



cmja

16th TRIENNIAL CONFERENCE
10-15 September 2012

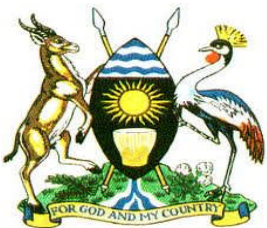
Uganda



The Pearl of Africa

Justice for Everyone: Myth or Reality?

Conference Report



The Republic of Uganda



Courts of the Judicature
Uganda

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The CMJA is indebted to the Ugandan Judiciary for their financial support for the Conference.



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FOREWORD

The 16th Triennial Conference was held at the Commonwealth Resort and Conference Centre, Munyonyo, Uganda at the invitation of the Chief Justice of Uganda, The Hon. Justice Benjamin Odoki, and the judiciary of Uganda. We would like to acknowledge the generosity of the Courts of the Judicature of Uganda, the government of Uganda. We are deeply grateful to the Justice, Law and Order Sector of Uganda, the International Commission of Jurists (ICJ) in Geneva, the ICJ-Africa and the ICJ-Kenya and LawAfrica for their generous support of the Conference. We are also grateful to the Speke Group for their support of the Conference.

The Conference, organised by the CMJA was open to all Commonwealth judicial officers and others interested in justice in the Commonwealth. The Conference attracted over 350 people from 22 Commonwealth jurisdictions. I am very grateful for the support of the Chairperson of the Steering Committee, Sheriff Douglas Allan, and members of the Steering Committee, the Chairperson of the Local Organising Committee, Mr Henry Adonyo and the Secretary of the Local Organising Committee, Mr Vincent Mugabo, the Chairpersons of all the sub-committees and the members of the Local Organising Committee, the Director of Programmes, Judge Shamim Qureshi, our Registration Administrator, Mrs Jo Twyman and our Executive Administrator, Miss Temitayo Akinwotu in the preparation of the Conference.

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

We are also very grateful to all the speakers, panellists and contributors to the educational programme. Having taken into account feedback from delegates attending the CMJA's previous conferences, the format of the 16th Triennial Conference focused on discussions during panel sessions and breakout sessions.

We were happy that our links with UNICEF have continued and welcomed their input into the programme.

Dr Karen Brewer
Secretary General

INTRODUCTION

Having just completed three years in the post, this is my first introduction written for a Triennial Conference Report. At the time I was requested to write it, I happened to be reading David Lodge's trilogy of *Changing Places*, *Small World* and *Nice Work*, three very humorous books based on the international conference circuit and recommended to me one fine evening in the Speke Resort Terrace Bar by one of our delegates in Uganda. In the Prologue to the second book, there is the passage below which I thought was most apt and summed up what conferences are all about.

He wrote that Geoffrey Chaucer observed that with the advent of spring "folk long to go on pilgrimages. Only these days, professional people call them conferences! The modern conference resembles the pilgrimage of medieval Christendom in that it allows the participants to indulge themselves in all the pleasures and diversions of travel whilst appearing to be austere bent on self-improvement. To be sure, there are certain penitential exercises to be performed – the presentation of a paper perhaps, and certainly listening to the papers of others. But with this excuse you journey to new and interesting places, meet new and interesting people, and form new and interesting relationships with them; exchange gossip and confidences (for your well-worn stories are fresh to them and vice versa); eat, drink and make merry in their company every evening; and yet, at the end of it all, return home with an enhanced reputation for seriousness of mind... If like Chaucer's hero Troilus at the end of Troilus and Criseyde, he looks down from the eighth sphere of heaven on 'this little spot of erthe that with the se embraced is' he would see the frantic traffic around the globe, the jet-trails that criss-cross the oceans, marking the passage of conferees from one continent to another, their paths converging and intersecting and passing, as they hasten to hotel there to confer and carouse."

So my fellow pilgrims and conferees, I hope you agree that the long and arduous voyage to Lake Victoria was well worth it. The conference days were long with the academic programme only ending with just enough time to retreat to one's private chamber to perform a quick change of dress before being summoned to partake in the social activities, that inevitably involved great food, drink, music and dancing long after the sun had disappeared.

The academic programme at Kampala 2012 produced some memorable presentations such as Lord David Hope, UK Supreme Court, talking about judicial activism; Sam Rugege, Chief Justice Rwanda, talking about the aftermath of the genocide; Judge Ayotunde Phillips, Chief Judge Lagos whose frankness in her talk delighted the audience; Lord Brian Gill, Lord President Scotland whose gentle manner commanded absolute attention from the audience; and Dr Adrian Sutton, the psychiatrist who watched and observed everyone over his time at the conference that I fear he may decide that research is seriously needed into the mental faculties of judicial officers.

In 2010 CMJA celebrated its 40th birthday in Brighton. Whilst it seems an age ago to remember the contents of anyone's speech in particular, I recall Justice Khalil Ramday, Pakistan Supreme Court, recounting his many months under house arrest at the orders of the military government, wondering if it was really worth it and thinking "judicial independence be damned!" It is an important principle in name only to many of us when we do not have to physically suffer for it. Even this year we have seen

our friend, Sir Salamo Injia, Chief Justice Papua New Guinea, also suffering the same indignities in the battle for judicial independence. Professor Black-Branch, magistrate and academic, gave an interesting lecture on protecting the liberty of the individual and Desiree Bernard, Caribbean Court of Justice, gave a comprehensive talk on the role of the appellate court.

In 2011 we trekked to Kuala Lumpur, Malaysia for a wonderful display of modern hi-tec wizardry in the opening ceremony. However modern technology does not come easy to many judges and I recall Justice Rita Ajumogobia, Nigeria, being ably assisted by her young son in controlling the laptop display when doing her presentation. Justice John Vertes, Supreme Court Canada and our new President CMJA, dealt with the problems of judges using Facebook. His paper is a timely reminder to judicial officers to beware! When dealing with issues in international family law, Lord Justice Thorpe, Court of Appeal England and Wales, was out-manoeuvred by Ari Tobi, Nigeria, who spoke for the entirety of the remaining session and left no time for questions! Finally Graham Travers, magistrate South Africa, gave a moving talk about his own physical illness and his battle with the authorities over his appointment and retention as a judicial officer.

My thanks go to all other participants (speakers and facilitators) and of course, all of the conferees for attending and who really make the success of the conference and I hope as many as possible will have been smitten by the CMJA-bug that makes us return year after year. I look forward to meeting many of you again at the next conference, and please remember, I am always looking out for speakers and facilitators.

Judge Shamim Qureshi
Director of Programmes

**MESSAGE FROM HER MAJESTY THE
QUEEN,
HEAD OF THE COMMONWEALTH,
PATRON OF THE CMJA**

Buckingham Palace

Please convey my warm thanks to the Judicial Officers, Lawyers, Legal Academics and Members of the Commonwealth Magistrates and Judges' Association for their message of loyal greetings, sent on the occasion of their sixteenth Triennial Conference which is being heldo from 10th-15th September in Kampala, Uganda.

As your Patron, I much appreciate your continued support and, in return, send my best wishes to all those who will be present for a memorable and successful event.

ELIZABETH R.

10th-15th September, 2012.

COUNCIL RESOLUTION

The Council expressed concern that stronger action has not been taken by governments to ensure that the Commonwealth (Latimer House) Principles are being respected and adhered to by governments throughout the Commonwealth with particular reference to the independence of the judiciary; and direct the CMJA' to take such steps as it considered appropriate to ensure that the Commonwealth Secretariat continues to promote adherence to that aspect of those principles and to maintain the momentum that was noted by the Commonwealth Secretary General at the Colloquium Meeting in Edinburgh in 2008.

10 September 2012

Endorsed by Chief Justice Benjamin Odoki, as Chairman of the Chief Justices' Meeting on 14 September 2012

Approved by the General Assembly of the CMJA on 14 September 2012.

WELCOME REMARKS

WELCOME

**By The Hon. Mrs Justice Norma Wade-Miller
CMJA President**

Greetings to one and all and welcome to this CMJA 16th Triennial Conference with a most apposite theme here in beautiful Munyonyo, Kampala, Uganda. I begin by extending appreciation to our gracious hosts, the Rt Hon. Vice President of Uganda His Excellency Edward K Sakandi; and of course the Hon. Chief Justice Benjamin Joseph Odoki, Chief Justice of Uganda. I welcome also all other Honourable Chief Justices, Honourable. Delegates, Distinguished Guests, Ladies and Gentlemen.

Having established protocol, I digress with honoured appreciation to convey a message from none other than her Majesty the Queen, our Honorary Patron

I further digress to convey a request sent to me on this occasion via email correspondence from our Secretary General, Dr. Brewer. It is appropriate for me to relay it at the outset as it has ramifications for your attendance. It reads:

Dear Norma

Temi has asked if you could mention, during your speech, that we are circulating an updating (sic) form to Member Association and Individuals at the Conference which they are requested to fill and return to Temi during the Conference so that we can update our information (some of the emails have bounced back due to changes of address) and we really want to keep our links going with our members.

Please keep this request in mind as the Conference progresses as compliance with such seemingly mundane undertakings is vital to our organizational agenda as we move forward.

Once again it is a great pleasure to welcome all distinguished attendees to the CMJA's 16th Triennial conference. The Triennial over the years has become one of the feature events of the Association calendar.

The theme of this year's conference, "Justice for Everyone Myth or Reality" gives us an opportunity to explore avenues to ensure that Justice is indeed a reality for all. But even more crucially, it compels sober contemplation as to our respective roles. More pointedly, the topic itself begs the following questions: How do we measure the dispensation of justice? As "justices" are we in the position to effectively engage in this crucial self-evaluation? And if not, to whom or what do we turn to evaluate not only our role but the efficacy of the very system we serve and that we all would agree is a cornerstone of society? Of course somewhere in my philosophizing is the notion evoked by our topic today that 'justice for everyone' is fundamental to the concept of justice itself; The idea that to the extent which a society fails to reach this goal it proportionately fails to attain the status of a just society.

My intention is to begin by setting a tone that is as provocative as the subject necessitates. We are undeniably living in a time of great challenges, particularly to the administration of justice in jurisdictions throughout the world. If nothing else, for example, our global economic crisis entails forced compromises. Ordinarily one of the first things to be compromised is access to justice itself, not to mention the tools needed for justice dispensation. Proliferations of conflicts within nations and between them as well as the combined effect of all these elements have a compounding effect upon these challenges.

The new challenges and new opportunities for justice dispensation created by new technologies cannot be overstated. Today's juries have instant access to the opinions and perspectives of people throughout the world via the world-wide web, mass media satellite television and wireless international telecommunication networks. Gone are the days of sequestered jurors singularly focussed upon the particulars of courtroom submissions and the conscience of local provincial communities. Long before cases are tried by law they are dissected and decimated in the court of public opinion.

There are also profound ramifications for the legal fraternity in this regard. I offer the example of a recent case in Bermuda where a prosecutor posted information on her Facebook page, in relation to a criminal case she was prosecuting. Defence Counsel who was able to view everything on her page asked her to remove it and she refused. Defence counsel then brought the matter to the attention of the presiding judge who ordered her to remove the posting which was subsequently reported to the Bar Counsel. Eventually she was reprimanded and fined by a disciplinary hearing committee.

Another case involved a black lawyer who was charged for simple possession of cannabis. Further to a Facebook posting he took the position that the white investigating officer who instigated the charge had been racially motivated to instigate the prosecution in the first instance. He was prosecuted for criminal libel but the Court held that the libel charge infringed his constitutional right to free speech.

On the other hand new technologies have facilitated communication between judges in different jurisdictions and created easy access to legal information. Videoconferencing has been recently introduced in Bermuda and is gaining popularity in other jurisdictions throughout the world; promising (among other things) to bridge the gap between courtrooms and witnesses and to limit the potential hazards of transporting prisoners for remand and other preliminary proceedings.

The challenges we face in this regard have never been greater because as you all know, the forces I have mentioned are increasingly compelling us to be dynamic and adaptive while at the same time we play a role that is inherently conservative and sometimes constrictive. More plainly put, while we cannot avoid being increasingly impacted by sensational events relating to justice around the world, we must respect the domestic imperative of our respective legal traditions. We interpret the law and by so doing it is unavoidable that we also fashion it as we dispense it. This arguably gives us the ability to influence the extent of its reach with a corresponding and proportionate responsibility to limit impediments to access to justice.

We are witnessing that in jurisdictions where injustice prevails, particularly in the form of being denied to some, the actual and potential consequences could never be more dire. They compel us to come to terms with the fact that justice itself is a holistic concept which does not relegate it to the Judiciary. We are ordinarily the last link in an extensive and systemic chain. Our work is carried out in tandem with key apparatuses that not only impact what we do but is often substantively decisive of

the outcome. Therefore, our deliberations today will no doubt touch upon the very pertinent issue of how to reconcile ourselves with governmental and non-governmental entities around which the wheels of justice revolve, as we assume the challenges inherent in achieving justice for everyone.

This is a precarious challenge when placed within its actual context. The “independence” which our fraternity jealously guards and that is germane to our function, taken to its highest degree, is in stark contradiction to the reality of the intricately intertwined role that we play in consort with others. So here once again another challenge is derived from a pre-existing hurdle. How do we safeguard our independence and avoid undue influence while at the same time work purposefully in tandem with those links to ensure access to justice? The Bar Association, law enforcement, prosecutors, social workers, professional bodies of expert witnesses and the rest of society impacted by the pursuit of justice – How do we reconcile our respective roles to extend justice’s reach in equal measure for everyone in society?

On this note, our Director of studies has put together an exciting roster of speakers who will explore the topics that relate to equal justice for everyone. While we plumb the depths of a legal framework and tackle our agenda, I encourage you to also take what little time is available to enjoy the hospitality of our host country and her people.

Finally, at this juncture I must mention that this is the end of my term as President after which I take on the mantle of Immediate Past President. It has been a tremendous opportunity over the past three years, corresponding to the geographical journey which it has entailed. It began with my appointment to the Presidency in Turks and Caicos in 2009; subsequent to which our first significant meeting was held in Brighton, UK in 2010 celebrating our 40th Anniversary; followed by our 2011 meeting in Kuala Lumpur, Malaysia; leading to this my final meeting in this capacity here in Kampala, Uganda. It has been both a gratifying experience and an enriching one. I look forward to the revelations of our deliberations on this crucial topic today and to continue to be inspired and enlightened by our ongoing efforts.

KEYNOTE SPEECHES

JUSTICE FOR EVERYONE: A MYTH OR REALITY? FROM THE UGANDAN PERSPECTIVE

By The Hon. Chief Justice of Uganda, Mr Justice Benjamin Odoki

The keynote address will explore how Uganda has used the Sector wide approach to the rebuild the justice system from scratch to a functional justice system. The lessons learned in Uganda can offer solutions to other countries which are either rebuilding or strengthening their justice institutions to expand the frontiers of justice. Furthermore, the keynote address will explore how courts can use business models to increase internal efficiency and external responsiveness to reduce lead times for delivering justice.

You may all recall that Uganda went through political turmoil in the 1970s with the accession to power of the late Idi Amin Dada. Not only did Amin misrule the country, he tore down the rule of law and with it, destroyed rule of law institutions including the Judiciary, the Police and the Directorate of Public Prosecutions. Subsequent Governments, which followed in tow, did not rebuild the rule of law institutions, notwithstanding the fact that these institutions were being heralded as kingpins in revamping Uganda's economy.

By 1999, litigants were being forced to bring their own writing paper to court. The prisons were over congested - some carrying over 16 times their approved capacity. Police Cells were clogged with suspects awaiting trial. The courts were suffering under heavy backlogs. The average waiting time to be tried on a capital and petty charge averaged five years and two years respectively. Public confidence in the Judiciary was at its lowest.

1999, however, marked a significant turn around in Uganda. In that year, criminal justice institutions, weighed down by the break down in the rule of law decided to set up the Justice Law and Order Sector with the sole aim of initiating and implementing justice sector reforms to remove impediments to the delivery of justice. These reforms were driven in part by the chain-linked programme, which had been piloted in Masaka, one of the districts in Uganda. Under the Chain Linked programme, criminal justice agencies were brought together under one common loose organization to find solutions to systemic problems affecting the criminal justice system.

The Judiciary, the Directorate of Public Prosecutions, the Police Force, the Prisons Service and the probation services together with civic leaders met under the chair of the Judiciary to discuss and find low cost solutions to criminal justice problems such as delays, loss of files and corruption across the chain of justice. This was a fundamental departure from the routine, where each institution worked independently and was keen to point fingers at the other institution. The chain linked, emphasized open communication between the institutions, cooperation and coordination in approaching systemic problems affecting the criminal justice system. The chain-linked programme worked so well in Masaka that within one year of its operation, justice institutions had solved most of their problems through communication, cooperation and coordination.

The lesson learned in the chain linked programme were:

1. That the delivery of justice was a system that was made up of different actors acting in concert with each other and that no actor was greater than the other. The success of one institution depended on the collective well-being of all.
2. That justice institutions by acting together could address systemic problems across the chain of justice.
3. That solutions to common justice problems of delay could be addressed by different institutions channeling their resources or priorities to streamlining processes and reducing on redundancies in the system.
4. That adopting a collaborative approach to justice delivered more dividends than institutions acting alone.
5. That a coordinated approach to resource mobilization and utilization maximized value for money.
6. That it was easier to innovate or find low cost solutions by acting in concert.

Motivated by the lessons learned in the chain linked programme, Government decided to set up the Justice Law and Order Sector to address the challenges of justice delivery. The Justice Law and Order Sector (JLOS) brings together all institutions involved in the administration of justice, maintenance of law and order as well as human rights. JLOS institutions include the Ministry of Justice and Constitutional Affairs, the Judiciary, the Directorate of Public Prosecutions, the Uganda Police Force, the Uganda Prisons Service among others. Collectively JLOS institutions strive to deliver justice to all.

JLOS is a sector wide approach with one common planning, budgeting and execution framework. JLOS institutions are run using a committee system. At the apex is the Leadership Committee, which is made up of cabinet ministers and heads of JLOS institutions. The Chief Justice chairs the Leadership Committee. The Leadership Committee is responsible for policy guidance and advocacy at the highest political level. The Steering Committee is made up of Permanent Secretaries of the different JLOS institutions. It is responsible for policy coordination and guidance. The Technical Committee is made up of technical officers. It is responsible for initiating policy and implementation of the investment plan. Thematic working groups, made up of experts from the institutions, support the Technical Committee. At a local level, there are the District Chain Linked Committees, which are responsible for addressing challenges of justice delivery at the grass root level. A secretariat exists at the Ministry of Justice to coordinate the committees and all the JLOS programmes.

Operationally, JLOS institutions have one common strategic investment plan focused on promoting the rule of law through strengthened legal and policy frameworks for JLOS institutions; deepened access to justice and strengthened observance of accountability and human rights across the chain of justice.

Collectively, JLOS institutions identify and find solutions to justice delivery problems; mobilize resources for programmes, take a unified approach to defend and harness the rule of law; deal with development partners with one voice and address justice delivery from a results perspective.

JLOS institutions have set themselves to:

1. Increase public satisfaction in the delivery of justice
2. Increase the number of people who have access to laws
3. Increase public confidence in enforcement of existing laws
4. Increase the number of completed cases

5. Complete the chain of justice
6. Reduce the average length of time spent on remand
7. Reduce lead times for accessing justice services and generally improve public confidence in the delivery of justice.

Achievement of the above targets will help JLOS institutions to deepen access to justice for all, especially for the marginalized.

What lessons do we learn from the sector wide approach?

1. Promotes communication, coordination and cooperation among justice agencies.
2. The sector wide approach perceives justice from a systemic view and values all justice institutions as active participants in shaping the delivery of justice in Uganda.
3. The sector wide approach focuses more on attainment of impact and results than processes.
4. The sector wide approach ensures equitable growth of justice institutions by using affirmative action for the most disadvantaged institutions, which is not possible when institutions are left to grow on their own.
5. In a world of scarce resources, the sector wide approach helps institutions to prioritize resources for the common good of all.
6. The sector wide approach empowers institutions to find solutions to common problems instead of resorting to finger pointing or the blame game.
7. Sector wide approaches to justice delivery helps to pull together diverse functions and talents into a productive whole (sector)
8. The sector wide approach empowers institutions to benefit from synergies of inter dependence in the delivery of justice.
9. Sector wide approach enhances responsibility for results through peer review. Non-performing institutions are compelled to perform to avoid being shamed.
10. The collective success of all depends on the success of the individual institutions.
11. Sector wide approach maximized the benefits of the Government thinking and working as a whole to avoid systemic breakdown that have been witnessed in the environment and arms race, where countries took a lonely approach.

Whilst Uganda still faces challenges of building an effective justice for all, it, has been able through the sector wide approach to register the following results:

1. Disposal of cases has increased from 12% in 1999 to 48% while disposal of cases against registered cases is 144% in 2012. This indicates a significant reduction in the case backlog.
2. Congestion in prisons reduced from 500% to in 2005 to 192.5% in 2011
3. Crime rate reduced from 502 persons per 100,000 in 2007 to 302 persons per 100,000 in 2012.
4. Conviction rate for the Directorate of Public Prosecutions increased from 22% in 2000 to 53% in 2012, due to both improved prosecution skills and strengthened investigation methods.
5. Public Confidence in the administration of justice increased from 21% in 2005 to 60% in 2012.
6. Recidivism decreased from 72% in 1999 to 26% in 2012.
7. Collection of Non-Tax Revenue increased from U\$ 5,000,000 in 2005 to U\$ 30,000,000 in 2012.

The sector wide approach may not be the mantra for overcoming challenges in the delivery of justice but it offers a realistic chance for countries, which are rebuilding justice institutions to focus their collective energies on holistic reforms in the justice sector.

How can we make justice work for all beyond the sector wide approach?

Justice for Everyone – Managing Justice for results

There is growing concern that public sector institutions including the Judiciary are not delivering results. Public confidence in most Judiciaries is low because of inefficiency- giving room to growth of alternative dispute resolution mechanisms to fill the void left by the courts. The shrinking space and relevance of the courts in the arena of dispute resolution is a symptom of a deep-seated inefficiency within the justice system, which is perceived as being incapable of making decisions expeditiously.

Courts, like any other public institution, are under pressure to deliver results or else be rendered irrelevant. According to Andre de Waal,

This interest has grown even more because of the rapid changes in the competitive environment of companies, forcing them to ***“adapt faster and faster to growing international demands for flexibility and speed and to compete simultaneously on the basis of development cycle time, price, quality, flexibility, fast and reliable delivery, and after-sales support for their products”*** (Kasarda and Rondinelli, 1998). As a result of the changes in industry and society, governmental agencies too are subject to change. They have to rapidly reshape themselves into nimble and flexible organizations, which focus attention on the interests of stakeholders (Zeppou and Sotirakou, 2002; Pollitt, 2003)¹. Unfortunately, public sector institutions are not changing fast enough and sometimes run more for the convenience of its employees than for their contribution and performance. Emphasis is put on processes rather than on results i.e. delivering justice. Whereas processes are very important in the attainment of justice, processes do not mean much for a woman who has been battered and is in search for remedy in the court.

Courts are funded by the taxpayers, and cannot therefore run away from results. Courts, therefore must²:

1. Improve the quality of public management – public judicial officers must become high performance managers – people who are guided by principles of client focus, continuous improvement and quality.
2. Be resolute on results, action oriented and decisive on taking against non-performers.
3. Innovate to serve their clients better.
4. Improve performance management systems.
5. Improve process management within the courts through simplifications and alignment of processes to strengthen the courts to deliver results.

According to Peter Drucker³, public institutions like the Judiciary can maximize results if they are disciplined about objectives, priorities and measurement of results.

¹Achieving high performance in the public sector, what needs to be done; a paper authored by Andre A De Waal

²Supra 1

³Peter Drucker; The Practice of Management.

Court resources must be pegged to results. For example, budgets for the court must go to the core business of the court, research on re-engineering processes and procedures to reduce lead-times for deciding cases. Use of technology should be expanded to assist in activities, which do not require the personal attendance of the judge or can assist the judge to do his work with ease.

But this requires judges to subject themselves to performance management, which was previously considered an affront on the independence of the Judiciary. Performance management as understood within the context of the Judiciary, includes activities, which ensure that goals are consistently being met in an effective and efficient manner. Performance management can focus on the performance of an organization, a department, employee, or even the processes to build a service, as well as many other areas. Court must adopt a results culture beyond usual case management, which has dominated judicial reform in the last twenty years. Infusing private sector principles in court administration may help courts to gradually adopt a results based culture. Of course the court should not forget its cardinal duty of rendering a public duty in deserving cases because government cannot be run on a purely business model. But who said that, public services cannot be delivered at the most advantageous cost to the taxpayer?

Robust judicial performance is however, dependent on having an effective monitoring and evaluation framework – which provides a mechanism for measuring court, the out puts and inputs with clear indicators and targets at input, out put and outcome levels as well as guiding the allocation of scarce resources.

Satisfaction of public needs:

Traditionally the courts have delivered justice from a one-sided prescription model, where the judge administers justice from his or her perspective without involvement of the litigant. However, with the growth of social consciousness manifested in a strong human rights regime, democratization and public pressure, it has become imperative that justice should be administered in accordance with the norms and aspirations of the public. The public is diverse because of gender, colour, groupings and other characterization and this calls for the judge to be mindful of these divisions.

As a starting point, the court must define the public (its stakeholders). Stakeholders are people who have a stake in the success and or failure of an organization. Success of any organization depends entirely on satisfying different stakeholders needs. According to Peter Drucker⁴, satisfaction of different stakeholders (customers) needs requires, in the context of the court to ask tough questions: what do stakeholders value? (However) What satisfies their needs, wants and aspirations is so complicated that stakeholders (customers) themselves can only answer it. And the first rule is that there are no irrational stakeholders (customers). Drucker goes on to say that the leadership of every organization should not try to guess at the answers but should always go to customers in a systematic quest for those answers⁵.

In a justice setting there are internal and external stakeholders. Each of these stakeholders has a vested interest in the delivery of justice. The public expects the courts to resolves disputes expeditiously and in conformity with their norms, values and aspirations. The public expects the justice system to

⁴Peter F Drucker and others: The Five Most Important Questions you will ever ask about your organization page 39

⁵Supra page 39.

guarantee their safety and security of their property. On the other hand, the police and the prosecutors, have a stake in seeing that the courts assist them to fight crime.

Defining stakeholder needs would address the commonly forgotten needs of the vulnerable such as marginalized communities, minority rights, gender biases as well as meeting the needs of those who would never, under the prevailing circumstances, have their day in court without undue hindrance. Court programmes should be customized to meet the individual needs of the different stakeholders to address shortcomings in the justice system.

Planning justice for the people:

Effective planning for justice requires the courts to address the demand side of justice i.e. planning with the objective of satisfying public needs.

No doubt, this will be a departure from the traditional planning model in most Governments, which has tended to place much emphasis on meeting the needs of the public from the perspective of the bureaucrats. Bureaucrats are in most cases divorced from the daily realities people go through to access justice because they are not a reservoir for public needs and are constrained by resources and other challenges from collecting relevant data about public needs. If courts are serious about meeting justice needs of the people and making justice for all a reality, then they ought to abandon the inward / supply based model of planning in favour of the outward / demand based model of planning. Demand based planning would satisfy the needs of the people and thus make justice more accessible. The courts can engage the public through customer reviews, surveys, public debates, open days, research on changing justice needs in the community. Alternatively, the courts can engage the public through court user committees, whose main objective is to provide a forum for the public to interface with the courts.

Bridging the gap between the law and the people:

In all commonwealth jurisdictions, the law was bequeathed to us by colonization and as such the law has remained alien and uncomfortable with the ways and customs of the people. Apathy and reluctance by the population to use the law to their advantage remains a challenge to deepening access to justice. Commonwealth countries have a compelling obligation to reduce the gap between the formal system and informal systems to create and promote greater understanding, appreciation, compliance and use of the law by the citizens. It stands to reason that if the written law is in conflict with the laws citizens live by, discontent, corruption, poverty, and violence are sure to follow⁶.

The courts, must promote the indigenization of the law, so that the law reflects the settled values and norms of the community particularly on matters, which are peculiar to a given community.

The recent riots in the United Kingdom demonstrated challenges the legal regime, which is divorced from society, can face if it is not in tandem with settled principles of justice in society.

⁶Hernando De Soto: The Mystery of Capital, page 92.

Commenting on the riots in the United Kingdom, the Minister for policing and criminal justice⁷, called for deepening neighbourhood justice in addressing riots as the surest way of empowering communities to deal with social issues in the community.

He said- the answer to managing social offences was not more money and more tired approaches but neighbourhood justice. He concluded that:

Neighbourhood justice would not need the traditional court buildings. It would be dispensed in community centers and village halls, visible to the public and open to scrutiny. He added,

“Neighbourhood justice would not be an alternative to criminal justice system, but a return of power of justice to local communities to resolve less serious crimes quickly and rigorously”.

We can similarly borrow examples from Rwanda, which used Gacaca courts to deal with crimes the formal system could never have resolved. In Uganda, the Local Council Court, on average handle 800,000 cases compared to about 200,000 cases, which are handled by the formal courts. What is most striking is that despite, accusations of informal courts not being human rights compliant more than 80% of the recipients in Uganda, say they are satisfied with informal courts because they are fast and people understand them.

If then customer satisfaction is central to acceptability of the legal system, it is imperative that countries pursuing deepening access to justice for all must consider greater use of informal systems for their simplicity, public acceptance and for being reflective of the settled ways of the community under which they are operating.

Judicial Communication – a dialogue between justice and the people:

Effective communication by the judge is essential in expanding the frontiers of justice to a vast majority of the population, which is excluded from the justice system by miscommunication by judges.

Judges have been accused of neglecting the basic tenets of communication by not paying too much attention to having their judgments and ruling effectively communicated to the public. Judges have been accused of speaking softly, being verbose and legalistic and mindless about the needs of the litigants. Some judgments are overloaded with information and yet others are complex to comprehend. Information overloads create barriers to effective administration of justice. Judgments, which are badly drafted, are difficult to use as precedents and to implement.

If courts care about communicating effectively, then their judgments and the way they are delivered must meet the minimum levels of effective communication.

