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(VENICE COMMISSION)

COLLOQUIUM FOR JUDGES FROM CONSTITUTIONAL AND SUPREME COURTS OF SOUTHERN AFRICA

Willow Park, South Africa (11-12 August 2001)

DISCUSSION PAPERS

STRENGTHENING THE RULE OF LAW-A SACRED DUTY

by Mr S. NAVSA

When we speak about the rule of law we do so in almost mantra fashion, persuading ourselves that if we repeat our commitment to it often enough it will prevail and prosper. The Constitution guarantees equality before the law and guarantees that no-one will be deprived of rights and freedoms through the arbitrary exercise of power. We do not appear to be concerned that unless the Constitution has faithful adherents and supporters and unless it has meaning in the lives of all our citizens it is not inconceivable that it will wither and die.

When the Constitutional era dawned on us and we proudly proclaimed ourselves free and part of the community of democratic states it was as if all the supporters of apartheid had miraculously disappeared. In a burst of optimism many of us believed naively that all the prejudices and animosities of the past would evaporate. It was as if centuries of dispossession and deprivation dissipated in the face of the Constitution that promised a bright and better future. The business of building a nation and democratic Institutions is very much with us. For as long as the poor and the deprived are on the outside looking in democracy is imperilled and the Constitution is in danger of being reduced to a worthless document.

In the third Bram Fischer memorial lecture Arthur Chaskalson, President of the Constitutional Court said the following:"..."

Too true. We are too busy proclaiming and asserting our rights and too readily forget the flip-side of the coin-obligations. We should all make an effort to ensure that the rule of law has real content and that it has meaning for every citizen. Lawyers are particularly well-placed to make a contribution. The Constitution proclaims that everyone has a right of access to Court to have his/her dispute adjudicated. How many lawyers do *pro bono* work to ensure that this right is not

illusory? How many lawyers who specialise in commercial work have taken the time to expose themselves to the real-life and legal problems of their less fortunate compatriots- even on an expedient basis it makes sense to do so. It enables practitioners to expand a field of practice, to generate goodwill and perhaps in the future, new business. How many lawyers have entered into genuine rather than expedient partnerships across the colourline? We must as a nation find that which can unite us. We appear to have a particular penchant for finding division.

Lawyers are especially well-placed to contribute towards debate on proposed legislation which bears on the national interest .How many have contributed to such debates? These matters should not merely be left to professional societies without any real input from the rank and file. It is a lawyer's duty, indeed it is the duty of every citizen who believes that law should reflect our higher selves to fight to ensure that law accords with justice. Law devoid of justice will struggle to find legitimacy. We must ensure that our conduct and the conduct of Government officials, functionaries and departments accord with the Constitution.

Lawyers in litigating on behalf of clients must ensure, in the best traditions of their profession that the litigant's interests is paramount. Lawyers must avoid milking the litigation cow. We should stop talking about case management and an acceleration of trial rolls and get on with the business of making decisions about how best to achieve a real improvement in the administration of justice. Their should be regular meetings with the judiciary at all levels to discuss how best to accommodate litigants. We must together devise means and measures to facilitate access to courts for those who are unable to afford the services of lawyers in private practice. We must fight to ensure that the perception that only the wealthy can obtain justice is without substance.

Judicial officers too have a duty to take control of the litigation process to ensure that the litigant's interests are advanced. They have the experience and the skills to make a meaningful contribution to the search for simplified and less costly court procedures.

In an address to the Commonwealth Law conference in Vancouver in .. Malcolm Wallis , a senior advocate said the following"..."

Lawyers gain and earn the respect of their clients, the bench and their peers when the act with integrity in their clients' best interests and give advice that a clients should hear rather than what he wants to hear. By acting in their own short term and selfish interests a few lawyers give the rest a bad name. By acting scrupulously lawyers will ensure that there is no substance to the numerous anti-lawyer jokes that abound.

When lawyers are matched in legal battles such as being on opposite sides in farm-labour tenant cases or in other labour disputes they should consider when attempting to resolve their instant dispute whether they can fashion a resolution that goes beyond the specific case and that may benefit the region or country as a whole. We should not underestimate our ability as lawyers to be creative and resourceful.

In contributing to jurisprudence we must be committed to scholarship. We must be industrious and apply ourselves and be conscious of making a real contribution to the legal life-blood of our country.

Lawyers must have a heightened appreciation that their well-being is inextricably tied to an independent and efficient judiciary. Lawyers must use such influence as they can bring to bear

on

the authorities to ensure that Courts have the resources to ensure that the guarantees in the Constitution are met. Lawyers who practice in our criminal courts know all too well the frustrations of waiting for accused persons to arrive at courts, of the absence of investigating officers and expert and other witnesses. Court official complain about the lack of co-operation from practitioners. Judicial officers complain about stretched resources and about unbearable administrative burdens. We must facilitate and participate in meetings involving the three key ministries, namely, correctional services , police and justice, the different levels of the judiciary, court officials, the prosecutorial services and the legal aid board.. Although the situation appears to have improved in recent times there is still room for improvement. We must find the best strategy to save time money and to optimise our limited resources.

When the judiciary is unjustifiably attacked by politicians and when it is weakened in the eyes of the populace lawyers cannot stand idly by. there can be no rule of law without a vibrant and independent judiciary. Lawyers should engage and educate the public about the importance of an independent judiciary. We do not have the advantage of some countries in which there has been centuries of undisturbed democratic traditions. We must establish out own traditions and we all have a part to play.

Lawyers who have the necessary skills should make themselves available for appointment to the bench. It is unhelpful particularly when black lawyers complain about the lack of representivity of the bench and then themselves to succumb to readily to the lure of the commercial world.

Professional societies should actively promote the study of human rights law. They should encourage a public awareness of the contents of the Constitution especially of the chapter on

fundamental rights. There should be interaction with educational institutions to see if lawyers cannot be part of a process of inculcating in our young, the decision makers of tomorrow, the values enshrined in the Constitution. When the Constitution is embedded in the psyche of our nation transitory politicians will find it harder to take away or limit that which the Constitution guarantees.

Lawyers should consider how, using their legal skills they can contribute to the reconstruction and development program. So for e.g they may want to consider offering conveyancing services free of charge when a township is being developed for poorer sections of the community. Of course professional bodies contemplating such steps may have to walk a tight-rope between individual members' interests and the interests of the legal profession as a whole. We must become visionary and develop a sense of community.

In his submission to the Truth and Reconciliation Commission Judge of appeal, Edwin Cameron said the following: "..."

In the past there was a deafening silence on the part of a substantial percentage of the legal profession in the face of the atrocities committed against their compatriots. Worse still, many participated not only in the latent fashion described by Judge Cameron but were active supporters of apartheid. History was kind to perpetrators and to the country as a whole. The poor and the exploited are still very much with us. When we see injustices and do nothing we weaken

the rule of law. When we have skills that we can use in strengthening the administration of justice and do not do so we weaken the rule of law. When we are silent when democratic institutions are under fire we weaken the rule of law. History will certainly not be so kind the next time around.

How should the judiciary respond to criticism by persons from the political sector, the media and the public?

(Willowpark Lodge - Benoni on Saturday 11/08/01 – 11h30 to 13h00)

by Mr J. M. HLOPE

Thank you Chairperson, distinguished guests, ladies and gentlemen. Mine is a relatively small contribution. I have been asked to make brief comments to introduce the discussion on how should judges respond to criticism by persons from the political sector, the media and the public?

For me the starting point is to accept that this is the era of the mass media. Our judgements are no longer read only by those involved in the case and a minority of interested parties, but they become objects of discussion, debate and inevitably criticism. This is even more so in a country like South Africa, which has just been liberated from many years of colonisation and apartheid. Expectations are high, particularly amongst those coming from the previously disadvantaged communities; People expect delivery. Therefore if a judge delivers a judgement which is regarded as

frustrating delivery in one way or the other there is usually an outcry. How are we to deal with this phenomenon?

I do not think that it is a wise thing to ignore criticism, with or without merit, by persons from the political sector, the media and the public. The question is, however, how do we respond to such criticism? It is also important to respond timeously to criticism i.e. the question of when is also crucial.

How do we respond to such criticism?

Distinguish between two scenarios:

(1) criticism directed at the entire judiciary, and

(2) criticism directed at a particular judge based on comments or reasons for the judgement given by the judge.

As far as criticism directed at the entire judiciary, I think the proper way of dealing with this is for the most senior judge to

respond to such criticism. In the South African case, it should be the President of the Constitutional Court or, in his absence, the Chief Justice (aware of proposals to change same). The reason for this suggestion is plain enough. Obviously a response by the most senior judge in the country carries much more weight than that of a junior judge sitting in remote areas like Umtata or Venda. The other reason is obviously the need to avoid conflicting pronouncements on the same issue.

It may be that in certain cases criticism is directed not at the judiciary as a whole, but at judges of a particular division. For example if a politician or anyone for that matter were to say Cape Town judges are lazy, in my view it would be appropriate for the Judge President (or Deputy Judge President as the case may be) to respond to such negative publicity directed at his/her judges. In other words the Head of the Court is the right person to respond to such criticism.

The second scenario relates to criticism directed at a particular judge based on comments made in open court or the reasons given in the judgement.

About 10 months ago a similar situation arose in Cape Town when Judge Davis in the course of delivering judgement in a criminal trial, made comments which offended particularly the ANC politicians. In the case (S v Madela) comments were made to the effect that some of the real criminals who were involved in the killing of the deceased were not being prosecuted. They were high ranking ANC officials in the Western Cape who regularly attended the trial and sat in court during the trial. The politicians were offended by the remarks made by the learned judge. He was in fact reported to the JSC. However, the complaint was subsequently formally withdrawn by the ANC.

Dennis Davis personally responded to the criticisms directed at him. The result was that there was a war of words between Davis J and the DPP (Advocate Frank Kahn SC.) Advocate Kahn SC was almost prosecuted for contempt of court. He publicly apologised later.

