CMJA 17th TRIENNIAL CONFERENCE

“INDEPENDENT JUDICIARIES, DIVERSE SOCIETIES”

REPORT
13-18 September 2015
Michael Fowler Centre, Wellington, New Zealand

CO-HOSTED BY

MINISTRY OF JUSTICE
Tabū o te Tūrē
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.

“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. Although it is highly desirable that the independence of the judiciary, as one of the arms of government, should be formally protected by constitutional guarantees, the best protection rests in the support of the government and people on the one hand, and in the competence and confidence of judges and magistrates in the performance of their offices on the other hand.”

Victoria Falls Proclamation, Zimbabwe, 1994

CMJA, Uganda House
58-59 Trafalgar Square
London WC2N 5DX

Tel: (44) 20 7976 1007  Fax: (44) 20 7976 2394
Email: info@cmja.org
CONFERENCE WEBSITE: www.cmja.biz
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Foreword

The 17th Triennial Conference was held at the Michael Fowler Centre, Wellington, New Zealand at the invitation of the Chief Justice of New Zealand, Dame Sian Elias QC the judiciary and Ministry of Justice of New Zealand. We would like to acknowledge the generosity of the Judiciary and the Ministry of Justice of New Zealand. We are deeply grateful to The Law Foundation of New Zealand, the New Zealand Federation of JPs and to Thomson Reuters for their support.

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 330 people from 41 Commonwealth jurisdictions. I am very grateful for the support of the Chairperson of the Steering Committee, Sheriff Douglas Allan, and members of the Steering Committee, the Chairperson of the Local Organising Committee, Justice William Young and the Secretary of the Local Organising Committee, Mrs Pauline Dear and Mr Robert Pigou from the Ministry of Justice as well as the other members of the Local Organising 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.

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

We are deeply grateful to the Elders of the Te Ati Awa tribe who assisted in ensuring the powhiri (Maori welcome) went smoothly during the Opening Ceremony and we are also very grateful for the participation of the children from the Nga Mokopuna School and Kelburn Normal School who sang and brought in the Commonwealth flags.

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

Having taken into account feedback from delegates attending the CMJA’s previous conferences, the format of the 17th Triennial Conference focused on discussions during panel sessions and breakout sessions.

Dr Karen Brewer
Secretary General

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It is the middle of 2016 as I write my introduction to the report for the 2015 conference. It seems an age since we all flew across the continents to the far corner of the globe to attend in New Zealand. Some had easier journeys than others. The number of outward flights taken by one judge just to reach Wellington was five! When I explained his exceptionally difficult journey to the delegates in the auditorium, not only was there an ovation for this judge’s efforts but it also brought home to us that the importance of the CMJA to judicial officers around the world should not be underestimated. These are not just attendance-only conferences; they are a chance to meet and exchange views about difficulties faced by colleagues in different countries. A short conversation over a cup of tea can lead to further discussions and even international publicity about some unfair decision of an unsympathetic executive somewhere in the world. Equally I have found that such a brief conversation with a chief justice can actually trigger serious discussions about hosting a future conference.

So my fellow conferees, I hope you agree that the long and arduous voyage to Wellington was well worth it. The conference days are always long and exhausting with the academic programme ending shortly before the evening social activities. The opening ceremony with the performance of the Maori welcome was a unique addition to the usual welcome speeches. We may have seen it performed in sports on the television screen before, but it was a memorable experience to be part of it ourselves.

I hope the content of the academic programme was rewarding to everyone. The opening ceremony was followed by the keynote speech from Chief Wilton Littlechild, Commissioner of the Truth and Reconciliation Commission, Canada. Wearing his head-dress, he gave a truly spell-binding presentation highlighting the little-known historic suffering by the First Nation people, especially children, of Canada. Sadly he had to return to Canada immediately after his speech and was not available to contribute afterwards. It was the kind of speech that could never be topped over the four days of the academic programme but nevertheless many other judicial officers of all ranks did give extremely interesting speeches, either keynote or as part of a panel. It would be unfair if I mentioned some of those speakers by name but not others. However, full details can be viewed further on in this document. They were all formidable and informative speakers and I thank each of them for the effort they put into the preparation and presentation of their papers.

My thanks go to the other participants who also assisted such as facilitating and chairing sessions, and of course, to all of the conferees for attending. All of them together created the success of the conference and I hope as many as possible will have been bitten by the CMJA-bug that makes us return year after year. I look forward to meeting you again at the future conferences. Finally, please remember I am always looking out for anyone wishing to volunteer to be a speaker or facilitator.

Judge Shamim Qureshi
Director of Programmes, CMJA
Message from Her Majesty the Queen, 
Head of the Commonwealth and Patron of the CMJA

Please convey my warm thanks to the Members of the Commonwealth Magistrates’ and Judges’ Association for their loyal greetings, sent on the occasion of their Seventeenth Triennial Conference which is being held from 13-18\textsuperscript{th} September in Wellington, New Zealand.

As your Patron, I was interested to learn that the Association has been cooperating with the Commonwealth Lawyers Association and Commonwealth Legal Education Association to celebrate the Eight Hundredth Anniversary of the Magna Carta with a travelling exhibition \textit{Magna Carta to Commonwealth Charter}.

I much appreciate your thoughtfulness in writing as you did and, in return, send my best wishes for a most memorable and successful conference programme.

ELIZABETH R.

13\textsuperscript{th} to 18\textsuperscript{th} September 2015
One of the recurring concerns throughout the Commonwealth that had been expressed during the Conference was the increasing constraints being imposed on institutional independence by the inadequate provision of resources to the judiciary. It was therefore proposed that the CMJA General Assembly adopt a resolution outlining concerns about the lack of sufficient resources.

The following resolution was endorsed unanimously by the General Assembly:

**“RESOLUTION ON THE LACK OF SUFFICIENT RESOURCES PROVIDED TO THE COURTS**

*Noting that jurisprudence and international conventions recognise that institutional independence is one of the fundamental pillars of judicial independence,*

*Noting that in every Commonwealth country there are pressures to reduce the cost of providing justice,*

*Noting that courts are expected to deliver results faster and with fewer resources, and*

*Noting that there is an ever increasing tension between governments who have the responsibility to fund the administration of justice and the courts that have the obligation to deliver justice,*

*Whereas, Paragraph IV of the Commonwealth (Latimer House) Principles on the Three Branches of Government states that adequate resources should be provided for the judicial system to operate,*

*The Commonwealth Magistrates’ and Judges’ Association notes with concern the continued lack of sufficient resources provided to the courts in many Commonwealth countries,*

*Therefore, the General Assembly of the Commonwealth Magistrates’ and Judges’ Association records that the provision of sufficient resources to the courts is a fundamental constitutional obligation of the Executive branch of government”.*
### Sunday 13th September

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<td>0930-1600</td>
<td>CMJA Council meeting (by invitation only)</td>
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<td>1230-1400</td>
<td>CMJA Council and Chief Justices Lunch (by invitation only)</td>
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<tr>
<td>1400-1700</td>
<td>Meeting of Chief Justices hosted by Chief Justice New Zealand (by invitation only)</td>
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<td>1400-1700</td>
<td>Registration of delegates</td>
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<td>1830</td>
<td>Welcome Reception - Michael Fowler Centre</td>
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<td>0830-1700</td>
<td>Registration continues</td>
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<td>0845</td>
<td>Be seated for the Opening Ceremony</td>
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<td>0900-1030</td>
<td>Session 1: OPENING CEREMONY</td>
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<td>TEA BREAK</td>
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<td>1100-1230</td>
<td>Notices and Introduction to Conference by Judge Shamim Qureshi, Director of Programmes, followed by</td>
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<td>Session 2:</td>
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<td>Keynote Speech: <em>Can We Get There From Here? Reconciliation and Canada’s Indigenous Past</em></td>
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<td>Speaker: Chief Wilton Littlechild, Commissioner, Truth and Reconciliation Commission, Canada</td>
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<td>Chair: Judge Heemi Taumaunu, New Zealand</td>
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<td>Speaker 1: Chief Justice Albert Palmer, Solomon Islands</td>
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<td>Speaker 2: Justice Stephen Gagler, Australia</td>
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<td>Chair: Mrs Katalaina Sapolu, Director Rule of Law Division, Commonwealth Secretariat</td>
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<td>1545-1700</td>
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<td>B: Military Justice Systems-</td>
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<td>Chief Judge Christopher Hodson, New Zealand</td>
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<td></td>
<td>C: The Future Role of the Lay Judiciary</td>
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<td>Mrs Rachel O’Grady, New Zealand</td>
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<td>0900</td>
<td>Announcement of 2016 Conference</td>
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| 0915-1030 | **Session 5:**  
**Keynote Speech:** *Judicial independence in a changing constitutional landscape*  
**Speaker:** Lord John Thomas, Lord Chief Justice of England and Wales  
**Chair:** Chief Justice Jacqueline Matheson, Canada |
| 1030-1100 | TEA BREAK                                                              |
| 1100-1230 | **Session 6:**  
**Breakout Session:** *Ensuring Fairness in Proceedings*  
**Discussion Moderators:**  
*Group 1:* Chief Justice Sir John Muria, Kiribati  
*Group 2:* Hon. John Lowndes, Australia  
*Group 3:* Mrs Nicola Stoneham, Bermuda  
*Group 4:* His Hon. Justice Charles Mkandawire, Malawi  
*Group 5:* Mrs Bridget Shaw, Jersey |
| 1230-1345 | LUNCH                                                                  |
| 1345-1515 | **Session 7A:**  
**Panel Session:** *Dealing with Litigants in Person*  
**Speaker 1:** Chief Justice Sir Salamo Injia, Papua New Guinea  
**Speaker 2:** Sheriff Robert Dickson, Scotland  
**Chair:** Justice Nigel Mutuma, Zambia  
**Session 7B:**  
**Panel Session:** *Issues in Gender-Based Violence*  
**Speaker 1:** Justice Scholastica Omondi, Kenya  
**Speaker 2:** Justice Richard Williams, Cayman Islands  
**Chair:** Mrs Olufolake Oshin, Nigeria |
| 1515-1545 | TEA BREAK                                                              |
| 1545-1700 | **Session 8:**  
**CMJA Regional Meetings:**  
*Africa – East, Central and Southern*  
*Africa – West*  
*Atlantic and Mediterranean*  
*Caribbean*  
*Indian Ocean*  
*Pacific* |
| 1830      | Evening Reception hosted by The Hon. Amy Adams, Minister of Justice    |

### Wednesday 16th September

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| 0900-0915 | CMJA Endowment Fund  
Bailiff and Chief Justice William Bailhache, Jersey |
| 0915-1030 | **Session 9:**  
**Keynote Speech:** *Recruitment, Retention and Discipline of Judicial Officers in Small Jurisdictions*  
**Speaker:** Chief Justice Margaret Ramsay-Hale, Turks and Caicos Islands  
**Chair:** Mr Mark Guthrie, Legal Advisor, Rule of Law Division, Commonwealth Secretariat |
<p>| 1030-1100 | TEA BREAK                                                             |</p>
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<td>“Discussion Moderators:”</td>
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<td></td>
<td>Group 1: His Hon. Chief Justice Patu F M Sapolu, Samoa</td>
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<td>Group 2: Justice Lynne Leitch, Canada</td>
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<td>Group 3: Justice Rohini Marasinghe, Sri Lanka</td>
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<td>Group 4: Judge Richard Cogswell, Australia</td>
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<td>Group 5: Justice John Keitirima, Uganda</td>
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<td>Speaker 1: The Right Hon the Baroness Brenda Hale, UK Supreme Court</td>
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<td>Speaker 2: Chancellor Carl Singh, Guyana</td>
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<td>Chair: The Hon. Justice Dr. Emmanuel Ugirasebuja, East African Court of Justice</td>
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<td>TEA BREAK</td>
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<td>Speaker 1: Justice John Logan, Australia</td>
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<td>Speaker 2: Justice Patrick Kiage, Kenya</td>
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<td>Chair: Justice Scott Brooker, Canada</td>
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<tr>
<td>1830</td>
<td>Evening Reception at Government House hosted by the Administrator, the Rt. Hon. Dame Sian Elias</td>
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<tr>
<td>0900-0915</td>
<td>Thomson Reuters Presentation</td>
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<td>paper by Justice Kalpana Rawal, Deputy Chief Justice, Kenya read by Justice Patrick Kiage, Kenya</td>
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<td>Chair: Justice Brassington Reynolds, Guyana</td>
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<td>1030-1100</td>
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<td>1100-1230</td>
<td>Session 14A: Panel Session: “Options for Judges taking control of cross-examination of vulnerable witnesses?”</td>
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<td>Speaker 1: Dr Emily Henderson, New Zealand</td>
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<td>Chair: Bailiff and Chief Justice William Bailhache, Jersey</td>
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<tr>
<td>1230-1345</td>
<td>LUNCH</td>
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<td>0900-0915</td>
<td>Thomson Reuters Presentation</td>
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<td></td>
<td>paper by Justice Kalpana Rawal, Deputy Chief Justice, Kenya read by Justice Patrick Kiage, Kenya</td>
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<td></td>
<td>Chair: Justice Brassington Reynolds, Guyana</td>
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<td>1030-1100</td>
<td>TEA BREAK</td>
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<tr>
<td>1100-1230</td>
<td>Session 14A: Panel Session: “Options for Judges taking control of cross-examination of vulnerable witnesses?”</td>
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<td>Speaker 1: Dr Emily Henderson, New Zealand</td>
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<td>Chair: Bailiff and Chief Justice William Bailhache, Jersey</td>
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<td>1230-1345</td>
<td>LUNCH</td>
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<tr>
<td>1345-1515</td>
<td><strong>Session 15:</strong> <strong>GENERAL ASSEMBLY OF THE CMJA</strong></td>
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<td>1515-1545</td>
<td><strong>Session 16:</strong> Closing Remarks by the new President CMJA and CLOSING CEREMONY</td>
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<td>1545-1615</td>
<td><strong>TEA BREAK</strong></td>
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<td>1615-1715</td>
<td>Meeting of the new CMJA Council members (by invitation) only</td>
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<td>Gala Dinner and Dance</td>
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**Friday 18th September**

Optional Day Trips
OPENING SPEECH
By The Hon. John Vertes, Canada, President of the Commonwealth Magistrates’ and Judges’ Association

Distinguished guests, friends, colleagues, ladies and gentlemen, welcome to the 17th Triennial Conference of the Commonwealth Magistrates and Judges Association.

And, on behalf of all the members of the CMJA, encompassing judicial organizations and individuals in over 60 countries and territories, I thank our hosts, Chief Justice Sian Elias and her colleagues of the New Zealand judiciary, for welcoming us to this beautiful city.

I want to thank the Maori people of New Zealand for welcoming us to their traditional territory.

I also want to acknowledge the generous assistance of the New Zealand Ministry of Justice in making this conference possible and the support of the New Zealand Law Foundation and the Ministry of Foreign Affairs for aiding the participation at this conference of our judicial colleagues from several Pacific island states.

And I very much wish to think our key sponsor, Thomson Reuters, for their support of this conference.

It is particularly appropriate that we are here in New Zealand in this year that marks the 800th anniversary of the signing of the charter that came to be known as Magna Carta.

The ideas in that charter have resounded throughout history --- through the English Civil War; the English Revolution of 1688; the American War of Independence; the founding of the independent British Dominions, such as New Zealand, Australia and Canada; the rise of modern democratic institutions; and the fights for racial and gender equality. Magna Carta continues to play a role in the demand for meaningful rule of law as opposed to the arbitrary and capricious exercise of executive power. Indeed, it was Eleanor Roosevelt who, in 1948 when she chaired the committee that drafted the United Nations Universal Declaration of Human Rights, described that Declaration as a modern international Magna Carta for people everywhere.

The Magna Carta is foundational to the rule of law; and the Commonwealth Magistrates and Judges Association has been in the forefront of promoting the rule of law, judicial independence and the good administration of justice for over 45 years.

The CMJA is the leading judicial organisation in the Commonwealth and the only one in the world that brings together judicial officers from all court levels. The CMJA works with national judicial bodies and other non-governmental organizations to promote the values of an independent, impartial and effective judiciary. It was in the forefront of the development and promulgation of the Commonwealth (Latimer House) Principles on the separation of powers in democratic states. It organizes judicial training seminars throughout the Commonwealth (often with the support of the Commonwealth Secretariat). It publishes the
Commonwealth Judicial Journal which provides informative articles and case law from throughout the Commonwealth. Our annual conferences provide a forum for the exchange of ideas and best practices that are pertinent to all Commonwealth judges. Through such vehicles we raise the standards of judicial competence, governance and ethics.

The CMJA monitors threats to judicial independence around the Commonwealth. During my three years as president, we have made representations on judicial independence issues and constitutional initiatives that have seriously affected the independence of our judicial colleagues in several Commonwealth countries. We have in many instances issued public statements in an attempt to draw international attention to what we considered to be arbitrary and undue interference by governments in the independence of judges or their security of tenure.

We are regularly asked to make presentations to meetings of Commonwealth Law Ministers and other international bodies on the state of the judiciary.

I highlight these activities because we must be ever vigilant to maintain the independence of the judiciary, not as a privilege of we the judges, but as a right of the public we serve.

We see far too many examples, throughout the Commonwealth, where governments try to erode that independence by subtle --- and sometimes not so subtle --- means. Deplorable and unsafe working conditions; inadequate salaries and resources; long-standing vacancies that are not filled with the result that workload backs up so that cases are delayed and inevitably justice denied; or situations where judges are appointed, removed or transferred simply for political objectives; these are all conditions that can lead to abuse of power going unchecked and the public being ill-served.

The Commonwealth Charter, endorsed by the heads of government in 2013, sets out the fundamental values of the Commonwealth: democracy, the rule of law, separation of powers, respect for human rights, tolerance, equality and freedom from discrimination in all its manifestations. We, in this Association, believe that an independent, impartial and effective judiciary is a primary vehicle for protecting these values.

We live in a world with an increasing insistence on human rights. And while the legislative and executive branches of government have an important role to play in supporting human rights, the difficult burden of interpreting those rights and maintaining them in the face of governmental intransigence, if need be, rests on the shoulders of the courts."

Ladies and gentlemen, the theme of this conference is “Independent Judiciaries, Diverse Societies”. The organizing committee has put together a most stimulating programme that will appeal to judicial officers of all courts and from every country. There will be presentations on indigenous issues, the challenges of dealing with cultural and religious issues in the courts, the adaptation of international human rights norms and many more presentations and workshops of general and specialized interest.

Once again, I thank our hosts, sponsors and organizers and I wish all of you a successful and enjoyable conference.
“Can We Get There From Here? Reconciliation and Canada's Indigenous Past?”
By Chief Wilton Littlechild,

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

Slide 1
The Truth and Reconciliation Commission
Presentation
INDEPENDENT JUDICIARIES DIVERSE SOCIETIES
CMJA 17th TRIENNIAL CONFERENCE
Wellington, September 14th, 2015

Slide 2
Commission begins public work
- 2009: Three new Commissioners named
- ‘Witnessing the Future’ launch event, Rideau Hall, October 2009
- Governor General Michaëlle Jean inducted: first “TRC Honorary Witness”

Slide 3
Survivors as TRC “owners” & Advisors
TRC Survivors Committee:
- Eugene Arcand, Madeleine Basile, John Banksland, Terri Brown, John Morriseau, Lottie May Johnson, Barney Williams Jr., Gordon Williams, Rebekah Uqi Williams, Doris Young
Inuit Sub-commission:
- Jennifer Hunt-Poitras & Robbie Watt

Slide 4
Statement Gathering
TRC Hearings
- 77 communities
- 7 National Events
- 240 hearing days
- 7,000 statements
- 2/3 were public
- 1/3 private: 65% of private gave permission to use for public education purposes

Slide 5
Public Response
National Events:
1. Respect: Winnipeg, June 2010
4. Truth: Saskatoon, June, 2012
5. Humility: Montreal, April, 2013

Attendance:
National Events: 155,500 (est.)
Regional Events: 5,000 (Victoria) 1,000 (Whitehorse)
Education Days: 14,300 students
Online: 68 countries; 250,000 views

Slide 6
TRC Honorary Witnesses
“Reconciliation” is a beautiful word... it connotes images of aspiration, of expectation, and hope for a positive outcome. It is all about creating something new while fully recognizing the past... Both parties need to address the situation in truth, understand its profound impact, learn lessons, and the rebuild...”

Honorable David C Onley TRC Honorary Witness

Slide 7
Documenting & Remembering

- 2012- Publication:
  o They Came for the Children
  o TRC Interim Report
- 2012-2014- Commemoration:
  o $20 million Fund
  o 143 Projects:
    ▪ Community
    ▪ Regional
    ▪ National
- 2014- Documentation:
  o National Centre for Truth & Reconciliation (NCTR)
- 2015- Validation & Conclusion:
  o The Survivors Speak
  o What We Have Learned: Principles of Reconciliation
  o TRC Calls to Action

Slide 8
TRC Conclusions
PRINCIPLES OF RECONCILIATION:
1. UN Declaration on Rights of Indigenous Peoples is framework for reconciliation
2. First Nations, Inuit & Metis peoples have Treaty, constitutional and Treaty rights that must be recognized & respected.
TRC Conclusions

**PRINCIPLES OF RECONCILIATION:**

3. Reconciliation is **process of healing relationships** that requires public truth sharing, apology, commemoration & redress of past harms.

4. Reconciliation **requires action to address destructive impacts** on Aboriginal education, language & culture, health, child welfare, administration of justice, economic opportunity & prosperity.

5. Reconciliation must create **more equitable society, closing gaps** in social, health & economic outcomes.

6. **All Canadians are Treaty peoples & share responsibility** for mutually respectful relationships.

7. Perspectives of **Aboriginal Elders & Knowledge Keepers** re concepts & practices of reconciliation are **vital** to long-term reconciliation.

8. **Aboriginal cultural revitalization**, & integration of Indigenous knowledge systems, oral histories, laws, protocols & connection to land are **essential to reconciliation process**

9. Reconciliation **requires political will, joint leadership**, trust building, accountability, transparency, & **investment of resources**

10. Reconciliation requires **sustained public education, dialogue, & youth engagement** about history & legacy of residential schools, Treaties & aboriginal rights, & past and present contributions of Indigenous peoples to Canadian society.

**TRC Final Report & Calls to Action**

- History of Schools
- The Missing Children
- School Legacy issues:
  - Education
  - Culture and Language
  - Spirituality
  - Health
  - Justice
  - Governance
  - Poverty
  - The Missing & Murdered
  - Child Welfare
- Reconciliation
25. We call upon the federal government to establish a written policy that reaffirms the independence of the Royal Canadian Mounted Police to investigate crimes in which the government has its own interest as a potential or real party in civil litigation.

26. We call upon the federal, provincial, and territorial governments to review and amend their respective statutes of limitations to ensure that they conform to the principle that governments and other entities cannot rely on limitation defenses to defend legal actions of historical abuse brought by Aboriginal people.

27. We call upon the Federation of Law Societies of Canada to ensure that lawyers receive appropriate cultural competency training, which includes the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law,* and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.

28. We call upon law schools in Canada to require all law students to take a course in Aboriginal people and the law, which includes the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law,* and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.

29. We call upon the parties and, in particular, the federal government, to work collaboratively with plaintiffs not included in the Indian Residential Schools Settlement Agreement to have disputed legal issues determined expeditiously on an agreed set of facts.

30. We call upon federal, provincial, and territorial governments to commit to eliminating the overrepresentation of Aboriginal people in custody over the next decade, and to issue detailed annual reports that monitor and evaluate progress in doing so.

31. We call upon the federal, provincial, and territorial governments to provide sufficient and stable funding to implement and evaluate community sanctions that will provide realistic alternatives to imprisonment for Aboriginal offenders and respond to the underlying causes of offending.

32. We call upon the federal government to amend the Criminal Code to allow trial judges, upon giving reasons, to depart from mandatory minimum sentences and restrictions on the use of conditional sentences.
Slide 19

**Calls to Action for Justice**

33. We call upon the federal, provincial, and territorial governments to recognize as a high priority the need to address and prevent Fetal Alcohol Spectrum Disorder (FASD), and to develop, in collaboration with Aboriginal people, FASD preventive programs that can be delivered in a culturally appropriate manner.

Slide 20

**Calls to Action for Justice**

34. We call upon the governments of Canada, the provinces, and territories to undertake reforms to the criminal justice system to better address the needs of offenders with Fetal Alcohol Spectrum Disorder (FASD), including:

i. Providing increased community resources and powers for courts to ensure that FASD is properly diagnosed, and that appropriate community supports are in place for those with FASD.

ii. Enacting statutory exemptions from mandatory minimum sentences of imprisonment for offenders affected by FASD.

iii. Providing community, correctional, and parole resources to maximize the ability of people with FASD to live in the community.

iv. Adopting appropriate evaluation mechanisms to measure the effectiveness of such programs and ensure community safety.

Slide 21

**Calls to Action for Justice**

35. We call upon the federal government to eliminate barriers to the creation of additional Aboriginal healing lodges within the federal correctional system.

36. We call upon the federal, provincial, and territorial governments to work with Aboriginal communities to provide culturally relevant services to inmates on issues such as substance abuse, family and domestic violence, and overcoming the experience of having been sexually abused.

Slide 22

**Calls to Action for Justice**

37. We call upon the federal government to provide more supports for Aboriginal programming in halfway houses and parole services.

38. We call upon the federal, provincial, territorial, and Aboriginal governments to commit to eliminating the overrepresentation of Aboriginal youth in custody over the next decade.

39. We call upon the federal government to develop a national plan to collect and publish data on the criminal victimization of Aboriginal people, including data related to homicide and family violence victimization.

Slide 23

**Calls to Action for Justice**

40. We call on all levels of government, in collaboration with Aboriginal people, to create adequately funded and accessible Aboriginal-specific victim programs and services with appropriate evaluation mechanisms.
41. We call upon the federal government, in consultation with Aboriginal organizations, to appoint a public inquiry into the causes of, and remedies for, the disproportionate victimization of Aboriginal women and girls. The inquiry’s mandate would include:
   i. Investigation into missing and murdered Aboriginal women and girls.
   ii. Links to the intergenerational legacy of residential schools.

Slide 24

Calls to Action for Justice
42. We call upon the federal, provincial, and territorial governments to commit to the recognition and implementation of Aboriginal justice systems in a manner consistent with the Treaty and Aboriginal rights of Aboriginal peoples, the Constitution Act, 1982, and the United Nations Declaration on the Rights of Indigenous Peoples, endorsed by Canada in November 2012.

Slide 25

Conclusion:
TRC Ending is Just the Beginning
- Reconciliation will require the leadership & sustained efforts of all levels of government
- Reconciliation will require the continuous efforts of Indigenous & public leaders working together
“Judicial independence in a changing constitutional landscape”
By The Rt Hon. The Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales

INTRODUCTION
It is an honour and a privilege to speak this morning on “Judicial independence in a changing constitutional landscape” – as the constitutional landscape of England and Wales is still in the middle of great change. I hope very much that what I will say will accord with the overall theme of the conference – “Independent Judiciaries, Diverse Societies” – as the centrality of justice through an independent judiciary is the basis on which democracy, prosperity, fairness and the rule of law depend in our increasingly diverse societies.

Before turning to explain, by reference to my own jurisdiction of England and Wales, what I see as the key tasks that face the judiciary in achieving what I have described, I want to outline four key themes that underpin my address:

i. The centrality of justice to our societies and the independence of the judiciary cannot be taken for granted: To all of us the centrality of justice to a State is obvious. The provision of justice is, we all know, a core duty of a State. But that is a view we should not take for granted. As judges we have a great deal to do to explain its importance and relevance. We have a key role as advocates actively to point out and explain the role and function of the judicial branch of the state.

Again the necessity for judicial independence is obvious to us all. We know it is central to the rule of law. In each of our nations, to a greater or lesser extent, we have to protect it or to fight for it.

ii. Strong judicial leadership and engagement is needed: Judges cannot expect others to do all that is necessary to protect the position of the judiciary and the justice system; a proactive stance led by the judiciary is required. This is entirely compatible with the Latimer House principles and with other ethical duties.

iii. The judiciary must reflect society to maintain legitimacy: The maxim, “Justice should not only be done, but must also be seen to be done”, is ordinarily taken to require transparency, impartiality, fairness and propriety. But in a broader sense, it must also encompass the principle that the public needs to have confidence in the judiciary that serves it, so as to strengthen the legitimacy of the judicial process. It is axiomatic, therefore, that one important way of gaining and maintaining the public’s confidence is making sure that the judiciary is reflective of society in its composition and in the issues it takes into account.

iv. Independence will be safeguarded: In a changing constitutional landscape, each of the above is essential if the judiciary is to safeguard its independence in a way that enables it to uphold the rule of law for the benefit of each of our respective nations.
THE RELEVANT CHANGES

Constitutional change has been a long but generally slow process. Although we celebrate the 800th anniversary of Magna Carta, it was a very long time before the clauses to which we attach so much significance had any real effect. It therefore may seem initially strange that after a long period where the UK had seen little by way of constitutional change, it has since 1998 been in a period of rapid and continuing change. I would like to highlight four of those changes which are most relevant to the position of the judiciary:

i. **The structure of the Union of the four nations: the position of Wales.** Scotland has always had its own court system, as has Northern Ireland. Thus the re-creation of legislatures with full law making powers in devolved fields could easily be accommodated. Wales has not had its own court system since 1830. Although the effect of the grant of full law making powers in devolved fields in 2011 has taken some time to work its way through, the unitary court system of England and Wales is having to adapt to administering laws passed by two different legislative bodies, one of which legislates bilingually.

   *The status of fundamental rights:* Although it can be said that the courts of the UK have always recognised through the common law the fundamental nature of some rights, the period since the coming into force of the Human Rights Act has gradually highlighted the difficult role that the courts are called upon to play outside the traditional areas of the protection of personal liberty, protection of property and free speech and the right to a fair trial.

ii. **The relationship with the European Union and its Court of Justice and the European Court of Human Rights:** Although the UK has been a member of the European Union for over 40 years and of the Human Rights Convention since its creation, it has taken time for the influence of EU legislation and the interpretation of that legislation and the Union Treaty to have a broad impact outside trade and business law.

iii. **The governance of the judiciary and its relations with the other parts of the state:** It is to this topic I must turn in more detail to explain the key themes.

The position of the judiciary

*The tradition in England and Wales*

Until 2005, the Lord Chancellor – an ancient Office of State that had existed since at least the eleventh century – was the Head of the Judiciary with extensive powers in relation to the judiciary. With at least nominal disregard for the separation of powers, he was also the Speaker of the House of Lords and a senior member of the Government cabinet. However anomalous it might have been, the office was the “buckle or linchpin”1 between the judiciary and the other two branches of the State. It gave the judiciary a certain degree of comfort and stability. The holder of the office had for some centuries been a lawyer of great distinction who also had significant political experience. Judges could therefore generally leave to him (and it always was a him) the relations with the other branches of State, ensuring the position of the judiciary on issues was understood at the highest

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levels of government: the delivery of reform, the appointment of judges, their dismissal and most functions relating to the organisation of the justice system and the judicial branch of the State. It was a relatively comfortable position.

However by the end of the last century, this position was already under strain and all of this changed with the passing of the Constitutional Reform Act 2005\(^2\) which in addition to other major changes (in particular the creation of the Supreme Court of the United Kingdom\(^3\) in place of the Judicial Committee of the House of Lords) recast the office of Lord Chancellor and the organisation of the judiciary.\(^4\) A decade later, even though changes are continuing, it is possible to assess the very different position which the judiciary of England and Wales now has.

**Governance**

The legislation made the Lord Chief Justice the Head of the Judiciary and President of the Courts of England and Wales in place of the Lord Chancellor.\(^5\) Vested in the office of Lord Chief Justice were very considerable powers and responsibilities over discipline, deployment, training, welfare and duties including making representations to Parliament and government.\(^6\)

Having transferred these various powers, responsibilities and duties for organising, leading and representing the judiciary from the Lord Chancellor to the Lord Chief Justice, the Act was otherwise largely silent about how these responsibilities should be discharged by the Lord Chief Justice. This was deliberate, at least on the part of the judiciary, as it left to the judiciary the opportunity to create its own leadership and governance structure. What is evolving is a system under which the general policies of the judiciary are by and large arrived at through the Judicial Executive Board,\(^7\) a group of 8 or 9 senior judges chaired by the Lord Chief Justice, with the advice of the Judges’ Council,\(^8\) a long established body which was recast to bring together the various judicial associations of the different types and levels of judge. The Judicial Executive Board or individual judges who, acting on behalf of the Lord Chief Justice, lead on matters ranging from diversity and relations with the regulator of the legal professions to training and international relations implement the policies. Whereas in the past all judges were by and large concerned with discharging their judicial function, at senior levels in particular – but also throughout the various tiers of courts and tribunals judiciary – the judiciary of England and Wales has had to create and refine a new leadership structure for itself, trying to avoid the clashes that can easily arise given the hierarchy that is the basis of the distribution of court work and the appellate structure. Its own civil service, the Judicial Office of England and Wales, supports the leadership judiciary.

The last is essential, as the principal task of all judges is to dispense justice through managing and trying cases or hearing appeals; any activity of an administrative or leadership nature, however important, is time spent away from court. Of course, that is not to say that judges should not undertake such activities – on the contrary, they should and they must – but it must be proportionate

\(^2\) Constitutional Reform Act 2005 (c.4).
\(^3\) Ibid. at section 23(1).
\(^4\) Ibid. at Part 2.
\(^5\) Ibid. at section 7(1).
\(^6\) Ibid. at sections 5(1) and 7(2).
and they must be able to rely on the strong support of the Judicial Office to implement matters on their behalf.

In addition to a host of other statutory functions that transferred from the Lord Chancellor to the Lord Chief Justice as a result of these changes, of particular importance for my talk is a statutory duty placed on the Lord Chief Justice in 2013 to take such steps as he or she considers to be appropriate for the purpose of encouraging judicial diversity, a topic to which I will return.

Residual powers of the Lord Chancellor and court administration

The major changes, however, preserved some of the responsibilities and functions of the Lord Chancellor who is now also Secretary of State for Justice, though they have been the subject of yet further change. For example, judicial discipline is a joint function of the Lord Chief Justice and Lord Chancellor (as representing the public interest); appointments are the function of an independent appointments commission, though appointments to some leadership posts are a joint function of the Lord Chancellor and the Lord Chief Justice; each also has powers to reject candidates for good reason.

One of the most important functions that was preserved was the responsibility of the Lord Chancellor to obtain the funds for the court administration. In a complex agreement reached in 2008 between the judiciary and the Government, the judiciary obtained a small role in the allocation of funds by the Finance Ministry and, more importantly, a joint responsibility for the running of the court administration. The court administration is now operated on a day-to-day basis by a board chaired by an independent person, accountable to both the Lord Chancellor and the Lord Chief Justice. The judiciary therefore takes a far greater role than before. This has been a beneficial change, given that the judiciary can utilise its practical and operational insight. The judiciary has been active in analysing practices, considering, initiating and evaluating reform proposals and driving the implementation of reform.

Relations with Parliament and the Government

Although the Lord Chancellor and other ministers are bound to uphold the rule of law and judicial independence, and indeed the Lord Chancellor’s traditional oath has been adapted to reflect those responsibilities, the judiciary now have, of necessity, adopted a much more active role in relation to government and Parliament.

There are regular meetings between leadership judges and the government. In addition, informal engagement occurs almost continuously between the civil servants in the Judicial Office and their counterparts in the Ministry of Justice and other government departments.

There is formal engagement with Parliament as illustrated by the Lord Chief Justice’s Annual Report, which is laid before Parliament, and annual appearances by the Lord Chief Justice before Parliamentary Committees shortly after its publication, as well as ad hoc appearances by other members of the judiciary that also form part of this formal engagement.

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9 Ibid. at section 137A.
10 Ibid. at section 17, which inserts a new section 6A into the Promissory Oaths Act 1868 (c.62).
Conclusion

The result of these major changes to the position of the judiciary, as Professor Robert Hazell of University College, London has correctly concluded in a recently published study, The Politics of Judicial Independence in the UK’s Changing Constitution, has produced a paradox. Under the system prior to 2005, judges could rely on the Lord Chancellor, a member of the executive and legislature, to protect their independence and did not have to engage with those other branches of State. Under the new system, which has produced a clear and formal separation of powers, judicial independence is best served by more, not less, day-to-day engagement with government and Parliament. It has also necessitated a much more proactive stance by the judiciary in promoting an understanding of the importance of justice and in taking more proactive steps in many areas it might traditionally have left to others.

Thus we can see that, in the changing constitutional landscape, this new approach is necessary to protect judicial independence, particularly in securing adequate resources for the justice system and in explaining to the public why it is a judge’s duty to make decisions in accordance with law in a way which might not appear at the time to be in accordance with popular sentiment.

THE CENTRALITY OF JUSTICE: THE PUBLIC’S UNDERSTANDING

The perception

As I have mentioned, as judges and magistrates, we all understand the importance of the system of justice. In Europe, and I can only speak first hand of this, the public tends to take the provision of justice for granted. Most will never need to rely directly on the system of justice. The court systems by and large seem to work and are perceived to uphold the rule of law. With varying degrees of speed, those who are alleged to have committed crimes are tried and their guilt or innocence determined. Government is generally held to account by the courts and rights by and large protected and developed. Judges generally command a very high degree of trust; not only is this evidenced by surveys, but by the fact that politicians often turn to judges when they need an independent public examination of a difficult problem. The public do not readily see the serious problems that face the system of justice, such as the inordinately high cost of using the courts, which puts access to justice out of the reach of most, and a system that has not been modernised so as to meet the needs of ordinary citizens (whether or not as litigants in person) and SMEs.

Across Europe, governments face increasing pressures to curtail expenditure. The competing pressures are well known. In the United Kingdom, as in many other countries, we have since the financial crisis in 2008 lived in a time of austerity and restricted budgets. The inevitable consequence of these measures is a reduction in State expenditure on justice.

Indeed many see the courts and the court administration – its buildings, people, and resources – as yet another public service in the way that schools, medical practices and infrastructure are public services, rather than as central an aspect of the State as Parliament and the Government. At a time when the control of expenditure is under pressure, the benefits of spending on education, health and

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See Note 1.
infrastructure are obvious, but the benefit of spending on justice and its modernisation, and the remedying of its problems, are not.

The lack of knowledge

Moreover the work of the courts, tribunals, and judges remains a mystery to so many. Any understanding is unlikely to be aided by its portrayal, or the portrayal of the legal system more broadly, in the media. However, given that much of the court estate belongs to a different era and court processes and procedures are blighted by often unnecessary convolution, not to mention the complexity of the law, such mystery is perhaps unsurprising.

And it is not only the public at large that is unfamiliar with the work of the judges. There can also be a lack of understanding in both the legislative and the executive branches of the State of the important and central role that justice equally plays.

Our task

As a result of the changes to the constitutional position, and particularly in these times of reducing budgets, never has it been more important for the judiciary, as an institution, to become more outward-looking and play a more educative role within the proper confines of the Constitution. In particular, judges in England and Wales have to explain the centrality of justice and what is necessary to ensure that the courts can deliver it. Judges have to be active in relation to decisions concerning the adequate provision of judges and court administration and explaining why these go hand-in-hand with maintaining judicial independence and defending the rule of law.

LEADERSHIP IN ENGAGEMENT

Explaining why justice matters

Arguments about abstract, albeit important, principles concerning the constitutional significance of an independent judiciary will, without more, likely fall on deaf ears. Justice and judges must be, and must be seen to be, relevant. And it is for the judges to explain their relevance. By way of simple illustration drawn from the UK:

i. **Relevance to small traders**: Civil claims with sums in dispute in excess of £10,000 (US$15,000) will, most likely, be heard in England and Wales on the fast track of the County Court. Imagine you are a sole trader or small business – a builder, a manufacturer, a supplier of some sort – and you have unpaid debts totalling £15,000 (US$23,000). That sort of debt could have a serious impact on your cash flow and might, in turn, cause you issues with your creditors. A year to resolve the issue through court proceedings might be several months too many.13

ii. **Relevance to investment and the financial markets**: Investment will not be made and financial markets cannot operate without an effective and independent system of justice. In the UK, there is an additional factor, as the UK legal services market generated £22.6 billion (US$34.5 billion) for the economy in 2013.14

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13 See Civil Justice Statistics Quarterly, England and Wales, April to June 2015 (Ministry of Justice).
14 UK Legal Services 2015 (TheCityUK) (2015)
iii. **Social relevance:** Often when the justice system appears in the media, it is about very, very sensitive issues that are of concern to many: serious crime, taking children in care, eviction, deportation, bankruptcy. Few people would choose to have anything to do with the justice system at all, but it is important to make clear that a just and fair society requires an efficient and expeditious system of justice.

iv. **Constitutional relevance:** Lastly, the principled arguments must be aired, but not in the abstract. Access to justice matters. It matters because courts and tribunals are the means by which individuals are able assert their rights against others, against the government, for each has equality before the law. An accessible and timely system of dispensing justice is required; otherwise the rights become meaningless. Acting with independence, judges are guardians of the rule of law and serve as a check on the exercise of executive power as part of the complex system of checks and balances that underpins our modern democracy.

How is this to be done – making speeches, engaging with the media through the Judicial Press Office and bringing those that need to understand the courts into the courts to see the work that judges do. One scheme that has recently been launched places Members of Parliament in courts or tribunals to observe hearings, with the opportunity of discussing the judicial process with the judge.

*Engaging in ensuring effective delivery of justice and bringing about judge led reforms*

Explaining why justice matters is not in itself sufficient, unless the judiciary also ensures that, within the resources provided to it, justice is delivered effectively and, where reforms are needed, reforms that judges can initiate are initiated by the judges.

It is not easy to ensure that the courts within a State are acting effectively, but it is, in my view, essential for the leadership judges to monitor closely the time different types of case take, the time that elapses before a case can be tried, the number of interlocutory hearings that take place, the workload individual judges bear and the time that judges take to deliver judgments.

Inevitably in a time when technology is advancing at an ever-increasing pace, court systems need reform to keep pace and to develop more cost effective ways of delivering justice and modernising procedure. The judiciary has taken the initiative in establishing new courts (a planning court and a financial court for international markets) and in making extensive procedural reforms, even though constrained at present by the funds necessary to take proper advantage of modern technology.

All of this assists in instilling confidence in the judiciary and the justice system. In particular, improved awareness of the everyday and constitutional role of the judiciary, the ability to assert rights, and how to access justice is itself protective of the rule of law. In addition, as public understanding of the role of the judiciary and the justice system increases, so too will understanding of the need for their independence to be protected.

*Judicial engagement and assistance in reform that is the province of the government and Parliament*

However, there are many areas of reform that are not for the judiciary, but are properly for the executive and legislature. Some might say that once it is accepted that the particular matter is not
within the scope of what judges can properly do on their own, then judges should leave matters entirely to the executive and the legislature.

I do not agree. The judiciary has a real role to play in offering what I have described as technical advice. There will often be choices that are for the politicians to make, but that is not to say that the technical feasibility of reforms are matters on which judges should not assist by giving advice. Guidance about assistance to Parliament has been issued, and, as a result of a series of seminars with senior civil servants, further Guidance will be issued later this year about appropriate engagement with the government on policy matters.

There are many other illustrations which time does not permit me to give. But you may ask why the judiciary should do this. The answer in my view is clear – our changing constitutional landscape has necessitated this to safeguard and to reinforce the centrality of justice and an independent judiciary in the proper functioning of a State.

**DIVERSITY**

Doing all of the above will, in my view, not be enough. We also actively engage in ensuring that the judiciary itself and what it does reflect our increasingly diverse societies

*Judicial diversity*

In the past ten years there have been major changes to the judicial appointments process. An independent Commission that is required to appoint on merit now runs it. The judiciary is working actively with the appointments commission in increasing judicial diversity, in particular to remove the barriers to entry to the judiciary and open-up applications to the widest pool of candidates.

In 2013, a Judicial Diversity Committee was established to assist in discharging the duty to encourage diversity of which I have spoken. We have put in place 90 Role Model Judges who undertake outreach and mentoring work; we hold specialist outreach events targeted at underrepresented groups; we have organised a specialist mentoring scheme for first-time judicial applicants or those seeking to progress to higher office. We put in place this summer a scheme to encourage, through mentoring, a much wider pool of applicants for appointment as deputy High Court Judges and early appointment to the High Court Bench.

We are beginning to bring about a change, particularly with appointments of female judges, but there is still a great deal to do.

We also have Diversity and Community Relations Judges across England and Wales. Beyond diversity work with aspirant judges, they actively seek to dispel myths surrounding the judiciary and act as a link between the courts and local communities. In addition, they play an important role in informing and educating people – communities, schools, universities – about the reality of what it is to be a judge, which helps to remove the myths and misconceptions that prevail. We have recently increased the number to 123.

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16 Constitutional Reform Act 2005 (c.5), section 63(2).
Cultures and languages

I mentioned at the outset the changes in the Union of the nations that form the UK. May I illustrate this by reference to Wales. Legislative and constitutional changes have given Wales a legislature and restored Welsh as a language of the courts and of legislation after an interval of over 400 years; these changes and other factors have restored Wales as a nation with a more distinct identity within the unitary system of England and Wales. On many different levels, the judiciary has therefore made changes to the operation of the legal system to reflect the constitutional change.

Legal systems and common cultural problems

I also mentioned the impact of our membership of the EU. This means not only a parallel, though much more occasional, dialogue with the institutions of the EU, but for present purposes a readiness to understand and adapt to cultures and legal methods different from that of the UK and the common law. Of the many examples, may I take victim’s rights? Most continental civil systems have a very different investigative process, but also accord to victims many more rights, such as the right to appeal against the failure of the prosecutor to prosecute. Political decisions were made to try and provide the same minimum rights for victims across Europe. Technically difficult though it was to set minimum rights, what proved to be more difficult was addressing the common cultural problem that each state had - the failure to keep victims informed throughout the whole process of what was happening and to take into account their concerns when dealing with cases. Thus although we may have to reconcile the diversity of legal systems, it is sometimes common cultural problems that the judiciary and the broader legal system needs to address.

CONCLUSIONS

So, what conclusions can be drawn?

i. Judicial independence must not mean judicial isolation;

ii. The judiciary must explain the centrality of justice and why it matters. That task cannot be left to others. Transparency and openness are crucial to instilling public confidence in the justice system. In so doing, the emphasis has to be on demonstrating the real-life impact, rather than relying on high-level constitutional principles;

iii. The judiciary needs to engage with the other two branches of State within the confines of the Constitution, and this strengthens, rather than undermines, judicial independence as it increases shared understanding and shared respect;

iv. Engagement with the public and the other branches of the State is particularly important when it comes to protecting judicial independence and the proper funding of justice;

v. The judiciary must be reflective of the society it serves and actively take steps to ensure that the processes of the courts take proper account of our diverse societies.

