procedure (Scotland) Act 1995, s 41A. Similar behaviour on the part of under-8s may be dealt with on the basis that “the child’s conduct has had, or is likely to have, a serious adverse effect on the health, safety or development of the child or another person”, albeit that it could not amount to criminality: Norrie (supra), p 51, eg 2011 Act, s 67(2)(m).
complementary role in establishing the factual basis upon which an appropriate disposal may be determined by the children’s hearing.\textsuperscript{49} Thus, any alleged offending that may be referred to the children’s hearing, as possible grounds for child protection, guidance, treatment or control measures to be imposed\textsuperscript{50}, will be subject to proof according to the usual criminal standard and fair trial guarantees.\textsuperscript{51} A decision that runs contrary to the principle of paramountcy of the child’s welfare is permissible only where it is necessary “for the purpose of protecting members of the public from serious harm (whether physical or not)”\textsuperscript{52} but having regard, nonetheless, to “the need to safeguard and promote the welfare of the child throughout the child’s childhood as a primary consideration”\textsuperscript{53}. In any event, disposals must be proportionate insofar as amounting to an interference with the rights of children and parents to respect for their private and family lives.

Even in those rare cases where criminal proceedings have been instigated, the children’s hearing system plays a complementary role, in return, in respect of child offenders who plead or have been found guilty by the criminal courts.\textsuperscript{54} The court may remit such cases to the children’s hearing for the purposes of appropriate welfare-oriented disposal, or advice on the appropriate treatment of the child in any criminal justice disposal by the court itself.

Subject to these considerations, the children’s hearings system offers a highly individualised approach to child offending: according to welfare principles, the proper focus ought to be ‘needs not deeds’.\textsuperscript{55} The successful integration of child welfare and criminal justice systems in Scotland also demonstrates the potential that may exist in other member countries to address the full spectrum of juvenile offending by adapting existing segregated systems. It also suggests that assessing the treatment of children in a criminal justice system by reference only to the age of criminal responsibility, or indeed any other single factor, may be both simplistic and potentially misleading.

Where there remains a possibility that children may be subject to criminal prosecution and sentencing similarly to adults, however, particular importance must be attached to the continuing development of the adult system, in order to provide adequately for the needs of those who may be fairly described as “vulnerable offenders”. The mere fact that such a phrase is little used (unlike the more familiar reference to “vulnerable witnesses” or alleged victims) may be indicative of cause for concern, but to develop that thought would require a different speech entirely. Suffice it to say for the present that certain measures for vulnerable witnesses, available to a vulnerable accused who wishes to give evidence, appear to be significantly under-utilised.

Whatever approach is adopted in respect of the liability of children to face criminal prosecution, the fundamental point remains that:

\textsuperscript{49} See, eg, Sloan v B\textsuperscript{1991 SC 412}, Lord Hope at 438: “The genius of this reform [following the report of the Kilbrandon Committee, supra], which has earned it so much praise…was that the responsibility for the consideration of the measures to be applied was to lie with what was essentially a lay body while disputed questions of fact as to the allegations made were to be resolved by the sheriff sitting in chambers as a court of law. The right to dispute the grounds for the referral is an essential part of the system…”

\textsuperscript{50} ie “grounds for referral” or “section 67 grounds”: 2011 Act, section 67; including that “the child has committed an offence” (s 67(2)(j)). The potential disposals are the same, whether the ground relates to child offending or otherwise.

\textsuperscript{51} 2011 Act, s 102(3); in Scotland, the criminal standard of proof is ‘beyond reasonable doubt’ by way of corroborated evidence.

\textsuperscript{52} 2011 Act, s 26(1)(a)

\textsuperscript{53} 2011 Act, s 26(1)(b) and (2) (emphasis added)

\textsuperscript{54} Criminal Procedure (Scotland) Act 1995, s 49

\textsuperscript{55} Hallett (supra), at 36: “The capacity to respond to similar ‘deeds’ differentially on the basis of dissimilar needs remains a characteristic of the Children’s Hearings System to this day;”; see, however, the observations of children’s reporters, cited at 42: “[T]he wee sort of catch phrase is needs not deeds, so we’re looking at the needs of this child. Sometimes it’s maybe not been considered to be a need of this child that he requires discipline…or punishment.”
“it is essential that a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings.”

With that in mind, recent developments in Scotland, which have begun a process that aims to revolutionise the treatment of children, and other vulnerable participants, in the criminal trial process, bear further examination.

**CHILD PARTICIPANTS IN THE CRIMINAL JUSTICE SYSTEM: OFFENDERS, VICTIMS AND WITNESSES**

In Scotland, an extensive review of the rules of evidence and procedure applicable to criminal cases is currently underway, with a particular emphasis on the greater use of pre-recorded evidence in all cases, and particularly those cases involving child and other vulnerable witnesses. In the latter regard, the work of a multi-disciplinary review group has already resulted in the substantial updating of procedures regarding the taking of evidence of vulnerable witnesses “to reflect current thinking on approaches to enabling vulnerable witnesses to give their best evidence” particularly in the most serious criminal cases involving child witnesses.

To a large extent, Scotland occupies a middle ground in this regard. Whilst huge strides have been made, it is fair to say that Scotland came late to the party, and it is important for me to acknowledge that we have learned a great deal from our Commonwealth colleagues in whose enlightened steps we are now beginning to follow. In particular, we have been fortunate to have been able to draw on the valuable experience in Western Australia of the use of pre-recorded testimony for vulnerable witnesses in order to inform our developing approach to the pre-recording of evidence of child and vulnerable witnesses in adversarial criminal proceedings in Scotland. We also benefitted enormously from the assistance of our colleagues south of the border, who arranged for us to observe and learn about their experience of a pilot of the so-called “Full Pigot” regime, named for the judge who chaired the body which first recommended pre-recording of testimony in that jurisdiction. To that extent, our legal system may be a good example of what might be achieved by lifting one’s gaze, and looking to learn from the related experience of other member countries. Many such systems may be at a comparatively early stage of development with regard to juvenile justice, and there is much that may be gained from the sharing of collective knowledge and experience.

The category of “vulnerable witnesses” who already receive particular statutory protection according to Scots law includes children under the age of 18, who are automatically considered to be vulnerable in all cases, and children under the age of 12, who may require

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56 *T v UK, V v UK* (2000) 30 EHRR 121, para 86
58 See, generally, the *Evidence and Procedure Review – Child and Vulnerable Witnesses Project, supra.*
60 Ibid, p 4, para (iii)
62 *Report of the Advisory Group on Video Evidence chaired by HHJ Thomas Pigot QC.*
63 See, generally, the Criminal Procedure (Scotland) Act 1995, ss 271 – 271Z and 288C – 288F
additional protection.\textsuperscript{64} The statutory provisions enable one or more “special measures”\textsuperscript{65} to be authorised by the court, for the practical purpose of enabling the witness either to give oral or written evidence at an earlier stage, prior to trial, or to present “live” oral testimony more effectively in the trial courtroom itself. Child witnesses are automatically entitled to benefit from the “standard special measures”, which include the use of a live television link, screen or supporter.\textsuperscript{66} Where a live link is used, the witness may be located in another part of the court building, or any other suitable place outwith that building.\textsuperscript{67} Where a screen is to be used, the accused is concealed from the sight of the witness, but remains able to watch and hear the witness giving evidence.\textsuperscript{68} Other measures may be authorised, unless there would be a significant risk of prejudice to the fairness of the hearing, which significantly outweighs any risk to the witness.\textsuperscript{69} Where the witness gives evidence before a commissioner, outwith the trial court setting, the accused is not entitled to be in the same room, without special leave of the court, but may watch and hear the proceedings by other suitable means. Such proceedings are routinely video recorded in any event.\textsuperscript{70}

In the trial setting, the public may be excluded from the courtroom during the taking of the witness’s evidence (ie a “closed court”).\textsuperscript{71} More significantly, however, prior statements may be admitted as the witness’s evidence in chief, in whole or in part, without the witness being required to adopt or otherwise speak to the statement by giving evidence in court.\textsuperscript{72} Such statements may include any recording of a so-called “joint investigative interview” (“JII”). Such interviews are routinely carried out by police officers and social workers together where children under the age of 16, and in some cases children between the ages of 16 and 17, are the victims of, or witnesses to, a potential criminal offence and there are related child protection concerns. JIIs will generally be audio-visually recorded, unless the child does not consent. Taken together, these provisions allow for significant technological innovation in the taking of evidence in a pre-recorded setting.\textsuperscript{73} As a result, there may be cases in which such witnesses do not require to attend court to give “live” testimony at trial at all. Instead, the testimony of child witnesses may be captured at an early stage, and subjected to cross-examination at that time, as close to the relevant events as possible, before memories begin to fade.

In certain cases of serious criminality, where child witnesses under the age of 12 are anticipated to give evidence, additional safeguards prohibit the accused from conducting his own defence and thereby questioning the child directly,\textsuperscript{74} and prevent the court from forcing a child witness to be present in the courtroom, unless the giving of evidence in some other way would give rise to a significant risk of prejudice to the fairness of the trial, which significantly outweighs any risk of prejudice to the witness\textsuperscript{75}. Reporting restrictions will also apply, in order to protect the identity of children under the age of 18 who are involved in any criminal proceedings.\textsuperscript{76}

\textsuperscript{64} 1995 Act, section 271 (“child witnesses”). There is no bar to the accused being treated as vulnerable: 1995 Act, section 271F.
\textsuperscript{65} 1995 Act, section 271H
\textsuperscript{66} 1995 Act, section 271A(4A)
\textsuperscript{67} Such a place will be treated as part of the courtroom in order that the giving of evidence is deemed to take place in the presence of the accused, as generally required in the interests of fairness: 1995 Act, section 271J.
\textsuperscript{68} 1995 Act, section 271K
\textsuperscript{69} 1995 Act, section 271A(10)
\textsuperscript{70} 1995 Act, section 271I
\textsuperscript{71} 1995 Act, section 271HB
\textsuperscript{72} 1995 Act, section 271M(2)
\textsuperscript{73} See, eg, High Court of Justiciary Practice Note No. 1 of 2017.
\textsuperscript{74} 1995 Act, section 288E. The accused is, in any event, prohibited from conducting his own defence in respect of certain sexual offences: 1995 Act, section 288C. A similar prohibition is not yet in force in relation to cases of domestic abuse: 1995 Act, section 288DC, inserted by the Domestic Abuse (Scotland) Act 2018.
\textsuperscript{75} 1995 Act, section 271B(6)
\textsuperscript{76} 1995 Act, section 47. The arrangements for the taking of a vulnerable witness’s evidence may be reviewed at any stage in the proceedings.
Some statutory barriers to further progress in these areas remain, and further reforms have been proposed, which would have “the practical effect of allowing either the full or partial evidence of a child under the age of 18 years...to be taken in advance of trial and visually recorded”, \(^{77}\) in circumstances which balance the right of vulnerable participants not to suffer undue harm in the giving of evidence in criminal proceedings against the right of the accused to a fair trial. \(^{78}\) The Vulnerable Witnesses (Criminal Evidence) Bill currently being considered by the Scottish Parliament proposes a new regime for child victims in serious cases, where all their evidence would be pre-recorded in advance of the trial, as a standard special measure, and where this may be done even prior to service of the indictment.

**SENTENCING AND WELFARE DISPOSALS IN RESPECT OF CHILD OFFENDERS**

Finally, it is necessary to mention briefly the matter of sentencing or other welfare disposals that may be deemed appropriate to address any particular instances of juvenile offending. The broad and flexible powers of the children’s hearing to determine appropriate welfare disposals in response to established offending behaviour, have been examined already. In the criminal justice sphere, the Scottish courts have also adopted a similar and consistent approach to the sentencing of convicted child offenders, with particular regard to the welfare and best interests of the child, as a primary consideration commensurate with the UN Convention \(^{79}\), and the need to facilitate rehabilitation and reintegration into society. \(^{80}\) In that context, it has been considered legitimate to contemplate by comparison the sentence that might have been imposed upon an adult offender in respect of the same offences. The appropriate sentence for a child “ought normally to be significantly below those levels”. \(^{81}\)

It is notable that similar underlying factors inevitably arise in relation to the appropriate “discount”, at the point of sentencing, as have been considered previously in relation to the fixing of the appropriate age of criminal responsibility in the first place. Thus, the relative and transient immaturity of child offenders, generally indicating that they are less blameworthy or more worthy of forgiveness than adult offenders, will be relevant to the retributive and deterrent aspects of sentencing. \(^{82}\) The same factors which underlie selection of an age of criminal responsibility will remain relevant to inform the subsequent assessment of fair and appropriate treatment of those children who do enter the criminal justice system as a consequence.

**CONCLUSION**

In conclusion, those who have contributed to the fairer treatment of children in our criminal justice systems across the Commonwealth are to be congratulated, encouraged and supported to

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\(^{77}\) Evidence and Procedure Review – Child and Vulnerable Witnesses Project (Pre-recorded Further Evidence Work-stream), supra, para 21; cf 1995 Act, section 271A.

\(^{78}\) See, eg, ss 271A(10), 271B(6), 271D(4) and 288F(3), 1995 Act.

\(^{79}\) UNCRC, art. 3(1)

\(^{80}\) See, eg, McCormick v HM Advocate 2016 SLT 793; O’Hara v HMA 2017 SLT 71

\(^{81}\) Kane v HMA 2003 SCCR 749; McCormick v HM Advocate (supra), para 3, applying Hibbard v HM Advocate 2011 JC 149 at para 15; see, also, Greig v HM Advocate 2013 JC 115 at para 9

\(^{82}\) See, eg, R (Smith) v Secretary of State for the Home Department [2006] 1 AC 159, Lady Hale at paras 23 – 25 cited in McCormick v HM Advocate (supra) at para 5. Cf Norrie (supra), p 5: “the proceedings at a children’s hearing are private and members of the public are not to be admitted... Deterrence of others plays no part in either the hearing’s deliberations or its outcomes.”
continue their efforts. The principled guidance to be derived from the Basic Framework, coupled with the sharing of practical experience across member countries, undoubtedly provides a solid foundation for progress. It is, of course, in the most serious cases of offending that our resolve and commitment to the welfare of child offenders, in particular, may be tested the most. Nonetheless, we must continue to build our resilience to such challenges by establishing robust, thoughtful and well-understood systems, making the most effective use of available resources and technological advances, to maintain the state of justice in the Commonwealth that our modern society deserves.

I have concentrated on the Scottish experience - it would have been presumptuous of me to do otherwise – but I hope that it may provide inspiration, showing that significant progress is possible, even from relatively inauspicious beginnings, where the requisite legislative and judicial will exists to effect change. It perhaps provides a small example of how we may indeed become stronger together.
“Psychological Issues of Victims of Sexual or Domestic Abuse”
By Dr Dianne Douglas,
Clinical Psychologist, Trinidad and Tobago

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

Slide 1
4 Key Terms:
• Psychological
• Victims
• Sexual or Domestic Abuse
• Court

Slide 2
4 Key Terms:
Psychological:
• Related to the mental and emotional state of a person.
• Internal world
• Their subjective realities

Slide 3
Victim

Slide 4
Victim:
• A person harmed, injured, or killed as a result of a crime, accident, or other event or action.
• A person who has come to feel helpless and passive in the face of misfortune or ill treatment.
• Someone who has been hurt, damaged, or killed or has suffered, either because of the actions of someone or something else, or because of illness or chance

Slide 5
What is Domestic Violence or Abuse?
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.

Slide 6
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.
Dr. Dianne Douglas,
diadouglas@juno.com
UN Women’s Partnership for Peace Manual

Slide 7
Court:
• Justice
• Unbiased
• Objective
• Fair hearing
• Rule of law
• Humane and sensitive
**Slide 8**
**BOUNDARIES:**
Where I end and the other person begins

**Slide 9**
**Who am I? Self-awareness**

**Slide 10**
**Personal Views and Experiences:**
- Gender
- Trauma
- Domestic or sexual abuse

**Slide 11**
**Activity**

**Slide 12**
**Personal Views and Experiences:**
- The Case of the Surgeon
- Race /Ethnicity
- Parental Modelling and Gender

**Slide 13**
**What is Emotional and Psychological trauma?**
- Emotional and psychological trauma is the result of extraordinarily stressful events that shatter your sense of security, making you feel helpless in a dangerous world.

**Slide 14**
**What is Emotional and Psychological trauma?**
- Traumatic experiences often involve a threat to life but any situation that leaves you feeling overwhelmed can be traumatic, even if it doesn’t involve physical harm.

**Slide 15**
**What is Emotional and Psychological Trauma?**
- It’s not the objective facts that determine whether an event is traumatic, but your subjective emotional experience.
- The more frightened and helpless you feel, the more likely you are to be traumatized.

**Slide 16**
**Your Trauma History**

**Slide 17**
**Sexual History Questions:**
- How old were you when you had your first sexual experience?
- How many sexual partners have you had in your lifetime?
- Describe your least satisfying sexual encounter.

**Slide 18**
**International Human Rights Law Documents:**
- Defining Gender-based Violence and Sexual Assault

**Slide 19**
**Definition: Gender-Based Violence**
Gender-based violence and 'violence against women' are terms that are often used interchangeably as most gender-based violence is inflicted by men on women and girls.
Slide 20
Definition: Gender-Based Violence
The 'gender-based' aspect of the concept highlights the fact that violence against women and girls is an expression of power inequalities between women and men.
http://www.health-genderviolence.org/news/191

Slide 21
Definition: Gender-Based Violence
Violence against women and girls is gender-based: It does not occur to women and girls randomly or by coincidence
http://www.health-genderviolence.org/news/191

Slide 22
Definition: Gender-Based Violence
The violence is directed against a woman or a girl simply because she is female
http://www.health-genderviolence.org/news/191

Slide 23
Forms and contexts of gender-based violence against women:
" (a) Physical, sexual and psychological violence occurring in the family; including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation.
http://www.health-genderviolence.org/news/191

Slide 24
Forms and contexts of gender-based violence:
While GBV occurs to women in all areas of life, the family is the place where women experience the most violence.
According to WHO estimates, nearly one-third (30%) of all women worldwide who have ever lived in a relationship have experienced physical and/or sexual violence from an intimate partner.
http://www.health-genderviolence.org/news/191

Slide 25
Forms and contexts of gender-based violence:
Women are disproportionately affected by killings committed by intimate partners and other family members.
Women represent about 20% of homicide victims worldwide and they make up almost two thirds of all persons killed by an intimate partner and other family members (UNODC 2014).
http://www.health-genderviolence.org/news/191

Slide 26
Types of Violence/Abuse/Assault

Slide 27
Sexual Abuse/Violence/Assault:
Any situation in which you are forced to participate in unwanted, unsafe, or degrading sexual activity. Forced sex, even by a spouse or intimate partner with whom you also have consensual sex, is an act of aggression and violence.

Slide 28
Sexual Violence or Assault:
Any sexual act, attempts to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed against a person’s sexuality, using coercion by any person
regardless of their relationship to the victim in any setting including but not limited to home or work.

**Slide 29**

**Sexual Violence or Assault:**

Acts of sexual violence include:
- Rape
- Unwanted sexual advances or sexual harassment
- Demands for sex in exchange for job promotion or a higher grade
- Trafficking for the purpose of sexual exploitation

**Slide 30**

**Sexual Violence or Assault:**
- Forced exposure to pornography
- Forced pregnancy, forced sterilization, forced abortion
- Forced marriage, early/child marriage
- Female genital mutilation
- Virginity testing
- Incest

**Slide 31**

**Psychological or Emotional Abuse:**
- Wears down the victim’s self-confidence and self-esteem by using verbal abuse: ridicule, jealous accusations, angry reactions, constant criticism, constant accusations of unfaithfulness, monitoring her whereabouts, asking her to closely account for her time or money, humiliating her in front of others and isolating her.

**Slide 32**

**Battering:**
- A pattern of behaviors through which one person continually reinforces a power imbalance over another in an intimate/romantic relationship context.

**Slide 33**

**Physical abuse:**
Physical abuse is the use of physical force or physical aggression against someone in a way that injures or endangers that person.

**Slide 34**

**Economic or Financial abuse:**
- Rigidly controlling your finances.
- Withholding money or credit cards.
- Making you account for every penny you spend.
- Withholding basic necessities (food, clothes, medications, shelter).

**Slide 35**

**Economic or Financial Abuse:**
- Restricting you to an allowance.
- Preventing you from working or choosing your own career.
- Sabotaging your job (making you miss work, calling constantly).
- Stealing from you or taking your money.

**Slide 36**

**STALKING** is harassment of or threatening another person, especially in a way that haunts the person physically or emotionally, in a repetitive and devious manner, where the victim fears for their safety. Stalking of an intimate partner can take place during the relationship, with intense monitoring of the partner’s activities.
Slide 37

Stalkers employ a number of threatening tactics:
- Repeated phone calls, sometimes with hang-ups
- Following, tracking (possibly even with a global positioning device)
- Finding the person through public records, online searching, or paid investigators
- Watching with hidden cameras
- Suddenly showing up where the victim is, at home, school, or work
- Sending emails; communicating in chat rooms or with instant messaging
- Sending unwanted packages, cards, gifts, or letters
- Monitoring the victim’s phone calls or computer-use
- Contacting the victim’s friends, family, co-workers, or neighbors to find out about the victim
- Going through the victim’s garbage
- Threatening to hurt the victim or their family, friends, or pets
- Damaging the victim’s home, car, or other property

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Cyberstalking is the use of telecommunication technologies such as the Internet, email, social media to stalk another person. Cyberstalking is deliberate, persistent, and personal.

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Spiritual Abuse
- Using the spouse’s or intimate partner’s religious or spiritual beliefs to manipulate them
- Preventing the partner from practicing their religious or spiritual beliefs
- Ridiculing the other person’s religious or spiritual beliefs
- Forcing the children to be reared in a faith that the partner has not agreed to

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The Cycle of Violence

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PANEL SESSIONS

PANEL SESSION 3A
“The Role of Judicial Associations in the Modern Era”
By the Chief Judge John Lowndes, Australia

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Introduction
Any democratic society that respects the principle of judicial independence and values the rule of law needs judicial associations to protect the independence of the judiciary as the third branch of government and to preserve the rule of law as the other cornerstone of democracy. Although almost three decades ago Justice McGarvie outlined a number of “foundations of judicial independence”, but did not include judicial associations as one of those foundations (Justice McGarvie “The Foundations of Judicial Independence in a Modern Democracy” Journal of Judicial Administration (1991) 1, pp 3-45), he certainly came close to including them when he observed (at p 22): In Australia, it is proper and expected that leaders within the legislative arm and the executive arm of government are alert and active to ensure that their arm is adequately sustained and protected. It is for judges to act in the same way in respect of their arm of government.

Judicial Associations are the perfect means by which the judiciary can ensure that the judicial branch of government is adequately sustained and protected. Judicial associations are truly a foundation of judicial independence.

The judiciary has traditionally been regarded as the weakest (Alexander Hamilton The Federalist Papers No 78) and most vulnerable branch of government – and yet it is expected to be the guardian and guarantor of judicial independence and the rule of law. However, the independence it seeks to sustain and protect (in the interests of preserving the rule of law) is always at risk due to the very weakness and vulnerability of the judiciary within the structure of government. Judicial associations serve the function of addressing the power imbalance between the judiciary and the other two more powerful arms of government, with a view to making the judiciary an equal branch of government. They achieve this by bringing the judiciary together and augmenting the power and influence of the judiciary as the third branch of government – a simple and pure case of “becoming stronger together”.

As the active and public voice of the judicial branch of government, judicial associations play a vital role in strengthening and defending the independence of the judiciary and preserving the rule of law in a modern democracy.

Judicial Associations as Legitimate Entities
Judicial associations are an internationally recognised phenomenon that have a legitimate existence in modern society.
Principle 9 of the *United Nations Basic Principles on the Independence of the Judiciary* states:

*Judges shall be free to form and join associations of judges or other organisations to represent their interests, to promote their professional training and to protect their independence.*

Similar recognition of judicial associations as legitimate entities is to be found in Article 8 of the *Beijing Statement of Principles on the Independence of the Judiciary in the Law-Asia Region*, Article 22 of the *Syracuse Principles on the Independence of the Judiciary* and Article 2.09 of the *Montreal Declaration*.

Perhaps, the fullest recognition of the legitimacy of judicial associations is to be found in the very recent *Brisbane Declaration on the Independence and Integrity of Judicial Officers of the Lower Courts* (endorsed and issued by the General Assembly of the CMJA at the 18th Triennial Conference on 13 September 2018)), which also provides a blueprint for the objects or purposes for which judicial associations may be formed (see below at p 8).

**The Need for Judicial Associations**

The judicial branch of government is traditionally regarded as “the least powerful (although it may be influential) in that it may act only when resorted to by parties who choose to invoke its jurisdiction and because it is dependent upon the other branches of government to enforce its decisions” (Justice Nicholson “Judicial Independence and Accountability: Can They Co-Exist? (1993) 67 ALJ 404, p 410). Alexander Hamilton concluded that “the judiciary is beyond comparison the weakest of the three departments of power” because: *The judiciary …has no influence over either the sword or of the wealth of society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments…. (Alexander Hamilton The Federalist Papers No 78, p 504).*

The judicial branch is also the least powerful of the three branches of government because of its “over –dependence upon the administrative and financial resources from the executive arm of government” (John Lowndes “The Australian Magistracy: From Justices of the Peace to Judges and Beyond- Part 11” (2000) 74 ALJ 592 at 601).

Furthermore, Parliament has a right to reorganise the court system in “the interests of the improvement of the judicial system” (“A Brief History of the Early Days of the Judicial Conference of Australia” (Brief History), prepared by the Secretariat of the Judicial Conference of Australia), p 17). However, the possibility that “the real reason for a particular reorganisation is to rid government of a court which itself is regarded, or some of whose members are regarded, as inconvenient” (Brief History, p 17) lays bare the vulnerability of the judicial branch of government.

The circumstances that make the judiciary the least powerful branch of government also make it the most vulnerable branch. Given the judiciary’s lack of power and vulnerability within the structure of government there are very few protective mechanisms to protect its independence.

The primary protective mechanisms are the Latimer House Principles and the doctrine of the separation of powers. Although these Principles encourage mutual respect between the three branches of government in relation to the fulfilment of “their respective but critical roles in the
promotion of the rule of law in a complementary and constructive manner” (Principle 11)(b)) - as well as acknowledging that “each Commonwealth country’s Parliaments, Executives and Judiciaries are the guarantors in their respective spheres of the rule of law” (Principle 1) and that “an independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice” (Principle 1IV) – they afford minimal protection for the judicial branch of government as they have not been formally adopted by governments across the Commonwealth, except for the Australian Capital Territory of Australia.

That only leaves the doctrine of the separation of powers. However, because this doctrine is not always constitutionally entrenched or legislated, and only operates by way of the common law or convention, it remains “an incomplete and fragile mechanism for ensuring judicial independence” (John Lowndes “Judicial Independence and Judicial Accountability at the Coalface of the Australian Judiciary”, a paper delivered at the Northern Territory Bar Association in Dili, East Timor July 2016, p 24). As noted by Diana Woodhouse (United Kingdom, The Constitutional Reform Act 2005- Defending Judicial Independence the English Way” (2007) 5 IJCL 153 at 158), where the doctrine of the separation of powers is based on “understandings, convention and guidance” its efficacy depends on “a commonality of purpose and shared values across various political, institutional and judicial cultures”. However, “developments in government – such as the emphasis on public management and efficiency, changes in the role and focus of the judiciary making it more outward looking, and increased public expectations coupled with a decline in public trust – mean that the relationships that have promoted a sharing of values are changing” and “commonality of purpose can no longer be assumed” (Woodhouse at 158).

Notwithstanding the fundamental importance of the Latimer House Principles and the doctrine of the separation of powers as institutional safeguards of judicial independence they are fragile mechanisms that are liable to shatter in an instant - even in a modern and stable democracy. Traditional thinking maintains that the judiciary and the public should look to the Attorney-General (in Australia) or to the Lord Chancellor (the equivalent office in the UK) to defend the courts and the judiciary from threats to judicial independence and unjustified and irresponsible criticism (see The Hon L King “The Attorney General, Politics and the Judiciary” (2000) 72 ALJ 444 at 453; Sir Anthony Mason “No Place in a Modern Democracy for a Supine Judiciary” 1997 35(11) Law Society Journal 51; Woodhouse at 154).

However, over the past three decades the role of the Attorney General and the Lord Chancellor as a defender of the judiciary has progressively diminished, and become minimised such that the judicial branch of government can no longer look to either an Attorney General nor a Lord Chancellor to protect the independence of the judiciary (see King at 453; Mr Daryl Williams (former Australian Attorney General) “Judicial Independence” 1998 36(3) Law Society Journal 50-51; Mr Daryl Williams “Who Speaks for the Courts” AIJA “Courts in a Representative Democracy” – A Collection of Papers from a National Conference presented by the AIJA, the Law Council of Australia and the Constitutional Centenary Foundation November 1994 182 at 192; Justice Robert Beech Jones “ The Dogs Bark But the Caravan Rolls On: Extra Judicial Responses to Criticism” – an address presented to the South Australian Magistrates Conference May 2017, p 15; Brief History, pp 6-8; Woodhouse at 154 -156).
In 1994, prior to becoming the Australian Attorney General, Mr Daryl Williams expressed the view that “the judiciary should accept the position that it could no longer expect the Attorney General to defend its reputation” (Williams “Who Speaks for the Courts” at 192). This view of the role of an Attorney General “appears to represent the approach adopted by most [subsequent] Federal and State Attorneys General “(Justice Beech Jones at 15) and continues up to the present day.

The experience in the United Kingdom has been similar. As pointed out by Woodhouse (at 154), over the past two decades there have been concerns that Lords Chancellor have not always fulfilled the role of “protector of judges and their independence” effectively. Specifically, the support of Lords Chancellor “for, and implementation of, policies of putting into effect the government’s commitment to efficiency and value for money have led to accusations that, rather than protecting judges and the administration of justice from interference, they have been a party to it” (Woodhouse at 159). As further pointed out by the author (at 9), doubts have arisen about the willingness of Lords Chancellor to protect the independence of the judiciary from “either government policies that encroach on the administration of justice or from political criticism”.

However, it would seem that the Constitutional Reform Act 2005 did little to enhance the role of the Lord Chancellor as the defender of the judiciary and its independence. According to Woodhouse, by “fundamentally changing the responsibilities of the Lord Chancellor” the reforms enacted by the Constitutional Reform Act have “cast doubt on the suitability of the office [of Lord Chancellor]” to fulfil the task of defending the judiciary (at 160). Woodhouse has concluded (at 163) that the Constitutional Reform Act appears to “afford less protection than has been portrayed by the government; the judges may find that they themselves will have to take some responsibility for the defense of their independence”. The recent case of R (Miller) v Secretary of State for Exiting the European Union [2016] EWHC 2768 supports that conclusion. In Miller the High Court held that it was for the UK Parliament, not the government, to decide whether to trigger Article 50 of the Treaty on European Union and to instigate the process of the UK leaving the Union. To say that the Court’s decision was not well received is an understatement. The three judges constituting the court were extensively criticised in the media, with one outlet (the Daily Mail) labelling them “enemies of the people”.

The Lord Chancellor’s slow and weak response to the vitriolic attack on the three UK judges who delivered the Brexit decision was a three –line statement to the effect that “the independence of the judiciary is the foundation upon which the our rule of law is built and our judiciary is rightly respected the world over for its independence and impartiality”. Such a response did little to instil confidence in the ability of the Office of the Lord Chancellor to fulfil its statutory duty to protect the independence of the British judiciary.

It is abundantly clear that in Australia and the United Kingdom – democratic countries which are generally regarded as bastions of the rule of law and judicial independence – the judiciary cannot confidently rely upon either the Attorney General or the Lord Chancellor to protect the judiciary and its independence – at least to the requisite level.

The reluctance of Attorneys General and Lords Chancellor in Australia and the UK in recent times to defend the judiciary - when it is clear that they have a duty as first law officer to protect the independence of the judiciary and to preserve the rule of law - is a significant factor
contributing to the relative weakness and vulnerability of the judicial branch of government within the tripartite structure of government. It is a factor that points to the need for judicial associations.

The historical reasons for the emergence of organisations such as the CMJA, the Judicial Conference of Australia (JCA) and the Association of Australian Magistrates (AAM) bespeak the need for judicial associations. All three associations were born out of a perception that the independence of the judiciary was not guaranteed because of:

- a lack of independence per se;
- the fragility of the principle of judicial independence; or
- the absence of strong institutional safeguards of judicial independence.

The CMJA, originally the Commonwealth Magistrates Association (CMA), was formed in 1970. In 1990, the CMA was renamed the CMJA to take account of the fact that in some Commonwealth jurisdictions magistrates had become judges.

The impetus for the creation of the CMA came from Sir Thomas Skryme who had in mind for a long time the formation of a Commonwealth judicial organisation (Sir Thomas Skyrme “CMJA: Serving Judicial Officers in the Commonwealth for 30 Years”, p1). Sir Thomas considered that “those who were in greatest need of [such] an organisation were the Magistrates” (p1) for the following reasons (pp 3-4):

- magistrates around the Commonwealth exercising extensive powers were not legally qualified and were in need of professional training;
- “their scrutiny and independence left much to be desired”; and
- “in some places the conditions under which they had to operate were appalling”.

The JCA was formed in 1993. Although its establishment coincided with the debate about the proper role of the Attorney General, the JCA was not established because the Attorney-General at the time had “expressed the view that he saw his role as no longer being a defender of the judiciary” (Brief History, p 6). Rather the impetus for the creation of the JCA was a fundamental concern to protect the important yet fragile principle of judicial independence (Brief History 1, citing Justice David Angel “The Early Days of the Judicial Conference” Judicial Conference News No 1 p 2). However, as pointed out by Justice Beech Jones (at 16) “to an extent by reason of the history and practice the JCA fills the role that the Attorneys General used to perform but no longer do”; and is therefore a factor justifying the existence of the JCA.

In his seminal paper “ The Foundations of Judicial Independence in a Modern Democracy” JJA (1991) 1, pp 3-45. Justice McGarvie helped to sow the seeds for the birth of JCA by raising “concerns that there were great challenges to judicial independence from the rising power of cabinet and the public service and from social changes” and that “some of the safeguards of judicial independence in fact lacked real strength and that the institutional framework should be repaired and extended so that it gave effective protection to judicial independence” (Brief History, p 2).

In a later foundational paper, “The Ways Available to the Judicial Arm of Government to Preserve Judicial Independence” JJA (1992) 1, pp 236 at 243 - 243 Justice McGarvie argued that the judicial branch of government needed to organise and assert itself “in the manner
necessary for the preservation of judicial independence in the modern democratic world”; and to display “a commitment to doing what is necessary to meet the challenges to judicial independence” (see Brief History, pp 2-3). To that end, His Honour proposed (at 259) the creation of a judicial association – an Australian Judicial Conference, sharing some of the features of the Canadian Judges Conference (see Brief History, p 3).

However, it is important not to overlook the fact that the need to meet these imperatives and challenges was not the only rationale behind the establishment of the JCA. It was anticipated that the JCA would also have “an educational role, directed towards the wider community and the legislative and executive branches [of government]” (Brief History, p 8). This encapsulated Sir Anthony Mason’s view that “judges could reinforce public confidence in the administration of justice by explaining publicly their work and the issues they faced” (Brief History, p 7 citing Sir Anthony Mason “The State of the Judiciary” (1994) 20 Monash University Law Review 1 at 11).

The Australian Stipendiary Magistrates Association (ASMA) which was formed in June 1978 changed its name to the Association of Australian Magistrates (AAM) because at that time the majority of magistrates around Australia were designated as magistrates, and not stipendiary magistrates. The purpose of ASMA was to enable magistrates of the various States and Territories of Australia “to speak with a national voice, and to address matters of importance to the Australian magistracy; and, where appropriate, to institute national projects relevant to the magistracy and its development” (anonymous).

Judicial associations endow the traditionally weakest branch of government with the ability to adequately sustain and protect its independence. As judiciaries in a modern democratic society generally have a hierarchical structure there may be a lack of institutional unity – the judges may not be bound together institutionally as the judicial branch of government. Justice John Priestley has commented on the lack of institutional unity in the New Zealand judiciary (Justice Priestley “Chipping Away at the Judicial Arm” The Harkness Henry Lecture (2009) Waikato Law Review Vol 17 1 at 12). Judicial associations have the potential to create the institutional unity that is necessary to maintain a strong and independent judiciary. As an old proverb says, “unity is strength”. We become stronger if we stay united.

The CMJA, JCA and AAM are prime examples of associations that bind judicial officers together institutionally as the judicial branch of government. The CMJA brings together judicial officers at all levels of the judiciary across the Commonwealth. The JCA is a national judicial organisation whose membership comprises both magistrates and judges from all tiers of the Australian judiciary. By having a Governing Council that represents superior and intermediate courts as well as the lower courts, the JCA helps to integrate the Australian judiciary in a way that contributes to the institutional unity of the judicial branch of government. The composition of AAM’s Executive and its membership contributes to institutional unity at the level of the Australian magistracy.

However, there are further reasons why a modern democratic society needs judicial associations as a foundation of judicial independence.
Although there are others like Chief Justices and heads of jurisdiction - as well as the legal profession- that the judiciary can look to for the protection of its independence, the assistance provided by these protectors may be limited, depending on the circumstances.

As pointed out by the Hon David Malcolm AC KCSJ (“The Role of the Chief Justice” Vol 12 2008 Southern Cross University Law Review 149 at 153, citing Chief Justice Doyle “The Role of the Chief Justice”, paper presented at the Supreme and Federal Court Judges’ Conference Hobart January 2001,3): The Chief Justice must be ready to speak for the judiciary of the nation, or of a State or Territory, on issues such as those that affect judicial independence and attacks on the judiciary.

As former Chief Justice Gleeson of the High Court of Australia acknowledged, “from time to time it will be necessary for Chief Justices to respond to criticism of judgments or judges when response is necessary and the Attorney General does not respond” (Justice Margaret McMurdo “Should Judges Speak Out or Shut Up”, an address based in part on a paper delivered at the 5th JCA Colloquium April 2000, p 6 citing I Henderson “Gleeson Vows to Defend Judges” The Australian 25 June 2001). This is reflected in clause 5.6.2 of the AIJA Guide to Judicial Conduct.

However, the role played by Chief Justices or heads of jurisdiction as protectors of the independence of the judiciary may be limited. Issues may arise that are not confined to a particular jurisdiction within a country, but extend to the judiciary as whole. Issues of this type may require an institutional response through a national judicial association. Cases may arise where the head of jurisdiction is the subject of unwarranted criticism. In such cases it may be more appropriate for a judicial association to respond to the attack. Furthermore, there may be cases where as a result of consultation between the head of jurisdiction and the judicial association it is mutually agreed that in the circumstances of the case it would be more appropriate for the judicial association to make the response.

As observed by the Hon David Malcolm AC KCSJ, “independence of the judiciary and the legal profession is recognised internationally as a core element of any civilised society”, and “the independence of the judiciary and the independence of the legal profession is for the protection of the people, and is the backbone of a free and democratic society” (Chief Justice David Malcolm “Independence of the Legal Profession and Judiciary”, Church Service May 2005, pp 3 and 4). As enunciated in the Latimer House Guidelines “an independent, organised legal profession is an essential component in the protection of the rule of law” (Guideline V111).

Thus, the judiciary and the legal profession have been enduring allies and the protector of each other’s independence and the rule of law. However, as pointed out by Justice Margaret McMurdo “the legal profession cannot be relied upon to routinely explain and defend the work of the judiciary and the courts; its hands are quite full enough promoting and defending its own position” (Justice Margaret McMurdo “Should Judges Speak Out”, a paper presented at the JCA Colloquium Uluru April 2001, p 5).

The judiciary needs the support of the legal profession; but as the primary guardian and guarantor of judicial independence and the rule of law, the judicial branch of government is duty bound to organise and assert itself in a manner that protects its independence. The best way for the judiciary to organise and assert itself is by forming judicial associations and for members of the judiciary to join and support such associations.
The Role of Judicial Associations

It is obvious from the preceding discussion that the primary role of judicial associations is to strengthen and defend the independence of the judiciary and to preserve the rule of law. By way of example, the primary objects of the JCA are:

*In the public interest:*

(i) To ensure the maintenance of a strong and independent judiciary as the third arm of government in Australia and

(ii) To defend the judiciary and judicial officers against unwarranted attacks and to respond to such attacks

A main object of AAM is to also “ensure the maintenance of a strong and independent judiciary as the third arm of government in Australia”.

Likewise, a primary aim of the CMJA is to “advance the administration of law and the rule of law by promoting the independence of the judiciary within several countries of the Commonwealth”. Furthermore, the recent *Brisbane Declaration on the Independence and Integrity of Judicial Officers of the Lower Courts* states, amongst other things: *Consistent with their fundamental rights, all members of the judiciary shall be free to form and join associations or other organisations to:*

(a) ensure the maintenance of a strong and independent judiciary within a democratic society that adheres to the rule of law;

(b) promote and encourage continuing legal, judicial and cross cultural study and learning by members of the judiciary;

(c) promote and encourage the exchange of legal (or judicial) educational practical or professional information on best practice between members of the judiciary and other persons or bodies including wherever possible by attendance at relevant conferences within or without the jurisdiction for which appropriate funding should be made available for attendances by judicial officers from the lower courts;

(d) promote a better understanding and appreciation of the proper role of the judiciary in the administration of justice and the importance of a strong and independent judiciary in protecting the fundamental human rights and entrenching good governance and to do likewise within the Executive and Legislative branches of government;

(e) seek improvements in the administration of justice and the accessibility of the judicial system;

(f) undertake supporting research that will further the achievement of these aims.

As the principal object of judicial associations is to promote, preserve or protect “judicial independence” it is essential to define “judicial independence” in order to determine what types of issues should properly concern a judicial association. This point was made by the Supreme and Federal Court Judges’ Conference (SFCJC) Steering Committee chaired by Justice Sheppard in 1992 in relation to the possible formation of the Australian Judicial Conference (*Brief History*, p 5).

The principle of judicial independence “focuses on the creation of an environment in which the judiciary can perform its judicial function as the third branch of government without being subject to any form of duress, pressure or influence from any persons or other institutions, in particular the two other branches of government” (John Lowndes “Judicial Independence and Judicial Accountability at the Coalface of the Australian Judiciary”, citing E Campbell and H.P.

The principle of judicial independence has a broad compass (Lowndes “Judicial Independence and Judicial Accountability at the Coalface of the Australian Judiciary”, p 3):
...the principle of judicial independence connotes more than just the notion of impartiality; it requires that there exist an environment which ensures that the judiciary performs its “central, distinctive function [which is] dependent and impartial adjudication (Sir Anthony Mason “The Appointment and Removal of Judges” in H Cunningham (ed) Fragile Bastion: Judicial Independence in the Nineties and Beyond (1997) 1, 4), and is perceived to perform that important function (Campbell and Lee, p49). It primarily “denotes the underlying relationship between the judiciary and the two other branches of government which serves to ensure that the court will function and be perceived to function impartially (MacKiegan v Hickman [1989] 2 SCR 796 per McLachlin J at 826).

As stated by Sir Anthony Mason, a further distinctive feature of judicial independence is that it is “a privilege of, and protection for, the people” (A Mason “The Independence of the Bench, the Independence of the Bar and the Bar’s Role in the Judicial System” (1993) 10 Australian Bar Review 1 at 3).

The promotion or protection of the independence of the judiciary is clearly an appropriate and pre-eminent object or aim for a judicial association to pursue. However, in pursuing that aim associations need to keep in mind the broad nature of judicial independence and its status as a right of every citizen in a modern democracy. These two aspects define the types of issues that should concern a judicial association. The pursuit of issues of judicial independence must always be in the public interest.

It must always be borne in mind that judicial associations are not – and should never be – “a judges’ trade union, advancing the financial interests of judicial officers” (Brief History, p 8) and other personal interests. This is also made clear in the “CMJA Procedures for Dealing with Judicial Independence Issues”. If judicial associations were to be perceived to be a mere judges’ trade union, that would impugn their credibility (Brief History, p15).

Judicial associations exist for the purpose of maintaining a strong and independent judiciary that adheres to the rule of law; and, in pursuing that fundamental object, judicial associations need to “act in the overall interest of ensuring that the independence of the judiciary as an institution continues to be of worth and value to the public” (John Lowndes “Judicial Accountability as an Evolving and Fluid Concept (2018) 24(1) CJJ 15). As pointed out by former Chief Justice of the High Court of Australia, Robert French, “ these objectives transcend any notion of a mere judges’ trade union” (Robert French “ Seeing Visions and Dreaming Dreams” JCA Colloquium Canberra Oct 2016, p 2).

It is legitimate for any judicial association concerned with the protection or promotion of judicial independence to respond on behalf of the judiciary whenever the independence of the judiciary or the rule of law is threatened.
The “Policies and Procedures in Regard to the JCA’s Role of Defending the Judiciary” identify the various ways in which the independence of the judiciary and the rule of law may be threatened and which may warrant a response from the JCA:

- The executive or legislative branches of government may propose an action that affects a court or the judiciary generally and the proposed action has the potential to “undermine a strong and independent judiciary”;

- An attack may be launched against an individual judicial officer, or a particular court or the judiciary generally in such a manner as to threaten or compromise the independence of the judiciary or the rule of law. By way of example, “a judicial officer [may] be vilified or denigrated”, “a judicial officer [may] be threatened with violence”, “a call [may] be made for a judicial officer to be ‘sacked’ or removed from a particular geographical area or from hearing particular types of matters”, “the role of the judiciary or a judicial officer [may] be inaccurately or improperly described eg to implement the will of the people as expressed in Parliament, or even to respond to a campaign conducted by a newspaper or other medium, leading to the potential that the public’s perception will be misled’;

- “There [may] be calls for inappropriate reform eg that the judiciary be elected, or the judiciary generally [may] be denigrated because its members are an unelected elite”: see for example the response of the media following the Brexit decision.

When an individual judicial officer or a court or the judiciary is attacked in any of the above ways it may be appropriate for a judicial association to respond to the attack (as is the policy of the JCA) by way of a “front-line defence” of the judicial officer, court or the judiciary. The JCA has regularly responded to such attacks: see the JCA website under “Media Statements” at www.jca.asn.au.

As pointed out by Justice Beech Jones (at 12), the particular circumstances of the case may warrant a response not to “vindicate the reputation or even feelings of the individual judge by correcting the misapprehension”, but because “some criticisms, considered individually or cumulatively, have the capacity to seriously undermine public confidence in the particular court, courts generally and ultimately the rule of law”. Whilst the “right of citizens to comment and criticise judicial decisions” is well recognised (Beech Jones at 19), a response may well be called for when the criticism exceeds the permissible limits of “freedom of speech” by undermining the authority or independence of the judiciary. This is supported by Article 5 of The Commonwealth Principles on Freedom of Expression and the Role of the Media in Strengthening Democratic Processes and Good Governance which was launched before the CHOGM in April 2018:

The rule of law, including the independence of the judiciary, is essential in order to uphold the right to freedom of expression, other human rights and the democratic process. The judiciary should promote open justice and facilitate media access to the courts for the reporting of proceedings. The media have a responsibility not to undermine the authority or independence of the judiciary and to communicate judicial decisions to the public.

Justice Beech Jones (at 20) says this about the purpose and content of the JCA’s responses to unwarranted attacks:
[they] have been prepared on the basis that its ultimate aim is to promote the respect for the judiciary and the rule of law... overall it has sought to make its response conform with a number of common themes that meet its principal objective such as the need to explain the judicial process, the importance of judicial independence and the rule of law, the accountability of judges through the process of giving reasons and the system of appeal. The responses have also referred to the inability of individual judges to respond to personalised attacks as a reason why such attacks should not be made.

As is clear from the CMJA’s front-line defence of the independence of the judiciary, it may also be appropriate for a judicial association to respond to disciplinary proceedings to suspend or remove a judicial officer for alleged misconduct or the arrest and detention or impeachment of judicial officers in circumstances that indicate that the process may be unconstitutional, unlawful, unfair or otherwise improper such as to erode the independence of the judiciary.

Furthermore, it may be appropriate for a judicial association to respond to a failure by governmental agencies to comply with court orders. A failure to fulfil court orders strikes at the heart of an independent judiciary which depends upon the executive to enforce its decisions. The CMJA has responded to such potential challenges to judicial independence: see the CMJA website under “Recent CMJA Activities” at www.cmja.org. However, the role of judicial associations is not confined to a “front-line” defence of judicial independence and the rule of law.

Judicial associations can perform a legitimate role in commenting on, or making submissions concerning, proposed legislative and executive action in the interests of pre-emptively protecting judicial independence, the rule of law and the administration of justice in a democratic society.

The CMJA has established a set of guidelines for dealing with requests from member governments, through their Ministries of Justice or equivalent, the Commonwealth Secretariat and Member Associations/Chief Justices – as well as individual judicial officers - to respond to consultations on constitutional or legislative reforms: see “The CMJA Procedures for Dealing with Judicial Independence Issues”.

When there is a request for assistance in relation to constitutional or legislative reforms, a process is followed. This includes an assessment as to whether or not the proposed reforms “relate to the CMJA and whether or not the CMJA has responded to similar requests in the past on the same or similar issues”. The process also includes consultation with the Executive Committee of the CMJA to ascertain whether there is any objection to the CMJA responding to the request and “whether or not any response should be made as a member of the Latimer House Working Group rather than the CMJA”. If the request has been received from a government source, the local member of Council /or Regional Vice President and local Member Association are also consulted as “to whether or not there are objections to a response from the CMJA”. An inquiry is also undertaken to establish or not “any responses have already been made by the Member Association or legal or judicial services within the country and check what, if any, responses are being made by other international organisations/partner organisations”.

After it is decided a response should be given, a draft response is circulated to the Executive Committee for its input, and where possible to the Member Association or Chief Justice for their
approval. Once approved the response is sent to “source of request with a copy to the Member Association /Chief Justice and Regional Vice President/Council Member for the country concerned as well as members of the Executive Committee”. Thereafter, progress on the constitutional or legislative reforms is monitored.

The JCA has also developed a set of guidelines concerning the circumstances in which it would be appropriate for it to make comment, or submissions concerning proposed legislative changes: see “Public Pronouncements about Proposed Legislation: Guidelines”. These guidelines are designed to inform the Governing Council or the Executive of the JCA, “in speaking on behalf of the judiciary”.

As noted in the guidelines:

_inevitably, within such a large body as the JCA, there will be some disparity of opinion upon issues which are the subject of, or related to, a political controversy. This is a further reason to be careful to avoid, if it is possible to do so whilst pursuing the objects of the JCA, participation in a discussion on matters of government policy. But it is a consideration which should not compromise the proper pursuit of the JCA’s objects. It is by limiting its public statements on proposed legislation to where they are reasonably required in the pursuit of those objects, that the Council or Executive will be able to speak authoritatively for the JCA and the Australian judiciary._

The guidelines acknowledge the necessity “to recognise that even where it is appropriate for the JCA to speak, ultimately it is for the Parliament to decide upon the content of legislation, and to that end to resolve issues of policy”.

With those matters in mind, the guidelines suggest that “in the main, the public statements of the JCA [in relation to proposed legislation] will be confined/directed to: (a) matters affecting the independence of the judiciary; (b) matters affecting the operation of courts; (c) the maintenance, promotion and improvement of the judicial system; and (d) matters likely to affect some aspect of the administration of justice”. These guidelines are broadly in line with the “Guidelines for Communications and Relationships Between the Judicial Branch of Government and the Legislative Branches Adopted by the Council of Chief Justices of Australia and new Zealand on 23 April 2014” and the UK Judicial Executive Board’s “Guidance to the Judiciary on Engagement with the Executive”.

The JCA guidelines recognise that “the range of matters which may affect some aspect of the administration of justice may, on some views, be extensive”. Accordingly, caution is to be exercised when “considering making a public statement on matters which affect the administration of justice”. As a general rule, the JCA will make “public statements on matters of that kind only if they bear directly on the central functions of the judiciary”.

The guidelines proceed to set out a number of considerations that are meant to guide the JCA in making such public statements:

- _the fact that it is Parliament which ultimately has the responsibility of resolving issues of policy affecting the content of legislation;_
- _the subject matter of the proposed legislation, and the extent to which it involves_
political controversy;
• the desirability of the judiciary avoiding entering into political controversies, but accepting that on occasions it will be inevitable;
• the desirability of judicial officers sharing their experience so as to inform public debate and to improve the quality of legislation;
• when the making of the public statement has been invited/solicited and, if so, the source of the request, and the uses which may be made of the public statement;
• the potential impact of the public statement on reasonable perceptions of judicial independence and impartiality, and to the desirability of avoiding a perception that judicial officers might not consider the law in question fairly and dispassionately;
• the desirability of avoiding so far as practicable a circumstance in which a reasonable apprehension of bias may arise in relation to the JCA’s members who will have to consider the law in question;
• in respect of a law which has effect on or in a certain jurisdiction, the views concerning the law expressed by the members of the judiciary in that jurisdiction, particularly views expressed of a head of jurisdiction, and attempt, so far as practicable, to avoid inconsistency with those views;
• the desirability of avoiding the expression of public and conflicting views by judicial officers; and
• the extent to which the members of the JCA may themselves hold conflicting views concerning the merit or otherwise of the law in question.

However, in making such public statements, any judicial association – as much as the judiciary – must operate within the framework of the Latimer House Principles and its theoretical underpinning, the doctrine of the separation of powers. Both require the three branches of government to mutually respect each other’s function in a democratic society. In making such public pronouncements a judicial association must be careful not to breach the doctrine of the separation of powers nor in any way to undermine the principle of parliamentary sovereignty.

In addition to pre-emptively defending the independence of the judiciary in the manner discussed, it is legitimate for judicial associations to promote, foster and develop “within the executive and legislative arms of government, and within the general community, an understanding and appreciation that a strong and independent judiciary is indispensable to the rule of law and to the continuation of a democratic society” and to bring about “a better understanding and appreciation of the benefits of the rule of law and of the role of the judiciary in the administration of justice” (see CMJA Brisbane Declaration on the Independence and Integrity of Judicial Officers of the Lower Courts; JCA Constitution; AAM Constitution). This is an important educational role which is designed to strengthen the independence of the judiciary as the third branch of government.

As Justice Margaret McMurdo has pointed out (“Should Judges Speak Out” JCA Colloquium Uluru April 2001, 5):

Most of us now accept that it is for the judiciary to foster public confidence in the courts by ensuring the public understand the role of judges to administer justice according to law. This is necessary to maintain public confidence, understanding and support for the courts.
Later, her Honour acknowledges (at 10) the desirability of “institutional communication to explain the workings of judges and the courts”. Indeed such institutional communication is an absolute necessity as the judiciary is under an ethical obligation to engage in civic education (S Bookman “Judges and Community Engagement: An Institutional Program” (2016) 26 JJA 3 at 5). There is no better vehicle for institutional communication of this type than judicial associations.

As pointed out by Lowndes, the judiciary has indeed a “societal obligation to engage the community in the manner suggested by Bookman because as an important social institution the judiciary needs to impart information to the public concerning its role, functions and activities in order to sustain its legitimacy – which is derived from the community it serves – and to maintain public confidence in it as a branch of government” (J Lowndes “Judicial Accountability as an Evolving and Fluid Concept” (2018) 24(1) CJJ 15 at 22, citing Bookman at 6). Judicial associations provide a means by which the judiciary as an institution can meet this fundamental obligation.

Finally, but not least, a judicial association must be concerned with providing “training and continuing professional development for the judiciary” – which is “essential to ensuring high ethical standards and competent judges” (Horizon Institute “Judges Associations” p 3; Principle 9 UN Basic Principles on the Independence of the Judiciary). Unethical and incompetent judicial officers are the arch enemies of judicial independence and impartiality. Continuing judicial education strengthens the independence of the judiciary and the rule of law.

**The Functioning of Judicial Associations**

To be effective, judicial associations need to be well-organised – and be a well-oiled and finely tuned machine.

It is essential that a judicial association have in place appropriate policies and procedures for responding to threats to the independence of the judiciary and the rule of law, so as to ensure a principled and consistent approach to the defence of judicial officers, a particular court or the judiciary generally from unjustified attacks. To that end, both the JCA and the CMJA have developed such policies and procedures.

In conducting a “front-line defence” of the judiciary, judicial associations need to possess the following characteristics:

- the ability to become aware of threats or risks to the independence of the judiciary and/or rule of law – otherwise a judicial association cannot begin to fulfil its role as defender of the judiciary;
- a process which enables an assessment to be made as to whether it is appropriate to respond to the threat or risk and procedures for determining the response (if any) to be made; and
- the ability to make a swift and effective response

These characteristics are shared by the CMJA and the JCA.

As referred to in the “CMJA Procedures for Dealing with Judicial Independence Issues, threats or risks are brought to the attention of CMJA through a number of sources: member
associations, Commonwealth Chief Justices, individual judicial officers, notifications from other Commonwealth organisations or a partner organisation such as the CLA or CLEA and through media reports identified by the CMJA Secretary General. As mentioned in the “Policies and Procedures in Regard to the JCA’s Role of Defending the Judiciary”, attacks are brought to the attention of the JCA through the Secretariat who regularly monitors media reports or through a member of the Governing Council or Executive Committee of the JCA or a JCA member.

Both the CMJA and the JCA have a structured approach to responding to threats or risks to judicial independence which is characterised by a well-developed set of procedures.

The CMJA’s approach is comprehensive, no doubt due to the fact that the CMJA is an international organisation with a diverse and dispersed membership consisting of both individual members and member associations.

A distinctive feature of the process is that the CMJA only responds to issues of judicial independence at the request of a member association/Chief Justice or an individual judicial officer.

Upon receiving a request of the first kind, the CMJA assesses the nature and urgency of the threat, and conducts an inquiry to establish “the geo-political status of the country concerned (including any past example of threats against the judiciary or the administration of justice)” and whether “any disciplinary measures have been taken in accordance with constitutional or legislative requirements” as well as the reactions of other national bodies and other organisations involved in the area of the rule of law, good governance, and human rights and any information received by other international organisations or the Commonwealth Secretariat on the issue and how these organisations might be responding to the issue. The following process is then followed:

(a) The CMJA Secretary General engages in the consultative process that is undertaken in relation to requests for assistance in relation to constitutional or legislative reforms as well as making the relevant inquiries: see p 12 above.

(b) The Secretary General, in consultation with Executive Committee, takes one of the following three approaches depending on the urgency or seriousness of the issue: (i) contacts “the Commonwealth Secretary General and/or members of the Ministerial Action Group, expressing CMJA’s concerns and urging them to resolve the issue according to Commonwealth fundamental values”; (ii) contacts other international organisations working in the area of judicial independence such as IBAHRI, ICJ or CLA who “might more easily produce a press statement or further investigate the matter”; (iii) provides the member association or Chief Justice with all the information they may need in support of their defence of judicial independence and the rule of law. The Secretary General would only approach the Minister responsible for the judiciary in exceptional circumstances.

(c) At all times, the Secretary General, assesses “the risk of any approach on the members of the judiciary within the country concerned”.

(d) The Secretary General then drafts a response citing relevant international documents
(including the Latimer House Principles) which is circulated to the Executive Committee and the member association/Chief Justice for final input prior to being sent to the relevant recipients referred to in paragraph (b) above.

(e) The Secretary General then continues to monitor the situation within the country concerned, keeping the Executive Committee, Council and membership informed of any developments, as well as informing the Commonwealth Secretariat relevant divisions of “any developments that may affect the way they deal with the issue”.

Any response sent in accordance with paragraph (d) above is posted to the CMJA website.

