CMJA CONFERENCE
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Bank of Tanzania Conference Centre
Dar-Es-Salaam TANZANIA

“Building an Effective, Accountable and Inclusive Judiciary”

Conference Report
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The CMJA held its Annual Conference in Dar-Es-Salaam, Tanzania from 24 to 28 September 2017. The Conference was open to all Commonwealth judicial officers and others interested in the administration of justice in the courts of the Commonwealth. The Conference attracted a record number of attendees for annual conferences, 320 delegates and 45 accompanying guests from over 41 jurisdictions in the Commonwealth and beyond.

The CMJA is deeply grateful to the Chief Justices of Tanzania and of Zanzibar, the Local Organising Committee led by Judge Ignasi Kitusi and the Members of the Judiciaries in both Tanzania and Zanzibar for making the Conference such a success. We are also grateful to Police Band and Jitegemee JKT Secondary School for the Entertainment they provided during the Opening Ceremony.

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

I am very grateful for the support of the Steering Committee and our Executive and Admin Officer Temi Akinwotu in the preparation for the conference as well as our Conference Registrations Coordinator, Jo Twyman. We are also very grateful to the Flinders University, LawAFrica, all the speakers, panellists and contributors to this educational programme. I am also grateful to our intern Natasha Campbell for compiling this Report of the Conference papers presented during the Conference.

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

The topics included: challenges to building inclusiveness and diversity in the modern judiciary. Other topics discussed included Tackling Delays and Financial and Procedural Delays as well as Corruption; Effective Problem Solving Courts; Issues of International Humanitarian Law as well as Contemporary and Futuristic Views of Judicial Accountability. The increase in public comments by politicians and the media about judges were discussed in the session on “Poor Public Image: Dealing with Comments by Politicians and the Media”. There were specialist sessions on Terrorism and Human Rights; The Role of the Judiciary in Wildlife Management; The change of title from Magistrate to Judge and Improving Court Procedures. Delegates also discussed the issue of Coping with Emotions, Financial and Judicial Stress as well as Judicial Welfare and Conditions of Service.

Dr. Karen Brewer,
Secretary General
WELCOME SPEECHES

WORDS OF WELCOME

By His Hon. Judge John Lowndes, President CMJA

It is my pleasure to welcome you to the 2017 Regional Conference of the Commonwealth Magistrates and Judges Conference held here in Dar Es Salaam – The Haven of Peace. On behalf of all members of the CMJA and delegates attending this conference, I thank the Judiciary of Tanzania with the Support of the government of Tanzania in hosting this year’s conference. The association is grateful to all members of the local organising committee for their efforts and hard work in making this conference a reality. There will be an opportunity at the close of the conference to properly thank them.

As I mentioned last night at the welcome reception the theme of this conference is “Building an Effective, Accountable and Inclusive Judiciary”. It is an absolute given that an independent judiciary that adheres to the Rule of Law in a free and democratic society must be effective accountable and inclusive. Indeed to be effective the judiciary must be both accountable and inclusive. Within the thematic structure of this conference, you will be treated to an impressive array of speakers and presenters, some of which will give keynote addresses while others will speak to more specific aspects of the conference’s theme. The conference program speaks for itself. We will be provided with ample food for thought over the coming three days. A number of issues will arise for consideration.

What is meant by accountability? Is it a virtue or a mechanism or both? In what sense is the judiciary accountable? For what is it accountable and to whom? What are the limits of judicial accountability? What should constitute an inclusive judiciary? Many more questions will arise. I am sure that you will be as excited as I am about the coming three days during which we will have the opportunity to consider and exchange ideas about what amounts to an effective, accountable and inclusive judiciary, and of course about who should assume responsibility for building a judiciary of that ilk. As I also observed last night, what better place than Dar – the haven of peace – to discuss the role of a modern judiciary, because an independent judiciary that adheres to the rule is the mechanism whereby disputes and conflicts are resolved by peaceful means, with a view to maintaining social harmony. I wish you all an enjoyable and rewarding conference.

May I say in closing: "Tunatoa shukrani nyingi na za dhati kwa mahakama za Tanzania na Zanzibar kwa kazi kubwa na nzuri waliyofanya kufanikisha mkutano huu". (We thank you for the Tanzanian Courts and Zanzibar for great and good work they have done to achieve this meeting)
WELCOME SPEECH

By His Hon. Justice Prof. Ibrahim Hamis Juma, Chief Justice of Tanzania

Your Excellency, it is with great pleasure that I stand here on behalf of the Judiciaries of the United Republic of Tanzania and that of Zanzibar to thank Your Excellency the Vice President of the United Republic of Tanzania, standing-in for His Excellency, President John Pombe Joseph Magufuli, for accepting my invitation to open this Conference. Your presence here today underscores the Government of Tanzania’s clear recognition of the importance of judicial independence as the ultimate guarantor of Rule of Law in Tanzania.

Your Excellency let me also take this opportunity to warmly welcome all delegates to the United Republic of Tanzania and to thank and congratulate you all for your decision to register and attend this important and historic conference. I was talking to Dr. Karen Brewer, the Secretary General of CMJA, she could not help but point out the record number of Judges and Magistrates, who had shown interest and are here in Dar Es Salaam. Some delegates even had the audacity to brave the hurricane season under the names— IRMA and MARI by booking their flights earlier than they were supposed to. It says a lot about the CMJA, and it is a great honour to the Judiciary of Tanzania. You are all MOST WELCOME TO TANZANIA.

Your Excellency, I want to join you in expressing how honoured and privileged we in Tanzania are, by the presence of record number of Honourable Chief Justices—

- Salamo Injia (Papua New Guinea),
- William Bailhache (Jersey),
- Yonette Decima Cummings-Edwards (Guyana),
- Bart Magunda Katureebe (Uganda),
- Andrew K.C. Nyirenda (Malawi),
- Margaret Ramsey-Hale (Turks and Caicos Islands),
- Bheki Maphalala (Swaziland),
- Nthomeng Majara (Lesotho),
- Omar Othman Makungu (Zanzibar),
- Adelino Manuel Muchanga (Mozambique) and
- Peter Shivute (Namibia).

I must also make a special mention of Chief Justice of Kenya, Hon. David Kenani Maraga who has also made it to this Conference. This is after spending over eleven hours on Wednesday, 20th September 2017 to preside the delivery of land-mark majority and minority decisions of the Supreme Court of Kenya. We are deeply honoured by your presence—Hon Chief Justice Maraga.

Your Excellency, we the Judges and Magistrates from the Commonwealth judiciaries are birds of a feather, so to speak, flocking together in Dar Es Salaam under our Commonwealth Magistrates’ And Judges’ Association. We make annual and triennial sojourns to Conferences like the present one in Dar Es Salaam, where we devote some quality time away from our tight judicial case lists, to sit together irrespective of our judicial ranks and positions, and share our experiences, common values and good practices. In 2014 we flocked to Livingstone Zambia where we revisited a theme, “Judicial Independence: The Challenges of the Modern Era”. In 2015, we flew from different jurisdictions of the Commonwealth and flocked to Wellington, New Zealand to deliberate a theme, “Independent Judiciaries, Diverse Societies.”

Your Excellency, this year, to be exact this week after this opening ceremony, Tanzania is for the very first time, having its moment of hosting the CMJA Conference with a theme “Building an Effective,
Accountable and Inclusive Judiciary”. I believe that every delegate present has some good practices or lessons to share on the theme. Because I am already at the podium, I can be forgiven if I briefly share with you, what the Judiciary of Tanzania is doing around that theme an Effective, Accountable and Inclusive Judiciary. Our feather has a shade or two of differences borne out of separate development of our judiciaries. Undoubtedly, there are some initiatives our judiciaries have taken, which stand out as good practices to share and learn. Judicial statistics as an aspect of accountability of the Judiciary is an area we can share experiences. For example, it came as a great surprise to The Editor of a Malaysian Magazine— “THE EDGE” when he interviewed former Chief Justice Tun Zaji Azmi of Malaysia (2008-2011), he found the former Chief Justice and fellow Judges were armed leaves of paper showing tables, line charts much statistics on how the Malaysian Judiciary was tackling the problem of backlog of cases. The Editor could not help but remark:

“One does not normally expect judges to talk like economists. But when they do, it is a sign that times are changing...That they are very much into the statistics was evident, but equally evident was that these are men with a mission — the mission being to reduce the backlog of cases in Malaysian courts. To do so, the Chief Justice and his team are employing management tools to push through the changes. One is the setting of key performance indicators (KPIs). Judges are now expected to get through a certain number of cases during the two sessions that sit in a day.....”

I must believe that some initiatives like “Strategic Planning” are a recent development in the judiciaries of the Commonwealth. Like several other judiciaries of the Commonwealth, the Judiciary of Tanzania has fully embraced Strategic Planning as a way of making the courts of Tanzania effective, accountable and inclusive. Now into its second year, the Five-Year Strategic Plan of the Judiciary of Tanzania is predicated to build public trust around the people-centric vision of “Timely and Accessible Justice for ALL”. I am sure over the course of this week, we shall share notes on the potential role of Strategic Planning in helping our respective judiciaries of the Commonwealth become effective, accountable and inclusive.

Your Excellency, it has rightly been pointed out that accountability, effectiveness, and efficiency of the judiciary are very much improved where judicial officers are freed from day to day administrative functions. The Judiciary of Tanzania realized its vision of separation of judicial functions from purely administrative functions following the enactment of the Judiciary Administration Act 2011. Now Court Administrators, led by the Chief Court Administrator, direct their energies at supporting the core judicial functions of the Judges and the Magistrates. Judges and Magistrates now have more time and space, to concentrate on the core judicial functions. Court Administrators have taken full advantage of their space by allowing distinct expertise and efficiency to thrive within the Judiciary like— Judicial Administration, Management, Planning, Financing, Auditing, Estate Management, Engineering, Transportation and Information Communication Technology. These internal administrative services have in their totality, enhanced the independence of the Judiciary. We must always remember that prevailing judicial habits towards the court administrators die hard, and transition to full acceptance may take time.

Your Excellency, sufficient funding is an important factor when discussing the independence and accountability of the judiciary. I would like to agree with what the European Network of Councils for the Judiciary (ENCJ)2 said about the funding of the Judiciary:—“Adequate funding of the judiciary is a key element in ensuring and safeguarding the independence of the judiciary and judges because it determines the conditions in which the courts and judges perform their functions.”


Your Excellency, the establishment of the Judiciary Fund is one key outcome of recent judicial reforms which has to some extent eased the funding strains for the Judiciary of Tanzania. This Fund has resulted in the increase of budget levels by almost 100% and Development Fund by more than 200%. The Fund has helped in the capacity building. The judicial and administrative functions have immensely been facilitated by the availability of more than 300 new vehicles, 450 motorcycles, and 1000 bicycles distributed to various court levels, from the Court of Appeal at the apex to the Primary Courts.

Your Excellency, apart from the accountability of judicial officers achieved through the special oversight by the Judicial Service Commission, self-imposed judicial accountability is an integral part of the administration of the Judiciary of Tanzania. The Judiciary of Tanzania can share with this conference, several examples of self-imposed judicial accountability measures.

Until April 2013 Judges and Magistrates in Tanzania worked without any performance benchmark in terms of quantity of cases and timeliness of their judgments, rulings and other decisions. In several of their annual meetings, Judges of Tanzania agreed to set down descriptions of “case backlog” to guide the backlog clearance strategies. Following that agreement, His Lordship the Chief Justice Mohamed Chande Othman issued a Circular setting down period of pendency of cases (Life-spans) in court should be 24 months for the High Court and the Court of Appeal; 12 months for the District and Resident Magistrates Courts; and 6 months in the Primary Courts. Quantity-wise, the Judges agreed that each one of them should dispose of a minimum of 220 cases annually. These otherwise self-imposed accountability measures have cut down case backlogs from 38% of all pending cases in 2012 to 5% by 31 December 2016. The Judiciary of Tanzania has realized a noticeable reduction in the number of case backlogs, Primary Courts and District Courts have wiped off their backlogs.

Your Excellency, I will not be far off the mark if I suppose that some of the judiciaries represented here like Tanzania, face shortage of court buildings, and also suffer from dilapidated court buildings. For the millions of people in the far-off rural areas of Tanzania, shortage of court buildings translates to lack of access to justice. In its Strategic Planning and Citizen-Centric Judiciary Modernisation and Justice Service Delivery Project funded by the World Bank, the Judiciary of Tanzania has adopted MOLADI TECHNOLOGY to fast-track construction of court buildings. This emerging technology cuts down the number of days for construction and slashes the costs down by 50%. MELODI TECHNOLOGY may be the answer.

Delegates present, should not leave Tanzania without visiting the nearby Kisutu Resident Magistrates’ Court to see how the Judiciary of Tanzania is employing this low-cost construction technology to put up a building to house a TRAINING AND INFORMATION RESOURCE CENTRE. This technology has enabled the Judiciary of Tanzania through its Strategic Plans, to confidently proclaim that, “...by 2020 the judiciary would have constructed— 48 District courts, 100 Primary courts, 14 Resident Magistrate courts, 13 High courts and a Judiciary Head-quarter (Judiciary Square).”

Your Excellency let me conclude my welcoming remarks by reminding all the delegates to this Conference about a spell which always catches up with all those visiting Tanzania. Tanzania is home to very amiable and friendly people. One visit is bound to lead to another, and yet another. There are many reasons for you to find out. Tanzania is home to Mount Kilimanjaro, Ngorongoro Crater and the Serengeti National Park—all world-famous in their own right. These attractions offer unparalleled opportunities and an unrivalled natural arena to appreciate as nowhere else on earth. For those of you who will the channel separating the island Zanzibar from mainland Tanzania by a very modern ferry, I wish you a quality time in the beautiful islands of Zanzibar.

I would like to thank the organizing committees which have worked so hard to make this conference a reality. Your Excellency and Distinguished delegates, with these remarks, it is now my pleasure to
request Your Excellency the Vice President of the United Republic of Tanzania Samia Suluhu Hassan to address this distinguished audience and officiate this important conference.
WELCOME SPEECH
By H.E. Samia Suluhu Hassan, Vice President of Tanzania

It gives me great pleasure and honour to join you here today on behalf of H.E Dr. John Pombe Joseph Magufuli, President of the United Republic of Tanzania to officiate the opening ceremony of the Commonwealth Magistrates’ and Judges’ Association Conference (CMJA). I kindly ask you to indulge me this honour of representing him. And rest assured that, I will be absolutely faithful to his instructions, and true to the feedback that I will get from this conference.

At this juncture let me take this opportunity on behalf of the people and the Government of the United Republic of Tanzania, and on my own behalf, to extend to you a warm and a hearty welcome to Tanzania, please feel at home. Karibuni sana.

I commend the outstanding achievements of the CMJA since its existence over 40 years. Indeed you’re a vital role in developing judicial standards and strengthening judicial independence and enhancing the rule of law has remained persistent and consistent thus making the association strong and vibrant. Over the years you have continued to contribute significantly to the nurturing and enhancing the independence of the judiciary while striving on the development of the Rule of Law in shaping the Commonwealth countries. I applaud you for always being ahead of the political leadership.

This year’s theme Building an Effective, Accountable and Inclusive Judiciary comes at an opportune moment and resonates well with the realities at hand. You will agree with me that there is a rising demand for countries to have an independent, accountable and an effective judiciary system which underpins the foundation of a democratic system. I understand that the expectations of the people to the judiciary may at times be overwhelming or overbearing given the capability challenges. Regardless of these challenges an independent, effective and accountable judiciary needs to be in place to ensure the adherence of the rule of law, equal access to justice, security of the livelihoods of all; and people’s participation in the peaceful governance of their countries. In this regard, I commend you for choosing a timely theme which is not only relevant to Judges and Magistrates in the Commonwealth but to the people and other arms of government.

I am delighted to see that the 5-day conference is not only graced by renowned speakers from the judiciary fraternity but will also provide participants an opportunity to delve on an array of topics ranging from Tackling Delays, Financial and Procedural Constraints on Access to Justice and Corruption for an Effective Judiciary; Improving Judicial Welfare and Working Conditions; Poor Public Image? Dealing with Comments by Politicians and the Media to mention but a few.

It has come to my understanding that there are perennial complaints of our people on issues regarding Delays, Financial and Procedural Constraints on Access to Justice which threaten loss of trust and confidence in our Justiciaries; but the fact that you have included such a topic in your program reassures some of us that Judges and Magistrates have now taken upon themselves the leading role to ensure an effective judiciary is in place. This is not to say that I do not understand that sometimes the delays of cases may be a function of limited capacity than indifference and incompetence of the Judges and magistrates.

I am well aware of the unequivocal and safeguarding role of the Executive in ensuring that the Judiciary get the requisite finances, manpower and infrastructure to be able to meet public demands for timely and quality justice. The Government of Tanzania has played its safeguarding role by enacting the Judiciary Administration Act, 2011 which established the Judiciary Fund, designed to fund the disposal of cases. That much said, however, in a developing country like Tanzania, funding is not always sufficient to cover all the requirements of the Judiciary.
According to Tanzania’s Vision 2025, the country is supposed to graduate from its current position as one of the Least Developed Countries it is now, to a middle-income country enjoying a high level of human development. This graduation has to be undertaken by all arms including the Judiciary which is now implementing its 2015/2016-2019/20 strategic plan. This plan provides a roadmap that will ensure the delivery of people-centric justice. The Government is in full support of this reform initiative and it is my sincere hope that this Conference will be a learning ground for our judiciary to see how they will consolidate its independence, accountability, and inclusivity.

I have always believed that the desire to build an effective, accountable and inclusive judiciary in Tanzania cannot and should not be isolated from the wider efforts of the Government to eradicate poverty and corruption. I am a strong believer and an ardent supporter of the UN General Assembly Resolution 63/142 on the need for the Legal Empowerment of the poor to attain human rights-based human development. In my understanding, rule of law and an independent judiciary in the least developed countries should be directed at empowering the poor, eradicate poverty and corruption. Corruption distorts the independence of the judiciary and defeats the Rule of Law.

I can only but agree with what the former Prime Minister David Cameron said when he hosted the Anti-Corruption Summit in London in May 2016: “The evil of corruption reaches into every corner of the world. It lies at the heart of the most urgent problems we face—from economic uncertainty, to endemic poverty, to the ever-present threat of radicalization and extremism.”

Speaking of accountability in practical terms, every Judiciary in the Commonwealth must expose corruption from within their respective ranks, must be seen to punish corruption through independent judicial service commissions, and drive corruption from within.

Tanzania’s Government will continue to ensure that the Judiciary of Tanzania remains free of corruption in order to strengthen its independence. We all know that Corruption-free Judiciary nurtures respect for Rule of Law, which brings wider national benefits of enabling the laws and institutions to work for the benefit of national development goals. Apart from ensuring speedy and fair dispensation of justice, corruption-free judiciary cultivates and instils public confidence in the governance system.

The Government of Tanzania has made several interventions to assist the efforts of the independent Judiciary to eliminate the vice of corruption from its few elements. Ever since the Fifth Phase Government took office, it has undertaken statutory interventions and rigorous enforcement of existing laws and openly declared war against corruption. These Government interventions include inter alia the National Anti-Corruption Strategy and Action Plan (NACSAP) in Phases I, II and the ongoing Phase III.

The National Anti-Corruption Strategy and Action Plan NACSAP Phase I prioritised six areas, which included “RULE OF LAW” designed to restore confidence in the judiciary and law enforcement agencies. The National Anti-Corruption Strategy and Action Plan Phase III which is scheduled to run from 2017 to 2022, focuses on the reduction of corruption in strategic sectors which include the Judiciary. The successes of these initiatives can only be attributed to collaborative efforts, time put in, resources, dedication, commitment and perseverance’s that have led to the Judiciary to register remarkable improvements in its performance.

These efforts are commendable and are in the right step towards achieving an independent, effective and accountable judiciary. I wish to urge you today to build upon these gains and focus on achieving more. And rest assured that you do your part and the Government will do theirs. I am amply encouraged by the progress made and being made by this Association and its member countries. I look to the future of our judiciary with a great sense of optimism.
This Conference offers a unique opportunity to learn from each other’s experience and best practices. I find it important that you find ways and means of forging closer collaboration. Such collaboration will go a long way towards bringing closer our judicial systems as we walk towards deeper integration of our Commonwealth region. I dream to see your Association rise to the occasion and take our Community to greater heights. I encourage you to keep up the good work.

I understand the organizers have scheduled some excursion in Zanzibar make the most of it and don’t forget to enjoy the finger licking Swahili cuisine.

With these many words, I declare this conference officially opened.
“BUILDING AN EFFECTIVE, ACCOUNTABLE AND INCLUSIVE JUDICIARY”

By Chief Justice Bart Katureebe, Uganda

INTRODUCTION
Although the Universal Declaration of Human Rights proclaims the equality of all before the law, the world is short of effective, inclusive and accountable Judiciaries.

The justice system remains elusive especially to the vulnerable and marginalized persons due to institutional and other challenges. The justice system has the highest levels of inequality with the rich using the fast track system as the poor ride on the slowest track littered with delays and corruption. It should not, therefore, surprise us that public confidence in most Judiciaries remains far below acceptable standards.

Nevertheless, the justice sector is undergoing rapid changes made possible by advancements in management, technology, democratization, rising levels of social consciousness supported by cross-fertilization of legal principles and best practices within the Commonwealth and the world at large. These developments will no doubt lead to effective and efficient courts.

Judiciaries are also engaging more with court users to understand their needs so that they can serve them better. Courts are also being run on modern business practices partly forced on them by shrinking budgets but also due to the overwhelming public demand for better service delivery and accountability. However, it must be emphasized that national governments need to invest in the Judiciaries to deliver justice as a public good. Investing in the Judiciary should be treated as a national priority given the important role the Judiciary plays in society as this paper will show below.

THE IMPORTANCE OF THE JUDICIARY IN SOCIETY
The primary objective of the Judiciary is to provide a mechanism for peaceful settlement of disputes through a rule-based settlement mechanism, where aggrieved persons have a level playing field to present and argue their cases before an impartial judge/tribunal instead of resorting to extra judicial methods that predate the rule of law.

The Judiciary is directed by the Constitution to respect, uphold and enforce the Bill of Rights, founded on universally accepted principles. A strong Judiciary is also needed to provide the stability needed for the economy to grow. A viable and vibrant legal and judicial regime catalyzes, attracts and retains investment and credit. Clean investors are more willing to invest in countries where they can rely on the Judiciary to protect their hard-earned investments.

For the poor, a judicial system that guarantees their safety and protection against lawlessness is a beacon of hope and a strong catalyst for economic growth than billions of dollars spent on projects where there is no peace and protection. Most importantly, a strong Judiciary acts as a proactive check against the excesses of the Legislature and the Executive.

WHAT THEN ARE THE MINIMUM STANDARDS EXPECTED OF THE JUDICIARY?

Independence
As a minimum, the Judiciary must be independent. Independence of the Judiciary is a broader concept, which covers both institutional independence and individual independence of its judges to administer justice without interference from any quarter.
In Justice Alliance of South Africa vs. President of Republic of South Africa and others; and Centre for applied legal studies and another vs. President of the Republic of South Africa and others (2011) ZA CC 23, the Constitutional Court said that: \textit{Judicial independence is indispensable for the discharge of the judicial function in a constitutional democracy based on the rule of law. The Judiciary should enforce the law impartially and it should function independently of the legislature and executive.} However, the court emphasized that: \textit{Judicial independence is not an end itself but a means to an end. It is the kernel of the rule of law, giving the citizenry confidence that the laws will be fairly and equally applied.}

Institutionally, the Judiciary should enjoy both \textit{de jure} and \textit{de facto} independence. The former requires the independence of the Judiciary to be anchored in practices, policies, and laws that are in accord with international standards. Furthermore, an independent Judiciary is one which is assured of adequate resources to do its work. It must also have in place a mechanism that appoints and disciplines judicial officers in a streamlined process that promotes the highest degrees of integrity and impartiality in the administration of justice. At an individual level, judicial officers must enjoy the independence to make decisions based on the law and facts before them, without interference from any person. The Judiciary must not only be independent but it must be seen to be independent because perceptions are critical to the sound administration of justice.

\textbf{Trustworthiness}

The strength and legitimacy of the Judiciary lie in the trust that the court and its judges enjoy in the public domain. This principle was re-echoed in the case of \textit{S vs Mamabolo} \textsuperscript{3}, where Kreigler J. observed that: \textit{Having no constituency, no purse and no sword, the judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the constitution, the arbiter of disputes between organs of state and, ultimately, as the watchdog over the constitution and its bill of rights- even against the state.}

The moral authority referred to above is the soft power that the Judiciary relies on to enforce its decisions and compel the other branches of the State to respect and enforce decisions of the courts. Likewise, the public is more likely to obey court decisions if it holds the courts and its judges in the highest esteem. This is especially true in the business world, where the rate of defaulting on loans is higher in countries with inefficient and less trustworthy judicial regimes than in countries, where the courts are trusted and have, therefore, a higher chance of enforcing contractual debts.

A trusted Judiciary is more likely to secure adequate resources from the budget than an inefficient Judiciary, whose relevance may be under question. However, I should caution that this assurance may not be true under dictatorial or less democratic states, where the legislature and executive are less inclined to invest resources in an independent Judiciary.

\textbf{Accountability}

The Judiciary is a public institution that is maintained at the public expense and exercises judicial power on behalf of the people. Therefore, the Judiciary as an institution and indeed, its judges must be accountable for the resources they enjoy and the power they exercise. Judges are accountable to the public, to the Constitution, to the Legislature, to the Executive and to their fellow judges in the exercise of judicial power. Judicial accountability is, therefore: \textit{The cost that a judge expects to incur or profit that he expects to gain in case his/ her behaviour or his/ her decisions deviate too much from a generally recognized standard} \textsuperscript{4}.

\textsuperscript{3} CCT 44/00 (Constitutional Court )
\textsuperscript{4}(https://www.legalindia.com/defining-judicial-accountability)
According to Justice Sandra Day O’Connor—Judges must be accountable to the public for their constitutional role of applying the law fairly and impartially. True accountability advances judicial independence and the paramount role of law. It follows, therefore, that judicial integrity and judicial competence are the hallmarks of a judiciary committed to upholding the rule of law and they are the principles for which the Judiciary should be held accountable. I should hasten to add that an accountable Judiciary is one that observes the time-tested principles of integrity, impartiality, propriety, diligence, professionalism, equality, transparency and competence that are well expressed in respective codes of conduct for Judicial Officers. Lastly, the independence of the Judiciary is not likely to be well served if a particular Judiciary does not manage itself effectively, measure its performance accurately, and account publicly for its performance.

Efficiency
The public is concerned about the high cost of accessing justice and most Judiciaries are therefore seeking ways to bring down the cost of accessing justice for 90% of the population in the developing world who cannot afford a lawyer. Most Judiciaries have or are at least in the process of streamlining their business processes, implementing fiscal discipline and case management to reduce redundancies and eliminate unnecessary processes so that cases are promptly and affordably disposed of.

UGANDA’S PATH TO BUILDING AN ACCOUNTABLE, EFFECTIVE AND AN EFFICIENT JUDICIARY
Guided by the 1995 Constitution, Uganda has provided for an independent, accountable and effective Judiciary and set minimum standards for the courts to observe in the administration of justice. Article 126(1) of the Constitution provides that: Judicial power is derived from the people and shall be exercised by the court established under this Constitution in the name of the people and in conformity with the law and with the values, norms, and aspirations of the people. The import of this article is that the ultimate judicial authority, like all the state power, lies in the people and that the Judiciary is accountable to the people and the law.

Article 127 provides that Parliament shall make laws providing for public participation in the administration of justice; again underscoring the importance of the Judiciary as a people’s arbiter. In the appointment of judicial officers, article 146(2)(e) of the constitution provides that the Judicial Service Commission shall be composed of 9 Commissioners including two Commissioners representing the public; yet again underscoring the importance of the people and accountability in the administration of justice.

Article 126 (2) of the Constitution provides the foundational principles that courts must observe in administering justice. It provides: In adjudicating cases of both civil and criminal nature, the courts shall, subject to the law, apply the following principles
1) Justice shall be done to all irrespective of their social or economic status;
2) Justice shall not be delayed;
3) Adequate compensation shall be awarded to victims of wrongs;
4) Reconciliation between the parties shall be promoted; and
5) Substantive justice shall be administered without undue regard to technicalities.

Observance of the above foundational principles of justice ensures that the justice system is not only capable of providing justice as a public good, but does so in a manner that caters for all segments of

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5In her paper judicial accountability must safeguard, not threaten, judicial independence: an introduction (2008) 86 Denver University Law Review 1:
6(International Journal for court administrators April 2010)
society, especially the vulnerable and the poor, who are either excluded or feel discriminated against by the mainstream judicial system.

**Challenges that Uganda faces in the administration of justice**

Despite the constitutional guarantees, the Uganda Judiciary faces several challenges. Internally, the Judiciary faces the challenge of delay in disposing of cases, corruption both real and perceived, high prison congestion, increasing caseload, among others. Externally, the Judiciary faces threats to its independence resulting from poor funding, poor remuneration, reluctance by the Executive to enforce judicial decisions, delay to enact legislation anchoring the independence of the Judiciary, delay to appoint judicial officers, and latent weaknesses in civil and criminal justice agencies. All these, either individually or collectively undermine public confidence in the Judiciary.

**UGANDA’S RESPONSE TO THE CHALLENGES**

**Sector-wide Approach**

The Judiciary in Uganda has made remarkable progress in addressing challenges in the administration of justice by focusing on holistic strategies and use of either a system approach or the sector-wide approach. The sector-wide approach acknowledges that the administration of justice is an eco-system, made up of different players, whose collective efforts and mandates are to deliver the public good called justice.

The Judicial ecosystem is made up of the public, the police, the prosecutors, the courts, the prisons, probation services, the ministry of justice and other players, who contribute directly and indirectly towards assisting the courts to administer justice. The administration of justice cannot be effective unless all these players are effective and efficient in discharging their mandates.

This is, therefore, the reason that motivated Uganda, in 1999, to set up the Justice Law and Order Sector (JLOS), to revamp the administration of justice by strengthening all the key players. JLOS is made up of all institutions charged with the administration of justice, maintenance of law and order, and the observance of human rights. The goal is to address existing challenges in an organized and holistic manner. JLOS institutions have a common strategic investment plan and a common planning and budgetary framework that looks at the whole sector instead of single institutions to improve overall justice outcomes.

For the last 19 years, JLOS institutions have mobilized resources from the Government and Development Partners guided by a secretariat of experts and common planning framework to address justice challenges through a holistic approach. JLOS has focused on rebuilding rule of law of institutions, taking judicial services to hard-to-reach areas, mobilizing donor and public resources to revamp justice services, increasing access to justice, tackling systemic challenges and ensuring that the justice system is effective and efficient.

As a result of the JLOS intervention, the level of satisfaction has increased from 59% in 2012 to 72% in 2016. The index of judicial independence grew from 2.8% in 2014 to 3.41% in 2016. Uganda is also ranked 9th in Africa and the first in East Africa in accessibility and affordability of civil justice; and ranked 12th in Africa and 1st in East Africa for the effectiveness of criminal investigation, adjudication, and correctional systems. There has also been a 20% reduction in pending cases and a case clearance rate of 125%. Despite the remarkable successes, a lot still remains to be done. For example, we must convince the Legislature and Executive to increase funding to the Judiciary; reduce the average lead times for civil cases, which stands at an average of 900 days; eliminate case backlog; deal with real and perceived corruption and reform the outdated legal regime.

**Case backlog reduction strategy**

Uganda has designed a comprehensive case backlog reduction strategy whose overall objective is to eliminate case backlog within the next two years. The strategy was informed by a nationwide case
census, which established the number of cases and the extent of the case backlog in the system. Though the dividends of the strategy are yet to be fully realized, we have noted that case backlog has gone down because of some of the interventions. We have introduced performance targets for all judicial officers. All Judges with delayed and pending judgments have been asked to take leave to write their judgments. This is intended to eliminate delayed judgments, which have been a source of discomfort and sometimes, a concern for the public, who imagine that the court is delaying judgment with the hope of getting a bribe.

**Greater public engagement – accountability and voice**
We have adopted a systematic way of engaging our stakeholders on a monthly and biannual basis. At a monthly level, all the JLOS actors at a district level meet with the civic leaders and local leaders to discuss removing impediments to the administration of justice using homegrown interventions. Civic leaders raise the concerns of litigants, which are also addressed at the meetings. At biannual level, every court hosts an open day, at which the court show-cases its services and opens up to public scrutiny. I and other Judiciary leaders have used these events to address concerns of the public and to put across the case for the judiciary better. This honest and frank engagement between the Judiciary and the public has lowered the tensions between the two and promoted mutual respect, which is essential to building an accountable judiciary.