For, it must be observed that:

Communication that produces the desired effect or result is effective communication. It results in what the communicator wants⁸.

⁷Nick Herbert, Get a gavel; you are the law, The Sunday Times of the United Kingdom on 2nd October 2011

⁸http://en.wikipedia.org/wiki/Communication#Effective_Communication

Likewise, judges should pay special attention to the often-ignored non-verbal communication, which accounts for close to 83% of the received communication as opposed to only 7% of the verbal communication, which the litigants take in⁹. If, indeed, the interest of the court is to communicate effectively to the public, then greater use of non verbal means of communication including simplification of complicated procedures and laws should take the front among the many tools lined up to bring the public on board in the court house.

Courtroom facilities should enhance greater understanding of the courtroom infrastructure for the benefit of the public, who are excluded by the highly formalized court system. Making use of short documentaries to explain court procedures and processes- like is used at most airports to explain immigration and security procedures would make the justice system easy to use. In addition, using intermediaries to explain court processes to witnesses - such as children, victims of special crimes, would stop secondary stigmatization of these special interest groups and give them their special day in court

Accessibility of the law- let everyone access and understand the law:

True observance of the rule law requires the law to be freely available to the citizens. According to Lord Bingham¹⁰, there are three compelling reasons why the law must be accessible;

1. First, the individual must know what not to do or do to avoid the pain of criminal penalty.
2. Second, if the individual is to claim the rights, which the civil law gives him, or to perform obligations, which it imposes on him, it is important that he must know what his rights and obligations are.
3. Thirdly, a body of accessible legal rules governing commercial rights and obligations generally promotes successful conduct of trade, investment and business.

The European Court of Human Rights¹¹, has observed that – the law must be adequately accessible.... A norm cannot be regarded as a ‘ law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct. He must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail¹². Unfortunately, the reverse is true. Judges have complained that:

There is no comprehensive statute law database with hyperlinks, which would enable an intelligent person, by using a search engine, to find out all the legislation on a particular topic. This means that the courts are in many cases unable to discover what the law is, or was at the date with which the court

⁹See also Wikipedia on Non Verbal Communication at:

http://en.wikipedia.org/wiki/Nonverbal_communication#Clinical_studies_of_nonverbal_communication. “People are more likely to believe that the first things they learn are the truth.”[2] When the other person or group is absorbing the message they are focused on the entire environment around them, meaning, the other person uses all five senses in the interaction. “Sight makes up 83% of the impact on the brain of information from the senses during a visual presentation. Taste makes up 1%, Hearing makes up 11%, smell 3% and touch 2%.”[3]

¹⁰Lord Justice Toulson in R vs. Chambers (2008) EWCA Crim2467, 17 October 2008

¹¹Sunday Times vs. United Kingdom, 1979 2 EHRR 245,271, Para 49.

is concerned, and are entirely dependent on the parties for being able to inform them of what were the relevant statutory provisions, which the court has to apply¹³.

Yet availability of the law to the court and public is central to claiming justice for all.

Given that the law is not easily accessible to the public, this may now call, for a departure from the established principle in criminal law that ignorance of the law is no defense. This principle violates the rule of law, which requires the law to be available and understandable by the people. Common law jurisdictions need to take a leaf from Italy, where its constitutional court ruled that ignorance of the law may constitute an excuse for the citizen when the formulation of the law is such as to lead to obscure and contradictory results¹⁴.

Legal aid:

The provision of legal aid to the most disadvantaged is central to deepening access to justice especially for the poor and marginalized. Access to justice for the rural and urban poor as well as vulnerable persons is restricted due to poverty; access to lawyers is limited, especially in rural areas; and lack of basic knowledge on procedure of access to justice.

It is not deniable that legal aid is a service, which the modern state owes to its citizens as a matter of principle. It is part of the protection of the citizen's individuality, which, in our modern conception of relationship between the citizen and the State, can be claimed by those citizens who are too weak to protect themselves¹⁵.

Commonwealth countries need therefore to prioritize the provision of legal aid to the indigent to make justice meaningful and empowering to the people.

Human Rights Based Approaches:

Administering justice in compliance with human rights based approaches will deepen access to justice for people who are excluded from the justice system.

Human rights based approaches consist of five core principles, which are vital in ensuring that people enjoy the full spectrum of human rights¹⁶.

The first principle is that all actions must be guided or should be in compliance with international and human rights law regime. In term of justice, justice must meet the minimum international law and national law standards as set out in international conventions and national constitutions.

Principle two, requires the court to empower court users to use the court and assert their rights to a fair trial, an effective remedy etc.

¹³R vs. Chamber (2008) EWCA 2467, 17 October 2008

¹⁴Tom Bingham, the Rule of Law at page 42

¹⁵Dr. E J Cohn quoted in Tom Bingham, the Rule of Law at page 87.

¹⁶http://www.ihrnetwork.org/what-are-hr-based-approaches_189.htm

Principle three requires the courts to provide avenues for court users to participate meaningfully in the justice system.

Principle number four, requires the court to be accountable to the people and the law in administering justice

Last but not least, the court is obliged to administer justice without discrimination.

Innovation – Re inventing efficiency:

The drivers for innovation in the public sector are premised on the need to maximize value for money and reduce lead times for delivering justice. Thus the demand for courts to give maximum value to litigants has made innovation a central theme in the judicial management. Declining budgets for courts and the pressure to increase internal efficiency and external responsiveness in justice delivery coupled with demands for accountability has made innovation, one of the principle vehicles for increasing judicial productivity.

Judicial Managers are questioning the old methods of doing work and are challenging the business as usual style that dominated the public sector for generations. Today, judicial managers must adopt a business approach in running courts so that courts are responsive to public needs. In particular, judicial manager must adopt a management style that promotes innovation – to avoid the inertia of adjusting to change in the public sector. According to business models used in companies to promote innovations, the courts must adopt the following culture to foster innovation.

Courts must to a great extent eliminate the blame game, encourage people to share insights, reward creative contributions, mandate managers to foster new ideas, picking the right team leader, encourage creativity, support winning ideas with resources and tapping the organization's networks¹⁷.

Innovation must be geared at ensuring that **every** procedure should be designed for the person or party seeking justice: to facilitate just, speedy, and inexpensive access to an impartial judge and to a jury where appropriate¹⁸.

Conclusion:

Courts can achieve the myth of justice for all by focusing on results and adding value to the men, women and children who walk through the courts or are affected by what the courts does. No doubt, this will call for a departure from the business as usual approach to a culture of results culture, continuous improvements and taking advantage of the positive forces of change. As echoed by one writer '**courts are built for service to the public ... and every procedure should be designed for the person or party seeking justice: to facilitate just, speedy , and inexpensive access to an impartial judge**'¹⁹.

¹⁷Michel Syrett, Successful Strategy Execution page 109

¹⁸Rebecca Love and Dirk Olim, Rebuilding Justice page 192.

¹⁹Supra 18, 192

JUDGES OUGHT TO BE ACTIVE REFEREES AND NOT MERE SPECTATORS

By Lord Hope of Craighead, Deputy President, Supreme Court, UK

The theme of this morning's keynote address is taken from a speech which Lord Judge, the Chief Justice of England and Wales, delivered last year. His point, which he had expressed before more than once, was that it is in the interests of everyone, including the defendant and all witnesses, that there should be a changed attitude and understanding of the role of the court. As he put it, judges really must not sit there and wait for the parties to present their cases. This wastes the time of the court, results in unnecessary cost and is against the public interest. Not long ago, after a very long hearing, with many adjournments, a judge in England complained that a comparatively simple case had taken seven days to try. He then pointed out that that was one day longer than the Almighty himself needed to create the entire universe. As Chief Justice saw it, however, the blame for this lay at least in part with the judge himself. He had allowed the case to drift on and had not done anything, or at least not enough, to control the proceedings. So there must be, and is now, a new dynamic. Judges, he said, should be active referees and not mere spectators. Our task this morning is to reflect on that proposition, which in itself is really unarguable, and on what it means for each of us.

Referees and spectators

Nobody today, I think, would suggest that a judge should be a mere spectator. The mere spectator does not have to do, say or decide anything at all. He or she has the luxury of just watching the game and leaving it to the players. Spectators can be as biased and partisan as they like. Indeed that is part of the fun, as those of us who were lucky enough to be present at any of the events at the London Olympics and Paralympics or even watch them on television found out. It is not the spectators' responsibility to see that the players stick to the rules. They may not even know what all the rules are. Some of them, in sports such as judo, taekwondo or beach volley ball, may be quite unfamiliar. But that does not matter. The spectators can leave all that to the judgment of the referee, and then have the fun of shouting abuse at the referee if the decision goes against the side they are supporting. We have mere spectators in our court rooms too, of course. It is one of the most fundamental of all our principles of justice that trials should take place in public, so that everyone can see that justice is being done. We provide places for the spectators to sit, and we make sure that they can see and hear what is going on. But their place is on the public benches, not on the bench itself.

Dealing with the issue superficially, as the Chief Justice put it, judges or magistrates are referees. The question is, what type of referee should they be? In my experience, the task of refereeing a sporting contest can be very difficult. In my case it was an attempt to referee a fast moving game of hockey between two Cambridge colleges that brought home to me that I lacked the skills to be able to do that job effectively. Hockey when played to a high standard is a game which is conducted at such speed that it really should have two referees, not just one. I was on my own, and I found it almost impossible to be in the right place at the right time to see whether a player was off-side at the critical moment. My role was, in effect, reduced to not much more than a mere time keeper. Well, one learns by ones mistakes. As the saying has it in my country, never trust a guy who has never fallen off his bicycle. I fell off my bicycle that day.

To return to the point that the Chief Justice was making, he said that until recently the role of our particular type of referee was thought to be to wait on the pitch until the teams turned up. Wait for as long as they wished. And let them go on and on, as long as they liked. That, he said, is no good. What we need is active referees who will go into the changing rooms beforehand, tell each side how the game will be played, warn the players who may go offside that they are being watched and, as for those who are tempted to foul, that they will be shown the red card and sent off. And who, having prepared the teams for the kind of refereeing they can expect, will lead the teams out on to the pitch and put the ball down in the middle of the centre circle at the time when kick-off is supposed to take place. And who will ensure that the proceedings are played once only, and that they will finish on time too. The picture which he painted of the judge as an active referee provides us with an amusing analogy. The question is, how do we put all of this into practice?

The phrase that is in everyday use now in my country to describe the process is “case management”. The phrase itself is not new. It was not invented by the lawyers. It has been borrowed from the medical profession, where it is used to refer to the coordination of services and the facilitation of treatment plans to ensure that appropriate medical care is given to disabled, ill or injured individuals. Legal case management by judicial officers in the courts and tribunals means managing the life cycle of a case more effectively. It means judicial continuity, as ensuring that the same judge is in charge of the case from the outset reduces the risk of delay. It means the exercising by that judge of a closer control over the entire litigation process. It means identifying and defining the issues in dispute, and reducing delay and cost by eliminating unnecessary steps in procedure. These things, which are worth repeating – identifying and defining the issues in dispute and reducing delay and cost by eliminating unnecessary steps in procedure – these are easy to say, of course. Putting it all into practice, while ensuring that the parties have a fair trial, is much more difficult.

Each legal system is different. Each has its own rules. So each system must find its own way to solve this problem. What I should like to do is set out some general guidelines, in the hope that this may assist you in finding a solution in your own systems that will achieve the aims that Lord Judge was talking about – and that will stand up to scrutiny in your appeal courts. Different approaches may be required in criminal proceedings as compared with those that may be permissible in civil litigation. That is especially so in jurisdictions that require prosecutions for serious crimes to proceed by means of jury trial. The scope for active case management by the trial judge has to be balanced much more carefully against the imperative that the accused must receive a fair trial and the risk that, if the trial is judged to have been unfair, there will have to be a new trial with all the problems this may cause for the administration of justice. The context for what I am about to say is that of civil litigation, where the judicial officer is the judge of fact as well of law and it can be assumed that there is equality of arms on both sides.

Do's and Don'ts

This is my list of ten things you should or should not do: -

First, know your rules of procedure inside out. They are there to guide you and should be at your fingertips at all times. Rules of procedure cannot provide for everything that may happen, but they are there to be observed and adhered to. You cannot go wrong if you insist on this, and insisting on the rules being observed is your responsibility. As we all know, a referee who lets things pass and does not blow the whistle when he ought to have done is asking for trouble. He loses the respect of the

players as well as that of the spectators. So make it your job to see that the rules are adhered to. Where they leave things to your discretion, exercise that discretion as carefully and narrowly as you can, bearing in mind the overriding objective that underpins all rule-making.

The overriding objective is to enable the court to deal with cases justly. As rule 1.1(2) of the Civil Procedure Rules of England and Wales (the “CPR”) puts it, dealing with a case justly includes, so far as is practicable, (a) ensuring that the parties are on an equal footing, (b) saving expense, (c) dealing with cases in ways which are proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party, (d) ensuring that the case is dealt with expeditiously and fairly and (e) allotting to it an appropriate share of the court’s resources, while taking account of the need to allot resources to other cases²⁰. This is as good a guide as any to the approach you should take when exercising any discretionary power that is given to you by your rules or interpreting their terms.

Second, start your management of the case at the earliest opportunity. If you leave this until the day of the trial it will almost certainly be too late. The best course to follow, if your rules and the court’s timetable allow for this, is to ask the parties’ representatives to appear before you at a preliminary hearing some weeks before the trial starts, to discuss how the case is to proceed. This is your equivalent of Lord Judge’s analogy of the referee who goes into the changing rooms beforehand and tells each side how the game will be played. Time may be saved if you were to direct the parties’ representatives to meet before they meet you, to facilitate agreement and to narrow the issues that you will have to consider when they appear before you. You should make clear to them that they can assist the court by good case preparation at each stage in the proceedings, and by co-operation with the court in the process of case management. If a preliminary hearing has not been possible before the trial date, you should take time to discuss with counsel the procedure that you propose to adopt to manage the case before the trial begins. This is the equivalent of the referee who tells each side how the game will be played.

One of the things that you really should insist on at the outset is a proposed timetable. This is among of the most important of the case management tools that are at your disposal²¹. If you think that the proposed timetable is too long, you should ask for an explanation and, if at all possible, insist on its being shortened. And you should make it clear that you expect the timetable of which you approve to be adhered to. This is, of course, easier to do in the appeal courts than it is at first instance where evidence is being led. But insisting on economy in the leading of evidence, including any cross-examination, and the elimination of irrelevant or unnecessary detail is a crucial part of the exercise. You should do your best to set out the ground rules at the outset.

Third, do not allow the parties to dictate the rate of progress. It is their duty to help the court to further the overriding objective²². Once a timetable has been identified, it will be your responsibility to see that it is adhered to. Fairness requires that, if you are minded to enforce a time limit, you should alert counsel in good time before the time limit runs out. In the United States some appellate courts employ a system of traffic lights – green, amber and red, with the obvious consequences. Giving an early verbal warning is just as good. But you must be careful to be fair to both sides when doing this.

²⁰ See also Practice Direction (Public Law Proceedings: Case Management) [2008] 1 WLR 1040, para 2.1.

²¹ See CPR, rule 1.4(g).

²² See CPR, rule 1.3.

Fourth, identify the issues that really matter and those which do not matter at all. This requires some effort, as you will need to get in to the case to understand what is in issue, what is in dispute, what is not and what can be left out as immaterial. But the time taken on this part of the exercise will be time saved at the end of the day. It will reduce the length of the trial and the number of issues that you will have to determine. It is best, of course, if this part of the exercise can proceed by agreement. Once again, fairness to both parties must be the guide as to how much can be done by direction if they are not prepared to agree. In practice a frank laying of the cards on the table by both sides, which you should insist on, is likely to result in a shrinking of the areas in dispute.

Fifth, always start on time and insist that the parties stick to the timetable. It is up to you to set an example. It should be a point of honour that your court sits at the time that has been publicly advertised. This is what Lord Judge was referring to when he described the action of the referee leading the teams out on to the pitch and putting the ball down in the middle of the centre circle at the time when the kick-off was supposed to take place. Sometimes a delay in coming into court is unavoidable. If that happens, an explanation should be given. The important point is that you should make it clear that you are applying the standards that you are setting for the parties to yourself as well. You will earn their respect if you do this. You risk losing it if you do not.

Sixth, ensure that all your directions are accurately noted in the court's records. This is an essential and obvious protection against misunderstanding and dispute as the trial proceeds, and it will be equally important should the case go to appeal. In some jurisdictions, as in Scotland for example, an appeal court can, and usually will, ask for a report from the trial judge which is made available to the parties as well as the court if his or her handling of the case is challenged on appeal as having been oppressive or unfair. This provides an opportunity for providing the appeal court with the judge's account of what actually happened, which may differ from the account that the court has been given by the parties. In other jurisdictions, such as England and Wales, the practice is the other way. This gives rise to the risk that a judge may be criticised on grounds that he or she thinks is unfair because their side of the story has not been heard, but there appears to be no enthusiasm among the senior judges for the practice to be changed. The court records are, however, always available for scrutiny. Make sure therefore, for your own protection and in the interests of fairness to both parties, that any directions that you give are written down.

Seventh, be firm with counsel, however senior and distinguished they may be. It is you, after all, who is in charge of the case. Its effective management is your responsibility in the public interest. You should take confidence from this if your authority is being questioned. And it is in your pocket that there lurks the red card. I do not think that Lord Judge was suggesting that its production should result in counsel actually being ordered out of court. But it is counsel's professional responsibility to observe and respect rulings from the bench. Jurisdictions differ in the extent to which complaints to the professional body about counsel's conduct will be effective. But, as a last resort, a report to the professional body is the equivalent of the red card.

Then there are three things that you should avoid doing: -

First, do not descend into the arena. As Lord Parker CJ once said²³, it has always been recognised that it is wrong for a judge to descend into the arena and give the impression of acting as advocate. Denning LJ put the point in this way²⁴:

“A judge’s part ... is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and stick to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the role of an advocate; and the change does not become him well.”

Case management, in short, is your responsibility. Presentation of the evidence and the argument, once the trial starts, is the responsibility of counsel. You should be careful not to try to run the case for either side. Frequent interruptions in the course of the leading of evidence can provide the losing party with grounds for an appeal. If the complaint of unfairness is judged to be well-founded, it will lead to the appeal being allowed and may give rise to adverse comments on your conduct by the appeal court²⁵. Like the referee, you should leave moving the ball about the field to the players, once you have told them how the game is to be played.

Second, do not do or say anything while giving your directions that might suggest that you could be biased for or against either party. Article 10 of the Universal Declaration of Human Rights states that, in the determination of his rights and obligations, everyone is entitled to a fair and public hearing by an independent and impartial tribunal. Like the referee, you must be impartial and you must be seen to be so. It is quite common for judicial officers who are accused of being biased to insist that they are not biased at all, and that they have conducted or will conduct the proceedings fairly. But actual bias, which may be hard to prove and is very rarely found in our judicial systems, is not the whole story. What the judge thinks of himself or herself subjectively is not determinative. The real risk is of being thought to have what is best described as an apparent bias. The test which the courts in the United Kingdom now apply is whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. This is not an easy test for an appellant to satisfy, and it is most unlikely that well thought out measures of case management will give rise to such an objection. But you should be aware of the possibility and be careful.

Third, above all, do not lose your temper. It is so easy to get irritated when people do not do what you want them to do or are obstructive or uncooperative. Controlled anger is one thing. If you can express yourself in this way without actually losing your temper, it may produce dividends. But loss of self-control is quite another. It will almost certainly lead to error and embarrassment. You must do everything you can to avoid getting into that position. One does not expect a referee to lose his or her temper. Nor should you.

Some guidance from Scotland

It may help to put some of these points into their proper perspective if I were to give three examples of how case management is being encouraged in Scotland.

²³ *R v Hamilton* (unreported), adopted by the Court of Appeal in *R v Hulusi* (1973) 58 Cr App R 378, 382.

²⁴ *Jones v National Coal Board* [1957] 2 QB 55, 64.

²⁵ Eg *Peter Michel v The Queen* [2009] UKPC 41.

The first is in the field of commercial actions, where the action arises out of or is concerned with any transaction or dispute of a commercial or business nature. A special procedure has been laid down by the Court of Session, the senior court of civil jurisdiction in Scotland, in Chapter 47 of its Rules²⁶ to enable disputes of that kind to be dealt with by specially appointed commercial judges as quickly as possible under the close supervision of the court. It was introduced about 20 years ago to answer the perception of the business community that the court's procedures caused delay and lacked expertise. Among the procedures that were introduced by an amendment to the rules were a preliminary hearing to enable the commercial judge to take control of the proceedings from the outset, such as by ordering disclosure and setting out time limits, and a procedural hearing to determine further procedure once the case is under way and the issues involved and the methods of disposing of them have been identified. The main purpose of the procedural hearing is to achieve speedy resolution of the case by reducing to a minimum the time spent on preparing for the case to go to court and the time actually spent in court when the case gets there. This is achieved by eliminating the leading of evidence or the presentation of argument on points which are not disputed or which turn out to be immaterial. The judges expect those who appear before them at these hearings to be fully informed about the case. This system works well in practice. It has the advantage, of course, of being underpinned by rules which give extensive management powers to the judges – which they are astute to exercise.

The second example relates to cases about the adoption of children. One of the most difficult aspects of this branch of the law is the freeing the child from its ties with the natural parent so that it can be adopted. For understandable reasons the natural parent may be very reluctant to agree to this, and in such a case there is a risk that proceedings may become protracted contrary to the best interests of the child which, as article 3 of the Convention on the Rights of the Child declares, must be a primary consideration. Rules providing for a degree of case management of these proceedings in the sheriff court were introduced in 2009²⁷, and they have been supplemented by guidelines as to good practice in the form of practice notes²⁸. The system that the rules adopt is similar to that for commercial cases. They provide for a preliminary hearing at which the sheriff is required, among other things, to ascertain the anticipated time required for the leading of any evidence, to fix a date for a procedural hearing and to make orders about the pleadings and the production of documents in advance of that date. He has power at the procedural hearing, after considering the state of preparation of the parties, to make such orders as he thinks fit to secure the expeditious progress of the case. This is a wide discretion, with the exercise of which an appeal court would be very unlikely to interfere.

The practice notes give useful guidance as to how these powers are to be exercised. They state that the object of the preliminary hearing is to enable the sheriff to make preliminary inquiries with a view to ascertaining the likely scope of the dispute, encouraging early preparation for the trial and the drawing up of a timetable and giving such directions as may be appropriate for the purpose of ensuring, so far as reasonably practicable, that the timetable is adhered to. The sheriff is encouraged throughout the proceedings to be prepared to engage in active management of the case and to maintain control over the proceedings while exercising flexibility in doing so. As the case proceeds it is his responsibility to direct his attention to securing that the issues at the trial are as sharply focussed as possible, to draw up

²⁶ Act of Sederunt (Rules of the Court of Session 1994) 1994 (SI 1994/1443).

²⁷ Act of Sederunt (Sheriff Court Adoption Rules Amendment) (Adoption and Children (Scotland) Act 2007) 2009 (SSI 2009/284).

²⁸ eg, the Sheriff Principal of Glasgow and Strathkelvin's Consolidated Practice Notes, para 3.2.1 et seq.

a timetable and determine further procedure after consultation with, and with the agreement of, the clerk of the court. A lengthy and poorly focussed trial must be avoided.

If this guidance is followed, the trial should not be unduly long. It has been stressed by the appeal court that there is a heavy responsibility on the parties' representatives to exercise all reasonable economy and restraint in their presentation of the evidence and in their submissions to the sheriff²⁹. Furthermore, it is necessary if the court is to deal with cases justly, that the parties and their legal representatives too act justly, responsibly and in accordance with the directions of the court³⁰. They must expect to be held to their estimates of time to be taken for the examination and cross-examination of witnesses and to any other directions that the court may have given as to how the case on either side is to be conducted. They cannot be allowed, as it were, to hold a gun to the court by resorting to conduct that will put pressure on the court by preventing it from determining the merits of the application or subjecting it to unreasonable delay.

These rules were designed for use in adoption cases. They have not yet been made applicable outside that special field. But there is a case for saying that they are capable of being applied more widely. Family law disputes are notorious for their tendency to overrun. The parties to a broken marriage may wish to throw a host of accusations of misbehaviour of all kinds against each other. Resolving endless disputes about who said, or did what, to whom during its entire history are unlikely to help the judge to resolve the real issues between them. But, as we all know, the parties' representatives cannot always be relied on to exercise all reasonable economy and restraint. It is the judge's task to see that they do so, and that they do so from the very start of the case before it gets out of hand.

The third example provides us with a useful illustration of what can be done by presiding judges to assist the process. Just a few days ago Lord Gill, the Lord President of the Court of Session, issued a direction about the management of a group of personal injury action for damages for pleural plaques and other asbestos-related conditions for which, under a recent statute passed the Scottish Parliament, damages are now recoverable – despite the fact that, according to expert medical opinion, these conditions are symptom-free. This change in the law gives rise to some interesting questions, and it is expected to give rise to a large number of claims. So the Lord President felt it appropriate to give directions as to how they were to be handled³¹. They are quite detailed, so I shall attempt to summarise them.

First, the pursuer (or claimant) must assemble and deliver to the other side a “pursuer's pack” which included a summary of the pursuer's employment history, an explanation of the trade or other activity which exposed him to asbestos and a copy of his up-to-date medical records. Within 8 weeks of the delivery of that pack to it, the other side (the defender”) must intimate to the pursuer whether it intends to settle his claim. If it elects to go for settlement, it will have four weeks from the date telling the pursuer that it intends to settle it to agree the terms of the settlement and to produce an agreed minute disposing of the action. If the defender fails to respond the pursuer's pack or tells the pursuer that it does not propose to settle the action the pursuer can proceed with his action, which will then be sent for a procedural hearing before the judge who has been nominated to discharge the court's management function. Her task will be to manage the action with the aim of securing its efficient

²⁹ *Lothian Regional Council v A*, 1992 SLT 858, 862.

³⁰ *Albon v Naza Motor Trading Sdn Bhd and another (No 5)* [2007] EWHC 2613 (Ch), [2007] 1 WLR 2380, para 19.

³¹ Court of Session Direction of 27 August 2012:2012 SLT (News) 173.

disposal. She will have power, among other things, to fix procedural hearings, determine further procedure, issue a timetable for the progress of the action, order the production and recovery of documents and the production of expert reports and ordering each party to produce a statement of valuation of the claim. The direction also states that the nominated judge may make any of these orders on her own initiative or on the application of one or more parties, but that if she acts on her own initiative she must give the parties an opportunity of being heard. She has been directed to give early consideration to whether it is appropriate to identify a lead action or actions to be progressed at an advanced rate in order to determine guidance on any generic issues in the action.

One can see from this summary that the overriding aim is to ensure that this difficult group of cases is dealt with as quickly and as economically as possible, while ensuring fairness to both sides. It is a good example of the court getting ahead of the game before it starts, and of the use of a timetable to ensure that it is controlled by the judge from the outset. It is a useful reminder, too, that case management is not just the responsibility of the judge before whom the case is to be tried. Those in senior positions who have power to give directions or give guidance to the judges at first instance have a part to play in this as well. We are all in this together, and everyone from the top down has a responsibility to ensure that overriding objective is given effect to.

Sanctions and the Appeal Court

Case management should, for the most part, be achieved by persuasion. It should result in agreement between the parties and the court itself as to the steps that are to be taken, and there should be no need for the imposition of sanctions or the production of the red card. But, human nature being what it is, there will be occasions when the court's orders will need to be backed up by a condition indicating that, if the order is not observed, certain consequences will follow. There will be others where an application, such as for permission to amend the pleadings or for an adjournment, will have to be refused because to grant it would not be to deal with the case justly in accordance with the overriding objective. This is where the role that the appeal court can be expected to play comes into focus.

Responsibility for case management does not, of course, stop when the case leaves the trial court. The overriding objective remains in play at all stages of the case, including on appeal. One of the functions of the appeal court is to review decisions that have been taken by the first instance judges on matters of procedure and, where sanctions have been imposed, to consider whether they were justified. From the trial judge's point of view there are perhaps two ways of looking at this. One is to acknowledge with gratitude that, if things go wrong, the appeal court is there to correct them. The other is to feel a sense of irritation, to put it no higher, that his or her decisions may be second guessed by the higher court. I would encourage you to prefer the former view, and not allow yourselves to be inhibited by the prospect of an appeal.

It has been recognised by the Court of Appeal in England that, in order to ensure that the court's process is not subverted so as to become an instrument of injustice, every procedural system must place at the court's disposal the power to manage proceedings before it by, if necessary, imposing sanctions on litigants who fail to comply with its rules and orders³²:

³² *Marcan Shipping (London) Ltd v Kefalas* [2007] EWCA Civ 463, [2007] 1 WLR 1864, para 10, per Moore-Bick LJ.

“The ultimate sanction, of course, is to dismiss the claim or strike out the defaulting party’s statement of case. A well-recognised way of imposing a degree of discipline on a dilatory litigant is to make what is known as an ‘unless’ order by which a conditional sanction is attached to an order, requiring performance of a specific act by a particular date or a particular period.”

An order in such terms takes effect without the need for any further order if the party to whom it is addressed to make the sanction effective. The onus is on the defaulting party to take steps to obtain relief. In that event the court is required to consider whether, in all the circumstances, it is just to make an order granting relief from the consequences that would otherwise follow. But an appeal court can be expected to adopt a robust approach to litigants whose conduct is liable to subvert the overall fairness of the proceedings³³ or, it may be added, to subvert the overriding objective. And an exercise of his or her discretion by the judge at first instance cannot be impugned unless the judge’s decision was plainly wrong³⁴. So there should be no second-guessing by any appellate court of the decision by the trial judge. Judges who are doing their best to manage their cases actively, and who do so justly and proportionately as the overriding objective requires, are entitled to expect to receive the support of the appellate judges if their decisions are taken to appeal.