If the request emanates from an individual judicial officer and the issue pertains to his/her personal position the Secretary General recommends that the judicial officer “take up the issue with the national association and/or the International Commission of Jurists Centre for the Independence of Judges and Lawyers who might be able to assist”. However, if the request relates to the rule of law, the independence of the judiciary or the administration of justice the process referred to in paragraph (a) above is followed. The Secretary General may consult with the President and the Executive Vice President as well as the relevant members of the Council as to whether or not the matter might be considered as affecting the independence of the judiciary, rule of law, or the administration of justice. If so, the Secretary General assesses the nature and urgency of the threat and conducts the other inquiries that are undertaken when a request for assistance is received from a member association or the Chief Justice, and proceeds in accordance with the process outlined in paragraphs (b) and (c) above.

The CMJA also has similar processes for responding to threats to judicial independence communicated to the association from other partner organisations such as ComSec or the CLA or other organisations such as IBAHRI and the ICJ. The CMJA also has a similar process for responding to threats to judicial independence which are brought to the attention of the association through the Secretary General’s monitoring of press and media reports.

The JCA’s process for responding to attacks against the judiciary is not as detailed owing to the fact that the JCA is a national, rather than an international, association and does not have to operate within a framework like the Commonwealth of Nations. The JCA’s process for responding to attacks against the judiciary which is set out in its “Policies and Procedures” may be summarised as follows:

- any response is made by, or in the name of, the President;
- if the President is unavailable or it is inappropriate for the President to respond, the Vice President, Treasurer or a member of the Executive Committee in order of availability responds;
- the process of responding is co-ordinated through the Secretariat;
- the President makes every effort to contact the judicial officer/s concerned and the relevant head of jurisdiction, seeking “their views as to whether a response should be made and in what terms”;
- if those persons cannot be contacted, usually no response is made;
- if either person requests that the JCA not respond, usually no response is made;
- “given that a response is only potentially effective if it is made very swiftly, the President is not obliged to seek the views or approval of the Executive Committee, but
in some circumstances the President may decide to do so”.

The form of response made by the JCA is governed by the nature of the attack or criticism and may consist of:

- a media release sent to media outlets, “presidents and media persons at the Law Council of Australia, bar associations and law societies”;
- a letter to “the editor of the relevant newspaper”;
- “an opinion piece article” sent to “the relevant newspaper or journal”;
- a letter to “the editor of the relevant media outlet expressing concern and seeking a retraction or correction”;
- a letter to “the person/s who made the attack seeking a retraction or correction”;
- “a complaint to the Australian Press Council”;
- if the attack is “sustained and personalised”, a letter to the Attorney General requesting him/her to “place in the public domain the reasons for the judicial officer’s decision and confirm that he/she acted in accordance with law”;
- if the attack is made in Parliament, a letter to “the Attorney General of the relevant jurisdiction, seeking his/her support in defending the judicial officer”.

The President of the JCA decides the form that the response is to take, involving, if necessary, “the Secretariat in the logistics of making the response”.

The JCA policies and procedures recognise the imperative for a swift response – otherwise the effectiveness of the response “is essentially dissipated”. Accordingly, once the President becomes aware of the attack, he/she contacts “the judicial officer/s concerned” and “the relevant head of jurisdiction”. The President also advises the Secretariat (if he is not already aware of the attack) that “a response is to be made and to be prepared to assist”. The President then prepares the appropriate response and arranges for the response to be distributed or forwarded, usually by the Secretariat.

As a general rule, all members of the JCA are advised of the response, including its contents, “either by email or by inclusion in the weekly JCA News & Media, and the response is posted on the JCA’s website.

**Moving Forward Together**

Judicial associations enable the judiciary to “become stronger together” and to assert itself as an equal branch of government. But what about the future? How does the judiciary move forward together as a separate, but equal branch of government?

Judicial associations are one of the foundations of judicial independence. They can give the judicial branch of government an institutional unity that it otherwise lacks - even in the most integrated court systems around the Commonwealth.

The structure and membership of judicial associations is critical to – and dictates – the degree of institutional unity engendered by a judicial association. The greater the institutional unity – judicial solidarity - that a judicial association creates the more likely it is to be effective. The reason for that is simple and straightforward. A judicial association whose membership only comprises members from one tier of the judiciary is bound to be less effective than an
association whose membership extends to other or all tiers of the judiciary. The most effective judicial associations are those which represent all tiers of the judiciary such as the CMJA and the JCA.

Such associations are more conducive to creating the institutional unity that is needed to enable the judiciary to stand firmer against executive and legislative action that challenges the independence of the judiciary and the rule of law (as suggested by Dr Brewer, the Secretary General of CMJA). Again as suggested by Dr Brewer, associations like the CMJA and the JCA avoid the “divide and rule” situations – pitting the higher levels of the judiciary against the lower levels - that some Commonwealth nations have faced. Is this not a matter of “united we stand, divided we fall”?

Looking to the future, judiciaries around the Commonwealth are encouraged to the extent they have not already done so to form judicial associations. Ideally, the membership of those associations should include both magistrates and judges (from all tiers of the judiciary) so as to ensure a sufficient level of institutional unity to enable it to operate effectively within their jurisdiction. In that regard, nascent judicial associations have some excellent models to look to – such as the CMJA and the JCA.

The CMJA is a network of not only individual judicial officers, but also of member associations. As part of becoming stronger and moving forward together the CMJA needs to have strong member associations in all the regions of the Commonwealth: the Caribbean, East, Central and Southern Africa, Indian Ocean, Atlantic & Mediterranean, Pacific and West Africa. The strengthening of the network will assist the CMJA in strengthening and defending the independence of the judiciary around the Commonwealth.

The opportunity that the CMJA affords for “networking” brings with it other benefits such as “opportunities to promote professional development through for example judicial study exchanges and conferences” and “guidance on the establishment and role of judges’ associations” (Horizon Institute “Judges Associations”, p 5).

Finally, but not least, such networking enables judicial associations around the Commonwealth to learn from each other as to the most effective ways to defend and strengthen the independence of the judiciary and preserve the rule of law in an ever-changing world that presents new challenges.

As observed by Woodhouse, “a key characteristic of the concept [of judicial independence] is its fluidity, which enables it to adapt to some degree to political, social and practical requirements”; and given “the elusive nature of judicial independence, it is also difficult to determine what developments might put it under pressure or undermine public confidence in the judiciary” (Woodhouse at 164)

The judicial branch of government must become stronger together- and move forward together - to meet the inevitable challenges ahead. As advocated by the Canadian Judges Conference, the judiciary must be “constantly vigilant and committed to assuring the preservation of a strong and independent judiciary” (Brief History, p 3). That role is best served by well organised judicial associations in all Commonwealth countries that are truly representative of the judiciary as a whole and able to speak and act on behalf of the judiciary as an institution when it comes
under attack. That is not to overlook the indispensable role played by the CMJA in bringing together judicial associations around the Commonwealth as a key strategy in preserving a strong and independent judiciary that adheres to the rule of law from one end of the Commonwealth to the other.
Let me first confess that I get very anxious whenever I hear the words “judicial independence” used in a phrase or sentence in which the terms “judicial ethics” and/or “judicial accountability” do not feature. This is because people, both within and without judicial office, sometimes mistake judicial idiosyncrasy, judicial caprice, judicial intractability or judicial arrogance for judicial independence. When the error is made by one of our brothers or sisters, it is a prescription for chaos and inimical to the rule of law. Judicial independence is not meant to be, and cannot operate successfully as, a stand-alone concept; it is inherently and unassailably plural, its “riding partners” being accountability and ethics.

As an active participant in the judicial arena for over 35 years from the vantage points of the bar and the bench, I can call to mind occasions when judicial independence was used as a cloak or screen to hide our imperfections … inexcusable delay in delivery of judgments, inexplicable disparity in sentencing and questionable use of resources. I am sure I am not singular in this observation.

Whenever we invoke this revered and sacrosanct principle, which is the bedrock of our vocation, we must ensure that it is in its truest and purest form, used in the right circumstances, at the right time and for the right reasons. To do otherwise would be to do a grave disservice to the principle, our institution, and the public, particularly litigants … we all know the end to the fable of the boy who cried wolf.

Before embarking on any discussion about defending and strengthening judicial independence let us agree on the true meaning and purport of the doctrine. It is not a right conferred on judges and magistrates merely by virtue of office, but rather a privilege afforded to ensure that they can be true to their oath of office without fear of being visited with adverse consequences. In our respective oaths we pledge - “to uphold the Constitution and the law, and to conscientiously, impartially and to the best of our knowledge, judgment and ability discharge the functions of our office and do right to all manner of people after the laws and usages of our jurisdiction without fear or favour, affection or ill-will”.

That is a tall order and one which can be difficult to accomplish without robust and effective safeguards which ensure that we are left alone, without pressure, influence or orders to perform our core functions and treat with ancillary matters. This inviolable principle is not for our own benefit but for the benefit of those who entrust their lives, rights and property to us. Litigants and interested observers, must be confident, especially when issue is joined with the state, that nothing but the evidence and the law, interpreted and applied by competent authority, factors into the decisions arrived at by the court.

In a shameless bit of plagiarism I adopt the definition of judicial independence found on the UK Courts and Tribunals Judiciary website and quote:

“It is vitally important in a democracy that individual judges and the judiciary as a whole are impartial and independent of all external pressures and of each other so that those who appear before them and the wider public can have confidence that their cases will be decided fairly and in accordance with the law. When carrying out their judicial function they must be free of any
improper influence. Such influence could come from any number of sources. It could arise from improper pressure by the executive or the legislature, by individual litigants, particular pressure groups, the media, self-interest or other judges, in particular more senior judges.”

Now that we are all on the same page there can be no difficulty in agreeing that our judicial independence has to be vigilantly guarded, strengthened and defended.

For the purpose of this discussion I make a practical distinction between strengthening and defending.

To my mind one strengthens from within by building up the core of an organism. That exercise requires pointed introspection aimed at identifying any weaknesses and the ways and means available to close the gaps.

Judicial education can be a frontline strategy for strengthening judicial independence. From the outset new judges must be familiarised with the doctrine. This cannot be a one-off lesson; it will need to be reinforced by repetition to embed it in their consciousness. Experienced judges will also benefit by reiteration. The sharing of experiences from other jurisdictions would be helpful in an appreciation of the nuances and intricate workings of the concept.

Additionally, continuing judicial education which ensures that judicial officers are up to date with current laws, procedures and practices is a necessary component of judicial independence. Sound knowledge of the law can render a judicial officer less likely to be improperly influenced, even unwittingly, by disingenuous practitioners and well-meaning colleagues. A forum that allows interaction between junior and senior judges so that the former can have the benefit of the latter’s experience without being pressured to accept advice or positions is invaluable.

Judicial independence can come under threat when a judiciary is seen as not being accountable to the legal profession, litigants and the public. Scrupulous judicial accountability goes hand in hand with judicial independence. The concepts are not inimical but rather complementary. Transparency engenders confidence.

A major complaint across many jurisdictions is that judges take far too long to hear cases, render judgement or provide written reasons. The delay can give rise to accusations of laziness, incompetence and, worse yet, conspiracy theories that unknown and unseen forces are influencing outcomes. The development and adoption of realistic performance standards can ensure prompt trials and the provision of clear, digestible, timely judgements. Judges must be held accountable for unreasonable delay.

Another facet of accountability is the provision of regular reports and statistics which give some insight into the operations of a judiciary. We strengthen our judicial independence by our willingness to be open about the workings of our institution. Such openness can be further enhanced by an active media interface, perhaps social media, catering for prompt responses to queries and requests for information. Those of us with Freedom of Information Legislation should ensure that it is used by the public only as the solution of last resort.

One final but critical issue in accountability is the need for a judiciary to be self-regulating, providing a mechanism for receiving, investigating and addressing complaints against our
number. As complaints are inevitable, we must undertake to treat with the grievances ourselves. Any external source of regulation or censure would fly in the face of the principle of judicial independence.

Institutional strengthening through a code of judicial ethics is yet another means of fortifying judicial independence. It is necessary to develop, monitor and enforce a code of conduct to which all judicial officers subscribe, whether or not its rules reflect their personal ethos, so that both judges and the public understand what is expected of us particularly in the many and diverse gray areas of practice.

The wealth of our shared experience is reflected in the Bangalore Principles to which the majority of us subscribe. No doubt some tweaking to accommodate jurisdictional peculiarities is permissible but the well-known values of independence, impartiality, propriety, equality, competence and diligence have stood the test of time.

No discussion on strengthening judicial independence can be complete without considering the issue of judicial neutrality. While we are all hyper-vigilant for external improper influences we sometimes fail to notice internal influences that could be just as dangerous to our judicial independence. We would be well advised to maintain a watchfulness over our known biases and to run a periodic diagnostic for any unconscious bias that may creep in undetected.

Though conceptual, judicial independence does involve practical considerations. As far as possible, judges need to be properly provisioned to carry out their functions. Attention must be paid to their physical accommodation, they must be given the human and other resources to get the job done and their remuneration must be adequate. These comforts allow them the ease and peace of mind to function without being susceptible to subtle influences that would take advantage of discontent.

The core function of judges ought to have the first call on the resources available to a judiciary. It happens from time to time that limited resources are diverted to ancillary and sometimes vanity projects while judicial officers struggle to get necessary aids for their work.

Defending judicial independence speaks to an external focus, proactive and vigilant, scanning the landscape in order to anticipate, identify and neutralise impending or incipient threats, though not indulging in paranoia. Defence requires that we take steps to surround both our institutions and individual judges with support mechanisms that can repel any attack on our independence.

We best defend judicial independence by convincing the public of its value; they must be as hellbent on supporting and protecting it as are we. An aggressive and sustained programme of education run by judiciaries about the meaning and import of judicial independence and aimed at driving home the message that the people, in particular litigants, are its true beneficiaries, can encourage buy-in and make them powerful partners in vigilance against and rejection of attempts to improperly influence our decisions.

As early as at secondary school level, using age-appropriate pedagogy, children should be introduced to the concept and made to understand its practical value to the society. In Trinidad and Tobago we have from time to time engaged in similar outreach affording the opportunity...
for students between the ages 14 to 18 to engage in a Q & A with judges. This exercise provided the perfect opportunity to begin the public education process, but unfortunately it has not been sustained. Civil society groups can be the medium through which the message is communicated to adults.

Another result of this exercise will be to demystify and humanise the judiciary, allowing judges to be seen as public servants with particular specialized skills and duties rather than as remote, entitled functionaries divorced from every-day realities. But we cannot do that without being willing to account for our actions and decisions and subjecting ourselves to public scrutiny… assuming a humility not often enough associated with holders of high office.

Public confidence in the judicial system also buttresses judicial independence. Transparency builds confidence, and this has to begin with the processes for the appointment of judges. The integrity of the body making the selection is critical; the entire process must be free of political influence. The hand picking of members of a judiciary is inimical to the very concept of judicial independence as he who pays the piper will call the tune.

The next step would be to ensure a widely-published and rigorous screening process which ensures that appointees of the highest calibre are chosen strictly on merit. When citizens are convinced that the most worthy candidates have been appointed, they are more inclined to support and defend judicial independence.

One of the more ticklish aspects of defending judicial independence is financial autonomy for judiciaries. This is not be mistaken for non-accountability. Autonomy would allow judiciaries, once their budgetary allocation has been determined by the executive, to allocate resources as they see fit, subject of course to all public accounting guidelines, and not to have to go “cap in hand” for separate items of expenditure. Too close oversight allows the executive to exert subtle influence over a judiciary. Where such autonomy does not now exist, judiciaries, bearing in mind the historic antipathy of the executive to this course, must be prepared to engage the powers-that-be, in a cogent and systematic discussion aimed at convincing them of the universal benefit. An economy thrives when it can attract the kind of local and international investment that can only be secured by an effective and efficient judiciary free of undue influence.

At a gathering such as this it is more than a suspicion that I am preaching to the choir when I conclude that judicial independence is pivotal to our function and must be zealously strengthened and defended, but I hasten to remind that when sentences are inexplicably disparate, when citizens are not accorded their fundamental rights, when custody of a child is granted to an unfit parent, no one is comforted by the thought that the magistrate or judge arrived at an indefensible decision while standing firmly on the platform of judicial independence.

Judicial independence is both a sword and a shield, let us use it wisely
I bring you warm greetings from the Republic of Ghana in West Africa. More specifically, I bring you special greetings from the Judges and Magistrates in Ghana. It is an honour and indeed a pleasure for me to be given the opportunity to speak to you on Fighting Corruption and Maladministration. This topic is very pertinent having regard to current circumstances in many parts of the world.

Without doubt, service on the Bench requires honesty and integrity, diligence, steadfastness and humility. Therefore, any person so privileged to serve his or her nation ought to possess all of these attributes and exhibit same in his or her duties.

We must endeavor to fight against corruption and maladministration. The Supreme Court of Ghana, in the case of the Commission on Human Rights and Administrative Justice (CHRAJ) vrs. The Attorney-General & Baba Kamara, endorses this fight for the following reasons: “Corruption is most inimical because it militates against the rights and freedoms of others and all sound principles of good governance. It is now generally considered, by all right thinking persons, to be a practice which raises serious moral and political concerns, undermines good governance and economic development, and distorts competitive conditions”.

With respect to the fight against maladministration in Ghana, a willful act or omission causing loss, damage or injury to the property of any public body or any agency of the State constitutes an offence referred to as “Causing Loss, Damage or Injury To Property” under Ghana’s Criminal Offences Act.

We are fully aware of the emerging trend of prosecutions for corruption in countries like the United Kingdom where, in the case of R v Mabey & Johnson Ltd, a company paid public officials in Ghana a sum of £470,792 in bribes in order to secure contracts worth £26 million. In the Australian context, cases such as the one instituted against John Jousif and the Elomar brothers for conspiring to bribe an Iraqi official in order to obtain a government contract in Iraq (just to mention a few) are worth mentioning.

WHAT IS CORRUPTION?
Going to the main focus of my presentation, we should first of all like to know what corruption is or what amounts to corruption. In order to fight something and to be able to tackle it effectively, you must know and recognize it from inside out; its root causes and effects. Otherwise, you will be fighting blindly and you will not obtain the desired results.

Evidently, corruption has beset humanity from the dawn of human existence. Thus, in Genesis Chapter 6, verses 11 to 13 of the Bible [KJV], it is written that “the earth was also corrupt before God, and the earth was filled with violence. And God looked upon the earth and behold, it was corrupt for all” and in Exodus Chapter 23 verse 8, we find the edict, “Do not accept a bribe, for a bribe makes people blind to what is right and ruins the cause of those who are innocent.”
Coming to the secular world however, simply put, corruption is dishonest or fraudulent conduct by those in power, typically involving bribery. The Ninth edition of the **Black’s Law Dictionary** defines “corruption” as Depravity, perversion, or taint; an impairment of integrity, virtue, or moral principle; especially, the impairment of a public official’s duties by bribery.

There are various scales or degrees of corruption briefly categorized as follows:

- **Petty corruption**: This is on a small scale and takes place at the implementation level of public services when public officials meet the public; it refers to everyday abuse of entrusted power by low and middle-level public officials in their interactions with ordinary citizens, who are often in the process of accessing basic necessities. It is a crime that violates human rights and deserves adjudication and punishment accordingly.

- **Grand corruption**: This occurs at the highest level of Government where there is a significant subversion of political, legal and economic systems.

- **Endemic/Systematic corruption**: This occurs where there is a weakness in an organization/institution or its processes, leading mostly to the culture of impunity and the abuse of discretionary powers. Examples are in procurement processes and the award of contracts. Many complain of endemic corruption in government institutions.

Corruption is an all-pervasive cancer stretching to nepotism, favouritism, clientelism, abuse of discretion, bribery, extortion, embezzlement, blackmail etc. Corruption occurs both in the public and private sectors. I will, however, limit my presentation to the public sector although there are cross-linkages between public sector and private sector corruption.

As an Association of Judges and Magistrates from the Commonwealth, I will like to specifically mention judicial corruption which includes misconduct of Magistrates and Judges through receiving of bribes, improper sentencing of convicted criminals, bias in the hearing of cases and judgments that are laced with bias. Judicial corruption can also manifest itself where a government in power uses the judicial arm of the government to oppress/persecute political opponents. It damages confidence in the Judiciary and deters citizens from bringing their matters to court, thereby adversely affecting or impeding access to justice.

Judicial corruption also involves misconduct on the part of judicial staff or officers whose work is to assist Judges and Magistrates in the performance of their functions. Such staff or officers corrupt their offices by demanding / accepting bribes from parties in order ostensibly to ‘see’ the Judge or Magistrate to adjudicate in their favour; by taking monies from parties who seek appointment with the Judge or Magistrate, which is in itself ethical misconduct; by ‘killing’ cases before the Judge or Magistrate through dubious means; by taking monies from parties to remove vital documents or processes from a case docket before the Magistrate or Judge; by engaging in the issuance of inflated receipts in the filing of court processes in connivance with corrupt paralegals or staff of Law Chambers/Firms and sharing the difference with their corrupt counterparts, etc.
CAUSES OF CORRUPTION
One may ask, what causes corruption? The causes are not far-fetched. They include poverty, low levels of education, ignorance, low remuneration rates, political decay, but more pertinently, inefficient administrative structures and greed. Thus, corruption has a linkage with maladministration which I will be addressing shortly.

Low and middle-level public officials mostly engage in petty corruption for survival purposes, as for example, some clerks and messengers in public institutions who can declare that a file is lost only to promptly produce same upon the payment of a “tip”. Incidentally, some people are also not aware of their rights and would pay for a service that they are legitimately entitled to, free of charge. The more inefficient an institution, the greater the latitude for corrupt activities; hence the universal emphasis for strong, well-structured and functional institutions.

The less said about political decay as a cause of corruption, the better. Some people who engage in corrupt activities, like taking bribes, are motivated by sheer greed. They do not need that bribe to survive but they will take it nevertheless and sometimes they take bribes from people who are economically less placed than them. When public officers do not have security of tenure, some may become vulnerable to corruption to secure their future survival.

EFFECTS OF CORRUPTION
Corruption lowers economic growth and increases social inequality. Corruption results in a lot of capital flight from the countries where it is indulged in, since the culprits hide their loot in off-shore accounts and tax havens. Such monies are not deposited in local banks for it to be turned around by businesses through borrowing to develop the economy of their respective countries. When economies do not develop, or develop slowly, it is the poorer areas that are normally short changed thus exacerbating the inequality margins. It leads to a cycle of poverty. Those assigned to collect taxes declare very low taxes, resulting in lack of funds for government to develop the country.

FIGHTING CORRUPTION
Having recognised this monster called corruption, how do we fight it? I will be sharing with you the efforts that we have made in Ghana to fight corruption. In essence, fighting corruption involves putting in place measures that will make corruption a high risk and low / negative gain activity irrespective of the approach. The measures should be such as will ensure that the prospects of being caught are very high and the penalty severe. The measures should encourage and internalize the values of integrity, accountability, transparency, the protection of whistleblowers, and the buy-in of civil society participation. Specifically, fighting corruption should include the following measures:

- Paying public officials adequate remuneration;
- Creating transparency and openness in government spending;
- Cutting bureaucratic red tapes;
- Implementing anti-corruption international conventions;
- Deploying smart technology;
- Strict financial controls – budget, book-keeping and reporting;
- Maintaining law and order and impartial and prompt enforcement of same;
- Free access to information and data;
- Political reforms;
- Economic reforms;
- Public supervision;
- Protection of whistle blowers and more importantly for this platform, educating the public to know their rights to free social interventions;
- Improving and strengthening the judicial system; and
- Strong public institutions like revenue authorities.

In Ghana, various public institutions have been set up with the mandate / function of fighting corruption, among others. We have the Auditor-General’s Department, the Commission on Human Rights and Administrative Justice (CHRAJ), the Economic and Organized Crime Office (EOCO), with the most recent being the Office of the Special Prosecutor.

Ghana recognises corruption as “an insidious plague that has a wide range of corrosive effects on societies; …corruption undermines democracy and the rule of law; leads to violations of human rights, distorts markets, erodes the quality of life and allows organised crime, terrorism and other threats to human security to flourish, and…it hampers efforts to alleviate poverty, undermines political stability and economic growth and diminishes the country’s attractiveness for investment” as provided in the Foreword to the Ghana National Anti-Corruption Action Plan (2012-2020).

In recognition of these harmful effects on the economy of the country, Ghana launched its National Anti-Corruption Action Plan (NACAP) for 2012 – 2020 with a vision to create a sustainable democratic society founded on good governance and imbued with high ethical standards and integrity.

The role of the Judiciary in the attainment of the vision of the Government of Ghana can never be over-emphasized. Accordingly, the Judiciary in Ghana has adopted its own Anti-Corruption Action Plan which it publicly launched in December, 2017. Our Tag Line, “The Judiciary of Ghana – uprooting corruption wherever it is found” shows the determination with which the Judiciary in Ghana intends to fight corruption within its own ranks. We are neither going to give any cosmetic dressing to corruption within our ranks, nor will there be any window dressing for it. We are going after corruption from its roots – by uprooting same. The Judiciary of Ghana is focusing on four key areas in its Anti-Corruption Action Plan, namely:

- Increasing the focus on integrity
- Reducing opportunity for corruption
- Increasing transparency and accountability and
- Dealing efficiently and effectively with complaints.

Our recruitment procedures have been streamlined and made more transparent so as to ensure the selection of persons with the highest standard of integrity. This is reinforced by rigorous induction training for Judges and Magistrates and training for supporting staff before they embark on their respective duties.
The computerization of our courts continues in earnest with a view to eliminating the opportunities for corruption reinforced by increased monitoring and evaluation, which benchmark international standards.

We established a Public Complaints Unit in 2003 headed by the Chief Justice, assisted by an Appeal Court Judge and three High Court Judges who are supported by a Secretariat. Branch offices have been established in four regions of Ghana and plans are well advanced to open branches throughout the rest of the country. The Complaints Unit investigates every complaint from the public about or against Judges, Magistrates and Judicial Service Staff and makes recommendations to the Chief Justice for resolution or remedial action as the case may be. Turning the search light, thus, on ourselves leaves no doubt that we will do the same when corruption issues come before the Courts by way of prosecutions.

The Judiciary in Ghana has been tested and the mechanisms for handling corruption in the Judiciary, including the application and enforcement of constitutional provisions, were triggered and performed perfectly. In 2015, the Judiciary in Ghana was shaken by a corruption scandal that seriously dented its reputation. I believe this scandal is generally known worldwide. A Ghanaian undercover investigative journalist was able to capture some Judges, Magistrates and support staff on video accepting bribes in order to pervert the course of justice in certain cases pending before their respective Courts. Although it was a low point for the Judiciary, we were able to keep our heads and took the affected Judges through the impeachment procedures outlined in our Constitution (as well as administrative disciplinary procedures for Lower Court Officers and support staff) very promptly and had them removed from office. Due to the promptitude and effectiveness with which the scandal was handled, the public has, by and large, maintained confidence in the Judiciary of Ghana.

Additionally, there are highly active Civil Society Organisations (CSOs) in Ghana which have the core aim of fighting corruption such as the Ghana Anti-Corruption Coalition (GACC) and the Ghana Integrity Initiative (GII), the local Chapter of Transparency International. There is also the acclaimed undercover investigative Journalist popularly known as Anas Aremeyaw Anas and his team whose avowed mission is to name, shame and jail corrupt public officials.

MALADMINISTRATION
According to K.C. Wheare, Fellow of All Souls College, Oxford, UK, maladministration is administrative action or inaction based on or influenced by improper consideration or conduct. (See his book “Maladministration and its Remedies” Published under the auspices of the HAMLYN TRUST, 1973). Again, according to Sheena Thomas, Assistant Professor at the Government Law College, India, in her publication in the International Journal of Legal Insight (IJLI) Vol 1 issue 1 entitled, “A critical analysis of controls on maladministration and corruption in India”, maladministration is an action of a government body which can be seen as causing injustice. Sheena Thomas goes on to add, and rightly so, that maladministration is worse than corruption for while the effects of corruption are felt after a period of time, the effects of maladministration cause immediate misery to the people.

These are definitions of maladministration in its simplest terms as most authors agree that it is difficult to define maladministration though we recognize the same when we see it. Maladministration, therefore, is very much like the proverbial elephant which is difficult to describe but which is easily recognizable by all and sundry.
MANIFESTATIONS OF MALADMINISTRATION
Maladministration in the public sector manifests in instances where official action transgresses laws such as when a public official:
- Fails to carry out a duty imposed by law,
- Fails to carry out a duty to the standard imposed by law,
- Acts beyond powers conferred by law,
- Uses the power conferred by law for purposes not intended,
- Acts without following due procedure,
- Takes arbitrary decisions,
- Takes actions that are influenced by bribery and corruption,
- Delays in taking actions or providing services,
- Displays unfairness, discourtesy, rudeness, bias, high handedness or even ignorance, and
- Displays incompetence.

Public officials, both at the Central and Local Government levels, who fail to provide information when it is needed, indulge in inadequate and sloppy record keeping, fail to investigate matters that require investigation, provide misleading and/or inaccurate information, fail to respond to correspondence where necessary are all exhibiting appalling indications of maladministration. Inadequate consultation where necessary and broken promises are all incidences of maladministration.

EFFECTS OF MALADMINISTRATION
The cumulative effect in all such lapses in the administrative system is that the country becomes virtually crippled, develops very slowly and becomes highly unattractive to foreign investment. The desired improvement in the standards of living of the majority of the citizenry is thus seriously compromised. Resources needed to develop the country find itself in the hands of only the corrupt few.

FIGHTING MALADMINISTRATION
In order to combat maladministration, I support the view that it is better to institute measures to prevent maladministration rather than to wait for the maladministration to occur and then to seek to remedy it. In my view, more emphasis ought to be placed on the recruitment process for public and civil servants with a view to recruiting only the best imbued with the ethical values of accountability, commitment, team work, integrity, transparency and honesty. With such officers, one can be relatively certain that the right things will be done. Another important element is to enhance the performance of the competent officers by continuous training and skill improvement so that they will acquire any new skills that they may require to re-focus and re-dedicate themselves to the ideals of their respective offices. There should therefore be strong institutions.

However, as mentioned earlier on, maladministration is likely to occur from time to time, hence the need to have institutions to remedy same when it does occur. In this respect, the Courts are the leading and the last resort to adjudicate on matters involving maladministration. In Ghana, we also have the Commission on Human Rights and Administrative Justice which performs the triple function of investigating Human Rights Complaints, complaints relating to breaches of Administrative Justice and investigations of complaints against Corruption. In some countries
the second function of investigating administrative complaints is handled by the office of the Ombudsman. We also have the National Labour Commission that primarily investigates employer / employee disputes which might sometimes arise from maladministration. The Court, as the final arbiter in all disputes, has supervisory jurisdiction over these quasi-judicial bodies and does so by judicial review, with power to issue such reliefs as shall be appropriate. Needless to say that all institutions with the mandate to investigate and remedy maladministration must be properly resourced and equipped in order to deliver the desired results in a timely manner, this is where many times the State fails.

Other remedial bodies are ad hoc Committees and Commissions of Enquiry which have specific terms of reference to investigate serious and systemic lapses in administration.

CONCLUSION
To conclude, there is no doubt that corruption and maladministration are the twin cankers that erode the welfare of the citizenry including those yet to be born. We must therefore, collectively, do all in our power and rededicate ourselves to fighting both to secure our collective existence now and into the future.

I thank you sincerely for your very kind attention. God bless our nations.
OPENING REMARKS

I am delighted to chair this panel session titled “A privilege to serve the nation. Fighting corruption and maladministration”. Corruption is now a worldwide disease. Its tentacles have travelled far and wide. In the words of the former UN Secretary General Kofi Annan:

“corruption is an insidious plague that has a corrosive effect on society by eroding the quality of life and allows crime and other threats to human society to flourish. This evil phenomenon is found in all countries, big and small, rich and poor but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a government’s ability to provide basic services, feeding inequality and injustice, and discouraging foreign investment and aid. Corruption is a key element in economic under-performance, and a major obstacle to poverty alleviation and development.”

There exists a clear and present danger that the spectre of corruption will permeate and destroy our commonly cherished constitutional value of the rule of law. There can be no gainsaying that the unholy trinity of corruption, unaccountable and arbitrary state action constitutes an antithesis to the rule of law.

We as judges are blessed with the responsibility of upholding the rule of law by administering justice without fear or favour, affection or ill will. I have consciously used the word “blessed” as I have always believed that dispensing justice is a divine function. An independent judiciary is essential to protect the citizen from the excesses of legislative and executive power. The sublime nature of our functions is vividly captured in memorable passage in a decision of the Supreme Court of India in *High Court of Judicature of Bombay v. Shirishkumar Rangrao Patil*, in the following words:

“Independent judiciary, therefore, is most essential to protect the liberty of citizens. In times of grave danger, it is the constitutional duty of the judiciary to poise the scales of justice unmoved by the powers (actual or perceived), undisturbed by the clamour of the multitude. The heart of judicial independence is judicial individualism. The judiciary is not a disembodied abstraction. It is composed of individual men and women who work primarily on their own.

The Judges do not do an easy job. They repeatedly do what the rest of us seek to avoid, i.e., make decisions. Judges, though are mortals, they are called upon to perform a function that is utterly divine in character. The trial Judge is the kingpin in the hierarchical system of administration of justice. He directly comes in contact with the litigant during the day-to-day proceedings in the court. On him lies the responsibility to build a solemn atmosphere in the dispensation of justice. The personality, knowledge, judicial restraint, capacity to maintain dignity, character, conduct, official as well as personal and integrity are the additional aspects which make the functioning of the court successful and acceptable. Law is a means to an end and justice is that end. But in actuality, law and justice are distant neighbours; sometimes even

1(1997) 6 SCC 339
strangely hostile. If law shoots down justice, the people shoot down the law and lawlessness paralyses development, disrupts order and retards progress.”

As far back as in 1742, in the *St. James's Evening Post case*, the Lord Chancellor Lord Hardwicke held that there cannot be anything of greater consequence than to keep the streams of justice clear and pure, so that parties may proceed with safety both to themselves and their characters.

The fruits of a more “detached” though not literally “separated” judiciary can be most salutary. As one writer puts it “values which are more enduring can be better preserved: individuals and groups that would be otherwise emargined or oppressed can be better protected; and more generally the fairness and the permanent representativeness of the political process itself can be better assured.” In our democratic system everyone has a voice in the political process, and it is perfectly possible for minority of today to become majority of tomorrow. If an example is needed, all it requires is to look at Indian Judiciary. The judiciary has time and again protected and zealously shielded fundamental rights such as equality before the law, before freedom of speech etc from the brute numbers of the majority. Thus, constitutional justice through Courts, far from being inherently anti-democratic and anti-majoritarian emerges as a pivotal instrument for shielding the democratic and majoritarian principles from the risk of corruption. The Courts afford, in the words of Mr. Justice Stone, the “opportunity of a sober second thought”!!

In a memorable passage in *R v Horseferry Road Magistrate’s Court Ex Parte Bennett*, Lord Griffiths, pithily explains the nature of Courts as institutions to uphold the rule of law and to check maladministration in the following words:

“If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accepts a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.

My Lords, I have no doubt that the judiciary should accept this responsibility in the field of criminal law. The great growth of administrative law during the latter half of this century has occurred because of the recognition by the judiciary and Parliament alike that it is the function of the High Court to ensure that executive action is exercised responsibly and as Parliament intended.”

In this backdrop, our Courts have continually evolved their jurisprudence to tackle the new and multifarious problems of corruption. A global impetus in the form of the UN Convention against Corruption in 2003 has proved to be a game changer. 186 countries across the globe are signatories to this Convention and have pledged their institutional resources to the prevention, investigation and prosecution of corruption. Significantly, corruption is not explicitly referred to in the text of the Constitution of India. However, in *VineetNarain’s case* [(1998) 1 SCC 226] the Supreme Court recognized the constitutional right to a corruption free government as an integral facet of Article 21. Moving forward, the jurisprudence of the Court evolved to relax the rigid and technical rules of locus standi in cases involving corruption. At the same time, finding that honest and efficient officers of the professional executive were being harassed by filing of false cases, the judiciary yet again came to their rescue. This has been done through a route discovered by the Supreme Court in 1984, called the public interest litigations. The central
vigilance commission was empowered through the judgment of the Supreme Court in Vineet Narain’s case. By ensuring that only officials of unimpeachable and unsullied reputation are appointed as Central Vigilance Commissioners, the judiciary has ensured that its fight against corruption is taken into the executive fold also.

(ii) In a significant development the Supreme Court drew upon the fundamental right of access to justice to interpret Article 21 to include a fundamental right to approach the Court for redress against corruption. Thence forward, a citizen could, as a matter of right, petition the Court to prosecute corrupt public servants.

A classic example of this new development can be seen in the case of Subramanian Swamy v Dr. Manmohan Singh (2012), where Mr. Justice Ganguly, in a felicitous passage held as under:

“\textit{The right of private citizen to file a complaint against a corrupt public servant must be equated with his right to access the Court in order to set the criminal law in motion against a corrupt public official. This right of access, a Constitutional right should not be burdened with unreasonable fetters. When a private citizen approaches a court of law against a corrupt public servant who is highly placed, what is at stake is not only a vindication of personal grievance of that citizen but also the question of bringing orderliness in society and maintaining equal balance in the rule of law.}”

It has been argued previously that treating corruption as a violation of Fundamental Rights is not likely to curb it in practice. Instead, perhaps the best approach is to treat it as a problem of bad governance\textsuperscript{2}. Semantic variations aside, it cannot be gainsaid that the magnitude of corruption in our public life is incompatible with the concept a liberal democracy founded on the rule of law. It cannot be disputed that where corruption begins all rights end. It is for this reason that the Supreme Court in Subramanian Swamy had evolved a principle of construction holding that the duty of the Court is that any anti-corruption law has to be interpreted and worked out in such a fashion as to strengthen the fight against corruption. That is to say in a situation where two constructions are eminently reasonable, the Court has to accept the one that seeks to eradicate corruption to the one which seeks to perpetuate it.

This brings me to the next point. How should a judge, armed with the power of judicial review, seek to vindicate the constitutional right to a corruption free government? I am free to confess that the question does not admit of a single answer. William O Douglas of the United States Supreme Court rightly observed, “\textit{The problems before the Supreme Court require at times the economist's understanding, the poet's insight, the executive's experience, the politician's scientific understanding, the historian's perspectives.}” But a free-standing application of these qualities may land the judge with the epithet of a judicial activist. Recently \textit{Swaraj Abhiyan v. Union of India, (2016) 7 SCC 498}, the Supreme Court said: “\textit{Public interest litigation presents the Court with an issue based problem concerning society and solutions need to be found to that problem within the legal framework. Sometimes, the cause of the problem is bureaucratic inactivity and apathy; sometimes executive excesses that cause the problem and sometimes the problem is caused by the ostrich-like reaction of the executive. These situations represent the broad contours of public interest issues brought to the notice of the Court, and these are the kind of issues for which we need to search for solutions. The successful pursuit of appropriate}

\textsuperscript{2}Daniel Kaufman, \textit{Corruption should be treated as a problem of Bad Governance}, 3 Eur. Aff. 5 (2000).
solutions and consequent conclusions and directions are often pejoratively and unfortunately described as judicial activism.”

The Court then drew inspiration from a lecture by Justice Michael Kirby, a former Judge of the High Court of Australia who in his Hamlyn Lecture titled “Judicial Activism — Authority, Principle and Policy in the Judicial Method” described the Indian approach in the following words: “The acute needs of the developing countries of the Commonwealth have sometimes produced an approach to constitutional interpretation that is unashamedly described as “activist”, including by Judges themselves. Thus, in India, at least in most legal circles, the phrase “judicial activism” is not viewed as one of condemnation. So urgent and numerous are the needs of that society that anything else would be regarded by many—including many Judges and lawyers—as an abdication of the final court’s essential constitutional role.”

In India the primary legislation dealing with corruption is the prevention of corruption act. This not only ensures that a person is brought to justice but also quickly. The statute itself ensures that trials relating to corruption cases are not unnecessarily hindered by judicial process of stay orders. The judiciary has ensured that statistics relating to all cases are available on a centralised data base. An analysis conducted a couple of years ago has shown that trials in around 55.26% of the cases registered have been concluded. The credit goes to the state of Haryana which has completed about 86.10% of its cases and a former chief minister / the top political executive, has been convicted. Of course, there is room for improvement and it is constantly being done. In fact, when an amendment was brought about to permit those convicted of corruption to continue to stand for elections, the Supreme Court struck it down quickly and ensured that the elections do not throw up tainted leaders and thereby affecting the morale of the society. Let me add here – free and fair elections is also a part of the basic structure.

In India, another road block in the fight against corruption was removed recently. The accused used to take shelter under an old principle, of colonial vintage, that the judiciary should not interfere in matter relating to investigation. Recognising that fighting corruption is a fight for establishing human rights, the judiciary while accepting this principle, has gone on to hold that not only fair investigation and fair trial are part of constitutional rights, if by non-interference by the courts, if it would result in failure of justice, then the judiciary will discard the principle and order reinvestigation and if necessary, retrial by an independent agency.

Today, several accused have been brought to book because the judiciary exercised its powers to transfer investigation to the central bureau of investigation and also ensured that the special courts are manned by judicial officers of impeccable judicial track record. This is because the tenet of the constitution is “be you ever so high, the law is above you”.

There can, therefore, be no two opinions that it has fallen to the lot of us, the judges, to apply and enforce the norm of ensuring a corruption free administration thereby strengthening the rule of law. In this connection Mr. Justice Madon, a former judge of the Supreme Court of India, writes as under: “The collective will of the society today wants that if the rich sleep in luxury apartments, the poor should sleep at least with a roof over their head, that if the rich can eat both bread and cakes, the poor should at least eat bread, that if the rich can live in opulence, the poor should at least be able to afford basic comforts of life. If the law is to operate today, so as to secure social justice to all, who else can do it but Judges whose constitutional task is to interpret and apply the law.”
The judiciary thus works to bring about a silent revolution for the purpose of securing socio-economic justice to all. This is the basic premise underlying the constitutional ethos. Will the judiciary be able to achieve this single headedly? This is poser, once again, does not admit of a clear cut answer. One thing is, however, clear. The judiciary has significantly contributed to strengthening the jurisprudence against corruption and maladministration. The jurisprudence of the Indian Supreme Court in the past decade in corruption cases only reinforces this point. The judicial attitude has been one of zero tolerance. Agreed that mere judicial activism cannot furnish a one stop solution to the ills of a corrupt bureaucracy. We must, however, remind ourselves with the golden words of Professor Julius Stone, when he famously quipped, “It is not given to any generation of men to complete the task of human improvement and redemption but no generation is free to desist from them.”

With these introductory remarks, I now invite the panellists to make their observations.
**PANEL SESSION 6A**

“Rights of Indigenous and Sexual Minorities”

By Hon. Justice Prof. Oagile Bethuel Key Dingake, Papua New Guinea

**Introduction**

The aim of this paper is to discuss the rights of minorities in Africa, more specifically the San in Botswana and the LGBT community generally. These two minority groups are linked by the fact that they are each a vulnerable group in society and their vulnerability is further exacerbated by the State’s inability or unwillingness to guarantee and protect their basic human rights. The essay is separated into two main Sections, beginning at section 2. Section 2 will discuss the rights of indigenous minorities. It will start with a brief discussion of International and Regional law which provides for the rights of Indigenous minorities. It will then discuss how these rights have been violated or enforced by the State and how they have been subsequently interpreted by the courts. Section 3 will discuss the rights of the LGBT community. It will start by highlighting the rights provided to LGBT individual in international and regional law. By way of example, it will then discuss how the laws of South Africa, Kenya and Botswana protect or limit the rights of LGBT individuals. In conclusion, the paper discusses the role of the judiciary in enforcing the rights of indigenous people and LGBT individuals.

**The Rights of Indigenous people**

UN Declaration of the Rights of Indigenous People

The International Labour Organisation (ILO) Convention (No. 169) concerning Indigenous Peoples and Tribal Peoples in Independent Countries of 1989 is a legally binding international instrument which reinforces that global consensus around standards of indigenous rights. In 2007, the UN General Assembly also adopted UN Declaration of the Rights of Indigenous People (UNDRIP) on 7 September 2007 after making amendments to the initial texts. The adoption of UNDRIP was a significant development by the UN toward the recognition and protection of indigenous peoples’ rights especially since it is ‘the only Declaration in the UN which was drafted with the right-holders, themselves, the Indigenous People. For the purpose of this paper, the author will only discuss some of the rights contained in UNDRIP, as it is the most recent international instrument which makes provision for the rights of indigenous people and many of its provisions are similar to those in the ILO.

The Preamble of UNDRIP begins by stating that its concerns for indigenous people is specifically ground in the ‘historical injustices that indigenous people have suffered’ as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests. The recognition of the history of indigenous peoples is proof...
that UNDRIP also serves as a remedial instrument. An example of UNDRIP’s remedial characteristic is in Article 28. It provides that indigenous people have the rights of redress by means of restitution or just, fair and equitable compensation, for land or territories which they previously owned, occupied or used but which have been confiscated or damaged without the free, prior and informed consent.

a) Socio-economic rights
UNDRIP does not explicitly make provision for basic rights such as the right to food, health, water, housing etc. However, Article 1 provides that indigenous people enjoy all human rights and fundamental freedoms recognised in the Universal Declaration of Human rights. Article 25 of the Universal Declaration of Human Rights provides for basic human rights such as the right to food, clothing, housing, medical care and the right to social security. Article 14(2) provides that all indigenous individuals, particularly children, have the right to ‘all levels and forms of education of the State without discrimination.

b) Civil and Political Rights
The Preamble affirms that indigenous people are equal to all other people while recognising their right to be, and consider themselves to be, different. In this regard, Article 2 provides that indigenous people have a right to be treated equally to all other people and Article 3 provides for the right of self-determination. Related to the right of self-determination, Article 4 provides that indigenous people have the right to ‘autonomy or self-government in matters relating to their internal and local affairs’.

Article 5 of UNDRIP also provides indigenous people with the right to maintain their political, legal, social and cultural institutions while also retaining their right to participate in the political, economic, political, social and cultural life of the State. The effect of Article 5 is two-fold: it provides indigenous people with the right to participate in and develop their own institutions; and 2) it allows indigenous people to participate in the political institutions of the State generally.

The African Charter
The African Charter on Human and People’s Rights was adopted in 1981 by the Organisation of African Unity (the forerunner of the African Union). All member-states of the AU, except South-Sudan, signed and ratified the African Charter. Unlike UNDRIP—which was adopted solely for the recognition and protection of indigenous people, the African Charter applies generally to all humans and peoples. According to the Report of the African Charter on Human and Peoples Right the Charter does not only protect the right of individuals, it also recognises and protects the rights of groups such as indigenous people.

The African Commission, the judicial body tasked with interpreting the scope of the Charter, in Centre for Minority Rights Development (Kenya) v Kenya, affirmed that the Charter also

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4 S Anaya Ibid.
8 Ibid.
recognises the rights of groups and therefore indigenous peoples. This case is significant because it is the first judgment from the African Commission to address the rights of indigenous people in terms of the African Charter.

Article 1 of the Charter obligates Member-States to recognise and protect the rights enshrined in the Charter and to adopt domestic legislation or other measures to give effect to these rights. In some African countries, international treaties are only enforceable once, as a prerequisite, an enabling Act of Parliament is passed. The rationale behind Article 1 is to prevent a situation whereby States avoid the enforcement of the Charter on the basis that an enabling Act of Parliament has been passed. The Commission has held that a State which has not enacted an enabling Act giving effect to the Charter is still bound by the rights and duties in the Charter in terms of the principle of Pacta sunt servanda. According to this principle ‘agreements are binding and are to be implemented in good faith’. Therefore, a State which has ratified the Charter must comply with its obligations and cannot use its domestic provisions as a justification to avoid its obligations under the Charter.

a) Socio-economic Rights
Article 16 provides for the right of indigenous peoples to receive medical attention when they are sick. Article 16(2) places a duty on the State to ‘protect the health of their people and to ensure that they receive medical attention when they are sick’. Article 13 (2) also states that every citizen has the right of equal access to public services of his/her country. Article 17 provides that everyone has the right to education. The Charter also makes provision for property rights. In terms of Article 14, the right to property may only be limited if it is in the interest of public need or in the general interest of the community, in accordance with the law. Linked to this rights is the right, in Article 21, to freely dispose of one’s wealth and natural resources. Article 21(2) grants individuals who have been dispossessed of their property the right to lawfully recover the property as well as the right to adequate compensation for such dispossession.

b) Civil and political rights
In terms of Article 3 of the Charter, everyone has the right to be treated equally before the law. Article 19 provides that ‘nothing shall justify the domination of a people by another. Article 5 states that everyone has the right to human dignity. Article 17 (2) and (3) provide that every individual has the right to participate in the cultural life of his/her community and that the State has the duty to protect the traditional values of the community. Article 20 provides that all peoples shall have the right to self-determination and ‘shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen’. This right is a right specifically geared at groups such as indigenous people. In relation to political rights, Article 13 states that every citizen shall have the right to participate

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11 Ibid.
13 Article 16(2) of the African Charter
14 N Udombana op cit note 12.
15 Ibid.
16 Vienna Convention on the Law of Treaties, May 23, 1969, Article 26; See also N Udombana supra note 12 at 126-128.
16 Article 16(2) of the African Charter
in the government of his/her country. This right may be exercised directly or freely chosen representatives.

**The Rights of the San in Botswana**
The San are indigenous people of Southern Africa, in countries such as Botswana, South Africa, Angola and Namibia, and have lived across Southern Africa for over 20,000 years. They are hunter-gatherers by nature and their culture requires them to move around and sustain their livelihood from natural resources. Today they are the minority of the population and have a history of discrimination, dispossession, social-exclusion, erosion of their culture and denial of basic human rights.

The Central Kalahari Game Reserve was established in 1961 to conserve the wildlife of the area and “to provide a residence for the “Basarwa”, “San” or “Bushmen” people who were already living there before the creation of the CKGR….” 17 This paper uses the terms ‘San’ and ‘Basarwa’ interchangeably when referring to the San of Botswana. It is reported that at the time that the game reserve was established there was approximately 3 500-5 000 San and Bakgalagadi occupying the region. 18 Many of these people were hunter-gatherers, as well as small-scale farmers producing small livestock and growing lemons. They moved from place-to-place on the availability of water. The government of Botswana had been providing basic services to communities in and around the reserve from the early 1970s. 19

The Constitution 20 of Botswana recognises the identity of the Basarwa: Article 14 (3) (c) allows the State impose restrictions on the right to freedom of movement of any person who is not a Bushman ‘to the extent that such restrictions are reasonably required for the protection or well-being of Bushmen’. 21 Article 14(3) (c) also provides, indirectly, the right of the San to occupy the reserve. 22

Of the San groups in Southern Africa, the San in Botswana are among the most persecuted. In 1997, 2002 and 2005, the government of Botswana forcibly removed most of the San people off of their ancestral land on the Central Kalahari Game Reserve. 23 In the 2002 forced removals, the government terminated the basic service and capped the borehole, which provided the community living in the Reserve with its only source of water. 24

**Forced Removals from the Reserve**
Between May-June of 1997, the Government of Botswana started the process of relocating the Basarwa from the reserves to nearby settlements outside of the reserve. 25 The next resettlement occurred in 2002. 26 The government also shut down the water points which provided the residence of the reserve with its only source of water; it terminated all services which it previously provided to the community; and it refused to issue special game licences to

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17 Matsipane Moselthanyene and Others v The Attorney General (Court of Appeal) Civil Appeal No CACLB-074-10 of 27 January 2011.
18 M Sapignoli ‘ “Bushmen” in the Law: Evidence and Identity in Botswana’s High Court’ Political and Legal Anthropology Review (PoLAR) Vol 40 No 2 page 212
19 Ibid.
21 Article 14.3c of the Constitution.
22 M Sapignoli op cit note 18 at 215.
23 M Marobela ‘The State, Mining and the Community: The Case of the Basarwa of the Central Kalahari Game Reserve in Botswana LABOUR, Capital and Society 43(1) 2010.
24 ibid.
25 M Sapignoli op cit note 18 at 212.
26 Ibid.
applicants residing in the reserve—any person caught hunting was arrested even if they had been previously granted a license to hunt.\textsuperscript{27} The people of the reserve were relocated in three settlements outside the reserve: New Xade, Kaudwane, and Xere. Some people were compensated for the relocation by way of money, seeds, small plots of land and a few cattle.\textsuperscript{28}

As a result, the members of the Basarwa and Bakgalagadi community approached the court, in the case of \textit{Sesana v. The Attorney General},\textsuperscript{29} for an order declaring that they had been forcibly removed from the reserve and ordering the state to allow them entry into the reserve.

The court held, unanimously, that the applicants were in possession of the land, which they lawfully occupied in their settlements in the reserve. It found that their possession was linked to their identity as “Bushmen”.\textsuperscript{30} The majority decision concluded that the applicants were deprived of their possession by the State forcefully, wrongfully, and without their consent.\textsuperscript{31} In relation to the termination of services, the court held that the State did not act unlawfully nor did it act unconstitutionally.\textsuperscript{32} However, it held that the State’s refusal to issue hunting licenses and to allow applicants to enter the reserve was unlawful and unconstitutional.\textsuperscript{33}

Unfortunately, the State interpreted the court’s decision as only applying to the applicants in the initial case.\textsuperscript{34} A day after the court handed down its judgment, the State issued a statement which outlined how the State intended to implement the court’s decision.\textsuperscript{35} The statement provided that the State would only allow surviving applicants from the initial court case, together with their children, to return to the reserve. The State produced a list which contained the names of those Baswa who had the rights flowing from the judgment i.e. the right to reside in the reserve and the right to hunt therein. Members of the Baswa whose names did not appear on the list were not granted entry into the reserve without a permit from the Minister of Wildlife, Environment, and Tourism Office.\textsuperscript{36} Members who attempted to gain entry into the reserve faced the threat of imprisonment.\textsuperscript{37} This caused a division or segregation among the Baswa which was foreign to the Baswa. Seven years after the \textit{Sesana} judgment, the San were still fighting for their right to enter the reserve.\textsuperscript{38}

For many indigenous people, land is more than just a means of economic survival, it is also a link between the living and the ancestors and therefore forms part of their cultural and/or spiritual identity.\textsuperscript{39} Both the African Charter and UNDRIP recognise the importance of land to indigenous people. Therefore, Article 26 states that indigenous people have ‘the right to the lands, territories and resources which they traditionally owned, occupied or otherwise used’. It also authorises States ‘to give legal recognition and protection to these lands, territories and resources.’ Most importantly, UNDRIP, in terms of Article 28, provides a remedial right to indigenous people who were historically dispossessed of their land, territories and resources. It

\textsuperscript{27} Ibid.
\textsuperscript{28} Ibid.
\textsuperscript{29} Sesana and Others v Attorney-General (2006) AHRLR 183 (BwHC 2006).
\textsuperscript{30} M Sapignoli supra note 18 at 219.
\textsuperscript{31} Ibid.
\textsuperscript{32} Ibid.
\textsuperscript{33} Ibid.
\textsuperscript{34} Ibid.
\textsuperscript{35} Ibid.
\textsuperscript{36} Ibid.
\textsuperscript{37} Ibid.
\textsuperscript{38} See Keothlhabetsi Ithuseng v Attorney General (citation).
\textsuperscript{39} ILO & ACHPR Overview report of the research project by the International Labour Organisation and the African Commission on Human and Peoples’ Rights on the constitutional and legislative protection of the rights of indigenous peoples in 24 African countries at 87.
provides indigenous people with the rights to redress by way of restitution or just, fair and equitable compensation.

Article 21 of the African Charter provides the right of people to freely dispose of their natural resources and not to be deprived of it. The African Commission in Kenya case interpreted Article 21 as allowing indigenous communities the right, in the absence of a title deed, to demand official recognition and registration of their property on the basis of their traditional possession, occupation, or use of land.

Firstly, The State violated its obligation under the above-mentioned provisions because it did not recognise the reserve as land traditionally possessed by the Basarwa. The reserve was established specifically to accommodate the Basarwa and their lifestyle. Secondly, the relocations constitute deprivation of the reserve, which they traditionally possessed, occupied and used.

The Right of access to Water
Around 1989, the De Beers Company agreed to allow residents of the game reserve use of a borehole. The government did not object to this arrangement, it even maintained the borehole on behalf. In 2002, the government stopped maintaining the borehole: it removed a pump engine and water tank which was installed for the purposes of using the borehole. The termination of this service was found to be lawful in the Sesana case. The borehole remained in the reserve however, the Basarwa were no allowed use of it. As a result, the Basarwa did not have water for domestic use.

The case of Matsipane Mosethanyene and Others v The Attorney General, an appeal of the decision of the high court, was brought by the Basarwa in an attempt to gain access to the borehole at their own expense.

The court first highlighted the living conditions of the residence of the reserve and the issues they face with limited access to water. This is important for the purposes of this essay because it highlights the difficulties faced by the San in Botswana.

The court recounted and accepted the Appellants account on the living conditions of the residents of the reserve. It found that the residents within the reserve did not have enough water to meet their needs. The first appellant told the court that they spent most of their time “looking for any roots and other edible matter from which [they could] extract even a few drops of water” and that the lack of water rendered them “weak and vulnerable to sickness”. An official report described the condition of the people living in the reserve at that time as “very dirty, due to lack of adequate water for drinking and other domestic use”.

The appellants argued that State’s refusal to allow them use of the borehole, or any other borehole in the reserve, amounted to degrading treatment contrary to section 7 of the

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40 Mosethanyane v Attorney General of Botswana (Court of Appeal) Civil Appeal No CACLB-074-10 of 27 January 2011, Para 5.
41 Ibid.
42 Ibid.
43 Ibid, see para 8-9 of the judgment for a more detailed account.
44 Ibid, para 8
45 Ibid.
46 Ibid.
The State argued that the borehole was not meant to supply water for the appellants and other Basarwa: the borehole was drilled for the purposes of prospecting for minerals. It argued that allowing humans to settle on the reserve would cause danger to the wildlife and fauna on the reserve. Lastly, the state argued that section 6 of the Water Act does not give the appellants an absolute right to abstract water.

The court interpreted section 6 of the Water Act as granting ‘any person who lawfully occupies or owns land […] a right to sink a borehole on such land for domestic purposes without a water right’. The court held that the appellants, as lawful occupiers of the reserve, do not need a water right to use the existing borehole or any other borehole on the land in the reserve.

The court cited the report United Nation’s Committee on Economic, Social and Cultural Rights called, Substantive Issue Arising in the Implementation of the International Covenant on Economic, Social and Cultural Right. The report states that ‘water is indispensable for leading a life in human life. It is a prerequisite for the realisation of other human rights…’ Furthermore, it provides that the State ‘should give special attention to those individuals and groups who have traditionally faced difficulties exercising this right.’ The court held that this provision places an obligation on the State to protect indigenous people’s access to water resources on their ancestral land. The court also noted that the United Nations General Assembly recognised the right to safe and clean drinking water as a fundamental human right, essential for the full enjoyment of life and all human rights.

The court found that the State was in breach of its constitutional obligation, based on international consensus, to refrain from inflicting degrading treatment. It concluded that the appellants have the right to use the existing borehole and sink one or more boreholes within the reserve at their expense.

To prevent the re-occurrence of the aftermath of the Sesana judgment, the court stressed that the appellants litigated on their own behalf and on behalf of the other members of their community residing in the reserve. Therefore, the court’s decision applies to all who reside within the reserve.

The role of the court in enforcing the rights of the San
The courts in both the Sesana and Masetlhanyane case interpreted and gave meaning the rights of the San provided for in the Constitution. These judgments created a sense of trust in the ability of the court to give meaning to their rights as provided for in the Constitution. Members of the San have expressed this trust in a statement saying, “My grandchild can quote the

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48 Ibid, para 10.
49 Ibid.
50 Water Act, Cape 34:106
51 Masetlhanyane supra note 40 at para 11
52 Ibid, para 15-16
53 Ibid.
55 Ibid.
56 Ibid.
57 Ibid.
58 Ibid, para 25
59 Ibid, para 24
constitution and get his rights from there”. Some NGO’s have reported that some people have kept copies of the summary judgment of the Sesana judgement as a symbol for their rights. The trust in the courts powers of judicial review has motivated the San to seek protection of their rights through the courts. On the other hand, the aftermath of the Sesana case highlights the courts inability to influence the State to comply with its judgments accordingly. The court in Maselthanyane, alive to this issue, stressed that its judgment applied to all who reside in the reserve. This is an example of the court ensuring that the State does not misinterpret its judgment to further deprive the San of their rights.

