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THE HONOURABLE MR JUSTICE LUKE MALABA

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**STAYING AHEAD OF THE PACK: REMAINING RELEVANT IN THE FACE
OF MULTI-FACETED COMPETITION**

**TRACING TRENDS AND DEVELOPMENTS IN ZIMBABWE LEGAL
JURISPRUDENCE – WHAT THE FUTURE HOLDS FOR THE PROFESSION**

Today I speak with you for the first time as Chief Justice. Regardless of that title, I remain a lawyer like yourselves. I thank you, the Law Society, for this opportunity that you have given me. The topic that you have tasked me to present on is one that is dear to me. I am honoured for that reason to stand before you to speak about something I love. This is the topic of jurisprudence and how we can trace developments in our legal jurisprudence as a country. This is critical for us to know where we are headed as a country. In order to understand the importance of tracing developments in jurisprudence, it is vital to understand what jurisprudence is and its relationship with the law.

Jurisprudence derives from the Latin term *juris prudentia*, which means "the study, knowledge, or science of law."¹ It has been defined as the philosophy of law, or the science which treats of the principles of positive law and legal relations.² It has been said to be a type of science that explores the creation, application and enforcement of laws.³ Ulpian defined jurisprudence as the knowledge of things human and divine, the science of the just and unjust.⁴ Others want to draw a line between jurisprudence and the philosophy of law by defining jurisprudence as the body of principles and practices that

¹Legal Information Institute <https://www.law.cornell.edu/wex/jurisprudence>

² <http://thelawdictionary.org/jurisprudence/>

³ <http://study.com/academy/lesson/schools-of-jurisprudence-theories-definitions.html>

⁴ *Jurisprudentia est divinarum atque humanarum rerum notitiam iusti atque iniusti scientia* Holland, Jurisprudence p 3

underlie a legal system, particularly as it applies to the work of applying and adjudicating laws (e.g. lawsuits, legal review, interpretive rules).⁵ Essentially they seek to say that jurisprudence is directed to the practice of law. Legal philosophy, as distinct from jurisprudence, is defined to concern itself with logic, metaphysics, ethics, what is right and wrong, what it means to agree with something, what justice and fairness are.⁶ Some view this definition of legal philosophy as a subset of jurisprudence.

In the United States jurisprudence is basically the philosophy of law. It has four common aspects⁷ -

1. The first and the most prevalent form of jurisprudence seeks to analyse, explain, classify and criticise entire bodies of law. Law school textbooks and legal encyclopedias represent this type of scholarship.
2. The second type of jurisprudence compares and contrasts law with other fields of knowledge such as literature, economics, religion and the social sciences.
3. The third type of jurisprudence seeks to reveal the historical, moral and cultural basis of a particular legal concept. (normative jurisprudence)⁸
4. The fourth body of jurisprudence focuses on finding the answer to such abstract questions as “What is law?” (analytic jurisprudence).⁹

⁵ What is the difference between Jurisprudence and philosophy of Law? <https://www.quora.com/What-is-the-difference-between-Jurisprudence-and-philosophy-of-Law>

⁶ What is the difference between Jurisprudence and philosophy of Law? <https://www.quora.com/What-is-the-difference-between-Jurisprudence-and-philosophy-of-Law>

⁷ Legal Information Institute <https://www.law.cornell.edu/wex/jurisprudence>

⁸ <http://study.com/academy/lesson/schools-of-jurisprudence-theories-definitions.html>

⁹ <http://study.com/academy/lesson/schools-of-jurisprudence-theories-definitions.html>

THE RELEVANCE OF JURISPRUDENCE

Perhaps it is important to understand the purpose of jurisprudence so that it is known why it is critical to promote jurisprudential development. This is because the law is just a component of jurisprudence.