Conclusion

At the heart of all of this is the principle of judicial independence. That is where our strength lies. It carries with it the clearest possible message that the judge is not to be subjected by anyone – government, media or litigant – to pressure to fear or favour, or display affection or ill-will towards, any one side or the other, or indeed to anyone in his or her court. Respect for the principle cannot be taken for granted, however. It has to be earned. So the judge must resist fear or favour, affection or ill-will, in whatever form it may take. And judges must be responsible to their consciences too. They must maintain their knowledge of the law and of procedure, and keep up to date with their developments. They must be aware of the problems create by modern technology, not just of its potential to assist. The proliferation of paper which was the product of the photocopier, and of endless information on every conceivable subject which is now obtainable by means of the internet, has made it all the more important for judges to exercise their own judgment and to manage their cases without fear or favour, courageously and robustly. If they do not do this, the system will be at risk of being overwhelmed by the sheer weight of the technology which the modern world has created.

The responsibility that this places on them does indeed, then, require judges to be active. They must not just sit there and wait for the parties to present their case. They must get to know the case each side intends to present, and they must prepare themselves to manage the case accordingly. The tendency to overburden the court with too much detail, too much information, too much case law, must be resisted. So too must the tendency for the parties to seek adjournments of the case to suit the convenience or counsel or for other reasons that conflict with the overriding objective to ensure that cases are dealt with expeditiously. Care should be taken, when the time comes to prepare the judgment, to ensure that it is no longer than it needs to be. Excessively long judgments too may make it hard to identify the crucial points and give rise to unnecessary cost and delay.³⁵ All of this takes

³³ Ibid, para 19.

³⁴ See, eg, *Maguire v Molin* [2002] EWCA Civ 1083, [2003] 1 WLR 644, para 35.

³⁵ See *Customs and Excise Commissioners v A and another* [2002] EWCA Civ 1039, [2003] Fam 55, para 83.

judicial effort. It requires knowledge and it requires training. And it takes time. But that is what, as Lord Judge would have said if he were here, our systems demand of each one of us.

POST-GENOCIDE JUSTICE IN RWANDA

By Chief Justice Sam Rugege, Chief Justice of Rwanda

Background

The genocide against the Tutsi that happened in Rwanda in 1994 was the culmination of periods of repression and mass killings that had taken place since 1959. A culture of impunity had developed with the active support of the state. The colonial and post-colonial regimes that run the state up until the genocide were discriminatory and repressive, characterized by ethnically based policies and politics. This led thousands of citizens who survived the repression and atrocities to flee into exile in neighbouring countries of Burundi, Congo, Tanzania and Uganda, some of whom returned in 1990 to wage a war to regain their citizen rights.

As far as justice is concerned, there was little respect for the rule of law and the judiciary was untrained and corrupt with no semblance of judicial independence. The judiciary was an appendage of the executive. The Head of State was the Chairman of the Superior Council of the Judiciary (equivalent of the judicial service commission in most Commonwealth countries) which was charged with the recruitment, discipline, and termination of judicial officers.³⁶ The Minister of Justice was the Vice-Chairman of the Council. It could not possibly be argued that such a council was independent of the Executive. The nature of the Judicial Council coupled with the fact that one did not have to be a lawyer to be appointed a judge,³⁷ created a fertile ground for interference and pressure from the executive power as well as promoting incompetence in the administration of justice.

Perpetrators of ethnic based killings were granted immunity from criminal prosecution. For instance, the amnesty law of 20/05/1963 promulgated by the First Republic was intended to exonerate those who had been killing Tutsis during the 1959-62 massacres.³⁸ As it has been said, the law “consecrated the principle of impunity which characterized all subsequent ethnic crimes committed from that point on.”³⁹ The perpetrators of criminal acts were granted amnesty because according to the regime, they had participated in a struggle for national liberation.⁴⁰ The Amnesty law of 30th November 1974⁴¹ granted amnesty for certain political offences. It is this long established culture of impunity,

³⁶ Institute of Research and Dialogue for Peace (IRDP), *Building Lasting Peace in Rwanda: Voices of the People*, Kigali, Nov. 2003, p.136.

³⁷ According to one report, in 1994 only 32 out of 1000 judges had legal qualifications and only 18 prosecutors had law degrees. “Five years after genocide in Rwanda, International Crisis Report No.1, 7 April, 1999 published by International Crisis Group; available at www.icg.org/library/doc.

³⁸ See Law of 20th May, 1963 on General Amnesty for political offences committed between 1st October 1959 and 1st July 1962. *Official Gazette of the Republic of Rwanda*, 1963, p. 229, reproduced in *Codes et Lois du Rwanda*, Vo.1, 2nd Ed., 1995, p. 431.

³⁹ IRDP, *ibid.* p.148.

⁴⁰ The French text of Article 1 of the 1963 Law reads: “Amnistie générale et inconditionnelle est accordée pour toute les infractions commises à l’occasion de la Révolution Sociale pendant la période du 1^{er} octobre 1959 au 1^{er} juillet 1962 et qui, en raison de leur nature, de leur mobile, des circonstances ou des motifs qui les ont inspirées, rentrent dans le cadre de la participation à la lutte de libération nationale et revêtent ainsi un caractère politique même si elles constituent des infractions de droit commun.”

⁴¹ Décret-loi Amnistie de certaines infractions politiques. (Decree Law of 30th November 1974, granting Amnesty for certain political offences, *Official Gazette of the Republic of Rwanda*, 1974, P. 629).

encouraged by the ideology of ethnic divisionism, which made the atrocities of the genocide against the Tutsi possible.

After the 1994 genocide, Rwanda embarked on policies and set up institutions and mechanisms that were the building blocks for unity and peaceful coexistence of its people so that the country itself could be primarily responsible for ensuring that never again will genocide take place on its soil. These policies and mechanisms were aimed at reconciliation but also had to be coupled with bringing to justice those who committed the heinous crimes so that the culture of impunity that prevailed until 1994 could be eradicated. The measures included encouraging and assisting refugees who had fled after the genocide (including perpetrators of genocide) to return, creating the National Unity and Reconciliation Commission and the National Human Rights Commission. A new democratic Constitution that enshrined the protection of human rights, respect for the rule of law and the separation of powers was put in place after a period of extensive consultation and a national referendum. This was followed by a law reform program focusing on the administration of justice.

Despite all the legal and administrative measures, for healing and reconciliation to take place it was crucial that a credible and effective administration of justice be established and put into operation. The biggest challenge to the post-genocide government in the area of justice was how to deal with those suspected of involvement in the genocide. In its aftermath, thousands were arrested suspected of crimes committed in the genocide. They had to await trial in circumstances of meagre human and material resources. The detention facilities were grossly inadequate as they were never meant to cope with large numbers. The suspects needed to be tried as soon as was practically possible. On the other hand, survivors of the genocide expected that the new dispensation would not tolerate impunity; they wanted to see justice being done. It was imperative that the new state find a way of dealing with the situation that addressed the need to clear the prison population, eradicate the culture of impunity for serious crimes while giving some semblance of justice to survivors. For many survivors who lost whole families and all they owned, there will never be full justice.

However, the justice apparatus after the genocide was in shambles. Many of the judges, magistrates, prosecutors and lawyers in private practice were killed in the genocide. Others had been involved in the genocide and had either run away when the genocide was stopped or were in jail awaiting trial for their crimes. This situation was compounded by the fact that prior to 1994 there was a dearth of trained lawyers as the state had not encouraged the study of law. About ten lawyers graduated from the single university at Butare each year.

There was no professional body for lawyers. From independence in 1962 to the 1994 genocide against the Tutsis, Rwanda did not have a self-regulated legal profession. Article 81 of the 1964 law on the Code of Civil and Commercial Procedure stated that “advocates enrolled in the national bar association” as the only persons qualified to represent and assist parties in courts. However, there was no such organization and no mechanism providing for enrolment. In 1984, Law N° 12/1984 of 12 May 1984 was enacted giving powers to the Justice Minister to regulate representation and assistance in courts. The Minister had discretionary powers to issue advocates’ licenses to applicants wishing to represent and assist people in courts. However, there were no pre-established criteria for such licensing. Legal training was not a prerequisite and any literate person was eligible to apply. These discretionary powers coupled with a lack of minimum standards resulted in poor quality of legal

services offered to the public.⁴² Thus, even before the chaos of 1994, there was lack of confidence in the administration of justice. It is in this context that we look at the administration of justice in post-genocide Rwanda.

Multiple jurisdictions in genocide cases

A new law dealing specifically with genocide and related crimes, was passed in 1996⁴³. Trials started in regular courts and subsequently in specialized chambers created to speed up the trials. However, the trials in the conventional adversarial system although commendable, were very slow. The number of people tried was constantly increasing since 1997⁴⁴ but by 31 December 2002, only 8,363 individuals had been tried for the crime of Genocide and other crimes against humanity. At this rate the trials would take forever to complete.

Meanwhile, at the international level, in late 1994, the United Nations Security Council set up the International Criminal Tribunal for Rwanda (ICTR) to try those most responsible for the genocide; the planners and organisers of the genocide, most of whom were hiding in different countries around the world. In terms of finding a solution for those accused of genocide inside Rwanda, ICTR was no answer and was not intended to be. The speed of ICTR in processing genocide trials was many times slower than the Rwandan courts and hardly addressed the issue of reconciliation. Although the Security Council Resolution setting up the Tribunal talked of reconciliation as one of the objectives of the Tribunal, this was not likely given that it was to handle only a handful of suspects however high-profile they might be. The impact of such trials on the Rwandan population as a whole was bound to be minimal.

It was clear that disposing of these cases, within a reasonable period of time and at the normal pace of criminal trials, was going to be an impossible task. Different studies speculated that at a normal pace criminal trials would take anything between 100 and 300 years to complete. The country started a national dialogue aimed at coming up with a solution to the crisis of the huge backlog of genocide cases. The dialogue involved politicians, civil servants, intellectuals and ordinary peasants. It is from these discussions and after months of debate that the idea of going back to Rwanda's traditional form of administration of justice called Gacaca was agreed upon. Ironically, opposition to the use of these courts came from outsiders, in particular foreign Non-Governmental Organisations, which argued that these lay courts could not deliver justice in such serious cases without the involvement of lawyers. However, they offered no viable alternative that could cope with the numbers while applying what they called international standards of due process. Rwanda decided to go ahead and experiment with these courts as it was crucial to deal with the problem if the country was to make any progress towards recovery, unity and reconciliation and reconstruction and development.

Gacaca courts were set up in every village and local communities elected from among themselves persons considered to be persons of integrity to hear and decide cases of the ordinary people and low

⁴² The information on the history of the bar in Rwanda is derived from a document provided by the Kigali bar Association entitled: "Background to the legal Profession in Rwanda" dated 18 May, 2011.

⁴³ Organic Law No. 8/96 of 30 August 1996 on the Prosecution for offences constituting the crime of genocide or crimes against humanity.

⁴⁴ LIPRODHOR, table n° 2, 2003, p.11.

level officials accused of participation in genocide. The so-called category one suspects, accused of master-minding, planning, organizing, instigating and supervising the genocide were left to be tried by regular courts. The objectives of Gacaca were set out as:

- to reveal the truth about Genocide;
- to speed up the cases of Genocide and other crimes against humanity;
- to eradicate the culture of impunity;
- to strengthen unity and reconciliation among Rwandans;
- to prove that Rwandans had the capacity to solve their own problems.

By the time Gacaca trials came to an end in 2011, more than a million cases (including property cases) had been decided by these courts.

Gacaca courts

The nature of the court

Gacaca courts were specialized courts set up to deal specifically with genocide cases. They were an adaptation of the traditional courts whereby members of the community used to come together and resolve disputes. Gacaca courts had many advantages over regular courts, especially in the context of the large number of suspects. These included:

(a) *Speedy trials*: the procedure was simplified to make cases move faster. There were no lawyers to raise objections on minor issues of procedure or making other preliminary applications. Judgments were often delivered on the day of completion of the hearing or the day after. It is interesting to note that during the year 2000, the ICTR rendered four judgements on the merits and more than 200 interlocutory decisions, including many rulings of the Appeals Chamber on diverse procedural issues. No wonder that only about 60 cases were finalised by ICTR in 17 years (by mid 2012). By June 2012, the Tribunal has completed 59 trials involving about 70 accused persons.

(b) *Less formal and not intimidating to witnesses*. Anyone in the community or outside it who could assist the tribunal to reach the truth was allowed to speak. There was a relaxed atmosphere that encouraged people to say what they knew, what they saw. To the unschooled the truth is more likely to be told in such circumstances than in a cold intimidating courtroom of robbed judges and prosecutors and defence counsels bent on destroying the credibility of witnesses through cross-examination.

(c) *Inexpensive for the state, the victims and witnesses*: As much as possible, the trial took place at the local area where the offence was committed and where the witnesses were likely to be. Travel and other logistical expenses incurred by state or individuals were minimal.

(d) *Truth, forgiveness and healing*: In the Gacaca court, the accused was given the opportunity to acknowledge wrongdoing, tell the truth of how the crime was committed and ask for forgiveness. If this happened the person once convicted was given a lesser sentence than he/she would have otherwise got. The victim or a relative of the victim, if present, was able to come face to face with the perpetrator and if forgiveness was asked for it was often given and there was a real chance of forgiveness and reconciliation. Over time, there was a good chance of healing for the victim and reintegration into normal society to get on with life psychologically and economically.

Gacaca court judges

Gacaca judges were lay people who were carefully selected by the communities from among themselves based on their reputation in the community for high integrity, honesty and trustworthiness. They had to be persons not involved in politics or certain positions in government service and should not have been involved in the Genocide. Persons elected to Gacaca who were subsequently discovered not to be persons of integrity or to have been involved in the Genocide, were removed and where appropriate prosecuted and punished.

Some human rights activists argued that justice could not be properly rendered by a group of lay men and women from the community of the accused and complainant and in the absence of qualified legal advisors. However, Gacaca courts were at the grass-roots level, in every village and ward. It was not possible in the circumstances of Rwanda, or anywhere else for that matter, faced with over a million cases, to have enough legally qualified judges and lawyers to handle these cases. Rwanda therefore came to the conclusion that the advantages of such community courts rendering justice during the lifetime of the victims and perpetrators outweighed the possible disadvantages of using lay judges.

Jurisdiction

Initially, Gacaca courts handled cases of so-called category two suspects, that is, those who killed but were not in planners, organisers or those in leadership positions. They also dealt with category three suspects who committed offences relating to property. First category suspects, that is, those who were in government leadership positions, were among planners, organisers, supervisors and ringleaders of genocide or other crimes against humanity, those who committed torture or rape, were not within the competence of Gacaca courts. In 2008, however, when it became clear that ordinary courts were failing to cope with category one suspects, the Gacaca law was amended to empower Gacaca courts to try certain category one cases. These were cases involving lower ranking leaders who committed genocide and those who committed sexual offences. There are now only a handful of category one suspects still to be tried in the ordinary courts.

Punishment that could be imposed by Gacaca

Imprisonment; compensation

Gacaca courts could only pass a maximum sentence of 30 years imprisonment for second category offenders. This could only be imposed by the higher (ward) level Gacaca court. The court could, however, also impose various intermediate punishments. The lower Gacaca court at the cell level, only dealt with issues of damage to property and could only order reparation or compensation where the parties were unable to agree. Where the accused and the victim of property damage were able to agree, the state only got involved with enforcement of the agreement.

Community Service as alternative punishment to imprisonment (Travaux d'intérêt général)

The law on Gacaca provided that if a suspect in the Second category (that is one who killed or committed other crimes against a person but was not in a leadership position and did not commit the more serious violations mentioned above) confessed his crimes, told the truth of what happened and asked for forgiveness, he/she would be given a lesser sentence (up to half the prescribed sentence) than

those who did not confess and ask for forgiveness. More importantly, of the sentence imposed, only half was to be served in prison while the other half of the sentence was served in the community or in a public institution in work beneficial to the public. Often, part of the sentence was suspended. Some in the survivor community thought over time the law had become too soft on persons who committed heinous crimes.

The type of work involved, included building and repair of rural roads, repair and maintenance of public buildings, growing food for prisoners, orphans and others who are indigent and for whom the state has the responsibility of feeding, as well as environmental protection – planting forests, clearing rivers and lakes etc. Thus perpetrators of genocide who did a lot of destruction were enabled to participate in the reconstruction of the country.

In carrying out community service, convicted perpetrators gained vocational skills that could help them later to be easily reintegrated in society and to become economically active, especially in construction and handicrafts. Those who were illiterate were taught how to read and write. This also helped to enable them to participate more effectively in development. In general, the community service punishment was intended to ease the perpetrator back into normal society and therefore to promote reconciliation and peaceful coexistence and avoidance of conflict. From 2005 to 2011, those who had been sentenced to community service were over 80,000.

Some Criticisms of the Gacaca process

Lack of Legal Representation:

The Gacaca system has been criticised for not permitting the right to legal representation to the accused. However, permitting legal representation would have changed the whole character of the court and would have turned it into a regular court. It would have brought in the formality of elaborate legal procedures and consequent delays. It would have also meant bringing in legally qualified judges who would understand the legal technicalities so well-loved by lawyers. It would have brought in the almost hostile atmosphere of cross-examination, all kinds of preliminary objections, adjournments *et cetera*. Moreover, even if the system were designed to accommodate lawyers, there were not enough of them in the country to represent over a million defendants scattered in villages around the country. It is also noteworthy that traditional courts in other African countries do not permit legal representation so as to keep proceedings simple, people-friendly and to ensure speedy resolution of disputes. Once again, it was a matter of weighing the pros and cons and in this case the country chose to take the many advantages of Gacaca and live with the possible disadvantage of the absence of legal representation. At the same time, the accused had all the time he or she needed to challenge whatever was said by the complainant or witness and to call witnesses willing to testify on his or her behalf and could be assisted by another person not claiming the prerogatives of defence counsel.

(b) No Appeals to regular courts

Appeals were only allowed from the village Gacaca court to the ward or sector Gacaca court. There were no appeals to the regular courts. In the regular courts, convictions and sentences of imprisonment are appealable up to the High Court and in serious cases up to the Supreme Court. However, again for the reasons given regarding delays in regular courts it was considered prudent to limit appeals to the system of Gacaca in the interest of fast-tracking genocide cases, getting convicted persons back into normal society as soon as possible and hence promoting reconciliation. Permitting appeals to regular

courts would have meant following the usual procedures in those courts with the inevitable delays. That would have defeated the whole idea of taking the cases to Gacaca in the first place.

Successes

Compared to the ICTR and the regular courts in Rwanda handling genocide cases, Gacaca courts were, in our view highly successful in the ten years they were operating. The total number of cases tried by Gacaca is 1,958,634 of which 67.4% were property related cases. Convictions amounted to 86% and 14% acquittals. The largest number of acquittals was in category 2 (37.4% while the smallest was with property cases at 3%. There were a significant number of guilty pleas among those accused of acts of genocide (41.4% in category one and 30% of those in category 2 whereas guilty the numbers of guilty pleas among those accused of looting or property damage was very low at 7.4%. This can be explained by considering the consequences: guilty plea on charges of committing acts of genocide meant a reduction of sentence and community service while with property cases there was little advantage since reparation would still have to be made without reduction. These were tried in 12,103 courts before nearly 170,000 lay judges. This is a far cry from just over 6,000 tried by regular courts and just over fifty by the ICTR. It is also clear that Gacaca courts have to a large extent achieved the objective of justice and enabled a substantial number of victims and perpetrators to reconcile and live in peace with each other.

Challenges

(a) Intimidation and killing of witnesses in genocide cases.

Despite the obvious successes of the Gacaca system, there were challenges. One of the most serious ones was the intimidation of witnesses to dissuade them from testifying against suspects. Witnesses were killed; some after testifying, others before they were due to testify. Acts of intimidation included setting houses ablaze, sending anonymous letters, uprooting crops and killing of animals belonging to survivors. This caused great concern on the part of government and all peace-loving Rwandans. It was a source of bitterness for some survivors who thought that the state was not doing enough to protect them and a number got discouraged from participating in the process. Some Gacaca judges (*Inyangamugayo*) were also intimidated, assaulted or killed.

(b) Fake confessions.

As indicated, the law allowed suspects who confessed, told the truth and asked for forgiveness to get lighter sentences and to serve half of their sentence in community service. It was also the practice that those who confessed and asked for forgiveness were released from prison and awaited their trial in Gacaca from their homes. However, there were some who did not tell the whole truth and just said enough to get them out of prison or to get them a light sentence. Some even mocked the Gacaca process once they were out and threatened to finish the job they started when the time was right. This did not advance the cause of reconciliation. The whole philosophy of the Rwandese reconciliation strategy was that truth and justice must precede reconciliation and not the other way round. This had a negative effect on the survivors and slowed down their healing.

(c) Cases of misconduct by Gacaca judges

There were a few cases of Gacaca judges who were discovered to have been involved in genocide and other crimes against humanity. They were removed and prosecuted. Some Gacaca judges were prosecuted for demanding or accepting bribes. Other cases relate to malfunctioning of some courts because of judges who were not genuine. For example, in one court two Gacaca judges destroyed a

notebook containing the information that had been collected on suspects. However, the vast majority of Gacaca judges were honest and committed to the cause of justice and reconciliation.

(d) Escaping from Community service

Not all persons sentenced to TIG show up for the community service. Because they perform it in camps close to communities and because there is insufficient guarding and monitoring, a number have escaped and disappeared. They may have changed their identities and resettled in places far from their former communities or may have left the country. These are of course those who were not sincere in their pleas for forgiveness in the first place. This has been a serious challenge to the search for maximum reconciliation when perpetrators go unpunished.

(d) Insufficient material support for survivors.

Most survivors lost family and all the property they had in the genocide. They have not got any compensation. Again this is discouraging, especially when survivors see those who were not affected by the genocide living comfortably. Although the state has acknowledged responsibility for reparation to survivors under the state succession doctrine, it has so far only been able to help those who are destitute or very poor through a state fund.

The Fund for the Support of Genocide Survivors popularly known as FARG (from its French name) is a state fund established in 1998. This fund provides assistance for housing, health and covers school expenses for the children of indigent survivors and orphans. A more comprehensive assistance fund for the survivors of the Genocide was created in 2008 (Law No. 69/2008 of 30/12/2008). It is intended to support genocide survivors through building houses for elderly, widows, widowers, orphans of the genocide as well as assisting them engage in beneficial self-help economic and social programs. It also has the responsibility of supervising and coordinating activities relating to the collection of contributions intended for survivors. This is an independent body with legal personality and may raise funds from any source including charities as well as taking action and seeking indemnity against those convicted of genocide, although the latter is unlikely to raise substantial amounts for compensation of survivors.

Despite the challenges, Gacaca was a substantial success. We believe there is something to be learnt from the Rwanda experience with our version of restorative justice by other countries emerging from conflict or currently going through conflict. The country has moved on with a revamped system of administration of justice that attempts to deliver justice to all through different mechanisms including the conventional court system, mediation and other alternative dispute resolution mechanisms.

Judicial Reforms that have improved Administration of Justice after the Genocide

After the genocide Rwanda embarked on a reconstruction programme not only for infrastructure which had been destroyed but the rebuilding of institutions including the judiciary.

The current justice system in Rwanda

Reformed structure

In Rwanda we have tried to get justice closer to the people and to enable whoever wishes to access the justice system to be able to do so. We also continuously try to improve the quality of service provided to the users of courts. There are sixty primary courts at the lowest level of the court hierarchy and 12 regional magistrate's courts. With regard to the superior courts, there is the High Court with five

branches (called detached chambers) serving the four provinces and the City of Kigali. At the top of the hierarchy, there is the Supreme Court.

There are also specialized courts. There are three commercial courts based in the 3 major commercial centres of Kigali, Musanze and Huye (Butare). Commercial Courts hear all commercial disputes at the first instance. Their decisions may be appealed to the Commercial High Court and thereafter may be appealed to the Supreme Court if they meet the monetary threshold of 50 million Rwandan Francs. There is also the Military Court and a Military High Court handling appeals from the former.

Regional courts take appeals from primary courts while appeals from the regional courts go to the High Court. The Supreme Court is the highest court of appeal handling appeals from the High Court, the Military High Court and the Commercial High Court. However it has no mechanism for selecting or vetting cases that come to the Court. The only limitations are the monetary threshold of 50 million Rwanda francs or USD 80,000 (until the 2012 Supreme Court Act the threshold was 20 million or just over USD3000) in civil matters and in criminal cases any case heard by the High Court or Military High Court at first instance (including murder cases) and those on second appeal where a sentence of 10 years or more was imposed, can be appealed to the Supreme Court. Thus there is a very liberal access to the courts, including the Supreme Court.

Legal assistance

There is of course the issue of cost of litigation for those who wish to access courts. The initial cost of accessing a court is affordable to the average litigant. In fact it has been argued that it is too low and encourages litigation in cases that could easily be resolved by agreement. Court fees for initiating a claim in the Primary court is two thousand Rwandan francs or about 3 USD, while at the High Court level it goes up to 6000 Rwandan Francs or approximately 10 United States dollars. The fee at the Supreme Court is only 8000 francs or USD13. The problem arises when it comes to paying for a lawyer to assist either a party in a civil case or the accused in a criminal case. There is legal assistance provided through legal aid programmes but it is of limited coverage; the programmes do not provide assistance to all who would need to be assisted due to limited funds.

It is only the most vulnerable who get assisted, that is, minors and the indigent. With regard to minors, there are a number of legal provisions that specifically talk about legal assistance for minors. Article 185 of the Code of Criminal Procedure provides that a minor who is being prosecuted must be defended by counsel. If the minor or his or her guardians cannot afford one, the prosecution requests the President of the Bar Association to appoint one.

Assistance to the child in other cases is provided for in paragraph 2 of Article 64 of the Law N°54/2011 of 14/12/2011 relating to the rights and the protection of the child which states that: *“The Government shall provide legal assistance to a child who has no guardian when he/she is tried before courts.”*

The Bar Association administers a fund partly funded by the Ministry of Justice for this purpose.

Besides the requirements of free legal assistance to minors, the law also requires that all litigants appearing before the Supreme Court must be assisted by counsel. Where the litigant cannot afford counsel, an application for free legal assistance is made to the President of the Supreme Court. If the President accedes to the request, it is communicated to the President of the Bar Association who

appoints counsel to represent the applicant. However, a person applying for free legal assistance is required to provide proof of indigence from the local authority.⁴⁵

In addition, Article 13(6°) of the Organic Law n° 11/2007 of 16/03/2007 concerning transfer of cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from other states provides that the accused is entitled to counsel of his choice. In case he or she has no means to pay, he or she shall be entitled to free legal representation.

At the same time, legal practitioners are obliged to perform pro bono services. The Internal Rules of the Bar Association require that in criminal matters an advocate provides legal assistance free of charge on request of the indigent client or the President of the Bar.⁴⁶

To boost Government's efforts with regard to ensuring access to justice for all, the Rwandan Civil Society created a Legal Aid Forum (LAF) since October 2006. The forum is made of 37 member organizations comprising of international, regional and national NGOs working in various human rights related fields as well as professional bodies such as the Bar Association and University legal aid clinics. Since 2008, a Legal Aid Civil Society Fund (LACSF) was established with the purpose of ensuring the provision of quality and accessible legal aid services to indigent persons and vulnerable groups by LAF members in pilot areas. The services provided are of 3 kinds:

- Legal representation in courts;
- Legal advice/mediation: this includes for instance drafting of court submissions, orientation to the competent organs and authorities such as the Mediation Committees for cases that need prior settlement by the latter before seizing the courts, local authorities, labor inspection service, etc.
- Legal information/education to the general public with particular emphasis on indigent population and vulnerable groups.

In addition to the above mentioned, LAF (through its members) has been actively involved in the joint justice stakeholders' initiative of carrying out a Legal Aid Week since 2009. During that week, free legal aid services are provided to the general population across the country and particularly minors in conflict with the law.

The situation is certainly not very satisfactory. However, it seems to be the best that can be done in the circumstances of a country that is not rich in resources and at the level of economic development like that of Rwanda.

Community mediation: Abunzi

Most civil disputes as well as minor criminal offences must by law go through the process of mediation before they can be considered by the formal judicial system. Mediation is done by a panel of mediators drawn from a mediation committee elected by the community in every cell and ward. The mediators do not have legal qualifications. Their only qualification is that they are regarded by the community as persons of integrity, not liable to be corrupted and who are wise enough to be able to resolve disputes at the local level. They take the same oath as judicial officers before other members of the community under the supervision of the President of the Primary Court in whose area of

⁴⁵ See the 2012 Supreme Court Act, article 42.

⁴⁶ See the Internal Rules of the Bar Association, article 88

jurisdiction the committee falls. In their oath they undertake to diligently fulfil the responsibilities entrusted in them and never to use the authority conferred on them for personal ends.

Although the members of the Committees are not legally qualified they receive some training, largely on the procedures that they are supposed to follow. They are also trained on some legal issues which may have been introduced by new laws. They are urged not to turn themselves into judges but rather to try and reconcile the parties and get them to reach a settlement of their own dispute. It is only where the parties fail to agree that the panel is allowed to make a decision as to what should be done. Generally, they apply basic principles of fairness and justice.

Some of the disputes falling within the powers of the Mediation Committees are those relating to land and other immovable property whose value does not exceed 3,000,000 Rwandan Francs (approximately 5,000 US dollars); cattle and other movable assets worth up to one million Rwandan francs (1,000,000), family matters (except civil status), succession if the value does not exceed three million francs, simple contracts, etc.

As far as criminal matters are concerned mediation committees are competent to handle offences relating to damage to property, theft, breach of trust where the value does not exceed three million francs and common assault.

Mediation committees have no competence over disputes involving the state or state owned structures or associations or companies with legal personality.

The purpose of mediation is to assist the parties to reach a settlement. However where the parties fail to agree, the mediation panel takes a decision which it communicates to the parties. The decision must be reduced to writing and is enforceable by the local authority. Where one of the parties is dissatisfied, he/she may lodge a claim with the Primary Court.

It is clear that if mediation in these disputes is fully embraced and its decisions accepted by all parties, it is bound to reduce the burden on the courts as well as ensuring greatest access to a system of justice. In practice the system has worked fairly well. This is evidenced by the fact that the disputes finally settled by the Mediation Committees are double those that go to court after the mediation process. It may be safely said that the majority of citizens with disputes are satisfied with the mediation process. It saves them time and money. It has also saved the state money as well as other resources. Mediators are volunteers; they receive no payment from the state although they get some incentives such as bicycles and radios.