The LGBT Community

The United Nations Declaration of Human Rights

The United Nations Declaration of Human Rights (UNDHR) was adopted by the General Assembly of the United Nations on 10 December 1948. It was adopted as a direct response to the experiences of the two world wars. The UN General Assembly has declared it as the first universally protected doctrine of human rights. The UNDHR is not legally binding however, it provided the foundation for legally binding treaties such as the International Covenant on Civil and Political Rights, and the International Covenant on Economic and Social Rights constitute the International Bill of Rights. For the purposes of this paper, the author will highlight some of the rights in the UNDHR, including the rights of non-discrimination, privacy, and marriage.

Article 2 of the UNDHR entitles everyone to the freedoms set out in the Declaration regardless of race, colour, sex, language, religion or other status etc. Article 2 protects both listed and unlisted categories of persons. While it explicitly prohibits discrimination on the basis of race, colour and language, it also implicitly prohibits discrimination against the LGBT community, via the term ‘other status’. Members of the LGBT community have successfully invoked this ‘other status’ category to seek protection of their rights. Article 7 provides that everyone is equal before the law and everyone is entitled to protection before the law. Article 7 provides that no one shall be subjected to arbitrary interference with his privacy and family. Article 16 provides for a right to marry. It states that everyone is entitled to equal rights to marry, provided that such marriage is entered into with the consent of the parties to the marriage. This right also includes the right to a family and places an obligation on the state to protect the family. In 2012, UN Secretary-General at the time, Ban Ki-moon urged African member-states to uphold their obligations under the UDHR and stop discriminating against people on the basis of their sexual orientation.


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60 Sapignoli op cit note 18 at 222.
61 Ibid.
63 Ibid.
64 Ibid at 617; see also C Finerty ‘Being Gay in Kenya: The Implications of Kenya’s New Constitution for its Anti-Sodomy Law 2012 (45) Cornell Int’L L.J 431 at 439
65 Brown op cit note 62 at 617
66 Ibid.
67 Ibid.
68 Finerty supra note 64 at 440
69 Discriminatory Laws and Practices and Acts of Violence Against Individual Based on Their Sexual Orientation and Gender Identity U.N.
have towards LGBT citizens under international human rights law. It states that ‘[t]he criminalization of private consensual homosexual acts violates an individual’s right to privacy and to non-discrimination and constitutes a breach of international human rights”.

The African Charter
As mentioned above, the African charter recognises the rights of ‘people’ however, it does not contain a definition of the term ‘people’. The Report of the African Charter on Human Rights and People’s Rights and the African Commission have confirmed that the term ‘people’ refers to rights of individuals and rights of groups. Therefore, the rights contained in the African Charter apply to the LGBT community as a group.

Article 2 of the Charter is that every individual is entitled to the rights and freedoms guaranteed in the Charter ‘without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth, or other status. Furthermore, Article 3 provides that every individual is equal before the law. Article 2 does not expressly include sexual orientation however, the phrase ‘every individual’ and ‘or other status’, indicates an open list therefore sexual orientation may be included as one of the prohibited grounds of discrimination.

South Africa
During apartheid, members of the LGBT community were another group who faced discrimination on the basis of their sexual orientation. Gays and Lesbians were excluded and punished in criminal, civil and family law. In 1969, the Immorality Act was amended to include the “three men at a party clause”, which criminalised any “male who commits with another male person at a party any act which is calculated to stimulate sexual passion or give sexual gratification”. This clause was a response to a police raid on a gay party in Johannesburg.

With the advent democracy, the rights of the LGBT community were specifically recognised and protected in the Constitution. The Constitution is the first in the world to explicitly include ‘sexual orientation’ as a means to guarantee equality for gay and lesbian people. Section 9 of the Constitution provides that:

“Everyone is equal before the law and has the right to equal protection and benefit of the law... The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”

The LGBT community has used this section to enforce their rights enshrined in the Constitution and this has resulted in a wide body of case law which further interpreted and gave meaning to the rights in the constitution in relation to the LGBT community. The Constitutional Court has played a pivotal role in enforcing these rights.

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70 Doc. A/HRC/19/41 (Nov. 17, 2011
71 Ibid.
73 Immorality Amendment Act of 1969.
75 South African History Online ‘Why protect the rights of gays and lesbians’ available from www.sahistory.org.za
76 Section 9 of the Constitution, 1996.
One of the first cases brought before the Constitutional Court concerning the enforcement of rights of gay and lesbian people was the case of *National Coalition for Gay and Lesbian Equality v Minister of Justice.* The appellants in this case challenged the constitutional validity of the common-law offence of sodomy, which prohibited the act of sodomy between two consenting men. Section 20A of the Sexual Offences Act, Schedule 1 of the Criminal Procedure Act and the Schedule in the Security Officers Acts were also implicated in the challenge of invalidity as they all included the offence of Sodomy. Sodomy was defined as ‘unlawful and intentional sexual intercourse per anum between human males.’

The court found that the offence of sodomy, which ultimately prohibited sexual intimacy between gay men, violates the right to equality as it unfairly discriminates against gay men on the basis of sexual orientation. Ackermann J said that:

The criminalisation of sodomy in private between consenting males is a severe limitation of a gay man’s right to equality in relation to sexual orientation, because it hits at one of the ways in which gays give expression to their sexual orientation. It is at the same time a severe limitation of the gay man’s rights to privacy, dignity and freedom. The harm caused by the provision can, and often does, affect his ability to achieve self-identification and self-fulfilment. The harm also radiates out into society generally and gives rise to a wide variety of other discriminations, which collectively unfairly prevent a fair distribution of social goods and services and the award of social opportunities for gays.

The court held that the offence of sodomy in terms of the common law and statutory law is inconsistent with the rights of privacy and dignity in the constitution and therefore invalid. The Constitutional court then heard the case of *National Coalition for Gay and Lesbian Equality and others v The Minister of Home Affairs.* This case concerned the constitutionality of section 25 (5) of the Aliens Control Act. The Act facilitated the immigration into South Africa of the spouses of South African residents however, it did not afford the same benefit to gays and lesbians in permanent same-sex partnerships with permanent South African residents. The constitutional court was called upon to confirm the invalidity of section 25(5) of the Aliens Act, on the basis that the exclusion of same-sex life partners to the benefits of section 25(5) is inconsistent with section 9(3) in that it constitutes discrimination on the basis of sexual orientation.

The Minister of Home Affairs argued that the section 25(5) benefit to heterosexual spouses was important ‘to protect the traditional and conventional institution of marriage’ and that the government has an obligation to protect the family life of such marriages. In this regard the court said that:

**“In the first place, protecting the traditional institution of marriage as recognised by law may not be done in a way which unjustifiably limits the constitutional rights of partners in a**
permanent same-sex life partnership. In the second place there is no rational connection between the exclusion of same-sex life partners from the benefits under section 25(5) and the government interest sought to be achieved thereby, namely the protection of families and the family life of heterosexual spouses. No conceivable way was suggested, nor can I think of any, whereby the appropriate extension of the section 25(5) benefits to same-sex life partners could negatively affect such protection.»82

The court held that section 25(5) of the Act constitutes unfair discrimination and a serious limitation of the right to equality of gays and lesbians who are permanent residents and who are in permanent same-sex life partnerships with foreign nationals. Furthermore, section 25(5) also constitutes a limitation on the right to dignity enjoyed by gays and lesbians. The court therefore decided to read-in the words ‘or partner, in a permanent same-sex life partnership’ after the word ‘spouse’ in section 25 (5) in order to cure the defect in the section.83 The court, in fashioning its order took into consideration that same-sex life partners are entitled to an effective remedy which takes effect immediately.84 This order would make it possible for same-sex partners who would like to benefit section 25(5) of the Aliens Act to do so immediately after the order was granted.85

Culminating from the two National Coalition cases is the case of Minister of Home Affairs v Fourie and Others.86 The outcome of this case was celebrated as ‘confirming the final and triumphant emancipation of those individuals who experience same-sex sexual desire and are emotionally attracted to members of the same sex.’87

The case constitutes two cases (the Fourie case and the Equality Project case, with two interconnected complaints, that were set down for a hearing on the same day in the Constitutional Court. The complainants challenged the common law definition of marriage, which states that marriage is a union of one man and one woman to the exclusion of all.88 They argued that the specific mention of a wife and a husband excludes same-sex couples from entering into a union in terms of the common law.89 In the Equal Project case, the complainants challenged section 30(1) of the Marriage Act, which provides that the marriage officer must put to each of the parties the following question:

“Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed marriage with C.D. here present, and that you call all here present to witness that you take C.D. as your lawful wife (or husband)?”, and thereupon the parties shall give each other the right hand and the marriage officer concerned shall declare the marriage solemnized in the following words: ‘I declare that A.B. and C.D. here present have been lawfully married.’” (Sachs J’s emphasis.)

82 Ibid, para 55-56.
83 Ibid, para 89.
84 Ibid.
85 Ibid.
86 Minister of Home Affairs and Another v Fourie and Another [2005] ZACC 19.
88 Fourie supra note 86.
89 Ibid para 2 &42.
Sachs J said that the link between these two cases lies in the fact that for a union to be formalised and have legal effect, section 30 (1) of the Marriage Act, which requires the marriage officer to ask the above-mentioned question, must be invoked.  

The court accepted that the definition of marriage in the common law, read together with the Marriage Act does not provide a legal mechanism by which same-sex parties may enter into a legally recognised union. It held that the consequence of the exclusion is to deprive same-sex couples the rights, obligations and protection afforded by the law to married heterosexual couples. One of the most significant of those duties is the reciprocal duty of support which arises once a couple enters into a marriage contract. In terms of family law, for example, heterosexual couples are protected by state regulation when things go wrong in their relationship. The exclusion of same-sex couples deprives them of the same protection of the law. Ultimately, the court held, the exclusion of same-sex couples deprives them of the right to choice to enter into a union which alters their status and attaches certain rights and responsibilities enjoyed by heterosexual couples.

The state argued that exclusion of same-sex couple from law regulating marriages should not be regarded as constituting unfair discrimination because even international law recognises and protects heterosexual marriages only. The state referred to Article 16 of the Universal Declaration of Human Rights which states that ‘[m]en and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family’. The court held that ‘reference to “men and women” is descriptive of an assumed reality, rather than prescriptive of a normative structure for all time’. It held that the main aim of the Article is to prohibit child marriages, remove racial, religious or nationality limitation to marriage, and ensure that marriage is entered freely.

The court concluded that the common law and section 30(1) of the Marriage Act denies same-sex couples equal protection and benefit of the law as afforded to heterosexual couples. The Court held that this constitutes an unjustifiable violation on same-sex couples’ rights to equal protection of the law under section 9(1), and the rights not be discriminated against unfairly in terms of section 9(3) of the Constitution. The court declared the definition of marriage under the common law and section 30(1) of the Marriage Act to be invalid and inconsistent with the Constitution.

The court gave Parliament a mandate to cure the defect in section 30(1) Marriage Act within 12 months of the date of the judgment. Failure of which, would result in the reading-in of the words ‘or spouse’ after the words ‘or husband’ in the section.

In all three of these cases the state had denied same-sex couples of their rights guaranteed in terms of the UNDHR. These rights include: the right not be subjected to discrimination on the
basis on their ‘other status’, i.e., their sexual orientation; the rights to equal protection of the law; and the rights to enter into a marriage, and the right to have their family unit protected by the State.

The role of the South African courts in enforcing these rights
The Constitutional court played a pivotal role in developing the common law and legislation to bring them in conformity with the right to equality. The one prominent feature in all these cases was the Court’s critical engagement with the impugned legislation. The court did not stop at making a finding of invalidity. It went further and enquired into the appropriate remedies which would take effect immediately. This resulted in the court utilising the interpretative tool of reading-in to ensure that defects are cured immediately to enable same-sex couples to exercise the rights which they were denied without delay.

In *Fourie*, the court went as far as mandating the Parliament to cure the defective legislation within a prescribed period of time, failure of which would result in the court reading-in words to cure the defect itself. In response to this decision, Parliament, in within a year of the judgment, enacted the Civil Union Act. Notwithstanding South Africa’s progressive constitution and laws, which recognise LGBT rights, South Africa has a high rate of LGBT-targeted violence. According to the report by the Hate Crimes Working Group, 35% of the hate crimes reported targets LGBT people. Lesbians still face the threat of corrective-rape, and victims of the corrective rapes have reported that they face further victimisation and abuse at the hand of Police officers who are charged with protecting their rights.

Kenya
In terms of Kenya’s Penal Code, engaging in same-sex sexual activity is described as an ‘unnatural offence’ (anti-sodomy law) which is punishable by up to fourteen years imprisonment. Attempting to engage in same-sex sexual activity carries up to seven years of imprisonment. As a result of these laws, gay men suspected of engaging in homosexual practices were subjected to anal examinations in order to determine whether they were engaging in homosexual activity in contravention of the Penal Code.

In 2011, the Kenyan Human Rights Commission interviewed members of the LGBT community with the aim of documenting the discrimination and abuse that LGBT Kenyans face. It found that members of the LGBT community are harassed and are subjected to physical violence and death threats. Its findings indicate that police officials routinely arrest and hold LGBT Kenyans in ‘remand houses’ without informing them of the charges against them. LGBT Kenyans are also brought into court on trumped up charges. Furthermore, the interviewees revealed that some police officials extort and blackmail LGBT individuals with the threat of arrest and imprisonment. A Police Constable interviewed by the Human Rights Commission, told the commission that “homosexuals are criminals, these are rapists who should be locked up

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99 Article 2 of UNCHR.
100 Civil Union Act 17 of 2006; See also P De Vos & J Banard ‘Same-Sex Marriage, Civil Union and Domestic Partnership in South Africa: Critical Reflection on An Ongoing Saga’ *SALJ*.
101 J Andersson ‘What is happening to the LGBT+ rights in South Africa’ available from [http://www.pinknews.co.uk](http://www.pinknews.co.uk).
103 The Penal Code, 2009 Cap 162; see also C Finerty supra note 66
104 The Penal Code, 2009 Cap 162.
106 Finerty supra 64 note 434.
107 Ibid.
forever”. Interviewees also reported being gang-raped by a group who target gay men to ‘punish them for their errant ways.'

From the anti-sodomy laws and the findings of the Human Rights Commission, the State has denied the LGBT community a number of rights guaranteed in the UNDHR and other international instruments. These rights include: The right to dignity; the right not to be subjected to torture or to cruel, inhuman or degrading treatment; the right to equal protection of the law; the right not to be subject to arbitrary arrest; the right not to be subjected to arbitrary interference with one’s privacy;  and the right to marriage. In 2010, Kenya enacted a new Constitution which replaced the Constitution which has been in effect since Kenya gained its independence from Britain in 1963. The Bill of Rights make provision for rights and freedoms which cannot be limited by any other provision in the Constitution. Article 27 provides that everyone has the right to equal protection of the law. It explains that includes the full and equal enjoyment of all rights and freedoms. Furthermore, Article 27(4) states that the State should not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status etc. The Constitution does not explicitly prohibit discrimination on the basis of sexual orientation. However, it does include the phrase ‘on any other ground’, which serves as a catch-all provision and therefore includes sexual orientation as a ground. Other rights and freedoms include: freedom from torture and degrading treatment and punishment; the right to a fair trial; the right to privacy; and the right to dignity.

Despite the new constitution’s new progressive stance and the inclusion of rights and freedoms that cannot be limited, the LGBT community has not been denied many of these rights. Members of the LGBT community are still subject to verbal, physical abuse on the basis of their sexual orientation. And Kenya’s anti-sodomy laws are still in operation, which means that, in accordance with these anti-sodomy laws, members of the LGBT community still face imprisonment solely because of their sexual orientation.

The introduction of the new constitution will serve as a tool for the LGBT community to enforce their rights guaranteed both in the constitution and in international instruments. The LGBT community has already begun using the constitution to secure these rights. In March 2018, the Kenyan Supreme Court of Appeal ruled that forced anal examination of men suspected of being gay in unlawful. This case challenged the arrest of two Kenyan men (the petitioners) who were subject to forced anal examination and HIV testing under a magistrate order to determine whether they had engaged in same-sex sexual activity. The Petitioners

108 Ibid at 436.
109 Ibid at 434-435.
110 Article 7 of UNDHR.
111 Ibid, Article 9.
112 Ibid, Article 12.
113 Ibid, Article 16.
115 Finerty supra note 64 at 432.
116 Ibid at 449
117 Article 25(a) of the Constitution, 2010
118 Ibid, Article 25(c)
119 Ibid, Article 31
120 Ibid, Article 28

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were arrested on suspicion that they might be gay and they were later charged with ‘carnal knowledge against the order of nature and indecent acts between two adults.’

The examination was conducted by forcing the Petitioners to lie with their legs up and a metal was inserted and torches shone into their anus. At the court a quo, Counsel for the Petitioners submitted: that the Petitioners did not consent to the examination; the use of metal was cruel; and the presence of police officers was humiliating. Counsel contended that the examination violated the Petitioners rights not to be subjected to cruel and degrading treatment and the right to privacy in terms of Article 29 (f) and 28 of the Constitution respectively and the rights guaranteed in the International Covenant and Civil and Political Rights, and the African Charter. The Court of Appeal agreed with arguments and found that the state-led examinations were unconstitutional and violated the above-mentioned human rights.

The National Gays and Lesbians Human Rights Commission has also challenged section 162(a), (c) and 165 of the Penal Code of Kenya which outlaws sexual activity between individuals of the same-sex. The case was heard on the 22-23 February and 1 March 2018. The court is yet to deliver its judgment in this regard.

The Role of the Judiciary
The new Constitution of Kenya is less than 8 years old and this may account for one of the reasons for why they are yet to interpret the equality clause in relation to sexual orientation. However, the Court of Appeal’s decision that pronounced forced anal examinations as unconstitutional may serve as a step closer to the decriminalisation of homosexual practices.

Botswana
Similarly to Kenya, the Botswana Penal Code criminalises any sexual activity between adults of the same-sex and any attempts to engage in such activity. Persons found guilty of engaging in sexual activity with a person of the same sex face imprisonment of up to 7 years. One of the first challenges of these sections in the Penal Code came through the case of Kanene v The State. This case was first heard in the high court however, for the purposes of this paper the author will only discuss the decision of the Court of Appeal as it discusses the right in section 3 and section 15(3) in detail.

The appellant in this case challenged sections 164 and 167 of the Penal Code, pre-amendment. Both sections 164 and 167 prohibited a male from engaging in sexual intercourse with another male. The appellant was charged with ‘permitting’ another male to have sexual intercourse with him, in contravention of section 164 (c) of the Penal code. He was also charged, in the alternative, with engaging in sexual intercourse with a male in contravention of section 167 of the Code.

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122 Petition 51 of 2015, para 5 (at the lower court)
123 Para 5-6
126 Ibid.
127 Penal Code Law No 2 of 1964.
128 See Sections 164, 165 and 167 of the Penal Code.
129 Kanene v The State 2003 (2) BLR 64 (CA).
130 Ibid.
The appellant contended that the sections: a) discriminate against male persons on the grounds of gender and breaches a number of rights included in section 3 of the Constitution, which includes the freedom of expression and privacy; and b) they limit male persons right to assemble freely and associate with other persons as provided for in sections 13 and 15 of the Constitution by discriminating against males on the basis of gender.

Section 3 provides that every person has the right of equal protection of his/her rights under the Constitution, regardless of his/her race, place of origin, political opinion, sex etc. Section 15 provides that ‘no law shall make any provision that is discriminatory either of itself or in its effect. Section 15(3) contains the definition of discrimination, which provides that discrimination means ‘affording different treatment to different persons’ on the basis of their race, tribe, political opinion etc. Neither gender nor sex is included as a ground of discrimination in the definition.

The court held, citing the court in Attorney-General v Dow,\textsuperscript{131} that the fact that ‘sex’ and ‘gender’ is not included in section 15(3) does not mean that unequal treatment on the basis of sex and gender is not prohibited. It held that the omission of the word ‘sex’ was not intentional nor was it made with the intention of excluding sex-based discrimination.\textsuperscript{132} Therefore, legislation which discriminates on the basis of gender, even though not explicitly included in section 15(3), would be in violation of section 3 of the Constitution. However, the court held that it was unnecessary to strike down the section 167 because of the amendment in 1988.

In relation to section 164(c), the appellant argued that the prohibition of sexual act by consenting males in private amounts to discrimination on the basis of sexual orientation in contravention of section 15(3) of the Constitution.\textsuperscript{133} The court noted that section 15(3) does not include sexual orientation as a prohibited ground for discrimination. Therefore, decriminalising homosexual practices would require a broadening of the word ‘sex’ in section 3 and section 15(3), to include sexual harassment. The court therefore asked whether ‘there is a class or group of gay men who require protection under section 3 of the Constitution? It found that at this stage, gay men and women do not represent a class which requires protection under the Constitution.

The court reasoned that no evidence was placed before the court to show that the general public had changed and developed Botswana to demand such decriminalisation. It held that while its function is to ensure that the rights of citizens are protected, it has to do so subject to the limitation contained in section 3, one of which is that the enjoyment of those rights and freedoms are in the public interest. Therefore, the court must take into account the public interest in consideration when interpreting legislation. Lastly, the court held that Parliament is the appropriate body to interpret the constitution in such a liberal manner in a society whose norms and values tend to be conservative.

The author disagrees with the court’s finding that it is not the appropriate body to interpret the constitution to include a prohibition of discrimination on the basis of sexual orientation, and thereby decriminalising homosexual practices, on the basis that the public opinion has not changed and developed to demand such interpretation. The Court’s imply reasons that the court

\footnotesize{\textsuperscript{131} Attorney-General v Dow [1992] B.L.R. 119, CA.}\n\footnotesize{\textsuperscript{132} Kanane supra note 129.}\n\footnotesize{\textsuperscript{133} Ibid.}
must always be led by public opinion even at the detriment of a minority. The author is of the view that the court’s role is to develop the law in tandem with the developments in society and not necessarily to be dictated by public opinion. In certain circumstances, protecting the rights of citizens, especially minorities, should trump public opinion. The court therefore should have interpreted section 3 to include sexual orientation, in the same way it included the terms ‘sex’ and ‘gender’, considering the impacts of the criminalisation of homosexual activity on the lives of the LGBT community.

Motivated by the Kanene case, members of the LGBT brought the case of Attorney General of Botswana v. Thuto Rammoge & 19 Others. The applicants in this case challenged the decision of the Minister of Labour and Home Affairs to refuse the registration of the organisation called, The Lesbians, Gays and Bisexuals of Botswana (LEGABIBO). One of the objective of LEGABIBO is ‘to carry out political lobbying for equal rights and decriminalisation of same sex relationships’. The applicants contended that the Minister’s decision limits their right of expression and their freedom to assemble and associate provided in sections 12 and 13 of the Constitution, respectively. Furthermore, they contended that the Minister’s decision was discriminatory on the basis of sexual orientation.

The Minister rejected the registration on two grounds. The first was that the Constitution did not recognise homosexuality. The second was that section 7(2) (a) of the Societies Act authorises the Minister to reject an application where any of ‘the objects of the Societies is (sic) or likely to be for any unlawful purpose or any purpose prejudicial to, or incompatible with peace, welfare and good order in Botswana’. The court then considered whether the Minister’s decision violated the appellants’ right to equal protection of the law in terms of section 3 of the Constitution. Section 3 provides ‘every person in Botswana is entitled to the fundamental rights and freedoms of the individual’ regardless of his/her race, place of origin, political opinions, colour, creed or sex. The section does not

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134 See S v Makwanyane and Another 1995 (6) BCLR 665
136 Ibid, para 15 objective no 4.5.
137 Societies Act Chapter 1801.
138 Ibid section 7(2)(a).
139 Kanane supra note130 Para 24
140 Ibid.
141 Ibid.
expressly mention sexual orientation. The court said that reference to all ‘persons in Botswana’ includes individuals with a different sexual orientation on the basis that such individuals are also ‘persons’. The court held that if the drafter of the constitution intended to exclude gay people from the enjoyment of those fundamental rights and freedoms, it would have expressly done so. It held further that the exclusion of gays from the freedoms guaranteed to ‘all persons’ would amount to reading implicit restriction into the section, contrary to the rules of constitutional interpretation.

The court also found that the Minister decision amounts to a refusal to allow the organisation to carry out peaceful and lawful advocacy for legal reform. Such refusal violates the appellants’ right to freedom of expression and freedom of assembly and association under sections 12 and 13 of the Constitution.

The respondents submitted that the court should dismiss the appellants’ case because they followed the incorrect procedure in bringing its application to court. The court accepted that the appellants followed the incorrect procedure, but said:

‘where, as in the instant case, a group of citizens allege that their constitutional rights are being violated, that alone should trigger alarm bells in the mind of the court and motivate it to move mountains to ensure that the truthfulness or otherwise of this serious allegation is investigated’.

Despite the procedural error on the part of the appellants, the court decided in favour of substantive justice and held that the application was properly brought. Furthermore, it held that Order 5 Rule 2(1) of the Rules of the High Court entitles the court to consider the application on its merits to determine whether there is substance to it.

The respondent also argued that the court of appeal in Kanane dealt extensively with the lawfulness of homosexual practices and therefore this court is bound by the principle of precedent to follow the decision in Kanane. The court differentiated the case before it from the Kanane case. It held that the issue in Kanane was whether the law criminalising homosexual activity was unconstitutional. The issue before the high court was whether the Minister’ decision to refuse to register a society, whose objectives was the lobbying for the decriminalisation of homosexual practices, was unconstitutional.

The court concluded that the refusal to register LEGABIBO was not justifiable under the constitution nor under section 7(2)(a) of the Societies Act. Furthermore, the decision violated the applicants’ rights to freedom of expression, freedom of association and freedom of

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142 Para 32.
143 Para 32.
144 Ibid para 38-41.
145 Ibid.
147 Para 51
148 Ibid.
149 Ibid.
150 Ibid.
151 Ibid para 55.
152 Ibid.
153 Ibid para 59.
association enshrined in sections 3, 12, and 13 of the Constitution. The case was taken on appeal to the Court of Appeal, where the High Court’s decision was upheld.

While Botswana is yet to decriminalise sexual activity between individuals of the same sex, the court, as of late, is making progress in realising the rights of the LGBT community in Botswana. Most recently, on 12 December 2017, the High Court overturned the Registrar of National Registration’s decision to refuse to allow a transgender woman to change her gender marker on her identity document.

**Role of the Court**
The court has played an instrumental role in interpreting the Constitution so as to include the sexual orientation as one of the prohibited grounds of discrimination. The court has even gone as far as ordering State officials to allow a transgender woman to change her gender identity marker in her identity document. However, the court has shied away from declaring unconstitutional the anti-sodomy laws contained in the Penal Code. An example of the court’s reluctance to declare the these laws unconstitutional is the *Kanene* case, where the court found that section 3 of the contained an open list of prohibited grounds of discrimination which enabled the court to include sex and gender as ground for discrimination. However, the court found that it did not have the power to include sexual orientation as a prohibited ground of discrimination as the elected Parliament was better suited to decide whether to interpret the constitution in the way.

**Conclusion**
One of the functions of an independent judiciary is to ensure that the rights of all citizens, especially minorities, are given meaning and that the State complies with its obligations to its citizens. The judiciary does this by interpreting the constitution and even developing laws which are found to be unconstitutional. The cases discussed above reiterated the importance of the courts function of interpreting the law, in the achievement and enforcement of human rights. It is important that in interpreting local legislation in cases involving human rights, the courts must, to the extent necessary, interpret the constitution and other legislation in a manner that is consistent with international law.
"Indigenous Rights"
By Hon. Justice Terrance Clackson, Canada

INTRODUCTION
The topic for this session is ensuring justice for Indigenous persons and other minorities in all walks of life. I have chosen to speak more narrowly on Canada's Indigenous population and the injustices visited upon them. I will address the impact of those injustices, the recognition of the injustices done and the changes being made and that need to be made to ensure Indigenous persons are justly treated.

WHERE WE HAVE BEEN
It is my view that one must understand the plight of Indigenous persons and their historic treatment by government in order to properly address the need to ensure that Indigenous persons are justly treated. As a result, one must recognize that before the arrival of Europeans in North America, Indigenous persons were free to go and do as they pleased subject only to the territorial claims and actions of other Aboriginal persons. In that sense, the term "Aboriginal or Indigenous Lands" could encompass vast tracts of wilderness. In land claim actions, both past and present, such demands have often been made by First Nations or Indigenous bands. That is especially the case with nomadic bands. I will have more to say on this subject later.

Reservations:
The arrival of Europeans eventually resulted in confining the bulk of Canada's Indigenous bands to reservations. Reservations were the product of treaties negotiated between bands, or as we now describe them, First Nations, and the Queen as represented by her national government. By relegating Indigenous persons to reservations, they could be largely ignored except where trading interests required contact. Reservations facilitated the settlement of our vast country.

Unfortunately, no one seems to have foreseen the cultural impact of the reservation/treaty system. While Indigenous persons were free to practice their culture, they became more and more impoverished and were ill equipped to withstand the European traders' wiles, alcohol and the influence of religion. While the reserve system provided a means to allow Indigenous persons to continue their way of life, it also doomed Aboriginals to a future of poverty and idleness. Prosperity left them behind. In result, it became apparent that something needed to be done. Unfortunately, in our arrogance, we acted without consultation. In the name of religion and arguably because we felt a need to help Indigenous persons become more like us, governments and churches took steps to normalize or to Canadianize our Aboriginal population. Those steps included the creation of residential schools.

Residential Schools:
As with the world, so with Canada, the Roman Catholic Church saw a need to bring God's word and laws to the unconverted and in keeping with the global model, education became the tool to achieve that result. Plainly, we all agree that education is essential. In Canada, government and churches hit on residential schools as the manner in which Indigenous children were to be educated. Residential schools in Canada were run by churches with government approval and funding. A brief explanation is necessary. Residential schools were buildings designed to teach and house Aboriginal children. The school focused upon religious
instruction and living in a Godly way. Traditional educational content was also part of the schooling but it is worth recognizing that while this was about making Indigenous persons more like us, the educational aspect of the indoctrination was inadequate to provide the children with the skills and abilities white children were being taught. Despite the fact that the goal was, of course, to help Indigenous persons become productive members of society, which at the time was predominantly white. Our first prime minister said this: "Take them from their parents' influence and put them in central training industrial schools where they will acquire the habits and modes of thought of white men."

To achieve that end, children were taken from their families, often forcefully, and forced to cut their hair, change their clothes, speak English or French and generally act like white children. They were forced to abandon all aspects of their culture and their customs. They were only to be allowed contact with their parents or extended families during the summer months, but often the schools were so far from their communities, that contact could not occur. This educational initiative lasted roughly 100 years and involved approximately 150,000 Indigenous children. It is estimated that 6,000 children in that 100-year period died while resident in one of the residential schools. Many of those deceased children were the victims of violence at the hands of the persons responsible for their education and care. Most of the schools were closed by 1986, although, a few of those near reserves continued as schools run by the local Indigenous band.

It is also important to remember that despite the pride we Canadians take in our belief in equality, racism was a common feature throughout this period. Canadian children were routinely exposed to such epitaphs as dirty Indian kid, drunken Indian, chief, Cochise, squaw, sitting bull, and the like. Indigenous persons were routinely referred to in this way. This is not a proud period in Canadian history. As a result of residential schools, Canada's Indigenous population could be fairly described as broken. They had been stripped of their culture, deprived of their communities until they became adults. Their communities were abominably poor. Alcohol and government welfare became the tool for economic and emotional survival.

Generations of abused children became abusers and the reserves became places of extreme violence. Not in all places, but in a clear majority, hopelessness was rampant. Inevitably, our local police forces were expending more and more resources investigating crimes on reserves and dealing with the criminal behaviour of Aboriginal persons off reserve. In virtually all cases, all of these behaviours were the product of deep emotional hurt, medicated by alcohol — that is the real legacy of the residential schools system.

The 60's Scoop:
Despite the obvious hash we had made of our unwanted attempts to indoctrinate our Indigenous population, we did not learn from that lesson. Instead, in the 1960's, we employed an even more ill-advised tool which has come to be known as the 60's Scoop. Let me explain.

Child welfare is a concern in all nations. In Canada, we saw Indigenous children residing in squalor, often abused and/or ignored by their alcoholic parents. These children were raised by the aunts, uncles, grandparents or fended for themselves. For some reason we failed to recognize that the residential school nightmare had created the abusers and alcoholics.
Motivated by concern for child welfare, governments felt obliged to intervene and they did so by apprehending Aboriginal children and placing them in white foster homes and adopting the Aboriginal children out to white families. As an example, in my province of Alberta, it is estimated that around 25,000 Aboriginal children were thus taken in an approximate 20-year period. In Canada, more than half the population of foster children are Indigenous; yet only 7 percent of Canada's children are Aboriginal. Once placed in a white home, the children were routinely deprived of their culture, language and customs. They had no exposure to their heritage or their Aboriginal families. They were essentially raised as a white child.

In addition, many of these children were sexually and physically abused by their foster families and were routinely treated as slave labor. Because of their skin color, it was common for an Indigenous child in this environment to be the subject of bullying both in the family and in the white community that the child became part of. Canadians are only now coming to realize the horror that was the 60's Scoop and its impact upon our Indigenous citizens. In this environment of abuse and ill-advised programs, it is little wonder that Indigenous groups started to organize. Militancy, obstructive behaviors against national infrastructure projects and general distrust and disillusionment is the harvest we have reaped. That brings us to our present circumstance.

WHERE WE ARE
Over the last 20 years, our community leaders and politicians have realized our follies and have apologized, in some cases repeatedly, for our arrogance and ignorance. Dialogues between government and Indigenous groups have been occurring on issues of Indigenous health, welfare and education. We have recognized that reserve infrastructure, including basics such as potable water, are in desperate need of attention and resources. We now consult with First Nations on projects that may impact their environments and lands. We have resolved many land claims although mostly in response to litigation by First Nations. Many more such claims remain in contention.

We have compensation agreements to pay damages to those victimized by the residential schools initiative and the 60's Scoop. The Supreme Court of Canada has routinely recognized and protected traditional Aboriginal activities. That court has ruled that historic accounts, often by word of mouth, can be received as evidence in support of land claims. In short, we have made progress. In this environment, Indigenous culture has experienced a revival, both locally and nationally. Pow-wows and traditional native ceremonies are embraced by both Indigenous and non-Indigenous persons. Aboriginal persons are rediscovering their culture and finding their voice. Ironically, many of the Indigenous children who were scooped provide the strongest voices for acceptance of fault and encouraging change.

Perhaps the most potent catalyst for change is the 2015 Truth & Reconciliation Report and Recommendations. The Truth & Reconciliation Commission was chaired by one of Canada's Indigenous judges, Murray Sinclair. The commission heard testimony and received documents while conducting proceedings across the country. It is important to remember that while we have spoken at length about recent government actions to help Indigenous persons and to apologize for past sins, Indigenous persons remain the subject of pervasive, derogatory bias. Remember, white children of the 50's, 60's and 70's, who now make up the majority of our white population, were raised in an environment where derogatory terms were commonly used to describe Indigenous persons, and those attitudes continue to exist. That subject was specifically addressed in the Truth & Reconciliation Report. As well, having concluded, in my
view correctly, that there is a broad lack of understanding of the unjust and violent circumstances from which modern Canada emerged, the Report details many individual stories of the damage done. The distribution of the Report and the publicity its contents received motivated many non-governmental groups to act to address their biases and inappropriate behaviours. Universities and colleges are now offering programs in Aboriginal Studies and many organizations engage in sensitivity training. As a result of the Report, individual Canadians have started to recognize their individual biases and have started to learn to be more tolerant and just, a national pride we have always claimed but are really just starting to earn in regard to our Indigenous brothers and sisters.

The next most important step in the process of ensuring justice is the recently commissioned Murdered and Missing Indigenous Women's Inquiry. That is an initiative of the Trudeau government to address a longstanding source of angst among all Canadians. In a nutshell, there is a grossly disproportionate number of Indigenous women who have been found dead or who have gone missing in Canada. The inquiry will help us understand the roles that poverty, alcohol and racism have played in those lost lives. In doing so, we as Canadians will be forced to again confront our racist attitudes. In this period of awakening, the Supreme Court of Canada has not just dealt with land claims, traditional rights and forms of evidence. It has also recognized the gross over-representation of Indigenous persons in our jails. Let me explain.

According to Statistics Canada's 2017 report which details circumstances in our jails in 2016, Indigenous men represent 25.2% of all incarcerated males and Indigenous women represent 36.1% of all incarcerated females yet only 5% of Canada's population is Indigenous. 82.4% of Indigenous offenders served their complete sentence before release while just 65.2% of non-Indigenous offenders did so. To address this atrocious imbalance, the Supreme Court has directed sentencing courts to give effect to an accused's Aboriginal heritage in imposing a fit and proper sentence. That initiative motivated changes to our Criminal Code. In order to achieve that end, the Supreme Court has obligated sentencing courts to obtain full information about the accused's Aboriginal history and his or her personal circumstances, including exposure to residential schools and child welfare. In Canada, we call them Gladue Reports, which is the name of the first Indigenous person whose sentence was considered by the Supreme Court. As a trial court justice, I have had many opportunities to hear such circumstances and even if the circumstances did not substantially impact a particular sentence, the fact that the accused's story got told and heard is a powerful rehabilitative and educational process.

**IV. FUTURE**

As I have said, we pride ourselves on equality, acceptance and assisting of those in need. We cannot legitimately claim any of those laudable labels until we accept our obligation to redress our past wrongs. The Truth & Reconciliation Commission told us that. Both our governments and we, individually, need to accept the fact that we are responsible for the current plight of our Indigenous countrymen. We need to acknowledge that the present, deplorable conditions in which our Indigenous populations live are born out of our arrogance and our prejudice.

As organizations, we must develop ways to encourage Aboriginal persons to seek or to pursue legal careers. We need to help those organizations to design programs, which are free of racial bias. We need to encourage governments to appoint more Indigenous judges and help governments develop and publish the criteria for selection, which will ensure that is possible.
Justice system stakeholders need to recognize that the fundamental difference between a penal and criminal adversarial system and the manner in which Indigenous cultures handle criminal behaviour. We need to be vocal supporters of systems modifications designed to allow for Indigenous persons who are alleged or who have committed crimes to be dealt with in a culturally sensitive way. Those modifications will help Indigenous persons accept the justice system as their own and thus overcome the present inequity in our system.

Indeed, we should consider empowering Indigenous groups to resort to their own legal systems and traditions and find a way to blend the systems together. Those specific actions are necessary to develop a justice system that can truly be said to be fair and to treat all fairly. However, justice for Indigenous persons depends on more than adjustments to justice systems. Fair treatment of Aboriginal populations also requires governments to resolve land claims and provide a mechanism for resource wealth distribution. Governments need to consult and properly provide for education, health and welfare of our Indigenous persons. Action in these areas will be recognized as a demonstration of our commitment to right past wrongs.

Let me end by saying that the biggest impediment to justice is our socially motivated disdain for the differences between us. Canadians hold prejudices against Indigenous persons and other minorities. Therefore, it behooves us, everyone, to examine our own attitudes and behaviours and commit ourselves to overcome our prejudices and biases. We must, today, refuse to allow ourselves to think or act as our colonialist forefathers did and we must encourage those with whom we associate to do the same. If we truly embrace fairness and equality, we will act in that fashion and there will indeed be justice for all of our citizens.
I am greatly honored to be given this opportunity to speak at this Commonwealth Magistrates and Judges Association Conference. I am a bit shy to speak on a rather technical subject of Virtual Courts and Digital Filing with no special expertise in the area and at the same time to be on the panel with a speaker from the Singapore judiciary which is reputed to be No. 1 in the use of court technologies.

As is now common knowledge, Rwanda was devastated during the Genocide against the Tutsi in 1994 with massive loss of life and destruction of the social fabric, the economy and infrastructure. Public institutions ceased to function and the post-genocide government and society had to start reconstruction virtually from scratch. However, even before the Genocide, courts were not known for their efficiency nor did they command the respect of the population, largely because they were not well funded, were dominated by the executive, were staffed by persons a majority of whom were not legally trained and the system was riddled with corruption. There was a heavy back-log of cases going back up to 20 years. Court processes were purely manual with the only machines being dated type-writers. Since the end of the Genocide, there have been many programmes of reconstruction and development of all institutions. Specifically, in the judiciary focus has been on the training of lawyers, judges and magistrates, construction of new courts, equipping them and introducing court technologies wherever possible as well as re-establishing the rule of law. Today, all courts have access to internet, communicate via email and proceedings are digitized. Some courts have digital recording systems for proceedings and electronic case management has been implemented in all courts.

A brief history of digitization in Rwanda
Until the judicial reforms that started in 2004, there were only a handful of computers in the judiciary and only available in the higher courts. Recording of proceedings was done by hand, all documents were kept in folders and storage was poor with the risk of damage or loss of the files whether intended or unintended. Finding a particular case file was very difficult since it meant physically searching through huge volumes of files. Equally, determining how many cases there were pending, for planning purposes, was slow and tedious requiring physical verification through piles of folders.

In 2006, with the assistance of the Canadians, a document management system called Registre de Dossier Judiciaire (RDJ) was initiated to ease access to case document information. With this system, cases were filed physically at the court and all case processing such as case number allocation was done manually. The court registrars would access RDJ to input the case information which could later be easily accessed to locate files, compared to searching physical documents. However, RDJ did not replace physical case documents but was used concurrently to facilitate search of case information. This did not help in terms of reducing the time or the cost a litigant spent in filing the case nor was it very helpful to the court staff charged with

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1 I am grateful to Nice Karungi, one of the IT staff at the Rwanda Supreme Court and administrator of its electronic case management system for making me literate enough in the area to make this presentation.
processing cases. The system did not allow for attachment of documents such as pleadings or evidence nor could it be accessed online by interested parties.

By 2008 almost all courts had computers for use by judges, registrars and other staff. In 2011 an electronic filing system (EFS) was introduced, whereby the litigant did not have to come physically to court to file a case. Pleadings could be scanned and attached into the system. However, the documents would then have to be printed at the court registry and compiled to make them ready for the hearing.

Although EFS had the advantage of saving time and cost for the litigant by enabling web-based filing and thereby also improving court efficiency, there were shortcomings in that case management after filing could not be done in the system and the litigant was not able to track developments in the case. The Electronic Document and Records Management System (EDRMS) was then introduced in 2012 by an Indian company to augment the EFS. EDRMS was conceived as a document management system, basically as an off-the-shelf software that was intended to be adapted to work as a case management system. Apparently, it had been used in different public institutions in some countries but had never been tried in courts. It did not include case filing which means that litigants would file cases through EFS and court registrars would manually fill information in EDRMS. It was not a web based system and each court worked in an isolated manner. The attempt to convert it into a case management system took a long time of tinkering with it but ultimately it did not work properly. The adaptation continued until the contract of the providers expired and it had to be abandoned. The lesson learnt with EDRMS was that before purchasing an application for your institution you need a thorough study that demonstrates that it will meet your exact needs and to have very close collaboration between court staff and developers at every stage.

Integrated Case Management System
The current Integrated Electronic Case Management System (IECMS) was introduced in 2016. It was developed by Synergy International Systems Inc. an American company with its development office in Armenia, after a thorough study by a consulting firm. It was an initiative of the whole Justice Sector based on a needs assessment conducted by the Sector. The Sector incorporates the institutions involved in the criminal justice chain that is to say: the Rwanda Investigation Bureau (RIB), the National Public Prosecutions Authority (NPPA), the Judiciary and the Rwanda Correctional Services (RCS). The system has a fully integrated process in criminal matters, from investigation where RIB officers capture suspect details, arrest statements, seizure and other procedures after which they send the case to the Prosecution. At this level, the prosecutor has access to the whole investigation case file, general information on the accused and other case information is automatically filled into the prosecution case and the prosecutor only adds prosecution related information like suspect statement made before the prosecutor, indictment, etc. which he then transmits to the court within the system. The court, the defendant and their lawyers have access to both the investigation and the prosecution case.

Once court proceedings are completed and a judgment is rendered, it is forwarded automatically to RCS for execution with all the supporting documents in the criminal process chain. Moreover, the system keeps track of the whole criminal record of the individual from detention through all appeals with the corresponding decisions from all the institutions. On the civil litigation side, individuals, entities with legal personality as well as the civil litigation department of the Ministry of Justice have access to IECMS. The litigant files a case
to any court in the country having filled the submissions within the system. The defendant is automatically informed of the case against them and provides responses through the same system. After admissibility compliance check by the registrar, an automatic case number is generated. At each stage in the case process, each actor builds on the previous actor’s work and completes only his/her relevant requirement until the file reaches case disposal.

The system was aimed at improving service delivery by reducing delays and costs with benefits both to litigants and the justice system. Unlike previous applications, IECMS was developed in close collaboration with stakeholders and thus was able to capture most of their requirements from the outset and is periodically upgraded based on the feedback and needs of users.

**The main advantages of the system**

The system can be accessed from anywhere on computer, tablet or mobile phone for electronic filing or appeal of a case, issuing of sermons, receiving notifications and reminders of any deadlines regarding case processes via e-mail, sms and system notifications, and litigants can also follow-up on their cases regarding current status and what follows next. Pleadings and other documents can also be filed online and new evidence can be added after the initial filing. Court fees can be paid using mobile money services on telephone. A litigant can also check whether his/her case has been appealed or not for execution purposes, which was one of the more frequent reasons that brought litigants to court. In 2014 the frequency of litigants coming to check whether their cases had been appealed was at 18.51% of all visits to courts whereas in 2017 it had dropped to 8.36%. As copies of judgments can be obtained online, trips to court to obtain copies have also been reduced considerably. These services are available 24 hours a day, seven days a week. Litigants and lawyers do not have to leave work to file documents or check on progress of their cases as they can do so from their offices or home saving them time and money.

IECMS makes work easier for registrars and court clerks in preparing files for the court hearings. Integration means that court staff can obtain data from other Justice Sector Institutions automatically. If there are delays in performing certain functions the system sends a notification and laxity can easily be identified. Operation of IECMS has been summarised thus: “The case workflow automates the processing of cases from one agency to the next, so that there is a seamless integration of activities and communication. The system automatically sends in-system, email, and sms notifications to users and users can create, assign, and track tasks. Information is captured and passed on digitally, and data exchange is no longer fragmented. A detailed audit trail provides a record of all edits and status updates.”

Besides enhancing efficiency, there is little contact between litigants or their lawyers and the court, which minimizes opportunities for corruption. It is also almost impossible for files to vanish. In addition, the system also helps track unnecessary adjournments and other delays, and assists in compiling reports on the performance of a particular court or individual judge, thus revealing where there might be a bottleneck or suspicious conduct symptomatic of corruption. It also helps to generate a global report for the whole judiciary on a quarterly basis. For judges, the system also has advantages. It assists judges in the management of cases allocated to them and in making available most of the information necessary for preparing

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orders and judgments in one place, such as pleadings, record of proceedings, documentary evidence submitted etc. After judgment delivery, judgments can be uploaded into the system for availability to parties free of charge.

**Level of achievement in implementing the system**

Implementation has been fairly successful although it has not reached 100%. Electronic filing is now fully functioning in all courts and most other digital court services are widely used, reducing considerably the number of court users physically coming to court. Almost all the functions of the registry are performed within the system including chatting with litigants, assisting them on how to properly prepare and submit their claims, pleadings, evidence *et cetera*. Case files are also exchanged between courts in the system. It is now easy for the head of the court to track the performance of individual registrars and court clerks as to how well they performed their duties.

**Challenges in implementation**

Implementation of the system has not been without challenges. One challenge was overcoming resistance to change and innovation among judges. Even the judiciary leadership was initially resistant to the change that would put judiciary business into an integrated electronic management system fearing that the data of the courts would be vulnerable to being accessed by institutions in another branch of government and hence put at risk judicial independence. It had to be reassured time and again by judiciary technicians that the data was safe and only persons with the requisite permissions would enter the system and only access what was relevant to them through the use of passwords, supported by an automated tracking system. There was also the need to change the mind-set, especially of the older more senior judges, to embrace electronic case management in cases assigned to them. Although there was adequate training in the use of the system, it took months for such judges to overcome the fear of technology to be able to perform functions within the system when their turn came.

The quarterly meetings of heads of courts and their chief registrars with the Chief Justice were used as an opportunity for the Judiciary’s IT staff to review the use of IECMS, explain any unclear processes and up-date those present on new functionalities added to the system. Judges and registrars could raise issues they had encountered and learn from their peers how they had resolved those issues. The Judiciary has also created an IECMS users’ email forum whereby judges and registrars can pose a question or state a problem they are having in using the system and they can get feedback from their colleagues who have encountered the same problem and how they resolved it. This has eased the pressure on the few IT officers who are then freed to deal with bigger problems.

The problem of change of mind-set also predictably applied to legal practitioners who had to represent their clients in filing claims, pleadings and other documents in the system. There was considerable resistance at the beginning but with sensitization and training by the Judiciary’s IT officers as well as the courts’ refusal to accept physical documents, led the practitioners eventually to come round and they are now in fact happy with the system. They realize that it saves them time and money as well as making them better organized and systematic in their preparation for court proceedings. One attorney told the story of why he was happy with the system. He lost his case in 2010 in the Magistrate’s court in the up-country town of Nyamagabe because he had forgotten a crucial document in Kigali (four-hour drive away). On the other hand, in 2017 while his co-counsel was in Lesotho, he was able to file a case in a Rwandan
court through IECMS using scanned documents emailed to him from Rwanda. Another lawyer tested on how he had physically gone to file an appeal case in 2005 in Kigali and there was a long line of litigants at court. The working hours ended while he was still waiting and since it was Friday, they were told to return the Monday. He was unable to file his appeal because Friday was the deadline for filing the appeal. Today, he is happy that he can file his appeal case in the night, while attending social events or over the weekend at his own convenience.

Another challenge was the inadequacy of necessary IT infrastructure in the Judiciary and the other partner institutions. Initially the internet infrastructure did not reach all courts and other institutions like the Police which did not have enough computers in their outlying stations. For this reason, IECMS was initially deployed in 24 courts mostly in and around the capital city in January 2016. However, connection has progressively been extended so that by July 2017 all courts in the country were using the system. Currently, 58 out of 63 courts are connected by high speed internet (52 on fiber optic cables, 6 on 4G LTE) while 5 are connected to 3G broadband internet. Equipment has also been progressively provided to the institutions that were not initially well equipped.

There was also the challenge of getting ordinary litigants to file cases and submit documents online, especially given that only about 30% of Rwandan society have access to the internet (29.8% by December 2017 according to Rwanda Utilities Regulatory Authority statistics). In order to get the litigant community to engage with online filing and other online services, there was a campaign by the judiciary officials to sensitize the public on the benefits of electronic case management. This was mostly through regular talk shows on local radio stations as most Rwandans have access to and regularly listen to the radio. In particular, the Judiciary has a weekly slot on a radio station where it regularly discusses current topics related to the work of the judiciary including technology.

There was, however, also the need to educate the public in the use of the system. Given the very limited human resource capacity in the IT department, the sector came up with the innovative strategy of training young people, mostly students and recent graduates with skills or interest in law or IT, in the use of the system to serve as IECMS facilitators. They were then deployed across the country to offer their services to members of the public who wished to file their cases. For a small fee, facilitators assist potential litigants to create user accounts and file cases online. Operators in cyber cafés, telecentres and smart villages were also trained to provide the service. This strategy has worked very well. Litigants who are too poor to afford services at cyber cafés, are able to access the services from employees of the Maison d’Access en Justice (MAJ) or Access to Justice Centres located at the offices of every District and which will soon be available at Sector centres, closer to the citizens. These centres enable the very poor to file and follow-up on cases free of charge. In addition, user manuals and tutorial videos on YouTube have been distributed in both English and Kinyarwanda.

An on-going challenge is that the system, although developed in collaboration with local stakeholders, is to some extent still dependent on the external experts. Although most modules are complete and have been used as soon as completed, a few modules are still under development. The local technical staff have been trained as administrators of the system and trainers of users.

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3 Recollections by IECMS trainer Nice Karungi of her conversations with lawyers at a training session in June, 2018
4 See http://www.internetworldstats.com/africa.htm
However, they are not trained software developers and all needs for upgrade still have to be referred to the Armenia-based developers. This is expensive and not sustainable in the long term, as most added functionalities have to be paid for. A plan is being worked on to train local software developers to a level where they do not only effectively maintain the system but are able to develop and effect upgrades whenever necessary.

**What is planned?**

Although the system is already doing a lot in terms of easing the work of the courts and other justice institutions as well as assisting litigants by reducing the cost and time involved in litigation, it is believed the system is capable of more. Some of the planned functionalities are:

- Execution of civil cases, which will soon be processed through the system as it is currently done for criminal case execution.
- **Online Auctioning**
- Future integrations are envisioned with other information systems and institutions, to permit easy access to shared information directly through the IECMS. Such institutions include the National Identification Agency (for easy identification of suspects), Rwanda Natural Resources Authority (to be able to view the land registration data in land disputes) and the Rwanda Law Reform Commission.
- E-signature and integration with *Irembo* (the Public Service E-payment System Provider System) for online payment with electronic bank cards.

**Virtual Courts**

For a while now people have predicted an impending end of courts as we know them with the increasing use of alternative dispute resolution and ICT. A few courts around the world are experimenting with virtual courts with litigants appearing before a judge from within their homes or offices via skype, video or tele conferencing or other technologies. A tech company advertisement captures some of the attractions of virtual courtrooms: “Police staff no longer have to spend half a day giving their witness statements, there are few changes to the clerk of court’s diary, no delays in transporting the suspect, victims and perpetrators no longer in the same space, foreign players don’t need to be flown in for international cases, and interpreters can do their work remotely”.\(^5\) As Chief Justice Wayne Martin of the Supreme Court of Western Australia observed after participating in a distributed court mock trial in Brisbane: “Anything that reduces the need for travel and makes it easy to participate in court processes has got to be an improvement in access to justice. There are also security opportunities. You can ensure people can participate safely from a secure place, whether they are a vulnerable witness, or an accused where there are legitimate security concerns…”\(^6\)

It is arguable that any court should benefit from virtual courts. In Rwanda, cases have been postponed or delayed several hours waiting for detainees or prisoners to arrive at court for their court hearings due to a shortage of vehicles or because the vehicle broke down. The point about security is also valid. Many courts do not have sufficient security to protect judges and other court staff as well as accused persons, witnesses and victims. There was a recent incident at the High Court in Rwanda where a terrorism suspect was allowed to go to the bathroom but once


inside removed his prison uniform, changed into civilian clothes, walked out passed the guard and hurried to the perimeter wall and was only caught after jumping over the wall.

On the other hand, sceptics have raised possible drawbacks of virtual courts. There is the argument that where an accused is not physically before the court, the judge is unable to determine whether the accused is telling the truth or not. However, there is no assurance that a judge is always able to tell with any certainty whether the person physically before the court, an accused or a witness, is telling the truth by merely observing their demeanour and reactions. There is also the concern, perhaps more plausible, that in a virtual courtroom setting, a party may not be in the same room as his/her lawyer and may not be able to consult when the need arises.

What is evident is that more and more courts are using video conferencing technology to hear witnesses and victims from designated locations in far flung parts of the country or in other countries. Rwanda has not advanced far in the direction of virtual courts. There are limited video conferencing facilities at the Supreme Court in the capital city and at least one in each of the five provinces. The facilities are used to hear witnesses and victims but have not been used to hear a defendant in a criminal case or a party in a civil case. Foreign jurisdictions, mostly in Europe, investigating or hearing cases of persons suspected of crimes committed during the Genocide against the Tutsi have used the video-conferencing facilities to interview witnesses in Rwanda.

Discussions have been held with stakeholders on the possibility of installing video conferencing equipment in prisons and police detention centres so that courts can hear cases remotely. There are no serious objections to the idea. On the contrary, many agree that it would eliminate the cost of transporting prisoners or detainees on remand to court and that it would ensure their and other people’s security. The sticking point seems to be one of affordability. At this stage, it would be too expensive to install and maintain video conferencing equipment in all prisons and courts around the country given the many other priorities the country has.

**Conclusion**

Rwanda has come a long way since 1994 in rebuilding its institutions, including the Judiciary. Thanks largely to the country’s prioritizing the use of ICT in all public activities and programmes; the Judiciary has been able to introduce some modest court technologies that have enhanced access to justice, efficiency and transparency in the administration of justice. However, there is still a long way to go by modern standards but the appetite for digitizing justice processes is only limited by the cost. High quality audio-visual equipment and technology do not come cheap and high level training is an additional cost. However, step-by-step Rwanda hopes to advance towards virtual courts in the most effective and cost-efficient ways, without compromising justice.
“Technology and Singapore Courts”
Justice Hoo Sheau Ping, Singapore

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

Slide 1
The eLitigation System
Integrated Electronic Litigation System

Slide 2
Two Generations of Filing System
2nd Generation Filing
• Jan 2013, new electronic filing system launched for Supreme Court
1st Generation Filing
• Electronic Filing System (EFS)- implemented in March 2000.

Slide 3
Scope
➢ Supreme Court:
• All civil, family and criminal cases and appeals
• State Courts
• All civil cases
• Integrated Criminal Case Filing and Management System (“ICMS”) for criminal cases
• Family Justice Courts
• All family cases, complemented by the Family Application Management System (“FAMS”)

Slide 4
Overall strategy
➢ Litigation process re-engineering
• Simplify and harmonise legal and administrative processes to maximise efficiencies from computerisation
➢ Focus on People
• Upgrading skills and re-designing jobs to transition registry staff to become Case Management Officers
➢ Optimise use of data
➢ Re-use party, case and hearing information in eforms, court papers and hearing lists

Slide 5
Filing & Service
4 Step E-Filing wizard

Slide 6

Step 1: Case Info
This stage inputs the information pertaining to:
- Case details
- List of Parties
- Questionnaires

Step 2: Form
The Form Page allows the user to perform the following functions relating to Court forms:
- Compose/pre-pupulate draft
- Upload
- Download
- Add/Delete a Document

Step 3: Admin Details
This stage provides the user with administrative information and input of the following details:
- Hearing Details
- Urgent Indicator
- Backdate Request
- eService
- Filing Fees and Waiver Details

Slide 7

Step 1
Step 1: Case Info

Slide 8

Step 2
Step 2: Form

Slide 9

Step 3
Step 3: Admin Details

Slide 10

Step 4
Step 4: Submission
The final stage allows the user to preview and print the details of the case before confirming it for submission.

Slide 11
Online Case File
Slide 12
Case Information: Summary information about nature of case, amounts in dispute, reliefs claimed, sub-cases, related cases.

Slide 13
Party Information: Information about parties and their solicitors, eg contact, details.
Slide 14

Documents: Documents in the case and sub-cases; filters for certain categories of documents.

Slide 15

Hearing: History and Future: List of past and future hearings.
Billing Information: List of filing, service and hearing fees incurred.