Although I have spoken of England and Wales, I anticipate that much of what I have said about the need for judicial engagement will be of much wider relevance.
Sexual Violence, Exploitation and Human Trafficking: A Commentary on the Kenya Experience

By Hon. Lady Justice Kalpana Rawal, Deputy Chief Justice of Kenya, (presented by Justice Patrick Kiage)

“...what a woman needs is not as a woman to act or rule, but as a nature to grow , as an intellect to discern, as a soul to live and unimpeded to unfold such powers as are given to her.”
Margaret Fuller

Introduction
Sexual exploitation, sexual violence and human trafficking in Kenya represent a tear in the moral fabric of the nation. Affecting men, women, boys and girls, these grave offences inflict adverse and long-lasting physical and psychosocial consequences on survivors, their families and communities. This commentary focuses particularly on women and children as they are generally more acutely affected by, and predominantly suffer the violence of, these vices in Kenya.¹ The paper will discuss sexual exploitation, violence and human trafficking in the Kenyan context. Focusing on the legislative and juridical steps that have been taken to address this scourge, the paper analyses the challenges that blunt the effectiveness of the law and briefly canvasses a number of policy, legislative and administrative actions that can move towards ameliorating the unacceptable situation in regard to sexual exploitation, violence and human trafficking in Kenya.

Sexual Exploitation, Violence and Human Trafficking in Kenya
Sexual exploitation is defined as “any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another.”² Sexual violence is defined as “any sexual act, attempt 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 and work.”³ Human trafficking is “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.”⁴

Worryingly, the trend in the past decade shows a steady increase in sexual violence across the country. Of particular concern is the increase in the number of female children being treated points to increasing numbers of minors being defiled. Findings from a 2010 survey showed that one in three

⁴ Art. 3(a) United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons.


11 Ibid at p. 22.

12 Ibid.
Adverse cultural norms, practices and traditions as well as patriarchal attitudes and deep rooted stereotypes regarding the roles, responsibilities and identities of women and men in all spheres of life persist in the Kenyan society. Social systems in Kenya are established on a patriarchal basis whereby women and children are treated as lesser human beings. Patriarchal social structures enable men to dominate women, and control their labour and power. Amongst Kenya’s traditions, women are subordinate to the men and have little control over resources and power in the home, village, and wider community. This culture has significantly contributed to the perception that sexual violence or exploitation committed against a woman is not atrocious, ‘after all she is just a woman.’

A 2013 Report on trafficking in persons stated that Kenya “is a source, transit and destination country for men, women and children subjected to forced labour and sex trafficking.” Taking advantage of the regions conflicts, humanitarian disasters, and the vulnerability of people in situations of crisis, human trafficking in Kenya, mirroring the global trend, is also on the rise. This profitable activity of organised criminal groups involves the abduction and sale of men, women and children for sexual exploitation and forced labour. Within Kenya, women and children are majority of the victims of this crime. It occurs from rural to urban centres mainly for domestic labour where young girls are trafficked to be housemaids. At the Coast, women and young children are trafficked for sexual exploitation within the tourism industry. Young girls are especially vulnerable to commercial sexual exploitation many have been trafficked out of the country on the pretense that their minds would get them jobs, or marry them only to end up as sex slaves. Porous borders, weak immigration laws, corruption, armed conflict and instability, poverty and socio-economic factors all fuel the human trafficking in Kenya.

The Ministry of Gender in conjunction with non-governmental organisations operate a child trafficking hotline that is toll-free, 24 hours a day. In 2013, 164,000 calls were received on this

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16 Ibid.
21 Ibid.
22 Ibid.
hotline, illustrating the extent of the crisis. The Children’s Department in the Ministry of Gender provides guidance and counselling services to the children victims of trafficking in persons.  

**Constitutional Developments**

Under the previous Constitution, women were not guaranteed protection from gender-based discrimination. For example, the clause on protection from discrimination excluded matters concerning marriage, divorce, adoption, burial or other matters of personal law, areas in regard to which women were generally at a disadvantage. The current Constitution of Kenya 2010 provides guarantees for a wide range of human rights and fundamental freedoms. It comprehensively elaborates rights and protections for women and children, according them treatment as marginalised groups. Article 21 requires all State organs to address the needs of vulnerable groups within society, which includes women and children. The Constitution now guarantees equal protection and equal benefit of the law to every individual, including women without discrimination, having expanded greatly the grounds for discrimination. Additionally, discrimination need only occur at the hands of the State or some authority; it is applicable amongst all persons. Further, the State is mandated to have “affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.” In regard to Kenya’s obligations under international law, Article 2 of the Constitution now expressly provides that the general rules of international law and any treaty or convention ratified by Kenya shall form part of the law of Kenya. The direct applicability of important international instruments on the rights of women and children such as the International Convention on the Elimination of all Forms of Discrimination against Women and the African Charter on the Rights and the Welfare of the Child enhances capacity of judicial and administrative organs of government to protect women and children in Kenya against sexual violence, exploitation and trafficking.

**Legislative Developments**

**Sexual Offences Act No. 3 of 2006**

It was an arduous quest to enact a statute that comprehensively provided for sexual offences. It was only as a result of extensive lobbying, commitment and ingenuity that the Sexual Offences Act was passed in 2006. Prior to this, the Penal Code and the Criminal Procedure Code were the applicable statutes in trying perpetrators of sexual offences. As general offences against morality, the Penal Code and Criminal Procedure Code did not adequately provide for sexual offences and the sentences provided for violations were very lenient. The Sexual Offences Act is much more comprehensive; it recognises a range of sexual offences such as gang rape, incitement to prostitution, cultural and religious sexual offences and provides mandatory sentences in offences of rape and defilement.

Prior to the enactment of the Sexual offences Act, sentences were more lenient as compared to the sentences. For example, in a 2005 case *David Odhiambo and George Omondi v Republic* the Court

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24 Ibid.
26 Article 27(4) of the Kenya constitution the state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
of Appeal of Kenya confirmed a conviction and a 14-year sentence to the appellants who had been convicted of the offence of having ‘unlawful carnal knowledge of a woman or girl without her consent’ under the Penal Code. The Sexual Offences Act now provides a stiffer sentence for the offence of rape that may be life imprisonment. In *F.O.D. V Republic*, the High Court of Kenya upheld a conviction of a person who had been charged with incest and meted an imprisonment term of 20 years which is the minimum sentence under the Sexual Offences Act for the offence of defilement of a child between the age of twelve and fifteen years. Under the Act the mandatory imprisonment term for defilement of a child of the age of eleven years and below, is life imprisonment. It is worth noting that in this matter the Court also affirmed the position of the law that the testimony of a minor who is the victim of a sexual offence does not need corroboration despite being the only testimony of the prosecution.

Since the enactment of the Sexual Offences Act, various regulations have been made to ensure its implementation and they include: the *Sexual Offences Regulations 2008* which deal, with amongst others, review of sexual offences and the keeping of sexual offences register; the *Sexual Offences (Dangerous Offenders DNA Data Bank) Regulations; 2008* and the *Sexual Offences (Medical treatment) Regulations 2012*. More recently, the *Sexual Offences Rules of Court, 2014* were developed to guide the courts on various aspects of implementation of the Act including the conduct of court proceedings and protection of victims of sexual violence. It is commendable that the courts now often conduct the trial of a person charged with a sexual offence *in camera* if it is of the opinion that the witness is ‘vulnerable’ hence entitled to special treatment. Such a witness may be allowed to testify while they are in a witness protection box, or testify through an intermediary and request the court for a recess if they are fatigued or stressed. *It is also notable that courts are now taking into consideration the evidence of the impact of any sexual offence on a complainant in order to determine an appropriate sentence.*

**Challenges in implementation of the Sexual Offences Act**

Implementation of the Sexual Offences Act has experienced some challenges. Adequate human and financial resources across government institutions have been lacking to comprehensively tackle sexual offences. There has been weak coordination amongst government institutions and relevant stakeholders in the implementation of the Act. A lack of awareness on the Act has resulted in a lack of understanding by judicial officers, prosecutors, the police and other key implementers. Further, the provisions within the Act are not included in curriculums and trainings of key stakeholders. There is also apathy and delays in the legal processes within the Act. This is compounded by negative cultural attitudes towards women and fear/ stigma, making reporting of cases a daunting task for both male and female victims. There has also been a piecemeal approach to the implementation of the Sexual Offences Act. The Judiciary, or any other institution, cannot undertake to do this alone. There must be a concerted and coordinated approach to implementation that includes all relevant government institutions, agencies as well as non-governmental partners in order to substantively realise the implementation of this progressive Act in regard to sexual violence and exploitation in Kenya.

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31 Criminal Appeal No. 32 of 2014, [2014] eKLR.
32 This is also in accordance with Section 124 of the Evidence Act, Chapter 80 of the Laws of Kenya.
Protection Against Domestic Violence Act 2015
In order to arrest the growing menace of domestic violence in Kenya, Parliament recently passed the Protection against Domestic Violence Act 2015. The Act expressly provides for the protection and relief of victims of domestic violence; and the protection of a spouse and any children or other dependant persons. The Act adopts a wide meaning of the term ‘violence’ which includes, inter alia, child marriage, female genital mutilation, forced marriage, forced wife inheritance, sexual violence within marriage, intimidation and emotional or psychological abuse. It also widely interprets the meaning of ‘domestic relationship’ beyond formal marriage. It lists the duties of police officers in relation to domestic violence, entitling a victim of domestic violence, including children, to apply for a protection order and seek compensation for the violation of their rights. Under the Act the police are also empowered to arrest a person whom they are satisfied has committed an offence without requiring a warrant of arrest. The Act establishes protection mechanisms for victims of domestic violence, contains provisions guiding the courts on the issuance of protections orders, the enforcement of these orders, orders for counselling and compensation of victims of domestic violence.

Victim Protection Act No. 17 of 2014
Previously, the law did not expressly provide for support and protection systems for victims of crime. However, Article 50(9) of the Constitution mandates Parliament to enact legislation providing for the protection, rights and welfare of victims of offence. Pursuant to this, Parliament enacted the Victims Protection Act 2014. The Act provides equal rights for accused’s and the victims whereby courts have to consider the views of each before making any decision. Minimum standards on the rights, support and protection of victim have now been established. Section 23 of the Act provides for reparation and compensation to victims and special protection for vulnerable victims. The law also provides the victims with the right to accessible information, support services, special protection measures among others. The law establishes the victim protection board which will play an important role in policy development and a victim trust fund to cater for expenses arising out of assistance of victims of crime. The Act provides for the right to privacy on intrusion from the media, health professional and any other person. Courts must now consider the views of the victim from the beginning of trial and victims should provide victim impact statements before court makes a sentence. These measures will ensure victims are active participants in their trials and thus promote justice.

Children’s Act
The Children’s Act makes provisions for the safeguards of the rights and welfare for the children. The Act stipulates that all activities done on behalf of children should be in the best interest of the child. Violence meted against children therefore does not constitute best interest of the child. Section 13 guarantees children (both girls and boys) the right to protection from physical and psychological abuse, neglect and any other form of exploitation including sale, trafficking or abduction. Under section 14 children are protected from female circumcision, early marriage or other cultural rites, customs, or traditional practices which are harmful to the child’s development. The Act also explicitly prohibits sexual exploitation of children as well as actions that expose children to torture or cruel or inhuman treatment such as circumcision or child marriages.

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34 No. 8 of 2001.
Witness Protection Act Cap. 79
The courts have been applying this Act to ensure the protection of witnesses in criminal cases. A Witness Protection Agency is established under the Act to maintain a witness protection programme that guarantees the safety and welfare of the protected persons. This may involve armed protection, relocation and change of identity of a witness. It also extends to requests to the courts to conduct the proceedings *in camera*, use of pseudonyms and use of video link during trial. Further, the Act establishes a Victims Compensation Fund that comprises monies realized from property forfeited to the government in connection with certain crimes as well as grants and donations made to the Fund. The Fund is for restitution to a victim of crime, or compensation for the death of a victim of crime committed by any person during a period when such a person is under the witness protection program and for meeting expenses incidental thereto. While this system is being made sustainable, the Judiciary remains empowered, under s. 31 of the Penal Code and Article 23(3)(e) of the Constitution, to make orders for compensation. Implementing the provisions of this Act is directly related to the effectiveness of all other laws combating sexual violence, exploitation and human trafficking.

Counter-Trafficking in Persons Act Cap. 61
Conscious of Kenya’s obligation under the UN Convention Against Transnational Organized Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, the Counter-Trafficking in Persons Act was enacted, criminalising trafficking in persons including trafficking for sexual exploitation. This buttresses the Penal Code that also contains provisions in regard to the operation of brothels in which trafficked children and women are kept for purposes of prostitution. Under the Counter-Trafficking in Persons Act the court is vested with the power to conduct trial in camera where circumstances demand. The aspect of confidentiality is given a lot of weight under the Act – the right to privacy of a victim and witnesses of trafficking is highly protected and infringement of that right attracts severe sanctions. Likewise, publishing of any information that tends to establish the identity of a victim of trafficking also attracts severe penalties both in terms of imprisonment as well as in fines. The prosecution is empowered to use victim impact statements at trial to adduce evidence relating to circumstances surrounding the commission of the offence and the impact of the offence upon a victim of trafficking, which the court relies on when considering the sentence that would be appropriate once an accused person is convicted. Of direct benefit to the victim of trafficking is an order for restitution that a court is empowered by the Act to impose on the person convicted. Such an order for restitution or compensation of the victim covers the costs of any medical or psychological treatment, transport, accommodation and living expenses or any other relief that the court may consider just under the circumstances. The Act establishes the National Assistance Trust Fund which is to be administered for the assistance of victims of trafficking. The court may make, over and above the orders of fine or imprisonment term, an order for forfeiture of property or funds acquired from trafficking in favour of the fund. The Act entitles a victim of trafficking to apply for compensation in a civil suit without being required to pay any court fees. DAMAGES awarded in such a suit will be taken from the personal assets of the person convicted of the offence and any deficit will be taken from the fund.
The Role of the Judiciary

Progressive Jurisprudence
It is worth to note that even before the promulgation of the 2010 Constitution, the Judiciary was keen on making progressive decisions despite a more limited bill of rights. In the Mathenge case\(^{36}\) for example, the courts declared that, noxious weeds that had been introduced into the area, infringed the petitioners right to life as they violated of their right to a clean and healthy environment. Similarly, prior to the enactment of the progressive 2010 Constitution, the courts had been interpreting the law towards securing the rights of women in Kenya’s social context. For example, in the Maasai culture women were not entitled to inherit their fathers land. However, in the case of Ole Ntutu,\(^ {37}\) the court held that Maasai customary law could not apply if the same was discriminatory regardless of whether the area in question was among those gazetted as community land. It was guided by the spirit of section 3(2) of the Judicature Act and the Constitution which curtailed the application of customary law if, ‘repugnant to justice and morality or inconsistent with any written law.’ Similarly, in Mary Rono v. Jane Rono & Another\(^{38}\) despite the law under Keiyo custom where a woman had no right to inherit, the court ruled that both sons and daughters should inherit equally.

In the post-2010 Constitutional dispensation, the Judiciary has made good progress in promoting and protecting the rights and fundamental freedoms enshrined in the Constitution. In the case of C. K. (a child) & 11 Others v Commissioner of Police/Inspector General of Police & 2 Others,\(^ {39}\) the Commissioner of Police and two others were sued for failing to conduct prompt and professional investigations into the offence of defilement and other forms of sexual violence committed against C.K. (a child) and 11 others. The High Court declared that the failure by the police to conduct prompt, effective and professional investigations into the complaints of the petitioners amounted to a violation of their fundamental rights and freedoms under the Constitution as well as under the relevant international instruments. The Court also issued an order of mandamus directing the Commissioner of Police to conduct prompt, effective and professional investigations into the complaints of the petitioners.

The courts have endeavoured to protect women and children from sexual exploitation, violence and trafficking in persons. In the 2015 case of W.J. & L.N. v. Astrikoh Henry Amkoah & Others\(^ {40}\) two minors had been sexually violated by the deputy head-teacher of the primary school that they were attending. The victims petitioned the High Court for a declaration that their constitutional rights to education and health had been violated by the government through its agent the Teachers Service Commission (TSC), the employer of the deputy head-teacher. In a landmark ruling, the High Court observed that though the petitioners had been unsuccessful in securing a conviction of the perpetrator of the sexual violence in the criminal court, this did not bar the petitioners from seeking the reliefs sought in the constitutional petition. The court held that the standard of proof in regard to the charge of defilement, upon which the respondent has been found not guilty, beyond reasonable doubt, is different from the standard of proof applicable in constitutional matters. The court thus held that the deputy head-teacher had violated the rights of the petitioners to human dignity, the

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\(^{37}\) In Re Estate of Lerionka Ole Ntutu (Deceased) [2008] eKLR.

\(^{38}\) Civil Appeal No 66 of 2002, (2008) 1 KLR (G&F) 803. In this case, the boys claimed a larger share of their deceased’s fathers property than their sisters and the father’s widow.

\(^{39}\) Petition No. 8 of 2012, [2013] eKLR.

right to have that dignity respected and protected, and the petitioners’ right to health and education. The court further held that the government and the TSC were vicariously liable for the unlawful acts of the deputy head-teacher, awarding damages amounting to Kenya Shillings 2,000,000 to the first petitioner and Kenya Shillings 3,000,000 to the second petitioner. In another notable decision, the courts addressed the issue of extra territorial jurisdiction; in George H. Mwakio v. Republic the court upheld the conviction of the accused who had abducted and defiled a Kenyan minor and later arrested in Tanzania. The Kenyan court conducted the trial, convicted and sentenced the accused to 30 years imprisonment.

Compensation
Section 31 of the Penal Code provides that courts’ may order a person convicted of an offence to make compensation to any person injured by his offence and the compensation may be either in addition to or in substitution for any other punishment. Further, Article 23(3)(e) of the Constitution encourages judicial officers to be bold in awarding victims of crimes compensation. Article 50(9) provides that Parliament shall enact legislation providing for the protection, rights and welfare of victims of offences. The Victim Protection Act mentioned above also provides for orders for compensation to victims of offences. These progressive provisions must be actively utilised by judicial officers particularly in offences of sexual violence, exploitation and human trafficking. Moving forward there have also been proposals that part of the fines meted out for sexual offences, which would ordinarily revert to the exchequer, be given to the victims of these offences.

Elimination of the Impediment of Undue Procedural Technicalities
The progressive jurisprudence being set by the Judiciary not only more firmly entrenches principles that reinforce the protection of women and children from sexual exploitation, violence and trafficking in persons, but it also prevents persons accused of these offences from circumventing justice merely by relying on procedural technicalities. This fortifies the Constitutional command that courts in the course of administration of justice should not have undue regard to procedural technicalities. In 2014, the Court of Appeal in the landmark case of Isaac Nyoro Kimita & Another v. Republic pronounced itself on the implications of a defective charge-sheet that stated that two or more accused persons had jointly committed the offence of rape against the same woman at the same time. Departing from its previous decision, the court held that even though the particulars of the charge stated that two or more accused persons ‘jointly’ defiled the complainant, the charge sheet did not become fatally defective if the accused suffered no prejudice as a result of the use of the term. If, despite the use of the term, the accused persons fully appreciated the charge against them and were not confused by the inclusion of the term, the charge sheet could not be said to be fatally defective. This illustrates a shift in the courts towards substantive justice and not procedural technicalities.

Other Judiciary Initiatives
Various initiatives have been developed towards the elimination of sexual exploitation, violence and human trafficking. The Kenya Women Judges Association (KWJA) was founded in 1993 as an affiliate of the International Women Judges Association (IWJA) and has grown in numbers. It seeks to among others keep under review all aspects of discrimination on gender basis and work actively to eradicate

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41 Mombasa Criminal Appeal No. 169 of 2008.
43 Criminal Appeal 187 of 2009, [2014] eKLR.
44 Paul Mwangi Murunga v Republic, Criminal Appeal 35 of 2006, [2008] eKLR.
all forms of discrimination against women in the administration of justice. Through this association members have been able to engage with stakeholders in the Court users Committees an idea the association birthed. KWJA has also been at the forefront in training of judges and magistrates on the application of international law and best practices in regard to sexual offences especially where there were deficiencies in national laws.

The number of women magistrates has increased significantly with 215 out of 458 magistrates now being women. Having more women in office has contributed towards solving the challenges associated with violence against women. Women judges and magistrates have been able to respond in various ways to women subjected to domestic violence thus helping eliminate the vice through various mechanisms. For instance by prioritizing women’s safety by addressing their fears; imposing sanctions on perpetrators of domestic violence among others.

The Judiciary has also established Court Users Committees (CUC’s) in all court stations in the country. They provide a platform for actors in the justice sector at the local or regional level to consider improvements in the operations of the courts, coordinate functions of all agencies within the justice system and improve the interaction of these stakeholders. CUC’s provide the Judiciary with an opportunity to make the justice system more participatory and inclusive since the public is represented by all arms of government, civil society organizations, opinion leaders, representatives of women and youth, the clergy and faith based groups and private sector. Through CUC’s members are sensitized on the various ways to curb these vices and the applicable laws.

The Office of the Chief Registrar in the Judiciary maintains a register of sexual offenders and this ensures that dangerous offenders are monitored. Though the system is still manual, efforts are underway to develop a more efficient and accessible electronic register.

The Judiciary Training Institute (JTI) has been offering training to judicial offices on sexual offences. Currently JTI is developing a curriculum and training manual on sex and gender based violence to train judicial officers on how to handle cases of sexual violence. The Judiciary has developed a sexual harassment policy to guide the institution and this proves that Judiciary is walking the talk against sexual offences.

The Office of the Chief Justice and the Deputy Chief Justice conducted a tour to the western part of Kenya and their findings on the incidences of sexual exploitation and violence were alarming. As a result, they resolved to take measures to curb the prevalence of this burgeoning menace. This includes the development of a Bench Book on sexual offences that will contain the local and international law, judicial precedents and procedural guidelines relating to sexual offences. The Bench Book will aid judicial officers and other users by clearly explaining and succinctly describing the law, processes and procedures in dealing with sexual offences in the courts.

Conclusion
The fight against sexual exploitation, violence and human trafficking has been an uphill task for Kenya just like any other country. However, the progress is remarkable with the adoption of a transformative Constitution which strongly enshrines the rights of women and children. The Bill of Rights guarantees a person’s freedom from all violence which includes sexual violence. All State organs are mandated under Article 29(c) and Article 21 of the Constitution to implement the Bill of Rights. Article 56 obligates the government to put in place affirmative action programmes to ensure
the protection of the marginalised groups which includes women and children. The constitution provides for the participation of women in all levels of government. Various laws as seen above have also been enacted to address the plight of women and children. The challenge remains in ensuring there is full implementation of these laws and policies so that the gains made so far are not eroded. It is important to ensure that improved legal and policy environment translates to real and tangible gains for women of all walks of life through participation and constant engagement. As a country we are not complacent more needs to be done. It will take combined effort both locally and internationally in combating these depravities. Despite the challenges, Judiciary must remain steadfast. The words of Margaret Ogola ring true:

“For the great river starts its journey as a little stream which at first meanders around without any apparent direction, sometimes disappearing underground altogether, but always there, always moving towards the sea”

“Custom and the Law in the Commonwealth”
By Justice Stephen Gage, Justice of the High Court of Australia

Introduction

The recognition of indigenous custom in the common and statutory law of Australia is a story in two parts. One is more widely known, and has been the subject of substantially more judicial attention. It is the story of the manner in which the traditional connection between indigenous persons, and the land and waters by and on which they live, came to be recognised by the common law and by Parliament. This body of principles is now commonly referred to as "native title". The other part of the story is of the ways in which customs other than those encapsulated by native title have come in part to be recognised by common law or by statute in Australia. The protection given to those other aspects of custom is highly fragmented and highly restricted. A theme common to both parts of the story is that custom interacts with Australian common and statutory law in fluid, and often complex, ways.

Although questions of whether and how to recognise indigenous custom had from time to time arisen in Australian courts since at least the 1820s, no systematic steps were taken towards the recognition of indigenous custom in Australian law before the publication by the Australian Law Reform Commission of several papers in the 1980s, which considered the potential for recognition of indigenous customary law in fields such as family law, criminal law and evidence and procedure. The outworking of the relationship between custom and law has garnered particular public and judicial attention over the three decades since then.

Before turning to discuss each of the two parts of the story to which I have referred, it may be helpful to make some preliminary comments on the terms "custom" and "customary law".

The meaning of "customary law"
The Australian Law Reform Commission commented in 1986 that "there is a large body of material on Aboriginal traditions and ways of life, including detailed studies of kinship, religion, and family structures", but that "[w]hether this [could] be regarded as 'Aboriginal customary law'" was a question "to which lawyers and anthropologists, in Australia and elsewhere, have tended to give different answers". More recent scholarship has tended to emphasise the utility of inclusive definitions of customary law, with one academic commenting:

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1 In Mabo v Queensland [No 2] (1992) 175 CLR 1, 57, Brennan J considered that "[t]he term 'native title' conveniently describes the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants". See also Yorta Yorta v Victoria (2002) 214 CLR 422, 440-441.


3 Note, however, that two legislative developments had affected the distribution of land to Indigenous Australians prior to this: the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) in relation to the Northern Territory, and the Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981 (SA) in relation to South Australia.


While too narrow to cover all aspects of every variation of legal regime adopted by Indigenous peoples, the term 'customary law' is broad enough to encompass a wide range of law, traditions and customs generated by Indigenous peoples in accordance with their own decision-making practices.

In a similar vein, Australian courts have endorsed a functional approach to the term "custom". In Yorta Yorta v Victoria, the High Court considered the meaning of a statutory reference to "the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples". The plurality suggested that the phrase "traditional laws and customs" implied a "normative system under which ... rights and interests are possessed", and went on to state:

Laws and customs do not exist in a vacuum. They are, in Professor Julius Stone's words, "socially derivative and non-autonomous". ... Law and custom arise out of and, in important respects, go to define a particular society. ...

To speak of rights and interests possessed under an identified body of laws and customs is, therefore, to speak of rights and interests that are the creatures of the laws and customs of a particular society that exists as a group which acknowledges and observes those laws and customs.

**The development of native title in Australia**

The earliest reported Australian decision "directly dealing with the merits of an Aboriginal claim to particular traditional tribal or communal lands" was the 1971 case of Milirrpum v Nabalco Pty Ltd, widely known as the Gove Land Rights Case. In that case, Blackburn J in the Supreme Court of the Northern Territory considered a claim made by indigenous persons and groups that they held proprietary rights in certain land in the Northern Territory, based in Aboriginal law and custom, and that those rights had been unlawfully impinged upon by a company which was conducting mining operations on that land, and by the Commonwealth, which had granted mineral leases to the company. In addition to its significance as the first case squarely to consider the merits of such a claim, Milirrpum is also significant for having laid the groundwork for what would twenty-one years later turn out to be a successful challenge brought in the High Court of Australia to the long-standing assumption that at the time of British settlement, Australia had been terra nullius, or "territory belonging to no-one". As subsequently explained, the assumption of terra nullius was influential at a time when "[t]he great voyages of European discovery [were opening] to European nations the prospect of occupying new and valuable territories that were already inhabited", and had allowed those nations to:

`parcel ... out the territories newly discovered to the sovereigns of the respective discoverers, provided the discovery was confirmed by occupation and provided the indigenous inhabitants were not organized in a society that was united permanently for political action.`

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7 Deriving from s 223(1)(a) of the Native Title Act 1993 (Cth).
8 Yorta Yorta v Victoria (2002) 214 CLR 422, 444; see also 440-441.
11 (1971) 17 FLR 141.
14 Mabo v Queensland [No 2] (1992) 175 CLR 1, 32 (citations omitted).
In the absence of an understanding that a settled colony was *terra nullius*, a new sovereign could not acquire ownership of land: "[i]t was only on the hypothesis that there was nobody in occupation that it could be said that the Crown was the owner because there was no other."\(^{15}\)

In *Milirrpum*, Blackburn J accepted that evidence led by the plaintiffs as to the indigenous groups' "social rules and customs" demonstrated that those rules and customs constituted "a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society."\(^{16}\) Despite determining that those rules and customs constituted a "recognizable system of law",\(^{17}\) the plaintiffs' claim ultimately failed as Blackburn J found that this system "did not provide for any proprietary interest in the plaintiffs in any part of the subject land."\(^{18}\) His Honour's determination was influenced by what he perceived as a lack of "significant economic relationship" between the groups and the land,\(^{19}\) and by the absence of any right of the groups to alienate the land or to exclude others from the land.\(^{20}\) In two cases decided after *Milirrpum*, members of the High Court commented that the questions raised in *Milirrpum* were of "fundamental importance", and that the correctness of the findings adverse to the indigenous groups may be an "arguable question if properly raised".\(^{21}\)

Just over twenty-one years later, in 1992, the High Court delivered its judgment in *Mabo v Queensland [No 2]*.\(^{22}\) The claim was brought by members of the Meriam people, who lived on the Murray Islands in the Torres Strait.\(^{23}\) In one fell swoop, the Court (with one dissentient) rejected the application of the doctrine of *terra nullius* to Australia,\(^{24}\) recognised the existence of native title,\(^{25}\) determined that native title interests were capable of surviving the Crown's acquisition of sovereignty and radical title,\(^{26}\) and found that the plaintiffs' interests had largely so survived.\(^{27}\)

The concept of "custom" was at the forefront of the court's analysis of native title in *Mabo* in three significant respects. The first was in relation to the content of native title. In the leading judgment of Brennan J, with whom Mason CJ and McHugh J agreed,\(^{28}\) his Honour stated:\(^{29}\)

> Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.

A similar statement was made in the joint judgment of Deane and Gaudron JJ. They commented that as native title "preserves entitlement to use or enjoyment under the traditional law or custom of the relevant territory or locality, the contents of the rights and the identity of those entitled to enjoy them must be ascertained by

\(^{15}\) *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 45.

\(^{16}\) *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 267.

\(^{17}\) *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 273.

\(^{18}\) *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 274.

\(^{19}\) *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 270.

\(^{20}\) *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 272.


\(^{22}\) *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

\(^{23}\) *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 16.

\(^{24}\) See, eg, *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 45, 58.


\(^{26}\) See, eg, *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 48-49.

\(^{27}\) See, eg, *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 75-76.

\(^{28}\) *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 15.

\(^{29}\) *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 58.
reference to that traditional law and custom.\textsuperscript{30} Both the joint judgment and the judgment of Brennan J emphasised that these statements were not to be taken to suggest that the content of "[t]he traditional law or custom [was] frozen as at the moment of establishment of [the] Colony".\textsuperscript{31}

Secondly, and relatedly, Toohey J recognised the significance of custom in the context of proving native title claims. His Honour emphasised that:

\textit{It is the fact of the presence of indigenous inhabitants on acquired land which precludes proprietary title in the Crown and which excites the need for protection of rights. Presence would be insufficient to establish title if it was coincidental only or truly random, having no connexion with or meaning in relation to a society’s economic, cultural or religious life. ... Thus traditional title is rooted in physical presence. That the use of land was meaningful must be proved but it is to be understood from the point of view of the members of the society.}

Finally, custom was considered to be a touchstone for determining whether native title continued to exist, or whether it had been extinguished. In a passage which has remained particularly influential, Brennan J explained that:

\textit{Where a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connexion with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence. The common law can, by reference to the traditional laws and customs of an indigenous people, identify and protect the native title rights and interests to which they give rise. However, when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared.}

These passages, taken together, support an understanding that "custom" and "customary law" inform inquiries as to the content, proof and extinguishment of native title. In many respects, this may not be surprising: as Brennan J remarked, "[n]ative title, though recognized by the common law, is not an institution of the common law".\textsuperscript{33} Brennan J also acknowledged that "subject to an important qualification, the only title dependent on custom which the common law will recognize is one which is consistent with the common law".\textsuperscript{35} A similar point was made in his Honour’s oft-repeated statement that any developments contemplated by the common law must not "fracture [the] skeletal principle[s] of our legal system".\textsuperscript{36}

Following the \textit{Mabo} decision, the Commonwealth Parliament passed the \textit{Native Title Act 1993 (Cth)}. The Act "codified the \textit{Mabo} definition of native title",\textsuperscript{37} and provided a "complex legislative regime for the recognition and protection of native title",\textsuperscript{38} "address[ing] issues the Bench left unresolved".\textsuperscript{39} The Preamble to the Act, both as passed and as it continues to exist today, expressly refers to the holding in \textit{Mabo} in the statement that:

\textit{The High Court has:}

\begin{itemize}
\item \textit{Mabo v Queensland [No 2] (1992) 175 CLR 1, 110; see also 187.}
\item \textit{Mabo v Queensland [No 2] (1992) 175 CLR 1, 110; see also 70.}
\item \textit{Mabo v Queensland [No 2] (1992) 175 CLR 1, 188.}
\item \textit{Mabo v Queensland [No 2] (1992) 175 CLR 1, 59-60; see also 70.}
\item \textit{Mabo v Queensland [No 2] (1992) 175 CLR 1, 59.}
\item \textit{Mabo v Queensland [No 2] (1992) 175 CLR 1, 43.}
\item Kildea and Williams, "The Mason Court" in Dixon and Williams (eds) \textit{The High Court, the Constitution and Australian Politics} (2015), 244, 248.
\item Kildea and Williams, "The Mason Court" in Dixon and Williams (eds) \textit{The High Court, the Constitution and Australian Politics} (2015), 244, 254.
\end{itemize}
(a) rejected the doctrine that Australia was terra nullius ... at the time of European settlement; and
(b) held that the common law of Australia recognises a form of native title that reflects the entitlement of the indigenous inhabitants of Australia, in accordance with their laws and customs, to their traditional lands...

Despite the passage of the Native Title Act, and the subsequent judicial recognition that any inquiry into native title must now be grounded in that Act rather than in the common law, the drafting and the interpretation of the Act have both been drawn deeply from the reasoning of Brennan J in Mabo, which remains an enduring and fundamental statement of the recognition and extinguishment of native title by the Australian common law. This is not to suggest that the views of Brennan J have prevailed in all respects. In Wik Peoples v Queensland, the High Court determined by majority, over the dissent of Brennan CJ (as his Honour had become), that native title rights were not necessarily extinguished by the grant of pastoral leases by the Crown. The legislative response, by way of the Native Title Amendment Act 1998 (Cth), had a significant impact on the burgeoning body of native title law. The High Court further refined the body of principles in a number of important judgments. In several significant decisions between 1998 and 2002, the High Court confirmed that "[t]he underlying existence of ... traditional laws and customs is a necessary pre-requisite for native title but [that] their existence is not a sufficient basis for recognising native title", and that in the absence of any inconsistency between the common law and the proposed native title rights or interests, the common law will "recognise those rights", and "by the ordinary processes of law and equity", give remedies in support of them. In these decisions, the High Court was also asked to extend native title to novel spheres of operation, leading to the Court's determinations that native title rights could extend to Australia's territorial sea and sea-bed, and to hunting and fishing rights, even in circumstances where state legislation regulated those rights.

In these cases too, however, the concepts ventilated and accepted in Mabo continued to reappear. Those concepts include the ideas that: "[n]ative title has its origin in the traditional laws acknowledged and the customs observed by [those] who possess the native title"; that native title, though not "an institution of the common law nor a form of common law tenure", is recognised by the common law; and that within Australian law, "[t]here is, therefore, an intersection of traditional laws and customs with the common law".

Legal recognition of other forms of "custom"

The second part of the story relates to the ways in which customary law (other than that encapsulated in "native title") is recognised in Australian law. As I have already foreshadowed, the recognition given to customary law outside the field of native title is extremely limited and highly fragmented. While the recognition of customary law has been mooted in several contexts, I will focus today on the protection accorded to traditional knowledge within intellectual property regimes.

Like the term "customary law", "traditional knowledge" is not susceptible to a single comprehensive definition, but it has been helpfully described as a "living system of information management which has its roots in

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43 Wik Peoples v Queensland (1996) 187 CLR 1, 88; see also 100, 167.
45 Fejo v Northern Territory (1998) 195 CLR 96, 128 [46].
46 Commonwealth v Yarmirr (2001) 208 CLR 1, 49 [42].
47 Commonwealth v Yarmirr (2001) 208 CLR 1, 60-61 [75]-[76], 134 [300].
50 Fejo v Northern Territory (1998) 195 CLR 96, 128 [46].
51 Fejo v Northern Territory (1998) 195 CLR 96, 128 [46].
ancient traditions", and as a "viable knowledge system that was the basis of traditional and developing societies." Common characteristics of indigenous knowledge systems include: "the holding of communal rights and interests in knowledge"; "interdependence between knowledge, land and spirituality"; the imparting of knowledge between generations according to "customary rules and principles"; and "the existence of rules regarding secrecy and sacredness which govern the management of knowledge". As is apparent from the breadth of this definition, "traditional knowledge" may be capable of protection by a number of causes of action within the standard suite of intellectual property protections, or in numerous other ways.

Some overtures have been made towards the protection of traditional knowledge through international instruments. For example, the Convention on Biological Diversity (1992), ratified by Australia in 1993 and partially implemented in the Environment Protection and Biodiversity Conservation Act 1999 (Cth), places obligations on contracting parties to "respect, preserve and maintain" traditional knowledge, to "promote" the use of such knowledge, and to "[p]rotect and encourage customary use of biological resources in accordance with traditional cultural practices". These protections are inherently limited in scope, applying primarily to traditional knowledge associated with bio-resources.

The Australian domestic intellectual property regime has on occasion been sought to be relied upon in order to protect some other aspects of custom. It has been observed, however, that such reliance faces at least two difficulties:

In one very fundamental sense, potential Indigenous IP rights are quite different to presently legally recognised IP rights because they consist, in many instances, solely of 'knowledge'. This knowledge may refer to identification of sites and areas, the rituals involved in preserving those sites and areas, the medicinal value of plants and animals, methods of preparation, the location of those species, and land management customs in relation to those areas or species. Moreover, given that this knowledge is cultural, ie, that it belongs to a particular, identifiable group, the potential 'ownership' rights are socially based, collectively owned and inherited. The fact that knowledge is held collectively and transmitted orally provides a second potentially fundamental departure from the traditional IP legal regime.

In addition, some critiques have focused on the inherent difficulties posed by specific elements of causes of action. By way of example, there have on occasion been suggestions that Australian domestic copyright law may not be a suitable vehicle for protecting "Aboriginal artworks based on pre-existing tradition and images" as such works may not be able to "satisf[y ...] the requirement of originality".

Despite these apparent complexities, in at least two cases, the Federal Court of Australia has permitted evidence of, and given some effect to, indigenous custom in the context of copyright claims. In Milpurrurru v Indofurn Pty Ltd, a claim for copyright infringement was brought by a number of indigenous artists who

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52 Howden, "Indigenous Traditional Knowledge and Native Title" (2001) 24 UNSW Law Journal 60, 60.
58 Milpurrurru v Indofurn Pty Ltd (1994) 54 FCR 240, 247; see also 248.
59 (1994) 54 FCR 240.
alleged that their work was substantially reproduced, without consent, on carpets manufactured in Vietnam and imported into Australia. After having determined that the importation of the carpets constituted an infringement of the claimants' copyright, von Doussa J acceded to the claimants' request, "so far as the procedural rules and practice of the Court permit", to give effect to the "Aboriginal law and custom [which] would treat each of the applicants ... equally so that the fruits of the action would be shared equally between the named parties". His Honour acknowledged the claimants' submission that this did not require the Court to "assess the liabilities of each respondent otherwise than according to [standard] principles", but rather that the Court had been invited "to express its judgment in terms which defined the aggregate liability of each respondent to the applicants as a group, rather than as individual judgments in favour of each applicant". This principle, and other aspects of custom, were given some effect in the assessment of the claimants' damages. An appeal was later allowed on other grounds.

Subsequently, in Bulun Bulun v R & T Textiles Pty Ltd, von Doussa J considered whether a representative of the group to which an indigenous artist belonged could maintain an equitable claim to ownership of copyright in that artist's work, concurrently with the claim of the artist. Bulun Bulun was noted without disapproval by the High Court in 2002 in the native title case of Western Australia v Ward.

In the course of considering the evidence filed in the proceedings, von Doussa J said:

Whilst Mason CJ observed in Walker v New South Wales ... that it is not possible to use evidence about indigenous customs and traditions to operate as 'customary law' in opposition to or alongside Australian law ... Australian courts cannot treat as irrelevant the rights, interests and obligations of Aboriginal people embodied within customary law. Evidence of customary law may be used as a basis for the foundation of rights recognised within the Australian legal system.

His Honour went on to note the claimants' "wide ranging search for a way in which the communal interests of the traditional Aboriginal owners in cultural artworks might be recognised under Australian law". In relation to their argument that "intellectual property rights are an incident of native title in land", von Doussa J commented that "[t]he principle that ownership of land and ownership of artistic works are separate statutory and common law institutions is a fundamental principle of the Australian legal system which may well be characterised as 'skeletal' and stand in the road of acceptance of the foreshadowed argument", although his Honour was not required to decide the issue.

Von Doussa J then explicitly rejected the argument that the "Ganalbingu people were communal owners of the copyright", stating that this would "involve the creation of rights in indigenous peoples which are not otherwise recognised by the legal system of Australia", and stand against provisions of the Copyright Act 1968 (Cth). However, his Honour determined that the artist held copyright as a fiduciary of the group, stating that:

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60 Milpurrurru v Indofurn Pty Ltd (1994) 54 FCR 240, 243, 248-249.
64 Milpurrurru v Indofurn Pty Ltd (1994) 54 FCR 240, 277, 279-280.
66 (1998) 86 FCR 244.
67 (2002) 213 CLR 1, 84-85 [61].
69 Bulun Bulun v R & T Textiles Pty Ltd (1998) 86 FCR 244, 256.
70 Bulun Bulun v R & T Textiles Pty Ltd (1998) 86 FCR 244, 256.
71 Bulun Bulun v R & T Textiles Pty Ltd (1998) 86 FCR 244, 258, see also 257.
The relationship between [the artist] as the author and legal title holder of the artistic work and the Ganalbingu people is unique. The 'transaction' between them out of which [the] fiduciary relationship is said to arise is the use with permission by [the artist] of ritual knowledge of the Ganalbingu people, and the embodiment of that knowledge within the artistic work. That use has been permitted in accordance with the law and customs of the Ganalbingu people.

... The law and customs of the Ganalbingu people require that the use of the ritual knowledge and the artistic work be in accordance with the requirements of law and custom, and that the author of the artistic work do whatever is necessary to prevent any misuse. The artist is required to act in relation to the artwork in the interests of the Ganalbingu people to preserve the integrity of their culture, and ritual knowledge.

His Honour went on to state that this determination:

does not treat the law and custom of the Ganalbingu people as part of the Australian legal system. Rather, it treats the law and custom of the Ganalbingu people as part of the factual matrix which characterises the relationship as one of mutual trust and confidence. It is that relationship which the Australian legal system recognises as giving rise to the fiduciary relationship, and to the obligations which arise out of it.

Von Doussa J concluded by discussing the scope of the fiduciary obligation, with reference to the law and customs of the Ganalbingu people.

It is notable that both Milpurrurru and Bulun Bulun were decided last century, and that there have been few, if any, situations in which indigenous custom has been utilised in similar ways in more recent intellectual property cases. Nonetheless, the cases do provide further examples of Australian law recognising aspects of customary law within a defined and confined area. It is also notable that, on such occasions, the language which accompanies the employment of "custom" or "customary law" is inevitably that of "recognition". The metaphor of "recognition" is a powerful one. As two members of the High Court recently stated:

The recognition of native title rights and interests translates aspects of an indigenous society's traditional relationship to land and waters into a set of rights and interests existing at common law. The metaphor of "recognition" reflects the proposition that the common law cannot transform traditional laws and customs, the relationships to country which they define, or the rights and interests to which, in their own terms, they give rise.

My thanks to Sarah Zeleznikow and to Alice Taylor for their considerable assistance in preparing this paper.

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75 As to this, see Meyers and Owoeye, "Intellectual Property Law and the Protection of Indigenous Australian Traditional Knowledge in Natural Resources" (2012) 22(2) Journal of Law, Information and Science 56, 63-65.
76 Queensland v Congoo [2015] HCA 17, [31].
INTRODUCTION

Religion has been defined as a system of faith and worship usually involving belief in a supreme being and containing a moral or ethical code. Religion has the absolute function of catering for needs satisfaction, control of behavior, simplification of actions, assigning roles and status and a contribution in uniformity of a society.

Culture on the other hand is the way of life of the members of a society; the collection of ideas and habits which they learn, share and transmit from one generation to generation. Culture has the characteristics of being learned, socially shared through transmission, constantly continuous and stimulative, dynamic and adoptive with gravity and super organic and ideational. Both Religion and culture are part and parcel of the existence of human beings. They are interwoven and totally tethered to each other. They both sustain life and help in peaceful coexistence and guide development in societies. Indeed, it’s the main distinguishing of the human society. From the foregoing definition it is worth noting that the underlying common denominator is the subscription to a certain way of doing things driven by long practice and/or a supernatural being.

UNESCO had this to opine in its world culture report:
“Culture shapes the way we see the world. It therefore has the capacity to bring about the change of attitudes needed to ensure peace and sustainable development which, we know, form the only possible way forward for life on planet Earth.”

The above aphorism with respect to religion was given a similar reception in the case of Williamson vs. Secretary of State for State for Education and Skills where it was stated:–

“Religious and other beliefs and convictions are part of the humanity of every individual. They are an integral part of his personality and individuality. In a civilized society individuals respect each other’s beliefs. This enables them to live in harmony.”

The law is defined as the authoritative regime that orders human activities and relations by systematic applications of the force of politically organized society or social pressure through the judicial and administrative process. John Austin says:–

“the existence of law is one thing; its merits or demerits is another. A law which actually exists is a law though we happen to dislike it or though it vary from the text, by which we regulate our appropriation and misappropriation”.

1 Bryan. A. Garner, Black’s Law Dictionary(7edn, Westgroup 1999)1293
2 Anthropology of Religion, Research Tank
3 Chapter 9: The characteristics of Culture- Earthlink Research tank
4 Culture & Religion for a sustainable future www.Unesco.org/education/tisf/mods/themec/mod10.intnl
Nevertheless, this paper, therefore will begin by providing a summarized theoretical framework of religion and culture, then thereafter highlight some of the religions and cultural issues that have got its way in the corridors of justice inter alia the courts of law, some of such issues include but not limited to: Abortion, Female Genital Mutilation (FGM), burial disputes and capital punishment. Thereafter systematic conclusions and recommendations are provided.

