I. TITLE OF THE SESSION:


Organiser: Commonwealth Magistrates’ and Judges’ Association (CMJA)

Contact information of the session coordinator: info@cmja.org

The CMJA is an association of magistrates and judges in the Commonwealth. Its aims are 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.

II. BRIEF INTRODUCTION OF MODERATOR AND PANELLISTS:

<table>
<thead>
<tr>
<th>Moderator:</th>
<th>Keith Hollis</th>
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<tbody>
<tr>
<td>Position:</td>
<td>Retired Judge, Former Director of Studies</td>
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<tr>
<td>Organization:</td>
<td>Commonwealth Magistrates’ and Judges’ Association</td>
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III. PANELLISTS

<table>
<thead>
<tr>
<th>Name:</th>
<th>The Honourable Justice M.C.C. Mkandawire</th>
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<tbody>
<tr>
<td>Position:</td>
<td>Head of High Court Civil Division</td>
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<td>Organization:</td>
<td>Judiciary of Malawi</td>
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<tr>
<th>Name:</th>
<th>Madam Justice Lynne Leitch</th>
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<tr>
<td>Position:</td>
<td>Ontario Superior Court of Justice</td>
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III. BACKGROUND INFORMATION ON THE TOPIC:

**Basic Principles on the Independence of the Judiciary**


‘Whereas judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens…………

**Independence of the judiciary**

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.
6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.’

Bangalore Principles of Judicial Conduct

“Judicial Independence is a pre requisite to the rule of law, and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify Judicial Independence in both its individual and institutional aspects”.

UN Basic Principles on the Independence of the Judiciary stipulate that persons selected must be “individuals of integrity and ability with appropriate training of qualifications in law”.

IV. MAIN ISSUES TO BE ADDRESSED AND KEY OBJECTIVES OF THE SESSION:

A. Establishing independent and accountable disciplinary mechanisms, appointments, lay involvement: an African Perspective.


www.cmja.org/downloads/latimerhouse/commprinthreearms.pdf

- Following the adoption in Abuja, a Sub-Saharan Conference was held in Nairobi, Kenya in April 2005. The Nairobi Plan of Action was adopted by conference delegates.


Nairobi Plan of Action:

“Each institution of government must exercise responsibility and restraint in the exercise of power within its constitutional sphere so as not to encroach on the legitimate powers vested constitutionally on other institutions. It was affirmed that Commonwealth Africa needed to pay particular attention to processes of democratisation that meet the needs of Africa’s historical, cultural and economic peculiarities and in a manner which is consistent with the principles.

Judicial Accountability

There should be adequate observance of principles of accountability in its processes, professional ethics and conduct amongst judicial officers as well as court officials. The institution of peer review mechanisms by members of the profession, appropriate criticism
through the media. For accountability to be effective, there must be judicial independence and security of tenure. The judiciary must be well resourced.”

- (ii) Commonwealth Governments are therefore encouraged to do set in place clearly defined criteria and publicly declared processes of judicial appointments (Judicial Appointments Commissions).

- The Commonwealth Magistrates’ and Judges’ Association (CMJA), Commonwealth Lawyers Association (CLA) and Commonwealth Legal Education Association (CLEA) have cooperated on a study of judicial appointments in the Commonwealth and a report on this was published in November 2013. The report includes a model clause for inclusion in constitutional and legislative documents on the composition and role of Judicial Appointments Commissions which may assist in ensuring that judicial appointments are seen to be independent

www.cmja.org/.../Judicial%20Appointments%20Commissions-%20CLA-CLEA-CMJA

- Areas of focus on Judicial Appointments Commissions (JACs) are:- Composition, Functions, Role of the Legal Profession, Rules governing operation of JACs, tenure of office of JACs, transparency and accountability of JACs

The Commonwealth Secretariat has published A Compendium and Analysis of Best Practices

- (iii) Status of Magistrates

- In 2009, the CMJA set up a Taskforce to look into the treatment, training and security of tenure of Magistrates across the Commonwealth.

www.cmja.org/.../Status%20of%20Magistrates%20-FINAL%20REPORT0213.pdf

The report was adopted by the CMJA General Assembly in 2013.