E-Filing: Advantages
Common online platform

- Available 24/7
- Lawyers / users
- One Stop Portal for ongoing cases
- E-Filing of papers
- E-service
- Courts
- Case management
- Scheduling
- Monitoring

Court Technologies
Towards Electronic Hearings

Strategy

- Provide infrastructure, not application
- Focus on equipping courtrooms with appropriate technology
- Tech Courts and Mobile Infotech Trolley
- Digital Transcription System
- Video conferencing
- Electronic signages and queue management
Technology in Court

• Different levels of technology equipping in court rooms
• Normal courtrooms
• Microphones for Digital Transcription Service
• Wifi connection
• Power points!
• Technology Courts
• Video conferencing
• Projector with 100” screen
• LCD panels at lawyers’ bar table
• Mobile Infotech Trolley

Slide 21

Slide 22

Slide 23

Learning points
Leadership is key
• Engage stakeholders
• Technology must assist, not dominate
• Whatever changes the future brings, we must always remember that justice must be assisted, not dominated, by technology. Technology alone does not improve the system. It is people, assisted by technology, who make the justice system work. We must be careful not to blindly substitute technology or become slaves of technology.

Chief Justice Yong Pung How 1996

Slide 24
Conclusion

*We have much work ahead of us in this effort. This marks for us the start of a long process of constant adoption, evaluation, reassessment, and ultimately, renewal. … We must see this as a time of opportunity, rather than of adversity, and approach technology and the impact it will have on us with receptive openness.*

Chief Justice Sundaresh Menon
Opening of the Legal Year, 2017
PANEL SESSION 7A
“Striking For Justice”
By His Worship Godfrey Kaweesa, Uganda

INTRODUCTION:
The topic “Striking for Justice” is of a vast nature. It is inspired by Martin Luther King Jr who stated; “Human progress is neither automatic nor inevitable… Every step towards the goal of Justice requires sacrifice, suffering and struggle; the tireless exertions and passionate concern of dedicated individuals.”1 If I am to contextualize this phase, my interpretation is that the CMJA Secretariat wants me to unpack the model the Uganda Judiciary adopted in 2017, when Judicial Officers under their umbrella body the Uganda Judicial Officers Association (UJOA) voted to trigger Industrial Action, in the face of marginalization of the Judiciary by other branches of state. This paper seeks to examine the factors that were affecting the relationship between the 3 pillars of any modern State, which are the Executive, Legislature and the Judiciary with a view of generating debate, that come out with concrete recommendations to guide Commonwealth Judiciaries.

Defining Key concepts
What is Justice? Literally Justice points at rightfulness or lawfulness, fairness and equity.2 However, philosophers and scholars look at justice in a wider perspective. For example, in his dialogue ‘The Republic’, Plato uses Socrates to argue for justice. Socrates defines justice as "… is the having and doing of what is one’s own.” He goes on to say that a just man is a man in just the right place, doing his best and giving the precise equivalent of what he has received.3 After this definition, there are pertinent questions as participants in this conference we must ask ourselves and answer, before we proceed to argue the concept ‘striking for justice’. We may ask “who is a just person?” In simple terms a Just person is one who is righteous, faithful, ethical and moral.

We may then ask “what is a just state?” A just state is that organ, mandated to oversee the existence and fair distribution of the common good of the people. This is expected to be achieved through well set laws and policies, implemented fairly to all the people, with checks and balances coming out of independent interpretation of those governing laws and procedures, to ensure peaceful co-existence of different people. In that regard, the Legislature sets policies and laws. The Executive implements the laws and policies. The Judiciary interprets the laws. In Uganda, the above mentioned obligations are constitutionally provided for.4

Then, is a poorly facilitated Judge, incapacitated to do the good by other players, and subject to (rules and regulations of other players i.e. legislature and executive) in the right place to dispense justice? If not, then is he doing what is his/her own? My Lords and worship, the answer to above questions depend on each one’s understanding and the environment one works in. But as professional lawyers, we have common analytical lenses to this. I started with those pertinent questions to set a pace for my paper “Striking for Justice.” I will discuss this topic looking at instances of Industrial Actions carried out by Judicial Officers not court users. To enable the audience, debate the status of justice underlying the doctrine of separation of powers.

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3 Plato: The Republic accessed @ Internet Encyclopedia of Philosophy @ http://www.iep.edu/republic
4 The Constitution of The Republic of Uganda, 1995 (Chapter Seven and Eight)
**What is striking for Justice?**

The noun ‘to strike’ according to the Cambridge English Dictionary denotes to refuse to continue working because of an argument with an employer about working conditions, pay levels or job losses.3 This is a right that was brought to workers as a result of democratization. One then wonders whether Judicial Officers have a legal right or moral authority to strike. On the international plane there are five core labor standards including, freedom of association and the effective recognition of the right to collective bargaining.”5 In accordance with the Universal Declaration of Human Rights, members of the Judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, Judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and Independence of the Judiciary.

Judges shall be free to form and join associations of Judges or other organizations to represent their interests, to promote their professional training and to protect their Judicial Independence. I believe that all commonwealth Countries have domesticate these United Nations norms. For instance, Article 40(3)(a)(b) and (c) of the Ugandan 1995 Constitution as amended provides:

Every worker has a right:
- a) To form or join a trade union of his or her choice for the promotion and protection of his or her economic and social interest.
- b) To collective bargaining and representation and
- c) To withdraw his or her labour according to law.

The Right to conduct Industrial Action as a bargaining tool by Judicial Officers does not seem to fringe. Other global standards like the Bangalore principles of Judicial conduct which are Independence, Impartiality, Integrity, Propriety, Equality, Competence and Diligence.6

The answer to the foregoing question is in the affirmative.

The International Labour Organization (ILO) which is a tripartite organization consisting of trade unions, governments and companies which is part of the United Nations system, in 1998 adopted the ILO Declaration on Fundamental Principles and Rights at Work and its follow up. These include freedom of association and effective recognition of the right to collective bargaining, and the elimination of all forms of forced or compulsory labour. These principles do not exempt judicial officers from withdrawing their labour as a bargaining tool to enhance their interests at work.7

This paper is looking at striking for justice as a tool for gaining judicial independence and immunity. Judicial independence and immunity are the key concepts that describe a Judge from other decision makers. Any decision taken without independence and immunity can be rejected, but a decision backed by immunity and independence carries a power hand of the government to ensure sanity in the administrative process of any state. That is why, in the Constitution of Uganda for example under Chapter 8, Articles 126, 127 and 128, judicial powers are given and emphasized, and judicial independence involves court independence, Judicial

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5 Adopted by the International Labor Conference at its 86th session, Geneva 18th June, 1998.
officers immunity, ensured facilitation both financial and otherwise, and assured existence of courts. (see The Republic of Uganda Constitution, 1995).

**What is Judicial Immunity and Independence?**
According to the UN Basic Principles on the Independence of the Judiciary: (supra)

"The Independence of the Judiciary shall be guaranteed by the State and Enshrined in the Constitution or the law of the country. It is the duty of all Governmental and other Institutions to respect and observe the Independence of the Judiciary."

According to the International principles on the Independence and accountability of Judges, Lawyers and Prosecutors:" Independence refers to the autonomy of a given Judge or tribunal to decide cases applying the Law to the facts. This Independence pertains to the Judiciary as an Institution (Independence from other branches of power, referred to as "Institutional Independence") and to the particular Judge (Independence from other members of the Judiciary family, or "Individual Independence.")

"Independence’ requires that neither the Judiciary nor the Judges who compose it be subordinate to the other public powers. On Judicial Immunity, it is provided that without prejudice to any disciplinary procedure or to any right of Appeal or to compensation from the State, in accordance with National Law, Judges should enjoy personal Immunity from Civil suits for monetary damages for improper acts or omissions in the exercise of their Judicial functions."

**Separation of powers**
Striking for Justice is also about emphasizing the doctrine of separation of powers. According to the International Commission of jurists (ICJ) Supra, the principle of an Independent Judiciary derives from the Rule of Law, in particular of separation of powers. The Human Rights Committee has said that the principle of Legality and the rule of Law are inherent in the International Convention or Civil and Political Rights ICCPR.

The Inter-American court of Human Rights has also stressed that ‘there exists an inseparable bond between the principle of Legality, democratic Institutions and the Rule of law’ According to the principle, the Executive, the Legislature and the Judiciary constitute three separate and independent branches of Government. Different organs of the State have exclusive and specific responsibilities. By virtue of this separation, it is not permissible for any branch of power to interfere into the others’ sphere.

Yet Professor Oloka Onyango of Makerere University Uganda doesn’t seem to agree. In his book, When Courts do Politics: Public interest Law and Litigation in East Africa. Yet Classical separation of powers theory as espoused by Charles the second at, Baron de Montesquieu (18 January 1689-10 February 1755) is no longer tenable for two reasons. First for postcolonial countries such as those in East Africa, there is the colonial Legacy in which the Judiciary evolved as an Integral part of and remained very closely related to the Executive Part of the Independence struggle was by the courts. Secondly, courts carry out several Administrative functions and by declaring a Law invalid, a court is invariably ‘making ‘ new Law, regardless of how strenuously the learned Judges avoid saying so. (Gomez 1993,93).
Justice Bhagwati of the Indian Supreme court was honest than most on the Bench when he stated that “every Constitutional question concerns the allocation and exercise of Governmental power and no Constitutional question can therefore, fail to be political”.

The principle of separation of powers is the cornerstone of an Independent and impartial justice system.

Why strike for Justice?

This question can best be answered by sampling some of the Jurisdictions that have already practiced the model.

In the 1991, under Harare Commonwealth Declaration, the Commonwealth countries including Uganda renewed their commitment to the Rule of Law and Independence of the Judiciary. Yet on 1st March 2007, armed security forces stormed the High Court in Kampala to re-arrest five men bailed after 15 months in detention on charges of treason. According to Georgette Gagwon the Deputy African Director at the Human Right watch.

Government’s attempt to intimidate the courts shows its profound lack of respect for the Law. The security forces surrounded the High court to intimidate the Judges and thwart the decision to release them on bail. A scuffle broke out within the premises of court and security forces beat up some Lawyers and journalists. At around 8:30pm, as the men and their Lawyers attempted to leave the High Court building, in the company of the Deputy Chief Justice of Uganda Laeticia Kikonyogo, and the Principal Judge James Ogoola (as they then were), security forces apprehended the five men, beat them and took them away in a police vehicle. The Judiciary then began a strike on march 5th 2007 in protest of Government’s action, while the Principal Judge composed the now famous poem Rape of the temple of Justice, by what is now the infamous ‘Black Mambas,’’ the security outfit that perpetrated the attack. The effect is that such attacks within the precincts of court have reduced.

The second Judiciary strike was triggered on the 23rd August 2017 when Judicial Officers under their umbrella body UJOA took a secret ballot vote in favor. Government was able to appreciate the plight of the Judiciary with commitments to increase their salaries, provide transport, Housing, medical Insurance and security. Gradual realization of these commitments is taking place. There is a new salary structure for some selected public servants in the first phase.

In Kenya in 2017, when the Supreme Court took an unprecedented decision to overturn the results of the Presidential election, President ‘elect’ Kenyatta stated publically that the country had a problem with its Judiciary which had to be fixed. “The President accused the Judiciary of ignoring the will of the people and dismissed the Judges as ‘wakora’ or ‘crooks’ who were paid by foreigners and other people. Chief Justice David Maraga in a statement, retorted that:- “The attacks on Judges, Judicial Officers and staff were denigring, demeaning and degrading and are meant to intimidate threaten and cow the Institution and individual Judges... Some political leaders have also threatened the Judiciary promising to cut it down to size and teach us a lesson.’’

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13 Inter-American Democratic Charter, adopted by the UAS General Assembly on 11/09/2001 (Articles 3 & 4)
15 Reuter’s Article:  Kenya Presidential Elections Overturned by Court, accessed @ reuter.com retrieved on 4th August, 2018.
Could this be the reason why the Kenyan Judiciary budget was drastically sliced in FY 2018/19? Kenya Magistrates and Judges Association Secretary General Derrick Kato was of the view that denial of adequate funds to the Judiciary is an attack on its Independence. The Judiciary submitted a budget of 31.2 bn Kshs in FY 2018/19, but Parliament has slashed it drastically to 17.3bn Kshs. “There have been heighted attacks on the Judiciary and Judicial Officers in the past and we notice a clean and systematic pattern to frustrate the work of the Judiciary,” Mr. Kato said. In Uganda, in July 2018, when the court of Appeal/ Constitutional Court, ruled to legitimize the amendment of article 102(b) of the 1995 Constitution to lift the Presidential Age Limit, but not to extend Parliaments tenure from 5 to 7 years, the President in a statement on Facebook criticized the Judgement, the Judges who delivered the Judgements and the Judiciary at large, maintaining that with or without Judges, Government can function effectively. The Uganda Law Society and the Uganda Judicial Officers’ Association (UJOA) issued separate statements to reiterate the need to respect the Judiciary.

In the same vein, the Executive has not spared making attacks on Parliament. Recently when the Speaker of Parliament wrote to the President Inquiring why Special Forces command soldiers had assaulted MPs and other civilians following an election in Arua District, the latter had this to say;

“Between 1971 and 1979 (Idi Amin dictatorship-Ed), there was no Parliament… Don’t think that you are in heaven: do what you took you there. You should know where the power of that Parliament comes from… in fact, I can do away with that Parliament…And we brought it (Parliament) back, so do whatever you’re doing knowing.”

So one wonders the model of Democracy being practiced in Uganda of the Executive can down play the relevance of the Legislature and the Judiciary. One wonders whether there is will to address the plight of the Judiciary. In the year 2017, Judges in South Sudan invoked Industrial Action over poor pay for five months. They chose to end the strike with not only Government failing to address their concerns, but President Salva Kiir sacking some of their leaders. South Africa. In 2013, the Association of Regional Magistrates courts of South Africa (ARMSA) and the Judicial Officers Association of South Africa (JOASA) declared a strike when the Chief Justice’s salary was increased to bring it in line with that of the Deputy President and Speaker without adjusting theirs.

In Asia, two gun fire incidents on the residence of the Chief Justice of Pakistan in Lohane province prompted advocates led by the Supreme Court Bar Association President Mr Kaleem Khrished to call a strike by the Bar across the country. The Chief Justice requested them to withdraw in public interest. In the United States President Donald Trump has openly criticized Judges who have ruled to curb his Executive orders.

The American Bar Association has concluded that such attacks undermine the Independence of the American Judiciary. When it comes to disciplinary proceedings, the exposure and speed at which the State planned to remove Chief Justice Nthomeng Magara of Lesotho for alleged misconduct, and the manner in which the Deputy Chief Philomena Mwilu of Kenya was

17 Daily Nation Article of 30/07/2018: Budget Cut: Judges back CJ Maraga
19 See www.ujoa.org 2018
22 Appeal 15/2018 CEO News Pakistan retrieved on 7/8/2018
23 News Article : In His Own Words: The President Attacks on Courts accessed on http://www.brennancentre.org retrieved on 2/8/2018
charged on allegations of corruption, may contravene International norms. The UN Guidelines on the Independence of the Judiciary, supra provide under Section 17.

“A charge or complaint made against a Judge in his/her Judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The Judge shall have the right to a fair hearing. The examination of the matter at initial stage shall be kept confidential unless otherwise requested by the Judge.”

I will conclude this section by briefly examining events back home bordering on suspected human rights violations. For some time now, the print and electronic media has been awash with all sorts of graphics and stories of alleged human rights violations following elections in Arua district of Northern Uganda.

At a recent function, Chief Justice Bart Katureebe had this to say while commenting on the relationship between the Judiciary and Parliament:24

“We do not like the trends, which are happening; because the court has made this decision against us (Executive and Parliament). We are not going to pass their Laws. If you do not pass that Judiciary Administration Bill, (meant to streamline operations of Uganda’s Judiciary) you are hurting the people of Uganda. The Judiciary is for Ugandans not us Judges.”

It means that the judiciary is being held at ransom by Parliament in a syndicate of ‘scratch my back I scratch yours… if your Ruling offends me, I won’t pass your Bill’.

At the same event, the Chief Justice commented on cases of tortured suspects being taken to court: “Security forces, when you arrest Ugandans, arrest them like humans but not animals. We do not want you to bring people in courts while bleeding” To crown it, Hon Frank J Labuda a sitting Justice in the District circuit court of New York and a surrogate international guest lecturer, while delivering a paper to Judges in Uganda had this to say:25

‘Judges across the world are overworked, under paid and never appreciated.’

It is scenarios such as the above that lead Judicial Officers to struggle for their space.

Conclusion and some recommendations

One should argue that under the theory of Judicial restraint Judges should be slow and cautious towards enforcing their rights under labour laws; however, the balance of convenience lies in favour of Judiciaries exercising these rights in order to become strong and more Independent. In Uganda, all power belongs to the people who accept to be governed by the Constitution under Article 1. The people in Chapter 8 aspire to have an Independent, accountable and vibrant Judiciary that can check the excesses of the Executive and the Legislature. It is therefore unconstitutional and contrary to the ‘‘WILL of the PEOPLE’’ for the other two branches of government not to render the necessary support to enable the effective functioning of the Judiciary.

The majority if not all countries falling under the realm of the Commonwealth have ratified and even domesticated a number of International Instruments like the Commonwealth (Latinor House) principles on the Accountability of and the relationship between the three Branches of

24 Daily Monitor Newspaper (Monday 3/09/2018) @ http://www.monitor.co.ug
25 Sic
Government (2003) State parties should abide by these principles especially concerning Administration of Justice. The convention against torture which in Uganda has been domesticated into the Anti-Torture Act should be able to arrest human Rights abuses against the people.

- Resourcing Judiciaries: The United Nations Guidelines on the Independence of the Judiciary impose a duty on each member state to provide adequate resources to enable the Judiciary to properly perform its functions. State parties must comply of the Administration of Justice is to improve.

Chief Justice Maraga of Kenya has suggested that what is recommended internationally is Judiciaries being allocated at least 2.5% of their National Budget. There is need for debate and a resolution on this issue from the Commonwealth Judiciaries.

In the same vein, the term of office of Judges, their Independence, security, adequate remuneration, conditions of service, pensions and the age of retirement should be adequately secured by Law.

- Relationships between Judiciary Administration and Executive members of Judicial Professional Associations should be cordial and complementary.

These two bodies should speak with one voice while engaging the other two branches of Government, in furtherance of the Judiciaries interests.

Executive members especially those that lead Industrial action should not be perceived as anti-establishment and then victimized. They should not be subjected to unnecessary disciplinary action and unfair transfers, denial of opportunities to sit on different committees, promotions and the like.

- Structured dialogue. There should be an annual structured dialogue between the heads of the 3 Branches of Government to address challenges that may fetter their relationship.
- Legal redress. Professional Judicial Associations like UJOA in the case of Uganda should not shy away from seeking Legal redress whenever need arises.
- Resignation on principle. In some instances, resignations especially of top officials in disagreement or protest against desired action or omissions may be an appropriate bargaining tool employed by Judiciaries.
- Judicial decisions must be respected and given effect by the other two Branches of Government.
- Industrial action in accordance with the Law should be triggered as a last resort.
- Appointment of Judicial Officers. This task should be left to the Judicial Service Commission and Parliament and the Public for vetting. The role of the Executive should largely be ceremonial, in this way Judicial Officers who toe the line of the Executive will be eliminated from the system. The Judiciary shall then become more Independent.
- The CMJA should make concrete recommendations and level of implementation followed up at the next conference or convenient time
REFERENCES

2. Plato(): The Republic accessed @ Internet Encyclopedia of Philosophy @ http://www.iep.edu/republic/
5. UN Convention No.29 & 105
7. UN Guidelines
Mentoring is defined by the Cambridge English Dictionary as “an activity of giving a younger or less experienced person help and advice over a period of time especially at work or school”.

On the other hand, Oxford Dictionary defines mentorship as “the guidance provided by a mentor especially an experienced person a company or educational institution”.

Mentorship can thus be equated to the period of time during which a person receives guidance from a mentor. The word Mentorship and mentoring are used interchangeably. Mentoring is thus the professional relationship in which an experienced person assists another (mentee) in developing specific skills and knowledge that will enhance the less experienced person’s professional or personal growth.

There are many examples of this such as Lawyers during pupillage, Medical Doctors during Housemanship, Artisans learning under a master craftsman, just to mention a few.

BIBLICAL EXPERIENCE

Moses, mentored Joshua – Exodus through to Joshua, especially Deuteronomy 31 : 17
Elijah mentored Elisha, 1st Kings 19, 19 -20
Christ Jesus, mentored the disciples see for example Luke 6, 12 -16
Paul also mentored Silas and Timothy……

ESSENCE OF MENTORING IN THE JUDICIARY

The essence of mentoring new Judges and Magistrates is to pass on core values like, judicial independence, delivery of timely and efficient judgments based on principles of transparency, accountability, integrity and competence, just to mention a few.

In the first place, the mentoring Judge or Magistrate must be deemed to have some special and excellent skills such as would benefit the mentee – (i.e) the Judge or Magistrate to be mentored.

There are skills which every Judge must possess Some of these are:-
Judgment writing
Case management
Evaluation of evidence
Courtesy and comportment on the bench
Punctuality
Dedication and commitment
Competence
Good Communication skills
Integrity
Independence of thought and mind just to mention a few
Slide 6

- Luckily for us in the Commonwealth, the Latimer House Principles on the Three Branches of Government, especially the principles of judicial independence, honesty and impartiality are the hallmarks of upholding a competent Judiciary and the Rule of law.
- Thus, any senior Judge who has by dint of hardwork and experience been acclaimed and accepted by his peers as possessing the above skills and qualities is qualify to mentor new members of the Bench. This is the process of imparting knowledge, skills and experience to the new Judges and thereby build their capacity.

Slide 7

BENEFITS

A good mentoring programme can serve as an incentive to newer members of the bench or also serve as a positive signal that adherence to the Latimer House Principles on the Judiciary as itemised supra is beneficial for those who practice and exemplify it. In other words, it can serve as an incentive i.e. if a senior Judge who has persevered in these principles over the years has been amply rewarded, then younger Judges and Magistrates will learn from these senior Judges that it is beneficial to work hard with the Latimer House principles as a road map.

Slide 8

OTHER BENEFITS

- It exposes the mentee to the good qualities of the mentor.
- Through the programme of mentoring, the mentee acquires the good values of judgcraft through the experience that the mentor has built over the years.
- A good mentoring programme will build up the confidence of the mentee and this no doubt has the ability or potential to improve the quality of judgments delivered by the mentee and this invariably will enure to the benefit of the public.
- The mentee is assured of a ready role model in the mentor which he can rely upon and look up to.
- There are others which the discussions will disclose at the presentation.

Slide 9

- There are others which the discussions will disclose at the presentation.

Slide 10

RISKS

- There is however a caution that the mentoring Judge should not abuse the independence of the mentee and thus take advantage of him. It is also not useful to let the mentoring Judge know about the live case or cases for which advice has been sought. This advice must be based on anonymity such that the independence of the mentee Judge is protected.
- Avoid over reliance on mentor. Use experience and advice to take your own decision based on evidence and law.
- Influence peddling can result if the mentoring process is not well managed and packaged. Give other examples.

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RISKS

- The mentee may develop subservient attitudes towards friends and relations of the mentor.
- The danger that a mentor may not have time and commitment for the mentee and this may render redundant an otherwise good mentorship programme.
- Inadequate resources to ensure effective administration and sustenance of the programme.
- For best results, it is critical to match the mentor and mentee so as not to have
• personality clashes.

**Slide 12**
This list is by no means extensive, and many more could be identified during the discussions.

**Slide 13**
**CONCLUSION**
• On the whole, mentoring new Judges and Magistrates on the job by their more experienced colleagues with character should form part of Judicial Training. This can take several forms like new Judges being exposed to senior Judges with character. This can be likened to how new Lawyers are attached to Senior Lawyers of integrity to do their pupillage, or junior Doctors do their Housemanship.

**Slide 14**
• On the whole, I will recommend streamlining of the mentorship programme of new Judges and Magistrates by their Senior colleagues who have character based on the accepted Latimer House Principles as well as individual home grown principles and conditions in each country.
The advantage of speaking on an assigned topic that is suitably vaguely worded is that it gives one the greatest latitude to interpret it; to roam far and wide. When I was asked to speak on this topic I thought I should do just that. But the time constraints permit me only to do three things. Firstly, to touch briefly on some aspects of the relationship between domestic and international law. Secondly, to look at some of the ways in which my court, the CCJ, has treated with some of the challenges that have emerged in the “co-ordination” of that relationship and thirdly, to look at the cross-pollination that has occurred between civil law and common law traditions.

As the world becomes more of a global village, it has become increasingly necessary for rules to be created to guide and regulate the conduct across national boundaries of persons and states. It has also become necessary to facilitate the peaceful resolution of tensions and disputes that will invariably arise among states and other international actors. By the same token, tribunals must be created to interpret and apply the relevant rules and to resolve the disputes that arise.

These tribunals need not be courts. Many states (and other international actors) these days agree to refer for adjudication disputes concerning important areas of life and, for this purpose, they have accepted the compulsory jurisdiction of international tribunals. This has resulted in a proliferation of international tribunals. These bodies operate independently from each other and address an increasing volume and complexity of international norms. Contributing to the proliferation of international tribunals has also been the following factors, namely a greater commitment to the rule of law in international relations; the easing of international tensions; the positive experience of international actors with some international courts and tribunals and the unsuitability of the International Court of Justice to decide certain disputes.

The Caribbean Court of Justice (or “the CCJ”), the court on which I sit, has encountered the challenges involved in co-ordinating justice systems that exist across national boundaries. We do so in unique ways because the court itself is special. It is two courts in one. That is to say, the Court exercises two distinct jurisdictions. In one sphere of its operations it is a final appellate court hearing final appeals from Caribbean States. In its other distinct jurisdiction, it is an international court interpreting and applying a regional economic integration treaty. The Court therefore functions in the same way as the UK Supreme Court or the Australian High Court does and then it also functions in the same manner as does the Court of Justice of the European Union or the Court of Justice of the Economic Community of West African States.

In one of the first cases to come before the court, the court acknowledged and referenced “the tendency towards globalisation in the regulation of matters such as crime, trade, human rights and the protection of the environment, to mention but a few.” That case, Attorney General v. Joseph & Boyce, was itself a case where we had to look at the relationship between domestic law and international law in the context of human rights. The issue in the case was whether a State could lawfully execute two men who were convicted murderers who had exhausted all their domestic appeals but who still had pending a petition they had filed before an international human rights body – the Inter-American Commission on Human Rights. The Commission was established pursuant to a treaty that had been ratified by the State in question.

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1 I gratefully acknowledge the tremendous assistance given to me by Ms Tanya Alexis in the preparation of this presentation
3 Ibid, [50]
But the provisions of the treaty had not been incorporated into municipal law. The argument of the State in that case was that because the Inter-American treaty had not been domesticated, the men could not derive any rights from it and there was therefore nothing to preclude the State from executing them.

The issues before the court arose in the context of a decision by the constitutionally established Mercy Committee. The men had sought clemency from the Mercy Committee. The Mercy Committee took a decision not to exercise clemency and to authorise their execution. Death warrants were read to the men. Before they could be executed, the men launched constitutional proceedings to have their execution stayed. Now, the Constitution of the country contained a clause ousting the jurisdiction of the Court in relation to decisions of the Mercy Committee.

The question for my court was how to reconcile all of this, namely: on the one hand there was: the desire of the State to execute the men; the Constitution’s ouster of the Court’s jurisdiction over decisions of the Mercy Committee and the fact that the Inter-American treaty provisions were not part of the country’s domestic law. On the other hand there was the pending nature of the men’s international petition; and the fundamental right, embodied in the domestic Constitution, that gave everyone a right to the protection of the law.

The Court took the view that even convicted murderers were entitled to enjoy the right to the protection of the law; the constitutional ouster clause concerning decisions of the Mercy Committee could not be employed to extinguish a person’s enjoyment of that fundamental right; the treaty establishing the Inter-American System may not have been locally incorporated, but it still yielded, at a minimum, certain legitimate expectations which the State had to respect; and the enjoyment by the men of their right to the protection of the law made it incumbent upon the State to wait a reasonable period of time for the international body to give its decision on the pending petition, before the State could consider executing the men. This was a case where, in other words, in order to advance the rule of law generally, the court was obliged to find a way to harmonise and co-ordinate the enjoyment of rights on the international plane with the exhaustion of rights on the domestic plane.

International dispute settlement mechanisms have been generally welcomed as an indication of the strengthening of an international rule of law, but there are certain concomitant risks and challenges that have become apparent. International law, after all, is not “a comprehensive body of law consisting of a fixed body of rules applicable to all states”. Here there is no centralised legislative organ. Each of the various international courts and tribunals is typically invested with its own unique scope of subject-matter and jurisdiction. Each is independent and autonomous and is anxious to robustly assert its independence. This can easily lead to conflicts and overlaps among the jurisdictionalambits of the different existing courts and tribunals.

A circumstance that neatly illustrates all of this was the cases concerning Article 36 para. 1(b) of the Vienna Convention on Consular Relations. This Article has to do with the provision of consular assistance in those instances where a person is detained in a foreign state. The Article requires the foreign state to inform the detainee of his or her rights under the Convention and also to comply with certain other obligations. Several questions arose from the Article. Did an individual have justiciable rights under the Convention that could be invoked by his or her

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2 Ibid.
3 See the discussion of this issue by Karin Oellers-Frahm, above
State? What consequences should accrue from the failure by the State detaining the person to render the requisite assistance to the detainee?

In 1997 Mexico requested an advisory opinion from the Inter-American Court on these issues. But not long after this, Germany brought proceedings against the USA before the International Court of Justice on the very same issue. The case before the ICJ concerned two German citizens, Karl and Walter LaGrand, who were due to be executed by the United States and who had not been informed of their consular rights under the Convention. So, basically, the same question was pending simultaneously before the ICJ and the Inter-American Court, namely whether article 36 para. 1(b) of the Convention gives a detainee on foreign soil the right to have his consular authorities informed without delay of his detention.

Now, in the hierarchy of international courts, it goes without saying that the ICJ stands at the very top of the ladder. It is the World Court. One may have expected that while the two courts were similarly engaged with the same issue, the Inter-American Court would decline to rule, would stay its hand and await the decision of the ICJ. The Inter-American Court did consider whether it should wait. It took the view, instead, that although, in principle, it could decline to give an advisory opinion, there was no reason to do so in this case. The Inter-American Court noted that the purpose of its advisory function is to assist the American States in fulfilling their international human rights obligations and to assist the various organs of the inter-American system to carry out the functions assigned to them in this field. As far as that court was concerned, the fact that the same question was also pending before the ICJ in a contentious case could not restrain it from exercising its advisory jurisdiction because it was an "autonomous judicial institution"

As to the dangers of conflicting interpretation of the same provision by two international bodies, the Inter-American Court noted that this possibility was a "phenomenon common to all those legal systems that have certain courts which are not hierarchically integrated ... Here it is, therefore, not unusual to find that on certain occasions courts reach conflicting or at the very least different conclusions in interpreting the same rule of law"

The Inter-American Court consequently rendered its advisory opinion and found "that Art. 36 of the Vienna Convention on Consular Relations confers rights upon detained foreign nationals, among them the right to information on consular assistance, and that the said rights carry with them correlative obligations for the host State"

The ICJ subsequently held that the United States had not only breached its obligations to Germany as a State party to the Convention, but also that there had been a violation of the individual rights of the detained persons. The ICJ also noted that, “Article 36, paragraph 1, creates individual rights, which, by virtue of Article 1 of the Optional Protocol, may be invoked before the ICJ by the national State of the detained person.”

Happily, the ICJ’s decision on the merits were consistent with the IACtHR’s. But the then President of the ICJ, Gilbert Guillaume, pleaded for greater dialogue among international courts and tribunals. He noted that “The proliferation of International Courts gives rise to a serious risk of conflicting jurisprudence, as the same rule of law might be given different

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9 ibid, [61]
10 Ibid para [61]
11 Ibid para 141(1)
interpretations in different cases…” A dialogue among judicial bodies is crucial…, he stated. This danger of conflicting decisions between international bodies is quite evident. Conflicting jurisprudence can erode the cohesiveness and consistency of international law. It can lead to the development of mutually exclusive legal doctrines. It can also encourage forum shopping as well as a multiplication of proceedings before different forums. Left unchecked, it could threaten the universality of international law. The wastage of judicial resources and the possibility of divergent outcomes can contribute to fragmentation of international law and the weakening of the coherence and credibility of the law as a whole.

These fears are not hypothetical. For example, there is a multinational company based in Geneva called SGS (Société Générale de Surveillance SA). SGS brought international arbitration proceedings against Pakistan in one matter and the Philippines in another arising out of alleged breaches of Bilateral Investment Treaties (“BITs”). Two arbitral tribunals of the International Centre for the Settlement of Investment Disputes (ICSID), came to different results over the interpretation of jurisdictional provisions in the respective Bilateral Investment Treaties (“BITS”). In the 2003 SGS v Pakistan decision, the arbitral panel interpreted provisions in a BIT in a manner that suggested that it lacked jurisdiction to adjudicate. But this interpretation was rejected by another ICSID tribunal in the SGS v Philippines decision although it involved an identical dispute settlement provision of the Agreement between the Swiss Confederation and the Republic of the Philippines.

Earlier I alluded to the challenges that sometimes face domestic common law courts as their jurisprudence intersects with international law and the decisions of international tribunals. The source of the tension, especially in common law states, is clear. Domestic tribunals should strive faithfully to apply international law and, as far as possible, interpret domestic law in a manner that is consistent with international law. But equally, domestic courts have a responsibility to be faithful to and to apply the domestic laws and the Constitution of which they are an integral part. There are occasions when it may simply not be possible to reconcile the two things.

The Caribbean Court of Justice faced this dilemma when we had occasion to overrule the effect of a decision of The London Court of International Arbitration. That Arbitral Panel had determined that the State of Belize should pay substantial damages for dishonouring certain promises its Prime Minister had made to two commercial companies. The promises were contained in a Settlement Deed. The Deed provided that the Companies should enjoy a unique and extremely favourable tax regime specially crafted for the companies. The problem was that the terms of this Deed were completely at variance with the tax laws of Belize and the Deed and its provisions were never brought to the attention of the Belize legislature, far less legislated. Indeed, the Deed had been negotiated in stealth by the companies with the then Prime Minister. The new tax regime was enjoyed by the companies for two years until after general elections in Belize a new Administration was sworn in. The new Government discovered the secret agreement and repudiated the provisions of the Deed. In one of its clauses the Deed provided for international arbitration before the LCIA. The companies accordingly proceeded to international arbitration.

12 Statement of the President of the ICJ to the UN General Assembly of 26 October 2000
15 (Objections to Jurisdiction) Case No. ARB/02/6 (SGS v Philippines), https://www.italaw.com/sites/default/files/casedocuments/ita0782.pdf
16 Ibid at paras 131-135.
The Arbitral Tribunal considered the issue but declined to hold that the Agreement was void on public policy grounds. It found the State of Belize in breach and awarded substantial damages against it. The companies then sought to enforce the arbitral award in Belize as a local judgment. Ordinarily, this would be a routine exercise. But on this occasion, the CCJ found that the underlying transaction giving rise to the arbitral award was void for public policy. The CCJ noted that under Belize’s Constitution only Parliament could alter tax laws. A secret Agreement between a Prime Minister and a local company, purporting to make special tax laws for that company, so seriously violated the country’s rule of law that the court could take no step to lend its imprimatur to that agreement. The court therefore held that the Award from the LCIA was unenforceable for public policy considerations.

So, here was a case that illustrated conflicting approaches of international and domestic tribunals towards the same subject matter. The arbitral tribunal’s interpretation of the limits of Executive authority (or what in the UK is called the Crown’s prerogative power) was at complete variance with the CCJ’s. While the Tribunal was prepared to allow the Executive a broad, almost unlimited, ambit within which lawfully to contract, and to hold the State accountable for breaches of any such contract. The CCJ, on the other hand, held that the Executive’s power to contract and the accountability of the State for Executive contracts were circumscribed by the provisions of the domestic Constitution. The CCJ considered that if it were to order the enforcement of the Award it would effectively be rewarding corporate citizens for participating in the violation of the fundamental law of Belize and punishing the State for refusing to acquiesce, albeit belatedly, in the violation.

One of the ways in which common law courts, in particular, seek to maintain consistency and stability in judicial decision-making is the application of the doctrine of stare decisis. The ability to take into account previous decisions, so that litigants in comparable situations to previous litigants may expect to be similarly treated, is a principle that lends predictability to the law. Such predictability promotes public confidence in the application of the law.

Generally, however, international courts and tribunals are not usually subject to a system of Stare decisis. These bodies are “autonomous”, as was trenchantly observed by the IACtHR. They are not obliged to follow the decisions of other courts, even where there are bodies with greater specialities or experience in the relevant subject matter. They are not even obliged to follow their own decisions. Indeed, many of the statutes and rules of procedure of international tribunals expressly exclude any precedent effect of their judgments. Their decisions have no binding force except as between parties and in respect of a particular case.\(^{17}\)

Notwithstanding the absence of a formal system of stare decisis, however, most internationals tribunals including the ICJ, tend to adhere closely to their own precedents in a system that is often referred to as de facto stare decisis\(^{18}\). And they usually would refer to their own decisions and only derogate from them in exceptional circumstances. They also concentrate narrowly on the case and the parties before them. They therefore tend to refrain from generalising their comments and decisions to cover situations not arising in the concrete case before them. In other words, they avoid making what we might call obiter dicta.

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\(^{17}\) See for instance Article 59 Statute of the ICJ “The decision of the Court has no binding force except between the parties and in respect of that particular case; Art 53(1) of the ICSID Convention “The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.

The Revised Treaty of Chaguaramas, the document that provides for the international treaty role of the CCJ, made an interesting design choice by expressly mandating in Article 221 that the judgments of the Caribbean Court of Justice constitute legally binding precedents for parties in proceedings before the Court. We have since confirmed in one case\textsuperscript{19}, that our decisions are not only binding on all Member States, but that as a matter of law, the court itself is bound to rely on its previous decisions. The CCJ also actively cross references the jurisprudence of various international courts and tribunals, both those with similar subject matter jurisdictions and those whose jurisprudence derives from a different legal domain but offer some relevance to the instant case.

We regularly cite, for example, judgments from the Court of Justice of the European Union (CJEU) in developing our own jurisprudence.\textsuperscript{20} This approach of active engagement with the jurisprudence of other courts is mirrored by other international courts and is an important factor in counteracting the risk of fragmentation of international law\textsuperscript{21}.

A critical factor for the integrity and legitimacy of international justice systems lies in the degree of confidence reposed in them by states. The absence or erosion of public confidence in an international tribunal or the exercise by States of naked power politics will naturally pose a serious challenge to the integrity of that tribunal. The International Criminal Court was and is still a noble idea. Here is a court dedicated to prosecuting individuals for the most heinous international crimes when national courts are unwilling or unable to prosecute such criminals or when the United Nations Security Council or individual states refer situations to the Court. But the Court is plagued with allegations from members of the African Union that it has not been even-handed in targeting Africa and African Heads of State while overlooking international crimes perpetrated elsewhere\textsuperscript{22}. Now that the court is currently investigating alleged war crimes in Afghanistan, which would include any committed by US military and intelligence officials in the treatment of detainees, the present US Administration has denounced the court and made some rather ugly statements about it.

Questions as to the legitimacy of UN Security Council Resolutions have also been raised, at least in one notable case, in Europe. It will be recalled that in the wake of the 9/11 terrorist attack in the USA, the Security Council instituted a raft of counter-terrorism measures.\textsuperscript{23} These measures have obligated member states to take wide-ranging steps, including the imposition of asset freezes and travel bans on listed individuals and legal entities. There has practically been little recourse against the sanctions contained in these resolutions. But their legitimacy was challenged as being in violation of the right to access to a court and the right to an effective remedy\textsuperscript{24}, both elements of which have been universally accepted as inherent facets of the right to a fair trial.

\textsuperscript{19} Shanique Myrie v Barbados
\textsuperscript{20} An instance of this occurred in Trinidad Cement Limited and TCL Guyana Incorporated v Republic of Guyana. Here, the CCJ was faced with the issue of what sanctions, if any, could be imposed for the breach of provisions of the Revised Treaty of Chaguaramas (RTC). The Revised Treaty contained no specific provisions on the issue. But we readily adopted the basic approach of the CJEU in C-6 and 9/90 Francovich v Italy. We held that the Revised Treaty is based on the rule of law and that this implies the remedy of compensation where rights which enure to individuals and private entities under the Treaty are infringed by a Member State.
\textsuperscript{24} Resolutions 1267 (1999) and 1373 (2001)
\textsuperscript{24} Hierarchy in International Law: The Place of Human Rights Erika De Wet and Jure Vidmar
The hierarchy and legitimacy of these resolutions was tested in a case brought before the European Court of First Instance\(^25\). In order to give effect to the Security Council resolutions, the Council of the European Union had adopted a regulation ordering the freezing of the assets of those on the list. The list included Yassin Abdullah Kadi, a resident of Saudi Arabia, and Al Barakaat International Foundation.

These persons commenced proceedings in the Court of First Instance (CFI) and requested annulment of the Council regulations on the ground that they infringed several of their fundamental rights including the right to respect for property, the right to be heard before a court of law and the right to effective judicial review. The CFI rejected these claims and confirmed the validity of the regulation, ruling specifically, that it had no jurisdiction to review their validity. On appeal, the Court of Justice of the European Union reversed this judgment and held, inter alia, that ‘obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty’. So, here was a decision that stated that core rule of law principles of the European Community could not be prejudiced by the resolutions of the United Nations Security Council. This decision was a clear rebuff to the United Nations. But it prompts the question whether such a rebuff would have been countenanced if it had been issued by the courts of a developing country.

It is judges who interpret and apply rules and who give or refuse appropriate remedies. The promotion of confidence in international justice systems can be advanced by ensuring transparent mechanisms in the nomination and appointment of judges of international bodies. As one commentator noted, ‘if good candidates are not put forward, or do not come forward, the election procedure cannot lead to good results’\(^26\) In this regard there has been a consistent call for greater transparency in the international judicial selection procedures, for the depoliticization of the selection process and the strengthening of the independence of international courts.

The Agreement establishing the CCJ was careful to ensure a non-political, transparent and ostensibly merit-based approach to the selection of the President and judges on that court. The CCJ positions are advertised and applicants are interviewed and selected by a Commission comprised mainly of representatives of Lawyers Association, Law schools and civil society. The judges are appointed by the Commission and have security of tenure.

**Cross-pollination of legal norms.**

There is a distinct tendency toward cross-pollination of legal norms, both substantive and procedural. Globalisation, instantaneous global communication, the ease with which courts and tribunals can access each other’s decisions, have encouraged common approaches to legal effectiveness. International courts and tribunals have no qualms now in adopting procedures and remedies that are borrowed from each other’s legal traditions.

For instance, the tendency towards *a de facto stare decisis* to which I earlier alluded is but one element of this. In human rights adjudication especially, one frequently sees domestic and international courts alike relying on the judgments of other municipal and international courts. When the Supreme Court of Kenya\(^27\) held that the mandatory death penalty violated fundamental rights and freedoms it relied on, inter alia, cases from India, from the Eastern


\(^{27}\) in Francis Karioko Mwau & Wilson Thirimba Mwangi v Republic (Writ Petition No.15 of 2015}
Caribbean Court of Appeal\textsuperscript{28}, from the European Court of Human Rights\textsuperscript{29} and from the UN Human Rights Committee\textsuperscript{30}. This kind of cross-pollination is gradually resulting in the global acceptance of “intransgressible principles of law” which are accepted/applicable on both the domestic and international planes. On the international plane, it has been suggested that this practice is promoted by Article 31(3)(c) of the Vienna Convention on the Law of Treaties, which requires judges to take into account, together with the context of ‘any relevant rules of international law applicable in the relationships between the parties’.

The final point I would like to make relates to the relationship between the common law and civil traditions. To a certain extent each of these systems have been enhancing their procedures by borrowing from each other. For example, towards the turn of the last century, common law courts began reforming their procedural rules to embrace greater written procedures such as the prior service of witness statements and the adjudication of issues on paper without an oral hearing, these were all measures borrowed from the civil law tradition. On the other hand developments in criminal procedures in the civil law tradition have led in some civil law states to the embrace of rights of cross-examination that are a feature of the common law adversary trial.

Yesterday as I listened to the presentation from Lady Dorrian about the taking of evidence from children and other vulnerable witnesses it occurred to me that she was describing a method of eliciting truth that was almost closer to that of the civil law investigating judge than of a common law adversarial cross examination.

At the end of the day, justice is about fairness; about effectiveness; about efficiency; about institutional and individual integrity. No one system has a monopoly on these attributes and if in order to achieve these objectives it is necessary for us to reach outside traditional sources, then surely this would enure to the enhancement of the rule of law.

\textsuperscript{29} Kafkaris v. Cyprus (Application No. 21906/04).
PANEL SESSION 10B

“Need of Judicial Education”

By Dr. Justice Vineet Kothari, India

Preamble:

Why Judges need to be educated and trained and that too, on a continuous basis, and one would feel that as they are already educated, well trained, matured and wise enough to do justice. Then why further judicial education for them and why we are discussing such a basic and mundane general concept in an International Conference and one may ask this question and I think all of us have this question at the base of our mind and heart today.

But, Dear Friends and Colleagues, I feel, it is always good to know the other side of the coin. It is only when you know more then you know, how less you know and how much more, there is still to know.

Law is a vast and infinite field of education and dynamic and ever developing. Though the Judges may not be called upon to decide the controversies on all fields of law in their day-to-day life, but like sharpening of tools by an Artisan is constantly needed, brushing of brains, even by all Judges who undoubtedly are wise and matured and selected few to dispense justice, is also equally needed.

At the same time, we should not be left behind and allow the cloud of ignorance cast the shadow upon us in the ever increasing area of light of knowledge and developing laws not only with the development of technology and social developments of all hues and colours taking place in the society compels and impels us to learn more and more, but constantly keeping ourselves updated not only with the statutory developments of law but even developing and changing shapes of principles of law which have to be applied by us on day to-day basis for our judicial dispensation in the Courts of Law. The need of judicial education is therefore ever continuing and increasing.

Coming from the land of ‘Rishis’ and ‘Saints’ of India, perhaps, we understand the need of taking guidance and directions from our ‘Gurus’ or ‘Teachers’ more than the other Common Wealth Countries and Western World and thus, education pattern in India subsequently and dramatically changed by Macaulay, brought by ‘British Raj’, still original values of earlier system continues in our blood and the Judges and Lawyers are no exception.

Here, on this international platform, therefore, kindly permit me to highlight some of the facets of need for judicial education and the various Institutions and manner in which such education and training is given shape on a constant basis by various countries, including the Common Wealth Countries, amalgam of which are represented in the audience today.

The continuing legal education and training of Judges takes place in the form of various Regional, National and International Conferences, Publication of Articles and Books, and the constant interaction on the statutory laws, which we get in the Court rooms and in a way, the Lawyers who argue before the Judges also play part of their role as Teachers for the Judges. One should always remain the student of law at heart and Judges are no exception. The constant learning curve not only makes them more seasoned, mature and wise, but it also quickens the judicial dispensation at their hands and a well-trained Judge, who sits in the Court
with an intention to learn more and more can in fact deliver more effective judgments in a quicker manner than the other compared ones.

As indicated above, in India, we have Judicial Academies at State level and National level and including several law colleges and Universities, wherein at Conferences and Seminars, platforms like Moot courts, we keep ourselves abreast with the latest controversies, statutory laws enacted and social developments. Our Supreme Court deals with the Constitutional, Public Laws, Taxation and other social issues not only in the litigations instituted by the parties to a lis, but in a much wider area of public interest litigation of "Epistolary Jurisdiction". The issues touch on liberty and freedom, privacy, religion, education etc., and combined with the legislative and executive efforts, the Indian Judiciary at the level of District, High Courts at State levels and Supreme Court permeating the national boundaries, contributes in a large manner to the maintenance of social order, interpretation of laws and reliefs to the litigants by having free access of justice in the courts of law through the Court orders and directions.

Therefore, continuing legal education and training right from the bottom level of Civil Judges to the top level of High Courts and Supreme Court Judges, in my opinion, is a sine qua non, and there is no cause to have a feeling of being belittled or demeaned in receiving such continuing judicial education and training from all sides. As Swami Vivekananda said, "let light from all sides come to me, let knowledge come to me from all corners".

I am indeed happy to have an opportunity to address an important issue on judicial education and training in this September in a very prestigious gathering, where we have an opportunity to interact from cross sections of various Countries and Continents and by exchange of thoughts, further empower ourselves for better public service in the form of administration of justice in our respective jurisdictions.

In fact, the effacing difference between various National Judicial Training Bodies in an International perspective, from where some common & important features of judicial training & education can be better learnt & later on assimilated in the respective National jurisdictions, all the more makes discussion of such topics on International fora like CMJA conference, all the more fruitful & meaningful.

JUDICIAL EDUCATION AND VARIOUS INSTITUTIONS – WORLDWIDE EFFORT

INTRODUCTION

The topic of judicial education would have puzzled the judges of the mid-20th Century. The concept of ongoing judicial education is a relatively recent phenomenon, at least in common law jurisdictions. It used to be thought that any type of training for judges was a threat to judicial independence. Now in most jurisdictions it is seen as a necessity. This shift in attitude can be attributed to a number of factors. Other professions, including the legal profession, had recognized the need for continuing education and ongoing education programmes had become commonplace. There had also been more specialization within the legal profession. This meant that it was no longer true, if indeed it ever was, that new appointees to the bench came ready equipped with the general skills needed to perform their role. Further, the task of judging had become more complex with the emergence of new and difficult social and technical issues.
INTERNATIONAL ORGANIZATION FOR JUDICIAL TRAINING (IOJT):\textsuperscript{1}

The International Organization for Judicial Training (IOJT) was established in 2002 in order to promote the rule of law by supporting the work of judicial education institutions around the world. The organization convenes Bi-annual conferences hosted by judicial training centers of different countries. These conferences provide an opportunity for judges and judicial educators to discuss strategies for establishing and developing training centers, designing effective curricula, developing faculty capacity, and improving teaching methodology. As on 8th November 2017, the International Organization for Judicial Training (IOJT) was composed of 129 judicial training institutions from 79 countries, which have unanimously adopted the Declaration setting out Guiding Principles for Judicial Training.

SAO PAULO DECLARATION (1997):\textsuperscript{2}

The initiative for the establishment of an international organization of judicial training institutes was first raised at a conference held in Sao Paulo, Brazil in 1997. A declaration stating the importance of international cooperation between institutes for judicial training, and calling for the establishment of an international organization designated to this issue, was signed - known as the "Sao Paolo Declaration".

The goals for the organization were set out in the Sao Paolo Declaration (1997):

1. To improve the exchange of all useful information in the field of initial and permanent training and schooling of judges;
2. To work on the expansion and creation of a network;
3. To continue the cooperation between each other, started at this conference;
4. To organize a preparatory meeting of representatives of schools of judges and/or persons responsible for training and schooling of judges about this initiative.

JERUSALEM DECLARATION (1999)

The preparatory conference for the establishment of an international forum was held in Jerusalem in December 1999 and subsequently signed the "Jerusalem Declaration" in which it was agreed that a conference would be convened with the intention of establishing an international organization for the training of the judiciary.

The "Jerusalem Declaration" included the following amongst its goals:

1. To establish an international organization of Judiciary training organizations from around the world.
2. To convene an international congress of judicial organizations in Jerusalem.
3. To establish a preparatory coordinating center in Jerusalem to prepare for the above mentioned congress.

In March 2002, the first international forum convened in Jerusalem with the participation of representatives from 24 countries, including representatives from the Council of Europe and The World Bank. The International Organization for Judicial Training – IOJT – was established and its Statutes approved.

\textsuperscript{1} www.iojt.org
\textsuperscript{2} www.iojt.org
INTERNATIONAL JUDICIAL ACADEMY - (IJA) – (1999)

The International Judicial Academy (IJA), initially founded in 1999, is now a newly added center of expertise at the International Law Institute. The IJA specializes in providing high-level training in all areas relating to a modern judiciary. Through its work, the IJA emphasizes the importance of a fair, efficient, accessible, and transparent judicial system. It recognizes that a fair and effective judiciary is only possible with skilled and knowledgeable individuals, and aims to further develop the capacity to ensure the effective administration of justice throughout the whole of a country’s legal system.

The International Judicial Academy also publishes a quarterly online judicial magazine: The International Judicial Monitor. The Judicial Monitor, available at www.judicialmonitor.org, explores various developments and themes in international law, international and national court systems, and other topics of particular interest to judges, lawyers, and all those with an interest in the law.

In addition to the above, the International Judicial Academy conducts a number of custom seminars each year examining a wide array of issues relating to judges, the courts, and the effective administration of a modern, fair and impartial judicial system.

THE EUROPEAN JUDICIAL TRAINING NETWORK (EJTN) 2000

EJTN is the principal platform and promoter for the training and exchange of knowledge of the European judiciary. EJTN represents the interests of European judges, prosecutors and judicial trainers across Europe. The vision of EJTN is to help to foster a common legal and judicial European culture. EJTN develops training standards and curricula, coordinates judicial training exchanges and programmes, disseminates training expertise and promotes cooperation between EU judicial training institutions. EJTN has some 38 members representing EU states as well as EU transnational bodies.

COMMONWEALTH MAGISTRATES' AND JUDGES' ASSOCIATION (CMJA) (1970)³ - The Association was founded long ago in 1970 as the Commonwealth Magistrates’ Association and the current name was adopted in 1988. The aims and objectives of Association are as follows –

- to advance the administration of the law by promoting the independence of the judiciary;
- to advance education in the law, the administration of justice, the treatment of offenders and the prevention of crime within the Commonwealth; [The Rule of Law can only be observed if there is a strong and independent judiciary which is sufficiently equipped and prepared to apply such laws. Victoria Falls Proclamation, 1994]
- to disseminate information and literature on all matters of interest concerning the legal process within the various countries comprising the Commonwealth;

The Judicial Education Programmes of CMJA mainly aims –

- to promote and where appropriate, provide judicial education programmes for judicial officers in all parts of the Commonwealth;
- to establish and maintain a network of judicial officers from all parts of the Commonwealth to assist in the planning, promotion and delivery of judicial education

³ https://cmja.org/
programmes;
- to provide judicial and administrative advice and support to existing judicial education institutes;
- to assist in the establishment and subsequent development of codes of conduct;
- to publicize developments in the common law in all countries of the Commonwealth.

The CMJA publishes CMJA Journal and Newsletter annually.

**WORLD INTELLECTUAL PROPERTY ORGANIZATION - WIPO** Academy through its Judicial Training Institutions Project titled as *Cooperation on Development and Intellectual Property Rights Education and Professional Training with Judicial Training Institutions in Developing and Least-Developed Countries*, which was approved by the Committee on Development and Intellectual Property (CDIP) at its Seventeenth Session (Geneva, April 11 to 15, 2016), aims to assist the Judicial Training Institutions of four countries in delivering effective continuing education programs on IP (Intellectual Property) for judges and other members of the judiciary. By the end of 2018 – each country will have a dedicated IPR Toolkit for Judges which will serve all the members of the judiciary in the respective country. The WIPO Academy will consider rolling out the project to other countries seeking such assistance.

**JUDICIAL EDUCATION IN UNITED STATES:**

**THE FEDERAL JUDICIAL CENTER** - *Education and Research for the U.S. Federal Courts*, which was established in the year 1967. The mission of the Center is to educate and train judges and employees of the federal courts. The Center’s Research Division conducts empirical studies and exploratory research into different aspects of judicial administration, such as case management, alternative dispute resolution, and proposed amendments to the Federal Rules of Procedure. The Center is also responsible for documenting the history of the federal courts. Its International Judicial Relations Office provides information to federal government agencies and other organizations working in the field of international judicial development. The Center conducts annual national and regional workshops covering a range of legal topics and judicial skills, including recent decisions by the U.S. Supreme Court, new developments in the law, ethics, use of technology, legal history, and law and literature.

The Other Units which promotes Judicial Education in US are as follows:

1. National Association of State Judicial Educators
2. National Judicial College
3. National Center for State Courts
4. The Judicial Education Reference, Information and Technical Transfer Project
5. Council for Court Excellence
6. National Center for Justice and the Rule of Law
7. The Federal Judiciary Channel on You Tube

**NATIONAL JUDICIAL COLLEGE (USA):**

In 1961, the American Bar Association joined with the American Judicature Society and the Institute of Judicial Administration to organize the Joint Committee for the Effective Administration of Justice. Among the Committee’s recommendations was the need to create an entity to provide judicial education. In 1963, The National Judicial College opened its doors to judges seeking further insight into their profession at the University of Colorado at Boulder. In 1964, with additional funding from the State of Nevada, the College moved its permanent
academic home to the University of Nevada, Reno campus. The College’s first building was built on the Reno campus in 1972.

The National Judicial College has remained the national leader in judicial education. It offers programs to judges nationwide, the NJC continues to work with the judiciary to improve productivity, challenge current perceptions of justice and inspire judges to achieve judicial excellence. The College serves as the one place where judges from across the nation and around the world can meet to improve the delivery of justice and advance the rule of law through a disciplined process of professional study and collegial dialogue. It offers an average of 100 courses/programs annually with more than 8,000 judges attending from all 50 states, U.S. territories and more than 150 countries, the NJC seeks to further its mission of education, innovation and advancing justice. With the growth of online education, more than 10,000 judicial officers are accessing 30 to 50 web events each year.6

JUDICIAL EDUCATION IN INDIA:
The Judicial Education in India is spread, monitored and controlled by a registered Society - National Judicial Academy (referred as NJA), located at Bhopal, which was established in the year 1993. The NJA is headed by the Chairman - who will be always the sitting Chief Justice of India. The main aim and object of the Academy is to promote Judicial Education as it enhances Timely Justice through focusing delay and arrears reduction; and also enhances the quality and responsiveness of justice. The Methodology adopted by this Academy for Judicial Education is through Knowledge sharing. The National Judicial Academy does not, in any way, impinge on the autonomy, freedom and flexibility of High Courts and State Judicial Academies in terms of their judicial education programmes. It is only a framework for cooperation, discussion and knowledge sharing so as to maximize effective use of resources and avoid needless duplication7.

VISION STATEMENTS OF NJA (INDIA)8
- **Legal Mandate** - Strengthening the Administration of Justice through Judicial Education, Research and Policy Development.
- **Guiding Philosophy** - The Vision of Justice of the Constitution of India.
- **Goal** - Judicial Education must enhance Timely Justice through (i) delay and arrears reduction; and (ii) enhancing the quality and responsiveness of justice.
- **Mission** - Knowledge for Justice.
- **Methodology** - Judicial Education as problem solving through knowledge sharing.

PUBLICATIONS OF NJA (INDIA)
NJA - as a part of fulfillment of its mandate, in 2004, Academy initiated a series titled "Occasional Papers" under which at least a dozen monographs are proposed to be published. Till date seven series are published by NJA as contributed by several eminent persons from the legal field. The Academy also publishes quarterly Newsletters and Journals consisting various judicially-relevant research Articles. A great deal of useful information is being generated at NJA which is being transmitted through these publications9.

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6 [http://www.judges.org](http://www.judges.org)
7 [www.nja.nic.in](http://www.nja.nic.in)
8 [www.nja.nic.in](http://www.nja.nic.in)
9 [www.nja.nic.in](http://www.nja.nic.in)
National Judicial Academy also conducts various workshops and conferences at regular intervals. Apart from National Judicial Academy, there are 24 State Judicial Academies established in all the states of the India.

KARNATAKA JUDICIAL ACADEMY (KJA)\(^{10}\)
The main aim of Karnataka Judicial Academy - established in 1999, is to provide an opportunity to the Judicial Officers of the State to develop their personality which would go a long way in enhancing their performance and thereby, improving the quality of dispensation of justice.

KJA also aims to impart the **Four Eminent Qualities** required for a Judge:

- Independence, impartiality, integrity, impeccable character, courage and commitment to the cause of justice;
- Sound judgment based upon the knowledge of law;
- Willingness to study all sides of an argument with an acceptable degree of openness; and
- An ability to reach a firm conclusion and articulate clearly the reasons for the conclusion.