**THEORIZING RELIGION AND CULTURE**

1. **RELIGION**

Since it’s unlikely that we will all ever share precisely the same political views or rather convert to one religion, we need to find a basis on which to establish cooperation in the midst of the divide. The concept of natural law is such a basis. Such is the philosophical tradition agreeable to notable philosophers, sociologists, anthropologists and other social scientists the likes of Socrates, Plato, and Aristotle. Comte, Herbert Spencer and Ibn Khuldun as well as such other late era thinkers like Germain Grisez, John Finnis, C.S Lewis, Emile Durkheim, Max Weber, Antony Giddens and Robert George.⁵

C.S Lewis in his book the abolition of man indicated the universality of natural law by saying “this thing which I have called for convenience the Tao, or others call it the natural law or traditional morality is the first principle of practical reason or the first platitude and source of all value judgment."

The Quran endorses the principles of diversity as an essential element of accommodating other faiths and beliefs in due respect of all human dignity. Allah the exalted confers: “if thy lord had so willed, he could have made mankind one people; but they will not cease to be diverse”(Q.2:118)

Allah further reiterates:........To each among you have we given a law and a way of life. If Allah had so wanted, he would have made you a single person(professing one faith and following one law) but he wished to test you with which, he has given each of you. So excel in good deeds”(Q.5:48).

The importance of natural law in ethical matters has long been recognized by the catholic church as clearly stipulated by the legendary Theologian St. Irenaeus in the second century and he rights “from the beginning God had implanted in the heart of man the precepts of the natural law. Then he reminded him of them by giving the Decalogue.”⁶ So emphasized pope Benedict XVI in his encyclical Deus Caritas(God is love) where he affirms the principles of natural law. “The church’s social teaching argues on the basis of reason and natural law, namely, on the basis of what is in accord with the nature of every human being.” As Thomas Aquinas so puts, the virtue of religion is not merely a theoretical virtue but more so a natural virtue falling under the basic of justice and truth⁷. In short, the basic principle of natural law ethics, therefore, is pretty simple: Do good and avoid evil.”⁸ Such is the similar philosophical aspect nurtured by the Quran Allah says “And let there arise out of you a band of people inviting to all that which is good and enjoining what is right and forbidding what is wrong, they are the ones to attain felicity”(Q.3:104)

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⁵ Montague Brown: The Role of Natural Law in the World of Religious and Political Diversity
⁶ Richard Neuhas in FIRST THINGS. Dec 2005, No158 pg 27-28
⁷ Thomas Aquinas, Summa theologiae 1-2.100.1
⁸ ibid
The same virtue on justice is elaborated here, “O you, who believe, stand out firmly for Allah and be just witness’s band let not the enmity and hatred of others make you avoid justice. Be just: that is closer to piety, and fear Allah, verily, Allah is well Acquainted with what you do.”

2. CULTURE

The beginning of the movie: *the gods must be crazy*, introduces a small group of Khoisan also known as “bushman” who live in the Kalahari desert in southern Africa and describes their way of life. The plot of the movie revolves around what happens once a plane’s pilot throws a glass bottle of coca cola soft drinks out of his cockpit window and the bottle lands right where the bushmen live they interpret it as the gift from the gods but are not sure how to use it collectively for the benefit of all hence causing conflict and contention among the group. The abhorred it and have no word for the bottle calling it an object of, “the evil thing or spirits”. They bestowed upon one of them to dispose it out of the eye sight of the community. Sending back the bottle to the gods by throwing in the air turned to be fruitless the only solution was to dispose it at the edge of their land. The moral lesson learnt from the above movie revolves around when different cultures meet and how cultures shape what we take to natural and normal to a point of contention, conflict or harmony. As such one of the founding fathers of sociologists, Emile Durkheim integrated from the onset the components of culture into his analysis of social fact theory. His concept of social solidarity imply that members of society share what he refers to as collective conscience. According to him and other sociologists like Talcot parsons held that culture is the glue that holds society together and any disruption or rupture in the cultural systems is a threat to society as a whole.

THE BOND BETWEEN RELIGION AND CULTURE

There is no doubt that part of the great diversity of human kind is the many different religious system we developed over ages- Animism, Buddhism, Christianity, Islam, Hinduism, Jainism, Taoism and many other ancient and emerging beliefs. Hence religion has a strong influence in the culture of a community. Indeed, for many, religious beliefs are central and are an integral part of a given society. In contrast, culturalist held that culture is the bedrock and source of religious beliefs.

RELIGIOUS AND CULTURAL ISSUES IN COURTS

1. ABORTION

The Black’s law dictionary defines abortion as the *spontaneous or artificially induced expulsion of an embryo or fetus*. Statistics illustrate that more than 60% of the world’s population live in countries where induced abortion is permitted and 26% in countries where it’s generally prohibited. The reason for prohibition ranges from saving the woman’s life on social economic reasons such as the woman’s age, economic or marital status to birth control.

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9 Christine Monnier’s. Introduction to Culture.
10 Christine Monnier’s. Theoretical Analysis of Culture.
11 ibid
13 http://www.reproductiverights.org/sites
The legalization of abortion has been met with a lot of criticism from the religious factions. Muslims regard abortion as wrong and forbidden, but majority permit it narrowly in necessary circumstances for example protecting the right to life of the embryo in normal circumstances but when the life of the mother is exposed to certain danger that cannot be avoided it becomes permissible\textsuperscript{14}. This right is established by the general prohibition of killing; Allah the exalted says “…..and kill not any soul that Allah has forbidden except for a just cause…”Q.6:151 which is supported by the Islamic jurisprudential principle “eliminate the doubtful life to save the existing”. In particular, Catholics abhor abortion with the strongest vigor and participating in it can lead to excommunication of a member from the catholic church\textsuperscript{15}. Rule number 2270 of the catholic church on abortion states as follows-:

“Human life must be respected and protected absolutely from the moment of conception. From the first moment of his existence, a human being must be recognized as having the rights of a person-among which is the inviolable right of every innocent being to life.”

Some examples of how courts of law have handled abortion matters constitute the one in the English case of Rex Vs. Bourne \textbf{(1938)} which had set a precedent in the legality of abortion in common law jurisdictions\textsuperscript{16}. The court ruled that the abortion was lawful because it had been performed to prevent the woman from “a physical and mental wreck”. Similarly, the decision in \textbf{Roe Vs. Wade \textbf{(1973)}} revolutionized abortion laws in the U.S\textsuperscript{17}. The supreme court in this case adjudged that prohibition of abortion by a Texas statute was unconstitutional and went against the right to privacy. Here, abortion was associated with the right to privacy under the United States constitution.

It is very imperative that when it comes to policy making in regard to abortion, religious and cultural factions should be involved to give their input be it in courts of law or any other formal forums.

\textbf{BURIAL DISPUTES}

Death is inevitable. It is a constant in life. The very fact that we exist consequently means that at some point we stop existing. When this happens, concerns arise relating to laying the remains of the deceased and inheriting his estate. Common questions include who has the right among the family members to dispose off the body and how. Determinations by the courts of law have differed on the same based on divergent considerations and societal interests. In Florida for example, courts would give control over the burial arrangements to the spouse and where none exists, to the next of kin\textsuperscript{18}.

In Kenyan courts, there emerged different verdicts on this matter each case based on circumstances and evidence adduced in submissions. The case of \textbf{Eunice Moraa Mabeche and 3 others vs. Grace Akinyi civil case No.2777 of 1994} is a classic example of the conflict between culture and religion. The facts of the case are that, the deceased, Robert Wangila was initially a Christian who professed the catholic denomination. He was married to Grace Akinyi. At some point they vacated to the United States of America where the deceased converted to Islam before he died. After his death, there were

\begin{itemize}
\item \textsuperscript{14}The Islamic Charter on family pg 421
\item \textsuperscript{15}The bible under Jeremiah 1:5
\item \textsuperscript{16}3All E.R 615(1938)
\item \textsuperscript{17}410 US 113(1973)
\item \textsuperscript{18}www.lifemanagement.com/nextstepsbook/pdf/next steps.
\end{itemize}
contestations as to where he should be buried. Eunice Moraa who was his mother approached the court for an injunction to stop the wife (i.e.) Grace Akinyi from burying the deceased stating that the deceased was from the Kisii tribe and according to Kisii culture the deceased should be buried in south Mugirango in Kisii. There was another group that filed a different case against the mother claiming that the deceased was from the Samia clan of the Luhyas tribe and should be buried in Siopetro. The cases were consolidated to be heard together and subsequently the supreme council of Kenya Muslims were enjoined in the case and their argument was that the deceased was a Muslim and therefore be buried according to Islamic law at Kariokor cemetery in Nairobi. The court held that the plaintiff was a Muslim and therefore the Muslim community had the right to bury him according to Muslim law and practice in the presence of his mother and wife.

In the case of John Omondi & Another Vs Sueflan Radal (2012) eKLR, the court held that a surviving spouse is the person with the greatest responsibility for laying to rest the remains of the deceased spouse. On the contrary, the Court of Appeal in Kenya in its judgment in Civil Appeal No.31 of 1987, reversed the ruling of the high court that gave the wife the deceased, the prominent lawyer S.M Otieno the permission to bury the body of her late husband. Eventually, she lost custody of her husband’s body and he was buried according to Luo customary Law and traditions.

In conclusion, there is necessity in understanding that burial disputes are characterized by complex psychological and emotional dynamics that requires judges to pay more close attention to such underlying aspects.

3. FEMALE GENITAL MUTILATION (F.G.M)

Female Genital Mutilation (FGM) comprises all procedures that involve partial or total removal of the external female genitalia or other injury to the female genital organs for none medicinal reasons. Statistics are that every year, 3 million girls and women are subjected to genital mutilation. The vice is mostly concentrated in Africa and Middle East. The practice is however strongly anchored on social conventions. Its justifications lies in strong cultural, social and religious concepts such as the fact that it is considered a necessary practice in proper parenting of the girl child in preparation for adulthood and more keenly marriage.

IS FGM A RELIGIOUS CONCEPT?

Female Genital Mutilation, As far as the Islamic point of view is concerned has been a contested subject over ages and no common stand on it has stood the test of time ever since. FGM however in Muslim societal environs, is mostly practiced in communities residing in central, east and north Africa and some parts of the Arabian peninsula but prevalence rates vary according to ethnicity, cultural norms and not necessarily on religious grounds.

The grand Iman of Azhar in Cairo, the late sheikh Mohamed Sayyid Tantawi opined that “Islamic sharia protects children and safe guards their rights those who fail to give rights to their children commit a major sin. FGM is a medical issue, what doctors say we heed and obey. There is no authentic text in the Koran and the prophetic sayings addressing FGM. The extensive research by recognized organizations has therefore concluded that the Quran is silent on FGM and majority of Muslims do not condone the practice.

19 http://www.who.int/mediacentre/factsheets/fs241/en/
From the Christian perspective FGM has no religious ground whatsoever. It is further stated that it's medically, morally and practically groundless. Bishop Mousa, the representative of Shenouda the third of the Coptic Orthodox church opined that, “there is not a single verse in the bible; old or new testaments, nor is there anything Judaism or Christianity – not one single verse speaks of female circumcision.”

THE LAW AND POLICY ON FGM
On 14th August 2014, the high court sitting in Nairobi Kenya upheld the decision of a lower court to convict a woman who had carried out FGM on several minors. This was in the High court criminal appeal No.6 of 2014eKLR. In another precedent setter in Kenyan context, the High Court in a criminal appeal no.115 of 2010(eKLR) displays the gruesome consequences of FGM. The appellants thereof were convicted to offence of man slaughter contrary to sections of the penal code (cap 63 laws of Kenya).

FGM AND HUMAN RIGHTS
As a harmful customary and traditional practice, FGM is addressed under two important legally binding international instruments, the 1979 convention on discrimination against women (CEDAW) and the 1989 convention on the rights of children(CRC) in addition to other various regional conventions and treaties.

CEDAW addresses FGM and other cultural practices in the context of unequal gender relations and calls upon state parties to take all appropriate measures to curb the vice. In regard to the constitution of Kenya 2010 FGM is an affront to article 26(1) and (3), article 27(1) and (2), article 28 on human dignity and article 29 (c), (d) and (f).

Great efforts have been made to combat FGM vice through research, community work and paradigm shift in public policy. In 2010 WHO in collaboration with other key UN agencies and other international organizations published a global strategic plan to stop health care providers from performing FGM. In December 2012, the UN general assembly adopted a resolution on elimination of FGM.

4. DEATH PENALTY
Death penalty also referred to as capital punishment is, “the punishment of execution administered to someone legally convicted of a capital crime.” Such a punitive punishment has been practiced over ages for serious and capital offences. Today over two thirds of the world countries abolished the death penalty in law and practice hence there exists a downward trend in the number of death sentences and executions worldwide. To date 141 states have abolished the death penalty for all crimes, however capital punishment is still applied in 58 countries and territories.

21 Supra, note 8
23 Oxford University Dictionary- Online edition
24 Amnesty International –Annual Report of 2014
**DEATH PENALTY IN ISLAM**

The spirit of the Islamic penal code is to save lives, promote justice and prevent corruption and tyranny. Life is sacred in Islam; but how can one hold life sacred by yet still support capital punishment? The Quran answers this query, “…..Take note life, which God has made sacred except by way of justice and law”-chapter 6 verse 151. The key point is that one may take life only by “way of justice and law”, therefore, the death penalty can only be applied by a court of law as punishment for the most serious crimes.

Islamic philosophy holds that a harsh punishment serves as a deterrent to serious crimes that harm individual victims, or threatens to destabilize the foundation of society. Allah the Exalted says, “....if anyone kills a person unless it be for murder or for spreading mischief in the land-it would be as if he killed all people and if anyone saves a life, it would be as if he saved the life of all people.”-Chapter 5 verse 32.

Thus according to Islamic Law, the following two crimes can be punished by death:-
1. Intentional murder.
2. Spreading mischief in the land which is wide and needs open interpretation, but it is generally meant to mean those crimes that affect the community as a whole and destabilize the society.

These include but not limited to:-

a) Treason/apostasy
b) Terrorism
c) Land, sea or air piracy
d) Rape
e) Adultery/homosexual behaviours

On the other hand Christians argue both for and against the death penalty based on the tenets of their faith. For much of history, the Christian Churches accepted that capital punishment was a necessary part of the mechanisms of society.

The death penalty is consistent with the Old Testament Biblical teachings, and suggests that God invented the death penalty whereupon the scriptures specifies a total of 35 capital offences in addition to murder, idolatry, magic and blasphemy.

In a landmark ruling by the Kenyan High Court in **Criminal Case No. 86 of 2011**, the judge agreed to settle the dispute by way of adopting a cultural settlement with a religious dimension. Upon getting satisfied with the contents of mutual consent letter upon the family of the deceased and that of the accused where they settled on some sort of camels, goats and some traditional ornaments as per the Somali Community Cultural norms which is basically what the Islamic Law stipulates on such occurrences, the Judge, after allowing some affidavit evidence, ruled to the effect that the ends of justice will be met by discharging the accused following the cultural and religious based settlement consented by both parties. By doing so, the learned Judge based her ruling on the provisions of Article 159 (1) of the new Kenyan Constitution which allows the Courts and the Tribunals to be guided by Alternative Disputes Resolution mechanisms (ADRs), reconciliation, mediation, arbitration and traditional disputes resolution methods.  

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25 Criminal Case No.86 of 2011(eKLR) Issued by Lady Justice Roseline Langat Korir
In conclusion, the variant approach towards the penalty of capital punishment derives from various penological schools and theories of retribution, restitution and restoration.

**CONCLUSION AND RECOMMENDATIONS**

Finally, religious and cultural issues in Courts are a fertile area that can furnish the growth of jurisprudence in the world. In this paper, what came up is that there is a strong linkage between religious and culture tenets and that if comparative study is done it can yield a harmonious path to justice. Considering that there exist instances when religion, culture and the law conflict where one tends to prevail over the other and try to destroy it or reject specific elements of its beliefs. In such circumstances there is indisputable need to try as much as possible to consolidate them and create a realm of conformity where applicable.

The paper therefore sets itself out to recommend that policy makers must:-

1) Organise formal conferences where all stakeholders are invited. Discussions should centre on the presentation of results of-country research, documentation studies and best practices on such burning issues that have got cultural and religious effect on legal platforms.

2) Efforts must be enhanced to ensure that all actions, governmental, non-governmental, judicial, individual or corporate events are synched. There has to be proper collaboration and linkage between all organs in a spirited bid to address those pertinent matters.

3) Enhancing efforts at enabling women to achieve self-reliance on complex matters affecting them. Issues of abortion and FGM which directly involves them must be tacked to meet women expectations, thereby realizing their rightful position in society.

4) Stakeholders should organize forums for journalists and other media platforms to encourage continuous publicity through their broadcasting and publications as to the needs for addressing the subject matters raised in the study.

5) Campaigns and mobilization of broad publicity should be initiated as it plays an important role in International, National and local attitude change.
“Dealing with Litigants in Person”, the topic for this session, raises fundamental questions concerning the ability of judiciaries of countries of the Commonwealth that adopt the common law legal system, to provide access to justice to ordinary people. The common law legal system is premised on bringing access of justice to all; however the system is attendant with formal and technical rules of Court practice, procedure and evidence that is meant to serve the lawyers that represent litigants; such that the application of those rules by the Courts and judicial approach to dealing with litigants in person can become too cumbersome and pose an hindrance to access to justice for ordinary litigants in person who wish to bring and prosecute (or defend) their own proceedings. The classic “litigant in person” is not a lawyer, and often an ordinary person of limited or no formal education; or if educated has little or no understanding of the formal court process. In a modern day setting, in the face of rising litigation costs and legal fees, an increasingly informed public that is fast learning the skills of lawyers, the volume of litigants in person has significantly increased in most countries of the Commonwealth. Yet it seems governments and the Courts have been slow in responding to the demands of litigants for the government and the Courts to tailor the procedural laws and rules of court in order to facilitate the litigants in person access to justice in the Courts. This appears to be a common problem faced by many Commonwealth countries and in some countries such as PNG, it has become almost a plight and if not addressed properly soon enough, it could reach boiling point for litigants in person and become unmanageable for the Courts. The problem is unlikely to go away over time; instead it is likely to intensify and judiciaries of the Commonwealth should address it sooner than later.

The purpose of my talk this afternoon is to briefly discuss the topic with a view to assisting Courts to develop some form of uniform standards by which litigants in person are dealt handled by the Courts in a way that the litigant is afforded reasonable access to seek justice in the courts in the sense that the litigant in person is given an opportunity to bring his or her case before the Court without difficulty and afforded a fair hearing of his or her grievance at every phase of the case filing and hearing process.

Judicial approach employed to deal with litigants in person varies amongst Commonwealth countries. With the exception of a few countries that have legislation in place that have statutory schemes in place to facilitate assistance to litigants in person, the approach in most countries including PNG remains largely unstructured, ad hoc and piece-meal approach. There is a need to set some form of Commonwealth standard in terms of setting minimum standards and guidelines by which countries of the Commonwealth and Judiciaries in particular should approach their dealings with litigants in person, in a way that is principled, structured and effective. To assist us in our thinking on developing such minimum standards, I propose to identify and discuss some of the important matters that need to be addressed, using my own limited experience in dealing with litigants in person in PNG.
Affirming the principles that underpin access to justice in the Courts.

The first step in the process is to get the principles that underpin access to justice, right. If we do not get the principles right, we will not get the methodology right and in the process, justice can be denied or miscarried. There must first occur an acknowledgment of the underlying principles pertinent to the rights of litigants to seek justice in the Courts of law.

Some of the important principles that are pertinent to access to justice are these. The judicial power to determine disputes does not belong to the Courts and the judges; it belongs to the people who vest that power in the Courts. Litigants have a right to seek justice in their Courts. It is right that the litigants should come to the Court to get their disputes resolved without any difficulty. Justice should be readily and easily available and any rules of practice and procedure and judicial approach should be facilitative rather than an hindrance. There is problem for judiciaries to be able to facilitate easy access to justice for litigants of a single homogeneous nation State; and I would think there are very few countries in the Commonwealth that are comprised of a single homogeneous group of people. The problem becomes even more difficult for countries with diverse groups of people. Most countries of the Commonwealth comprise people of diverse groups. Each country is has living within it either multiracial, multi ethnic and multicultural or multi-linguistic backgrounds. The problem reaches new dimensions for countries that have a large rural population. Most countries of the Commonwealth are comprised of the rural majority, of ordinary people who live in the villages area and their way of live governed by longstanding traditions and customs. With the introduction of the new order social order by the notion of a single nation State, it matters to those people in their diversity and the nation State that their diversity be recognized the State by force of law and every effort be made to facilitate them access to justice. The force of law should make provision for the diverse societies to continue to thrive in their own way and at the same time integrate their worthy customs and traditions to play a meaningful part in the provision of access to justice. These are some of the more important and fundamental principles that should provide the foundation upon which the plight of litigants in person is addressed by governments and the Courts.

In terms of articulating the principles by force of law, I use PNG as an example. PNG is by far the most diverse nation that I know of, probably on the face of the earth. The Pacific rim is the home to 24 countries. In terms of the smaller Island States excluding Australia and New Zealand, PNG’s population is the largest island State. Close to 7.5 million people, which is 50% of the Pacific island population 14 million of island live in PNG. PNG is known for its ethnographic diversity and the diversity of its traditional and cultural heritage. For instance, of the World’s 6,000 languages, 800 or 13% (or more than 50% of the languages spoken in the Pacific) are spoken in PNG. Each language represents a distinct ethnic group. In these kind of diverse conditions, anything can happen for the better or for worse. It is no wonder that PNG has attracted a notorious reputation to be known “as the land of the unexpected”. In these conditions, participants at this conference would want to expect PNG to be in a position to have developed sufficient and special experiences in dealing with litigants in person from diverse groups to be able to share with judicial officers of other commonwealth countries. You will be disappointed to know that PNG does not possess those experiences; instead, PNG Courts has very limited experience in dealing with litigants in person and therefore it stands to learn from the experiences of other Commonwealth countries who have addressed the problem.

There is however one thing that I believe PNG has got it right. It has got the basic principles right. The principles that I have alluded to are embodied in the Constitutional of PNG. And for a country that that diverse, it is necessary for the Constitution, the supreme law of the land, to recognize and
affirm that diversity and in that way, assuring the people that the way of life of the rural majority is respected in the pursuit of modern nation-building. The Constitution of PNG, under The National Goal No. 5 states:

**Goal 5: Papua New Guinean ways.** We declare our fifth goal to be to achieve development primarily through the use of Papua New Guinean forms of social, political and economic organization. WE ACCORDINGLY CALL FOR—

- a fundamental re-orientation of our attitudes and the institutions of government, commerce, education and religion towards Papua New Guinean forms of participation, consultation, and consensus, and a continuous renewal of the responsiveness of these institutions to the needs and attitudes of the People; and
- particular emphasis in our economic development to be placed on small-scale artisan, service and business activity; and
- recognition that the cultural, commercial and ethnic diversity of our people is a positive strength, and for the fostering of a respect for, and appreciation of, traditional ways of life and culture, including language, in all their richness and variety, as well as for a willingness to apply these ways dynamically and creatively for the tasks of development; and
- traditional villages and communities to remain as viable units of Papua New Guinean society, and for active steps to be taken to improve their cultural, social, economic and ethical quality.”

The Constitution declares that the judicial power of the people is vested in the Courts of the national judicial system. The Supreme Court in several cases has judicially determined this provision to mean a direct vesting of judicial power by the people on the Judiciary through the Constitution.

The Constitution then goes on to declare the civil rights of the people to freely bring their disputes over determination of the existence of civil rights or obligations to be determined by “by an independent and impartial court or other authority prescribed by law or agreed upon by the parties, and proceedings for such a determination shall be fairly heard within a reasonable time; and to have that determination reviewed by a higher court or tribunal according to law.”: Constitution, s 37 (14), (16).

In PNG, as with other nations of the Commonwealth, a majority of the people who live in the rural areas (rural majority) are ordinary and simple people whose dispute resolution methods and processed are simple, practical and purpose driven. Disputes are settled amicably with no rules regulating access to the customary dispute resolution authority (the leaders). The dispute is privately talked over between the disputing parties, if that fails to reach an agreement, it is brought to the open for the whole community to discuss and mediate and assist parties to reach an agreement. If that fails to resolve the dispute, it is taken to the Chiefs to resolve the dispute through negotiation, compromise and reconciliation. If that fails, some limited form of adjudication is performed by the Chief as a last resort and enforced by the community. This process guarantees a peaceful resolution of the dispute—one that the parties and the whole community are comfortable with and can live with. In the context of unrepresented litigants, how the formal Courts integrate this form of useful dispute resolution method in dealing with litigants remains a challenge.

**Offering alternative and more appropriate methods and processes for dispute resolution outside the formal Court process- Informal Court System**

Each country should provide alternative dispute resolution forums that are appropriate for the rural majority. In PNG, the Village Courts system established by statute makes provision for resolution of disputes in the villages applying local customary law. Lawyers are prohibited from appearing for any party. Mediation is the main method of dispute resolution mandated by statute. Orders for a fine or compensation made by the
Village Courts are enforceable imprisonment by the District Court. About 80% of disputes in PNG are resolved by Village Courts. There are over 700 village Courts serviced by over 16,000 Village Court officials in PNG.

The Constitution and Statutes that create the formal Courts – the District Courts (Magistrates Courts), National Court and Supreme Court, make provision for customary law as a source of the underlying law, the other source being the common law and equity of England. It is possible for a civil action based purely on local custom to be pleaded and conducted in all these Courts, by litigants in person.

Legislative reform that recognizes and facilitates ordinary peoples’ right of access to justice: Formal Court System

Each country should by legislation recognize the plight of the unrepresented litigants and provide legislation that sets out the framework by which legal and other assistance. Legislations have been introduced in a number of Commonwealth countries including the United Kingdom that sets up a scheme to assist litigants in person. In PNG, there is none. PNG stands to learn from the experiences of those countries.

Rules of practice and procedure that facilitate easy access to justice for the ordinary people in the formal Courts

In most common law jurisdictions, the executive and legislature appear to be slow in enacting legislation that affects the Courts processes perhaps out of respect for judicial independence, unless the initiative for the legislation were to come from the Judiciary itself. Judiciaries are faced with a no go zone in matters of policy and legislation and remain at arms length. The plight of the litigants in person continues unabated. But there is a way. If the legislature is slow in introducing legislation to facilitate assistance to litigants in person, then the Courts should use their rule-making power given by statute, to fill the gap and introduce a comprehensive set of rules of court that facilitate easy access for litigants in person. In PNG, the high Courts and Magistrate’s Courts have taken some steps to address the problem in different ways but those efforts still remain ad hoc and piece-meal. The Courts do not provide any legal services or assistance to litigants in person or pro bono work for self represented litigants. There is no specialist judges assigned to any special court track under rules of court designed to deal specifically with self represented litigants or small claims. No special allowances are made for self-represented litigants for their claims to be treated any differently than those of represented litigants.

In the magistrates Courts, most litigants are self represented. Magistrates deal with self-represented litigants on a daily basis. The enabling statute defines the formal procedures and the form in which proceedings may be commenced or defended and those forms are formalistic and technical. There are no published reports on how Magistrates handle those cases and litigants in person in Court. I am not able to share any information in that regard.

With regard to the high Courts – the National Court (Court of first instance) and Supreme Court (Appeal Court), of the little that has been done by the Courts, the steps put in place to assist litigants in person include the following:

- Simplified National Court and Supreme Court appeals forms in English and Tok Pisin versions.
- Professional assistance offered to prisoners in person to prepare Appeal Books for Supreme Court criminal appeals free of charge.
- Simple Complaints forms introduced by Rules of Court for Application for Enforcement of Human Rights in the National Court. This has enabled many litigants in person to lodge and conduct claims in the National Court.
- The prospect of posting duty-lawyers engaged by the PNG Law Society and Public Solicitor’s office, to be stationed at the Court house, to offer pro-bono legal services is under consideration.
PNG Judiciary wants to develop its own scheme for assisting litigants in person. PNG stands to learn from the experience of those countries that have developed standard by rules of practice and procedure to facilitate litigants in person.

**Judicial approach to dealing with litigants in person:** *Communication in language of their understanding, Flexibility, Neutrality, Impartiality, Objectivity and Encouraging alternative dispute resolution in civil cases using ADR and Mediation*

For those countries of the Commonwealth that are in a situation similar to that of PNG, judicial approach to dealing with litigants in Court remains largely ad hoc and varied amongst judicial officers. Very little is written on the subject. No one judicial officer knows how another officer handles a litigant in person in their Court. In order that there is some degree of uniformity and consistency in judicial approach to dealing with litigants in person, there is a need to develop some minimum standard of practice with regard to how these group of litigants are handled by judges and magistrates in Court over different phases of the court process. Drawing from my own experience in sitting in dealing with litigants in person, I mention a few of the problematic areas for discussion at this conference with a view to finding the way forward in reaching some minimum standards:

- **Communication: Official Language of the Courts**

*Communication, in a language of their common understanding, between the Courts and litigants in person* is vital for access to justice. Most if not all Commonwealth countries have living within their borders diverse racial or ethnic groups with their own languages that pose difficulties for the litigants in person. In PNG, only three of 800 different languages spoken are officially recognized as National languages (English, Tok Pisin and Motu). Only English is recognized as the official language of the formal courts.

Translating Court documents and forms has not occurred except for a few appeal forms for use by prisoners in person appellants. An English-Pidgin Court dictionary was published many years ago which has not been updated. In court accurate translation still remains an issue even though the Court has a dedicated staff that provides interpretation services.

Litigants in person are allowed to speak in Tok Pisin and Motu or any other languages they prefer to speak in and interpreters are used to translate the speech into English, even if the Judge knows that language. In some instances, judges are tempted to speak in the same language if the judge is dissatisfied with the interpretation or if there are no interpreters in Court.

- **Drafting and filing Court documents**

Court documents are required to be drafted and filed in English. The practice remains unchanged in PNG. Court documents filed in other languages are rejected at the registry.

- **Judicial scrutiny of documents filed in person**

The ordinary high standard of Judicial scrutiny of court documents filed by litigants is applied in PNG. Many documents are struck down or amended. Should there be different standards of scrutiny, a lower standard of scrutiny, for litigants in person?
• **Deciding cases on technicality rather than on substance**
Many cases are thrown out at the preliminary stage on technicality for want of form, etc. There is a feeling of injustice that the case has not been determined on the merits. Should the Courts insist on strict compliance with formal requirements?

• **Flexibility**
Against the notion of equality before the law, should the Courts maintain a flexible attitude to scrutinizing the appearance and conduct of litigants in Court? Many litigants, more so out of ignorance that disrespect for the Court, do not observe appropriate dress codes, do not observe court room protocols, follow no order in their presentations and become argumentative? Should Courts be flexible in accommodating or insist on litigants observing strict protocol and decorum?

• **Neutrality**
Many litigants appear in person and need assistance to organize and present their cases. When one party is represented, the unrepresented person is disadvantaged and needing assistance. Some of us Judges take great deal of time explaining things to litigants in person. Should the Court lend its assistance to the unrepresented litigants in understanding the rules of court and their application to examine witnesses and make submissions? If one party is represented by counsel and there is some balance achieved and the party represented by law may accept the judicial intervention. If both parties are unrepresented, should the judge intervene; and if so, how does the judge maintain the balance?

• **Impartiality**
Some litigants in person do at times earn a reputation in the Courts as busybodies or notorious in the way they present their cases. There is a chance that the Courts may develop certain attitudes towards them that might not be facilitative of access to justice or a fair hearing. How do the Courts deal with this kind of litigant?

• **Objectivity**
Given the manner in which litigants carry on court proceedings, particularly the notorious ones that have a reputation in the courts for being pushy, persistent and argumentative with the judge over unmeritorious cases, it is irritating enough for the Judge or Magistrate to handle the litigant (may raise his or her HBP and stress level) and become antagonistic towards the litigant in person and in the process loose his or her temper, balance and objectivity. How do judges and magistrates handle such litigant? How should the judge behave in such case?

• **Encouraging alternative methods of dispute resolution in civil cases that involve ADR and Mediation.**
In civil cases registered in the Court of first instance, a lot of cases that involve ordinary persons in numbers and many claims are filed by litigants in person. They are the most contested cases. Many of those cases seek are declaratory relief and damages and are bitterly contested. Even with lawyers appearing for them in court, many want take over the case. An alternative method of dispute resolution within the formal court system must be found to deal with these types of claims.

In 2010 the Courts initiated a move for Court-annexed Mediation to be introduced as part of the formal judicial dispute resolution process. Parliament amended the District Courts Act and the National Court Act which introduced mediation. The amendment are being implemented to resolve
many disputes registered in the Courts, particularly those civil cases that involve customary natural resource ownership and development issues. Many of these claims are brought by litigants in person coming from rural communities where the resource development project is situated.

The Courts encourage mediation as a first step to dealing with these claims and insist on litigants in person appearing at mediations to hear them out. Some engage lawyers but they are side-lined at times.

In the National Court, the amendment to the National Court Act provides for the training and accreditation of mediators which includes judges. Comprehensive set of rules of court have been developed to complement the statutory amendment. As I speak, there are over 100 Mediators trained and accredited in PNG, amongst them over 10 Judges and some 15 international mediators from Australia who specialize in civil commercial mediation. This method of dispute resolution takes a lot of burden away from the formal Courts. Apart from conducting mediations in the mediation room, they go out to the field where the parties live and visit the site of the resource development and speak to the real parties or litigants in person, conduct verifications and resolve disputes at the site through mediation. The mediators are welcomed by litigants with open arms. Everyone gets a chance to speak in the on-site Mediation. The mediators’ role in the mediations is respected. The mediators assist litigants to reach their own agreement to resolve the dispute. A settlement is reached which is endorsed by Court order on site. Everyone is happy. Everyone is happy. A meal or feast is shared by everyone. The mediators including judges share the moment. The Mediation party is farewelled. A good example of the Court affording access to justice, to litigants in person, Mediators and Judges dealing with the litigants in person face to face, on site, using a process the dispute resolution process that they know best, applying the law that they are accustomed to, and reaching a resolution of the dispute that the parties can live with.

Suggestion-the way forward
Amongst the matters to be considered in developing standard guidelines for dealing with litigants in person in a way that is facilitative of access to justice, I suggest the following matters: Declaration of underlying principles that underpin dealing with litigants in person, Statutory enactment, Rules of practice and procedure and Judicial approach in dealing with litigants in person in Court.
Introduction

Gender Based Violence (GBV) is a global concern that calls for the involvement of everyone on how best to stop it. Deeply rooted in and perpetuated by cultural practices, perceptions and attitudes of various communities in different parts of the world, GBV has no place in the twenty first century. It is universally accepted that all human beings have a right to life, and states must provide an environment in which everyone can realize their full potential.

Human relations are governed by the principles of human rights, equality, equal protection of everyone by the law, non- discrimination, respect and dignity for all human beings, justice and fair treatment of everyone. To achieve this goal, governments and legal systems must ensure that laws, policies, institutions and programs are put in place towards the elimination of GBV. Towards this end, civil societies, judiciaries, prosecutorial agencies, security systems, health institutions, lawmakers, sociologists, anthropologists, lawyers, policy developers, societies, communities, families, individual experts, and indeed everyone must play their role towards building a secure world devoid of GBV.

This paper argues that legislative and policy measures alone are not sufficient in addressing GBV. Although they are effective in creating fear of punishment in potential perpetrators of GBV, the socio cultural and economic circumstances in which GBV occurs, and which determine access to justice by victims must addressed.

The arguments are structured within the context of the new Constitution of Kenya 2010. The presentation is divided into thematic areas:

Defining Gender Based Violence

There is no agreed, exact and precise definition of GBV today. Different definitions and understanding of the phenomenon exist. However, whichever description one adopts, there are common themes that characterize any attempt to define GBV. These are the concepts of gender, power, violence, the use of force, injury or harm, human rights and consent. The term gender must be differentiated from sex, which refers to the biological differences between males and females. Gender refers to the social construction of the roles, expectations, privileges, opportunities, access to resources, and limitations between males and females in any given society. Gender attributes manifest the society’s socialization and perception of the unequal distribution of power between males and females.

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1 Department of Justice, Canada (2001), Report on Spouse Abuse Policies and Legislation
Power refers to the exercise of authority and control by one gender over another, historically by the males over the females. The resultant unequal relationship is one of male dominance over the females as their subordinates. In order to maintain the unequal relationship, violence is the tool used to exercise the dominance by one gender, while ensuring the subordination of the other.

Violence therefore refers to the use of force, directed at the victim to force them to do something against their will. The violence may be physical and manifested through direct physical force, manipulation, threats, intimidation, coercion or verbal force. It may take the form of social force such as social stigma, isolation, ridicule and discrimination. It may be economic violence such as denial of access to basic resources such as food, shelter, livelihood, money and employment. The violence may be political, perpetrated through differential access to protection mechanisms and opportunities or through the use of discriminative laws, policies or practices.

The use of violence results into harm or injury to the gender it is directed to. Such harm/injury may be physical, psychological, emotional, mental, spiritual, financial or economic. Violence ensures that the gender, to which it is directed, performs what is required by the perpetrator against their (victims’) will. The conduct occurs without consent of the victim, who is often in a vulnerable position. GBV is a violation of fundamental human rights of the victim.

GBV includes all harmful and discriminating practices based on a society’s social construction of roles and expectations of males and females. Examples are sexual violence and assault, sexual harassment, female genital mutilation, early and forced marriages, denial of inheritance to girls, widow inheritance, use of pregnancy to dominate and subordinate women, denial of ownership rights to women in land matters, emotional and psychological abuse by any gender towards another gender. The list is not exhaustive.

**The Nature of Gender Based Violence**

GBV is a multi-faceted phenomenon that takes various dimensions and is variously defined by different disciplines. It can be approached from the medical, legal, sociological, anthropological, economic, developmental, gender amongst other disciplines.

Sociologically, GBV encompasses all such conduct (action and or inaction) perpetrated against the victim on the basis of his/her gender. The conduct involves the use of violence, intimidation, manipulation, duress, and coercion by the perpetrator, against the will of the victim, in furtherance of the perpetrators’ wishes. The violence may be physical, emotional, psychological, spiritual, sexual or financial abuse. It is characterized by the exercise of power by the perpetrator, on the victim, who is often in a vulnerable relational position.

GBV may be perpetrated willingly or unwillingly, depending on the knowledge, perception, attitude, socialization and personality of the perpetrator. Likewise GBV may be condoned, encouraged and perpetuated by the individuals to whom it is directed, based on their socialization, awareness levels, attitude, knowledge, understanding and perception of the phenomenon.

GBV may be personalized or institutionalized depending on the reason for which it is carried out and who perpetrates it. GBV transcends all races, gender, age, religion, color, social origin, language, income levels, social status, class and standing in society. GBV effects go beyond the victim, affecting the perpetrator, families, communities, nations, states, regions, continents and the
entire world. GBV may be treated as a crime or not, depending on a country’s criminal laws and penal provisions. GBV may therefore be outlawed, condoned or perpetuated depending on a society’s values, policies and criminal justice approach.

Although the perpetrators of GBV are predominantly males and the victims are mostly women, research studies show that women are also perpetrators while men are also victims.\(^2\) The amount of time spent or lost, resources allocated, emotional and psychological effects of GBV, undoubtedly impacts negatively on a country’s development. GBV has and continuous to be transmitted from generation to generation, perpetuated by outdated socialization and cultural practices which have no place in democratic societies. The fatalities that result from GBV are a violation of the right to life, equality, non-discrimination, human dignity and respect for all humankind as enshrined in various international human rights instruments.

**The Extent, Typologies of GBV in Kenya**

GBV is a concern in Kenya as it is in other parts of the world. Perpetuated by cultural practices and socialization, various parts of Kenya experience different forms and levels of GBV. Detection and reporting of GBV is hampered by various social-cultural and economic factors such as fear, stigma and economic dependence on the perpetrators. The exact extent of GBV is not known due to poor documentation. However, documented reports give an indication of the magnitude of the problem. The most authoritative is the Kenya Demographic and Health Survey Report\(^3\) which shows that 39% of women in Kenya had experienced some form of GBV since they attained the age of 15. The violence occurred in the form of emotional, sexual, psychological and physical abuse. The report states that the different cultural practices in various parts of Kenya socialize males as perpetrators of GBV. In addition females are socialized to accept, tolerate and rationalize GBV that often occurs within the family, perpetrated by people who are supposed to protect the victims.

Some parts of Kenya such as Kisii, Luoland, Luhya, Rift Valley and Nyeri, experience incidences of male spouse abuse, attributed to the social construction of the roles and expectations of the male and female gender. This GBV is caused by the failure of male spouses to live up to societal expectations of providing for their families and being heads of their households. However, due to socialization and cultural perceptions of spouse abuse as a ‘domestic matter’, male victims find it difficult to report the GBV or seek redress.

Female Genital Mutilation (FGM) involves the partial or total removal of the external female genitalia. After FGM, a girl is regarded as an adult and ready for marriage, leading to early and forced marriages. FGM is common amongst the Somali, Kisii, Kuria, Kikuyu, Kamba and Maasai communities. Although circumcision of boys is more rampant than that of girls, the practice does not draw criticism as much as FGM. However, the fact that it is performed on a young man below the age of 18 years, who cannot say no due to socialization and culture, makes it a GBV. In addition, the circumcised boys are regarded and treated as adults and subsequently assume adult roles such as marriage, herding livestock and protecting the family, taking away their childhood.

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\(^3\) Kenya National Bureau of Statistics (2008-2009) *Demographic and Health Survey Report*
Other forms of GBV are forced and early marriages, which are common amongst all the ethnic communities in Kenya. Contrary to popular belief that only girls are subjected to early and forced marriages, the reality is that both boys are girls in different parts of Kenya are victims of early and forced marriages. According to UNAIDS\(^4\), 10% of girls in Kenya between the ages of 15 to 19 years were married compared to 1.3% of boys of the same age. The implication is that this form of GBV affects both girls and boys although more girls than boys are affected.

Under section 8(4) of the Sexual Offences Act of Kenya 2006, the penalty for defilement of a child between the ages of 16-18 is a jail term of not less than 15 years. In circumstances where a girl and a boy both under 18 years engage in any sexual relations amounting to the offence of defilement, the implementation of the Act is skewed against the boy-child who is prosecuted, and if found guilty, as is often the case, especially where a ‘marriage’ took place, the court’s hands are tied and the boy child is sentenced to the mandatory jail term of a minimum of 15 years. This is indeed an institutionalized GBV perpetrated by discriminatory law that was meant to protect victims of sexual violence.

Among the Masai community is the practice where if a man visits his male counterpart from the same age set (those circumcised together) overnight, the host chooses one of his many wives in the homestead as the place where the guest will spend the night, by sticking a spear at the wife’s door step. The ‘chosen’ wife takes care of the visitor, including his sexual needs. Such outdated practices violate the dignity, respect and individuality of the woman, while reducing her to an object/chattel owned by the husband who literally controls what she can or cannot do. It reduces her to a sexual object and takes away her choice of whom to relate with intimately. This form of GBV still occurs in the interior remote parts of the community, yet very little is documented about it.

Widow inheritance (a practice that requires a widow to be inherited by her late husband’s brother or male relative to ensure her continual user rights and access to the family property) is a form of GBV perpetuated by traditional customs among the Luo and Luhya communities. If the widow refuses, she may be chased away from the homestead together with her children and be disinherited of the husband’s property. In a patriarchal society where most women do not own land and are economically dependent on their husbands, widows have few choices and many are forced into accepting the practice. The practice results into sexual exploitation, harassment and is a way of disinheriting the widow of the late husband’s property that subsequently comes under the control of the wife inheritor (jater).\(^5\) Although the Kenyan succession laws allow widows to use and hold such property in trust for their children, the procedural technicalities of seeking court intervention, the socialization and cultural practice contribute to the perpetuation of this form of GBV. Wife inheritance has been blamed, amongst other factors for the high prevalence of HIV/AIDS in Luoland (Homabay, Kisumu, Siaya and Migori counties) compared to the rest of the country.\(^6\)

**Causes, Perpetrators, Victims and the Impact of GBV**

There are various causes of GBV, but the main reasons are societal conflicts, high crime rates, poverty, weak community sanctions, social norms and cultural practices that encourage male

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\(^5\) Wakano Shiino (1997), ‘Death and Rituals Amongst the Luo in South Nyanza’

dominance over females. Other causes are conflict of roles and unmet expectations of the perpetrator or victim as perceived by various communities.

In Kenya, GBV is predominantly perpetrated by the males towards the females due to the society’s patriarchal system. Up to 47% of Kenyan women aged between 15-19 years had experience GBV in their lifetime, while the FGM prevalence rate is 27%. Up to 13.5% of pregnant women in Kenya experience GBV during pregnancy.

Females are also perpetrators of GBV, although to a relatively much lesser extent. Females participate in GBV by encouraging the practice through their socialization when they take part in activities that amount to GBV. An example is the use of females to carry out FGM. 3% of the perpetrators of GBV are women and the form of GBV is often spouse abuse.

Other forms of GBV committed against males include sodomy and rape in which the perpetrators are both males and females. Due to social stigma and cultural perceptions of the male dominance over females, the cases are rarely reported to the police, but are detected by medical practitioners when the victims seek medical intervention. GBV against males is therefore relatively under reported due to the socialization and cultural perceptions and attitudes towards male masculinity. However, just like the female victims, male victims of GBV also suffer emotional, psychological and physical trauma. The social stigma surrounding GBV towards males has the great potential of triggering suicidal and homicide thoughts in their victims.

Organizations engaged in addressing GBV against females are many and spread all over the country, while those concerned with GBV against men is relatively few. Maendeleo ya Wanaume and FEMNET are among the few organizations trying to raise awareness on the extent and impact of GBV against men and the need to treat the issue as serious as GBV against women.

GBV has very serious short and long-term effects on the perpetrators, victims, family members and the society as a whole. There are no benefits or advantages of GBV at all, irrespective of any attempts to justify and rationalize the practice in whatever form. The effects of GBV include emotional, psychological, physical trauma experienced in varying degrees depending on the type and extent of the injury occasioned. Domestic Violence for example takes away the self-esteem of the victims, while resulting in strained relations between the perpetrator, victim and family members. The health and financial implications of GBV deny the family and the nation resources, time and energy that could otherwise be invested in the country’s development agenda. GBV in some cases result into deaths and homicides, as the family environment becomes insecure and the number of separations and divorce increase. GBV is thus a threat to the family as the basic unit of society.