**Engagement with the other arms of the state**
Improved relations and mutual respect between the Executive, Legislature, and Judiciary is essential for the proper functioning of the Judiciary. The Judiciary relies on the Legislature to appropriate resources and enact laws for the proper functioning of the courts. On the other hand, the Judiciary needs the Executive because it is responsible for policy, initiating laws, making proposals on the budget, making appointments and enforcing court decisions. Conversely, the Legislature and Executive need the Judiciary to administer justice, which is essential to the overall success and development of a country. Bearing in mind the indispensability of the Legislature and Executive, the Judiciary has pursued a policy of constructive engagement with the other arms of the state. I have on several occasions made the Judiciary’s case to the Legislature and the Executive, with a degree of success, without losing sight of the independence of the Judiciary. I have noted that cooperation with the other arms of the state, strengthens the reach of the State to provide services and that challenges are better addressed by effective engagement rather than each arm of the state trumpeting its power.

**Addressing gender-based discrimination**
Addressing gender-based discrimination in the Justice System is key to engendering the administration of justice and therefore making the administration of justice inclusive. The Judiciary’s Gender strategy is focused on ensuring that there is gender sensitivity and responsiveness in the delivery of justice in Uganda. Accordingly, the Gender Strategy has committed the Judiciary to:
- Ensure access and delivery of justice to all persons irrespective of gender;
- Create institutional awareness and demonstrable commitment to gender equality amongst judicial officers and other staff of the Judiciary;
- Address gender obstacles in the delivery of justice; and
- Establish systems and mechanisms to address discrimination, enforce women’s rights and address unfair treatment based on gender.

Consequently, the Judiciary is promoting more recruitment of female judicial officers to increase their say in the administration of justice. At the magistracy level, we have achieved gender parity, where the women to men ratio is about 50%. At the Judge level, the ratio of women to men is at 43% but slowly moving towards the 50% mark. We are also deliberately promoting higher professional training for women so as to increase their opportunities to access higher offices in the Judiciary. In addition, we are training judicial officers on how to administer justice through gender lenses; fast-tracking cases involving women and cases involving gender-based violence; provision of
space to breastfeeding mothers in some courts; and generally integrating gender in the training of Judiciary staff. We are planning to carry out a gender audit of the laws and procedures in court and other interventions to mainstream gender. The Judiciary has also published a Gender Bench Book to guide judicial officers on gender issues.

**Increasing judicial remedies that favour the disadvantaged**

Increasing procedures and remedies that are affordable, less formal and easy to use by court users is a game changer for the poor and other vulnerable persons. In recognition of the special challenges that the poor face in accessing court services, the judiciary has introduced the Small Claims Procedure, Plea Bargaining and Alternative Dispute Resolution to fasten the delivery of justice. These initiatives are also meant to assist and empower the vulnerable to effectively use the justice system without being hindered by technicalities which are common in the traditional formal system of justice. In the recent past, we have rolled out plea bargaining to tackle case backlog and congestion in prisons. We have noted that cases move faster, are resolved at a cheaper rate and that all the parties have more faith in the justice system. We have further noted that involving the victims and the community in the administration of criminal justice produces decisions that are more acceptable to the community and this reinforces public confidence in the administration of justice.

Under the Small Claims Procedure, courts handle claims of less than approximately USD 2,800. Most disputes are disposed of in less than one month. The procedure has been instrumental in assisting the poor individuals, and the small and medium enterprises to recover debts and enforce simple contracts. At the moment, owing to its success rate, filings under the Small Claims Procedure have overtaken that in ordinary civil suits, in respect to cases under the same threshold, demonstrating its effectiveness and acceptability by the public, who have found the procedure user friendly, cheap, accessible and one they can use without the rigors of legal representation.

Relatedly, the use of Alternative Dispute Resolution which has worked wonders in the developed world in reducing case backlog and pressure on the courts is another area that we are effectively pursuing so as to resolve civil cases promptly and eliminate petty corruption in civil justice. Recently, we introduced appellate mediation in the Court of Appeal to reduce backlog. Initial results show that litigants are more willing to resolve interlocutory matters, family and commercial cases through mediation. We can, therefore, draw lessons from the informality, affordability, and flexibility of these procedures which are the characteristics that are responsible for the success of the Small Claims Procedure, Plea Bargaining and Alternative Dispute Resolution mechanisms to address barriers that hinder the majority of persons from using the formal court system.

**Rebuilding the infrastructure**

Resources for building judicial infrastructure are severely limited due to budgetary constraints. Through targeted constructions, we have built Justice Centres. Each Justice Centre is a one-stop centre made up of the court, the Directorate of Public Prosecutions, the Police, and Prisons as part of the overall government plan to make hard-to-reach areas safe for human life and productivity. Through this programme, we have reduced the average distances people travel to courts from 72 km in 2009. We have also ensured that there is a criminal justice agency within a radius of 12 km in 2016. Sharing infrastructure by criminal justice agencies in one-stop centres has greatly reduced the transaction costs and time as well as ensuring better integration and synergy of the scarce resources available to the Judiciary. Adjournments that were caused by the absence of police files and absenteeism of staff have greatly reduced. Physical structures are also being made more amenable to physically challenged persons by introducing rumps, where there are old stairs.

**Specialized courts**

Specialized courts have proved to be very effective in addressing vital areas of the economy and public demand for customized court services. In Uganda, we started with the Commercial Court to
serve the increasing demand of settling commercial cases as a way of attracting and retaining investors and supporting the rapid transformation and expansion of the economy.

We have established the Anti-Corruption Division (ACD) of the High Court to address the challenges of delays in the adjudication of corruption cases. The ACD has the highest conviction rate and is pioneering efforts to trace and recover ill-gotten wealth. Both the Anti-Corruption Division of the High Court and Commercial Court have User Committees made up of stakeholders to ensure that the courts are able to meet changing needs of users and improve service delivery.

Uganda has also established the International Crimes Division (ICD) to deal with cases under the Rome Statute of the ICC under the complementary principle to try cases that were committed in the two-decade war in Northern Uganda. The court also tries terrorism and trafficking persons cases that would not otherwise be handled efficiently if they were handled in the traditional courts. Whilst specialized courts can be effective in addressing critical justice needs for the overall good of a country, Judiciaries should not lose sight of improving the entire court system to provide equally competitive services to all instead of focusing on the few.

**WHAT ELSE SHOULD BE DONE TO HAVE AN EFFECTIVE ACCOUNTABLE AND INCLUSIVE JUDICIARY?**

**Address access to justice for all, especially the vulnerable**

The silver bullet for making the Judiciaries inclusive lies in dealing with inequalities that are now becoming more pronounced in the Justice System. The physical barriers that must be overcome include long delays, prohibitive costs, the absence of legal aid and absence of remedies that are preventative, gender biases, lack of adequate information, a formalistic and expensive legal system, poverty and ignorance.

The UNDP[^7] says that Judiciaries must focus on immediate and underlying causes that impede access to justice. These include lack of safeguards to access to justice, insufficient mechanisms to uphold justice for all, and failure to identify claim holders. This must be followed by an analysis of the capacity gaps of claim holders and duty holders to help them meet their responsibilities and obligations. UNDP argues that access to justice must include working on legal outcomes that are just and equitable and focusing on remedies that strengthen the ability and institutional capacity to provide remedies. It is also important that countries should address poverty which is one of the leading causes of vulnerability and disempowerment in the administration of justice as a tool to strengthen the capacity of the poor to enforce their rights and seek services of legal counsel to protect their legal rights within the justice system.

**Reduce inequality in the administration of justice**

It is a common fact today that there is a two-track system in the administration of justice. The first track is for the rich and privileged while the second track, which is the slowest, is for the poor and most disadvantaged. Professor Shvijji says that delays and corruption equally affect the rich and the poor litigants. But there is no equality of suffering here. For one, the rich and powerful have the means of speeding up and slowing down the cases as they wish. Discrimination of the poor is also compounded by the absence of a comprehensive legal aid regime for the indigent. Studies have found that the absence of legal aid violates the right to a fair trial and undermines the administration of justice especially for the poor.

In order for us to create an inclusive judicial system, we must address barriers which the poor and vulnerable face in accessing the courts. The first point of call is to sensitize the poor and vulnerable to use the justice system. Secondly, the poor must be given a voice, so that they can raise and claim their rights. Thirdly, the procedural rules for accessing the justice system must be simplified.

[^7]: Access to Justice, Practice Notes found at: https://www.un.org/ruleoflaw/files/Access%20to%20Justice_Practice%20Note.pdf

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Where necessary, we must endeavour to limit the number of laws one has to contend with to pursue a claim in court. Legal aid must be provided for the indigent and, where possible, legal advice should be provided at the point of entry into the legal system for people to make informed decisions.

**Reduce and eliminate corruption in the administration of justice**

Corruption undermines the reliability of the judicial system generally reinforcing discrimination and disadvantages for the poor and vulnerable groups. According to Transparency International (TI), judicial corruption is a threat to the independence and impartiality of the Judiciary. Judicial corruption is equally a major drawback to having an effective, accountable and inclusive justice system. The Judiciary ought to adopt a broader definition of corruption which takes into account the Bangalore Principles on Judicial Integrity by defining corruption to cover breach of ethics, integrity, honesty, fairness, and compassion. It also entails non-compliance with ethical rules and failure to adhere to widely accepted norms of honesty, fairness, civility, and respect for societal interests. At an individual level, ethical judicial officers should be those that exemplify integrity and social responsibility in their personal conduct and support the institutionalization of practices that encourage such conduct by others.

Whereas commitment exists in most Judiciaries to fight corruption, the challenge has been and still remains the methodology for fighting the vice. Victoria Jennnet, Sofie Schutte and Phillip Jan had this to say: *Most Judiciaries have veered from small measures to extreme measures, both of which have not yielded the much needed results. The best way of fighting corruption in the Judiciary is to mainstream anti-corruption efforts in the judicial process*. Several scholars recommend integrating anti-corruption activities at all levels of the Judiciary and adopting a Judiciary specific anti-corruption strategy as opposed to generalized strategies that tend to address symptoms rather than the root causes of corruption. In addition, Judiciaries should adopt Institutional or sector-specific anti-corruption efforts because they are more efficient, have customized tools for dealing with institutional problems, have less political interference, take advantage of synergies, lead to a reduction of the cost of services to customers, thereby enjoying economies of scale.

Some of the tools suggested for fighting corruption include *improving access to information, sector-specific standards on transparency, anti-corruption legislation, use of ombudsmen, integrity reviews, use of civil society organizations, independent complaint mechanisms, social audits, blacklist or name and shame lists, and developing an integrity management system*. The other tools are *Judicial Codes of conduct, performance targets, performance evaluation, court user committees, customer care charters, and Ethics training programs*.

The Judiciary of Uganda has adopted a customized anti-corruption strategy which incorporates most of the above tools but broadly focusses on enhancing the capacity of the Judiciary to fight corruption through improving processes, structures and facilities for service delivery; enhancing institutional integrity and performance; and improving public awareness on the role of the Judiciary. The second pillar focuses on strengthening the capacity of the justice system to detect, investigate and adjudicate corruption cases. The third pillar focuses on ensuring that there are effective mechanisms for punishing corruption. We have, among other interventions, revamped the Inspectorate of Courts and given it wide powers to inspect all the courts for improved service delivery as well as supplementing the work of the Judicial Service Commission which is mandated to discipline judicial officers.

**Improving customer care at the courts**

\[^8\]In their paper, mapping anti-corruption tools in the judicial sector.
Effective customer care for litigants at the courts is critical to improving the efficiency, effectiveness, inclusiveness of courts and public trust particularly for many litigants who find it difficult to use the court system. Customer care can be used to widen and deepen access to justice by employing cost friendly strategies that have proved instrumental in many jurisdictions. Such interventions include locating the courts near public transports points, listing courts in telephone directories, use of mobile courts, video conferencing, concierge services, clean and safe courthouses, and adequate space for court users. In addition, Judges should be visible and involved in their communities outside the courtroom by participating in town hall meetings, writing columns in the newspapers as well as simplifying the language used in court to a level that ensures that the most disadvantaged is able to dialogue and follow proceedings in court.

**Greater use of ICT in the administration of justice**

The World Development Report – 2016 says that digital technologies have boosted growth, expanded opportunities and service delivery across the world. According to Jim Yong Kim the World Bank President – among the poorest 20 percent of the households, nearly 7 out of 10 have a mobile phone. The poorest households are more likely to have access to mobile phones than to toilets or clean water. We must take advantage of this rapid technological change to make the world more prosperous and inclusive. Judiciaries can therefore take advantage of the digital revolution and its dividends, among other things, to increase access to justice by linking up the litigants with court; providing information to litigants using electronic and social media platforms, such as WhatsApp; developing and launching case managed systems to streamline processing of cases; digital presentation of evidence; providing a platform for complaints handling and customer case management; and facilitating sharing of information among judicial officers.

Furthermore, digital technology can be deployed to reduce the cost of litigation through electronic service and filing of documents. Digital technology can be used to bypass middlemen by directly linking the court to the litigant thereby eliminating opportunistic corruption and reducing transactional costs. In Africa, ICT offers potential opportunities for Judiciaries to reach out to remote areas through virtual courts to bridge the access gap and substantially reduce inequalities in the justice system. However, as a word of caution, courts should invest in the most appropriate technology that is suitable for their environment; one that is sustainable and customized along the needs of the users if the courts are to reap the digital dividends.

**Invest more in the Judiciary**

Judiciaries are generally underfunded and suffer perennial cuts in their budgets especially in the developing world. With limited funds, courts cannot be efficient nor attend to the needs of all court users particularly those who require special attention. While Judiciaries acknowledge that resources are limited in the national budget, it is important that the following principles are observed in arriving at the Judiciary’s budget.

Firstly, funds allocated to the Judiciary must be sufficient to enable it to dispense justice daily and function effectively as an equal arm of the state, with adequate resources to meet short, medium and long-term needs. Secondly, the budget must be adequate to facilitate the courts to administer justice in accordance with Constitutional requirements expected of the Judiciary.

Thirdly, funds allocated to the Judiciary must enhance rather than diminish the independence of the Judiciary and if there are any budgetary cuts, they must be done with the strictest regard to the independence of the Judiciary. It is also suggested that the budget must allow for the timely disposal of the caseload and keeping knowledge and skills of judges up-to-date. The court facilities must be appropriate to maintain judicial independence, dignity, and efficiency.

However, the Judiciaries must also exercise fiscal discipline and observe value for money principles to ensure the highest value for each dollar invested in the administration of justice. In appropriate
circumstances, courts should consider adopting cost saving measures to deal with stressed or underfunded budgets for the overall good of justice.

Diversity

Lady Hale says that diversity is good for building inclusive Judiciaries because each different individual adds voice, variety, and depth to decision making as everyone brings their own inarticulate premises to the business of making choices inevitably involved in judging. Unfortunately, many Judiciaries do not reflect the composition of their national population and are rightly criticized for not being diverse and inclusive in their appointments.

In the United Kingdom, the Judiciary is encouraging minorities to join the higher bench to avert a crisis. In Uganda, the problem of diversity is usually about gender, religion, and ethnicity. Uganda has addressed the problem through a provision in the Constitution that provides that all the appointments must take into account the above concerns. It is therefore suggested that Judiciaries should use affirmative action to bring on board under-represented segments of the population. Judges should be trained in diversity as it puts them on notice that ignoring diversity can undermine public confidence in the administration of justice.

CONCLUSION

Building efficient, accountable and inclusive Judiciaries is within our reach if we can build a court system that is capable of meeting the needs of the people. Judiciaries cannot therefore remain inward looking. Judiciaries have to change and embrace people-centric policies if they must remain relevant. Transformation of the Judiciary however calls for total personal commitment on the part of judicial officers to adopt modern case management which is anchored on improving the quality of judicial outcomes at the least cost and within the shortest possible time in court. Judiciaries on their part must not relent in simplifying, customizing and integrating justice services to increase access, maximize customer experience and satisfaction that are necessary for increasing public confidence in the administration of justice.

National Governments must do more than lip service to strengthen Judiciaries by allocating adequate funds to provide services, develop appropriate infrastructure and ICT in particular, put in place appropriate laws, develop legal aid schemes, and generally to provide a conducive environment for the courts to function effectively. After all, courts are part of the human heritage and must therefore be preserved for posterity.

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9 Equality in the Judiciary 21st February 2013 – Menom Memorial Lecture
INTRODUCTION
There could be no serious dispute that the existence and sustenance of any democratic state highly depend upon, among others, whether its judicial organ is functioning properly and effectively. A noticeable and key indicator of the performance of the courts of law is the speed at which they resolve the disputes that are presented to them.

In many countries including Tanzania, the administration of justice has been beset by crippling delays and backlogs. The former Chief Justice of Tanzania, Honourable Mr. Justice Mohamed C. Othman, whose agenda of the transformation of the Judiciary of Tanzania included tackling case delays and backlogs, reminisced and warned in July 2012 that: “If not properly managed, case delays may lead to unmanageable case backlogs which in turn clog the courts. Excessive case delays may amount to a denial of justice.”

In Tanzania, however, efforts to study and craft measures to ease case delays and backlogs began much earlier in the 1970s. For an example, the issues featured prominently in the report of 1977 (“the Msekwa Report”) presented by a presidential commission known as “Judicial System Review Commission” Briefly, in that report detailed recommendations were made for reforming the law and rules of procedure as well as for institutional restructuring and realignment, all aimed at achieving speedy resolution of disputes. Despite these early efforts, the unnecessary prolongation of judicial proceedings in the country has remained a huge concern, as its dire consequences have been evident.

This paper specifically examines the experience of the Judiciary of the Mainland Tanzania in tackling case delays and backlogs. In doing so, the paper looks at case delay as a threat to the proper administration of justice and then proceeds to assess the related legal structure, nature and extent of the delay, causes of delay and finally efforts to confront case delays. In the end, a few lessons will be drawn from the experience of Tanzania.

CASE DELAYS: AN OVERVIEW

Definition of Case Delay
While case delay may be defined in variety of ways depending on one’s perspective, in this paper, “delay in criminal or civil proceedings, is understood to be unnecessary or undue prolongation of proceedings, assessed from the time an action is commenced through filing of a charge or [a plaint] or issuing of a writ, until final judgement.” It should be noted that this definition emphasizes

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11 Other studies that examined case delays, among other issues, were (i) the High-Level Task Force Report 1993-1996, (Bomani Report); (ii) The Law Reform Commission Report of 1986 on Delays in the disposal of civil suits; and a report by a Committee headed by the Hon. Mr. Justice John A. Mrosio (Justice of Appeal) issued in November 2002.

“undue” or “unnecessary” prolongation because it acknowledges the existence of certain protraction or elongation of proceedings for allowing smooth running of the process.\(^\text{13}\) As regards case backlog, it is defined as a case which is pending before the court for a longer period that one prescribed. In Tanzania, the longest prescribed time-limit is years, implying that case backlog constitutes all pending cases of, at least, two years old. The two-year limit applies to the High Court and the Court of Appeal of Tanzania. While for the Resident Magistrates’ Courts the limit is eighteen months, the prescribed limit for the Primary Court is six months. On the basis, the definition of case backlog is court-specific.\(^\text{14}\)

**The Impact of Case Delays on Justice Delivery**

Case delays are inimical to the administration of justice. They do not only cause uncertainty, insecurity and public discontent but they also erode public confidence in the Judiciary thereby driving people to options for mob justice. The following quotation succinctly summarises the negative impact of case delays:

> “Waiting for years to resolve a dispute blurs truth, weakens witness memory and makes the presentation of evidence difficult. Lengthy delays prior to trial may cause physical evidence to be lost, tainted or destroyed. Moreover, a correlation exists between time and the accuracy of eyewitness testimony. In criminal cases, delay causes hardship to accused persons, particularly those in custody. Delay is also a denial of justice because contrary to the notion of presumption of innocence, awaiting trial prisoners detained because they cannot afford bail or due to the seriousness of the offence often spend more time in detention than the maximum sentence prescribed for that particular crime...in addition, delays in judicial proceedings may cause litigants to suffer financially. Quite often a litigant pursuing a judicial remedy spends more than the value of the remedy claimed. This increases the cost of litigation, and may cause litigants to abandon meritorious claims or to accept lesser, unjust settlements out of court.”\(^\text{15}\)

**Speedy Resolution as an Imperative at International and Regional Levels**

At the international and regional levels, the concern for slow justice resulted in efforts to regulate case delay and enact certain provisions aimed at guiding the states parties. The right to speedy trial (and timely justice) as therefore, been enshrined in several international and regional instruments, most notably the International Covenant on Civil and Political Rights (ICCPR), which Tanzania ratified 1976, and the African Charter on Human and Peoples’ Rights (ACHPR) ratified on 18\(^\text{th}\) February 1984 by Tanzania. Beginning with the ICCPR, it states in Article 14 (3) (c) that:

> “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
> (a) [Omitted]
> (b) [Omitted]
> (c) To be tried without undue delay”

Although the meaning term “undue delay” appears to be unsettled, Article 14 (3) (c) obliges state parties to ensure that their respective procedural laws guarantee that a trial would proceed without undue or unnecessary delay from the initial lodgement of a charge until when the appellate process is exhausted. It is important to note that the CCPR Human Rights Committee stated in its General Comment 13, it held that Article 14 is not limited to the procedures for determining criminal charges against persons but also to the procedures governing the determination of their rights and obligations in a suit.\(^\text{16}\)

\(^{13}\) Ibid, at 182-183

\(^{14}\) See Section 4.3 of this paper for further details on the case backlog limits.

\(^{15}\) Ibid, at 183.

In Africa, the ICCPR is supplemented by the ACHPR. It stipulates in Article 7 (1) (d) as follows
“1. Every Individual shall have the right to have his cause heard. This comprises:
   a. [Omitted]
   b. [Omitted]
   c. [Omitted]
   d. The right to be tried within a reasonable time by an impartial court or tribunal”

Although there is little interpretation of the boundaries of what is a reasonable time, violations of the right to trial within a reasonable time have been found quite a number of cases. These have included indefinite or extended detentions without charge or trial.\(^{17}\) It seems Article 7 (1) (d) would extend beyond criminal proceedings as the African Commission on Human and Peoples’ Rights has held that unwarranted delays in adjudication of civil proceedings would amount to a violation under the aforesaid provisions.\(^ {18}\)

**CASE DELAYS IN TANZANIA**

**Background**
The constitution mandate for the timely dispensation of justice is unquestionable. Timely dispensation of justice is a constitutional and fundamental right of the citizens of Tanzania that is meant to be guaranteed by Article 107A (2) (b) of the Constitution of the United Republic of Tanzania of 1977. It provides that: “(2) In delivering decisions in matters of civil and criminal nature in accordance with the laws, the court shall observe the following principles, that is:
   (a) [Omitted]
   (b) Not to delay dispensation of justice without reasonable ground;
   (c) [Omitted]
   (d) [Omitted]
   (e) [Omitted].”

So far there is a dearth of judicial pronouncements on the yardstick for determining what would amount to “delay without reasonable ground.” On the part of Zanzibar, its Constitution of 1984, too, provides under Article 12 (6) (e), as amended by Act No. 2 of 2002, provides some guarantee for speedy disposal of criminal cases. Its wording is to the effect that criminal cases must be tried and disposed of promptly. This means, at least in theory, that judicial delays in disposal of criminal litigation are violative of the Constitution. Yet, legal ramifications of the aforesaid provisions appear to be unclear and untested.

The legislative sensitivity concerning dispensation of timely and effective justice is reflected by the fact that most statutes governing procedure have a number of detailed provisions explicitly devoted to timely adjudication, decision-making, and justice delivery. Such provisions either stipulate a maximum time-limit or envision an orderly time-frame for the contemplated action by the parties or the court. They also stipulate consequences of non-compliance. The most notable statues in this regard are the Civil Procedure Code,\(^ {19}\) The Criminal Procedure Act\(^ {20}\) and the Law of Limitation Act.\(^ {21}\)

**Nature and Extent of Case Delays**
Delay in the disposal of disputes in Tanzania is a historic and widespread challenge. Apart from existing in every stage of proceedings (i.e., institution of proceedings commencement of trail,

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\(^{18}\) Ibid. See also Iruoma, op cit. at 193.

\(^{19}\) Chapter 33, Revised Edition of 2002

\(^{20}\) Chapter 20, Revised Edition of 2002

\(^{21}\) Chapter 89, Revised Edition of 2002
delivery of judgement and transmission of records for appellate processes), it is most pronounced in respect of criminal proceedings commenced before the subordinate courts (i.e., District Court and the Resident Magistrate’s Court) upon holding charges pending committal for trial before the High Court. It is not unusual for an accused person to be remanded in prison for between two to four years to await the determination of the Director of Public Prosecutions for him or her to be arraigned before the High Court for offences triable by that court, which include capital offences. Land disputes are also notoriously associated with delays.

As Table 1 below shows, the state of case delay and backlogs is also specific to the court level concerned. The backlog rates increased progressively and consistently from the bottom of the court hierarchy to the apex. For a while, the primary court, at the bottom, recorded the rate of 2% in 2013, the Court of Appeal, at the apex, recorded the rate of 46% in 2013. It is, however, notable that case backlogs went down across the board over that the same period. The rates for 2015 indicate that while the Primary Court’s rate improved by dropping to 1%, the Court of Appeal cut down its backlog by 15 points to 31%. For the same year 2015, in which all the courts registered 206,115 cases and disposed of 228,818, the Judiciary of Tanzania recorded an overall clearance rate of 111%.

TABLE 1: Summary of pending and backlog cases from 2013 to 2015 in all courts, Tanzania Mainland

<table>
<thead>
<tr>
<th>S/N</th>
<th>COURT LEVEL</th>
<th>TOTAL PENDING CASES</th>
<th>CASES OVER TWO YEARS (BACKLOG)</th>
<th>BACKLOG (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Court of Appeal of Tanzania</td>
<td>1,190</td>
<td>2,101</td>
<td>2,387</td>
</tr>
<tr>
<td>2</td>
<td>High Court (13) Registries</td>
<td>16,194</td>
<td>17,304</td>
<td>12,853</td>
</tr>
<tr>
<td>3</td>
<td>High Court, Commercial Division</td>
<td>461</td>
<td>463</td>
<td>456</td>
</tr>
<tr>
<td>4</td>
<td>High Court, Land Division</td>
<td>1,735</td>
<td>1,532</td>
<td>1,888</td>
</tr>
<tr>
<td>5</td>
<td>High Court, Labour Division</td>
<td>1,236</td>
<td>2,542</td>
<td>2,141</td>
</tr>
<tr>
<td>6</td>
<td>Resident Magistrates' Courts</td>
<td>9,553</td>
<td>10,517</td>
<td>10,052</td>
</tr>
<tr>
<td>7</td>
<td>District Courts</td>
<td>14,900</td>
<td>20,991</td>
<td>13,664</td>
</tr>
<tr>
<td>8</td>
<td>Primary Courts</td>
<td>63,540</td>
<td>33,006</td>
<td>25,394</td>
</tr>
</tbody>
</table>

Source: The Statistical Data Centre of the Judiciary of Tanzania, 2015

The positive trend in Table 1 is confirmed by the statistics for the period ending December 2016 indicating that backlog at the High Court level stands at 15% and that on average it takes about 12 months for a case to be concluded at that court level. At the Resident Magistrates’ Courts and District Courts levels, the average time taken to dispose of a case is 9 months and backlog stands at 6%. At the bottom of the judicial hierarchy (i.e. Primary Court level) where most of the citizenry are attended, there is no case backlog. The overall backlog rate improved remarkably as it stood at 5%.
Causes of Case Delays

The Law Reform Commission of Tanzania (LRCT) is one of the key actors that extensively researched causes of case delays in Tanzania. The Commission documented the causes in two of its reports: Report on the Comprehensive Review of Civil Justice System in Tanzania, May 2013\textsuperscript{22} and Report on the Flow of Justice in Tanzania.\textsuperscript{23} This part looks generally at some of the causes identified in the Commission’s reports as well as other studies.

Adversarial Nature of the Procedures

The adversarial system, by its nature, leaves the conduct of litigation entirely in the hands of the lawyers resulting in minimal judicial control. This affects the flow of dispute resolution, especially in civil litigation. Writing on this issue, Justice R.V. Makaramba opines that: “The inherited common law adversarial system in vogue in this country with its attendant English practice and procedure has always been at the centre of public criticism for contributing to delays in the dispensation of justice together with legal technicalities and high cost of litigation. Furthermore, the adjudication system is in the hands of the parties and their lawyers/attorneys/advocates. Judges or Magistrates do not have a lot of control over the litigation process. Consequently, civil litigation has been dogged with frequent adjournments, which contribute to further delays in the delivery of justice”\textsuperscript{24}

Unnecessary Adjournments

Unnecessary adjournments are one of the commonest causes of case delays in Tanzania. Judges or magistrates grant unnecessary adjournments sometimes out of fear that if they do not do so they would appear to be biased.\textsuperscript{25} In some cases, adjournments are granted even without assigning any justification.

Parties’ Absence

The non-appearance of the parties especially in cases involving numerous parties can result in unnecessary adjournments especially where it not prudent to punish the defaulting party.

Real or Perceived Corruption

It is perceived that corruption is another cause of slow justice. Some compromised judicial officers might grant unmerited adjournments, withhold judgements or rulings on matters such as bail applications or apply other tactics that may disturb the flow of the trial for personal gain or some other ulterior motive.

Resource Limitations or Constraints

Although there has been a positive trend showing increased allocation of recurrent and development budget for the Judiciary of Tanzania in recent, the funds disbursed to the courts across the country are generally insufficient to support their main function of adjudication.\textsuperscript{26}

\textsuperscript{22} This report categorized the causes of case delays in the civil justice system into three main groups: first, causes arising from the weakness in the rules procedure (i.e. the Civil Procedure Code); secondly, delays caused by the parties; and finally, delays caused by the court.

\textsuperscript{23} This report identified trends in the criminal justice system by examining it from the commission of a crime to the stage of sentencing and sanctions or acquittal. For civil matters it examined the system from the time a matter is brought to court to the stage of judgement and decree. Secondly, the report identified the barriers that slow down or impede the flow of justice in criminal and civil matters.

\textsuperscript{24} Makarama, R.V., \textit{Unearthing Challenges and Solutions in the Delivery of Justice in Tanzania.}, A Paper to be presented at the Tanganyika Law Society Annual Conference and General Meeting held at the Arusha International Conference Centre (AIC) on 20 February, 2015

\textsuperscript{25} \textit{Report on the Comprehensive Review of Civil Justice System in Tanzania, Op. Cit. at 20.}

\textsuperscript{26} To see recent trends in the provision of resources by the Government to the Judiciary Tanzania, see, Hon. Lady Justice S.E.A. Mugasha, \textit{Constitutional Obligations to Provide Sufficient Resources to Courts and the Judiciary: A Retrospection of Tanzanian Judiciary}, Paper presented at CMJA Conference, 19 September 2016, Georgetown, Guyana
In most cases, courthouses are congested and dilapidated, meaning that judges and magistrates work in poor environments. The situation is worsened by staff shortage, which by June 2015 stood at 29% as the Judiciary of Tanzania had a staff complement of 6,143 against the requirement of 8,688.  

**Recording of Proceedings**

Almost all magistrates and judges in Tanzania record the proceedings in longhand and for long hours without the assistance of any technology. With the exception of the proceedings before the High Court, Commercial Division where court-recording technology is installed and used, the parties and their witnesses in trials before the rest of the courts have to be slow-paced so as to allow the magistrates and judges to record the proceedings. Consequently, trials involving multiple witnesses tend to be long and tiresome.

**Minimal Use of Technology**

Most courts are not ICT-enabled, the notable exception only being the High Court and the Court of Appeal. Many judicial and administrative processes in courts and executed manually. There are no online services even for basic processes. A few years ago, getting a copy of judgments or rulings from a primary court was a huge challenge due to the absence of word processing facilities in most primary courts.

**Abuse of Interlocutory Applications and Preliminary Objections**

Abuse of interlocutory applications or preliminary objections can lead to delay especially in litigation involving legal counsel. Some advocates have a tendency to raise frivolous applications and preliminary objections, aimed at slowing the progress and follow a case.

**Pre-committal Procedures before the Subordinate Courts**

For most serious offences (including capital offences) triable by the High Court, the accused would be arrested and charged before a Magistrate’s Court pending the formal charges being filed with the High Court and his commitment to that Court for arraignment and trial in accordance with the provisions of the Criminal Procedure Act.  

Since the Magistrate’s Court has no jurisdiction to try the accused, he is usually arrested, held and charged on a holding charge until when the Director of Public Prosecution lodges formal charge (known as information) before the High Court. The procedure is a source of a lot of discontent principally because the accused would be held in remand prison for years on a holding charge. Although the accused would be brought to the Magistrate’s Court regularly, the court is generally powerless to interfere with the pace of the ongoing investigations.