Ensuring quality in delivery of justice

(1) Recruitment and discipline of judges and registrars

Recruitment and discipline of judges and registrars/court clerks is handled by the High Council of the Judiciary whose membership is comprised mostly of judges representing their fellow judges at all levels of courts and is chaired by the Chief Justice. Members from outside the judiciary are the Ombudsman, the President of the Human Rights Commission, two deans of law faculties elected by fellow deans, a nominee of the Minister of Justice and a representative of the Bar Association. Thus the Council is a body independent of the other branches of government. The Council ensures that persons appointed as judicial officers are well qualified

for the positions and that the recruitment process is fair and transparent. It also ensures due process for those judicial officers accused of misconduct and where the accusations are found justified, appropriate disciplinary sanctions are applied, including dismissal.

(2) Training

In order to continuously improve the quality of judicial officers, training is regularly organised. The law requires that every judge must take the diploma in legal practice offered by the Institute for Legal Practice and Development in order to improve the practical skills of judges for instance in the conduct of proceedings, assessing evidence, judgment writing etc. So far it is mostly the younger judges with little experience who have taken the course but over time it is expected that all judges will have taken the course. In addition, the judiciary regularly organises continuing legal education seminars and workshops on specialised topics largely with facilitators coming from more developed jurisdictions such as the Netherlands, United Kingdom, United States and Canada. The Dutch government has been particularly supportive in funding these trainings and seminars. The Commonwealth Secretariat has also been very supportive in funding training that introduces Rwandan judicial officers to common law concepts as Rwanda pursues its vision of a mixed legal system that incorporates aspects of the civil law as well as those of the common law.

(3) Promoting use of ICT

The judiciary has promoted the use of information technologies to enhance performance and efficiency in all its operations. All judges have computers and write their own judgments. All staff in the registries have computers and enter all information electronically as soon as it is received. Although recording of proceedings in most courts is manual, digital recording has been introduced in Commercial Courts. All judges and other court staff have access to internet which they use for communication and research. A system of electronic filing of cases is working well, making it unnecessary for litigants to come to court while an electronic records management system has also been installed to ease the exchange of documents among courts and enable the management of the judiciary to monitor activities at all levels of courts as well as receive monthly reports on the performance of courts. There are video conferencing facilities in a number of courts which make it possible for court proceedings to be conducted simultaneously from different parts of the country as well as enabling foreign courts to take evidence of persons in Rwanda in conducting proceedings relating to the 1994 genocide against Tutsi.

(4) Fighting corruption in the judiciary

A judicial system cannot work well if its officers are corrupt. This is why the judiciary together with other state agencies have taken various measures to combat corruption. As a result of various strategies adopted at the national level, Rwanda is among countries that have been recognised regionally and internationally for substantial improvement in combating corruption. In December 2011, Transparency International⁴⁷ issued the Report on Corruption Perceptions Index in which it ranked Rwanda 49th in 182 countries. This placed Rwanda in the lead among East African countries, and in 4th position among all African countries.

⁴⁷ <http://cpi.transparency.org/cpi2011/interactive/2/>, Interactive report-Transparency International/Corruption perceptions Index 2011, 1st December 2011.

Strategies for fighting corruption include public awareness campaigns on the evils of corruption through radio talk shows, pamphlets and other literature; an annual anti-corruption week to mobilise the population against corruption with an anti-corruption walk through the streets, a press conference and fast tracking hearings of corruption cases; and naming and shaming those involved in corruption which also ensures that corrupt officials are not recruited into other public institutions where they could perpetuate the cycle of corruption. While there has been substantial success, there are still challenges in combating corruption. New ways of covering corruption tracks are being invented and, even though reporting of corruption has increased, some judicial officers and court staff remain reluctant to report instances due to fear for their personal safety or because of negative solidarity.

Conclusion

Rwanda has come a long way on the road to justice that is fair and accessible to all. There were lots of problems in the aftermath of the genocide that appeared insurmountable but Rwanda not only pulled through but has done well in rebuilding institutions and ensuring their efficient functioning. The struggle for improvement continues.

PRESENTATION

Mr Albert Kamunde, Chairman, ICJ-Kenya

Distinguished guests, Justices, Magistrates, Ladies and Gentlemen – on behalf of the Kenyan Section of the International Commission of Jurists, it is our pleasure to support and participate in the 16th Commonwealth Magistrates’ and Judges’ Association conference.

As a brief background, ICJ Kenya is a national section of the International Commission of Jurists with headquarters in Geneva, Switzerland. The International Commission of Jurists was established in 1952 as a global movement of judges and lawyers dedicated to the advancement of the rule of law and the legal protection of human rights. The Commission comprises of 60 Commissioners, eminent judges and lawyers representing diverse legal systems from around the world. ICJ has a presence in several countries around the world, including our Kenyan section. Globally, the work of ICJ is well-known. For example, ICJ provided the impetus that led to the adoption of the African Charter on Human and Peoples’ Rights, in 1980.

ICJ has established a regional program based in South Africa, which has contributed to the dialogue on judicial reforms in the continent. Together with the Africa Program, the Kenyan Section has been working with other bodies of judicial officers including the East African Magistrates and Judges and the Southern Africa Chief Justices forum. ICJ Kenya is grateful to the African program which has contributed material resources towards this conference. I would like, with the permission of the chair to request Mr. Martin Okumu-Masiga, the Deputy Director of the ICJ Africa Program, and a son of Uganda, to kindly stand up for recognition.

While we agitate for change, and seek justice for those individuals and groups that have been under-served and disenfranchised, we also recognize that change, positive change, requires a dialogue. We are proud to be involved in this dialogue with you.

The judiciary plays a vital role in establishing both domestic and international legal standards, in shaping the law, and in ensuring the protection of human rights.

This is especially important in the post-conflict and present conflict situations on the African continent. There are many unresolved disputes around Africa where Justice has been delayed, denied, or ignored. Even now, there are situations where the present systems in place have failed to provide security, peace, and order in communities. This is the case in Kenya, where there is ongoing violence between two communities in the Tana River area due to a long history of land issues and political influence. Timely access to justice is a key component for mitigating future conflicts and for creating a basis for a peaceful society.

I have mentioned conflict to which the African continent remains prone. One of the consequences of conflict is that it leads to crimes of such a scale that national justice systems may be ill-equipped to handle them. The emergence of special justice mechanisms in our region, such as the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone, reflects efforts by national governments, supported by the international community, to respond to the very challenging justice needs

that these conflicts throw up. The year 2012 marks the 10th anniversary of the establishment of the International Criminal Court as a permanent mechanism for bringing justice in relation to a small number of crimes under international law that have been identified under the Rome Statute. Under the principle of positive complementarity, national judiciaries can play a meaningful role in support of access to justice in relation to crimes under international law. I hope that discussions during this conference will give recognition to the increasing need for judges in national systems to familiarize themselves with international criminal justice issues.

We believe that an essential component to a peaceful and proper functioning society is a proper functioning judiciary. And we believe that in order for a justice system to carry out its function, it needs to be independent. Judicial independence is a broad topic, but we think, as a priority, it means that the judiciary should be free from partial, external influences, and be given the space to exercise its functions to the fullest, including having a fund to finance its budget that is not controlled by the executive.

It is also clear that justice does not exist in a vacuum. The reality of our increasingly interconnected and expanding world has meant that issues, cultures, and conflicts have developed and changed at a high rate. This is at odds with our laws, which, by their very nature, appear not to correspond to the fast changing situations.. This tension often leaves the state of the law confused. Finding the right balance of applying laws appropriately to a given context requires bold and progressive decision-making by judicial officers. We hope that this conference will contribute to your abilities to navigate these issues and tensions in a way that moves society forward and affords greater protection for human rights and the rule of law.

As we seek to make justice accessible to all, we need to be mindful of the realities of the situations on the ground. There is likely no 'one-size fits all' solution to the problems that we are currently facing in our own respective jurisdictions. Instead, through dialogue, through discourse, it is our hope that the sharing of experiences and practices from the various national and judicial cultures gathered here can be an inspiration for greater, positive changes for all of you back home.

PANEL SESSIONS

PANEL SESSION

JUDICIAL INDEPENDENCE IS THE PRECURSOR TO JUSTICE FOR EVERYONE

Judicial Independence is the Precursor to Justice for Everyone

By Her Hon. Justice A.A Phillips, Chief Judge, Nigeria

For me, delivering this Paper is an emotional as well as an exhilarating experience in that even though I have been a member of the CMJA for several years, as a Judge of the High Court of Lagos State, Nigeria this is the first time I am attending this Conference and this is my first international outing as the recently sworn in 14th Chief Judge of the Lagos State of Nigeria. I am therefore highly honoured to have been invited to share my thoughts on this all-important topic with such brilliant legal minds as are here present.

I must however confess to an initial hesitation in accepting this invitation. But the topic proved too strong an attraction and there is no better opportunity to discuss the role of the administration of justice in my own jurisdiction, vis-à-vis judicial independence; because like most of us here today, I share a passion for seeing judicial independence expressed not just in words but also in deed.

In May 1999, Nigeria re-joined the League of Nations that have embraced democracy and assented to the inalienable right of its citizens to have access to a fair, unbiased judicial system that guarantees that justice is not only done but seen to be done.

I use that phrase ‘re-joined’ for two important reasons. First because even though we have experienced far more years of military than civilian rule, this is by no means our first experience of democracy having gained independence from Britain as far back as 1960. This was truncated in 1966 when the first Military coup took place.

Second, since 1999 when we returned to civilian rule proper, we have had 13 years of uninterrupted democratic governance, the longest spell so far. We are therefore moving from being cautiously optimistic, to being definitely optimistic that democracy is here to stay in Nigeria.

In achieving democratic ideals, there is no doubt that a strong and independent judiciary is pivotal to the attainment of these goals. We are not unmindful of the fact that to be a key component in this process, the judiciary must shield itself from undue interference from its Executive and Legislative siblings.

A former Justice of the Supreme Court of Nigeria, the Hon. Justice Olayinka Ayoola, CON puts this most succinctly as follows: -

“Where law does not matter or where it is seen as incapable of rendering equal protection to citizens, cynicism produces a general perception of Justice as an illusory and at most fictitious virtue. Justice can only be done where the mediator of a dispute is dispassionate , objective and independent.”

Article 26 of the African Charter on Human and Peoples Rights defines judicial independence in the following words: -

“States party to the present Charter shall have the duty to guarantee the independence of the courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.”

This provision enjoins African countries to repeal laws that are inconsistent with the principle of judicial independence in all its ramifications, notably – in the appointment of judges; the provision of a decent living and working environment; security of tenure; and undue interference.

The United Nations 1981 Syracuse Draft Principles on the Independence of the Judiciary include the most comprehensive definition of judicial independence. These Principles prescribe that: -

“...Every Judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law, without any improper influences, inducements or pressure, direct or indirect from any quarter or for any reason; and that The Judiciary is independent of the Executive and Legislature, and has jurisdiction directly or by way of review over all issues of a judicial nature.”

The Oath of Office that Judges in Nigeria swear to on appointment underscores this. Clause 2 of our judicial oath of office is particularly instructive in this regard. It states and I quote: -

“ I will well and truly exercise the judicial functions entrusted to me and do right to all manner of people in accordance with the Constitution of the Federal Republic of Nigeria as by law established and in accordance with the laws and usage of the Federal Republic of Nigeria without fear or favour, affection or ill-will.”

But how do all these laudable prescriptions, definitions and declarations bear up in reality? In the course of my judicial career I must admit that I have sometimes been overwhelmed by some of the challenges that face the efficient and effective administration of justice and therefore judicial independence. But by far the most debilitating challenges in my view are (1.) the unrestricted power of the executive and/or legislature, leading to undue interference and (2.) manipulation of the judicial process. These two ailments are antithetical to the health of an independent judiciary.

Let me give a couple of examples. In July this year, lawyers and Judges in Sri Lanka boycotted the courts to protest alleged political interference with the judiciary in the form of the alleged intimidation of a Magistrate in the Island’s northwestern town of Mannar by an influential Government minister. I give kudos to the Hong Kong based Asian Human Rights Commission, which welcomed the action by the judges and lawyers as a “...very important step in the fight back against the serious undermining of the courts...” and stated that “...the only way forward is to fight back vigorously, otherwise legal institutions face the threat of extinction and ... irrelevance...”

Back home in Nigeria, our own federal executive Government has refused to allow the reinstatement

of the President of the Court of Appeal, despite the fact that the National Judicial Council; the body constitutionally empowered to sanction and discipline judges and which suspended him, has since lifted the suspension. The National Assembly has also refused to give the requisite legal backing to the new Local Government Councils created by the Lagos State Government for purely political reasons.

The Judiciary's independence is equally threatened by manipulation of the justice system by litigants, their lawyers and even judicial colleagues, for the improper motive of defeating justice. This manifests in several ways - from allegations of the likelihood of bias, to the use of spurious objections and applications to stall proceedings especially with relation to a court's jurisdiction to hear a matter, and so on. I have had some experience of this in my court where in a case filed as far back as 1986 Counsel for the defence some 20 years thereafter still run to the court of appeal at every twist and turn just to delay the progress of this already very old matter.

Manipulation in whatever form hinders justice for everyone because one party, usually the weaker one, is unfairly held to ransom in a system that is supposed to be the last hope of the common man. Sometimes Judges are reluctant to exercise their best discretions for fear of being petitioned against or of being lumbered with a case with no foreseeable end in sight or even in extreme cases, for fear of their lives! This then begs the question; without courageous judicial decisions, made, as our judicial oath dictates, without fear or favour, affection or ill-will - how can we extend the frontiers of our jurisprudence or even guarantee justice for all?

Thankfully, despite the example given above, unrestrained power is not prevalent in my jurisdiction. In this regard I must single out the Lagos State in Nigeria for particular mention. The Governor of my state is a Senior Advocate of Nigeria, which is the equivalent of a QC in the UK, and he is very mindful of the fact that he is first and foremost a Legal Practitioner and is therefore very protective of the Justice system and the rule of law. For this reason we get no interference from him at all. A judicial system that is clogged with technicalities and undue delays cannot be said to be providing justice for everyone. Lagos State has been a pace setter in drafting laws and rules to help the Lagos State judiciary attain its overriding objective which is the speedy, effective and efficient resolution of disputes.

I am proud to note that in the Lagos State judiciary, we have just concluded a review of the 2004 High Court Civil Procedure Rules to bring them more in conformity with present day reality. The 2004 Rules were themselves based on the new U.K. Civil Procedure Rules brought about by the Lord Woolf Report on the Reform of the Civil Procedure Rules. Lagos State was the first to review its Civil Procedure Rules and of course since then, several other States in the Federation have either adopted our rules or reviewed their own rules. In the new 2012 Rules emphasis has now been placed on ADR and cases will be sorted at the filing stage into those which will go through the normal court system of Pre Trial Conference and trial and those which will go to our Multi Door Courthouse for mediation. These new Rules will soon come into effect.

Before I conclude, permit me to leave you all with some food for thought by asking: "Can or should judicial independence be absolute?"

In our clamour for judicial independence, particularly in jurisdictions where it has been sadly lacking, the tendency is for us to adopt an 'all or nothing' stance. In my view however, this extreme posture is

itself antithetical to justice for all, particularly in developing economies and emerging democracies. And I think the reason is simple. In jurisdictions where democracy is still in its infancy, I believe there is a greater need for collaboration amongst all the arms of the government but with the clear understanding that in order to have an effective administration of justice system, there must be unity in diversity and mutual respect for constitutional limitations.

In reality, I do not believe that one arm can work independently of the others. The argument that this may infringe on the doctrine of separation of powers does not in my humble view outweigh the fact that the converse can only result in technicality over substance.

This is why in my inaugural speech when I was sworn in as Chief Judge of Lagos State in June this year, I noted with pleasure, the mutual respect that the three arms of Government in Lagos State share, observing that this no less than it should be. I however am of the view that these 3 arms of Government apart from being independent of each other are also interdependent in certain respects.

My people have a saying, which literally translated means: the soup pot is secure on a tripod stand. Take away one of the legs of the tripod and the fate of the soup needs no imagination. The tripod therefore ensures stability.

Each leg has its own defined roles to play and none should assume the role of the other. My view is that the development of our nations cannot be achieved without the inter-dependence of our various government institutions and a strict adherence to the constitution as the grundnorm of the law in any nation.

For instance, Governments' intention to deliver economic, political and social reforms cannot be achieved without a good understanding of the adjudicatory system.

Similarly, an effective justice system is not just the business of the bar and bench but of all stakeholders in governance – the executive, the legislature and the citizens.

All must have a firm understanding of their respective roles, duties and obligations, and must contribute to developing an unassailable administration of justice system, which will impact on achieving an independent judiciary and ultimately, justice for everyone.

I cannot end my paper without commending the Council of the CMJA for the recently created Endowment Fund. It goes without saying that without adequate funding for the CMJA Secretariat and its attendant projects we would not all be here. To underscore this I hereby on behalf of the Lagos State Judiciary pledge our commitment to contributing towards this fund. I also know I have the support of my fellow Chief Judges to commit them to doing likewise. I as the Chief Judge of Lagos State will take up the responsibility of coordinating this Commitment and I assure the CMJA that come January 2013 Nigeria would have donated towards this fund.

I seize this opportunity to urge fellow Chief Justices of other jurisdictions to go back home and do likewise.

PANEL SESSION:

ARE JUDGES STILL DINOSAURS? KEEPING UP WITH TECHNOLOGY IN THE LAW

Judges, IT and Technology

By Dr Karen Brewer, CMJA Secretary General

Currently there were 2.5 Billion users of the internet (2011 figures) and if you count the people using android/smart phones etc.. this number is due to increase to 4 Billion by 2013 . Businesses and individuals have become highly dependent on information and electronic communications to such an extent that they dominate our daily lives.

No sector of society has remained unaffected and information technology has pervaded almost every aspect of human activity and therefore has given rise to economic and social changes. It has provided better communication across borders, better access to information, to developments and discoveries that enhance people's daily lives and that, only a few years ago were part of science fiction.

Access to the internet has allowed cross cultural exchanges that have not only enhanced the social lives of individuals, encouraged economic development but also provided opportunities for professional exchanges.

In his speech to the Commonwealth Law Conference of 2003 in Melbourne, the then Lord Chief Justice of England and Wales, Lord Woolf, pointed out the importance of judicial exchanges on the international level:

“...the judiciary are not only responsible for promoting the quality of justice in their own jurisdiction, they are equally, so far as practical, responsible for making a contribution to the jurisprudence of other jurisdictions. Individual judges and lawyers have in the past and, I hope, will continue in the future to make significant contributions to other jurisdictions, particularly with a view to enhancing the observance of human rights”

The judicial and legal sector have received benefits from this technological revolution. Many courts are now integrating technology into the court process with parties exchanging documents online, through secure central hubs, instead of sending hard copy documents which not only assists in preserving the environment but is seen to better preserve the chain of evidence. Digital recording has become popular replacing the traditional stenographers in court and a number of jurisdictions now accept fees and other payments electronically. Case management is no longer possible without the use of computers spreadsheets or case management software. Many countries now have closed intranet systems (chatrooms) for their judicial officers to receive official notices, but also to seek information about judicial developments and every judge is accessible twenty four /seven as emails are now sent to phones.

We can't even come to conferences like this without bringing our Ipad with us (and I am as guilty as the next – using my Ipad as an essential extension of my writing arm over the past few days). And computer-related issues arise in court frequently. As we have only just seen judicial officers may have conflicting views on how to deal with computer-related issues in the Apple vs Samsung cases with the US judges favouring Apple whilst judges in England and Wales and the rest of Europe did

not see any patent issues. Some have called for specialised courts to deal with computer related patent issues. One will have to see if this develops in the future.

In this presentation I want to concentrate on three aspects:

- How judicial officers can use technology to enhance their own development;
- What precautions judicial officers need to take when dealing with technology; and
- How judicial officers can prepare for the new cases of cybercrime coming to all courts.

1. The use of technology to enhance personal and professional development

Caution has been expressed over the use of social networks such as Facebook, Twitter or LinkedIn (*and I refer you to the very good speech made by Justice Vertes of Canada in Kuala Lumpur last year which was reproduced in the Commonwealth Judicial Journal of December 2011*) and the need for caution when the concept of confidentiality is slowly being eroded by the Twitter generation.

There are, however, many means by which judicial officers can strengthen their knowledge.

There are a number of intranet sites (limited to judicial officers only) such as the Members Messageboard of the CMJA, which can be used to advantage by judicial officers seeking or providing information on a variety of matters (sentencing, approaches to child law, approaches to gender discrimination, environmental law, etc...). These closed networks are proving to be invaluable to the development and strengthening of the rule of law across the world not only by providing information but also by providing essential support to judicial officers under threat or pressure from the Executive branch of Government. We would therefore encourage Members of the CMJA to use the Messageboard to discuss areas of common interest.

Today there are numerous internet based legal information sites which are either jurisdictionally based (BAILII /AUSLII) or regionally based (SAFLII /PACIFLII or COMMONLII) which provide free access to case law and legislation. In the Commonwealth, this is of particular importance bearing in mind the number of countries which share common legal traditions and systems. The Commonwealth Secretariat has been assisting small jurisdictions to develop or cooperate with others to develop such sites to ensure that all judicial officers are given access to the law reports of their own jurisdiction as well as law reports from other Commonwealth jurisdictions to enhance and strengthen standards of justice.

2. Precautions to be taken by judicial officers

Not too long ago, access to such materials and inter-exchanges would require sophisticated internet connections and a constant electricity supply, the innovations of the i-phone, i-pad, blackberry or smartphone have meant that most of these materials and sites are now available literally at the judicial officer's fingertips, at a relatively low cost.

The revolution in technology has changed society fundamentally and will no doubt continue to do so. Our increasing reliance on information technology be it through the traditional desktop computer, laptop or through the use of Apple or Android technology has meant that we are more vulnerable to attack.

We are all very familiar with the need to protect our computers from viruses, worms or hackers (or crackers-those that hack into computers for illegal reasons), the more recognisable forms of online attack in the past. We are also aware that security of laptops and data on laptops must be protected as breaches of data protection of this nature have found their way into the press around the world, when officials have inadvertently lost their office laptop containing confidential documents or data.

Today, we receive work emails on I-phones, I-pads, smartphones, tablets, or via Blackberrys. We store all kinds of data on our various devices . Data stored on devices is vulnerable to hacking or interception, it there fore needs to be secure. In the UK recently with the Leveson inquiry on the role of the press and police in the phone-hacking scandal, we have seen first-hand, the consequences on the vulnerable members of society. The perversion of the course of justice, including the bribery of police officials or intercepting and deleting of emails has had devastating consequences on some investigations and on some people's lives and according to a recent report has cost over £8 Million so far of the Metropolitan Police Force's budget as they had to contact thousands of people who were potential victims, with many others still to be approached.

No one is really safe from such incursions and everyone has a duty to their profession or company to ensure that the data they are storing (emails, documents, case files) electronically, is protected. Many jurisdictions now limit the type or number of devices from which one can access work emails or have internal policies about receiving work related emails on such devices as the sophistication of hacking today is such that hackers could gain access to confidential information on hard drives, or cloud devices (ie: devices that allow for the storage of data in a virtual storage area) via wifi access. Most data-transfer processes among Internet infrastructure providers or Internet service providers are well protected and difficult to intercept. However, hackers and crackers are expert at finding the weak points in our systems. With wifi being offered everywhere, signals in the data exchanges between the computer and the access point can be received within a radius of up to 100 metres. Even when encrypted, offenders may be able to decrypt data.

Everyone is therefore vulnerable to becoming a victim of cybercrime

3. How does a judicial officer prepare then to deal with computer related cases or cybercrime.

Organised crime is increasingly using information technology to its advantage and cybercrime has become a major concern within the Commonwealth. Cybercrime violates the rights of individuals, generates vast amounts of illicit proceeds, causes major damage, undermines confidence and trust in institutions and in the information technology itself and can put the infrastructure and security of individuals and countries at risk. It is very difficult to provide reliable estimates of the financial losses from cybercrime. For example: some sources estimate losses to businesses and institutions in the United States due to cybercrime to be as high as USD 67 billion in a single year but not all businesses publicize their vulnerability to cybercrime so the actual losses could be even higher. Whilst the abuse or misuse of information technology and the legal response to such crimes has been discussed since the invention of the internet, the never-ending advances in technology and the evolution of methods used to commit offences continue to challenge all those working in field. In particular today I want to concentrate on three areas:

- The development of national and international norms and sanctions;

- The investigation of crimes by law enforcement agencies ;and
- The challenges faced by judicial officers in this area.

Legislation and International Instruments

Although all countries in the world are connected to the internet, many do not have a cybercrime law, and many continue to be over reliant on traditional criminal law provisions. Whilst some offences- such as email fraud- can be prosecuted under existing domestic penal legislation, there have been quite a few inconsistencies in the laws in various jurisdictions which have led to conflict and make it sometimes difficult or impossible to advance cases of cybercrime behaviour through the courts. According to the International Telecommunications Organisation (ITU), the adoption of appropriate legislation against the misuse of ICTs is central to achieving global cybersecurity.

The Commonwealth developed a Computer Related Model Law in Cybercrime and Computer security which was drafted in 2001, Surveys are currently being conducted by the Council of Europe and the United Nations Office on Drugs and Crime and by the Commonwealth Expert Working Group on Cybercrime on the extent to which countries' cybercrime laws are based on the Council of Europe's Budapest Convention, the Model Law, or otherwise. Criminal law must keep up to date with technological developments so as to combat the misuse of cyber-space and to avoid damage to legitimate interests. This has to be done not only at the national level but also at the international level and Cybercrime requires a concerted, international effort as new technologies challenge existing legal concepts and cybercrime is a crime without borders with information flowing across them, unstoppable and unstopable.

International cooperation, investigative assistance, and common substantive and procedural provisions are essential to advancing the fight against cybercrime.

The UN has produced a number of Resolutions on computer related crimes under the auspices of its congresses on the Prevention of Crime and the Treatment of Offenders.

UN Resolution 45/121 of 1990 called upon Member States to intensify their efforts to combat computer-related abuses more effectively. Resolutions 55/63 and 56/121 on "*Combating the criminal misuse of information technologies*" advocated a global framework to counter cybercriminal behaviour. Resolutions 57/239 in 2002 and 58/199 in 2004, encouraged Member States to create a global culture of cybersecurity and to take action regarding the protection of critical infrastructure.

Following the 2003 and 2005 World Summits on the Information Society (WSIS), the International Telecommunications Union ("ITU") was entrusted to take the lead in "*Building confidence and security in the use of information and communication technologies.*" And in 2010, the ITU Toolkit for Cybercrime Legislation was developed by a global, multidisciplinary team of policy experts, industry representatives, academicians, attorneys, technical experts, and government personnel from around the globe working through the American Bar Association's (ABA) Privacy & Computer Crime Committee (PACC), Section of Science and Technology Law.

Whilst there are many organisations on the international and regional level looking at ways of fighting cybercrime (The International Telecommunications Organisations, the Commonwealth

Telecommunications Organisation, the UNDP, OECD etc..) currently, there is only one international treaty which deals with cybercrime, the Council of Europe's Budapest Convention which entered into force in July 2004. It is currently the only binding instrument serving as guideline for any country developing comprehensive national and legislation against cybercrime and is also a framework for international cooperation between State parties. Although a Council of Europe Treaty, it has been opened to non-Council of Europe states for signature and ratification. A Protocol has been added to the Convention on "*The criminalisation of a racist and xenophobic nature committed through computer systems*", which entered into force in 2006. To date only 15 out of the 54 Commonwealth states are party to this Convention. The Budapest Convention on which the Commonwealth Model Law is based is similarly in need of revision and is currently the subject of review

In April 2012, the Economic Community of West African States was urged to establish a convention on cybercrime for the Region. A resolution passed at the three day regional workshop on cyber-crime organised by the Economic and Financial Commission, (EFCC) of Nigeria, and the Australian Federal Police, AFP. The conference also deliberated on the need for practical cooperation among West African countries in terms of policing and intelligence gathering on cyber crime -related issues and other organized crimes and called on law enforcement agencies in the region to come together and think up policies on how to tackle the issue of cyber crime. This follows on the work that has been done in relation to the 419 scams Through schemes such as fake lotteries, bogus inheritances, romantic relationships, investment opportunities or - infamously - requests for assistance from "officials," scammers promise an elusive fortune in exchange for advance payments. According to Microsoft's Security Intelligence Report advance fee fraud accounted for 8.6 % of the spam messages blocked by Microsoft's Forefront Online Protection for Exchange (FOPE).

And in August 2012 in Addis Ababa Ethiopia over 25 legal experts met to discuss an African Union Convention on Cybercrime which would cover 4 main areas namely e-transactions, cybersecurity, personal data protection and combatting cybercrime. This is Economic Commission for Africa. The African Union Commission is collaborating with regional economic communities for harmonisation of cyber legislation for East, Southern and North Africa regions.

Although it is difficult to define what is meant by cybercrime, one common definition describes cybercrime as **any** activity in which computers or networks are a tool, a target or a place of criminal activity, The Convention covers not only offences against computer data and systems such as hacking, but also offences that are committed with the help of computer data and systems. It includes

- Offences against the confidentiality, integrity and availability of computer data and systems.
 - Such as illegal access to computer systems, hacking, circumventing passwords
 - Illegal interception – interception of phone conversations or interception of emails which can be magnified if there is no secure system or encryption in place
 - Data interference- the spreading of viruses or worms or the manipulation of data on a computer to create backdoor access to computers.
 - System interference: the introduction of malware into a system may not only affect data but the actual functioning of the computer itself. The Denial of Service Attacks- where a massive number of requests (or emails) are sent in order to crash a system or the use of botnets (where a group of compromised computers are controlled externally).