- i. It has been said that “Jurisprudence is from this point of view a paragon of pluralistic activity, in close touch with reality and with a great openness for new methods and theories, and readily assimilating new insights from other areas of society.”¹⁰ Jurisprudence creates space in the law for new areas that emerge in society. It is a base upon which newer areas of the law will rest. It is that part of the legal system that stays in touch with reality and introduces such emerging areas of society to the law. It is an enabler for the inculcation of any area that will arise in human activity to find its place in law and within the legal system. Jurisprudence relates to the fundamentals that all current and future laws will be measured against.
- ii. “The purpose of jurisprudence can ... be to provide explanations and authority for fundamental principles of law, democracy, etc. and the particularisation of various needs can of course be made more detailed, and so can the analysis of different purposes.”

¹⁰ Peter Wahlgren, The Purpose and Usefulness of Jurisprudence, p 503
<http://www.scandinavianlaw.se/pdf/48-30.pdf>

- iii. Jurisprudence is always essential because it provides explanations concerning the content and nature of law, and consequently it facilitates legal decision-making.
- iv. The purpose of jurisprudence is that it provides indispensable means for balancing interests, that jurisprudential activities vindicate traditional values, develop fundamental principles, ensure constitutional rights, provide material for education, pursue research and support a critical and insightful debate in society.
- v. To seek and to produce knowledge, and to make it easier for people to make rational decisions.
- vi. These objectives can in the field of law be transformed into endeavours to increase the knowledge of individuals, to contribute to increased freedom of choice, to facilitate the development of trade, education and creativity, etcetera.
- vii. Creativity and curiosity must always be important guiding stars – jurisprudence is only useful if it can vindicate its independence and extend its adaptability.¹¹
- viii. Remove the complexities of law: One of the tasks of jurisprudence is to construct concepts and make law more manageable and rational.¹²

¹¹ Peter Wahlgren, The Purpose and Usefulness of Jurisprudence, p 503
<http://www.scandinavianlaw.se/pdf/48-30.pdf>

¹² Article Source: <http://EzineArticles.com/5664824>

- ix. Answers the new problems that arise within human existence and progression.
- x. Jurisprudence is the grammar of law. It throws light on the basic ideas and the fundamental principles of law.
- xi. It helps the judges and the lawyers in ascertaining the true meanings of the law passed by the legislatures by providing the rules of interpretation.
- xii. It enables a lawyer to study foreign law because the fundamental principles are generally common to all systems of law.
- xiii. The study of jurisprudence is an opportunity for the lawyers to bring theory and life into focus, for it concerns human thought in relation to social existence.

WHAT IS THE RELEVANCE OF LAW IN SOCIETY?

- i. Law in society leads to the progression of society, in that law allows for the comfort of education to be taught and it enables technology to grow through the distribution of patents and regulations.¹³
- ii. “Law was brought into the world for nothing else but to limit the natural liberty of particular men, in such manner, as they might not hurt, but assist one another, and join together against a common enemy”¹⁴

¹³ The Statesman, THE IMPORTANCE OF LAWS IN OUR SOCIETY
<https://thestatesmanreport.wordpress.com/2012/06/15/the-importance-of-laws-in-our-society/>

¹⁴ Hobbes quoted in Holland, Jurisprudence, Thirteenth Edition, page 79

- iii. The law enlarges or preserves freedom as opposed to its end being abolishing and restraining.¹⁵ The limits and restraints imposed by the law essentially enlarge and preserve the freedoms that people enjoy.
- iv. It is the law which is responsible for the creation and protection of legal rights.¹⁶ What are considered rights are only so because the law gives them that status and creates mechanisms for their protection and vindication within its confines.
- v. The law is responsible for peace and order, as it sets parameters within which freedoms are enjoyed by each person in a way that allows the same for the next person. In so doing it creates a system of order and peace by balancing interests and rights through obligations and responsibilities. In so doing it provides safety.
- vi. The law gives birth to justice. There is always a disparity between what the layperson considers to be justice and what the law says justice is. The law always prevails and it is the law which brings justice in accordance with its content.
- vii. The law provides a dispute resolution system that is consistent and certain. In criminal matters, the law is actioned through the State taking on the vindication of a person against that which is considered criminal within a country. In civil matters, law provides recourse as between two parties.