**EFFORTS IN TACKLING DELAYS**

In order to confront case delays, a holistic approach is necessary. This part addresses some of the initiatives and measures being applied to reduce or eradicate case delays and backlog.

**Continuous Reform of Court Procedures**

There has been a continuous process of reform of court procedures, some of which was based upon the Report on the Comprehensive Review of Civil Justice System in Tanzania of 2013. The promulgation of the new rules for the Court of Appeal of Tanzania to addressing outstanding bottlenecks and other issues is one illustration. Although full-scale reform of the Civil Procedure Code remains pending, the experience at the High Court, Commercial Division where new rules of procedure have been operating since 2012 confirms that improved procedures can lead to speedy

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27 Judiciary of Tanzania, Annual Performance Report for 2014/2015, at page 6  
28 Cap. 20 Revised Edition of 2002  
29 Tanzania Court of Appeal Rules, 2009  
30 The High Court Commercial Division (Procedure) Rules, 2012 Government Notice No. 250 of 2012
resolution of litigation. It is notable, for example, that the new Commercial Court Rules have been hailed for facilitating expedited disposal of disputes partly because they have dispensed with the traditional examination in chief introducing witness statements.  

In addition, the Chief Justice, who is empowered under various laws, notably the Judicature and Application of Laws Act, the Civil Procedure Code and the Magistrates' Courts Act, to make rules of procedure and practice, appointed a Judiciary Rules Committee (JRC) to assist him with reviewing and updating various rules of procedure. Some of the rules procedures proposed or updated by the JRC are already operational.

Recently, the JRC through the Chief Justice recommended the amendment of the Criminal Procedure Act, to introduce plea bargaining in Mainland Tanzania. It is expected that this measure will help address delays in completion of investigations and trial of criminal cases, and decongest the prisons, which overburdened with a huge population of remand prisoners.

Under plea-bargaining, an accused person would agree to plead guilty to a particular charge or lesser charge to multiple charges in return for some concession from the public prosecutor which may not be limited to lenient sentence or dismissal of other charges. Another ongoing reform initiative is the establishment of a mobile and small claims court that will provide optional simplified, inexpensive, and speedy resolution of disputes over mostly liquidated monetary claims. Feasibility assessment and draft rules for the operation of the court have already been done.

**The Judiciary Funding Mainstreamed**

The Budget Act of 2015 requires the Government to ensure that sufficient funds are allocated to all arms of the state including the Judiciary. This is a welcome move as it guarantees sufficient recurrent and development funding for the Judiciary of Tanzania for it to discharge its functions effectively. There are indications that budgetary allocations and disbursements to the Judiciary have seen an increasing trajectory in recent years, with the development budget having been doubled for the year 2015/16.

**Measurement of Judicial Performance as a Mechanism for Accountability and Tackling Delays**

In a bid to advance the internal accountability of judges and magistrates in Tanzania and improve their performance, the then Chief Justice of Tanzania, Mohamed C. Othman, in April 2013 issued a directive that institutionalized continuous performance evaluation of judges and magistrates across the country. The directive’s key features included the following: first, it set forth the maximum lifespan for each level of the court system for disposal of cases. While the maximum lifespan for a case before the High Court was twenty-four months, the District Courts and Courts of the Resident Magistrate had eighteen months to complete a case before them. The Primary Court is required to complete its cases within twelve months of their filing.

Secondly, the directive set a minimum of 220 cases to be decided annually by each Judge of the High Court save for judges of the Commercial Division of the High Court. Other levels of the court system except for the Court of Appeal have their own annual targets per judicial officer.

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31 Makaramba, op. cit. at 11
32 Cap. 358 Revised Edition of 2002
33 Cap. 33 Revised Edition of 2002
34 Cap. 11 Revised Edition of 2002
35 Cap. 20 Revised Edition of 2002
36 Prof. Juma, op. cit. at 15.
37 Mugasha, op. cit. at 16-17.
38 Prof. Ibrahim H. Juma, Chief Justice of Tanzania, *Balancing the independence of the Judiciary with Accountability: Recent Piecemeal Reforms in Tanzania*, 2016 (on file with author) at 8-10.
39 220 cases is aggregated from the following cases: 10 Civil Cases; 20 Civil Application; 30 Civil Appeals; 5 Probate Causes; 10 Matrimonial Cases; 5 Civil Revision Causes; 40 Criminal Cases; 10 Criminal Applications; 25 Criminal Appeals; 10 Criminal Revision Causes; 5 Land Cases; 10 Land Applications; 30 Land Appeals; and 10
The adoption of the above targets along performance indicators is generally hailed as a fundamental step in improving individual performance judges and magistrates for such targets and indicators serve as useful bases for evaluation of performance. Apart from releasing positive peer pressure for the achievement of the targets, it has checked slothfulness to a great extent.

It should be noted that in designing the performance evaluation mechanism, the following points were taken into account: first, judges and magistrates participated, directly or indirectly, to assess the caseload situation in their respective courts and then propose the targets and benchmarks. The Chief Justice’s directive was, therefore, issued with sufficient input from judges and magistrates. In this regard, it can safely be stated that the current mechanism of judicial performance evaluation was developed and undertaken solely by the judiciary, without any influence or pressure from the other branches of the state.

Secondly, although the performance of each judge or magistrate is evaluated, the main object of the assessment is the determination of the performance of the Judiciary as a whole as opposed to individual performance. Accordingly, while the general performance of the Judiciary as a whole is regularly published, the individual performance of judges and magistrates remain confidential and unpublished. Thirdly, the evaluation mechanism so far does not address the quality, reasoning or evaluation cannot in itself be a basis for imposing sanctions against the evaluated judge or magistrate.

Finally, every effort is made to ensure that evaluation is made upon accurate information and data. Accordingly, the Judiciary has put in place a computerized statistical management system – the Judiciary Statistical Dashboard System – so as to improve the integrity of its information and data.

Despite the obvious benefits of the judicial performance evaluation system, there are concerns that the current system is skewed to achieving “quantitative targets” by sacrificing the quality of the decisions. Indeed, the pressure on judges and magistrates for achieving their respective annual benchmarks can lead to an appetite for applying technicalities to dispose of as many cases as possible thereby thwarting the course of justice. Secondly, the current system does not analyse the nature and quality of the decisions delivered by the judges and magistrates. There is no distinction between a complex case determined after a protracted trial and a small claims case that is settled at the pre-trial stage. Presently, both cases are weighted equally. Certainly, the above concerns merit immediate attention so as to improve the current performance evaluation system.

Improved Case Flow Management
There has been a discernible improvement in the management of the continuum of processes and resources necessary to move a dispute from its lodgement to its finalization by the court. Aside from the application of the individual calendar system by which a magistrate or judge is assigned a case immediately after it is lodged, the Judiciary has put in place a computerized statistical management system – the Judiciary Statistical Dashboard System – so as to improve the integrity of its information. The individual calendar system, as opposed to the Master Calendar system which was phased out in the mid-1990s, allows the assigned magistrate or judge to manage and control all events related to his docket of cases.

Use of Technology in Courts

Land Revision Causes. Each judge of the Commercial Division of the High Court is required to dispose of 100 cases annually.
In line with the Judiciary’s Strategic Plan, most courts have been equipped with computers, at least for document processing. It is planned to roll out the installation and use of court recording systems at the entire High Court level to improve efficiency and expedite resolution of cases.

Construction and Rehabilitation of Courthouses
The Judiciary of Tanzania adopted an ambitious plan in 2013/14 for construction and rehabilitation of courthouses across the country. The plan includes construction of new buildings for identified High Court centres, Resident Magistrates’ Courts, District Courts and Primary Courts. Although the said plan is expected to executed and accomplished in a long-term, it will decongest the courts and provide sufficient space and conducive environment for the courts to function properly.

Other Initiatives for Tackling Delays
Other notable measures applied to tackle case delays are the following: first, in 1994 the Judiciary of Tanzania introduced into the civil justice system a form of Alternative Dispute Resolution mechanism known as “Court-annexed Mediation”. That initiative was possible after amendments to the Civil Procedure Code. Since the year 2002, court-annexed mediation is practised in the High Court and the Courts of Resident Magistrates and District Courts throughout the country. Presided by a Judge or Magistrate, the mediation sessions are conducted at the pre-trial stage to try to hammer out a settlement. If the settlement is not achieved within time, then the suit proceeds to trial. To build on the initial success of this procedure, the Judiciary established a special Mediation and Arbitration Court at the High Court level at Dar Es Salaam.

Secondly, the establishment and operation of specialized divisions of the High Court to adjudicate specified manner of disputes. So far, three divisions – Commercial, Land and Labour Divisions – have been established between 1999 and 2005. The divisions apply their specific expertise in their respective areas of jurisdiction to bring efficiency and effectiveness in the resolution that is tailored to the needs of their areas of specialization. For many years, the Commercial Division has remained a modern court with impressive statistics on case disposal and case clearance.

Finally, from the fiscal year 2011/12, the Judiciary of Tanzania took the key measure of separating judicial functions from administrative functions by employing professional Court Administrators and divesting administrative duties from Registrars and Deputy Registrars. This measure allowed all Judicial Officers to concentrate on the core function of adjudication of disputes as all support function including administration, planning, finance, and procurement are performed by relevant professionals efficiently and effectively.

SOME LESSONS
Two lessons can be immediately drawn from the experience of the Tanzania Judiciary:

Limitation of Reform of Court Procedures
Although it is appreciated that one key strategy for curbing case delays is the review and updating of court procedures so as to improve them, there is a feeling that the problem primarily lies with the actors in the justice sector (i.e., the Bench and the Bar) as opposed to the existing procedures. The perception is, therefore, that the existing, age-old procedures are sufficient or that they only need minimal tinkering. In the circumstances, the best way towards the reduction of case delays must involve the assumption of joint responsibility by all the stakeholders in the administration of justice.

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40 Amendment was done through Government Notice No. 422 of 1994, which came into effect on 1 November 1994
41 Dr. Fauz Twaib, Legal Empowerment of the Poor: Access to Justice and the Rule of Law, (mimeo)(on file with the author), at page 15.
Therefore: “there is a need for parties to see litigation as a means to resolve conflict peacefully. Lawyers, prosecutors, and court personnel who benefit from unduly protracted proceedings need to change. Stakeholders ... should appreciate that ... it is their joint responsibility to realize the main aim and goal of courts, which is to ensure that justice is done.”

**Evaluation of Judicial Performance as Catalyst for Change**

The adoption of the targets along performance indicators for magistrates and judges in Tanzania is generally hailed as a fundamental step in improving individual performance of judicial officers on the reason that such targets and indicators serve as useful bases for evaluation of performance. Aside from generating positive peer pressure for the achievement of the targets, it has checked tardiness to a great extent. For jurisdiction that are yet to put in place a similar or equivalent mechanism, this experience undoubtedly offers a useful lesson.

**CONCLUSION**

That case delays and backlogs are inimical to proper and effective administration of justice is well beyond dispute. Apart from causing discontent among the citizenry and thereby leading to the public’s loss of confidence in the Judiciary, case delays erode three key human rights: the right of access to justice, the right to an effective remedy and the right to fair hearing. While clogged courts create a disincentive for the members of the public from accessing courts, inordinate delays render court verdicts and awards of little or no value implying that the right of access to courts and the right to an effective remedy is violated. Again, the right of fair hearing, which includes the right to an expeditious resolution of the dispute is trampled upon if the dispute resolution is unduly prolonged. In this sense, by crafting and employing appropriate measures to curb case delays and backlogs the Judiciary will be taking a fundamental step in promoting and safeguarding the rule of law as well as respect for human rights. It is significant to note that since the causes of delays are diverse and involve multiple actors, tackling delays would entail a holistic approach and the participation and cooperation of all justice actors in any country.

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42 Iruoma, op. cit. at 219.
43 Ibid. at 184 – 186.
44 Ibid.
INTRODUCTION

The international community has recognized corruption as a global issue that needs to be addressed. The United Nations Convention against Corruption (UNCAC), the only legally binding universal anti-corruption instrument, is the greatest example of this joint effort. On its Article 11, the United Nations Convention against Corruption emphasizes the crucial role of the Judiciary in combating corruption and recognizes that, in order to play this role effectively, the Judiciary itself must be free of corruption and its members must act with integrity. Accordingly, it requires each State Party to take measures to strengthen judicial integrity and to prevent opportunities for corruption among members of the Judiciary.

In order to enforce article 11, the United Nations Office on Drugs and Crime (UNODC) has provided assistance to Member States in strengthening judicial integrity, accountability and professionalism. Most notably, UNODC supported the work of the Judicial Integrity Group in developing the Bangalore Principles of Judicial Conduct as well as the Commentary on the Bangalore Principles of Judicial Conduct. The Office further prepared the Resource Guide on Strengthening Judicial Integrity and Capacity and the Implementation Guide and Evaluative Framework for Article 11. In 2015, Member States at the 13th United Nations Congress on Crime Prevention and Criminal Justice adopted the Doha Declaration. In this act, the international community reaffirmed its commitment to “make every effort to prevent and counter corruption, and to implement measures aimed at enhancing transparency in public administration and promoting the integrity and accountability of our criminal justice systems, in accordance with the United Nations Convention against Corruption.”

UNODC, with the support of the State of Qatar, launched in 2016 a Global Programme for Promoting a Culture of Lawfulness. The aim of this Programme is to provide sustained support and technical assistance to Member States in implementing the ambitious goals of the Doha Declaration. It is a four-year programme with four key components: I) Judicial Integrity; II) Education for Justice; III) Prevention of Youth Crime through Sports and; IV) Prisoner Rehabilitation.

Under the Judicial Integrity component, UNODC will work to develop and strengthen global guidance and technical assistance to support judiciaries in the development and implementation of strategies, measures, and systems to strengthen integrity, independence and accountability in the justice system. In order to achieve these goals, one key initiative will be the establishment of the Global Judicial Integrity Network and offer technical assistance programs through which several high quality manuals and tools will be delivered.

The objective of the Network is to advance the networking of judges around the topic of judicial integrity, provide an easily accessible database of resources, good practices and other materials, develop new tools for judiciaries, and facilitate the provision of technical cooperation to assist judiciaries in the development and implementation of specific measures and systems aimed at enhancing judicial integrity and prevention of corruption in the justice system.
As part of the initiatives under the Judicial Integrity component, the **Global Judicial Integrity Network** will comprise members of the judiciary from around the world. It will support the implementation of Article 11 of the United Nations Convention against Corruption while harnessing the expertise and experience of judges, regional and national judicial associations and other stakeholders from around the world. The Network will become a platform to support Judiciaries in areas such as:

- **Exchange of best practices and lessons learned.** It will prioritize the scoping of challenges and emerging issues in judicial integrity, and the prevention of corruption, through regular in-person and virtual meetings of the Global Network;
- **Creation of a database of relevant resources;**
- **Development of tools, practical guidance manuals, and training programmes,** that can be tailored to the relevant legal system, professional cultures and national challenges;
- ** Provision of peer-to-peer advisory services,** training and other capacity-building support in the area of judicial integrity and professionalism;
- **Assessments of integrity risks** in the criminal justice chain and in the development of effective responses to the risks identified; and
- **Development and implementation of codes of conduct** and the establishment of effective oversight and accountability mechanisms for Judiciaries and judicial support staff.

The Network will connect judges and magistrates and allow them to support each other in upholding judicial integrity and independence and in preventing corruption in the justice system. As the first step, and in order to build support by judges and magistrates around the globe for the creation of the Global Judicial Integrity Network, UNODC has been hosting regional preparatory meetings for the launch of the Global Judicial Integrity Network.

An initial Expert Meeting on Judicial Integrity was organized in Amman, Jordan on 31 July 2016. The meetings focused on judiciaries of the Middle East and North of Africa Region and was co-organized with United Nations Development Program (UNDP) and the Arab Anti-Corruption and Integrity Network (ACINET). The meeting facilitated an exchange of experiences and expertise towards enhancing the integrity of judicial systems in the region and the development of a regional framework to advocate and monitor concrete actions.

The regional preparatory meeting for the Pacific, South Asia, and Southeast Asia region took place from 15 to 16 November 2016 in Bangkok. The event gathered around 40 senior members of the judiciary from across the region. It was an important opportunity for participants to highlight challenges and opportunities judicial integrity faces in their countries. The Honourable Chief Justice Veerapol Tungsuvan, President of the Supreme Court of Thailand and host of the event, reflected this at the opening session: “The Network will be a significant mechanism for strengthening judicial integrity as it can be a forum for exchanging our experience and best practices and effectively support us in dealing with new challenges. The establishment of a judicial integrity network among us is, therefore, an effective response to these challenges with the aim of guaranteeing the confidence of people in judicial power.”

The regional preparatory meeting for Latin America and the Caribbean was held in Panama City on 30 November 2016 and was attended by more than 20 Justices, including 07 Chief Justices.

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The Chief Justices of Panama and El Salvador hosted the meeting. The recommendations emerging from the meeting covered topics such as the appropriate ethical oversight of courts, the implementation of mandatory codes of ethics, as well as, the importance of mapping corruption risks as a basic tool for the design of an Integrity Institutional Plan, among others.46

Lastly, the regional preparatory meeting for the launch of the Global Judicial Integrity Network for European countries was organized by UNODC in Vienna on August 24 and 25 2017. The meeting was attended by Chief Justices and senior judges from more than 20 jurisdictions as well as various judicial associations and institutions. The meeting raised awareness about the Global Judicial Integrity Network and allowed participants to assess the needs and expectations of European judiciaries in terms of capacity-building support, advisory services, tools, networking opportunities and other resources, which could be provided through the Network and its digital platform of resources. A strong recommendation emerging from this meeting referred to the need to maintain a strong focus on the importance of judicial independence, in particular from state pressure and outside influence.47

Before the launch of the Global Judicial Integrity Network in 2018, two other regional preparatory meetings are planned for October 2017. The first meeting will take place in Burkina Faso, on October 3-4, for the Francophone African countries, and the second, in Namibia, on October 16-17, for Anglophone African countries.

Further to the organization of the regional preparatory meetings, UNODC has reached out to a great number of regional and international judicial associations and forums. In turn, this led to UNODC’s participation in multiple conferences, meetings, and workshops of judges, with a view to providing detailed briefings on the proposed Network and obtain feedback and guidance on its further development. More specifically, UNODC participated, for example, in events in different regions of the world:

- Latin America and the Caribbean: In February 2017, the judicial integrity component team participated in the International Seminar "Corrupción y Estado de Derecho" organized by the Latin American Federation of Judges, the International Association of Judges and the International Association of Portuguese Speaking Judges in Lima, Peru. The team briefed the 700 participating judges from 12 countries as well as representatives of several international organizations on the proposal for the creation of a Global Judicial Integrity Network. Likewise, in April 2017, UNODC reached 40 justices from 16 Ibero-American countries at the 66th Annual Assembly of the Latin American Federation of Judges and at the Meeting of the Ibero-American Group of the International Association of Judges in Toluca, Mexico.

- Europe: In March 2017, the judicial integrity component team briefed 40 judges from Europe, including the Court of Justice of the European Union, about the proposals for the creation of the Global Judicial Integrity Network, at the meeting of the European Network of Councils for the Judiciary (ENCJ) in Vienna in March 2017. Similarly, in May 2017, approximately 75 judges from 32 European jurisdictions, who gathered at the Annual Meeting of the European Association of Judges in Chisinau, Moldova, received the information.

- Africa: In May 2017, about 50 judges, legal practitioners and representatives of Human Rights NGOs from 11 African countries gathered at the meeting of the African Group of the International

Association of Judges in Maputo, Mozambique. Participants gained a better understanding of the scope of the Network and confirmed their keen interest in participating.

UNODC also took part in the XXIII Annual Meeting of Presidents and Judges of Constitutional Courts of Latin America, organized by the Konrad Adenauer Foundation Rule of Law Programme for Latin America in partnership with the Federal Supreme Court of Brazil in June 2017. The participants were 30 Judges and the Presidents of the Constitutional Courts from Brazil, Bolivia, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Germany, Honduras, Nicaragua, Panama, Peru and Uruguay as well as representatives of the Inter-American Court of Human Rights, the International Commission of Jurists and Transparency International.

The meeting concluded with the adoption of the Brasilia Declaration. In this, participants expressed their commitment to judicial ethics, human rights, transparency, tackling corruption and promoting access to justice. The document also highlights the support for measures to promote transparency and calls on all judiciaries in the region to participate in the Global Judicial Integrity Network.

Likewise, UNODC also reached out to relevant international organizations, bilateral development agencies, relevant associations, specialized institutes and think tanks, such as the World Bank, the German Development Cooperation Agency, the International Bar Association, the Istituto di Ricerca sui Sistemi Giudiziari, the National Center of State Courts, Democratic Governance and Rights Unit of the University of Cape Town, Centro de Estudios de Justicia de las Americas, the CEELI Institute and the Rule of Law Initiative of the American Bar Association, to draw on the expertise and networks of these bodies to support the development of the future substantive work of the Network.

This group of meetings with all interested stakeholders have facilitated the exchange of experiences and expertise towards strengthening the integrity of judicial systems and to develop frameworks to advocate and monitor concrete actions. They allowed for in-depth discussions on present challenges as well as good practices adopted by participating judiciaries and concerns upholding judicial integrity and preventing corruption within the justice system. Moreover, these meetings provided a platform for participating judiciaries to give guidance to UNODC on the key objectives, tools and materials as well as services a Global Judicial Integrity Network should provide in order to further support them in their efforts to strengthen judicial integrity and prevent corruption and other forms of misconduct in the justice system.

The feedback received so far has been encouraging, confirming the keen interest of judges around the globe to engage in a sustained conversation and exchange of good practices and experiences around judicial integrity. In an additional effort, UNODC has developed a survey to collect inputs from judges, magistrates and other justice sector stakeholders on priority issues and challenges as well as needs for tools and technical assistance aimed at strengthening judicial integrity and preventing corruption in the justice system.

The results of the survey so far show that judges and magistrates have a particular interest for the Network to focus on issues such as the use of social media; financial disclosure systems; the conduct of individual and institutional quality, performance and integrity assessments; judicial ethics training;

50 Available at http://icts-surveys.unog.ch/index.php/569437?newtest=Y&lang=en
disciplinary proceedings; as well as the selection, vetting and appointment procedures for judges and magistrates. These results serve as a guidance tool to UNODC towards developing a Network that responds to the needs of the Judiciaries around the globe. UNODC will continue to use the survey as a tool for receiving inputs to inform and guide the work of the Network and build stakeholder ownership. The survey is available in English, Spanish, French, Arabic, Russian and Portuguese.

Finally, the various outreach efforts have also allowed for the initial collection of the contact details of judiciaries, judges, magistrates and judicial associations. The database of contacts at present includes more than 1200 individual contacts, including chief justices and presidents of Constitutional and Supreme Courts, heads of national, regional and international judicial associations, heads of judicial training institutions and oversight bodies as well as other justice sector stakeholders. The results of all these efforts will culminate in the launch of the Global Judicial Integrity Network on April 09 and 10 2018 at the United Nations Headquarters in Vienna, Austria.

BEYOND NETWORKING
Besides connecting Judiciaries through the Global Judicial Integrity Network, UNODC aims to also support them in the development and implementation of strategic measures and systems to strengthen institutional integrity, independence, and accountability in the judiciary. The results of the above-mentioned survey demonstrate so far that participants are highly interested in the development and implementation of codes of conduct and the establishment of effective oversight and accountability mechanisms for judiciaries and judicial support staff, as well as in the development of judicial integrity standards. Several countries have already requested UNODC to review and provide detailed comments and observations on the draft of Codes of Conduct for officials (judges and prosecutors) and civil servants. As a response, UNODC has made observations to such documents and will be offering support through national workshops for the sharing of international good practices in the development and establishment of codes of conduct and respective implementation mechanisms. Furthermore, in one of the cases, UNODC conducted a technical-assistance scoping mission to assess the judicial training needs of the country, as well as other opportunities for cooperation on judicial integrity issues; and in another case an integrity assessment, using the UNODC Implementation Guide and Evaluative Framework for Article 11, is planned to be conducted.

The support to be provided to the Judiciaries by UNODC will also entail the development of a Judicial Ethics Training package for newly appointed judges and serving members of the judiciary. The package will include an e-learning tool as well as the guidance materials for conducting in-person training workshops based on the Bangalore Principles of Judicial Conduct, Article 11 of the United Nations Convention against Corruption and other relevant standards. A first Expert Group Meeting to guide the development of these products was conducted in Vienna in August 2017 with the participation of the International Organization for Judicial Training, the Commonwealth Judicial Education Institute, the University of Cape Town, the Centre for Judicial Studies of the Americas, the CEELi Institute, the European Judicial Training Network, UNESCO as well as several national Judicial Training Institutes, including those institutes that have indicated an interest to pilot test the training package once completed. The training tools will initially be available in English, Spanish, Arabic, and Portuguese, given the composition of the group of pilot jurisdictions. Once the tools are finalized in 2018, they will be made available in all UN official languages.
In addition, more than 400 resource materials on judicial integrity, international good practices, and standards have been identified by UNODC and will form the basis upon which a respective database will be built. This database will be available on the Global Judicial Integrity Network website. The database will also include UNODC existing resources and publications, among which are the:

- **Commentary on the Bangalore Principles of Judicial Conduct**: guide that enables judges and teachers of judicial ethics to understand not only the drafting and cross-cultural consultation process of the Bangalore Principles and the rationale for the values and principles incorporated in it, but it also facilitates a wider understanding of the applicability of those values and principles to issues, situations, and problems that might arise or emerge. Available in: English - French - Spanish - Russian - Arabic - Portuguese - Romanian.

- **Implementation Guide and Evaluative Framework for Article 11 UNCAC**: addresses key thematic areas in the field of judicial and prosecutorial integrity. In relation to each of these areas, two key tools are provided. Firstly, relevant international standards and best practices are summarized to provide a helpful overview of the types of measures States may consider adopting in the implementation of this article. Secondly, sets of questions are provided which States can use to assess to what extent they have addressed the relevant thematic area. Available in: English - French - Spanish - Russian - Arabic.

- **Resource Guide on Strengthening Judicial Integrity and Capacity**: this guide draws together ideas, recommendations and strategies developed by contemporary experts on judicial and legal reform, and includes reference to successful measures taken in a range of countries to address particular challenges in strengthening integrity and capacity in the justice system. Available in: English - French - Spanish - Arabic.

All of these guidance materials and tools will assist in the development and implementation of strategic measures and systems to strengthen institutional integrity and accountability in the judiciary. Moreover, through the establishment of this database and inputs from various stakeholders engaged in the activities to create the Global Judicial Integrity Network, UNODC will be able to identify existing gaps in international guidance, standards and technical resources that could be filled through the work of the Network and its participants.

The Global Judicial Integrity Network will launch its website in 2018. The website is designed to be a one-stop-shop for judges, magistrates and other stakeholders interested in studies, guidance materials, tools, good practice examples and other resources related to the strengthening of judicial integrity and the prevention of corruption and other forms of misconduct in the justice system. The work on the website will be ongoing and inputs from participants of the Network will be continuously used to improve content, resources, and accessibility, as well to foster opportunities for networking and peer learning and support.

**CONCLUSION**

The creation of a Global Judicial Integrity Network represents an invaluable and unique opportunity for the Judiciaries around the globe to connect and interact through a platform that will not only provide them with learning and collaboration opportunities but will also promote the exchange of good practices and discussions that surround the topic of judicial integrity.

Assessments conducted by UNODC and others throughout all regions of the world have time and again confirmed that many citizens perceive their countries’ justice systems as opaque, difficult to access and prone to corruption. As such, corruption in the justice sector is a major impediment to the achievement of Sustainable Development Goal (SDG) 16, aimed at the promotion of peaceful
and inclusive societies for sustainable development, the provision of access to justice for all, and building effective, accountable institutions at all levels.

Recognizing that many jurisdictions have already made great progress in strengthening judicial integrity and preventing corruption in the judicial system, sharing these experiences through the Global Judicial Integrity Network will help build strong and effective justice institutions and a culture of lawfulness on a global scale, strengthen the rule of law and enhance the delivery of fair and transparent justice to every citizen.

We invite then all judges and magistrates around the world to join this effort, to participate in the Global Judicial Integrity Network and share their experiences, ideas, suggestions, challenges and good practices, so, collectively, we can establish a powerful tool to promote judicial integrity and prevent corruption in the justice system.

For more information on the Global Judicial Integrity Network, please visit: www.unodc.org/judicial-integrity.
“EFFECTIVE PROBLEM-SOLVING COURTS: MENTAL HEALTH AND DRUGS COURTS”

By Chief Magistrate Juan P. Wolffe, Bermuda

Slide 1
“Treatment Courts: Transforming Lives” by The Worshipful Juan P. Wolffe, Senior Magistrate of Bermuda

Slide 3
Bermuda Statistics
- Bermuda is 21 sq. miles long and 2½ miles wide, with a population of approximately 64,000. Given this relatively small size, the drugs and crime have a devastating effect on the wider community.
- The vulnerability of Bermuda to drugs and crime remains a grave concern with increasing crime rates against the person and property.
- The drug market is still very active in Bermuda as offenders of the law have reported that drugs are easily available and accessible.
- There has been an increase in trials for drug-related offences.
- 2015 saw a 5.8% increase in all drug-related offences, although there was an 88.5% increase in drug importation offences.
- 2015 recorded an increase in the total value of drugs seized, with a sharp increase in seizures for crack cocaine and cocaine.

Slide 4
Drug-Using Offenders
- Over the past 12 years the recidivism rate has on average been 80% (fortunately in the last 3 years the rate has dropped).
- 64% to 72% of all offenders who enter prison have a history of drug use, and many continue to use drugs while in prison (figure does not include the 13% who refused to be tested or were released before being tested).
- In recent years 65% of first-time offenders had a history of drug use with most of them having used marijuana.
- Of the offenders, 44% had used marijuana, 36% had used cocaine, 24% poly drug use, and 19% had used opiates (e.g. heroin).

Slide 5
Offenders with Mental Illness
Recent data in Bermuda shows the following:
- Approximately 75% to 80% of the inmates at The Westgate Correctional Facility may be suffering from some form of mental illness.
- In 2011 – there were 487 total mental health encounters; 393 inmates were seen; there were 91 psychiatric sessions.
- The problem is compounded where there is a duo-diagnosis of mental illness and drug addiction.

Slide 6
Types of Mental Illness
- Acute Stress Disorder
- Adolescent Antisocial Disorder
- Alcohol Dependence
- Anxiety Disorder
- Autism
- Bipolar Disorder
- Depression
- Impulse Control Disorder
Those suffering from mental illness often do not intend to commit the offence. Meaning, they:
- Do not understand what they are doing
- Cannot control their actions
- Do not know that they should not do the criminal act
Sometimes this could be for only a split second.

Unfortunately, prior to 2001, the Bermuda Courts dealt with offenders who had been afflicted with drug addiction and mental illness in a way which did not ultimately help them. Basically:

**THEY WERE LOCKED UP!**

Some of us just wanted to.... [Photo: Get the Violent Crazies off our streets].

The problem with incarcerating persons who have committed criminal offences as a result of a drug addiction or a mental illness is that it does not help them or society. This is because in most cases the drug addiction and/or the mental illness is not addressed while the person is in prison and so when they are released from prison they often go back to committing offences as a result of their drug addiction or mental illness.

**WE REALIZED THAT WE COULD NOT INCARCERATE OURSELVES OUT OF THE PROBLEM**

The Drug Treatment Court (DTC) and The Mental Health Treatment Court (MHC) are specialized Court programs designed to decriminalize drug addiction and mental illness by treating the addict and the mentally ill in a Court environment, whilst protecting public safety. That is:

Treating these individuals rather than needlessly locking them up has been a viable option

Goals of Treatment Courts
- Properly manage persons with drug addiction and mental illness
- Reduce confinement for drug addicted and mentally ill offenders and at the same time protect their rights
- Improve the well-being of persons
- Reduce recidivism
- Improve public safety

The Drug Treatment Court and Mental Health Treatment Court Teams
- Magistrate
- Prosecutions
- Legal Aid
- Court Services/Case Managers
- Psychiatrist/Psychologist
- Treatment Providers
- Police
Established in October 2001 as the flagship program of the Alternatives to Incarceration (ATI) initiatives.

Statutory basis – section 68 of the Criminal Code Act 1907

To be read with sections 53 to 55 of the Criminal Code which inter alia states that the fundamental objectives of sentencing is to protect the community and at the same time assist in rehabilitating offenders. With this in mind, it directs the Judiciary to only hand out terms of imprisonment as a last resort.