It is important to note that even though Davis J was undoubtedly the winner, however, I feel there are lessons to learned by all of us.

Firstly, Davis J was personally involved in the case. Therefore he could not have been expected to be completely objective upon being criticised for comments made in open court. Secondly, in trying to explain what he meant in his judgement, he offended the DPP. The latter felt that the blame was being shifted to him. This in turn led to the DPP's office reacting publicly and in fact blaming Davis J for what he said and did.

And, thirdly, the solution, I think, is that even in situations like this the leader of the division is the right person to respond. One expects a reasonable Judge President to retain objectivity at all times, particularly when he is not personally involved in any controversy.

The upshot of what I am saying is that even in cases where criticism is directed at a particular member of the judiciary, the Head of the Division i.e. the Judge President, is the right person to respond to such criticism. I do not wish to draw any distinction in this regard between criticism emanating from the politicians, the media or the public. I think in general that the Head of the Court is the right person to respond thereto.

In my view any response to criticism must be made timeously whilst it is still current news. It is important not to miss the boat. One must always strike at the right time. Any unnecessary delays often complicate the situation. In short, my view is that it is important for the head of the institution or the head of a particular court, as the case may be, to respond timeously.

If there is an attack on the independence of the judiciary of the SADC region, I would argue that it would be appropriate for the head of the institution (i.e. President of the Constitutional Court or the Chief Justice) to respond. It may be necessary to do so in consultation with other heads. However, I feel it would be wrong for individual judges to do so as the judiciary, in general, has no extraterritorial jurisdiction. We should also be careful not to step on the toes of the politicians. For this reason, I would support the creation of a regional structure/association to deal with matters of mutual interest to judges in the SADC region.

"Does the Constitution compel the recognition of new grounds for claiming privilege in criminal cases? Some thoughts"

Judicial Colloquium, Willowpark, Johannesburg

10 - 12 August 2001

Kate O'Regan

Judge of the Constitutional Court

Our discussion of the importance of the media in a democracy yesterday and events of recent weeks -- in particular the Staggie trial and related evidential chase which has received much publicity -- make the topic of our discussion this morning particularly timely. Our common law recognises only a few privileges whereby witnesses can refuse to answer questions concerning what would be otherwise relevant and admissible evidence – marital privilege, the privilege against self-incrimination and what is perhaps inelegantly termed legal professional privilege being the most important.

We are asked to consider this morning the cogency of claims for the extension of the rules of privilege to other relationships: notably the media, the clergy, the medical and other humanitarian professions. And we are talking in the criminal law context. How should we start to think about these questions?

In my view, the starting point must be the fundamental maxim that the public has the right to demand that all relevant evidence be provided. Accordingly, everyone bears

the obligation to provide relevant evidence when requested to do so. The importance of this proposition is arguably most important in criminal cases, given the public interest in the proper and efficient prosecution of crime. As Wigmore observed (at para 2192) –

> "From the point of view of society's right to our testimony, it is to be remembered that the demand comes, not from any one person or set of persons but from the community as a whole -- from justice as an institution and from law and order as indispensable elements of civilized life."

Perhaps somewhat melodramatically he continued:

> " The whole life of the community, the regularity and continuity of its relations depends upon the coming of the witness...".

Our general law of evidence therefore proceeds from the assumption that all relevant evidence must be placed before a court. Most of the evidential rules which exclude evidence are founded on another principle -- the principle that unreliable evidence should be excluded. But the rules governing privilege are based not on the need to exclude unreliable evidence, but on the principle that although the evidence in question is both relevant and cogent, there are other concerns which render the compulsion to answer questions inappropriate.

To determine whether we need to extend the scope of the rules of privilege, we need to balance the fundamental public interest in having all relevant and cogent evidence placed before the court, on the one hand, with the other fundamental public interests which may be asserted. The balance that needs to be struck is a difficult one. The four classes we have been asked to consider today concerning the potential expansion of the law of privilege all relate to the communication of confidential information to a third party who may potentially be a witness in subsequent litigation. In this, there are

profound similarities between them and the legal professional privilege and the marital privilege which relate to the communication of confidential information to a third party who is potentially a witness.

Wigmore identifies four requirements that should be met (para 2285) before a privilege should be established:

1. communications must originate in a confidence that they will not be disclosed;
2. the element of confidentiality must be essential to the relationship;
3. the relationship must be one which "in the opinion of the community" should be fostered; and
4. the injury that would be caused to the relationship must be greater than the benefit gained by administration of justice generally in the giving of the evidence.

If one measures the marital privilege and the legal professional privilege one can see that the first three of Wigmore's requirements are met. We may however argue about the fourth. In my view, it is the fourth that will create the greatest difficulty of analysis in any case.

It may be useful before proceeding to say a word or two about section 189 of the Criminal Procedure Act, 1977 which has indirectly received some attention in the Constitutional Court. Section 189 of the Criminal Procedure Act, 1977 provides that where a witness refuses to answer a question *without a just excuse* he or she may be sentenced to imprisonment by the judicial officer hearing the case. The phrase "just excuse" has been held to be broader than lawful excuses recognised by the law of

evidence.[1] The Constitutional Court has not directly considered section 189. However in *Nel v Le Roux NO and others* 1996 (3) SA 562 (CC) it considered the constitutionality of section 205 of the Criminal Procedure Act which makes section 189 applicable. The Court held that if the answer to any question would unjustifiably infringe any of the witness's constitutional rights this would constitute a just excuse for refusing to answer the question under section 189.[2]

One final thought before I turn to consider the four categories for consideration today. Generally, a privilege provides a person with a right to refuse to answer a question. Difficult questions arise as to whether a court has a discretion not to admit otherwise admissible evidence in the public interest or to override a privilege validly claimed, a matter expressly left open in *Safatsa.*[3] It may well be that the balance that needs to be struck between the competing interests of the administration of justice on the one hand and specially protected constitutional interests on the other require the assertion of that discretion. Such an approach permits of greater flexibility and may indeed be more conducive to producing a delicate balance between the interests at play. The risk, of course, of using discretion is that it creates legal uncertainty. The question of whether one should opt for legal certainty but potential injustice on the one hand or justice but legal uncertainty on the other is with us always -- in this area, as in many. Perhaps our discussion will highlight different implicit responses to this old conundrum.

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[1] See *Attorney General, Transvaal v Kader* 1991 (4) SA 727 (A) approving the dictum in *S v Weinberg* 1966 (4) SA 660 (A) that if a witness found it humanly intolerable to testify he or she would have a just excuse.

[2] See also *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC) at para 61, where the Court considered the meaning of "without sufficient cause" in section 418 of the Companies Act and reached a similar conclusion.

[3] *S v Safatsa* 1988 (1) sa 868 (A) at 886-7.

It is now appropriate to say a few things about each of the potential areas of privilege we need to consider his morning.

Journalists

There are two different issues which arise here: the obligation of a journalist to hand over video or tape recordings made by him or her (a matter raised by the Staggie trial); and the obligation of the journalist to disclose confidential sources or to give evidence of crimes observed at firsthand. There is no question that at common law there is no privilege accorded to journalists under either head.[4]

As far as the question of "just excuse" for the purpose of section 189 goes, the picture is less clear. In *S v Pogrund,* the court held that the ethics of a journalist did not constitute a just excuse as required by the Act. However, in an early Zimbabwean decision *S v Parker* 1966 (2) SA 56 (RA) under similar legislation and a more recent South African decision, S *v Cornelissen* 1994 (2) SACR 41 (W) the courts found, for different reasons that a just excuse did exist. In that case, the Court found that in the light of the interests of the community it was not necessary for the information to be obtained from the journalist and that the journalist therefore had a just excuse. The court however made clear that no general privilege for journalists existed.

Before turning to the underlying principles, it may be helpful to note that in *Branzburg v Hayes* (1971) 408 US 665 (US SC), the US Supreme Court held that the First Amendment, protecting free speech, does not relieve a newspaper reporter of the obligation to respond to a grand jury subpoena and answer questions relevant to a criminal investigation. The First Amendment therefore does not found a testimonial privilege. Justice White wrote the opinion of the Court. The journalists had argued,

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[4] see *S v Pogrund* 1961 (3) SA 868 (T); *Matisson v Additional Magistrate, Cape Town* 1980 (2) SA 619 (C); *S v Parker;* and *S v Cornelissen.*

not that they should enjoy an absolute privilege, but that a reporter "should not be forced to appear or to testify before a grand jury or at trial until and unless sufficient grounds are shown for believing that the information the reporter has is unavailable from other sources, and that the need for the information is sufficiently compelling to override the invasion of first amendment interests." (At p 680) White J rejected this argument stating:

> "On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential but uncertain burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the court of a valid grand jury investigation or criminal trial." (At 690 -1).

There are two dissents to the majority – one by Douglas J and another by Stewart J joined by Brennan J and Marshall J. The latter accepts the argument for a limited privilege as proposed by Branzburg based on the following proposition:

> "The reporter's constitutional right to a confidential relationship with his source stems from the broad societal interest in a full and free flow of information to the public. It is this basic concern that underlies the Constitution's protection of a free press." (At 725/6)

It should be noted however that in a significant number of states, statutes have been enacted which provide some qualified privilege to journalists. These statutes of course are not compelled by the Constitution as *Branzburg v Hayes* makes clear.

On the other hand, the European Court of Human Rights held that an order by a British court requiring a journalist to disclose his sources was in breach of the

European Charter of Human Rights.[5]

Journalists of course are insistent that there should be such a privilege. They base their arguments on a range of factors:

* the centrality of the press to a functioning democracy;
* the need to ensure that journalists are perceived as non-partisan sources of news;
* the need to ensure that journalists are not perceived as stool pigeons of the prosecution services which will put them in danger;
* the need to be able to protect confidential sources who may not otherwise provide information.