7 n.3
8 ibid
10 n.3
Legislative and Policy Frameworks for the protection against GBV

Article 29(c) of the Constitution of Kenya 2010 protects everyone from acts of violence. The Bill of Right provides for equality, equal protection of everyone by the law, respect dignity, non-discrimination and the right to life amongst other human rights provisions. The Penal Code outlaws any form of physical assault. The Sexual Offences Act 2006 provides for a wider definition of sexual offences and punitive sentences upon conviction. The Children Act protects children from any form of abuse and neglect, forced and early marriages, any harmful cultural practices such as FGM and child labor. The Prohibition of Female Genital Mutilation Act specifically outlaws FGM while the Protection Against Domestic Violence Act 2014 provides for the protection of victims of domestic violence. Kenya is a signatory to the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women.

In addition, Kenya has policies towards the protection of individuals from various forms of GBV such as the National Population Advocacy and IEC Strategy for Sustainable Development 1996-2010, Mainstreaming Gender into the Kenya National HIV/AIDS Strategic Plan 2000-2005, the Kenya National HIV/AIDS Strategic Plan 2005-2010 and the Kenya Vision 2030 Policy Document.

Despite the legislative and policy initiatives, GBV is still prevalent in the country and access to justice by victims is hampered by several factors, mainly socio cultural and economic determinants.

The major concern today is that GBV is still prevalent due to various communities’ socio cultural practices, despite the presence of awareness creation conducted by several non-governmental, faith based and community based organizations. Few cases are reported to the criminal justice system for intervention, while many victims seek medical services, but in some cases such as spouse abuse, they disguise the cause of the injury as a fall due to the social stigma attached to the abuse.

Reporting, detection, investigation, prosecution, presentation of evidence and the making of protective court orders are further hindered by the socio cultural and economic factors that perpetuate the dominance of the males and subordination of the females. Even where the threat or injury is very serious or life threatening, the vulnerability of victims, their socialization, perception, attitudes towards GBV and their dependence on the perpetrators make them condone and rationalize the violence.

Institutionalized GBV is far more challenging than individually perpetrated violence. Institutionalization of GBV is where the abuse is perpetuated by the society’s systems and structures that subject the victims to the violence. The victims are socialized to accept the abuse as part of the community’s way of life, which they must comply with to gain recognition and respect, or risk social stigma, discrimination, ridicule or social isolation. In the next paragraphs, the paper discusses the various socio-cultural and economic determinants to accessing justice by GBV victims in Kenya.
Social Cultural and Economic determinants to accessing justice by GBV victims/survivors

Socialization and culture are very strong determinants that influence the thinking, attitude and behaviour of any individual in a given society. Accessing justice has certain financial implications for victims of GBV that may either enable or hinder their quest for justice.

Social Determinants
There are two important social determinants to GBV victims’ access to justice, namely socialization and social status.

(i) Socialization
Socialization refers to a continuing process where by an individual acquires a personal identity and learns the norms, values, behavior, and social skills appropriate to his or her social position. Socialization simply refers to the lifelong social experiences by which people develop their human potential and learn culture. The various interactions within the social set up makes individuals to develop fairly consistent patterns of acting, thinking and feeling. This consistency in pattern is what is called personality. Socialization is a lifelong process, although some of the most important facets of this phenomenon occur during childhood. Agents of socialization include school, peers, family and the mass media.

Sociologically, GBV is primarily a social issue. Society has seen historical inequality in the relationship between the male and female sexes for years. GBV is a result of social inequality between male and female genders. A socialization process that is characterized by sexism ultimately creates distinct and specific roles for each of the sexes.

Girls are taught to take care of others and feel responsible for their well-being. They are expected to be devoted, understanding and respond to others’ needs without acknowledging their own. From early on, girls are set on a path to become what the society expects of them. They are given dolls, dish set and other toys that encourage them to aspire to the traditional roles of women. A presumably innocent toy will become a concise tool in expressing the clear division that exists between the gender roles. Unfortunately, the type of socialization does not prepare girls to be independent but merely emphasizes their position as the weaker gender. The effect of socialization is that toys given to girls are intended subconsciously to prepare them for the roles that are specifically designated to women such as dolls, household utensils or accessories that symbolize womanhood.

A woman who perseveres GBV and suffers silently is, in the traditional African view a good woman while a battered man symbolizes shame, weakness and inability to control his household. It is such kind of socialization that makes both male and female victims of GBV unwilling to look at GBV as a crime that merits the intervention of the criminal justice system. As the boy child grows older, they begin to understand that they are not at the same level as the girls of their age. They are not expected to show pain and in no circumstance should they allow the girls to be better than them in anything. They must maintain their dominant status quo. As they grow into men, this conception is ingrained into their psyche and perpetuates GBV such as spouse abuse, intimate partner violence, domestic violence, FGM, treatment of women as chattels for men, sexual violence, widow inheritance and disinheritance amongst many others.
Boys are trained to be strong, independent, preserve their ego, to obtain privileges, and become intolerant to frustration. Boys’ socialization revolves around machismo. They are trained to be tough, told that they have the responsibility to take care of their families. Boys embrace machismo and are trained early not to succumb to emotions, not to cry and not to show weakness and that the female gender is the weaker one. Subsequently, men assume that an occasional assault on a wife is not a bad thing as women need to be disciplined or shown love throw abuse. To some women, the occasional beating is actually a sign of “love” since they are socialized to believe that being beaten by a husband is a show of love and marital rape is condoned because the woman’s role in a marriage is to satisfy the man’s sexual desires.

Although historically, women have been isolated within the private sphere of life, today they are increasingly undertaking roles that were primarily left as a preserve of the men, hence the crisis of masculinities.

Since men are socialized to dominate women, when a man becomes a victim of GBV, it is only natural to cover up the abuse because it will not be taken seriously in the predominantly patriarchal society. Many male victims of GBV therefore find it extremely difficult to report or talk about the abuse due to societal expectations and their socialization. A man who is beaten by a woman is perceived to be a disgrace to the community that he comes from, while the female perpetrator attracts condemnation, social stigma, and ridicule.

The perception of GBV as a woman’s problem and not a social problem impedes the development of measures to stop it. The effect of this societal attitude is that the plights of male victims of GBV are largely ignored and fewer support services exist to address the vice. Consequently, most male victims of GBV opt to suffer in silence instead of reporting and seeking intervention, a process perceived as further exposing their loss of masculinity. The impact of this socialization process is that some male victims of GBV commit homicides and or suicide as a result.

(ii) Social Status

According to Brym and Lie\textsuperscript{12} this is a recognized position that can be occupied by an individual when specific elements are taken into consideration. For instance, an individual can be a flight attendant, a wife, and a mother at the same time. Social status denotes the relative rank that an individual holds, with attendant rights, duties and lifestyle, in a social hierarchy based upon honor or prestige. It implies social stratification on some vertical scale in which those who occupy the higher positions are considered to be in control or able to influence the conduct of others through the derivation of prestige from holding important offices, better incomes or esteemed positions of leadership. Education can grant an individual a chance to climb the social ladder through better income and influence.

Kenya is regarded as one of the fastest growing economies in Africa\textsuperscript{13}. However, up to 46\% of the population live below the poverty line.\textsuperscript{14} Majority of the residents of Nairobi city, the capital, in Nairobi County, are considered poor and many of them live in informal settlements, where access to basic services such as health care, education, clean water and sanitation is considered a luxury.

A study by Omondi\textsuperscript{15} found a strong correlation between social status and GBV. Whereas GBV affects everyone, irrespective of their social status, more victims from the lower social status were found to be less likely to seek intervention due to their economic dependence on the perpetrators of the violence. The few victims in this group who reported GBV to non-governmental organizations did so only for purposes of getting maintenance support for their children and themselves from the perpetrators. Victims from the middle class were more likely to report the violence and seek intervention, but were driven by the need to obtain financial support than a quest for justice. Victims from the upper class were less likely to seek intervention due their high social status in society. The traditional perception, attitudes and social stigma, isolation and ridicule attached to GBV make it harder for such victims to report, testify and participate in Kenya’s adversarial trial system.

Other social factors that determine victims’ access to justice include social support networks such as families.

**Cultural determinants**

Culture may be defined as the values, beliefs, behavior, and material objects that together form a people’s way of life. It includes what they think, how they act, and what they own. It is both a link to the past and a guide to the future. It can be material or non-material. Non-material culture refers to the ideas created by members of a society, which range from the arts, beliefs, perceptions, ideas and attitudes that define a people. Material culture by contrast is the physical things that are created by a society. Culture therefore shapes peoples’ thinking, attitude and behaviour. Religion is a key component of what people are cultured into believing, for it’s role in defining an individual’s perception.

Although the characteristic features of GBV are universal, the victim’s or the perpetrators’ cultural background significantly influence how they respond to the abuse. An individual’s cultural identity affects his or her beliefs, values, behaviour and how they deal with the problem. Culture is one of the building blocks of an individual’s personality that influences their potential to perpetrate, condone or reject and report GBV. Culture, ethnic origin, religion and economic background, contribute to the formation of a very complicated set of influences, constraints, and resources that perpetuate GBV. Culture is the collection of learnt beliefs, principles and traditions. It directs behaviour that is commonly shared amongst members of a particular community. All human beings are products of the culture in which they live. Culture is manifested in assumptions, feeling, thoughts, and processes which include ideas governing child-rearing, relationships between males and females,


\textsuperscript{15} Omondi Scholastica (2015) Socio Cultural and Economic Determinants to Accessing Justice by Spouse Abuse Victims in Nairobi County (unpublished)
conception of justice and fairness, importance of one’s ancestry, incentives to work, patterns of decision making, notions on leadership, nature of friendship, concept of past and future and the ordering of time. Outdated cultural inclinations often lead to marginalization and perpetuation of GBV. While culture is a dominant player on what people eventually become, it’s influence on GBV can lead to the difficulty of solving the problem due to its inhibiting effect to report or talk about the abuse.

In Kenya, different communities’ cultures define and apportion roles to males and females, with defined role expectations in their relationships with one another. The culture perpetuates the belief in inherent superiority of males and the subordinate status of females. They include values that give proprietary rights to males over females and the notion that the family is a ‘private domain’ under the male control, to which interference is discouraged, even in GBV cases. Customs regarding marriage such as the concept of ‘bride price/wealth’ only serve to perpetuate the notion of females as chattels, predisposing them to GBV which is perceived and condoned as a means of maintaining the male dominance over females, and as a means of resolving disputes and maintaining the society’s status quo.

The Kenyan Government, in enacting legislation to deal with various forms of GBV has criminalized such GBV as sexual assault, early and forced marriages, FGM, prevention of children from attending school, child labour amongst others. Although such measures have greatly reduced the practice, many people still suffer GBV in Kenya. The enforcement of laws that criminalize a people’s culture results in a conflict between law and culture. Due to the strong influence of culture and socialization, some people opt to adhere to the culture than risk societal stigma, isolation and ridicule by obeying the law. Law enforcement officers who come from communities that practice the outlawed GBV find themselves in a difficult situation between law and culture. It is therefore not unusual to find such officers turning a blind eye to the violation of the law, not withstanding their oath of office. This is the effect of the influence of culture and socialization on a person’s thinking, attitude and behaviour. Mere knowledge of the law and level of education alone are not persuasive enough to ensure obedience to the law as against adherence to one’s culture.

**Economic determinants**

All human beings require finances and resources to access the basic needs such as food, shelter and clothing. Dependence by the victim of GBV on the perpetrator, for access to resources obviously takes away their ability to report, seek intervention or testify in court as reported by Omondi (2015). This applies to both male and female victims of GBV. Financial strain is another determinant and cause of GBV. Early and forced marriages of young girls in Kenya in most cases occur where the family is relatively poor or in financial difficulty. The girls are ‘traded off’ for a number of cows in bride-price/wealth. Girls are traditionally viewed as sources of wealth in this respect, while boys are perceived as security and an assurance of the continuation of the family lineage. There is a strong correlation between GBV against male victims of spouse abuse, and their earning capacity in Kenya. Men who earn relatively less than their wives and are unable to meet their family obligations are more likely, than those who earn higher than their wives and meet family expectations to be subjected to GBV.

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16 ibid
The concept of bride price has an influence on marriage and family in some communities in Kenya. Uncircumcised girls from communities that carry out the practice face social isolation, ridicule and stigma. Amongst the Kisii community, the uncircumcised girl is looked down upon and referred to as *egesaganeka* (unclean, worthless, social misfit girl). In addition, they may not get suitors from their community, but if they do, their bride-price is relatively lower compared to the circumcised girl. Due to this cultural perception of the uncircumcised girl, even where parents are not for the circumcision, girls are known to seek circumcision secretively so as to gain recognition, acceptance and self-worth and ‘attract acceptable bride price’ within their communities. Some uncircumcised girls are thus not able to access justice since they consider themselves worthless, but seek recognition by ‘accepting’ the GBV. In Kisii, Somali and Kuria communities, the married uncircumcised woman is targeted and forcefully circumcised by the traditional birth attendant during childbirth when she is helpless.

Traditionally, most communities in Kenya are patriarchal and males inherit land while females have access and user rights, making them dependent on the males. This practice perpetuates ‘wife abuse’ since girls become wives whose land user and access rights are dependent on their marital status. Likewise, the practice encourages widow inheritance. Today, some women are financially independent, can buy and own their property and so do not depend on their male counterparts. When they become victims of GBV, they are able to meet the financial costs of accessing justice, but may be hindered by their socialization and social status as discussed earlier.

Corruption is another economic determinant to accessing justice by GBV victims in Kenya. During the 2007-2008 post election violence in Kenya, many cases of GBV occurred, but could not be successfully prosecuted due to corruption involving some officers in the criminal justice system. They included the local administration office (the local chief), the police, courts and custodial institutions that took bribes in favor of the perpetrators. Many GBV cases were delayed, files went missing, and witnesses were intimidated or interfered with, cases withdrawn and suspects set free. The bureaucracy and legal technicalities that characterize the adversarial legal system, necessitate the services of lawyers, which is beyond many ordinary Kenyans who live below a dollar a day.

Access to psycho social services is another economic determinant. The study by Omondi\(^{18}\) found that more female than male victims of GBV were able to report the abuse in Nairobi County because there are many psychosocial support centers for women, but very limited services for men. The establishment of such centers requires finances to put up facilities, train staff and remunerate them.\(^{19}\)

The greatest challenges to GBV in Kenya include the misunderstanding of the notion of gender as primarily women’s’ empowerment against men as opposed to equal access to resources and opportunities for both genders. In addition, the socio cultural and economic circumstances of the country greatly influence the people’s response to GBV. Inadequate laws, weak coordination of their implementation, inadequate human and financial resources complicate strategies to address the problem.

\(^{18}\) n.15
In conclusion, Kenya needs to adopt a multi sectorial and interagency approach in coordinating responses to GBV. This includes preventive, health, criminal justice, sociological, anthropological and other best practices. The target should be to engage the public, create awareness and use knowledge to change the perception, attitude and behaviour that amounts to GBV.
Applying concepts of international Human Rights in the national or domestic courts
By The Right Hon the Baroness Brenda Hale, Vice President, UK Supreme Court

You have before you this afternoon two different models of implementing international human rights standards in domestic law - Guyana has a written constitution which, like most of the new Commonwealth constitutions, includes the protection of fundamental human rights within it; the United Kingdom has no written constitution and therefore only such protection of fundamental rights as the common law or Parliament allows. Even though the UK is party to all the UN's major international human rights instruments, such as the ICCPR, CEDAW, and the Convention on the Rights of the Child, these have not been made part of UK law by legislation.

However, the UK was one of the first to sign the European Convention on Human Rights in 1950, to ratify it in 1953, and to allow individuals to petition the European Court of Human Rights in Strasbourg in 1966. This meant that the UK was bound by international agreement with the other member states, not only to respect those rights but also to respect the decisions of the Strasbourg court in cases brought by individuals.

It did not take long for the UK to learn that the common law was not as good at protecting fundamental rights as we all thought it was. We kept losing cases there. So the Human Rights Act 1998 was passed in order to 'bring rights home', to avoid people having to go to Strasbourg to vindicate their rights, to avoid the UK suffering embarrassing defeats there, and to enable the UK courts to examine alleged violations of human rights in terms that the Strasbourg court would understand (thus making it much more likely that, if we held that there was no violation, the Strasbourg court would agree - the UK loses far fewer cases in Strasbourg now).

That context, of an international treaty with a supra-national court to interpret it, explains some of the differences between the UK model and the other models of protecting human rights in commonwealth countries where the Constitution does not do so - such as the Charter of Human Rights and Responsibilities Act 2006 of the State of Victoria in Australia or the New Zealand Bill of Rights Act of 1990.

The Human Rights Act 1998

Our Human Rights Act does five main things:

(1) It turns the rights set out in the ECHR into rights enforceable in UK law.

It does this by making it a statutory tort for a UK public authority to act in a way which is incompatible with the Convention rights (s 6(1)). Anyone who would be regarded in Strasbourg as a victim can bring proceedings for a remedy, including damages where appropriate, or rely on the violation in proceedings brought against them, in the UK courts (ss 7 and 8). This includes non-human persons as
well as individuals, but not public authorities. Some of our most prominent cases about property rights have been brought, for example, by insurance companies.

The courts, too, are public authorities and therefore have to act compatibly with the Convention rights (s 6(3)). This means that we sometimes have to enforce those rights in actions between private persons - for example, when balancing the right to respect for private life enjoyed by celebrities against the right to freedom of expression enjoyed by newspapers and other media. We have therefore expanded the tort of breach of confidence to encompass privacy rights, which we seemed unable to do at common law (see Campbell v MGN Ltd [2004] UKHL 22, [2004] 2 AC 457). This may be one reason why the Act is so unpopular with certain sections of the British media.

Human rights adjudication brings challenges which were unfamiliar to UK judges, but presumably not to all of you who are judges from nations with a written Constitution. We have to decide how much weight to give to the decisions and policy judgments made by government or Parliament, whether the ends do justify the means, how to balance one right against another. This inevitably draws us into small ‘p’ political questions which we did not have to consider when our only tools for challenging governmental decisions were the law of tort or judicial review based only on illegality, procedural defect or Wednesbury unreasonableness. Not everyone is comfortable with this role and some worry that it may lead politicians to want a greater role than the very limited one they currently have in judicial appointments.

(2) It imposes a duty to read and give effect to all forms of legislation, so far as it is possible to do so, in a way which is compatible with the Convention rights.

This duty (in s 3(1)) of so-called conforming interpretation is something we were familiar with in European Union law, long before the HRA. So the higher courts, at least, had got used to reading words into legislation, reading words out, and other techniques of interpreting UK law so as to be compatible with EU law. This was always intended to be the Human Rights Act’s principal means of getting round incompatible legislation.

So it was no surprise when the government intervened in the case of Ghaidan v Godin-Mendoza [2004] UKHL 30, [2004] 2 AC 557. This was an action brought by a private landlord to recover possession of a flat from the survivor of a same sex relationship. The government argued that the statutory right to succeed to the tenancy ought to be enjoyed, not only by the survivor of an opposite sex cohabiting relationship, but also by the survivor of a same sex cohabiting relationship. Otherwise, the law would discriminate unjustifiably in the right to respect for the home, protected by article 8 of the Convention. The government also argued that the words 'living together as husband and wife' in the relevant statute could be interpreted so as to include a same sex couple. The majority of the House of Lords agreed on both points (the dissenter agreed on the first point, but thought that 'husband and wife' had necessarily to mean a man and a woman and could not be read in any other way).

We have done even more adventurous things by way of conforming interpretation since then. But, so far as I know, the government has never sought to promote legislation in Parliament to overturn such an interpretation, which it could always do if it really wanted to. On the whole, we think that the government prefers the courts to solve an incompatibility problem for them, rather than to have to go to Parliament itself in order to do so. If the public do not like the result, they can always blame us.
(3) If primary legislation cannot be interpreted compatibly, it empowers the High Court and above to make a declaration of incompatibility.

This is only a problem with primary legislation. Subordinate legislation which does not comply can (usually) simply be ignored as ultra vires. This happened, for example, in Re G (Adoption: Unmarried Couple) [2008] UKHL 38, [2009] 1 AC 173, a case about the Northern Ireland Adoption Order, which did not allow for joint adoptions by unmarried couples. We found this unjustifiably discriminatory in the right to respect for the family life of all the parties, including the child, who were living together as a family unit.

But we cannot ignore incompatible provisions in an Act of the UK Parliament. Parliament is still sovereign and can make or unmake any law. So then the High Court and above may make a declaration of incompatibility (s 4). This does not affect the validity of the provision, or of anything done under or in pursuance of it, but it sends a message to government and Parliament that we think that the legislation is incompatible (and - usually - that the UK would lose the case in Strasbourg).

The government then has three options -

- it can promote a fast track remedial Order in Council (under s 10), approved by Parliament, to amend or repeal the offending provision; it has done this three times;
- it can promote an Act of Parliament to solve the problem - necessary when a whole new legislative scheme has to be devised, for example, for the recognition of transgender people in their reassigned gender or to replace the indefinite executive detention of only foreign suspected terrorists with the control order scheme which applied to everyone;
- it can do nothing and wait to see what the Strasbourg court and the Council of Europe enforcement mechanism do.

Thus the government and Parliament always has a choice. Parliamentary sovereignty is preserved. However, of the 19 or so declarations which have been made and survived the appellate process since the HRA came into force, only one has not been put right. That is the disenfranchisement of any sentenced prisoner who happens to be in prison on polling day. Strasbourg declared that this 'blanket ban' was a disproportionate interference with the right to vote. A Scottish court made a declaration of incompatibility. The government and Parliament have been dragging their feet since then. The Prime Minster has said that the thought of prisoners of any sort being allowed to vote makes him physically sick.

That apart, however, government and Parliament are surely to be commended for their positive approach to putting right such human rights violations as we or the Strasbourg court have discovered in our laws.

(4) Ministers promoting legislation have to state whether all provisions are compatible with the Convention rights.

This good record may be partly because the Act makes government and Parliament partners with the courts in trying to protect the Convention rights. Any Ministers promoting a Bill in Parliament has to
state whether it is compatible and if not, why not, and why they still want to do it. They usually state that it is compatible, because that is what they have been advised, but of course it may turn out that they are wrong.

An exception was the Communications Act 2003, which contains a very wide ban on all kinds of political advertising in the broadcast media. There was a chamber decision in Strasbourg holding a very similar ban in Switzerland incompatible with freedom of expression. Freedom of political speech is regarded as the most important aspect of freedom of expression in a democracy.

In Animal Defenders International v Secretary of State for Culture, Media and Sport [2008] UKHL 15, [2008] AC 1312, the House of Lords nevertheless held that the ban was justified. We thought that Strasbourg had not yet had an opportunity of taking into account the context in the control of election expenditure. We do not want our elections bought by the highest spenders. The right to free elections competed with the right to free speech. The case went to the Grand Chamber in Strasbourg, which upheld us by a slender majority of 9 to 8 (see Animal Defenders International v United Kingdom (2013) 57 EHRR 21). Part of their reasoning was that Parliament had debated the provision in the knowledge of the human rights issues raised. Strasbourg, too, is more respectful of the considered decisions of democratically elected legislatures than it is of the decisions of other public authorities.

(5) Finally, the Act requires courts and tribunals to take into account the Strasbourg jurisprudence.

This is unsurprising, as the main object of the Act was to stop us losing cases in Strasbourg. But Strasbourg has become very unpopular in some quarters in the UK. It has been accused of 'mission creep', of extending some of the rights way beyond what was originally intended and agreed to by the member States, of denying Member States the so-called 'margin of appreciation' which ought to be accorded to them on issues which depend upon local economic, social and cultural conditions.

It is possible to make four broad statements about how the UK courts operate this provision.

If it is clear that the claimant would win in Strasbourg, he or she will generally win in the UK. Only if we think that Strasbourg has failed to appreciate some fundamental substantive or procedural aspect of UK law, or their reasoning appears to overlook or misunderstand some argument or point of principle, are we likely to refuse to find a breach (see Manchester City Council v Pinnock [2010] UKSC 45, [2011] 2 AC 104. The claimant can always take the UK to Strasbourg if he or she does not like the result, but the government cannot do so.

If it is clear that the claimant would lose in Strasbourg, he or she will generally lose in the UK courts, but not inevitably (see, eg, R (Al-Skeini v Secretary of State for Defence [2007] UKHL 23, [2008] 1 AC 153).

If the case is one within the margin of appreciation which Strasbourg accords to member states, then the UK court has to decide which organ of government should be responsible for deciding what the UK's answer to the problem should be - should it be the government, Parliament or the courts? Re G, the adoption case, was an example where we thought that we in the courts could put it right. In R (Nicklinson) v Ministry of Justice [2014] UKSC 38, [2015] AC 657, a case about assisted suicide, the Supreme Court was divided about who should decide whether our outright ban on any sort of help to any sort of person who wishes to end their own life could be justified. Four thought that it should only
be Parliament; five thought that it was open to the court to make a declaration of incompatibility, telling Parliament what we thought the answer should be, but leaving it to Parliament to make the final decision; but of those five, three thought that the time was not ripe, the evidence was not right, to make such a declaration; and two of us would have made a declaration there and then.

If it is not clear what the answer in Strasbourg would be, because no case has yet been decided there, then we usually have to work out the answer for ourselves; we cannot wait for Strasbourg because a similar case may never reach them and meanwhile the claimant needs to know whether he or she has a remedy (see Rabone v Pennine Care NHS Foundation Trust [2012] UKSC 2, [2012] 2 AC 72). There may be other situations in which the UK courts are prepared to develop the rights in a distinctively UK way - that was certainly the expectation when the Bill was passing through Parliament. But I cannot for the moment think of an example.

Indirectly incorporating other international human rights treaties

One interesting feature of Strasbourg's approach to the Convention is its readiness to develop its guarantees in accordance with the development of international human rights law generally, specifically in other, more recent, human rights treaties. This is all part of the general approach to the interpretation of treaties, taking into account subsequent State practice in a way which is not permissible when interpreting domestic legislation. In this way, those other treaties, to which the UK is a party but which have not been expressly incorporated into our law, can be indirectly incorporated through the medium of European human rights law. I can give three illustrations from recent Supreme Court cases, although not all of them ended happily.

First is ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4, [2011] 2 AC 166. This concerned two British citizen children of a Tanzanian woman. As British citizens they had the right to live in the UK, where they had been born and lived all their young lives. But their father could not look after them, so if their mother was deported, then they would have to go with her. We held, consistently with Strasbourg case law, that their right to respect for their private and family life in the UK had to be read in the light of article 3(1) of the United Nations Convention on the Rights of the Child. This requires that in any action concerning a child the best interests of the child must be a primary consideration - not the primary, not the only, not the paramount, but a primary consideration none-the-less. To uproot these children from their schools, their home, the only country they had ever known, was so contrary to their best interests that it could not be outweighed by the need for firm and fair immigration control. They were not to blame for their parents' transgressions. So their mother had to stay too. (Incidentally, by the time the case got to us, the Home Secretary had conceded that it would be a disproportionate interference in their rights to deport their mother.)

Second is the two cases collectively known as Cheshire West and Chester Council v P [2014] UKSC 19, [2014] AC 896. Under the Mental Capacity Act 2005, people who lack the capacity to decide for themselves where to live cannot be placed in a setting where they are deprived of their liberty without safeguards to ensure that the placement is in their best interests. This legislation is the direct result of Strasbourg jurisprudence about the need for proper safeguards against arbitrary or abusive decisions when depriving people with mental disorders and disabilities of their liberty. But how to draw the dividing line between what is and is not a deprivation, rather than a mere restriction, of liberty? The Act says that this must be decided in accordance with its meaning in the Convention, that is, in Strasbourg. But Strasbourg had not yet had directly comparable case.
One of the cases was about two profoundly mentally disabled sisters, who had been removed from their abusive parents while still under 17. One was living in a small group home for adolescents. The other was living with a foster mother. Their situation was as normal as it was possible to be, given their disabilities. So was it to be compared with the situation of other similarly disabled people. Or was it to be compared with the situation of normal young adults of their age? We held that their situation was to be compared with normal young adults. The acid test is whether the person is completely under the control of those looking after her and not free to leave. By that test they were both deprived of their liberty. In reaching that decision, we took account (as Strasbourg had done in another context) of the UN Convention on the Rights of Persons with Disabilities, with its stress on non-discrimination between disabled and non-disabled people.

The last case was R (SG) v Secretary of State for Work and Pensions [2015] UKSC 16, [2015] 1 WLR 1449, about the so-called benefit cap. This breaks the link between the amount of benefit a household can receive and the minimum amount of money that the household needs to live on. They can only get so much, no matter how many children they have to feed, or how expensive their accommodation is to rent. The long term aims are beneficial, in encouraging people into work and away from long term dependence on benefits, but the short term consequences for the families affected are severe. The government accepted that it was indirectly discriminatory against women, because the families worst affected are lone parent families, where multiple child care responsibilities make it much harder for the parent to go out to work, and the vast majority of lone parent families are women. But they said that the long term aims justified the means.

The issue that divided the court was whether we could take into account the government’s duty under article 3(1) of the UN Convention on the Rights of the Child in deciding whether the discrimination was justified. Two of the five Justices held that the government had taken enough account of the interests of the children affected anyway; one held that they had not done so, but that this was irrelevant to the discrimination claim; so the case failed; one held that they had not taken enough account of the children’s interests and this meant that the discrimination could not be justified; one agreed with that, but decided to go even further and hold that the common law had developed to a point where treaties can now become part of UK law even though they have not been expressly incorporated by Parliament.

Of course, if he were right, that would be the solution to the problem of how we apply concepts of international human rights law in the courts of the United Kingdom, but somehow I don't think that he is going to get another two Supreme Court Justices to agree with him any time soon. And I think that we would probably regard it as such a momentous step that we ought to sit in a court of nine Justices to decide it.

Meanwhile, we have to do the best we can with the Human Rights Act. The new government has, however, promised to repeal it. We do not yet know what their plans are for a replacement. We judges shall wait with interest to see what transpires and then loyally do whatever Parliament tells us to do.
Adjacent to me as I commence to prepare this short paper in late August is a copy of the “Sydney Morning Herald”, with the front page headline, “Tragic Exodus”.\(^1\) That lead article notes decisions in prospect for Australia in relation to the fate of 2,000 asylum seekers in Papua New Guinea and Nauru and compares and contrasts that with challenges presented by the 250,000 persons who have this year crossed the Mediterranean to land on the shores of Italy and Greece. September has brought with it accounts in the news media of clashes in Hungary between asylum seekers and authorities there.\(^2\)

According to the UNHCR and in respect of industrialised countries:

An estimated 866,000 asylum applications were recorded in 2014, some 269,400 claims more than the year before (+45%). This is the fourth consecutive annual increase and the second highest annual level since the early 1980s.\(^3\)

Delving further into these statistics, one finds that the vast bulk of this increase is derived from asylum applications made to member states of the European Union, particularly those in Southern Europe, applications made to Turkey and those made to the United States or Canada. The news articles mentioned offer proof that, internationally, these statistics do not record a passing phenomenon. For Australia and New Zealand, these latest UNHCR statistics tell the opposite story, with a 23% reduction in claims recorded as between 2013 and 2014.\(^4\) This reduction may very well, for Australia, be the result of the impact of off-shore processing and re-settlement and other measures, some of which the current Australian government has persuaded Parliament to enact, others matters of executive action, via diplomacy or naval or border protection force operations, but all becoming widely known amongst those who would seek to arrive or persons who would seek to facilitate the arrival of others in Australia without visas in order to make such claims. If so, that impact is the result of high policy value judgements made by a Nation State.

Contemporary familiarity with the definition of “refugee” in the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 and the Protocol relating to the Status of Refugees done at New York on 31 January 1967 (collectively, the Refugee Convention) of a “refugee”\(^5\) should not

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\(^1\) Friday, 28 August 2015.
\(^2\) Asylum seekers pulled off train, throw themselves on tracks”, ABC News 4 September 2015.
\(^4\) UNHCR Trends, p 8, Table 1
\(^5\) As affected by the 1967 Protocol, which removed geographical and temporal restrictions in the definition found in the 1951 Refugee Convention relating to the Status of Refugees, the definition in Article 1A(2) materially defines a refugee to be a person who:

“... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”
obscure the fact that, as originally drawn, the definition was descriptive of features of the immediate post-Second World War, European phenomenon of displaced persons and those in Eastern Europe for whom the prospect of life behind the “Iron Curtain” was intolerable or worse. Before the Second World War, the concept of a “refugee” in international law was very different, initially defined in juridical terms by reference to membership of a group of persons effectively denied state protection and later reflecting a social approach which embraced only those who either de jure or de facto had lost state protection for one reason or another, including persecution. Before the 20th century, there was no discrete concept of a “refugee” at all, only persons or groups of persons that a Nation State, in the exercise of a sovereign power of border control, chose for one reason or another to admit or not to admit. 

In the face of a continuance of individual asylum claims of the order of magnitude noted, the extent to which, if at all, the Refugee Convention any longer admits of feasible implementation by any or a particular Nation State may also give rise to other high policy value judgements.

The separation of powers, adherence to which for Commonwealth member countries is emphasised by the Commonwealth (Latimer House) Principles on the Three Branches of Government, necessarily means that such high policy value judgements are not for the judiciary. Yet a role which is assigned to the judiciary is in adjudicating controversies which may arise as to whether, in implementing such high policy value judgements, one or the other or each of the other branches of government has acted according to law.

In Australia, in relation to asylum claims, that assigned role has been and continues at times to be productive of tension between the judiciary and the other branches of government. The Hon. Michael McHugh AC, when a judge of the High Court of Australia, pointedly remarked on this in 2002, in an address to the Australian Bar Association Conference.

Legislative responses or executive procedures designed to manage or even deter the seeking of asylum in a particular national jurisdiction, which are found to be beyond constitutional legislative competence; or, if valid, are nonetheless found not to authorise what the executive contends they do; create jurisdictional error when not followed; or which are otherwise unlawful were then and remain productive of such tension. These tensions are not unique to this century. They are but contemporary manifestations of one of the Westminster system’s formative struggles of the 17th century, that between the Crown in the person of King James I of England and Lord Chief Justice Coke in relation to the independent exercise of judicial power and the subjection of the Crown and officers of the Crown to the rule of law, as determined by an independent judiciary.

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7 Considerations which attend these high policy value judgements were canvassed in an Australian Parliamentary Research Paper, The Problem with the 1951 Refugee Convention, prepared in 2000:
Fifteen years later, the considerations canvassed in that paper remain, if anything magnified by the current asylum seeker numbers documented by the UNHCR
9 The other formative struggle being that between the Crown in the person of King James I’s son, King Charles I, and Parliament in relation to the ability of the Crown to make laws, including to raise revenue, without the advice and consent of Parliament
At ultimate appellate (High Court) level in Australia, the following outcomes offer recent examples of how such tension can arise:

- In 2011, a conclusion that, on the true construction of the Migration Act 1958 (Cth) Migration Act, the Gillard government’s proposed “Malaysian Solution” for the transfer of unauthorised maritime arrival asylum seekers to Malaysia, which was not a signatory to the Refugee Convention, there was an absence of statutory authority for any such transfer.  
  - In Australia, it is the Migration Act which governs the issuing of a visa to an asylum seeker on the basis of satisfaction that he or she is a refugee to whom Australia has protection obligations under the Refugee Convention.
- In 2014, a conclusion that s 85 of the Migration Act did not authorise the Minister for Immigration and Border Protection to limit by instrument the number of protection visas that may be granted in a specified financial year.
- In 2015 and by way of a sequel to the 2014 case just mentioned, a conclusion that the Minister’s return to the writ of mandamus which issued in that case, purportedly authorised by regulations made under that Act, of a “national interest” criterion engrafted on to the statutory criteria satisfaction of which otherwise obliged the granting of a Protection Visa, was unlawful. The Minister had purported to refuse a visa because it was not “in the national interest”.
- Interviewed shortly after the “Malaysian Solution” case judgment was handed down by the High Court, the then Prime Minister, the Hon. Julia Gillard MP, was reported to have observed that the High Court had missed an opportunity “to send a message” and to make “a real and meaningful contribution” to “the evil of people smuggling”.

The recent cases are not all one way. CPCF v Minister for Immigration and Border Protection, also decided in 2015, exemplifies this. CPCF, the appellant (plaintiff below), was a Sri Lankan national of Tamil ethnicity, who claimed to be a refugee on the basis of having a well-founded fear of persecution in Sri Lanka. He was one of 157 other passengers on an Indian flagged vessel which had left India and was intercepted in the Indian Ocean within Australia’s contiguous zone by an Australian border protection vessel crewed by officers of the Commonwealth of Australia. He had no visa entitling him to enter Australia. He was detained by those Commonwealth officers. They did not ask him whether he claimed asylum.

When the Indian flagged vessel became unseaworthy, the occupants, including the appellant were transferred to the border protection vessel. This vessel then sailed to India, pursuant to a decision of the Australian Cabinet’s National Security Committee, of which the Minister for Immigration and Border Protection (Minister) was a member. Australia did not at the time have an arrangement with India which would have permitted the appellant being disembarked there. Upon reaching the vicinity of India, the appellant and other passengers were detained on the vessel for a period until the Minister decided that it was not practical to disembark him there. The passengers were then taken to the Australian External Territory of the Cocos (Keeling) Islands where they were placed in immigration detention.

10 Plaintiff M70 v Minister for Immigration and Citizenship (2011) 244 CLR 144
11 In the Migration Act, see s 35A as to the types of visa, s 36 as to the protection obligation criteria and s65 as to the obligation to grant a visa
The appellant instituted proceedings in the original jurisdiction, claiming that his detention was unlawful and seeking damages against the Commonwealth for false imprisonment. The Commonwealth claimed that the actions of its officers were lawful pursuant to s 72(4) of the Maritime Powers Act 2013 (Cth), which states that a maritime officer may detain a person on a detained vessel and take the person, or cause the person to be taken, to a place outside Australia. A case was stated for the Full Court of the High Court. The High Court held, by majority, that the making of a detention decision under s 72(4) was not subject to a procedural fairness obligation. It was further held that the detaining officer was not required to form any view as to the requirement for detention independent of the decision of Cabinet and that the detention was lawful even though there was not then an arrangement in place between Australia and India for the disembarking of the appellant.

In Papua New Guinea, the Supreme Court last month determined that a decision by a National Court judge to initiate under s 57 of the PNG Constitution, an inquiry into possible violations of rights and freedoms entrenched in that constitution by the detention of asylum seekers at Manus Island was void because it was affected by a reasonable apprehension of bias.\textsuperscript{16}

Where a court outcome is adverse to their legislative or executive actions, the temptation for these other branches of government to describe the judiciary as obstructionist or to ascribe to the judicial branch a role it does not have is a strong one. Yet it is a temptation to be resisted if public confidence in the administration of justice is not to be eroded. Conversely, the temptation for the judicial branch to step outside an assigned role of judicial review or an exercise of appellate jurisdiction in respect of such review and to stray into the path consigned to the executive of merits review in respect of a particular claim is also to be resisted.

For a judicial officer, the temptation is not remote. Collectively, asylum cases give rise to statistics but each one involves a human being who, if nothing else, sincerely and, in many instances, desperately wishes to live in the country in respect of which one is exercising judicial power. It is in the nature of judicial power that judges deal with specific cases, with individuals, not statistics. More often than not, those individuals are in court before us when we must exercise that power. The pathos of an individual case can make the temptation to develop innovative grounds of judicial review or interpretations of the reach of the Refugee Convention a strong one. Such behaviours are destructive of the legitimacy of the process of judicial review.\textsuperscript{17}

Both the sheer number of asylum cases and tensions between the branches of government have transformed the jurisdiction consigned to the Federal Court of Australia in relation to asylum cases over the last two decades.

To understand the transformation which has occurred, it is first necessary to provide some brief detail as to the distribution of power under the Australian Constitution and the exercise of judicial power under that constitution.

\textsuperscript{16} Independent State of Papua New Guinea v The Transferees, SCA No 31 of 2014, 5 August 2015. Earlier this month, the Supreme Court of PNG heard another case relating to the Manus Island Detention Centre: SCRef 1/2014 Special Reference by Principal Legal Adviser to National executive Council; Re Manus Island Centre.

\textsuperscript{17} Attorney-General (NSW) v Quin (1990) 170 CLR 1 at 38.
At the national level in Australia, the separation of powers is formalised in the Constitution. Judicial power can only be conferred upon and exercised by the High Court of Australia, other courts created by the Parliament and State courts invested with federal jurisdiction. Entrenched in the Constitution by s 75(v) is an original jurisdiction, exercisable by the High Court in any matter “in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth”. The Minister administering the Migration Act, each of his delegates and a member of an administrative tribunal reviewing any such decision on the merits are each “officers of the Commonwealth” for the purposes of this entrenched judicial review jurisdiction. It is not within the legislative competence of the Australian Parliament alone to abolish this jurisdiction.

A principal, if not the principal, reason for the creation of the Federal Court of Australia in 1976 was to liberate the judges of the High Court from the exercise of original jurisdiction and the more routine appeals from the exercise of that jurisdiction and to allow them to concentrate upon the High Court’s role as Australia’s ultimate appellate court and in the determination of major controversies arising under the Constitution or involving its interpretation.

In relation to the judicial review of decisions of officers of the Commonwealth, this liberating was originally achieved by the conferring on the Federal Court of a procedurally liberalised judicial review jurisdiction in respect of the vast bulk of administrative decisions made by officers of the Commonwealth under statute and then by the consigning to the Federal Court of most of the judicial review jurisdiction also exercisable by the High Court in its original jurisdiction.

Neither of these original measures is now a source of original jurisdiction for the Federal Court in respect of asylum cases. Commencing in 1994 with the commencement of a 1992 statute which withdrew from the Court the original jurisdiction conferred by these measures and, in substitution, conferred on the Court a judicial review jurisdiction with restricted grounds of review, Parliament has endeavoured, within what it saw as the limits of its legislative competence, to restrict recourse to an exercise of judicial power in respect of refugee cases. This was followed by further legislative amendments to the Migration Act, which introduced privative clauses. These privative clauses have been narrowly construed by the High Court. The effect of these cases is that a private clause is not effective to withdraw from an applicant the ability to invoke the original jurisdiction conferred on the High Court by s 75(v) of the Constitution.

The fate of the privative clause response by the Parliament was to create a situation whereby unless the role of the High Court as an ultimate appellate court was to be overwhelmed by the number of cases

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18 Chapter I is concerned with the Parliament, Chapter II, the Executive and Chapter III, the Judiciary. At this general level of abstraction, the Australian Constitution is similar to that of the United States. A fundamental difference, apart from the absence of a constitutionally entrenched “Bill of Rights”, is that, in Australia, unlike in the United States, there is provision for a system of responsible government on the Westminster model whereby Ministers must be members of a House of Parliament and are responsible to Parliament.

19 s 71, Australian Constitution.

20 Abolition would require constitutional amendment, which entails both the passage of amending legislation and the approval of the amendments by popular referendum in the manner specified in s 128 of the Constitution.


22 Via s 39B(1A) of the Judiciary Act 1903 (Cth).

23 s 33, Migration Reform Act 1992 (Cth), commencement deferred to 1 September 1994 by s 5 of the Migration Laws Amendment Act 1993 (Cth).

brought in its s 75(v) original jurisdiction by asylum seekers, it was necessary for pragmatic reasons that a like original jurisdiction in respect of asylum cases be conferred on another court. The number of cases would also have overwhelmed the myriad of other jurisdictions exercised by the Federal Court. The position which now prevails is that a judicial review jurisdiction akin to that found in s 75(v) of the Constitution is exercised by the Federal Circuit Court on unrestricted jurisdictional error grounds in respect of asylum cases decided by a merits review tribunal with an appeal as of right to the Federal Court.

The present situation is unorthodox in the sense that the Federal Circuit Court is an inferior court of record and the judicial review jurisdiction it exercises in relation to refugee (and other migration) cases is akin to the jurisdiction to issue prerogative writs, historically the province of superior courts. Further, in the absence of a direction from the Chief Justice of the Federal Court based on the importance of an issue raised by a particular case, the appellate jurisdiction of the Federal Court in an appeal from the Federal Circuit Court is exercised by a single judge of the Federal Court, rather than a Full Court constituted by three or, occasionally, five judges. In each instance, necessity derived from the sheer volume of cases and their propensity to skew the ability to deal with other jurisdictions has proved the occasion for this unorthodox provision for the exercise of judicial power.

There is no appeal as of right from the exercise of the Federal Court’s appellate jurisdiction. Appeals to the High Court of Australia lie only by special leave. In asylum applicant cases, where an applicant in most cases appears in person, the High Court’s practice is to deal with these cases on the papers without an appearance in person.

Even though, for Australia, the number of asylum applicants has declined of late, that decline has not yet translated into a decline in judicial workload in respect of such cases. There is always a lag between the lodging of an asylum application, the exhausting of merits review rights, the hearing and determination of judicial review applications and the lodging of appeals to the Federal Court and any subsequent special leave applications. So a considerable number of cases in the Federal Court’s current appeal list consist of appeals from the Federal Circuit Court in judicial review of asylum application decisions made by a merits review tribunal or other executive government official. Even allowing for the use of historically unorthodox ways of constituting courts for the exercise of judicial power, there remains a substantial opportunity cost in terms of the allocation of judicial resources to deal with asylum seeker cases. In terms of public funds, to this cost must be added the cost of providing interpreter services and the cost of legal representation for the Minister. Both by virtue of their volume and the ingenuity of legal practitioners and legislative draftsmen, the asylum seeker cases have occasioned much development in Australian administrative law as well as exploring the ambit of Commonwealth legislative competence and executive power in relation to migration, external, affairs and border control. Notwithstanding, for Australia, a recent fall in the number of asylum seeker applications, the course of international events suggests that there is nonetheless every prospect that this jurisprudential development and exploring will continue. The extent to which that prospect comes to pass may depend on high policy value judgments about the Refugee Convention which lie beyond the remit of the judiciary to make.

25 Previously the Refugee Review Tribunal the members and role of which was, on and from 1 July 2015, taken over by the Administrative Appeals Tribunal.
Introduction

The Right to Seek and Enjoy Asylum

In 1948, profoundly influenced by the atrocities of World War II, the right to seek and enjoy asylum from persecution became human right number 14 of the Universal Declaration of Human Rights (UDHR). In particular, the non-admission policy, which had been adopted by many states in relation to German Jews, Roma and others in the 1930s, had catastrophic consequences because Jews and others found nowhere to seek asylum. Any individual should be granted the right to enter the territory of another state to apply for protection. Moreover, it followed logically from several of the other principles embodied in the UDHR that the international community should request countries to afford the right to seek asylum to individuals who were subject to violations of the human rights listed in the UDHR. Otherwise people would, in some cases, be less inclined to stand up for their rights and to further develop the international respect for human rights norms. The right to seek asylum was reaffirmed at the 1993 UN World Conference on Human Rights in Vienna, and it is part of the draft EU Charter on Fundamental Rights.