The KJA conducts seminars, workshops, conferences on various subjects and also conducts Induction course, Refresher course, regular training programs for District Judges & lower level Civil Judges. KJA also publishes **monthly e-Newsletter**.

INDIAN LAW INSTITUTE, DELHI - Another premier Legal Research Institution headed by CJI in India is Indian Law Institute, Delhi, which regularly undertakes legal research and conducts classes for Graduation and Post-Graduation in law as a deemed University and organizes National and International Conferences. Being a Member of the Governing Council of I.L.I, I can proudly claim that Indian Law Institution has access to worldwide leading E-libraries and its Library is most enriched and well stocked and doors are open to all National and International Law Students, Professionals and Judges all alike. Its monthly Journal **JILI** is a great compilation.

JUDICIAL INSTITUTES IN OTHER COUNTRIES

PAKISTAN – Judicial Education Institutions:
- Federal Judicial Academy
- Punjab Judicial Academy
- Sindh Judicial Academy

BHUTAN - Bhutan National Legal Institute (BNLI) – Namati, a judicial training institute established under Judicial Service Act of 2007. It is named as ‘Namati’ remembering the sayings’ of Martin Luther King Jr. – **“The Arc of the moral universe is long, but it bends towards justice”** and the institute is dedicated to bending that curve. The word Namati also denotes **“to shape something into a curve”** in Sanskrit.

SRILANKA - Sri Lanka Judges’ Institute (SLJI) – established in the year 1984 holds the rare distinction of being the only judicial institute in Sri Lanka providing judicial education for Sri Lankan Judicial officers and enhancing their professional standards.

\(^{10}\)www.kjablr.kar.nic.in
SINGAPORE - Singapore Judicial College (SJC) - established under the auspices of the Supreme Court of Singapore, is dedicated to the training and development of Judges and Judicial Officers. The SJC consists of a Local Wing and an International Wing, and Empirical Judicial Research, which aims to achieve excellence in judicial education and research and to provide and inspire continuing judicial learning and research to enhance the competency and professionalism of judges.

MALAYSIA – The two important Judicial Education Institutes are:

- Malaysia Judicial Academy, which was established only in 2012 to provide training to judges of the Superior Courts, has also been holding programmes consistently.
- Judicial and Legal Training Institute (Institut Latihan Kehakiman dan Perundangan or ILKAP), which provides training to Subordinate Court judges, has an impressively detailed annual curriculum.

NEPAL - The National Judicial Academy (NJA) - was established in 2004 to serve training and research needs of the judges, government attorneys, government legal officers, judicial officers, private law practitioners, and others who are directly involved in the administration of justice in Nepal. It is focused on training to contribute to enhance knowledge and skills that impact on promotion of effective, efficient and accessible justice.

GERMANY - Germany Judicial Academy was established in the year 1971 and is Germany’s leading institution for training judges from all branches of jurisdiction, as well as public prosecutors, from all parts of the country. The Academy plays a significant role for maintaining unity of law in the federal constitutional state.

ISRAEL - The Institute of Advanced Judicial Studies was established in 1984. The Institute operates from offices located at the Supreme Court in Jerusalem and is granted total independence. The Institute has relationships with schools for judges and with judges’ training institutes abroad, and also provides exchange programs with such institutions, thereby broadening the knowledge of other systems of law.

BANGLADESH - Judicial Administration Training Institute, (JATI) - is one of the premier training institutes of Bangladesh established in 1996 with the task to impart legal and judicial knowledge, skill and attitude to the member of the subordinate judiciary and other stakeholders of the justice sector for bringing positive change in the justice delivery system of Bangladesh. JATI has been endeavoring to meet this goal through undertaking various types of training programmes for its target groups and also publishing a yearly research journal on the contemporary judicial issues, complexities of laws and their application. JATI has not only become a platform for sharing and exchanging knowledge but also a place of gathering world class educational and professional experience for its trainees.

CONCLUSION: By giving brief introduction to various judicial training & education Institutes on the world map, I wish to emphasize on this platform that let us increase interaction on International levels more & more. I suggest that all Judges should at least get once in 3 years term, an opportunity to attend an International conference outside their country, as a part of their necessary judicial training besides local conferences, to broaden their Horizons & Fraternity.

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“The Need for Judicial Education: A Case For Bespoke Training On the Impact of Cost of Litigation and Other Economic Analyses”
By His Hon. Justice Emmanuel Roberts, Sierra Leone

INTRODUCTION
My choice of a theme for this paper was informed and influenced by the history and judicial context of my country. Sierra Leone is a small nation in West Africa, a proud member of the Commonwealth, with a population of approximately 7 million. It is still recovering from one of the most brutal conflicts in Africa which lasted from 1991 to 2002. The war devastated almost all institutions of our nation. The Lomé Peace Agreement signed on the 7th July 1999 which recorded a negotiated end to the conflict made provision for the establishment of a Truth and Reconciliation Commission (TRC) as a means of providing for some accountability for atrocities committed during the conflict as well as a healing and reconciliation process for our people.

The TRC which was eventually established in 2002, concluded its work and presented its final report on 5th October 2004. In this Report the TRC made very scathing and disparaging findings about the judiciary as whole, while highlighting the lack of access to justice as one of the root causes of the civil war.

In its several recommendations the TRC noted that “delay in the delivery of both criminal and civil justice threaten to cripple the administration of justice in Sierra Leone”.

The TRC also recommended the simplification of court rules and procedure in order to improve access to Justice.

Today our judicial strength is 35 judges in the superior courts and 34 magistrates in the lower bench, and when juxtaposed with our population it not difficult to see why we often struggle with backlog of cases in the courts.

JUDICIAL REFORM AND THE JLTI
After the publication of the Final Report of the TRC and its recommendations, there followed massive and widespread reforms of many state and other institutions. The judiciary embarked on a series of reform measures in a bid to improve on access to justice. One such measure was the establishment of the Judicial and Legal Training Institute (JLTI) in December, 2010. This was in recognition of the urgent and present need to provide well-structured and carefully designed judicial training for all judicial and other staff and officers of the justice sector.

Judge Sandra E. Oxner defined judicial education as follows:

What is Judicial Education? A definition of judicial education includes collegial meetings (international, national, regional and local) and all professional information received by the judge, be it print, audio, video or electronic…… As well, mentoring, organized feedback such as performance evaluation, self-study material and distance learning are important judicial education mechanisms.

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5. Judge Sandra E. Oxner is the Chairperson of the Commonwealth Judicial Education Institute (CJEI), Canada
The objectives of judicial education are succinctly summarized as impartiality, competency, efficiency and effectiveness (ICEE) of the judicial system. No doubt judicial education plays a pivotal role in judicial reform. It enhances competence and efficiency which will consequently aid in the restoration of public trust and confidence in the justice system.

Judicial education primarily involves training in core and basic courses and programmes including judgment writing, civil and criminal procedure, court, case and time management, judicial bias, fact finding etc. However, there is the growing argument that judicial education should also encourage bespoke training in relevant academic and practical thought and analysis that would enhance the speed and quality of the service delivered by judges. Indeed Judge Oxner encourages the teaching of a judge “…new intellectual approach as in the judicial exercise of discretion, domestic application of human rights norms or in developing schools of jurisprudential thinking related to reform”.

Perhaps it is in this regard that I emphasize the benefits of the judges’ appreciation of issues like the transaction cost of litigation and its impact on the parties as well the judiciary as an institution. This may well require some basic knowledge of microeconomics and cost analysis, but the appreciation of the various aspects of the cost of litigation and their impact would no doubt help the judiciary in becoming more effective as well as aid in the judicial reform process.

COST OF LITIGATION AS AN ACCESS TO JUSTICE ISSUE.
As was mentioned in the TRC Report, improving access to justice was a key and imperative recommendation. Access to justice is an ever-relevant component of judicial reform in Sierra Leone as in many other commonwealth countries. It involves meeting the legal and justice needs of the people. From the judiciary point of view, access to justice involves an assessment of the cost of approaching the court, the costs associated with trial, the speed of the process as well as how simple and fair the process is. It would also include the availability of affordable legal advice/representation, the availability of courts in all areas including remote communities etc.

In his paper titled “What is Access to Justice?” Trevor C. W. Farrow stated that “...(s)pecific opinions and ideas about what could be done to promote a more accessible justice system (particularly from a procedural perspective) often included cost, simplicity, and speed…” Indeed access to justice is much broader and means much more. It must be considered not only from the judiciary viewpoint but also from the views of the people (parties, litigants, victims, communities etc.) who come in contact with the law.

JUDGES’ APPRECIATION OF THE COST OF LITIGATION.
The training of judges to appreciate the impact of the cost of litigation as an access to justice issue is most relevant not only to the work of the individual judge, but also to judicial reform programmes of our respective nations.

Again, in his Paper cited above, Trevor Farrow made a very salient observation when he stated that “…one issue that is only starting to be taken seriously by the justice community is the question of cost: in particular, what it costs to provide accessible justice, and more importantly, what it will cost if we do not provide accessible justice.” He went on to state that “…having unresolved family, racial, employment, discrimination, housing or other legal...”
problems will tend to lead, as we know, to further legal and other social and health-related problems. When we take into account these clustering and cumulative negative effects of not resolving legal problems, the cost to society—in individually and collectively—is significant. And of course cost in this context includes not only economic costs, but also health and other related social costs”.

I cannot agree with him more. It would in this regard be helpful to remind judges (through training) about what I would call the judicial cost of trial, in other words what it costs the judiciary (its time, salaries of personnel, equipment etc.) in trying a case. Many courts in the United States adopted the CourTools Trial Courts Performance Measures methodology, which, among other things, calculates the average cost (to the court) per case. The CourTools methodology calculates the average cost per case by aggregating total court expenditures over a period of time, including salaries and benefits for judicial officers and court staff, supplies, equipment, and services, rent, maintenance and insurance costs. These total court expenditures are split among the various civil case categories according to the court’s time allocation of personnel across the different types of cases. These total costs then are divided by the number of case dispositions over the time period to obtain the average cost per case for that civil category.

Surely in this day and age when many judiciaries are experiencing low if not decreasing budgetary allocations, it would be most helpful for us to calculate the judicial cost of providing justice, and in particular, the judicial cost of trying a case (be it civil or criminal). I believe many commonwealth countries may have mechanisms/tools for estimating or measuring the judicial cost of trial and it would be useful to share such tools (through training and collegial exchange) with their colleagues in other jurisdictions. This would enhance efficiency, judicial accountability as well as remind us to be very conscious and responsible in the use of judicial time and resources in the performance of our duties.

I also note that in their reform initiatives, many commonwealth countries have introduced in their civil procedure rules an order that is called the “overriding objective”. This was a reform initiative recommended by Lord Woolf (I shall say a bit more on the Woolf Reforms later). Implementing the overriding objective requires that in applying or interpreting as well as exercising discretion under civil rules of procedure, the courts are obliged to deal with a case justly and at proportionate cost. In other words when judges interpret these rules and exercise discretion they must bear in mind the speed, expense and proportionate cost of every stage of the proceedings. It also requires a judge to give each case an appropriate share of the court’s resources, bearing in mind the requirements of other cases.

This is surely a reform initiative that contemplates cost analysis and implications worthy of consideration by those jurisdictions that do not have such an order in their civil procedure rules. This can be facilitated by judicial training and exchange programmes.

An example of this order is found in the civil procedure rules in countries like Ghana (2004), Nigeria (2009), Kenya (CPA revised in 2012), Belize(2005) to name a few. More recently, the overriding objective provisions in the civil procedure rules in England have been amended by adding enforcing compliance with rules, practice directions and orders.

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9 http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=2761&context=ohlj
10 https://static1.squarespace.com/static/56a1484625981dd7f9f45da68b/5ac2a6b4a4a99763c360744/1522706039337/costs-benefits-civil-feb28.pdf
Another illustration of the importance and impact of the transaction cost of civil litigation is explained in the Book *Analytical Methods for Lawyers*\(^{11}\). There, the authors suggest that by bringing a suit or instituting a civil action the plaintiff will be taking a costly initial step, adding that “*bringing a suit involves costs including the plaintiff’s time and energy, legal services and possibly filing fees.*” They further state that “*the plaintiff will sue when the cost of suit is less than the expected benefit from suit*”\(^ {12}\). This is a most practical illustration of an economic analysis in relation to one of the most fundamental issues in civil litigation: that is, the decision to commence the action. Generally (all things being equal), the plaintiff is less likely to sue and perhaps more willing to settle if his estimated cost of the suit (including cost that may be awarded against him) is higher and the likelihood of winning is lower as the case may be.

Indeed transaction costs of litigation may be considered not only in relation to whether or not to commence the action, but also whether or not to settle after commencing the action and even during trial. This analysis would surely assist the judge in his assessment and award of costs and damages as well as in his role in urging or encouraging settlement by the parties.

**COST OF LITIGATION AND PRE-ACTION PROTOCOLS IN THE UK.**

Pre-action protocols were introduced in England and Wales as part of the Woolf Reforms. In March 1994, Lord Woolf was appointed by the Lord Chancellor to review the rules of procedure of the civil courts in England and Wales with a view to, among other things, improve access to justice and reduce cost of civil litigation. This review resulted in wide ranging reforms of civil procedure and practice in England and Wales\(^ {13}\). As part of the Woolf Reform, certain guidelines called *pre-action protocols* were introduced in certain civil cases, which encouraged the parties to enter into discussions and negotiations and/or seek alternative dispute resolution. The view was that “*disputes should where possible be resolved without litigation, but that if litigation was unavoidable, pre-action protocols would make both parties well informed at the outset of the litigation*”\(^ {14}\).

This would enable the parties to a dispute “*to embark on meaningful negotiation as soon as the possibility of litigation is identified and ensures that as early as possible they have the relevant information to define their claims and make realistic offers to settle*”\(^ {15}\).

Lord Woolf’s report however stressed that the objectives of the reforms (which included *pre-action protocols*) “*can only be achieved if the court itself takes more account of pre-litigation activity*”\(^ {16}\).

Failure to comply with a *pre-action protocol* would not bar a party from commencing litigation but such party may end up being liable to additional costs proportionate or approximate to the cost that may have been avoided had the protocol been complied with and ADR attempted. Indeed if in the opinion of the court non-compliance with a *pre-action protocol* “*has led to the commencement of proceeding which might otherwise not have needed to be commenced, or has

\(^ {11}\) *Analytical Methods For Lawyers*, second edition, foundation press

\(^ {12}\) *Analytical Methods For Lawyers*, second edition, foundation press Chapter 7 page 414

\(^ {13}\) Blackstone’s Guide to the Civil Procedure Rules by Charles Plant, Blackstone Press Ltd 1999 page 1


led to costs being incurred in the proceedings that might otherwise not have been incurred,” the court may order, inter alia, the failing party to pay the cost of the litigation proceedings, or part of those costs, of the other party. There is therefore a clear incentive to abide by the *pre-action protocols* and try ADR, and conversely there is a cost disincentive not to do so. This is a mechanism that is designed perhaps with clear and obvious cost benefit analysis in mind. The plaintiff would have to consider the cost he may have to bear if he commences an action without complying with the protocol. The thinking is that with the cost analysis in mind a plaintiff in certain civil actions would be more inclined to try ADR before commencing an action. This would lead to more cases being settled out of court, thereby decongesting the courts and reducing the caseload of judges.

This would increase the satisfaction of the parties especially if the dispute is settled at the ADR forum. It would also free the court to deal with other cases quicker and with greater efficiency. Initially there were *pre-action protocols* for only two types of civil cases, namely personal injury claims and clinical dispute. Over time there have been protocols in other civil case such as defamation, engineering and construction etc.

Even where a protocol does not exist for the type of civil action in question the court will nevertheless expect the parties to act reasonably in exchanging information and documents relevant to the claim and to try to avoid instituting litigation by trying ADR.

Another example of a mechanism with cost analysis considerations was the encouraged use of cost budgets in certain civil matters in the UK. There was concern in the UK about the huge and spiraling cost of civil litigation. Some suggestions were that lawyers were unnecessarily increasing their legal costs and the cost of the trial without justification or prior warning to their clients. In 2013, on the recommendations of Lord Justice Rupert Jackson, the Civil Procedure Rules in England included a requirement that in certain civil matters, both parties will have to provide budgets in respect of the estimated cost of the various steps in the action and may agree on each other’s budget. If they fail to agree then the court will examine and approve the budgets and file them. At the end of the trial when assessing costs the court would have to give regard to the approved budget and will not depart from it without “good reason”. The desired benefits of this mechanism were firstly to put a cap on the amount that can be recovered from the other side at the end of the trial, thus ensuring that costs incurred or awarded are not only reasonable but proportionate to the nature and quantum of the claim in the action. A second benefit is that it will afford the lawyers and especially the parties an opportunity to know, reasonably well in advance, what cost they may incur in respect of prosecuting their case and conversely what cost they would have to pay (which they can see by examining their opponent’s budget) if they lose. Again the likely cost of litigation will be much more predictable from the outset and this will assist the parties in litigation planning.

And this may also warn them to seriously consider ADR and settle the matter in order to avoid estimated costs which they now know in advance that they may have to pay. Again this represents a conscious and pragmatic application of cost analyses in the making of rules of procedure as well as in the decision making of a judge in certain civil actions.

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The principles and considerations that informed the introduction of *pre-action protocols* and cost budgets in England and Wales would most probably have involved cost analysis, and this would no doubt be worthy of consideration in the judicial reform initiatives of some of our respective jurisdictions.

**TRAINING ON BASIC ECONOMICS FOR JUDGES**

Indeed (notwithstanding some criticisms), I share the view that some judicial training on basic economics and cost analysis is relevant and useful in all kinds of civil cases, including but not limited to simple contract cases, landlord and tenant, employment and wrongful termination, assessment of damages and economic loss in other tort cases. Even though we rely on experts in this field to help us reach our conclusions sometimes we end up being more confused than we were before they came in to assist us.

And this may largely be attributable to our complete lack of knowledge in this area as we often do not know what useful questions to ask, or we may simply fail to recognize flaws in the method used in securing some data, or flaws in the conclusions drawn from them. We often rely on the expert on the other side who we hope will help mask our ignorance or perhaps illuminate our path to the decision we eventually reach. This is most unsatisfactory to our work in dispensing justice and certainly most unfair to the parties before us.

In countries like the United States, huge antitrust cases have become increasingly complex, with huge amounts or claims at stake. These cases often require experts on either side to assist the court and here the issues would be highly technical. In an article by Michael Baye and Joshua D. Wright titled *Is Antitrust Too Complicated for Judges? The Impact of Economic Complexity and Judicial Training on Appeals*, the authors concluded that the benefit of providing economic training to judges who handle antitrust matters is obvious (at least to economists). Their study examined data on antitrust cases from federal district courts and Administrative courts from 1996 to 2006.

The study revealed, among other things, that in antitrust cases, those judges who have attended economic training were less likely to have their decisions appealed or reversed. It is not difficult for me to accept these conclusions and I believe that even in simple civil or commercial cases a judge who has received basic training in courses such as economics and economic analysis would be more competent, confident and efficient to appreciate economic and cost implications of issues like adjournments, and other trial delays, injunctions and other interim orders, and many other issues that may come up for determination whether directly or indirectly.

In short, it would be most useful for judges and magistrates to appreciate that what we do at every given time in the course of our work could have huge cost and economic implications on the parties and their means or resources.

Significantly also it would be most useful to appreciate that certain orders, adjournments etc. granted by us do have economic and other implications on the resources of the judiciary as a service-providing institution.

In his lecture titled *Economics for Judges*, Ross Gittins stated as follows:

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Micro (economics) is the study of individual consumers, workers and firms using markets to produce and consume goods and services. At the heart of microeconomics is what is called ‘the neo – classical model’ in which price is set by the interaction – and intersection – of demand on the one side and supply on the other. So conventional microeconomics is preoccupied with price; it strips away other considerations so it can get to what economists regard as the heart of the matter, price…..It is the ‘price mechanism’ that economists see as bringing supply and demand – hence markets – into equilibrium, or balance.20.

The above analysis by Ross Gittins bears greater significance and appreciable relevance to the work of a judge or magistrate in handling many civil and commercial cases. Demand, supply, cost of production, consumer and producer surplus etc. are often relevant factors that a judge may have to appreciate and consider when assessing damages claimed or loss incurred in an action before him or her as the case may be.

In her article titled “Judicial Review of Economic Analysis”, Patricia M. Wald stated as follows:

(M)ost federal appellate judges are generalists, not intensely schooled in economic theory and mindful of the limits to their institutional competence. Judicial review of economic analyses is an increasingly important task of the courts, however, particularly courts like United States Court of Appeals for the District of Columbia Circuit that hears appeals from the rules and rulings of regulatory agencies. Agencies use economic analyses for administrative decision making in a variety of ways. They may be required by statute to make decisions that are ‘economically feasible’ or to consider ‘reasonableness of cost’…Notwithstanding the differences among these situations, they all require judges to understand the often arcane economic issues involved in an agency’s decision.21.

The above passage supports the view that judges at appellate or review (and even trial) levels would now and again need to appreciate and apply economic principles in deciding matters that come before them. This appreciation can been made possible by the clear, expert and simplified training courses, accompanied by practical everyday examples.

CONCLUSION: BESPOKE AND RELEVANT TRAINING
My discussions above are to encourage an increase in judicial training in a bit more specialized but nonetheless practical areas such as cost and economic analysis in relation to our work of judging as well as judicial reform. However, I am not necessarily suggesting such training to be in advanced and complex economic analysis. I am more concerned with simple, basic, bespoke and relevant programmes associated with each country’s unique and specific circumstances. In my country for example, our courts do not have many hugely complex antitrust-like cases as you would find in the United States. I would therefore expect and recommend simple non-complex training on costs and basic economics that will nevertheless be helpful in deciding the kinds of cases and issues that come up for determination in our courts. Surely such training would remind us of the impact of costs and other economic implications of our work and our decisions. And here I am referring to the impact on the parties, the judiciary (time and resources) as an institution and the community as the case may be.

This should urge us (judges and magistrates) to be more efficient, fair, reasonable, sensitive and responsible in carrying out our judicial functions.

21 https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1003&context=yjreg page 43
In a conference which takes as its theme “becoming stronger together”, it may seem ungracious to start by questioning whether convergence is always a good thing. But it is possible to see in the transformation of the administration of criminal justice in many of the jurisdictions represented at the conference a cautionary tale about global fashion and borrowings. It is a wave that has seen the application to criminal courts of the methods of modern public administration and a repositioning of criminal justice around the interests of the victim. These developments have taken place against rising public anxiety about crime which has fuelled scepticism about the institutions and systems by which criminal justice is delivered. The distinct function performed by courts is obscured and may not be valued in what is seen as an integrated government response to crime – a “pipeline”, as it is referred to by New Zealand’s Ministry of Justice – in which courts are seen as part only of the overall government response. The purpose is much more ambitious than effective and efficient administration. It impacts on the principles and assumptions of the system of proof of guilt in public demonstration of the rule of law.

It is necessary to say immediately that efficiency and reduction of costs in the delivery of criminal justice is something to be welcomed and modern technology offers opportunities for better administration all of us should be keen to use. We cannot expect to divert more and more resources away from other important social services into courts because of nostalgia for the way things have been or because of inertia and complacency. But, as with any reform, it is important not to throw the baby out with the bathwater. There are important values served by the criminal justice system that can be overlooked or easily eroded, and not only by public servants applying principles of modern public administration. A number of reforms have been judge-led too.

What are the ends of criminal justice today?
The purpose of the system most of us share is the public and safe determination of culpability in a system that is accusatory (because innocence is presumed). It is built around a detached judge, an independent prosecutor representing the public interest in safe verdicts and right outcomes, and defence testing of the prosecution case.

The rules of practice and procedure we observe were originally developed by judges concerned to ensure, as Lord Devlin once put it, that “what was fair and just was done between prosecution and accused”.1 Although these processes reflected wider rule of law values, their observance was also thought to minimise error in convictions and equality of treatment.

Today, many of the rules of practice and procedure are codified and are kept up to date by legislation. That means that setting the rules for the administration of criminal justice is increasingly a political responsibility. Since it is undertaken at a time of increasing politicisation of crime, it is not surprising that the rules reflect interests other than ensuring that what is fair and just is done between prosecution and accused. There seems to be diminishing appetite for fair process and its public demonstration.

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1 Connelly v DPP [1964] AC 1254 (HL) at 1347.
Much of this has been driven by fear of crime and associated reaction to a system which is seen to be too costly, too time-consuming, too tender of the interests of defendants and too much of a gravy train for lawyers. Indeed anti-lawyer rhetoric has been a striking background to reform in a number of jurisdictions. There has been a significant repositioning of the place of the victim. This is significant reversal of the view acted on in the last 200 years that it was not safe and was too erratic to leave crime to private prosecution. It has implications for the functions of judge and prosecutor and may be loading more on to the criminal justice system than it can bear without more substantial overhaul.

I do not develop this point today, although I think commentators such as Andrew Ashworth are right to point out the profound effect it is having. Instead, I want to talk about a second feature of modern changes, the shifts in management of criminal justice driven by modern models of public administration with their drive to efficiency and cost-effectiveness and measurement of success in timely disposal of cases. With them has come pressure for inter-agency cooperation in recognition that most of the levers which control cost and timeliness in criminal justice are operated by public agencies: police, prosecutors, legal aid, courts administrators among them. So in New Zealand the Ministry of Justice latest annual report talks about the importance of “collaboration” between judges, lawyers, the Ministry of Justice, Police and Corrections. Similar language is seen in publications of the Ministry of Justice in the UK such as the 2012 “Swift and Sure” White Paper. It is echoed in explanations of reforms in Australia and other jurisdictions. Maintaining proper boundaries between these different agencies and courts is increasingly difficult. If the courts are not seen as distinct from the whole of government effort in relation to crime and its causes, the courts become part of the “culture of control” described by Nicola Lacey by which successive governments in a number of jurisdictions have sought to demonstrate that their strategies on crime are effective. If timely disposals are the principal measure of success, the detachment of the judge which has been considered to be the central feature of British criminal justice is under some threat if judges are required to manage cases according to measures of efficiency and cost effectiveness.

The accusatory model of criminal justice in which the prosecution establishes culpability according to law in front of a judge who comes to the case only as a judge is not of course the only safe system of criminal justice. But if we modify its central balances, then we need to compensate with other protections for safe verdicts and right sentences - and they will not be costless.

Features of modern criminal procedure
The aim of modern reforms to criminal justice have expanded beyond the more limited aim of ensuring that what is fair and just is done between prosecutors and accused in process that is thought to minimise error in convictions.

In the UK, the Criminal Procedure Rules 2010 now explain that dealing with a criminal case “justly” includes not only “dealing with the prosecution and the defence fairly” and “recognising the rights of a defendant”, but also “acquitting the innocent and convicting the guilty”, “dealing with the case efficiently and expeditiously”, “respecting the interests of witnesses, witnesses, witnesses...”

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2 Ministry of Justice Annual Report 1 July 2016 to 30 June 2017.
5 During much of the period in which crime has emerged as a significant political issue, crime rates have in fact been falling, suggesting perhaps lack of political leadership in communicating the facts to the public.
6 Its something of a departure from the view that the purpose of criminal justice is the sufficiency of proof of guilt, in the way explained by Baroness Hale in R (Adams) v Secretary of State for Justice [2011] UKSC 18, [2012] 1 AC 48 at [116].
victims and jurors” and dealing with cases in a way which takes into account “the needs of other cases”. Similar goals appear in reforms elsewhere in the common law world.

Commonly encountered features are:

- push to reduce “court events” and adjournments (in NZ a reform in 2011 aimed to achieve 43,000 fewer court events and a sharp decrease in the number of jury trials);
- the view that trial is system failure and corresponding measures to incentivise early guilty pleas;
- application of modern case management patterned on the processes adopted for civil cases;
- reduction of the use of juries by wider use of summary trial and adjustment of requirements of jury unanimity in cases tried by a jury;
- reduction in the number of courthouses, enabled in part by a move away from physical appearances in courts;
- greater prosecutorial and in particular police discretion in charging and in diverting prosecutions out of the courts for informal resolution;
- reduction of resources for legal aid and fixed fees on a transaction model, affecting both defence and prosecution and leading to some acknowledged failures such as the “systemic failures” recently the subject of apology by the Crown Prosecution Service in England and Wales which resulted in the discontinuance of 47 rape or sexual offence cases because of lack of disclosure;
- dependence on data and interagency cooperation in its use, with the courts seen as part of a joined-up justice “sector.”

In my remarks today I concentrate on three of these matters: use of audio visual technology, measures to incentivise guilty pleas and increased discretion in charging, diversion and disposals.

**Avoidance of court appearances**

There is increasing push across jurisdictions towards the reduction of “unnecessary” physical appearances by use of audio-visual technology. In New Zealand, the default position is now that appearances of defendants in custody for all “criminal procedural” matters (defined as those where no evidence is called) must be by AVL unless a judicial officer determines that its use is contrary to the interests of justice.

In England and Wales, although such appearances have been enabled by legislation for some time, Criminal Practice Directions amended last year now require courts to exercise their statutory and other powers to conduct hearings by live link or telephone wherever it is “lawful and in the interests of justice to do so” and in accordance with the earlier 2015 recommendation made by the President of the Queen’s Bench Division.

In Victoria, Australia, there is now a presumption that an accused will appear via an AVL for all criminal hearings except contested trials, committal hearings, first appearances (unless the accused consents) and any inquiry into the accused’s fitness to plead.

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7 Criminal Procedure Rules 2010 (UK), r 1.1.
8 In New Zealand, s 66 of the Summary Proceedings Act 1957 had given defendants the right to elect trial by jury where accused of an offence punishable by more than 3 months’ imprisonment. Under the Criminal Procedure Act 2011, however, defendants have the right to elect trial by jury for offences punishable by imprisonment for 2 years or more (see ss 50–53). This required an amendment to s 24 of the New Zealand Bill of Rights Act 1990.
9 Caroline Davies and Vikram Dodd “CPS chief apologises over disclosure failings in rape cases” The Guardian (online ed, London 5 June 2018).
10 Courts (Remote Participation) Act 2010, s 8(1) (as amended by the Courts (Remote Participation) Amendment Act 2016).
11 Criminal Practice Directions 2015, Division I: General Matters – Part 3N.
12 Evidence (Miscellaneous Provisions) Act 1958 (Vic), s 42K.
too, legislation provides that appearances of those in custody must be by AVL except for trials, inquiries into fitness to plead and first appearances.\(^\text{13}\)

There is no doubt that there are real benefits in the use of audio visual technology, especially in relation to the evidence of vulnerable witnesses, expert witnesses, and the ability of lawyers and litigants, including prisoners, to participate in hearings in which their attendance is unnecessary. It saves the time and cost of travel and is very helpful for emergencies where the court is at a distance. An early indication from the United Kingdom suggested too that audio visual technology can reduce delay in criminal case progression and reduce failures to appear in court for first hearing.\(^\text{14}\) The same study, however, found that guilty pleas were slightly higher (3\%) among defendants appearing by AVL and the proportion of defendants with representation lower (54\% compared to 68\%) when AVL was used. Custody as a sentence outcome was also higher for people appearing by AVL (at 10\% compared to 7\% for those appearing in a traditional courtroom). In a more recent survey of 300 court users, 58\% of respondents thought appearing on video made it more difficult for defendants to understand what was going on and to participate, and a significant number said it was difficult to recognise whether someone who was on video had a disability.\(^\text{15}\)

The use of AVL for first appearances where the accused is held in police custody is controversial. In New Zealand the legislation which sets up a presumption of appearances by audio visual means is now being systemised by administrative measures to set up police custody units in centralised locations which is expected to result in most first appearances being by audio visual means.

First appearance in this way is not permitted in a number of jurisdictions and it is difficult to reconcile with deep-seated assumptions (recognised in human rights instruments) that someone arrested must be brought before the court at the first available opportunity. The reason is explained in the case law as a salutary check on the abuse of power. As was said in one New Zealand case “[i]t prevents the police from keeping those arrested incommunicado and from exerting unreasonable pressure on them in a coercive environment.”\(^\text{16}\) The Grand Chamber of the European Court of Human Rights has similarly described the right of those arrested to be brought “physically” before a judge “provides an important measure of protection against arbitrary behaviour, incommunicado detention and ill-treatment”.\(^\text{17}\) Commentators have reported that assessment of vulnerability or mental disorder is compromised where audio visual technology is used. Often judgements as to whether a person is vulnerable or is in need of immediate medical attention are left to the police.\(^\text{18}\) The physical delivery of the person arrested also serves rule of law and constitutional ends. It brings a person detained unmistakably under the authority of the Court.

Again, it can readily be accepted that there are significant benefits in the use of audio visual technology in many situations. But some of the proposals put forward for administrative reasons which may be perfectly sensible if seen in those terms alone need to be questioned against the purpose and values of the criminal justice system. Further down the line the are quite ambitious suggestions that where judges and counsel are located is immaterial. Cases may be

\(^{13}\) Evidence (Audio and Audio Visual Links) Act 1998 (NSW), Part 1B and s 3 (definition of “physical appearance proceeding”).

\(^{14}\) Matthew Terry, Steve Johnson and Peter Thompson Virtual Court Pilot Outcome Evaluation (Ministry of Justice Research Series 21/10, December 2010) at 19.

\(^{15}\) Penelope Gibbs Defendants on video – conveyor belt justice or a revolution in access? (Transform Justice, October 2017) at 16.

\(^{16}\) Re Te Kira [1993] 3 NZLR 257 (CA) at 266.

\(^{17}\) Ocalan v Turkey (2005) 41 EHRR 45 (Grand Chamber, ECHR) at [103].

queued to be dealt with by the first available judicial officer anywhere in the country, with counsel and accused attending by video link wherever they happen to be. We are not quite there yet. But there are straws in the wind in the closure of courthouses in a number of jurisdictions.19

Measures to incentivise guilty plea

As we know, only a tiny proportion of cases go to trial.20 In all systems it is recognised that there are considerable savings in time and cost if guilty pleas are entered at an early stage. It is understandable, then, that early pleas of guilty are encouraged. (Indeed, one writer said as early as 1976 that “the whole system of criminal justice would collapse administratively if defendants exercised their right to plead not guilty in any significantly greater numbers”.)21 In that context references in prosecution guidelines to the facilitation of “principled plea discussions and arrangements” make sense.22 So too do the greater discounts available when guilty pleas are entered early.23 But care is needed because a guilty plea waives the fair trial rights against self-incrimination and to determination of guilt and rush to plea in particular may result in real injustice.

Judges have been drawn into the promotion of early guilty pleas. In New Zealand we now have an elaborate system for sentence indications by judges, established by legislation and available before plea.24 The judge can determine whether or not to give a sentence indication and, if so, the type of indication to be given.25 Increasingly, judges have been prepared to indicate the sentence considered appropriate before the defendant pleads, rather than giving a range or indication that it will be custodial or non-custodial. There is general acknowledgement that the willingness to give such indications has led to an increase in guilty pleas.26 It has to be acknowledged that in some courts and among some judges the preparedness to give sentence indications was evident before the legislation permitted it and was seen as an effective tool of case management. Other jurisdictions have been more cautious about sentence indications, permitting indications of maximums only or whether a custodial sentence is in prospect. So, in England and Wales, under appellate guidance and practice directions, judges in the Crown Court may indicate a maximum sentence to be imposed if a guilty plea is made at the stage of case management but were rarely given in the High Court.27 In Victoria, judges may indicate whether a custodial or non-custodial sentence would be imposed.28

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19 There have apparently been around 250 courthouses closed in England and Wales since 2010; Owen Bowcott “Travel, court closures and falling crime: why magistrates are quitting” The Guardian (online ed, London, 3 December 2016). Courthouses have been closing in New Zealand too, with Fielding, Warkworth, Whataroa, Upper Hutt, Balclutha, Rangiora all having closed recently. See also Steve Doughty “Jailed by Skype: Judges will be able to sentence criminals over the internet in new plans to cut costs” The Daily Mail (online ed, London, 3 February 2017).
20 Andrew Ashworth and Mike Redmayne note that “whereas the rhetoric of English criminal procedure tends to place emphasis on trial by jury according to the laws of evidence, the practice is otherwise”. They say further that the fact that the large majority of defendants in the criminal courts plead guilty is “in no sense … a ‘natural’ or ‘unavoidable’ phenomenon: the system is structured so as to produce it”: The Criminal Process (4th ed, Oxford University Press, Oxford, 2010) at 418.
22 Crown Law “Solicitor-General’s Prosecution Guidelines” (1 July 2013) at [18.1.2]. The Guidelines also indicate that prosecutors may take into account the cost of the proceeding in deciding whether it is in the public interest to continue with a prosecution even where there is sufficient evidence to do so (at [5.11]).
24 Before enactment of legislation in 2011, such indications had often been given in the District Court as part of a judicial initiative for case management but were rarely given in the High Court.
26 See for example Report from the High Court 2015 – the Year in Review (17 May 2016) at 6.
27 Guidance was established by the Court of Appeal in R v Goodyear [2005] EWCA Crim 888, [2005] 1 WLR 2532 and is set out in the Criminal Practice Directions [2015] EWCA Crim 1567. For indications in the magistrates’ court as to whether a sentence will be custodial, amendments were introduced by Schedule 3 of the Criminal Justice Act 2003, which amended the Magistrates’ Courts Act 1980.
28 Under the Criminal Procedure Act 2009 (Vic), ss 207–209.
Obtaining pleas through sentence indications is now widely seen as an important end of case management. It is difficult to get a handle on whether judges are consciously or unconsciously attempting to obtain pleas by offering discounts that provide incentives. I have been surprised to hear senior judges speak of success in obtaining pleas on sentence indications. It is troubling to hear senior practitioners say that at pre-trial review hearings it is not unknown for judges to interrogate defendants directly, even defendants who are represented, about the defence or the conduct of the case. Some judges are said to give sentence indications without invitation in apparent effort to move a case to resolution. In a recent decision the New Zealand Court of Appeal has allowed an appeal against conviction where the defendant said she was bullied into entering a plea by the judge in this way.\(^{29}\) It is also worrying to hear reports that counsel both for the defence and for the Crown sometimes feel under pressure from the judge when seeking necessary adjournments or when seeking further disclosure on the basis that there is little point because the defendant knows what he has done. It is difficult to know whether these reports give an accurate picture of what is happening. They are, however, commonly heard. It is striking that many of the complaints about overbearing behaviour from judges by practitioners arises in the context of case management and plea indications in criminal cases. If these indicate a shift in culture in which judges assume responsibility for managing cases to achieve prompt guilty pleas, they represent a move away from the idea of the detached judge.

Some commentators see the modern criminal justice system as characterised by the “mass production of guilty pleas” and a culture that measures the rate and timeliness of disposals as the principal marker of success.\(^{30}\) It is not right to treat trial as system failure.\(^{31}\) Criminal trial represents public determination of guilt and demonstration of adherence to the rule of law. It is one of the hallmarks of a civil society under law.

But that is not the only reason we should be concerned. We should not overlook that guilty pleas may be false. They may be entered into because of a calculation of risk or simply to put an end to uncertainty, rather than because a guilty plea is right. Pleas are often entered on inadequate information.

Guilty pleas which are known to be incorrect may arise more frequently in relatively trivial cases where the costs and vexation of pleading not guilty make it seem unworthy. We should not be complacent about admissions of guilt in those circumstances. But there is also reason to believe that the inducements to get matters resolved at a cost that is less than may be risked by post-trial sentence apply also to more serious offending. In a case in the United States Supreme Court, the defendant pleaded guilty to murder despite maintaining his innocence because he did not want to be in jeopardy of the death penalty.\(^{32}\) Similar calculations are being made whenever a defendant is urged to plead to a lesser charge rather than risk conviction on a sentence bearing a heavier penalty.

There are very high stakes indeed when alternatives available according to whether a plea is entered as soon as possible or at a late stage are apart by a number of years’ imprisonment or

\(^{29}\) Gleason-Beard v R [2018] NZCA 349.


\(^{32}\) North Carolina v Alford 400 US 25 (1970). The “Alford-plea”, where a person pleads guilty to a crime they do not acknowledge committing, continues to be permitted in the United States. There are however restrictions on acceptance of such pleas. In federal cases, if the defendant maintains his or her innocence federal attorneys must seek approval from an Assistant Attorney-General before entering a plea agreement, and must make an offer of proof of all facts known to the government to support the conclusion that the defendant is in fact guilty; see United States Attorney’s Manual: Title 9 at (9–27,440).
Discretion in charging and out-of-court resolution

Decisions as to plea only arise if there is a criminal charge in the first place. Increasingly, however, criminal cases are being kept out of court altogether. According to a report in 2015, 40 per cent of police apprehensions in New Zealand now are dealt with by alternative processes which do not lead to prosecution.\textsuperscript{33} They include “diversion”\textsuperscript{34} and formal police warnings. Neither are statutory processes (although there is some recognition of diversion in legislation). As a result, much offending has moved out of the supervision of the courts altogether.

A recent report by the Independent Police Conduct Authority in New Zealand has found inconsistency in use of pre-charge warnings and disparity in the treatment of Maori and non-Maori.\textsuperscript{35} The Authority found varying practices in relation to consultation with victims and the extent to which previous criminal history was disqualifying. It found there was a lack of integration with the other alternative actions of informal warnings and diversion. Informal warnings were, perversely, often given in respect of offending too serious to receive a pre-charge warning.\textsuperscript{36} Pre-charge warnings were sometimes given to those who were not eligible for diversion under the guidelines.\textsuperscript{37} The Independent Police Conduct Authority found inadequate recording and inadequate observance of guidelines as to the seriousness of offences.\textsuperscript{38}

Similar lack of consistency has been identified in the comparable out of court police warning system in England and Wales. Reports in 2011 and 2015 have found non-compliance with guidelines and significant regional variations in application.\textsuperscript{39} As is the case in New Zealand, the recording of warnings was unsatisfactory and meant that previous warnings were sometimes overlooked. There was a lack of clarity about the circumstances in which alternative methods of dealing with offenders were used instead of out of court warnings.\textsuperscript{40}

Police warnings and police diversion are not the only way in which cases are being resolved outside the courts. In England and Wales and in New Zealand some offenders are dealt with by neighbourhood or community justice panels. In New Zealand, this is under a pilot programme in one city (Christchurch). There is no statutory underpinning for the process. Removal at the option of the police to community or neighbourhood panels is used in the case of offending

\textsuperscript{33} See Ministry of Justice “Trends in Conviction and Sentencing in New Zealand” (2015), available at www.justice.govt.nz
\textsuperscript{34} For a defendant to receive diversion, he must enter into a written acknowledgement of responsibility and conditions, including any reparation or counselling or agreement to undertake a restorative justice programme. Once the conditions are fulfilled, the police prosecutor advises the court and the defendant is not required to attend the court again. Withdrawal of the charges is made by a registrar or the court on the prosecutor’s application. See New Zealand Police “About the Adult Diversion Scheme”, available at www.police.govt.nz
\textsuperscript{35} See Independent Police Conduct Authority Review of Pre-charge Warnings (14 September 2016, Wellington) at [76]–[84]. Although the Authority declined to draw the conclusion that the differential treatment was based on ethnicity, it was troubled by the disparity and suggested more guidance.
\textsuperscript{36} At [119]–[121].
\textsuperscript{37} The Authority considered it was unclear whether recidivist offenders could be offered diversion to ensure payment of reparation. Some offenders received a pre-charge warning where they may not have been eligible for diversion due to previous convictions (even following the 2013 change to expand diversion beyond first-time offenders): see at [122]–[126].
\textsuperscript{38} At [120]–[121] and [127]–[130].
\textsuperscript{40} House of Commons Home Affairs Committee “Out-of-Court Disposals” (14th Report of the Session 2014–2015, The Stationery Office, 6 March 2015) at [37].
where warnings are thought not to be a sufficient response. The cases are said to be at “the upper-level of offences that can be resolved without charge and prosecution”. The review of the pilot indicates that some relatively serious offending has been referred, including a small number of family violence cases as well as other offending generally thought to require charge before restorative justice is attempted (such as burglary, assault on a child and common and domestic assault). It is not clear how decisions to refer to community panels have been taken in such cases. The panel pilot scheme is reported to have been successful. Only about 20 per cent of those referred are returned to be dealt with through the courts. There are plans to expand panels in partnership with local iwi (tribes) in particular areas. And other pilots are being undertaken for therapeutic courts and for cases of sexual violence, if the victim agrees.

There are certainly promising aspects to these schemes. I do not underestimate the extent of the problems and the need to adopt better ways of dealing with them, but there are risks in such systems to the principle of public justice and a risk that the door is opened to unequal application of the criminal law in cases of serious offending, according to the attitude of the victim. What is easily overlooked by defendants is that pre-charge warnings, and the resolution of cases through community justice panels have consequences for those who are dealt with under them.

Offending must be admitted. Although the actual offence cannot be prosecuted once there is resolution, the admission forms part of the police record and is maintained as part of the person’s “criminal history”. The person receiving a pre-charge warning is required to sign a statement acknowledging that “a record of this warning will be held by Police and may be used to determine your eligibility for any subsequent warnings, and may also be presented to the court during any future court proceedings”. The information obtained through these processes, including the acknowledgement of guilt, is also information which may be shared by the police with other agencies and can be used in the police vetting increasingly resorted to by public and private bodies. The acknowledgement of guilt is also evidence that may be led as propensity evidence in respect of subsequent offending. These are therefore significant public law powers which potentially provide opportunities for intrusive social control of the individuals affected. There is a risk of over-criminalisation if people are incentivised into acquiescing in alternative resolution because it seems comparatively costless at the time.

We should be very cautious about going down a path which relies heavily on law enforcement agencies to decide the laws they enforce and the manner of enforcement. Making substantive criminal responsibility depend on police or complainant procedural choice is a fundamental change in the direction taken by criminal justice in the last 200 years. It is also a fundamental departure from equality before the law if criminal justice outcomes depend on access to programmes which are available to some only, without any rational basis for distinction.

41 Lord Judge expressed misgivings about use of such panels in his 2011 speech, in case they set up a third distinctive and separate method for the administration of summary justice: see Lord Judge “Summary Justice In and Out of Court” (John Harris Memorial Lecture, Thapars Hall, London, 7 July 2011) at 17–18, available at <www.judiciary.gov.uk>.


43 At 33.

44 A copy of the “Pre-Charge Warning and Release Note” used in the Auckland pilot is available in Justine O’Reilly New Zealand Police Pre-Charge Warnings Alternative Resolutions: Evaluation Report (Wellington, December 2010) at Appendix 13. A similar written acknowledgement is also required by persons receiving police cautions in England and Wales: see Ministry of Justice Code of Practice for Adults Conditional Cautions (Stationery Office, London, January 2013) at [82].

William Stuntz, in his sobering book *The Collapse of American Criminal Justice*, referred to criminal justice in the United States as a “disorderly legal order, and a discriminatory one” where justice is dispensed not according to law but according to official discretion.\(^{46}\) He raises concerns about the legitimacy of such a system and points to scholarship that suggests that perceptions of illegitimacy themselves raise crime rates and exacerbate the difficulty of its control. He suggests closer attention to the fundamental value of equality before the law and more public determination of guilt, including through trial by jury. He expresses concerns about “assembly line adjudication” (in which “quick and casual” investigation and inadequate representation leads to “equally quick and casual plea bargain between lawyers”).\(^{47}\) Our systems may not be in comparable crisis. But it is deeply worrying if the early reports on the new system of police warnings are showing indications in England and Wales and New Zealand of unequal treatment and discrimination. The criminal justice system cannot afford such taint.

**Conclusion**

The extent to which criminal justice can be managed to meet goals of public administration and by the methods of public administration needs to be challenged. Courts need to stand apart. They are not properly seen as part of a pipeline. The goals of efficiency and timeliness in the delivery of criminal justice are subsidiary to the end of achieving verdicts that are safe through processes that are open, fair and just.


\(^{47}\) At 57–58.
Looked at from the point of view of the Cayman Islands judiciary, this subject title invites at least two distinct enquiries. The first enquiry would involve an examination of the case management of criminal cases coming before the courts. In this wise, one would logically consider the systems and practices which would ensure that the cases are disposed of in a timely and efficient manner.

A foremost and obvious consideration would be the availability of legal aid. Without legal representation, the courts are left in the invidious and often intractable position of having to try a defendant’s case while at the same time having to guide him through the procedural steps of preparing for trial and representing himself at trial. This is a time consuming and inefficient process which only adds to the time and costs of trials. Experience in this regard has revealed the fallacy of the policy of some Governments, most notably and controversially the recent policies of the United Kingdom Government, of drastically curtailing legal aid entitlements in the hope of saving costs.

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

There is also, in the Cayman Islands as one might expect, a Criminal Justice Reform Committee (CJRC) chaired by the judge who heads the Grand Court Criminal Division¹ and whose mandate it is to advise on the ongoing modernization of criminal justice practices and to identify the need for and advise on legislative, procedural and practical reforms. For instance, an important and ongoing function of the CJRC has been the development of Sentencing Guidelines based especially on local sentencing precedents and the UK Sentencing Council Guidelines.

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

In the event that there is material that could be of use, especially to those of our sister Commonwealth jurisdictions which have not yet introduced practices like these, the Cayman Courts are very pleased to share our experiences. Access to material about these practices, including especially about the diversionary courts, can be found on the Cayman judicial website and will be readily supplemented upon request with any other information that might be available: www.caymanjudicial-legalinfo.ky.

Having recognised the importance of modern case management, it is however, with regard to the second line of inquiry which the subject title invites that I think the Cayman experience might be more informative.

¹ Until his retirement at the end of August 2018 Justice Charles Quin.
Again, from the point of view of the judiciary, this inquiry may be framed in terms of what are the modern reforms which the judges would advise to combat crime effectively and, given its ascendancy, youth crime in particular.

“Restorative Justice” is now a widely known catchphrase for what may be regarded as a more enlightened modern approach to the relationship between crime and punishment. The concept is already familiar around the courts of many of our jurisdictions and its importance is already marked by its inclusion on the agenda in session 4 of day one of this Conference.

The concept has been described in many different ways. I find the description of criminologist Martin Wright to be clear and compelling where he states that the new model is one:

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

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

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

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

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

The FGC is attended by the young offender, members of his family (including his extended family), the victim (often accompanied by supporters), a youth advocate (if requested by the young offender), a police officer, a social worker and anyone else that the family may wish to be there. This last category might include a representative of a community organization, drug addiction agency or community work sponsor seen as potentially helpful to the young person. Judges do not attend FGCs as their presence would disempower others who should attend. Instead, the New Zealand model requires the youth justice coordinator to chair the FGC meeting in such a way as to enable feelings to be expressed and all points of view heard.

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Victims are encouraged to bring supporters so that they do not feel overwhelmed by a solid turn-out of the offender’s family.

The objective of the FGC is to make recommendations to the Youth Justice Court for the disposition of the case.

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

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

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

…
(f) a convicted person should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances; and
(g) all available sanctions other than imprisonment that are reasonable in the circumstances of each case should be considered for all convicted persons.”

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

The ASL also contemplates the appointment of Justices of the Peace and other volunteers as quasi-probation officers to perform such duties as may be specified under the Law and as may be prescribed by rules made under the Law.

Among the duties envisaged will be the supervision within the community at large of conditional sentences and that of youth justice coordinator for the chairing of FGC meetings when the rules for their adoption in the Youth Justice Court are finally promulgated.

The foregoing is a brief overview of the Cayman Islands judicial approach to restorative justice, the benefits of which the courts fully accept.

The courts have long since recognized however, that lasting and effective impact upon the real causes of crime will not be delivered through the criminal justice system. The youth criminal cases coming before the courts are a manifestation of societal failures not at the institutional but

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4 Section 4 (f) and (g)
5 Sections 15 -17 of the ASL.
6 Sections 50 and 51
at the most fundamental level - the breakdown of family life and the impact that has upon the child, especially the male child leading to criminal behavior.

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

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

Examples of Prevention Programs include:
- Parent caregiver/child drop-in programs for 0 - 6 year olds
- Parenting education
- Parent peer group support programs
- Support groups for caregivers, grandparents and foster parents
- Informal counseling
- Prenatal classes
- Home visits
- Literacy programs
- Volunteer mentors

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

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

These and other proven methods of lasting and effective intervention by the state are of course, expensive. But experience in the Cayman Islands has shown, no doubt as it has in other countries, that programs such as these are likely in the long run to be far less expensive than imprisonment and far more beneficial in effect both for the youth offender and society as a whole.

Many of the components are in effect in the Cayman Islands but many others which are vitally needed are not. The Cayman judiciary will continue to advocate for their implementation.
Experience throughout North America has shown that Family Support Programs have strengthened families and communities together. In many parts of the United States and Canada, the program is based around neighbourhood or “Family Resource” centers. Where no dedicated building is specially available, schools, churches and community centers are used for the delivery of these programs.

A few churches have taken up the mantel in the Cayman Islands in the ongoing lack of initiative by Government, albeit in some cases with financial support from Government. The family resource centers have been described as welcoming hubs of activity where children of all ages, together at times also with parents and caregivers participate in a variety of community programs.

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

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

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

The modern judiciary is well placed to appreciate and advocate for the society based intervention programs. Speaking from the Cayman Islands perspective, it is a challenge that the judiciary should accept and embrace.
The New Zealand context

Contributions to, and likely effects of climate change

As this table shows, New Zealand’s greenhouse gas (GHG) emissions, calculated on a per capita basis, are very high:

![New Zealand Per Capita Greenhouse Gas Emissions 1990-2012](image_url)

New Zealand gross greenhouse gas emissions per capita 1990–2012 compared to United Kingdom, Europe, China, World average, India and Africa.

This level of emissions is a function of economic development and substantial agricultural production. In 2014, agriculture contributed 49 per cent of total emissions, energy, including transport (40 per cent), industry (6 per cent), and waste (5 per cent). The balance is made up of the awkwardly acronymised LULUCF (land use, land-use change and forestry sectors) which removes more carbon dioxide than it emits. In other developed countries, agricultural emissions are, on average, in the order of 11 per cent of total emissions. Practical difficulties associated with reducing agricultural emissions (other than by limiting production) have been a significant constraint on the actions taken to limit GHG emissions. New Zealand has substantial hydro-electric generating infrastructure and currently produces approximately 80 per cent of electricity renewably. That so much power is already produced from renewable sources also limits the extent to which emissions reduction can be achieved cheaply.¹

New Zealand’s share of world-wide GHG emissions is in the order of 0.15 to 0.2 per cent.² Although the effects of climate change on the main islands of New Zealand will probably be less moment than in other areas of the world, they will, nonetheless be seriously adverse. A recent report noted:³

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¹ Alastair Cameron Climate Change Law and Policy in New Zealand (Wellington, LexisNexis, 2011) at 100.
² At 100.
³ Ministry for the Environment “Overview of likely climate change impacts in New Zealand” (31 May 2018) [www.mfe.govt.nz](http://www.mfe.govt.nz)
Based on the latest climate projections for New Zealand, by the end of this century we are likely to experience:

- higher temperatures – greater increases in the North Island than the South, with the greatest warming in the northeast (although the amount of warming in New Zealand is likely to be lower than the global average)
- rising sea levels
- more frequent extreme weather events – such as droughts (especially in the east of New Zealand) and floods
- a change in rainfall patterns – with increased summer rainfall in the north and east of the North Island and increased winter rainfall in many parts of the South Island.

There is a general consensus that temperature rises in excess of 1.5 degrees pose an existential threat to some of our Pacific Island neighbours, including Tokelau for which New Zealand has current responsibilities.⁴

**New Zealand and the international setting**

New Zealand is a party to the United Nations Framework Convention on Climate Change (UNFCCC)⁵ and also the Kyoto Protocol to the UNFCCC. Under the Protocol, Annex I countries, including New Zealand, were committed to binding emissions reductions for 2008–2012.⁶ New Zealand’s obligation was to maintain its annual average emissions during this period (referred to as “the first commitment period”) at 1990 levels.⁷ The Government’s position is that New Zealand met its obligations in relation to the first commitment period, albeit that this was achieved by a variety of means including carbon removal by forests and, controversially, the use of international emissions units.⁸ I will come back shortly to discuss the role of such units. New Zealand declined to give any further commitment under the Protocol beyond the expiry of the first commitment period, although it has set a target of a 5 per cent reduction from 1990 levels by 2020,⁹ for the period corresponding to the second Kyoto commitment period (that is 2013–2020).¹⁰

The **Paris Agreement**, the successor to the **Kyoto Protocol**, was established in December 2015 and has a target to keep temperature rises to within 2 degrees of pre-industrial levels and pursue measures to limit this rise to 1.5 degrees.¹¹ This agreement provides for Nationally Determined Contributions (NDCs) under which countries determine their own goals for reducing emissions in the period after 2020.¹² New Zealand ratified the Paris Agreement on 5 October 2016.¹³

New Zealand’s NDC applies from 2021 and establishes a 2030 target of a reduction in GHGs of 30 per cent from 2005 levels.¹⁴ This was set on the basis of assumptions which include the purchase of international emission units. Comparison of this NDC with those of other countries

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⁴ See James Shaw “Global climate change agreement extended to Tokelau” (14 November 2017) www.beehive.govt.nz
⁶ Art 3(1).
⁷ Art 3(1).
⁸ Ministry for the Environment “New Zealand meets its target under the first commitment period of the Kyoto Protocol” (2 April 2015) www.mfe.govt.nz
⁹ Which replaced an earlier conditional target of 10–20 per cent reduction by 2020.
¹² Art 4(2).
¹³ New Zealand Government “NZ ratifies Paris Agreement on climate change” (5 October 2016) www.beehive.govt.nz
is not a simple exercise. In broad terms, however, New Zealand’s NDC is in line with those of
Australia, Canada and Japan, and less ambitious than those of the European Union, the United
States and China.\textsuperscript{15}

\textbf{The Climate Change Response Act 2002 – general}

There are two features of this Act which I propose to discuss. The first is that it established, by
amendments made in 2008, an emissions trading scheme (the NZETS).\textsuperscript{16} This scheme was
amended in 2009 (following the election of a new Government), 2012, and 2016.\textsuperscript{17} The second
feature is that the Act provides for the setting of targets by the Minister for Climate Change
pursuant to s 224.

\textbf{The NZETS}

The NZETS was conceived of as a cap and trade scheme.\textsuperscript{18} In simple – perhaps simplistic –
terms, such schemes operate on the basis that emissions will be capped, with the number of
units available corresponding to the level of the cap. Those responsible for emissions will be
required to surrender units corresponding to their emissions.\textsuperscript{19} Such units may be allocated free
on the basis of historical emission levels. If a participant's emissions exceed their emissions
units, they must purchase additional units. Units may also be: (a) earned by those who
sequester GHGs, most significantly in forests; and (b) acquired on the market. The cap is
reduced incrementally over time. By reducing the cap, total emissions can be directly reduced.
And by reducing the allocation of free units, the cost of emissions increases. All of this should
generate price signals creating financial incentives to change behaviour towards reducing GHG
emission levels.