In considering the arguments that may come before our courts, attention will have to be paid to the role of the press in our constitutional democracy and in particular to the text of section 16 of the Constitution. Section 16 provides that:

"(1) Everyone has the right to freedom of expression, which includes –
(a) freedom of the press and other media; ..."

It will almost certainly be argued that the media have a particular constitutional role which should afford them certain protection. The contrary argument will be that the members of the media should not enjoy any special status, that being a witness is risky for all citizens and that there are no special considerations which would permit the exemption of journalists. It remains open how the courts will respond to such arguments.

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[5]*Goodwin v UK* (1996) EHRR 123.

Clergy

It is interesting that Jeremy Bentham, that arch-utilitarian, who generally believed that all cogent and relevant evidence should be placed before courts, and be hanged to all other principles, believed in a privilege for Catholic priests. In his view, compulsion of such evidence would give rise to a "preponderant vexation, and little evidence would be lost as a result."[6] No such privilege of course existed at common law in the United Kingdom,[7] the United States[8] or South Africa.[9] Many states in the United States and several provinces in Canada have statutorily enacted privileges.

The question that we may need to consider is whether section 15 of the Constitution which provides that everyone has the right to freedom of conscience, religion, though belief and opinion should have any effect on the established common law principles or on the interpretation of "just excuse" in section 189 of the Criminal Procedure Act.

It may well be that communication between priest and penitent does meet the first three of Wigmore's test, the question remains how the balance required by his fourth test should be struck.

Medical and other Humanitarian Professions

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[6] See William Twining "*Theories of Evidence: Bentham and Wigmore*" Weidenfeld & Nicolson, 1985 at 99.

[7] See Tapper *Cross on Evidence* 7th ed at 447.

[8] See Wigmore on Evidence para 2394.

[9] See *Smit v van Niekerk* 1976 (4) SA 293 (A); *S v B* 1980 (2) SA 946 (A).

Botha v Botha 1972 (2) SA 559 (N); *Davis v Additional Magistrate, Johannesburg* 1989 (4) SA 299 (W).

At common law, no privilege existed in relation to confidential communications between patient and physician.[10] In the United States, however, as early as 1828 New York enacted legislation conferring such a privilege and most states subsequently followed. In some states, the courts have developed a common law privilege along similar lines. The US Supreme Court has also recently recognised a privilege in federal law for the relationship between psychotherapist and patient.[11] Wigmore is scathing about this extension of the law of privilege.[12] He concludes that:

> "It is certain that the practical employment of the privilege has come to mean little but the suppression of the useful truth – truth which ought to be disclosed..."

English judges however have several times expressed a regret that the common law protected only solicitor-client communications and not doctor-patient communications.[13]

The question of privilege in such cases in South Africa would raise the constitutional right to privacy (section 14) which provides:

> "Everyone has the right to privacy, which includes the right not to have –
>
> .....
>
> (d) the privacy of their communications infringed."

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[10] See Tapper *Cross on Evidence* 7th ed at 449 and authorities there cited.

[11] See *Jaffee v Redmond* 518 US 1 at 15 (1996). See a note on this decision in the 2001 *Harvard Law Review* at 2194.

[12] See para 2380a.

[13] See, for example, Buller J in *Wilson v Rastall* (1792) 4 Term Rep 753 at 760; Lord Edmund Davies in *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171 (HL) at 245 where the Law Lords were divided.

Conclusion

The history of privilege for professional and confidential communications could leave one wondering why communications between attorney and client are privileged and other confidential communications are not and concluding perhaps that the constitutional values of rationality and equality would best be served by a rapid extension of privileges to other confidential communications. I would however urge some caution. The fundamental principle that relevant and cogent evidence should be heard by a court should not be weighed too lightly in the scale. Extensions to the law of privilege may undermine that principle in a very sweeping manner, particularly if the privilege afforded is an absolute and not a qualified one. A more delicate balance should perhaps be struck. In the South African context, the language of section 189 makes this possible in the context of criminal trials. Precisely what the proper balance should be in the context of journalists, doctors or priests, remains a hard question.

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CONSTITUTIONAL ASPECTS OF THE LAW OF PRIVILEGE IN CRIMINAL CASES

James Hamilton

INTRODUCTION

The law of privilege is concerned with the production, or non-production, of evidence, rather than with its admissibility. A witness may refuse to produce documents or give oral evidence on the grounds that the information is privileged. There are many forms of privilege, including the privilege against self-incrimination and privileges intended to protect necessary confidentiality relating to government and the administration of justice, such as the privilege afforded to Cabinet discussions, speeches in parliament or jury deliberations. Other forms of privilege arise out of the nature of confidential relationships which the law judges to be deserving of respect and protection. Forms of privilege which appear to be universally recognized, or virtually so, include communications between husband and wife, and between lawyer and client. Other professional relationships may attract privilege, such as those between priest or confessor and penitent, doctor and patient, and the journalist and his or her source. These privileges are recognized in many systems, but not in all, and in some cases are given a qualified recognition only.

The law of privilege generally involves constitutional issues because the justification for a privilege is invariably that the privilege serves to protect a particular value which it is public policy to support, and values which can be invoked in order to justify excluding evidence are usually of sufficient importance to be given constitutional protection. Privileges, however, inevitably interfere with the ability of the system of justice to arrive at the truth. In the application of the law of privilege to the criminal

justice system, the right to a fair trial, to due process and to fair procedures, norms which are universally given constitutional protection, will tend to lean in favour of the production of any evidence which is relevant to the determination of guilt or innocence on a criminal charge. Against that consideration stands a different value deemed worthy of constitutional protection. The privilege whereby a spouse is not a compellable witness serves to protect the family, the institution of marriage and the right to private life. The protection of the relationship between lawyer and client is generally accepted to be fundamental to the administration of justice. The confidence between priest and confessor may be regarded as an incident of freedom to practice and manifest religion. Protection of the confidence between the journalist and the source of a story is considered by many people to be essential to a free press and consequently to the protection of freedom of speech, freedom of information and the maintenance of a democratic society. Breach of the confidence between a doctor and patient is of necessity to some degree an intrusion into the right of privacy of the patient and may tend to undermine the protection of health, particularly in the area of mental health.

For this reason, cases in relation to privilege frequently involve the examination of competing constitutional norms and a balancing exercise between them, both generally and in relation to the facts of the particular case. In many cases the decision will rest on a policy choice. How serious, for example, is the breach of privacy involved in looking at a medical record? How high is the risk of a miscarriage of justice if a particular piece of evidence is not given? To what extent is the constitutional right in question subject to exception or qualification? And, in the last analysis, which is the superior right? Even in legal systems which do not have clearly expressed written constitutional norms in the area of human rights, such as that in England and Wales prior to the incorporation of the European Convention on Human Rights, the judges decide such cases on an analysis of public interest and the relative importance of conflicting public policy considerations.

There are at least four possible approaches which the law can adopt when confronted with the demand to recognize a class of privilege – to deny the privilege and rule the evidence admissible, to deny the privilege

but allow the judge discretion whether to hear it, to allow privilege on a case-by-case basis where an analysis of the policy reasons for exclusion would be applied to the facts of the particular case, or to allow an absolute privilege.

The purpose of this paper is to look at different approaches to the question of reconciling conflicting values in deciding whether to allow a privilege in relation to three areas which may be regarded as doubtful or emerging – privilege in relation to religious communications, doctor and patient communications, and communications between a journalist and his or her source. The examples, chosen from different jurisdictions, are intended to be illustrative, and it would be not only beyond my competence but impossible in a short paper to attempt to give a comprehensive account of the law in any of the jurisdictions from which examples have been chosen.

I have not dealt with the lawyer and client privilege but it usually serves as the model for privileges relating to other professional relationships where these are recognised.

PRIVILEGE CONCERNING RELIGIOUS COMMUNICATIONS

Modern legal systems which recognize a privilege for communications between a priest or clergyman and a member of a religious congregation try to avoid discriminating between different denominations. Historically however, the origin of this privilege lies in the Roman Catholic doctrine regarding the secrecy of the confessional. That doctrine has been described by a Catholic legal scholar, Prof. John Aranjo, S.J., as follows:

> "The importance of the secrecy of the confessional continues to be observed in the present day under the 1984 Code of Canon Law of the Catholic Church, which obliges those who know the contents of penitential communications to maintain the secrecy. The code clearly establishes that the sacramental seal is inviolable. Accordingly, it is criminal for a priest in any way to betray the penitent for any reason whatsoever whether by word or in any other fashion...
>
> As the Catechism of the Catholic Church points out, a priest is bound to keep in

> absolute secrecy any confession that he hears. This secret is without exception and is called the Sacramental Seal.
>
> Anyone who betrays the seal of the confessional faces a stringent penalty of automatic excommunication." [1]

It is unclear to what extent the priest – penitent privilege was recognized in the common law of England before the Reformation,[2] but the overwhelming weight of English judicial opinion since then has denied the privilege and this remains the position in English law today.[3] However, while in strict law the privilege was not recognized, in practice a degree of reluctance to allow evidence of what transpired in the confessional developed. An example is *R v Griffin*[4] where a woman charged with the murder of her child had conversations with the chaplain in the workhouse where she resided. Alderson B. stated as follows:-

> "I think these conversations ought not to be given in evidence.
> The principle upon which an attorney is prevented from divulging what passes with his client is because without an unfettered means of communication the client would not have proper legal assistance. The same principle applies to a person deprived of whose advice the prisoner would not have proper
> spiritual assistance. I do not lay this down as an absolute rule; but I think such evidence should not be given."

