I invite you as judges for whom fairness is part of your DNA to apply a critical eye to consider how you can ensure that what you do gives effect to international human rights norms, even in the face of difficulties posed by the legislation and the Constitution; and, more than that, what you can do to encourage ratification of those instruments which have not yet been ratified and the enactment of appropriate legislation.

I am aware of the obstacles; but in inviting you to take a “can do” attitude, therein lays the challenge or dilemma.

Who’s afraid of Human Rights?
The Judge’s Dilemma

Fifth Distinguished Jurist Lecture 2015
by Dame Linda Dobbs, DBE
Who’s Afraid of Human Rights?
The Judge’s Dilemma
Who’s Afraid of Human Rights?  
The Judge’s Dilemma
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This year, the Judicial Education Institute of Trinidad and Tobago (JEITT) celebrated the fifth lecture in our annual Distinguished Jurist Lecture series. These lectures have been a priority of the Institute over the past five years for the necessary discussions that they evoke. Our past lectures and discussions have generated widespread debate, and we hope that this year’s dialogue will have similar effects.

The Distinguished Jurist Lecture 2015 was held in the Convocation Hall at the Hall of Justice, Port of Spain on May 13, 2015. Our Distinguished Jurist was Dame Linda Dobbs, D.B.E. Her lecture, “Who’s Afraid of Human Rights? The Judge’s Dilemma” was not only the first of its kind hosted by the Judiciary, but also a somewhat challenging one for the Judiciary family. In fact, it was a direct challenge to the Judges who might find their hands figuratively tied and are therefore unable to act in accordance with internationally accepted human rights standards. It was certainly a clarion call for Judges to play a greater part in promoting and defending fundamental human rights, if not a call to activism.

Dame Linda, a retired Judge from the United Kingdom, is no stranger to our local Judiciary, having made several presentations over the years. On this occasion, as she states, she wore neither a judicial nor a lawyer’s hat but rather one looking at the issues more as that of a devil’s advocate or an ‘informed observer’.

The lecture and the panel discussion that followed were an outstanding success. The lecture itself is divided into two parts – (i) the United Kingdom experience on human rights and a short history behind the introduction and the impact of the 1998 Human Rights Act (United Kingdom); and (ii) certain international human rights instruments that have been ratified by Trinidad and Tobago but opt-out provisions have been entered and some which have not been ratified by Trinidad
and Tobago at all. This latter category highlights the fundamental rights of certain classes of persons within Trinidad and Tobago which are not protected, due to the existing national legislation and Constitution being incompatible with fundamental human rights. Such a situation can and does create dilemmas for the Courts.

Dame Linda’s reference to the Human Rights Act 1998 in the United Kingdom, where for the first time United Kingdom judges were allowed to interpret human rights domestically, is both useful and informative. Where a Judge finds that the law is incompatible with Convention rights, he/she can make a declaration of incompatibility which would require Parliament to amend the law. The sovereignty of Parliament is retained but such a declaration could force its hand to amend. As we continue to talk about constitutional reform in Trinidad and Tobago, it may be that a similar mechanism could be useful if only to expedite an amendment to an offending provision.

Dame Linda’s recognition of four areas of the law where Trinidad and Tobago had not ratified certain human rights instruments at all, or had ratified certain instruments but with reservations, was compelling and she questioned the role of the Judge in not calling for total implementation. These areas are: capital punishment, corporal punishment, imprisonment of young offenders and sexual orientation.

It will serve us well to give considerable thought to her observations in our quest to achieve developed, as compared to developing, nation status. Dame Linda concludes by calling on Judges to find ways and means to ensure that effect is given to international human rights norms, even in the face of difficulties posed by legislation and the Constitution. She makes a bold and independent move by standing up before the heads of our legal and political systems within Trinidad and Tobago, insisting that they must play a greater role in having this state of affairs resolved so as to ensure that Trinidad and Tobago conforms to the imperatives of all basic fundamental rights.

A panel discussion on the afternoon of May 14, 2015 followed Dame Linda’s lecture. Our distinguished panellists were The Honourable
Madame Justice Maureen Rajnauth-Lee, Judge of the Caribbean Court of Justice; Dr. Francis Alexis, prominent Grenadian politician; Professor Rose-Marie Belle Antoine, Dean of the Faculty of Law at the University of the West Indies’ St. Augustine campus; and Professor Dylan Kerrigan, Lecturer in Cultural Anthropology and Political Sociology at the University of the West Indies’ St. Augustine campus. We are certain that reading their contributions will enhance and deepen your understanding of, and bring further insights to, the topic.

In retrospect, when the JEITT started this Distinguished Jurist Lecture series, we were unsure about its viability and whether it would have been sustainable. Not only have we been able to host it every year for the last five years, but it has become something of note both in the legal fraternity and in the Judiciary community. Admittedly, we continue to remain uncertain as to its impact in the national community and its effects on public discourse on the topics that have shaped the lectures and panel discussions. Nevertheless, we remain committed to continuing these Distinguished Jurist Lectures and to ensuring that they are made available to the widest national, regional and international audiences available. In this latter regard, the 2015 lecture was streamed live internationally via the world wide web, in addition to being televised and published in local media.

It remains our hope that through these lectures and panel discussions, the JEITT and the Judiciary of Trinidad and Tobago can continue to play its leadership role in informing and educating the public about current and relevant topics related to the administration of Justice in Trinidad and Tobago and in the region.