Heavily structured system of supervision and accountability

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<th>Slide 16</th>
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<tr>
<td>5 Phases of DTC</td>
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<td><strong>Phase 1</strong> – Detox, drug testing, attend DTC, actively attend counselling sessions, no new arrests, and remain drug free for 30 consecutive days – <strong>Minimum 30 days to complete</strong></td>
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<tr>
<td><strong>Phase 2</strong> – Continuation of Phase 1 plus participate in Community Support meetings and remain drug free for 90 consecutive days – <strong>Minimum 90 days to complete</strong></td>
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<td><strong>Phase 3</strong> - Same as above phases plus actively participate in Aftercare Services, Life Skills training, Relapse Prevention, and remain drug free for 120 days – <strong>Minimum 120 days to complete</strong></td>
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<td><strong>Phase 4</strong> – Same as phase 3 – <strong>Minimum 120 days to complete</strong></td>
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<tr>
<td><strong>Phase 5</strong> – Same as Phases 3 and 4 plus remain drug free for 365 days – <strong>Minimum 365 days to complete</strong></td>
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<tr>
<td>The Results</td>
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<td><strong>Slide 18</strong> From 2001 to December 2016 approximately <strong>85%</strong> of persons who have successfully completed DTC have <strong>not</strong> re-offended (this is above the international drug court averages).</td>
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<tr>
<td>Re-offence rate of persons who have participated in DTC is 8%.</td>
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<td>94.86% of drug tests taken in DTC have been negative for illicit substances.</td>
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<td>In the past 5 years, only 5 persons were convicted of a new offence while in DTC.</td>
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Mental Health Court

Pilot program commenced in October 2013 and in October 2016 Mental Health Court was given legislative footing.

Requirements: Weekly contact with case managers, drug testing if necessary, psychiatric/psychological counselling, no new arrests, and life skills training.

So far: 75% of those who have completed MHC have not committed further offences. 90% of clients do not commit offences whilst in MHC

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<td>Scary possibility: The need for DTC and MHC may increase</td>
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<td>Recent 2017 National Household Survey of 1,270 households in Bermuda which was conducted by the Department for National Drug Control revealed the following:</td>
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<tr>
<td>80% of participants indicated the use of at least one drug in their lifetime, and 52.3% were current users of at least one drug (including alcohol).</td>
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<tr>
<td>Age of first use of any drug was as early as 12 years (for use of inhalants) with the average age of first use of any drug was 16.3 years (avg. age for marijuana use – 18 years old)</td>
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</table>

As evidence in the data contained in this report, drug use and misuse continue to affect all segments of Bermudian culture, with youths, college students, and adults all reporting higher prevalence of use of alcohol and marijuana, two of the most easily accessible and affordable substances widely available to all population groups”.

- 2013 Annual Report of the Bermuda Drug Information Network (BerDIN)

Additionally! The United Nations Office on Drugs and Crime (UNODC) revealed in their World Drug Report 2016 that:

* Bermuda has one of the highest percentages of cannabis users in the World.
BERMUDA RANKED: 8th FOR CANNABIS USE, 13th FOR COCAINE USE

**STATISTICS ALERT** Our Department for National Drug Control states that our statistics are much lower than those produced by the UNODC.

Slide 22
Why are these statistics important?
Well.........as the prevalence of drug use and drug abuse continue to rise so does the likelihood of drug-induced and drug-related crimes being committed. Obviously, this will impact the criminal justice system which must continue to implement programs such as DTC and MHC to deal with offenders. This is especially so given the increases of poly drug use and the emergence of substances such as meth and other designer drugs (2016 BerDIN report)

Slide 23
So what’s next!?!?
HOPEFULLY, MORE TREATMENT COURTS
In November 2013 then Minister of Public Safety and Premier Michael Dunkley introduced the National Drug Control Act 2013 which he stated as highlighting the Government’s “concern for the issues surrounding drug misuse and abuse and commitment to providing a documented mandate for The Department of National Drug Control bringing a sharper focus to these issues”.

- DWI Treatment Court
- Juvenile Drug Treatment Court (2015 National School Survey revealed marijuana use as early as 10 years)
- Juvenile Mental Health Court
- Family Treatment Court
- Sex Offender Court
- Re-Entry Courts (for those on probation and parole)
“JUDICIAL ACCOUNTABILITY AS AN EVOLVING AND FLUID CONCEPT”

By Chief Judge John Lowndes, President CMJA

INTRODUCTION
Judicial accountability has traditionally been viewed as requiring the judiciary to be accountable to the law and its members to conduct themselves according to certain standards – independence, impartiality, and integrity – which are designed to enhance public respect for the institution of the judiciary, to uphold public confidence in the administration of justice and to protect the reputation of individual judicial officers and of the judiciary.\(^{51}\)

However, as observed by the former Chief Justice of the High Court of Australia, the Honourable Murray Gleeson AC, “the concept of accountability is flexible and, in its practical application, varies according to the context in which it is being considered”.\(^{52}\) This equally holds true in relation to the concept of judicial accountability.

The concept of judicial accountability is an evolving and fluid concept, the substantive content of which is influenced by societal changes. However, the defining characteristic of judicial accountability is that it is firmly anchored to the principle of judicial independence which ultimately structures and defines the forms and limits of judicial accountability in an ever-changing society.\(^{53}\)

Primarily, the judiciary should be accountable to the extent that is necessary to protect, reinforce and preserve the principle of judicial independence as a core court value, which underpins the ultimate responsibility of the judiciary – that of doing justice according to law. Secondly, it should be accountable to the extent that is necessary to maintain other related core court values – such as equality before the law and access to justice, fairness, impartiality, transparency, and timeliness – without which the principle of judicial independence is nothing but a hollow concept, and the judiciary cannot do justice according to law. Thirdly, the judiciary should be accountable to the extent that is necessary to ensure that the principle of judicial independence retains its relevance and value in a modern society, having regard to those values as well as the objectives of the justice system. Finally, but not least, the judiciary should be accountable to the extent that is necessary to ensure that the principle of judicial independence in conjunction with those values and objectives results in an effective judicial system.

The judiciary should be held accountable in all of these respects for the purposes of upholding public confidence in the administration of justice, enhancing public respect for the institution of the judiciary and protecting the reputation of individual judicial officers and of the judiciary. This model of judicial accountability is entirely consistent with the rationale behind the traditional view of judicial accountability.

This paper discusses new and emerging forms of judicial accountability and demonstrates how these forms of accountability are legitimised by this modern model of judicial accountability. As a fluid concept, judicial accountability is evolving in a number of areas, most of which are interrelated:

- Accountability for the administration of courts;
- The societal obligation of the judiciary to engage the community;

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\(^{52}\) The Hon Murray Gleeson “Judicial Accountability” (1995) 2 TJR 117.

\(^{53}\) As stated by the former Chief Justice of the High Court, the Hon Murray Gleeson n 2 at 119-120, the principle of judicial independence determines the form of judicial accountability.
• The duty to improve the quality of justice;
• The duty to promote and enhance access to equal justice;
• The duty to enhance the well-being of individuals and the community; and
• The impact of the concept of sustainable justice on judicial accountability.

ADMINISTRATIVE ACCOUNTABILITY AND THE INTERNATIONAL FRAMEWORK FOR COURT EXCELLENCE
In recent times courts have become increasingly accountable to the public for the administration and organization of the judiciary. This new form of accountability is generally referred to as “administrative accountability”.

As noted by Chief Judge of the District Court of New Zealand, Her Honour Jan-Marie Doogue, the administrative accountability of the judiciary has emerged as a result of a number of factors:

• rapid societal change which has led to all democratic institutions (which includes the judiciary) being subject to increasing scrutiny and to the immense importance to contemporary society of having an independent but modern accountable judiciary;

• the democratic principle that no branch of government should have power without accountability and the concomitant requirement for all power, including the exercise of judicial power, to be responsible and responsive to the community; and

• The need for the judiciary, as the third branch of government, to adapt and respond to the changing demands of the public in an era of unprecedented access to and expectation of information.

However, these factors alone do not justify making the judiciary accountable for the administration and organisation of its courts. It is the nature of the judicial function and the concomitant principle of judicial independence that legitimises the administrative accountability of the judiciary.

As Sir Anthony Mason explained, judicial independence is “a privilege of, and a protection for, the people: it is a fundamental element in our democracy, all the more so now that the citizen’s rights against the state are of greater value than his or her rights against another citizen”. The Hon John Doyle and Chad Jacobi have also highlighted the fact that the members of the judiciary must accept responsibility for the state of the institution of the judiciary and should see themselves as the custodians, rather than the owners of the institution.

It follows that the judiciary, as an institution, is responsible to the public for ensuring that the judicial independence it enjoys “serves and protects the governed” and operates for the benefit of the

54 Judge Jan-Marie Doogue Chief District Court Judge of New Zealand, “Accountability For the Administration and Organisation of the Judiciary”, a paper presented to the Asia Pacific Courts Conference, Auckland March 2013, pp 1-2 and 10-11.
56 Chief Judge Doogue n 4 p 1. This principle is particularly important where individual or institutional actors who act on behalf of the community are funded from the public resources: see H Yusuf “Transitional Justice, Judicial Accountability and the Rule of Law” (2010). As the author points out, an important utilitarian function of democratic accounting is the promise it holds for establishing trust between the people and the government”.
57 Chief Judge Doogue n 4 p3.
58 Chief Judge Doogue n 4 pp 10-11.
community that it serves. Judicial power is given by society to an independent judiciary on the assumption that this is beneficial to society.\textsuperscript{61}

This is a core aspect of the overarching responsibility of the judiciary for the functioning of the institution and its maintenance. Judicial independence is indispensable to the performance of the judicial function. As stated by Campbell and Lee:\textsuperscript{62} “The judiciary occupies a very important place in the framework of government. In a society which is regulated by the rule of law, disputants place their faith in the judicial institutions to resolve their conflict.”

Disputants place their faith in the judiciary to resolve their conflicts in an independent and impartial manner. They implicitly place their faith in the courts to exercise their independence and impartiality in a way that is beneficial to – and serves the interests of – the community. The judiciary is accountable to the public in this regard.

Furthermore, judicial independence and the administration of justice are connected: as Rafiqui and Solaiman point out, an independent and impartial judiciary is “a means for the administration of justice according to the rule of law”.\textsuperscript{63} Accordingly, courts and judges, in the exercise of their independence, are “accountable to the public for the manner in which they administer justice”.\textsuperscript{64} This is a “form of accountability that the system of justice upholds”.\textsuperscript{65} It surely follows that the quality of justice administered by the judiciary and its courts in the course of resolving disputes is highly relevant as to whether an independent and impartial judiciary – which is the privilege of the people – is, in fact, serving the interests of the community.

The importance of judicial independence in the resolution of disputes between the State and its citizens and between citizens cannot be overstated.\textsuperscript{66} However, unless disputes are resolved according to the rule of law in an accessible, procedurally fair, efficient, cost-effective and professional manner, the value of the independence of the judiciary – which is “a private right of citizens, who have a vested interest in having a neutral, independent court system to protect their fundamental rights from interference by the State and others”\textsuperscript{67} – will be diminished, and judicial independence as a privilege of, and a protection for, the people will gradually be eroded. As neatly put by Chief Judge Doogue, “in order for judicial independence to be of any worth or value to the public”, justice needs to be administered in a fair, efficient, accessible and professional manner.\textsuperscript{68}

This point was elegantly made by Justice Nicholson almost a quarter of a century ago.\textsuperscript{69} The quality of independence given to the judicial branch is unique in the political spectrum and in turn, requires of the branch that it be accountable in the sense that it performs its functions efficiently. A judicial branch which is (for example) years behind in disposal of its caseload may be

\textsuperscript{61} The Charter for Sustainable Justice: \url{www.sustainablejusticecharter.com} p2.
\textsuperscript{62} E Campbell and Lee “The Australian Judiciary”, sleeve cover to this definitive work on the judiciary in Australia.
\textsuperscript{63} I Rafiqui and SM Solaiman “Public Confidence Crisis in the Judiciary and Judicial Accountability in Bangladesh” (2003) 13 Journal of Judicial Administration 29.
\textsuperscript{64} The Hon John Doyle and Jacobi n 10 at 169. In a similar vein, Justice McGarvie has stated that “Judges like all officials in the community must be accountable to the community”: see “The Accountability of the Australian Judiciary: Procedures for Dealing with Complaints Concerning Judicial Officers”, The Australian Institute of Judicial Administration 1989, p15.
\textsuperscript{65} The Hon John Doyle and Jacobi n 10 at 169.
\textsuperscript{66} Lee and Campbell “The Australian Judiciary” p 49.
\textsuperscript{67} Former Chief Justice Murray Gleeson “Public Confidence in the Judiciary” JCA Launceston 2002 cited by Chief Judge Doogue n 4, p1.
\textsuperscript{68} Chief Judge Doogue n 4, p10.
independent but it has no political relevance. The quality of independence ceases to matter to citizens if they cannot have it applied in prompt resolution of their disputes. The principle of judicial independence requires of the judicial branch that it be efficient in the dispatch of its business for without efficiency the preservation of public confidence necessary to the existence of the principle will not occur. Public confidence is diminished by delay in the administration of justice.

The Chief Judge of the District Court of New Zealand, Her Honour Jan-Marie Doogue has come to this inescapable conclusion regarding the administrative accountability of the judiciary.\(^70\)

\textit{The judiciary, as an institution, accountable to society to administer and organize itself so as to provide for the resolution of disputes in a way that is not only fair, just and in accordance with the rule of law, but also efficient, cost effective and with a high degree of professionalism and skill. The fairness, justness, effectiveness, efficiency and professionalism with which disputes are resolved within the judicial system affect the quality of justice that is dispensed by the courts. The judiciary is accountable for the quality of justice it delivers.}

The effectiveness and efficiency with which judicial business is conducted is dependent upon the administrative decisions and actions taken by the judiciary as an independent institution.\(^71\) Given that such independent decisions and actions affect the quality of justice and attendant court services, it follows – as stated by Chief Judge Doogue – that the judiciary should be subject to some form of administrative accountability in respect of such administrative decisions and actions.\(^72\) The judiciary should be accountable to the public in an explanatory way.\(^73\) As the former Chief Justice of the High Court of Australia, the Hon Murray Gleeson, has said: the judiciary must recognise and accept “the right of the legislature, and the executive and the public to know what administrative decisions are being taken by the judiciary and why”.\(^74\)

This form of accountability requires the judiciary to make available to the public such information about the operations of the courts as is necessary to assure members of the public that in the independent exercise of its administrative functions the judiciary is making decisions or taking actions that maintain the value of the principle of judicial independence as a privilege of, and a protection for the people. The public needs to have confidence in the independent administrative decisions and actions taken by the judiciary because of the impact of those decisions and actions on the quality of the independence possessed by the judiciary. That public confidence is engendered by the judiciary informing the public about the administrative operation of its courts. This form of accountability complements judicial independence in that it protects, reinforces and preserves its existence by maintaining public confidence in the judiciary as the guardian and guarantor of the principle of judicial independence.

All courts should aspire to be “excellent courts”, delivering high quality court services to the public that they serve and for whose benefit there exists an independent judiciary that adheres to the rule of law. Excellent courts should embrace core court values, as well as being efficient, effective and accountable. The public deserves no less than an excellent judicial system. The judiciary should be held accountable to the public (in an explanatory sense) for the quality of justice and court services that it delivers.

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\(^70\) Chief Judge Doogue n4, p1.

\(^71\) As stated by Chief Judge Doogue n 4, p8, the doctrine of the separation of powers requires that “the judiciary must be independent in their administration as individual judges are when making decisions in court”.

\(^72\) Chief Judge Doogue n 4, p 8.

\(^73\) Chief Judge Doogue n 4, p 1.

\(^74\) Chief Justice Murray Gleeson n 2 at 135.
But what should an “excellent court” look like? In 2008 an International Consortium consisting of groups and organisations from Europe, Asia, Australia and the United States of America developed the International Framework for Court Excellence (IFCE).  

The IFCE is a framework of values, concepts, and tools by which courts worldwide can voluntarily assess and improve the quality of justice and court administration they deliver. The foundation of the IFCE is “the clear statement of the fundamental values courts must adhere to if they are to achieve excellence”. The Framework provides an invaluable guide and toolkit for those courts that want to embark upon the journey to excellence and become “excellent courts”. The Framework represents a resource of assessing a court’s performance against seven detailed areas of court excellence and provides guidance for courts intending to improve their performance. It provides a model methodology for continuous evaluation and improvement that is specifically designed for use by courts. It builds upon a range of recognized organizational improvement methodologies while reflecting the special need and issues that courts face.

The benefits of adopting the IFCE are set out in the Framework. Adoption of the Framework will help ensure courts are able to deliver the quality court services essential to fulfilling their critical role and functions in society. Fair, accessible and efficient courts create positive relations among citizens and the State. Public trust and confidence that a court will provide accessible, fair and accountable proceedings are, in turn, naturally enhanced by an effective and efficient court system. Confidence within the business community and therefore in business investment is likewise heightened. A sound justice system enables positive economic growth and healthy social development.

IFCE recognises ten internationally accepted core values that courts apply in carrying out their role and which are key values to the successful functioning of the courts:

- equality before the law;
- fairness;
- impartiality;
- independence of decision making (adjudicative independence);
- competence;
- integrity;
- transparency;
- accessibility;
- timeliness; and
- certainty

As stated in the Framework, these core or key values “guarantee due process and equal protection of the law to all those who have business before the courts”. These values also “set the court culture and provide direction for all judges and staff of a proper functioning court”. The IFCE provides “a methodology for building a court’s performance on the basis of the internationally accepted court core values and their application to every area of a court’s activities”. Acknowledging that there is a “fundamental and clear link between court values and the

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75 IFCE s1. See also Lowndes “judicial Independence and Judicial Accountability at the Coalface of the Australian judiciary”, a paper presented at the Northern Territory Bar Association Conference in Dili East Timor July 2016, p62.
76 IFCE s1. See also Lowndes n 25, p62.
77 IFCE s1. See also Lowndes n 25, p62.
78 IFCE s1.
79 IFCE s1.2.
80 IFCE s2. See also Lowndes n 25, p62.
81 IFCE s2.
82 IFCE s2.
83 IFCE s3.
performance of a court”, the IFCE provides “a clear method for courts to assess whether those values that have been identified as being important are in fact guiding the court’s role and functions”.\(^{84}\)

In order to simplify the process of assessment of performance and identification of areas for improvement, the IFCE divides these area of activity and roles into seven separate categories collectively called the Seven Areas for Court Excellence.\(^{85}\) The Framework goes on to say,\(^{86}\) each area conveniently captures an important focus for a court in its pursuit of excellence. Each area has a critical impact on the ability of the court to adhere to its core values and to deliver excellent court performance.

The values should be reflected in a court’s approach to each of the areas of court excellence and, through the Framework process of assessment and improvement, a court can be aware of how well it is promoting and adhering to the values it espouses. It is important for courts to not only publicise the values which guide court performance, but also to ensure those values are built into the court’s processes and practices.

The seven areas for court excellence identified by the IFCE are:\(^{87}\)

- Court leadership and management;
- Court planning and policies;
- Court resources (human, material and financial);
- Court proceedings and processes;
- client needs and satisfaction;
- Affordable and accessible court services; and
- Public trust and confidence.

As stated in the IFCE, the framework provides a continuous methodology which ensures that a court actively and continuously review its performance and looks for ways to improve its performance.\(^{88}\) The methodology is based on a four step process:\(^{89}\)

- A self-assessment, involving an analysis of court performance across all seven areas of excellence, is undertaken;
- Following this self-assessment, an in-depth analysis is conducted to identify those areas of the court’s activities that are capable of improvement;
- An improvement plan is then developed that details the areas identified for improvement and actions proposed to be taken and the outcomes sought to be achieved;
- Through a process of review and refinement the implementation of the improvement plan is closely monitored.

This four stage process is repeated when the court is ready to undertake a fresh self-assessment to determine its progress.\(^{90}\)

The central feature of the IFCE is that it offers courts a model for self-reflection and self-assessment in relation to the critical role and functions they fulfill in society. It provides courts with a blueprint for self-accountability, which is alternatively referred to as personal accountability. The Framework enables courts to be honest with themselves and to be answerable and responsible for what they say and do. It gives courts the ability to look beyond the immediate moment to consider the

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\(^{84}\) IFCE s3.
\(^{85}\) IFCE s3.
\(^{86}\) IFCE s3.
\(^{87}\) IFCE ss 3.1.1 – 3.1.7
\(^{88}\) IFCE s4.
\(^{89}\) IFCE s4.
\(^{90}\) IFCE s4. It is recommended that courts should aim to conduct an annual self-assessment.
consequences of the administrative decisions and actions they take or fail to take. By these means, it enables courts to cultivate a well-developed sense of self-accountability.\textsuperscript{91}

The IFCE implicitly recognises that self-accountability is a critical first step towards improving court leadership and in identifying those areas of court activities that the judiciary should be accountable to the public in the interests of building and maintaining public trust and confidence in the judiciary.\textsuperscript{92}

The message conveyed by the IFCE is loud and clear. The judiciary should be personally accountable – and ultimately accountable to the public – for the delivery of quality court services that incorporate the core values of a court and reflect the areas for court excellence that are identified in the IFCE. Without that accountability courts cannot fulfil their critical role and functions in society.

The ten core values that courts apply in carrying out their role are unquestionably vital to the successful functioning of courts. Each value is in some way connected with the principle of judicial independence or its concomitant – the rule of law- and helps to ensure a strong and independent judiciary that adheres to the rule of law.\textsuperscript{93} Unless these core values are adhered to, the independence of the judiciary and the rule of law – which exist for the benefit of the community – are compromised, if not rendered meaningless and valueless in the eyes of members of the community. Consequently, public trust and confidence in the judiciary is eroded.

As the seven areas for court excellence have a critical impact on the ability of courts to adhere to its core values and deliver excellent court performance,\textsuperscript{94} courts that fail to aspire to excellence run the risk of losing public trust and confidence. The risk of a loss of public trust and confidence in the judiciary is an effective mechanism for ensuring judicial accountability in a free and democratic society. As made clear in the Framework, courts that aspire to excellence need to systematically measure their performance – that is “the quality as well as the efficiency and effectiveness of the service they deliver”.\textsuperscript{95} In order to properly undertake that exercise, courts “need to maintain a collection of both [reliable and accurate] quantitative and qualitative data”.\textsuperscript{96} The IFCE provides courts with performance indicators and tools to assist in “the quantitative and qualitative assessment of the functioning of courts”.\textsuperscript{97}

The IFCE stresses the need for courts to be accountable to the public for their activities to ensure public respect, trust and confidence in the judiciary and the judicial system:\textsuperscript{98}To ensure public respect and confidence a court must be open and transparent about its performance, strategies and its processes. It is important that courts are open about their current position but more importantly publish details of what actions they are taking to address the problems. By being transparent about its performance, engaging with its users and stakeholders and communicating its reform strategy courts will engender greater confidence and trust in the community and its stakeholders.

The IFCE emphasises the importance of judicial engagement and communication with the public as an integral part of the administrative accountability of the judiciary.\textsuperscript{99} A court should communicate

\begin{footnotesize}
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  \item \textsuperscript{91} B Benjamin “Ethics and Self–Accountability”. Although the author discusses self-accountability in a much broader ethical context, his analysis of self–accountability is clearly relevant to the judiciary as an important social institution.
  \item \textsuperscript{92} As Chief Judge Doogue n 4, p22 puts it the judiciary must be accountable for being accountable.
  \item \textsuperscript{93} Lowndes n 25, pp 63-65.
  \item \textsuperscript{94} IFCE s3.
  \item \textsuperscript{95} IFCE s5.1.
  \item \textsuperscript{96} IFCE s5.
  \item \textsuperscript{97} IFCE s5.
  \item \textsuperscript{98} IFCE s6.
  \item \textsuperscript{99} IFCE s6.
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widely to the bar, public prosecutors, law enforcement, other governmental and non-governmental agencies, and the general public its commitment to undertaking Framework implementation... Courts should publish the results of its evaluations and its plans for improvement. Annual reports should also contain detail of a court’s role, practice and procedure and performance. Where practical a court throughout the year should keep court users, government and the community informed of its performance and reform initiatives.

An important aspect of an Improvement Plan should be the development of a Communication Plan identifying how a court intends to inform its users and the community. The plan should include not only strategies for publishing material and information but also outline other forms of appropriate communication, including:

- regular meetings with key users and legal groups
- the provision of information to the media
- assistance provided to litigants in person or disadvantaged groups
- feedback and complaint processes

Finally, but not least, the IFCE imposes an obligation on courts to “manage all available resources (human, material and financial) properly, effectively and proactively”. As pointed out by Lowndes:

This is a reflection of the modern view of judiciary accountability referred to by Popovic – according to which courts should be accountable for the application of the substantial resources made available to them. And there is no reason why courts should not be accountable to the public (in the explanatory sense) for their use of court resources, particularly as courts progressively move away from the traditional model of court governance towards more autonomous systems of court administration. As stated by the Honourable Marilyn Warren, former Chief Justice of Victoria, the IFCE provides a means for “court accountability through self-assessment and self-improvement without compromising judicial independence”. Consistent with the philosophy and objectives of the ICFE, the Chief Justice reported:

Under the rubric of the IFCE, the Supreme Court of Victoria has developed a strategic statement aspiring to be an outstanding superior court. We define our purpose as safeguarding and maintaining the rule of law, and ensuring:

- Equal access to justice;
- Fairness, impartiality, and independence in decision-making;
- Processes that are transparent, timely and certain;
- Accountability for the court’s use of public resources; and
- The highest standards of competence and personal integrity.

Together, these elements are all part of the Supreme Court’s ongoing improvement of its transparency and accountability.

JUDICIAL INDEPENDENCE AND THE SOCIETAL OBLIGATION OF THE JUDICIARY TO ENGAGE THE COMMUNITY

It is readily apparent that the developing administrative accountability of the judiciary to the public it serves entails a high level of communication with the community in relation to the performance of courts. The IFCE encourages this interaction by stressing the importance of strong leadership in ensuring a court is “not operating in isolation from the broader community and external partners”.

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100 IFCE 3.1.3. See also Lowndes n 24, p67.
101 Lowndes n 25, p67.
103 Chief Justice Warren n 52, p7.
104 IFCE 3.1.1. See also Lowndes n 25, p66.
However, communication between the courts and the community should be more generalized and commonplace. As Bookman has recently put it, the judiciary as an institution and a collective entity has an ethical obligation to engage – and communicate with - the community in a much broader sense.105

Bookman’s definition of community engagement is pivotal to understanding the nature of this ethical obligation. He defines “community engagement” in these terms:106 A relationship between judges and their local communities, whereby each party imparts information to and learns from, the other. This relationship may take different forms, but its ultimate objective is to promote the understanding of each party to the other.

The “community” includes court users, stakeholders, and the general public.107 The judiciary clearly has an ethical obligation – indeed a societal obligation - to engage the community in the manner suggested by Bookman because as an important social institution the judiciary needs to impart information to the public concerning its role, functions, and activities in order to sustain its legitimacy – which is derived from the community it serves – and to maintain public confidence in it as a branch of government.108

This societal obligation to engage the community gives rise to a legitimate form of public accountability (of the explanatory type) which is entirely consistent with the principle of judicial independence and which is an essential condition for ensuring the legitimacy of the judiciary and public trust and confidence in the judicial system.

Judicial engagement “provides an opportunity for education about the court system.”109 As noted by Bookman, “the justice system cannot operate effectively unless the public understands how it works”.110 In particular, the judiciary needs to explain the sentencing process which is an important aspect of the judicial function. The imparting of such information enables members of the community to contextualize and understand sentencing decisions.111 It also promotes and enhances public confidence in both the judiciary and the judicial system.112

Given that judicial independence underpins the justice system and an independent judiciary is a privilege of, and protection for, the people, the public needs to understand the workings of the justice system in order to have trust and confidence that the independence of the judiciary is, in fact, operating in the best interests of the community. The judiciary is accountable to the public in this very fundamental respect.

IMPROVING THE QUALITY OF JUSTICE AND JUDICIAL ACCOUNTABILITY

As discussed earlier, the IFCE is a quality management system that assists courts in improving and enhancing the quality of justice they deliver. As pointed out by Richardson, Spencer and Wexler, the Framework “promotes innovation and reform with the aim of creating excellent courts that are fair, efficient, effective, and impartial and that enable access to justice for their users”.113

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106 Bookman n 55 at 5.
107 Bookman n 55 at 5.
108 Bookman n 55 at 6.
109 Bookman n 55 at 9.
110 Bookman n 55 at 9.
111 Bookman n 55 at 9.
112 Bookman n 55 at 9.
As stated by former Federal Attorney General Robert McClelland, “an effective justice system must be accessible in all its parts”, and “without this, the system risks losing its relevance to, and the respect of, the community it serves.”\(^{114}\) Furthermore, access to justice is an essential element of the rule of law and therefore of democracy.\(^{115}\) It is also a matter that goes to the quality of justice:\(^{116}\) Just as health is not found primarily in hospitals or knowledge in schools, so justice is not primarily to be found in official justice dispensing institutions. Ultimately, access to justice is not just a matter of bringing cases to a font of official justice, but of enhancing the justice quality of the relations and transactions in which people are engaged.

Finally, but not least, “improving access to justice is a means of promoting social inclusion”.\(^{117}\) As former Chief Justice Murray Gleeson of the High Court of Australia persuasively stated, access to justice is a core aspect of a functional and effective judicial system:\(^{118}\) For courts, effective functioning includes dealing with the business of the court with due dispatch and by procedures which are fair and which serve the ends of justice and which allow for reasonable access to the court by citizens. For the judiciary as an institution, effectiveness includes the maintenance of the rule of law and the preservation of a just society.

Just as the judiciary should take a leading role in protecting its independence and upholding the rule of law, it should take a leading role in promoting access to justice.\(^{119}\) In addition, it should be proactive in enhancing access to justice.

The IFCE emphasises that “fair, accessible and efficient courts create positive relations among citizens and between the individual citizen and the State” and that “public trust and confidence that a court will provide accessible, fair and accountable proceedings is, in turn, naturally enhanced by an effective and efficient court system”.\(^{120}\) It follows that an accountable, effective and efficient judiciary needs to promote and enhance access to justice.

A recent and prime example of this form of judicial accountability is the judiciary-led National Framework to Improve Accessiblity to Australian Courts for Aboriginal and Torres Strait Islander Women and Migrant and Refugee Women (the National Framework).

In 2014 the Australian Council of Chief Justices endorsed the formation of the Judicial Council on Cultural Diversity (JCCD) for the purposes of assisting Australian courts, judicial officers and court administrators to positively respond to the changing needs of Australian society and ensure that all Australians have equal access to justice.\(^{121}\) The National Framework acknowledges that Australia is “one of the most ethnically, culturally and linguistically diverse countries in the world” and that “in a


...judicial independence is of no political importance to a citizen of a country where it is economically impossible to access the use of the judicial power. The principle of independence of the judiciary requires that the court system be economically and procedurally accessible so that the courts are resolving disputes of relevance to the polity: Justice Nicholson n 19 at 424 cited by Lowndes n 25, p64.

\(^{115}\) Strategic Framework n 64, p1.


\(^{117}\) Strategic Framework n 64, p1.

\(^{118}\) Chief Justice Warren n 52, p21.


\(^{120}\) IFCE s1.2.

\(^{121}\) The National Framework p2.
multicultural, multilingual and multi-faith society, it is fundamental that strategies are put in place to ensure the accessibility of the courts”. The National Framework believes that “both Aboriginal and Torres Strait Islander women and migrant and refugee women require the development of a national framework to improve access to justice, particularly in the context of family violence and family breakdown”.

The JCCD has used the IFCE as the key organising structure for the National Framework. Using that structure, the National Framework is put forward as: a national approach to improving access to justice and achieving equality before the law for Aboriginal and Torres Strait Islander women and migrant and refugee women.

The National Framework is “intended to serve as an aspirational set of principles and best practice guidelines for Australian courts around operational actions they can take to improve accessibility”.

The key features of the National Framework are:

- It embraces all of the core values of a court as identified in the IFCE;
- Its underpinning value/principle is the achievement of equal justice for all court users – regardless of their sex, race, religion, language or national or ethnic origin;
- It emphasises the point that “equal justice requires that courts are free from unconscious bias and discrimination and that proceedings are fair and impartial”;
- In implementing these underlying principles and values, it aligns itself with the seven areas of court excellence outlined in the IFCE;
- It stresses the importance of leadership from senior judicial officers and court administrators in demonstrating “a court’s commitment to providing equal justice for Aboriginal and Torres Strait Islander women and migrant and refugee women”;
- It attaches equal importance to the need for “a more uniform and systemic approach to the complexity of cultural and linguistic issues facing the courts”, as well as to the need for courts to adopt measures to modify structures and policies throughout the court system in order to tackle “the distrust and poor familiarity with court processes that exist amongst such diverse court users”;
- It stresses the need for courts to meaningfully engage with local communities to develop and implement the framework and to “ensure that courts and their staff are open and accountable around their operations”.

The National Framework points out that “rigorous planning and policies are required for courts to continuously demonstrate that they are responsive to the needs of diverse court users”. The Framework also recommends that courts develop clear plans to implement the framework and formulate strategies for working with diverse groups.