The Irish courts in the nineteenth century adopted a slightly different approach to those of England. While Ireland applied common law, it appears that the Irish courts respected the seal of the confessional "tacitly and from sheer necessity." [5]

The question of the extent of sacerdotal privilege came before the Irish High Court in 1944 in *Cook v Carroll.* [6] This was an action in tort for damages for seduction. The privilege claimed arose not from a confession made by a penitent but in the course of confidential

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[1] Aranio, International Tribunals and Rules of Evidence: the Case of Respecting and Preserving the "Priest – Penitent" Privilege Under International Law in 15 Am U. Int'l L. Rev. 639 at pp. 645-648. Professor Araujo is an adviser to the Holy See and Professor of Law at Conzaga University.
[2] See Wigmore on Evidence, 3rd Ed., Boston, 1940, § 2394
[3] Archbold 2000, 12-22

[4] (1853) 6 Cox 219.
[5] See *Cook v Carroll* [1945] I.R. 515 at pp 518 and 523.

[6] Footnote 5 above.

discussions in which a priest had attempted to resolve a dispute between two parishioners - a girl who claimed to have been seduced and her alleged seducer. Gavan Duffy J. referred to Wigmore on Evidence in which the author had attempted to formulate a general test according to which communications between persons standing in a given relation might be accepted as privileged and according to which the reasons for accepting privilege in some areas while rejecting it in others could be evaluated.

The Wigmore formulation is as follows:-

> "(1) The communications must originate in a *confidence* that they will not be disclosed;
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties;
> (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*; and
> (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.
>
> These four conditions being present, a privilege should be recognized; and not otherwise. That they are present in most of the recognized privileges is plain enough; and the absence of one or more of them serves to explain why certain privileges have failed to obtain the recognition sometimes demanded for them. In the privilege for communications between Attorney and Client, for example, all four are present; and the doubt which Bentham has raised as to the policy of that privilege fixes upon the only condition therein open to dispute, namely, the fourth. In the privilege for communications between Husband and Wife, all four conditions are again present; and the chief variance of judicial opinion in defining the privilege (*i.e.* in holding, as some do, that the protection extends to all communications, or, as others do, to confidential communications only) is due to a question as to the fulfillment of the first condition. In the privileges for communications between Jurors and between Informer and Government, the four conditions are clearly present. In the privilege (denied at common law) for communications between Physician and Patient, the fallacy of recognizing it lies in the incorrect assumption that the second and fourth conditions are generally present. In the privilege (also denied at common law) for communications between Priest and Penitent, the objection to its recognition has probably lain in a tacit denial of the third condition."[7]

In *Cooke –v- Carroll* the priest had held a conference aimed at resolving the dispute between his two parishioners. Gavan Duffy J.

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[7] Wigmore, § 2285

analysed the circumstances in which he had done so and concluded that all four Wigmore tests were met. In particular, regarding the third condition, Gavan Duffy J. ascribed the refusal of the sacerdotal privilege in English law to anti-Catholic bias and held that the emergence of the Constitution of Ireland – which at the time contained a clause recognizing the "special position of the Holy Catholic Apostolic and Roman Church as the guardian of the Faith professed by the great majority of the citizens" [8]- was a complete and conclusive answer to the objection that there was no judicial precedent for his decision.

Today *Cook v-* Carroll strikes a very denominational note redolent of its era. Nevertheless, the approach of applying the Wigmore test has survived the test of time. In *ER - v -* JR[9] the Irish High Court used the same test to hold that there was a privilege between marriage counselors and their clients. Following the English case of *Pais - v-* Pais[10] Carroll J. held that the privilege was that of the clients and not the marriage counselor (who was, in fact, a priest).

Cooke -v- Carroll came to be considered recently by the Irish High Court in *Johnston -v- Church of Scientology Mission of Dublin Limited*[11]. Geoghegan J. took the view that "the absolute unwaivable privilege which probably does attach in Irish common law to the priest penitent relationship in the confessional is *sui iuris*" and not capable of application to the practices in scientology of "auditing" or "training". In *Johnston*, however, the person who took part in these sessions had waived any privilege which might have existed.

All three Irish cases were civil actions in the area of family law. It remains to be seen to what extent an Irish court would hold religious communications privileged in relation to a criminal trial.

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[8] Constitution of Ireland, former Article 44.1.2º
The sub-section was deleted by the Fifth Amendment to the Constitution Act, 1972, following approval of the proposal to do so by a popular referendum.

[9] [1981] ILRM 125

[10] [1970] 3WLR 830

[11] Unreported, High Court, Geoghegan J., 30th April 1999.

Some form of recognition of the priest-penitent privilege has been given by statute law in many jurisdictions. These include all 50 American States,[12] Newfoundland, Quebec, New South Wales, Northern Territory of Australia, Tasmania, Victoria, New Zealand and France. [13]

The Canadian courts have also used the Wigmore test in formulating a rule relating to religious communications privilege, but in a somewhat different manner to the Irish cases. In *R v Gruenke*[14] the Canadian Supreme Court considered whether there was a privilege for religious communications at common law in Canada. The case concerned the admissibility in a murder trial of evidence of conversations between the accused and a pastor and a lay counselor in the accused's church, which was a "born-again" Christian Church. The case also raised the question of the constitutional guarantee of freedom of conscience and religion. The court unanimously rejected the application of a religious communications privilege on the facts of the case but there was a division of opinion in the court as to the basis in principle on which such cases should be decided.

Lamer C.J., delivering the majority judgment of the court in which 6 other judges joined, distinguished between two possible types of privilege. The first was a "blanket", prima facie, common law or "class" privilege, under which there would be a prima facie presumption of inadmissibility, once it was shown that the relationship fell within the class, unless the party urging admission could show why the communication should not be privileged. Such a category would be based on excluding evidence, not on grounds of relevance, but for an overriding policy reason. The solicitor – client privilege formed an example of such a category. The second was a "case-by-case" privilege where there would be a prima facie assumption the communications were not privileged but where an analysis of the policy reasons for exclusion would be applied to the facts of the particular case.

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[12] Mitchell , Mary Harter. "Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion (1987), 71 *Minn. L. Rev.* 723, at p 734, fn. 56.
[13] Aranjo

[14] [1991] 3 S.C.R. 263

The question of whether a prima facie privilege existed for religious communications was essentially one of policy. Unless the policy reasons to support a class privilege were as compelling as the policy reasons underlying the class privilege for solicitor–client communications, there was no basis for departing from the fundamental "first principle" that all relevant evidence was admissible until proven otherwise. Lamer C. J. went on to say:

> "the policy reasons which underlay the treatment of solicitor-client communications as a separate class from most other confidential communications, are not equally applicable to religious communications. The prima facie protection for solicitor-client communications is based on the fact that the relationship and the communications between solicitor and client are essential to the effective operation of the legal system. Such communications are inextricably linked with the very system which desires the disclosure of the communication (citation omitted). In my view, religious communications, notwithstanding their social importance, are not inextricably linked with the justice system in the way that solicitor-client communications surely are."

In relation to the argument based on the Canadian Charter guarantee of freedom of religion the court held that the extent (if any) to which disclosure would infringe on this guarantee would depend on the particular circumstances involved, for example, the nature of the communications, its purpose, the manner in which it was made, and the parties to it.

The court held that decision whether religious communications should be excluded in particular cases could be made by applying the Wigmore criteria on a case-by-case basis. These criteria were not "carved in stone" but provided a general framework within which policy considerations and the requirements of fact-finding could be weighed and balanced on the basis of their relative importance in the particular case.

In applying the Wigmore criteria the court held that the constitutional guarantees of freedom of religion and the requirement to interpret the Charter consistently with the multicultural heritage of Canadians should be borne in mind and the case-by-case analysis conducted with a non-denominational approach. The fact that the communications were not made to an ordained priest or minister or did not constitute a formal

confession would not bar the possibility of exclusion.

Two of the judges, L' Heureux – Dubé and Gonthier J.J., would have adopted a different approach, and would have accepted a class privilege. Doing so would avoid having to specifically address the third and fourth Wigmore tests. But in any given case the specific nature of the relationship would have to be examined to ensure it fitted the pastor-penitent category at all. Furthermore, the extent of the privilege would still be determined in accordance with the first and second Wigmore tests.

L'Heureux – Dubé J.'s judgment contains a detailed and comprehensive catalogue of the arguments that can be advanced in favour of a religious communications privilege. They include:

(a) Society's interest:
The utilitarian benefit in allowing the individual to draw psychological and spiritual sustenance from the relationship by allowing full and frank discussion of troubling matters.
The benefit the community derives from the mental, emotional, and spiritual health of its members.
The importance of religious confidentiality to the maintenance of religious organizations.

(b) Freedom of Religion:
Religious confidentiality is a part of religious practice, and this is constitutionally guaranteed.

(c) Privacy Interests:
The personal interest in the dignity of privacy for intimate relationships. This is an individual benefit, not one to society, and does not depend on showing that disclosure would deter or inhibit relationships.

(d) Other Concerns:
Impracticality of forcing clergy to testify.
Disrepute to system of judgment if a clergyman has to choose between a breach of conscience and imprisonment.

The latter point, of course, reflects what appears to have been the practical approach of the common law both in England and Ireland, whereby without conceding any right to privilege a judge frequently exercised his discretion not to require evidence to be given. It may also be noted, as a practical point, that if a priest or pastor maintains the secrecy of the relationship it is unlikely to become known that he or she has relevant evidence, unlike the situation of the medical person, where records are likely to be kept and their disclosure may be sought, or journalist, who by publishing a story reveals that he or she has relevant evidence.

MEDICAL / PATIENT PRIVILEGE

The issues surrounding whether to allow a privilege for communications between physician and patient raise similar questions to those discussed in relation to religions communications. Justifications advanced to support the privilege centre on the value to society in ensuring a healthy population, as well as the private individual's own right to health and welfare and to privacy. To permit a court access to medical communications could, it is suggested, endanger these values.