¹⁵ Holland, Jurisprudence p 80

¹⁶ Page 81

- viii. Law prevents self-harm. It provides protection to those who are vulnerable. This relates to laws that restrict the use of drugs and laws that protect children, women, the disabled and so on.
- ix. Law also functions under the statist principle¹⁷ to protect governments from acts which cause instability within nations. This includes laws against treason and espionage. The aim of law in this regard is to ensure stability and order within a nation as it functions well in such an environment.
- x. The law is a guidepost for minimally acceptable behavior in society, in that it establishes standards regulating all areas of life.
- xi. The law regulates business relations within various sectors of the economy because law thrives within the context of economic realities prevailing and fostered by it.
- xii. The law regulates the exercise of political, judicial and legislative functions. The State is heavily reliant on this structure and the law itself has its full cycle in the legislature making it, the judiciary interpreting it and the executive enforcing it.
- xiii. The resolution of disputes is a core function of the law, as disputes are unavoidable in the light of the diversity of persons and their views, interests and values.

¹⁷ Tom Head, Why Laws Exist <https://www.thoughtco.com/why-laws-exist-721458>

WHAT PEOPLE EXPECT THE LAW TO DO FOR THEM

Societal expectations of the law stem from the people's perceived relevance of the law.

In other words, people expect the following from the law -

- To be protected by the law from harm caused by others;
- To be protected by the law from injustice;
- To be treated equally under the law;
- For the law to promote morality;
- To regulate business and all areas of human interaction;
- To give them a remedy when they need redress;
- For the law to set limits, checks and balances to the exercise of State power;
- For the law to be certain and for its content to be known and readily accessible;
- To provide for access to the courts even for those who cannot afford the cost of acquiring representation from legal practitioners.

Lawyers bridge the gap between what the law is and what society expects it to do for them. The judge interprets the law as between parties who appear before him or her. Those parties are representative of society and what they seek in courts reflects what society perceives the law must do for them. More often than not, there are legal practitioners involved. The law being the wheels upon which the justice sought by the ordinary men or women moves, lawyers become the driving force to bring forth that justice. Through the use of the law, logic and diligence, lawyers can bring forth that which society expects from the law.

Jurisprudence is a wider concept of the law, in that it is the science or knowledge or philosophy of law itself as opposed to the law which is made up of "laws".

Jurisprudence evolves as society evolves. As far back as 1924, the author T E Holland noted that:

“The ever-renewed complexity of human relations calls for an increasing complexity of legal detail, till a merely empirical knowledge of law becomes impossible.”¹⁸

As society develops and evolves, the expectation of society from the law remains constant. Society still expects justice, redress, protection and remedies.

HOW DO WE FIND OUT HOW JUDGES OR COURTS USE THE LAW?

There are different schools of jurisprudence concerning how judges use the law to make judicial pronouncements. There is the school of thought which is pro-formalism or conceptualism. Formalism treats law as a science or math. Formalists believe that a judge identifies the relevant legal principles, applies them to the facts of a case and logically deduces a rule that will govern the outcome of the dispute. This is quite the opposite of legal realism, which believes that most cases before courts present hard questions that judges must resolve by balancing the interests of the parties and ultimately drawing an arbitrary line on one side of the dispute.

The theories present a good starting point on how judges use the law to reach certain decisions and to develop jurisprudence. However, none of them can be ascribed to a specific judge or at least not in all cases. The most efficient way of knowing how judges use the law is to follow the cases themselves and their resolution. Ours is a reading

¹⁸ T E Holland, *The Elements of Jurisprudence*, Thirteenth Edition, Oxford, Clarendon Press 1924 page 1

profession and while the law is written and it is certain, the reality of distinct and different sets of facts that come before the courts makes the law susceptible to interpretation which in turn leads to the development of jurisprudence.

Lawyers must read foreign case-law where relevant and be well versed with international jurisprudence as the Zimbabwe legal system does not exist in a vacuum. It is not a legal island. A look at section 46 of the Constitution indicates that the Legislature was alive to this reality. Section 46 of the Constitution enjoins courts or other adjudicating bodies to take into account international law and all treaties and conventions to which Zimbabwe is a party. Lawyers are responsible for knowing and understanding the content of such international law, treaties and conventions. A lawyer who is interested in the development of jurisprudence will come to court armed with international law authorities, well sifted and analysed for their significance.