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123 The National Framework p2.
126 The National Framework p 5. This in turn requires access to appropriately trained interpreters, supported by court policies and judicial officers and staff who understand and value the role of interpreters.
129 The National Framework p5.
130 The National Framework p5.
133 The National Framework p7.
135 The National Framework p11.
Accordingly, in furtherance of its objectives, the Framework recommends:

- The establishment of cultural diversity committees within the courts;
- Partnerships and co-operation with other organisations;
- Community education forums;
- Regular meetings with key stakeholders;
- Working with the legal profession;
- Community visits;
- Court open days and tours; and
- Celebrating diversity.

Again in alignment with the IFCE, the National Framework emphasises the need for courts to:

- “Efficiently and proactively manage their resources to meet the demands of the justice system and address the needs of court users”;
- Review their judicial education and professional development programs in light of the objects of the framework;
- Ensure that court staff are “trained to understand the needs of diverse court users so they can respond appropriately”;
- Employ indigenous court liaison officers and cultural liaison officers to further the objects of the framework;
- Ensure that all court users are able to understand the processes in which they are participating and to contribute fully to the proceedings so that courts can operate fairly, effectively and efficiently,
- Seek to improve the collection of data concerning the cultural, linguistic and gender diversity of their court users in order to advance the objects of the framework;
- Introduce or enhance mechanisms to assess satisfaction levels among diverse court users.

As stated in the National Framework, a key objective of the framework is to promote higher public trust and confidence in Australian courts and the judiciary. The framework seeks to make the judiciary accountable to the community it serves in a fundamental and significant respect: Courts need to demonstrate that they are aware of the barriers faced by diverse court users, that they are attempting to address these barriers, and that they are responsive to honest feedback about the justice system and its impact on Aboriginal and Torres Strait Islander women and migrant and refugee women.

The Framework recommends that courts meaningfully engage with diverse communities in the development and implementation of the matters and measures outlined in the framework with a view to building that all important public trust and confidence in the judiciary as a responsive social institution - whose independence is a privilege of and a protection for the people. The independence of the judiciary is of little value to an ethnically, culturally and linguistically diverse community unless there is equality before the law and equal access to justice.

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137 The National Framework pp 7-11
139 The National Framework p11.
140 The National Framework p12.
143 The National Framework pp 15-16.
144 The National Framework p16.
146 The National Framework p1.
The Framework concludes on this fitting note: Managing responsibility and accountability within the court system for the introduction and maintenance of measures to ensure equality before the law and access to justice for Aboriginal and Torres Strait Islander women and migrant and refugee women is critical.

**ENHANCING THE WELLBEING OF THE COMMUNITY AND THE INDIVIDUAL AND JUDICIAL ACCOUNTABILITY**

As pointed out by Richardson, Spencer and Wexler, there is “a growing emphasis on the role of justice systems to improve the well-being of individuals and the communities that justice systems serve”. In that regard, Michael King has convincingly argued that an “ethic of care” is an important judicial value that should be added to the traditional values of judicial conduct of independence, impartiality, and integrity.

In a broader vein, Richardson, Spencer and Wexler argue that the promotion of well-being and improvement of the experience of court users is “another goal that excellent courts should ideally strive for; and that this goal can be achieved by using the principles of therapeutic justice (TJ) and the IFCE. As the authors point out, both TJ and the IFCE (a quality management system for courts) are “complementary in that both are directed at improving the quality of justice”. We are reminded by the authors that the IFCE acknowledges “the role of a sound justice system not only for positive economic growth but also for healthy social development”. Relevance, Richardson, Spencer and Wexler point out that the core court values identified in the IFCE are all aspects of “the justice system that encourage social and economic growth” and “enhance the well-being of those who come into contact with the court and the community in which a court sits”.

Furthermore, TJ, which has the primary goal of maximising the well-being of individuals and communities, intersects with many of the core court values identified in the IFCE, and therefore the promotion and enhancement of the wellbeing of individuals and communities should be included as a core value of court excellence.

As noted earlier, the judiciary is responsible and accountable to the public for the quality of justice it administers and delivers, and in the performance of that role its courts should aspire to “court excellence”. Given that responsible and accountable courts should adopt the IFCE – which in part acknowledges the role of the judicial system in facilitating healthy social development – and the intersection between this aspect of the IFCE and TJ’s emphasis on enhancing wellbeing, the judiciary should therefore be responsible and accountable for maximizing the well-being of the individuals.

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149 Richardson, Spencer and Wexler n 63 at148. As referred to by the authors (at 149):
150 Richardson, Spencer and Wexler n 63 at 148. TJ is an interdisciplinary discourse on the therapeutic and anti-therapeutic impact of the law and legal processes.
151 Richardson, Spencer and Wexler n 63 at 148. As the Productivity Commission in Australia has highlighted in its 2014 inquiry report on Access to Justice Arrangements the overriding objective of any civil justice system (and, we would argue, criminal justice system) is to enhance community wellbeing or quality of life: Productivity Commission of Australia: Access to Justice Arrangements: Productivity Commission Inquiry Report Vol 1 (Canberra, 2104), p6.
152 MS King “Judging, Judicial Values and Judicial Conduct in Problem –Solving Courts, Indigenous Sentencing Courts” (2010) 19 JJA 133, 151 citing K Auty “We all Teach Hearts to Break But Can We Mend Them” (2006) 1 E Law 101 and RK Warren “Public Trust and Procedural Justice” (200) 37(3) Court Rev 12, 15. King describes an “ethic of care” as “an approach that is mindful of the effect of judicial action on the wellbeing of those taking part in or otherwise affected by judicial processes”.
153 Richardson, Spencer and Wexler n 63 at 156. See also the Productivity Commission Inquiry Report also cited by the authors.
154 Richardson, Spencer and Wexler n 63 at 156.
155 Richardson, Spencer and Wexler n 63 at 157.
and the communities it serves. The IFCE and TJ provide the analytical tools by which the courts can achieve this objective.156

Judicial accountability for enhancing the well-being of individuals and communities is a form of “societal accountability” that stems from the principle of judicial independence, which is not a privilege of the judiciary — but a privilege of, and a protection for, all members of the community. If that privilege and protection is to be of any relevance or value to the community the judiciary must ensure that it embraces the well-being of individuals and the community as both a core court value and objective of the justice system. This is so because the primary purpose of the judicial system is to maintain social harmony,157 and the maximization of the well-being of individuals and the community is an integral part of that objective. Unless courts do everything they can to maintain social harmony the independence of the judiciary will cease to be relevant to, or of value, to the community.

THE CONCEPT OF SUSTAINABLE JUSTICE AND JUDICIAL ACCOUNTABILITY

It is important not to overlook the fact that courts play an important role in maintaining peace and harmony within our society.158 Professor Hazel Genn in the 2008 Hamlyn Lectures spoke about the role of the civil law and civil justice as a public good:159 My starting point is that the machinery of civil justice sustains social stability and economic growth by providing public processes for peacefully resolving civil disputes, or enforcing legal rights and for protecting private and personal rights.

A similar view was expressed in the Productivity Commission Inquiry Report on Access to Justice Arrangements:160 Well-functioning justice systems can also promote social order and facilitate the peaceful resolution of disputes. This view of the aim of the justice system is echoed by Dr. Andrew Cannon when he says that “the primary purpose of courts is to maintain social harmony and holding people to account for wrongdoing is only a part of what is necessary to achieve this purpose”.161 The author points out the use of State power through the court system “to hold people accountable is not sufficient to ensure social harmony”.162 As the use of such power may “exacerbate conflict not resolve it”, in order to be “accepted and effective in their role courts must proceed with care and fairness and respect and uphold the individual rights of the citizen, at the same time as authorising the use of State power to hold them accountable for their wrongdoing”.163

Dr. Cannon proposes that “the principle of sustainability is a useful guiding aim to ensure that court systems perform their original and primary purpose of maintaining social harmony”.164 He advocates a “sustainable justice approach”165 resulting in a “sustainable justice system”. The concept of sustainable justice, which is a powerful example of the growing example of the role of justice systems to improve the well-being of individuals and the communities that justice systems serve, finds its most powerful expression in the Charter for Sustainable Justice.

The Charter for Sustainable Justice is a document co-produced by Alexander F De Savornin Lohman (former legal attorney, Rotterdam-Utrecht, the Netherlands) and Jaap Van Straalen (entrepreneur and editor, Amsterdam, the Netherlands) and written in close co-operation with Dr Andrew Cannon

156 Richardson, Spencer and Wexler n 63 at 149.
158 Chief Justice Warren n 52, p3.
159 Chief Justice Warren n 52, p4.
160 The Productivity Commission n 99, pp 138-139.
161 Dr Cannon n 107, p4.
162 Dr Cannon n 107, p4.
163 Dr Cannon n 107, p4.
164 Dr Cannon n 107, p5.
165 Dr Cannon n 107, pp 5-7.
As stated in the Charter: Sustainable justice is the approach to justice that aims to improve social harmony, wellbeing, the general feeling of safety within society, and furthers personal and societal development within a framework of human rights and principles securing legal uniformity and equality. In order to enable the justice system to intervene effectively, justice is vested with power and independence and acts in the pursuit of social sustainability of society and its members.

The Charter is a response to recent and growing criticisms that existing justice systems “do not appropriately and effectively meet societal needs”. It follows upon the heels of various justice innovations which have been aimed at serving values of social sustainability – like different forms of problem-solving courts, restorative justice, intercultural justice, procedural justice and therapeutic jurisprudence.

The Charter makes it clear that the “main goal of Sustainable Justice is increasing the quality of life by improving the quality of relationships and social networks”. Values of social sustainability “complement judicial values and contribute to the effectiveness of the justice system”. Sustainable justice views “conflicts and criminal acts as opportunities to restore and improve social harmony”.

It is also made clear in the Charter that “judicial power is given by society to the justice system on the assumption that this is beneficial to society” and that “judicial officers using judicial power are societal change agents, who act as a catalyst for a better society”. The Charter acknowledges the very special position occupied by judicial officers: Prestige, independence and the position as ultimate decision maker drapes judge with a kind of magic that enables them to accomplish outcomes that others cannot achieve. Judicial officers are in “a key position to procure socially sustainable outcomes”.

The Charter points out that the “general principle of sustainable judging is to turn bad into good, contributing to social harmony and personal and societal development”. The Charter reflects the changing perspective of justice: “Social sustainability provides valuable guiding principles to justice systems encouraging them to gradual change so that they contribute to social harmony more effectively.” Justice systems based on principles of social sustainability are role models guiding people in the best way to manage conflicts and other challenges constructively without harming others.

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167 The sustainability movement is one of the most influential trends in law and justice of the 21st century.
168 Lowndes n 116, p19
170 Charter for Sustainable Justice n 119, p1.
171 Charter for Sustainable Justice n 119, p1.
172 Charter for Sustainable Justice n 119, p1.
175 Charter for Sustainable Justice n 119, p2.
176 Charter for Sustainable Justice n 119, p2.
177 Charter for Sustainable Justice n 119, p2.
178 Charter for Sustainable Justice n 119, p2.
179 Charter for Sustainable Justice n 119, p3.
A core responsibility of courts is to resolve conflicts in the exercise of their adjudicative independence. They must also do justice according to law. However, in exercising these functions courts must have “an eye for innovation and a proactive response to changes in society”. Courts need to bear in mind that their primary purpose is to maintain social harmony, and in order to be part of an effective and accountable judiciary they must respond to changing perspectives of justice. As the custodian of the principle of judicial independence, the judiciary must ensure that its independence works in the best interests of the community that it serves, and is obliged to administer justice in a constructive manner that produces socially sustainable outcomes.

CONCLUSION
The principle of judicial independence is the pivot upon which judicial accountability turns. The independence of the judiciary places the judiciary in a unique and powerful position in modern society. Consistent with the democratic principle that no branch of government should have power without accountability, the judiciary should be held accountable for the ways in which it wields - in the exercise of its independence from the other two branches of government - the judicial power given to it by society. In the exercise of its independence, the judiciary has a societal obligation to:

- Embrace the core court values (which include independence of decision-making);
- Deliver quality justice in accordance with the rule of law;
- Ensure that court proceedings are dealt with in an effective and efficient manner;
- Provide such information relating to the administration and organisation of the courts as is necessary to ensure public confidence in the judiciary and the judicial system;
- Engage the community to the extent that is necessary to uphold public confidence in the administration of justice and to enhance public respect for the institution of the judiciary;
- Promote and enhance access to equal justice;
- Do justice according to law in order to maximise the wellbeing of individuals and the community, and to the best of its ability to maintain social harmony by producing socially sustainable outcomes.

The judiciary should be held accountable to the public for meeting these obligations in the overall interest of ensuring that the independence of the judiciary as an institution continues to be of worth or value to the public.

180 IFCE 3.1.1.
Traditionally judges have not been leaders – certainly in the context of the conduct of court proceedings. Their job was to react to the submissions presented. Counsel set the agenda. In Scotland the judge’s role was likened to that of a referee at a boxing match in these words of the Lord Justice Clerk in 1962 when he said:

“It is an essential feature of the Judge’s function to see that the litigation is carried on fairly between the parties. Judges sometimes flatter themselves by thinking that their function is the ascertainment of truth. This is so only in a very limited sense. Our system for administering justice in civil affairs proceeds on the footing that each side, working at arm’s length, selects its own evidence. Each side’s selection of its own evidence may, for various reasons, be partial in every sense of the term…A litigation is in essence a trial of skill between opposing parties conducted under recognised rules, and the prize is the Judge’s decision. We have rejected inquisitorial methods and prefer to regard our judges as entirely independent. Like referees at boxing contests, they see that the rules are kept and count the points.”

Times have changed. In domestic jurisdictions, judges have assumed a role as managers of cases. Although management was not traditionally a skill that came naturally to lawyers, judges readily demonstrated an enthusiasm to learn and acclimatised quickly. So it now is commonplace for there to be early procedural hearings at which the judge sets the timetable for the case and makes orders regulating aspects of the conduct of the case. Other forms of case management have evolved, such as that in Scotland for reparation actions where a timetable setting a trial date and working back through all earlier stages of procedure is automatically generated upon the first calling of the case, and judicial intervention occurs only as and when a party seeks to depart from that timetable.

The core point is that the last 25 years have seen the steady development of a more proactive role for judges in managing the progress and the conduct of court proceedings. And the trend is towards the expansion of the management role with judges taking greater responsibility for adapting the judicial system to the demands of the age in which we live, in order to satisfy public expectations. As Lord Woolf, when Lord Chief Justice of England and Wales, said, our judicial independence carries with it responsibilities. Judges are increasingly viewed by the public as the ones who are accountable for the quality and success of our judicial systems. By and large, I think it can be said that the judiciary are succeeding in meeting that challenge.

We are already, and shall continue to be, subject to ever-increasing public scrutiny, and have to react accordingly. Even in the 20 years since I was appointed to the Bench there have been a number of fairly fundamental changes, some instigated by politicians and others by judges themselves, which have modernised the judiciary and made us appear less remote and more in touch with current daily life and culture. Perhaps number one is the development of programmes of judicial training, previously thought unnecessary, and now not only keeping judges fully abreast of developments in legislation and the law in general, but also leading to better understanding of, and a better response to, the needs of the huge variety of people whose interaction with our courts is inhibited by physical, cultural or psychological impediments. Other notable developments have been the introduction of independent judicial appointment commissions, a retirement age, the promotion of cultural, age and gender diversity, the expansion of the ambit of human rights legislation, and ultimately the transfer of significant control of their budget and management to the judges themselves, leading to the development of complaints and disciplinary procedures for judicial misconduct to which the public has access. All of this has led directly or indirectly to far greater transparency in the working of judicial systems. A good example of the effect of an accumulation of modernising measures can be
seen in the transformation of the fairly remote Judicial Committee of the House of Lords into the user-friendly United Kingdom Supreme Court of which much has been written and broadcast.

**The situation in international criminal tribunals and courts - introduction**

It is axiomatic that the principal ingredient for a high-quality judicial system is able and talented judges. They are the core element of the judicial system. As the result of the developments to which I have just referred, it is now widely accepted that the selection of judges with the characteristics and qualities that ensure that a judicial system is both fair and effective is through an open, transparent selection process in which every candidate with the necessary qualifications has an equally fair chance of being appointed on merit. To enable that to happen may require adjustment or tweaking of the system to reflect historical anomalies which have impeded the progress of ethnic minorities and women, with a view to ensuring an inclusive judiciary properly reflecting racial, gender and, possibly, age diversity. Although this may largely result in the appointment of the same judges as were in the past appointed by systems of patronage, it is to the public more acceptable. Judicial appointment commissions or boards, which may even include a majority of lay persons, are now a common feature of domestic judicial systems.

However, that is not the case in the international criminal justice system. I want to address what I consider to be unsatisfactory aspects of the selection process for international judges. I also want to look at the impact the inadequacy of the selection process has on the quality and hence the effectiveness, accountability and inclusivity of the international judiciary and in turn on the effectiveness of the international criminal justice system. After all, judicial appointment is the method of judicial regulation par excellence. This is an issue that resonates particularly in this country where Arusha was home to the International Criminal Tribunal for Rwanda (ICTR), and is now home to the Mechanism for International Criminal Tribunals (MICT), and where the African Court on Human and People’s Rights and the East African Court of Justice sit. It is indeed a privilege to be invited to address this subject at a gathering of this distinguished Association in a country which contributes so much to the cause of international justice.

**Delay**

In academic articles, in court and tribunal judgments, in human rights instruments and in the statutes establishing international criminal courts and tribunals, there is a regular reference to “fair and expeditious” trials or the right to “trial without undue delay”. It is accepted in principle that expedition is compatible with fairness. Expedition is regarded as desirable, as long as it is not achieved at the expense of fairness.

I think I can say with confidence that there is broad agreement that international criminal trials take far too long. And by that I mean too long from the point at which it is decided there is sufficient evidence and the accused are indicted. There is no doubt that the absence of a powerful international police force does slow down investigations. So I confine my remarks to the situation where a case is live before an international court or tribunal. The problem is not confined to trials; it is widely accepted that appeal proceedings also generally take far too long.

The trial of Jadranko Prlic and five other Bosnian Croats, all of whom held senior posts in the armed forces, police or prison service of the Croatian Community in Bosnia-Herzegovina, began on 26 April 2006. The Trial Chamber sat on 465 days. Closing arguments in the trial were completed on 2 March 2011. The judgment was pronounced over two years later on 29 May 2013. All parties filed their appeal briefs against the judgment by 12 January 2015. The judgment in that appeal is still awaited, but is expected to be rendered in November 2017. Closure of the ICTY has been postponed to accommodate this. The whole process will have taken eleven and a half years. Not only that, but the events being addressed occurred in the first half of the 1990s. That must change. One would routinely expect 465 court days to be comfortably accommodated in a period of 3 years. Indeed the prosecution case was presented in 21 months. There are many reasons why thereafter the trial took
so long. However, this is simply one of many cases which each lasted for periods of years. Members of the public and some lawyers find it difficult to understand why that should be so.

It is, I hope, not controversial to suggest that international judges are responsible for ensuring that proceedings are conducted fairly and expeditiously because they are accountable for ensuring the provision of a competent and effective judicial system. I note that “effective” is the lead word in the title of this conference. Not only is that statement a reflection of what I see as an important aspect of the principle of judicial accountability, that also reflects the reality at international courts and tribunals that the judges are personally responsible for delivering that service because they have control over all proceedings from the point of indictment. Judicial independence and the delivery of efficient justice services were recognised from the outset of discussions on the Latimer House Principles as entirely compatible aims. Although the initial choice of the number and form of the charges in an indictment lies with the prosecutor, judges have rule-making powers under which they can allocate to themselves greater control over these and other matters. The applicable statutory provisions and rules are in that sense consistent with developments in domestic judicial systems. However, the factual reality does not match the legal norm that trials should be not only fair but also expeditious.

The recent commemorations of the 800th anniversary of Magna Carta highlighted a number of its classic features, none more so than Clause 40 – “To no one will we sell, to no one will we refuse or delay, right or justice” – today reflected in the aphorism “justice delayed is justice denied”. A modern reflection of the importance of the principle can be found in a speech made by United States Chief Justice Warren E Burger to a meeting of the American Bar Association in 1970, when he said:

“A sense of confidence in the courts is essential to maintain the fabric of ordered liberty for a free people and three things could destroy that confidence and do incalculable damage to society: that people come to believe that inefficiency and delay will drain even a just judgment of its value; that people who have long been exploited in the smaller transactions of daily life come to believe that courts cannot vindicate their legal rights from fraud and over-reaching; that people come to believe the law – in the larger sense – cannot fulfil its primary function to protect them and their families in their homes, at their work, and on the public streets.”

All three of those things should concern those of us who have an interest in the effectiveness of the proceedings of our international criminal institutions. In his foreword to the recent work of Devlin and Dodek on “Regulating Judges” Richard Goldstone, the first Prosecutor of the ICTY, made the same point by saying that “the judiciary has to rely for its efficacy upon its fulfilling the public trust placed in it”.

There is a danger that failure to tackle the problems posed by the length of the proceedings and the delay in producing judgments will be seen as a failure in judicial accountability. Judges have to be sensitive to the pace of change in our 21st century society, and the level of public expectation that contentious business should be resolved fairly quickly. It is, in my respectful opinion, the responsibility of judges constantly to be alert to devising ways of expediting proceedings without compromising them. The public see that as a judicial responsibility because they perceive judges to be in a position of authority over court proceedings independent of outside control. They are accountable for the quality of their administration of justice. They should be at the forefront of a debate about the development of a judicial system that is fit for the purpose of ensuring that international criminal trials are conducted fairly and expeditiously. And there are, I suggest, measures that could have a significant, immediate impact on the efficiency of international criminal proceedings.
Qualifications of Judges
The first relates to the qualifications and qualities of the judges. Judges in tribunals for which the United Nations (UN) is responsible, such as the ICTY and now the MICT, are mostly elected by the General Assembly. Judges of the International Criminal Court (ICC) are elected by the States Parties to the Rome Treaty. In the case of both, every member state has a vote. Of course there are rules as to eligibility requiring candidates for the UN tribunals to be persons of high moral character, impartiality and integrity qualified to sit as members of the highest courts of their respective countries and to have certain relevant experience. However, that means that there is a very large pool of potential candidates, including many whose careers have been spent in non-judicial roles, such as academia and diplomacy. Article 36 of the Rome Statute provides that the judges of the ICC shall be drawn from two specified groups: the larger group consists of those with established competence in criminal law and procedure, and having the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings, and the smaller one of persons with established competence in relevant areas of public international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the court.

The division is effectively between criminal law professionals on the one hand and international law academics, former civil servants and diplomats on the other. At the ICTY there was no specific rule, but in practice the division was generally 50/50 between the same groups. The result has been that the involvement of academics and ex-diplomats in the Trial and Appeals Chambers of international criminal judicial institutions has been extensive. The international judiciary should not be viewed as a parking place for retired diplomats and civil servants or simply an aspect of the continuing study and lecturing of even the most distinguished academics.

It is not easy to identify what particular expertise it is thought that former diplomats bring to the judicial process in international criminal cases, in contrast to candidates from an academic background whose knowledge of the subject can play a role in the development of international criminal law. However, overall the balance, which resulted at times at the ICTY in fewer than 50% of the permanent judges being professional judges, is wrong. Although there is and has been scope for the academic development of substantive international criminal law, the bulk of the decisions taken by the judges relate to procedure, the admissibility of evidence and the determination of guilt based on recognised principles and rules. These are the daily diet of the professional judge. And as I hope I have already demonstrated today, at the heart of the effective conduct of domestic court proceedings today lies judicial case management, which varies according to the nature of the case and the personnel involved, and which is dependent for its success on the judicial management skills of the experienced professional judge.

Selection of Judges
Because the nomination is for the member state, it is to a considerable extent a matter of chance just what proportion of candidates are professional judges. Which are elected is also largely a matter of chance, since voting patterns suggest that the state of origin of the candidate may be an important factor in determining the votes that will be secured. To a judicial mind that system is basically unsound. I am not alone among judges in thinking that to be the case. That has tended to be confirmed for some by their experience of the “electioneering” or “canvassing” in which states’ candidates are expected to engage. The electorate for judges of UN Tribunals, who are the permanent representatives of member states to the UN, wish to see the candidate, but have on occasion been known to express far more interest in issues of common concern to their state and that of the candidate, even to the point of endeavouring to horse-trade support for one cause in exchange for supporting the candidate for judicial office. To be elected, a candidate must secure 50% plus one of the voting membership of the General Assembly of the UN.
I recognise that this is a democratic process which accords respect to the equal standing of all states which are members of the UN or are parties to the Rome Treaty. However you only need to describe the system to realise that it must be possible to devise a better one. Having said that, although a better scheme can be envisaged, the democratic recognition of the equality of all states and their inevitable involvement at some stage in the voting process means that not all of the unsatisfactory features of the current system can be eliminated. It is encouraging to note that in 2013 an Advisory Committee on Nomination of Judges to the ICC was formed with a mandate to facilitate that the highest qualified candidates are appointed as ICC judges, ensuring that they meet the criteria set out in the Rome Statute. Promising though that development is, in spite of being described by one commentator as “a timid affair indeed compared with...the procedure in force for appointments to the European Court of Human Rights”, it is too early to judge its success.

An obvious improvement would be the establishment of a truly independent appointments commission comprising five or so members. Inevitably membership of such a commission could be a coveted post, and the unsatisfactory features of diplomatic voting might simply be moved to that election process. On the other hand, qualification to be appointed to the commission could be prescribed in a way that would ensure the election of those best-suited to the task. A group of that size would be well-placed to study the qualifications of the candidates, to carry out detailed interviews, to have regard to the need for the right blend of experience and qualifications in those appointed, and, if appropriate, to try to secure a gender and regional representation balance. For all that I spent an intensive week of electioneering in New York, little attempt was made to explore with me my judicial experience and judicial and legal qualifications for the job, surely the most important factor.

It is my firm view that there just is no substitute for appointment of professional judges, used to dealing with the most serious of cases and all the pressures that go with such work, in whom impartiality and freedom from any form of influence (political or otherwise) has been demonstrated repeatedly and can be relied upon implicitly, to conduct international trials which are among the most demanding of cases.

**The Winds of Change**

It is the responsibility of judges in any justice system to propose and to encourage improvements in the system based on their experience of that system in practice. To fail to do so risks a charge of complacency which is antithetic to proper judicial accountability. It is a fairly obvious feature of procedure at the ICTY that the adversarial system followed there was unsuited to the proceedings for a number of reasons, including the fact that it was so unfamiliar to people from the former Yugoslavia present there as accused, witnesses or public observers, and also because the volume of material involved was such that presentation of all evidence *viva voce* in court was unrealistic. As experience of the workings of the various tribunals increased, the advantages to be gained by introducing more of the practices followed in civil law jurisdictions were appreciated.

The general admissibility of hearsay evidence and the widespread use of written statements in lieu of oral evidence are good examples of practices from civil law systems by which the procedures of international tribunals were enhanced. Unfortunately the potential for expediting proceedings presented by some of the changes has not been realised. On two occasions I chaired a Committee for Speeding up Trials at the ICTY, which on each occasion produced a number of recommendations, but these were no more than tinkering at the margins. To date, there has been no determined, systematic attempt to try to devise a set of rules that incorporates the best features of the different systems to be found around the world, as well as devising new, imaginative procedures for obtaining, securing and presenting the evidence of witnesses.
I have suggested before, and suggest again, that there is enormous scope for a major academic project aimed at meeting that challenge. There is a danger that failure to address the delay in proceedings by means such as that will bring those proceedings and the judges associated with them into disrepute. That would be a failure in judicial accountability. It would be a failure to respond to the recognised principle that justice ought to be delivered both fairly and expeditiously. It would also mirror what is happening in domestic jurisdictions where new, speedier and better ways of conducting proceedings are being explored.

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It is significant and encouraging that there are now signs of increasing dissatisfaction among judges in common law domestic jurisdictions with aspects of the adversarial system as normally applied there. In a speech in 2013 at a conference on the Future of Criminal Law and Procedure in Scotland the now Lord President questioned the emphasis on oral evidence in court. He highlighted social and technological advances since the rules of adversarial procedure were first devised and posed a number of searching questions. In particular, he asked this:

“Howver, one question which is worth posing by way of introduction to the substantive content of this paper is this: which is more likely to be true:

• A record of an event as caught on camera;
• A video recorded statement made by a witness in the hours immediately following the event;
• Or the testimony of a witness at a trial months and perhaps years later?

The answer to that, at least for the lawyer, may be ‘well, it depends’, and no doubt it does. Nevertheless, is it not worth considering why the Scottish courts afford so much precedence, if not quite exclusivity, in terms of value, to the testimony of a witness at a trial in the face of what might be the obvious truth as recorded digitally or in accounts given by the witnesses at the time of the incident under scrutiny?”

He went on to propose the revocation of rules that exclude evidence, such as the hearsay rule, and the adoption of an approach to evidence that is consistent with that followed in civil law systems rather than common law systems. He advocated concentration on the weight and significance of evidence presented rather than on technical rules of admissibility. And he suggested that the trial would become the stage at which all information relevant to the case gathered in the course of the investigation is presented to the judges who have to sift through it, decide which, if any, witnesses should be examined orally, and make their decisions.

This realisation that change in the application of the adversarial system of proceedings is necessary has not been confined to Scotland. Structured case management and target time limits are now a feature of complex criminal cases in the legal system of England Wales. These are but small examples. Change along these lines in domestic common law systems is seen as essential to ensure that they evolve in a way that reflects the conditions of modern life and improves the quality of justice delivered in the 21st Century.

In the context of international proceedings I have heard the suggestion mooted that investigations might be carried out by an investigative judge accompanied by a prosecutor equipped with a video camera, rather like a documentary film crew, who would be tasked with visiting the conflict area and recording the evidence of witnesses. Therein lies the germ of an idea for expediting the presentation of crime-scene evidence, without restricting the oral presentation and challenge of evidence relating to individual criminal responsibility.

These developments are clear recognition of the obligation of those to whom the administration of justice is entrusted to keep their justice system under constant review to ensure that it develops to meet the expectations of modern society; they are accountable to the public of their jurisdiction for that.
Researching ways of improving the justice system is as clear an example of positive judicial accountability as I can identify. There are many others – eg dedication to proactive judicial case management, 100% commitment to the job in hand, aiming to engage the co-operation of the parties, displaying the core qualities of a good judge such as even temper, open mindedness, even handedness, impartiality, sense of fairness and justice, sound judgment and many more.

My task today is complete. I urge you to initiate in your jurisdictions a debate aimed at rendering our international criminal proceedings more effective by tightening the qualification requirements for judges, improving the selection process and revising and modernising the procedures adopted.
INTRODUCTION
The term ‘implementation’ is synonymous with the word ‘application.’ ‘Implementation’ covers all measures that must be taken to ensure that the rules of International Humanitarian Law (IHL) are fully respected. Although IHL is more concerned with armed conflicts, there are certain things that must be considered both in wartime and peace periods. Amongst them is the institution of structures, administrative arrangements and recruitment of personnel who would ensure compliance with the law in place. There is also a need for continuous sensitization of civilians and military personnel in order to familiarize them with the rules of IHL.

The institutions which have the responsibility of implementing IHL include Government Ministries, Parliament and the Courts. There are roles for National Red Cross or Red Crescent Societies and other voluntary organizations. In the context of IHL, there have been solutions, which have been developed to deal with the specific issue of implementation. Some of the solutions developed are the International Fact-Finding Commission and National Commissions.

The first solution was established in accordance with Art.90 of Additional Protocol I in 1991 known as the International Fact-Finding Commission (IFFC). This fact finding commission was created on the international stage to investigate allegations of serious violations of IHL. The creation of this mechanism for the implementation of IHL gives credence to IFFC’s competence to investigate international armed conflicts. Additionally, the Commissions have the ability to take an active role in the settlement of disputes in relation to violations of IHL.

The second solution is at the national level, where the Commissions are enabled to investigate and also to ensure the implementation of IHL. This solution has had more success than the IFFC. This is partly due to the fact that National Commissions have greater jurisdiction within the State. According to the ICRC as many as some sixty countries have established Commissions.

The structure of these Commissions, however, often vary from State to State. Some have permanent mandates, while others are created when a violation arises and then maybe disbanded once the investigation has been completed. Some of the various types of National Commissions are the Inter-Ministerial or Inter-Departmental Commissions; Committees established within National Red Cross or Red Crescent Societies; Commissions, Committees or Working Groups set up to study a specific issue or to deal with a given task and the National Human Rights Commissions whose mandates extend to cover humanitarian law.

Domestic courts, therefore, play an important role in the enforcement of IHL and fighting impunity. In addition to national jurisdictions, violations of IHL can also be prosecuted by various international

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criminal tribunals. This is encountered when violations of IHL occur. States are under an obligation to prosecute alleged offenders.