- Misuse of devices: there are many tools now readily available on the internet which allow criminals to create viruses, worms or other malware and allow access to computers to obtain information, destroy data or create botnets or phishing sites.
- Computer related offences: fraud and forgery
 - Computers offer many opportunities to manipulate data and we have seen an increase in credit card fraud, advance fee fraud, internet marketing and retail fraud and auction fraud.
- Content related offences: child pornography, racism and xenophobia

Whilst the internet is an ideal forum allowing people more opportunities to give their opinions, it also can be misused. It has become a key platform for the trading in child pornography and radical groups have used it to spread propaganda of a racist or terrorist nature. It has also been used increasingly in offences against the person, such as cyber-bullying which not only affects children but also vulnerable adults with videos of assaults being communicated on YouTube and other such social media.
- Offences related to intellectual property rights and similar rights.

We are all aware of the debates around the distribution of illegally acquired music. File sharing has created a numerous issues relating to copyright violations.
- Combination of offences:
 - Phishing and identity theft: that is acts that allow offenders to get personal information about themselves which is then used to commit crimes. Identity theft which is on the increase in many countries is the act of obtaining or transferring or using identity related information of a third party with the intention of using this for criminal purposes.
 - Organised crime: organised criminal networks use a variety of processes to exploit the vulnerability of societies, institutions or businesses and the anonymity of cyberspace reduces the risks of being caught or prosecuted.
 - Terrorism: Terrorists have learnt to use information technology not only for propaganda purposes with most terrorist organisations now having a website presence, but also for collecting information to identify targets and to distribute materials (information on making weapons, or sourcing materials necessary to commit or prepare for terrorist attacks through online games) but also to communicate between each other. In addition, it has been recognised that ICTs and the development of online and other virtual banking mechanisms have provided easier access for terrorists to financial resources. The growing reliance of all of us on information technology makes states more vulnerable to attacks against their critical information infrastructures especially if these infrastructures are linked.
 - Targeted Attacks. According to the most recent Microsoft Security Intelligence Report⁴⁸, attackers target individuals or organisations, singly or as a group, specifically because of who they are or what they represent; or to access, exfiltrate, or damage specific high-value assets that they possess. In contrast, most malware attacks are more indiscriminate with the typical goal of spreading malware widely to maximize potential profits. Not all attackers are deterred by failure and some attack a target repeatedly,

⁴⁸ SIR Report Volume 12- December 2011

using different methods until they are successful this despite defensive systems being put in place.

According to the most recent Security Intelligence Report from Microsoft, criminals no longer need sophisticated, bespoke capabilities to conduct attacks. There are now kits available in illicit online marketplaces which require less effort and expertise and in some cases the operational models and techniques used in targeted attacks have

Whilst not an example of terrorism, all we need to do is remind ourselves of the recent global impact of computer glitches in the banking systems of HSBC and Natwest.

It should also be remembered that any legislation or international treaties or agreements must take into account the protection of fundamental rights. Whilst we are all happy to be protected against cybercriminals, fraudsters, identity thieves and those who use information technology for sordid criminal activity, the fundamental rights of users must also be protected against draconian legislation which can limit freedom of expression (as the Levinson Inquiry has been accused of in the UK), freedom of speech (the blocking of Facebook in China), political and civil rights (if states are given permission to gather and store data or are able to intercept emails from political opponents) and privacy rights.

The investigation of crimes by law enforcement agencies

Some efforts have been made to ensure that law enforcement institutions have the tools they need, and in this regard it is interesting to note the creation last month of the Computer Emergency Response Team (CERT) as a specialised unit under the Uganda Communications Commission (UCC) whose objectives are to detect internet crime in the country. However, many jurisdictions still lack the expertise available to undertake forensic investigations of cybercrime within their borders and this can affect the way site.

Cybercrime requires cooperation between jurisdictions to resolve issues of real concern. The Commonwealth did update its Harare Scheme on Mutual Legal Assistance on criminal matters to include cybercrime but the lack of legal frameworks, knowledge, awareness and training continues to be a problem in Commonwealth jurisdictions.

Some efforts have been made to train police and investigative officers in cybercrime and in a number of cases, private companies such as ICANN (the Internet Corporation for Assigned Names and Numbers), who have developed a set of training materials which can be used by investigators and enforcement officers. The cooperation of ICANN and Internet Service Providers (ISPs) are essential to track cybercrime. The Council of Europe have created a set of Guidelines for cooperation between law enforcement personnel and ISPs. In some cases, in the US for example, private internet companies such as Microsoft and Google have worked with criminal law investigators to stop botnets operator and their expertise has proved invaluable in the prosecution of some cases.

Prosecution of cybercrime can be difficult as to commit a cybercrime, the offender doesn't need to be in the same location as the victim and it is essential that countries develop "strong legislation" to avoid being considered as a soft touch or safe haven for cybercriminals. Tracing offenders can be

problematic as the timeframe to identify where offending emails or transactions have come from is short, especially if these documents are deleted shortly after transmission.

The Training of Judicial Officers.

Few efforts have been made to date to ensure that judicial officers are kept up to date with developments and there is little training, if any, within the Commonwealth currently on such issues. As we said, judicial officers need to be aware of their own data security. In an age where court documents are increasingly being transmitted by computers, judicial officers must be aware of security risks of transmission of documents via unencrypted methods- google docs or even facebook. Whilst virtual storage areas are on the increase (i-cloud systems) these storage areas may not have the same security features that institutions have.

And whilst in court, judges are being increasingly asked to consider whether or not tweeting by reporters or those attending court is acceptable. In December 2011 England and Wales, the Lord Chief Justice has allowed tweeting in court so long as the judge in charge of the hearing believes it does not interfere with the administration of justice. And in July this year South Australia has followed suit.

The ability of judges to control their courtroom has been put in jeopardy in some jurisdictions with jurors inappropriately using social media during trials. Some jurors have triggered mistrials and in June 2011, Joanne Fraill, became the first juror to be convicted in England and Wales, a juror to 8 months in prison for contempt of court because she had contacted the defendant on Facebook.

Not only are jurors breaking the long established rules but in their selection of jurors, lawyers are turning more and more to social media to assess the capability and mind-set of jurors they wish to have on a jury.

When it comes to cybercrime itself, the difficulties arise as in most jurisdictions there are no specialised judges or magistrates and it is very rare to find a cybercrime court (Netherlands and Serbia being the only current examples).

Training has to not only encompass basic knowledge about how a computer system works but also how networks operate, how computers are used to commit crimes, what domestic legislation and international standards exist, the jurisdiction and territorial competences, and the technical procedures and legal considerations in electronic evidence.

They must be aware of what ordinary common law offences can be used in the absence of specific legislation and the experience of judges in other Commonwealth countries and case law on the matter is paramount in order for them to understand.

Judges should have a basic knowledge of matters relating to cybercrime and electronic evidence. The Council of Europe's Draft Training Manual for Judges is a good start. It is no longer acceptable for judicial officers to be luddites when it comes to computers or the use of computers.

Whilst judicial officers play a crucial role in the fight against cybercrime, their involvement only usual comes at the end except when a court order may be required. As cybercrime is largely dependent on electronic evidence, the collection of this must be done as quickly as possible as it is ephemeral. If the judges realises in court that some evidence is missing, it might be too late to correct any omissions made during the investigation

Judges need to be able to evaluate the significance of the evidence without being an expert in computer forensics and whilst the court may call on experts, a basic understanding of computer forensics is essential for any judge or magistrate dealing with such cases.

At the Commonwealth Law Ministers Meeting held in July 2011, in Australia, Ministers urged the Commonwealth Secretariat to establish a

‘a multidisciplinary working group of experts to review the practical implications of cybercrime in the Commonwealth and identify the most effective means of international co-operation and enforcement, taking into account, amongst others the Council of Europe Convention on Cybercrime, without duplicating the work of other international bodies; and that the Working Group collaborate with other international and regional bodies with a view to identifying best practice, educational material and training programmes for investigators, prosecutors and judicial officers’.

The Commonwealth Heads of Government who also met in Australia in October last year, reiterated their commitment to improve national security by improving legislation and capacity in tackling cyber crime and other cyber space security threats.

Earlier this year the CMJA was invited to be a member of the Cybercrime Working Group which was set up to:

- Firstly explore the practical implications of addressing cybercrime in the Commonwealth;
- Secondly identify the most effective means of international cooperation and enforcement to combat cybercrime taking into account the work of other international organisations;
- And thirdly Identify best practice and educational materials for training of criminal justice officials, investigators, prosecutors and judicial officers, as well as Identify suitable training programmes for investigators, prosecutors and judicial officers

The Cybercrime Working Group has met twice so far and the CMJA is a member of the Training sub-committee. Whilst the Council of Europe has developed a training manual for judges and magistrates, the CMJA would be extremely interested in receiving feedback from you on what you consider the requirements might be in terms of training.

**PANEL SESSION:
HOW CAN WE IMPROVE THE QUALITY OF JUSTICE?**

**Infusing A Humanistic Approach Into The Civil Justice System: An
Experimentation In Judicial Settlement Conferencing**

By His Hon. Justice Vashist Kokaram, Supreme Court, Trinidad and Tobago

Introduction

“When suffering knocks at your door and you say there is no seat for him, he tells you not to worry because he has brought his own stool.”

— Chinua Achebe

The famous African novelist Chinua Achebe captures accurately what may well be the experience of most users of the civil justice system. A never ending line of suffering litigants knocking on the judiciary’s door, dragging their stools to our doorsteps, to await their turn for lady justice to cast her gaze. Many do so reluctantly, as they would rather not be here. Some judicial systems feel overwhelmed by the sheer numbers of these sufferers with their stools. However empirical studies have demonstrated that these disputants represent but the apex of a multitude of disputes that arise in our society which are not litigated because of high legal costs or the anticipated exasperation of the nuances of the civil judicial system. Nevertheless those sufferers who feel compelled to do so still pick up their stools with their disputes bundled under arm and come sit at our doorsteps.

What do they wait for? Justice. But justice is not a loaf of bread in the baker’s shelf nor a carefully drawn plan on an architect’s desk. It is intangible, almost indefinable it is multifaceted. One aspect of justice is the notion of fairness. The delivery of the good of fairness is however being offered by a monopolistic service provider which gives no guarantees as to outcome, no estimates as to timeliness and no forecast as to budgetary expenditure. Imagine if this was your architect or plumber? In any competitive environment such an institution would have already been out of business or the subject of a commission of enquiry.

Another aspect of justice is predictability. But civil litigation is a gamble and if they are so advised then really what are they waiting on their stools for? Perhaps it’s simply for a decision. A decision on the law or on a rule that will regulate their lives. However to be accepted it must be a decision arrived at by fair and just means. It can be nothing else. We can unfortunately give no comfort in anything more in the traditional adversarial civil justice system. We do not promise truth although we will try our best to search for it. Nor do we promise substantial justice although we feel we can get close to it. The civil justice system has been marketed like the famous Buckley’s advertisement “it tastes awful but it works”. It is an imperfect system which prides itself with the knowledge that there is no other better alternative. Or is there?

In the Commonwealth we have witnessed the rise of ADR systems within and without the judicial system. As the Pound Conference of the 1970’s did for mediation in the US, regionally in the Commonwealth Caribbean, the ADR movement, and in particular mediation, received its impetus with the reform of the Civil Proceedings Rules in the late 90’s and early 21st century following in large

measure Lord Woolf's Report "Access to Justice" in the UK. Court annexed mediation is now well entrenched in the OECS and Jamaica. In fact in Jamaica there is a mandatory court annexed mediation system. Court annexed mediation is still in its infancy in Barbados. It is perhaps a bit more mature in Trinidad and Tobago with an entrenched court annexed mediation service offered at the Family Court. Although introduced some years ago in Guyana, court annexed mediation is yet to gain widespread support from the litigant waiting on his stool.

The lack of development of a fully integrated court annexed mediation service in the judiciary of Trinidad and Tobago is not to be mistaken for a lack of appreciation of its importance in the delivery of justice nor of the institutional competence for it. The T&T Civil Proceedings Rules 2006 (CPR) is but the commencement of the reformation of the civil justice system which can only be complete with a fully integrated ADR system. In fact the Hon Chief Justice Ivor Archie continues to spearhead several experimentations in improving the quality of justice with mediation through several pilot projects in court annexed mediation in both civil and family court matters and in judicial settlement conferencing⁴⁹. The latter is the only such intervention in the Commonwealth Caribbean.

This experimentation together with those of other public⁵⁰ and private agencies⁵¹ is designed to turn the gaze of the suffering litigant on the stool to mediation not as an alternative but as an appropriate dispute resolution strategy. We are philosophically far removed from 20th century adjudication of disputes. For the majority of cases such a system is unsuitable. Since 2010 in our jurisdiction the question no longer is whether ADR is to be introduced? The question now is, how, so as to ensure the quality of justice is not compromised. In promoting mediation we are not asking the suffering litigant to remove themselves from our doorsteps altogether. We are refashioning our civil justice system to deliver a better quality product. How is the quality of that product to be tested or measured? Is the quality of justice obtained in mediation superior to that in adjudication? Or is it similarly flawed? I would like this afternoon to initiate a dialogue with you on our perceptions of justice and the delivery of justice to all those litigants waiting patiently for us on their stools on our doorsteps. I will raise a few issues that have arisen in our experimentation in judicial mediation that should give us pause to rethink our roles as judicial officers. To reshape the civil justice system to provide the justice the layman seeks by infusing a humanistic approach to dispute resolution.

In my view, unless judiciaries transform its vision of itself as the drivers of an imperfect system it will preside over the development of extra judicial systems of dispute resolution which will find the judiciary becoming in the 21st century the alternative service provider of justice. Unless we transform our roles as judges and attorneys into peacemakers and facilitators we would be incapable of stemming a tide of public dissatisfaction with the integrity of the judicial system. In short, unless we introduce a humanistic approach to dispute resolution into the adjudicative process we cannot begin to speak in terms of measuring the quality of justice, as a purely adversarial system will fail any real quality assurance test conducted by the suffering litigants judging us on their stools.

I begin this dialogue with the case of two cousins whom I will call **Mohani** and **Mustaza**.

⁴⁹ In the criminal arena we will soon witness the introduction of a specialist drug treatment court. The value of mediation institutionally has been recognized in other superior courts of record: the Industrial Court, Environmental Commission and Equal Opportunities Commission

⁵⁰ The Mediation Board of Trinidad and Tobago, The Ministry of Legal Affairs

⁵¹ Dispute Resolution Centre, Direct Resolve Limited

The truth is...

Here were these two suffering cousins glaring at each other at opposite ends of the court room. They had spent a little over four years in pre trial activity waiting on their stools. I should mention over that period of time in which the claim lingered in a judge's docket, one judge retired and another judge to whom it was assigned was elevated to the Court of Appeal. The cousins both made their respective claims to a five acre parcel of agricultural land. Neither of the cousins actually lived on the land. It was owned jointly by the cousins' fathers now deceased. Mustaza's father survived Mohani's father and on his death Mustaza together with her 5 siblings became the owners of the entire 5 acre parcel by the requisite deed of assent. Mohani, the Claimant however instituted a claim for the Eastern half of this 5 acre parcel by adverse possession. She claimed that their respective fathers had divided the 5 acre parcel of land amongst themselves and cultivated their respective portions. Since the death of her father her family continued using their father's half of the property over the years including renting the land to farmers. The Defendant Mustaza maintained her claim for the entirety of the five acre parcel and denied any such acts of possession by Mohani or her family.

At the trial both cousins exhumed the ghosts of dead uncles and aunts to demonstrate whether the land was informally subdivided and used amongst themselves. It was a simple trial of fact with the burden of proof squarely on Mohani. On the one hand there were very few witnesses for Mohani. One witness forgot the contents of her witness statement, another witness claimed not to have read the statement before signing it. On the other hand after cross examination Mustaza appeared terribly unprepared for trial or simply untruthful. The Defendant herself forgot many of the documents she was using to support her claim. Legal submissions were about to be made asserting legal rights over the family property when the judge asked the question of counsel for the Defendant "how would you assess the credibility of your client?" Counsel responded "well she was unable to identify the relevant documents, she forgot some of her testimony but I assure you M Lord everyone in Trinidad knows of the Mustazas if there is anything they are a reputable family and they tell the truth".

But what was the truth about possession. What does the judge know of the truth of the deceased brothers? The attorneys both knew their client's die was cast in the unknown. Acts of possession to prove a claim of adverse possession is a question of fact. The outcome was win or lose. Isn't it tempting in this case to bring the sword of Solomon and cut the baby in half amongst the cousins? That in fact appeared to be the claim of Mohani. But were the admissible facts on her side? The dichotomy of justice according to facts is the blessing and curse of the adversarial system. Is it justice according to truth and reality? These disputes are so real for the litigant and so abstract for the judicial officer, who almost becomes a crime scene investigator coming after the fact to put the pieces back together and hopefully recreate a picture of reality from which he can judge or assess. Can there be justice by the imposition of a judge's version of the life of the family? The truth is this was a family plot. The truth is the deceased brothers shared a very close relationship. The truth is that the land was seen as an inheritance to be enjoyed by the family. The truth is that the cousins since their fathers' death have not been on speaking terms and the notion of settlement was never pursued because of the bitter relationship. The land a source of unity is now a source of friction for the second generation. Would the sword of Solomon be the only solution? Or can there be a family solution; a communal solution, a solution that sounds with social justice, a solution by consensus rather than by edict.

After hearing what Counsel said of his own client, the judge looked again at one of the exhibits, a copy book, (used by students in primary school), containing the random writings of Mohani's father. In the

process of disclosure under the CPR only the relevant pages of this book was disclosed which contained lists of short crops allegedly planted on the land and rent receipts allegedly from tenants of Mohani. At the trial the entire book was produced and tendered into evidence. In examining the book, it was a memoir of sorts not only useful for its list of random acts associated with the land but for its invaluable moral authority. The judge was surprised as he turned the pages. It contained phrases after phrases of Hindu prayers and devotions, passages from the family's holy book the Bhagavad Gita. Prayers for the family of both the Mustazas and Mohanis. He re opened the copy book and read aloud one of the prayers inscribed by their father and uncle to the attorneys and then asked a question which brought sighs of relief on the brows of the embittered attorneys and confused looks on the faces of the suffering cousins: "I doubt very much that your fathers would have wanted his family divided in this legal battle can you not settle this at a judicial settlement conference before I deliver judgment".

This actually took place in one of my matters quite recently as part of an experimentation in the Judiciary of Trinidad and Tobago with a form of evaluative mediation known as Judicial Settlement Conferencing⁵². I will be the first to admit that this was an act of adjudicative heresy in a 20th century civil justice model. Here the judge is seized of all the facts. All the evidence. It is his duty and task to sift the truth from the relative probabilities and piece together the family history of ownership to determine the existence of actual possession and animus possidendi. Did the judge abdicate his responsibility to deliver justice or was he trying to find a way to achieve harmony and appeal to a wider sense of social justice? Judging and creating harmony may be a concept in a Disney movie surely not in a civil adjudicative system.

I thought I should repeat verbatim the very brief note I sent to the judicial settlement judge for whom I am forever in debt.

"As discussed, the parties in this claim are agreeable to a Judicial Settlement Conference. However the case is at a very delicate stage. I have heard all the evidence and brief oral submissions. I indicated to the parties that this matter is fact sensitive and that neither of them are guaranteed any success. They, for the first time I understand, agreed to talk to try to resolve the matter. However both attorneys acknowledge that the emotional issues are too high in this case to result in a compromise.

I hold the personal view that the only issue that is preventing a settlement in this matter is an emotional one which may be unconnected with the case and that any judgment that I may render may not truly solve the real dispute between the parties.

I hope that you will be able to assist the parties in this matter.....

I have made it clear to them if they cannot solve it I will deliver a judgment."

⁵² In our system of JSCs Judges in an informal procedure have been referring cases to other judges to sit as evaluative mediators to assist the parties in arriving at a just and fair resolution of their dispute. The JSC Judge holds the conference in camera. The judge sits as a mediator and uses the facility of both facilitative and evaluative mediation. In the latter case the judge can give to the parties a non binding or binding opinion. Each step is authenticated by the consensus of party and attorney. If the matter is successfully resolved the agreement is issued to the trial judge to enter for approval and to be entered as a consent order. Consent orders have taken many forms to "The matter is compromised on terms endorsed on counsel's brief" to "the proceedings are stayed save for the execution of the agreement annexed to this order and marked A", or a classical Tomlin order or a record of the entire agreement as the order of the Court.

What was interesting in this case was that it was the first time that a matter was referred to JSC literally at the doorstep of a judgment after all the evidence had been taken. The parties went off to engage in closed door discussions with another High Court judge. There were about three sessions with that Judge which spanned a period of some 6 months. The matter returned to me unresolved however it was announced to me that the parties were close. The attorneys revealed to me that it was the first time that the cousins had spoken to each other for years. I recall, the JSC judge coming to me in exasperation telling me “I am sorry It was not resolved”. My immediate reaction was once they had spoken to one another, to me it was a success. Indeed the ice having broken between the cousins and having come so close to finding a solution to their own conflict I again encouraged them to find a way. They left and returned with a consent order.

A consent order was presented to me where Mustaza agreed to pay to Mohani 1.5m for the relinquishment of all her rights and entitlement to the land. I understand that the sum was a negotiated sum after the parties conducted a joint valuation of the eastern portion of the land. Instead of the sword of Damocles descending, the cousins for the first time were able to work out a solution. This immediately draws into sharp focus the benefits of mediation in the judicial system traditionally lauded by academics and mediation practitioners:

- It allows for a greater degree of flexibility in the determination of disputes.
- The just outcome is outside the contemplation of pleadings and reliefs sought in the litigation. The just outcome is one determined by the parties in accord with their own notions of justice and social responsibility. It turns on its head the notion of substantive justice in the adjudicative system and gives life to the concept of social justice.
- It is ideally suited for disputes with underlying relationship issues. This land dispute is a typical dispute in our civil justice system. Although land disputes are framed as claims in legal terms such as possession, trespass, the underlying dispute is a human one which affects families or neighbours⁵³.
- The success of judicial mediation is not measured by the entering into an agreement. It provides a forum for discussion which is the ideal lubricant for hardened positions. It directly engages underlying emotions and motivations in social interactions which had given rise to the dispute either couched in the instant legal battle or lying elsewhere in the relationship matrix of the disputants or extended participants.
- The matter could not have been settled had I not encouraged the parties to give the system of JSC a try. It underscores the need for active judicial encouragement of dispute settlement as a social good as well as equips the judge with the relevant tools to be deployed in the deserving cases.
- It reinforces the old adage that it may be too early to settle but never too late. In some cases a tolerable element of delay to arrive at a mediated result, in this case 6 months may just be worth the wait.

The struggle in the 21st century with integrating this form of dispute resolution into the adjudicative process is the tension between normative notions of justice and social justice. Is it fair? The principle of self determination which predominates mediation as it also does evaluative mediations at the JSC promotes self affirmation, individualism, but at the same time is a hidden trap for the unwary, unprepared or feeble. I believe however that adequate safeguards can be implemented to ensure the

⁵³ Approximately 5,000 cases are filed in our Judiciary each year. Land disputes are amongst the top category of disputes in the system second to commercial disputes.

integrity of this form of dispute resolution and it highlights the importance of fairness in any dispute resolution process and the need of judicial control.

However in assessing the quality of this product we must be open to a new concept of justice within the traditional mould of fairness. If indeed we are interested in substantial justice and fair outcomes I have found that a system that integrates mediation and judicial mediation into it spruces softens justice makes it accessible user friendly and socially acceptable.

The Fair Outcome

Lord Devlin painted a rather pathetic picture of the Judge in the 20th century in his anguish over arriving at a just outcome.

“In the course of their work Judges quite often disassociate themselves from the law. They would like to decide otherwise, they hint, but the law does not permit. They emphasise that it is as binding upon them as it is upon litigants. If a Judge leaves the law and makes his own decisions, even if in substance they are just, he loses the protection of the law and sacrifices the appearance of impartiality which is given by adherence to the law. He expresses himself personally to the dissatisfied litigant and exposes himself to criticism. But if the stroke is inflicted by the law, it leaves no sense of individual justice; the losing party is not a victim who has been singled out; it is the same for everybody, he says. And how many a defeated litigant has saved his wounds with the thought that the law is an ass! So I am not distressed by the fact that at least nine-tenths of the judiciary spends its life submerged in the disinterested application of known law.” **Lord Devlin**

One of the first lessons to be learnt from this case of the warring cousins is that we should no longer hold the view that we have a monopoly on the shape or form of the fair outcome. Michael Zander SC in his lecture “The state of justice”, thought the measuring of the quality of justice was almost impossible as we cannot unearth or grapple with a definition of justice. I tend to agree. It is of course always difficult to say what the just outcome is. Indeed in our civil justice system you have available to you 8 versions of a just outcome. The version of the High Court judge, three appellate judges and five judges in the Judicial Committee of the Privy Council. And even then I imagine we are eventually all judged in another place.

Judicial officers are keenly aware of their social responsibility and role in improving the quality of justice. It can be measured by the reduction in time for the delivery of judgments, or the length of time it will take for a matter to be disposed of once introduced into the judicial system. It can be reflected by the quality of the judgments delivered by the courts. It can be measured by the impact the judgment has had in improving the lives of citizens or shaping democratic societies. The European Commission for the Promotion of the Efficiency of Justice correctly observed that the specific nature of the quality of justice “cannot be boiled down to the mere delivery of services: as a specific and unique public service, justice produces social links.”

The Trial Court Performance Standards articulates the fundamental purpose of courts within a framework of five areas:

- Access to Justice
- Expedition and timeliness: Decisions made by the courts should be delivered in a timely manner without any undue delay

- Equality fairness and integrity. Courts should provide due process and equal protection of the law concerning integrity the decision and actions of a court should adhere to the duties and obligations imposed on the court by relevant law as well as administrative rules, policies and ethical and professional standards
- Independence and accountability: Trial courts must establish their legal and organisational boundaries monitor and control their operations and account publicly for their performance
- Public trust and confidence: courts should work in an accessible, fair and accountable way where there is a high level of public trust⁵⁴.

None of these tools are really helpful when we look at the disputing cousins and tell them after the litigation is over we are happy to say that we have checked off all the boxes on our quality assurance spreadsheet. There was no hindrance to you in accessing our courts, indeed one of you was legally aided, you met our friendly and helpful staff and administrators. Your case was streamlined in an efficient judge's docket. You got your trial relatively early and a decision within three months by a judge of impeccable integrity uninfluenced by political persuasions. But I am not happy to report that this decision will fracture your families further and possibly forever and may even result in one of your members resorting to violence later on because of the emotional disputes we left unattended on our doorsteps.

Lord Diplock indeed identified in **Maharaj v AG** that our fundamental right of due process of law is to a system of justice that was fair and not one that was perfect or infallible. Lord Devlin asked a question in 1970 "is it right to cling to a system that offers perfection for the few and nothing at all for the many?"

Sriram Panchu wrote in *Mediation and the Law*:

"There are limitations placed on a judge in the Anglo Saxon tradition. He administers the rules of the adversarial conflict which is played out by the counsel.

'Do not enter the arena' is the caution administered to judges who would like to play a greater role in the conduct of cases. The judge labours over facts, strains to capture the principle of law, wades through every case load of differences, writes a reasoned judgment, but is often denied the substantive satisfaction of having resolved the conflict. What will mediation do for him?"

In measuring the quality of justice we must shift our perspective and ask what is the law for? I believe that the greatest potential for radical reform achieved in the civil justice system has been the creation of the case managing judge meeting the litigant face to face from the moment that both parties have revealed their rivalling claims. I believe that the judge now becomes a part of the struggle that envelops both parties and must be part of the solution. Having such an intimate and first hand insight into parties cases, motivations, asking probing questions on the law and frank discussions with attorneys, is it to be utilised as a sifting out process in a sterile civil procedure or an opportunity for dynamism and change. An opportunity for reconciliation and restoration? The judge is no longer the silent sphinx. The client gets his opportunity to meet the man in robes long before his day of trial. Is this not all he wanted in the first place? Must we wait for a trial to get a solution? Is this not the opportunity for the judge to counsel and advise parties to shed light on their respective claims? Is this

⁵⁴ There is also the 2005 Court Tools. In Europe several initiatives have been undertaken to toward court quality in Netherlands, Finland, Australasian and New Zealand. In 2007 in Singapore the senior judge Manguon of the Singapore Subordinate Courts took the initiative to imitate a project towards the development of a global Framework for court excellence. 10 values were identified as importunate when it comes to the fundmanental purpose or reason for the existence of a court: Equality before the law, fairness, impartiality, independence of decision making, integrity, transparency, accessibility and timeliness

a new opportunity for the delivery of justice clamoured for by the suffering litigant sitting patiently on his wooden stool?

I am convinced that in a large majority of cases the cry for justice calls for a humanistic approach to the application of the law. Dr. Justice Arijit Pasayat in his essay Human rights and social justice commented:

“Humanism is the soul of justice and of all social sciences. In the words of Anatole France: To disarm the strong and arm the weak would be to change the social order which it’s my job to preserve. Justice is the means by which established injustices are sanctioned. Further he said the majestic egalitarian of the law, which forbids rich and poor alike to sleep under the bridges to beg in the streets and to steal bread”.

Taking such an approach the law will serve as a guide and outer limit for human action and behaviour but that the individual given the opportunity in a JSC is reinvested with the liberty of choice and freedom to act, to collaborate, to cooperate and to create a viable realistic future in harmony with the wider society.

The search for Harmony

“Secretary: And the key-word Kongi insists, must be- Harmony”
Kongi’s Harvest, Wole Soyinka

Wole Soyinka’s cynical play “Kongi’s Harvest” focused on King Kongi’s celebration of the Harvest as a feast with an obvious political agenda and to create the appearance of Harmony in the State. In essence the delivery of justice in the civil justice system is a search for harmony in the affairs of the citizen.

In 1978 Sir Jack Jacob observed:

“We must enable legal disputes conflicts and complaints which inevitably arise in society to be resolved in an orderly way according to the justice of the case so as to promote harmony and peace in society lest they fester and breed discontent and disturbance.”