Justice Peter Jamadar JA
Chairman, JEITT
Justice Roger Hamel-Smith (Ret.)
Programme Director, JEITT
December 2015
General Introduction
Kelsea Mahabir

The Honourable The Chief Justice, Mr. Justice Ivor Archie.

Distinguished members of the Diplomatic Corps.

Our very distinguished speaker and special guest, The Honourable Dame Linda Dobbs.

Chairman of the Judicial Education Institute, Mr. Justice Peter Jamadar, Justice of Appeal.

Director of the Judicial Education Institute, Mr. Justice Roger Hamel-Smith, and other distinguished members of the Board of the Institute.
Other Justices of Appeal, Judges and Masters of the Supreme Court of Trinidad and Tobago.

Judges of the Caribbean Court of Justice.

Judges and members of the Superior Courts of Record here in Trinidad and Tobago.

Magistrates, Registrars and members of the Court Administrative Unit.

Members of the Media.

Distinguished ladies and gentlemen.

A very good evening again to one and all.

I am Kelsea Mahabir, the Research and Publications Specialist at the Judicial Education Institute of Trinidad and Tobago, but for this evening I am going to change my hat and wear the one of Master of Ceremonies to guide you through what we anticipate to be a most informative evening. This is the fifth time that we have gathered in this setting under the aegis of the Judicial Education Institute in furtherance of our objective “Transformation through Education.” This has been at the heart of this series of Distinguished Jurist Lectures, which we launched in 2011. These have all been highly successful ventures, as demonstrated not only by your attendance but by the excellent record we have been able to develop at the JEI.

As you may know, the JEITT has been in operation since April 2002, striving to uphold our mission “to promote excellence in the administration of justice in the Republic of Trinidad and Tobago through continuous training and development.” Since our inception, we have fulfilled this mission through our education seminars, workshops, publications, training programmes, and lectures such as this one tonight.

For the very first time, our Distinguished Jurist Lecture is being streamed live tonight to over 10 countries, from Bermuda and the Bahamas in the North, to Guyana and Suriname in the South and I take the opportunity here to welcome our audience in these wider Caribbean jurisdictions as we take advantage of the technology to connect with so many of our brothers and sisters in the wider Caribbean.

In the past, we have enjoyed lectures from highly esteemed jurists including Sir Shridath Ramphal, the Former Commonwealth Secretary
General, the Honourable Mr. Justice Adrian Saunders, Judge of the Caribbean Court of Justice, Sir Marston Gibson, Chief Justice of Barbados, and Dr. Leighton Jackson, Deputy Dean of the Faculty of Law at the University of the West Indies, Mona in Jamaica. This year, we are fortunate to have The Honourable Dame Linda Dobbs whose Distinguished Jurist Lecture will be on the topic: “Who’s Afraid of Human Rights? The Judge’s Dilemma”.

To formally introduce Dame Linda, I take great pleasure in inviting The Honourable Madame Justice of Appeal Judith Jones, member of the Board of the JEI.
Introduction of
Dame Linda Dobbs D.B.E

The very name the Honourable Dame Linda Dobbs D.B.E. BSc LLM PhD conjures up images of a different kind of person other than the gentle, well-mannered, seemingly unassuming but personable individual that some of us have been privileged to meet. But I certainly would not like to be on her bad side in Court. Hopefully after this introduction we will all be a little more familiar with the real Linda Dobbs.

Dame Linda, as I shall be calling her henceforth, did not start off with all of these accolades; she earned them, every single one. Born in Sierra Leone as simply Linda Dobbs, Dame Linda started off life as the daughter of a Sierra Leone mother and an English father, himself a High
Court Judge. As is sometimes the case with children of lawyers, despite her family’s expectations, Dame Linda entered academia not in law, as her parents hoped, but as a student of music at Edinburgh University.

Luckily for us that flirtation was short-lived. It is said that young Linda, recognising the exceptional talent of her peers, determined that to compete with them in the field of music would be an exercise in futility. Not being the type of person who would engage in futile endeavours, she soon moved on, thereby confirming the early signs of a determination and a drive to succeed that are the hallmarks of Dame Linda.

In keeping, perhaps, with her determination not to succumb too easily to her parents’ expectations, she entered into the realm of linguistic and regional studies. This field somehow, thankfully, led her to studying Russian and Law at the University of Surrey. From there it was plain sailing to a Master’s degree in Law at the London School of Economics and, just to ensure that she did not appear to surrender too soon to her parents’ ambitions for her, a doctorate in Soviet Criminology and Penology. No easy feat. But by now you will have realised that this is no ordinary woman.

Eventually, to the relief of her family, who by this time must have been wondering what next, young Linda sat the Bar exams and was called to the Bar in 1981. And there began a career at the Criminal Bar that culminated with Dame Linda in October 2004 being appointed the first, and so far only, non-white High Court Judge in the United Kingdom and one of only ten female High Court Judges.

While on her way to Judgeship, Dame Linda was a member of numerous committees, many of which are highlighted in your programme. In 1998 she was appointed Queen’s Counsel. At the time of her appointment to the bench, she held the post of chair of the Criminal Law Association and in that capacity, pursuant to her commitment to ensure equality and treating with diversity, established that Association’s first equality and diversity sub-committee.