Practically, the foremost strategy is to enact the relevant laws. In Uganda, the most pertinent laws to IHL are, *inter alia*, the Geneva Conventions Act, Cap 363, the Penal Code, Cap 120 and the ICC Act, No. 11 of 2010 together with the relevant procedural laws. A discussion on the most pertinent laws to IHL will ensue.

**THE GENEVA CONVENTIONS**

These Conventions provide the fundamental international standards for the treatment of prisoners of war. On 18 May 1964, Uganda ratified the Geneva Conventions of 1949 and on 16 October 1964, the Geneva Conventions Act 1964 was enacted as a municipal law. The Additional Protocols were ratified on 13 March 1991 and are yet to be ratified. They relate to the Protection of Victims of Non-International Armed Conflicts (Protocol II). Among the prohibited acts are those listed under Article 4 of Protocol II such as murder, acts of terrorism, and pillage. Under the Geneva Conventions Act, Uganda has a duty to either prosecute grave breaches of the Geneva Conventions of 1949 or extradite suspects to countries where they can be prosecuted.

**THE INTERNATIONAL CRIMES ACT NO. 11 OF 2010 (“THE ICC ACT 2010”)**

On 10th March 2010, the Bill on International Crimes was passed by Parliament in the twilight of the ICC Review Conference which was held in Uganda on 11 June 2010. The effective date, however, came later on 25 June 2010. The International Crimes Act is intended to give effect to the Rome Statute. It provided for offences under Uganda Law corresponding to the ICC jurisdiction and other connected matters.

The jurisdiction is covered under Section 18 of the ICC Act 2010 and extends to those who commit the prohibited offences outside Uganda and are Ugandans citizens, its military personnel, or suspected persons who have allegedly committed the listed crimes and had fled to or come to Uganda. This in a way creates universal jurisdiction in the Act. It is provided that where inconsistencies exist between this Act and the provisions of the Rome Statute, the latter would prevail thereby setting international law as being paramount over domestic law. The law did not specify which Court would handle such cases. However, the High Court established the International Criminal Court Division (ICD). This Division is mandated to try those who have allegedly committed war crimes, among other crimes. Considering that the discussion is envisaged to cover challenges, I would go directly to them.

**THE CHALLENGE OF INTERPRETATION OF IHL AND THE ISSUE OF AMNESTY**

The first hurdle experienced by the ICD pertained to the enforcement of the IHL in light of the existing Amnesty Act. The Geneva Conventions Act was enacted in 1964 but had never been put to use until 2011, when the case of *Uganda v. Thomas Kwoyelo Case No. A9 of 2010* was committed to the ICD. While in custody, Kwoyelo made a declaration denouncing rebellion and sought amnesty. In March 2010, the Amnesty Commission forwarded his Application to the Director of Public Prosecutions (DPP) for consideration, which the DPP never responded to. Instead, the DPP charged Kwoyelo with Grave Breaches. The original Indictment contained 11 Counts constituting several grave breaches under Article 147 of the Fourth Geneva Convention of 12th August 1949 and later, with alternative charges under the PCA Cap. 120.

After the plea was taken, the Defence Counsel raised objections to the Indictment and the Court accorded the Defence two weeks within which to prepare written motions to object to the Indictment. Thereafter, on 25th July 2011, the Court was convened to resume the trial of Kwoyelo. It was at that time that the Defence put forward issues which they wanted to challenge. These included an application to quash parts of the Indictment on the basis that the particulars of the
Indictment relating to international armed conflicts were so vague and insufficient that the Defence was unable to prepare their defence. For clarity’s sake, I will refer to the Preamble to the Indictment, which specifies 3 (three) very crucial aspects about the ‘international armed conflict.’ First that the alleged offences were committed in the context of an International armed conflict, which occurred in Northern Uganda, North Eastern DRC and Southern Sudan between the LRA and the Government of Uganda. However, the LRA was under the control and support of the Government of Sudan. According to the Defence, the three characterizations of ‘armed conflict’ did not disclose conflict within the meaning of Section 2(1) (d) of the Geneva Conventions and S.3 of the Geneva Conventions Act.184

The second contention was that the Indictment and its particulars did not disclose any facts relating to High Contracting Parties being at war in the periods of 1993-2005. There was a mere reference to the Sudan and DRC without indicating details of the parties, which made the indictment to be defective.

Thirdly, that the Indictment and particulars thereof did not show any facts pointing to a High Contracting Party rendering support to the LRA. The Defence contended that the facts disclosed should have been indicative of the nature of the offence with which he is charged including exculpatory materials. Yet another question raised was whether grave breaches were applicable to an internal armed conflict. There was reference to Article 2(2) of the Geneva Conventions which is to the effect that ‘grave breaches’ apply only to international armed conflict. The Defence had at first wanted the Trial Panel to determine the preliminary Objections but at the last minute, they changed their intention and instead requested a Constitutional Reference pursuant to Article 137(5) (b) of the Constitution.

Before I actually get to the details of the Constitutional Reference, I must point out that by removing the Application from this particular Bench, the Defence miscalculated. This is because the Judges had been trained over and over in the field of IHL and other laws pertinent to the work of the ICD. If the Defence had not withdrawn their motion on grave breaches, the issue of what is ‘an armed attack,’ specifically the crucial issue of what is tantamount to ‘non-international armed conflict’ in light of the differences between ‘internal violence situations’ and non-international armed conflict would have been considered by the Trial Chamber:

Kwoyelo filed a Constitutional Reference to determine three issues one of which was whether the failure by the DPP and the Amnesty Commission to act on his Application to be granted a Certificate of Amnesty was discriminatory, in contravention of, and inconsistent with Articles 1, 2, 2(2), 21(1) & (3) the Constitution of Uganda. Secondly, whether the act of charging the Accused under Common Article 2 of the Geneva Conventions and S. 2(1)9d) & (e) of the Geneva Conventions Act of Uganda, Cap 363 in respect of offences allegedly committed in Uganda between 1993-2005 was inconsistent with Articles 1, 2, 287 & Articles 8(a) of the Constitution and objectives I, XXVIII (b) of the National Objectives and Directive Principles of State Policy.

There was a third issue which I will not discuss in the paper owing to its irrelevancy to the subject under discussion. The Trial Panel granted the Defence request to have the issues sent to the Constitutional Court as a Constitutional reference and have them interpreted. When the matter came before the Constitutional Court, the Defence Counsel informed Court that the Accused wished to withdraw the 2nd issue relating to Geneva Conventions.185

184 See also the 4th Schedule to the Act
185 Thomas Kwoyelo alias Latoni v Uganda, Constitution Petition No. 036/11(Reference),
The Senior Principal State Attorney had no objection to the proposed amendments but raised an issue outside those framed for determination, *to wit*, whether the Amnesty Act is inconsistent with the Constitutional provisions found in Articles 120(3) (b)(c) & (d), (5)&(6); Art 126(2)(a); Art. 128(1) and Art. 287. She argued that any law which is alleged to be inconsistent with the Constitution is null and void to the extent of inconsistency under Art. 20 of the Constitution. This was allowed by the Constitutional Court despite the fact that earlier the same Court had declined to entertain an extra issue in the case of Akankwasa Damian v Uganda. In *Kwoyelo’s* case, the additional issue was permitted because it encroached upon the legality and constitutionality of an Act of Parliament under which the Applicant was claiming his acquisition of the right to be amnestied.

The Defence enunciated the issue of amnesty, which was his major ground for the Constitutional Reference. The thrust of Counsel for the Defence was that Kwoyelo was indicted for offences that were subject to a grant of amnesty under the Amnesty Act. Further, the Defence contended that other rebel commanders who were captured under similar circumstances like him had been granted certificates of amnesty by the DPP and the Amnesty Commission. In this regard, Kwoyelo had been discriminated against and deprived of equal protection of the law under Article 21 of the Constitution of the Republic of Uganda 1995.

On the other hand, the State was more concerned about the non-fulfilment of Uganda’s responsibility under the international Treaties. The Senior Principal State Attorney argued, *inter alia*, that Art. 287 of the Constitution recognizes the validity of ratified treaties under Uganda laws like the Geneva Conventions Act which criminalizes grave breaches of the Convention and prescribes maximum sentences thereof. In any event, the principles of international law oblige any country which is a Party to a Treaty to observe its obligation under that Treaty. She relied on the Vienna Convention on the law of Treaties of 1969 which had been ratified by Uganda. In Article 27 of the Convention, it is stipulated that municipal law cannot be used to justify a violation of international obligations. She also relied on the *Prosecutor v Morris Kallon & Brima Bazzy Kamara*, where it was noted that insurgents are subject to IHL and are bound to observe the Geneva Conventions.

In respect of the *Kwoyelo case*, the Constitutional Court held that the Applicant had made out a case of unequal treatment by the Amnesty Commission and the Director of Public Prosecutions under the Amnesty Act. He was, therefore entitled to a declaration that the Amnesty Commission and the DPP’s acts were inconsistent with Articles 21(1) (2) of the Constitution. On 22 September 2011, the Court finally issued an order that the file should be returned to the ICD for it to cease the trial of Kwoyelo.

**THE APPEAL TO THE SUPREME COURT**

Soon after the decision of the Constitutional Court, an appeal was lodged by the Attorney General contending, among other things, that there cannot be amnesty for international crimes and that the Amnesty Act encroached against the constitutional mandate of the DPP to select cases for prosecution which is in breach of the Constitution of Uganda. In its Ruling, the Supreme Court presided over by the Hon. Chief Justice held that the Respondent had to show the Constitutional grounds on which he had been discriminated. He was also of the considered opinion that there could never be unequal treatment under the law simply because a person has been charged with specific crimes which another person has not been charged with. He underscored the enjoyment of rights and freedoms on an equal footing. However, this does not connote “identical treatment in every incidence.”

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186 Constitutional Reference No. 05/11
188 *SCSL-04-16-T*(20 June 2007)
Concerning the international treaties, Hon. Bart Katureebe expressed the view that, “when a Country commits itself to international obligations, one must assume that it does so deliberately, lawfully and in its national interest [...]. Therefore, a State should not easily shun its obligation as and when it wishes to. The framers of the Constitution [...] must have been convinced that all the International Treaties were in the best interests of Uganda. He held, inter alia, that the Amnesty Act is not inconsistent with Uganda’s international obligations.”

The Chief Justice noted that the international crimes were not political offences but they comprised of crimes committed on members of society. He highlighted the offence of willful murder of civilians as being part of the crimes against humanity. He held that for such offences, there could not be a grant of amnesty under the laws of Uganda, particularly the Geneva Conventions Act. Consequently, the Court decided that the Amnesty Act is not inconsistent with Uganda’s Treaties and Obligations. As such, there was no impediment to the prosecution of international crimes. The Court ordered the trial of Kwoyelo to proceed. It was scheduled for hearing on 18\textsuperscript{th} July 2016 but again stalled for diverse reasons.

THE APPLICABILITY OF CUSTOMARY INTERNATIONAL LAW IN WAR CRIMES IN UGANDA

Another challenge in the applicability of IHL arose from the belated dates of commencement of the ICC Act and the non-domestication of the Additional Protocol II yet the crimes committed in Uganda prior to 2002 were left out of the Kwoyelo Indictment owing to the prohibition of retrospectivity in Art. 28 of the Uganda Constitution. Resultantly, the ICC Act 2010 would strictly be applicable to crimes that are committed after 25\textsuperscript{th} June 2010. This eliminates the possibility of applying the ICC Act 2010 to crimes committed prior to its coming into force. This situation highlights the issue of retrospectivity. Art. 28 (7) of the Constitution of Uganda 1995 bars any conviction based on a non-existent crime. Retrospective rule-making has a few supporters and many opponents. Defenders of retrospective law usually argue that it is a necessary evil in specific or limited circumstances. For example, it is necessary to deal with terrorists or prosecute fallen tyrants. The rationale for the presumption against retrospective application of criminal law is the need for certainty in the law. This is essential to enable those likely to be affected by a law to be able to comprehend it and regulate their conduct in order to avoid breaking it.\textsuperscript{189}

Connected to retrospectivity is the need to domesticate certain treaties which Uganda had ratified. Art. 123 of the Constitution proscribes that Parliament shall make laws to govern ratification of Treaties, Conventions, Agreements or other arrangements entered into by Uganda. This provision enumerates the requirement of an act of Parliament to implement Uganda’s treaty obligations in order to make them applicable in the domestic legal order. It is interesting to note that of recent the Constitutional Court has, in practice, directly applied Uganda’s obligations under treaty law without implementing legislation.\textsuperscript{190}

For instance, in Uganda Law Society and Karugaba v Attorney General,\textsuperscript{191} the Court noted that this right was not explicitly contained in the non-exhaustive guarantees under the Constitution.\textsuperscript{192} Justice Twinomujuni and the majority of Judges were of the view that, by virtue of Art. 287 of the Constitution, which provides that any Treaty, Agreement or Convention with any country or international organisation made or affirmed by Uganda on or after 9 October 1962, and was still in force immediately before the coming into force of the 1995 Constitution is not affected by the Constitution and Uganda continues to be a party to it. The Charter was, therefore, binding on

\textsuperscript{189} Sunday Times v UK (1979-80) 2 EHRR 245,
\textsuperscript{190} The lead opinion was given by Hon. Justice Amos Twinomujuni and it was held that Art. 7(1) (a) of the African Charter on Human and Peoples’ Rights, which relates to an automatic right of appeal where one’s fundamental rights and freedoms have been violated, was directly applicable.
\textsuperscript{191} Constitutional Petitions No 2 of 2002 and No 8 of 2002 (5 February 2009)
\textsuperscript{192} Constitutional petitions No 2 of 2002 and No 8 of 2002 (5 February 2009), para. 50, per Twinomujuni J.
Uganda. This Judgment could be interpreted to support the view that where no domestication of an international agreement existed, there was a direct application of international law, despite the fact that Uganda is a dualist State.

In this context, a question may be posed: whether there could be a possibility of giving the ICC Act 2010 retroactive effect on the basis that some crimes within its jurisdiction, namely genocide, war crimes and crimes against humanity, formed part of the international customary law that existed before the ICC Act 2010 came into force. What’s needed is a case to test the judicial waters.\(^{193}\)

**PROSECUTING TERRORISM AS AN OFFENCE OTHER THAN AS A WAR CRIME**

The people of Uganda have had bitter experiences of terrorist atrocities committed by terrorists operating within the Country but with bases outside the Country such as the Lord’s Resistance Movement (LRA) and the Allied Democratic Force (ADF). The latter has been suspected of being responsible for the 48 bomb blasts in Kampala and other urban centres. In rural areas, they were responsible for the death of over 5,000 innocent lives. The ICD also adjudicates terrorism cases under the Anti-Terrorism Act No. 14 of Uganda, Act of 2002 as amended by the Anti –Terrorism Act of 2015. Pursuant to S. 7 of the Anti –Terrorism Act, the offence of Terrorism is committed where any person carries out any of the acts set out in paragraphs (a) to (j) of subsection (2) of Section 7 of the Act, where such act is committed for purposes of influencing the government; or intimidating the public or a section of the Public, and for a political, religious, social or economic aim, indiscriminately without due regard to the safety of others, or property. The punishment for the Offence of Terrorism upon conviction is a death penalty if the Offence directly results in the death of any person.\(^ {194}\)

**GLOBAL WAR AGAINST TERRORISM**

A problem of classification also emanates from a distinction between acts that are not prohibited by IHL and those which constitute terrorist acts under the “Global war of Terrorism.” According to the ICRC, the normative regimes governing armed conflict and terrorism should not be confused.\(^{195}\) The ICRC observes that, in legal terms, “armed conflict” is a situation in which certain acts of violence are considered lawful and others are unlawful, while any act of violence designated as “terrorist” is always unlawful. There is no dichotomy in the norms governing acts of terrorism. The defining feature of any act that is legally classified as “terrorist” whether under domestic or international, is that it is always penalized as criminal.\(^ {196}\)

The ICRC has long recognized the legitimacy of a State taking responsive action to ensure State security. However, in doing so, it is indispensable to maintain the safeguards of protecting human life and dignity as laid down in IHL and IHRL.\(^ {197}\) Overtime also, the ICRC has argued that legally permitted acts under IHL should not be labelled "terrorist" at the international level because attacks against lawful targets constitute the very essence of an armed conflict and should not be legally defined as "terrorist" under another regime of law. To do so would imply that such acts must be subject to criminalization under that legal framework. This would create conflicting obligations of States at the international level, which is contrary to the reality of armed conflicts and the rationale of IHL that does not prohibit attacks against lawful targets. It should be noted that in a domestic jurisdiction, terrorist acts would still remain subject to ordinary domestic criminalization where a Non-International armed conflict (NIAC) is involved.

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193 A Preliminary Objection has been raised in the Kwelo case on the issue and awaits Ruling.
194 Several cases have been filed but only two have been completed.
196 ibid
197 See the 32nd International Conference of the Red Cross and Red Crescent (Geneva, Switzerland, 8-10 December 2015)
The ICRC is of the view that adding another layer of incrimination by designating acts that are not unlawful under IHL as “terrorist” may also discourage IHL compliance by non-State armed groups which are party to a NIAC. Any motivation they may have to fight in accordance with IHL would likely erode if, irrespective of the efforts they may undertake to comply with it, all of their actions are deemed unlawful.

Before I discuss the practical examples of adjudicating upon ‘terrorist’ acts as violations against the IHL, I am inclined to consider, albeit, briefly the issues involved in the Global war against terrorism. Prior to 11 September 2001, there was not so much fuss about fighting terrorism internationally. However, in the aftermath of the terrorist attack on the twin towers in New York, the attack had to be classified hence the term ‘transnational armed conflict’ was coined. Geoffrey S. Corn states that following the US’s response to the terror attacks of 11 September 2011, a number of theories emerged ranging from a strict adherence to the widely accepted international/internal armed conflict paradigm to the other extreme proffered by Corn and others, that military operations conducted against international terrorist organizations like Al Qaeda should be characterized as transnational armed conflicts: non-international armed conflicts of international scope.198

What was at stake was to justify the action taken by the US, which was a tactical military response and bring it within a framework of established legal norms.199 The term ‘transnational armed conflict’ was coined to bridge the chasm between two traditionally acknowledged situations of international or inter-State armed conflicts and non-international armed conflicts. “Transnational armed conflict” was intended to denote a non-international armed conflict within the meaning of common Art.3 of the Geneva Conventions but of international scope, that is, what would be referred to as “internationalized non-international armed conflict.” Corn states that “the objectives of the concept on ‘transnational armed conflict’ were simple — adopt a characterization for the non-international armed conflict with Al Qaeda consistent with the non-State.

Nonetheless, the international character of the organization require application of the fundamental LOAC principles and deny the Al Qaeda any credibility windfall, which could result, if they were to suggest that the conflict was international within the meaning of the law.”200 It is sometimes called “militarized extraterritorial law enforcement.”201 President Bush was advised by his Attorney General and he concluded that the Law of Armed Conflict (LOAC) was inapplicable to the Al Qaeda members captured in the struggle by Americans.202 According to Corn, this was possible on the basis that armed conflict with Al Qaeda did not fit within the international/internal armed conflict law triggering equation as the Al Qaeda was not considered to be a State. Therefore, the conflict could not qualify as international since the Al Qaeda operated outside the territory of the US and it could not squarely qualify as an ‘internal’ armed conflict.203

In Hamdan v Rumsfeld,204 the US Federal Supreme Court held by a majority that the term ‘non-international armed conflict’ in common Article 3 is not restricted to internal armed conflicts but covers any armed conflict which does not qualify as international within the meaning of Art 2 and

199 Supra
200 Geoffrey S. Corn, “Blurring the Line Between the Jus ad Bellum &the Jus in Bello” in Non-International Armed Conflict in the Twenty First Century by Naval War College (US), p. 62
202 Geoffrey S. Corn’s Article in the Naval War College (US) publication (supra), p. 61
203 Supra, p. 64
204 US 557 (2006)
this would trigger the minimum humanitarian obligations. Against this backdrop, a discussion of terrorism as an IHL crime is timely.

**TERRORISM AS A WAR CRIME UNDER IHL**

The prohibition of terror against the civilian population was a part of customary international law from at least the time it was included in treaties. In Article 33 of Geneva Convention IV, an expression of customary international law is found which prohibits in clear terms “measures of intimidation or of terrorism” as a form of collective punishment, as they are “opposed to all principles based on humanity and justice.” The International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL)’s Statute contain provisions prohibiting ‘acts of terrorism against a civilian population.’ Further, the Additional Protocols also have similar provisions as stipulated in Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II of 1977.

There have been several cases in international law which have interpreted these provisions. In the *locus classicus* case of *Galić Stanislav v The Prosecutor*, it was held that the purposes of Additional Protocols I and II were expressly stated by the High Contracting Parties in the preambles to those treaties. They were: to “reaffirm and develop the provisions protecting the victims of armed conflicts” and “to ensure a better protection for the victims” of armed conflicts. Additionally, Protocol II is further considered to embody the “fundamental principles on protection for the civilian population.” Articles 51(2) of Additional Protocol I and 13(2) of Additional Protocol II, in essence, contribute to the purpose of those treaties. They do not contain new principles but rather codify in a unified manner the prohibition of attacks on the civilian population. The principles underlying the prohibition of attacks on civilians, namely the principles of distinction and protection, have a long-standing history in international humanitarian law. They also constitute “intransgressible principles of international customary law.” Considering that the case of *The Prosecutor v Alex Tamba Brima, Brizy Bazzy Kamara and Santigue Kanu (“the AFRC Case”)* relied upon the *Galić* case, I will refer to them as appropriate and cite the one which enunciates the point I wish to make.

The Indictment in Count 1 of the *AFRC Case* alleged that the armed attacks throughout the territory of the Republic of Sierra Leone including BO, Kono, Kenema, Bumbali etc. targeted the civilian population and were primarily meant to terrorize the civilian population for failing to provide sufficient support to the AFRC/RUF and for supporting the Kabbah Government forces. The acts of terrorism were charged within the auspices of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(d) of the Statute of the SCSL.

The Prosecutor relied on the evidentiary basis as shown in Counts 3-14 of the Indictment to demonstrate the acts of terror. Similarly, in the *Galić Case*, in Count I of his indictment, *Galić* was charged pursuant to Article 3 of the Statute and on the basis of Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II. It was held that the crime comprised of acts or threats of violence, the primary purpose of which was to spread terror among the civilian population. The offence encompasses the intent to spread terror when committed by combatants, in a period of

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205 Geneva Convention, IV, Article 33.
207 IT-98-29-A(30 November 2006)
208 *Galić* Appeals Judgment, para. 87, page 46
209 *ibid*
210 *ibid*
211 *ibid*
212 *ibid*
213 *SCSL-04-16-T*(supra)
214 *AFRC Trial Chamber Judgment*, para.1434,page 401
215 *Galić Appeals Chamber Judgment*, para. 69, p.31
armed conflict. The findings of the Appeals Chamber with respect to grounds five, sixteen and seven did not envisage any other form of terror.

For the purpose of brevity, I will go directly to what the elements of this offence entails. In the AFRC Case, the Kanu Defence argued that the crime of acts of terrorism does not encompass acts or threats of violence targeted at protected property but only protected persons.

The Trial Chamber noted that the protection of property is not the one which forms the object of protection from acts of terror. However, the destruction of people’s homes or means of livelihood and in turn their means of survival will operate to instil fear and terror.\textsuperscript{216} It was held that the \textit{actus reus} for the crime of terror involves “acts or threats of violence directed against protected persons or property.”\textsuperscript{217}

In the \textit{Galić} case, under the fifth ground of appeal, \textit{Galić} alleged that the Prosecution charged him with “infliction of terror” among the civilian population in Count 1 of the Indictment, but the Trial Chamber impermissibly convicted him of acts of violence with the intent to spread terror among the civilian population, thereby going beyond the scope of the Indictment and violating his right to a fair trial pursuant to Article 21 of the Statute.\textsuperscript{218} Furthermore, that the Trial Chamber “had no power to change the description of the criminal acts charged against the accused”\textsuperscript{219} \textit{Galić} claims that he had been convicted of an offence for which he had not been formally charged.\textsuperscript{220}

The Prosecution responded that \textit{Galić} had “misstated the situation” as “[t]here was no doubt that throughout the course of the trial, the offence at issue was drawn from the prohibition of terror in Article 51(2) of Additional Protocol I and Article 13 of Additional Protocol II.”\textsuperscript{221} Prosecution claimed that, while a Trial Chamber must confine itself to the charges set out in an Indictment, it is not bound to accept the elements of the crimes charged.\textsuperscript{222} The Appeals Chamber held that the determination of what are the legal elements of the crimes charged in an Indictment is not a duty of the confirming Judge. It is the responsibility of the Trial Chamber to ensure that an accused is only found guilty of a crime with respect to acts which constituted a violation of international humanitarian law at the time of their commission.\textsuperscript{223}

Hence, the Trial Chamber is not bound to accept the elements of an offence as proposed by the parties but is responsible for determining those elements for itself.\textsuperscript{224} Accordingly, the Trial Chamber’s holding that “\textit{infliction of terror}” is not an element of the crime of terror against the civilian population was perfectly within its authority.\textsuperscript{225}

In the \textit{AFRC Case}, The Trial Chamber held, \textit{inter alia}, that although the acts of burning did not fall within pillage, burning \textit{per se} was particularized by Prosecution in Count 14 and as such, the Defence had been put on notice. The Court held that the burning acts were part of the \textit{actus reus} of the crime of terror as an act of violence directed against protected persons or their property.\textsuperscript{226}

\textsuperscript{216} \textit{AFRC Case}, para. 668, page 205
\textsuperscript{217} \textit{AFRC Trial Chamber Judgment}, para. 2639, p.401
\textsuperscript{218} Defence Notice of Appeal, paras 11-14. \textit{See also} Defence Appeal Brief, para. 32.
\textsuperscript{219} Defence Appeal Brief, para. 31.
\textsuperscript{220} Defence Appeal Brief, para. 32. \textit{See also at} 63-64, 97
\textsuperscript{221} Prosecution Response Brief, para. 5.2.
\textsuperscript{222} Prosecution Response Brief, para. 5.3.
\textsuperscript{223} Para. 71, \textit{Galić Appeal Judgment}, p. 32-Fn 208
\textsuperscript{224} Para. 71, \textit{Galić Appeal Judgment}, p. 32-Fn.209.
\textsuperscript{225} \textit{Ibid}, p.32. There have been several cases before the International Tribunal in which a Trial Chamber or the Appeals Chamber decided not to adopt the elements of the crimes proposed by the Prosecution.
\textsuperscript{226} \textit{AFRC Case}, para. 1432, p. 401
Furthermore, regarding the “specific intent” constituting the purpose of the attack, the Kanu Defence argued that this intent is a requisite element as the Accused must be aware of the possibility of terror resulting and that the terror was specifically intended.

Relying upon the Galić Case, the Trial Chamber in the AFRC Case held that the unlawful acts need not be the only purpose of acts/threats of violence as the purposes may co-exist simultaneously. However, the purpose of spreading terror among the civilian population must be the principal one. The determinant factor of whether the purpose of terrorizing the civilian population is the major one may be inferred from circumstances of the acts/threats considering their nature, manner, timing and duration.\(^{227}\) The Trial Chamber also held that the series of amputations against the civilian population were used by the AFRC with the primary purpose of spreading terror amongst the civilian population. As the people hands were being amputated, they were told to go to “Pa Kabbah’ or to ECOMOG to get other hands.”

In Freetown, there was “operation cut hand” where people were being asked whether they wanted “long sleeves (amputation of the arm at the wrist)” or “short sleeves (amputation of the arm at the bicep).”\(^{228}\) The Trial Chamber held that with regards to the elements of war crimes, it was satisfied that the elements in Count I (acts of terror) have been established beyond reasonable doubt.\(^{229}\) Similarly, the Trial Chamber in the Prosecutor v Issa Sesay, Morris Kallon and Augustine Gbao (RUF)\(^{230}\) held that carvings practiced by the RUF were notorious, and served as a permanent, visible and grotesque reminder to all civilians of the consequences of resisting or escaping from the AFRC or RUF or of supporting Kabbah or ECOMOG. The Trial Chamber was therefore satisfied beyond reasonable doubt that the AFRC fighters who carved the words “AFRC” or “RUF” into the bodies of 18 captured persons were acting with the primary purpose of spreading terror.\(^{231}\)

CONCLUSION

The practical constraints that may hamper the application, implementation and enforcement of IHL have been highlighted such as the legal classification of situations. The discourse has also considered the distinction between international and non-international armed conflict, “global war against terrorism,” terrorism per se and terrorism as an IHL crime. Although the crime of terrorism has not been considered in detail, some acts designated as “terrorist” could hinder the supportive services offered to victims of war by the ICRC. This is likely to call into question the very purposive creation of the ICRC and its corresponding national associations which were established over a century ago. I agree with the proposal by the ICRC that “measures adopted by governments, whether internationally and nationally, aimed at criminally repressing acts of terrorism should be crafted so as not to impede humanitarian action.”\(^{232}\) Courts of law should continue enunciating what would amount to “terrorist acts” within IHL so that a uniform interpretation is achieved.

\(^{227}\) AFRC Case, para. 1441-1442, page 403; Galić Appeal Judgment, para. 104, page 403

\(^{228}\) ibid, para. 1461, p. 408

\(^{229}\) ibid, para. 1633, p. 448

\(^{230}\) Prosecutor Issa Hassan Sesay, Morris Kallon & Augustine Gbao (the RUF Case), SCSL-04-15-T, 25 February 2009

\(^{231}\) ibid, para. 2044

\(^{232}\) Report on the International Humanitarian Law and the challenges of contemporary armed conflicts Presented on 31st International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 28 November – 1 December 2011
The problem of how the judiciary should deal with adverse comments by politicians or the media is not new. For as long as there have been judicial decisions there have been criticisms of lawyers and judges. Solomon’s first ruling (before it was revised) provoked a distraught response from the real mother. One of Shakespeare’s characters in Henry IV, Part II who was intent on overthrowing the state said that the first thing to be done was to kill all the lawyers. Criticism varies from uncomplimentary jokes to more serious criticism. I suspect we can all live with the jokes, but serious criticism of judges raises different issues.

Recent serious criticism of judges around the Commonwealth has included: criticisms about judges and their role in society in Bangladesh following a decision quashing a recent amendment to the Constitution; and criticism of the Courts in Australia in a manifesto by a political party, which led to a response from the Judicial Conference of Australia. In this speech, I will look at the common law offence of scandalising the Court to see whether this offence will provide the answer to dealing with unfair criticism of judges. The common law offence of scandalising the Court forms part of the law of contempt.

This common law offence was considered to have been discovered or invented by Wilmot J. in *R v Almon* in a draft judgment which was not delivered because the prosecution was discontinued. The draft judgment was published in the nominate reports (1765) Wilm 243 because it was said to contain so much legal knowledge that it was worthy of being preserved. The existence of the offence recognised the truism that criticism of the judiciary can undermine public confidence in systems of justice to the detriment of all society.

The elements of the offence of scandalising the Court were defined by Lord Russell CJ in *R v Gray* [1900] 2 QB 36 who said: “any act done or writing published calculated to bring a Court or a judge of the court into contempt, or to lower his authority, is a contempt of court ... subject to one and an important qualification. Judges and courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no court could or would treat that as contempt of court”. It might be noted that the journalist, the editor of the Birmingham Daily Argus, in that case had described Darling J. as “an impudent little man in horsehair, a microcosm of conceit and empty-headedness”. The journalist had noted that “no newspaper can exist except on its merits, a condition from which the bench is exempt, happily for” the Judge. The editor was fined £100.

This meant that an act done or writing “calculated” to lower the authority of a judge or court was an offence, save where there was “reasonable argument or expostulation” that the judicial act was contrary to law or the public good. On the face of it the Courts and Judges were very well protected from criticism. It might have been thought that they were too well protected, but at least it was recognised that if there was a reasonable argument or expostulation that the judicial act was contrary to law there would be a defence. This meant that if a Judge was rightly identified as corrupt, proceedings could not be brought.

In *Ambard v Attorney General for Trinidad and Tobago* [1936] AC 322 Lord Atkin commented on and expanded the defences to the offence by holding that “no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice” recording that “the path of criticism is a public way: the wrong-headed are permitted to err therein: provided that members of the public abstain from imputing improper
motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue ...” The extent to which truth was a defence was an issue of controversy.

In England and Wales the last successful recorded prosecutions were in 1930 and 1931, although there had been some attempted prosecutions since that time. Even by the end of the 19th century Lord Morris, when giving judgment in the Privy Council, said that “committals for contempt of court by scandalising the court itself have become obsolete in this country”, see McLeod v St Aubyn [1899] AC 549 at 561. Lord Diplock repeated the comment about the offence being “virtually obsolescent” in Secretary of State for Defence v Guardian Newspapers Ltd [1985] AC 339. Indeed in 1987 the Daily Mirror published an upside down photograph of 3 Judges with the caption “You Fools”. The Judges had granted an injunction on appeal preventing publication of the Spycatcher book.