This privilege was not recognized by the common law of England.[15] This remains the position in England today.[16] However, as with religious communications the judge has a discretion to exclude evidence. In *Hunter v Mann*,[17] a case which turned on statutory interpretation of a duty imposed by road traffic legislation, and in which a legal privilege against giving evidence was not contended for, Lord Widgery C.J. explained the English law as follows:-

> "if a doctor, giving evidence in court, is asked a question which he finds embarrassing because it involves him talking about things which he would normally regard as confidential, he can seek the protection of the judge and ask the judge if it is necessary for him to answer. The judge, by virtue of the overriding discretion to control his court which all English judges have, can, if he thinks fit, tell the doctor that he need not answer the question. Whether or not the judge would take that line, of course, depends largely on the importance of the potential answer to the issues being tried."[18]

In the United States medical/patient privilege has been recognized in the statute law of many states, although frequently subject to exceptions, in particular by reason of the operation of the doctrine of waiver.

Wigmore took the view that medical privilege did not meet the canons he proposed for the recognition of a privilege.[19] In his view, only rarely was a fact communicated to a physician confidential in any real sense.

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[15] Wigmore § 2380.

[16] Archbold 2000, § 12-22.

[17] [1974] Q.B. 767.

[18] At p 775.

[19] Wigmore, § 2380a.

> "Barring the facts of venereal disease and criminal abortion, there is hardly a fact in the categories of pathology in which the patient himself attempts to preserve any real secrecy. Most of one's ailments are immediately disclosed and discussed; the few that are not openly visible are at least explained to intimates." [20]

Regarding the second test, that relating to the necessity to maintain the confidence

> "Even where the disclosure to the physician is actually confidential, it would none the less be made though no privilege existed. People would not be deterred from seeking medical help because of the possibility of disclosure in court. If they would, how did they fare in the generations before the privilege came? Is it noted in medical chronicles that, after the privilege was established in New York, the floodgates of patronage were let open upon the medical profession, and long-concealed ailments were then for the first time brought forth to receive the blessings of cure? "[21]

Wigmore conceded the third test, that the relation of physician and patient should be fostered, but emphatically denied the fourth, that is, that the injury to the physician / patient relationship was greater than the injury to justice by allowing the privilege. He pointed out that the principal issues upon which justice asks for disclosure are those – personal injury and life and accident insurance – which the patient himself has voluntarily brought into court. Wigmore opined that in 99% of cases where medical privilege was invoked the medical testimony was absolutely needed for the purposes of knowing the truth, and the only reason for the party to conceal the facts was as a tactical manoeuvre in litigation.

Recognition of the undesirable effects of the physician / patient privilege in those American State jurisdictions which have adopted it have led to the creation of judicial and legislative exceptions to such an extent that the Advisory Committee on the Federal Rules of Evidence, reporting in 1972, stated

> "while many states have by statute created the privilege, the exceptions which have been found necessary in order to obtain

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[20] at p 811 Ibid.,

[21] Ibid

> information required by the public interest or to avoid fraud are so numerous as to leave little if any basis for the privilege." [22]

One method of creating an exception is the doctrine of waiver, whereby an issue as to which a physician has knowledge is placed in question by the party relying on the privilege – typically in negligence cases, but in criminal cases as well, the privilege is deemed waived. For example, in a New York criminal case where insanity was raised as a defence, a waiver was held to be effected so as to permit the prosecution to call psychiatric experts to testify regarding the defendant's sanity, even though those experts had treated the defendant. The Federal District Court upheld the constitutionality of the State Court's decision. [23]

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[22] Advisory Committee's Note to Proposed Rule 504, 36 F.R.D. 183, 241-242 (1972) quoted in Younger, Goldsmith and Sonenschein *Principles of* Evidence 3rd Ed. at p 846.

[23] *United States ex rel. Edney v Smith* 425 F. Supp. 1038 (E.D.N.Y. 1976)

THE PSYCHOTHERAPIST PRIVILEGE

The area of medical practice for which, in principle, the strongest case for a privilege can be made is that of psychotherapy.

The United States Judicial Conference Advisory Committee, in approving Proposed Federal Rule of Evidence 504, even though the rule was not subsequently enacted by Congress, proposed a general rule of privilege in the following terms:-

> "A patient has a privilege to refuse to disclose and prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of his mental or emotional condition, including drug addiction, among himself, his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family." [24]

The United States Supreme Court formally recognized a federal psychotherapist / patient privilege in the case of *Jaffee v Redmond.* [25] In doing so it went beyond the terms of Proposed Rule 504, however, which would have confined the privilege to medical practitioners and psychologists. In *Jaffee* the privilege was allowed to a licensed social worker who had counselled a police officer following her involvement in a fatal shooting in respect of which the deceased's administrator had brought a civil action.

Stevens J., delivering the opinion of the court, while recognizing "the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional" stated that such exceptions may be justified by "a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth". [26]

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[24] 56 F.R.D.183, 240 (1972) quoted in Younger et al at pp 850-1. The proposed rule would have defined a psychotherapist as (A) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including drug addiction, or (B) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged. The privilege could be claimed by the Patient or his guardian, or by the psychotherapist, but only on the patient's behalf. There was an express waiver in relation to communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which the patient relied on the condition as an element of his claim or defence.

[25] 518 U.S. 1 (1996).

[26] Quoting *Trammel v United States,* 445 U.S. 40 at p 50, in turn quoting *Elkins v United States* 364

> "Treatment by a physician for physical ailments can often proceed successfully on the basis of a physical examination, objective information supplied by the patient, and the results of diagnostic tests. Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace."

The majority opinion claimed that the proposed privilege served obvious private interests, but also the public interest by facilitating the provision of appropriate treatment for persons with mental or emotional problems. The majority took the view that any evidentiary benefit which would flow from denial of the privilege would, on the other hand, be slight, since in such an event the evidence would be unlikely to come into being. [27]They considered that the fact that all 50 States had enacted into law "some form of psychotherapist privilege" supported their decision. The majority went on to hold that the privilege should also extend to licensed social workers, whose clients often included the poor and those who could not afford a psychiatrist or psychologist. Drawing a distinction would serve no discernible social purpose.

Finally, the majority rejected the balancing component of the privilege as found in the Court of Appeals below. The Court of Appeals had postulated a balance between the relative importance of the patients interest in privacy and the evidentiary need for disclosure – this, the majority held, would eviscerate the privilege and be uncertain and "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." In a footnote to the opinion, the majority stated:

> "Although it would be premature to speculate about most future developments in the federal psychotherapist privilege, we do not doubt that there are situations in which the privilege must give way, for

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U.S. 206, 234 (1960) (Frankfurter, J., dissenting).

[27] For an analysis disputing the empirical basis for this argument see Inwinkelried The Rivalry between Truth and Privilege: The weakness of the Supreme Court's Instrumental Reasoning in Jaffe v-Redmond, 49 Hastings L.J. 969

example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist" [28]

The case of *Jaffee* is also noteworthy for a scathing dissent by Justice Scalia.

"The Court has discussed at some length the benefit that will be purchased by creation of the evidentiary privilege in this case: the encouragement of psychoanalytic counseling. It has not mentioned the purchase price: occasional injustice. That is the cost of every rule which excludes reliable and probative evidence or at least every one categorical enough to achieve its announced policy objective. ... For the rule proposed here, the victim is ... likely to be some individual who is prevented from proving a valid claim or (worse still) prevented from establishing a valid defense. The latter is particularly unpalatable for those who love justice, because it causes the courts of law not merely to let stand a wrong, but to become themselves the instruments of wrong.

In the past, this Court has well understood that the particular value the courts are distinctively charged with, preserving justice, is severely harmed by contravention of the fundamental principle that 'the public has the right to every man's evidence', [29] Testimonial privileges, it has been said, *are not lightly created nor expansively construed*, for they are in derogation of the search for truth" [30] ...

The court today ignores this traditional judicial preference for the truth, and ends up creating a privilege that is new, vast, and ill defined. I respectfully dissent."

Justice Scalia's dissent questioned the whole basis of the privilege:

"When is it, one must wonder, that *the psychotherapist* came to play such an indispensable role in the maintenance of the citizenry's mental health? For most of history, men and women have worked out their difficulties by talking to, *inter alios*, parents, siblings, best friends and bartenders none of whom was awarded a privilege against testifying in court. Ask the average citizen: Would your mental health be more significantly impaired by preventing you from seeing a psychotherapist, or by preventing you from getting advice from

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[28] Footnote 19
[29] citing *Trammel v United States*
[30] citing *United States v Nixon*, 418 U.S. 683, 710

> your mom? I have little doubt what the answer would be. Yet there is no mother-child privilege.
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> How likely is it that a person will be deterred from seeking psychological counseling, or from being completely truthful in the course of such counseling, because of fear of later disclosure in litigation? And even more pertinent to today's decision, to what extent will the evidentiary privilege reduce that deterrent? The Court does not try to answer the first of these questions; and it *cannot possibly have any notion* of what the answer is to the second, since that depends entirely upon the scope of the privilege, which the Court amazingly finds it neither necessary nor feasible to delineate,"

and in a passage echoing Wigmore's comments on the physicians of 1828 New York:-

> "The Court confidently asserts that not much truth-finding capacity would be destroyed by the privilege anyway, since [w]ithout a privilege, much of the desirable evidence to which litigants such as petitioner seek access ... is unlikely to come into being." *Ante*, at 10. If that is so, how come psychotherapy got to be a thriving practice before the psychotherapist privilege" was invented? Were the patients paying money to lie to their analysts all those years?"

In relation to the extension of the privilege to social workers, Justice Scalia was joined in his dissent by Chief Justice Rehnquist. He questioned the degree of skill a social worker could bring to psychotherapy (as distinct from a rabbi, minister, family or friends), the lack of uniformity of training or standards for social workers, the fact that social workers provide services other than psychotherapy, the fact that many states conferred no social worker privilege, and that where there were laws there was a lack of uniformity in them.