Section 47 of the Constitution provides that rights which are not dealt with under Chapter 4 of the Constitution are applicable to Zimbabwe to the extent of their consistency with the Constitution. Such rights usually find their existence in other jurisdictions. A diligent lawyer may find a remedy for a client in other jurisdictions, but that would require reading and understanding the jurisprudence under which such right exists. In other words, law in itself exists in certain realities that a legal practitioner needs to understand. We do not just copy what other courts are doing. Foreign decisions have to find justification and legitimacy in our legal conspectus. The ability to find that relevance and the nexus which compels or persuades the court to adopt and apply a particular principle

to arrive at a landmark decision is what differentiates an exceptional lawyer from all others.

Lawyers should not concern themselves with having practical knowledge of law only. They must train themselves to think philosophically about the rôle of law in society. It is not enough to read and understand what the Constitution says for jurisprudential purposes, without taking the trouble to ask the question why a Constitution is such an important document in the existence and development of society. In other words, an understanding of jurisprudential development may require the conceptualisation of the meaning and effect of the broader concepts such as constitutionalism. Constitutionalism is not a normative theory of procedures and forms of governance but concerns itself with the control, limit and restraint of state power.¹⁹ Jurisprudence is found in the Constitution and constitutionalism defines jurisprudence.

EFFICIENT JUSTICE DELIVERY

We need an efficient delivery of justice system. Lawyers play an important role in achieving that goal. It means hard work for the lawyer and commitment to giving quality legal service. There is need to adhere to values that advance jurisprudential development. These are values that carry us forward. There is need to effect change where there are hindrances to such development and that comes with a preparedness to make painful changes with the end goal being development. All stakeholders need to pull their weight. Justice delivery is not just for judges. As I mentioned before, as lawyers you bring the

¹⁹ Jeremy Waldron, Constitutionalism: A skeptical view, Georgetown University Law Center, 2010
<http://scholarship.law.georgetown.edu/hartlecture/4/>

parties before the courts and thus you are part of that process. Each lawyer must be devoted to doing the hard work. The hard work will start with knowing the client's case well and researching. With the advent of technology, research now goes beyond the hard copy law books. It has expanded to the internet. The internet is a rich source of legal information.

Case management is also important. Case management relates to the proactive approach to processing a legal matter.²⁰ This proactive approach helps, in that the lawyer is in control and aware of the progression of his or her case and can adequately be prepared. It is the benefit of foresight and not acting like a passenger in a case one is supposed to be driving. Law firms with the funds could also invest in the various case management softwares that are now being used. This is staying abreast of the development within the legal fraternity nationwide. This would be a good tool towards effective justice delivery. Even without a software, effective case management is still possible. It is just the product of knowing what the next stage of the proceedings are and the dates involved. Simply put, it boils down to good diarising.

THE COURTS

People view courts as avenues for obtaining justice. In relation to criminal matters, it has been said that “people have a fundamental desire to feel that there is just punishment in response to wrongdoing.”²¹ The opposite would be true, in that where there

²⁰ <http://legal-dictionary.thefreedictionary.com/case+management>

²¹ Tom R. Tyler* & Justin Sevier, HOW DO THE COURTS CREATE POPULAR LEGITIMACY?: THE ROLE OF ESTABLISHING THE TRUTH, PUNISHING JUSTLY, AND/OR ACTING THROUGH JUST PROCEDURES

http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5984&context=fss_papers

has been no wrongdoing, people expect exoneration of those wrongfully accused. People expect the attainment of truth. In civil law, courts are seen as being more than moderators. They are viewed as places where justice as between two parties is achieved.

PROFESSION

People expect lawyers to actually know the law and the philosophy of the law. There is a reason why one does not go to a doctor with a legal problem, they go to a lawyer as a person who has mastered the law. They expect adequate and knowledgeable representation. They expect that the lawyers know procedural and substantive law and will use the law to further their causes. Society seeks to get the justice it believes the courts should give. That justice should be procured for them by the lawyers. Legal practitioners are seen as midwives for justice.