The 1951 Convention Relating to the Status of Refugees is the foundation of international refugee law. It defines a “refugee” as someone who has a well-founded fear of persecution because of his/her race, religion, nationality, membership in a particular social group, or political opinion; is outside his/her country of origin; and is unable or unwilling to avail him/herself of the protection of that country, or to return there, for fear of persecution.

The Convention thus sets minimum standards for the treatment of persons who are found to qualify for refugee status. Because the Convention was drafted in the wake of World War II, its definition of a refugee focuses on persons who are outside their country of origin and are refugees as a result of events occurring in Europe or elsewhere before 1 January 1951. As new refugee crises emerged during the late 1950s and early 1960s, it became necessary to widen both the temporal and geographical scope of the Refugee Convention. Thus, a Protocol to the Convention was drafted and adopted. The Protocol lifted the time and geographic limits found in the Convention’s refugee definition.1

One of the main challenges to refugee protection is refugee emergencies. Refugee emergencies are times of crisis for the refugees and often for the country of asylum. UNHCR’s working definition of a refugee emergency is any situation in which the life or wellbeing of the refugees will be threatened unless immediate and appropriate action is taken, and which demands an extraordinary response and exceptional measures.2

More important than the definition is the ability to recognize quickly the development of a situation in which an extraordinary response will be required. Lives are at stake and a speedy response is

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essential. The country of asylum may be under tremendous pressure, and often under media scrutiny, and may not have had experience in handling the arrival of large numbers of hungry, sick, wounded or frightened people.

Refugee emergencies almost always occur in the context of armed conflict and, in that sense, can be seen as an emergency within a larger catastrophe. The aim of emergency response is to provide protection and ensure that the necessary assistance reaches people in time. The country of asylum is responsible for the safety of, assistance to, and law and order among refugees on its territory. Governments often rely on the international community to help share the financial burden; UNHCR provides assistance to refugees at the request of governments.

As from April 2015, there was a rising number of migrants and refugees crossing to the European Union (EU) across the Mediterranean Sea and the Balkans from Africa, Middle East and South Asia. A number of boats heading to Europe sank in the Mediterranean Sea with a death toll of over 1,000 people. Many of them were fleeing poverty stricken homelands or war torn countries. The entry points were mainly Italy, Greece, Hungary, Spain/Morocco and France. The countries affected by the crisis include Austria, Bulgaria, Croatia, Czech Republic, Germany, Hungary, Latvia, Poland, Italy and Slovakia.

Some countries have embraced the migrants while others resorted to closing their borders and locking out those fleeing from their countries of origin.

**Countries Implementing Border Closures**

*Non-Arrival and Non-Admission Policies*

New trends developed in the international refugee regime as a result of the increase in the number of asylum seekers in the late 1980s and early 1990s. In particular, the United States and countries in Western Europe introduced a non-arrival or non-entry policy in order to create barriers for the new influx of asylum seekers. In the first period starting in the late 1980s, these policies developed with a multi-faceted approach: visa requirements combined with carrier sanctions (today used by most OECD countries); the creation of international zones in airports (France); isolation of applicants and processing of applications for asylum at military bases abroad (the United States in the case of the Haitians at the Guantanamo base in Cuba).

Notwithstanding the international condemnation of the United States’ repatriation policy, nations around the world are increasingly following suit by moving the locus of border enforcement efforts beyond their terrestrial borders and floating such borders into the sea or landing them on territories of foreign countries, in an effort to halt the flow of refugees. In the European Union, some Member States have begun the process of externalizing the EU borders by leveraging the EU joint external border guard agency (FRONTEX) to intercept and repatriate thousands of migrants caught at sea while desperately attempting to reach Italy, Malta, Greece, or Spain’s Canary Islands.

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4 See the official FRONTEX website For a description of current initiatives aimed at deterring migration by sea to the EU southern states, , http://www.frontex.europa.eu/
EU Member States with borders in close proximity to Africa (such as Spain) have entered into agreements with nations with large emigrant populations (such as Senegal and Mauritania) in order to shift responsibility for refugee flows onto already overburdened developing nations. Nations with large emigrant populations have little choice but to enter into immigration agreements with EU Member States, since development funding or visa-allocation is often tied to acceptance of these agreements.

In addition, the global focus on securitization and enforcement has weakened the refugee protection regime, particularly the obligations of the 1951 United Nations Convention Relating to the Status of Refugees.

The European Union, like the United States, has cast a wide net in its multifaceted approach to deterring migrants and refugees alike from reaching its land borders. EU Member States no longer wait for refugees to seek protection at their borders. Rather, the European Union proactively sends its forces directly into refugee sending nations (whether by stationing officers at airports or ships in the sending-nation’s waters) in order to prevent their citizens from fleeing to its Member States. Individual Member States also negotiate agreements with refugee-producing nations, so that any refugees actually landing on EU soil can quickly be sent south again.

Indeed, some of the techniques for blocking access to the European Union bear striking similarities to the United States’ approach to its war on terror. As in the war on terror, much of the EU border externalization is carried out through informal agreements that are not subject to public scrutiny or parliamentary review. FRONTEX operates with little transparency, oftentimes engaging in actions abroad that would be impermissible on European soil.

The European Union’s imposition of a unifying refugee protection regime throughout its twenty-seven Member States and its attempt to seal off its southern water borders from Africa similarly undermines access to protection just as the U.S. interdiction policy undermines access to international protection for Haitian boat people.

The UNHCR defines interception as “encompassing all measures applied by a State outside its national territory in order to prevent, interrupt or stop the movement of persons without the

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8 Ratna Kapur, Travel Plans: Border Crossings and the Rights of Transnational Migrants, 18 Harv. Hum. Rts. J. 107, 134 (2005). As noted by Ratna Kapur, “the new ‘War on Terrorism’ has created space for a more strident and alarming response to the global movements of people, reducing it at times to nothing more than an evil threat.”


required documentation from crossing international borders by land, air or sea and making their way to the country of prospective destination.”

France recently closed its borders with Italy to block asylum seekers. The French parliament voted through a new law at the end of May which allows the authorities to expel asylum seekers more easily.

In June 2015 Switzerland threatened to temporarily close its border with Italy to migrants.

Hungary finished construction of a fence on its southern border with Serbia in late August 2015 which consists of three strands of NATO razor wire, and is 175 kilometres long. The next phase involves construction of a wire fence which will be approximately 4 meters high. The will deploy 9,000 police to keep illegal migrants out.

Bulgaria built a fence along its border with Turkey to prevent migrants from crossing through its territory in order to reach other EU countries. The fence is equipped with infrared cameras, motion sensors, wire and is monitored by the army.

In April 2015, Kenya announced it will proceed with plans to build a wall along its porous border with Somalia to stem the flow of illegal immigrants and security threats into the country, in response to the Garissa terrorist attack.

The major reasons fronted for border closures include: the threat of terrorism, safety of citizens of the asylum state, safety of immigrant children, lack of sufficient resources, voter fraud and even racism.

Refugees versus Migrants Narrative: Who exactly is currently arriving in Europe?

Articles 1(2) of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problem in Africa expands the definition to include victims of:

- i. External aggression
- ii. Occupation
- iii. Foreign domination
- iv. Events seriously disturbing public order in either part or whole of the country.
- v. The Kenyan Refugee Act 2006 combines both definitions at section 3.

Migrant workers are defined in article 1.1 (a) of the UN Convention on the Rights of Migrants as people engaged in a remunerated activity in a State of which he or she is not a national. As such it should be understood as covering all cases where the decision to migrate is taken freely by the

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13 http://www.nytimes.com/2015/04/06/world/europe/bulgaria-puts-up-a-new-wall-but-this-one-keeps-people-out.html?_r=0
individual concerned, for reasons of 'personal convenience' and without intervention of an external compelling factor (www.unesco.org, n.d.)

The reason for such distinction is that the narrative changes depending on the usage of the word.

<table>
<thead>
<tr>
<th>Refugee</th>
<th>Migrant</th>
</tr>
</thead>
<tbody>
<tr>
<td>Flee armed conflict or persecution</td>
<td>Choose to move to improve the lives by finding work, education, family reunion etc.</td>
</tr>
<tr>
<td>Cross national borders to seek safety in nearby countries because it is too dangerous to return home</td>
<td>If they choose to return home, they will continue to receive their government’s protection.</td>
</tr>
<tr>
<td>Internationally recognized and Protected in international law</td>
<td>Individual states deal with them under immigration laws and processes</td>
</tr>
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By closing the borders, asylum seekers and refugees are denied the international protection they desperately seek therefore going against the principle of non-refoulement.\textsuperscript{16} For migrants the consequences of deportation are not as heavy as those of refugees whom deportation is a matter of life or death.

**Effects and Consequences of Border Closures**

Asylum seekers and refugees are denied the international protection they desperately seek. By lumping asylum seekers and refugees with migrants, they all suffer deportation, which puts the former at risk of death while the latter do not face such risk in the country of origin.

In Hungary there are new regulations, in combination with the other amendments made to the asylum law in August, which seriously impede access to asylum in Hungary. As a result of the legal changes, the government declared a state of emergency on September 16 due to “mass immigration.” The new border regime has three key elements:

- It restricts access to asylum in Hungary for those who enter from Serbia and permits quick returns of asylum seekers to Serbia on the ground that it is deemed a “safe country” for asylum seekers;
- National authorities are allowed to declare a state of emergency and close border crossing points. They have already taken that step in four counties with the crossing points; and
- Irregular entry is now a criminal offense, allowing authorities to imprison people who cross the border irregularly for up to eight years, deport them, and bar their reentry.

This means criminal proceedings related to irregular border crossing or destruction of the fence will take precedence over other procedures, including adjudicating asylum claims.\textsuperscript{17} The resources used in

\textsuperscript{16} Article 33 of the Convention Relating to the Status of Refugees provides that all countries must respect the principle of non-refoulement, which includes: 1. Not returning asylum seekers or refugees to a place where their life or liberty would be at risk; 2. Not preventing asylum seekers or refugees—even if they are being smuggled or trafficked—from seeking safety in a country, if there is a chance of them being returned to a country where their life or liberty would be at risk; 3. Not denying access to their territory to people fleeing persecution who have arrived at their border (access to asylum).

\textsuperscript{17} https://www.hrw.org/news/2015/09/19/hungary-new-border-regime-threatens-asylum-seekers.
building the fences and the walls to keep those fleeing away would have been used to assist them rather than keep them away.

Disobedience of the international principle of Non-refoulement. In recent years, European governments have used return as a tool to gain political advantage by appearing tough on asylum at the expense of fairness and efficiency. The drive to return has led to an increased use of detention in the case of asylum seekers whose cases have been rejected for unreasonably long and even indefinite periods of time to prevent absconding. It has also led to destitution for many asylum seekers whose cases have been rejected, from whom all types of support are withdrawn as an incentive to return. Even where it is recognized by the host country that an individual cannot be returned many of those whose applications have been rejected do not receive a legal status and find themselves in a limbo situation without the right to work to earn a leaving and without state support. The result is that asylum seekers whose applications have been rejected form a growing segment of vulnerable, poor and marginalized people in European societies.\(^{18}\)

Human suffering as some of the people fleeing resort to getting harmed or even to harming themselves in a bid to crossing over to their country of desire. For example when dozens of refugees tried to escape police officers at a Hungarian camp on, one camerawoman decided to get involved. While she was filming a father, holding a child in his arms, she tripped both of them.\(^{19}\) Some people also burn their palms in order to destroy their fingerprints such that their data cannot be included in the system of the country of arrival as their plan is to move on to another country.\(^{20}\)

It provides a breeding ground for smugglers who capitalize on the desperation of those fleeing and they end up risking the lives of those they transport resulting in a number of deaths.\(^{21}\)

The migrant narrative is entrenched on to the locals of the countries that close the borders. The citizens of such countries do not see them as fellow human beings but as people who will come into the country and strain the resources of those citizens and result in higher taxes to cater for them.

Overstretching of police resources who are deployed to keep those fleeing at bay.\(^{22}\) This effectively means that there are less policemen available to cater to ensuring the safety of the rest of the citizenry.

The various countries lose out on human resource. For example if they move on to another country that embraces them and they get to start a new life in that country, they would use their skills to build the economy of their new found home.

Condemnation from the UN, human rights bodies and political associations as the procedure is carried out inhumanely

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Political strife between member states of the EU on sharing the burden fairly and equally as some countries feel that they are carrying a larger share of the burden than others.

THE DEVELOPMENT OF REFUGEE LAW IN KENYA


Refugee Situation in Kenya

Kenya hosts about 650, 610 persons of concern many of whom are refugees and asylum seekers from neighboring countries with the largest population of over 462, 7900 is from Somalia. The largest population of over 400,000 is from Somalia.

Dadaab and Kakuma refugee camps were set up in the early 1990s. The camps have been described as “small cities” of thatched roof huts, tents, and mud abodes. Living inside the camp has been equated to prison and exile. Once admitted, refugees do not have freedom to move about the country but are required to obtain Movement Passes from the UNHCR and Kenyan Government.

“Essentially, the refugees are confined to the Kakuma camp area: they are not allowed to move freely outside of it, and they may not seek education or employment outside of it.” Inside this small city at the edge of the desert, children age into adulthood and hope fades to resignation. To be quite frank, it’s more or less a kind of hostage life for many refugees.

However, some refugees who manage to get movement permits now live in urban areas. They can however not take part in gainful employment.

Kenya in Turmoil

Kenya has experienced several terrorist attacks in the period 2011-2014 e.g. the Westgate Mall and the Garissa University attacks most of which are believed to have been undertaken by the Al-shabab militia group. This is believed to be mainly as a result of porous Kenyan borders and the peace keeping mission by African Union Mission in Somalia.

It is believed that terrorists pose as refugees and use the refugee camps as entry points where they conduct recruitment and then infiltrate urban centers and carry out attacks and sneak back into Somalia.

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Government Response


In June 2015, it was proposed that a 700km anti-terror security wall separating Kenya and Somalia be built. The Government also ordered the closure of Somali hawalas- informal money transfer- and froze accounts of prominent Somali business men in April 2015. Five hundred and ten (510) NGOs were deregistered with 15 being accused of money laundering and financing terrorism.

Operation ‘usalama watch’ by security forces started its operations in April 2015 and has been stated to have been marred by serious human rights violations e.g. extrajudicial killings, arbitrary detentions and torture.

The 2015/2016 budget estimates focused on security, the allocation to the military and police was increased to $2.28 billion from $2 billion to cater for this.

Public Interest Litigation

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

“….that in enacting or amending any law that touches on national security (or any other law for that matter), Parliament (i.e. the National Assembly and the Senate) must ensure that there is no violation of the people’s rights and freedoms that are spelt out in the Bill of Rights and which are, moreover, part and parcel of what national security entails as per the Constitutional definition. …. It must always be borne in mind that the rights and fundamental freedoms in the Bill of Rights are not granted by the State and therefore the State and/or any of its organs cannot purport to make any law or policy that deliberately or otherwise takes away any of them or limits their enjoyment, except as permitted by the Constitution. They are not low-value optional extras to be easily trumped or shunted aside at the altar of interests perceived to be of greater moment in moments such as this. Article 20 of the Constitution is explicit that the Bill of Rights applies to all law and binds all State organs and all persons. The interplay between State security and citizens’ enjoyment of their rights and freedoms in a suit challenging the constitutionality of a key statute such as SLAA, particularly in turbulent times as we are living in, calls for a very careful navigation by the Court.”

Courts in Kenya have also been faced with certain crimes that have called for the application of Art. 24 of the Constitution in their pronouncements. The crime of terrorism for instance presents certain peculiarities, which result into serious issues of national security, peace and unity. Courts must take into account the possible effect of the court order on the well-being of individual suspects, their families, their communities and the nation at large.

26 A.G & Anor vs CORD & others Civil Application No. Nai 2 OF 2015 (UR 2/2015)
27 Ibid
In *Coalition for Reform and Democracy (CORD) & Anor v Republic of Kenya & Anor* the High Court was faced with the determination of whether various sections of the Security Laws (Amendment) Act No. 19 of 2014 were unconstitutional for violation of among others the right to freedom of movement under Article 39 and the rights of refugees under Articles 2(5) and 2(6) of the Constitution and International Conventions.

The High Court held that Section 48 of SLAA which introduced Section 18A to the Refugee Act, 2006 is unconstitutional for violating principle of non-refoulement as recognized under the 1951 United Nations Convention on the Status of the Refugees which is part of the laws of Kenya by dint of Article 2(5) and (6) of the Constitution.

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

**Present day Refugee status in Kenya**

As of today, Kenya has not closed its borders and is within the principle of non-refoulement. Although political statements in the past indicate its desire to do so due to their porosity.

There is an ongoing review of the Refugee Act 2006 to meet the insecurity concerns raised during the period that Kenya was in turmoil with regard to terror attacks.

**Current Developments**

The death of the 3 year old Syrian boy Aylan Kurdi resulted in an international response to the migration crisis that Europe is currently facing. The picture went viral and got everyone talking about the crisis.

Germany was previously associated with its Hitler regime has taken up the largest share of the refugees than any European country. In this instance, it has emerged as a hero for refugees for embracing and welcoming them despite the influx and the economic burden of welcoming such numbers would have on their economy. The only question is, is Germany the solution to the European crisis?

Sweden and Austria have taken up the challenge and have accepted and welcomed refugees and asylum seekers.

**Conclusion**

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

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28 [2015] eKLR
with individual rights which strengthen the fabric of democratic life. There is still much that needs to be done with in the area of Refugee Law.

Based on the experience and developments over the years, the majority of essential needs are expected to remain in the areas of life-saving and life-sustaining support, and the pursuit of sustainable and durable solutions.

The main priorities are projected to be in: preserving access to asylum and international protection for asylum-seekers and refugees; delivering essential life-saving services in safety and security; providing basic shelter, primary health care, clean drinking water, sanitation and hygiene services; enabling access to education, acquisition of marketable skills, and work opportunities; as well as supporting voluntary repatriation, resettlement and requests for alternative residency status.

Strategies to achieve the desired outcomes include engaging and coordinating with interested stakeholders to provide technical and material support to governmental, non-governmental and community-based awareness-raising and capacity-building efforts as part of a broader and integrated solutions' framework for refugees and host communities. Community-based, protection-compliant approaches in law and order as well as child protection and sexual and gender-based violence prevention and response activities will also be implemented.

Root causes for migration need to be addressed as nations come up with humane policies that provide legal pathways of entry to those fleeing for various reasons.

Striking a balance between obligations to refugees and respecting the economic concerns of citizens also plays a big role in international refugee law. Willingness of states to share the costs and divide the burden is also an important factor for consideration.

Effective implementation of smuggling and trafficking laws which address citizen concerns as to their personal safety and security.

Europe needs to look at its laws and policies and amend some legislation to provide for such occurrences as it is faced with currently.

Each country needs to prepare itself for climate change displacement that will result in migration and influxes in some points. Case in point the Nepal and Haiti earthquakes, Tsunami and floods. Countries need not have knee jerk reactions to such catastrophes. Disaster management should look at the impacts of such displacements.

Non-Governmental Organisations can file Public Interest Litigation to propel the arms of government into action. For example in the Europe crisis, a number of Public Interest cases would have seen decisions emerge from the courts that would have made a difference in the way the crisis progressed. The Judiciary has a role to play too. Judiciary can enforce the rule of law without strict interpretation of the law but by developing jurisprudence that creates a balance for all parties involved. More so in Public Interest cases.
Options for Judges taking control of cross-examination of vulnerable witnesses

By Bailiff and Chief Justice William Bailhache, Jersey

I am going to tell you about a case I did last year, in which the issue of judicial control of cross examination arose. In the course of it I made a number of judgment calls. Some of you will feel that you would not or could not have made those calls, or indeed that one should not do so. But I hope the case makes an interesting illustration of how some of the principles of Emily Henderson’s challenging presentation can be applied and will be a talking point.

A man – I will call him Tommy - of about 35 was indicted on two counts of committing an act of gross indecency. The complainant, if that is the right word, was a girl aged 4. I will call her Polly. Tommy worked with Polly’s father and, not for the first time, had agreed to babysit when Polly’s parents went out. He and Polly got on well. She was very shy, but a bright little girl and he had an IQ of 78 on a good day. He was slow, and we will hear more about his make up in a moment.

A week or so later Polly was at home with her Mum and her grandmother. While Mum was making a cup of tea, and Polly was doing some drawing, which she liked, she announced casually to Grandma that she had seen Tommy’s winkie and that it was soft and squishy. Oh, said Grandma, have you seen it before? Yes, said Polly I have loads of times.

The grandmother fetched her daughter and told Polly to tell her mother what she had told her, which Polly did. What? Said Mum, and when the father came back they had a discussion and decided to take Polly down to the police station where she could make a statement. Polly was duly interviewed in the usual way – ABE interviews (explain) but by now she realised she had done something terribly wrong and in her four one hour interviews she wouldn’t tell the police much. Eventually she did say that she had asked Tommy if she could see his winkie and if she could touch it. She agreed that she had seen it but she denied that she had touched it. The police hauled in Tommy for interview. He was examined by the Force medical examiner who said she was satisfied he was fit for interview. She conducted some basic but I thought effective medical tests which I was told are frequently used to establish whether older people are in command of their faculties. No question arose on the facts known to her or the police at that time as to raise a concern that he should not interviewed without any appropriate adult or counsellor with him. He was read his rights and he waived his right to legal advice. He initially denied showing Polly his penis but eventually agreed that he did and that she did touch it. He denied having any sexual preferences for children. She just went on and on at him and he gave in. He was asked whether he should have done this and he agreed he should not – when asked why, he said because you shouldn’t do it to a minor.

On indictment Tommy pled not guilty. He was represented by a counsel I would describe as robust, a relatively young man who does not hesitate to be forthright with a witness or with the court. In a small place like Jersey, you soon come to know the people who appear before you. It means you must be on your guard against allowing preformed opinions about counsel to influence you in your approach to any individual case. This advocate is rightly hot on the rights of the defendant. He knows there is an obligation to put his case to the complainant and he knows he has a right under our law not to reveal
that case to anyone until the last moment because the defence has to prove nothing. He has learnt the need in cross examination to have closed questions — and I feared slightly, probably without justification, that his questioning of Polly would go along the lines of “That was a lie wasn’t it? You’re a naughty little girl aren’t you?” and the results would be traumatic for her.

So that was the only evidence for the prosecution which relied substantially on the admissions of the defendant in interview.

At a pre-trial directions hearing, it became apparent the police interview would be challenged as inadmissible. The defendant was interviewed by a clinical psychologist who told me that he was a very vulnerable individual who not only had an IQ which put his overall cognitive functioning in the borderline range but he was particularly compliant and suggestible. On the Gudjonsson scale, following the conclusions of that psychologist widely regarded as expert in this area, Tommy was in the top 5% of the population for suggestibility and compliance. She said Tommy should only have been interviewed in the presence of an appropriate adult and that the admissions he made were not reliable. Having considered the interview, I reached the conclusion that it was legally admissible and that it was reliable. Despite his apparent compliance and suggestibility, a consideration of the questions and answers showed that he stood up well to some quite fierce police questions and he did not just cave in and agree with everything put to him. I thought the admissions were therefore genuine and that the clinical psychologist, while intelligent and knowledgeable in her field, showed no sufficient judgment in the application of her undoubted knowledge to the facts of the case. I recognised that it was likely she would give evidence and it would be a matter for the jury to determine whether they reached the same view and were sure about it.

At the directions hearing, I made it clear that not only should the defendant have a fair trial, but that I was determined that the risk of emotional damage to Polly should be reduced to a minimum if not removed. I should say at once that in Jersey we have no statutory legislation conferring powers to act as I did. All the orders made were made on the basis of the Court’s inherent jurisdiction to ensure a fair trial and to respect the rights of witnesses including Polly to a private and family life, consistent with the statutory requirement to do so following the incorporation of the European Human Rights Convention into the domestic law of the island. I recognise that this approach might not be thought possible in some countries represented here.

As a result, a number of preliminary orders were made. At the very first hearing I asked the advocates for the prosecution and the defence to review before the next hearing all that is set out in www.theadvocatesgateway.org so that we were all on the same page at the next directions hearing. I directed that the ABE interviews of 4 hours in length be reduced to half an hour and should stand as Polly’s evidence in chief. That was because, if she were to be cross examined, she would have to have the chance of reviewing what she had said to the police 6 months earlier, and I could not see a 4 year old child watching some rather boring television of her being asked questions for 4 hours. She could be cross examined but only remotely by a video link – she would be in a room downstairs in the court building so she would not see the jury – only the person asking her the questions. She would have an intermediary with her, who could explain the question to her if she thought the child did not understand it fully and also explain the child’s answers if she felt that the language used did not reflect what the child meant. She should have several familiarisation visits with the intermediary so she felt comfortable in her presence and she should have a familiarisation visit to the court so she could meet me, the prosecuting counsel and the defence counsel. We used our first given names. I was William. Defence
The perhaps controversial preliminary order made was that the defence counsel would have to show his proposed questions to the intermediary to enable her to comment on them to him if the content was not appropriate for a child of Polly’s age, and if necessary to refer them to me in advance. The purpose was to ensure that no damage was done to the child and that the questions put would result in her giving the most accurate evidence she could. The justification for the latter was to ensure a trial that was fair for both the prosecution and the defence. I also did not want to find myself in the position of interrupting the cross examination to rule questions out of order for the protection of the child witness because if I had had to do so, there was a risk that the jury might have taken adversely against defence counsel and therefore the defendant. I also made it clear to the defence that I would insist on knowing the questions to be put if the intermediary considered there might be a problem and, because I was not sure how counsel would take such interference, I made it clear that if necessary I would take over cross examination myself. Privately, I was determined not to reach that position unless unavoidable, because it is fraught with difficulty, not least because the judge cannot know for sure what the defence line would be and how the cross examination would tally with the defendant’s evidence, if he gave it; but also because there must be a perception of a fair trial and once the judge descends into the arena, it is a difficult perception to preserve.

The trial started on the following Monday. We adjourned early so that the child could see the abbreviated ABE interview that afternoon, and so she would give evidence the following morning. It is important that children give evidence in the morning while fresh and not tired from the day’s activities. Before cross examination started, I spoke with Polly over the remote link to the room where she was with the intermediary. She was at her most shy. She would not engage with me at all. I have two grandsons aged 3 and 5 with whom I get on very well so this was disappointing. But perhaps I have forgotten how I related to my daughter when she was that age. In the event, defence counsel decided that it would be counterproductive to his defence for him to cross examine at all, and so there as none. I must say that while I understood that decision, I was not happy. The child had been put through meeting an intermediary, had been brought to court to meet all of us, had had her parents worrying all week as to what effect it would have on their daughter, and I expect that anxiety came through to her. I felt better when told later by the intermediary that Polly had said she was sorry that Paul had not wanted to talk to her!

The defendant also wanted an intermediary appointed - someone to stand by him and reassure him, and someone to intervene if the questions were too difficult for him to understand. His vulnerability, it was said, made such an order essential. The prosecution resisted. Counsel said that the effect would be to encourage the jury to think the court thought there was something not quite right with the defendant and the jury could take that in ways that might be prejudicial to him. He was also worried that the jury might think the admissions at interview were not reliable because the defendant had no one with him then. I directed that an intermediary’s report be prepared on the defendant. I wanted to ensure that the defendant could give reliable instructions to his counsel. When that report arrived, perhaps unsurprisingly, it relied on the views of the defence clinical psychologist, who was far more qualified than the intermediary. The recommendation was that the intermediary should stand next to the defendant and translate the questions to him so that he could understand them. My response to that was to make some ground rules about the type of questions – because Tommy was compliant and
suggestible, there should be no tagged questions – you did show her your penis didn’t you? You did let her touch it didn’t you? There would be no long questions, no double negatives. There would be regular breaks in the proceedings to allow the defence counsel to explain what was happening. But the intermediary would not stand next to the defendant when giving evidence although she could come to court and would be able to raise a hand if there were an issue to draw to my attention.

When the trial came, the defence application was renewed for the intermediary to stand next to the defendant. It was said that if I did not make this order, the defendant would not give evidence because he was too frightened. The way was being prepared for an appeal if I did not agree of course but I like to think I did agree to the defence suggestion for a more ethical reason, namely because I accepted he would not give evidence if I did not and the need for a fair trial required that if he wanted to give evidence, he should be able to do so. So that happened. Prosecuting counsel was reasonably robust in his questioning and Tommy was robust in standing up to it, just as he had been in the police station, and this without help from anyone.

I hope that is not too long an account. I wonder if there are two conclusions to draw:

(i) Courts are there to achieve justice which we do by ascertaining the facts and applying the law to them. This debate is about how one establishes the facts - how one maximises the chances of getting the best evidence out. Once it is out, it can be evaluated and we can arrive at our best assessment of the facts. Historical rules have been developed with this objective but new learning casts doubt on some of them. While there is undoubtedly a place for them, a time when they should be applied, one should be ready to be flexible where that is necessary. The critical principle is that the defendant should have a fair trial.

(ii) A trial judge has the responsibility at common law of ensuring there is a fair trial. Unless there is something concrete in the constitution or in legislation which provides otherwise, in my view a judge should be prepared to exercise his inherent jurisdiction - all that body of powers available to him to allow him to meet his responsibility - to make orders of the kind I have discussed, without any need for legislative authority.
Lies, damned lies, and statistics

I would like to start by telling a story. The story is about Sally Clark, a British solicitor, married to Stephen, also a lawyer. The couple’s first son, Christopher, died suddenly in December 1996. He was just under three months old. A post-mortem by a Home Office pathologist, Dr Alan Williams, concluded that Christopher had died of natural causes, probably of what is colloquially known as cot death but is more technically called sudden infant death syndrome or “SIDS”.

Sally gave birth to her second son, Harry, in November 1997. In January 1998 Harry was also found dead. He was just under eight weeks old. A post-mortem was conducted by Dr Williams, the same Home Office pathologist as for Christopher’s death. Harry’s death led him to reconsider his conclusions about Christopher. His new view was that both Christopher and Harry had died as a result of child abuse.

Sally had been home alone with both boys when they died. A month later she was arrested and charged with their murder. At her trial a number of highly qualified medical experts gave evidence. The medical evidence was complex but, in essence, the experts called by the prosecution considered that both deaths were caused deliberately, either by shaking or smothering the babies. The experts called by the defence said that the evidence was not conclusive and that the causes of the deaths were simply unclear. There was evidence of trauma in both boys but that could have been related to the attempts to resuscitate them.

One of the witnesses for the prosecution was a well regarded paediatrician, Professor Sir Roy Meadow. He was, at the time of the trial, writing a preface to the report of a panel appointed to investigate the causes of SIDS in the United Kingdom. Based on figures he took from that report, Professor Meadow’s evidence was that the chance of two children from an affluent non-smoking family like the Clarks dying of SIDS was one-in-73 million. In his evidence he apparently likened the probability to the chances of backing an 80-to-one outsider in the Grand National four years running and winning each time.

Sally was convicted of the murder of both boys and went to prison. Her first appeal against conviction was unsuccessful. While some issue was taken in that first appeal with the accuracy of Professor Meadow’s statistical evidence given at trial, the Court dismissed these errors as incapable of affecting...
the safety of the convictions. The Court stated that “the trial was not about statistics” and that out of a 170 page summing up, only two or three pages dealt with the statistics. As a result, even if there had been a statistical error at the trial, there was an “overwhelming case against the appellant” and “in the context of the trial as a whole, the point on statistics was of minimal significance”. The Court concluded that “there is no possibility of the jury having been misled so as to reach verdicts that they might not otherwise have reached”.

After the first appeal it came to light that microbiological tests had revealed that Sally’s second son, Harry, had a colonisation of staphylococcus aureus bacteria at the time of his death. That had been known by Dr Williams, the Home Office Pathologist, since February 1998 but had not been disclosed to the defence or to any of the other medical witnesses. It had come to light only through the efforts of a lawyer who had not been satisfied with the verdict and who was acting pro bono for Sally.

This new evidence led to a review by the Criminal Cases Review Commission and a second appeal. That second appeal in 2003 was successful. The Court of Appeal said that, since there was evidence that was not before the jury that might have caused the jury to reach a different verdict on the count in respect of Harry, that verdict was unsafe and had to be quashed. As a result, the Court said that no safe conclusion could be reached that Christopher was killed unnaturally. Sally was freed from prison, after an incarceration of over three years. Her experience had, however, left Sally with major psychological and alcohol problems, and she died on 16 March 2007 of accidental acute alcohol poisoning, aged 42. Her third son was then aged only eight. Sally’s case prompted a review of a number of other cases by the Attorney-General which resulted in other convictions being overturned.

It is probably true to say that, although the existence of the bacteria was the main reason for allowing the appeal, it is the statistical evidence given by Professor Meadow that became the focus of concern about this case. It is therefore worth looking at how Professor Meadow calculated his odds. He started with the proposition that, for a family like the Clarks, the probability of a single SIDS death was

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6 Vincent Scheurer, in an article “Convicted on statistics?” (available at <www.understandinguncertainty.org>), says that, to the outside observer, the medical evidence in Sally Clark’s trial was extremely complicated. There were a number of different medical issues debated by some nine specialists who reached different and contradictory conclusions. He suggests that what is striking about the case is that “within the sea of complexity, the staggering figure of one in 73 million stands out like a beacon of simplicity. Unfortunately for Sally Clark, far from being a lighthouse to the truth this figure managed the feat of being both irrelevant and wrong.”
7 R v Clark (first appeal), above n 5, at [256].
8 R v Clark (second appeal), above n 4, at [134].
9 At [135].
10 Sally had post-natal depression and alcohol issues after Christopher’s death but she had been in recovery by the time Harry was born: see “Obituary of Sally Clark” The Telegraph (online ed, 19 March 2007). It appears that evidence of Sally’s issues with alcohol and depression was put before the jury: see R v Clarke (first appeal), above n 5, at [141].
11 See further Mark Townsend “Shaken baby convictions will stand” The Guardian (online ed, 12 February 2006).
13 A non-smoking household, with at least one waged income in the household, and the mother 27 years or older.
one in 8,543. He calculated the probability of two SIDS deaths in the same family as around one in 73 million, that being 8,543 times 8,543.

So why was he in error? The first mistake was that Professor Meadow’s probability calculation methodology would only have been valid on the assumption that two SIDS deaths in the same family are independent of each other. 14 There are very strong reasons for supposing that assumption is false. There may well be unknown genetic or environmental factors that predispose families to SIDS so that a second case within a family that has already suffered a SIDS death is much more likely than would be the case in another apparently similar family. 15

Second, there is a real danger that the jury committed a statistical error known as the “prosecutor’s fallacy”. This fallacy consists of first showing that the “innocent” explanation for certain facts is highly improbable and then deducing guilt from that. 16 That is the wrong approach. The relevant question is whether it is more likely that the deaths were natural than that they were deliberate.

Professor Meadow should have assessed the probability of the alternative explanations – that the boys were victims of SIDS or that the deaths were caused by rare but natural causes missed by the pathologist performing the autopsies – and compared these explanations with the probability that a mother like Sally had murdered her first two children. Double murders by natural parents are very unusual and, indeed, one may think likely to be rarer than double SIDS. 17 If all this is taken into account, the probability of Sally’s innocence was in fact quite high.

In any event (and the third error), the probability of a child dying from SIDS from a family like the Clarks was in fact one in 1,300 and not one in 8,543. 18 Professor Meadow had ignored a major risk factor for SIDS: the fact that both of the Clark babies were boys.

In the meantime, what are the lessons we can take from this tragic saga? The first is that Professor Meadow was not a statistician. Nevertheless he was allowed to give statistical evidence in front of the jury. His evidence was not seriously challenged by defence counsel at trial and no contrary evidence was called from a defence statistician. 19 Further, the first appeal was unsuccessful, despite the statistical errors being brought to the Court’s attention.

It seems to me that it is is up to us as judges to ensure that expert witnesses stick to their areas of expertise. Statistical evidence should only be presented by those qualified to do so. This will not only be statisticians, of course, as many scientists (and especially forensic scientists) will be familiar with the particular statistical techniques and probabilistic assessments in their field of expertise. 20 Further, the first appeal was unsuccessful, despite the statistical errors being brought to the Court’s attention.

So can Professor Meadow really carry all the blame? 21

14 Hill, above n 12, at 325.
15 At 321–323.
16 At 325.
17 At 321–323.
18 At 324–325
19 In the first appeal, the Court of Appeal noted there had been no assistance from a medical statistician for either side: see R v Clark (first appeal), above n 5, at [120].
20 In the first appeal, the Court of Appeal noted there had been no assistance from a medical statistician for either side: see R v Clark (first appeal), above n 5, at [120]
21 Professor Meadow in fact was struck off the Medical Register by the General Medical Council in 2005 for
The second lesson is to ensure that we as judges have a basic understanding of probability and statistics and their uses and limitations. And that we encourage the counsel who appear in our courts to do the same.  

The third is to ensure that, when statistical evidence is presented to a jury (or indeed to a judge alone in judge alone trials), it is presented in as simple a manner as possible and that it is properly explained, including the assumptions on which it is based and any qualifications to the evidence.

As judges, we need to make sure that vague phrases such as “consistent with”, “cannot be excluded” and “could have come from” are explained. “Consistent with” for example usually seems to mean “not inconsistent with” and this concept is often useless unless the alternative explanations are also considered. As the Sally Clark story illustrates, even if an outcome is unlikely assuming innocence, it could conceivably be even more unlikely assuming guilt.

None of this is to suggest that statistical and probability evidence is not good evidence. Of course good statistical and probability evidence is very often the best evidence. Indeed, such evidence is becoming more and more important in our courts, DNA evidence being the most prominent example of this. And statistics can also provide real assistance for other types of evidence, such as shoeprint and glass fragment evidence by comparing, in statistical and probability terms, the likelihood of a guilty and innocent explanation for possible matches (often referred to as the “likelihood ratio”). This type of evidence can be much more meaningful and fairer than assertions by experts of matches.

It is not just in trials that statistics can provide assistance. For example, risk assessment tools have been shown to provide better (although not perfect) predictions of the risk of recidivism than unstructured clinical judgement. Statistics can thus play a role in sentencing and, of course, we must never forget the DNA exonerations that have occurred in recent years.

serious misconduct in relation to Sally’s case but reinstated in 2006 after he appealed. In General Medical Council v Meadow [2006] EWCA 1390, Auld LJ commented that, when assessing the culpability of an expert witness accused of misconduct, all the circumstances must be considered including the emotional strain of testifying: “Not least ... should be an appreciation of the isolation of an expert witness, however seasoned in the role, in the alien confines of the witness box in an adversarial contest over which the judge and the lawyers hold sway.” Dr Alan Williams, the Home Office Pathologist who conducted the post-mortem examinations on both the Clark babies, also suffered consequences. He was banned from Home Office pathology work and coroner’s cases for three years. The decision was upheld by the High Court. Those consequences to the doctors involved are obviously nothing like the trauma that Sally Clark and her family suffered by her being wrongfully sent to prison or to the subsequent tragedy of her death but their professional (and probably personal) lives must have been adversely affected.

The Royal Statistical Society’s Practitioner Guides, described above at n 12, are a useful tool in this regard.  


Murder of Dorothy Wood
To my next case study, which occurred in May 1996. Mrs Dorothy Wood, a frail, arthritic and totally deaf 94 year old woman, was asleep at her home in Huddersfield, England. In the early hours of the morning, an intruder, by means of a jemmy or screwdriver, forced open a small transom window above her bed, scrambled through it and suffocated Mrs Wood with her pillow. Suspicion fell on Mark Dallagher. Mr Dallagher was, as one of my colleagues is wont to say, a rather unsatisfactory chap. In addition to living close to Mrs Wood, Mr Dallagher was a serial burglar and he frequently effected entry through a transom window.

The Police found ear prints on the glass immediately below the transom window during the course of their scene examination. These were examined by two experts and compared with control prints provided by Mr Dallagher and others. They reported a match with Mr Dallagher’s ear prints and he was duly arrested, tried and found guilty of murder in 1998. It is fair to say that the main evidence relied on by the prosecution at trial was the ear print evidence and it appears from news reports that this was the first time ear print identification had been used successfully in evidence in England.

The first ear print expert at trial was a Dutch police officer who had specialised in ear print identification for some ten years but without formal qualifications or training. The second expert was a forensic science professor. Both experts agreed at trial that the technique was in its infancy and that it would be useful if further research was done. But this did not stop them proffering their opinions. The Dutch police officer testified that he was “absolutely convinced” that the ear print was Mr Dallagher’s. The Professor said it was highly likely to be Mr Dallagher’s ear print, although but he could not be 100 per cent satisfied. No challenge to the admissibility of the evidence was made by the defence at trial.

In 2002, four years after being convicted, Mr Dallagher successfully appealed on the basis that ear print evidence, in the current state of knowledge, could not safely be used to identify a suspect. And in 2004, DNA obtained from the ear print excluded Mr Dallagher as the source of the ear print.

So what lessons do we take from this case? The first is that, even if there is not a challenge to the admissibility of evidence, the courts should take care, in cases of novel science in particular, to ensure that it has a sufficient scientific base to be admitted as expert evidence.

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26 A transom window is a window above the transom of a door or larger window
27 There was other evidence at trial. Mr Dallagher’s history of burglaries was admitted as similar fact or propensity evidence and there was a jailhouse confession. According to the informant, Mr Dallagher revealed information about the killing, and in particular, about the use of the pillow; information which was not known to the general public: R v Dallagher [2002] EWCA Crim 1903, [2003] 1 Cr App R 12 at [3].
29 See for example, “Ear print catches murderer” (15 December 1998) BBC <www.news.bbc.co.uk>.
30 R v Dallagher, above n 26.
31 It has been shown for example that ears change shape depending on the temperature or how hard they are pressed on a surface. There was also a paucity of research into the technique which was in its infancy at the time of trial. David Bamber “Prisoners to appeal as unique ‘earprint’ evidence is discredited” The Telegraph (online ed, 2 December 2011). See further C Champod, I W Evett and B Kuchler “Earmarks as evidence: A critical review” (2001) 46 Journal of Forensic Sciences 1275.
32 Bob Woffinden “Earpint landed innocent man in jail for murder” The Guardian (online ed, London, 23 January 2004). See, however, Vicki Martin “DNA Profiling of earprints” (Abstract, 2004) available at <www.le.ac.uk>, which suggests that DNA evidence obtained from ear prints is too inconsistent to be utilised reliably. However, I have not been able to source the underlying study and it is possible that the DNA from the ear print in this case may still have been sufficient to exclude Mr Dallagher as the source of the ear print.
The second is that the witnesses should not have given evidence in such definite terms in what was at the least a technique in its very early days. Scientific method generally does not deal in certainties and witnesses should not suggest otherwise (or be pushed into it by counsel).

The third is that witnesses should be properly qualified. The Dutch police officer seems to have been working largely alone without peer review, validation, or formal qualifications or training.

The fourth (and somewhat contradictory point) is that, just because a form of evidence is not accepted by the establishment, does not mean it is invalid – it may be at the cutting edge and set to overtake old thinking.32

Brandon Mayfield
This leads onto my next point. We do have to be wary of accepting what has always been accepted as necessarily reliable. Mr Brandon Mayfield was an American lawyer from Oregon and his fingerprints, which were held on an electronic database, came up in a search when the Federal Bureau of Investigation (FBI) was assisting with investigations into the train bombings in Madrid in March 2004.33

Three senior FBI fingerprint examiners concluded that Mr Mayfield’s fingerprints were a 100 per cent match with those found at the site of the bombings. Thus, in May 2005, Mr Mayfield was arrested, despite protesting that he had never been to Spain. Approximately two weeks after Mr Mayfield was arrested, the Spanish National Police informed the FBI that it had identified an Algerian national as the source of the fingerprints. After the FBI undertook its own examination of the fingerprints of the Algerian, it withdrew its identification of Mr Mayfield’s prints and he was released from custody.34

So is the Mayfield case an isolated incident? Well no. Indeed, in 2009, the United States National Academy of Sciences (NAS) in a report on the use of forensic evidence in courts, concluded that for many of the common types of forensic science (including firearms, handwriting and fingerprint identification), there was simply not sufficient scientific basis for the so called experts’ conclusions.35 The only exceptions36 were nuclear DNA analysis, toxicology and drug analysis.37


33 Brandon Mayfield was a recent convert to Islam.


35 Nancy Gertner “National Academy of Sciences Report: A Challenge to the Courts” (2012) 27 Criminal Justice. See National Academy of Sciences “Strengthening Forensic Science in the United States: A Path Forward” (2009) [NAS Report]. The conclusions were simply not supported by their methodology or their training and there was not an adequate basis for individualisation, for linking crime scene evidence to a particular defendant, and much less for conclusions that were announced to an exceptional degree of certainty. For a discussion of the admissibility of fingerprint evidence in New Zealand, see R v Carter (2005) 22 CRNZ 476 (CA).

36 In summary, the NAS stated that, in terms of scientific basis, the analytically based disciplines (eg nuclear and mitochondrial DNA analysis, toxicology and drug analysis) generally hold a notable edge over disciplines based on expert interpretation (eg fingerprints, writing samples, tool marks, bite marks, and specimens such as hair): NAS Report, above n 34, at 7.

37 The NAS was highly critical of the competence of judges, lawyers and jurors, calling the courts “utterly ineffective” in apprehending and excluding poor expert evidence: NAS Report, above n 34, at 53.
Taking fingerprints as an example, the NAS said that there had been assumptions made without proper testing, for example that fingerprints are unique and do not change over time.\(^\text{38}\) It also said that the matching process was so subjective that it could not be called scientific.\(^\text{39}\) Further, there was inadequate training and validation of individual results. Since the report there has been more research conducted and better training and validation processes instituted in the United States.\(^\text{40}\) So I am not suggesting (at least yet) that courts should be abandoning fingerprint evidence, but we do need to remember that it is not infallible.\(^\text{41}\)

The Mayfield case had a fascinating aftermath, which illustrates another point I want to make. An experiment was carried out in which a group of five international fingerprint examiners were each given a pair of prints they were told were from the Mayfield case.\(^\text{42}\) However, that was not the case. The two prints were from fingerprint sets that each examiner had in unrelated cases previously testified (under oath) were a conclusive match. Three out of the five examiners, thinking they were re-examining the flawed Mayfield prints, said that the prints did not match; one said he could not decide; and only one of the five said that the prints were a match. This experiment illustrates the dangers of an expert’s judgment being influenced by prior expectations. This is called confirmation bias – the idea being that people see what they expect to see. Given fingerprint examiners will know they are comparing crime scene prints with those of a suspect and may know why the person is a suspect, they may be highly susceptible to the effects of confirmation bias.