The NZETS, as first provided for in 2008 and as amended in 2009 (during the Global Financial
Crisis (GFC)) and again in 2011 and 2016 has had certain features which have severely limited
its practical impact:

(a) For the first Kyoto period, there was no New Zealand specific cap on emissions
and international emissions units were accepted in discharge of the emissions
liabilities of individual emitters.\textsuperscript{20}

(b) An amendment in 2009 allowed allocation of units on the basis of industrial
intensity with the result that, in certain circumstances, a firm increasing
emissions could be entitled to free units in respect of such increases.\textsuperscript{21}

(c) Various concessions have been allowed in relation to (i) the number of units
required to be surrendered; (ii) a very slow scheduled reduction in the allocation
of free units; (iii) the exclusion of the agricultural sector; and (iv) deferrals of
the application of the scheme to other sectors of the economy.\textsuperscript{22}

\textsuperscript{15} See Teresa Weeks “New Zealand’s changing climate target” (2015) 11 BRMB 86.
\textsuperscript{16} Climate Change Response (Emissions Trading) Amendment Act 2008.
\textsuperscript{17} Climate Change Response (Moderated Emissions Trading) Amendment Act 2009; Climate Change Response (Emissions Trading and Other Matters) Amendment Act 2012; and Climate Change Response (Removal of Transitional Measure) Amendment Act 2016.
\textsuperscript{18} Mark Bracey “New Zealand’s Emissions Trading Scheme: An In-depth Examination of the Legislative History” (2017) 21 NZJEL 133 at 142.
\textsuperscript{19} Alastair Cameron, above n 1, at 146.
\textsuperscript{20} Ministry for the Environment The Framework for a New Zealand Emissions Trading Scheme (September 2007) at 47. Instead, the Government decided in principle that the NZETS would operate within the cap on emissions established by the Kyoto Protocol (for the first commitment period).
\textsuperscript{21} Mark Bracey, above n 18, at 151.
\textsuperscript{22} At 140–141.
The NZETS scheme is usually seen as having been ineffective. As New Zealand’s former top climate change negotiator, Adrian Macey, points out:\textsuperscript{23} Since its original design – a world-first, all-sector, all-gases scheme – the ETS has been weakened by the continued non-inclusion of agriculture and the softening of settings [which has been] compounded by the collapse in carbon prices.

... Under this combination of price factors and settings, the ETS appears to have led in the opposite direction to that of the intended policy, and is most likely to delay New Zealand’s transition to a low-carbon economy.

The evolving design of the NZETS has reflected a number of overlapping political and economic considerations:

(d) Under the National Party-led Government in power from 2008 until 2017, the aim was not to be a world-leader in emission-reductions; rather the more limited ambition was that New Zealand would meet its “fair share” of such reductions.\textsuperscript{24} This was the basis upon which the National Party campaigned in the 2008 General Election (which took place just after the start of the GFC) and, having won that election, it claimed political legitimacy for the least-cost approach to emission reductions which it then applied.

(e) There has been a fear that the costs associated with the NZETS might put New Zealand firms at a competitive disadvantage compared to firms in jurisdictions where costs of emissions are less.\textsuperscript{25}

(f) It is arguable there are no practicable means of significantly reducing agricultural emissions otherwise than by a politically unacceptable reduction in production. Although there are some counter-arguments, it was this view which prevailed between 2008 and 2017.

(g) There has been significant push-back from those who have faced the prospect of incurring significant costs if a more rigorous scheme is implemented.

(h) As I have noted, under s 224 of the Climate Change Response Act the Minister is required to set targets for reductions in GHGs. The only target set under these provisions (as opposed to those associated with international agreements) is a 50 per cent reduction of 1990 GHG emissions by 2050.\textsuperscript{26} As should be apparent, the setting of this target is independent of giving the NDC under the Paris Agreement.

The Intergovernmental Panel on Climate Change (IPCC) has issued a series of reports. At the time when the s 224 target was assessed, the most recent report was its fourth Assessment Report (the AR4). Subsequently, the IPCC has issued a fifth report (the AR5) which was published in stages between September 2013 and November 2014.\textsuperscript{27} It set out, inter alia, the then current assessment of climate change, its likely consequences and mitigation strategies which may enable temperature change caused by anthropogenic GHG emissions to be kept to less than 2 degrees.\textsuperscript{28} The New Zealand Government has accepted the AR5 as accurate.

\textsuperscript{23} A Macey “Climate Change Towards Policy Coherence” (2014) 10 Policy Quaterly 49 at 52 and 53.
\textsuperscript{24} (11 July 2013) 692 NZPD 11975.
\textsuperscript{25} (24 September 2009) 657 NZPD 6869 and 6874.
\textsuperscript{26} New Zealand Government “Govt sets -50% by 2050 emissions reduction target” (31 March 2011) www.beehive.govt.nz
\textsuperscript{27} The IPCC is currently in its sixth assessment cycle.
\textsuperscript{28} Intergovermental Panel on Climate Change Climate Change 2014 Mitigation of Climate Change (Cambridge University Press, Cambridge,
I will come back shortly to the significance of the AR5 in relation to the current s 224 target.

The use of international units
As I have already noted, New Zealand met its obligation for the first commitment period under the Kyoto Protocol and there is no reason to suppose that it will not meet its non-binding target for the second commitment period, or, under the settings established by the last Government, would not meet its s 224 target and the NDC. But all of this has either involved, or has been predicated on, the use of international emissions units, these being units issued in other countries but in line with international agreements.29

There is an argument for the use of international units in this way. New Zealand’s very particular emissions profile means that the cost of reducing emissions is greater than in many other countries. Since what matters for climate change is the global extent of the GHG emissions, non-reduction in New Zealand emissions is of no moment if New Zealand (or New Zealand firms) acquire international emissions units sourced from countries where reductions in GHG emissions can be achieved more cheaply. As well, the continuing use of international emissions units is specifically contemplated by the Paris Agreement.30

New Zealand’s use of international emissions units is, nonetheless, controversial. One obvious consequence of the availability and use of international units has been the absence of change in respect of emitting behaviour within New Zealand. There has been very little movement towards a low-carbon economy. As well, it is clear that some of the international emissions units which have been acquired lacked legitimacy, with the result that their acquisition did not in fact indirectly result in emissions reductions.31 More generally there are ethical and political issues as to the appropriateness of a reasonably wealthy country off-shoring its climate change responsibilities, in effect, paying to pollute.

The current position
Climate change has particular salience for the current Labour-led Government which came to office in late 2017. It has announced that it is “committed to New Zealand becoming a world leader in climate change action”,32 It has now set a s 224 target of zero net emission of GHGs by 2050. This target will be introduced by a new Zero Carbon Act. The Government has agreed, in principle, that the target of reducing net emissions to zero by 2050 should be reached using a mix of both international units and New Zealand units.33 However, a limit will be placed on the use of international units in order to provide the confidence necessary to encourage investment in domestic emission reductions and forestry.

A series of initiatives are being implemented (some of which were underway under the previous Government). These include amendments to the NZETS, working groups on how agricultural emissions can be reduced (particularly in respect of dairy farming) and promoting greater sequestration of carbon through forestry. The Government has committed to one billion trees being planted between 2018 and 2027 (being approximately 500 million more than would have

29 United Kingdom, 2014).
30 For example, in 2012 82 per cent of the units surrendered were from offshore carbon markets: see Macey, above n 23, at 52.
31 Paris Agreement, above n 11, art 6.
32 In particular, those units were of Russian and Ukrainian origin: see Macey, above n 23, at 52.
33 Ministry for Environment “The transition to low-emissions and climate-resilient Aotearoa New Zealand” (13 August 2018) www.mfe.govt.nz
34 Ministry for Environment “In-principle decisions: further information” (13 August 2018) www.mfe.govt.nz
been otherwise planted).34 As well the Government has announced that it will no longer grant permits for new oil and gas exploration.35

**Litigation aimed at limiting emissions**

There are two significant cases in which litigants have gone to New Zealand courts to seek judgments aimed at limiting GHGs emissions.

The first of these cases is *West Coast ENT Inc v Buller Coal Ltd.*36 This concerned the granting of consents for the establishment of a coal mine. The objectors argued that the climate change effects on the environment of the eventual burning of the coal to be won were relevant to whether consents were properly granted.

The case fell to be determined in the context of the complex and hierarchical structure established by the Resource Management Act 1991 (RMA) which regulates the use of land, the use of, and discharges into water and discharges into the atmosphere. The regime is “effects-based” and the primary consideration for decision-makers is the effect of proposed activities on the environment. A key provision of the RMA is 104(1)(a) which provides:

When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to–

(i) any actual and potential effects on the environment of allowing the activity; …

In seeking to invoke s 104, the objectors faced some difficulties of a general nature:

(j) The proposed mine was to be established in a mining area. Under the relevant planning instruments there was no practical scope for direct challenge to the establishment of the mine. But to establish the mine, a number of ancillary consents were required, such as consent to construct an access road. The objectors’ argument could be seen as coming down to the proposition that consent to build the road should be denied because the proposed road would enable the mining of coal which would result in the burning of coal resulting in the emission of GHGs. At least to my way of thinking, the logic of this line of argument – in the particular context of the RMA – was not overwhelming. This because the climate change effects relied on would not result directly from the activities for which consent was sought (whether this is viewed as building the road or mining coal) but rather from consequential but nonetheless independent activities (the burning of coal).

(k) If the coal was to be burnt in New Zealand, separate regulatory authority (for the discharge of gases into the atmosphere) would be required. At the time of the litigation, the intention was that the coal be exported to China.37 There was thus a sense in which the objectors were contending for an extra-territorial application of the RMA.

(l) It would be difficult to show a tangible climate change effect resulting from the burning of coal from a single mine.

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34 New Zealand Government “One billion tree programme under way” (23 February 2018) www.beehive.govt.nz
35 New Zealand Government “Planning for the future – no new offshore oil and gas permits” (12 April 2018) www.beehive.govt.nz
37 As it happened, for reasons which I assume related to fluctuations in international coal prices, the coal eventually extracted from the mine was burnt in New Zealand, an activity for which independent regulatory authority was required.
The last point has arisen in other jurisdictions and all points are addressed, albeit in general terms, in the *West Coast ENT* judgment. The case, however, turned on a very particular point of construction in respect of the Resource Management (Energy and Climate Change) Amendment Act 2004 (the 2004 Amendment Act).

The Act was intended to prevent a piecemeal, local authority by local authority response, to climate change in favour of a national strategy, for instance as exemplified by the NZETS which eventually emerged. That this is so is apparent from s 3:

**Purpose**

The purpose of this Act is to amend the principal Act—

... (b) to require local authorities— (i) to plan for the effects of climate change; but (ii) not to consider the effects on climate change of discharges into air of greenhouse gases.

If this purpose had been explicitly carried through to the operative provisions of the 2004 Amendment Act, this would have disposed of the objectors’ argument. Awkwardly, however, the operative provisions of that Act apply only to: (a) the making of rules by regional councils in relation to the discharge of GHGs; and (b) the consideration by regional councils of applications for resource consents associated with the discharge of such gases. Since the applications in issue in *West Coast ENT* did not seek consent to discharge contaminants into air, the objectors claimed that the 2004 Amendment Act was irrelevant.

The Supreme Court split on the application of the 2004 Amendment Act with the majority adopting a non-literal interpretation and concluding that the decision-maker was not required to take into account the climate change effects of GHG emissions; this on the basis that the overall legislative policy was that the reduction of GHG emissions was for the central government. As the majority judgment illustrated by reference to a number of examples, acceptance of the argument advanced by the objectors would have resulted in paradoxical outcomes inconsistent with the general scheme and purpose of the RMA. As well, the majority saw the incompleteness of the operative provision of the 2004 Amendment Act as most easily explained by a legislative assumption in 2004 that arguments of the kind advanced by the objectors were not sustainable for the reasons I have set out in 0.

The second of the two cases is *Thomson v The Minister for Climate Change Issues*. In this case, the plaintiff challenged in judicial review proceedings the s 224 target set by the Minister for Climate Change and the NDC given in terms of the Paris Agreement.

By the time judgment was delivered (November 2017), there had been a change of government and the new Labour-led Government had announced an intention to set a new s 224 target. This

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40 *West Coast ENT*, above n 36, at [175].

41 At [157]–[167].

announcement pre-empted the need for a definitive ruling.\textsuperscript{43} The Judge did, however, address the arguments advanced by the plaintiff. One of these turned on an interpretative issue as to the combined effect of ss 224 and 225 of the Climate Change Response Act which is too particular to warrant discussion in this paper. The other, and for present purposes, more significant argument, was that:\textsuperscript{44}

(m) the s 224 target was set on the basis of a particular understanding of the facts around climate change;
(n) with the publication of the AR5 it became clear that that understanding was unsound;
(o) at that point it was necessary for the Minister to review the s 224 target; and
(p) the Minister’s refusal to review and remake the decision was unlawful.

The Judge concluded that the s 224 target had been reasonably consistent with the most up to date information available at the time it was promulgated. The publication of the AR5 altered the information against which the s 224 target had been set.\textsuperscript{45} She considered that in light of this it was incumbent on the Minister to consider whether this alteration was sufficiently material to require a review of the s 224 target, an exercise which the Minister had not carried out.\textsuperscript{46} Although she was not definitive on what, if any, relief should have been granted, the drift of the judgment is that but for the announcement by the new Government of an intention to review the target, she would have required such a review.

The NDC was not issued pursuant to a statute but rather in terms of New Zealand’s international obligations. In concluding that the challenge to the NDC was nonetheless justiciable,\textsuperscript{47} the Judge reviewed a number of decisions from the United States, Canada, the United Kingdom and the Netherlands.\textsuperscript{48} In the course of addressing the challenge the Judge addressed in some detail the arguments relied on by the plaintiff which focused on:

(q) The complaint that the modelling which had been undertaken for the Minister assessed the costs of reducing emissions but not those which will result from climate change.\textsuperscript{49}
(r) When developing the NDC, a failure to take into account the particular position of Tokelau (a non-self-governing territory of New Zealand situated to the north of Samoa and made up of three atolls which are between 3–5 metres above current sea level).\textsuperscript{50}
(s) A contention (broadly similar to that in relation to the s 224 target) that the NDC fell short of what is appropriate in light of current knowledge.\textsuperscript{51}
(t) A related contention that the NDC was irrational and unreasonable.\textsuperscript{52}

\textsuperscript{43} At [72].
\textsuperscript{44} At [84]–[85].
\textsuperscript{45} At [95].
\textsuperscript{46} At [94]–[96].
\textsuperscript{47} At [133]–[134].
\textsuperscript{48} At [105]–[132].
\textsuperscript{49} At [137].
\textsuperscript{50} At [145].
\textsuperscript{51} At [158].
\textsuperscript{52} At [161]–[162].
In rejecting the challenge to the NDC, the Judge accepted that the setting of the NDC called for an evaluative and not just a scientific judgment and that the responses from other countries were material. She saw the processes around the setting of the NDC and the NDC as set as being within the parameters of what was legitimately open to the Minister. There was, however, reasonably detained engagement with the merits of the arguments and little, and perhaps no, reliance placed on the political background to the decisions which were premised on the “fair share” and not “world leader” and least-cost approach adopted by the National Party during its 2008 General Election campaign.

Addressing the consequences of climate change

The statutory framework
The RMA specifically provides for planning authorities (such as city councils) to address the effects of climate change. Such effects will be wide-ranging and include drought, flooding and rising sea levels. I can most easily illustrate how the statutory framework operates in practice by reference to the last of these effects – that is rising sea levels – and associated consequences in low-lying coastal areas.

There is much building and other infrastructure along New Zealand’s coasts, and around estuaries and harbours. Much of this will become unusable with sea level rises within those forecast as likely to result from climate change. Areas such as South Dunedin in Otago, Haumoana in the Hawke’s Bay, parts of Devonport in Auckland and New Brighton in Christchurch have been identified as being particularly vulnerable.

The New Zealand Coastal Policy Statement 2010 (NZCPS) (which is a very high-level planning instrument prepared under the RMA) directs that climate change be taken into account in managing coastal hazard risk, and that such risk be managed by:

- locating new development away from areas prone to such risks;
- considering responses, including managed retreat, for existing development in this situation; and
- protecting or restoring natural defences to coastal hazards.

The way this is worked out in practice is reasonably complex and beyond the practical scope of this paper. What will be apparent, however, is that there is a tension between the policy (along with the risks which it is based on) on the one hand and, on the other, personal and community expectations around the maintenance of existing buildings and infrastructure and future development, expectations which are built on beliefs that either: (a) existing circumstances will persist; or (b), if necessary, protection against rising sea levels will be provided. It is, however, clear from the terms of the NZCPS that government authorities have no intention of building, or sanctioning the building, of extensive defences against inundation from the sea.

Implementation of the policy of locating development away from areas which are at risk of climate change-induced inundation has given rise to a significant amount of site and project specific litigation which has been determined by the Environment Court. The relevant cases

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53 At [165].
54 At [176].
are of interest in demonstrating how this policy works out in practice but are of limited policy significance. This is because preventing new development (which is what the cases are about) has not attracted any real controversy. In particular, such push-back as there has been from those whose economic interests (in the form of lost development opportunities) have been adversely affected has been limited and localised.

Yet to occur in New Zealand are any incidents in which managed retreat from climate change threatened areas has occurred. We do, however, have recent New Zealand experience of managed retreat in the aftermath of a disaster which was not caused by climate change. This experience serves to illustrate some of the difficulties which managed retreat is likely to throw up.

During 2010 and 2011, there were a number of devastating earthquakes centred in and around Christchurch. These caused significant loss of life along with extensive damage to buildings and underground infrastructure. The Government concluded that some areas of Christchurch could not, in the reasonably foreseeable future, be remediated for residential use and that what was required was, in effect, a managed retreat. This entailed the abandonment of around 8,000 residential properties located in an area termed the red-zone. This has now been effected with the result that, with very limited exceptions, all houses in the red-zone have now been demolished and the land on which they stood is vacant.

In implementing its red-zone policy, the Government did not exercise statutory powers. Rather it made offers which were: (a) for the vast majority of property owners, very generous; and (b) difficult to refuse because of the at least implicit threat not to restore or maintain residential services in the red-zone (such as water, sewerage, power etc). That the vast majority of property owners were inevitably going to accept the offer added to its coercive effect; this because the consequences of non-acceptance included living in a depopulated area. As well, by making the offers, the Government diminished significantly the post-earthquake values of red-zone properties, values which in any event were uncertain as they were practically dependent on expectations as to governmental decisions.

The offers from the Government were based on 2007 government valuations used for rating purposes which, in the post-GFC environment, were generally a fair representation of pre-earthquake market value. The practical effect of the offers meant that insured owners received at least the pre-earthquake market value of their properties and, in some cases, depending on how insurance arrangements worked out, sometimes much more than that. The offers, however, were distinctly less generous for the comparatively few owners who were not insured. This lack of generosity was founded on a number of considerations:

(u) The net cost to the Government of the offers to insured owners was significantly diminished by reason of insurance cover. Thus where the Government simply acquired an insured red-zone property for its 2007 government value, the owner was required to assign his or her rights of recovery against insurers to the Government. By definition, no such off-set would be available where properties were acquired from uninsured owners.

(v) There was a moral hazard concern (in the perhaps slightly unusual sense that providing compensation for insurable but uninsured losses would discourage the taking out of insurance). And

57 Tower Insurance Ltd v Skyward Aviation 2008 Ltd [2015] 1 NZLR 341 (SC) concerned a house in the red-zone with a pre-earthquake value of $492,000 which had been insured on an uncapped reinstatement/replacement basis. The insurance entitlements of the house owner along with the amount received from the government under the buy-out offers were in the order of $1,100,000.
There was an associated reluctance to set a precedent for paying compensation in respect of insurable but insured losses resulting from natural disasters.

The offers evoked vigorous legal and political responses from uninsured owners who organised themselves as the “Quake Outcasts”. The elements of practical coercion and government-caused diminution in value which I have discussed added moral force to the complaints of the Quake Outcasts. The resulting litigation produced a number of judgments including one from the Supreme Court (from which I dissented) in which the Quake Outcasts were largely successful. The Government, in the end, and by degrees, has agreed to deal with uninsured owners on the same basis as those who had insurance (in the sense of paying them out on the same basis).

Although the case was seen by the Court as unique, I now realise that similar controversies have arisen in the United States in contexts which are more closely related to climate change; where inundation by water, the risk of further inundation and government policies of managed retreat have led to abandonment of residential property. To enable the abandonment of residential land threatened by inundation, American governments have sought to acquire residential properties pursuant to “voluntary” buyout arrangements by making offers which, although not reinforced with eminent domain compulsion, were nonetheless coercive for very much the same reasons as the red-zone offers were. As well, as with the red-zone offers, the offers had the effect of diminishing the property values of those who were minded not to accept them. There was, also, the more general problem of uncertainty as to value where the viability of existing residential use was largely dependent on government decisions.

In this context what the earthquakes/red-zone problem and its resolution suggest is that sensible and co-ordinated government-led abandonment of developed land is likely to be seen as smacking sufficiently of compulsory acquisition to produce demands for compensation which will be difficult, both politically and legally, to resist. As has been said of the American situation, the position we have now arrived at is that:

… those who live in vulnerable areas have reason to expect that the costs of disaster will be borne in part by taxpayers.

Difficult though the responses to the Christchurch earthquakes have been, responses to future climate change disasters are likely to be even more fraught. Climate change disasters (whether slow or sudden in onset) are eminently foreseeable. Indeed, inundation risk is already notified on the titles to many properties in coastal areas around New Zealand. Assuming rational property and insurance markets, this risk will impact on property values (which will decline over time) and the availability, terms and price of insurance. In contradistinction to what happened with the Christchurch – with much of the cost of the retreat from the red-zone being met by insurance – there is unlikely to be much of a contribution from insurers. Absent government action which would be inconsistent with the NZCPS – such as the erection or sanctioning of substantial defences against inundation – there will eventually be a complete loss of value. Government-led managed retreat involving the abandonment of developed land will

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60 At 247.
61 The language of loss of value is contestable. One way of looking at property at risk of inundation is that it is a time-limited and thus wasting asset, the value of which at any given time represents only the present value of the right to use it pending inundation. That, however, is a view which may not appeal to coastal property owners, even if it is validated by diminishing resale values and unavailability of insurance.
be difficult to implement. And where such retreat is to be effected on the basis of technically voluntary but coercive and value-diminishing offers, *Quake Outcasts* suggests that demands for compensation will be made which will have the effect of socialising what, to my bleak eye, look to be private losses.

**Conclusion**

As will be apparent, New Zealand’s response to climate change is in a state of flux. How it will play out in practice is uncertain, particularly if and when the abandonment of the least-cost approach to emission reductions results in the imposition of significant financial burdens and therefore generates significant push-back from particular sectors of the economy. It may be that there is now sufficient public support for the currently proposed ambitious emissions reduction targets and programmes to enable such push-back to be resisted successfully. As well, the *Thomson* judgment provides some support for the view that arguments based on political judgments, including those which have the apparent imprimatur of the electorate, will not necessarily prevail. Time will tell.

On the adaption to climate change front, there is a legislative and policy framework in place which addresses the effects of climate change. To date, however, there are comparatively few instances where this policy framework has been implemented in a way which appreciably affects the economic interests of members of the public, at least in respect of built infrastructure. There have not been a sufficient number of economically disadvantaged people to generate significant political or legal resistance. So there remain issues as to how the strategy of managed retreat can be implemented in a way which is politically and legally sustainable.
THE IMPACT OF CLIMATE CHANGE ON JUSTICE
Several factors exist which hinder smooth and effective justice delivery—especially in
developing countries but hardly has advocates of justice and fairness seen these challenges
from the viewpoint of climate change. This paper discusses the narrow nexus between justice
and climate change. It examines the concept of climate change being a factor which has been
sparingly considered as playing any meaningful role in the devastation of the structure of
effective justice delivery. The paper therefore underscores how the effect of climate change
robs off on justice. In doing this, the paper considers the implication of certain environmental
factors like global temperature rise generating situations of unconducive physical working
environment for judicial officers, among others, thereby resulting partly in delay in the
administration of justice. The paper further examines the role of climate change in access to
justice as well as climate induced poverty as a serious enigma in the wheel of justice delivery
in developing nations like Nigeria. The paper finally calls on the government of developing
countries, particularly Nigeria, to rise beyond the momentary satisfaction in the adoption of the
United Nation Framework Convention on Climate Change and the Kyoto Protocol and join the
rest of the world to practically develop a comprehensive framework for abating the danger of
climate change and by extension of some of the setbacks associated with justice delivery.

KEY WORDS: Climate change, impact and justice

INTRODUCTION
Justice is a multifaceted concept and stands at the receiving end of almost every failure on the
part of the state and state’s functionaries, failures induced by nature as well as failure to arrest
unfavourable extreme weather variations. Notwithstanding this multiple dimensions to the idea
of justice, desiring to improve on justice delivery by focusing on the impact of the environment
has not been very popular. Thus, it has not been a matter of serious concern how the
environment or variation in weather affects justice though deliberations on the effect of climate
change on human rights, social justice and the economy are a household word at local and
global plane. This paper therefore seeks to establish that whether justice has been done at any
particular time or can be seen to have been done is sometimes predicated on the prevailing
climatic conditions. The paper considers the implication of certain environmental factors like
global temperature rise which generates condition of unconducive physical working
environment for judicial officers, among others, thereby resulting partly in delay in the
administration of justice in low income countries like Nigeria.

Justice has been described as an imaginary scale. Lamely speaking, justice is associated with
how individuals and people are treated, giving to each his due. Issues of justice arise in
circumstances in which people can advance claims—to freedom, opportunities, resources, etc
which are potentially conflicting with the hope of having such disputes resolved by determining
what each person is properly entitled in the circumstance. According to a Nigerian Jurist,
Abiru, J.C.A:

We must never lose sight of the fact that justice is rooted in public confidence and it is essential
to social order and security. It is the bond of society and the cornerstone of human togetherness.

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1 LMI Cooray, The Rule of Law at available [https://www.ourcivilisation.com/cooray/btof/chap182.htm](https://www.ourcivilisation.com/cooray/btof/chap182.htm), notes that ‘the concept of justice has
three facets — interpersonal adjudication, law based on fault and an emphasis on procedures
2 WAEC v. Oshionebo (2006) LPELR-7739(CA)
Justice is the condition in which the individual is able to identify with society, feel at home with it and accept its rulings. The moment members of the society lose confidence in the system of administration of justice, a descent to anarchy begins.4

Though, there may not be apparent anarchy all the time when there is failure of justice, especially taking it from the angle of climate induced failure, the obvious is that whatever impedes the individual from being able to approach the court or judicial institutions or affects the court from being able to handle its responsibilities effectively affects justice.

The Extended Effect of Climate Change

The United Nations Framework Convention on Climate Change (UNFCCC)5 is an international mechanism for facilitating international cooperation in stabilising atmospheric concentrations of Green House Gases (GHGs).6 The UNFCCC recognises the global climate as a ‘common concern of humankind.’7 The issues addressed in the Convention were systematic scrutiny of patterns of production particularly the production of toxic components such as lead in gasoline, or poisonous waste including radioactive chemicals, alternative sources of energy to replace the use of fossil fuels which are linked to global climate change, new reliance on public transportation systems in order to reduce vehicle emissions, congestion in cities and the health problems caused by polluted air and smoke and the growing scarcity of water.

Nigeria, like most other nations, is experiencing adverse climate conditions with negative impacts on the millions of people. Particularly, the year 2012 is not a year to be forgotten in a hurry in the history of flooding in Nigeria. Persistent droughts, flooding and off season rains have been rampant and have adversely distorted growing seasons in Nigeria, a country dependent on rain-fed agriculture.8 Climate change has also caused lakes drying up and a reduction in river flow in the arid and semi-arid regions.9 These aftermaths of climate change affect not only security of food and water, property right or right to clean environment but also, in the long run, access to justice and justice delivery.

In early October 2012, the floods spread through several states in Nigeria affecting more adversely states in the southern part. Delta, Rivers and Bayelsa States were terribly hit, rendering about 120,000 people homeless, according to state authorities and the Nigerian Red Cross.10 Several temporary displacement sites set up were also flooded forcing people to flee. In Yenogoa, in Bayelsa State 3,000 people were accommodated at the Ovom State Sports Complex.11* In Delta State, among the buildings destroyed by the floods were 20 health clinics, five hospitals, many schools, churches and government buildings, while some court houses were submerged. Schools were either closed or occupied by internally displaced persons.12 The floods also spread across Benue State where a local river overflowed causing the displacement of over 25,000 people.13 The impacts included deterioration of building quality, intrusion of

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4 MBAS Motel Ltd. v. Wema Bank PLC (2013) LPELR-20736 (CA)
6 The UNFCCC was negotiated at the United Nations Conference on Environment and Development (UNCED), informally known as the Earth Summit held in Rio de Janeiro from 3 to 14 June 1992.
9 Id.
10 Id.
11 Id.
12 Id.
contaminated water into apartments, lack of good drinking water, and loss or damage to household properties including sanitation facilities as well as creation of unclean environment, disruption of movement, and damage to public utilities. Part of the effect is that some litigants and their witnesses were cut off from court room by the heavy flood or the courts affected by the flood were out of from the reach of parties and their witness. These inconveniences, losses and deprivations presented and still present a measure of impact on justice- a scenario of failure of justice. Justice failure in the circumstances above was an extended effect of climate change.

Climate induced Poverty and Effect on Access to Justice
Access to justice is a basic principle of the rule of law. In the absence of access to justice, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable. Inaccessibility of justice includes any manner of inhibition to justice delivery. Technical rules or procedures may also inhibit access to justice. The courts have consistently resisted and disassociated themselves from legislation or procedures which have the capacity to prevent aggrieved litigant from the temple of justice. The Apex Court in Nigeria has stated that: “It is settled law that a court of law will not allow the provisions of an enactment to be read in such a way to deny access to court by citizens. Thus, it is not the intention of the law to deny any litigant access to justice. A rule of courts stands to guide the court in the conduct of its business and I must not hold as a "mistress" but as a hand maid.” However, the sense in which the phrase “access to justice” is used in this discourse is in connection with climate change – that is, the effect which changes in climatic conditions may have on the ability of litigants and their witnesses to be able to approach the court for redress.

It was in this light that the Supreme Court in Nigeria said:

“[a]n uninhibited accessibility by a citizen to court of law to ventilate real or imagined grievance is a hallmark of determining the degree of civilization of a country. Let it be said that the quest for justice is insatiable when it is realised that that great phenomenon called justice is not a one way traffic; not even a two-way traffic; I beg to say a court of law which is also a court of justice must always ensure that justice flowing out from its sanctuary which, of course, must be in accordance with the laws of the land, is not only for the plaintiff (the complainant) not even only for the defendant (the person complained against) but also for the larger society whose psyche is always affected, one way or the other, by any judicial pronouncement.”

Climate change has rendered many whose livelihoods are directly depended on the environment poor, economically weak and unable to gain access to the court to ventilate their grievances. Flooding, drought and acute water shortages which are some of the fall out of climate change negatively impact directly on the economic survival of individual and family economies. Most remote African communities are dependent on rain fed agriculture. Besides, rural dwellers are ordinarily far from formal justice. Where equal access to justice is denied whether or not as a result of weather variations, the “people living in poverty are less able to engage the judicial process for the enforcement of their rights and as such are exposed to exploitation.” These rights include economic and social rights, property and labour rights. It has also been identified that “poverty as a barrier to access to justice is exacerbated by other

14 Id.
16 SPDC & Ors v. Agbara & Ors. (2015) LPELR-25987(SC)
17 Ojukwu v. yar’adua & Ors. (2009) LPELR-2403(SC)
structural and social obstacles generally connected to poverty status, such as reduced access to literacy and information [and it is immaterial whether such poverty is climate induced]”\textsuperscript{19}

Generally, there is inadequate legal representation in most rural communities in low income countries. There is also little or no presence of practising lawyers and law courts and community members have to travel a distance, expending a fortune to be able to get justice. They do not also have access to government support to free legal services in the like of Legal Aid services and services of the Office of the Public Defender in Nigeria. This is basically because these services are situated mostly in the cities and have no extension at the rural areas. For people who are in the remote areas who are pushed into poverty, “it is rather a foregone alternative to go in search of lawyers and justice in the city…”\textsuperscript{20}

This category of people are also prevented from accessing legal information and legal materials. In a situation where even some judges and lawyers find it difficult to get access to current legal materials and authorities, it is unrealistic to expect ordinary lay persons – especially the poor – to have any understanding of their legal rights. Again, the justice system in Nigeria can be very slow meanwhile the poor are in dire need of the machinery of justice and they are unable to foot the bill – because their most fundamental components of livelihood has been washed away by flood or dried up in drought.

Given that climate change and acute weather variation are majorly responsible for the condition of poverty in the rural areas, it is sad to note that poor and aggrieved members of the society in commonwealth jurisdictions especially in Africa are not only prevented from being able to access the court, (as a result of high cost of litigation)\textsuperscript{21} rules of practice and procedure and principle of common law referred to as the doctrine of \textit{locus standi} also restrict willing persons from pursuing the legal right of the poor.

In the Nigerian case of \textit{Centre for Oil Pollution Watch v. Nigeria NNPC},\textsuperscript{22} the Appellant was a Non-Governmental Organization [NGO] involved in the reinstatement, restoration and remediation of environments impaired by oil spillage/pollution; it also ensured that environments are kept clean and safe for human and aquatic live/consumptions. It sued the Respondent at the Federal High Court, Lagos, wherein it claimed \textit{interalia} for the:

1. Reinstatement, restoration and remediation of the impaired and/or contaminated environment in Acha autonomous community of Isukwuato Local Government Area of Abia State of Nigeria particularly the Ineh and Aku Streams, which environment was contaminated by the oil spill complained of.
2. Provision of portable water supply as a substitute to the soiled and contaminated Ineh/Aku Streams, which are the only and/or major source (sic) of water supply to the community.

The Respondent on its part contended that the Appellant lacked the requisite \textit{locus standi} to institute and/or maintain the action as presently constituted, as the Appellant had neither suffered damage nor been affected by the injury allegedly caused to the Acha Community. The Court of Appeal in dismissing the appeal of the Appellant had this to say:

\begin{flushleft}
\textsuperscript{19} Id. \textsuperscript{ hope you are well?}
\textsuperscript{20} https://www.pressreader.com/nigeria/thisday/20160202/282282434331087
\textsuperscript{21} some rules of court in Nigeria have increased filing fees astronomically.
\textsuperscript{22} (2013) LPELR-20075(CA).\end{flushleft}
The position of the law may have changed to cloak "pressure groups, NGOs and public spirited taxpayers" with _locus standi_ to maintain an action for public interest, as argued by the Appellant, but that is in other countries, not Nigeria. The truth of the matter is that there is a remarkable divergence in the jurisprudence of _locus standi_ in jurisdictions like England; India; Australia, etc., and the Nigerian approach to same, which has not evolved up to the stage, where litigants like the Appellant can ventilate the sort of grievance couched in its Amended Statement of Claim. As it is, the position of the law on the subject is that the plaintiff must show [enough] interest in the suit.

No doubt, the Acha community was denied access to justice. Even though there is nothing expressly suggesting that the NGO decided to litigate on behalf of the community because the community was too poor, it is obvious that the NGO stepped in because of the huge expense and the technical knowhow required in pursuing environmental cases particularly under the common law rules of tort. But that was the end of the case for the community because the appellants were not members of the community. To the community justice was not done.

In _Ngbor v. Compagnie Generale De Geophysique (Nig.) Ltd_23, another Nigerian case, the plaintiff’s claim was that his sound factory was damaged by the defendant’s seismic activities. Thus the Plaintiff needed to demonstrate with concrete evidence the nature of such activities and how it affected Plaintiff’s factory as alleged. This he can only do through an expert. The plaintiff could not afford the cost of an expert witness in the field of industrial noise and vibration control to testify that the dynamite shot which allegedly caused the damage was fired at a distance which was not safe. The cost of procuring such an expert then was N1,000,000.00 (one million naira only). The defendant company was able to call a witness who testified that the dynamite was shot at a distance which was considered safe by seismic standard. There was no expert testimony on the part of the poor plaintiff to contradict the defendant’s evidence and as such the court accepted it and relied on it and the plaintiffs’ case was dismissed.

Similarly in _Seismograph Services (Nig.) Ltd. v. Ogbeni_24 the plaintiff lost the claim that defendant’s seismic activities caused damage to his buildings. The plaintiff could not foot the bill of a seismologist to ascertain and testify as to whether the vibration arising from the seismic explosions were the cause of plaintiff’s collapsed buildings. The plaintiff lost. In _Seismograph Services Ltd. v. Onokposa_,25 the Respondent case was that the Appellant was responsible for the damages caused to his building during appellant’s seismic activities as a result of vibrations. The Respondent could not also prove causal link. The Apex Court set aside the decision of the court below which granted respondent’s claim for damages.

It is needless to say that the line of cases summarised above demonstrates the frustration of indigent and aggrieved victims who are too poor to have access to required evidence to prosecute their cases and enforce their rights. They are indirectly denied justice on account of their poverty and it is no difference if the poverty was induced by climate change. Most low income countries like African countries are heavily depended on agriculture for their economic development and thereby worst hit by climate change. At the moment, most economies in Africa are experiencing wide spread consequences of climate change, effect of which includes inability of most rural dwellers to afford the cost of enforcing their right. This is further overstretched by the common law doctrine which forbids third parties from litigating a dispute where he has no cause of action.

23 Suit No. BHC/30/93
24 (1976) 4 S.C. 85
25 (1972) All NLR 347
It is interesting to note, however, that the doctrine of *locus standi* has been jettisoned in fundamental right cases in Nigeria. The Fundamental Right (Enforcement Procedure) Rules 2009 in Nigeria provides for the commencement of Fundamental Right cases by a number of person which include interest group and third parties thereby abolishing the time-honoured principle of *locus standi* as far as cases under the FREP Rules are concerned. By the provision of Preamble 3(e) of the FREP Rules 2009 those who can take up fundamental right proceedings include:

1. Anyone acting on his own interest
2. Anyone acting on behalf of another person,
3. Any one acting as a member of, or in the interest of a group or class of persons;
4. Anyone acting in the public interest, and Association acting in the interest of its members or other individuals or groups.

The provisions of the FREP Rules above are a huge relief to poor victims of fundamental rights breaches who have not the wherewithal to enforce their rights. The implication of the rule is that poor victims who ordinarily cannot enforce their rights under Chapter IV of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and who were hitherto prevented from taking the cause of others, can now be assisted by anyone in the interest of the public. According to Amechi, "because of the FREP rules person unrelated to the victims can now validly bring action under fundamental right enforcement rules to enforce the right of even an individual." The old FREP rules limited the right of action to the victim who either proceeded personally or through a lawyer to enforce his right. But how far can a poor victim personally enforce his right? Amechi points further that "[E]ven though our rules of court allow a party to represent himself in person, this offers is usually a huge risk in trials of technical cases." It is therefore not a succour for poor people. As rightly noted:

The law permits every [person] to try [his] own case, but 'the lay vision of every man his own lawyer has been shown by all experience to be an illusion.' It is a virtual impossibility for a [person] to conduct even the simplest sort of a case under the existing rules of procedure, and this fact robs the in *forma pauperis* proceeding of much of its value to the poor unless supplemented by the providing of counsel . . . We can end the existing denial of justice to the poor if we can secure an administration of justice which shall be accessible to every person no matter how humble, and which shall be adjusted so carefully to the needs of the present day world that it cannot be dislocated, or the evenness of its operation be disturbed, by the fact of poverty.

**Weather Variations, Heat waves and the Court Environment**

Apart from hindrances associated with the inability of litigants as a result of climate change to have access to justice, a number of factors which hinder justice delivery exist which are related to the working environment of the judge, judicial officers and staff of the judiciary in general. The environment where a judge works is a critical factor to effective justice delivery. Delivering justice is not synonymous with the delivering of judgment. Thus, where the geographical environment where the judge and his staff work is not eco-friendly, the end result is either that justice is delayed or hurriedly delivered. Some of such unfavourable weather

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27 Id.
conditions which mostly inhibit the judge’s maximum productivity are excessive heat waves. In fact, it has been identified that adverse environmental effects caused by climate change include, among other things, increases in “temperature, as well as increased frequency and/or duration of heat waves.”\(^{29}\) It has been observed that “temperatures have risen during the last 30 years, and 2001 to 2010 was the warmest decade ever recorded. As the Earth warms up, heat waves are becoming more common in some places. Heat waves happen when a region experiences very high temperatures for several days and nights.”\(^{30}\)

The challenge posed by extreme weather conditions is a major factor in low income countries where a number of court rooms are still without electricity supply let alone air conditioners. This is coupled with the fact that judges in these jurisdictions are few and far between and are still writing in long hands without comprehensive life assurance policy. There is therefore a limit to what a judge under this harsh condition can do. It has been observed that “the manual documentation of files and recording of cases in long hand by the judges in court [especially under uncontrolled and unfavourable weather conditions] adversely affects the dispensation of justice and contributes to the delay in most trials in Nigeria.”\(^{31}\) In this 21st Century where the world has gone digital and information technology is the driving force of most developments in the political and legal fields, the Nigerian judiciary [appears to have been] left behind in the analog world where files and judicial activities are manually conducted.”\(^{32}\)

Heat waves have increased in frequency in recent years due to the effect of climate change and it is said that same “cause a variety of heat related disorders and exacerbations of cardiovascular diseases, respiratory disorders, and other chronic conditions. (In addition and in particular, increased heat has adverse consequences on work productivity and activities of daily life.)”\(^{33}\) In Nigeria, particularly, court sessions occasionally close abruptly even in superior courts and all the cases are adjourned till the new date because of power failure coupled with excessive temperature rise. This is one certain factor, though remotely, leading to congestions of cases in court and delay in delivering justice. Justice delayed, they say, is justice denied. Most courts in developing or low income countries have no well-furnished court rooms let alone air conditioners to control excessive and unconducive heat waves.

**Way forward**

Africa has contributed only a tiny fraction to overall greenhouse gases, unfortunately, the continent has very few resources to adapt to global temperature rise and as such stands to lose the most. To this extent, it has been doubtful whether global climate change governance will be of any benefit to Africa if the continent does not develop internal mechanism for combating the menace. Climate change does not only threaten Africa’s food and water security it also limits energy access and hinders the continent’s social development and economic growth thereby rendering affected countries unable to meet with the requirements for guaranteeing effective justice delivery.\(^{34}\) Addressing the issue of effect of climate change frontally has significant and


\(^{31}\) It has been observed that the use of court recording machines and other technologies makes the life of a judge easier and healthier and saves time. See R. H. Cudjoe, “Legal Informatics and the technological Landscape of Justice Systems –Commentary (1) ed. E. Umaru Proceedings of 2007 All Nigeria judges’ Conference (Abuja: national Judicial Institute, 2010) p. 399


unequivocal implications for Africa’s development. This is basically because African’s economies are majorly agro-based. In fact, it has been ascertained that poorer countries and communities suffer most from global warming because of weaker resilience and greater reliance on climate-sensitive sectors like agriculture.\(^{35}\) The Nigerian economy for instance is beginning to recycle around agriculture again after a long period of dependence on oil production and exploration. But how far this can drive the economy is majorly predicated on the preparedness of the African continent as a whole to deal with the increasing effects of climate change.

Global temperature rise and excessive heat waves have adversely affected productivity of the judiciary staff and the bench, especially in Nigeria where most judges and magistrates are still writing in long hands. Besides, some courts cannot be accessed at the slightest rainfall in Nigeria. What is more? Some states in Nigeria do not have the economic capacity to engage enough judicial staff as are propionate to the volume of cases received yearly thereby overworking existing judges with little or no additional incentives.

The condition of work of the judge is a critical factor to the overall idea of justice since the judge delivering his judgment does not necessarily mean that he has delivered justice. To this end, in attempting to mitigate the effect of climate change on justice, it is suggested as follows:

1. That more government interventions are needed in the area of establishment of court rooms with facilities to control temperature rise and to assist the judge in electronic recording. Speed and accuracy is an integral part of justice.
2. That developing countries should advance plans to adapt to the challenges of climate change such as investing in flood tolerant crops or building defences to protect coastal areas against rising sea levels since most African countries are relying on agriculture for the development of their economy.
3. That both industrialized and agro-based economies should adhere strictly to relevant international legal instruments like the UNFCCC and the Kyoto Protocol for the reduction of GHGs. It has been observed that “If people keep adding greenhouse gases into the atmosphere at the current rate, the average temperature around the world could increase by about 4 to 12°F by the year 2100.”\(^{36}\)

Besides plans to curtail climate change, governments should deliberately develop plans to expand the frontiers of access to justice for the poor. This is because economic effect of climate change is felt most in the remote areas since the economy of people in this region is predominantly based on rain fed agriculture. These people too are the category of people most distant from state facilities, including justice institutions. In achieving this, it is therefore important for government to:

a. eradicate or relax the rules of court which obstruct access to justice.
b. improve on legal procedures to create greater access for public interest litigation. While the provisions of the FREP Rules 2009 is a welcomed development the common law rule of *locus standi* is still a huge set back to public interest litigation in other civil heads of claim.
c. deliberately extend government legal service facilities to rural dwellers and provide

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\(^{36}\) A Student’s Guide to Global Climate Change, *supra* note 30.
incentives for service providers in remote areas for motivation. Most legal aids offices and offices of the public defender are cited in the cities even though their services are meant for indigent clients.

d. support civil society and nongovernmental organisations as well as private legal practitioners who are willing to come to the aid of the poor and vulnerable victims of climate change by providing pro bono legal services.

CONCLUSION
Addressing climate change is a desirable exercise not only for the sake of preservation of nature alone but also for the purpose of cushioning the effect on other sectors like the justice sector. Unfortunately, the effect of acute weather variations on justice has hardly been the business of any government or organisation. Government and non governmental bodies are therefore enjoined to extend their inquiries into the statistic of the impact of climate change on justice to promote greater interest in pursuing the recommendations listed above.
I wonder about my credentials for talking about this subject? I come from the best resourced court in one of the wealthiest countries in the Commonwealth. I run a very small organisation of 12 Justices and around 50 staff (plus security staff and cleaners): not like the Lord Chief Justice of England and Wales, with responsibility for 4000 odd judges and a court service which is facing massive challenges. Yet even we, in Supreme Court of the United Kingdom, have some Justices who need careful nurturing to get the best out of them. I am very grateful to Karly for providing empirical evidence for my impressionistic observations of the picture in the United Kingdom.

The short answer to the question posed is ‘if – which is not admitted – we are still pretending that judicial wellness is not a problem, then we should stop it at once’. And if judicial wellness is a problem in the UK, with all its resources, how much more so must it be in many other Commonwealth countries? (I am aware of work being done here in Australia, for example by the Judicial College of Victoria, which is ahead of the UK). But is it just a first world problem, while the judiciary in other countries have so many more pressing challenges to deal with?

I have been struck, when looking at the programme of this Conference, by how many of the sessions do have a bearing, direct or indirect, on the topic of judicial wellness: ‘Strengthening and defending judicial independence’ (Monday afternoon), ‘Judicial work and domestic life: managing the boundaries’ (Monday afternoon), ‘Mentoring new Judges and Magistrates’ (Tuesday afternoon), ‘What is the need for judicial education’ (Wednesday morning), and ‘A comparative study of judicial terms, conditions and emoluments in the Commonwealth’ (Wednesday afternoon). The Attorney General of Queensland was surely right to pick up on this theme in her inspiring remarks at the Reception on Monday.

In the UK, becoming a Judge, particularly a High Court Judge, used to be the pinnacle of a barrister’s career. Depending on his area of practice, he might suffer a loss of earnings, but he would still be comparatively well paid. And the pension was extremely attractive – difficult if not impossible to match on the personal pension market. The level of support from court staff did vary with the level of judge but it was good enough. There were many loyal and efficient people in the court service who took a genuine pride in their role. Legal aid meant that, at least in the higher courts, the parties had proper legal representation. By and large, cases which ought to settle did settle. There was also the sense that the judicial role was respected, not only by other judges and the court staff, but by the public, and even the media and politicians.

It is very difficult to say any of that now, at least in England and Wales. Some stark realities emerge from the 2016 UK Judicial Attitude Survey, conducted by Professor Cheryl Thomas of University College, London, who also conducted a similar survey in 2014. The report covers salaried judges in courts and tribunals in England and Wales (between them 86% of all salaried judges in the UK). We do, of course, also have a large number of part time fee paid judges, and some part time salaried judges, who may see things rather differently.

The gap between what some – though by no means all – successful barristers can earn at the Bar and their judicial salaries has widened. Over three quarters of serving judges said that they have had a net loss of earnings over the last two years. The pension is no longer the attraction it
once was – in fact for any judge who has sensibly built up a good personal pension in practice it is scarcely worth having at all. Worse than that, the rules were changed in such a way as to affect the younger serving judges – those who had signed up for the job on the basis that they would have a particular pension entitlement which has now been taken away from them. 62% of serving judges said that the change in pensions had affected them personally. A similar percentage said that the changes in pay and pensions had affected their own morale and even more said that it had affected the morale of the judges they worked with (is this an interesting example of presenting oneself as stronger than one’s colleagues?). This has had the further effect of eroding trust between the judiciary and the executive.

The Ministry of Justice suffered some of the most severe cuts in the whole public service in the 2010 to 2015 government’s austerity drive. Many court buildings are dilapidated and ill-maintained. The court service has been cut so drastically that the judges no longer have the same level of administrative support – often, for example, district judges have no staff member in the room with them. 64% of judges rated the morale of the court staff as poor, 42% said that the level of administrative support was poor. Half of all judges have sometimes felt concerned about their personal security in court. Three quarters felt that they had experienced a deterioration in their working conditions since 2014 – though not as great as they had experienced between 2009 and 2014.

Legal aid – not only for representation in court but also for all forms of legal advice and help - has been withdrawn from whole areas of work – including the great majority of private family law disputes, between husband and wife, mother and father. This has led to a huge increase in litigants in person and to cases coming to court which would never have come to court before (not everyone realises that lawyers settle cases and they also refer cases for mediation and other forms of Alternative Dispute Resolution). So the character of the work has changed, especially in the Crown and county courts. Another change has been the huge increase in cases involving sex abuse – both in the family courts where it has always featured to some extent and in the criminal courts with the increase in prosecutions for historic sex crimes. Vicarious trauma has been identified in the USA as a source of pressure on judges (Chamberlain and Miller, 2009). 90% of judges in the UCL survey felt that their job had changed since they were first appointed.

Nevertheless, virtually all judges felt that they provided an important service to society and showed a deep commitment to their job, despite the strong levels of disenchantment with certain aspects of it. Most also felt valued by their judicial colleagues, by the court staff, by the legal profession and by the parties in the cases before them (in that order). Less than half (43%) felt valued by the public and almost none felt valued by the UK Government (2%) or by the media (3%). But this did vary between different judicial posts. Generally speaking, the sense of being valued was higher at higher levels of the judiciary - although I do wonder whether there is a certain correlation between feeling satisfied with oneself and feeling valued by others!

Social media also add to the pressures on judges – the Lord Chief Justice has said (in the BBC radio programme, Law in Action, in November 2017) that judges are being put under “intolerable pressure” by social media users who criticise their decisions. Some of us defend ourselves against this by having nothing to do with social media, but this could risk our being seen as out of touch with the modern world – “what is snapchat?” being the modern equivalent of “who are the Beatles?”.
All this has had its effect. First, there is a growing crisis in recruitment, especially to the High Court bench, but beginning to affect other tiers as well. It has not proved possible to fill all the vacancies in recent competitions with suitably qualified candidates. This year there were 25 vacancies but only 10 suitable candidates, leaving 15 vacancies out of a complement of 108, and there will be further retirements in the pipeline. The Judicial Appointments Commission, the Lord Chancellor and the Lord Chief Justice are determined not to sacrifice quality. But this does mean that deputy judges are increasingly being called upon to do work which would normally be done by High Court judges. This too is a form of sacrificing quality. Worryingly, over a quarter (27%) of High Court judges said that they would not encourage suitably qualified people to apply to be a judge.

Second, more and more judges are taking or considering taking early retirement. In the 2016 survey, 36% said they were considering leaving the judiciary early in the next five years, an increase of 5% from the 2014 survey. More than half cited stressful working conditions among the factors making them more likely to leave the judiciary early. Perhaps curiously, High Court and Court of Appeal judges were more likely than others to be considering this. Women were less likely than men to be doing so (31% and 38% respectively) but it is concerning that nearly one third of women judges are thinking of leaving the profession early, given that we want to increase the recruitment of women to the judiciary. Of course, thinking of early retirement and actually taking it are two different things, but it is worrying that so many are even thinking of it.

Third, and this gets to the heart of today’s question, judges are having to take time away from court because of stress-related illnesses. But it is difficult to tell whether this is increasing. The standard measure of sickness absence is “Average Working Days Lost” per staff year – ie the number of working days lost to sickness in a 12-month period per person on average, taking into account the full time equivalence of part timers and people who joined or left during the year. But we don’t have the figures to enable us to do that. We can only show the total numbers of working days lost, so it is difficult to interpret the figures. But what we can look at are the number of days lost, the number of incidences of sick leave, and the number of individuals who took sick leave. So, from 2015/16 to 2016/17, the number of days lost went up, but not by a great deal for full time salaried judges (6,947 to 7,238 for fulltime salaried court judges; 2,375 to 2,728 for full time salaried tribunal judges; 1,730 to 2,723 for part time salaried judges). But the number of incidences of sickness absence rose much more (from 540 to 908; 728 to 1,140; 192 to 254), as did the number of individuals affected (328 to 445; 429 to 564; 103 to 128). Most of these absences were due to physical illnesses or injuries. Indeed, for full time salaried judges, the percentage of days lost because of mental illness or stress fell from 19% to 17%, although the number of individuals affected rose from 18 to 22. For part time salaried judges, the percentage of days lost due to mental illness or stress is considerably higher, but it too fell from 37% to 32%, and the individuals affected from 9 to 8. It is of course possible that some physical ailments are in fact stress-related and that judges, like many others, are reluctant to ascribe their problems to stress.

Absence is, of course, only part of the story. Judges may manifest their unwellness in many other ways – they may become irritable or impatient with litigants and lawyers, they may delay hearing cases, they may delay making decisions, they may take an inordinate time to produce their judgments. Or they may suffer in silence until things become unbearable.

Dealing with sickness absence and other manifestations of unwellness is a problem, because of the importance we attach to security of tenure at all levels of the judiciary as a means of
securing the independence of the judiciary. The inability of a judge to perform the role has to be pretty severe and permanent to justify removal from office. But at the same time, public confidence in the judiciary has to be maintained.

The answer has to be to make efforts to build resilience in the serving judiciary. There may have been a tendency in the past – perhaps there still is – to think that, because our judiciary is recruited from people who have already made a successful career in the legal profession, they must all by definition be naturally tough and resilient people. The Bar, in particular, is a very stressful profession, so how can anyone who has succeeded there find it difficult to handle the stresses of a judicial career? I don’t think that our judicial leaders any longer take that view.

In 2017, the Judicial Executive Board approved an enhanced welfare programme to ensure that judges are properly supported, especially when dealing with a diet of traumatic cases. This includes an annual one to one welfare conversation for judges hearing traumatic cases; one to one resilience coaching for senior leadership judges; a judicial helpline which is available 24 hours a day and 365 days a year (https://intranet.judiciary.uk/organisation-of-the-judiciary/judicial-office/hr-for-the-judiciary/casework.the-judicial-helpline); and both face to face and on-line training.

The Judicial College for England and Wales began face to face training of judges in stress and resilience awareness in 2013 at its cross-jurisdiction seminars in judge-craft, entitled The Business of Judging. This is now also used in jurisdiction-specific training events and as part of the Judicial Leadership and Development Programme. An on-line introduction to stress and resilience programme was launched in August 2018, which enables judges to access training and support at any time: (https://judicialcollege.judiciary.gov.uk/course/view.php?id=2941).

Both the face to face and the on-line programmes invite judges to do four things.

First, to identify their greatest source of pressure, by reference to the six factors identified by the Health and Safety Executive that can lead to work-related stress if not managed properly: demands, control, support, relationships, role and change (http://www.hse.gov.uk/stress/causes.htm). It could be, for example, that one reason why people who could handle the demands of a busy practice find it harder to handle the demands of a judicial life is the loss of control involved in the latter.

Second, to complete the free online i-resilience questionnaire developed by Professors Cary Cooper and Ivan Robertson (https://www.robertsoncooper.com/resilience), albeit in general rather than by reference to the particular conditions of the judiciary or particular judicial posts.

Third, to consider how to strengthen their resilience in the light of the four key components of resilience identified by Professors Cooper and Robertson:

1. Confidence: Having feelings of competence, effectiveness in coping with stressful situations and strong self-esteem are inherent to feeling resilient. The frequency with which individuals experience positive and negative emotions is also key.

2. Purposefulness: Having a clear sense of purpose, clear values, drive and direction help individuals to persist and achieve in the face of setbacks.

3. Adaptability: Flexibility and adapting to changing situations which are beyond our
control are essential to maintaining resilience. Resilient individuals are able
to cope well with change and their recovery from its impact tends to be quicker.

4. Social Support: Building good relationships with others and seeking support can help individuals overcome adverse situations rather than trying to cope on their own.

Fourth, to access sources of support from the Judicial Office, LawCare (a charity offering support for lawyers), the nominated welfare judge for courts and tribunals and their leadership judges.

I must confess to having downloaded the questionnaire and done my best to answer it honestly. The difficulty was that the questions were not related to my actual role, so it was often necessary to give a neutral or non-committal answer. The Report made interesting reading – on most characteristics deemed relevant to the four ingredients of resilience, my answers were either neutral or helped my resilience; the only one identified as hindering my resilience was my degree of emotional awareness – ie not good enough – though it was not clear whether this was awareness of my own or other people’s emotions. Quite a blow to my self-image; but everything else was pretty encouraging, so I can live with it. I might even get to work on the possible areas identified: including “feeling sympathetic or sorry for others may interfere with addressing firmly any performance issues that are adding to workload problems”. Just so.

Discussing this with friends in academia, I discovered that the University of Lincoln has a “wellness button” on its staff computers, so that members of staff can click on it and get away from the stresses of their lives for a while. Sounds like a good idea to me.

But I come back to where I started. How much of this makes sense to all of you here? And how much of it is a first world worry from a judiciary which is still, whatever the problems, relatively well resourced, well-respected and whose independence is not under serious threat?
SPECIALIST SUBJECTS SESSION

SPECIALIST SUBJECTS SESSION 4A
“Restorative Justice”
By Judge Mary Beth Sharp, New Zealand

Introduction:
This Paper on Restorative Justice focuses on the following aspects:

a) Development of restorative justice in NZ;
b) The Framework in the sentencing Act;
c) The restorative justice process in NZ; and
d) Repercussions of the restorative justice process.

What is Restorative Justice?
The general consensus from literature and government material is that restorative justice is a broad concept with no agreed definition, and significant overlap with other concepts such as community justice. Some broad definitions include:

`a process that brings together all the parties affected by an incident of wrongdoing to collectively decide how to deal with the aftermath of the incident and its implications for the future'.

`a focus on repairing relationships between victims, offenders and the community in a way that is responsive to considerations of justice.'

Development of Restorative Justice in New Zealand
The application of restorative justice principles and practices in New Zealand as a response to offending and victimisation began with the introduction of Family Group Conferences for young offenders through the Children, Young Persons, and Their Families Act 1989. Over the 1990s, similar principles and practices began to be applied on an ad hoc basis to cases involving adult offenders. However, it was not until the passage of the Sentencing Act 2002, Parole Act 2002, and the Victims' Rights Act 2002 that there was any statutory recognition of restorative justice processes in the formal criminal justice system.

Although restorative justice processes can operate in a variety of ways at different stages in the criminal justice system, pre-sentencing conferencing of referrals from the District Court and the Police Adult Diversion Scheme are the most common restorative justice processes for adult offenders in New Zealand.

The focus in this Paper is on the processes generally. While acknowledging the genesis of the process in the youth system, there is not substantial difference in the restorative justice process in that system. However, there are published guidelines for restorative justice generally, and special guidelines for family violence and sexual offending.

Restorative Justice in the Sentencing Act 2002
The former Chief District Court Judge Sir David Carruthers describes the Sentencing Act 2002 as containing comprehensive provisions for restorative justice processes. He notes that

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1 Now the Oranga Tamariki Act 1989
Section 7 provides the purposes for which the court may sentence or otherwise deal with an offender, many of which overlap with the purpose and outcomes of restorative justice. These include: accountability for harm caused;\(^5\) promoting a sense of responsibility for, and acknowledgement of that harm;\(^2\) providing for the victim's interests;\(^3\) reparation for the harm done by the offending;\(^4\) and assisting the offender's rehabilitation and reintegration.\(^5\) The court must take into account, inter alia, any outcomes of restorative justice processes that have occurred, or that the court is satisfied are likely to occur, in relation to the particular case.\(^6\)

In addition to aggravating and mitigating factors provided in s 9, sections 10, 24A and 25 give explicit recognition to "restorative justice". These provisions are central to the fair and just disposition of sentencing matters. Both individually and collectively, they provide a platform for restorative justice processes and accord them the weight they deserve in the criminal justice system. It is axiomatic that the outcome of restorative justice processes must be carefully and reasonably considered by the sentencing judge to ensure that the weight given to restorative justice outcomes is appropriate in every case.