Professor Hazel Genn in her distinguished Hamlyn Lectures observed that:

“The machinery of civil justice sustains social stability and economic growth by providing public processes for resolving civil disputes for enforcing legal rights and for protecting private and personal rights...the civil courts contribute silency to the social and economic well being”

Our very Constitution in its preamble recognises this concept of distributive and social justice where we have affirmed: “respect for the principles of social justice and therefore believe that the operation of the economic system should result in the material resources of the community being so distributed as to serve the common good”. In the working out of fundamental human rights we have recognised that in a democratic society rights cannot be absolute but must be balanced and asserted within an overarching harmony with the rights of others. This was observed by Chief Justice Wooding in **Collymore v AG** and recently in by Lady Hale in re **the Constitution of the Republic of Trinidad and Tobago... Surratt, Kenneth Ors v The Attorney General of Trinidad and Tobago.**

The humanistic approach I advocate is the use of justice as a means to create Harmony in the citizen's social affairs, commercial relationships and domestic matters. This is our focus of the judge in settlement conferencing who now sits in the chair not as adjudicator but as a friend of harmony trying to restore the balance.

Let us examine another case. Poor Mrs. Woodford she has been for years complaining to her neighbour about the damage done to her property at the boundaries of their respective parcels of forested land. These neighbours owned huge tracts of land in a forested area in Trinidad. Mrs Woodford had dreams of developing an eco-tourism centre to be operated for profit with nature trails and wildlife preserve on her tract of land. Mr Harry her neighbour wanted to develop his land for his children. He bulldozed several feet of Mrs Woodfords land, felling several mature trees in the process and leaving large muddied tracks left by Mr Harris' equipment. She complained that her dreams of her centre were shattered. She brought her claim of course in damages for trespass. She also claimed exemplary damages. The defendant admitted in his pleadings that he had encroached unto Mrs Woodfords boundary but denying of course the full extent of the trespass as alleged by her and naturally putting her to strict proof as to the extent of her loss. As close as her lawyers could fashion a legal right to a shattered dream she itemised several aspects of her special damages such as the loss of several trees and saplings it ran close to a million dollars in damages. It also included the loss of several DVDs about Trinidad fauna and flora and her 4 x 4 jeep! At the CMC conference I exclaimed "Mrs Woodford did Mr Harry's bulldozers demolish even your collection of DVDs and your 4 x4 vehicle as well?" Her attorney stepped in to say "no M Lord she had acquired those DVDs and 4 x 4 vehicle solely for use in the nature reserve which is now unusable. It is a consequential loss."

Sometimes the lexicon of the law is unsuitable to articulate a litigants true concerns. This matter was settled at a JSC. The terms of that settlement was in short, Mr Harry agreed to supply and plant a number of fruit trees and timber trees, to pay an agreed sum in damages and to agree a common boundary by agreement of appointing a joint surveyor. There was an aspect of restoration and rehabilitation in this outcome which could not have been obtained in the adjudicative system. It was not about money. It was about an acknowledgment of wrong, restoring the harmony between the neighbours and what is significant the parties themselves were able to create certainty to guide their future lives by agreeing a common boundary. Exemplary damages are now irrelevant as punishment is no longer the objective. The cycle of an eye for eye is broken by a collaborative exercise conducted by neighbours. In this way the neighbouring parties have achieved a transformation in their lives, such a transformation achieved in mediation accords with social justice:

"Transformation... involves transforming not just situations but people themselves and thus the society as a whole. It aims at creating a better world not just in the sense of a more smoothly or fairly working version of what now exists but in the sense of a different kind of world altogether. The goal is a world in which people are not just better off but better: more human and more humane. Achieving this goal means transforming people from dependent beings concerned only with themselves into secure and self reliant beings willing to reconcile with and be responsive to others the occurrence of this transformation brings out the inherent good, the highest level within human beings and with these better human beings society as a whole become a changed and better place." **ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION (1994).**

When last I saw them they both smiled when they left the CMC room. This is the same experience that I have encountered when a matter is resolved by JSC. I don't see the scowl or the frown. In several cases have I seen expressions of harmony. A sigh of relief. Many times a smile. In other cases a spontaneous gesture of a handshake. There can be no other satisfaction for a judge. In taking this humanist approach we are taking on the emotional baggage of disputes the liabilities and the triumphs? Family members speaking and crying together. In an insurance claim by a widow against the insurance company for damages for breach of contract in failing to reimburse the deceased's medical bills I have seen the grieving wife in the JSC emotionally open up as the conference moved forward and settling her dispute by adjusting her expectations. Still there was resentment against the company indeed the option of taking another insurance policy as an option to settle the dispute was flatly refused. But after three sessions there was a level of understanding between the two parties.

I have seen dispute over land between an aging father against his daughter and son in law being settled by the father making one phone call to his estranged daughter prompting her to visit her father at the next JSC in person. An occurrence which had not happened in years. Still resentment against the son in law but peace was finally achieved between a daughter and father who was patently at death's door. I have seen simple commercial claims being settled with an expression of apology. I have seen close collaboration between several defendants including agents of the state working together in the acquisition of a new house for an elderly claimant whose modest wooden house was demolished by the defendant who claimed that her house was allegedly on his land.

In none of these cases was there an obsession of legal rights. Notably in some case the claimant's chances of success in the litigation was very weak. The negotiated result was an expression of harmony, social justice at work.

Chief Justice Wooding, in his speech at the opening of the law term in 1963 a year after our Independence stated:

“To my mind, the intent and meaning of the Law is precisely that of disciplined endeavour in the cause of social justice. What do we do about it? Do we merely practise our profession or do we set about informing ourselves of the law's inadequacies so that, armed with knowledge, we may give an impetus to social reform? Put another way, I would phrase it in this wise – that our purpose should not be limited administering the laws justly but should extend to seeing that the laws just.”

I believe that this notion of social justice should underpin the quiet revolution which will see the infusion of mediation and ADR appropriate dispute resolution systems into our formal judicial process.

Forging a new equity

Rather than dilute the civil justice system I anticipate that in incorporating mediation into the formal court process whereby negotiated agreements, compromises, settlements arrived at with the assistance of judges in facilitative or evaluative mediation may unwittingly forge a new equity! It will certainly result not only in softening of the rigors of the law through mediated outcomes but perhaps the realisation of new communal rights.

Take another example of rivalling claims to land however constructed through a different legal lens, An estate claim. Here is a claim between siblings over the deceased father's house and land. It is the family's inheritance. One sibling claims that by the father's will the property was left to him. The other siblings claim that the will is a forgery. Therefore all the children would be owners of the property. The father died intestate. The claimant, the beneficiary under the will, makes a claim to propound the will in solemn form. The agreement that was arrived at in mediation is interesting:

1. The house at No. 631 Papoulis Road, Monkey Town to be a **family house** and that Mr. Hamlyn Goal is at liberty to reside in the family house.
2. The interested parties do undertake not to make any claims or contest the ownership of the lands described in deed dated 30 August, 2006 and registered as No. DE200602388938;
3. The applicant shall be responsible to pay all land taxes in respect of the loans. The house tax for the family home at No. 631 Papourie Road, Monkey town shall be paid by the interested parties;
4. The interested parties shall be responsible to pay all repairs and maintenance to ensure that the family house at No. 631 Papourie road, Monkey Town is kept in good condition; and
5. No costs.

The concept of a family house now bears greater significance outside the lexicon of equity or the law. There is now a moral and social responsibility. As a family home a family decision has been made for the applicant to reside there with the family members contributing to the home's upkeep and to maintaining it as the family home. It addresses the basic needs of shelter as well as the family sense of tradition. In our promotion of ADR systems mediation and JSC in our civil justice system we are promoting self worth, self determination and creativity. These mediated results by the private mediator or the JSC judge give life to new form of law of consensus. A new equity. A transformation in the way we see the application of the law.

Another transformation that can yet take place is in the law of exemplary damages. There must be some other social medium to correct deviant behaviour apart from registering disapproval of that behaviour by punishment. Exemplary damages sole objective is to punish the tortfeasor. Following the principles of *Rookes v. Barnard* [1964] 1 All ER 367 in *Takiota* the Board observed:
"The award of exemplary damages is a common law head of damages the object of which is to punish the defendant for outrageous behaviour and deter him and others from repeating it."

Punishment is seen as the formula to prevent the recurrence of the same wrong. Is it effective? Is it just?.

Our courts have been punishing prisoners and prisoner officers alike and unwittingly creating a more oppressive prison climate in our attempt to settle disputes between prisoner and prison officers. There are far too many claims for assault and battery that are coming into our courts. In 1998 Chief Justice M A de la Basted in *Thaddeus Bernard v Nixies Quashie* CA 159 of 1992, some 13 years ago in 1998, that "There is a tendency among a minority of uniformed officials in this country to exercise their authority in an oppressive and unreasonable manner." Such oppressive conduct which was censured by our Courts so long ago is still even today unfortunately rearing its ugly head and which the Court has had no choice in the traditional adjudicative setting but to condemn in the strongest of terms. But our condemnation is reflected in more punishment in the form of an award of exemplary damages.

I am doubtful whether awards of exemplary damages are in reality having the effect of deterring other members of the force from engaging in the type of conduct which the Court is condemning in this case. And it is doubtful whether a form or punishment is in fact appropriate to solve the problems underlying act of violence in prisons or between the state and member of the public. The prison system is a unique and sensitive environment of delicate relationships which must be carefully managed. What the judiciary has done in its attempt to deliver justice by making awards of exemplary damages has only served to create a cycle of hostility and acrimony in a high tension environment when every attempt should be made to restore harmony. The social impact of hostility in a recent Report of the Commission on Safety and Abuse in American prisons, the Commission observed:

*“What happens inside jails and prisons does not stay inside jails and prisons. It comes home with prisoners after they are released and with corrections officers at the end of each day’s shift. When people live and work in facilities that are unsafe, unhealthy, unproductive, or inhumane, they carry the effects home with them. We must create safe and productive conditions of confinement not only because it is the right thing to do, but because it influences the safety, health, and prosperity of us all... We must remember that our prisons and jails are part of the justice system, not apart from it”.*⁵⁵

In the new term I have scheduled two such cases of claims by a prisoner for damages for assault and battery against prison officers to examine the prospect of mediating the dispute. The nature of the dispute was such that the facts or the versions of the incident are so at variance with each other if I believe the prisoner then it is a clear case of an unprovoked attack and wanton mindless abuse. If I believe the officers then it is case of a prisoner who has fabricated charges against innocent guards out of the wind. The only legal result is either a dismissal of the claim and an award of costs to punish the lying litigant or the award of damages inclusive of exemplary damages to punish the abusive prison officers. Does a system of punishment reinforce core human values of compassion respect and understanding? There will still be in those scenario larger unresolved administrative institutional and emotional issues. Does either of the parties need counseling, what is the underlying cause of the tension leading to violence on the prisoner or to targeting innocent prison officers? What of the prison conditions or system within the prison was there some past unresolved issue between these persons.

We cannot continue to adopt a revolving door approach recycling deviant behaviour. In *Judging in the 21st century: a Problem solving Approach NJI...*

“It aims to make all courts and their decisions relevant to all people who use them and are affected by those decision whetted in family appeal civil federal or small claims court settings... TJ does not ask judges to be therapists or social workers. It does not ask judges to cure mental illness or addiction to council court participants or to single handily solve systemic social problem. It does however ask judges to be aware that such problems do exist to be slave to their signs and symptoms and to consider the effects they may have on people in court and on the activities that have brought them to court and to think about how to address these situations so as to maximize therapeutic outcomes.

TJ asks all judges to recognize that can be irritant agents of change and to acknowledge that their words actions and demeanour will invariable have no impact on the people how came before the in the courtroom.”

Humanism vs. "Proceduralism"

⁵⁵ Gibbons and Katzenbach: ‘A Report of the Commission on Safety and Abuse in America’s Prisons’, Vera Institute of Justice, June 2006, pages 11-13 paragraphs 10.

“Ogbuef Ezedudu, who was the oldest man in the village, was telling two other men when they came to visit him that the punishment for breaking the Peace of Ani had become very mild in their clan. “It has not always been so,” he said. “My father told me that he had been told that in the past a man who broke the peace was dragged on the ground through the village until he died... but after a while this custom was stopped because it spoiled the peace which it was meant to preserve.”
— Chinua Achebe, *Things Fall Apart*

Customs, laws, mores change with time as societies recalibrate needs and standards against a yardstick of social development and economic growth. Indeed a legal system that drags the litigant through a rugged civil landscape until he is exhausted, near death and crying out for mercy could hardly be described as achieving the objects of justice. However civil procedure may unwittingly do just that and “spoil the peace it was meant to preserve”. In our reform of the civil justice system under the CPR we have still paid undue deference to procedure as a guarantee to justice. It is time to recalibrate our process and eliminate if not reduce altogether the temptation to play procedural games with the lives of litigants. While many academics argue that substantive justice is obtained when procedures that are fair are implemented and preserved, there is a danger that procedure may tie the hand of justice leaving the suffering litigant without a remedy.

Indeed our entire exercise of case management is cast in the language of ensuring that procedural justice is observed. The overriding objective of these rules is to “Deal with a case justly”. To deal with a case justly means we must ensure we have adopted a fair process where the principles of economy, proportionality and equality are carefully weighed in the balance. A just outcome is premised on such processes. But in many judicial settlement conferences disputants frequently agree on one thing they only want what is fair. It is their vision of fairness which colours their lens of justice this transcends any issue of procedural justice.

In 1968 Sir Jack Jacob wrote:

“The admonition by Lord Justice Bowen that courts do not exist for the sake of discipline should be reflected in the principles that rules of court should not be framed on the basis of imposing penalties or producing automatic consequences for non compliance with the rules of order of the court. The function of rules of court is to provide guide lines not trip wires and they fulfil their function most where they intrude the least in the course of litigation.”

Dick Greenslade responsible for the reform of our civil rules described procedural rules as “electric fences, not meant to kill cows”. The editors of our Caribbean Civil Practice admonished us not to follow the UK example of developing a tome of practice directions which is larger than the rules themselves and become encrusted in procedural law. Justice Goblin recently in **Alicia House** highlighted the travesty of a legal system that foisted procedural rules over substantive rights.

Commenting on our relief from sanctions provisions she commented:

*“Judges must simply be allowed to judge. The interpretation of the rules must allow a sufficient discretion in matters of procedure which does not unlawfully limit the jurisdiction of the Court.In its judgment in the case of **Carmine Bernard v Rajesh Seebalack [2010] UK PC 15** the Privy Council also warned that inflexibility in the rules of court can lead to injustice as it is ordinarily understood. However, it paid due regard to comments of the Court of Appeal in relation to the litigation culture in Trinidad and Tobago and these aims of rules insofar as they were intended to produce a change in the*

laissez-faire attitude to civil litigation and to introduce more discipline in the conduct of it. This court too zealously embraced this aim in the early days of CPR in the belief that they were acceptable and necessary, but six years into the new system the question has to be asked, is there no price which is too high for this cultural shift? If the pursuit of these objectives leaves a judiciary with judges whose hands are tied, who must suppress their instinctive aversion to injustice, who are constantly apologizing for not being able to do other than as the rules dictate, then I daresay this could not have been the intention of the Rules Committee and if it was, this could not be right. Procedural rules cannot systematically deny access to substantive justice.”

Quite recently the relief from sanction regime, which is more draconian than that in the UK, was challenged as being unconstitutional in **Karen Tesheira v AG** so much so it was a barrier to access to justice. I ruled that it was a rule which was proportionate to achieving justice in a disciplined civil system. The ball is in the Court of Appeal. But it continues the debate between procedure and substantive justice. Taking a humanistic approach we can sympathise with Justice Gobin’s sentiments and either find ways to stretch the law or implement mechanisms to achieve substantial justice through mediation.

In August 2006 the Chief Justice of Western Australia commented of the Australian legal system: *“It is the Rolls Royce of justice systems but there is not much point in having a Rolls Royce in the garage if you can’t afford the fuel to drive it anywhere. You can sit in it, polish it, admire it, boast about it, lend it to rich friends or give it out to people who can afford to drive it, but you can’t use it for its basic purpose which is to get you from A to B. We might be better off trading in our Rolls Royce for a lighter more fuel efficient vehicle”*

Our Chief Justice is leading the transformation of our civil justice system to meet the needs of our citizens He said:

“The transformation of the judiciary therefore is and always will be about more than ad-hoc and intermittent ‘interventions’. We are not talking about tweaking the organizational chart. There must be a real change in thinking and culture...There must be a change in culture because one lesson I have learned from observation and experience is that among the biggest impediments to achieving the developed status to which we aspire are some aspects of our national culture that feed into our organizational culture.”

In the new term the Chief Justice will lead another pilot project where both mediation and JSC will be applied to the same case before a trial. Mediation is viewed as an integral part of the suite of options made available to the litigant along his or her path towards an efficient and economical disposal of their dispute. The Chief Justice commented:

“In doing this we complete a transformation of our judicial system from a purely autocratic rights based system to one that offers customized conflict settlement...Mediation and case management philosophy must be viewed in a broader perspective of achieving justice in a flexible and fair manner. If we transform our image of our courts in this way, if we transform our vision along these lines we will focus on the true task of guaranteeing access to justice which recognizes the realities of culture, expectations, interests and the demands of time, costs and resources”

In this transformed culture the trial is no longer the centre piece of dispute resolution. It will be a collaborative approach to dispute resolution which will begin and end in the case management room.

The menu offered is no longer a main course of a trial but a starter of mediation a main course of judicial settlement with a side dish of a trial.

A significant and unfortunate obstacle in this approach is the judgement of the UK Court of Appeal in **Halsey v Milton Keynes** and the spawn of several recent judgments on the satellite issue of the recovery of costs by a successful party to litigation which refused to mediate the dispute. In its attempt to structure a procedure for determining what is an unreasonable refusal to mediate a dispute the Court has unwittingly added fuel to the flames of “proceduralism”. The onus is on the defeated party to show that the other party’s refusal was unreasonable. The guidelines to determine reasonable refusal adds even more complicated layers over a process which should be engaged by almost any litigant as a matter of course. The Halsey guidelines are perhaps better put in perspective when one views the philosophy of the Court’s view of ordering mediation as a breach of the litigants fundamental right to access the court. But ordering mediation is far removed from forcing parties to settle. In any event arguably the Mediation Act of Trinidad and Tobago provides a unique platform for Courts to order mediation and even categorises the Judiciary as a mediation agency!

To the naysayer and enthusiast

This takes me directly to the distinguished lecture of Professor Genn of the UK and her cautious reservation of the benefits of mediation. She decried the promotion of ADR as a path to diluting the civil justice process. She advocated against the mediation hype and the pro mediation rhetoric.

“Much of the interest in ADR in jurisdiction around the world has grown out of the failure of the civil courts to provide access to fair procedures. In many parts of the world both the criminal and civil courts are overloaded. ..ADR can be a means of citizens of side stepping legal systems in which the public have no confidence. More importantly in such circumstances the promotion of ADR by governments could be interpreted as less about the positive qualities of mediation and more about diverting cases to mediation as an easier and cheaper option than attempting to fix or invest in dysfunctional systems of adjudication. It is in effect a throwing up of the hands and admission of defeat.”

Professor Genn further postulated:

“We must therefore conclude that mediation may be about problem solving, it may be about compromise it may be about transformation and recognition, it may be about moral growth it may be about communication, it may be about restoring relationships but it is not about substantive justice. Concern for justice and fairness is not perceived to be the goals of mediation.”

The Professor saw mediation as not just settlement but just about settlement. From my experiences in judicial settlement I am unsure whether anyone can authoritatively speak to the injustice of a collaborative system of justice or discount its social value. The professor’s work is however quite helpful rather than offend the mediator enthusiast it should remind us of the place for mediation within the civil justice system. To manage the integrity of the results of mediation it must operate within the shadow of the law.

If outcomes are to be arrived at by the mediated processes it must be done through a process supervised by the courts else we would encourage the privatisation of dispute settlement which may supplant the civil process. I find it very comforting in judicial settlement conferencing and mediation

to know that the prospects of a trial lay in the wings and can be the party's last resort to settle the dispute. The emphasis in these mediations has never been nor should it be in arriving at agreements but in promoting the principles of collaborative approaches to solving human problems. For this reason the use of caucusing should be rarely used by the JSC judge in any style of mediation facilitative or evaluative. The general principle should be transparency and openness. If parties still wish to snuggle in a corner maybe they are not ready for this collaborative exercise. I have used the device of caucusing in JSC rarely. In one case however I could not help but feel that I was becoming a pawn in the party's game a mere shuttle of information from one camp to the next to broker a deal. Shuttle diplomacy should be left to the diplomats. Judges should be equipped with the skill to avoid such cases and in most instances it may simply be the result of sheer fatigue and a desire to work out a quick deal. Such temptations must be resisted if the integrity of the process and purpose of the exercise is to be preserved.

Further Professor Genn's work reminds us that the movement to promote mediation must a must be judge led. There is value in a judiciary that is respected for its integrity and its past record of resolving disputes in promoting these forms of legitimate dispute resolution. This is moreso the case in our society which has been bedevilled by a high incidence of crime and hostility. We need more than ever to introduce new ways to restore harmony and peace in our society. If the judiciary takes the lead in such an approach if it can infuse through our society the humanism that is sorely needed for the restoration of order, then it would achieve the transformation of a justice system that delivers justice in a fair and flexible manner.

Breaking the glass ceiling

Take the case of Samson, a resident of Ghana, who married Susan in Ghana. Susan, who is a citizen of Trinidad, was on holiday in Ghana for a few weeks. At the end of her vacation Samson accompanies her back to Trinidad. However at our Airport Samson is seized by the Immigration authorities for declaring and using a forged passport. He is charged and he pleaded guilty and sentenced to a term of imprisonment of 3 months.

The term of imprisonment came to an end in November 2011. Susan is at a loss as to why he is still in the custody of the authorities. She is getting no information about the reason for his detention and is getting the run around. She is very concerned since she has not been able to see Samson since November 2011. The only response she has received by letter from the Prison authority is that Samson is in the custody of the immigration authorities. In January 2012 she meets an attorney Mr Right who makes an application for a writ of habeas corpus against the Chief Immigration Officer (CIO).

A writ of habeas corpus was issued by the Judge. On the return of the writ an affidavit was filed in the morning by the CIO who explains that a Special Tribunal has now been convened under the Immigration Act to determine the status of Samson. One of the orders the Tribunal can make is an order of deportation. The only explanation given for the delay in setting up the Tribunal was that the department was awaiting a response from the Ghanaian embassy in Cuba to issue fresh documents to Samson.

At the hearing the CIO is present with State Counsel ready to argue that the Court has no jurisdiction this is a matter for the Tribunal. Samson is present with his Mr Right who is ready to argue that the

establishment of the Tribunal is an abuse of power to circumvent the hearing of the habeas corpus. If a deportation order is made Samson can no longer return to Trinidad.

In using a collaborative approach to dispute resolution, this public law matter was resolved within the immigration laws by the detainee voluntarily subjecting himself to the Special Tribunal. The state making arrangements for his voluntary departure so that his passports could be regularised in his native country and he would be allowed to return. This could have been a result easily obtained in a judicial settlement conference but the attorneys themselves already familiar with the culture of collaboration of this court was willing to simply find a logical solution acceptable to all parties.

The lesson, first there are no barriers to the application of mediation, the language of collaboration is infectious. What is needed is a bold and fresh look at the objectives of justice and the methodology that is applicable to produce the fairest outcome adjudged by the underlying interests of all the parties. Second the principles of collaboration through mediation and JSCs are infectious and affect the practice of the law. I recall my obsession when at the bar in the days before hearing to ensure that all procedure was observed, list of documents, hearsay notices, notices to strike. Now the obsession should be on examining all the ways in which a human problem presented in a legal dispute can be resolved.

The genie is out of the bottle

In closing this short presentation, there is much to be said for the introduction of judicial mediation into the mix of civil justice systems as a means of improving the quality of justice. The genie is out of the bottle. Who knows the judiciary of the future will be regarded as “peace centres” and not as “war rooms”.

But we must be careful what we wish for. We cannot in integrating mediation into the formal court process allow it to be enmeshed in procedural niceties. The fundamentals of collaborative consensus and self determination must be preserved. Judges and mediators must be properly trained and monitored by the judiciary to ensure fair outcomes. The increased and frequent use of caucusing for instance is a red flag which deserves investigation. The cloak of secrecy that comes with these conferences must equally call for increased vigilance by the judge to preserve his integrity and impartiality. We must remember that the simplest of things said by the judge is taken as golden and great care must be exercised in a push or the nudge to get the parties to settle. A tired judge saying we are not leaving unless this matter is settled may produce a result or it may compromise the entire campaign for judicial mediation. We must constantly remind ourselves of the underlying social purpose of which these opportunities are being made available to the litigant.

A forced agreement is not superior to a decision by the judge at trial. Outcomes are not as important as the creation of opportunities to achieve a restoration of harmony and the achievement of social justice. As a last resort the litigant can have their trial if it is really appropriate. These are the considerations that are uppermost in our mind in adopting a humanist approach to the law which will make the system of civil justice that more understandable, acceptable and relevant to the sufferers sitting on his stool at our doorstep.

**PANEL SESSION:
JUSTICE FOR CHILDREN IN CONFLICT AREAS**

**TRUST, VULNERABILITY AND AUTHORITY: REFLECTIONS ON THE
INFLUENCE OF CONFLICT ON CHILDREN'S MENTAL HEALTH AND
DEVELOPMENT.**

Dr. Adrian Sutton, Consultant In Child & Family Psychiatry And Psychotherapy, Hon Senior Teaching Fellow, Manchester Medical School, University Of Manchester, United Kingdom

Trust, vulnerability and authority

During a train journey with his parents 15 year old Tony's behaviour and thoughts had become unusual. On arriving at the destination he told his parents that terrorists were following him. His parents were very concerned and brought him to the hospital emergency department. During the clinical assessment he described other unusual beliefs which had developed during the course of the journey.

I felt his unusual thoughts were delusions i.e. fixed abnormal beliefs not based in reality. I needed to see whether Tony could think more about them to assess this further. Having spent a considerable time with him, I asked Tony why he would be of such interest to terrorists. I told him I did not think he had given me sufficient evidence to convince em that this was the case.

After a while, he looked at me and said 'So you're saying that you don't think the IRA are after me... Well, if I believe you I'm going to feel like a right Wally'⁵⁶!

Tony illustrates a particular clinical constellation which can be examined in terms of trust, vulnerability and authority. Something in him had decided that there was an identifiable organisation with evil intent towards him. How he had decided this could not be elicited through objective evidence. However, whatever the source of this belief, it held him in its power, organising his thoughts in this particular way. For a few moments, its authority was challenged. But this required placing trust in a different authority – me – and becoming vulnerable in a different way. Rather than being in fear of his life, he had to contend with feeling utterly humiliated. The original 'organising authority' again dominated and he experienced fear but was relieved of doubt and shame. It appeared that feeling like a Wally was a fate worse than death.

Trust is "accepted vulnerability to another's possible but not expected ill will (or lack of good will) toward one" and "reliance on others' competence and willingness to look after, rather than harm, things one cares about which are entrusted to their care." [Baier 1986, 235 and 259 respectively]. It is not only about interpersonal relationships. More importantly, it is also about our relationship with ourselves. In judging situations and the trustworthiness of other people, we need to trust our own physical senses and the sense we make of the world in all its physical and interpersonal relationships. Even if we have doubts, there is a judgment being made that alternative possibilities need consideration and that this is manageable.

⁵⁶ A silly or inept person (OED)

Tony was suffering from an acute psychotic illness. His experience of life was ill-informed, or rather 'illness informed'. More usually the ability to make sound judgements about trust and trustworthiness is a maturational process which may or may not develop robustly and may or may not be resilient in the face of betrayals. Without trust we cannot live. Taking a drink or eating food is an act of faith: so too is putting ourselves literally or metaphorically in the hands of another person. All have been essential at the start of life and will become so again at other times through life. We must hope that any errors of judgement are made in safety with minimal suffering to ourselves and others. Through these means we also learn about our abilities, inabilities and vulnerabilities.

Safety first

Ordinarily, what might have been traumatic rather than 'simply' upsetting can be metabolised and assimilated through play. When they return to the safety of home, we may observe children's experience of a medical procedure as they play at being the doctor, inflicting their experience on an unsuspecting doll. But the restorative quality of this requires safety otherwise it may simply become repeated enactment without resolution. Children's experience of living with on-going armed conflict can be profoundly distorting of emotional, behavioural and relational development.

My only direct experiences of children in a conflict zone came when I was a young medical student. My parents lived in rural Northern Ireland from 1972-5. The troubles were more intense in the large towns and cities but the evidence of armed conflict was present all around in the armed police and army on the streets, news of killings and bombs. However, these did not provide one of the most chilling episodes for me.

I was walking from home to the town's shops in the main street. My route took me through a housing estate next to the police station where the army were also stationed. The history and politics of Northern Ireland meant that housing estates were identifiably of predominant declared allegiance to one side or the other in the conflict. This estate happened to be Protestant.

I walked past three boys probably aged 9-10 years. One boy was blind-folded with his arms tied behind his back: he was marched along by the other two who had toy rifles. I heard them talk about him being an IRA man and they were the UDA.⁵⁷

I did not have the training and experience to articulate why this felt so appalling but I did instinctively know that this was not the same quality as the games of 'Germans and English' and 'Cowboys and Indians' of my own childhood. Those scenarios were removed from the immediate experience of my friends and me: we could use them as vehicles for the processing of various impulses and experiences, one or more steps removed from reality, in the world of fantasy.

Children can survive and thrive by virtue of their inherent developmental potential and receiving good-enough care. Children may survive even when the actions of those upon whom they depend defy good sense and compassion but it is at a cost in their emotional lives and wider psychological development. In their effort to try and make sense of their experience of physical mistreatment and failures of care and protection some children may develop distorted perceptions and constructions of themselves and others. Victimisation may produce self-blame and self-loathing rather than protest at being treated outrageously.