It was against this background that in March 2012 the Attorney General for Northern Ireland obtained leave to prosecute Peter Hain MP for statements in his book “Outside In” in which Peter Hain criticised Lord Justice Girvan’s handling of a judicial review claim when sitting as a trial judge. An appointment to a committee made by Mr Hain had been quashed. Mr Hain spoke of “high-handed and idiosyncratic behaviour” and said that the Judge was “off his rocker”, claiming that the then Lord Chancellor had agreed with his assessment in a private conversation. The prosecution was discontinued after Mr Hain issued a statement clarifying his intention behind the remarks.

There had long been calls for the offence to be abolished. Arguments for abolition were made in a number of different ways. First, it was said that the offence was based on dubious assumptions as to its necessity. For example if confidence in the judiciary was so low that statements by critics would resonate with the public, such confidence would not be restored by a criminal prosecution. Secondly, the existence of the offence would have a chilling effect on freedom of expression. Thirdly, the modern offence recognised that some of criticism of the judiciary was lawful, and it was difficult to draw the line between lawful and unlawful criticism. Finally where criticism merited a response there were other public methods of answering it for example a public statement by the Lord Chancellor (in England and Wales) or libel proceedings.

During the passage of the Crime and Courts Bill in England and Wales amendments were tabled seeking the abolition of the offence of scandalising the Court. These were withdrawn because the Government undertook to review the matter. The Law Commission produced a consultation paper (“Contempt of Court: Scandalising the Court”) which concluded that the offence was probably compatible with the provisions of the European Convention on Human Rights but which recommended abolition of the offence. At paragraph 49 of the report it was noted that in England and Wales it was customary to emphasise that the offence of scandalising the court was not to protect the personal dignity of the judges, but the administration of justice as a process, whereas the offences upheld by the European Court of Human Rights had mainly been offences akin to criminal defamation designed to protect individual judges. This was because attacks on individuals were less worthy of respect than political free speech.

In the final event the common law of offence of scandalising the courts was abolished in England and Wales by section 33 of the Crime and Courts Act 2013. This provided that “(1) Scandalising the judiciary (also referred to as scandalising the court or scandalising judges) is abolished as a form of contempt of court ...” However subsection (2) made it plain that if the actions would also have amounted to another offence, proceedings for that other offence could continue. This means that judges will still have the protection of the criminal law for harassment or public order offences.

It was against this background that in November 2016 the Daily Mail greeted the judgment of the Divisional Court ruling in Miller v Secretary of State for Exiting the EU [2016] EWHC 2768 (Admin; [2017] 1 All ER 158 (since affirmed by the Supreme Court [2017] UKSC 5; [2017] 2 WLR 583) with the headline “Enemies of the People”. As is well known the absence of an immediate response and the
absence of a strong statement in support of the judiciary by the then Lord Chancellor, the Right Honourable Liz Truss MP, was said to be incompatible with her duties under the provisions of the Constitutional Reform Act 2005. Comments have been made that there are principled differences between adverse and public comments on the decision on the one hand and abuse of or attacks on individual judges on the other hand, which comes closer to reflecting the jurisprudence of the European Court of Human Rights.

However although in England and Wales the common law offence of scandalising the court has been abolished, its continued existence in other Commonwealth jurisdictions has been declared to be compatible with the fundamental rights and freedoms provisions.

In *Dhooharika v DPP of Mauritius* [2014] UKPC 11; [2015] AC 875 the Privy Council held that the offence of scandalising the courts was compatible with the right to freedom of expression, provided that the restriction on free speech was proportionate. In that case the criticisms of the Chief Justice of Mauritius by a “highly controversial” unsuccessful litigant had been prominently reported in a newspaper. The DPP had brought proceedings for contempt and the editor had been sentenced to 3 months’ imprisonment. The editor’s appeal was allowed on the basis that the editor had not been given the opportunity to give oral evidence but had been restricted to adducing affidavit evidence, and oral evidence might have led to a different result where there were issues of good faith of the individual editor.

Lord Clark, who gave the judgment of the Privy Council specifically approved the earlier judgment of the Privy Council in *Ahnee v DPP* [1999] 2 AC 294 in which Lord Steyn had noted that the offence was “narrowly defined. It does not extend to comment on the conduct of a judge unrelated to his performance on the bench. It exists solely to protect the administration of justice rather than the feelings of judges. There must be a real risk of undermining public confidence in the administration of justice.” In these circumstances, it appears that the common law offence of contempt of court by scandalising the courts will continue, unless specifically abolished, in commonwealth jurisdictions. However the practical objections to the use of the offence of scandalising the court, including the objection that if the administration of justice is so adversely affected by criticism it is unlikely that its reputation will be restored by a prosecution before Judges, remain.

In these circumstances the common law offence of scandalising the court, assuming that it continues to exist in the relevant jurisdiction, is unlikely to provide a practical remedy when dealing with unjustified and unfair comments about judges made by politicians or the media.

Individual Judges will continue to be best advised to consider their own remedies. Although individual judges have in the past brought proceedings for libel in England and Wales, there are different views about whether that is a well-advised step for a judge. Judges might also, having considered them take the advice of a former judge which was to note the criticism, give a wry smile, and carry on which mirrors the advice of Mr Justice Bamwine of Uganda to have a thick skin.

It might be thought that the administration of justice is likely to be best defended by other constitutional protections. One of these protections include comity between the branches of Government. Comity requires respect between the different branches of Government. Comity should prevent unjustified and unfair public criticism of the judiciary by members of the legislature and executive (although everyone will recognise that unjustified and unfair criticism may continue to be made). Other relevant constitutional provisions include, in England and Wales, the constitutional obligation of the Lord Chancellor in the Constitutional Reform Act 2005 to uphold the rule of law, with all that is required by that. The role of judicial associations (including international associations such as the CMJA) in providing a short reasoned rebuttal should not be underestimated. Analysis of those other protections is for another day, but it seems safe to conclude that the answer to unfair criticism of judges from politicians or judges does not lie in proceedings for scandalising the Court.
"JUDGING AND EMOTION IN THE LOWER COURTS"

By Prof Sharyn Roach Anleu, Flinders University, Australia

Slide 1
Judging and Emotion in the Lower Courts
Sharyn Roach Anleu: Sociology
Flinders University, Adelaide, Australia

Slide 2
Judicial Research Project, Magistrates Research Project
* National Consultations with Magistrates 2000-01
* Magistrates Survey 2002
* National Court Observation Study 2004-05
* National Survey of Australian Magistrates 2007
* National Survey Australian Judges 2007
* Judicial Officers and Workload Allocation Study 2007-12
* National Interviews with Judges and Magistrates 2012-13

Slide 3
Ethical Guidance: International
Bangalore Principles of Judicial Conduct
Value 2: Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.
2.1 A judge shall perform his or her judicial duties without favour, bias or prejudice
2.13 A judge’s demeanour is crucial to maintaining his or her impartiality because it is what others see. Improper demeanour can undermine the judicial process by conveying an impression of bias or indifference. (Emphases added.)
Many judiciaries represented here have codes or guidelines for judicial conduct.

Slide 4
Skills and Qualities for Judicial Work
Survey Respondents identifying a quality as: essential or very important
* Impartiality 99%
* Integrity/High ethical standards 99%
* Communication 95%
* Courtesy 90%
* Being a good listener 87%
* Patience 85%

Slide 5
Ethical expectations, emotions and judicial practices
Empirical research shows variation in
* Contexts of Judicial work
* Judicial attitudes
* Judicial practices

Slide 6
Interactional Demands

<table>
<thead>
<tr>
<th></th>
<th>Supreme Court (N=111)</th>
<th>District/County Court (N=128)</th>
<th>Magistrates Courts (N=239-240)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal representatives are well prepared Always/Often</td>
<td>70%</td>
<td>47%</td>
<td>38%</td>
</tr>
<tr>
<td>My time is taken up explaining things to</td>
<td>10%</td>
<td>5%</td>
<td>58%</td>
</tr>
<tr>
<td>unrepresented Litigants</td>
<td>Always/Often</td>
<td></td>
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</tr>
</tbody>
</table>

Source: National Surveys 2007

**Slide 7**

Interactional skills as resources

I think **courtesy** is very important and I think, umm, **dealing with people with respect I think is the most important** and requiring some respect for the court in return and most people do actually **behave respectfully in court if they’re treated with respect.**

[I 36; Female judge] (Emphases added)

**Slide 8**

Interaction and emotion(s) in judicial work

Survey respondents identifying a quality as: **essential or very important**

- * International skills: 79%
- * Compassion: 64%
- * Empathy: 56%
- * Managing emotions of court users: 56%
- * Sense of Humour: 54%

Whole judiciary (N=540-549); Source National Surveys 2007

**Slide 9**

Making decisions is very stressful

- * Strongly disagree/disagree: 36%
- * Strongly agree/agree: 35%
- * Neutral: 30%

Whole judiciary (N=538); Source: National Surveys 2007

**Slide 10**

Limits

We get a lot of difficult people before us in court, not only defendants but also some //very unskilled lawyers and sometimes **It’s quite difficult to deal with them and difficult not to be rude but we’ve got to try** ...if you just sit there and passively – there’s a **tension between passive and active judging** I think too and **If you just sit there passively you could be there for three times the amount of time that it actually takes but, and we don’t have that luxury – if it’s a luxury.**

[I 09; female magistrate] (Emphases added)

Source: National Interviews 2012-13

**Slide 11**

Judicial display of emotion

There’s often matter which brings tears to your eyes and I think that my role is that, **my role isn’t to sit there and empathise** and cry with them, my role is to be that **face of the judiciary,** that face of the community, that face that is acknowledging that grief without participating in it as such but I also **don’t think there’s anything too wrong in showing that you’ve been affected by** what’s happened.

[I 17; male magistrate] (Emphases added)

Source: National Interviews 2012-13

**Slide 12**

Judicial Research Project

We appreciate funding, financial and other support from the Australian Research Council (LP0210306, LP0669168, DP0665198, DP109888, and DP150103663), Flinders University as well as the Australasian Institute of Judicial Administration association of Australian Magistrates and many courts and judicial officers. We are grateful to several research and administrative assistants over the course of the research, especially to Colleen delaine, Rhiannon Davies, Jordan Tutton and Rae Wood. All phases of this research involving human subjects have been approved by the Flinders University Social and Behavioural Research Ethics Committee. Thanks also to Ainhoa Markuleta Letamendia and the International Institute of the Sociology of Law (Spain) for assistance.
“COPING WITH FINANCIAL AND JUDICIAL STRESS”

By His Worship Godfrey Kaweesa, UJOA President

INTRODUCTION
In my presentation, the discussion of financial and judicial stress is based on the key issues in the Conference theme and the Constitutional provisions that create Judiciary as an arm of government in different states. I will use Uganda’s Constitution which I am familiar to, for purposes of my discussion. Therefore, before going into the discussion, let me give operational definitions to the important terms that are going to form the basis of my analysis and arguments.

Definition of Key Terms:
Effectiveness: for purposes of this discussion, effectiveness will mean “doing the right things.”
Accountability: for purposes of this discussion, accountability will mean “doing the things right.”
Inclusive-judiciary: This will mean a pro-people judiciary.
Financial Stress: A wanting financial position, be it for the judiciary as an institution or a judicial officer as a person.
Judicial stress: This will mean that stressing working environment surrounding the justice delivery process, both at individual and institutional level.

I cannot discuss the coping mechanisms before I point out the causes and associated challenges of the stress that is surrounding the justice delivery systems in states. In this paper, I will use Uganda as a case to discuss today. Stress is a burn-out situation where one undergoes a problem for so long a time, without a solution, and does not expect a solution in the near future.

SYSTEMIC CHALLENGES THAT CAUSE STRESS TO JUDICIAL OFFICERS
Governments’ failure to operationalize constitutional provisions that protect independence of the Judiciary. In Uganda, the term “Independence of the Judiciary” sounds brief, but it is wide and deep, and creates special powers for the agency and the people therein, in this case (judicial officers). For purposes of this discussion, I will point out only those powers that relate to the topic in discussion. The Constitution of the Republic of Uganda (1995) under Chapter Eight creates the Judiciary and vests the powers to administer justice in it. These powers go with a constitutional enabling environment that gives a Judicial Officer as a state moral agent, powers to deliver justice to all in the most upright manner. These provisions are mainly under Article 128 of the Constitution.

Article 128:
(1) In the exercise of judicial power, the courts shall be independent and shall not be subject to control or direction of any person or authority.
(2) No person or authority shall interfere with the courts or judicial officers in the exercise of the judicial functions.
(3) A person exercising judicial power shall not be liable to any action or suit for any act or omission by that person in the exercise of judicial power.
(4) The administration expenses of the judiciary, including all salaries, allowances, gratuities and pensions payable to or in respect of persons serving in the judiciary, shall be charged on the Consolidated Fund.
(5) The Judiciary shall be self-accounting and may deal directly with the Ministry responsible for finance in relation to its finances.
(6) The salary, allowances, privileges and retirement benefits and other conditions of service of a judicial officer or other person exercising judicial power shall not be varied to his or her disadvantage.

Among others; (see the Constitution of the Republic of Uganda 1995)
The Constitutional provisions as you may see are very ideal but in practice, the situation is different. Whereas Baron de Monstequie in his work “Spirit of Law 1748” espoused the doctrine of separation...
of powers that Judiciary is an equal arm of government in tandem with the Executive and Legislature, in Uganda’s case the Legislature and Executive overpowers the Judiciary. Judiciary’s direct powers are only in courts but when it comes to administration and management of the Institution; its affairs are controlled to a large extent by Cabinet with the Legislature as a clearing house for its demands. This implies that Articles 128(5) (6) and (7) are not practicable.

Also lack of enough resources has caused workforce shortage because the judicial officers’ appointing authority which is Judicial Service Commission cannot appoint enough workers when the paying Institution’s financial status is questionable. But on the community side, the number of people yearning for justice increase every other day due to increased population that has raised crime commission and misunderstandings amongst populations.

- The result of poor financing and less manpower causes increase of unattended to files or call it delayed justice in the hands of judicial officers. This has prompted our administration to set basic performance targets, but this on its own, from our observation as UJOA, has increased stress and poor health among Judicial Officers due to over work and pressure. On this, UJOA as an organization intends to engage our managers to deliberate on this issue. However, on the court users’ side, they believe delays are outcomes of bribe sourcing which I cannot commit myself so much but from my explanation, I think it is much on the poor facilitation and pay of Judicial Officers which causes instability in the process.

- When it comes to personal financing, it is clearly known that judicial officers have families and children that go to school. Yet majority of them work in stations outside their home areas, but the salary paid, in comparison to the cost of living, do not match. That stressing condition of not having enough to cater for their personal problems undermines performance at the work place, and others have lost marriages because of failure to fulfil their duties especially in home care and school fees for children. This matter sounds simple but very threatening especially to young officers with young families.

- Because, the court does not have enough resources to support justice delivery, this at times causes long stay of files on the judicial officers’ desks especially when a case needs more special input than just in-house hearing. For example, there are many land cases at the judicial officers’ desks in Uganda which require locus visits, but they cannot be done effectively due to lack of vehicles in some cases and in other cases fuel. The outcome of this exclusion has kept a Judicial Officer in a poor working environment both at the work place and at home.

The other problem is the sensitivity of cases especially land cases which are normally involving emotionally charged parties. Every other day, the lives of Magistrates are at stake, especially those who operate in lower courts, majority of which are up-country and rural. Increasing land conflicts have dramatically intensified mob actions amongst communities to the extent that locus visits are becoming more insecure on the side of anyone representing a government agency. Yet, the lower courts security caters for courts only, but not personal security of Judicial Officers, except in special circumstances. Magistrates would have used nearby police, but the cost of maintaining the privately solicited security is not manageable by a judicial officer privately. As you will appreciate, this is two way, it is an issue of finance and at the same time an issue of environmental unfriendliness, yet many land matters cannot be decided without visiting locus. In the end, this causes inaccuracy in judgment or case backlog. With inaccuracy, it causes unnecessary appeals and with case backlog, it undermines Judiciary’s integrity in the eyes of court users.

The court process involves other stakeholders. On the criminal side, initially it involves police and DPP’s office, lawyers and then court. However, the Judiciary does not have powers over those other stakeholders’ competencies. This means that mistakes done by other stakeholders can only be referred. This in such times, results in delayed justice. In other times, when not referred, it causes unnecessary appeals in the judicial system. But on the face of it, it’s the judiciary to blame in case of delay of omission or erroneous commission. This implies that sometimes, the Judiciary carries...
blames because they are the known agents. In the process, judicial officers and the Judiciary generally lose their integrity because of other people’s in-competencies.

CONCLUSION
In conclusion, judicial dependency which is contrary to the constitution has undermined effective and efficient justice delivery which has claimed judicial integrity in Uganda. On the side of the Judicial Officers, denial of independence in all terms as stated in the Constitution has caused the whole court environment to be stressful to the extent of stalling the justice process directly and indirectly.

RECOMMENDATIONS
In order to rectify the situation, the following should be done:

Judiciaries in all commonwealth countries should be granted full independence. This will sort out the operational challenges they are faced with now. Total independence comes with autonomy. This will enable the Institution to hire competent staff, and also to rationally motivate them and to manage discipline which will increase inclusiveness on the court users’ side.

Judicial Officers should get subsidized salary loans to help them bridge the economic gap they are experiencing, which is compounded by poor pay and national economic depression.

A friendly working environment, mindful of judicial officers’ lives should be created. For instance, Judiciaries should provide Counselling services, to help declining family relations and also to help individuals with the qualitative problems they have, plus creating judicial social clubs where juniors can interact with seniors for mentoring, and also freely socialize in a safe place. Interaction with fellow colleagues builds the confidence of individuals through sharing problems and safely discussing sensitive issues that confront them at the workplace.

There should be a clear synchronized working policy to streamline the justice delivery process amongst all stakeholders in the Justice, Law and Order Sector in all countries, if the justice delivery process has to be effective, transparent and pro-people (or inclusive).

Administration of the Judiciary Acts to operationalize Constitutional Provisions on the Judiciary should be enacted across Commonwealth countries. In Uganda, such an act has been on the shelves for the past 15 years, and failure or inordinate delay by the Executive and the Legislature to table it in Parliament, is one of the reasons that triggered the Industrial Action. Such an act seeks to guarantee the Uganda Judiciary’s Financial Autonomy through provision for a Judiciary fund and Human Resource autonomy i.e. (delinking all Judiciary staff from Ministry of Public Service).

Unity and Solidarity. From the Benkort sessions on welfare on Monday, it was evident that the majority Judiciaries in the Common wealth are stressed in one way or the other through marginalization by the other two pillars of state.

UJOA recommends as follows;

- Executives usually issue congratulatory statements whenever a fend of state is elected in any country. Sometimes, they even come for the rescue of their peers through military intervention (like Tanzania did to oust Field Marshal, life president, Conqueror of the British Empire etc. Idi Amin in 1979). Can we have each Common wealth country study and issue a statement, whenever a unique situation manifests in a given Judiciary? For instance, UJOA once again applauds Chief Justice Maraga and the Supreme Court of Kenya for that historical precedent that was set. But the Executive has severely bashed and threatened the court for executing its Constitutional mandate.

- On 22nd July, 2017, Judicial Officers through their Association, Uganda Judicial Officers Association resolved tools to employ Industrial Action for necessary tools of trade like Adequate operational funds to meet performance targets, motor vehicles to facilitate supervision and land justice,
housing, medical insurance, salaries befitting Judicial Officers and security. These concerns I believe cut across the Common wealth and therefore there is need for support.
- CMJA should also rise to the occasion whenever need arises.

**Austerity measures and frugality among Common Wealth Judiciaries.** Resources in the Judiciary are limited and therefore should be expended wisely.
The following is recommended;
- Resources to the 3 Arms of state should be appropriate and proportionate.
- Majority of Judiciary budgets should be expended on case adjudication the primary mandate, then on Administrative expenses.
- Expenditures which may be awarded should indeed be avoided. For instance, in 1799, Napoleon Bonaparte abolished the wig in his empire as being out fashioned, and yet we still maintain them in Common wealth countries. Research has shown that wigs apart from scaring court users, are also quite expensive, and alien to Africa, which traditionally is not a home to horses. Can all Judiciaries then adopt simple, less costly robes reflecting our heritage e.g. robes bearing bark cloth, cowrie shells and opolipo leaves (of course modified as won by Obi Okwonko in Flingo Fall Apart Nigeria)?

**Bridging the gap between the Higher and Lower Bench.** When the British handed over the flag of independence, unfortunately the legal regime relating to the Judiciary and administration of Justice was largely left intact. Executives and Legislatures have accordingly explained this rift of Higher-Lower Bench in a spirit of Divide and Rule to marginalize Judiciaries. We recommend as follows;
- Chief Justices should strive to ensure that their Judiciaries are administered as one unit whose primary mandate is to deliver a judicial service to the citizens.
- The comparison ratio pertaining to salaries and fringe benefits should be equitable and narrowed. The difference between the highest earning judicial officers in the Judiciary should be proportionate to the lowest earning judicial officers. Allowances and benefits should cut across board, including tools of trade.
- Titles of “Judge”, “Magistrate” that tend to promote discrimination and cause confusion among the public should be dispensed with. In one of our local dialects Luganda, “Mulamuzi” refers to a Judge, a Justice or a Magistrate. In a certain Cameroonian state, all judicial officers to the Supreme Court are referred to as Magistrates. In Rwanda, they are all Judges. Can we have something like Judge of the court of 1st instance and 2nd Appellate, instance 3rd Appellate etc.?
- The Executive and the Legislature tend to take aim at as when we maintain titles like “Lordship”, “Worship”. During the mediaeval times, “Lordship” was associated to feudalism and nobility. “Worship” tends to confuse the public with worshipping God. I believe in the 21st Century, the commonwealth should adopt the simple title of “Your Honour” just like the Magistrates.
- Enhance both civil and criminal jurisdictions especially for the Lower bench to enable them to have dignified and meaningful work. The Higher bench could then retain Appellate jurisdictions, to refine decisions of the Lower bench (or First instance counts).
- Establish the unit cost of completing any given civil or criminal case and fund accordingly as per continual plans. Enhancement in jurisdictions should go hand in hand with enhancement in the Budget.
- In order to improve access to Justice, translate the laws into local languages and adopt such during court proceedings where possible.
- Simplify court procedures and embrace Alternative Dispute Resolution mechanisms like mediation, arbitration, small claims procedure etc.
- Commonwealth Judiciaries should adopt robust fundraising strategies as per their strategic plans, but without compromising their codes of conduct. The Bangalore and Latimer House should drop the motion of sitting back and waiting for others “to do things for us”. In Uganda, Chief Justice Bart Katureebe usually engages the President, Members of Parliament and other stake holders for the benefit of the Judiciary.
**Human Resource manuals and policies.** Commonwealth Judiciaries should enact all-inclusive Human Resource manuals and policies if stress is to be alleviated. “Adhocism” which is not tandem with modern institutional management practice should be dispensed with. Such HR manuals should include clear policies on things like Deployment, Promotions, Counselling, Health and safety, Disciplinary issues etc. “Public Service Standing Orders” which guide many internal operations in our Judiciary sound arbitrary and may not be tailored to suit the unique nature of the Judicial service.

**Corporate Social Responsibility.** Simply defined, *Corporate Social Responsibility simply refers to corporations and institutions giving back to the public in order to improve on their images.* Activities here may include things to do with a Judiciary leaving suit land for tree planting to conserve the environment, free outreach programmes to schools to counsel them about the law and career development, charitable donations by Judicial officers etc. There is no doubt that this modern management practice of CRS once adopted by commonwealth Judiciaries shall relieve both financial and institutional stress.

**Networking and benchmarking in Common Wealth Judiciaries.** There exists a great disconnection and communication gap between commonwealth Judiciaries. Can we have the CMJA secretariat share a catalogue of email addresses and phone contacts of all CMJA members, to enhance cohesion and networking among commonwealth Judiciaries? Can we have more benchmarking and exchange programmes so that judicial officers in our respective countries can learn from best practices?

**Research.** The Uganda Judicial Officers Association, UJOA in conjunction with the CMJA secretariat proposes to conduct a comparative research titled “An Overview of the Relationship between the 3 pillars of state in the Common wealth and their resourcing.” The objective is to develop a comprehensive Report on all Judiciaries in the common wealth from which other and different variables can be compared so that no Judiciary is left behind. A common wealth Judiciaries’ checklist shall then be developed and it is hoped, the Report shall be shared in the next CMJA in Australia. A tool has been developed which shall be shared and completed by members through email.

In total, common wealth Judiciaries should stop reading from the Old Testament Book of Lamentations and resort to the New Testament Book of Acts of the Apostles, if the Judiciary is to reclaim her rightful place as a co-equal Arm of state, in tandem with the Executive and the Legislature. Otherwise, history and posterity shall never forgive our generation for sitting back, while the Independence of the Judiciary is fettered.
SPECIALIST SESSION

“IMPROVING COURT PROCEDURES”

By Principal Judge Ferdinand L.K. Wambali, Tanzania

INTRODUCTION

It may be neither desirable nor feasible to discuss all the matters pertaining to court procedures in view of the limited space and time. This paper therefore briefly discusses an overview of court procedures, challenges in the use of procedures in the administration of justice, some initiatives of reforming procedures in Tanzania and some recommendations in improving procedures. The paper attempts to respond to the theme of the conference of “Building an effective, accountable and inclusive judiciary.”

Court procedures govern the conduct of litigation. Court procedures are the road map for steering a case through trial and beyond. Court procedures are very important tool because they provide a guideline for each step in the litigation process and also set time limits for certain steps within which some actions must be completed. Court procedures provide answers to many questions about the litigation process. Procedure contain in a large measure the body of rules whereby a machinery of the court is set in motion for determining the rights and liabilities of the parties or litigants.

According to the Halsbury’s Laws of England, 4th Edition, Vol. 37 PP 18 – 19, Para 10, the function of procedural law is to provide the machinery or the manner in which the legal rights or status and legal duties may be enforced or recognised by the court of law or other recognised or properly constituted tribunal.

Court procedures can be an effective tool in the management of cases and can achieve any of the following important measures:

- Prescribing time frames within which parties are expected to do certain things/actions;
- Prescribing punitive measures for undue delay (e.g. awarding costs);
- Empowering registrars to dispose of any non-contentious matters such as pre-trial applications;
- Compelling lawyers and litigants to exhaust opportunities for settlement before opting for a full trial of the case;
- Prescribing guidelines for the conduct of scheduling conference and preliminary hearing;
- Prescribing the format for full disclosure through pleadings, discovery etc. in civil cases and pre-bargaining in criminal cases; and
- Empowering the court to dispose of cases summarily where pleadings disclose no case or defence.

It must be emphasized that any improvement of court procedures must aim to facilitate:

- Equal treatment of all litigants by the court.
- Timely disposition consistent with the circumstances of the individual case.
- Enhancement of the quality of the litigation process.
- Public confidence in the court as an institution.

Therefore in improving court procedures, reforms must be initiated which encompasses the entire criminal and civil justice chain as well as many issues beyond the justice system. But it must be remembered that “a one – size - fits all” does not work. Reforms must be tailored to address specific matters and stakeholders must be involved from the start. Procedural improvement must be part of the access to justice initiative. This is so because there is always a general tendency for access to justice reform to focus on programmes supporting formal mechanism of justice, especially process of adjudication through the judiciary system leaving aside Quasi – judicial bodies.
There must be reforms to both formal and informal justice mechanism. It must be noted that the justice system comprises the courts and tribunals, other forms of dispute resolution, the legal profession – public and private and investigative bodies, principally the police force.

Indeed, as plainly stated in the Draft Report of the Consultation Review Committee on the Criminal and Civil Justice System in Western Australia; “The tide of history has not only produced a system. It has resulted in a culture, which affects all those working within the system; judges, lawyers and administrators. Any attempt to reform the justice system must take that culture into account, not as an inseparable obstacle to reform but as something that is deep seated and changing which is a long term process.”

In this regard, no one can deny a fact that improved judicial performance requires changes in behaviour and culture. In turn, cultural change can be supported by transparency and accessible information. The mission of the judiciary therefore must be to provide the people an open, fair, efficient and independent system for the advancement of justice under the law.

On the other hand, while procedure is important in access to justice, it is acknowledged that in many jurisdictions, including Tanzania, procedures and court processes are outdated and have made the litigation process slow and cumbersome to the extent of denying access to justice for many.

In this regard, I cannot resist the temptation of quoting the following comments by the Hon Mr. Justice James Ogoola (retired Principal Judge of Uganda and Justice of East African Court of Justice):

“The machinery of justice crawls at the proverbial snail’s pace – leaving in its slimy tracks, footsteps of discontent, dissatisfaction and frustration, costing the litigant time and effort, and exhausting his patience and pocket book. Oftentimes, one wonders whether such a system is not deliberately designed to meet the financial interests of the advocates who being in the driver’s seat of this brand of litigation, contrive every technicality in the rates and every subterfuge in the statute book, to defeat the smooth flow of the litigation process; and to distort the efficient trajectory of the litigation arc.”

It must thus be emphasized that while procedure is important in the litigation process, but judges and magistrates must be encouraged to consider substantive issues as prime and only act on procedural irregularities where they are pertinent to an issue on the case. Indeed, as observed by Granville Williams (PP 119 – 120) “Cases in court are either won or lost in accordance with the requirement that the judge utilizes the procedural code to act justly. The controlling role remain that the judge’s principal objective is to make an effective, practicable and workable decisions.”

In enforcing procedure, judges and magistrates should give attention to each case that come before them. The involvement of the court renders it responsible for managing the adjudicatory process and procedures thus avoiding legal gamesmanship of making and obtaining a just outcome or goal. Judges and magistrates must manage and control the flow of cases through the court processes and procedures by being actively involved in the proceeding rather than being passive. To borrow the words of the Supreme Court of India in Ram Chander v. State of Haryana, AIR 1981 SC 1036;

“The role of the judge has become more active rather than passive as it was earlier. Though the judge has to remain impartial and act like a referee but it does not mean that he is a passive spectator and “a mere recording machine.” The judge must participate in the proceeding in a very subtle manner so as to reach the grass – roots of the truth. He may ask short questions to elicit more factual information from either party or witness, but such questions should be asked so as “not to confuse, frighten or intimidate the witness” which action would vitiate the proceedings. The judge is not supposed to descend into the arena as it were.”
Therefore, through the use of innovative mechanisms judges and magistrates need to build an effective, speedy and fair system of administration of justice through proper application of court procedures.

OBSTACLES/CHALLENGES TO PROPER APPLICATION OF COURT PROCEDURES
It cannot be denied that in most of the jurisdictions court procedures in a significant way are outdated and therefore not responsive to the emerging social, political, economic and technological developments. To a large extent most of the court procedures used in some Commonwealth jurisdictions have been in existence before and after early days of independence for those countries which inherited the common law system. It must be emphasized as commented by Lord Woolf in the Report of Access to Justice in Civil Justice System Review that our jurisdictions are operating publicly funded justice system which should be responsive to the needs of society. Thus the proper functioning and application of procedures is of utmost importance in the administration of justice.