As a Judge, Dame Linda was the senior Liaison Judge for Diversity and the Chair of the Magisterial Committee of the Judicial College. She has been named one of Britain’s most powerful black women and one of the 100 great black Britons.
But it is her work in education and with young people that is, to me, particularly laudable. She is the patron of two charities in South Africa that are concerned with education and do work with young people in the Townships. In keeping with her strong belief in service and in the world as a community, Dame Linda has embarked in pro bono training of young lawyers all over the world: from South Africa, where she has a home, to the Caribbean, where she is considered more like family than a friend.

A member of the Grey’s Inn advocacy project she has trained young lawyers the world over, including Trinidad and Tobago, in the dying art of advocacy. Her work with the Judiciary in Trinidad and Tobago has ranged from training on the use and delivery of oral judgements to being a member of the team working on a Train the Trainers pilot project between the Trinidad and Tobago Judicial Education Institute and the University College London.

In an interview with www.blackletterlawpublication.com, when asked if she were to choose another job or role other than what she was doing, what would it be and why? Dame Linda replied: “Trouble-shooting the justice system. A solid justice system is the bedrock for our rights and responsibilities.”

Dame Linda closed that interview with the answers to three questions. Permit me to quote them:

“What are you most passionate or happiest about?”—“Pro bono work. Good wine.”

“What are your dislikes/ makes you angry?”—“Injustice of any kind.”

“If you could rule the world for a day what would you change/do?”—“Empower the severely disadvantaged. Give them a chance to achieve.”

In 2013 Dame Linda retired early from the High Court to pursue various interests. With Dame Linda’s history, I personally cannot wait to see what develops.

Given the wide range of her experience and interests, can there be any doubt that we are in for a treat tonight. No, I take that back, from what we now know of Dame Linda, ‘treat’ is certainly not the correct word. If
Dame Linda runs true to form, and I am sure she will, do not expect the usual. Indeed the title of this lecture: “Who’s Afraid of Human Rights? A Judge’s Dilemma” serves only to confirm my suspicions. Sit back, but don’t get too comfortable — expect to be challenged!
It’s both an honour and great pleasure to be here today. It’s a great honour to be asked to give the Distinguished Jurist Lecture, and a great pleasure to return to Trinidad, which is almost becoming like my second home. I’d like to thank the Chief Justice, Justice Jamadar and the Board for inviting me.
Today, I am not wearing a judicial hat, nor am I wearing a lawyer’s hat. I am seeking rather to look at the issues as an “informed observer” and even as devil’s advocate. I go further therefore by suggesting this: In the pursuit of “developed nation” status by 2020, Trinidad and Tobago has to forge ahead with a changed outlook, looking forward and giving less deference to tradition and history. For example, in respect of the Judiciary, where it seems that Judges’ hands are tied and you feel that you cannot act in accordance with internationally accepted human rights standards, do you not as Judges have a duty to make your views known, not only through judgements (because sometimes the right case may not come along for years), but also by means of legal writings, opportunities at public events, and also submissions to Parliament?

The lecture is going to be divided into two parts. Because it is such a broad topic, I will of necessity have to be selective and deal with issues in summary fashion.

In Part One I will start with the United Kingdom experience with a brief overview of the history behind the introduction of our 1998 Human Rights Act; I will also look at some areas of law on which the Act has had an impact.

In Part Two I will focus on some of the international human rights instruments that have been ratified by Trinidad and Tobago, but opt-out provisions/reservations have been entered, and some of which have not been ratified by Trinidad and Tobago at all. I will look at four specific areas where national legislation has not yet changed and where arguably the fundamental rights of certain classes of people are not protected; areas that can create dilemmas for the Courts. The content of this part is intended to form the basis of the panel discussion tomorrow—with questions revolving around how Judges can best give effect to the letter and the spirit of the international human rights instruments where no specific legislative provisions exist or where the Constitution itself (being the supreme law) allows for exemptions which may arguably undermine international human rights norms. What can a Judge do if s/he thinks that the national legislation, the Constitution and authority are incompatible with fundamental human rights?
**PART ONE**

I have mentioned human rights several times. What do we actually mean by the term? Two primary categories of rights have been developed:

- civil and political rights; and
- social and economic rights.

The first category includes the right to liberty of the person, the right to form political parties and to participate in elections, rights to freedom of conscience, religion and expression and fair trial rights. These “first-generation rights” can be found globally in all documents purporting to set out human rights. Accordingly this is the category of rights which is usually being referred to when the term “human rights” is being used.

The second category contains rights such as the right to employment, health care, housing and income maintenance during periods of ill health, unemployment or old age. As a result of these rights being significantly more difficult both to define and enforce, fewer countries have made attempts to enshrine these rights in law in the same way that they do the former category. Furthermore, civil and political rights do not in general call for any additional resources to be provided for people to be able to enjoy them. On the contrary, economic and social rights will generally require some allocation or redistribution of resources.

**WHAT LED TO THE INTRODUCTION OF THE HUMAN RIGHTS ACT IN THE UNITED KINGDOM?**

(i) **From Magna Carta to ratification of the European Convention on Human Rights**

In 1215, Magna Carta introduced the human rights concepts of habeas corpus and trial by jury. This year marks the 800th anniversary of the document and because of that I am going to spend a little more time on it than I had originally intended, given that it is credited with being the forerunner to the development of human rights in the United Kingdom.