⁵⁷ For an interesting account of growing up during 'The Troubles' in Northern Ireland see Owens (2012)

“He beat me then, as if he would have beaten me to death... when my smart and passion began to cool, how wicked I began to feel! ...My stripes were sore and stiff, and made me cry afresh, when I moved; but they were nothing to the guilt I felt. It lay heavier on my breast than if I had been a most atrocious criminal, I dare say... I began to wonder fearfully what would be done to me. Whether it was a criminal act that I had committed? Whether I should be taken into custody, and sent to prison? Whether I was in danger of being hanged?” (Dickens 1850, 58-9)

If they have particular vulnerabilities, or in extreme situations, their conception of the needs and rights of others may develop in a differently perverse way. They may even identify with their persecutors or exploiters, swallowing whole their perverse view of the world and reproducing their *modus vivendi*. They may cease to experience suffering or moral conflict about causing suffering and may even gain gratification from it (see Freud A. 1936). But later, when the relative safety of living in a geographical and political state that is designated ‘post-conflict’ they may begin to experience psychological conflict and turmoil. The impact of what has been done may lead to disturbances of emotions and behaviour such as Post-traumatic stress disorder, substance abuse, depression or violence. They may experience horror and shame as a result of the actions of which they have been victim or perpetrator.

My colleagues⁵⁸ at Gulu University have been among those documenting, researching and seeking to ameliorate the particular effects of the civil war in Northern Uganda. There is no single form of help which will benefit everyone: there needs to be adaptation and attunement to individual need. Some children may have sufficient personal resilience and find the necessary and sufficient support in the framework of family, friends and their community but others will not. In Uganda as in other countries, many have lost their families through abduction or death. Recovery for children requires a framework of acceptance and forgiveness around them: revenge and retribution may only feed the adverse impact of violent and perhaps also the sadistic impulses at the core of the problems. This view appears to me to be consistent with the traditional *Mato Oput Process* (e.g. see Mato Oput Project, 2009) which is integral to the justice system adopted to build reconciliation in Northern Uganda. However, it may be in conflict with other views of justice (e.g. see Facing History and Ourselves, 2011)

Too close for comfort:

Armed conflict disrupting whole communities is only one form of interpersonal conflict which children may live with or witness. In all the countries represented at this conference domestic violence will be a significant issue. As judges and magistrates you will be dealing with victims and perpetrators whether it be in the Family Court or the Criminal Court. It is crucial that the law recognises that domestic violence is a child protection issue.

Just as with physical, sexual and other forms of emotional abuse it can have devastating effects: *“The importance of the physical evidence of bruises, broken bones or other physical impingements or intrusions, and the emotional sequelae of these, are well established. Domestic violence is a different type of impingement: the child is intruded upon through the eyes and ears by seeing violence inflicted upon a key person in their lives by another key person’.* (Sutton 2008, 55). *Children living with the fear of partner violence even without seeing or hearing it happen can be traumatised: helplessness in the face of their concern for their parent, usually the mother, as well as concern for their own welfare can compound already present difficulties. In fact, even in the extreme situations which apply where*

⁵⁸ I would like specifically to mention Prof Emilio Ovuga, Dr James Okello, Dr Grace Akello and Dr Kennedy Amone-P’Olak

children have been abducted to be child soldiers, the experience of domestic violence should not be underestimated. Klasen et al's (2010) "... findings point to the detrimental effects of domestic violence in addition to traumatizing war experiences in child soldiers."

The key component of the foundation for helping these children is confidence in there being a system which will truly strive to ensure safety: "Child mental health specialists can only be effective child mental health *therapists* if the child is being cared for reasonably" (Sutton 2008, 51).

The effects of armed conflict and domestic violence can reverberate through generations causing fault lines of vulnerability in individuals, families and communities. Promoting mental health requires a framework of 'healthy authority' in the institutions of the state. By 'healthy authority' I mean the uses of the power and resources of the state being made available to manage the inevitable competing and conflicting demands of communal living to minimise suffering and avoid exploitation of the most vulnerable. A police force and legal system which demonstrates a 'healthy authority' is an essential component of mental health promotion.

Have the lunatics taken over Asylum?

My work in Manchester brought me into contact with many children and families who were refugees from armed conflict in the Balkans, Somalia and other states. It was humbling to hear the esteem accorded to the U.K. as a true place of asylum. But in practice there were times when I felt an acute sense of shame about how they were treated by our institutions.

Discharging responsibilities or fulfilling obligations?

Mohammed and Shahina were a teenage brother and sister given asylum in the U.K. with their surviving siblings and Mother after fleeing civil war in which their father and many other family members had been killed or lost. They had been referred to me because they were depressed and suicidal.

They were living temporarily in cramped conditions, awaiting re-housing but had become established in school and the local community. They were offered a larger house in another part of the city which had a reputation as being rough, but more specifically for being an area which was not safe for people of their nationality and race.

When I assessed them, it was clear that both Shahina and Mohammed had serious mental health difficulties and that the risk of self harm was high. Their distress at the proposal that they should move to an area in which they would feel more vulnerable was clearly making their condition worse. I wrote to the Housing Authority advising them of my concerns.

When I saw them again with their Mother, I heard that she had made representations and that my concerns had been considered by the Housing Authority. However, she had received a letter advising her that they must accept the offered house. The letter pointed out the Local Government's obligations under the appropriate legislation; the housing being offered was deemed entirely appropriate. Failure to accept it would result in no further offers of housing and in them being required to vacate their present accommodation. The family were extremely distraught and my level of concern for Shahina and Mohammed was raised further.

I wrote again to the Housing Authority explaining that I had been shown their ruling and re-stating the mental health concerns. I pointed out that the risk of self harm or suicide was being raised by what was happening and that, although the children were not at direct risk of attack from another person as is usual in child abuse, I felt the situation constituted one of child protection. I posed the question “Which should take precedence – Housing Regulations or Child Protection Law?”

I did not hear back from the Housing Authority, but they did withdraw their threats regarding housing. It seemed to me that there had initially been a blinkered, non-inclusive approach. The shift was from a bureaucratic attempt to ‘discharge responsibilities’ to an approach of ‘fulfilling obligations’ by looking to the spirit in which the law is shaped – a collective responsibility to the most vulnerable.

Border control or broader compassion?

The above example relates more to what might be called the ‘petty bureaucracy’ of government and governance. But more esteemed institutions are not immune.

Zahira was 14 years old. Along with two of her teenage siblings she had been granted residence in the U.K. having fled civil war in Somalia. They passed through refugee camps and had become separated from their mother who was in a camp in Africa with one of their brothers. Their father and other siblings had been killed.

Zahira was depressed with suicidal thoughts and feelings, struggling to keep going without her Mother with whom she was able to have mobile telephone contact. That contact was a mixed blessing since at least she knew her mother was safe: but knowing her mother’s suffering and being helpless in the face of it was an additional burden.

All legal advice had been followed to try and seek admission to the U.K. for Zahira’s Mother but these had failed because she had been deemed to be in a place of safety and therefore not eligible for asylum in the U.K.

It seemed to me that there was a conflict between Immigration Law and the requirements of the U.N. Convention on the Rights of Children, specifically Articles 9 (Separation from parents) & 10 (Family reunification). (Office of the United Nations High Commission for Human Rights, 1989 and UNICEF, 2005).

I approached a senior local Judge with responsibility for Child and Family Justice for advice. He agreed with my view but explained that it had been made clear that Immigration Law would take precedence over child welfare.

I was due to speak to an audience of lawyers and welfare professionals involved with child refugees and asylum seekers and I told Zahira that I would like to tell them about her situation. I asked her if there was anything specific she would like me to say. She thought carefully and then said “It’s hard to live without your Mother.”

From Armed forces to Market Forces

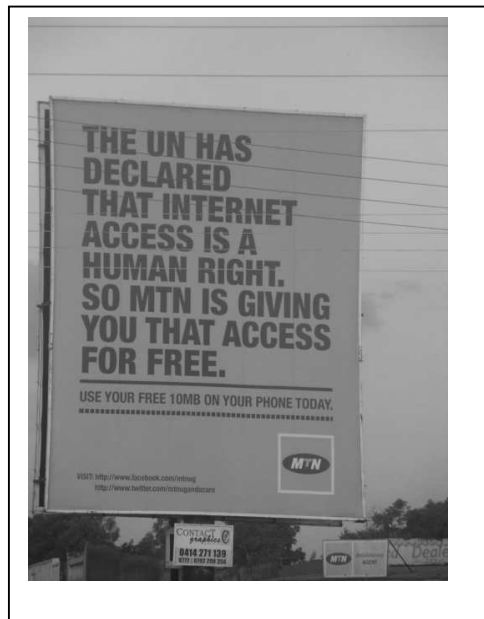
I may now be accused of straying from my area of expertise in mental health into politics and economics, but I will invoke my right to roam or at least take such a liberty.

In one of the hospitals I have visited in Uganda, I came across these posters outside the senior management offices.

The posters could be considered as simply eye-catching advertisements to inform people of ‘financial products’. However, the images could not be more at variance to the city that the hospital serves in terms of the westernised cultural image nor in the likely housing possibilities for the over-whelming majority of the population. In terms of my theme of trust and vulnerability, I would suggest that they are at best a recruitment poster, seeking to recruit people to the ranks of those enrolled in the army of debtors serving financial institutions which have proved far from trustworthy. At worst do they not simply rub people’s noses in their predicament?

Rights and wrongs

Consider another advertisement.



The advertisement draws on a document from the United Nations (2011) which actually states “... ensuring universal access to the Internet should be a priority for all States. Each State should thus develop a concrete and effective policy... to make the Internet widely available, accessible and affordable to all segments of population.” (p22)

A right cannot simply be conferred: it requires that there is someone able to carry out the actions to fulfil that right (O’Neill, 2002a). To seek to represent something as a right is also to seek to create a belief on the part of those not in possession of it that it is being withheld. By seeking to create a

semblance of benevolence in the face of 'rights-denied', adverts such as this seek to exploit through misrepresentation. In the UK I believe it would fall outside the Advertising Standards Agency code (2012) "The Advertising Codes contain wide-ranging rules designed to ensure that advertising does not mislead, harm or offend. Ads must also be socially responsible and prepared in line with the principles of fair competition." It is morally reprehensible whether it is legal or not.

So, why do I as a child mental health specialist become so heated about an advertising campaign such as this?

At worst, it can be an attempt to make something that is non-essential, albeit desirable, essential to our sense of value and worth. Moreover, it implicitly proposes that someone is withholding it wilfully. Human development relies on the development of a capacity for healthy discrimination. We need to be able to differentiate between those things towards which we feel impelled through desire without there necessarily being 'good', rational cause and those things which are essential for life and living in relationships or at least in alleviating suffering. If we have been held in trust in this respect as children, we can come to find this capacity inside ourselves. However, such a capacity is not always resilient even when long-established.

To conflate *aspiration* with *expectation* is corrosive. The repeated and/or insistent presentation of "entitlement-denied" in order to control, seduce or provoke desire for personal gain is an abuse of power, a form of 'grooming'. In the case of advertisements such as this, the power derives from and pursues financial gain rather than the common good. They can hit at a basic foundation of psychological development as described by Eriksen (1986, 222-6). Parents, families and communities may be able generally to protect their children from insidious corrupting influences. However, this requires that all are able to be well-informed since anybody may fall prey to the effects of these affronts to trustworthiness. This is far more problematic when the means of communication are in the hands of those who gain from such mis-communication. It has been suggested that there is a 'crisis of trust' in contemporary societies (O'Neill, 2002b) and that problems can ensue as much from 'misplaced mistrust' as from 'misplaced trust' (O'Neill 2002a).

A just society should, I believe, seek to protect the vulnerable, which can be any one of us at a particular time, by seeking to ensure that those agencies which purport to serve us through facilitating information exchange do not do us a disservice.

The sweet smell of success?

Healthy development relies on the management of everyday competing demands and conflicting wishes without there being serious or irreversible adverse affects on physical or mental health. Children and their parents inevitably come in conflict. Creating unnecessary conflict between them may simply be a nuisance but it can add further burden when the cumulative burdens may already be immense.

Consider the following picture taken at retail store near my home.



If you look closely, you might just work out that it is a checkout counter. I think it is unlikely that you will be able to identify that the shop is not actually a sweet shop / candy store. It is a garden centre. I watched a mother negotiating paying for her plants, accompanied by her two young children and her own mother. The grandmother was fully occupied dealing with the youngest child for whom these sweets were just too enticing: he became extremely frustrated with his grandmother who patiently dealt with his mounting aggression towards her as she withheld the sweets from him. I complained to the shop manager about the 'wall of sweets': he explained that he was uncomfortable about its presence but had directions to place it there. I spoke to the Managing Director. He said that it was common practice in retail stores and sought to defend it by saying that children had to learn that they could not have everything they wanted. He accepted my assertion that there were more than enough opportunities for this without his company creating another one out of a simple visit to the garden centre. He said he would take it to his management group since he liked to do things by consensus: he did not accept my point that sometimes good leadership meant employees being told that other things were actually more important than simply trying to increase the figure on the bottom line. The picture was taken a year and a half after my complaint so clearly, maximising profit and seeking consensus in the management team assumed a higher priority than avoiding disservice and distress to young children, parents and grandparents.

Article 12 of the Universal Declaration of Human Rights (United Nations General Assembly, 1948) states that 'No one shall be subjected to **arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.**' Dare we consider that, just as armed forces should be there to serve and protect and not to oppress or exploit, so too should market forces?

Conclusions

As an advocate for children's mental health I think these are all examples of the way in which seeking to promote their interests as the foundation for a just society, equipping them to be the stewards of justice for future generations is consistently not at the centre of adult behaviour nor necessarily the law. The child psychiatrist Donald Winnicott coined the term 'The maturational processes and the facilitating environment' to capture the synergy of a child's inner resources and those of the people and institutions within which they grow up. The framework of the law is part of that environment

which can be facilitating or debilitating. It can make a positive contribution to children's mental health when it demonstrates that it is based in 'healthy authority', founded on trustworthiness.

My colleague, Prof Emilio Ovuga at Gulu University said to me that he thought in his country it was sometimes tantamount to a crime to be a child (personal communication June 2012). It certainly seems to me that internationally, justice for children will be a reality when they are no longer regarded as legitimate collateral damage in the pursuit of power and money.

JUSTICE FOR CHILDREN IN CONFLICT AREAS

By Ms Silvia Pasti, Chief Child Protection, UNICEF-Uganda

UN approach to justice for children



Silvia Pasti Chief Child Protection
UNICEF Uganda

For every child
Health, Education, Equality, Protection
ADVANCE HUMANITY



J4C - Context of International development

- Recognition of the Rule Of Law in promoting peace, security and human rights.
- Rule of law approaches are thus a cornerstone of UN commitment to the Millennium Declaration and the fulfillment of the Millennium Development Goals, as well as human rights for all.
- The way children are treated by national justice systems is integral to the achievement of rule of law and its related aims. Increased attention to the treatment of children as alleged offenders, and the development of international norms and standards for juvenile justice.

Definition Rule of Law – SG report on RoL, 2004

Rule of law “refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency”

General Assembly Recommendations

- The recommendations of the UN General Assembly in response to the UN Report on Violence against Children stress the need to ensure accountability and end impunity for crimes against children.
- It also recommends the establishment of comprehensive, child-centred, restorative juvenile justice systems that reflect international standards

However

- Children are yet to be viewed as key stakeholders in rule of law initiatives.
- Work to implement child justice standards is frequently handled separately from broader justice reform.
- Vertical approaches, aimed at improving either the juvenile justice system or responses to child victims and witnesses, without acknowledging the frequent overlap between these categories and the professionals and institutions with responsibility towards them.
- Access to justice, recognized as an important strategy for protecting the rights of vulnerable groups, and for fighting poverty, yet to prioritize children.

Justice for children – Definition

'Justice for children' covers:

- Children in conflict with the law, i.e. alleged as, accused of, or recognized as having infringed the penal law
- Child victims and witnesses of crime in contact with justice systems
- Children in contact with justice systems for other reasons such as custody, protection or inheritance (child parties to a justice process)

Goal of the UN approach

The **goal** of the justice for children approach is to ensure that

- **all** child victims, witnesses and alleged offenders...
- ...have **access to justice** systems (formal and/or informal) and are **better served** and **protected** by these systems...
- ...through full application of relevant **international norms and standards**

Strategy of the UN approach

The main strategy towards this goal is to...

...Ensure greater attention to children in rule of law efforts by...

1. Broadening partnerships and leveraging the work of UN entities around rule of law
2. Scaling up and using existing expertise in improving the realization of the rights of child victims, witnesses and alleged offenders

Guiding Principles

- Ensuring that the best interests of the child is given primary consideration
- Guaranteeing fair and equal treatment of every child, free from all kinds of discrimination
- Advancing the right of the child to express his or her views freely and to be heard
- Protecting every child from abuse, exploitation and violence
- Treating every child with dignity and compassion

Broadening partnerships and leveraging the work of UN entities around rule of law

Children's issues are to be integrated in the following efforts:

1. Strengthening of national systems, e.g.:
 - Constitution-making processes
 - Law and policy reform efforts
 - Institutional reform and capacity development for professionals
2. Legal empowerment and access to justice, e.g.:
 - Human rights education and legal awareness
 - Community based legal and paralegal outreach services
3. Specific crisis and post-crisis interventions, e.g.:
 - Peace agreements
 - Transitional justice mechanisms
 - Security sector reform

What Can be Done ?

- Building the knowledge base on children in (formal and informal) justice systems
- Support diversion of children from judicial proceedings and alternatives to deprivation of liberty
- Enabling the full involvement of the social sector in justice for children
- Promoting child-sensitive procedures and environments in justice systems

Uganda – Key Issues In J4C

- Northern Areas- Post Conflict Recovery and Rehabilitation measures
- Adolescents and Reintegration into traditional lifestyles, poverty, lack of parental guidance /interest child headed homes, differing life style at former IDP camps, drugs/alcohol consumption
- Land disputes and impact on children and young people
- Awareness of Justice For Children issues in communities to make diversion meaningful and avoid mob justice

Uganda – Key Issues In J4C

- Role of Local councils- Their capacity/attitudes and its impact on children
- Lack of /inadequate record keeping and follow up
- Promotion of child's rights to privacy

Some steps forward

- JLOS and promotion of coordinated Sector Wide Approach
- Inclusion of 11 Juvenile Justice Indicators for monitoring in the Sector Investment Plans(SIP)
- 1371 Juvenile Justice stakeholders sensitized and DCC action plans developed
- Chief Justice designated Grade 1 Magistrates to cover Family and Children courts which helped in overcoming the lack of magistrates to address child related issues (previously limited to grade 2 Magistrates only).

Some steps forward

- Promotion of diversion -980 child offenders were diverted
- Introduction of child friendly processes in legal process
- Disposal of back log of cases
- Child Support centres to support children appearing in court
- Data collection harmonized resulted in marked increase of proper reporting
- Periodic visits and inspection of police cells and children facilities by DCC and J4C committees has helped in feedback

J4C Uganda – Special Sessions

- 154 cases were cause listed for these Special Sessions for Children. 134, or 89% of these cases were completed; .
- Sessions were successful in implementing child friendly procedures
- Judges remove wigs and red gowns; lawyers are also informally dressed; Close relatives allowed to accompany children to court;
- Child cases heard in chambers; proceedings should be in camera for all cases involving children (only where necessary) ; child friendly language used by ALL; using inquiries rather than interrogations; post trial counseling as well as snacks and refreshments.

J4C Uganda – Special Sessions

- Child Support Centre set up to support the children who came to the court as victims, offenders or witnesses with Registrar’s support in Gulu and Pader High Courts.
- Innovative tools designed by CJSI for the collection and feedback on these procedures, including weekly reflection diaries distributed among key actors and questionnaires used by Fit Persons with children .
- The feedback from all key actors and especially children on these practices was overwhelmingly positive.

Challenges

- Age Determination continues to be an issue. Medical officers capacities need to be strengthened .
- Probation services need strengthening in terms of numbers and resources.
- Remand homes- Children are regularly held in remand without due process, awaiting trial due to backlogs, for crimes that should be dealt with through diversion.
- Resources for transporting children home to be provided

SPECIALIST SESSIONS

GENDER

Report on the Gender Section Meeting

This session focused on the work that the CMJA Gender Section had been undertaking over the last three years and issues of current concern. It was chaired by Mrs Anita St John Gray JP, the Vice Chairperson who welcomed participants to the meeting and outlined the objectives and history of the Gender Section and the work the CMJA had undertaken to date on gender and human rights. A draft agenda was tabled at the meeting. Mrs St John Gray presented the apologies of the Chairperson, Mrs Clover Thompson Gordon and also of the Vice Chairperson, Mrs Gloria Millwood.

1. Restructuring of the Gender Section and Elections

At the CMJA's Council Meeting held in Brighton in 2010, the Council had agreed to the restructuring of the Gender Section, to ensure its continuation and to bring it in line with constitutional changes that had been enacted by the CMJA at its General Assembly in 2009. A copy of the paper outlining the re-structure had been circulated with the Gender Section Report and was available online. It was also included in the draft agenda tabled at the meeting.

The restructure called for a Chairperson and Vice Chairperson to be appointed by Council. The Regional Meetings had been asked to nominate a representative from each region for appointment to the Gender Section. Nominations had been received:

- Atlantic and Mediterranean Region: Justice Lynne Leitch (Canada),
- Caribbean: Justice Paula Mae Weekes (Trinidad and Tobago),
- East Central and Southern Africa, Justice Angeline Rutazana (Rwanda)
- Indian Ocean: Justice Chanda (Sri Lanka)
- Pacific: to be appointed.
- West Africa: Mrs O A Sofowora (Nigeria)

A volunteer had sought to assist as Hon. Secretary, and Ms Debbie LeMottee, Judicial Secretary to the Jersey judiciary had volunteered for this position.

Reports from Members on Gender Issues in particular Violence against Women.

The Chairperson pointed out that the theme for the next Commission on the Status of Women Session in 2013 would be the Combating Violence against women. She suggested a number of issues for discussion at the meeting: Forced Marriages, FGM and Widows Rights.

Forced Marriages:

The Chairperson talked about the recent campaign launched by Plan International and the Commonwealth to bring the issue of forced marriage to the forefront of gender awareness in the

Commonwealth. Forced marriage was tantamount to sexual and domestic slavery and an affront to every human right protecting individual freedom, dignity and self-determination. The Chairperson pointed out that in 2011, up to 8000 cases, mostly of girls or children from many different ethnic and religious backgrounds were taken against their will and married to men they had never seen before in countries, where they did not speak the language or understand the culture. 50% of girls were under the age of 16 and a significant number were as young as 8. Under new laws in England and Wales, parents who forced their children into such marriages could be jailed. The Home Secretary had also put in place a fund to help schools and other agencies spot early signs of forced marriages. The law against forced marriages already existed in Scotland having been promulgated in November 2011.

Female Genital Mutilation

Some 140 Million women worldwide have been subjected to FGM and an estimated further 2 Million are at risk every year. It was reported that Somalia had recently banned FGM in their constitution saying that it was tantamount to torture and yet it was still not recognised as a reason for asylum.

However, it was recognised that any ban would only take effect if there were changes in attitudes not only at the grassroot level but also within the leadership of villages and communities and within the women of the communities who had already undergone this process themselves. It was important that the health implications of FGM were widely publicised within these communities in order to stop this inhumane practice. In the UK, anyone found guilty of carrying out FGM could face a maximum sentence of 14 years in prison.

Widows Rights

Dr Karen Brewer, trustee of Widows Rights International, spoke about the degrading treatment suffered by widows across the world who were subjected to inhumane funeral rites which put not only their health at risk but also their lives. She pointed out that widows not only were ostracised from their husbands clans, they could be forced into marriage with their husband's relatives, could suffer violence from relatives, be forced to be "cleansed" by a relative of their husband's or more common now, a "professional" cleanser.

Country Reports

Uganda

It was reported that progress had been made since TCI, with the criminalisation of domestic violence and the introduction of protection orders in domestic violence cases. In addition, compensation and other remedies had been introduced. Uganda had also passed an FGM Act banning FGM, although this also coincided with a judgement in the Constitutional Court against FGM. Uganda had also promoted the anti-trafficking act and had put in place provisions to protect persons who were trafficked. Although this was very progressive, there was still some way to go as the Domestic Violence act did not cover women from Muslim communities. DB also pointed out that Uganda had signed up to the Maputo Protocol (ie the **Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa**, which guaranteed comprehensive rights to women though they had put in a reservation about abortions. They had been using the new training manual on the Maputo Protocol produced by Equality Now and had adapted this with the Judicial Services

Commission to produce a training manual for judicial officers to increase their knowledge of women's rights and how they could be protected.

Also mentioned was a test case on bride price which had recently been heard by the Court of Appeal where the relatives had lost the case, but it was being appealed now to the Supreme Court. Uganda was moving in the right direction

In some parts of Uganda, women who married were given a portion of land by their husband's clan at the time of marriage and this could not be taken away when they became widows.

Tanzania

Although Tanzania had passed a law against FGM, more and more babies were being subjected to this inhumane practice to avoid the need for consent.

In Tanzania, it was pointed out that some young men had now become "professional sexual cleansers" of widows in order to gain a regular salary in a country where unemployment was prevalent. But this was a risky business leading to unwanted pregnancies, HIV/AIDS infections and other health issues. The Tanzanian Magistrates and Judges Association had been working with civil society organisations and widows organisations to promote better awareness of widows rights and had produced a leaflet in Swahili and English to better inform and train communities and leaders as to what they should be doing.

Although disputed land and property cases have been taken to court, this could be too late for the widow as the property may already have been sold off by relatives of the deceased husband and with the administration of estates taking so long, widows who were already infected with HIV/AIDS might have in the meantime passed away.

South Africa

The issue of the proposed Traditional Courts Bill was raised. This was currently being discussed in Parliament in South Africa. It was argued that the Bill would give traditional courts judicial powers that were not contained in the constitution and that women rights would be worse off as the bench in these traditional courts, which were due to hear not only civil or family cases but also criminal cases, were entirely male dominated and these courts did not allow legal representation. The right to choose which system to go for had been removed as it was the criminal, civil or small claims courts prerogative to transfer a dispute before the traditional court. It was reported that the CMJA secretariat would be monitoring the progress of the bill and its compliance to the South African Constitution.

Other issues.

The CMJA was commended for taking up the issues and for publicizing the problems. Judicial officers were often restricted in what they could do but sensitizing communities and the public was an important part of the work the CMJA was doing in this area. What was important was to back up any advocacy on the issue with empirical data. It was important not only to sensitize communities but individuals within that community.

SENTENCING IN CRIMINAL CASES

By The Hon. Justice, John Vertes, Canada

SENTENCING A CANADIAN PERSPECTIVE

Justice John Vertes
Canada

Sentencing Involves

- A Complex Process
- Application of conflicting philosophical approaches to sentencing
 - Retribution
 - Rehabilitation
- A balancing of many circumstances
 - The facts of the offence
 - The circumstances of the offender
 - The principles and purposes of sentencing

Types of Sentences

- Incarceration
- Conditional sentence
- Fine
- Suspended sentence
- Probation
- Absolute or conditional discharge
- Indeterminate detention

The Purpose of Sentencing

Section 718, Criminal Code of Canada:

- The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- To denounce unlawful conduct;
- To deter the offender and other persons from committing offences;
- To separate offenders from society, where necessary;
- To assist in rehabilitating offenders;
- To provide reparations for harm done to victims or to the community; and
- To promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community.

Fundamental Principle of Sentencing

Section 718.1:

- A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

R. v. C.A.M., [1996] 1 S.C.R. 500

- The fundamental principle is that of retribution which requires that a judicial sentence properly reflect the moral blameworthiness of that particular offender as well as the gravity of the offence.

Sentencing requires a balancing of competing principles:

- Retribution – punishment fits the crime
- Prospect of rehabilitation – could result in more lenient sentence or more severe sentence
- Circumstances of offender – criminal and personal history
- These principles frequently modify each other

Denunciation

- Denunciation mandates that a sentence should also communicate society's condemnation of that particular offender's conduct.

(*R. v. C.A.M.*, at para.81)

Deterrence

- Deterrence refers to a sentence that will specifically deter the offender from committing further offences, as well as generally deter other like-minded individuals from offending.
- Specific deterrence & general deterrence

Rehabilitation

- Rehabilitation is an important principle in establishing any sentence, but it is of particular significance when dealing with young people and first offenders.

Other Principles

- Jail as the last resort – Section 718.2(d)
- Alternatives short of incarceration should be examined.
- Look for sentencing options which will achieve the goals of sentencing without incarceration, if possible.
- Restraint in sentencing as a fundamental principle.

Other Principles

- Totality principle – Section 718.2(c)
- If the judge is imposing consecutive sentences for more than one offence, even though the sentence for each individual offence might be fit, the totality or cumulative sentence must not be too harsh.

Other Principles

- Sentences for similar offences – Section 718.2(b)
- Consistency of sentencing for similar offenders committing similar offences is the aim.
 - Range of sentences are established for offences by appellate courts which take into account circumstances of the offence and the offender.

Other Principles

The “Gap” Principle:

- When an offender has a significant gap in his or her criminal record since the last offence, the fact the offender has stayed out of trouble for a while may be a mitigating factor.

Other Principles

The “Jump” or “Step-Up” Principle:

- Sentences for subsequent offences should increase in small “steps” and not “jumps” unless the offence dictates a substantially higher sentence.
- This principle applies even when rehabilitation is a significant sentencing factor.

Maximum Sentences

- The maximum sentence is rarely imposed.
- It is only appropriate if the offence is of sufficient gravity and the offender displays sufficient blameworthiness.
 - *R. v. Chedessingh* [2004], 1 S.C.R. 433
 - *R. v. L.M.*, 2008 SCC 31

Application of Principles

How does the judge apply all of the principles to reach the correct and just decision?

- The Criminal Code delegates to trial judges considerable latitude in ordering an appropriate period of incarceration which advances the goals of sentencing and properly reflects the overall culpability of the offender.
- *R. v. C.A.M.*, at para.37

Overarching Principle

R. v. Lyons, [1987] 2 S.C.R. 309 at 329:

- In a rational system of sentencing the respective importance of prevention, deterrence, retribution and rehabilitation will vary according to the nature of the crime and the circumstances of the offender.

MODERN JUDICIAL ADMINISTRATION

By The Hon. Justice M Charles C Mkandawire, Judge Of The High Court Of Malawi, Currently On Secondment As Registrar To The SADC Tribunal In Windhoek, Namibia

1. Introduction

Modern judicial administration used to be a myth in many legal systems. It is however now settled that many judiciaries have embarked on very ambitious strategic plans which have fully embraced this judicial philosophy.