Section 25(1)(b) is permissive in its terms and gives the court a discretion to adjourn proceedings to allow a restorative justice process to occur or be completed. In contrast, s 24A requires a court to adjourn proceedings in the circumstances set out in s 24A(1), so that enquiries can be made as to whether a restorative justice process is appropriate and, if it is, the process can occur. Section 24A only came in as an amendment in 2014.

The Sentencing Act provides the following:

25 Power of adjournment for inquiries as to suitable punishment
(1) A court may adjourn the proceedings in respect of any offence after the offender has been found guilty or has pleaded guilty and before the offender has been sentenced or otherwise dealt with for any 1 or more of the following purposes:

(a) to enable inquiries to be made or to determine the most suitable method of dealing with the case;
(b) to enable a restorative justice process to [occur, or to be completed];
(c) to enable a restorative justice agreement to be fulfilled;
(d) to enable a rehabilitation programme or course of action to be undertaken: [(da) to determine whether to impose an instrument forfeiture order and, if so, the terms of that order:]
(e) to enable the court to take account of the offender's response to any process, agreement, programme, or course of action referred to in paragraph (b), (c), or (d).

(2) If proceedings are adjourned under this section or under [section 10(4) or 24A], a Judge or Justice or Community Magistrate having jurisdiction to deal with offences of the same kind (whether or not the same Judge or Justice or Community Magistrate before whom the case was

\(^{2}\) Section 7(1)(b).
\(^{3}\) Section 7(1)(c).
\(^{4}\) Section 7(1)(d).
\(^{5}\) Section 7(1)(e).
\(^{6}\) Section 8(j).
heard) may, after inquiry into the circumstances of the case, sentence or otherwise deal with the offender for the offence to which the adjournment relates.

Section 24A, inserted by the Sentencing Amendment Act 2014, overlaps with s 25(1)(b). However, whereas s 25(1)(b) is permissive in its terms and gives the court a discretion to adjourn proceedings to allow a restorative justice process to occur or be completed, s 24A requires a court to do so in the circumstances set out in subs (1). Restorative justice processes are to be regarded by the courts as an important component of criminal justice procedure that should be utilised whenever they are available and appropriate:

24A Adjournment for restorative justice process in certain cases
(1) This section applies if—
(a) an offender appears before [the District Court] at any time before sentencing; and
(b) the offender has pleaded guilty to the offence; and
(c) there are 1 or more victims of the offence; and
(d) no restorative justice process has previously occurred in relation to the offending; and
(e) the Registrar has informed the court that an appropriate restorative justice process can be accessed.

(2) The court must adjourn the proceedings to---
(a) enable inquiries to be made by a suitable person to determine whether a restorative justice process is appropriate in the circumstances of the case, taking into account the wishes of the victims; and
(b) enable a restorative justice process to occur if the inquiries made under paragraph (a) reveal that a restorative justice process is appropriate in the circumstances of the case.

An adjournment under this section first enables enquiries to be made as to whether a restorative justice process is appropriate in the circumstances of the case and then, if it is, to take place. The wishes of the victim are to be taken into account. The offender must agree to participate.

Further, s 10 is an expanded version of s 12 of the Criminal Justice Act 1985, which codified the long-standing principle that the making of appropriate amends by the offender, or a promise to do so, may reduce the sentence which would otherwise be appropriate.7 Section 10 reads as follows:

10 Court must take into account offer, agreement, response, or measure to make amends
(1) In sentencing or otherwise dealing with an offender the court must take into account—
(a) any offer of amends, whether financial or by means of the performance of any work or service, made by or on behalf of the offender to the victim:
(b) any agreement between the offender and the victim as to how the offender may remedy the wrong, loss, or damage caused by the offender or ensure that the offending will not

7 *R v Thacker* CA392/90, 22 March 1991
continue or recur:

(c) the response of the offender or the offender's family, whanau, or family group to the offending:
(d) any measures taken or proposed to be taken by the offender or the family, whanau, or family group of the offender to---
   I. make compensation to any victim of the offending or family, whanau, or family group of the victim; or
   II. apologise to any victim of the offending or family, whanau, or family group of the victim; or
   III. otherwise make good the harm that has occurred:

(e) any remedial action taken or proposed to be taken by the offender in relation to the circumstances of the offending.

(2) In deciding whether and to what extent any matter referred to in subsection (1) should be taken into account, the court must take into account—
   (a) whether or not it was genuine and capable of fulfilment; and
   (b) whether or not it has been accepted by the victim as expiating or mitigating the wrong.

(3) If a court determines that, despite an offer, agreement, response, measure, or action referred to in subsection (1), it is appropriate to impose a sentence, it must take that offer, agreement, response, measure, or action into account when determining the appropriate sentence for the offender.

(4) Without limiting any other powers of a court to adjourn, in any case contemplated by this section a court may adjourn the proceedings until—
   (a) compensation has been paid; or
   (b) the performance of any work or service has been completed; or
   (c) any agreement between the victim and the offender has been fulfilled; or
   (d) any measure proposed under subsection (1)(d) has been completed; or
   (e) any remedial action referred to in subsection (1)(e) has been completed.

Other references to Restorative Justice in the Sentencing Act

Section 26(2)(c): Pre-sentence reports. Pre-sentence reports may include information regarding any offer, agreement, response, or measure of a kind referred to in s 10(1) or the outcome of any other restorative justice processes that have occurred in relation to the case.

Section 27: The offender may request the court to hear a person speak on the personal, family, whanau, community, and cultural background of the offender. That person may speak on, amongst other matters, any processes involving the offender and his or her family, whanau, or community and the victim or victims of the offence that have been tried to resolve, or that are available to resolve, issues relating to the offence: s 27(1)(c).

Section 32: Sentence of reparation. When determining the amount of reparation to be made, the court must take into account any offer, agreement, response, measure or action.
Section 62: Determining placement of offender for community work. Under this section, probation officers must take account of the outcome of any restorative justice processes that have occurred in the case when deciding on a placement of an offender for community work: s 62(e).

Sections 110 and 111: Come up for sentence if called upon. These sections provide that the court may order an offender to come up for sentence if called upon. Under s 111, the offender under such an order may be called up for sentence if he or she fails to comply with any agreement or fails to take any measure or action of a kind referred to in s 10 that was brought to the attention of the court at the time the court made the order under s 110.

Restorative Justice in Practice
Restorative justice services are run by community-based groups contracted by the Ministry of Justice. Maori providers are available in many areas. Restorative justice providers are approved by the Ministry to ensure they have experience and training to make sure the restorative justice process is safe and supportive for everyone. The Ministry of Justice providers on its website.

In 2017 the Ministry of Justice published an updated 'Best practice framework', and in 2018, the 'Specialist standards for family violence cases', and 'Practice resources for family violence cases'. Prior to this the 'Standards for sexual offending cases' were published in 2013.

The Restorative Justice Process
Restorative justice typically involves a mediated meeting between the offender and victim and others supporting them. Both parties must agree to the meeting. It incorporates traditional customary reconciliation practices.

The Institute of Justice Benchbooks provide a useful summary document that outlines the standard process in a restorative justice conference. It gives an overview of the process in a succinct manner, outlining each step.

For a rudimentary overview, the Ministry of Justice provide the following diagram outlining the restorative justice process in New Zealand:

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8 Restorative Justice Providers NZ.
9 See, for example, R v Buttar [2008] NZCA 28; R v Fanguna [2009] NZCA 316.
Key points for Restorative Justice Referral

a) There must be a firm guilty plea.
b) Record and note the plea. "Convicted. Remanded to ......................... PSR (if appropriate) and RJ Report and sentence".
c) Ascertain the willingness of the offender and the victim—of the offender through counsel and of the victim through the Victim's Adviser (not through an agent of the offender). Attendance is entirely voluntary.
d) The case is then referred to a trained and professional independent facilitator who is familiar with resource materials such as the Ministry of Justice's Manual on Restorative Conferencing (2001).
e) The facilitator should be provided with a copy of the charge(s), summaries of facts, any victim impact statement, the contact details of the offender and victim, and the name and base of the officer in charge.
f) The facilitator must ensure that the police are invited to attend.
g) Victims and offenders should be encouraged to have support people present.
h) The conference cannot proceed unless both victim and offender are actually present (agents or representatives are not appropriate).
i) Lawyers are entitled to attend but not in the role of advocate.
j) The facilitator will write a report recording any agreements reached, arrangements for monitoring and completion of agreements, and adequate information to enable the Judge/Community Magistrate to appreciate the processes of communication that took place.

Repercussions of Restorative Justice

Statistics

The most recent report was published by the Ministry of Justice and compared the reoffending rates of adult offenders who completed a RJ conference with statistically matched controls. The main results from this report were that for offenders who participated in a Police or court-referred RJ conference, 34% reoffended over the following 12 months. This is in comparison to 39% of otherwise similar offenders who did not participate in an RJ conference.¹¹

The key findings of the most recent Ministry of Justice report on re-offending are as follows:

a) The reoffending rate for offenders who participated in restorative justice was 15% lower over the following 12 month period than comparable offenders and 7.5% lower over three years.
b) Offenders who participated in restorative justice committed 26% fewer offences per offender within the following 12 month period than comparable offenders (20% fewer offences within three years).

Restorative justice appeared to help reduce reoffending across many offence types including violence, property abuse/damage and dishonesty. However, the reoffending rate was not lower for restorative justice participants who committed a driving causing death/injury offence.

d) The reoffending rate for Maori who participated in restorative justice was 16% lower over the following 12 month period than comparable Maori offenders (6.9% lower over three years). Maori offenders who participated in restorative justice committed

37% fewer offences per offender within the next 12 month period than comparable Maori offenders (23% fewer offences within three years).

e) The reoffending rate for young offenders (aged 17 to 19) who participated in restorative justice was 17% lower than comparable young offenders over the following 12 month period (8.9% lower over three years). Young offenders who participated in restorative justice committed 30% fewer offences per offender than comparable young offenders within 12 months (32% fewer offences within three years).

Principally, the most important finding is that restorative justice was associated with a statistically significant reduction in reoffending over all four measures analysed in this report. This reduction in reoffending is in line with international evidence. The reduction in reoffending was larger for those offenders who had committed property damage and dishonesty offences.

**Sentencing**

Participation by an offender in a restorative justice process prior to sentence provides the opportunity for the expression of genuine remorse and contrition, and enables the victim offender to agree on the means by which the offender can make appropriate amends. It affords the offender a way of demonstrating his or her remorse and thus operates to mitigate sentence.\(^\text{12}\)

As an indication of genuine remorse, an offender’s engagement in restorative justice is recognised by a reduction in sentence.\(^\text{13}\) A 15 per cent reduction for participation in a successful two-day restorative justice meeting with victims of sexual offending was allowed in *R v Martin*.\(^\text{14}\)

Since the Criminal Procedure Act 2011 now allows for involvement in the restorative justice process as a matter of course, a willingness to participate in a restorative justice conference that does not proceed may, of itself, mean little. That willingness is to be given more weight when it is coupled with other evidence that shows an offender has taken responsibility for his or her offending and wishes, in a meaningful way, to atone for it.\(^\text{15}\)

**Conclusion**

Restorative justice is now deeply embedded in the NZ Criminal Justice framework. It is to be hoped that the principle of it will eventually be adapted in replacement of retributive justice which is the hallmark and hangover of colonial New Zealand.

\(^{12}\) See 8(j), s 9(2)(f) and *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [64].


\(^{14}\) [2017] NZHC 1571.

\(^{15}\) *Heriare v R* [2017] NZHC 2397 at [17]; *Scott v R* [2014] NZHC 1598.
This paper outlines the position in Scotland with regard to the availability and use of Restorative Justice, under the following headings:
1. Introduction
2. Restorative justice as an alternative to a criminal record - youth justice
3. Restorative justice as an alternative to a criminal record – diversion from prosecution
4. Restorative justice in sentencing adult offenders
5. What next for restorative justice in Scotland?

Introduction
In Scotland restorative justice is less well developed than in New Zealand, particularly as regards the use of restorative justice in courts dealing with adult offenders. In contributions in 2017 to a special edition of a Scottish justice journal devoted to restorative justice and at conferences about restorative justice in Scotland the Chair of the Restorative Justice Forum for Scotland (Professor Joanna Shapland) reported that restorative justice in Scotland is less developed than in the other UK jurisdictions, mainland Europe and in some countries further afield, such as New Zealand; and that “its availability is patchy.” In a paper in the same journal a judicial perspective was expressed by a Sheriff who wrote of his impression that:

“whereas in other jurisdictions around the world and in Europe restorative justice practice is seen as a normal and integral part of the criminal justice process, either as diversion from prosecution or as a post-conviction pre-sentence process, it is yet to gain traction in Scotland.”

At various times during the past thirty years there have been restorative justice projects of various kinds in operation in Scotland. However, it was not until 2014 that there appeared Scottish legislation containing provisions relating to restorative justice.

Following the EU Victims’ Directive of 2012, the Scottish Government produced legislation which was enacted by the Scottish Parliament in 2014 as the Victims and Witnesses (Scotland) Act 2014. A small section of that Act relates to restorative justice. Provision was made (in Section 5 of the Act) enabling Scottish Ministers to issue guidance about the referral of victims of offences and persons who have committed such offences to restorative justice services, and about the provision of restorative justice services to those persons.

Section 5 (1) of the 2014 Act reads:
“(1) The Scottish Ministers may issue guidance about –

(a) the referral of a person who is or appears to be a victim in relation to an offence [or alleged offence] and a person who has or is alleged to have committed the offence [or alleged offence] to restorative justice services, and

(b) the provision of restorative justice services to those persons.”

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3 See, for example, Kearney, Kirkwood and MacFarlane, ‘Restorative Justice in Scotland: an Overview’, British Journal of Community Justice Vol.4, No.3, 2006 pp.55-65
4 Directive 2012/29
Section 5(3) provides:

“In this section, “restorative justice services” means any process by which the persons such as are mentioned in subsection (1)(a) participate with a view to resolving any matter arising from the offence or alleged offence with the assistance of a person who is unconnected with either person or the offence or alleged offence.”


However, of relevance to the topic of this conference session - the restorative justice services that are available in Scotland at present are almost entirely services that provide an alternative to a criminal record (although these services are not available throughout Scotland).

**Restorative justice as an alternative to a criminal record - Youth Justice**

The provision of restorative justice services to young offenders in Scotland is one way in which the Scottish system may prevent a child or young person from getting a criminal record. Scotland has a child welfare-based approach that largely keeps child offenders (aged under 16) out of the courts. Child offenders are generally dealt with by lay Children’s Hearings, rather than courts. So, in general child offenders do not get a criminal record in Scotland.

In Scotland youth restorative justice services are available in cases involving children and young persons up to the age of 17 in several parts of the country - although not throughout the whole country.

The services are provided by Social Work Departments and a voluntary (“third sector”) organisation: “Sacro” (Safeguarding Communities – Reducing Offending)\(^6\). The services work with young people who have been charged by the police and referrals can be received from the police\(^7\) and from Children’s Reporters, Children’s Hearings and public prosecutors (Procurators Fiscal). The services are available as an alternative to or from Children’s Hearings.

The services available include: restorative justice conferencing; face to face meetings; shuttle dialogue; awareness programmes and reparative tasks and programmes.

**Restorative justice as an alternative to a criminal record – diversion of adult offenders from prosecution**

In Scotland restorative justice may be an alternative to a criminal record for some adult offenders, as it is also available to the public prosecutor (the Procurator Fiscal) as an alternative to prosecution for adult offenders in appropriate cases in some places in Scotland – although not across the whole country. Restorative justice projects are recognised by the Scottish prosecution service as one of a range of diversion outcomes that may be the appropriate in the public interest. The principal service provider in relation to restorative justice as an alternative to prosecution is Sacro\(^8\).

Potentially suitable cases are initially referred to Sacro by the local Procurator Fiscal rather than court proceedings being commenced. If the parties agree how to proceed through restorative justice conferencing, face to face meetings or shuttle dialogue a mutually agreed plan is made and the case is diverted from prosecution. The agreed action plan may include a

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5 Scottish Government website - www.gov.scot/Publications/2017/10/8454
6 www.sacro.org.uk/services/youth-justice/youth-restorative-justice-services. This organisation has been involved in various restorative justice projects for the past thirty years.
8 www.sacro.org.uk/services/criminal-justice/adult-restorative-justice
letter of apology, financial reparation, a reparative task or charitable donation. In one part of the country a restorative justice programme run by a community mediation team is accessed through diversion to social work and the Social Work Department may devise a programme for an individual accused person that includes but is not limited to a restorative justice element.

**Restorative Justice in Sentencing in Adult Criminal Proceedings**
Currently restorative justice services are not generally available for courts sentencing adult offenders.

Judges in Scotland are familiar with taking account of victim interests in sentencing. They are accustomed to receiving victim impact information in appropriate cases. Some sentences that are imposed have regard to victims’ interests - including compensation under a compensation order or a compensation requirement of a community payback order, non-harassment orders, and antisocial behaviour orders.

However, there is no sentencing legislation in Scotland that makes specific provision relating to restorative justice. There is no provision for the deferral of sentence specifically to allow for restorative justice. Deferral of sentence for that purpose may, in fact, be competent under the existing provisions for deferral of sentence, which include the power to defer sentence for reports or inquiries, or for a period on such conditions as the court may determine.

The Criminal Procedure (Scotland) 1975 contains provisions for community payback orders that include requirements for compensation (as noted), and for “unpaid work or other activity”. There is no reference to restorative justice as a possible element of a community payback order. However, restorative justice may be competent as part of a community payback order and may in a few areas be an option available to offenders who have received community service ordered by the court.

Sentencing guidance provided for the judiciary in Scotland currently contains no mention of restorative justice. The Scottish Sentencing Council in a draft consultation guideline on principles and purposes of sentencing has included as a suggested purpose of sentencing: “Giving the offender the opportunity to make amends.”

The draft guideline provides: “Giving the offender the opportunity to make amends. Sentencing acknowledges the harm caused to victims and/or communities. Sentencing may also aim to recognise and meet the needs of victims and/or communities by requiring the offender to repair at least some of the harms caused; this may be with the co-operation of those affected.” Although it does not mention restorative justice in terms this proposed guideline would seem to cover the use of restorative justice options in sentencing.

**What next for restorative justice in Scotland?**
The slow progress of restorative justice in Scotland and the current patchy (and limited) provision of restorative justice services contrasts with the position in other countries, such as New Zealand – as has been noted. Some developments in Scotland over the past year suggest

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9 From various sources, including statutory victim statements – Criminal Justice (Scotland) Act 2003 s. 14
10 Criminal Procedure (Scotland) Act 1975 (1975 Act) ss. 249-252
11 1975 Act s. 227H
12 1975 Act s. 227H(H)
13 1975 Act ss. 234A
15 In sections 227A-227ZK
16 Information from Community Justice Scotland following a survey in January 2018. There are no figures for the number of such cases.
that further progress may be expected. The publication of the Scottish Government’s statutory guidance in October 2017 was welcomed as an important development in Scotland. The Chair of the Restorative Justice Forum for Scotland said: “We very much welcome the provision of this guidance, which will be useful both to practitioners and those referring to services.” Sacro’s response concluded: “This guidance provides clarity for those delivering services, confidence for those making referrals, and an opportunity for local government to review service provision across Scotland to ensure these valuable services are available wherever they are needed.”

That last element – about ensuring that these services are available wherever needed - appears to be particularly relevant both for the development of existing schemes for restorative justice in youth justice and as an alternative to prosecution, and for the availability and use of restorative justice as a sentencing option in adult criminal proceedings. It is of interest to note that in England and Wales the Restorative Justice Action Plan for the period to March 2018 identified equal access as a key aspect of the Government’s vision and a key area for action. Success in delivering the vision would mean: “Victims have equal access to RJ at all stages of the CJS irrespective of their location, the age of the offender or offence committed against them”.

The likely adoption (at some uncertain future date) of a sentencing guideline that recognises “Giving the offender the opportunity to make amends” would provide a basis for, and perhaps encourage the use of restorative justice by sentencing judges. In fact, current general statutory provisions relating to the deferral of sentence may permit the use of restorative justice as a disposal option or element of sentence at present.

At a time when the statutory presumption against short custodial sentences is going to be extended by the Scottish Government my former judicial colleagues may welcome having available an additional non-custodial sentencing option - in the form of a restorative justice disposal. That would require there to be high-quality restorative justice services available across Scotland in which judges could have confidence, as well as the provision to judges in individual cases of information (in pre-sentencing reports) about the attitude of the victim and the offender and the suitability of a restorative justice disposal in the particular case.

In a debate about restorative justice in the Scottish Parliament on 22 May 2018 the Justice Minister confirmed the Scottish Government’s commitment to restorative justice. She said: “Our vision is to have high-quality restorative justice services across Scotland.” She went on to say: “We want restorative justice to be a key component of our justice system, empowering victims and enabling offenders to make amends. We will continue to work with our partners to turn that vision into a reality.”

Following the Ministerial statements in that debate the Scottish Government is now working on the development of a national Restorative Justice Strategic Framework in the form of an action plan. Offering restorative justice as a sentencing option will be considered as part of the Restorative Justice Action Plan.

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23 1995 Act s. 204(3A). The provision was inserted by the Criminal Justice and Licensing (Scotland) Act 2010 s.17 and imposed a presumption against a sentence of imprisonment for a period of less than 3 months.
24 In the Scottish Government’s Programme for Government of September 2017 (available at [www.gov.scot](http://www.gov.scot)) one of the actions that it was stated the government would take “over the next year” was “extending the presumption against short sentences from 3 to 12 months.” (p. 14) It is understood that this is now likely to happen early in 2019.
25 See Sheriff Mackie’s paper, referred to at fn.2 above.
27 Information from the Scottish Government Justice Division, Victim and Witnesses Team
In preparing a plan and ensuring that action is delivered (and not just ‘warm words’\textsuperscript{28}) I believe the Scottish Government would do well to consider and have regard to the New Zealand experience, particularly in relation to the availability and use of restorative justice as a sentencing option in courts dealing with adult offenders.

\textsuperscript{28} “Warm words, but no action” was the title of the introductory article, by Kirkwood and Munro, in the special edition of the Scottish Justice Matters journal devoted to restorative justice in April 2017, referred to above at fn.1.
A decade ago, in Afghanistan, a Canadian Operational Mentor and Liaison Team (OMLT), deployed in an advisory role with the Afghan National Army, was on patrol with the Afghan army unit it supported. The unit was ambushed by a superior Taliban force. The OMLT called in fire support from a helicopter gunship armed with 30 mm cannon. The gunship strafed the ambush party to devastating effect. In clearing the ambush position, the unit encountered a scene littered with the remains or partial remains of Taliban insurgents. The OMLT commander, a Canadian Army Captain, later recalled wondering, at one particular moment, why a string of sausages was hanging from a tree, until he realised it was someone’s intestines. Nearby was a mortally wounded Taliban, for all intents and purposes cut in half with a hole about the size of a dinner plate through his midsection and one of his legs shattered. Afghan soldiers passing this insurgent commented, “Allah will look after him” and moved on. The Canadian officer chose not to do this. He stopped and fired two rounds into the dying or already dead insurgent before quickly catching up with the unit. This occurred in the space of about 10 seconds.  

That Canadian officer was Captain Robert Semrau of the Royal Canadian Regiment. Some 17 months later, Captain Semrau faced court martial proceedings, the principal charge being second-degree murder. After seven months, the court martial acquitted him of that charge but found him guilty of disgraceful conduct, sentencing him to reduction in rank and dismissal from the Canadian Army.  

Captain Semrau was an infantry officer. The role he was undertaking is typical of that undertaken in modern times by the infantry. So, too, is the jeopardy in which he found himself because of a brief value judgement made by him in the field when undertaking that role. 

Under Australian military doctrine, the role of the Royal Australian Infantry Corps is:

“to seek out and close with the enemy, to kill or capture him, to seize hold ground and to repel attack, by day or night, regardless of season weather or terrain”.  

Each of the other Corps in the Australian Army have roles that support or complement this infantry role. Unsurprisingly, the role and place of the infantry in the Canadian Army is no different. The statement of that infantry role is, in turn, generally descriptive of the features which attend the raison d’être of any organised military force—warfighting. 

The curriculum of Australia’s Royal Military College, and of other officer cadet training units established as required, centres on imparting the necessary basic skills to command an infantry platoon in war or peace and in determining whether a candidate for commissioning as a general service officer has the requisite qualities to undertake that role. Such skills may come to be studied and practised in greater depth in the event that, on graduation, an officer cadet is commissioned into the Infantry. Nevertheless, no officer cadet is commissioned as a general service officer unless those requisite, basic command qualities are assessed as present.

2 Ibid
6 Author’s personal experience as a graduate of an Officer Cadet Training Unit.
Soldiers can, and do, undertake other roles – aid to the civil power in times of natural disaster or, happily very infrequently in Australia, in times of civil unrest or terrorist activity, humanitarian aid duty and peacekeeping duty. Nevertheless, each of these is subordinate to the warfighting role just mentioned.

A like point may be made in relation to the respective roles of the navy and the air force.

The ramifications of warfighting for those exercising military command functions and for those under command were accurately and authoritatively addressed by Sir David Fraser, a senior British general officer of the modern era, in this way:

*Few men are born heroes. Few are incorrigible cowards. Most can be either; and to help them towards the former rather than the latter state an army uses leadership, discipline and training – a mix which produces confidence and pride. The man well-led can believe there is sense in what he is ordered to do, and that his commander both cares for him and knows his own job. The disciplined man knows that the habit of obedience and united action distinguishes a self-respecting body of soldiers from a mob. The trained man knows his profession enough to do what he has to do, and do it by instinct amidst great dangers. Without these characteristics in the body to which they belong soldiers cannot behave well in battle; and when they fail the fault is not theirs but lies in the system which has placed them there unprepared.*

*No army can function on the basis that its members require rational explanations before they obey: obedience must be absolute, immediate and enforced. But although, in practice, men had “blindly” to obey, they needed to feel they were not blind – that they knew as much as could be managed, and that it made sense. They needed to know, above all, that their destinies were in good hands.*

Fraser was well placed by experience to make these observations. Over the course of his 40-year military career, he experienced, as a junior officer, high intensity combat operations in North-West Europe during the Second World War, followed by war-like operations in Malaya, Suez and Cyprus in the period that saw the transition of the British Empire to the modern Commonwealth of Nations. Thereafter, he assumed responsibility during the Cold War as a formation commander within the British Army of the Rhine for the contingency of conflict with Group Soviet Forces Germany and its Warsaw Pact allies. The culmination of his career entailed his assumption of senior, tri-service, strategic command, defence policy and high level staff training roles.

Fraser’s observations and Captain Semrau’s experience on operations highlight why the exercise of command in war, and in training for war, is so very different to the exercise of civilian, management powers.

A civilian manager who deliberately directed an employee to engage in a known life threatening activity may not just be negligent but criminally so. Civilian managers do not direct employees to kill another human being or plan operations around that.

Conversely, soldiers are not employees at all. Officers serve in accordance with the terms of their commission and other ranks serve in accordance with the terms of their enlistment. At common law, their service was determinable at will and for any reason or even no reason.

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10 Defence Act 1903 (Aust), s 27.
11 Marks v. The Commonwealth (1964) 111 CLR 549, at 586 per Windeyer J; The Commonwealth v. Quince (1944) 68 CLR 227, at 234, 241
There remain echoes of this common law position in the Australian regulatory provision for early termination of a defence member’s service in that it may be terminated on the basis of nothing more than satisfaction that “retention of the member's service is not in the interests of the Defence Force”.  

A military commander who deliberately refrained from directing a soldier to engage in a life threatening activity necessary to fulfil the role of the infantry on a given mission would be grossly derelict in his duty. In tasking the gunship to attack the Taliban ambush position with the results described, Captain Semrau’s OMLT was likewise fulfilling a role of the infantry. In the course of employment, a civilian may be injured, fatally or otherwise, in a workplace accident; a soldier, on the other hand, may be killed or wounded in action. Even to conceive of a theatre of operations as a “workplace”, much less to assimilate the two, is fundamentally to misunderstand the absolute and immutable centrality for the army of the role of the infantry.

None of this is to suggest that some styles of military command may not, at times, in training for war or on operations, mimic or even draw inspiration from civilian management practices. For example, the absolute and immediate obedience described by Fraser, so very necessary for a force in close contact with an enemy, may be ill suited to the production by an intelligence staff of the best predictive analysis of future enemy operations and intentions. In that circumstance, a frank and free flowing exchange of views between superiors and subordinates may be the best way of avoiding an uncritical “group-think”. However, even in that situation, there will come a time when a command value judgement must be made as to the analysis to adopt for the purpose of briefing a commander.  

Within Special Forces, where teamwork and co-operation by small patrol groups is essential, a form of collaborative decision-making known as a “Chinese Parliament”, successfully pioneered within the United Kingdom’s Special Air Service Regiment, is often employed to good mission effect.

Nor is it to suggest that any and every military activity is, ipso facto, immune from giving rise to a duty of care at common law for the breach of which there is a remedy in damages. They are not. Any doubt as to the absence of such absolute immunity has long been resolved in Australia. The immunity extends only to combat operations and to training activities directed to the conduct of such operations.

There is a necessary interplay between leadership, discipline and training, Fraser’s three essential elements for the transformation of a civilian recruit into a soldier. Effective military leadership is impossible unless the leader’s commands are obeyed. Hence the need, as Fraser highlights, for obedience to be “enforced”. In the military, an enforced disciplinary system is a corollary of command. In turn, training, Fraser’s third element, must entail the learning and practising in peacetime of the skills necessary for warfighting, culminating in military exercises that replicate, as closely as possible, warfighting, including the practice of leadership in war. It is axiomatic that an army must train for war, not peace. It necessarily follows that the means by which military discipline is enforced must be suitable for war, not peace, and practised in peace in order to be prepared for its use in war.

All of these propositions may seem elementary, and they are. Nevertheless, in my experience, there is a tendency in contemporary academic consideration of military justice systems either to

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12 Author’s experience.
misunderstand them or not to confront the ramifications of these propositions for those systems.

The University of Southern Queensland’s Associate Professor Pauline Collins’ recently published work, “Civil-Military ‘Legal’ Relations” offers, with all due respect, a paradigm example of this tendency in academia. Collins offers an historical and contemporary survey and analysis of the military justice systems of the United Kingdom, the United States of America and Australia. She prefaced her work with the following conclusion that she draws from her survey and analysis:

The case studies lead to the conclusion that the highest civil courts in the three states compared still adopt a reduced control (RC) deferential approach. ...

When civilian courts adopt a RC deferential approach, they shirk their role in the structure of the constitutional pact in a manner potentially damaging to the civil-military relationship. For this reason, consideration of the courts need to be included in any future development of an evaluative theory of the civil-military relationship. The courts also need improved capacity to take account of the impact their decisions may have on the civil control of the military. This is essential in order to discourage militarisation of the civilian domain and avoid a breakdown in the fundamental institutional roles of the three organs of government in liberal democracies, in which individual rights and control of states’ power are important in providing civilian management of the military.

Insofar as the Commonwealth of Australia is concerned, there are several manifest errors in Associate Professor Collins’ conclusion and her expansion upon that conclusion in the passage just quoted.

The Australian “constitutional pact” to which Collins refers undoubtedly envisages civilian control of the military.

Section 68 of The Constitution vests the command in chief of the naval and military forces of the Commonwealth in the Governor-General as the Queen’s representative. In accordance with constitutional convention, that command in chief is exercised by the Governor General on the advice of the Federal Executive Council. The command is a titular one but not without significance in that it constitutionally entrenches and thereby emphasises the subordination of each and every member of the Australian Defence Force (ADF), no matter how senior their rank, to the civil power. Section 68 anticipates that the Commonwealth will have naval and military forces but it does not itself establish them. Rather, s 51(vi) of the Constitution grants to the Commonwealth Parliament legislative power in respect of “the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth”. It was pursuant to this grant of legislative power that the naval and military forces of the Commonwealth were originally established. The present provision for the existence of the ADF remains statutory.

As to that statutory provision, the Defence Act 1903 (Cth) vests the “general control and

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17 Brill Nijhoff, Leiden, 2018 – “Collins”.
19 Collins, p. xiv.
20 The account of constitutional provision for the command and control of the Australian Defence Force draws upon, without further attribution, the account offered by the Administrative Appeals Tribunal in Secretary, Department of Defence v Thomas [2018] AATA 604, in which the author was the presiding member of the Tribunal.
23 Strictly, s 69 of the Constitution provided for the transfer to the Commonwealth, on a date fixed by proclamation after Federation, of the State departments responsible for naval and military defence but thereafter the authority for the several arms of what is now the ADF was statutory – Defence Act 1903 (Cth)(Army), Naval Defence Act 1911 (Cth) (Navy) and Air Force Act 1921 (Cth) (Air Force).
administration” of the ADF in a civilian, the “Minister”.\textsuperscript{24} The Minister responsible (subject to some presently immaterial exceptions) for the administration of the Defence Act is the Minister for Defence.\textsuperscript{25}

The Defence Act distinguishes between the command of the ADF and its administration.

The command of the ADF is consigned to the Chief of the Defence Force.\textsuperscript{26} In that command, the Chief of the Defence Force is assisted by the Vice Chief of the Defence Force,\textsuperscript{27} who is obliged to comply with any directions of the Chief of the Defence Force.\textsuperscript{28} The Chief of the Defence Force is also tasked with advising the Minister “on matters relating to the command of the Defence Force”.\textsuperscript{29}

The administration of the ADF is consigned to a diarchy comprising the Secretary and the Chief of the Defence Force.\textsuperscript{30} The Defence Act contemplates that the Vice Chief of the Defence Force will assist with the administration of the Defence Force, as directed by the Chief of the Defence Force.\textsuperscript{31}

These basal features of the Australian Constitution and, in turn, the Defence Act in relation to a standing military force and its command and control reflect our British heritage. In the United Kingdom, these features were the result of both revolution and evolution, of the experience, in the 17\textsuperscript{th} and early 18\textsuperscript{th} centuries, of, successively, Royalist absolutism, a dreadful civil war as between Royalists and those adherent to parliamentary supremacy, military dictatorship during the Protectorate, and an eventual rapprochement. That rapprochement yielded the checks and balances and separation of legislative, executive and judicial powers in a constitutional monarchical system of government, known as “the Westminster system”, that has proved enduringly successful in the delivery of peace, order and good government in that country, in Australia and elsewhere in the Commonwealth of Nations. The subjection of the military to the civil power is another of the key features of that system.

There is no constitutional provision for the command and control or administration of the ADF by the judiciary. This is a reflection both of our heritage as well as of common sense. By neither training nor resources is the judicial branch of government equipped to undertake that role. Rather, Chapter III of the Australian Constitution vests the exercise of federal judicial power in the High Court of Australia, other courts created by the national parliament and in such State courts as that parliament chooses by legislation to invest with federal jurisdiction.\textsuperscript{32} Within Chapter III, s 75(v) entrenches a jurisdiction exercisable by the High Court to issue writs of prohibition and mandamus directed to officers of the Commonwealth, thereby providing an irreducible minimum means by which they can be required, by an exercise of judicial power, to act according to law.\textsuperscript{33} A court martial constituted by Australian military officers or a military prison custodian relying upon a warrant issued by a court martial comprised of such officers is amenable to such writs but they lie only for jurisdictional error. The jurisdiction conferred in

\textsuperscript{24} Defence Act, s 8(1).
\textsuperscript{25} Defence Act, s 9(1).
\textsuperscript{26} Defence Act, s 9(3).
\textsuperscript{27} Defence Act, s 9(4).
\textsuperscript{28} Defence Act, s 9(2).
\textsuperscript{29} Defence Act, s 10(1).
\textsuperscript{30} Defence Act, s 7(1).
\textsuperscript{31} Constitution, s 71.
\textsuperscript{32} Defence Act, s 28.
\textsuperscript{33} Defence Act, s 19B(1)(a) of the Judiciary Act 1903 (Cth) but that jurisdiction is not constitutionally entrenched.
much narrower than that of a Court of Criminal Appeal. It has been invoked both in war and in peace in respect of alleged errors of jurisdiction by courts martial. In this sense, Collins’ “RC” deferential approach is nothing more than a manifestation of the distinction between the judicial review of the decisions of officers of the Executive in respect of legality and the review of the merits of those decisions. The latter is not the province of the judiciary.

In her survey of the Australian position, Collins refers to, but her conclusion indicates she does not understand, just how fundamental, in terms of civilian control of military justice, was the legislative provision in the 1950’s for an appeal to a civilian tribunal against convictions by courts martial, extended since then to convictions by Defence Force Magistrates (DFM).

In the aftermath of the Second World War, a need for a right of appeal to a legally qualified tribunal, sitting in public and outside the military chain of command, in respect of the lawfulness of court martial proceeding outcomes was recognised both in the United Kingdom, Australia, in comparable Commonwealth jurisdictions as well as in the United States. Hitherto, court martial verdicts were reviewed within the chain of command, increasingly often with the benefit of legal advice, but were only amenable to external scrutiny via writs and on the narrow basis mentioned. Such scrutiny was rare.

In response and following a like initiative taken by the United Kingdom that same decade, Parliament enacted the Courts-Martial Appeals Act 1955 (Cth), since renamed the Defence Force Discipline Appeals Act 1955 (Cth).

As enacted, that legislation conferred upon a person convicted by court martial the following right of appeal:

(a) that the finding of the court martial-
   (i) is unreasonable, or cannot be supported, having regard to the evidence; or
   (ii) involves a wrong decision of a question of law; or

(b) that, on any ground, there was a miscarriage of justice.

This right of appeal was much wider in scope than review for jurisdical error as provided for by s 75(v) of the Constitution.

The current right of appeal is even broader than the original:

(1) Subject to subsection (5), where in an appeal it appears to the Tribunal:

(a) that the conviction or the prescribed acquittal is unreasonable, or cannot be supported, having regard to the evidence;

(b) that, as a result of a wrong decision on a question of law, or of mixed law and fact, the conviction or the prescribed acquittal was wrong in law and that a substantial miscarriage of justice has occurred;

34 R v Bevan; Ex parte Elias and Gordon (1942) 66 CLR 452
35 See, for example, Re Tyler; ex parte Foley, (1994) 181 CLR 18 and Re Aird; ex parte Alpert(2004) 220 CLR 308.
36 Attorney-General (NSW) v Quin (1990) 170 CLR 1 at 35-36, applying Marbury v. Madison [1803] USSC 16; (1803) 1 Cranch 137, at p 177 (5 US 87, at p 111).
37 “Civil-Military ‘Legal’ Relations”, pp 243-244.
38 See, further, as to this background, the Second Reading Speech of the then Minister for Defence, the Honourable Sir Philip McBride: Australia House of Representatives, Commonwealth Parliamentary Debates, (10 May 1955) Vol 49, p 566 (CMAT Second Reading Speech); see also: Enderby KE (then Barrister and Senior Lecturer, ANU Law School; later Commonwealth Attorney-General and later yet a judge of the Supreme Court of New South Wales), Courts-Martial Appeals in Australia, (1964) 1 FedLR 96
40 Commenced 1 June 1957; Commonwealth of Australia Gazette (1957) p 1501.
41 Courts-Martial Appeals Act 1955 (Cth) s 23(1).
42 Defence Force Discipline Appeals Act 1955 (Cth) s 23.
that there was a material irregularity in the course of the proceedings before the court martial or the Defence Force magistrate and that a substantial miscarriage of justice has occurred; or
that, in all the circumstances of the case, the conviction or the prescribed acquittal is unsafe or unsatisfactory; it shall allow the appeal and quash the conviction or the prescribed acquittal.

(2) Subject to subsection (5), where in an appeal it appears to the Tribunal that there is evidence that:

(a) was not reasonably available during the proceedings before the court martial or the Defence Force magistrate;
(b) is likely to be credible; and
(c) would have been admissible in the proceedings before the court martial or the Defence Force magistrate; it shall receive and consider that evidence and, if it appears to the Tribunal that the conviction or the prescribed acquittal cannot be supported having regard to that evidence, it shall allow the appeal and quash the conviction or the prescribed acquittal.

(3) Subject to subsection (5), where in an appeal against a conviction it appears to the Tribunal that, at the time of the act or omission the subject of the charge, the appellant was suffering from such unsoundness of mind as not to be responsible, in accordance with law, for that act or omission, the Tribunal shall:

(a) allow the appeal and quash the conviction;
(b) substitute for the conviction so quashed an acquittal on the ground of unsoundness of mind; and
(c) direct that the person be kept in strict custody until the pleasure of the Governor-General is known.

(4) Where in an appeal it appears to the Tribunal that the court martial or the Defence Force magistrate should have found that the appellant, by reason of unsoundness of mind, was not able to understand the proceedings against him or her and accordingly was unfit to stand trial, the Tribunal shall allow the appeal, quash the conviction or prescribed acquittal and direct that the appellant be kept in strict custody until the pleasure of the Governor-General is known.

(5) The Tribunal shall not quash a conviction under subsection (3) or (4) if there are grounds for quashing the conviction under subsection (1) or (2).

(6) Section 194 of the Defence Force Discipline Act 1982 (Cth) applies to a direction under subsection (3) or (4) of this section as if that direction were a direction to which that section applied.

In Australia, the appellate jurisdiction was, deliberately, conferred not on a court established under Chapter III of the Constitution but rather on a statutory tribunal, now termed the Defence Force Discipline Appeal Tribunal (DFDAT), established under the legislation for that purpose. Regard to the Second Reading Speech of the then Minister for Defence, the Honourable Sir Philip McBride, discloses that the reasons for this did not stem from any reservation as to any constitutional invalidity which would attend the conferral of the jurisdiction on a court. Rather, those reasons were pragmatic, albeit informed by constitutional considerations concerning judicial tenure.

The constitutional consideration was the requirement, flowing from the settled understanding of
the meaning of s 72 of the Constitution as it then stood, that those exercising the judicial power of the Commonwealth had to be appointed for life. This and the pragmatic considerations are evident in the explanation which the Minister gave for why, in contrast with the United Kingdom, the jurisdiction was not being consigned to a civilian court:

In Australia, on the other hand, we were faced by the constitutional requirement that judges exercising the judicial power of the Commonwealth must hold life tenure of office. However, the kind of body which was needed was one of a flexible character, able to function satisfactorily under all conditions in time of war as well as in time of peace. Under active service conditions a fairly large complement of members might at times be required, whereas in normal conditions a relatively few members would suffice. In these circumstances, a civilian court, all of whose members would, in accordance with the Constitution, have to be appointed for life, was not an appropriate choice.

An advantage which the Minister particularly commended to the House in respect of the new appeal system, in contrast with the then existing conviction review system, was that the proposed tribunal would sit in public, enabling the appellant and others to attend and observe the hearing of his or her appeal.

To maximise the opportunity for practical voice to be given to this aspiration, the practice of the DFDAT is to hear an appeal at or as close as possible to the locale where the appellant is stationed. The Defence Force Discipline Appeals Act contemplates that the DFDAT may sit at any place within or outside Australia as determined by its President.

To date, the DFDAT has never sat overseas. The nature of appellate jurisdiction and of ADF overseas deployments since the establishment of the DFDAT have not warranted this. The position may well be different were there ever in the future large scale deployments overseas of the kind seen in the First and Second World Wars. Were such a need to arise, it would be necessary for provision to be made for terms and conditions of both DFDAT members and staff. For tribunal members, this might be done by the Remuneration Tribunal by determination pursuant to s 10 of the Defence Force Discipline Appeals Act.

Some noteworthy features of the first Courts-Martial Appeal Tribunal appointed under that Act were:

(a) each of its members had served during the Second World War; and,

(b) its membership was not drawn exclusively from the federal judiciary or, for that matter, the judiciary alone.

As originally enacted, the Australian legislation required that a presidential member of the tribunal be or have been a member of a federal court or a State supreme court or one of Her Majesty’s Counsel. At that time, the only federal courts were each, in the technical sense, superior courts of record. In expressly referring to Queen’s Counsel, the legislation recognised the class from which, traditionally and for good reason, superior court judges were usually appointed in the United Kingdom and, by then, in the principal Australian jurisdictions, even

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43 As a result of amendments made in 1977, that s 72 tenure is now until age 70 or, for courts other than the High Court, such lesser age as Parliament may establish.
44 CMAT Second Reading Speech, p 567.
45 Defence Force Discipline Appeal Tribunal Act 1955 (Cth) s 14(1).
46 Advice to the author from its current President, Tracey J of the Federal Court of Australia, 30 September 2009 and the author’s subsequent experience.
47 It would, for example, be anomalous were DFDAT members deployed to a theatre of operations not granted the like medical benefits and tax concessions to other Commonwealth officers, military and civilian, deployed in that theatre.
48 Courts-Martial Appeals Act 1955 (Cth) s 8(1).
49 The High Court of Australia, the Federal Court of Bankruptcy and the Australian Industrial Court.
50 more feasible than at the Bars of other States. Increasingly from the late 1950’s, Silk became more pervasive at the other State Bars with
if governing legislation provided for lesser appointment criteria.

Originally, the other tribunal members were drawn from those eligible to be presidential members, as well as other legal practitioners or those of suitable legal experience.\(^{51}\)

In respect of these original appointment qualifications, the Defence Minister opined that, “it can, I think, fairly be predicted that the tribunal will command, in the military sphere, a status corresponding to that of a supreme court of a State or Territory exercising criminal appellate jurisdiction”.\(^{52}\)

There is every reason to conclude that the Minister’s prediction has amply been fulfilled over the 60 years of the existence of the DFDAT with a related, sustained and beneficial improvement in the standard of trials before service tribunals.

As early as 1963, the Chief Legal Officer of the Australian Army’s then Eastern Command, Lieutenant-Colonel E P T Raine, after completing a two-day hearing before the DFDAT, wrote to all legal officers in that Command expressing his belief that it was “ minded to set up and maintain the highest standards”.\(^{53}\) He made particular reference to the scrutiny by the DFDAT in the course of the hearing of the appeal of the adequacy of the summing up of the Judge Advocate as well as of the conduct of the prosecuting officer. A year later, similar views were expressed about the effect of the DFDAT by a civilian legal commentator and future Commonwealth Attorney-General and later New South Wales Supreme Court judge, the then Mr Kep Enderby.\(^{54}\)

The experience over that 60-year period is that the system of appeals to the DFDAT is well adapted both to peacetime and to the wartime and other overseas deployments conducted to date by the ADF.

To date, the largest overseas deployment since the establishment of the DFDAT has been the Vietnam War. The volume of appeal cases yielded from that war by the deployment, over a sustained period of years, of a task force comprising what these days would be termed a joint force headquarters commanding a reinforced brigade group, a logistic support base and significant air and naval components, was readily dealt with by the DFDAT’s part-time membership. These cases included appeals in respect of convictions for offences up to and including murder.\(^{55}\) There is no reason to think that this establishment would not be sufficient to meet the demands of any present like deployment.

Eligibility for membership of the DFDAT has, since its first establishment, been made even more rigorous. This occurred pursuant to legislative amendments made in 1982,\(^{56}\) when the class of those eligible to be appointed as presidential members was narrowed to superior court judges of the Commonwealth, the States and Territories. At the same time and apart from those eligible to be appointed presidential members, the class eligible to be appointed as members was narrowed to District or County Court judges.\(^{57}\) In practice and most desirably, only superior court judges have been appointed as presidential or other members of the DFDAT since these 1982 amendments commenced. The provision for members to be drawn from District or County Court judges is a useful “surge” capacity in the event of a volume of cases greater than

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\(^{51}\) Courts-Martial Appeals Act 1955 (Cth) s 8(2).

\(^{52}\) CMAT Second Reading Speech, p 567.


\(^{54}\) Enderby, supra.


\(^{56}\) Defence Force (Miscellaneous Provisions) Act 1982 (Cth) s 17, which made amendments to the Defence Force Discipline Appeal Tribunal Act 1955 (Cth) s 8.

\(^{57}\) Defence Force Discipline Appeal Tribunal Act 1955 (Cth) s 8
that which can be accommodated just by drawing upon available superior court judicial resources. This wider class certainly has criminal trial experience within it but its members do not sit on Full Courts or Courts of Appeal in the exercise of appellate jurisdiction.

In practice and even though the Defence Force Discipline Appeals Act has always been silent in this regard, it remains a feature of the DFDAT’s membership that each of its members has had military experience. My experience is that prior military service experience is desirable. That is not just because that experience gives one a disposition to accept an additional commission on the DFDAT. It is because that experience brings with it a greater likelihood of an understanding of service terms, conditions and context and more ready assimilation of service publications and other documentary evidence. The appointment practice doubtless also adds to the credibility of the DFDAT in defence circles, senior and junior.

What is termed an “appeal” lies on a question of law involved in a decision of the DFDAT to the Full Court of the Federal Court of Australia. It strictly speaking, such an “appeal” is a proceeding in the Court’s original jurisdiction. A further appeal to the High Court is possible only by special leave of that court.

In short, ever since the late 1950’s, each person convicted by a service tribunal of a service offence has been able to challenge that conviction before a civilian tribunal on grounds akin to those available in civilian criminal appeals. Such convictions can be and in practice are quashed by the DFDAT whenever a ground of appeal is upheld. This, too, is hardly a “RC” deferential approach. There is no warrant for any apprehension as to deference to the military in relation to the exercise of appellate jurisdiction in relation to convictions by service tribunals.

But what of the determination of whether to convict at all? Under Australia’s present military justice system, civilian judicial officers do not determine whether to convict a person of a service offence. Following a model found in the Army Act 1881 (UK), the Defence Force Discipline Act 1982 (Cth) (DFDA), expressly creates a number of service offences uniquely related to military service. It also incorporates by reference and as a code of proscribed and punishable behaviour also made a service offence conduct which would amount to an offence against a nominated body of criminal law.

The DFDA distributes the jurisdiction to determine whether a service offence has been committed between particular officers, termed “superior summary authorities”, appointed by the Chief of the Defence Force, commanding officers, other officers, termed “subordinate summary authorities”, appointed by commanding officers, DFM appointed by the Judge Advocate General (JAG) and one or the other of two types of courts martial. The two types of courts martial are a Restricted Court Martial and a General Court Martial. Each type is constituted by a panel of a specified number of officers assisted by a Judge Advocate whose rulings as to matters of law are binding. The panel determines both whether a charge is proved and, if so, the punishment to be imposed.

Who or which of these persons or service tribunals comes, in a given case, to determine whether a charge is proved is dependent on a range of factors - an election by the accused, a value

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58 Defence Force Discipline Appeal Tribunal Act 1955 (Cth) s 52. There is no such appeal in respect of single member tribunal decisions; in effect, procedural decisions.
59 Federal Court of Australia Act 1976 (Cth) s 33(3).
60 Compare s 41 of the Army Act 1881, which incorporates by reference the criminal law of England with s 61 of the DFDA, which incorporates “Territory offences, which are defined thus: “Territory offence” means: (a) an offence against a law of the Commonwealth in force in the Jervis Bay Territory other than this Act or the regulations; or (b) an offence punishable under any other law in force in the Jervis Bay Territory (including any unwritten law) creating offences or imposing criminal liability for offences.
61 DFDA, Part VII.
62 The office of JAG is held as a persona designate appointment by an officer of the ADF who is or has been a Justice or Judge of a federal court or of a Supreme Court of a State or Territory; DFDA, s 180.
63 A Judge Advocate is appointed by the Chief of the Defence Force or a Service Chief on the nomination of the JAG and must be an officer enrolled as a legal practitioner who has been so enrolled for not less than 5 years; DFDA, S 196.
judgement by a superior or subordinate summary authority or commanding officer as to the aptness of an available range of punishments or a value judgement by the Director of Military Prosecutions and the seriousness of the offence itself and related applicable punishments.

In its provision for trial by court martial or DFM, the present Australian system entails a restoration of a system that existed prior to the establishment, by amendment of the DFDA, of the “Australian Military Court” (AMC). The members of the AMC were officers of the ADF. They were given singular independence from the chain of command in their adjudicative function but they were not given tenure during capacity and good behaviour until a specified age of the kind afforded those exercising Commonwealth judicial power by s 72 of the Constitution.

The origin of the AMC lay in the response of the then government to a June 2005 report by the Senate’s Foreign Affairs, Defence and Trade References Committee (Senate Committee) into the effectiveness of Australia's military justice system. In its report, the Senate Committee had recommended the establishment of “[t]he Permanent Military Court to be created in accordance with Chapter III of the Commonwealth Constitution to ensure its independence and impartiality” (Senate Report). This court was to replace the then existing system for the trial of service offences by court martial or DFM. Though the government’s response to this report accepted the replacement of the trial of service offences by court martial or DFM by a military court, that institution was, deliberately, not established as a court whose members had tenure in accordance with Chapter III of the Constitution. The flaw in that compromise response was exposed by the High Court in Lane v Morrison.

For present purposes, there are two noteworthy features of the Senate Report.

Firstly, the report conflated, under the rubric “military justice”, service inquiries and investigations on the one hand and the trial of service offences and related appeals on the other. To adopt a civilian analogy, this is akin to grouping police investigations and coronial inquiries on the one hand with trials by magistrates and judges and juries and related appeals on the other. At a general level of abstraction, these might, perhaps, be grouped under the rubric, “criminal justice” but it would be odd to abolish the latter on the basis of concerns about the former.

Secondly, insofar as there were concerns about the then existing system for the trial of service offences by courts martial and DFM, a reading of the Senate Report would suggest that the foremost of these was an apprehension that this system might contravene Chapter III of the Constitution. Further, that same reading suggests that these concerns were heightened by some comments from the bench made in the course of argument in the High Court in the then recently decided Re Aird; Ex parte Alpert.

As to this and with all due respect, even at the time, these concerns were over-stated and later authority demonstrates them to be baseless.

Comments made in the course of argument in the High Court by some members of the bench are of no authority. Further, the validity of the court martial which was to try Private Alpert, in terms of whether that would entail a contravention of Chapter III, was not in issue in that case.

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64 The Director of Military Prosecutions is appointed by the Defence Minister and must be a “One Star” officer enrolled as a legal practitioner who has been so enrolled for not less than 5 years. The functions of that office are akin to those of a civilian Director of Public Prosecutions: see DFDA, Part XIA.
65 Department of Defence, The Effectiveness of Australia’s Military Justice System (AGPS, Canberra, June 2005).
66 Senate Report, Recommendation 19, at [5.95].
67 Senate Report, Recommendation 18 at [5.94].
68 Department of Defence, Government Response to Report by the Senate Foreign Affairs, Defence and Trade References Committee (Senate Committee) into the Effectiveness of Australia’s Military Justice System (AGPS, Canberra, October 2005) Recommendation 18, p 4.
70 Senate Report, pp xxxii at [36]; 77 at [5.5]; 84 at [5.25]; 86-88 at [5.33] – [5.44].
That was not happenstance. I was senior counsel for Private Alpert. Though the point may have been arguable, to raise it would have required leave to re-open earlier authority. I considered that that argument had no reasonable prospect of success. The correctness of that assessment was later emphatically vindicated in the High Court in White v Director of Military Prosecutions (White’s Case).

There certainly was once a school of thought in Australia that service tribunals as constituted under the DFDA prior to the establishment of the AMC invalidly exercised the judicial power of the Commonwealth. That was never a view which commanded a majority of the High Court. It has now been so comprehensively rejected by the High Court in White’s Case that it may be consigned to history.

It would also be a mistake to consider that the pre-Lane v Morrison trial system failed to meet some existing Australian constitutional norm in relation to impartiality and independence. In Re Tyler; Ex parte Foley,74 a majority of the High Court was of the opinion that, if there were to be found in the Constitution a requirement of sufficiency of independence on the part of service tribunals exercising disciplinary powers, a general court martial constituted under the DFDA met those requirements. Overseas authority75 which, on the basis of different norms, has held to the contrary in relation to like such tribunals is of no relevance to the Australian position. It is evident from her commentary in respect of the Australian position that Associate Professor Collins is unable to accept this.

In Lane v Morrison, the High Court held that the AMC could not validly exercise the judicial power of the Commonwealth. That was because its members did not enjoy constitutionally ordained tenure. An irony about that case is that a feature of the AMC which was, at the time of its establishment, seen as desirable namely, independence from the military chain of command, was also one which facilitated the conclusion that it was exercising judicial power. A rationale for the military discipline system standing outside Chapter III of the Constitution is that it is a function of command. Removal of the trial forum from the chain of command removed the presence of that rationale. That facilitated a conclusion that it was judicial power that was conferred on the AMC. Given this, the limited tenure of its members became a constitutionally insufficient basis for the appointment of those who were to exercise the judicial power of the Commonwealth.

In addition to an original jurisdiction in respect of the trial of service offences, the AMC exercised an appellate jurisdiction in respect of outcomes before summary authorities. The DFDA/T was retained for the purpose of exercising its historic, appellate role in respect of convictions, now from the AMC. Further, and for the first time, a jurisdiction was conferred on the DFDA to hear appeals against punishment.

The Military Justice (Interim Measures) Act (No. 1) 2009 (Cth), an urgent legislative response to the outcome in Lane v Morrison, did not just result in the restoration, on what was said to be an interim basis, of the original jurisdiction in respect of military discipline cases hitherto exercised by summary authorities and, as required, by DFM and courts martial. It also resulted in the restoration of the jurisdiction hitherto exercised by the DFDA/T in respect of convictions by DFM or courts martial. There was no continuance of the provision for appeals to the DFDA/T in respect of punishment.

A Bill, designed to replace both the original jurisdiction exercised by DFM and courts martial

72 Re Tracey; Ex parte Ryan (1989) 166 CLR 518 Re Nolan; Ex parte Young (1991) 172 CLR 460 and, in particular, Re Tyler; Ex parte Foley (1994) 181 CLR 18.
74 2007) 231 CLR 570.
75 (1994) 181 CLR 18.
and the appellate jurisdiction exercised by the DF DAT with a new court established under
Chapter III of the Constitution, to be known as the “Military Court of Australia”, was introduced
into Parliament in 2010, only to lapse without enactment upon a pre-election dissolution. 76

The Bill proceeded on the basis that a court designed to hear and determine charges in respect
of service offences might not sit overseas if, materially, the court determined that it was
necessary so to do but the security of the place concerned would not permit that. 77 In that
circumstance, the charge concerned was to be taken to be withdrawn with any further proceeding
in respect of the service offence to be taken before a service tribunal under the DFDA. To say
the least, one might, with respect, think it odd for a nation’s parliament so obviously to identify
in advance a potential need to undertake a particular task in wartime, in this instance trial by
service tribunal, only deliberately to decide not to take every available opportunity to practise
that task in peacetime. In this respect, the lapse of that Bill is not, I respectfully suggest, to be
lamented. 78

Thus, so far as the trial of service offences is concerned, trial by court martial or DFM has the
advantage of demonstrated constitutional validity. Further, unlike the model in the lapsed Bill, it
also, in the court martial procedure, offers a procedure proven by experience to be suitable for
both peace and war. The wartime suitability of trial by court martial was demonstrated abroad
on countless occasions in the course of Australian participation in general and more limited
conflict in the course of the 20th century. There is no reason to think that the less elaborate, trial
by DFM alternative, an innovation that came with the DFDA, would be any less suitable. That
the procedures one practises in peacetime will be the same as one adopts in wartime is surely
also an advantage, and one of inestimable value.