Magna Carta Libertatum was sealed on June 15th at Runnymede, some 20 miles from London, in 1215. It came about because King John of England found himself in a very vulnerable position. He had no money. The
Church wanted independence; King John had surrendered his kingdom to the Pope, Pope Innocent III. King Philip Augustus of France was eying up the English throne for his son Louis and King John's rebellious barons had formed an association to air their grievances against the King. The barons had captured the City; the King, thinking that he could bribe his way out of the fix, gave the City of London its charter for free, having previously refused to do so unless he received a substantial payment. He thought this would bring the city onside. He was wrong. Thousands of French soldiers landed in England, welcomed by the barons and eventually received into the City. There was revolt in the air. King John realised that he was in a tight corner.

At Runnymede, on June 15th, 1215, King John was presented with a document drawn up by the barons setting out their demands. The demands were as much about commercial rights as they were about trial by one's peers. There were men bearing arms on both sides who were ready to fight nearby. Outrageous though King John may have found the demands, he was in no position to bargain. However, he had little intention of abiding by the Charter. He sealed it because he had no choice. Once Pope Innocent III got wind of the Magna Carta, urged by King John he annulled it, declaring it illegal as having been sealed under duress.

The context in which it came into being is important, as it was sealed not as a document of lofty ideals and aspirations on behalf of the king, or selflessness of the barons, but as a way to avoid civil war (which, in the end, it did not); and, in the case of the barons, pure self-interest. Despite this, it is said to represent the symbol of our liberties. Lord Denning described the Magna Carta as “the greatest constitutional document of all times—the foundation of the freedom of the individual against the arbitrary authority of the despot.”

Magna Carta has influenced other constitutional documents worldwide. The US 1791 Bill of Rights includes several of the ideas; due process of law was elevated into a constitutional right in the Constitution of the US. In 1948 Mrs Eleanor Roosevelt, speaking at the UN General Assembly about the UN Universal Declaration of Human Rights, said this:

“We stand today at the threshold of a great event both in the life of the United Nations and in the life of mankind. This declaration may well become the international Magna Carta for all men everywhere.”
Magna Carta has an additional significance. The Bill of Rights, an Act of Parliament passed on December 16th, 1689, laid down limits on the powers of the crown and set out the rights of Parliament, including the requirements for regular parliaments, free elections and freedom of speech in Parliament. It also set out rights of individuals and, I stress, the prohibition of cruel and unusual punishment. It should be noted that this Bill was one of the inspirations for the United States Bill of Rights, to which I have already alluded. Our Bill of Rights, taken together with the Magna Carta, the Petition of Right, the Habeas Corpus Act 1679 and the Parliament Acts 1911 and 1949, forms part of our un-codified British Constitution.

Now I’m going to make another confession, because having read in more detail about the circumstances in which the Magna Carta came about, I wondered how it came to attract such accolades. I then read an interesting talk by Lord Sumption given to the Friends of the British Library in March of this year. He pointed out that historically, there have been two schools of thought about Magna Carta. The first he called the “lawyer’s view”, which is, as I have already described to you, that the Charter is a major constitutional document, the foundation of the rule of law and the liberty of the subject in England. The other is the “historian’s view”, which has tended to emphasise the self-interested motives of the barons and which has generally been sceptical about the Charter’s constitutional significance.

Lord Sumption observed that there are obvious reasons why lawyers should have taken the lead in extolling Magna Carta, because there have been periods in our history when law has acquired an intensely ideological flavour. He said this:

“English law has a long, distinguished and comparatively unbroken history. Its practitioners have a natural tendency to legitimise their ideals by asserting their antiquity. But they have, on the whole, been bad historians. This is because, with a few honourable exceptions, they have treated the history of law as a self-contained and self-sufficient discipline based almost exclusively on the study of legal texts. They have been much less interested in the social and cultural context in which law is made. Yet, like any system of customary law, English law has adapted itself to reflect the values of each successive generation. Manifestly, the values of the early thirteenth century were not the same as our own”.

He then went on to identify the writers of legal texts who he submitted were responsible for inventing the myth of the Magna Carta, citing Sir Edward Coke as the chief exponent of the myth.

Historians, Lord Sumption said, were once content to adopt the myths of the lawyers. It was not until the beginning of the twentieth century he said that historians dared to suggest a more sceptical view with some famous articles and essays on the myth of Magna Carta.

Lord Sumption then went on to put Magna Carta into its historical context to demonstrate why he took this view. He accepted that the Magna Carta stands for the rule of law, but argued that it was not true that Magna Carta was the origin of the principle. He said:

“The idea that the King was subject to law had, for a very long time, been part of the orthodoxy of medieval constitutional thought both in England and elsewhere. The barons did not invent it at Runnymede. Their object was to define what the law was. No one doubted that whatever it was, the King was subject to it. So why do we single out Magna Carta as the origin of the rule of law. We might equally have celebrated the 800th anniversary of the coronation charters of Henry I, King Stephen or Henry II, if we had thought of it in time. The answer is that what was special about it, was not the ideas which it embodied, which were perfectly conventional, but the dramatic circumstances in which it came into existence.”

Lord Dyson, Master of the Rolls, without naming names, in a lecture at the Law Society on April 22nd, said this:

“There are those who seek to debunk Magna Carta, at least to the extent of insisting that it be examined in its true historical context… It is remarkable that a treaty extracted from a feudal king by the barons ‘at the point of the sword’ would have such a powerful and enduring influence on constitutional development in England, the United States and the common law world and beyond… It expresses an idea that retains its vitality and relevance in the 21st century. This idea, as described by Sir Winston Churchill, is the ‘sovereignty of the law’ as protection against attempts by governments ‘to ride roughshod over the rights or liberties’ of the governed.”