Subsequent to *Jaffe*, the Federal United States Courts recognized a crime-fraud exception to the psychotherapist privilege. This exempts from the scope of the privilege communications made to a psychotherapist in furtherance of a crime or fraud. [31]

The United States Federal Courts have also considered the issue of disclosure in order to protect third parties against whom a patient has made serious threats. *In Tarasoff v Regents of the University of California* [32] the Supreme Court of California held that a psychotherapist

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[31] *In re Grand Jury Proceedings (Gregiory P. Violette)* 183 F. 3d 71 (1st Cir. 1999); Harvard Law Review Vol 113. 1539.

[32] 529 P. 2D 553 (Cal. 1974)

had such a duty. The Federal Courts have held that this duty also applies in respect of the federal privilege found in *Jaffe* , but the cases differ as to whether that disclosure destroys any subsequent privilege. [33] Finally, the psychotherapist privilege remains subject to the principle of waiver, discussed above.

Difficult questions can arise concerning the confidential records of third parties. In a criminal trial the victim of the crime is, in principle, a third party to the proceedings which are brought by the prosecuting authority against the accused. In a trial for sexual assault, for example, an accused person may seek particulars, not only of medical records, but of records of counseling sessions. Is the accused entitled to such records?

In a Canadian case, *R -v- O' Connor*[34] this issue arose. The Canadian Supreme Court held that where such records had come into the possession of the Crown, there were probably no grounds on which their disclosure could be refused. Once the records were shared with the Crown the complainant's privacy interest in them had disappeared.

> "...it is somewhat inconsistent to claim that therapeutic records are sufficiently confidential to warrant a claim of privilege even after this confidentiality has been waived for the purpose of proceeding against the accused. Obviously, fairness must require that if the complainant is willing to release this information in order to further the criminal prosecution, then the accused should be entitled to use the information in the preparation of his or her defence".

Where records were in the hands of third parties the first issue to be decided was that of relevance. The onus was on the accused to satisfy the court that the information was likely to be relevant. The test of relevance was that the information was logically probative to an issue at trial or to the competence of a witness to testify. Relevance to an issue at trial included not only evidence probative to the material issues in the case but evidence relating to the credibility of witnesses and to the reliability of other evidence. There was no need to show the documents themselves were admissible if they could lead to a relevant train of enquiry. The onus to show likely relevance was significant but fairly low.

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[33] United States Glass, 133F, 3d 1356 (10th Cir. 1998); United States v Hayes, 227F 3d 578 (6th Cir. 2000). The cases are discussed in Harvard Law Review, Vol 114, p2194 (2000).
[34] [1995] 4 S.C.R. 411

The court did not accept the proposition that therapeutic records would normally be irrelevant. They might contain certain information about the criminal events themselves, or they might reveal that the therapy had itself affected the complainant's credibility.

Once the court considered the documents likely to be relevant, it should commence a separate enquiry to decide whether they should be produced, in which the accused's right to full answer and defence and to fairness of the trial would be weighed against the third party's right to privacy. The following factors were relevant:

(a) the extent to which the record was necessary to permit the accused to make full answer and defence,
(b) its probative value,
(c) the nature and extent of the reasonable expectation of privacy vested in the record,
(d) whether production of the record would be premised upon any discriminatory belief or bias,
(e) the potential prejudice to the complainant's dignity, privacy or security of person by production.

The court did not accept that the extent to which production would frustrate the public interest in encouraging the reporting of sexual offences was a factor which would justify non-production. This interest could be protected by excluding the evidence if it was not relevant or by restricting its reporting.

The Canadian Parliament subsequently enacted legislation to amend the *O' Connor* procedures. The new provisions of the criminal code apply to any personal record in which the subject enjoys a reasonable expectation of privacy, other than records created by the investigator or prosecutor, even if in the possession of the Crown. Unless the subject has waived the right to protection, the record may not be produced in proceedings in relation to sexual offences, except following an application to the trial judge. Before the court can even inspect the document itself, the accused must show that it is likely to be relevant and

necessary in the interests of justice to produce it. Among the matters to be considered in this determination are the accused's right to a fair trial and any relevant rights to privacy or equality. The judge is also to consider the extent to which the record is necessary to make a defence, its probative value, the nature and extent of the reasonable expectation of privacy with respect to the record, whether its production is based on a discriminatory belief or bias, the potential prejudice to personal dignity and privacy, and society's interest in encouraging the reporting of sexual offences and encouraging victims to receive treatment. The court, if it decides to inspect the documents, then evaluates them according to the same criteria and decides on their release.

In *R -v- Mills*[35] the constitutionality of the new legislation was upheld. McLachlin and Iacobucci JJ stated:-

> "The right of the accused to make full answer and defence is a core principle of fundamental justice, but it does not automatically entitle the accused to gain access to information contained in the private records of complainants and witnesses. Rather, the scope of the right to make full answer and defence must be determined in the light of the privacy and equality rights of complainants and witnesses. It is clear that the right to full answer and defence is not engaged where the accused seeks information that will only seek to distort the truth-seeking purpose of a trial, and in such a situation, privacy and equality rights are paramount. On the other hand, where information contained in a record directly bears on the right to make full answer and defence, privacy rights must yield to the need to avoid correcting the innocent. Most cases, however, will not be so clear, and in assessing applications for production, courts must determine the weight to be granted to the interests protected by privacy and full answer and defence in the particular circumstances of each case."[36]

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[35] [1999] 3 S.C.R. 668
[36] At para 94

JOURNALISTIC PRIVILEGE

The common law in England and in Ireland, gave no special privilege to journalists or the press to protect their sources. Examples of cases include, in England, *Attorney General v Mulholland*, [37] in which a journalist refused to answer questions concerning his source before a Parliamentary Tribunal of Inquiry, and was punished for contempt. Referring to the argument that the journalist had a privilege to refuse to divulge his source, Lord Denning M.R. said:

> "The journalist puts forward as his justification the pursuit of truth. It is in the public interest, he says, that he should obtain information in confidence and publish it to the world at large, for by so doing he brings to the public notice that which they should know. He can expose wrongdoing and neglect of duty which would otherwise go unremedied. He cannot get this information, he says, unless he keeps the source of it secret. The mouths of his informants will be closed to him if it is known that their identity will be disclosed. So he claims to be entitled to publish all his information without ever being under any obligation, even when directed by the court or a judge, to disclose whence he got it. It seems to me that the journalists put the matter much too high. The only profession that I know which is given a privilege from disclosing information to a court of law is the legal profession, and then it is not the privilege of the lawyer but of his client. Take the clergyman, the banker or the medical man. None of these is entitled to refuse to answer when directed to by a judge. Let me not be mistaken. The judge will respect the confidences which each member of these honourable professions receives in the course of it, and will not direct him to answer unless not only it is relevant but also it is a proper and, indeed, necessary question in the course of justice to be put and answered. A judge is the person entrusted, on behalf of the community, to weigh these conflicting interests – to weigh on the one hand the respect due to confidence in the profession and on the other hand the ultimate interest of the community in justice being done or, in the case of a tribunal such as this, in a proper investigation being made into these serious allegations. If the judge determines that the journalist must answer, then no privilege will avail him to refuse."

The Irish case *In re Kevin O' Kelly*[38] was concerned with the refusal of a journalist to identify and name in court a man whom he had interviewed in a broadcast interview. The man had been named by the journalist in the course of the interview. Walsh, J., in the Court of Criminal Appeal, held that

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[37] [1963] 2 Q.B. 477.
[38] 108 I.L.T.R. 97 (1974)

"... not every news gathering relationship from the journalist's point of view requires confidentiality. But even where it does journalists or reporters are not any more constitutionally legally immune than other citizens from disclosing information received in confidence. The fact that a communication was made under terms of expressed confidence or implied confidence does not create a privilege against disclosure. So far as the administration of justice is concerned the public has a right to every man's evidence except for those persons protected by a constitutional or other established and recognized privilege".

Walsh J. furthermore considered that to allow such a privilege would entrench on the judicial power.

"it would be impossible for the judicial power under the Constitution in the proper exercise of its functions to permit any other body or power to decide for it whether or not certain evidence would be disclosed or produced.

In the last resort the decision lies with the courts so long as they have seisin of the case. The exercise of the judicial power carries with it the power to compel the attendance of witnesses and the production of evidence and, *a fortiori*, the answering of questions by witnesses. This is the ultimate safeguard of justice in the State, whether it be in pursuit of the guilty or the vindication of the innocent. ... there may be occasions when different aspects of the public interest may require a resolution of a conflict of interests which may be involved in the disclosure or non disclosure of evidence but if there be such a conflict then the sole power of resolving it resides in the courts. The judgment or the wishes of the witness shall not prevail. This is the law which governs claims for privilege made by the executive organs of State or by their officials or servants and journalists cannot claim any greater privilege."

These cases must now be considered in the light of the jurisprudence of the European Court of Human Rights regarding Article 10 of the European Convention on Human Rights. Article 10 of the Convention provides as follows:

Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions,

> restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

In *Goodwin –v- the United Kingdom*[39] the European Court of Human Rights had occasion to consider a case in which the English courts had granted an injunction restraining publication of confidential and commercially sensitive information and subsequently had ordered disclosure of notes by the journalist to enable his source to be identified. The latter order was made pursuant to section 10 of the English Contempt of Court Act 1981 which provided:

> "No court may require a person to disclose, nor is a person guilty of contempt of court for refusing to disclose the source of information contained in the publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime".