Each case is an opportunity for a legal practitioner to contribute to the development of jurisprudence. A lawyer should know the issues that arise in the case he or she is dealing with. He or she should know the law to be applied and how to apply it to the facts. A lawyer must be in a position to anticipate questions that are likely to arise on the issue for determination. Adequate preparation would mean finding answers to the questions anticipated. A legal practitioner should not find the relevant answers upon close scrutiny of the sources only but must in appropriate cases seek the application of the law to the facts in a manner that would have the effect of contributing to the development of jurisprudence in the area of law under review.

Lawyering is about thinking closely and accurately. Thinking as a lawyer is a fundamental value of jurisprudential development. That means that one indulges in a mental process that involves analysis and synthesis. The logic of jurisprudence requires that a lawyer should be prepared to go through a mental process of thinking, which involves breaking of things and constructing them to come up with a legal or factual answer to a matter in dispute. To do so, one must know the rules of analysis to use.

The golden rule for any legal practitioner appearing in court proceedings to advance a client's case to bear in mind is that he or she must adequately prepare for the hearing. Jurisprudential development will not be assisted by legal practitioners who think that their duty entails picking up a file, putting the gown on and going to court without a clue as to what the case is all about. A lawyer should never put himself or herself in the embarrassing position of having to appear and acting like a disinterested observer in a case in which he or she is hired to provide the service of legal representation. The job of a legal practitioner is to persuade a court to adopt the position that is not just favourable to the client. He or she is an officer of the court, with the duty to assist the court to arrive at a correct decision that advances jurisprudential development.

There are legal practitioners who do not read judgments from the higher courts. Judgments coming out of the Superior Courts ought to be a legal practitioner's stock-in-trade. For lawyers to play their rôle in the development of jurisprudence in any branch of the law, they should first appreciate how important they are as a stakeholder in the proper administration of justice. Courts cannot hope to function efficiently and effectively

without an independent and efficient legal profession. The call for a legal profession that espouses the values of diligence and hard work is for the benefit of the Judiciary, which invariably works on material presented to it by litigants and their legal representatives.

The jurisprudence of a country is developed as a result of joint efforts of lawyers and judges, among other stakeholders. Both are instrumental in the development of law. Law is developed when it achieves the objectives for which it exists. More and more new areas are developing and the law needs to keep abreast with the changes. In order to understand some of these changes, it is imperative that we have regard to other jurisdictions that have tackled similar problems before. That entails diligence and hard work on the part of the legal profession. Jurisprudential development cannot be achieved on substandard performance. Its demands require the participation of a legal practitioner who stays abreast with international developments in topical legal issues involving fundamental human rights and freedoms.

An example is the fact that the international legal community is currently debating bioethics, stem cell research and other related issues that have arisen with the evolution of medical research. That is a source of a body of jurisprudence being developed as a result of scientific research and inventions. These developments are pregnant with questions that may give rise to disputes for resolution by the courts, as they implicate violations of fundamental human rights and freedoms enshrined in national Constitutions and international human rights instruments. While these issues are not as yet topical in Zimbabwe right now, there can be no doubt that they will be on our doorstep in the not-

so-distant future. There will be need for us to be prepared to answer the legal questions that would arise in these fields of law, taking into account our own political morality.

It has been said that a profession's fundamental claim arises from specialised expertise over a body of knowledge (law in this case) and it is this specialised expertise over the law which gives lawyers the exclusive rights to practise that knowledge of law.²² A legal practitioner is an officer of the court, meaning that he or she has an obligation to promote justice and the effective operation of the judicial system.²³ He or she is under a duty to be truthful with the court.²⁴ Beyond this, and more fundamentally, legal practitioners are agents of the law. Judges do not develop and shape jurisprudence without lawyers. Lawyers are critical in the process of jurisprudential development. Every lawyer must be concerned about the direction in which jurisprudence is developing. The judicial rôle is activated by live disputes brought before the courts. This is usually through lawyers. The arguments made by the lawyers, the quality of those arguments and the depth of their foundation in legal reasoning, philosophy of law and adequate preparation points to the direction jurisprudence is most likely to develop. So lawyers have the power to influence the direction of jurisprudence by presenting well-reasoned arguments.