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The British common law, as developed by the Courts, recognised concepts relating to human rights long before the European Convention of Human Rights: for example, the right to personal security and liberty, private property, freedom of discussion, and assembly. However, the incremental development of the common law to protect rights proved languid and unsatisfactory. This was especially so in a legal landscape where Parliament had been known to pass legislation which seeks to remove fundamental rights, or propagate discriminatory practices. For example, the Commonwealth Immigrants Act 1968—passed to stop British passport holders in East Africa who were fleeing persecution in their home countries coming to the United Kingdom—was found to be motivated by racism by the European Commission of Human Rights in the more commonly known as the “East African Asians’ case”.

The importance of human rights for all was etched into the minds of people across the world with the horrors of World War II and its atrocities. In the war’s aftermath, the international community framed new covenants, explicitly enshrining universal human rights to try to ensure that such atrocities would never occur again. Leaders from Western countries called for the creation of a European organisation that would promote and ensure democratic values such as the rule of law and human rights.

The outcome of those international discussions was the creation of the Council of Europe in 1949, the European Convention on Human Rights in 1950 and the European Court of Human Rights in 1959. The United Kingdom government signed the Covenant in 1950 and was the first country to ratify the European Convention on Human Rights in 1951. It recognised the right to bring claims in the European Court of Human Rights in 1966.

(ii) From ratification to incorporation of the European Convention on Human Rights

Despite the United Kingdom government having been the first country to have ratified the European Convention on Human Rights, it was one of the last of the member states to have incorporated it into their domestic law. For decades it was feared that incorporation of the European Convention on Human Rights would irreparably harm the constitutional doctrines of parliamentary sovereignty and separation of powers between the Executive
(the Government), Legislature (the Parliament) and the Judiciary (the Courts). Over the past fifty years or so, those views on incorporation have gradually changed, as it was realised that the common law safeguards for human rights were inadequate.

In 1968 Anthony Lester (now the Liberal Democrat peer Lord Lester QC) published a pamphlet, “Democracy and Individual Rights”, which called for incorporation of the European Convention on Human Rights. In 1974 Sir Leslie Scarman (later the cross-bench peer Lord Scarman) wrote of the need for an instrument to challenge the sovereignty of Parliament and to protect basic human rights that could not be adequately protected by the legislature alone. Scarman was in favour of entrenchment. He believed that only by making a Bill of Rights superior to Parliament could such fundamental rights be protected.

The House of Lords set up a select committee in 1978 to inquire whether to introduce a Bill of Rights. There was further consideration of the issue, but it was not until the Labour Party Conference in October 1993 that a two-stage policy supporting the incorporation of the European Convention of Human Rights, to be followed by the enactment of a domestic Bill of Rights, was adopted. Lord Lester of Herne Hill continued his human rights work in the House of Lords by introducing a bill in November 1994. The bill did not receive support from the Conservative government. Particular aspects of the proposed bill were criticised by the Law Lords, but significantly they supported incorporation in so far as it allowed United Kingdom Judges to interpret human rights domestically.

In December 1996, a consultation paper was published, entitled “Bringing rights home”, setting out the Labour Party’s plans to incorporate the Convention if it won the election in 1997. When the Labour Party won the election, the government introduced the Human Rights Bill into Parliament in November 1997. Jack Straw, the then Home Secretary, at the second reading of the Human Rights Bill, emphasised the purpose of the Human Rights Act, namely a practical one of “bringing rights home”. It was to enable people in the United Kingdom to bring a human rights claim without having to go to the unnecessary expense and delay of bringing proceedings in the European Court of Human Rights. At that point it took approximately five years and cost £30,000 for a claim to reach the
European Court of Human Rights after exhausting all domestic remedies. The Human Rights Act was a means by which people could secure access to justice in British Courts. The Bill received Royal Assent in November 1998 and it came into force in October 2000.

**How is the Human Rights Act enforced?**

The British constitutional model is a largely unwritten one in which the concept of parliamentary sovereignty is paramount. This means that Parliament can alter any law—there is no legal distinction between constitutional and other laws. Moreover, no judicial authority has the right to strike down an act of Parliament or to treat it as void or unconstitutional.

The Human Rights Act adheres to the concept of parliamentary sovereignty, therefore it is not possible for United Kingdom Courts to declare void any legislation where it breaches Convention rights. However, there are two mechanisms available to the Courts. Courts are firstly required to interpret legislation compatibly with Convention rights “so far as is possible to do so”; this is known as “strong” interpretation or the “purposive” approach. Secondly, where the senior Courts cannot interpret legislation compatibly with Convention rights, they can make a declaration of incompatibility. This is considered to be a remedy of last resort. Declarations from the lower Courts can be appealed. Once the Supreme Court issues a declaration of incompatibility, it remains for Parliament to decide what action to take. I am not aware of any declarations of incompatibility that have not been followed by amended legislation. The model is said to create a dialogue between the Courts and Parliament.

What rights are incorporated from the European Convention on Human Rights by the Human Rights Act?