Associate Professor Collins regards White’s Case as evincing a deference by the High Court to
the Executive in military matters so far as the trial of service offences is concerned. 79 The
upholding of a system designed to enforce, within the chain of command, discipline is said by
her not to acknowledge “changed realities”. Such “changed realities” are said to be evidenced
by an acknowledgement by a recent Chief of Army of a need to adapt military command
methods to new technologies and new types of warfare. 80 She opines, “prioritising hierarchical
obedience can forego the bigger structural issue: the duties between the military and society”. 81

But for the military in a country of British heritage, the “bigger structural issue” was long ago
emphatically resolved in favour of the absolute subservience of the military to civil authority, as
exemplified in the Australian Constitution and the Defence Act. And for Captain Semrau and
his OMLT on the ground in Afghanistan, evolution in technology brought with it an ability
readily to communicate with the crew of an attack helicopter who were able to deploy in short
order precision munitions to devastating effect. But the end to which all this was directed was as
timeless as warfare itself, killing an enemy in a theatre of operations. As it happened, for one of
the enemy, death may not have been instantaneous and, in the agony of the moment, Captain
Semrau made a value judgement the nature of which is hardly unique to our times. 82

It is, with all due respect, just arrant nonsense to suggest that, on deployment and within an
OMLT usually comprised of an officer, warrant officer and two more junior soldiers, there is no
longer a place for “hierarchical obedience”. If, for example, the calling in of the attack
helicopter required a signaller in the OMLT to relay to the crew the OMLT commander’s request

76 Military Court of Australia Bill 2010 (Cth).
77 Military Court of Australia Bill 2010 (Cth) cl 49(4)(a) and cl 49(6)
78 Like thinking is evident in the subsequently introduced and also lapsed Military Court of Australia Bill 2012: see, especially, cl 51.]
80 “Civil-Military ‘Legal' Relations”, p 246.
81 Ibid.
for an air strike, can it sensibly be suggested that, while the unit was being ambushed, there was room for that signaller to refuse to relay that request and to seek to debate its merits with his commander because of some “bigger structural issue”? No-one with any understanding of what is entailed in the practice of the profession of arms would suggest there was any such room. That is the point made by Fraser in the passage quoted.

Apart from the subject of battlefield euthanasia, a subject beyond the scope of this paper, the real issues exposed by the Semrau case are the length of time taken by a modern military justice system to deal with an alleged service offence corresponding with a violation of the Laws of War and the trial venues.

The incident occurred on October 19, 2008, in Helmand Province, Afghanistan. Captain Semrau was arrested on December 31, 2008, by the Canadian Forces National Investigation Service and charged with second-degree murder while deployed in Afghanistan as commander of an OMLT. He was released from custody with conditions on January 7, 2009. On September 17, 2009, three additional charges were brought forward to a court martial, which began on January 25, 2010, at the Asticou Center in Gatineau, Québec. The verdicts noted above were returned on 19 July 2010. Captain Semrau was sentenced on 5 October 2010. Thus, a period of almost two years elapsed between arrest and sentencing.

Part, but not the whole, of the trial was held in Canada. The court martial also sat at Kandahar Airfield in Afghanistan over two weeks in June 2010 so as to take evidence from two Afghan witnesses.

There is no reason to believe that, under Australia’s present military justice system, either the length of trial or the trial venues would be any different in respect of the trial of this kind of service offence under the prevailing operational conditions.

For Australians, the misconduct during the Boer War of Lieutenant Harry (“The Breaker”) Morant and his co-defendants, summary execution in the field of a suspect, offers an enduringly notorious and controversial example another type of violation of the Laws of War. Their court martial offers a useful starting point for a survey to test whether the likely present length of the military justice process is any different from earlier times and also to test that against timeliness in the civilian criminal justice system of the day.

A survey commencing at the Boer War era, moving to the Vietnam War era and then drawing upon more recent cases which have come before the DFDAT is annexed to this paper.

It is noticeable from this survey not just that the length of time for charging, trial and, where applicable, sentencing in respect of service offences has expanded over the course of the last century but also that this expansion in time has broadly corresponded with a like expansion in timelines in the civilian criminal justice system. There is, therefore, no reason to expect that the wholesale replacement of a military trial system by the civilian court system would confer any advantage at all on either an accused or the nation state in terms of timeliness of justice. Further, it is, to say the least doubtful, whether the Executive could compel a judge enjoying Chapter III independence to serve overseas to conduct, even in part, the trial of a service offence in a theatre of operations. The correctness of that proposition was apparently recognised in the lapsed Bill to which I have referred above.


martial-proceedings#hmp51uxi5 Accessed 21 August 2018.

84 CTV News website, “Court martial for Semrau heads back to Canada”, published 26 June 2010: https://www.ctvnews.ca/court-martial-for


85 Murder of a suspect – for a detailed account of events, trial and execution after court martial, see K Denton, Closed File The True Story Behind the Execution of Breaker Morant and Peter Handcock, Rigby Publishers, 1983.

86 For details, see the comparative table annexed to this paper.
Timeliness aside, is it truly desirable, in terms of the command and discipline within the military, that the commission of a service offence in a theatre of operations provides an accused defence member with an invariable, certain opportunity to quit that theatre of operations for a trial in Australia? The self-evident answer, I suggest, is that the offering of that opportunity is potentially subversive of command and discipline. Of course with short term deployments abroad or with particular types of overseas deployments there will often be a convenience about holding a trial for a service offence, wherever committed, in Australia. But a study of the history of warfare discloses many examples of the flaw in designing one’s defence strategies and preparations around a particular assumed scenario.³⁷ “Civilisation” of military justice, to the extent that it entails an abandonment of trials by a panel of officers, offers a good example of this type of flawed thinking in my view. A “civilianised” alternative is undoubtedly workable in times of peace and in certain limited warfare scenarios but not generally. In my view, the current Australian limit of “civilisation”, present in the appellate jurisdiction exercised by the DFDAT, draws a line at the limit of what is suitable for warfare in all its potential forms.

In terms of the historic Australian experience, where an alleged service offence has been committed in the course of an ongoing operational deployment, the court martial has been held in theatre. During the Vietnam War, courts martial were held in theatre. What has changed since then, one might ask rhetorically, so as to warrant the elimination of a proven facility for a local trial in respect of a service offence committed in an ongoing theatre of operations or to consign the conduct of any such trial to a tribunal the operation of which one is not going to rehearse in peace?

Timeliness is a legitimate concern in relation to any justice system, civil or criminal, civilian or military. In the military, the intermediate limbo between charging and disposal of a charge carries with it the superadded difficulty of how to employ the defence member concerned over that period. How greater timeliness might be introduced into the military justice system is a subject worthy of detailed attention. But the answer will not be found in “civilisation”, as the survey demonstrates.

However much academics might think otherwise, our day and age is no different to earlier ages in relation to why an army exists. Warfighting, as determined necessary by the civil power, and with that killing an enemy, is an immutable. So, too, are Fraser’s warfighting essentials of leadership, discipline and training. So, too, is the need for enforcement of discipline by a means that is suitable for war fighting, not just peace or something intermediate. That means must be practised in peace to prepare for its use in war. Within the bounds of constitutional legislative competence, the choice of means is a matter for the legislature, not the judiciary. As with other national defence decisions, making the wrong choice is not a bad business decision; it may form part of why national independence is lost. “Civilianising” the military is a contradiction not just in terms but also in thinking.

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³⁷ See, for example, the discussion of the flawed “Singapore strategy” of the 1930’s in Thomas; Secretary, Department of Defence and (Freedom of information) [2018] AATA 604 at [57].
Slide 1
The object of an inquest (1)

(1) To answer 4 (or 5) statutory questions:
- Who
- When
- Where
- How

Slide 2
‘How’ expressed as ...

- How did they come by their death: E & W; Zambia; Nigeria; Bahamas
- How the person died: Brisbane
- The circumstances of the death: NZ
- The manner of death: Nova Scotia
- The cause and manner of death: Kenya

PLUS

Slide 3
The cause of death

PLUS
the medical cause of death

ie 4 or 5 standard statutory questions to be answered

Slide 4
The object of an inquest (2)

- To make recommendations
- To make comments
- To report to prevent future deaths

Slide 5
How best to achieve those 2 objectives?

General points:
- Independence
- Fairness
- Openness/transparency
- Disclosure
- Case management decisions
- Thorough inquest

Slide 6
Thorough inquest

- The function of an inquest is to seek out and record as many of the facts concerning the death as public interest requires. - *Ex parte Thompson* (1982), Lord Lane
The purposes of such an investigation are clear: to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrong doing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others. - Amin (2004), Lord Bingham

Slide 7
What needs UPDATING?

GROUP SESSION 1: Identifying defects
What are these ‘old-fashioned procedures’?
Where is the process weak/inadequate?
Let us begin by finding fault

Slide 8
My list of defects
(1) NOT putting families at heart of process
(2) Closed justice
(3) Poor case management
(4) Unsatisfactory hearings
(5) Insufficiently clear outcome

Slide 9
How to remedy these defects?
GROUP SESSION 2: Making changes
■ Suggestions for updating, for modernisation
■ Valuable changes
■ Practical improvements

Slide 10
My suggested list of remedies

1. Families at the heart of the process
2. Open justice
3. Good case management
4. Thorough hearings
5. Clear outcome

Slide 11
Reports, recommendations, comments

■ Clarity and simplicity
■ Directed to achievable goal
■ Researched
■ Publish
■ Responses
■ Making use of reports etc

Return To Contents Page
The scourge of terrorism and religious/political extremism/intolerance has existed in almost every corner of this earth since time immemorial. It is a harbinger of darkness and sorrow that is as much alive today, as it was in the 80’s when I was just a young man, pursuing my Masters degree in Criminology at the University of Sydney.

For example in my country, Uganda, from around 1997 the Allied Democratic Front (ADF), not only terrorized the rural population, but they also used clandestine operatives to plant improvised explosive devices (IEDs) in commuter taxis, buses, bars, and busy streets in Kampala City. They also abducted and ruthlessly killed some civilians who refused to cooperate with them.

On 11 July 2010, suicide bombings were carried out against crowds watching a screening of 2010 FIFA World Cup Final match during the World Cup at two locations in Kampala. The attacks left 74 dead and 70 injured. The Al-Shabaab militant group claimed responsibility for the attacks as retaliation for Ugandan support for AMISOM. Al Shabaab is an Islamist terrorist organization directly linked to Al Qaeda that operates in war-torn Somalia and wants Ugandan and Burundian peace keepers out of Somalia. Since then, they have continued to issue threats of attacks within Uganda. Kenya and Burundi.

Thirteen suspects were rounded up, including seven Kenyans, five Ugandans, and one Tanzanian and they were each charged with terrorism, murder, attempted murder, and of being accessories to terrorism.

* Principal Judge, High Court of Uganda, Kampala

In the course of the trial, the lead prosecutor, Joan Kagezi, was brutally murdered on 30 March 2015, presumably by agents of Al-Shabaab. Her killers, are to-date still at large.

In other parts of the world, in May 2014, the Gamboru- Ngala attack occurred in Nigeria, in the two towns of Gamboru and Ngala in the Borno state of Nigeria and more than 336 people were killed by the Boko Haram militia.

The attackers used AK 47 assault rifles and RPGs using military vehicles that had been stolen several months earlier from the military. They set fire to the town and opened fire on civilians trying to escape the fire.

In April 2015, gunmen stormed the Garissa University College, killing almost 150 people and wounding several others. The attackers claimed to be from the Al-Shabaab militant group, and indicated that they were retaliating over non-Muslims occupying Muslim territory. The militants took several students hostage, freeing Muslims but withholding Christians. Over 500 students were still unaccounted for.

April 15, 2013 - Twin bomb blasts exploded near the finish line of the Boston Marathon, killing three and wounding at least 264.
On 3rd June 2017, an attack in London left seven people dead and 48 injured. A white van hit pedestrians on London Bridge before three men got out of the vehicle and began stabbing people in nearby Borough Market.

Sadly, I could go on and on. Although we have strong criminal laws that provide sanctions— including the death penalty for perpetrators of such acts, there is a strong case to be made for having specialized legislation that deals with extremism of any form.

**NEED FOR SPECIALIZED TERRORISM LEGISLATION**

Terrorism is often used to spread fear or further a specific agenda. The attacks are often indiscriminate in nature and if they’re targeted, the victims are usually individuals of a different political, religious, ideological, cultural or social inclination from the perpetrator(s). Its effect is usually felt across a huge section of a nation’s citizenry.

It is this fundamental characteristic that makes the case for specialized legislation, such as the Anti-Terrorism Act, 2002 of Uganda. The Act makes "terrorism," and supporting or promoting terrorism, crimes punishable by capital punishment. It defines terrorism as the use of violence or threat of violence with intent to promote or achieve religious, economic and cultural or social ends in an unlawful manner, and includes the use, or threat to use, violence to put the public in fear or alarm.

This specialized legislation was motivated by the feeling and conviction most especially of the police and the directorate of public prosecutions that terrorist suspects should no longer be treated like ordinary suspects who are charged under the penal code, that terrorists be charged under a separate criminal law because of the sophisticated nature of their activities and the elaborate and complex planning that precedes attacks.

Laws like the Anti-Terrorism Act, help to strengthen a country’s counter-terrorism strategy. They can easily be amended to suit changing times and help governments adapt as quickly as terrorists do. It is often difficult to achieve this within existing penal legislations.

For example, Uganda’s Anti-Terrorism Act has been amended on a number of occasions, the latest being in 2017 when it included interference with electronic systems within the definition of acts of terrorism.

Usually, governments will need the leeway to carry out swift and timely investigations before the terrorists carry out more heinous acts of terror. The problem, is always in finding the balance between national security and human rights.

I must stress, however, that such laws should not give the police and security services carte blanche to abuse human rights. Their aim should be to disrupt and restrict the movements of terror suspects and to make it easier to hold them accountable for their actions.

In Kenya, for example, the Security Laws (Amendment) Act No. 19 of 2014 has been heavily criticized for allowing Kenyan police to hold terror suspects for nearly a year, and giving authorities the power to monitor and tap phones.

Other terrorism legislation in select jurisdictions worldwide are, the Patriot Act (2001) in the USA which was passed in the wake of the 9/11 terrorist attacks. It was signed into law by President George W. Bush on October 26, 2001. The USA PATRIOT stands for: “Uniting and
Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act 2001.”

In Australia, three anti-terrorism bills were enacted in the Australian Parliament in 2004 by the Howard Coalition government with the support of the Labor Opposition. These were the Anti-terrorism Bill 2004, the Anti-terrorism Bill (No 2) 2004 and the Anti-terrorism Bill (No 3) 2004.

The Australian Parliament passed The Anti-Terrorism Act in 2005 as a counter-terrorism law intended to hamper the activities of any potential terrorists in the country.

Terrorism legislation allows for counter terrorism actions such as surveillance that is necessary to stop/deter planned acts of terrorism. This is usually difficult under ordinary criminal law. There should nonetheless be a reconciliation of laws that ensures that any such surveillance is based on the “balance of probabilities” rather than “reasonable belief”.

Specialized legislation also strengthens the justice sector through the special courts set up to try terrorism related cases. The independent courts that will usually be presided over by specially trained judges and prosecutors build confidence in the Judiciary as cases are disposed off in a professional and speedy manner.

Terrorism legislation further promotes cooperation between security organs and the judiciary. The legislation which is usually based on international best practices, usually promotes cooperation in developing forensics capacity, asset forfeiture expertise, cross-border law enforcement coordination, and victim and witness protection programs.

Needless to add, National counter terrorism legislation should aim to address conditions conducive to the spread of terrorism and must, to that end, be compliant with the rule of law and human rights. Very often local political conditions are known to motivate disgruntled citizenry to go underground and start terrorist attacks.

Overall, it is my firm belief that in order to effectively counter terrorism, it is imperative for countries to supplement existing criminal law with terrorism legislation that is current, fair and pragmatic.
SPECIALIST SUBJECTS SESSION 4E
“International Child Abduction: An Overview”
By Her Hon. Justice Sophia A.N. Wambura, Tanzania

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

Slide 1
Definition

- Child abduction is an offence of wrongfully removing, retaining, detaining or concealing a child or baby.
- Abduction is defined as taking away a person either by fraud, persuasion or by open force or violence.
- There are two types of abduction:
  - Parental child abduction where one parent removes a child or children from the matrimonial home without the consent of the other parent to an area or country they visit frequently or of their habitual residence.
  - Abduction by a stranger who could do so for various reasons but mostly for cash or political purposes.

Slide 2
Kidnapping

Kidnapping can be said to be similar to Abduction
Kid - stands for a child
Snapper - is a person who snatches and
By abducting one is taken as a captive.

Who are mostly targeted?
I. Women and Children (both boys and girls) are targeted most as they are weak. Moreover, children cannot easily contemplate what is going on.
II. In some areas Tourists have been victims because they may not know where they can easily seek assistance apart of the fact that they are presumed to have plenty of money with them.

Slide 3
Abduction can also be said to be similar to Human Trafficking.
- This is because the abductors, kidnappers and human traffickers mostly have one common intention of making money.
- This is done by both Men and Women as well as Youth. Whereas men and women can be persuasive men and youth can also use force.
- Child abduction is a global phenomena and so it is not surprising to hear of a number of children who have gone missing everyday and some have never been found to date. Case of Madeleine McCann of Portugal

Slide 4
Manner of Abduction

Issuing of gifts by a parent

Slide 5
Issuing of gifts by a total stranger
This could be a sweet but has great impact on children. Three children in Arusha Tanzania were abducted by being given sweets. Only one child was later found,

**Slide 6**

Persuading a child who may not be easily convinced.

**Slide 7**

Pretending to assist a child

**Slide 8**

Use force at distant or alienated locations

**Slide 9**

Through Court Orders in custodial or adoption matters

**Slide 10**

**Factors contributing to Child Trafficking**

There are various factors depending on where the child comes from. These include but are not limited to:

- Poverty it is seen as a source of trafficking because in most families in rural areas parents give away their children if someone comes searching for children for employment in domestic servitude then it is easy to take them

**Slide 11**

- Lack of education on one hand as most children are not going to school so are taken to urban areas or plantations where they are physically and sexually exploitation.
- Need of scholarships on the other hand where children are promised scholarships.
- In most countries high rates of unemployment cause youth to become kidnappers demanding to be paid huge or even very small amounts of money for their livelihood.

**Slide 12**

- Political instabilities and civil wars cause families to be disrupted and children are taken captives to join the military or marry the soldiers. Or political demands for release of # people in prison- Chibok girls, Nigeria
- Fractured families where one parent wants to take away the children without notifying the other parent.
- Or a single parent fails to take care of the family causing children to run away from their homes.
- Religious beliefs.

**Slide 13**

- Corruption and Laxity in Immigration Policies thus people can enter and leave the country with a child without even being questioned on their relationships
- Superstitious beliefs-killings of people and mostly children with albinism in Tanzania and Malawi
- In February 2015 a child with albinism was trafficked from his village to another village where his body was thrown after cutting some of his body organs.

**Slide 14**

**Effects**

- Child abduction is a gross violation of Human Rights because abducted, kidnapped or trafficked children are denied their basic rights such as
- Right to life as most are killed because they cannot feed them
- Right to proper meals - they are starved
- Right to education for those already going to schools
- Right to medication,
Slide 15
- Right to safe shelter
- Right to be loved by being physically, sexually and mentally abused
- Right to play being held captives case of Josef Fritz who held captive his own daughter for 24 years in their basement and gave birth to seven children. Wife had reported of the missing child not knowing she was at their own basement. He was sentenced to life imprisonment in 2009

Slide 16
- Subjected to forced labour in plantations, mines, industries or as families house maids, in the army as child soldiers or prostitutes.

Slide 17
- Forced or arranged marriages/ eloping/ rape
- Psychological trauma and depression – Woman in Australia was held captive by her father for some years. Though he was imprisoned she said she would only feel free after her father dies.
- Stigmatization – Chibok girls refused to return home for fear of being labeled and stigmatized
- Lack of Trust on the community

Slide 18
International Child Abduction

- Columbia, Philippines, India, Brazil, Mexico, South Africa are the seven countries which have been ranked to have high rates of child abduction worldwide.
- This does not leave the US, EU or UK, Australia, Nigeria or Tanzania as safe countries either. This is because of easy travels from one Region or State to another

Slide 19
Measures taken

In order to stop child abduction States came up with the Hague Abduction Convention of 25th of October, 1980 On Civil Aspects of International Child Abduction. Of the top seven only Brazil and South Africa have ratified the Convention.

Slide 20
The Hague abduction convention

The Hague Abduction Convention is a treaty that many countries, including the United States, have joined. It is a multilateral treaty which internationally seeks to protect children from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the States of their habitual residence.

Slide 21
Some features of the Convention

- To secure the effective rights of access to a child. So custody and visitation matters should be decided by the proper Court
- Each country has to have a Central Authority [CA] which has the responsibility of helping in locating abducted children; encourage amicable solutions to parental abduction cases and help facilitate the safe return of children as appropriate
- Documents submitted to the CA are admissible in Courts of Partner States without undue formalities which are usually required in Courts
Slide 22
- A Parent does not need to present a Custody Order, one only has to issue proof of marriage or parenthood
- One has also got to prove that the child was an habitual resident at the time of removal or retention.

Slide 23
United STATES [US]
- Child abduction is on the rise.
- According to the Bureau of Justice Statistics, approximately 80 percent of the human trafficking in the United States is sex trafficking.
- In 2011, The End Child Prostitution and Trafficking [ECPT] Report estimated that around 1.6 million children have been “caught up in the sex trade with some as young as 9 years old.
- According to United Nations Office on Drugs and Crimes [UNODC], a “large proportion” of trafficking victims in the United States are “Mexicans, Central Americans and people from Caribbean countries

Slide 24
UNITED STATES [US]
- The US has put in place mechanisms of reporting, investigating and wherever possible the child with to parents/guardians by filing a formal complaint known as the Hague Application
- Could take long and not guarantee that child a would be found.
- Most children are killed or found after a very long time.

Slide 25
European Union [eu]
- The EU is a community composed of multicultural and ethnic societies where citizens move feely across borders and so child abduction is also becoming a growing problem.
- The EU has thus committed itself to assist in efforts to recover Internationally Abducted Children.
- Has a Committee for Missing Children
- Have International and National Centre's for Exploited and Missing Children

Slide 26
- Has an European Parliament Mediator for International Parental Abduction
- The European Court of Human Rights has decided quite a significant number of cases which have helped improve one of the weaknesses of the Convention- lack of clarity about how return Orders are to be enforced.

Slide 27
- The Court has also added weight to the duties on Central Authorities in Article 7 of the Convention to the requirement of acting expeditiously in Article 11 and reinforced the significance of prohibition on deciding custody rights before a return Order in Article 16
- Cases can be found on ECHR website
A clearer picture of the scale and forms of child trafficking in the UK is slowly emerging. Slowly because there was a belief, held by some communities, that ‘child trafficking is something that happens to ‘others', 'over there', not in the UK Community.

The 1st major case profile of child trafficking in UK was a Nigerian girl who went missing from Sussex Social Services in 1995. Thereafter many more also went missing. This led to the launch of Operation New Bridge which has lasted for several years.

In April 2009 the Child Exploitation and Online Protection (CEOP) published its Strategic Threat Assessment on Child Trafficking in the UK and identified 325 children in the UK who were trafficked in one year.

In its 2010 Strategic Threat Assessment of Child Trafficking CEOP detailed 287 children identified as potentially trafficked from March 2009 to February 2010.

It stated that of 219 cases 35% of children were sexually exploited, most of whom female; 18% were exploited for cannabis cultivation, 11% were exploited for domestic servitude, 11% for benefit fraud, 9% for labour exploitation, 9% for street crime, 4% for forced marriage, 2% for illegal adoption and 2% for various other types of exploitation.

According to CEOP figures are not accurate due to lack of sufficient data.

Australia ratified the Hague Convention on 1st January, 1987. To date it has high rates of child abduction cases.

In 2014 – 15 more than 4000 child abduction cases were reported being 610 more than in 2013 – 2014.

Government has established a Central Authority under the Attorney Generals Department.

Has also established International Child Abduction Newsletter providing general information on the issue.

According to the National Human Rights Commission of India 40,000 children are abducted each year with 11,000 untraced. 10% being international abductions and 90% being interstate abductions.

The National Crimes Record Bureau of July 2018 states that the crime has doubled from 2012 to 2016. Low convictions has resulted into mob justice.

Not surprising to hear incidents of suspects being torched or stoned to death.

South Africa has ratified The Hague Convention. However it is leading in child abduction cases in Africa. It has been reported that at least one child is abducted every day and only 1% of them have been reunited with their parents/families.
Most are found dead or allegedly trafficked to other countries.

**Slide 34**  
**Nigeria**

- Not a signatory to the Hague Convention
- Has attempted to legally address the problem by criminalizing it in all its ratifications
- Despite of the legislative and policy framework put in place to curb the menace; the trend has only progressed over the years.
- Only recently, Nigeria has been downgraded from its previously improved position as it relates to child and human trafficking to a worse position.

**Slide 35**  
**TANZANIA**

- Tanzania like Nigeria is not as signatory member state to the Hague Convention though it is also one of the countries with high rates of child abduction in East Africa
- It is estimated that the average age of child trafficking is from 12 to 15 years. They are being trafficked from rural areas to work as domestic workers, barmaids, hair salon dressers or prostitutes in big cities like Mwanza, Arusha and Dar-Es-salaam

**Slide 36**

- The report produced by the USA State Department of Trafficking In Person of 2013 had put Tanzania at the second tier category.
- Tanzania is a source and possibly transit country for forced labour and child prostitution.
- Number of girls are trafficked to South Africa, Oman, United Kingdom, and other European and Middle East countries for domestic servitude.
- Innocent children from neighbouring countries like Kenya and Uganda are trafficked through Tanzania for forced domestic labour and sexual exploitation in those countries by being promised decent jobs or scholarships. Case of children arrested at Malawi

**Slide 37**

- Tanzania is among the signatories of international legal and human rights instruments which guarantee the protection of children as the most vulnerable member of the society.
- The Convention to the Rights of the Child
- The Optional Protocol to the Convention on the Rights of the Child on Sell of Children,
- Child Prostitution and Child Pornography a
- The African Charter

**Slide 38**

- Measures taken by Tanzania
  - Government of Tanzania has thus made significant efforts in order to address the problem of child trafficking
  - Has enacted The Anti-Trafficking in Persons Act 2008 but like Nigeria the problem is still critical.

**Slide 40**  
**Challenges Of Child Abduction**

- Lack of proper data in most countries including the US so data available though shocking does not display the reality of the problem.
Lack or poor of collaboration amongst States some of which have even not ratified the Hague Convention despite of its benefits.

Poor investigation mechanisms eg Tanzania killing of suspect before he revealed where the captives were in Arusha or loss of investigation file in Iringa case.

Failure to find and return the victims.

Low rates of convictions has made people to lose confidence in Police and our Judicial Systems.

Insufficient resources and facilities to support victims.

Stigmatization of victims

**Way forward**

Child abduction is a serious international issue. There is an indication that more effective and collaborative approaches are required to reduce the level of child abduction as individual State efforts have not borne the expected results. Therefore there is a need for:-

- Governments to ratify the Hague Convention and have Bilateral Agreements to resolve the problem.
- Each State to increase resources and assist in international judicial collaboration.

**Strengthen collaboration amongst the Police through Interpol in order to effectively prosecute such cases and probably raise the conviction rates.**

- Close down all offices of Human Traffickers and criminalize the establishment of such offices
- Asserts seized from convicted persons be devoted to victims rehabilitation and compensation thus be beneficial to the society.
- Governments to establish, corroborate and assist Non Governmental Organizations which devote their lives to societal rehabilitation of victims by giving them spiritual and psychological support. Chinas decision to recognize such persons in burying them in Special Graveyards as heroes.

**Public awareness programs ought to be put in place through the Media, Newsletters, brochures, local /community radio programs in schools and colleges.**

- Religious leaders to assist in preaching to their believers to abstain from such behaviors by engaging in awareness programs.
- Encourage victims who have been rescued to share their experiences.

**Convene Regional / Domestic Meetings involving all stake holders including Community leaders and clan elders to discuss the problem.**

- Training of various actors on how to deal with the problem domestically and internationally.

**Establishment and Maintenance of Victim Centre's**

**COURTS**

- Deal with such matters expeditiously.[Circular]
- Upon conviction Issue stiff sentences as well as effective remedies such as compensation to victims
- Establish a follow up mechanisms by both Courts and Social Welfare Officers on children who have been adopted even were there are no Bilateral Agreements in existence.[Court Orders /Circulars]
Call for Enactment /Amendments of various legislations were necessary.

**Slide 46**

- Share Court decisions on the best practice some of which can be accessed from International Child Abduction Database (INCADAT)- [handbook]
- Take up Mediation Roles as done by the European Parliament
- Participate in public awareness programs as done by Australia
- Join the International Hague Network of Judges for direct Judicial Communications in specific cases.
- If we really intend to be Stronger Together than a continued dialogue domestically and within the Regional Blocks is a thing to carry back home.

**Slide 47**

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- Goggle country status, cases and or videos
Dear Colleagues,

It is a real pleasure for me to attend, for the first time, a CMJA Conference and to have the opportunity to make a presentation on a very important issue for judges, Handling the media.

Last year, at the annual meeting of the International Association of Judges, I had the pleasure to meet Justice John Lowndes, who was invited to talk about the CMJA at our meeting. I think it is essential that these two important international organizations collaborate and exchange views on crucial matters for judges around the world.

Today, our topic is a very international one and of the utmost importance.

In Canada, the adoption of the Charter of Rights and Freedom\(^1\), in 1982, changed the role of the judiciary. The parliamentary supremacy was moved to a constitutional system where judges have the responsibility to determine whether or not laws conform to the Constitution. It was a big change. The judiciary now plays a more important role than ever and often attracts a lot of media attention.

In our modern society, where communication is instant, journalists have a unique role and should be at the centre of quality information, especially when the news to be published touches a field as vital as justice.

As for judges, they must be able to work free from external influences. We are an essential bulwark against the public clamour. The least sympathetic accused has the right to a fair trial. The administration of justice must be above all suspicions of external influence. However, the open court principle is essential to justice and journalists are important players for the publicity of justice. Freedom of the press is “the main vehicle for informing the public about court proceedings”\(^2\).

Here are the problems that the judiciary is faced with.

Certain cases attract the public’s attention more than others. Some journalists are looking for sensationalism. Consequently, judges have to preside over trials that are hyper-publicized. They can be victims of unfair comments that are very difficult to rectify. Moreover, there is a real danger that a person will be found guilty by the public before a trial even begins.

Nowadays, the main news outlets have few specialized journalists and smaller outlets don’t have any. Furthermore, it is now very difficult to give a definition of who is a journalist. Certainly a person employed by a major paper to write articles, such as the New York Times, qualifies as a journalist. But what about the person who has a blog, students who write for their school or university paper, or the person who just attends trials and sends tweets on what he or she sees and hears in court? It is more and more difficult for the public to get accurate information on what is really happening in courthouses.

\(^1\) The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), c.11.
Jeremy Bentham, a British philosopher of the eighteenth century, said that “Publicity is the soul of justice”. But how can we find a balance between the fact that justice is public and the right to a fair trial, by an impartial and independent trier of facts, judge or jury. How should a judge react to criticism? How should the judiciary react? Should there be any communication or cooperation between the judiciary and the media?

I certainly don’t pretend to have all the answers, but I will present to you a few ways of handling the media that we use in Canada and have proven to be efficient.

First, I would like to start by giving you an example of how the Chief Justice of Canada handled a major crisis, in 2014. The Prime Minister, at the time, publicly accused the Chief Justice, Beverly McLachlin, of attempting to contact him about a court case. He said he refused to take her call after the Minister of Justice told him it would be inappropriate.

To fully understand what was behind that crisis, let me give you a bit of background.

In 2013, approximately one year before the crisis, it was known that the government wanted to appoint a judge from the Federal Court in Ottawa, situated in the province of Ontario, to one of the three positions reserved for Quebec judges, out of nine on the Supreme Court. In the province of Quebec, where I live, there is a majority of French-speaking Canadians. We have a civil law legal system in private law and a common law system in public law. Elsewhere in Canada, the legal system is common law for private and public law.

The Supreme Court Act provides special rules of eligibility for an appointment to one of the three Quebec positions on our highest court. The requirements enacted aim to ensure that the candidate has the necessary expertise in civil law, since he or she will be one of the three specialists on the court. To be appointed to one of the Quebec seats, you need to be a judge of the Superior Court or the Court of Appeal of Quebec or a lawyer member of the Quebec Bar.

When there is a vacancy at the Supreme Court, a committee presents a list of candidates to the government after consultation with different people, including the Chief Justice of the Supreme Court. It is also customary that the government consults with the Chief Justice when they make an appointment. In fact, it consults the chief justices of the provinces before appointing a new judge to any court in Canada to verify, among other things, what is the judicial expertise that would be needed.

During the summer of 2013, one of the Quebec seats on the Supreme Court was vacant. On July 29th, Chief Justice McLachlin was consulted by the committee and she provided her views on the needs of the court. On the 31st of July, the Chief Justice’s office called the Minister of Justice’s office and the Prime Minister’s Chief of Staff to flag a potential issue regarding the eligibility of a judge of the federal courts, in accordance with the legislation, to fill a Quebec seat at the Supreme Court. Later that day, the Chief Justice spoke with the Minister of Justice. Her office also made preliminary inquiries to set up a call or meeting with the Prime Minister, but

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ultimately, the Chief Justice decided not to pursue a call or meeting.

On October 3, 2013, more than two months later, the government appointed the judge from the Federal Court to the Supreme Court. Immediately, his appointment was challenged in court by the Constitutional Rights Center and a constitutional lawyer. The Quebec government also announced that it would challenge the appointment. The federal government decided to refer the question directly to the Supreme Court.

In March 2014, the Supreme Court ruled that the new appointee was ineligible, as a federal judge, because he didn’t qualify under the Supreme Court Act.

Around the same time, the Supreme Court had made five rulings, in as many weeks, by which it struck down key elements of the government’s legislative agenda.

On May 1, 2014, the Prime Minister came out to say that the Chief Justice of Canada had inappropriately contacted him to discuss a court case (the reference on the eligibility of the new appointee). The allegation was very serious and the media from coast to coast reported the news. It was the talk of the country!

A journalist suggested a link between these five rulings, the decision about the ineligibility of the appointee from the Federal Court, and the allegation of the Prime Minister about the Chief Justice of the Supreme Court⁴.

Chief Justice McLachlin was not in Ottawa when it occurred. She read the declaration of the Prime Minister in the paper the next morning before boarding her flight. It was only when she retired, in December 2017, that she was able to share how she felt when that happened. She declared:

“I knew I hadn’t done anything wrong, and I spent a rather miserable two hours, or 2½ hours, on the flight figuring out how this could have happened and what was going on. When I got back to the office, I thought about it and I said, I am not going into a fight. Judges can’t get into fights with politicians. We have to just be quiet if we are accused normally. But I do believe the public is entitled to the facts.”⁵

The Supreme Court and the Chief Justice reacted promptly and very efficiently. The next day, on May 2, 2014, the court issued a short news release stating the facts and giving the exact timeline of events. Chief Justice McLachlin made the following statement in the news release:

“Given the potential impact on the Court, I wished to ensure that the government was aware of the eligibility issue. At no time did I express any opinion as to the merits of the eligibility issue. It is customary for Chief Justices to be consulted during the appointment process and there is nothing inappropriate in raising a potential issue affecting a future appointment.”

The media published the information and commented on it. Two important guardians of the democracy worked together to establish the truth in a story that could have damaged the judiciary badly.

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⁵ “Shocked”: Retiring Chief Justice was blindsided by Stephen Harper’s public attack, Kathleen Harris, Rosemary Barton, CBC News, December 14, 2017.
That way of handling the crisis was perfect in the circumstances. It became obvious that the Chief Justice of Canada had never contacted the Prime Minister regarding a court case. The population, bar associations and law societies across the country, as well as from abroad, strongly supported the Chief Justice. Her reputation remained intact, the institution was protected, but the government lost a few feathers over that crisis…

I am of the opinion that the reason why that major crisis was handled so successfully is that the Chief Justice reacted quickly and established the facts. She was also able to rely on communication experts.

What could judges do to improve the communication with media? The situation faced by our Chief Justice of the Supreme Court illustrates that the courts should have a policy on communication with the media and hire a person in charge of communication and relations with the media.

In Canada, many courts have hired specialists in communication in order to be able to react in a timely and appropriate manner, when needed. Chief justices and judges, of course, have to be involved in the process, but we need experts to work with us.

In the province of Quebec, two years ago, the three courts (Court of Appeal, Superior Court and Quebec Provincial Court) hired a specialist in communication to act as the spokesperson for the judiciary in the media. She also acts as a counsellor for education and information of the public concerning the role of the judiciary in our society. She develops communication and crisis management plans. She is supervised by one of the chief justices of the courts. Up to now, it has been very useful to have her around.

The Canadian Judicial Council, composed of all the chief justices and associate chief justices of the country, has also developed a very useful protocol for assessing whether and how to respond to the media. Let me give you the guidelines it provides.

If an issue is of national importance, chief justices are encouraged to contact the Council Office. The Public Information Committee’s National Response Team will discuss the issue and take appropriate action. It could be a press release, a letter to the editor, discussions with journalists, or consultations with law societies, the Canadian Bar Association and the Canadian Superior Court Judges’ Association.

On other issues, the Canadian Judicial Council suggests that, generally, a media response should be considered when:

- A judge is the subject of an unjust personal attack;
- A judgment or ruling is seriously misstated;
- Criticism is materially inaccurate and the inaccuracy is a substantial part of the criticism; or
- Criticism displays a lack of understanding of the legal system or the role of the judge and is based at least partially on such misunderstanding.

But generally, the Canadian Judicial Council is of the opinion that it is best not to respond when:
• The criticism constitutes thoughtful and fair comments;
• The criticism is in the manner of opinion by a columnist;
• The criticism is vague or the product of innuendo;
• The criticism could be perceived as a personal feud between critic and judge;
• A judge subject to criticism has not agreed that a response should be made;
• The criticism raises issues of judicial ethics which could become the subject of contempt proceedings, or would prejudice a matter before the court;
• The issues in question are the subject of political debate; or
• The issues in question can only be clarified through lengthy investigation.  

Judges have to remain very prudent in their relations with the media. One thing is clear to me: A judge should never decide alone to talk to a journalist. As judges, our communication take normally place in a court room or in a written decision. We always have to keep in mind that our public comments could put judicial independence and the impartiality of the judiciary in jeopardy.

Quebec courts also participate in a committee called Justice and media. For many years, I was a member of that committee, representing the Chief Justice of the Court of Appeal. It is a useful exercise to get together with journalists and try to understand each other’s work better. Our work and responsibilities are different, but both essential in a democratic society.

Unfortunately, one of the things we realized was that part of the problem, when it comes to the quality of the information published, is the fact that many journalists don’t understand these two important principles: judicial independence and the presumption of innocence, in part because there are not many specialized journalists in legal affairs. Judges can contribute to educating journalists on these principles. One of the difficulties, as I said earlier, is that it is not always easy to identify who is a journalist.

My next example of what can be done to handle the media concerns the delicate balance between the open court principle and the need to control the integrity of the trial.

In the Province of Quebec, few years ago, there was a big problem with the journalists in courthouses. They could move freely in public areas, conduct interviews, record sound, take films or photographs. As a result of the way they were working, there were crowds in front of the courtroom doors. It was difficult for parties and witnesses to get through doorways. There were crushes, races down hallways and jostling.

The judges of the Superior Court of Quebec adopted rules which only permitted interviews and the use of cameras in the courthouse in areas designated for such purposes. The rules also prohibited any broadcasting of a recording of a hearing. The government, on his part, adopted Directive A-10 to the same effect.

The media challenged the Rules of Practice of the Superior Court and the Directive A-10. The Supreme Court had to decide if they were infringing on the right to freedom of the press guaranteed under s. 2(b) of the Canadian Charter of Rights and Freedom.

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7 Supra, note 2.
8 Supra, note 1.
The Court recognized the importance of the freedom of the press and wrote that “The open court principle is of crucial importance in a democratic society. It ensures that citizens have access to the courts and, as a result, comment on how courts operate and on proceedings that take place in them”. The Court also stated “that the right to freedom of expression is just as fundamental in our society as the open court principles [...] Freedom of the press has always been an embodiment of freedom of expression”. But sometimes, it is necessary “to harmonize the exercise of freedom of the press with the open court principle to ensure that the administration of justice is fair”. 

The Supreme Court concluded that the conduct of journalists, outside of courtrooms, had a negative impact on the decorum and serenity of hearings. The fair administration of justice necessarily depends on maintaining order and decorum in and around the courtrooms. It also includes protecting the privacy of litigants appearing in front of the courts. The measures contribute to maintaining public confidence in the justice system and are reasonable.

The other measure, concerning the interdiction to broadcast a recording of a hearing, was also found reasonable and constitutional. Audio recordings are made to conserve evidence. It is “a modern alternative to having stenographers take notes in the courtroom. Journalists have a right to use them to enhance the accuracy of reports they are preparing, but they cannot use them in a way that would have an impact on the testimony itself”. The Supreme Court considered that “to broadcast the audio recordings of hearings would be to alter the forum in which the testimony is given”. 

For many years now, in Quebec, these Rules of practice and the Directive A-10 have been in effect and I think this solution is a very good one. The journalists still have the possibility to conduct interviews, take films and photographs, but in an orderly manner which ensures that the administration of justice is fair. Witnesses and litigants can participate in a hearing that is serene and where the decorum is respected.

Finally, I would like to take a few more minutes to talk to you about a new initiative of our Supreme Court. On March 22, 2018, the Chief Justice, in a news release, announced that the Court, which has always aimed at transparency and accessibility, would publish short summaries of its decisions. They are drafted in a reader-friendly language, so that anyone interested can learn about the decisions that affect their lives. They are published on the court’s website and shared on social media.

It might be the same thing in your countries, but in Canada, the Supreme Court’s decisions are not always easy reading, to say the least... There has been an improvement over the last years, but they are still very long (often 100 pages and more...) and complicated. That is why this initiative is so important. Not only for the public in general, but for the media as well. It makes their work easier in a world of instant communication and the Supreme Court increases the chances that the information publicized by the media is accurate.
In conclusion, the judiciary and the media are central players in a democratic society and I think that we should, to a certain point, collaborate together. We should welcome the media in our courts, facilitate their work and help them to improve the quality of the information they publish by giving them copies of interlocutory judgments, for example.

At the same time, as I said earlier, judges have to remain very prudent with media because we are in a special position and must stay free of external influence. A judge should never decide alone to give an interview to a media. Even if a judge is personally concerned by an event or a publication, he or she must be aware that the intervention could damage the reputation of the judiciary as a whole. For that reason, I think that it is essential that all courts adopt policy on media and have access to experts in media relations and communications. I believe that these two elements are the most important ones to handle the media.

Unfortunately, even if judges and courts do everything they can to better communicate information and to collaborate with journalists when possible, there will always be unfair criticism and unjust personal attack on judges. When it happens, I think the best thing to do is to follow Michele Obama’s advice: “When they go low, we go high”!
“Breakout Session”
Survey on Terms and Conditions of Service

All Respondents: 87 Respondents

- 40 out of 87 (46%) stated that their salaries/benefits and any other increments are decided by an independent commission on salaries (Some specified that the decisions are made by either the Judicial or recommendations to Parliament)
- 13 out of 87 (15%) stated that their salaries/benefits and any other increments are decided by Parliament alone (Some specified that the decisions are made from CA to SC and vice versa)
- 22 out of 87 (25%) stated that their salaries/benefits and any other increments are decided by the recommendation from the Executive (Some specified that the decision are made through entitlements, district judges, or magistrates)
- 62 out of 87 (71%) stated that the benefits of the judiciary in their country include housing allowance or houses that are provided (Some specified that they are only fixed or limited allowances, or that it is only available in certain locations [circuit] or certain personnel [judges or chief registrar])
- 56 out of 87 (64%) stated that the benefits of the judiciary in their country include a vehicle with or without a driver (Some specified that this is only an allowance, only for certain personnel [judges], or only for business)
- 30 out of 87 (34%) stated that the benefits of the judiciary in their country include a mileage/kilometre allowance (Some specified that this is limited or only available for travelling or circuits)
- 38 out of 87 (44%) stated that the benefits of the judiciary in their country include a security officer/bodyguard (Some specified that this is limited to certain locations or personnel)
- 28 out of 87 (32%) stated that the benefits of the judiciary in their country include medical insurance
- 43 out of 87 (49%) stated that the benefits of the judiciary in their country include holidays
- 83 out of 87 (95%) stated that women and men in the same function receive the same benefits
- 55 out of 87 (63%) stated that the retirement age for judicial officers is a minimum of 60-65 years of age (Some distinguished between Lower courts, High courts, magistrates, Court of Appeal, Lower bench, and Supreme Court)
- 47 out of 87 (54%) stated that the retirement age for judicial officers is 70 (Some distinguished between Appellate Courts, Grand Court, Court of Appeal, Federal Judiciary, Supreme Court, Higher Bench and Upper Bench)
- 83 out of 87 (95%) stated that there is no retirement age difference between women and men
- 37 out of 87 (43%) stated that pension allowances do not differ according to the grade of a judicial officer
- 37 out of 87 (43%) stated that pension allowances do not differ according to age (Some specified that this is based on years of service)
- 45 out of 87 (42%) stated that pension allowances do not differ according to gender
- 70 out of 84 (83%) stated they had access to a library or online facilities at work (Some
Anonymous Respondents: 45 Respondents

- 20 out of 45 (44%) stated that their salaries/benefits and any other increments are decided by an independent commission on salaries (Some specified that the decisions are recommendations to Parliament or decided by the executive or a committee)
- 32 out of 45 (71%) stated that the benefits of the judiciary in their country include housing allowance or houses that are provided (Some specified that they are only fixed allowances and only available in certain locations [circuit] or to certain personnel)
- 31 out of 45 (69%) stated that the benefits of the judiciary in their country include a vehicle with or without a driver (Some specified that this is only an allowance or only for business)
- 21 out of 45 (47%) stated that the benefits of the judiciary in their country include holidays
- 32 out of 45 (71%) stated that benefits differ for different levels of the judiciary
- 42 out of 45 (93%) stated that women and men in the same function receive the same benefits
- 29 out of 45 (64%) stated that the retirement age for judicial officers is a minimum of 60-65 years of age (Some distinguished between Lower courts, High courts, magistrates, Court of Appeal, Lower bench, and Supreme Court)
- 22 out of 45 (49%) stated that the retirement age for judicial officers is 70 (Some distinguished between Appellate Courts, Grand Court, Court of Appeal, Federal Judiciary, Supreme Court, Higher Bench and Upper Bench)
- 44 out of 45 (98%) stated that there is no retirement age difference between women and men
- 19 out of 45 (42%) stated that pension allowances do not differ according to gender
- 34 out of 45 (76%) stated that they have access to a library or online facilities at work (Some specified that this is limited or partial access)
- 31 out of 45 (69%) stated that provisions were made for flexible working (Some specified that the provisions are only for maternity leave)

Australia: 4 Respondents

- 4 out of 4 (100%) stated that their salaries/benefits and any other increments are decided by an independent commission on salaries
- 3 out of 4 (75%) stated that the benefits of the judiciary in their country include housing allowance or houses that are provided (Some specified that they are only available in certain locations [circuit] or to certain personnel)
- 4 out of 4 (100%) stated that the benefits of the judiciary in their country include a vehicle with or without a driver
- 2 out of 4 (50%) stated that the benefits of the judiciary in their country include mileage/kilometre allowance
- 3 out of 4 (75%) stated that the benefits of the judiciary in their country include holidays
- 3 out of 4 (75%) stated that the benefits of the judiciary in their country included a contribution towards their professional education
- 3 out of 4 (75%) stated that such allowances are taxable (Some specified that it is a
fringe benefit tax)

- 4 out of 4 (100%) stated that women and men in the same function receive the same benefits
- 4 out of 4 (100%) stated that the retirement age for judicial officers is 70 years of age
- 4 out of 4 (100%) stated that the retirement age does not differ between women and men
- 4 out of 4 (100%) stated they have access to a library or online facilities at work
- 4 out of 4 (100%) stated that provisions are made for flexible working (Some specified the specific manner in which maternity/paternity leave are conducted)

Botswana: 2 Respondents

- 2 out of 2 (100%) stated that the benefits of the judiciary in their country include medical insurance
- 2 out of 2 (100%) stated that such allowances are taxable
- 2 out of 2 (100%) stated that women and men in the same function receive the same benefits
- 2 out of 2 (100%) stated that the retirement age does not differ between women and men
- 2 out of 2 (100%) stated that their terms and conditions have not been affected in any way by changes in policy in relation to the way the court is administered
- 2 out of 2 (100%) stated that they do not have access to a researcher for judgment writing or any form of clerical assistance
- 2 out of 2 (100%) stated that they do not have time allocated within the court timetable for them to write up decisions or judgements
- 2 out of 2 (100%) stated they have access to a library or online facilities at work

Canada: 3 Respondents

- 3 out of 3 (100%) stated that their salaries/benefits and any other increments are decided by an independent commission on salaries
- 3 out of 3 (100%) stated that the benefits of the judiciary in their country include a mileage/kilometre allowance (Some specified that this is only available for circuits)
- 3 out of 3 (100%) stated that the benefits of the judiciary in their country include medical insurance
- 3 out of 3 (100%) stated that the benefits of the judiciary in their country include holidays
- 3 out of 3 (100%) stated that the benefits of the judiciary in their country include a contribution towards their professional education
- 2 out of 3 (67%) stated that such allowances are not taxable
- 3 out of 3 (100%) stated that benefits differ for different levels of the judiciary
- 3 out of 3 (100%) stated that women and men in the same function receive the same benefits
- 3 out of 3 (100%) stated that the retirement age for judicial officers is 75 years of age
- 2 out of 3 (67%) stated that there is no retirement age difference between levels of the judiciary
- 3 out of 3 (100%) stated that the retirement age does not differ between women and men
- 2 out of 3 (67%) stated that pensions (superannuation) allowances differ according to
the grade of the judicial officers

- 3 out of 3 (100%) stated that pensions (superannuation) allowances do not differ according to age
- 3 out of 3 (100%) stated that pensions (superannuation) allowances do not differ according to gender
- 2 out of 3 (67%) stated that they have not been in any way affected by changes to resources in within the judiciary
- 3 out of 3 (100%) stated that they do have access to a researcher for judgment writing or any form of clerical assistance
- 2 out of 3 (67%) stated that they do have time allocated within the court timetable for them to write up decisions or judgements
- 3 out of 3 (100%) stated that they do have access to a library or online facilities at work
- 3 out of 3 (100%) stated that provisions are not made for flexible working (Some specified the specific manner in which maternity/paternity leave are conducted)

UK - England and Wales: 2 Respondents

- 2 out of 2 (100%) stated that the benefits of the judiciary in their country include a mileage/kilometre allowance (Some specified that this is only available for certain destinations)
- 2 out of 2 (100%) stated that the benefits of the judiciary in their country include holidays
- 2 out of 2 (100%) stated that women and men in the same function receive the same benefits
- 2 out of 2 (100%) stated that the retirement age for judicial officers is 70 years of age (One respondent specified that the minimum age is 65)
- 2 out of 2 (100%) stated that there is no retirement age difference between levels of the judiciary
- 2 out of 2 (100%) stated that the retirement age does not differ between women and men
- 2 out of 2 (100%) stated that pensions (superannuation) allowances differ according to the grade of the judicial officers (One respondent specified that it is based on pay and length of service)
- 2 out of 2 (100%) stated that pensions (superannuation) allowances did not differ according to gender
- 2 out of 2 (100%) stated that their terms and conditions have not been affected by changes in policy in relation to the way the court is administered, in regards to more time spent on court administration than in hearings
- 2 out of 2 (100%) stated that their terms and conditions have not been affected by changes in policy in relation to the way the court is administered, in regards to changing to a new court, function
- 2 out of 2 (100%) stated that they have not been affected by changes to resources in within the judiciary in terms of numbers of judicial officers per population
- 2 out of 2 (100%) stated that they have been affected by changes to resources in within the judiciary in terms of support from court administration (Provision of materials/technology/transcripts/translation - If required, to ensure good case management)
- 2 out of 2 (100%) stated that they have been affected by changes to resources in within
the judiciary in terms of provision of opportunities for training and/or participation in international educational conferences

- 2 out of 2 (100%) stated that they have access to a library or online facilities at work
- 2 out of 2 (100%) stated that provisions are made for flexible working

**Nigeria: 5 Respondents**

- 5 out of 5 (100%) stated that their salaries/benefits and any other increments are decided by an independent commission on salaries
- 5 out of 5 (100%) stated that the benefits of the judiciary in their country include housing allowance or houses that are provided
- 5 out of 5 (100%) stated that the benefits of the judiciary in their country include a vehicle with or without a driver
- 4 out of 5 (80%) stated that the benefits of the judiciary in their country include a security officer/bodyguard
- 4 out of 5 (80%) stated that the benefits of the judiciary in their country include a contribution towards their professional education
- 4 out of 5 (80%) stated that such allowances are taxable
- 4 out of 5 (80%) stated that benefits differ for different levels of the judiciary
- 5 out of 5 (100%) stated that women and men in the same function receive the same benefits
- 5 out of 5 (100%) stated that the retirement age for judicial officers is 65 years of age for High Court and 70 years for Appellate Courts (Some specified that the age is in regards to judges)
- 5 out of 5 (100%) stated that there is a retirement age difference between levels of the judiciary (Some specified that this is in High Court and Appellate Courts)
- 5 out of 5 (100%) stated that the retirement age does not differ between women and men
- 3 out of 5 (60%) stated that they do have access to a researcher for judgment writing or any form of clerical assistance
- 4 out of 5 (80%) stated that they do have time allocated within the court timetable for them to write up decisionis or judgements
- 5 out of 5 (100%) stated that they have access to a library or online facilities at work
- 3 out of 5 (60%) stated that they do not undertake any social responsibility/charitable projects either as an individual (Code of Conduct Permitting) or as part of the judiciary organisation that they belong to

**Namibia: 3 Respondents**

- 3 out of 3 (100%) stated that the benefits of the judiciary in their country include housing allowance or houses that are provided
- 3 out of 3 (100%) stated that the benefits of the judiciary in their country include a vehicle with or without a driver
- 2 out of 3 (67%) stated that the benefits of the judiciary in their country include a mileage/kilometre allowance (Some specified that this is only available for periodical courts)
- 2 out of 3 (67%) stated that the benefits of the judiciary in their country include medical insurance
- 3 out of 3 (100%) stated that such allowances are taxable
- 3 out of 3 (100%) stated that are salaries and benefits are part of the judiciary budget
• 3 out of 3 (100%) stated that benefits differ for different levels of the judiciary
• 3 out of 3 (100%) stated that women and men in the same function receive the same benefits
• 3 out of 3 (100%) stated that the retirement age for judicial officers is 65 years of age
• 3 out of 3 (100%) stated that there is not a retirement age difference between levels of the judiciary
• 3 out of 3 (100%) stated that the retirement age does not differ between women and men
• 2 out of 3 (67%) stated that they do have access to a researcher for judgment writing or any form of clerical assistance (Some specified that this is only for High Courts, Supreme Courts, judges, and justices)
• 2 out of 3 (67%) stated that they do have time allocated within the court timetable for them to write up decisionis or judgements
• 3 out of 3 (100%) stated that they have access to a library or online facilities at work
• 2 out of 3 (67%) stated that provisions are made for flexible working

Papua New Guinea: 2 Respondents
• 2 out of 2 (100%) stated that their salaries/benefits and any other increments are decided by an independent commission on salaries
• 2 out of 2 (100%) stated that the benefits of the judiciary in their country include housing allowance or houses that are provided (One respondent specified that this is a fixed allowance)
• 2 out of 2 (100%) stated that the benefits of the judiciary in their country include a vehicle with or without a driver (One respondent specified that this is only an allowance)
• 2 out of 2 (100%) stated that the benefits of the judiciary in their country include medical insurance (One respondent specified that this occurs only when the budget/funding allows)
• 2 out of 2 (100%) stated that the benefits of the judiciary in their country include holidays
• 2 out of 2 (100%) stated that the benefits differ for different levels of the judiciary (The respondents specified that the benefits differ between National/Supreme Court and District Court, as well as between judges and magistrates)
• 2 out of 2 (100%) stated that women and men in the same function receive the same benefits
• 2 out of 2 (100%) stated that the retirement age for judicial officers is 75 years of age (Both respondents specified that this pertains to judges)
• 2 out of 2 (100%) stated that there is a retirement age difference between levels of the judiciary (One respondent specified that magistrates retire at 60)
• 2 out of 2 (100%) stated that the retirement age does not differ between women and men
• 2 out of 2 (100%) stated that pensions (superannuation) allowances differ according to the grade of the judicial officers (One respondent specified that this is between a CJ, DCJ, and judge)
• 2 out of 2 (100%) stated that their terms and conditions have not been affected by changes in policy in regards to increased caseload, less time being able to concentrate on research/writing judgements, and changing to a new court, function
• 2 out of 2 (100%) stated that they do not have time allocated within the court timetable for them to write up decisionis or judgements
Uganda: 2 Respondents

- 2 out of 2 (100%) stated that the benefits of the judiciary in their country include housing allowance or houses that are provided
- 2 out of 2 (100%) stated that the benefits of the judiciary in their country include a vehicle with or without a driver
- 2 out of 2 (100%) stated that the benefits of the judiciary in their country include a security officer/bodyguard (One respondent specified that this is only for judges)
- 2 out of 2 (100%) stated that such allowances are not taxable
- 2 out of 2 (100%) stated that the benefits differ for different levels of the judiciary
- 2 out of 2 (100%) stated that women and men in the same function receive the same benefits
- 2 out of 2 (100%) stated that the retirement age for judicial officers is 65 years for High Court judges and 70 years of age for Supreme Court and Court of Appeal Justices
- 2 out of 2 (100%) stated that there is a retirement age difference between levels of the judiciary
- 2 out of 2 (100%) stated that the retirement age does not differ between women and men
- 2 out of 2 (100%) stated that their terms and conditions have not been affected in any way by changes in policy in relation to the way the court is administered
- 2 out of 2 (100%) stated that they have access to a library or online facilities at work (One respondent specified that it is not adequate)
- 2 out of 2 (100%) stated that provisions are made for flexible working (One respondent specified that maternity leave is 60 days and paternity leave is 4 days)

Zambia: 6 Respondents

- 5 out of 6 (83%) stated that their salaries/benefits and any other increments are decided by an “other”
- 5 out of 6 (83%) stated that the benefits of the judiciary in their country include housing allowance or houses that are provided
- 3 out of 6 (50%) stated that the benefits of the judiciary in their country include a mileage/kilometre allowance
- 6 out of 6 (100%) stated that such allowances are taxable (Some specified that this only applies to certain allowances)
- 5 out of 6 (83%) stated that the benefits differ for different levels of the judiciary
- 6 out of 6 (100%) stated that the retirement age for judicial officers is between 65-70 years of age
- 5 out of 6 (83%) stated that there is a retirement age difference between levels of the judiciary
- 6 out of 6 (100%) stated that the retirement age does not differ between women and men
- 3 out of 6 (50%) stated that pensions (superannuation) allowances differ according to the grade of the judicial officers
- 4 out of 6 (67%) stated that pensions (superannuation) allowances do not differ according to age or gender
- 4 out of 6 (67%) stated that they do not have access to a researcher for judgment writing
or any form of clerical assistance

- 5 out of 6 (83%) stated that they do not have time allocated within the court timetable for them to write up decision or judgements
- 3 out of 6 (50%) stated that they do not have access to a library or online facilities at work
- 6 out of 6 (100%) stated that provisions are made for flexible working
- 3 out of 6 (50%) stated that they do not undertake any social responsibility/charitable projects either as an individual (Code of Conduct Permitting) or as part of the judiciary organisation that they belong to