2. The aims for Court Organisation

I could not do better than start with the set of principles and standards recognized the world over relating to court organization.

The organization of any court system should serve the courts' basic task of determining cases justly, promptly, effectively and efficiently.

To this end, the organizational structure should promote:

- Authority over all judicial operations
- Clear delineation between judicial and non judicial responsibilities and common management system so that delivery of services may be administered uniformly through out the jurisdiction.

The administration of a court system should facilitate the development of skilled leadership, selection and assignment of competent judicial, administrative and other personnel, sound management, efficient use of human resources, facilities, equipment, public accountability and responsiveness, and continuous planning should place emphasis on resource flexibility to meet varying and changing systems wide and local contingencies.

3. The duties and responsibilities of Registrars.

As legal systems differ from country to country, there are thus variations on what are these duties and responsibilities of Registrars.

By and large, these duties and responsibilities are bound to be found in the following sources: -

- Constitutions
- Statutes
- Administrative Regulations
- Financial Regulations
- Judicial Circulars
- Policy Documents
- Strategic Plans
- Practice Directions
- Custom

We should also take cognizance of the fact that depending on the type of legal system, it is a requirement in other jurisdictions that a Registrar has to be a qualified lawyer. On the other hand, in other jurisdictions, a legal qualification is not necessary.

4. Judicial Duties

In many jurisdictions, statutes determine the scope of duties for the Registrars.

These include:-

- Receiving of Court documents
- Issuing out all Court processes
- Ensuring that the cases are consecutively numbered
- Service of Court documents
- Presiding at any pre-hearing conference if directed by the Court
- Preparation of records on appeal/reviews

- Hearing interlocutory applications like summary judgements, stay of execution, setting aside default judgements
- Assessment of damages
- Taxing of Costs.
- Sending notices to parties
- Listing of cases
- Sheriff work

It has been said in other jurisdictions, that actually a Registrar exercises the powers of a Judge in Chambers.

5. Administrative/Financial Duties & Responsibilities

- A Registrar is in charge of the Judiciary. He is the controlling officer. The Registrar must be abreast of all the happenings in a judicial setting including that of all outstations. In other jurisdictions, one finds that the sphere of influence of the Registrar is very limited for example; the Registrar only takes charge of the affairs of Judges.
- The Registrar oversees all departments and sections within the judiciary both at Headquarters and all stations and may keep all confidential reports of all officers from a certain grade.
- The Registrar is in charge of enforcement of discipline of all staff. He/She makes sure that Members of staff stick to their responsibilities.
- Towards the enforcement of discipline, the Registrar may issue or direct any other officer to issue query to any officer. He/She can also give or direct that written warning or “serious warning” be given to such staff but he/she can not dismiss a staff. The Registrar can only recommend for such punishment to the relevant judicial service commission.
- The Registrar is in charge of posting of all staff of the Judiciary. For judicial officers such as Magistrates, he/she has to liase with the Chief Justice. In other jurisdictions, the Chief Resident Magistrate is in charge of such postings.
- The Registrar makes recommendations about acting appointments, advancement, promotion, confirmation, transfer of service, secondment, suspension and dismissal in respect of all staff under him/her to the Chief Justice for onward inclusion in the agenda of the Judicial service commission which has the statutory power to approve them.
- The Registrar is in charge of the preparation of the Annual Leave Roaster for all Magistrates. The Registrar cannot however dictate the period of Annual Vacation for Judges or appoint vacation Judges as this power lies statutorily with the Honourable Chief Justice.
- The Registrar has to update information. By this, he/she directs either the officer in charge of the store or the Librarian to procure all National Dailies, Weekly, Monthly, Quarterly and Annual Newspapers, Law Journals, Judicial Journals or Magazines, both local and foreign.

- The Registrar is the chief public relations officer of the Judiciary. He/She issues and sends out notices, special bulletins, advertisements for vacant positions within the Judiciary, announcement of Annual Legal Year Service and invitation cards and letters to that effect, including the announcements of Annual Vacation after being signed and approved by the Chief Justice.
- The Registrar has the responsibility to place special advertisements about the acting or substantive appointment and retirement of Chief Justice and Judges.
- The Registrar oversees the training, re-training, seminars, workshops and symposia for all categories of workers under him. In doing this, he/she liaises with relevant bodies and organizations dealing with the subject especially the Judicial Training Committee or other Government organizations. The Registrar also liaises with centres for training of Judiciary workers equally abroad oversees.
- The Registrar must always ensure adequate and proper security for all Judges and Magistrates and property of the Judiciary. He/She must be in constant touch with the Police in realizing this goal. For example, where a controversial or sensational case is being handled by a Judge or Magistrate, he/she must request for police protection in writing within a reasonable time before the date of such a case.
- The Registrar should deal with all manners of petitions and complaints against all staff of the Judiciary under him/her including Magistrates. He/She shall investigate such petitions and complaints meticulously and where the need arises he/she may set up a panel or committee within the Judiciary to investigate and make appropriate recommendations to him/her. This he/she shall consider before directing the same to the Chief Justice for either a final directive or for directives as to inclusion in the agenda of the Judicial service commission, for deliberation.
- For reasons of peace, industrial harmony and workers' encouragement, the Registrar should make staff welfare a priority. For example, the provision of official cars to principal officers. Approval of vehicles, motorcycle and bicycles loans, housing loans where the budget can accommodate them is also part of workers' welfare.
- The Registrar must ensure prudent financial dealings and strict compliance with the Financial Regulations of the Government. This is more so as most judiciaries are now getting direct funding from the Treasury account for their Recurrent and Capital Expenditure.
- The Registrar is responsible for all policy formulation and award of contracts and supplies to the Judiciary. He/She should therefore be very conversant with Government Procurement Regulations.
- As the Accounting Officer, the Registrar is to maintain proper check on the accounts of all cashiers and collectors of revenue. The Registrar must ensure that payments of fines, court fees are promptly made or banked to the account. He/She should ensure that accountants and revenue collectors are closely monitored in order to avoid perpetration of fraud.
- The Registrar must ensure prompt payment of leave allowance/grants for workers.

- It is the duty of the Registrar to make sure that budget proposals are made and submitted in good time.
- The Registrar has the duty to defend the Judiciary budget before the relevant Parliamentary body/Authority.

6. Modernized Legal Systems

The legal system has not been left behind in this era of globalization. As such, our emerging judiciaries have to cope with the exactitudes of the present Era of Good Governance, Proper Management, Specialization, Information Technology and Consumer Oriented Services. It is therefore important to re-examine our judicial systems and adjust the roles and responsibilities of Registrars in the field of Judicial Administration. This will in turn dictate the way our Court Administrators, our Court Clerks, our Ushers, our Recorders, our Court Orderlies, our Security Staff, our Bailiffs/Sheriffs and our Secretaries operate.

We cannot put an old, unperforming car on a new motorway. New machinery is needed and novel methods of work. To cement our judiciaries, our judicial support systems have to be reinforced.

7. The live issues in Modern Judicial/legal systems

The live issues of a modern judicial/legal system can be identified as follows:

- What are the objectives of a legal system?
- The definition of the aim of a National Judicial System
- Who should be Court Administrators, Judicial officers or Executives – appointed Court officers?
- What exactly should they be involved in? Who should exercise control?
- How should the network Court Administrator – Court Officer – Judicial Officer-Law Reform Group function?
- What type of Educational Programme will orient and train the Court Administrative Personnel for the New Era?
- How should performance be assessed of various Personnel, Institutions and Actors?
- What planning strategy should be developed?
- How should Judicial control be acquired of the plans? be they micro and macro plans?
- Nature and extent of Executive control over the Judiciary.
- Can we modernize without going electronic?

8. Our Thinking Philosophy.

Presumably, we have to reproduce a new environment and raise a breed of Judicial administrators equipped for the new era that has been born, at the cost of our extinction. Thinking is needed and implementation to follow the thinking. But it should not be traditional thinking, but an emergent, emancipatory one, a thinking outside the system itself. The type that makes our system come out of present shell doff its traditional rites and tyranny, conceive of the future by revalidating time – honoured principles.

9. Administrative Duties

There are so many logistical needs in modern legal systems. There is thus need to have in place a court executive to manage and supervise administration duties. Leaving entire administration to the Registrar leaves serious pit-falls.

The Registrar should concentrate on judicial functions.

The absence of a court Executive to manage and supervise administrative duties with the assistance of a senior judicial officer has done the judicial system a lot of harm. Alternatively, it devolves upon judicial officers who have a greater aptitude for legal and procedural work than strict administrative, budgetary, maintenance, planning and assessment of performance. This results in expenditure of Registrar's time that would be better spent on his/her performing judicial functions.

Second, it is left to those uninitiated in administration with all the consequences that it brings. It is management by chaos. Nothing is done at all until the fire breaks out, and it is simply put out and wait for another. In modern judicial systems, the appointment of the Chief Courts Administrator is necessary. This provides the Chief Justice and the Judiciary with the overall capacity to plan and direct the administration of courts. The Chief Justice and the Judiciary will have executives to plan and deliver the administrative reforms to the court.

10. Towards an indigenized solution in our judicial systems

The Registrar should have an up-date in the concepts, principles and practices of our judiciaries by observance of what such emerged jurisdictions as the USA, Canada, United Kingdom, Australia, and Singapore have done. The idea should not be indiscriminate copy but proper indigenization. David Heal, Director of the Judicial Administration Course at the Royal Institute of Judicial Administration, London, talks of the Pyramid of 7A's

A
A A
AAAA

Analyse, assess then adopt or adapt or abandon altogether as the case may be or alternate.

There should be changes in concept, attitude, commitments, re organization and training etc. But all these have to take into account realities existing in the country where the reform is sought.

The indigenizing process means seeking the assistance of all persons concerned to offer typically local solutions to its Judicial Administration problems.

11. New Management Philosophy

Pre-occupation has shifted from the one time assumption that the Court was for the convenience of the Bench and the Bar. The prime consideration to day is whether the community will receive good value for its money. The Modern concept therefore is one of the Court Service.

A new management philosophy has to be adopted based on scientific principles with emphasis on human relations and personal worth.

12. Involvement of the Para-legal staff in change.

Effective Court Management requires co-ordination of the involvement of all the administrative and Para-judicial staff towards the provision of a good court service, the Clerks, the Orderlies, the Bailiffs, the Ushers, the Police, the Prosecutors, Defence Counsel, the Attorneys, the Jurors, the Witnesses, the Prison Authorities etc.

Codes of Ethics, guidelines, directions, work schedules, check lists and minimum standards should be prepared for each, undertaken by each. This can easily be done through Court user Committees (CUCs).

13. Up-Dates and Extensions of Laws and old Habits and Rites.

A mere understanding of modern organizational management and methods and its practical applications in a Court setting are not enough. The legal framework under which these will work should be adopted.

Procedural laws, substantive laws as well as jurisdictional laws have to be revised. The legal system may need some adjustable overhauling at certain places such that cases can be disposed of within a short time may not act as a clog to the machinery involved in the disposal of cases.

14. Court Reporting Services

With current available technology on the matter of reporting, the desirability of adopting one of the means of producing a Court record mechanically or electronically must be emphasized. There are various methods of speech recording: the manual short-hand, the stenograph machine (machine-short hand), stenomask, multitrack electronic sound recording, Gimelli voice writing, video recording, and computer winded trans-scriptions.

15. A system of court statistics should be developed that is dynamic.

Little importance has been given to the importance of critical statistics. Thus there has been very little information that can be passed on to the public of how the Courts have been functioning. A system of compilation of case-load statistics should be available at all times. This has been rendered very simple and easy by the advent of computers which produce charts and graphs by daily entries.

16. Court Computerization.

Technological innovations fills into basically three categories, even if there is considerable overlapping;

- (a) automated legal research
- (b) use of video and telecommunication such as Satellite applications including video recording of court proceedings
- (c) the latest technology in audio and voice recording and computer aided transcription of court records.

Registrars therefore have the responsibility to design and develop the court rooms to accommodate new and developing technologies most effectively and efficiently.

Registrars should therefore make the best possible use of modern information technologies to build public awareness of the courts. They should establish a website on which relevant information about the court is posted. The public should be invited to read the full judgement of the courts to ensure that they are not jaundiced view of a judgement because of inept reporting.

Registrars should seek also to create and publish Executive Summaries of all important judgements with an appropriate disclaimer that these Summaries are not and form no part of the relevant judgement. There is also much value in the creation, sale and distribution of DVDs on the Courts concerning the Courts and the administration of Justice.

17. Use of Information Technology (“IT”)

New Rules of procedure and the new culture of litigation require adequate support by appropriate technology. Registrars should therefore appreciate that relevant IT is essential for effective functioning of new Rules of Procedure. They should seek to integrate the software they use with software being used by **auxiliary** government agencies such as the prisons, probations, police and immigration departments so that efficiency in the entire Justice sector is maximized.

The ultimate objective of the installation of modern IT should be the maximum of the efficiency of the Courts and the enhancement of access to Justice.

18. Information Centres and Customer Service Charters

Registrars should ensure that courts are more customer-friendly. They should develop Customer Service Charters in which the public are given information as to the manner and time in which the various departments of the court will deliver various services. They should publish brochures and leaflets that indicate the services that are offered by the court and how they can be accessed. Another special innovation would be the establishment of a Help Desk or Information Centre to which court users could go for information about the services provided by the Court.

19. Improving Physical Access

The traditional under-resourcing of the Justice System has resulted in court buildings being inadequate, dilapidated and unsuitable for the dispensation of Justice in contemporary times. The courts are liable to be seen in negative and derogatory terms because of the environment in which judicial officers function.

Registrars therefore have the responsibility to put in place planned, systematic and sustained programmes for modernization of Court infrastructure over a defined period. The infusion of resources should have as its objective the improvement of existing facilities and the creation of new ones. Such facilities should ensure adequate security for all court users and make provision for persons with disabilities. It requires no amplification to say that courts should be equipped with public address systems to improve audibility in the court rooms.

20. Procedural improvements

Rules of Procedure in the 20th century have had negative impact on access to Justice. They have allowed lawyers to manipulate the administration of Justice to the disadvantage of parties.

Their language has not been readily intelligible to the non-lawyer. Registrars should therefore initiate adoption of Rules of Procedure that are written in simple English/language and are readily intelligible to the average person.

They should provide for case management by Judges to ensure that the process of litigation is driven judicially in an efficient and expeditious manner. These Rules should also incorporate Alternative Disputes Resolution (ADR).

21. Codes of Conduct

Many courts throughout the world have developed and published Codes of Judicial conduct or guidelines for such conduct. These are very useful tools. They assist judicial officers in understanding the constraints of judicial office and serve to inform the public of the standards to be held accountable. Equally, they give the public an appreciation of the nature and responsibilities of judicial office.

Registrars have the responsibility to make these codes or guidelines easily available to the public at places in which the public often has access.

22. Complaints Procedure

The Judiciary should have existing mechanisms for dealing with complaints against it.

Registrars have the responsibility to ensure that such mechanisms do exist where they are not existing. Crucial to any such system is public awareness of its existence and its procedures. Publication of these, including on the Court's website, is necessary. Such measures encourage judicial accountability and enhance public confidence in the administration of Justice.

23. Annual Press Conferences

The Head of the Judiciary assisted by the Registrar has a responsibility to inform the public of the work of courts and to respond appropriately to concerns which the press may wish to raise on aspects of the courts operation.

24. Publication of Reports

Whether required by legislation or not, the Registrar has the responsibility to publish an Annual Report of the work of the Court and its departments to enable the public to assess the efficiency and effectiveness of the Courts.

25. Promote open Justice

It would reduce some of the mystique surrounding Courts if for example, there was an Annual Open Day when Members of the public would be encouraged to visit the Courts and interact with Judicial Officers and Court staff. The Registrar therefore has the responsibility to organise this.

26. Case management systems

Registrars have the responsibility to implement an electronic case management system tailored to specific needs of courts to facilitate the effective management of cases.

The electronic system adopted should have features which would assist in the following:

- identification of the status of cases
- identification of various categories of matters.
- Generation of reports e.g statistics, reason for adjournments
- Generation of standard forms, e.g letters, orders, notices etc
- Identification and tracking of reserved judgments
- Minimising of multiple entries
- Posting of case Notes for internal use only
- Allowing lawyers and the general public to access case information via the internet.

27. Statistics

Registrars should ensure that statistics are generated periodically for the internal use of the court to ensure the efficient and timely disposition of cases in keeping with applicable standards. Statistics should also be used to identify caseload trends, time lines, revenue collection, financial and human resource needs.

Registrars have the responsibility to make available general statistics to the public annually.

28. Electronic filing

It is the responsibility of Registrars to recognize the existence of electronic filing. Electronic filing should thus be recognized as the way of the future but should be introduced as the last step in modernization of Courts.

In particular, caution should be exercised to ensure that the introduction of electronic filing does not cause a transfer of workload and cost from the litigants to the courts.

Electronic filing should only be considered after the courts below have been fully computerized (thereby allowing documents to be electronically transferred between courts and/or lawyers/litigants)

REHABILITATION OF PRISONERS

By Ms Brenda Simpson, Country Director, African Prisons Project

BRENDA SIMPSON

COUNTRY DIRECTOR
AFRICAN PRISONS PROJECT

Rehabilitation of Prisoners

Rehabilitation myth or reality

Among the many aims of incarceration—retribution, deterrence, public disapproval, incapacitation, **rehabilitation, and reintegration**—the last two goals remain some of the most elusive and controversial, particularly in Africa.

Challenges

- Resources
- Skill and governance
- Lack of political will
- Low policy awareness and impact critique
- Lack of research
- Women and children

Is all hope lost?

- Use of informal networks (local community) to resolve conflict including local community dispute resolution teams.
 - JC Uganda
 - APP identify clients who could benefit from DR
- Alternative sentencing
 - Use of community sentencing in Africa (MIA)
- Out of prison vocational based sentencing

Enablers

- Act of parliament – Community Services Act
- Extra funded programs
- NGOs
- Community demand

Statistics – Uganda

12th May 2012

- 33,498 prisoners
- 222 prisons
- 15,162 (46%) convicts
- 18,336 (54%) remand
- 760 -90% serving longer sentences
- Half eligible for community sentences.

Conclusion

- 1/3 of prisoners in Uganda can be kept out of prisons.
- Community sentencing and vocational based reintegration is demonstrated to be of higher impact.
- Three pronged approach

Approach

- Before accused get into the justice system
- Whilst they are in the justice system and or prison
- When they come out.

APP's work

- Identify those prisoners who may benefit from intervention prior to trial through family discussions.
- Identify those who will benefit from rehabilitation efforts in education and other activities
- On the outside, reintegration efforts to reduce recidivism. Work opportunities, training, family reconciliation.

QNS

- Examples of rehabilitation programmes from your countries.
- What about children?
- Sustainable solutions to lack of funding for rehab programmes in prisons

NOTES OF THE SPECIALIST MEETING

BRENDA SIMPSON, APP COUNTY DIRECTOR introduced herself and did the same regarding African Prisons Project (APP) stating that APP was an NGO registered in Uganda and the UK which brought dignity and hope to prisoners through Health, Education and Justice mainly in Uganda but also in other parts of Africa. She then went on to explain the thematic area that APP worked in and indicated that her topic of choice for this plenary session was about rehabilitation.

Brenda referred to an online dictionary definition of rehabilitation and explained that APP worked in prisons and was able to see all the challenges that were faced there on a daily basis. She went on to state that talk about effective rehabilitation was a luxury that led to questions as to whether or not such a concept (rehabilitation) was a myth or reality.

She then indicated that there were a lot of challenges faced within the prison environment and these included a lack of funding, difficulties in communicating to loved ones and the provision of only limited meals (one) a day.

However, she did feel that talking about the many different types of rehabilitation – bespoke or off-the-shelf, seemed a bit like a luxury.

Reference was made to the older colonial model of detention which was touted as not having been meant for rehabilitation.

Coming up to fifty years of independence, Brenda wondered if the country (Uganda) had sufficiently matured to an extent where a person being released from prison would be something to publicise or be celebrated.

Negative attitudes and low interest in prisoner welfare in Uganda was characterized largely as being due to the popular perception of criminals.

The statistics available were given as being that 90% of prisoners would eventually be released back into society and one pondered how society would react to this demographic re-entering the populace unrehabilitated.

However, given this fact, what assistance would be available to achieve the goal of rehabilitation? The idea of '*Community Backed Rehabilitation*' was then introduced as a much cheaper modality of rehabilitation that would help resolve a multitude of challenges including:

- Resource scarcity
- Skills and Governance lacunae
- Lack of publicized help
- Low policy awareness and impact critique
- Dearth of research
- The special plight of women and children within the prison system

It was acknowledged that not a lot of resources were available in relation to prison orientated research but similarly, it was also accepted that first-hand interviews did result in a wealth of knowledge.

The question was posed as to whether rehabilitation in Uganda was a dream? Is all hope lost when one enters a prison in Uganda?

Brenda opined that maybe this was not entirely the case.

The Ministry of Internal Affairs' programme on rehabilitation was highlighted as an endeavour that incorporated '*Access to Justice*', rehabilitation and Community Re-integration.

Under this programme, suitable candidates for vocational based sentencing and community sentences were identified.

"...the person is facilitated to work with the community to find out what they have done wrong and select a reasonable sentence"

Organisations such as APP, Justices Centres Uganda as well as the Ministry of Internal Affairs could arbitrate in select instances.

Following this informative entrée, Brenda opened up the topic to the floor with **Mukasa Morris Kizito and Ms Teddy Nakalembe of *Mission After Custody*** being one of the first to take up this opportunity.

Mukasa Morris Kizito spoke about the challenges that were faced by those in prison, particularly with regards to provision of foodstuffs and gave his take on the scope and depth of Mission After Custody's work throughout Uganda, indicating that they had almost country-wide reach.

Teddy Nakalembe made an appeal that the Prison Act 2006 of Uganda be translated in Swahili and other languages and that prison staff, prisoners and community members be targeted for sensitization training.

Brenda then explained that APP had '*Bail Manual*' that would be coming out next year and that this would be a simple, non-legalistic procedures manual which would enable prisoners to identify their rights.

Peter Herbert, a UK Barrister, sitting Judge and Chair of the Society of Black Lawyers, referring back to the Prison Act 2006, enquired as to what type of prisoner within Ugandan prisons actually were reformed.

Lady Justice Flavia Senoga Anglin, the Chairperson of the National Community Service Committee (NCSC) highlighted a need for a Probation Service Officer in courts as well as a need for Prison and Pre-sentence Reports.

Additionally, she touched upon issues of financial accountability, particularly at the Magistrates level and the possibility of Accounting Officers within the Judiciary.

Sheriff David Mackie of Edinburgh Sheriff Court zeroed in on his area of interest, namely the condition of children within the Ugandan prison system and contrasted his experiences with children's hearings within the Scottish system.

Sheriff Mackie kindly informed the session of how the Youth Court System in New Zealand had been based on a basis of greater accountability through Family Group Conferences.

Emmanuel James Oteng, APP staff member also asked the session to note that Uganda, as a nation, did have unique experiences and perspectives to share with the rest of the world. These experiences, he stated, were in the areas of reconciliation and rehabilitation and were as carried out regarding former members of the Lord's Resistance Army in the Acholi Sub-Region of Uganda. Within that region, such former combatants would enter into the formal process of amnesty for what could possibly be '*Crimes Against Humanity*' or '*War Crimes*' through the Government of Uganda's Amnesty Commission whilst also undergoing the informal and traditional '*Acholi*' Community '*Mato Oput*'/Justice and Reconciliation process. Under the first process, the offender (who would have inevitably have been held prisoner to have even entered into any of these processes) would reconcile himself with the State and the Laws of the country whilst under the second process, reconciliation would be with the individuals and communities offended against and the norms of society.

CLOSING SESSION

Inaugural Speech by

**Justice John Vertes,
CMJA President 2012-2015**

The following is the acceptance speech by Justice Vertes on his election as President of the CMJA for the period 2012-2015

“Distinguished delegates, ladies and gentlemen, friends and colleagues, it is with pleasure, pride and a hearty dose of humility that I take on the position of President.

For those of you who are not familiar with my background, I served for 20 years as a judge of the superior courts of Canada’s northern territories, I retired last year as the Chief Justice of the Supreme Court of the Northern Territories and now I serve as a part-time deputy judge of that court. I thought I would have a lot of time to reflect and relax but obviously there were some in this Association who had other plans for me. And I accept this position fully aware of the responsibility reposed in me.

Before I go any further, I wish to propose to this assembly a resolution- one that I know all of you will join me in making unanimous – a resolution of thanks and appreciation to our past President, Justice Norma Wade Miller- for her dedication and leadership of this Association for the past three years.

I thank Chief Justice Odoki and the judiciary of Uganda for welcoming us to this beautiful land and for their support of the work of this Association.

I congratulate the Local Organising Committee and the Steering Committee for a successful and stimulating conference.

The primary aim and objectives of the CMJA are the promotion and protection of the independence of the judiciary and the advancement of judicial knowledge and education. I invite you to review the reports of the Secretary General and the Director of Programmes that are contained in the General Assembly papers. You will see there a catalogue of the different education programmes and training missions that were put on over the past few years in a number of countries. You will also see where the CMJA has made interventions and representations in a number of countries where our colleagues have faced challenges to their independence and where the rule of law came under threat.

These activities take a great deal of effort and strain the resources of the Association. And no one should be under any misapprehension. Notwithstanding the success of this conference, the Association is facing a number of challenges.

First and foremost is the financial one. There are unfortunately numerous member associations and jurisdictions who do not pay their annual dues, either on time or at all. This is seriously jeopardising our ability to carry on the important work mandated by our objectives.

So I ask all of you to assist us by encouraging your courts, your judicial associations, and your governments to meet their financial obligations to this Association on a timely basis.

I also encourage all of you to communicate with me, or indeed any member of Council, with your views and opinions as to the direction this Association should take in meeting its objectives. The strength and credibility of this Association rests on the support and participation of its members. So I invite each of you to learn more about our activities and to get involved.

Finally, I ask you to consider supporting the work of the Association by making a contribution to our Endowment Fund. The fund was established a few years ago to support the endeavours of the Association. Information about the fund is available in your conference materials and on the Association's website. I acknowledge and thank Chief Judge Philips of Lagos State, for her public commitment made here earlier this week to support the fund.

It is important to remember that we are an association of Commonwealth magistrates and judges.

The Commonwealth- made up of 54 member countries with over 2 billion people worldwide- is committed to shared values- democracy, adherence to the rule of law and the separation of powers, protection of human rights, development and stability. Its ethnic, cultural and religious diversity under a single umbrella is a remarkable strength not only for the advancement of these shared values but also for the example of peaceful coexistence and collaboration it shows to the world.

This Association is also committed to advancing those shared values and it is uniquely placed to do so bringing together judicial officers of all court levels from all of the countries in the Commonwealth in an atmosphere of equality, collegiality and mutual assistance.

I look forward to serving as your President for the next three years. I ask for your assistance in promoting the objectives of the Association. And I thank you for your trust and confidence.

I wish you all safe travels back to your home and I declare this 16th Triennial Conference closed."

Committees

Steering Committee

Chairman: Sheriff Douglas Allan OBE

Members: Paul Norton JP, Judge Shamim Qureshi (Director of Programmes),

Judge Tim Workman CBE
Secretary: Dr Karen Brewer

Local Organising Committee

Programme Director / Master of Ceremony - Hon Justice Lawrence Gidudu

Chairman: H/W Henry Adonyo

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| H/W Asaph Ruhinda | H/W Thadeus Opesen | H/W Jane Mugala |
| H/W Henrietta Wolayo | H/W John Arutu | Mrs Eva K Byaruhanga |
| H/W Elias O Kisawuzi | H/W Esther Rebecca Nasambu | Mr Linnard Nahabwe |
| H/W J B Ssegirinya | H/W Emmanuel Baguma | Mr Joseph Mutamba |
| H/W John Eudes Keitirima | H/W Margaret Tibulya | H/W Harriet Ssali |
| H/W E Jane Alividza | H/W Isaac Muwata | H/W Araali K Muhiirwa |
| H/W Batema N. D. A | H/W Margaret Mutonyi | H/W Susan Abinyo |
| H/W Elizabeth Kabanda | H/W Muse Musimbi | H/W Sarah Basemera |
| H/W A. G Opifeni | H/W Tom Chemutai | H/W Jessica Chemeri |
| Mrs Dorcas Okalany | H/W Deo Nizeyimana | Mr Robert Semwogerere |
| Mr E. N Muhindo | H/W Ajiji Alex | Mr Godfrey Namundi |

Secretary: H/W Vincent Emmy Mugabo

COMMONWEALTH MAGISTRATES' AND JUDGES' ASSOCIATION

(Registered Charity 800367)

The Association was formed in 1970 as the Commonwealth Magistrates' Association and in 1988 changed its name to the Commonwealth Magistrates' and Judges' Association in order to reflect more accurately its membership. Most Commonwealth countries and dependencies are represented in full membership which is open to national associations of magistrates, judges and any other judicial body. Associate membership is open to any individual who is a past or present member of any level of the judiciary or has connections with the courts within the Commonwealth.

AIMS

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

MEMBERSHIP

Associations of the judiciary of Commonwealth countries are Members Associations whilst individual magistrates, judges and court administrators may become Individual Members. Regional associations or specialized commissions can become Institutional Members of the CMJA

ACTIVITIES

Pan-Commonwealth Conferences; Regional Meetings and Workshops facilitating communications and co-operation between the different countries of each region; Study Tours and Exchange Visits; Judicial education seminars.

PUBLICATIONS

"The Commonwealth Judicial Journal" and the "CMJA News" (both twice yearly and complimentary to members); Reports of proceedings of major conferences and seminars; specialised information books on particular topics (printing or copying costs may apply).

"The Rule of Law can only be observed if there is a strong and independent judiciary which is sufficiently equipped and prepared to apply such laws. Although it is highly desirable that the independence of the judiciary, as one of the arms of government, should be formally protected by constitutional guarantees, the best protection rests in the support of government and people on the one hand, and in the competence and confidence of judges and magistrates in the performance of their offices on the other." Victoria Falls Proclamation, Zimbabwe, 1994