- Article 2 – right to life
- Article 3 – protection from torture and other inhuman and degrading treatment
- Article 4 – freedom from forced labour
- Article 5 – right to liberty
- Article 6 – right to fair trial
- Article 8 – respect for privacy
• Article 9 & 10 – freedom of thought and expression
• Article 11 – freedom of peaceful assembly
• Article 1, Protocol 1 – right to peaceful enjoyment of possessions
• Article 2, Protocol 1 – right to education

**How did the Human Rights Act affect lawyers and Judges and what changed?**

Before I look at what changed post-Human Rights Act, it should be noted that pre-Human Rights Act the United Kingdom’s record in the European Court of Human Rights was not one to be particularly proud of pre-Human Rights Act. Cases in which the United Kingdom was held to be in breach of the Convention included cases about conditions of detention and treatment of suspected IRA detainees in Northern Ireland; these were not uncommon. It also included the law of phone tapping; the holding that the ban of the employment of gays and lesbians in the armed forces was unlawful; and many others.

The most immediate way in which the Human Rights Act affected lawyers and Judges was that we all had to undergo training on the Act and the European Convention, and that was compulsory. For those civil rights and public law lawyers and possibly those who did European law, it was nothing really new. For the rest, it was a steep learning curve. Who was afraid?—A lot of people. Afraid of what? From the lawyers’ perspective, it was how to present human rights arguments. I was one of the lecturers for the Bar training. It consisted of a series of lectures on the Convention and the Act. There was no practical application of what was learnt so the issue of what a human rights argument might look like was not really addressed. That may have had more to do with the kind of training one received in those days. Today it would be very different.

For the Judges it was a similar course of lectures. For the Magistrates, however, there was some practical work to be done. For the first time, Magistrates were obliged to give reasons for their decisions as article 6 of the European Convention on Human Rights provided a right to a reasoned judgement. I recall conducting a day’s workshop with some Magistrates in London on giving reasons. Our lay Magistrates had been used to saying
after trial—“we find the case proved”—then passing sentence. To have to articulate reasons for their conclusions caused great consternation, fear and anxiety. The dilemmas facing them had more to do with what we would refer to now as “unconscious bias”, there being a tendency to always accept the evidence of the police officers. With time they came to realise that the giving of reasons actually helped them with their decisions. Today, they would not even remember that fear and anxiety as giving reasons is second nature.

In the criminal sphere in which I practised, the reality is that not that much changed certainly so far as the law was concerned. The enthusiastic amongst us would produce European Court judgements during our legal arguments, knowing deep down that, with some exceptions, it would make little difference to the expected outcome of the argument. The dilemma of the Judges was how much weight to give to European Court judgements; however the dilemma did not last long. Mostly, Judges would repeat the mantra—“I have taken into account the Convention authorities” with no analysis and then would carry on as normal.

I remember doing a case shortly after the Act came into force. I was defending a man accused of serial rape of about six or seven victims. It was a hopeless case. I was in front of a senior Judge who had the reputation of being very pro prosecution and a Judge who pulled faces, made comments, and made his view of the case perfectly clear to the jury. I had never been before this Judge before but his reputation was legendary. He acted true to form in my case. I tolerated him repeating every word the victims said when they were giving their evidence, but when my client went into the witness box I decided it was time to stand up to the Judge. Why? Because he had put his pen down, turned away from the defendant, turned his seat toward the jury and was looking at them and pulling faces as my client gave his evidence. So I stood up and availed myself of the Human Rights Act and the European Convention on Human Rights and the fair trial provisions. In short, I pointed out that these instruments guaranteed the defendant a fair trial and that he was not receiving one. Now, the Court of Appeal had criticised counsel for coming up to appeal and complaining about what the Judge did but not having complained to the Judge in the Court below, so usually those kinds of appeals failed. So I thought, well I’ll spell it out, so I did. I put it on record and set out everything the Judge had been doing.
You could have heard a pin drop. The Judge went ashen. The prosecuting lawyers could not believe their ears and the ushers were highly amused. However, it backfired on me because the Judge then got hold of a transcript of the defendant’s evidence, and when it came to summing up, he did a summing up which was the fairest he had ever done in his life. The client (surprisingly) was acquitted of some of the charges so the chances of a successful appeal were very slim. But in actual fact, the reality of the matter was that I did not need to allude to the Human Rights Act or the European Convention on Human Rights. I could have just dealt with it on the simple grounds of fairness and the Judge’s duty of impartiality. However, the newness of the Act in that case definitely had its effect!

I have said that little changed in the criminal sphere, and that is true; the impact being felt more in other areas. However, one example in criminal law was the setting of the life tariff by the Home Secretary. So, the Judge would pass a sentence of life imprisonment but it would be the Home Secretary that set the tariff—the executive. This was found to be incompatible with the Convention and the tariff is now set by the sentencing Judge. Let me give some examples of other areas of law. One is prison law, where disciplinary hearings within prisons have to be adjudicated by impartial Judges rather than the prison authorities, given the right to an independent and impartial tribunal. Prisoners were for the first time entitled to be represented at the adjudication of their disciplinary proceedings due to fair trial provisions.

Other examples include:

- Changing the Rent Act to give equality to same sex couples regarding statutory tenancies;
- Certain provisions of the Mental Health Act 1983 were found to be incompatible with Article 5 as they did not require a mental health review tribunal to discharge a patient where it could not be shown that the patient was suffering from a mental disorder;
- Under anti-terrorism law, detention without trial of foreign nationals was found to be discriminatory;
- The safeguarding of service personnel—the Supreme Court held that soldiers operating overseas enjoy the protection of the Human Rights Act since they are within United Kingdom jurisdiction, being subject to United Kingdom authority and control; and
• The age for consenting heterosexuals and homosexuals was made the same (Sexual Offices Amendment Act 2000).