We need bright lawyers who tap into world decisions and practices. We need lawyers who capture and tap into universal thinking and understand their rôle in

²² Lawyer Specialisation - Managing the Professional Paradox, Richard Moorhead, Professor of Law, Cardiff Law School, Cardiff University

²³ The Legal Dictionary dictionary.law.com/Default.aspx?selected=1385

²⁴ <http://www.nolo.com/dictionary/officer-of-the-court-term.html>

developing jurisprudence. Such lawyers are competent, diligent, visionary and devoted to professionalism.

Jurisprudential development must be a reflection of the content of the fundamental values of society, as contained in the Constitution and other laws of a country. As lawyers and members of the Judiciary bear the burden of interpretation and application of the values enshrined in the Constitution in a manner that usually has far-reaching impact on public interest, it is incumbent upon them to seek and obtain deeper knowledge of these values if they are to play their rôle as vanguards. Jurisprudential development is in a way an effective means of social development. Law has always been a means to be used to bring about social change.

Law affects all facets of people's lives. It is the use of the law which gives people hope. It is the misuse of the same which crushes people's dreams as a nation. One cannot divorce law from society because many of society's activities are governed by law. Any pursuit of social change inevitably involves engagement with the law at one level or another. In this sense, the law, where properly used and interpreted, is an instrument for social change. It is often the hard and novel cases that provide opportunities for jurisprudential development. Judicial decisions on cases that fall within what may be called the normal run of the mill cases usually apply existing precedent. They provide continuity and certainty in the law. They do not provide opportunities for jurisprudential development. A legal practitioner with an eye for the grey area of the law and has the courage to use genuine facts of a case to have the grey area of the law clarified on the basis of well researched legal arguments becomes an agent of jurisprudential development.

JURISPRUDENTIAL DEVELOPMENT - EXAMPLES

In the past few years, we have witnessed some changes in the way our courts have developed jurisprudence in this country.

The Constitutional Court in *Mudzuru and Another v Minister of Justice, Legal and Parliamentary Affairs and Another*²⁵ held that the new section 85(1) of the Constitution was a liberalisation of the narrow traditional conception of *locus standi*. What this means is that the approach to *locus standi*, which used to be narrow in the old days, has been liberalised, meaning that more people, including those who would otherwise not have had *locus standi* under the old legal regime, would now have *locus standi* to pursue various legal remedies.²⁶ In that case as well, the Court had opportunity to interpret the law in order to correct social ills that have caused untold suffering on our citizens. That judgment also highlighted the shift in the interpretation of our own constitutional provisions, more particularly in light of section 46 of our Constitution, as mentioned above. That section imposes upon a court a duty to have regard to international law that Zimbabwe is party to and foreign law as well. This buttresses the new way of thinking, by which the country acts in accordance with the universal values it voluntarily chose to subject itself to as standards of behaviour when it enshrined them in the new Constitution. This new approach allows the country to adopt international best

²⁵ CCZ 12/15

²⁶ Also see *Mawarire v Mugabe* CCZ 1/13

practices and use them in a way that enriches jurisprudence and promotes constitutionalism.

Another example of the development of jurisprudence in this country is the case of ***Madanhire & Another v AG***²⁷ wherein the Constitutional Court struck down section 96 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] as being in contravention of the provisions of the Constitution guaranteeing the right to freedom of speech. In doing so, the Court also relied on international law, more specifically jurisprudence from the international landscape, that is the UN Human Rights Committee and the African Commission on Human and Peoples' Rights. That judgment signalled the furtherance of the broad and liberal approach to the interpretation of provisions guaranteeing fundamental human rights and freedoms. That judgment was underpinned by the need to utilise the law to break the shackles that hindered journalists in the conduct of their business and free speech generally. Similar findings were made in ***Chimakure and Others v The Attorney-General of Zimbabwe***.²⁸