There will also be “adversarial bias” arising from an expert’s involvement in the adversarial system.\(^\text{43}\) Some commentators have said that it is almost an “inevitable” consequence of the appointment of experts by partisans.\(^\text{44}\) This adversarial bias may be present due to a number of factors and lead to an expert moulding his or her evidence to fit appointing counsel’s case.\(^\text{45}\) This may be an unconscious bias through being part of a “team” and only getting one side of the story. In addition to being part of a side, cross examination could lead an expert to become defensive and to take more extreme positions than they would otherwise adopt.\(^\text{46}\)

\(^{38}\) At 144. For example, through variations in pressure applied and the impression medium.

\(^{39}\) At 142

\(^{40}\) In the United States, there is a judicial reference manual on scientific evidence developed by the National Research Council and others: see “Reference Manual on Scientific Evidence: Third Edition” (2011) available at <www.fjc.gov>.

\(^{41}\) This is even so for those jurisdictions that still require a certain number of points of similarity before fingerprint evidence can be admitted: see Ian Freckelton and Hugh Selby Freckelton & Selby: Expert Evidence (looseleaf ed, vol 6, Lawbook Co) at [96-1056]–[96-1057].


\(^{43}\) Emily Henderson and Fred Seymour “Expert Witnesses under Examination in the New Zealand Criminal and Family Courts” (Auckland University, 2013) at 27.


\(^{45}\) See Henderson and Seymour, above n 42, at 28.

\(^{46}\) See for example the comment by the United States Supreme Court in the case of Melendez-Diaz v Massachusetts 557 US 305 (2009) where it said “[b]ecause forensic scientists are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency. A forensic analysis responding to a request from a law enforcement official may feel pressure – or have an incentive – to alter the evidence in a manner favourable to the prosecution”.

\(^{47}\) As one commentator has suggested, “permitting cross-examination on these opposing views is as likely to polarise them further as it is to eliminate or reduce areas of difference”: Davies, above n 43, at 377.
In an attempt to stem any bias, many jurisdictions have promulgated codes of conduct for expert witnesses. For example, in New Zealand, clauses 1 and 2 of the Code of conduct for expert witnesses emphasise that the expert has an “overriding duty to assist the court impartially” and is “not an advocate for the party who engages the witness”. This obviously serves as a reminder but is not a total solution to what can be unconscious and natural bias. Nor are other solutions, such as court appointed experts or pre-trial consultation, necessarily without issues.

Equality of Arms
So to my final case study. In 1985, Anthony Ray Hinton was convicted of two separate killings of restaurant workers in Alabama. There were no eyewitnesses linking him to the crimes charged, no finger prints linking him to the scene, and no other physical evidence except for a supposed link between the bullets found at the crime scenes and a gun found at Mr Hinton’s home. There was identification evidence from a later restaurant robbery but he was not charged with that offence. The identification evidence from that later robbery was given in Court despite the fact that Mr Hinton had been working in a locked warehouse over 25 kilometres away at the time of the later robbery.

Mr Hinton’s appointed lawyer for the murder trial mistakenly thought he would not be allocated sufficient funds to hire a qualified firearms examiner. Instead, he retained a visually-impaired (blind in one eye) civil engineer with no expertise in firearms identification and who admitted in court that he could not operate the microscope properly to examine the evidence. In the closing argument, the prosecutor said, when comparing the defence firearms witness and the expert called for the prosecution: “[t]here is no comparison. One man just doesn’t have it and the other does it day in and day out, month in and month out, year in and year out, and is recognized across the state as an expert”. Mr Hinton was convicted and sentenced to death. He was to spend 30 years on death row before being released in April 2015.

Mr Hinton’s release came after 12 years of litigation when the United States Supreme Court finally reversed the lower Courts and ordered a new trial. The new trial Judge dismissed the charges after scientists at the Alabama Department of Forensic Sciences tested the evidence and confirmed that the bullets from the crime scene could not be matched to Mr Hinton’s weapon. In fact, the bullets from the murders could not be matched to a single gun. When Anthony Hinton was freed among his first words were “the sun does shine”.

48 The Code of Conduct is contained in schedule 4 of the Judicature Act 1908. In addition to the Code of Conduct, expert witnesses with professional memberships may already be covered by some internal code of conduct or ethical standards
49 Whether such codes are enough to dispel more subtle and subconscious biases is another question. As some commentators have stated, while these types of codes “are impeccable normative ideals, experts who have been exposed to the direct and more subtle pressures of adversarial criminal proceedings might be forgiven for experiencing, if not total bewilderment, at least mild cognitive dissonance”: P Roberts and A Zuckerman “Criminal Evidence” (2nd ed, Oxford University Press, Oxford, 2010) at 509.
50 The manager from the more recent shooting (for which Mr Hinton was not charged) identified Mr Hinton from a photo line-up.
53 In 2002, Mr Hinton’s lawyers engaged three of the United States’ top firearms examiners who testified that Mr Hinton’s gun could not be matched to the crime evidence. Despite this, the prosecution refused at that stage to re-examine the case or concede error.
54 Equal Justice Initiative, above n 50.
Mr Hinton’s case is a stark example of the reality that there is often an inequality of resources between the prosecuting state and a defendant. This disparity is compounded when the defendant is indigent and relies on limited state funding and resources to present a defence.

In many countries expert evidence is largely provided by the prosecution. There are issues with this, apart from disparity of resources. First, the prosecution “owns” the crime scene, controlling its investigation and possession of any evidence taken from it. Secondly, many forensic scientists are employed by the state, leading to the sort of bias issues discussed earlier.55

In any countries expert evidence is largely provided by the prosecution. There are issues with this, apart from disparity of resources. First, the prosecution “owns” the crime scene, controlling its investigation and possession of any evidence taken from it. Secondly, many forensic scientists are employed by the state, leading to the sort of bias issues discussed state laboratories in these jurisdictions may be too small to be able to offer credible defence services, even if conflicts of interest could be managed.

Concluding Thoughts

This short paper has concentrated on miscarriages of justice arising, at least partly, from flawed expert testimony. The examples are not isolated ones. The Innocence Project reports that in more than 50 per cent of DNA exonerations cases, invalidated or improper forensic science contributed to the wrongful conviction.56

But we must not lose sight of the very great assistance that forensic techniques provide, both in the investigation and successful prosecution of criminals. The message though is for courts to be vigilant in making sure proper standards are kept by experts giving evidence. Even with proper vigilance, however, the reality is that flawed evidence may still be given. This may be due to a particular expert’s fallibility but may be because scientific knowledge has moved on. This points to the need for robust post-conviction processes to address miscarriages of justice.

The fallible and, sometimes, ephemeral nature of science was encapsulated by a United States’ State Court which said: “[s]cience moves inexorably forward and hypotheses or methodologies once considered sacrosanct are modified or discarded. The judicial system, with its search for the closest approximation to the ‘truth’, must accommodate this ever-changing scientific landscape.”57

56 Innocence Project “Wrongful Convictions Involving Invalidated or Improper Forensic Science that Were Later Overturned through DNA Testing” <www.innocenceproject.org>. As the NAS report, above n 34, noted at 42, “even those [forensic scientists] who are critical of the conclusions of The Innocence Project acknowledge that faulty forensic science has, on occasion, contributed to the wrongful conviction of innocent persons”.
“The Use Of Expert Evidence In The Courts - Of Orcs Wizards And Lagahoos
Reorienting The Role Of The Judge And The Expert”
By His Hon. Justice Vasheist Kokaram, High Court of Trinidad and Tobago

Introduction

I was thrilled to have been invited to speak at this conference not only for the fact that I have been asked to examine the controversial topic of the use of expert evidence before such distinguished company but for the fact that I do so in Wellington! It is the beautiful setting for the Peter Jackson films that brought to life JR Tolkien’s mythical creatures of orcs, hobbits, elves, golum and wizards, the mythology of Middle Earth and the experts who can prattle on Tolkien’s mythical world.

Apparently such mysticism is not the reserve of JR Tolkien’s expert knowledge. Interestingly in the early days of the common law adversarial system, the Courts grappled with the use of expert knowledge in the famous Witches trials to determine if persons were witches. In the 1665 Witches case, a Dr Brown of Norwich gave evidence that he clearly was of the opinion that the accused were witches, by a scientific explanation of the fits to which they were subject. Impressed no doubt by his expertise the accused was sentenced to death!

Not so long ago in Trinidad a defence attorney in defending an accused charged with the offence of murder, summoned a folklore expert to provide his expertise on his knowledge of the existence of a lagahoo, a mythical demon in our Caribbean folklore. That expertise was critical to support the defence that the accused in a crime of murder did not have the requisite knowledge. His case was that when he gutted and beheaded his victim he thought it was a lagahoo. The famous cross examination by the prosecutor revealed that the “expert” never saw a lagahoo and the prosecutor triumphantly asked in his cross examination “So then you have never actually seen a lagahoo?”. “No” was the reply. But after a pause the “expert” added: “but I does hear them bawling in the night...” Remarkably, the jury, acquitted the accused leaving one to speculate as to the extent the expert’s account of the existence of these “lagahoos”, impacted on the finders of fact to believe that there was indeed no intention by the accused to kill a human.

The point being of course that there are experts and there are experts. Centuries after those Witches cases, the use of expert evidence has increased dramatically both in frequency and complexity in the commonwealth civil courts. It now forms an integral feature of the delivery of justice in the judge’s role of fact finding and dispute resolution. However, great care must be exercised by the Court in the admission of expert evidence and its use in the task of fact finding and truth determination.

Disputes that are remitted to us in the civil courts depend upon our ability as the ultimate finder of fact to analyse conflicting facts forensically, assess the reliability of witnesses and to arrive at a version of the truth through a careful study of evidence, its consistency, cogency and credibility. Demeanour is no longer our yardstick. Our search is for objective facts, internal and external consistencies, synergies in contemporaneous documents and comparative probabilities to arrive at truth. There is great attraction therefore to an active role of experts in a process of truth determination which is based on logic and reason.
The task becomes difficult however when there is conflicting expert opinions in areas of science or of a speciality which is not only rapidly changing but beyond the education of some of us who are scientifically or arithmetically challenged. How equally tempting it may be for those so inclined to draw on our common knowledge of such areas of science or specialisation to which we are exposed but which in the absence of expert evidence may lead to an error in law in making a determination.

But experts have developed their reputation of a mysticism of their own having emerged from an adversarial system where experts became more of an orc summoned by the evil wizard. Attorneys would search for their expert as a “Saruman” to rally the forces to convince a court of a party’s position even though it serves only to perpetuate the spectres and myths of his cause: whether to exaggerate a claim of a personal injury, to convince the judge that a wrong medical procedure was adopted in a medical negligence claim or to advance an inflated valuation price in a property dispute. In such a system, logic and reason is stifled by the lack of objectivity and neutrality. Professor Langbein commented on the lack of trust of experts in such a system: “The idea is that the lawyer plays the tune, manipulating the expert as though the expert were a musical instrument on which the lawyer sounds the desired notes... I have experienced subtle pressures to ‘join the team’ - to shade one’s views, to conceal doubt, to overstate nuance, to downplay weak aspects of the case that one has been hired to bolster... The result is our familiar battle of experts... [which] tends to baffle the trier... The more measured and impartial an expert is, the less likely he is to be used by either side.”

Lord Woolf in his Access to Justice Report observed: “Experts witnesses used to be genuinely independent experts. Men of outstanding eminence in their field. Today they are in practice hired guns. There is a new breed of litigation hangers-on, whose main expertise is to craft reports which will conceal anything that might be to the disadvantage of their clients.”

Experts can be wild galloping horses proudly bearing the standard of their rivalling armies. Thankfully there are more options available to the trial judge under the new civil proceedings rules which can assist it in corralling experts in our search for facts, truth and justice. These rules are found in Part 33 of TT CPR, Part 32 in Barbados, EC, Jamaica.

The real revolution of the use of expert evidence underpinning the new civil proceeding rules in Trinidad and Tobago and the Caribbean is twofold: firstly economising the use of experts in their numbers and in the quality of their evidence and second creating an atmosphere of trust by insisting on their impartiality by converting the expert as the party’s witness to the court’s witness and so enjoining the expert in an exercise to assist the court to achieve the just result.

In our jurisdiction the use of expert evidence after 10 years of the introduction of our new Part 33 CPR based on the Lord Woolf reforms and the Dick Greenslade Report is at a cross roads. On the one hand there is the risk of taking the well worn road of the adversarial model, rubbing off respective opponents’ experts and credentials leaving the judge none the more wiser to choose from opposing ends of the expertise spectrum. On the other hand there is the road presently less travelled in truth determination of obtaining the best available evidence by a collaborative perhaps collegiate exercise with experts to assist the court in fact finding and the search for just solutions to disputes. From simple to complex civil cases judges and attorneys need to re-orient their relationship with experts to better enhance our judicial function in adopting a problem solving or collaborative model rather than
one that rehearses the polarised positions of the respective parties. Even in developing fields of sciences or with sharp divergence of views, the judges will in this model depend on experts to keep their egos and academic reputations at bay and focus on the possibilities not only of the resolution of disputes but of the opportunity for the collegiate development of their own expertise.

In the brief moments I have with you I would like to examine some of the challenges thrown up in the use of expert evidence over the past 10 years in our jurisdiction in Trinidad and Tobago and the Caribbean. I will map out some recommended case management strategies for the more effective use of expert evidence which would lead to a more problem solving less adversarial approach in the treatment of expert evidence and ultimately move our discussion from myths and legends to facts, reason logic and.... truth.

**Case study**

I offer some scenarios for consideration which we as civil judges frequently encounter:

(a) At your first CMC in a running down action where a child has suffered injuries to his leg and head both parties have made a joint oral application to the Court for permission to have the child independently assessed by a joint medical examiner to be agreed by the parties within one week from making the order. They indicate it is necessary for them to move closer to settlement. They have not yet identified who the examiner will be but confident they can sort that out in the week. Do you grant the application?

(b) In another case at a pre trial review in a medical negligence claim one week before the trial, the parties confess that they have not been able to get their medical experts to meet to agree on any points of common science or to offer any joint report pointing out their agreement and areas of disagreement on the medical procedures that ought to have been followed by the Defendant hospital. The experts, 7 in number have already filed their opposing reports and witness statements and are ready for cross examination at the trial. Do you proceed with the trial?

(c) In yet another case the parties indicate at their first case management conference that they have retained 14 experts to deal with the question of damages. Do they file applications for permission to admit all 14?

(d) In public law claims, the issue that falls for determination is the suitability of the conditions of a prison to keep on remand a juvenile, facing criminal charges. Parties have filed their respective affidavits from the Claimant’s parents and the Respondent prison authorities on the conditions at the prison. The matter is on for hearing, however there is no scientific evidence concerning the impact of the prison system or conditions on the welfare of the juvenile. There is a statutory authority in your jurisdiction which specialises in child assessments and child protection issues under special Children protection legislation. How do you proceed at the hearing?

**Case management- Guarding the gates of Gondor**

These case scenarios throw up some of the problems of managing expert evidence and the Court’s dilemma of being the silent sphinx or the active problem solver. One of the challenges faced by our Courts is a reticence and reluctance to aggressively case manage the use of experts to avoid the appearance of bias, descending into the arena or of micromanaging a case to the expense of the
parties’ right to present their own case. Indeed if the parties cannot get their evidence right far be it for the Court to try to patch their case together. After all, it certainly is not the judge’s case. It is the parties...or is it? Such a perspective although not without merit, if taken too far will re-invest the management of a trial in the hands of the parties and is counterproductive of the principle of judge led litigation. It also misses the point of the modern judiciary which should be actively seeking solutions for parties within a fair and transparent system rather than egging them on to a needless and painful fight. Indeed for the past 10 years succoured into such apathy of “leaving it to the parties”, the use of experts has presented to us in our jurisdiction a mixed bag of missed opportunities for truth and reconciliation in the Court system.

Aggressive case management calls for leadership to navigate parties through the pits of their respective cases. Routinely I have seen many instances where expert evidence has been of very little use in resolving disputes due to poor management. I can cite some personal experiences.

After making an order appointing a single expert to conduct a valuation, attorneys would simply send the order to the expert without accompanying joint instructions or proper explanation of his obligation under Part 33. In fact Part 33 is simply copied and included in the joint letter for the expert to read and I imagine on his own volition to appreciate its impact. This led to the submission of a report to the Court which provided the value of the entire subject property by a report one would do for a purchaser buying a house or insurance company rather than following the requests of Part 33 report. However the issue in dispute is the value of the additional works claimed to have been done by one party on one aspect of the property.

I have had the unfortunate experience of having ordered an expert report of a surveyor to determine the boundary between two neighbours in a claim for trespass. The issue being whether the Defendant’s building had in fact encroached over the boundary line. The parties requested an extension of time of a month to file the report in Court. Then another month. All granted without a hearing. On the third request on my enquiry it was now being revealed that the expert’s report was submitted to the parties by the surveyor three months ago! It was never filed because the parties were arguing over the contents of the report and the expert himself was being criticized by one party for producing what they viewed as a valueless report and being bullied to conduct a fresh survey. Both parties were in a war as to exactly what the expert was being appointed to accomplish. When I enquired further the dispute had nothing to do with the surveyor’s report or the surveyor’s competence but instead it was a question of the correct interpretation of the parcel clause in the claimant’s deed; a matter for the judge and not the expert.

In a more recent case concerning adverse possession the critical issue concerned the claimant’s occupation of land over a 30 year period. An attempt to use photographic surveys over the period of time by the lay Defendant in his witness statement was struck out as it was opinion evidence not being admitted by an expert properly under Part 33. This was done at a pre trial stage. But how difficult was my exercise of determining whether the claimants truthfully occupied, cultivated and built structures on that land without having the benefit of such surveys. A court is left only with sifting truth from cross examination, which in itself is a very risky exercise.

Indeed as Judges we all agonise in the solitude of our chambers over the lack of cogent and independent evidence to guide us on our way to a just solution. In a recent case on medical negligence Karen Tesheira v Gulf View Medical H.C.2051/2009 the issue was the standard medical
practice for the conduct of a TURP procedure and the management of the patient’s blood transmissions to prevent the onset of TURP syndrome or fluid overload. My attempts to obtain joint reports, joint answers to questions that I had asked and even the appointment of a third expert to conduct a peer review of the expert opinions of the haematologist all failed due to a lack of enthusiasm by the attorneys for these suggestions. Ultimately the cross examination of the claimant’s expert evidence focused almost in its entirety on the partisan nature of the evidence leaving the scientific theories, their submissions on procedure, their opinions on the standard that ought to be achieved in our hospitals virtually untouched. In the end the Defendants made a no case submission that based on their cross examination of the Claimant’s experts no weight should be attached to their evidence as they were advocates of their client’s cause. The submission failed and in my judgment I did lament that it was unfortunate that I ultimately was left with the task of determining the fate of the hospital on medical theories to meet the gold standard of the Bolam test with the Bolitho gloss with virtually one hand behind my back. See Karen Tesheira.

But what a loss to the medical profession and the state of health care in our country that the opportunity was missed for experts on both sides to have discussed and shared with the Court in an objective manner the various procedures that are acceptable, the standards to which our medical profession should aspire and the development possibly of new standards and practice. Armed with such information the quality of a Judge’s judgment becomes more than just an answer to a legal question. It can be elevated to a handbook of professional conduct and or a template for fixing problems in a national health care system.

Learning from my mistake in not robustly case managing expert evidence before coming here, in a matter on negligence heavily dependent on expert evidence on the cause of damage and the extent of damage when I suggested that my intention would be after the identification of the relevant expert evidence to conduct a “hot tub” I was met with blank stares on the attorneys faces.

The problem in our jurisdiction is that there are no practice directions on expert evidence nor codes of conduct or protocols established by professional bodies or the legal profession, nor guidance, training and assistance to attorneys and the bench in the proper use of expert evidence. See by comparison the jurisdictions of Australia, UK and Canada.

The context of the use of expert evidence in the Caribbean therefore imposes on the judge an even greater obligation for the careful, thoughtful and practical use of expert evidence even at the risk of the accusation of having descended into the arena. I would advocate for a form of leadership and responsibility from the bench to transition the experts and advocates into a more useful approach to expert evidence even at the risk of being accused of descending into the arena.

The notion of the judge as a silent sphinx is a nonstarter. Our CPR 33 confers on the Court great powers of expert evidence management that are mirrored in various forms across the Commonwealth. We all have in common the following main powers (a) It is for the Court to grant permission to use expert evidence and not for the parties to simply pull from a hat. One cannot use expert evidence unless the Court grants permission, filters the evidence. (b) The court on its own motion can appoint an expert (c) The court can appoint a single expert instead of the parties instructing their own expert in addition to experts appointed by them to replace experts instructed by the parties (d) The court may direct a meeting of experts and joint examinations (e) The court has the power to stay or dismiss proceedings if parties fail to comply with its directions and orders.
A fundamental pillar of expert evidence is that he/she is the Court’s witness. It must be non partisan and an independent product of the expert. There are key characteristics of the Part 33 expert (a) The expert is a witness of the court (b) The expert’s duties are primarily to the court and the objective of him being a part 33 expert is to help the court to resolve issues of fact. He is not an advocate for cause. (c) His evidence is reasonably required to resolve proceedings justly. (d) The court should rely upon one expert (e) The court should encourage the collaboration of experts (f) Independence and non partisan views are a cornerstone of his evidence. The Reefer underpins our rules on the importance of the expert:

“Instructions to the expert are at present protected by legal professional privilege and are thus immune from discovery. However in many cases sight of such instructions is important both to understand the matrix within which the report was prepared and also to ensure that the expert has not been ‘coached’ by the attorney.

I do not propose that legal professional privilege in this field should be directly abolished - that would be ultra vires. However there is no reason in principle why the rules should not require, as a condition of allowing the expert’s report - or his oral evidence - to be adduced, that all written instructions should be disclosed with the report and that the expert should certify whether and what oral instructions he has received.

These two changes should help bring about a significant change in the adversarial nature of many expert reports. However the will not be sufficient of themselves to reduce the cost of instructing and adducing the evidence of experts. To do this the court must have a number of tools at its disposal aimed
• At providing a single expert’s report for the court
• At ensuring that wherever possible when an expert is instructed by each side, the two experts carry out any examinations or inspections jointly
• At limiting areas of disagreement between experts
• At limiting the amount of oral evidence to be given at the trial.”

In Cala Homes (South) Ltd and others v Alfred McAlpine Homes East Ltd - (1995) IP & T Digest 18 Laddie J in quoting the article of Goodall said: “How should the expert avoid becoming partisan in a process that makes no pretence of determining the truth but seeks only to weigh the persuasive effect of arguments deployed by one adversary or the other?

. . . the man who works the Three Card Trick is not cheating, nor does he incur any moral opprobrium, when he uses his sleight of hand to deceive the eye of the innocent rustic and to deny him the information he needs for a correct appraisal of what has gone on. The rustic does not have to join in: but if he chooses to, he is 'fair game'.

If by an analogous 'sleight of mind' an expert witness is able so to present the data that they seem to suggest an interpretation favourable to the side instructing him, that is, it seems to me, within the rules of our particular game, even if it means playing down or omitting some material consideration. 'Celatio veri' is, as the maxim has it, 'suggestio falsi', and concealing what is true does indeed suggest what is false; but it is no more than a suggestion, just as the Three Card Trick was only a suggestion about the data, not an outright misrepresentation of them.
Thus there are three phases in the expert's work. In the first he has to be the client's 'candid friend',
telling him all the faults in his case. In the second he will, with appropriate subtlety, be almost what
the Honorary Editor's American counsel called 'a hired gun' so that client and counsel, when
considering the other side's argument can say, with Marcellus in Hamlet, 'Shall I strike at it with my
partisan?'. The third phase, which happens more rarely than is acknowledged in much of the
comment on expert witness work, is when the action comes to court or arbitration.

Then, indeed, the earlier pragmatic flexibility is brought under a sharp curb, whether of conscience,
or fear of perjury, or fear of losing professional credibility. It is no longer enough for the expert like
the 'virtuous youth' in the Mikado to 'tell the truth whenever he finds it pays': shades of moral and
other constraints begin to close upon on him."

With this background on the need for proper case management of experts I wish to examine briefly
the issues of admissibility and the effective use of experts.

Are you really an expert or a wizard?
In our treatment of the admissibility of experts many expert reports were rejected by the Court for
late applications, failing to obtain permission and to comply with Part33. The usefulness of expert
evidence cannot be overemphasized and there are five categories:
(a) Expert evidence of opinion upon facts adduced before the court.
(b) Expert evidence to explain technical subjects or the meaning of technical words.
(c) Evidence of fact given by an expert; the observations, comprehension and description of which
    require expertise.
(d) Evidence of fact given by an expert which does not require expertise for its observation,
    comprehension and description but which is a necessary preliminary to the giving of evidence in
    the other categories.
(e) Admissible hearsay of a specialist nature.

R v Bonython (1984) 38 SASR 45 King CJ the test for the admissibility of expert evidence was based on
first a common knowledge test:
“(a) whether the subject matter of the opinion is such that a person without the instruction or
    experience in the area of knowledge or human experience would be able to form a sound judgment
    on the matter without the assistance of witnesses possessing special knowledge or experience in the
    area.

Second the special expertise test:
Whether the subject matter of the opinion forms part of a body of knowledge or experience which is
sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience a
special acquaintance with which by the witness would render his opinion of assistance to the court
and Whether the witness has acquired by study or experience sufficient knowledge of the subject to
render his opinion of value in resolving the issues before the court. See Barings PLC v Coopers and

In the early part of the implementation of the new rules our Courts grappled with the question as to
who should be treated as an expert. The answer sometimes may have been cast through a
procedural rather than a substantive lens. In other words, once the checklist of Part 33 has been
complied with, the expert simply joins the queue of witnesses for the eventual trial. Part 33 may have been viewed as a mere matter of process or box ticking exercise.

For instance, if at the exchange of witness statements a party was adducing evidence of a medical practitioner who assessed the claimant at the emergency ward, it was argued that such a witness was not to be treated as a Part 33 expert but rather simply as a witness for the Claimant having conducted his own assessment and can give statements of fact and opinion of the claimant. The problem of course with such an approach is that it is the gateway to a flood of experts lining up at the doors of the court without any proper assessment and review by the court of their utility. See Rhonda Taylor. Master Mohammed as she then was, observed that the lack of a clear definition of “expert” in Part 33 may have caused some confusion in the use of experts and may have caused some persons to try to reclassify expert evidence as one of fact. In the cases of Gall v Chief Constable of the West Midlands [2006] All ER (D) 297 and Kirkman v Euro Exide Corporation [2007] EWCA Civ 66 it was held that medical witnesses can be witnesses of fact depending on the evidence which such witnesses are permitted to give. So that if the medical witness is stating the nature of the injuries which the doctor observed upon examination of the claimant, while he is relying on his knowledge and experience as a professional person, he is giving evidence of facts and not an expert opinion.

In Vanessa Garcia v North Central Regional Health Authority CV 2010-00463 Aboud J. addressed the issue of whether 2 doctors who were employed with the defendant were experts within the meaning of Part 33. In that case, one of the doctors gave information concerning the claimant’s medical records which were in the possession of the defendant and the other gave his medical opinion on the cause and likely resulting effects of such an injury as sustained by the claimant. The Court allowed the defendant to call the 2 intended witnesses at the trial on the basis that “the two doctors are not experts within the meaning of Part 33, or within the definition of Lord Wilberforce. They are not independent or uninfluenced by ‘the exigencies of litigation’. They are seeking to defend the professional integrity of their hospital, and in that sense, I do not mark their evidence as inherently unbiased, independent, or non-tendentious. Leave to use their witness summaries under Part 33 were not required because while they are witnesses with expertise they are not regarded by me to be expert witnesses within the parameters of Part 33. Whatever use I can make of their evidence at the trial will depend on what weight I ascribe to their testimony, bearing in mind, at all times, that they are likely to be serving the defendant’s interest above those of the court”. On appeal, the Court of Appeal allowed the defendant to call the doctor who proposed to give evidence of the claimant’s medical records but not the doctor expressing his medical opinion. Archie CJ commented “where you have a rule which requires an expert’s evidence, you have something that has statutory reports that require an expert evidence to meet certain criteria, then if you admit that it is expert evidence, then it must meet those criteria, otherwise it is hearsay.”

The hallmark of the expert’s evidence is his independence, objectivity and honesty. He should be truthful as to fact, thorough in his technical reasoning and honest as to his opinion and complete in his coverage of relevant matters in both his expert reports and testimony. He should be forthright about conflicts of interest. Several cases have expressed the Courts’ concerns over the need for objectivity and impartiality of the experts to be of any real value to the Court. See Alfano v Piersanti 2009 CanLII 12799 (ON SC):

“... It was very apparent that [the expert] was committed to advancing the theory of the case of his client, thereby assuming the role of an advocate. The content of many of the e-mails exchanged
between [the expert] and [the client] reveals that [his] role as an independent expert was very much secondary to the role of ‘someone who is trying to do their best for their client to counter the other side’... [The expert] became as spokesperson for [the client] and, in doing so, did not complete independent verification of key issues in accordance with the standards that are expected of an expert.”

Gould v Western Coal Corporation (2012) ONSC 5184 at 85:
“The willingness of an expert to step outside his or her area of proven expertise raises real questions about this or her independence and impartiality. It suggests that the witness may not be fully aware of, or faithful to, his or her responsibilities and necessarily causes the court to question the reliability of the evidence that is within the expert’s knowledge.”

Indeed in Toth v Jarman the Court of Appeal gave useful guidance on how expert witnesses should handle potential conflicts of interest.

In Emile Elias v Joseph Elias and others CV 2013-01623 Justice des Vignes indeed saw the issue of potential conflict of interest as a matter which goes to weight rather than the admissibility of evidence as an expert. However all attempts should be made to address that bogey and call it out, not to discredit the expert but to make the best use of his evidence. All attempts should be made by the Court before experts give evidence for example to rehearse with him his duties and obligations to the Court and to intervene where necessary when he is being cross examined. The Court must take its role seriously as the gatekeeper of the expert’s evidence.

“The court has emphasised that the trial judge should take seriously the role of gatekeeper. The admissibility of the expert evidence should be scrutinised at the time it is proffered and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility.” R v. J. (J.-L.), [2000] 2 S.C.R. 600, at p. 613

Notably Dulong v. Merrill Lynch Canada Inc., 80 O.R. (3d) 378 the Canadian Supreme Court identified the notion of this gatekeeper function with the general requirement that the parties to the action must be afforded the opportunity to lead the most complete evidentiary record consistent with the rules of evidence. “This fundamental tension can only be resolved by the careful and consistent application of the rules of evidence.”

Experts and mythology... is it necessary?: the wise counsel of Gandalf
The content of the expert’s report as set out in Part 33 really is the gold standard of the matters which he must pay regard to. However the challenges concerning the use of expert evidence has led to our Court of Appeal ultimately recognising the importance and contribution of the role of experts to the determination of truth through an appreciation of the role to be played by the expert in the resolution of the dispute. Experts may be summoned as mystics themselves however whether the Court should use an expert or not should engage for the most part more than just a box checking of procedural requirements but a substantive review of the proposed evidence and contribution the expert is likely to make to the issues that fall for determination. In short is it really necessary?

The Supreme Court of Canada established an inquiry as to the necessity of expert evidence in R v Mohan. The Mohan inquiry calls the Court to determine admissibility based on relevance, necessity, the absence of exclusionary rule and whether the proposed witness is a properly qualified expert. Does the evidence as a matter of logic or human experience have some tendency to advance the inquiry and .... the cost benefit analysis. See also R v McIntosh the comment of Finlayson J is quite instructive:

“... However, I do not intend to leave the subject without raising some waning flags. In my respectful opinion, the courts are overly eager to abdicate their fact-finding responsibility to “experts” in the field of the behavioural sciences. We are too quick to say that a particular witness possesses special knowledge and experience going beyond that of the trier of fact without engaging in an analysis of the subject matter of that expertise... simply because a person has lectured and written extensively on a subject that is of interest to him or her does not constitute him or her an expert for the purposes of testifying in a court of law on the subject of that specialty. It seems to me that before we even get to the point of examining the witness’ expertise, we must ask ourselves if the subject matter of his testimony admits of expert testimony. Where is the evidence in this case that there is a recognized body of scientific knowledge that defines rules of human behaviour affecting memory patterns such that any expert in that field can evaluate the reliability of the identification made by a particular witness in a given case?”

See also P v McDonald and R v J0 LJ dealing with “junk science”

The common knowledge or area of expertise tests in US and Canada are not free from controversy.

The simple requirement in our rules r 33.4 is that expert evidence must be restricted to that which is reasonably required to resolve the proceedings justly. There is no requirement to judge the content of the expert report to determine its admissibility as in the Daubert trilogy in the US examining whether the testimony is based on sufficient data or fact, that it is the product of reliable principles and methods and the expert has applied the principles and methods reliably to the facts of the case. Not unusually applications are made for the permission to use expert reports and there may be no report annexed or proposed witness statement. Granting permission to rely on an expert then must be subject to the Court later scrutinizing the actual report and evidence at a later stage and determining its suitability. Permission granted to use a Part 33 expert is not an unconditional irrevocable imprimatur for its use at a trial. It is subject to review, scrutiny and supervision of the Court.

Indeed in Jamaica such a two stage approach is recommended by the Court of Appeal where permission granted by the case management judge can be reviewed by the trial judge. See National Commercial Bank of Jamaica 2005 “all parties should know long before trial what expert evidence will be put before the trial judge and what will not.” In a docket system as pertains in Trinidad and Tobago it simply means that the Court must always keep an open mind as to the relevance and usefulness of experts as the proceedings progress.

We would do well as Judges to bear in mind the Aikens J warning on becoming too complacent in determining whether expert evidence is reasonably required to resolve the dispute.


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"I should mention one further practical matter, which I think is relevant to large commercial disputes. It is inevitable when there is a dispute between commercial entities that covers a long period of time (as this case does) and concerns a very large sum of money, that a huge amount of documents will have to be considered. There is a natural tendency of parties and their advisors to consider employing experts to assist in digesting this material, particularly if it relates to any area that might be recondite, such as trading in Russian debt in the 1990s. There is a tendency to think that a judge will be assisted by expert evidence in any area of fact that appears to be outside the "normal" experience of a Commercial Court judge. The result is that, all too often, the judge is submerged in expert reports which are long, complicated and which stray far outside the particular issue that may be relevant to the case. Production of such expert reports is expensive, time-consuming and may ultimately be counter-productive. That is precisely why CPR Pt 35.1 exists. In my view it is the duty of parties, particularly those involved in large scale commercial litigation, to ensure that they adhere to both the letter and spirit of that Rule. And it is the duty of the court, even if only for its own protection, to reject firmly all expert evidence that is not reasonably required to resolve the proceedings."

Recently Warren J in British Airways plc v Spencer and others (trustees of the Airways pensions scheme)[2015] EWHC 2477 (Ch)reflected on this test on the admissibility of expert evidence and opined:

“Instead, it is necessary to look at the pleaded issues and, unless and until a particular issue is excluded from consideration under CPR 3.1(2)(k), the court must ask itself the following important questions:

(a) The first question is whether, looking at each issue, it is necessary for there to be expert evidence before that issue can be resolved. If it is necessary, rather than merely helpful, it seems to me that it must be admitted.

(b) If the evidence is not necessary, the second question is whether it would be of assistance to the court in resolving that issue. If it would be of assistance, but not necessary, then the court would be able to determine the issue without it (just as in Mitchell the court would have been able to resolve even the central issue without the expert evidence).

(c) Since, under the scenario in (b) above, the court will be able to resolve the issue without the evidence, the third question is whether, in the context of the proceedings as a whole, expert evidence on that issue is reasonably required to resolve the proceedings. In that case, the sort of questions I have identified in paragraph 63 above will fall to be taken into account. In addition, in the present case, there is the complication that a particular piece of expert evidence may go to more than one pleaded issue, or evidence necessary for one issue may need only slight expansion to cover another issue where it would be of assistance but not necessary. Further, although CPR 35.1 does not refer to issues, but only to proceedings, if evidence is not reasonably required for resolving any particular issue, it is difficult to see how it could ever be reasonably required for resolving the proceedings. I therefore see a test directed at issues as a filter. That, at least, is an approach which can usefully be adopted.”

In our jurisdiction in Kelsick v Kuruvilla and another CA Civ 0277 of 2012, the seminal judgment of Jamadar JA has been our guide in determining the admissibility of evidence. Its focus is on a holistic view of the evidence to determine if this ultimately gives effect to the overriding objective.
In determining whether permission should be granted to use expert evidence and what expert evidence is reasonably required to resolve the issues that arise for determination, a court ought to weigh in the balance the likelihood of the following (assuming admissibility):
(i) how cogent the proposed expert evidence will be; and
(ii) how useful or helpful it will be to resolving the issues that arise for determination.

In determining whether this evidence is reasonably required to resolve the proceedings justly, the following factors that allow one to assess proportionality should also be weighed in the balance:
(iii) the cost, time and resources involved in obtaining that evidence, proportionate to the quantum involved, the importance of the case, the complexity of the issues, the financial position of each party involved in the litigation, and the court resources likely to be allocated to the matter (in the context of the court’s other obligations);

Depending on the particular circumstances of each case additional factors may also be relevant, as such:
(iv) fairness;
(v) prejudice;
(vi) bona fides; and
(vii) the due administration of justice.

Under cogency, the objectivity, impartiality and independence of the proposed expert, together with the qualifications and experience of the proposed expert, in relation to both the specific subject under consideration and the particular issues to be resolved, are material considerations. At this stage of the proceedings a trial judge is simply required to assess how cogent the expert evidence is likely to be. That is, how convincing and compelling it is likely to be based on the stated considerations. Under usefulness or helpfulness, the technical nature of the evidence to be reconciled and the focus of the issues to be determined, as well as the familiarity of the expert with the areas under scrutiny, are material considerations, especially when that expertise is relevant for necessary fact and/or inferential findings. As with cogency, at this stage of the proceedings the trial judge is only required to assess the likelihood of usefulness or helpfulness.

These two factors (of cogency and usefulness/helpfulness) contain some commonalities and there will often be overlap in what one considers under these two heads. Proportionality involves a comparative assessment of the multiple considerations stated in the Overriding Objective (Part 1.1, CPR, 1998). These considerations are not exhaustive and only serve to assist the court in determining what is required to deal with a case justly.

In summary, for expert evidence to be appropriate in light of the CPR, 1998, and for permission to be granted to use it, that evidence ought to be relevant to matters in dispute, reasonably required to resolve the proceedings and the proposed expert must be impartial and independent and have expertise and experience which is relevant to the issues to be decided. In addition, the use of expert evidence must also be proportionate in light of the factors set out in Part 1.1, CPR, 1998. Economic considerations, fairness, prejudice, bona fides and the due administration of justice are always matters that may have to be considered depending on the circumstances of each case.

To ensure that there is no uncertainty we wish to clarify that the above factors are not to be understood as hurdles to be cleared when considering whether to grant permission for expert
evidence. They are intended to function as guidelines to assist the court in determining whether to grant permission. We also wish to note, that the factors of cogency and usefulness/helpfulness may also be relevant at the stage in they are intended to function as guidelines to assist the court in determining whether to grant permission. We also wish to note, that the factors of cogency and usefulness/helpfulness may also be relevant at the stage in the proceedings when the trial judge has heard the evidence and is analyzing the expert evidence and determining the matter on the merits.”

This has been welcomed guidance for the admission of expert evidence and the principles that are applicable to determining its utility. In its application the Court has been more focused on seeing to what extent the expert really can synergize his expertise to assist the court. A good working example is the recent case of Emile Elias and the decision of Justice De Vignes. The court in this case was left to decide two issues; firstly whether expert evidence was reasonably required to resolve the matter justly and whether the Court should appoint the proposed experts of the Claimant. The case in itself dealt with the devise of assets and the estate of the Claimant’s father who was a Lebanese national with his Will made under Lebanese law. The Claimant accused the Defendants of fraud and breach of trust and was seeking equitable compensation for the value of the Lebanese property he believed he has a share in.

In understanding the laws of Lebanon as it relates to Wills, the judge found that expert evidence would be required to assist with such and in order to determine the action justly. He considered the matter to be a complex one and of great interest to all involved due to the financial implications and the contentious issues that arise for determination. The learned judge delved into the law on expert evidence with the starting point of Kelsick v NWRHA Civ App 277 of 2012, in which he reiterated the approach set out by the Court of Appeal in considering whether or not to appoint an expert. These considerations are the Part 33 principles and those that ought to be interpreted in light of the overriding objective. Specifically Part 33.4 makes mention of the fact that expert evidence must be restricted to that which is reasonably required to resolve the proceedings justly. This goes hand in hand with the tenets of the overriding objective. Key aspects to be considered are how cogent the evidence will be and how useful it will be to resolving the issue at hand. This will be weighed against factors such as cost versus the proportionality of the quantum versus the financial position of the parties; time and resources involved in getting the evidence versus the importance of the case to the parties.

In assessing the need for the expert evidence and whether the Court should appoint the experts of the Claimant, the learned judge looked at the qualifications and experience of the proposed experts by the Claimant in order to determine whether those persons met the criteria of being capable of providing the Court with an objective, impartial and independent opinion on the issue before the Court. The persons put forwards were versed in the laws of Lebanon and the judge saw this as being beneficial to the issue at hand. Furthermore the judge found that the complexities of the case and a law of a different land would require someone with the experience in that law and more so with a keen interest in the area of wills to assist the Court in understanding the issues. Thus the Court saw the need to accede to the request for independent assistance by way of an objective unbiased opinion and further to appoint the proposed experts of the Claimant who the Court found to be sufficiently independent and no signs of impropriety of their respective behalves. The Court also gave consideration to the overriding objective and found the conduct to be in keeping with the principles of the overriding objective.
The battle of the five armies

Five or more experts having a go on their professional opinion on damages or professional negligence is as epic as a battle of men, orcs, dwarves, elves and hobbits at Helms deep. The case of personal injury assessment and multiple experts is overwhelming with assessments being constantly reviewed as progresses to trial. Boxes of files may be hauled into your office and you are asked to become an expert overnight. The question is where do you draw the line? Indeed the exasperation of too many experts in a case may have been the cause for Justice Rothstein to observe in the Canadian Supreme Court in Masterpiece Inc v Alavida Lifestyles Inc (2011) S.C.J. 27 that regarding opposing expert testimony his preference was for “none” and a judge’s common sense could well replace expert testimony in areas where the judge has direct experience as a consumer. (Ignoring their own idiosyncratic knowledge or temperament).

Obtaining cogent and credible evidence of an expert is one thing but where there are rivalling expert opinions, the difficulty of managing such opinions is quite another task. What strategies can be devised by the case managing judge to deal with battles amongst experts? There are two workable solutions: (a) encouraging collaboration amongst experts and (b) the utilisation of an independent expert.

Arriving at a consensus amongst experts: managing multiple experts and expert conference circles

Hot tubbing or concurrent evidence is a technique to encourage collaboration amongst experts. Its focus is on economy of time, getting to the “bulls eye” of the dispute, simplifying scientific data. In judicial settlement it also is an opportunity to humanise the scientific debate or reframe it in simple laymen friendly terms. It is a process whereby experts give their evidence concurrently rather than one at a time in the presence of each other with each expert having the opportunity to question the other as well as their advocates and the judge usually can with his own question and summarises. A useful illustration is in Bathurst Regional Council v Local Government Financial Services Pty Ltd (No 50 [2012] FCA 1200. Hon Justice Peter McLellan described it as “The process is flexible and variations can be made depending on the nature of the case. Under the Court’s direction, the basic approach is for the experts retained by the parties to prepare written reports in the normal way. The reports are exchanged and the experts are required to meet without the parties or their representatives to discuss those reports. This may be done in person or by telephone. The experts prepare a Joint Statement incorporating a summary of the matters upon which they agree, but also and very importantly, matters upon which they disagree. Before the trial the parties produce an agreed agenda for taking concurrent evidence based on the Joint Statement. This contains a numbered list of the issues where the experts disagree and must be provided in sufficient time to enable the judge to consider it properly. At trial, the experts are sworn together and take their place together at the witness table. Using the summary of matters upon which they disagree, the judge chairs a “directed” discussion of the issues in disagreement. The process provides an opportunity for each expert to place his or her view on a particular issue or sub-issue before the court. The experts are encouraged to ask and answer questions of each other. The advocates also may ask questions during the course of the discussion to ensure that an expert’s opinion is fully articulated and tested against a contrary opinion. At the end of the discussion, the judge will ask a general question to ensure that all of the experts have had the opportunity to fully explain their positions.”

The process is flexible. The basic template is that the experts prepare written reports. They are exchanged and they meet without parties or representatives to discuss the reports either in person
or over the telephone. They prepare a joint statement summarising the matters they agree and matters they don’t agree. An agreed agenda for taking the evidence concurrently is submitted to the Court containing the issues on which they disagree. The experts are sworn together and sit at the same table. On the matters on which they disagree the judge chairs a discussion on these issues. Each expert submits his views and the experts question each other, followed by the advocates and the judge. The judge then summarises or asks general questions to ensure all experts had a sufficient opportunity to explain their positions. Much like a panel discussion or a conference circle.

It calls for active case management and a very thorough knowledge of the area by the judge. It is suitable in complex cases with multiple experts, most of whom having difficulty meeting or agreeing. It is an opportunity for the judge to take the evidence by the scruff of the neck and determine where the common theories lie and where the difference which would allow for his analysis to be easily identified.

It was introduced in Australia, Canada, Singapore, Malaysia, Hong Kong and Japan, with limited introduction in the UK. Judicial endorsement is growing:

“The courtroom, with all its formalities and evidentiary rules, is a poor schoolhouse, and ‘duelling experts’ may make bad teachers...a court should be able to require opposing experts to testify on the same panel and to be subject to questioning in the presence of each other, with the right to question each other in the presence of the trier of fact ... The theory is that experts testifying in the presence of one another are likely to be more measured and complete in their pronouncements, knowing that exaggeration or errors will be pounced upon instantly by a learned colleague, as opposed to being argued about days later, perhaps by unlearned opposing counsel.”

In the UK following the publication of the Jackson Report, the judges at the Manchester TCC and Mercantile Court agreed to participate in a pilot study on concurrent evidence. Mrs. Genn’s report makes for useful reading on the feedback from the participants.