The House of Lords had held, weighing the two public interests against one another, that disclosure was necessary in the interests of justice. In his speech, Lord Bridge explained the balancing exercise in the following terms:

> "It would be foolish to attempt to give a comprehensive guidance as to how the balancing exercise should be carried out. But it may not be out of place to indicate the kind of factors which will require consideration. In estimating the importance to be given to to the case in favour of disclosure there will be a wide spectrum within which the particular case must be located. If the party seeking disclosure shows, for example, that his very livelihood depends upon it, this will put the case near one end of the spectrum. If he shows no more than that what he seeks to protect is a minor interest in property, this will put the case at or near the other end. On the other side the importance of protecting a source from disclosure in pursuance of the policy underlying the statute will also vary within a spectrum. One important factor will be the nature of the information obtained from the source. The greater the legitimate interest in the information which the source

[39] Case No. 16/1994/463/544
Judgment 22 February 1996

> has given to the publisher or intended publisher, the greater will be the importance of protecting the source. But another and perhaps more significant factor which will very much affect the importance of protecting the source will be the manner in which the information was itself obtained by the source. If it appears to the court that the information was obtained legitimately this will enhance the importance of protecting the source. Conversely, if it appears that the information was obtained illegally, this will diminish the importance of protecting the source unless, of course, this factor is counterbalanced by a clear public interest in publications of the information, as in the classic case where the source has acted for the purpose of exposing iniquity".

The European Court of Human Rights, by 11 votes to 7, held that there had been a violation of the Convention. The applicant's right to freedom of expression had been interfered with. The question was whether the conditions of Article 10 (2) had been met. It was held that the interference with the applicant's right was one prescribed by law, and pursued the legitimate aim of protection of the interests of the commercial firm whose secrets had been given to the press. The remaining issue was whether the interference could be considered "necessary in a democratic society".
The court emphasized that:

> "Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest"..

While the United Kingdom was entitled to "a certain margin of appreciation" that margin was circumscribed by the interest of democratic society in ensuring and maintaining a free press. The court observed that "limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the court".

The original injunction had served to prevent publication. The order for disclosure was designed to enable the commercial firm to pursue its legal remedies against that source. The court, however, was not prepared to accept that that firm's

> "interests in eliminating, by proceedings against the source, the

> residual threat of damage through dissemination of the confidential information otherwise then by the press, in obtaining compensation and in unmasking a disloyal employee or collaborator were, even if considered cumulatively, sufficient to outweigh the vital public interest in the protection of the applicant journalist's source".

The minority, however, considered that the European Court of Human Rights had undertaken no detailed assessment of the interests of the commercial firm. And in the absence of such an assessment there was no basis for the balancing exercise the court was required to undertake.. In any event, the national court was better placed to evaluate those interests and their conclusion, was within the national authorities margin of appreciation.

In a separate dissent, the Irish judge, Judge Walsh, returned to a theme he had discussed in *In re Kevin O' Kelly*, that of the journalist above the law and the potential of journalistic privilege to undermine the judicial authority. In his view "the applicant has succeeded in frustrating his national courts in their efforts to act in the interests of justice".

> "The applicant claims that because he does not believe it was stolen he can justify his refusal to comply with the court order made in his case. His attitude and his words give the impression that he would comply if he believed the document in question had been stolen. He is thus setting up his personal belief as to truth of a fact which is exclusively within the domain of the national courts to decide as a justification for not obeying the order of the courts simply because he does not agree with the judicial findings of fact.
>
> It does not appear to me that anything in the Convention permits a litigant to set up his own belief as to the facts against the finding of fact made by the competent courts and thereby seek to justify a refusal to be bound by such judicial finding of fact. To permit him to do so simply because he is a journalist by profession is to submit the judicial process to the subjective assessment of one of the litigants and to surrender to that litigant the sole decision as to the moral justification for refusing to obey the court order in consequence of which the other litigant is to be denied justice and to suffer damage. Thus there is a breach of primary rule of natural justice – no man is to be the judge of his own cause".

The United States Supreme Court has considered whether journalistic privilege should be recognized in three cases, *Branzburg -v- Hayes*[40], *Zurcher -v- Standford Daily*,[41] and *Herbert -v- Lando*.[42] The court refused to recognize any claim of privilege that would elevate journalists above other citizens despite the fact that the First Amendment gives express recognition to the freedom of press. In *Branzburg* the court, while recognizing that the First Amendment provides "some protection" found the hindrance of having to testify before grand juries was too insubstantial and speculative to outweigh the public interest in bringing criminals to justice. However, four of the justices dissented. Three would have recognized a qualified privilege, and one an absolute. One of the majority, Justice Powell, argued for a case-by-case balance.

In *Zurcher* the Supreme Court, by a vote of 5-3, upheld the authority of searches of newspaper offices pursuant to warrant, even in the absence of a judicial hearing following notice to the owner of the premises.

In *Herbert -v – Lando* the court held that journalist's thoughts about their writings, as well as conversations with colleagues, can be discovered in defamation proceedings. American law, however, requires proof of actual malice in defamation actions brought by public figures so in such cases privilege could seriously interfere with public figures' ability to sue.

In addition, there are numerous statutory privileges conferred on the press in the law of the various states.

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[40] 408 U.S. 665 (1972)
[41] 436 U.S. 547 (1978)

[42] 441 U.S. 153 (1979)

CONCLUSION

Legal systems display a wide variety of response to the approach to be adopted where privilege for confidential communications with a member of a profession is sought. For a claim to succeed, the confidential communication must arise from a relationship which society considers ought to be protected and fostered. The relative importance society attaches to such relationships will vary from time to time and from society to society. In this respect it is striking that much greater recognition is given to the role of journalists and psychotherapists today than was previously the case.

The injury caused by the disclosure of a communication must be greater that the benefit to be gained for the correct disposal of litigation if a privilege is to be recognized. It is difficult to avoid the conclusion that a court should never allow a privilege in relation to a criminal matter without an examination of the consequences in the individual case. To take the most extreme example, if evidence tends to support the conclusion that an accused person in a criminal trial is innocent, can it be acceptable to any judicial system that the price to be paid to protect a public benefit such as the freedom of the press or the secrets of the confessional, or the interests of an individual in privacy or autonomy, could be the conviction of the innocent person? The balancing exercise to be adopted should be made subject in clear criteria, either stated in case-law or by statute, but should not be left to an undefined judicial discretion. Privilege should be regarded as that of the client or patient and not of the professional person. Finally, privilege should be capable not only of being waived expressly but should also be considered to be waived impliedly by a litigant who seeks to put forward a case which is inconsistent with the information respecting which the privilege is claimed.

THE PUBLIC PROFILE OF THE JUDICIARY

Mr Justice Benjamin J Odoki, Chief Justice of the Republic of Uganda

The Public Image of the Judiciary:

Judiciaries in Africa are undergoing a crisis of confidence due to the need to adjust to the democratic wave that has swept across the continent and the increasing public scrutiny they are facing. There is therefore a need to create a new image of the Judiciary to reflect the new democratic ethos and constitutional dispensation that call for independent, efficient and accountable judiciary.

Judicial independence is a core constitutional value which must be guaranteed by Constitutions. In the determination of civil rights and obligations or any criminal charge, a person is entitled to a fair and public hearing before an independent and impartial court established by law. In the exercise of their judicial power, courts must be independent and not subject to the control or direction of any person or authority. Indeed the independence of the judiciary is a corner stone of any democratic society.

In most young African democracies courts have assumed a very high profile as guardians of the constitution and defenders of the fundamental rights and freedoms of the people, especially through judicial activism. They are makers of news and controversy. They are expected to check on the excesses of executive action and protect the rights of the less privileged. Therefore courts now do matter to the people, the governments, the investors and the donors. They promote good governance and the rule of law and provide an enabling environment for economic growth and development.

However Courts are being criticised for being inefficient, too slow and costly, conservative and applying outdated laws and procedures, elitist and out of touch with ordinary people, not being user friendly, not gender sensitive, experiencing corruption and lack of integrity, being executive minded and partisan or anti-government, and not being adequately competent in various emerging fields of law and jurisprudence, among others.

The Judiciary must take steps to respond to these criticisms and address the shortcomings. There may be need for each judiciary to formulate a Strategic Plan or Judicial Charter to address its problems like we are currently doing in Uganda. There may also be a need to adopt a sector-wide approach for the Legal Sector in planning and budgeting so that the priorities and bottlenecks in the entire justice, law and order sector is addressed, an approach Uganda has adopted. The need for judicial reform is therefore imperative. The Judiciary must shade off its inward outlook and open up to the public to build a new image,

a new direction, and improve service delivery, as well as rebuild public esteem and confidence in the administration of justice. The Judiciary must become proactive and not merely reactive to public demands and criticisms.

***Judges Participation in Public Discourse*:**

The question of how and subject to what constraints judges should participate in public discourse is an important one for strengthening judicial independence and accountability, improving the image and performance of the judiciary and building public confidence in the administration of justice. In order to achieve these goals, judges must take part in certain activities that advance these goals and refrain from participating in those activities that undermine those goals.

In participating in public discourse, judges must be guided by the Constitution, laws and codes of judicial conduct of their jurisdictions. Judges are entitled to enjoy the fundamental rights and freedoms guaranteed by the Constitution. In particular they are entitled to enjoy freedom of expression, association and assembly. But these freedoms are constrained by the nature of their judicial office which requires them to maintain independence, impartiality and integrity. The national codes of Judicial Conduct and International Principles on the Independence of the Judiciary are intended to regulate their conduct.

The United National Basic Principle on the Independence of the Judiciary, 1985, provide how and with what limits judges may exercise their freedom of expression and assembly. Articles 8 and 9 state:

> "8. In accordance with the Universal Declaration of Human Rights, members of the Judiciary are like other citizens, entitled to freedom of expression, belief, association and assembly; provided however, that in exercising such rights, judges shall always conduct themselves in such as manner as to preserve the dignity of their office and the impartiality and independence of the Judiciary.
>
> 9. Judges shall be free to form and join associations of judges or other organisations to represent their interests, to promote their professional training and to protect their judicial independence."

The Universal Declaration on the Independence of Justice adopted by the World Conference on the Independence of Justice, Montreal, Canada 1983 gives the following disqualifications for judges:

> "2.26 Judges may not serve in an executive or legislative capacity unless it is clear that these functions are combined without compromising judicial independence.