In ***Makoni v Commissioner of Prisons and Another***²⁹ the Constitutional Court had occasion to pronounce on prisoners' rights. The Court was confronted with a dispute arising from discriminatory laws which operated against prisoners serving life imprisonment sentences. The Court placed a lot of reliance on international law and recommended best practices to be adopted by the Government in dealing with the

²⁷ CCZ 2/14

²⁸ SC 14/2013

²⁹ CCZ 8/16

prisoners. The jurisprudential development has been directed towards the adoption of best international practices in the interpretation and application of fundamental human rights and freedoms. In the case of prisoners serving life imprisonment, regard was had to international human rights treaties having a bearing on the issue dealt with. In dealing with a number of human rights issues, it is important to have regard to international human rights law because most of the provisions in the Bill of Rights are based on the provisions of international human rights instruments.

Jurisprudence is founded on the interpretation and application of the provisions of the Constitution and other laws. But because the Constitution is the supreme law of the land, its provisions form the nerve centre for jurisprudential development. It is the Constitution which guides all lawyers on what is permissible and what is not. It is the Constitution which enables courts to decide matters in a certain manner. Courts can only develop jurisprudence to the extent that members of the Judiciary and the lawyers involved in particular cases understand the Constitution. The better all concerned understand the Constitution, the more improved will become the jurisprudence.

There are certain values that we need to live by if we are to develop jurisprudence. As lawyers we cannot develop anything if we are not disciplined as a profession. As lawyers, we need to prepare every time we have a court appearance. This is so because when one comes to court, one must be in a position to motivate one's own argument and try to convince the court to think in a particular way. In order to achieve the objective of developing jurisprudence, there is need to inculcate into the minds of lawyers good values such as honesty, integrity, hard work, vigilance and independence. By this I mean that the

development of jurisprudence should be the guiding principle and these values the necessary content of the predisposition for the implementation of the principle.

There are many things that one does not do as a serious lawyer desirous of playing his or her rôle in the development of jurisprudence. Lack of preparedness, inefficiency and lack of diligence are some of the things which stand as insurmountable obstacles in the way of development of jurisprudence. These vices are the bane of jurisprudential development. As antithesis to the conditions required for jurisprudential development, these practices need to be discouraged at all costs as a way of behaviour by legal practitioners.

I am constrained to say that the system is serviced by some lawyers who seem to have adopted and internalised the bad habits that constitute the antithesis of conditions for jurisprudential development. The wheels of justice need to be oiled by lawyers by means of well-prepared pleadings and arguments. Should that happen, the judges will then be in a position to deliver judgments more expeditiously. Lawyers should be “judges” in their own right. By this I mean lawyers should be in a position to prepare heads that a judge can simply turn into a judgment. If a lawyer does that, the judge will deliver the judgment expeditiously and, by so doing, aid the process of development of jurisprudence. Jurisprudence is seldom developed where judges have to reserve judgments for a year or more. Sometimes judges have no choice because they would have to do the original research themselves. A properly pleaded, well-researched and persuasively presented case is a pleasure to the court. It earns the legal practitioner the respect of the court even if the decision goes against his or her client’s case.

The legal profession needs to adapt to the changes taking place in societies the world over. In order to stay relevant, the profession needs to “up its game” and move with the times. Someone said the animals which survive are not necessarily the strongest but those which adapt to change. History teaches that very big and mighty dinosaurs used to roam the earth, but they are extinct now because they failed to adapt to the changes which happened around them. In this world of technological advancement almost on a daily basis, lawyers need to keep abreast with the trends. As such, the profession, including judges, needs to be familiar with the newer research tools like the internet and the various legal information centers hosted on the internet. It means the profession needs to invest in information communications technology. It might entail subscribing to some of the more prominent online platforms which have very useful information. Gone are the days when lawyers used to rely on physical libraries only. We need to invest in virtual libraries as well. I have no doubt that would improve our capabilities and help us all to achieve our desired goal.