“The main benefit I found was when the other expert said something with which I did not agree, I could immediately explain my disagreement directly to the trial judge rather than have to explain it to my Counsel and for him then to cross-examine the other expert. Many times over my 43 years of giving evidence in the conventional manner, Counsel has not initially fully understood certain technical issues and it has taken several attempts and extended his cross-examination to clear up the issue to my satisfaction. The use of concurrent evidence where I could talk directly to the judge was a great improvement, in my opinion, and allowed points of disagreement to be cleared up quickly,” [Expert]

“I feel that if concurrent expert evidence is fully developed that in time experts will understand that their role is to assist the Court rather than the party that instructs them. This mindset is changing, but I believe that the giving of concurrent expert evidence will take this to another level.” [Solicitor]

The advantages of course of this process is:

• Its efficiency with collating multiple experts’ evidence.
• There is more focus on the issues.
• It can be engaged prior to the trial which may eliminate the need for a trial altogether.
• Time at the trial is ultimately saved.
• It enhances the quality of decision making and certainly makes it far easier to meet the timely delivery of judgments by the court having a better appreciation of the expert evidence.
The success however depends upon its careful execution and supervision by the Judge. It is important in my view to have other relevant witnesses of fact there who may add to the debate. The conference should be done at trial or before the trial. A shadow expert to help the court in asking questions and summarising in layman’s language what is said is a useful variation. The court should still be on the guard for persuasive, assertive, confident experts or experts with brilliant reports who simply are poor witnesses. The best filter must be in the manner in which questions are asked and to abandon the rules of cross examination and re-examination altogether. It is a half way house of the judge and relinquishing entirely the examination to the advocates. But this is your process. Be creative. Even though it may be costly and adds to the time of preparation of a trial but certainly it is more rewarding.

This will require changes to our roles. A judge must be well prepared to take an active role. Not only pre reading but to obtain assistance in understanding basis concepts. Schooling attorneys of the aim of cross examination not to trip up the witness but to elicit a constructive dialogue. There is a need to identify the right cases to use the hot tub and whether indeed the alternative of without prejudice joint meetings ought to be used in preference to or as a precursor to the hot tub. Speaking to a qualified pathologist he pointed out the real possibility of egos and long history of academic animosity to filter in to a hot tub. Some indeed can be overbearing intransient and ignorant. Knowing your experts, their backgrounds and their ability to focus is critical to the success of this strategy. This requires therefore in my view a form of screening for the suitability of the hot tub. This screening should be conducted with the attorneys and the experts and after the reports are produced. It is a way in which you begin the process of collaboration and consultations to maximise their input in your task of fact finding. This can be in the form a of a questionnaire. Some questions that should be asked (a) independence and impartiality (b) openness to explore alternative theories (c) duty to the court (d) knowledge of the opposing experts and their work (e) concessions being made and its impact on their professional and academic reputations (f) convenience to meet preferably before trial (g) volunteering to prepare a draft report of their discussions (h) important questions and issues that they would like addressed or dealt with. (i) an understanding of the procedure to give concurrent evidence. (j) Explain how the court room will be set up and the procedure. (This is the court’s witness you begin by making that point) (k) use of IT so that all experts and court can follow the evidence conveniently lecture style or use of power point presentations, flipcharts or other devices. With the advent of YouTube or simulations experts can display for the Judge how an operating procedure was conducted and what were the alternatives available.

Expert conferences are also a useful procedure to be conducted by the experts on an without prejudice basis. Usefully the Australia Federal Court Rules imposed a very useful obligations which makes it mandatory for experts to utilise these meetings to the best of their ability. “If experts retained by the parties meet at the direction of the Court it would be improper for an expert to be given or to accept instructions not to reach agreement. If at a meeting directed by the Court the experts cannot reach agreement about matters of expert opinion, they should specify their reasons for being unable to do so.”

A precursor to this certainly is to impose sanctions on the parties to stay or dismiss proceedings if there is non-compliance or an inability to arrive at a joint statement without setting out a good reason for doing so. Further if the attorneys have acted reasonably to consider the imposition of wasted costs orders against them.
Another procedural device is putting questions to experts in lieu of their attendance. See EC and Jamaican rules.

In my view speaking from my experience from judicial settlement or judicial mediation this type of collaboration is to be encouraged and is a working example of the mode of problem solving transforming our role as a Judge.

**Side warning-The desolation of the independent expert**

An alternative to the hot tub is the court appointed and single expert. Part 33 specifically provides for the appointment of a single expert. Indeed this is the preferred model of adding expert evidence. While cost effective one only has to reflect that at one stage in history science concluded the world was flat. It makes the point that even here the Judge must choose his cases carefully before using this model.

In fact, in P v Mid Kent Healthcare NHS Trust [2002] 1 W.L.R. 210; [2001] EWCA Civ 1703 which concerned a claim for medical negligence, the expert evidence dealing with quantum was provided by seven joint experts: an education psychologist, an employment consultant, a nursing specialist, an occupational therapist, a physiotherapist, an architect and a speech therapist. Each produced a report. The appeal centered around whether the claimant’s parents should have been allowed to hold conference with the experts without the defendant solicitor present Lord Woolf ’s judgment included a clear point of principle on the single joint expert procedure at paragraph 28:

“The starting point is: unless there is reason for not having a single expert, there should be only a single expert. If there is no reason which justifies more evidence than that from a single expert on any particular topic, then again in the normal way the report prepared by the single expert should be the evidence in the case on the issues covered by that expert’s report. In the normal way, therefore, there should be no need for that report to be amplified or tested by cross-examination. If it needs amplification, or if it should be subject to cross-examination, the court has a discretion to allow that to happen. The court may permit that to happen either prior to the hearing or at the hearing. But the assumption should be that the single joint expert’s report is the evidence. Any amplification or any cross-examination should be restricted as far as possible. Equally, where parties agree that there should be a single joint expert, and a single joint expert produces a report, it is possible for the court still to permit a party to instruct his or her own expert and for that expert to be called at the hearing. However, there must be good reason for that course to be adopted. Normally, where the issue is of the sort that is covered by non-medical evidence, as in this case, the court should be slow to allow a second expert to be instructed.”

There have been orders where parties agree to be bound by the results of the single expert in the hope that it may be determinative of the issue. This brings with it its own mixed bag. While a salutary principle for simple cases such as valuations, some assessments there are some drawbacks. A court would tend to accept readily the findings of the single expert but it can present an incomplete picture to the court in failing to acknowledge that there may be more than one acceptable option existing in the community. Justice Downes of Australia’s Administrative Appeals Tribunal made these comments of the single expert.

“The risk of choosing an expert who is satisfied how a controversy within a discipline should be resolved is obvious, as are the problems associated with trying to select an expert who still holds an
open mind. *No impropriety is involved here. The first expert has simply moved to a concluded opinion before others. He may be right. But he may be wrong. There are... practical problems with court experts.***

Use of a single court appointed expert can be made to conduct a peer review of conflicting evidence and act as the Court’s shadow. Of course there is the cost associated with this measure and should be reserved for complex cases it raises concerns of transparency. It is certainly desirable in medical negligence cases especially where the Bolitho question is raised.

What is therefore required is for the Court to be even more vigilant with the single expert. To ask questions. To ask that further research be done. That other opinions be sought and examined. At minimum the independent expert can act as a shadow expert to advise the Court and at best he supplies all the expertise necessary to adequately resolve the controversy.

It is difficult to classify cases as being fit for the appointment of the single expert. Personal injuries, boundary disputes, child evaluations come to mind. But it depends upon the issue raised for determination and whether a question of fact can be safely disposed of by the intervention of an expert. A lot of time and money can be wasted if indeed the court has appointed the wrong expert or someone with very little expertise in the area. For this reason the contents of the report as required under Rule 33.10 is critically important and the Court ought to carefully scrutinise the expert’s opinion as truly determinative of the issue. The judge should have no hesitation in my view to discharge the expert of his duty and to commission another expert opinion. It is therefore recommended that qualifications and background checks are made before the selection of the independent expert, not simply rubber stamp the applications of the joint parties. It is of critical importance not to waste resources of the parties in pursuing a single expert without a full appreciation of his role and the issues he must address.

**The plan to defeat the dark Lord Saruman - Case Management strategies**

The best way to win a war is to avoid it. The Judge then at the very early stage must deploy strategies to manage a conflict which is cost effective and which is fair and which produces a practical and just result in litigation dealing with the issue of expert testimony. In so doing he manages the cost of proceedings, its complexity and its track towards solution without a trial. Fundamentally a thorough evaluation process must be engaged at the earliest opportunity. In Jamaica the Court of Appeal advised:

“*the reasons underlying the new rules require that expert evidence needs to be prepared in a structured manner under the supervision of the court. Judges sitting at first instance should therefore assert greater control over the preparation for the conduct of hearings than has hitherto been customary.***”

(a) The first task would be to understand the case, obtain all discovery and the facts and issues that need to be determined to resolve the dispute.

(b) Questioning the parties on their proposed witnesses and the expertise that may be required to deal with the issues. If experts have been retained, order disclosure of the reports. If pre action protocols have been observed this would have already been done.

(c) Determine the need for expert evidence and then how it is to be put to the most effective use. The determination on the admissibility of the expert evidence will be guided by the Kelsick
factors as well as probing questions on the substance of the reports. The reports can be reviewed after the submission and a Kelsick review conducted to filter the evidence even further.

(d) The court can consider a menu of options: joint experts, panel of experts, expert conferencing, just to list a few. Consider the need for joint reports and joint statement by the experts. The need to have joint pre trial conferences. Eliminating the need for expert cross examination or extensive questioning, by putting questions to experts.

(e) Where there is conflicting evidence: Appointment of peer reviews, neutral panels and conferencing.

(f) In a suitable case can it be appropriate for the case managing judge to say well let the expert decide. In boundary disputes, medical assessments, handwriting disputes.

(g) Sanctions are to be expressly made when parties fail to agree or to comply. Consider costs sanction for excessive and unnecessary reports. See Jacksons recommendations.

(h) Encourage without prejudice discussions amongst experts.

(i) Encourage collaboration on site visits.

At every stage the early discovery of expert opinion and joint expert testimonies should give the Court the confidence to re-engage the parties to re-think their cases towards settlement; indeed in most cases the experts themselves may hold the key here.

**Recommendations**

Active expert conferencing or hot tubbing, notwithstanding the absence of rules, in our jurisdiction can be introduced in the Caribbean under the court’s general power of case management under Part 26.1(w) and rule 33.6. Indeed Hon Justice Ian Binne correctly observed “Courts are the masters of their own produce and have the flexibility to modify to their own advantage the framework within which experts testify”.

To bring about this change in the use of expert evidence where focus is not on criticising or debating at length credentials reputations or theories by seeking their legitimate input, experts themselves must be consulted to devise an appropriate mechanism to enhance their utility in court. Post trial reports for example should be conducted in the use of concurrent evidence to determine matters such as their ability to contribute to the issues, their ability to find an appropriate middle ground, a process which is less time consuming and convenient.

A senior appellate judge in our jurisdiction before his retirement bemoaned the fact of the need for establishing a panel of experts. His solution was simple and practical: start with the simple case of valuations and surveys and get a roster of suitably qualified independent experts who would build a reputation of trust and candour with the court. They will of course be subject to a certification process, review and retraining. It should be an exercise conducted by both the bench and bar. I understand in some jurisdictions these panels exist. However more effective use of such a panel can be made so that it can indeed perform pro bono services in the appropriate cases, conduct peer reviews, act as shadow experts or be part of a panel to present varying views and present a 360 view of a legal problem.

There is the need as well for the bench and bar to develop protocols and guidelines for the use of experts and the use of expert circles or concurrent evidence.
I also recommend for serious consideration the use of expert mediators to confer with experts to arrive at common grounds in areas of expertise.

Returning to the case scenario what should have been the court’s approach:

(a) This issue in the most part arises in joint applications made by the parties for the appointment of an expert. In practice especially in the area of personal injury cases attorneys would make an oral application for permission to use expert evidence and for the claimant to be medically assessed by an expert to be agreed between the parties. All well and good for the parties to agree upon the appointment of an expert however who is this expert, what is his expertise, would that expert ultimately prove useful to the Court in the determination of the issues of continuing disability, pre-existing injuries and the like. Have the parties spent their time and expenses briefing a general practitioner.

(b) The Judge would agonise after the fact if he is left on his own to search through mounds of expert evidence without any assistance and would regret launching enthusiastically into a trial without the proper management of the expert evidence. The trial simply cannot proceed. The Court should consider sanctions against the parties such as depriving them of the costs of the reports so far prepared. The Court should now engage his menu of options to manage the experts. It is a suitable case for hot tubbing to arrive at some consensus and focus on the differing theories.

(c) The parties cannot expect to flood the Court with expert evidence. While the reports if already obtained ought to be disclosed, the first step is to determine the issues that arise which will resolve the dispute. Discuss with the parties the need for experts at all and if so in what areas. The Court should consider the menu of joint reports, without prejudice conferencing, hot tubbing at a pre-trial stage or a single expert. Selected applications should be then be made for the Court's review.

(d) Be creative, join the authority as an interested party. Make orders for the child’s assessment and the assessment of the prison. A well informed judge makes for a well informed judgment or better yet a more constructive dialogue with the parties to find solutions for the dispute and guidance for the future.

Conclusion:

In my view expert evidence should be seen as more than just simply an exception to the “opinion evidence rule”. Its value lies in its assistance to the judge in the determination of facts and truth where its admissibility should be premised upon its relevance and probative value. The future of the use of expert evidence in our civil justice system is one that will be heavily dependent on our robust and thoughtful case management that sees past the colours of their standards and balances finely the utility of their evidence on the principles of equality, economy and proportionality.

There is no doubt, great utility in the use of expert evidence, but the challenge is to reorient our roles with experts into a more collaborative model and to assume leadership for the management of the expert. Like a careful navigator, the Judge must be astute to detect which disputes would require his active management of expert evidence and which disputes can be left for expert and the assistance which they can lend to the determinations of facts and the central issues of case and ultimately the search for truth. The judgment call is yours guided by the principles of equality, economy and proportionality. A new and collaborative approach is necessary to effectively complete the revolution
of the new rules and make the expert becomes less of a mythical creature and more of a professional colleague in the Judges’ team for the search for just solutions.
ANNEX A

DRAFT GUIDELINES FOR THE VOLUNTARY PILOT OF THE TAKING OF CONCURRENT EXPERT EVIDENCE IN SUITABLE CASES IN THE MANCHESTER TCC AND MERCANTILE COURT
COMMENCING Monday 21 June 2010

Introduction
1. These guidelines set out (a) the procedure to be adopted when determining whether a case is suitable for a Concurrent Expert Evidence Direction (“CEED”), (b) the procedure to be adopted prior to trial where a CEED is made and (c) the procedure to be adopted at the trial itself.

Identifying a suitable case
2. In relation to a new case, consideration should be given to the suitability of a CEED at the first or subsequent CMCs. In relation to existing cases, either party may apply to the Court for a CEED or the Judge may of his own motion invite consideration of it and convene a hearing for that purpose. In cases approaching trial, this may be done at the PTR. In any case where the Judge has not invited consideration of a CEED, either party may apply to the Court for such consideration to be given. In an appropriate case, where the Judge makes pre-CMC directions, those directions may include a request that the parties consider the appropriateness of a CEED for that case.

3. In considering whether or not to make a CEED, the following factors will be of particular relevance:
   (1) The number, nature and complexity of the issues which are or will be the subject of expert evidence (“expert issues”); there is, however, no presumption that a CEED is appropriate only where the expert issues are complex or unusual;
   (2) The importance of the expert issues to the case as a whole; there is, however, no presumption that a CEED is appropriate only where the expert issues are of central importance;
   (3) The number of experts, their areas of expertise and their respective levels of expertise;
   (4) The extent to which use of the concurrent evidence procedure is likely to:
      (a) Assist in clarifying or understanding the expert issues, or any of them; and/or
      (b) Save time and/or costs at the hearing;
   (5) Whether there is any serious issue as to the general credibility or independence of one of the experts; if there is, a CEED is unlikely to be suitable.

4. A CEED may only be made by the Judge
   (a) after hearing submissions from the parties and
   (b) with their consent.

5. The CEED shall state that the oral evidence of the experts at trial shall be given concurrently, identifying the expert issue(s) and the experts to which it is to apply.

Pre-trial Procedure where a CEED has been given

6. The Court will make the usual directions as to the service of expert reports.

7. The Court will also make a direction for a meeting of experts and the provision of a joint statement pursuant to CPR 35.12 (“the Joint Statement”). However, in relation to the areas of
disagreement, the statement should identify each area clearly and separately, by reference to a heading and number in the list of such areas. Each expert’s position in respect such an area shall be set out, together with the reasons therefore. If the expert is relying on reasons given in the report already served, a clear cross-reference to the relevant part must be given.

8. Prior to the trial the parties shall produce an agreed agenda for the taking of the concurrent expert evidence based upon the Joint Statement (“the Agenda”). This will contain a numbered list of the issues where the experts disagree. It must be provided in sufficient time to enable the Court to consider it properly and if possible, by the PTR.

Procedure at trial where is CEED has been given

9. The final form of the Agenda will be decided at the PTR or the trial by the Judge after hearing from the parties. The Judge may re-order, revise or supplement it. The Agenda should then be reduced into writing and made available to the experts before they give their evidence.

10. At the appropriate time, the experts who are to give their evidence concurrently will each take the oath or affirm and then take their place at the witness table.

11. Before the evidence starts, and after hearing from the parties, the Judge will identify to the experts any significant factual matters or issues which have arisen in the trial thus far and which may affect their evidence.

12. Subject to any further direction the experts will address the issues in the order in which they appear in the Agenda.

13. In relation to each issue to be addressed,
   (1) The Judge will initiate the discussion by asking the experts, in turn, for their views. Once an expert has expressed a view the Judge may ask questions about it. At one or more appropriate stages when questioning a particular expert, the Judge will invite the other expert to comment or to ask his own questions of the first expert;
   (2) After the process set out in paragraph (1) above has been completed for all the experts, the parties’ representatives will be permitted to ask questions of them; while such questioning may be designed to test the correctness of an expert’s given view, or seek clarification of it, it should not cover ground which has been fully explored already. In general a full cross-examination or re-examination is neither necessary nor appropriate;
   (3) After the process set out in paragraph (2) above has been completed, the Judge may seek to summarise the experts’ different positions on the issues, as they then are, and ask them to confirm or correct that summary.

14. It is highly desirable that the parties agree in advance that a transcript of the expert evidence be obtained and provided to the Judge in all but the simplest of cases.

Data for the Pilot Study
15. In order to obtain the material needed for an evaluation of the pilot,
   (1) Judges will complete a suitable form
      (a) Explaining why a CEED was made in that particular case and
(b) In the event that concurrent evidence was actually given at the trial, how helpful, or otherwise, the process was to the parties and the Court, and in what way;

(2) The parties in such a case will be invited to give their own evaluation on a suitable anonymous basis, and

(3) The experts concerned will also be invited to give their views on a similar basis.
1. Introduction

Strictly speaking, the evidence of an expert is a form of opinion evidence. Unlike opinion evidence in general, however, expert evidence will be admissible if the expert is qualified to express the opinion and it is relevant to the issues before the court.\(^1\) Expressed slightly differently, Trollip JA, in *Gentiruco AG v Firestone SA (Pty) Ltd*,\(^2\) said that an expert’s opinion evidence would be admissible if the court would receive appreciable help from the witness on the particular issue concerned. The role of the expert witness in court proceedings was set out thus by Addleson J in *Menday v Protea Assurance Co Ltd*:\(^3\)

‘In essence the function of an expert is to assist the Court to reach a conclusion on matters on which the Court itself does not have the necessary knowledge to decide. It is not the mere opinion of the witness which is decisive but his ability to satisfy the Court that, because of his special skill, training or experience, the reasons for the opinion which he expresses are acceptable. . .

Phipson and Hoffmann, op. cit., both point out the dangers inherent in expert testimony. For example, the inability of the Court to verify the expert’s conclusions and the tendency of experts to be partisan and over-ready to find and multiply confirmation of their theories from harmless facts... Nonetheless the Court, while exercising due caution, must be guided by the views of an expert when it is satisfied of his qualification to speak with authority and with the reasons given for his opinion.

However eminent an expert may be in a general field, he does not constitute an expert in a particular sphere unless by special study or experience he is qualified to express an opinion on that topic. The dangers of holding otherwise - of being overawed by a recital of degrees and diplomas - are obvious; the Court has then no way of being satisfied that it is not being blinded by pure “theory” untested by knowledge or practice. The expert must either himself have knowledge or experience in the special field on which he testifies (whatever general knowledge he may also have in pure theory) or he must rely on the knowledge or experience of others who themselves are shown to be acceptable experts in that field.’

The evidence of experts (or, indeed, of anyone else) will never be admissible in relation to certain issues, no matter how eminent the expert may be. In the first place, generally speaking, expert evidence as to the law is not admissible. In South Africa, however, that is subject to qualification. Section 1 of the Law of Evidence Amendment Act 45 of 1988 provides that, if a court is not in a position to take judicial notice of a rule of customary law or international law, it may be proved by evidence, inevitably expert evidence.\(^4\) Secondly, expert evidence may not be led on the very issue that the court is required to decide, such as, for instance, the credibility of a witness.\(^5\) Thirdly, the

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\(^{2}\) *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A), 616H.

\(^{3}\) *Menday v Protea Assurance Co Ltd* 1976 (1) SA 565 (E), 569B-G.


In this paper, I intend to discuss three cases that highlight, in one way or another, the correct approach to expert evidence — and its limits — when there is also direct evidence available. The first case concerns the cause of a serious injury to a player in a game of rugby, the second the cause of a collision between a ship and a structure in a port and the third, the cause of a latent defect in a luxury car.

2. ‘Jack-knife’: the rugby injury

Rugby union is a contact sport played by teams of 15 a side which compete for an oval shaped ball that players may carry, pass and kick with the aim of scoring tries by dotting the ball down behind the opposition’s goal-line. The force inherent in the game is exemplified by the scrum — a way of restarting the game after a minor infringement of the rules. Rule 20 of the rules of rugby describes the scrum as follows:

A scrum is formed in the field of play when eight players from each team, bound together in three rows for each team, close up with their opponents so that the heads of the front row are interlocked. This creates a tunnel into which a scrum-half throws in the ball so that front row players can compete for possession by hooking the ball with either of their feet.’

The front rows of each team comprises of a tight-head prop on the right, a hooker in the middle, and a loose-head prop on the left. Rule 20.1(f) defines how the front rows are supposed to engage with each other. It states:

‘First, the referee marks with a foot the place where the scrum is to be formed. Before the two front rows come together they must be standing not more than an arm’s length apart. The ball is in the scrum-half’s hands, ready to be thrown in. The front rows must crouch so that when they meet, each player’s head and shoulders are no lower than his hips. The front row must interlock so that no player’s head is next to the head of a team-mate.’

The case of Roux v Hattingh7 concerned a game of rugby played between the first teams of two schools, Laborie High School and Stellenbosch High School. The principal issues involved were whether Roux, the hooker in the Stellenbosch team, caused, either intentionally or negligently, an injury to Hattingh, the hooker in the Laborie side, and, if so, whether his conduct was wrongful. In the trial, the evidence of a number of players on both sides was led. The coach of the Stellenbosch side was also called, as were three expert witnesses.

The evidence of the Laborie players, including Hattingh, was that before the scrum in which the injury occurred, Roux shouted the word ‘jack-knife’, obviously a call for a manoeuvre of some sort. When the front rows were about to engage, Roux loosened his bind on his loose-head prop (to his left) and moved to his right. This had the effect of closing the channel into which Hattingh’s head was supposed to go — between Roux’s head and Roux’s tight-head prop to his right. When the scrum

7 Roux v Hattingh 2012 (6) SA 428 (SCA).
engaged, Hattingh’s head, with no channel to go into was forced down under Roux’s head, placing pressure of his neck. When the scrum collapsed, as it inevitably was bound to, the downward pressure on Hattingh’s neck resulted in a fracture.

Roux’s evidence (and that of his team mates) was that the call of ‘jack-knife’ was a code for the wheeling of the scrum, either to the left or the right. He gave two different versions of what had happened in the scrum. In the first, he said that he had engaged in the scrum in accordance with the rules and with no difficulty whatsoever. In the second, he claimed that the scrum had collapsed, not because of anything he had done, but because the Laborie tight-head prop had scrummed in at an angle towards the centre of the scrum, forcing him to the right.

The three experts who gave evidence were Andre Watson, an international referee widely regarded before his retirement as one of the best referees in the world; Balie Swart who had been the tight-head prop in the Springbok team that won the Rugby World Cup in 1995 and who had subsequently been involved in coaching the Springbok forward pack; and Mathew Proudfoot, a South African who had played as a front-row forward for Scotland and who also had been involved in coaching after his retirement as a player.

The trial court had found that the version given by Hattingh and his teammates was more probable than that given by Roux and his teammates, and it regarded Hattingh to have been the more credible witness of the two. On appeal, the court found that there was no basis upon which the factual findings of the trial court could be interfered with.\(^8\) It concluded:\(^9\)

> ‘From the credibility findings made in favour of [Hattingh’s] version, which included the evidence that the word “jack-knife” was called by [Roux] and he only uttered that word, as well as the illogical explanations of [Roux] and his teammates that it related to the wheeling of the scrum, it seems to me that the probabilities are overwhelming that it related to the manoeuvre in terms of which [Roux] was to change his position in the scrum in order to close [Hattingh’s] channel and then scrum over him. Fourie J’s finding that it denoted a “manoeuvre which would cause the scrum to ‘jack-knife’, ie to collapse due to the opposition hooker being forced into a bent or doubled-up position” cannot be faulted.’\(^8\)

It confirmed the finding that Roux had acted intentionally in injuring Hattingh.

In so far as the evidence given by the experts was concerned, the court noted that while a great deal of time was taken up by the leading and cross-examination of these witnesses, none of them were present when the injury occurred with the result that their evidence really consisted of speculation as to what had happened based on a short video clip of the scrum in question and still photographs distilled from the video. Despite these shortcomings, however, the trial court had acknowledged that it had obtained ‘valuable assistance’ from them on ‘technical aspects of the game’.\(^10\) The place of expert witnesses in a case such as this was dealt with as follows by the court:\(^11\)

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8 Paras 12-13.
9 Para 17.
10 Para 19.
11 Para 20.
'In Motor Vehicle Assurance Fund v Kenny Eksteen J held, in the context of a motor collision that “[d]irect or credible evidence of what happened in a collision, must, to my mind, generally carry greater weight than the opinion of an expert, however experienced he may be, seeking to reconstruct the events from his experience and scientific training”; that the view of an expert witness as to what might probably have occurred should generally “give way to the assertions of the direct and credible evidence of an eye witness”; and that it is “only where such direct evidence is so improbable that its very credibility is impugned that an expert’s opinion as to what may or may not have occurred can persuade the Court to his view”. This is such a case: despite the undoubted experience and expertise of the three experts, and their useful contribution that was acknowledged by Fourie J, the direct, eyewitness evidence of [Hattingh] as to what happened in the fateful scrum, rather than the speculation of the experts as to what may have occurred, drawn from their viewing of the video clip and the photographs, must surely carry the day, as Fourie J concluded.’

The views of the experts in this case were important in three respects. In the first place, they confirmed the credibility of the version given by Hattingh: all of them knew of this method of blocking the hooker’s channel and scrumming over him as part of the dark arts of front row play (although neither Swart nor Proudfoot admitted to ever having done this); secondly, they confirmed that if Roux and his teammates had blocked Hattingh’s channel in this way, the scrum would have been unstable and bound to collapse, as it did; and thirdly, they confirmed that the move was inherently dangerous and bound to have the result which it did, a piece of evidence that went to the court’s conclusion that the act of closing the channel was not only intentional but wrongful as well.

3. ‘Hard to port’: the Banglar Mookh’s mishap in the port of Cape Town

MV Banglar Mookh: Owners of MV Banglar Mookh v Transnet Ltd 12 concerned whether the pilot who was bringing a ship into the port of Cape Town was either reckless or grossly negligent when the starboard bow of the vessel struck a structure in the port. 13 The trial court found that the pilot had been negligent but not grossly so, with the result that Transnet was not liable for the damage to the vessel. The owners of the vessel took the matter on appeal.

For the owners of the vessel, the main witness was the vessel’s master. He testified that the cause of the collision was the speed with which the pilot had brought the vessel into the harbour basin, coupled with him having taken it on an incorrect line in the approach channel, necessitating him having to steer hard to starboard to avoid colliding with a structure on the port side, which then put it on a collision course with a structure on the starboard bow, which it struck. The judge in the court below accepted this evidence and the evidence of an expert, one Captain McAllister, who had calculated the speeds at which the vessel had travelled as it entered the port. The evidence of the pilot was that he had brought the vessel into the basin of the port without incident except for the fact that the incompetence of the vessel’s crew had hindered the forward tug from making fast. When the vessel entered the entrance to the dock where it was to berth, he ordered the helmsman

12 MV Banglar Mookh: Owners of MV Banglar Mookh v Transnet Ltd 2012 (4) SA 300 (SCA).
13 Item 10(7) of Schedule 1 of the Legal Succession to the South African Transport Services Act 9 of 1989 provides that Transnet, a parastatal that operates harbours in South Africa (through one of its subsidiaries), and any pilot (employed by it) ‘shall be exempt from liability for loss or damage caused by a negligent act or omission on the part of the pilot’. It has been held that this exemption does not apply to grossly negligent or reckless acts or omissions on the part of the pilot. See for example, Owners of the MV Stella Tingas v MV Atlantica & another (Transnet Ltd t/a Portnet & another, Third Parties) 2002 (1) SA 647 (D).
to move the helm to port. He noticed, however, that the bow had veered to starboard. He then ordered the helmsman to steer hard to port and rushed to the helm. He found that the helmsman had the helm hard to starboard. He took the helm and swung it hard to port but this was too late to avoid the starboard bow striking a structure in the port.

The appeal court found that the trial court had misdirected itself in its assessment of the evidence and its factual findings. It had ignored the fact, in rejecting the evidence of the pilot, that his evidence was corroborated by the evidence of the master of one of the tugs and the engineer of the other, and the evidence of all three was consistent with the recording of their communications at the time. It had overlooked a range of difficulties with the evidence of the master of the vessel. More importantly, for present purposes, the appeal court expressed grave doubts about the reliability of the expert evidence of Captain McAllister, which had been accepted by the trial court as corroborative of the master’s evidence. It summed up these problems as follows:14

‘We do not think that Captain McAllister’s reconstruction can be regarded as having been based on accurate data — on the contrary, we think that it rested on “a potentially imperfect foundation”. A number of aspects are not clear. The deck and engine logs did not coincide and the assumption that the engine log could be taken as reliable lacked a factual basis. Accordingly there was no clarity on the engine speeds at different stages. To take but one example, the deck log said that the order “full ahead” was given after passing the breakwater, whilst the engine log showed it as having been given before passing the breakwater. The difference between the two is one minute, and that would materially affect the calculations. What was meant by “past the breakwater”? If that point was taken only once the vessel’s superstructure was past the end of the breakwater, it reduced the distance to be covered to the point of collision by around 10% and the speed by between one and two knots, from the 9 knots calculated by Captain McAllister to a little over seven knots, which no one described as too fast. The position of the vessel at the various stages was not clear. What effect did the heading of the vessel have on the calculation? Captain McAllister agreed that it was not possible to assess the speed of the vessel as it passed the breakwater. Was the vessel on the easterly side of the channel as it passed the breakwater? Captain Islam said it was, and the judge accepted this evidence and found that this was a result of an easterly set caused by the wind and swell. But in coming to this conclusion he ignored the unchallenged evidence of the respondent’s expert, Captain Woodend, who had extensive experience in piloting vessels entering the port of Cape Town, that the effect of wind and tide at the point is to set the vessel to the west, as described by the pilot, and not to the east, which is what mariners unfamiliar with the port would expect. While the judge was correct in criticising his evidence because he was unwilling to reject the pilot’s version on certain issues, that criticism does not apply to his evidence on this point. Here he was in any event not testifying as an expert, but on his experience as a pilot, which was that there is no easterly set in the entrance to Table Bay if the wind and swell are coming from the west (as they were on the day of the collision). If there was no easterly set and the vessel was more or less on the leading line, subject only to minor course corrections as described by the pilot, then it was also travelling significantly slower than Captain McAllister’s calculations suggested. The fact that the pilot came down the channel, well before reaching the breakwater, with the number four buoy “fine on the port bow” (ie at an angle of up to 45 degrees from the port bow looking ahead), lends no support to Captain Islam’s evidence that the vessel was on the easterly side of the channel.’

14 Para 51.
A number of observations are apposite arising from the judgment and this passage in particular. First, the passage highlights the problem that the accuracy of an expert witness’s evidence often depends on the accuracy of the input data. Secondly, and related to that, it is only supportive of the eye witness if the eye-witness is credible: one has to be careful to avoid the approach that the evidence of the eye witness corroborates the expert, rather than assessing the eye witness properly before considering the expert’s evidence. Thirdly, one has to guard against being seduced by what appears to be a sound and attractive theory of what happened at the expense of a proper analysis of the evidence given by those best placed to say what happened. Fourthly, one has to be astute to identify the precise area of expertise of the expert witness. In this case, McAllister had been a container ship captain who had experience of bringing vessels into the Ben Schoeman dock in the port of Cape Town, while Transnet’s expert, Captain Woodend, a former port captain, had been a pilot with extensive experience of bringing vessels into the Duncan Dock, where the collision occurred.

4. The luxury BMW and Sherlock Holmes

In Vousvoukis v Queen Ace CC t/a Ace Motors, Mr Georgios Vousvoukis had bought the type of second-hand BMW M5 that gives us all nightmares. Having driven it for only 5 000 kilometres, it experienced mechanical problems which required the replacement of the engine. When he had driven another 8 000 kilometres, the second engine also broke down. Having lost confidence in the BMW, Vousvoukis tendered the return of the vehicle against the repayment of the purchase price, a tender rejected by the defendant, the used car dealership that had sold him the lemon. He issued summons against the dealership for the refund of the purchase price on the basis that the BMW was latently defective.

It was common cause that the problem had occurred when some of the teeth of the oil pump’s drive gear had sheared off, but what had caused this to happen was the subject of dispute. It had been pleaded by the dealership that, while the cause was unknown, it was likely to have been brought about by an object falling into the sump when Vousvoukis replenished the oil. Vousvoukis, in his evidence denied that he had replenished the oil during the 8 000 kilometres of driving between the replacement of the engine and its breakdown, or that the oil light had come on. (This, according to the two experts who testified, would have occurred when a litre of oil had been used.)

The dealership’s expert was of the opinion that Vousvoukis would have had to replenish the oil during the course of the 8 000 kilometres because of the high oil usage of the BMW M5. His theory as to the most likely cause of the problem was that when oil was replenished, a plastic or foil object from the oil container must have fallen into the sump, been thrown up when the engine was running and sheared the teeth of the gear. The competing theory of the expert called by Vousvoukis was that when the sump from the first engine was used to replace the cracked sump on the second engine, a foreign body somehow found its way into the sump.

A number of problems manifested themselves in relation to the dealership’s expert’s theory. The first, as Pickering J pointed out was that a central pillar of this theory was that the oil must have been replenished, a fact which Vousvoukis denied. Secondly, his basis for this assumption was not first-hand knowledge of the BMW M5’s actual oil consumption but ‘anecdotal, hearsay averments by

15 Vousvoukis v Queen Ace CC t/a Ace Motors (3878/2013) ZAECGH 64 (19 June 2015).
16 Para 54.
certain unnamed clients’, some of whom appeared to have driven their cars very hard indeed.\textsuperscript{17}

Thirdly, he did not know if the plastic or foil objects he had in mind could have caused the damage, conceding that ‘[s]ome type of material engineer’ may have been able to give that answer.\textsuperscript{18}

Fourthly, he conceded, initially at least, that the plaintiff’s expert’s theory was possible that the damage was caused by an object like an aluminium shard or chip having been in the sump all along.\textsuperscript{19}

Fifthly, having made this and other concessions, he withdrew them when he got a chance, at a cost to his credibility. This led Pickering J to observe that he ‘appears to have adopted the evidentiary equivalent of a scorched earth policy, metaphorically burning every concession he had originally made as he retreated to the redoubt of re-examination’.\textsuperscript{20}

Having made the point that, in addition to the evidence of the experts, there was also the evidence of Vousvoukis before him to the effect that he had never taken off the oil filler cap and replenished the oil, Pickering J concluded as follows:\textsuperscript{21}

\textit{‘[68] In the light of what in my view was the unsatisfactory and speculative evidence of Gravett as to the oil consumption of the BMW it cannot be said that plaintiff’s evidence that he did not replenish the oil is so improbable that its very credibility is impugned. On the contrary, plaintiff was, in my view, a credible witness who made a favourable impression upon me. I am satisfied that he was an entirely honest witness and I accept his evidence that he did not replenish the oil during the relevant period. The underlying facts on which Gravett’s theory was based were therefore not established and his theory must therefore be rejected as being impossible.’}

\textit{[69] What was said by Sherlock Holmes over 150 years ago in The Adventure of the Beryl Coronet is apposite namely, once the impossible is excluded, whatever remains, however improbable, must be the truth.}

\textit{[70] Once the possibility of an object having fallen through the oil filler cap into the engine is eliminated then the only inference to be drawn in my view is that the damage must have been occasioned by an object present inside the engine itself. Once that is established as a fact then, it seems to me, the only further plausible inference to be drawn is that such object must have been present inside the engine at the time of its installation into the BMW. In the absence of any forensic examination of the engine it is not possible to determine what exactly that object was nor, in my view is it necessary to attempt to do so.}

\textit{[71] I am satisfied therefore that plaintiff has discharged the onus upon him of proving that the damage to the oil pump was occasioned in consequence of an object present in the engine at the time of its installation into the BMW.’}

5. Conclusion

What lessons can be drawn from the three cases that I have discussed? First, it seems to me, the Vousvoukis case highlights a problem that one finds all too often when experts testify: they become

\textsuperscript{17} Para 62.
\textsuperscript{18} Para 48.
\textsuperscript{19} Para 50.
\textsuperscript{20} Para 51.
\textsuperscript{21} Paras 68-71.
champions of the party who called them rather than independent witnesses whose function is to assist the court. It is difficult enough to arrive at the truth when dealing with complex technical evidence without an expert digging his or her heels in and trying to hold a line, come what may.

Secondly, the Roux and Banglar Mookh cases, in their different ways, are good illustrations of the idea that where one has direct, credible evidence as to what has happened in a case, all things being equal, it should be preferred over the reconstructed evidence of an expert working from assumptions that may or may not be accurate. That is, I think, a valuable, if trite, lesson because it is easy to be seduced by convincingly presented theories of an expert in his or her field. That is precisely what happened in the Banglar Mookh case. There is no substitute for a proper evaluation of all of the evidence and a thorough analysis of the probabilities.

Thirdly, even though the opinions of experts may, as a general rule, have to bow to the direct evidence of eye witnesses, the expert evidence may do two important things. It may provide an understanding of surrounding circumstances, such as the valuable assistance given by Watson, Swart and Proudfoot on technical aspects of rugby, especially scrumming, in the Roux case. It may, in other words, inform the court’s understanding of the direct evidence. The opinions of experts may also assist the court in determining the probabilities. In Roux, once again, the experts all knew of the ‘jack-knife’ move and what its effect on a scrum – and on the opposing hooker – would be.

The opposite was true in Vousvoukis. The defendant’s expert evidence as to the car’s oil consumption was not satisfactory so it could not serve to undermine the probabilities in favour of Vousvoukis not having taken off the oil filler cap and replenished the oil. Once the evidence of Vousvoukis was accepted as credible, that blew the defendant’s expert’s theory out of the water because it was based on an assumption that had been rejected.

Finally, it seems to me, the Banglar Mookh and Vousvoukis cases highlight the very real limits of expert evidence when it is tacked onto the direct evidence of one of the parties, and dependant on the acceptance of that evidence: it is often an all or nothing game. In Banglar Mookh, for instance, McAllister’s evidence was only as good as the assumptions upon which it was based, and they were drawn from the version of the master of the vessel. Once his evidence was not accepted, McAllister’s speculation as to the speed of the vessel and its course was vulnerable to challenge. Conversely, in Vousvoukis, once the direct evidence of Vousvoukis was accepted, that of the opposing expert had to be rejected as it lacked a proper foundation.

All of this is not to say that expert evidence does not serve an important role in the administration of justice. There are many cases that simply cannot be decided without regard to the opinions of expert witnesses. But it is nonetheless necessary to bear in mind the limits of the usefulness of expert evidence.
A Court administrator is an officer of the Judicial system who performs administrative and clerical duties essential to the proper operation of the business of Court, such as tracking trial dates, keeping records, entering judgments and issuing process.

A go-between for Judges, attorney and clients, the Court’s administrator essentially runs the Court’s business.

The officer is responsible for scheduling trial dates, handling all official correspondences, processing Court papers, accepting lawsuit filings and summons.

In most Commonwealth countries, Court administration is done by middle manager Judicial officers.

Judicial administration consists of the practices, procedures and offices that deal with the management of the system of the Courts. Judicial administration or administration of the Court has traditionally been concerned with assigning of Judges to cases, creating Court calendar of activities and supervising non Judicial staff.

Contemporary trends in Court management have reshaped this traditional office. Technology has led the change. Where once Courts relied entirely on paper records, computer databases are fast becoming the norm. The administrators provide the Court with an executive leadership team, capable of confronting the increased complexity & necessity of change that characterize a modern Court system.

Issues

Most Judicial officers have not received training in Management. There is need for managerial expertise to direct the complex operations of Court. Trained managers will leave room for the Judges to concentrate on their primary duties.

Currently many Judicial officers are on assignment as Registrars of High Court while at the same time carrying out Judicial duties as Chief Magistrates. They have to supervise both High Court and Magistrate Courts which is a very big task. It becomes impossible to balance Judicial work and administration and management which inter alia involves human resource management, fiscal administration, case flow management, information management, community relations and public information.

The Judiciary has made many innovations like mediation as a form of ADR but lacks the requisite funding to support the innovations. The infrastructure to carry out the innovations like rooms for mediation are very limited which poses a big challenge to the registrars to do their work.

Technology advancement is very limited. Internet access in some areas is poor and electric power supply is intermittent in many areas without an alternative to power supply thus affecting productivity of Registrars in Court administration.
There is a noticeable low morale among Court administrators in Uganda attributed mainly on low terms and conditions of services and delayed career progress which affect the output of the Court managers.

Delayed and inadequate funding of the operations of Court in many cases has frustrated implementation of Court calendar of activities.

A well functioning Court administration is a condition for legal certainty, the fair and effective resolution of legal disputes that reach the Courts.
Military Justice Systems
Chief Judge Christopher Hodson, New Zealand

Independence and Impartiality – The Military Justice context

Historical Background

Throughout most of their 800 years of existence the courts-martial of the Commonwealth world had little regard for the appearance of independence or impartiality. The powerful figure of the “convening officer” - invariably a highly ranked officer of one of the armed forces – dominated the process. It was the convening officer who approved the charges, appointed a judge-advocate, selected and appointed members of the court, appointed the prosecutor and (in many cases) the defending officer too. Restraints upon this significant power were, if they existed at all, self-imposed. For example in one New Zealand case the Court Martial Appeal Court questioned the wisdom of the convening officer actually sitting in the court-room to observe proceedings, but could find no rule prohibiting it.

The decisions and findings of military courts were, furthermore, often subject to the confirmation of superior military commanders, who did not always require a legal basis for their decisions. The rulings of judges-advocate were, for much of this time, regarded as useful guidance only.

The antidote to this institutional lack of independence was simply this – the military members of the court swore an oath to do justice in the case before them and, as a general proposition, this is what they did.

This arrangement began to change in the mid-1960s when the United Nations adopted the International Covenant on Civil and Political Rights. This major treaty set-out unambiguously the expectations of a justice system. Article 14 (1) states: everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Over the following decade many Commonwealth nations incorporated the ICCPR into their domestic law, and domestic courts gradually adopted its standards when assessing compliance with constitutional instruments. The impact on military justice systems, however, was not immediately apparent. Indeed it was not until the 1990s that the need for independence and impartiality in the military courts was emphatically affirmed in judgments such as the Canadian case of R v Généreux.

The modern requirement

The requirements for independence and impartiality within a military justice system, and how they are given effect-to, necessarily vary from state-to-state throughout the Commonwealth. For the purposes of this discussion the following principles, adopted by the United Nations, provide a useful yardstick:

- 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.

- The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
• The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

• There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

• Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

• The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

• It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

Other consideration in the military context

Within the military justice context there are other particular issues which impinge upon the appearance and reality of independence of military courts and tribunals. These include:

• Whether the judges of military courts are civilians or uniformed officers of the armed forces.
• Who, if anyone, governs their conduct, career and advancement.
• How military court judges are selected for appointment and how they are assigned to a particular trial.
• Whether they have security of tenure (subject to reasonable misbehaviours or incapacity procedures).
• The immunities of judges from legal proceedings.
• The process by which judges’ pay and access to resources is established and guaranteed.
• The relationship between military law and martial law.
• The process by which military members of the court are selected.
• The protection of military members from adverse assessment / punishment – for their conduct as members of the court.

These are matters which can be productively considered in our discussions.
Environmental Law
Justice Philip Waki, Kenya

Environmental Rule of Law: Critical to Sustainable Development.

Introduction.

The 22nd day of February 2013 is a historic day for the Environment. On that day the Governing Council of UNEP, in its 27th and first universal session, adopted Decision 27/9 on advancing justice, governance and law for environmental sustainability and used the term ‘Environmental Rule of Law’. This is the first internationally negotiated document to establish the term ‘environmental rule of law’. The decision, inter alia, called upon UNEP to “lead the United Nations system and support national Governments upon their request in the development and implementation of environmental rule of law with attention at all levels to mutually supporting governance features.” This has brought to the fore the urgency to forge the outer contours of the legal notion of environmental rule of law.

The decision followed the “Future We Want”- the outcome document of Rio+20 United Nations Conference on Sustainable Development which took place in June 2012, reaffirming that justice, including participatory decision-making, access to information and judicial and administrative proceedings as well as the protection of vulnerable groups from disproportionate adverse environmental impacts, should be seen as an intrinsic element of environmental sustainability.

Rio + 20 in turn had heeded the call by over 250 of the world’s Chief Justices, Heads of Jurisdiction, Attorneys General, Auditors General, Chief Prosecutors, and other high-ranking representatives of the judicial, legal and auditing professions, who gathered in Rio de Janeiro, Brazil, from 17 – 20 June 2012 for the UNEP World Congress on Justice, Governance and Law for Environmental Sustainability. They seized a generational opportunity to contribute to the debates on the environment and came to the conclusion that any diplomatic outcomes related to the environment and sustainable development would remain unimplemented without adherence to the rule of law and open, just and dependable legal orders.