In this regard, court procedures have not escaped from challenges which should be addressed to make them effective and efficient. Some of these challenges are:

- Lack of coordination with other stakeholders involved in the delivery of justice which lead to misapplication of procedures and delay in case processing. Courts are dependent on good cooperation with various external partners in enforcing the rules of procedure and processes in criminal, civil and administrative cases.
- Existence of self-represented litigants who pose dangers to proper application of procedures through necessitating more pre-trial procedures, poor issue identification/definition and clarification, greater time and expenses being spent to respond to unclear or irrelevant evidence and excessive time being spent in hearing cases. It has been stated in many jurisdictions that self-represented witnesses may not question a witness excessively because:
  - They do not appreciate what is considered relevant at law.
  - They are not aware of evidentiary rules.
  - They are less constrained by any duty to the court.
  - They may use the opportunity to vent frustrations or engage in personal attacks.
- The inability, efficacy and dilemma of using affidavit and witness statement as evidence in court proceedings in place of oral evidence.
- The dilemma of application by litigants for recusal of judicial officers. Whether recusal/disqualification of a judicial officers in court proceedings be dealt in a standard procedure or as a matter of judicial ethics in codes of conducts.
- The extent of allowing the public and press to comment and report on pending court proceedings. Whether a procedure be set for members of the public and press to be excluded in judicial proceedings where publicity would compromise the interest of justice or should courts work on the principle of openness or closed to the press and public or a decision be on a case by case basis. (This concerns protection of privacy of the accused/witness in both court proceedings and in terms of wider publicity).
- The attitude and discretion of the courts in treating some procedures as of less importance and others as of greater importance and mandatory.
- Lack of effective and modern system and under-resourced information technology.
- The language used in courtrooms and the court records has some impact on the procedure on how justice is accessed by the majority of the litigants, lawyers and judicial officers. In some instances, the absence of interpreters complicates and obstructs the desire for smooth administration of justice.
- Long delays and prohibitive costs of using the judicial system.
- Severe limitations in existing remedies provided either by law or procedural rules or in practice.
- Lack of adequate information about what is supposed to exist under the laws, procedures, what prevails in practice and limited popular knowledge of rules of procedure by court users.
Lack of adequate legal aid systems.
Limited public and stakeholder participation in the changes or reforms involving the laws and court procedures which lead to reluctance or resistance in applying the same.
Excessive number of laws, procedural rules, regulations, practice directions/circulars on the same subject matter.
Lack of understanding by litigants and judicial officers on the importance of court forms in enforcing procedures.
Formalistic and cumbersome legal procedures in criminal, civil and administrative adjudication.
Avoidance of the legal system by litigants due to economic reasons, fear or a sense of futility of purpose.
Failure to automate the systems.
Failure to introduce appropriate procedural reforms.
Reluctance by litigants to stop their adversarial habits and ways in the application of procedures.
Inadequate or excessive use of judicial discretion in applying procedures.
Delay in issuing and service of summons and court processes.
Unnecessary adjournments.
Abuse of court processes and procedures.
Failure to supervise the court processes and movement of cases by judicial officers.
Disappearance and misplacement of court files.
Long delays, excessive or unreasonable fees and prohibitive costs of using the justice system.
Low competence and morale of judicial officers, staff and other legal sector personnel.
Weak enforcement of laws and procedures in execution of court orders and decrees.
The judiciary therefore need to respond to these challenges through proper strategic planning that emphasize on sustainability, effectiveness and accountability.

INITIATIVES/REFORMS MADE BY THE JUDICIARY OF TANZANIA TOWARDS IMPROVING COURT PROCEDURES
In recognition of the need to improve court procedures and access to justice, the Judiciary of Tanzania has taken some steps to review some procedures which are outdated and put in place some which never existed. Certainly some of the reforms which the Judiciary of Tanzania has undertaken exist in some jurisdictions. However, for the purpose of exchanging views and sharing experience, let me outline some of the steps taken in improving court procedures in Tanzania.

In order to strengthen access to justice and better improve the administration of justice through proper case management, the Judiciary Administration Act, 2011 (Act No. 4 of 2011) was enacted. Towards this end, the administrative structure of the Judiciary has changed by introduction of the cadre of court administrators to allow more time for judicial officers to deal with disposition of cases. Under the new arrangements and reforms, a new Directorate of Case Management has been established. The Directorate has the objective of facilitating smooth and speed adjudication of cases. Its functions are;

- To give adequate perusal and consideration to each case by ensuring proper documentation, serving of notices to parties and ensure compliance with the key steps in conduct of cases;
- To develop measures aimed at ensuring that the court maintains control of the case flow and management of proceedings;
- To develop, review and operationalise guidelines on how cases are managed and coordinated;
- To initiate and operationalise case flow management, strategies and reduction of backlog of cases;
- To carry out period standards to identify critical issues and best practices in case flow;
- To study final case evaluation reports prepared by case management committees in order to identify remedial measures and advise accordingly;
- To develop and operationalise case flow management systems as a standard business practice; and
• To provide all filed documents relevant to the case to the trial judge/magistrate and if required by law to parties.

It is important to note that the Directorate has three sections, namely:
• Case management system
• Cause listing and court forms
• Court Recording and Transcription

It is hoped that the Directorate will play a great role towards improving court procedures and effective case management system through application of modern information communication technology.

• Establishment of the Case Flow Management Committees (For criminal cases)
• Establishment of the Bench – Bar Monitoring Committees (For civil cases)
• Establishment of the Rules Committee in 2013.
• Introduction of the Individual Calendar System for judges and magistrates.
• Establishment of the mediation centre of the High Court in 2015.
• Publication of the Legal Aid (Criminal Proceedings) Rules, 2014.
• Publication of the Advocates Remuneration Order, 2015.
• Publication of the Judicature & Application of Laws, (The Court Fees Rules, 2015).
• Establishment of the specialized Divisions of the High Court namely, Land, Labour, Commercial and the Corruption and Economic Crimes to facilitate speedy dispensation of justice.
• Establishment of the Judiciary electronic Statistics Dashboard (JSDS).
• Introduction of the Chief Justice Circular No. 1 of 2016 on delivery of judgment and supply of copy of judgment and proceedings.
• Publication of the Court Fees Rules 2015.
• The launching of The Judiciary Strategic Plan 2015 – 2020 as a new road map that the Judiciary will follow to realize its vision of being a people centred institution. The aim is to ensure citizen centric service delivery through changing court processes and procedures, mind-set, ethical behaviours, performance orientation and accountability among judicial officers and staff. It comprises three pillars;
  • Governance, accountability and management of resources.
  • Access to justice and expeditiousness.
  • Public trust and stake-holders engagement.

There are also some procedural rules in the process of publication. These include:
• The Civil Procedure Code, (Approved Forms), Notice, 2017.
• The Criminal Procedure Forms, 2017.
• The High Court Registries (Amendment), Rules, 2016.
• The Advocates (Disciplinary and other Proceeding) Rules, 2017.
The Advocates (Professional Conduct and Etiquette), Regulation, 2017.
Mobile and Small Claims Court (Procedure) Rules, 2017
Advocates (Professional Requirements) Regulations, 2015.

It is admitted that the initiatives and reforms undertaken so far have contributed to improved access to justice to litigants through better case management and reduction of backlog.

RECOMMENDATIONS FOR IMPROVING COURT PROCEDURES

The role of the registry in enforcement of procedure and case management must be emphasized and given priority. The registry is an important office in court. Indeed, since the registry is a first point of call for most court users, it may be fair to say that most of them create their first impression of the court system from their initial interaction with staff in the registry. This is so because all cases initiated in the court are filed in the registry. Thus in order to operationalize efficiently, effectively and properly the court process and procedures, every court needs the registry. The court cannot therefore function properly without a registry.

The Registry is therefore the official record keeper of pleadings and all other documents that are filed in relation to each case. The registry staff usually assist to review documents to ensure they are in the correct form and comply with procedures before accepting them for filling.

If the registry performs its work properly it helps the case to be heard on merit and not on technicality. In order to ensure that procedures of the court are adhered and applied properly the registry staff must have sufficient knowledge and skills. Therefore, hurdles and inefficiencies in the clerical or judicial processing of work that unnecessarily impede, delay or complicate the flow of work through the registry must be identified for the purpose of finding lasting solutions.

• The standardized court procedures should be put in place by launching court operational manuals.
• The use of technology in the court system and operations will generally be of significant assistance of making access to, and the delivery of court and legal services more efficient, fair and effective. The aim should be to design next generation of electronic case management system for efficiency and integration. It is acknowledged that among other matters, the capacity of the courts to improve their effectiveness in case processing in the era of globalisation is dependent on their ability to use information technology particularly in providing statistical information for better record and resource management. Thus rules of procedure must be changed to address the graving role of information communication technology (ICT) of reducing costs and delays in court proceedings.
• Continuing training of judges, magistrates and registry staff on court procedures should be given priority.
• Judiciaries should endeavour to produce brochures that provide information about court procedures for the use of court litigants, victims, witnesses, lawyers and visitors.
• Judiciaries should establish and enhance court users committees to assess procedures used in order to draw ideas for improving the services and procedures at every level of the court. This will promote the smooth and efficient running of the court procedures by involving users through consultation.
• Establishment of mobile courts services be considered. Mobile Courts offer the option of simplified procedure and extending services to the door steps of litigants without the cost of new permanent court facilities in remote areas and as a way of addressing backlogs.
• Use of Alternative Dispute Resolution Mechanisms like mediation should be encouraged to attain the aim of simplified procedures in litigation. It is proposed that mediation should be court annexed and not court connected.
• Court proceedings be conducted in a language that the accused, litigants and other court users understand so that such persons may understand the proceeding. It must be emphasized that the ability to understand and be understood is a minimal requirement of the due process.
• In order to facilitate access to justice, legal representation in court proceedings through legal aid schemes be given priority. However, in order to promote effectiveness and improve the quality of representation, legal aid providers should be coordinated, supervised and controlled with emphasis on the sustainability of the legal aid services.
• Emphasis be put on listing of cases at various times of the day to reduce the number of persons in court and the amount of time people have to wait for their case to be reached in the list.
• Improve the system of recording court orders and decrees to facilitate smooth enforcement and execution.
• Establish and strengthen legal research units in the courts to assist the Rules Committees fulfil properly their responsibilities of proposing the review, update, amendment and repealing of the laws and rules of procedures for better administration of justice.
• Adjournments of court proceedings should be sharply curtailed and granted only upon a showing of substantial good cause.
• Record management processes and procedures be reviewed with an emphasis on the enhancement of record management competencies to ensure the care, custody, safe keeping and security of the court’s records.
• The duration of litigation process must be set and constantly monitored as well as pending cases that have been in the process for an excessive period. This is important because the standard operating procedures of an excellent court comprise among other important elements such as agreed upon time standards, establishment of case schedules in individual cases, the active role of the judge with respect to time management, the limitations on the adjournment of court proceedings, effective scheduling methods for court sessions and the simulation of the use of Alternative Dispute Resolution.

CONCLUSION.
The justice system must aim to provide justice to the people it is meant to serve. Judiciaries must therefore improve the court procedures by identifying common problems and promising solutions and by developing the will among the public and the legal sector stakeholders. Court procedure therefore must be fair and understandable to court users. It is stressed that court processes and procedures should be reviewed and simplified. Procedures should be as simple, effective and proportionate as possible while at the same time maintaining fairness and justice. There is no doubt that streamlined procedures and practice help to reduce time and expenses and typically in turn, militate in favour of improved access to justice. Indeed, simplification of court processes and procedure has been consistently identified as one of the pillars of an effective approach to access to justice. To borrow the words of Richard Zorca;

“Courts must become institutions that are easy – to – access, regardless of whether a litigant has a lawyer. This can be made possible by the reconsideration, simplification of how the courts operate and by the provision of informational access services and tools to those who must navigate its procedures.”

The aim of reviewing procedures must be based on the fact that the current set up of the rules of procedure in most jurisdictions is more focused on the substantive aspects of the adjudication process than on the procedural intricacies and difficulties of administering justice in courts. This brings practical and inefficiency or ineffectiveness in the enforcement of procedures. Judiciaries need to move forward and implement reforms which aim to improve the procedures through
creating a “will power” which implies the ability to adhere to course of action once is adopted, even in the face of criticism, discouragement, and discomfort. Change can occur if our respective judiciaries are willing to let go the cumbersome and complex documentary procedures and litigation mechanics that bog down the whole process of justice administration. It must be remembered that court procedures are intended to smoothen the path of justice and not to defeat the same. Thus using procedural rules as delaying tactics is an abuse of the court process. Let us act now, as destiny is not a thing to be waited for, it is a thing to be achieved. We have to build a bright future for the society today as Mahatma Gandhi once said; “The future depends in what we do in the present.”

REFERENCE
2. Draft Report of the Consultation Review Committee on the Criminal and Civil Justice System in Western Australia 1995
3. The Judiciary of Tanzania 5 years Strategic Plan (2015/16 – 2019/20)
INTRODUCTION

When speaking to judges about the impact of social media and the “big data” industry that has grown up alongside it, I often ask them to cast their minds back a decade. In UK popular culture, for example, 2007 was the year that saw the publication of the final Harry Potter book. In that light, 2007 does not seem so very long ago. In technological terms, however, it was a lifetime ago.

In the UK, as 2007 began, few people in the UK had a Facebook account (Facebook had only launched in the UK to those over the age of 13 in September 2006). No one owned an iPhone (Apple launched the first iPhone in the USA in June 2007 and in the UK in November 2007). EBay had been going for just over a year and Twitter about nine months. Online banking and online shopping were in their infancy. If a person wanted to watch television, they turned on their television set. If they wanted to listen to music, they put on a CD or turned on a radio.

How things have changed. Ten years later, we are living what social scientists Anabel Quan-Haase and Barry Wellman call “hyper connected” lives. Technology suffuses every aspect of our existence and continues to transform it. We hear phrases like “Web 2.0” and the “Internet of things.” The smartphones in our pockets operate as digital Swiss Army knives. These devices, and the apps on them that we use, have become our window to the wider world: email, GPS navigation systems, taking and sharing of photographs, messaging services, traffic updates, word processors, news consumption and, increasingly, a platform for paying for goods and services. Diagnostic health services are coming. (Occasionally, we even use these devices to make phone calls.) These devices have, at the same time, become our main means of escaping the world: streaming of video and audio content, gaming and internet browsing. They are part of the fabric of daily life. A strong case can be made that they have expanded our knowledge and our horizons and enabled us to make richer connections with wider circles of people.

At the centre of these trends are the innovative companies that enable us to search the World Wide Web and connect with one another through social media. In doing so, the world is often reflected to us as we would like it to be, not as it is; witness, for example, the growth of echo chambers and their impact on how we consume and share news of world events. Then again, some might say that there are good reasons to avoid the world as it is. The growth of social media has been accompanied by a coarsening of public debate and an increase in online attacks on public figures.

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233 https://en.wikipedia.org/wiki/Hyperconnectivity
235 https://en.wikipedia.org/wiki/Web_2.0
237 https://en.wikipedia.org/wiki/Echo_chamber_(media)
238 There is a polemical article on the issue here: https://www.wired.com/2016/11/facebook-echo-chamber/
239 See, for example, James Hoggan’s book, I’m Right and You’re an Idiot.
including judges. All these services, and the way we use them, leave lasting digital footprints online for each of us. Those footprints are analysed by advanced algorithms. They are repackaged. They are sold for profit. The organisations that perform these tasks have become known collectively as the “big data” industry. The vast amount of data that we now broadcast online – sometimes known as a “data exhaust” – gives this industry an unparalleled insight into how we behave, the choices we make and, increasingly, the choices we are going to make. It has delivered a mechanism for making predictions about how we will spend our money, the entertainment we will consume, how healthy we will be (and the cost of our insurance) and perhaps even how we will vote. Yet, if we lose the devices by which we access these services and transmit this data to the world at large, the resulting “fear of missing out” can, for some, negatively influence psychological health.

In summary, when discussing social media, the “pros” and the “cons” are both in abundance. But, whether we think that these trends have been a force for good or not, they cannot be ignored. For several reasons, they are of great importance to holders of judicial office.

**RELEVANCE FOR JUDGES**

I noted above that the devices and apps we use are now part of the fabric of daily life. That provides the first, and perhaps most compelling, reason for judges to be interested in these trends. Social media engagement is one of the mechanisms by which marriages, friendships and business relationships form and are broken. Social media platforms offer a rich vein of raw material for the cases we are asked to decide. They have even contributed to an evolution of the language we use. To develop Benjamin Franklin’s famous quotation, the stuff of dispute is there, which means that the stuff of dispute is there too. This compels us to keep up to date; we must be judges of 2017, not of 2007 or 1997.

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240 See “Public Figure Attacks in the United States, 1995-2015” by J Reid Meloy and Molly Amman, published in *Behavioral Sciences and the Law*, Volume 34, Issue 5, Sept/Oct 2016, pp. 622-644. The three most likely victim categories were shown to be politicians, athletes and judges.

241 The algorithm behind the Facebook news feed is accessibly described in this *Time Magazine* article from July 2015: http://time.com/3950525/facebook-news-feed-algorithm


243 An interesting account of how data analytics increased profit can be found here: http://www.information-age.com/tesco-saves-millions-with-supply-chain-analytics-123456972/

244 See, further, *Big Data: Does Size Matter?* by Timandra Harkness and *Predictive Analytics, Data Mining and Big Data: Myths, Misconceptions and Methods* by Steven Finlay.

245 Explored in *Ask, Measure, Learn: Using Social Media Analytics to Understand and Influence Customer Behaviour* by Lutz Finger and Souitra Dutta.

246 Explored in *Predicting the Future with Social Media* by Sitaram Asur and Bernardo Huberman.

247 See the Actuaries Institute green paper from November 2016: *The Impact of Big Data on the Future of Insurance*.

248 A more controversial proposition, sceptically considered in *The Power of Prediction with Social Media*, by Harold Schoen et al.

249 https://en.wikipedia.org/wiki/Fear_of_missing_out


251 An interesting experiment is to do a Google search on “the impact of social media on [    ] law” and insert a specialism of your choice. Appearing alongside the numerous academic articles and blog posts will be a host of law firm marketing pieces, a sure sign that this is a growth area.

252 See this blog: https://blog.oxforddictionaries.com/2014/06/social-media-changing-language/
The second reason for judges to be interested in these trends is because, in the years to come, they will radically change the nature of what we do. Those who have followed the writings of Richard Susskind will be familiar with his prophesies on how the internet and artificial intelligence will influence the development of the legal profession. Machine learning is already here; its use in assessing the risk involved in legal disputes will only increase. Any judge who doubts this should spend some time browsing the website of the legal analytics company Lex Machina, the result of a joint venture between Lexis Nexis and the law and computing departments of Stanford University.

However, it is on two other reasons that I shall concentrate. The first concerns the online security of judges. The second concerns their online conduct.

SECURITY

I shall begin this section with a personal anecdote. In face-to-face training that I have delivered on this topic, the part of the session with the most impact is where I demonstrate the ready availability online of sensitive personal data about individual judges. Using publicly available information from data aggregation websites, which facilitates “jigsaw research”, I can often locate a judge’s home address and year (or precise date) of birth. In one case I obtained the maiden name of a judge’s mother, the names of his wife and daughter and pictures of his extended family; this was a judge who did not use social media at all. In another case I located the school attended by a judge’s children and, in yet another, the park in which a judge ran a 5K race every Saturday morning.

This was all done swiftly from the comfort of a desk; 20 years ago, a private detective would have been required. Such are the risks judges now face.

Given the sensitive, confidential and sometimes life-changing nature of the work judges do, they need to learn how to protect themselves. They need to develop wisdom about the way they interact with new technology. They need to educate their friends and family members too, since their use of technology and social media also creates a digital footprint that captures their judicial relatives.

When I started delivering these training sessions in 2012, it was typically the case that about a quarter of those attending owned a smartphone and an even smaller number used social media. Moreover, those who did use social media could be described as “light users”; for example, they might have set up a Facebook account simply to stay in touch with travelling adult children. As we near the end of 2017, the situation has markedly shifted. Now, I find that a large majority owns a smartphone (and often a tablet as well) and somewhere around two-thirds actively use social media. It will not be long, if we have not arrived there already, when most candidates for judicial office will bring with them a social media history – a digital “baggage”. In addition, the range of social media services being used by judges has increased. The use of Twitter, which can be a popular platform for spreading legal news, is widespread. I am especially interested in the numbers now using Instagram and WhatsApp, since few judges realise that both services are owned by, and share data with, Facebook.

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254 See Tomorrow’s Lawyers and The Future of the Professions, both by Richard Susskind, the latter co-authored with Daniel Susskind. A quick understanding can be gained from their public lectures. See, for example, a shared lecture at https://www.gresham.ac.uk/lectures-and-events/what-will-happen-when-artificial-intelligence-and-the-internet-meet-the-professions.

255 https://lexmachina.com


257 Which may contain something known as the “database of ruin”, which is discussed polemically in this online interview: https://www.newstatesman.com/microsites/cyber/2017/02/databases-ruin

I set out below some suggestions to help judges use technology and social media more wisely. If followed, they will enhance privacy and security, and minimise the chances that a disaffected party can trace a judge to his or her home address. They will reduce, to some extent, the way in which data about judges’ lives as citizens, parents, voters, workers and consumers becomes a tradeable commodity in the “big data” world described above. My suggestions are:

- Find out what information about you is public and remove/amend it where you can. Make every effort to ensure that your home address and telephone number are not online (for example, through holding a company directorship).
- When signing up for online services, enter the minimum amount of authentic information possible. Consider providing a memorably bizarre rather than truthful answer to a security question – for example, that your first pet was called “Do you like pizza?”
- If you don’t use social media, protect yourself by speaking to and educating those who do. If you do use social media, use common sense. Take care of your privacy. Check who can see what you post: friends, friends of friends, everyone? Don’t announce online holiday plans or a house move, except perhaps to a limited circle of trusted contacts. Be careful of the photographs you share. Ask friends not to “tag” you in photographs.
- Consider using a pseudonym as your social media handle.
- Check the default settings of websites and browsers you use. Can you increase the privacy settings? Be wary of signing up to websites using your social media profiles. Turn on two-step verification where it is available.
- Change your passwords regularly. Don’t use the same password for everything. Make sure they are good passwords (a password manager app, like mSecure, will help you remember your passwords and even suggest secure and random new ones).
- Maximise privacy settings on your smartphones. Turn off location services. Don’t allow apps to access all your contacts. Back up your data. Use encryption services. Use anti-virus and anti-spyware software. Keep software up to date, since that is how weaknesses are identified and repaired.
- Be wary of using free public Wi-Fi, which is usually not encrypted, for work use.
- Buy (and use) a shredder for disposing of personal mail.
- Consider using more than one email address. For personal use, consider using an email address that does not contain your name.
- Treat unsolicited text messages and emails warily. Do not reply. Do not open attachments if you are not confident that the source is safe.

These are matters that can and should be emphasised through judicial training. Ultimately, however, the clock cannot be turned back. In the words of Pete Cashmore, the CEO of the digital media website Mashable, “Privacy is dead. And social media holds the smoking gun.”

**CONDUCT**

As judges, we are mercifully more likely to be exposed to the crass things said and done online when they are said and done by the parties appearing before us rather than when said and done by judges. Nonetheless, it is worth reflecting for a moment on why people say and do such crass things online. This may make judges approach their cases in a more nuanced fashion and it may also promote understanding of the impulses that drive risky behaviour. I propose four reasons.

The first reason is that social media communication, like email and text messaging before it, uses a much less formal style. A chatty exchange over email may begin with an informal salutation and end with a light-hearted comment in a way that formal letters or memoranda would never have done.

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260 It has been suggested that the presence of a full-stop (or period) is synonymous with formality and even irritation, as discussed in this irreverent article: https://newrepublic.com/article/115726/period-our-simplest-punctuation-mark-has-become-sign-anger.
In the context of exchanges on internet bulletin boards, an early form of social media, one judge described this communication as “rather like contributions to a casual conversation (the analogy sometimes being drawn with people chatting in a bar) which people simply note before moving on; they are often uninhibited, casual and ill thought out; those who participate know this and expect a certain amount of repartee or give and take”\(^4\). One might say that less formal conversation is less filtered conversation.

The second reason is that social media communication can exhibit narcissistic or attention-seeking elements, often related to low feelings of self-esteem among those using it. There is a burgeoning field of psychological research into the relationship between social media activity and self-esteem\(^5\) and the tendency of people to project false version of themselves online\(^6\). Efforts to appear witty, relevant or likeable may prove counterproductive. This is perhaps especially true in the field of sexual offences, where judges would be wise to heed the sage words of the Court of Appeal: “The complex mixture of motives which impels people, especially young people, to post messages on such sites includes, the court suspects, the desire to attract attention, admiration from peers and to provoke the interest of others in the person posting the material. We suspect that objective truth and the dissemination of factual evidence comes low on the list.”\(^7\)

The third reason is the ubiquity of devices by which social media content is accessed. A few decades ago, a person’s irritation with a colleague at work might not survive a good night’s sleep – certainly not long enough for them to use a typewriter to prepare a document to be placed on a public message board in the workplace. Nowadays, the ever-present smartphone might mean that a comment is made online in the heat of the moment, perhaps with less awareness of who might read it, resulting in dismissal\(^8\). These are devices that we touch an average of 2,617 times a day\(^9\). Around the world more people have access to a smartphone than a toothbrush\(^10\) or a toilet\(^11\). The average person responds to a text within 90 seconds (rather than 90 minutes for an email)\(^12\) and many will look at their device within five minutes of waking up\(^13\).

The fourth reason, connected to the third, is the addictive nature of the devices and the social media apps they contain. It has long been noted that social media services have addictive qualities\(^1\). Indeed, they were designed to be so, through a “hook” system involving variable reward, just like a

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\(^{261}\) Mr Justice Eady in *Smith v ADVFN plc & others* [2008] EWHC 1797 (QB), paragraph 14.


\(^{264}\) Mr Justice Mackay in *R v D* [2011] EWCA Crim 2305, paragraph 7.

\(^{265}\) By way of example, see: https://www.pressreader.com/uk/the-courier-advertiser-fife-edition/20131129/281599533290347

\(^{266}\) https://blog.dscout.com/mobile-touches

\(^{267}\) http://60secondmarketer.com/blog/2011/10/18/more-mobile-phones-than-toothbrushes/


The red badge for alerts and notifications, for example, was deliberately chosen because it is a trigger colour. These four reasons combine to form a toxic brew.

The opportunities for unfiltered comment are obvious. Judges would do well to bear these features in mind when criticising parties for their online conduct. However, they should take note of them for another purpose: judges are human beings and, therefore, are not immune to the same impulses. Against that backdrop, what guidance can and should be given to judges, particularly those joining the judiciary in 2017 and bringing their digital baggage with them?

Around the world, judicial codes of conduct or statements of judicial ethics draw from the Bangalore Principles, compiled in 2002 by a meeting of chief justices now known as the Judicial Integrity Group. An extensive commentary was produced in 2007. Both documents predate the emergence of social media and the “big data” industry and, at first blush, cast little light on judicial conduct online. That said, potentially problematic behaviours online are simply an extension of potentially problematic behaviours in the real world. For that reason, the Bangalore principles provide a workable platform on which to construct additional guidance.

The six Bangalore values are independence, impartiality, integrity, propriety, equality and, expressed as a single value, competence and diligence. In respect of each value, a principle is expounded followed by examples of its application. For example, the second value of impartiality provides for this principle: “Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.” As an example of its application, we are told that “a judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary”. The third value of integrity provides for this principle: “Integrity is essential to the proper discharge of the judicial office.” We are told that “a judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer.”

In the context of online conduct, it is the fourth value – “propriety” – that is most pertinent. The principle says this: “Propriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge.” The examples of its application include the following:

- As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office.
- A judge shall, in his or her personal relations with individual members of the legal profession who practise regularly in the judge's court, avoid situations which might reasonably give rise to the suspicion or appearance of favouritism or partiality.
- A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but in exercising such rights, a judge shall always conduct himself or herself in such a

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273 The designer is interviewed here: https://www.theguardian.com/technology/2017/oct/05/smartphone-addiction-silicon-valley-dystopia
276 I acknowledge a debt here to Justice John Z Vertes (senior judge of the Supreme Court of the Northwest Territories of Canada) and his paper “Why can’t we be friends? (Should judges be on Facebook – or – The intersection of technology and judicial ethics?)”. This was delivered to the Commonwealth Magistrates’ and Judges’ Association annual conference in Kuala Lumpur in 2011.
manner as to preserve the dignity of the judicial office and the impartiality and independence of
the judiciary.

- A judge shall not use or lend the prestige of the judicial office to advance the private interests of
  the judge, a member of the judge's family or of anyone else, nor shall a judge convey or permit
  others to convey the impression that anyone is in a special position improperly to influence the
  judge in the performance of judicial duties.

It is clear that the highest standards are expected of a judge on and off the bench and, by extension,
in respect of his or her digital life. In practice, does this mean that judges should not engage in social
media at all? I would suggest not. That would be too onerous and intrusive a requirement.

A person becoming a judge in 2017 could no more divest themselves of a social media life than they
could divest themselves of the ability to shop or bank online or consume news and entertainment
services online. In any case, requiring judges to abandon their digital lives upon appointment might
lessen their effectiveness as decision-makers. We should bear in mind, admittedly out of context,
the words of Lord Denning: “If we never do anything which has not been done before, we shall never
get anywhere. The law will stand still whilst the rest of the world goes on; and that will be bad for
both.”

A similar sentiment was expressed by an appellate court in Texas, which was asked to decide
whether a criminal trial had been unfair because of a Facebook friendship between the judge and
the victim’s father. In the course of deciding that the trial was not tainted by the appearance of
bias, the court said this: Allowing judges to use Facebook and other social media is also consistent
with the premise that judges do not “forfeit [their] right to associate with [their] friends and
acquaintances nor [are they] condemned to live the life of a hermit. In fact, such a regime would ...

Social websites are one way judges can remain active in the community. For example, the ABA has
stated, “[s]ocial interactions of all kinds, including [the use of social media websites], can ... prevent
[judges] from being thought of as isolated or out of touch.” ABA Op. 462.

The ruling nonetheless made clear that judges should be mindful of their responsibilities under
applicable judicial codes of conduct. In the Texas case, the judge had properly placed on the record
the fact that he was friends on Facebook with the victim’s father and that he had received a plea for
leniency from him; he treated it as an inappropriate ex parte communication.

I am not aware of any judicial code of conduct that explicitly prohibits judges from using social media
altogether. Given the difficulty in defining social media activity (would it extend to reviews of
products on Amazon, sellers on eBay or hotels on TripAdvisor?) this is not surprising. Our focus
should therefore be on the use of social media that is consistent with accepted norms around
judicial ethics. I would suggest that the following guidelines to judges can be developed from the
Bangalore principles and offer a sound basis for future discussion:

277 Packer v Packer [1953] 2 All ER 127.
278 Youkers v State of Texas, Court of Appeals (Fifth district of Texas), 05-11-01407-CR.
279 I am indebted to Hannah White, the Associate to the Judges in New South Wales in Australia, who surveyed
various Commonwealth jurisdictions for me. The firmest advice against social media I have seen is the
Statement of Principles of Judicial Ethics for the Scottish Judiciary, which is available here:
http://www.scotland-judiciary.org.uk/21/0/Principles-of-Judicial-Ethics. It states that “Judges are advised not
to sign up to social media sites such as Facebook or Twitter” (paragraph 5.2). By contrast, the Judicial Code of
Conduct for England and Wales states that “the use of social networking is a matter of personal choice”;
https://www.judiciary.gov.uk/publications/guide-to-judicial-conduct (paragraph 8.11.1). The jurisdiction that
appears to have done most work in developing principles around social media use for judicial officers is
Canada; see https://www.cacp.ca/law-amendments-committee-activities.html?asst_id=844.
• First and foremost, avoid expressing views online that, were it to become known you hold judicial office, could damage public confidence in your own impartiality or in the impartiality of the judiciary in general.
• Unless running an authorised blog (intended, for example, to demystify the work of the judiciary), do not use your personal social media networks to publicise your appointment or your work as a judge or to identify yourself in a judicial capacity.
• Be wary of “following” or “liking” particular advocacy groups, campaigners or commentators if association with their views could damage public confidence in your impartiality. If you wish to follow certain political commentators, avoid creating your own echo chamber by ensuring a breadth and diversity of views.
• Avoid expressing views that are indicative of prejudgment of an issue of fact or law. Do not comment on actual or pending cases, whether your case or another judge’s case. Do not engage in private exchanges over social media sites or messaging services in respect of such cases. Do not post comments on websites in support of your own decisions.
• Avoid looking up the parties online or engaging in private research in respect of their digital lives; this is an extension of the rule that a judge should not engage in independent investigation of the case. Do not indulge idle curiosity.
• Be circumspect in tone and language and professional and prudent in respect of all interactions on social media. Consider in respect of each comment or photograph: what might its impact on judicial dignity be? Treat others with dignity and respect too; do not use social media content to trivialise the concerns of others. Behave in a manner that promotes a safe and healthy working environment.
• Consider whether any pre-appointment digital content might damage public confidence in your impartiality. If it does, remove it (it may be necessary to take advice on how to do so).
• Be wary about extending or accepting “friend requests” to and from lawyers or representatives who may appear before you. The risk is that the connection might suggest a degree of leverage that a lawyer has over a judge, in the sense of being in a privileged position to influence the judge. Such an online friendship will not always be a disqualifying factor, but it will be a matter of degree and perception.
• If you have been insulted or abused online, seek advice from senior judicial colleagues. Do not respond directly.

These are again matters that can and should be emphasised through judicial training. The risk otherwise is that judges may face disciplinary action which, in many jurisdictions, is done publicly.

CONCLUSION
If judges are to be modern and diverse, and properly reflective of the societies they serve, they should be familiar with the way technology and social media are transforming all aspects of life. If they choose to be aloof from social media services – an understandable, admirable but increasingly difficult aspiration – they should at least be aware of their influence. If they choose to engage, they should do so with their eyes open and they should proceed with caution, aware of the security risks arising from their digital footprints and with the benefit of guidelines about appropriate online behaviour. Effective judicial training is essential to protect judges and to maintain compliance with ethical standards.

281 In England and Wales, for example, see here: https://judicialconduct.judiciary.gov.uk/disciplinary-statements