SPECIALISATION

At this juncture, I wish to discuss the aspect of specialisation. I intend to talk about it insofar as it is a tool to develop jurisprudence. Specialisation affects depth of the knowledge of law, which is jurisprudence, positively. However, it does not help to push for specialisation until we have set a high bar of performance for ourselves. We need high standards first before specialisation. It does not help to have specialists in law whose standard of performance is mediocre. Mediocre specialisation equals no specialisation at all. It would not be a remedy to problems of jurisprudential development to have

specialists whose standards of performance are no better than those of general legal practitioners. It has to be a personal decision for each and every lawyer and a collective decision of the legal profession to set high standards and not accept performance and practice that falls below the standard of excellence.

Let us all develop that culture of always pursuing jurisprudential development. It is a philosophy of life, more than just a way of doing things. It must affect the first meeting you have with your client, to the first pleading you file in the court of first instance, to the notice of appeal you file with an appellate court. It affects the preparations you make before appearing in court and the quality of submissions you prepare to make before the courts. It is about the thought you put into answering every legal or factual question put to you in court. There is a pride you must carry as a member of a profession that is the custodian of the law. It comes with the honour of periodically arguing points of law and being part of the process that delivers justice to the society for whose benefit the law exists.

Specialisation is, however, an important part of jurisprudential development, as it affects the competence and depth of knowledge of jurisprudence. It has been said that:

“Legal specialisation has a direct, positive impact on attorney competence ... The result is that lawyers learn about their specialty in great depth, stay on the cutting edge of their profession, and improve their competence. The general competence level in the legal profession improves as more attorneys become certified and set a higher standard of competence for all members of the profession. The public

benefits because they can hire attorneys who are more knowledgeable about their practice area and who can therefore provide higher quality legal services.”³⁰

Specialisation is one of the most effective tools for development of jurisprudence. This is not to say that there are no potential difficulties that specialisation brings. It has been questioned whether or not it may lead to intolerable professional fragmentation or unethical practices by specialist lawyers. It improves competence of lawyers in certain areas of the law. The benefit is that when we have specialisation then all areas of law have adequately developed jurisprudence, as we have lawyers who are exceptionally knowledgeable in certain areas of the law. The jurisprudence will get better, especially as the new areas of law keep on emerging.

A lawyer who specialises in tax law, for example, is constantly on the lookout for amendments and repeals and is always monitoring international trends and jurisprudence in tax law. When such a lawyer represents a client before the courts, they are way past elementary knowledge of the subject area. Instead they inform the courts on developments in jurisprudence in other areas and the legal realities that enable such developments to be embraced. This is critical. Law needs to be understood at the practical and philosophical levels.

The benefits of specialisation are reaped by all in the profession, as they lead to efficient justice delivery. The world is evolving and every day there is a development of

³⁰ Attorney Specialization: Good for the Attorney, the Profession, and the Public, JUDGE KEVIN S. BURKE AND SUDHA RAJAN, 2012, Bench & Bar of Minnesota

international jurisprudence somewhere. Someone needs to stay abreast with such developments. In the pursuit of doing law of succession today, tomorrow tax law, the next day delict, and every other branch of law in the subsequent days, we sacrifice development of jurisprudence on the altar of busy practice if we are not keeping up with developments in law. At the rate of the evolvement of society and the law, there is need to ensure we maintain the self-sufficiency of our profession by staying relevant and keeping abreast with developments in the law.

Tied with the issue of specialisation is the issue of the proliferation of law firms. The question would be what is most compatible with jurisprudential development: many small law firms or fewer big law firms? The bigger law firms usually have more resources in legal literature. They often boast of a larger pool of legal minds to tap into when faced with complex matters. There is also the ability to specialise as there are many lawyers who become well versed with different areas of the law without worrying about the financial implications. The firms of two legal practitioners do not have that benefit. Between them the lawyers have to deal with a variety areas of legal matters to stay afloat financially.

Everyone needs to have a place in the universe of jurisprudential development. This is not the concern of the judge only but of all the stakeholders, because of the importance of the law and jurisprudence in society. To better understand the importance, it is critical to know how society views the courts, the law and the profession.

CONCLUSION

I must thank you once again for this opportunity you gave me to address you. I look forward to continuing to work with all of you for the collective good of jurisprudential development.

Thank you.