In December 2012, pursuant to the outcomes of the World Congress and Rio+20, UNEP appointed a nine member council to advance the role of law, justice and good governance in achieving sustainable development. More specifically, the mandate of the council is to provide strategic guidance to the international community in improving the legal foundations for achieving international environmental goals, and overcoming legal barriers to inclusive sustainable development. It is now known as the International Advisory Council for Environmental Justice (IACEJ) and I am one of the disciples preaching the gospel on environmental rule of law.

The gospel has so far been preached at the 2012 World Congress on Justice, Governance and Law for Environmental Sustainability in Brazil, the 2013 Asia Pacific Colloquium on Environmental Rule of Law in Malaysia, the Global Symposium on the Environmental Rule of Law, which was held during the United Nations Environment Assembly (UNEA) in 2014 in Nairobi, and the first Inter-American Congress on Environmental Rule of Law held in March 2015 in Jamaica. In October 2015, it will be the turn of Africa
when the 1st “Africa Colloquium on Environmental Rule of Law” will be held in Nairobi, Kenya.

**Background**

**Definitions:**

**Environment**

A definition of “environment” easily reminds one of the old tale about an elephant and seven blind men. Each of the men characterized an elephant according to which part of the elephant’s body one touches and each unable to perceive the whole animal they are unable to see. So in the case of environment, each discipline tends to characterize it according to the subject they are familiar with. Those from public health field conceive of environment largely in terms of pollution and environmental health. Those from agriculture-related fields conceive of environment from the angle of land use, perhaps to include forestry. On the other hand, ecologists will invariably think of environment in terms of flora and fauna to the extent that some forget the land on which these grow. The World Conservation Union (IUCN) and International Council of Environmental Law (ICEL), in their Draft International Covenant on Environment and Development defined “environment” to mean “the totality of nature and natural resources, including the cultural heritage and infrastructure essential for socio-economic activities”.

**Preservation**

Preservation, as a management tool, is defined by the Working Group as the regulatory or management measures taken to ensure that selected natural resources or infrastructure such as unique biological formations, fragile ecosystems, endangered or threatened species, representative or unique natural or cultural sites are set aside, restrictively utilized or left alone so as maintain their characteristics in a manner unaffected by human activities to the fullest extent possible. Preservation also applies to maintenance of quality of natural resources, such as air, water, animal health or biological diversity.

**Conservation**

Conservation, on the other hand, is defined by the Working Group as the use of renewable resources sustainably and to avoid waste of non-renewable resources. In other words, conservation as a mode of management, refers to components of the environment, such as fisheries, forestry, land etc., which are renewable and should be used in such a way as to protect the threshold of sustainability. Biologists and resource economists operationalized the idea of conservation by coining the principle of maximum or optimum sustainable yield to determine the point which is not to be exceeded by utilization. Conservation provides the conceptual foundation for sustainable utilisation of the environment and its components so as to ensure sustainable development. That is to say, if we are to find a fundamental justification for environmental law, it is to ensure that the development interests of the present generation are realized without jeopardizing those of future generations. Promotion of intergenerational equity is therefore fundamental to environmental law.

**Sustainable Development**

The concept of sustainable development is as old as history itself, as was lucidly explained by Judge Weeramantry in his separate opinion in the ICJ Case Concerning Gabcikovo-Nagymaros Project (Hungary V. Slovakia) 1997. However, in modern times the concept of sustainable development acquired popularity since the Report of the World Commission on Environment and Development (popularly
known as the Brundtland Commission). Therein, sustainable development is defined as development which satisfies the needs and interest of the present generation without jeopardizing the interest of future generations to enjoy the same.

For non-renewable resources, such as minerals, petroleum and oil the meaning of conservation is to utilize the resources as to avoid waste and thus protect the interests of future generations to every extent possible. In other words, even diamonds might not be forever, if users are wasteful.

**Environmental law**
What, then, is environmental law? Simply stated, environmental law comprises rules and doctrines arising from common law; provisions from constitutions; statutes; general principles (otherwise called soft law); and treaties which deal with protection, management and utilization of natural resources and the environment as defined above.

The function of environmental law follows partly from the discussion of the management tools and partly from its definition. In protection and management of the environment, environmental law primarily prescribes the threshold of sustainability of the environment and natural resources. Thus, environmental law is the tool by which Our Common Future is to be realized. In this sense, the core function of environmental law is to protect the threshold of sustainability in utilization of environment and intergenerational equity.

i). Sectoral laws  
ii). Common law  
iii). Statutory framework law  
iv). Constitutional entrenchment – fundamental rights and public policy  
v). Treaties  
The UNEP Register of Treaties and Other Agreements in the field of Environment listed 216 instruments of regional and global instruments in 1996. Egs: Agreements on the protection of the atmosphere, such as the 1985 Vienna Convention for the Protection of the Ozone Layer, the 1992 United Nations Framework Convention on Climate Change (UNFCCC) and the 1997 Kyoto Protocol to this convention; Agreements relating to Flora and Fauna; Agreements on the marine environment; Agreements on the regulation of transboundary movement of hazardous wastes.

vi). Soft law

- **Stockholm Declaration** was adopted by the first ever global conference attended by 113 States, to deal with environmental protection. The United Nations Conference on the Human Environment (UNCHE) concluded its work in Stockholm on June 16, 1972 and adopted Declaration of Principles, a set of recommendations and an Action Plan. The Stockholm Declaration, comprising twenty-six principles has no binding force, as such. However, it is an expression of the international consensus and commitment to evolve the protection of the human environment in a particular manner, and it remains a respectable instrument amounting to principles of environmental law.

- **The International Union for the Conservation of Nature and Natural Resources** (IUCN) (or the World Conservation Union, as it is now known), decided to build on the enthusiasm generated by the Stockholm Conference. the UN General Assembly as the World Charter for Nature on 28 October 1982
The United Nations Conference on Environment and Development (UNCED) held at Rio de Janeiro in June 1992, and which adopted the *Rio Declaration* and the celebrated Agenda 21. While the latter reflected the items, which constitute a plan of action to be addressed in the management of the environment as the world moves to the 21st century, the Declaration stipulates the precise principles to guide policy and legislation in the same spirit as the Stockholm Declaration and the World Charter for Nature. fortification by the *Brundtland Commission Report* which stressed that environmental conservation is a prerequisite to sustainable development. The Rio Declaration comprising 27 principles with the doctrine of sustainable development as its organizing principle.

The Draft *International Covenant on Environment and Development* developed under the aegis of the IUCN’s Commission on Environmental Law in co-operation with the International Council of Environmental Law (ICEL). It is a product of the initiative of experts from distinguished professional organizations and benefited from the direct contribution by over one hundred distinguished personalities in environmental law.

**The Johannesburg Plan of Implementation-2002**

The Stockholm Declaration has 26 principles, the World Charter for Nature is presented in 24 paragraphs under the different categories, the Rio Declaration has 27 principles, while the Draft International Covenant on Environment and Development is in 72 articles, in treaty form, and with commentaries, but there are seven identifiable common principles, namely:

a) Sustainable utilization and inter-generational equity;
b) Integration of environmental exigencies into development planning and management
c) Public participation in environmental matters
d) Precautionary measures
e) Polluter pays
f) Prior consultation and international co-operation
g) Provision of legal and institutional arrangements.

Subsequent developments towards environmental rule of law built on those principles.

**Environmental Rule of law:**

*Symbiosis of Rule of law, Environment, and sustainable development.*

The rule of law is a fundamental concept at the heart of the UN. The Secretary-General has defined the rule of law as a *principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.*

Environmental rule of law is central to sustainable development. The ever increasing environmental pressures from climate change, biodiversity loss, water scarcity, air and water pollution, soil degradation, among others, have far reaching economic and social consequences. They contribute to poverty and to growing social inequalities. Conflicts over natural resources and environmental crimes exacerbate the problems. At least 40 percent of internal conflicts over the last 60 years have a link to
natural resources. The risks of violent conflict increase when exploitation of natural resources causes environmental damage, loss of livelihood, or unequal distribution of benefits. Poor people are especially vulnerable, as are women and girls. Natural resources that are managed sustainably, transparently, and on the basis of the rule of law can be the engine for sustainable development as well as a platform for peace and justice.

Decision 27/9, recognized the growing importance of the rule of law in the field of the environment in order to reduce violations of environmental law and to achieve sustainable development overall. It further recognized that ‘the violation of environmental law has the potential to undermine sustainable development and the implementation of agreed environmental goals and objectives at all levels and that the rule of law and good governance play an essential role in reducing such violations’ and invited Governments and relevant organizations to reinforce international, regional and sub-regional cooperation to combat noncompliance with environmental laws.

Hundreds of treaties, nonbinding legal instruments, documents setting forth internationally agreed goals and objectives, and national laws and policies address environmental problems. Implementation and compliance with them remains a major challenge. For example, of the 90 most important environmental goals and objectives, significant progress has to date only been made in four. Several critical thresholds for humanity may soon be exceeded, beyond which abrupt and generally irreversible changes to the life-support functions of the planet could occur. Environmental rule of law integrates the critical environmental needs with the essential elements of the rule of law, and provides the basis for reforming environmental governance. It prioritizes environmental sustainability by connecting it with fundamental rights and obligations. It implicitly reflects universal moral values and ethical norms of behaviour, and it provides a foundation for environmental rights and obligations. Without environmental rule of law and the enforcement of legal rights and obligations, environmental governance may be arbitrary, that is, discretionary, subjective, and unpredictable.

**Elements of Environmental Rule of Law**

**Key Elements of Environmental Rule of Law:**

1. **Accountability and transparency:**

   **Transparency:**
   - Official business of government is conducted in an open, consistent and predictable manner that ensures substantive and procedural information is available to all people and groups in society, subject to recognized limits for protecting national security.

   **Accountability:**
   - Governments and their officials be vested with an unfailing fundamental responsibility, justiciable under the law, to follow legitimate mandates and to make principled decisions, grounded in reason, science and law framed within each country’s social and cultural milieu, and provide individuals and institutions an opportunity to insist that they do so.

   Transparency and accountability together;
   - ensure that laws and procedures are open to scrutiny, governments clearly state what is being done, how and why actions take place, who is involved, and by what standards decisions are made and demonstrate that it has abided by those standards. They constitute
the very antithesis of governance through deception and secrecy, which inexorably lead to the negation of foundations of democracy.

The instruments for securing accountability and transparency:
- an independent judiciary,
- a free and responsible press,
- a vigilant and active civil society.

2. Access to justice:
- The right to a remedy is a fundamental attribute of the rule of law.
- Principle 10 of the 1992 Rio Declaration which provides that “effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”
- Thus, governments and legislators should establish judicial and administrative procedures for legal redress and remedy of actions affecting the environment that may be unlawful or infringe rights under the law, and to provide access to justice to individuals, groups and organizations with a recognized legal interest.
- It is also a means of empowering marginalized groups such as rural indigenous, minorities and women by ensuring that information is disseminated to such persons and groups about their rights and duties under the law will enhance this process.
- Equal access to national remedies is one way of implementing the polluter pays principle because it tends to expand the scope of polluter accountability.
- The Judiciary as the guardian of the rule of law is required to boldly and fearlessly implement and enforce applicable international and national laws, which also contribute to alleviating poverty and sustaining an enduring civilization.
- Judicial integrity and independence and transparent judicial process are vital dimensions of the principle of access to justice.
- Members of the Judiciary, as well as those contributing to the judicial process at the national, regional and global levels, are crucial partners for promoting compliance with, and the implementation and enforcement of environmental rule of law.
- The Judiciary has a key role to play in integrating fundamental human values such as those set out in the Millennium Development Goals, namely, Freedom, Equality, Solidarity, Tolerance, Respect for Nature and Shared Responsibility into contemporary global civilization by translating these shared values into action through strengthening respect for the Rule of Law.
- The Judiciary also plays a critical role in the enhancement of the public interest in a healthy and secure environment. Environmental sustainability can only be achieved if there are effective legal regimes, coupled with effective implementation and accessible legal procedures, such as, *locus standi*, collective access to justice, a supporting legal and institutional framework and applicable principles from all the world’s legal traditions.
3. Access to information:

- A key procedure that enhances environmental sustainability and the rule of law is one that ensures in addition to access to justice, access to information on environmental conditions, threats, and actions and opportunity to participate in environmental decision making.
- All individuals, groups and organizations should have access to information relevant to the environment and development held by national authorities, including information on products and activities that have or are likely to have a significant impact on the environment, and information on environmental protection matters.
- Routinely making environmental information public enables civil society to take an active role in ensuring accountability, reinforcing and expanding upon government efforts to ensure accountability. This also provides a basis for community engagement and fosters development of an environmental ethic throughout civil society, industry, and government.

- There are two dimensions of the principle of access to information: Proactive and Reactive:
  - The proactive dimension places a positive obligation on public bodies to provide, to publish and to disseminate information about their main activities, budgets and policies so that the public can know what they are doing, can participate in public matters and can control how public authorities are behaving.
  - The reactive dimension, involves the right of all persons to ask public officials for information about what they are doing and any documents they hold and the right to receive an answer, unless protected by privacy, national security or commercial interests.

- Scientific research as well as robust monitoring and assessment of pollution and resource threats as well as data collection, analysis and dissemination are important dimensions of the right to information and participation.

- Systematic collection and assessment of environmental information can form the basis of reviewing environmental programs and policies to evaluate effectiveness and make adjustments.

- The 2012 Report of the Secretary General to the UNGA on the Rule of Law also emphasizes the need to devote adequate resources to enhancing the capacity of national institutions to systematically collect and analyze data related to the rule of law, such as crime rates, sentencing patterns, average time for completion of trials, pretrial detention rates, percentage of population using civil courts, rates and speed of enforcement of court decisions, and the use of tools such as public perception surveys in respect of the rule of law sector, in line with internationally accepted norms and standards of data protection. In the area of environmental rule of law.

- Such information could also relate to the domain of sustainable use of natural resources, pollution prevention and control and the balancing of environmental and development considerations in decision making.
4. **Public participation in environmental decision making:**

- Effective public participation of individuals and groups in environmental decision making has two critical dimensions:
  - the opportunity to offer timely, effective views at a pre-decisional stage,
  - the opportunity for post-decision challenge before an independent and neutral tribunal.

- The test of bona fides of the decision-makers, the provision of reasons for the decision taken and the availability of an opportunity for post-decisional challenge before an independent tribunal invest such processes with the character of rule of law. In such circumstances, the involved individual or community is more likely to see reason and accept the outcome.

5. **Environmental laws must be implementable, enforceable, as well as equally and fairly applied and enforced:**

- Laws should be founded on the principles of justice and recognized human values such as equality and non-discrimination, and must be capable of compliance, having sufficient detail and direction that those subject to it are able to adjust their conduct accordingly.

- It is not uncommon in legal systems for the judiciary to reject enforcement of laws deemed to be vague or which fail to give sufficient notice to the subjects of the conduct required.

- The regulated community must have a clear and unequivocal understanding of the legal requirements and related legal processes.

- Law is not a static phenomenon and must be so constructed so as to allow for it to serve as a living document which can be applied in a variety of circumstances, without affecting its essential character.

- Environmental laws often provide for review and renewal of standards and means of updating requirements based on new knowledge. Anti-backsliding mechanisms such as the principle of *non-regression* may be included to promote continual improvement or at least to guard against regression.

- Environmental laws also commonly make use of measures that make accountability mechanisms more efficient, including requiring polluters to monitor and report their pollution, limiting defenses that can be raised in enforcement cases, and curbing opportunities to challenge regulatory agency decisions beyond a set timeframe.

- The laws must also be designed to advance the other core environmental governance precepts and should include clear articulation of processes and mechanisms for intra-governmental accountability and coordination, reporting and information disclosure requirements, procedures for stakeholder involvement, institutional structures for program implementation, mechanisms to reduce the possibility of corruption, and provisions for judicial review.

- It is often necessary to retain a significant degree of flexibility, particularly in international law where the situations of countries varies considerably, and negotiations take place among sovereign nations under the principle of equality of States. With many international norms and principles drafted in
very general terms, national authorities may genuinely not know what is legally required of them. Authoritative judicial clarification of the content of terms such as “precaution” and “equitable benefit-sharing” can assist governments and allow better monitoring of compliance.

6. Preventing graft and corruption:

- The UNGA Declaration on the Rule of Law affirms a strong link between low levels of corruption and economic and social development and proclaims that the negative impact of corruption obstructs economic growth and development, erodes public confidence, legitimacy and transparency and hinders the making of fair and effective laws, as well as their administration, enforcement and adjudication. It has therefore stressed the importance of the rule of law as an essential element in addressing and preventing corruption, including by strengthening cooperation among States concerning criminal matters.
- The active engagement of all parts of society, especially national and sub-national institutions and officials responsible for addressing justice, governance and law issues, including judges, prosecutors, auditing institutions and other key functionaries, the media and civil society organizations is central to meaningful progress being achieved in addressing the pervasive issue of corruption.
- Environmental rule of law, especially the principles of transparency, accountability and access to justice, information and public participation, provide an effective basis for addressing this challenge.

7. Human rights and environmental rule of law:

- The United Nations defines the rule of law as a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.

- Ecosystems and the services that they provide, including food, water, disease management, climate regulation, spiritual fulfillment and aesthetic enjoyment, are the foundations of the full enjoyment of human rights such as the right to life, health, food and safe drinking water.

- At the same time, human rights and the legal and institutional instruments developed for their protection can be instrumental in fostering sustainable development and environmental objectives.

- The focus of work in regard to human rights and the environment includes two equally important dimensions:
  - The further development of environmental norms, in particular the right to a healthy environment, as a substantive Human Right, which is basically the mandate of the UN Commission on Human Rights.
  - The other, more widespread work relates to determining if national laws in the area of environment and development are consistent with “international human rights norms and standards”.

- Judicial decisions and pronouncements in the past two decades show an increasing readiness of judges throughout the world to engage in this inquiry in their judicial work and to interpret and apply laws within this frame of reference.
The link between human rights and environmental sustainability has been asserted since the 1972 Stockholm Declaration, whose Principle 1 states: “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.” Its preamble states that protection of the environment is “essential [...] to the enjoyment of basic human rights— even the right to life itself”.

These provisions do not directly recognize a human right to a healthy environment as such. They rather amount to an indirect recognition of such a principle, by establishing a link between well-recognized human rights, such as the right to freedom and the right to life, and the quality of the environment.

Lack of access to shelter, drinking water, sanitation, and adequate food are aspects of poverty and linked to environmental degradation. The environmental rule of law, which stresses transparency, accountability and participatory governments responsive to the needs and aspirations of people, plays a fundamental role in poverty reduction and for the realization of human rights.

The 1972 Stockholm Declaration in fact builds on some earlier language contained in the 1966 UN International Covenant on Economic, Social and Cultural Rights, which recognized the individual’s right to “the continuous improvement of living conditions” (Article 11) as well as to “the enjoyment of the highest attainable standard of physical and mental health” (Article 12, paragraph 1) and committed states to protecting the right to health by positive measures, including, inter alia, “the improvement of all aspects of environmental and industrial hygiene” (Article 12, paragraph 2(b)).

After Rio earth summit, the United Nations human rights bodies continued their work on the relationship between the environment and human rights. In all its dimensions, addressing not only the right to a healthy environment as such, but also the effect of the environment on the enjoyment of other fundamental rights, such as the right to life, the right to health, the right to food, and so on.

International environmental agreements provide few avenues of redress for those harmed due to environmental degradation. As a consequence, many individuals and groups have turned to other international complaints mechanisms, particularly those created under international human rights treaties. The growing jurisprudence of international human rights commissions and courts attests to the desire of those affected to ensure the governments are held accountable and provide some redress when their actions result in environmental harm of such magnitude that it impacts internally-guaranteed rights such as life, health, privacy and home life.

At national level, some courts have invoked the doctrine of Human Rights in the adjudication of disputes in the area of environment and development.

The post-2015 development agenda.

The post-2015 development agenda provides a unique opportunity to ensure that sustainable development is based on the rule of law, and affords all people equality in terms of environmental protection. It also provides a vehicle for translating the hundreds of existing commitments in the field of environment into action. To this end, legal and practical means to increase transparency, strengthen
access to information and enhance public participation in environmental decision-making processes will be needed.

We need to increase the capacity of all those critical to implementing environmental rule of law. This includes in particular courts and other tribunals, law enforcement agencies, auditing institutions and other stakeholders at the national, sub-regional, regional and international levels. Courts and tribunals the world over now address environmental issues. More than 50 States have established specialized environmental courts and tribunals. Yet, citizen access to justice in environmental matters differs greatly from country to country and is far from being barrier free. These barriers must be removed and the capacity of courts and tribunals to dispose of environmental cases strengthened.

The protection of the environment and the promotion and protection of human rights are increasingly recognized as intertwined and complementary. Ecosystems and the services they provide, including food, water, disease management, climate regulation, spiritual fulfilment and aesthetic enjoyment, are the foundations for the full enjoyment of human rights, such as the right to life, health, food and safe drinking water. At the same time, human rights are instrumental in fostering sustainable development and environmental objectives. The 1972 Stockholm Declaration on the Human Environment expressed this connection and the 2012 Rio+20 Conference explicitly affirmed it.

A rights-based approach to guide decision-making will ultimately lead to better results in implementing the post-2015 development agenda and in addressing the impact of environmental degradation generally, in particular its impact on the world’s poorest and most vulnerable populations. It will encourage economic development that recognizes that healthy ecosystems are a precondition for reducing poverty and an opportunity for development and economic growth.

The Kenya experience.
The 27th August 2010 is a historic day for the people of Kenya and the environment. After a long protracted process and ultimately through a referendum, Kenyans gave themselves a new Constitution which the Supreme court of Kenya has declared as:

“...a transformative charter. Unlike the conventional liberal constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today’s Constitution is to institute social change and reform through values such as social justice, equality, devolution, human rights, rule of law, freedom and democracy.”

Article 10 spells out the “National values and principles of governance” which
(1) bind all State Organs, State Officers, public officers and all persons whenever any of them-
(a) applies or interprets this Constitution;
(b) enacts, applies or interprets any law; or
(c) makes or implements public policy decisions.

(2) The national values and principles of governance include-

(a) patriotism, national unity, sharing and evolution of power, the rule of law, democracy and participation of the people;
(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
(c) good governance, integrity, transparency and accountability; and
(d) sustainable development.

**Article 35** provides for access to information to the extent that
(1) Every citizen has the right to access to  
(a) information held by the state; and 
(b) information held by any other person and required for the exercise or protection of any right or fundamental freedom.
(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.
(3) The state shall publish and publicise any important information affecting the nation.

The Environment as a whole receives robust and generous provisions under **Articles 42 and 69 to 72** thus:

“42. Every person has the right to a clean and healthy environment, which includes the right-

(a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and
(b) to have obligations relating to the environment fulfilled under Article 70.

69. Obligations in respect of the environment:
(1) The State shall-
(a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;
(b) work to achieve and maintain a tree cover of at least ten percent of the land area of Kenya;
(c) protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities;
(d) encourage public participation in the management, protection and conservation of the environment;
(e) protect genetic resources and biological diversity;
(f) establish systems of environmental impact assessment, environmental audit and monitoring of the environment;
(g) eliminate processes and activities that are likely to endanger the environment; and
(h) utilise the environment and natural resources for the benefit of the people of Kenya.
(2) Every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.

70. Enforcement of environmental rights:
(1) If a person alleges that a right to clean and healthy environment recognized and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect of the same matter.
(2) On application under clause (1), the court may make any order, or give any directions, it considers appropriate—
(a) to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment;
(b) to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or
(c) to provide compensation for any victim of a violation of the right to a clean and healthy environment.

(3) For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.

71. Agreements relating to natural resource:

(1) A transaction is subject to ratification by Parliament if it-
(a) involves the grant of a right or concession by or on behalf of any person, including the national government, to another person for the exploitation of any natural resource of Kenya; and
(b) is entered into on or after the effective date.

(2) Parliament shall enact legislation providing for the classes of transactions subject to ratification under clause (1).

72. Legislation relating to the environment:
Parliament shall enact legislation to give full effect to the provisions of this Part.

The Legislation envisaged under Article 72 was already in existence since the year 1990.


Section 3 of the Framework legislation stipulates as follows;

“(1) Every person in Kenya is entitled to a clean and healthy environment and has the duty to safe-guard and enhance the environment.

(2) The entitlement to a clean and healthy environment under subsection (1) includes access by any person in Kenya to various public elements or segments of the environment for recreational, educational, health, spiritual and cultural purposes.

(3) If a person alleges that the entitlement conferred under subsection (1) has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress and the High Court may make such orders, issue such writs or give such direction as it may deem appropriate to prevent, stop or discontinue any act or omission deleterious to the environment etc.

(4) A person proceeding under subsection (3) of this section shall have the capacity to bring an action notwithstanding that such a person cannot show that the defendant’s act or omission has caused or is likely to cause him personal loss or injury provided such action is not frivolous or vexatious, or is not an abuse of the court process etc.”
Various principles of Agenda 21 are explicit in the Act, including:

- **Sustainable utilization principle** on the doctrine of inter-generational equity in the use of the environment and natural resources; the **Precautionary principle** requiring that every precaution and prudence should be exercised to prevent any possible deleterious environmental consequences of any socio-economic or military activities through such measures as Environmental Impact Assessment (EIA), Environmental Risk Assessment (ERA), and various forms of Environmental Audit and Environmental Monitoring; Integration of Environmental Considerations into Development Planning and Management; promotion of Public Participation in Environmental decision-making; the **Polluter Pays Principle**; and the **principle of Prior Consultation and Ultimate Co-operation** in the management of environmental resources shared by two or more states.

The Act sets up a major regulatory organ; the **National Environmental Management Authority** (NEMA) as well as other constitutive organs like the National Environment Action Plan Committee and the Standards and Environment Review Committee to complement the reinforcement capacity of NEMA. The Legislation also advocates retention of sectoral statutes provided that the operative standards and the scheme of enforcement of the statutes are harmonized with the framework statute.

Kenya is also a signatory to the major international conventions, treaties and protocols relating to the environment and aiming at the achievement of sustainable development. Some of such conventions include; **Convention on Biological Diversity**, the **United Nations Framework Convention on Climate Change**, the **Vienna Convention for the protection of the Ozone Layer** and the **United Nations Convention to combat Desertification**.

The rosy picture of solid Constitutional and Statutory foundations which is now evident, has not always been the case. Like other nations of the world before Stockholm 1972, the legal landscape was characterized by fragmented sectoral laws; over 60 of them, of a distinctive environmental character but basically focusing on the use and protection of natural resources rather than management of the environment. Examples are, the **Water Act**, The **Forest Act**, the **Kenya Wildlife Act**, and the **Mining Act**.

In terms of enforcement, the Constitution established **Environment and Land Courts** to deal exclusively with disputes relating to the environment and land use. There are currently 20 Land and Environment Courts in 15 counties that are presided over by competitively recruited judges, and the goal is to have at least one such court in each of the 47 counties in the country.

**The Challenges:**

**Growing sophistication of environmental crime.**

Transnational environmental crime is particularly one of the most profitable forms of criminal activity. The challenge is the development and implementation of appropriate responses to it. The International Criminal Police Organization (INTERPOL) estimates that global wildlife crime is worth billions of dollars a year. The economic value of global illegal logging, including processing, is estimated to be worth between $30 billion and $100 billion, approximately 10 per cent to 30 per cent of the global wood trade. Environmental crimes encompass a broad list of illicit activities, including illegal trade in wildlife; smuggling of ozone-depleting substances; illicit trade in hazardous wastes; illegal, unregulated and unreported fishing; and illegal logging and trade in timber. Such crimes pose a security and safety threat.
to many countries and have a significant negative impact on sustainable development and the rule of law.

Kenya is a good example of the insidious nature of environmental crime which has resulted in illegal poaching and trade in wildlife trophies has now reached an epidemic level. While the typical offender is the person found killing the elephants and rhinos in our game parks, or is found in possession of illegal trophies, there is a more complex network that is behind these illegal activities that spreads beyond Kenyan borders, and where the market for the trophies exists. Kenya has responded by legislating and meting out stiffer penalties for such crimes for deterrence but there is still need for an integrated approach to eliminate environmental crime. Additional measures such as addressing the key contributing factors such as poverty and corruption must be enhanced through cooperation and information sharing between national and international environment law enforcement and compliance agencies.

**Civic education**

Despite mechanisms put in place to access courts through liberal *locus standi* provisions in our Constitution, more simplified court processes, and the establishment of the specialized courts, there is a dearth of environmental cases that are being litigated in our courts. Statistics show that environmental cases are less than 5% of the cases filed in the Environment and Land Courts, as compared to disputes on the right to possession and title to land, which form the bulk of cases heard and determined in the Court.

Various factors may account for this phenomenon including the lack of capacity, and/or disincentive by members of the bar to venture into environmental litigation, and the lack of awareness by the general public of environmental conservation and available remedies in the event of violation. Legal fees is also prohibitive for the bulk of our population. The encouragement given by the judiciary is to decline the imposition of costs in environmental disputes which are considered to be of public interest in a bid to encourage public spirited individuals, and civil society groups to litigate on environmental violations.

It is imperative that proactive engagement between the judiciary and other stakeholders in the field of the environment, should be encouraged to promote public participation in the environmental rule of law and environmental justice. A key component in public participation is the provision of necessary information, particularly by the state, on environmental laws and rights. Co-operation and technical assistance among and between both national and international stakeholders in the systematic collection and assessment of information on environmental issues will also greatly contribute to the number and quality of judicial responses to environmental disputes. Exposure of judicial officers to the international dispute resolution mechanisms is an imperative, not only for providing the appropriate guidance with respect to trans-boundary environmental disputes, but also for purposes of developing a constituency of trained and informed judges who can be called upon to adjudicate these disputes at regional and international dispute resolution bodies.

**Training**

Environmental laws and regulatory frameworks around the world continue to evolve in response to changing conditions. The need to train and expose all the institutions and officials responsible for addressing justice, governance and law issues on the environmental laws and the enforcement and
compliance mechanisms cannot be gainsaid. For the Kenyan judiciary, the nature of environmental disputes poses a significant challenge to judges primarily due to the technical and scientific issues involved. It is also be invaluable for judges to participate in regular national and international fora for the sharing of experiences and best practices and to learn and implement new ethics, concepts and approaches that take science into account. Capacity building of, and technical assistance to our respective judiciaries will therefore not only enhance the quality of judicial pronouncements and improve judicial techniques and approaches in the application of green principles, but will also develop an environmental jurisprudence that can be used in enhancing environmental rule of law and justice. Enhancing the environmental rule of law is thus not only a call of duty but of necessity requires positive and ardent commitment from judges in their contribution to protect the environment as a common heritage and concern of mankind.

**Conclusion**

Moving forward, the global community must make the environmental rule of law a reality for all by realizing its intrinsic value for environmental justice and sustainable development. It must work towards eliminating financial and other barriers obstructing access to justice in environmental matters. It must invest in environmental legislation, increase support for legislators, and strengthen the capacity of all those involved in implementing, complying with, and enforcing the obligations.

The global community should also build up on the messages delivered by the UNEA conference participants in June 2014, thus:-

1) The environmental rule of law is indispensable for sustainable development. Its further development and implementation will help to ensure just and sustainable development outcomes.

2) Law, coupled with strong implementing institutions, is essential for societies to respond to increasing environmental pressure in a way that respects fundamental rights and principles of fairness, including for future generations.

3) Only through the environmental rule of law can conditions be established under which justice and respect for environmental obligations arising from treaties and other sources of law can be maintained.

4) The basis for the environmental rule of law is adherence to environmental law, constitutional rights to a healthy environment and human rights. Such obligations must be binding on all persons, institutions and entities, both public and private including the State itself.

5) During recent decades, there has been a growing acceptance and advancement of environmental legislation at the national, regional and international levels, including procedural rights which provide an important mechanism for ensuring environmental justice, accountability and transparency. However, their ideals and benefits remain a distant reality for many.
6) Through adequate, publicly promulgated environmental legislation, fairly enforced and independently adjudicated, the environmental rule of law reduces corruption, ensures accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, respect for human rights and delivers environmental justice.

7) The illegal exploitation of natural resources, in particular the surging illegal trade in wildlife, is a growing concern. It highlights the importance of the environmental rule of law, involves sophisticated international criminal syndicates and has an impact not only on the environment, but also on peace and security and national economies.

8) In order to combat such illegal activities, the environmental rule of law must be strengthened through increased capacity, both human and financial, of courts, tribunals, enforcement agencies and other stakeholders to implement and promote the environmental rule of law at all levels.

9) There are many encouraging examples from around the world that underline the major benefits for societies and countries when the environmental rule of law is improved. Such examples must be built upon to promote and further develop the environmental rule of law; environmental jurisprudence; technical, legal and enforcement capacity and awareness.

10) The world’s chief justices, attorneys general, judges, chief prosecutors, auditors general, leading legal scholars, practitioners, experts and all stakeholders must continue the dialogue on the environmental rule of law in order to increase both cooperation and the broad ownership of environmental rule of law measures.

11) The global community must move forward in making the environmental rule of law a reality for all by realizing its intrinsic value for environmental justice and sustainable development. It must work towards eliminating financial and other barriers obstructing access to justice in environmental matters. Investment in environmental legislation and support for legislators should be increased. The United Nations Environment Assembly, UNEP and its partners all have a critical role to play.
Youth and Family Courts
Judge Andrew Becroft, New Zealand

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

Slide 1
How to Turn a Troubled Child into an Adult Criminal in Just Ten Easy Steps!
Commonwealth Magistrates’ and Judges’ Association
Triennial Conference 13 – 18 September 2015
Wellington, Aotearoa New Zealand
Judge Andrew Becroft
Principal Youth Court Judge
Te Kaiwhakawā Matua o Te Kōti Taiohi

Slide 2
A Short Quiz for you....?

- 44 million Sheep
- 4.6 million People
- 6,000 Lawyers
- 5,000 Youth Justice Family Group Conferences (annually)
- 200 Judges
- 39 Judges who do (some) Youth Court work
- 1 Rugby World Cup

= New Zealand /Aotearoa

Slide 3
How to turn a troubled child into an adult criminal in just ten steps!

Slide 4
Interruptions Encouraged!

Slide 5
The pivotal importance of focusing on youth crime
A different perspective......

Slide 7
1. Ignore the developing teenage brain science

- Music
- SEX
- Cell phone
- Friends
- Facebook
- Clothes
- Alcohol
- Cars
- Drugs
Slide 8
Maturing of the Brain (as seen in MRI Studies)

Cortical regions, which deal with:
- Judgement
- Responsibility
- Wisdom

...do not fully mature until the second or third decade
NB: blue matter resembles maturation of cortical areas

Slide 9
Adolescence is about risk taking

Slide 10 & 11

2. Ignore the “early risk factors”
   - Ignore early intervention programmes; do not support home visitation programmes for the most at risk new born infants
   - Do not conduct comprehensive assessments at age 5 upon school entry
   - Ignore, or don’t assess learning difficulties (e.g. dyslexia, fetal alcohol syndrome and conduct disorder)
   - Allow issues such as “stigmatisation” and “false positives” to stall comprehensive national early intervention debates
   - Use no tools to assess deficits & strengths in each of the four “domains” in a child’s life: home / school / friends / community

Slide 12
...Carry out no assessments and leave neuro-developmental issues undiagnosed
3. Blur, or make no distinction between “care and protection” factors and true criminal offending

Care and Protection and Youth Offending
- 73% - of young people in the YJ system known to CYF for Care & Protection issues
- 83% - of prison inmates aged under 20 (ie; in our adult prison system) who have a Care & Protection record with CYF
- 91% & 67% - Research carried out in Australia where the progress of young people in the youth justice system was followed for 7 years. 91% who were subject to a YJ order as well as a care order had graduated to adult offending and 67% had spent at least one term in prison

Care and protection and youth offending...
- When, and on what basis, is offending by children/young people to be viewed primarily as a care and protection issue, and when is it to be considered a criminal issue?
- In other words, how do we avoid “criminalising” behaviour that has at its centre, welfare/child protection issues?
- How do we avoid disproportionate sentence lengths, justified solely on “rehabilitative” grounds?
- When is the appropriate age to bring children to the Youth Court?
How much richer are the richest 20% than the poorest 20%?

**Income gaps**

How many times richer are the richest fifth than the poorest fifth

<table>
<thead>
<tr>
<th>Country</th>
<th>Income Gap</th>
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<tr>
<td>Japan</td>
<td>3.4</td>
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<tr>
<td>Finland</td>
<td>3.7</td>
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<tr>
<td>Norway</td>
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<tr>
<td>Portugal</td>
<td>8.5</td>
</tr>
</tbody>
</table>

Child Well-being is Better in More Equal Rich Countries

4. Youth Offenders & what we know about them
   - *Adolescent onset* offenders (desisters)
     - The majority of youth offenders = 80% (?)
     - Usually only offend as teenagers
     - *We* can work with this group effectively in the community, usually without Youth Court intervention
   - *Life-course* “persistent” offenders
     - Much smaller group (5% of youth offenders)
     - The “unexploded human time-bombs?”
     - 1,000 at a minimum in New Zealand
Slide 21
Capital & Coast Youth Forensic Services Statistics: 2000 – 2004 n = 276

- 83% Male
- Maori over-represented (48%)
- 70% faced cannabis and alcohol issues
- 16% drug dependent; 14% alcohol dependent
- 18% attending school: 28% attending course/training; 45% unemployed
- 45% excluded/expelled from school
- 55% attended more than one school/transient
- 60% in CYFS care at some stage
- 12% living with both parents; 28% with one parent

Slide 22
Characteristics of Young Offenders: England & Wales an analysis of 4,000 young offenders

- 83% Male
- 70% from single parent families
- 41% regularly truanting
- 60% have special educational needs
- Over 50% use cannabis
- 75% smoke and drink
- 75% considered impulsive
- 25% at risk of harm as a result of their own behaviour (9% at risk of suicide)

Slide 23
‘a substantial body of longitudinal research consistently points to a very small group of males who display high rates of antisocial behaviour across time and in diverse situations. The professional nomenclature may change, but the faces remain the same as they drift through successive systems aimed at curbing their deviance: schools, juvenile-justice programs, psychiatric-treatment centers, and prisons’ (1996:15).

Slide 24

Focusing on the most serious persistent offenders

The most prolific % of young offenders

Slide 25

5(a). Always arrest young persons when they offend the first time

Slide 26

5(a). Always arrest young persons when they offend the first time

- Arrest no matter what the circumstances and be disrespectful
- A more restrained, strategic approach may be more helpful
- Community based, prompt diversionary approaches are usually more effective than charging

Slide 27

5(b). Always bring a young person to Court following apprehension

Slide 28

5(b). Always bring a young person to Court following apprehension

- Once in Court, hard to get out
  - Inoculation to the system?
  - Peer “contagion”?  
  - Live up to the label?  
  - Acquire a badge of honour?
- NZ is world leading in not charging young offenders?
• 70 – 75% young offenders are not charged and in some regions up to 90%. Their offending shut down by firm, prompt, community based interventions
• A principled goal would be a 90% non-charging rate

Slide 29
Rate per 10,000 population of 14 – 16 year olds, appearing in the Youth Court

Slide 30
6. “Sideline” the young offenders and allow them no meaningful participation in the process

Slide 31 & 32
7. Always enter a conviction on the young offender’s record
• An area for interesting debate
• In cases of minor to moderately serious offending, do we really need to enter a “conviction” or impose a formal order if there has been a positive response by a young offender and good future prospects?
• In NZ the concept of an “absolute discharge” (as if the charge had never been laid) is a very useful tool

Slide 33 & 34
8. Make no allowance for youth at sentencing - “adult time for adult crime”
• A popular “catch cry” and superficially attractive
• Young people are not “junior adults”. A qualitatively different approach is required.
9. Give all young offenders a short sharp shock

- Use “boot camps” and “scared straight” programmes wherever possible and get public support for these ineffectual, populist, interventions
- Ignore the evidence based as to what constitutes effective rehabilitation programmes for young offenders

...and ignore ethnicity & culture?

- Disproportionate number of Māori apprehensions
- The figures are unacceptable in a civilized community:
  - 19% (Māori in the 14-16 age group)
  - 49% (of police youth apprehensions)
  - 55% (of young people before the Youth Court)
  - 66% (of young people in custody)

Rangatahi Court in Christchurch, NZ

Pasifika Court in Auckland, NZ
10. Segregate young offenders from their families, communities and victims

And then aggregate them together in residential facilities or prison where ever possible.

- “Segregation” and “aggregation” are all too convenient responses
- What has happened to “top-shelf” family centred, community based rehabilitation programmes for young offenders?
- Not saying that NO place for prison

A Final Step: If all else fails, use “what works”, but deliver it badly

- Alter proven programmes and introduce your own unproven theories
- Take as many young offenders as you can on the programme…the more the better….more fees etc.,
- Then…..employ untrained but idealistic staff
- Always provide no supervision or training for staff
- Ignore evidence based research as to what works
- Ensure there is no review of programme structure
- Ensure there is superficial research of the programme

Conclusion

- An increasing punitive community and the desire for “instant” solutions create real pressures for those involved in youth justice
- We must affirm a principled approach, consistent with UNCROC
- Abandoning principles, surrendering to populist pressures and using programmes with no evidence base runs real risk of turning troubled children into a serious persistent adult offenders

The most effective step of all....?
Writing Judgments and Delivering ex-tempore judgments

Lord Hope of Craighead

a. Background

One of the features of writing or delivering ex tempore judgments is that the techniques that they both involve are not easily taught, if they are taught at all. In some jurisdictions judicial officers sitting as magistrates or their equivalents are given some instruction as to what they should do. But for most, especially those sitting in the higher courts, the techniques have to be learned on the job by experience.

Under the systems of the common law, unlike those of the civil law, there are usually no set rules as to what a judgment must contain. There are, however, some simple guidelines which can be used, based largely on common sense. The most basic of all is an acute awareness of the audience to which the judgment is to be addressed. We need to know whom we are writing for. At some levels the judgment can be kept very simple, as all the system requires is some basic information as to who the parties are, what is at issue and what has been decided. But in the higher courts reasons for the decision are needed too. The style and content must depend on whom the audience is to which it is addressed. The parties need to be told why the decision has been in their favour, or against them, as the case may be. The judgment may also be subject to scrutiny by an appeal court, which may be expected to be more exacting and more critical. And there is the wider public too, including students and their teachers at the universities, who may be interested in why the law is taking the course that it has in the given case.

As for the structure, every judgment has to have a beginning, a middle and an end. It is best to start by saying who the parties are and what the issues are that have to be decided. Then the facts must be set out. It is usually helpful, if the judge is the fact finder, to make it clear which of the facts were common ground, which were disputed, what conclusions were reached as to the disputed facts and why. Then the legal issues will need to be explained and applied to the facts as agreed or as found proved by the judge. At the end there must be a clear statement of what has been decided and of the orders that will dispose of the case.

The final stage in the preparation of a written judgment is to check over the draft very carefully to see that it makes sense, and that it is accessible to all of those people who will need to read it. Sentences which are overlong should be shortened. The same technique should be applied to paragraphs. Care should be taken as to where paragraphs are to begin and end. The easier the judgment is to read the better. Even the most complex judgment can be made accessible to everyone in this way.

b. Discussion

i. All judgments (Questions 10 and 11)

It was agreed that the basic essentials are as set out in the introduction. At first instance priority has to be given to fact finding, as this is the primary function of the trial judge. It was thought that concern as to what the appeal court might make of the judgment was of lesser importance than making it clear to the parties what the judge’s conclusions were. It was better for the trial judge not to wander into legal jurisprudence or historical analysis. That can be left to the appeal courts.
As for the appeal process, in some jurisdictions the facts as found at summary level by the trial judge are not open to review on appeal. In such cases reasons for each finding are not required. There was some resistance to the idea that, even in a case where the facts found are open to review on appeal, reasons had to be given for each finding of fact. It was felt the judgments would tend to become overloaded if reasons had to be given for every finding.

ii. Ex tempore judgments (Questions 1 to 4)

Jurisdictions varied widely in the amount of technical support that was available to assist this process. One the hand there were those where audio equipment is always available. All the judge has to do is to dictate the judgment and then check and, if necessary, correct the transcript when it is available. On the other there are those where there is no such assistance at all. The judge has to write everything down so as to put in on the record. This takes time and slows down the whole process. It became clear in discussion that the provision of appropriate resources had an important part to play in the speed and frequency with which the court could resort to judgments delivered ex tempore.

It was thought to be both useful and wise for a judge who knows that he or she will have to give an ex tempore judgment to prepare for this in advance. The basic details, such as who the parties are, what has to be decided and what facts are agreed or are not in dispute, can be written out in a note beforehand. That will give a structure to the judgment on which the judge can build after hearing the argument.

It was agreed that it is perfectly in order for a judge who has been able to dictate the judgment to correct errors in the transcript when it becomes available for checking over. This extends not just to mistakes in the narrative, but also to errors of grammar and style which can so easily be made when delivering judgments ex tempore when under pressure. Judges need not feel embarrassed by doing this, especially where the judgment is likely to be reported in the press or in the law reports.

There some discussion about whether courts should set targets for, or limits on, the number of ex tempore judgments that should be given at any time. The general view was that targets of that kind should not be set. The best controlling factors are the proper use of the court’s time and the pressure of business, which can only be met if the judge is free to decide how much of his judgment workload should be disposed of ex tempore. It would not be wise to set any limits either way.

iii. Time limits for written judgments (Questions 5 to 7)

It is common for guideline limits to be set for the time within which a written judgment should be delivered. In some jurisdictions they are more than just guidelines, being rules to which the judge is expected to adhere. But a problem with fixed rules is that they increase pressure on the judges if they are to comply with them. It was quite common in jurisdictions to which fixed rules apply for the judges to buy more time by putting the case out for a further discussion which would not otherwise be necessary. This was a waste of the court’s time and was likely to cause needless expense to the parties.

It was agreed, therefore, that rigid rules are best avoided. It was also agreed that a flexible approach should be adopted to the use of guidelines. Where they were not followed, peer pressure could be a useful means of ensuring that the judgment was not delayed further. Circulating lists of outstanding judgments among the judges to show up those which were delayed could have that effect. But it was noted that delay in the issue of a judgment was not necessarily the product of idleness. It was often the perfectionist who was most at risk of being delayed.
The threat of sanctions was not likely to be helpful. The approach should be to help the judge, rather than to penalise. More generous rostering to avoid overworking a judge who was in difficulty might be helpful. But this had to be balanced against the risk of unfairness to other members of the court. It was better to manage the problem, bearing in mind that what the case ultimately requires is the delivery of a judgment in which both the court and the parties can have confidence.
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