2.27 Judges may not serve as Chairmen or members of committees of inquiry except in cases where judicial skills are required.

2.28 Judges shall not be active members or hold positions of political parties."

These appear to be the broad perimeters within which judges may legitimately participate in public discourse. Several national Codes of Conduct Judicial Conduct have attempted to expand and specify the types of extra-judicial activities that are permissible or not permissible.

It seems to be generally accepted that a judge may participate in public discourse by giving lectures or participating in public discussions through workshops, seminars and conferences to improve the law, the legal system and the administration of justice. For instance, the code of Conduct of Judges of the Supreme Court of Bangladesh provides in Regulation as follows:

"A. A Judge may speak, write, lecture, teach and participate in other activities concerning the law, the legal system and the administration of justice.

B. A judge may appear at a public hearing before or otherwise consult with an executive or legislative body or official on matters concerning the law. The legal system, and the administration of justice to the extent that it would generally be perceived that a judge's judicial experience provides special expertise in the area."

Regulation 6 however provides a limitation:

"A judge must not enter into public debate or express his views in public on political matters or on matters that are pending or are likely to arise for judicial determination before him."

Several Codes of Judicial Conduct for instance from Canada, Virginia and India prohibit a judge from taking part publicly in controversial discussions of a partisan political character. The Bangalore Draft Code of Judicial Conduct, adopted in February 2001, by the Judicial Group on Strengthening Judicial Integrity has consolidated the principles relating to extra - judicial activities of a judge. Under the Value of propriety the Code states:

"1.12. Subject to the proper performance of judicial duties, a judge may engage in activities such as:

1.12.1 The judge may write lecture, teach and participate in activities concerning the law, the legal system, the administration of justice and related matters;

1.12.2 The judge may appear at a public hearing before an official body concerned with matters relating to the law, the legal system and the administration of justice or related matters; and

1.12.3 The judge may serve as a member of an official body devoted to the improvement of the law, the legal system the administration of justice or related matters.

1.13 A judge may speak publicly on non-legal subjects and engage in historical, educational, cultural, sporting or like social or recreational activities; if such activities do not detract from the dignity of the judicial office, or otherwise interfere with the performance of judicial duties in accordance with this Code."

The Draft Code also contains a provision allowing a judge to form or join associations of judges or participate in other organisations representing the interests of judges to promote professional training and to protect judicial independence (para 1.19).

The American Bar Association Code of Judicial Ethics recognises the right of a judge to comment on legislation relating to the administration of justice. Cannon 23 states:

> "A judge has exceptional opportunity to observe the operation of statutes, especially those relating to practice and to ascertain whether they tend to impede the just disposition of controversies, and he may well contribute to the public interest by advising those having authority to remedy defects of procedure of the result of his observation and experience."

I think that the contribution of judges to law reform is crucial. They interpret and apply law all the time and are bound to discover lacunae and defects in the law and procedure of which the public and the law makers should be made aware. Their comments and opinions can be given in public at conferences, seminars, and ceremonies. To assist this process, it would be useful if proposed legislation could be sent to the Judiciary for comments. Comments however should be made with caution lest judges are taken to have taken pre-conceived positions on the proposals so that they would be presumed to be biased when applying them.

Similarly, a judge may be a member of a Commission or Committee dealing with matters related to law, the legal system and the administration of justice. A judge may also present his views to such a body or participate in public discussions or seminars organised by it. However, in either case a judge must avoid

commenting publicly on highly controversial political matters which are likely to undermine the independence of the judiciary or which are likely to come before the court.

There has been some criticisms against appointing judges on Commissions or Committees of inquiry dealing with controversial issues. In the case of Uganda judges have recently chaired Constitutional Commission, Corruption in the Uganda Police Force, Closure of Commercial Banks, Purchase of Junk Military Helicopters and Illegal Exploitation of Natural Resources from the Democratic Republic of Congo. Clearly some of these are controversial matters and some are political. The argument of the Executive has been that judges are the most suitable persons to head these inquiries because they have integrity and impartiality, and judicial skills of inquiry and decision - making which are likely to enhance public confidence and credibility in the inquiry and its outcome.

The constraint placed on judges not to discuss in public ***subjudice*** matters is one that appears in most Codes of Judicial Conduct. It is intended to protect the right to a fair trial and maintain the integrity and independence of the Court. For instance, Rule 9 of the Uganda Code of Judicial Conduct 1989 states,

> "A judge should strictly adhere to the ***subjudice*** rule. He should not discuss in public matters pending in any court and should discourage others from doing so."

A general ethical constraint on the right of a judge to participate in public discourse is that a judge must avoid impropriety and the appearance of impropriety in all his or her activities. The Bangalore Draft Code of Judicial Conduct, 2001, states:

> "1.2 As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office."

***Promoting of the Judiciary as an Institution by Judges*:**

Judges are the best public relations managers for the Judiciary. They understand the Judiciary better than any person or agency. Their image and performance reflects the character of the Judiciary. They must therefore actively participate in promoting the Judiciary as an institution, to defend its independence, to build capacity and resources, to reform the institution and to improve its image and public confidence in the administration of justice. To achieve these objectives the Judiciary should undertake strategic planning for the institution, advocate for appropriate laws and procedures to improve delivery of justice, organise programmes of continuing judicial education, form and

participate in national and international judicial associations and conduct programmes of civic or public education.

Judicial reform and planning are necessary to provide informed and systematic change. In Uganda we have carried out a number of studies in the legal sector to reform the Criminal Justice System, Commercial Justice Sector, Professionalisation of the Bench, Alternative Dispute Resolution Mechanisms, Case Management, Restructuring of the Judiciary, Job Evaluation, Training Needs Assessment, Introduction of Information and Court Technology and Result Oriented Management (ROM). In addition there has been decentralisation of the High Court to improve access to justice. These institutional building reforms are judiciary-driven and our development partners or donors have been extremely supportive.

Judges can promote the Judiciary as an institution by conducting and participating in programmes of continuing judicial education. Judicial training as a planned and systematic effort to modify or develop knowledge, professional skills and attitudes through learning experience in order to achieve effective performance in the dispensation of justice, plays a significant role in strengthening the independence of the Judiciary and the efficient and timely dispensation of justice.

During these training programmes Judges should interact with members of the legal profession and other stakeholders involved in the administration of justice. They should discuss issues that can promote the improvement of the law, improvement in ethical standards, new strategies and methodologies for dispensing justice, and the improvement in the co-operation and communication between the various institutions and agencies involved in the administration of justice. Uganda has a Judicial Training Committee responsible for developing and implementing training programmes. This Committee co-ordinates training activities with the East African Judicial Training Committee. We are planning to establish a National Judicial Academy to conduct training programmes for Judicial Officers as well as support staff. Currently the Judicial Service Commission is also mandated to conduct training for Judicial Officers and it has organised some programmes recently especially for the lower Bench.

Judges should promote the independence and welfare of the Judiciary by forming and participating in judicial associations at national and international levels. Judicial associations are the voices of judicial power. Judges can speak with one voice and can be taken seriously. Apart from defending the interests of the Judiciary, such associations can be agents of learning and reform. In Uganda for instance, we have the Judicial Officers' Association with a membership of which Judges and Magistrates. This Association is a member of the East African Magistrates' and Judges' Association, and the Commonwealth Magistrates' and Judges' Association. Regional and International Co-operation

in judicial and legal matters is crucial in promoting and strengthening national judiciaries.

The last strategy through which Judges can promote the Judiciary as an institution is through public legal education. The need to enhance public understanding of the law, the role of Judges and the operation of the court system is now well recognised. Many NGOs and other civic organisations are undertaking human rights education, but this is insufficient to meet the need.

Law and court procedures are still shrouded in mystery to most ordinary people. The only way to demystify the law and the judicial process is to promote public legal education to improve civic competence. Public awareness will improve access to justice and increase public confidence in the administration of justice. Public confidence is necessary to support the authority of the court and promote voluntary compliance with the decisions of the Courts.

It is generally agreed that Judges have a responsibility to improve the state of public understanding of the Courts and the role of Judges. Therefore Judges should be more open, up front, and accessible. The traditional monastic view of the Judiciary may no longer be acceptable given the modern era of democratisation.

The public may not get a completely balanced view of the operation of the Courts or judicial independence from the media. Judges therefore should take advantage of appropriate opportunities to help the public understand the fundamental importance of judicial independence in view of the public's own interest. Such opportunities may arise when they are addressing various audiences at various occasions. Judges should also consider addressing a wide range of subjects in the public media and through educational programmes.

Judges should draw up a programme of public education. Such a programme could include:

- education programmes at all levels of education system
- public lectures to various audiences in the community
- public discussions and talks through the media
- publication of information about the law, the legal system and the administration of justice
- law reporting of decisions of the Courts

There must be an institutional structure to manage the educational programme. An office, department or committee charged with implementing the programme

must be established. In Uganda there is a Registrar in-charge of Research and Training which includes the activities of public affairs and publications. The Registrar works under the Judicial Training Committee headed by a Supreme Court Judge. In addition, there is the Judicial Service Commission which has the Constitutional function of preparing and implementing programmes for the dissemination of information to judicial officers and the public about law and the administration of justice. The Commission also acts as a link between the people and the judiciary and is responsible, in addition to recommending appointment of judges, for receiving and processing people's recommendations and complaints concerning the Judiciary and the administration of justice generally. Therefore both the Judiciary and the Commission, which has an independent status, have a role to improve public awareness about the Judiciary and the administration of justice, and they are cooperating in this area.

The Judiciary therefore needs to improve its relationship with the public and the media. To achieve this objective, it is proposed that the Judiciary should have a competent public relations or information officer to help turn around the public image and understanding of the Judiciary as an indispensable institution in a modern democratic society.