- A key issue was:-

The appointment of Magistrates, their security of tenure and removal as well as their conditions of service fall short of the requirements of an independent judiciary as contained from the Commonwealth (Latimer House) Principles and International Law.

Findings relevant to the discussion of the Proposed Declaration on Judicial Integrity relate to the following:

I. In majority of Commonwealth jurisdictions, the legislative safeguards of the independence of Magistrates’ are minimal if they exist at all.

II. In a number of jurisdictions, Magistrates are still considered as civil servants. Their mode of appointment, ethical obligations, disciplinary procedures and grounds of removal reflect this situation.
III. In most jurisdictions removal of Magistrates is governed by the rules that apply to civil servants. In some jurisdictions removal of Magistrates is left to the Judicial Service Commissions.

- It is therefore imperative that the status of Magistrates in most jurisdictions should be given due attention.

- It is submitted that many similar issues arise for magistrates and junior judicial officers in non-Commonwealth countries.

- (iv.) Judicial officers at all levels should be subject to suspensions or removal only for reasons of incapacity or proven misbehavior, established by due process, and such that clearly renders them unfit to discharge their duties.

B. How to implement effective judicial conduct review mechanisms that do not and are not used to hinder the Independence of Judges. (LL) (5 minutes)

- The rule of law requires judges to be institutionally and individually independent and to be able to give difficult judgments without fear of retaliation or punishment.

- However, to ensure and to maintain public confidence in the judiciary, transparency and public accountability are necessary in judicial conduct review mechanisms.

- These competing principles must be appropriately balanced to ensure that in a conduct review process, the interest of the public in maintaining judicial independence is not undermined.

These challenges have been the subject of:

(i) a cornerstone text—Martin L. Friedland, A Place Apart: Judicial Independence and Accountability in Canada (Ottawa: Canadian Judicial Council, 1995);


(iii) a recent international review of “regulating” judges by two Canadian legal scholars—Richard Devlin and Adam Dodek, eds., Regulating Judges: Beyond
Independence and Accountability (Cheltenham: Edward Elgar Publishing, 2016)); and


C. Devising and enforcing appropriate and proportionate sanctions for breaches. Some issues to consider:

(i) (KH - 5 minutes): constitution of disciplinary tribunals, lay involvement, proportionality of procedure and outcome, Differing positions in civil law countries, publication of result, punishment and sentence.

(ii) (LL - 5 minutes): public access, burden and standard of proof, due process for the judicial officer, prosecuting authorities, potential sanctions: reprimands, financial, dismissal), appeals

V. SPECIFIC QUESTIONS AND DISCUSSION POINTS TO BE ADDRESSED IN THE SESSION:

i. Are risks to judicial independence posed by the proposed Global Judicial Integrity Network? How can these be mitigated? In what ways could the Network strengthen the ability of the Judicial Officer to act independently in accordance with his or her judicial oath? (the audience)

ii. What are appropriate sanctions for judicial misconduct? When the judicial officer enjoys security of tenure and the relevant legislation only references removal from office, is some lesser sanction or a remedial rehabilitative measure possible and/or appropriate? Is the consent of the judicial officer necessary? Should these alternate measures be made public? (the panel and the audience)

iii. In your own jurisdiction how sound is the relationship between the three branches of government? (the audience)

iv. Do judges at all levels in your jurisdiction have acceptable levels of security of tenure? Have you ever had threats made against judicial officers by the state or by the press. If so how are they dealt with? (the audience)

v. Public participation in Judicial Appointments, should it be encouraged? (the panel and the audience)
vi. What is the appropriate standard of review for judicial conduct? (the panel)

vii. To what degree should judicial conduct review proceedings be public and should findings of misconduct be made public? (the panel and the audience)

viii. What procedural “safeguards” should be available to judges facing misconduct allegations to ensure procedural fairness and due process? (the panel and the audience)

ix. VI. PROPOSED OUTCOME(S) OF THE SESSION:

A broader understanding of the nature of Judicial integrity, the individual responsibility of each judge to promote and protect respect for the judiciary

The nature of Judicial Independence and its importance as a vital element in the economic development of a country and essential prerequisite for the protection of human rights.

An understanding of the centrality of due process

Proper consideration of the role that the Proposed Declaration on Judicial Integrity and Global Judicial Integrity Network can play in strengthening both judicial integrity and judicial independence.