Whilst much of our legislation was human rights compliant, there is no doubt that the Human Rights Act had the effect of “upping our game”. All public authorities have to act compatibly with the Convention; it is a civil wrong not to do so. The Courts are expressly included in the definition of “public authority” and this includes not just what happens in Court, but what happens behind the scenes as well. Any new Act has to have a certification that it is Convention compliant, meaning that the legislature has to think about it. Having said that, in practice, this seems to be no deterrent to Parliament passing inadequately considered legislation such as the 2001 Anti-Terrorism Crime and Security Act.

Adverse findings by Strasbourg against the United Kingdom have also dropped significantly. In 2015 the United Kingdom lost only four out of 2,997 cases brought against it and lodged at Strasbourg. Perhaps the biggest change was one of culture within public authorities and policy makers who had to think more deeply about such issues to ensure that proper transparent and accountable policies and procedures were in place.

Sadly, and this is hot off the press, the progress we have made may be under threat. Yesterday in the press, there were two announcements in relation to human rights in the United Kingdom. The first was a report showing that the United Kingdom was the number one country in Europe so far as equality legislation for lesbians, gays and transgenders; something to be proud of, but which was scarcely noticed in the wider press. Secondly, that the new Lord Chancellor—another non-lawyer, like his predecessor—was to press ahead with the scrapping of the Human Rights Act and the introduction of a Bill of Rights and Responsibilities.

This announcement follows the pledge in the Conservative election manifesto. This pledge being, many would say, a knee-jerk reaction to a handful of decisions made by Strasbourg, such as on voting rights for prisoners and whole life tariffs, which the Conservatives didn’t like. Plus a reaction to the right-wing media protests that foreign criminals were not being deported, and this was based on a handful of notable cases. The then Attorney General, Dominic Grieve QC, a senior and very well-respected lawyer, counselled against the proposals, which are notoriously vague. He pointed out that they were unworkable. He was fired. The rationale, says
the government, is to break the link between the British and Strasbourg Courts, and make our own Supreme Court the ultimate arbiter of human rights in the United Kingdom. Having read the proposal document, it shows a profound lack of understanding of the law and fails to take into accounts some European Union law and powers which could make the proposal difficult. But it’s not only Europe that the government will have to worry about. Conservative backbenchers, the Labour party, the Liberal Democrats, the SNP, Plaid Cymru, the Greens, and the House of Lords, and let’s not forget Northern Ireland, all will be against this proposal.

The Chief Commissioner of the Northern Ireland Human Rights Commission has described the proposals as deeply concerning. The Northern Ireland Human Rights Organisation has said the proposals will break the Good Friday Peace Agreement of 1998, which committed the Government to incorporate the European Convention of Human Rights into Northern Ireland law with direct access to the Courts and remedies for breach. Now, I have to make one observation—the authors of these proposals clearly hadn’t read the scholarly document written by two Conservatives, published by Liberty in 2009, called Churchill’s Legacy: The Conservative Case for the Human Rights Act, which debunks, with proper analysis, the Conservative’s objections and makes the case that both the Convention and the Human Rights Act are essentially Human Rights documents. So I suppose I could say watch this space.

So, we move on now to you.

**Part Two**

What has Trinidad and Tobago done in respect of implementing its international human rights obligations and espousing international human rights norms? I am going to concentrate on a number of international human rights instruments which Trinidad and Tobago has either ratified, but with reservations, or has not ratified at all in relation to four areas: capital punishment, corporal punishment, imprisonment of young people and sexual orientation.

The International Covenant on Civil and Political Rights 1996 (plus two optional protocols) is relevant to all the four topics to be considered. It commits its parties to respect the civil and political rights of
individuals, including the right to life, the right not to be subjected to torture, inhuman and degrading treatment or punishment, freedom of religion, speech, assembly, electoral rights, rights to due process and a fair trial and the prohibition against discrimination. The Convention came into force on 23 March, 1976. Trinidad and Tobago deposited its instrument of accession on 21 December, 1978. Reservations were entered. I touch on only one of them: where at any time there is a lack of suitable prison facilities, the Government of the Republic of Trinidad and Tobago reserves the right not to apply article 10 (2) (b) and 10 (3) so far as those provisions require juveniles who are detained to be accommodated separately from adults.

The two optional protocols are relevant to the issue of capital punishment.

**First Optional Protocol to the International Covenant on Civil and Political Rights (Human Rights)**

This established an individual complaint mechanism for the International Covenant on Civil and Political Rights. Trinidad and Tobago deposited its instrument of accession on 14th November, 1980 but entered a reservation to Article 1 to the effect that the Human Rights Committee shall not be competent to receive and consider communications relating to any prisoner who is under sentence of death in respect of any matter relating to his prosecution, his detention, his trial, his conviction, his sentence or the carrying out of the death sentence on him and any matter connected therewith. The UN Committee on Human Rights decided that the reservation was destructive of the main thrust of the protection and ruled that it had no effect. (Rawle Kennedy, UNHRC 2.11.99). So, this Optional Protocol was denounced by Trinidad and Tobago in June 2000.

**Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty**

This Protocol says that a State Party will not execute anyone in its jurisdiction and will aim to abolish the death penalty. The Protocol was adopted and proclaimed by General Assembly resolution 44/128 of 15 December 1989. Trinidad and Tobago has not signed, ratified or acceded to it.

**Convention against Torture and Other Cruel, Inhuman or**
Degrading Treatment or Punishment 1984

This Convention is relevant to the issue of corporal punishment. It aims to ‘make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world’. The Convention came into force on 26 June, 1987. Trinidad and Tobago has not signed, ratified or acceded to it.

Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The objective is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment. This Protocol came into force on 22 June, 2006. Trinidad and Tobago has not signed, ratified or acceded to it.

On a regional level, the relevant human rights instrument is:


Trinidad and Tobago denounced this treaty on 26 May, 1998 and re-ratified it with the proviso that it did not apply to death penalty cases. The underlying reasoning for the denunciation was based on the decision of the Judicial Committee of the Privy Council in Pratt and Morgan v. Attorney General for Jamaica (2.A.C.1, 1994). The Judicial Committee decided that strict guidelines must be observed by States in the hearing and determination of appeals from convicted murderers who have been condemned to death. In any case in which execution was to take place more than five years after the sentence of death there would be strong grounds for believing that the delay was such as to constitute “inhuman or degrading punishment or other treatment”. A State that wished to retain capital punishment must accept the responsibility of ensuring that execution followed as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve. Capital appeals must be expedited. The aim should be to hear capital appeals within twelve months of conviction. It should be possible to complete the entire domestic appeal
process (including an appeal to the Privy Council) within approximately two years. It should be possible for the International Human Rights bodies, such as the United Nations Humans Rights Committee and the Inter-American Commission on Human Rights, to dispose of complaints to them in death penalty cases at most within eighteen months.

The Government of Trinidad and Tobago’s justification for denouncing the treaty ran as follows: the effect of the decision of the Judicial Committee of the Privy Council in the case of Pratt and Morgan is that, notwithstanding the fact that the death penalty is the punishment for the crime of murder in Trinidad and Tobago, inordinate delay in carrying out the death penalty constitutes cruel and unusual punishment and is accordingly a contravention of section 5(2)(b) of the Constitution of Trinidad and Tobago. The Government had to ensure that the appellate process is expedited by the elimination of delays within the system in order that capital sentences imposed in accordance with the laws of Trinidad and Tobago can be enforced. The Attorney General and Minister of Foreign Affairs, as representatives of the Government of Trinidad and Tobago, met with the Assistant Secretary-General of the Organisation of American States and with the Inter-American Commission on Human Rights to present the problems facing Trinidad and Tobago in complying with the timeframes laid down by the Judicial Committee of the Privy Council for the consideration of petitions by the International Human Rights Bodies in capital cases. The Attorney General sought the cooperation of the Commission in implementing the relevant timeframes for completion of the consideration of petitions to the Commission in capital cases so that the mandatory sentence of death for convicted murderers could be carried out within the time limits.

The Commission indicated that whilst it was sympathetic to the problem facing Trinidad and Tobago, it had its own established procedures and was unable to give any assurances that capital cases would be completed within the timeframe sought. So, Trinidad and Tobago said that they couldn’t allow the inability of the Commission to deal with applications in respect of capital cases expeditiously to frustrate the implementation of the lawful penalty for the crime of murder in Trinidad and Tobago. So, it would be the Court of Trinidad and Tobago who would determine the fates of somebody convicted for murder. The Inter-American Court of Human Rights declared
that the denunciation had no effect on the Court’s jurisdiction over events which took place before the denunciation took place (Hilaire v T and T IACHR 21.6.02).

Turning to the issue of imprisonment of young persons, there are a number of provisions that are relevant. There are specific provisions concerning children and young persons and rules and principles for the treatment of prisoners generally.


The United Nations Convention on the Rights of the Child is a human rights treaty which sets out the civil, political, economic, social, health and cultural rights of children. It came into force on 2 September, 1990. Trinidad and Tobago signed the convention on 30 September, 1990 and later deposited the instrument of ratification on 5 December, 1991.

The UN Rules for the Protection of Juveniles Deprived of their Liberty 1990

These rules relate to young people under the age of eighteen. They address their treatment from arrest to detention, noting that deprivation of freedom should be a last resort. The rules seek to serve as a minimum standard for the protection of juveniles without discrimination while trying to counteract the detrimental effects of detention and fostering integration in society. They were adopted by General Assembly Resolution A/RES/45/113 on 14 December 1990. The resolution invites member states to adapt national legislation to the spirit of the rules.

The Basic Principles for the Treatment of Prisoners 1990

These basic principles address the treatment of prisoners with respect for their human dignity, and exposure to activities for the full development of their human personality. The principles were adopted and proclaimed by General Assembly resolution 45/111 of 14 December, 1990.

The Body of Principles for the Protection of all Persons under Any
Form of Detention or Imprisonment 1988

These principles seek to set out and protect the rights of all persons under any form of detention or imprisonment. Such persons are to be treated in a humane manner with respect for the inherent dignity of the human person. The principles were approved by General Assembly Resolution A/RES/43/173 on 9 December, 1988.

THE FOUR AREAS

Well, that is the background. Let us now look at some specific examples where legislation has lagged behind international human rights standards and, in some cases, created anomalies. As already noted, the headings are: capital punishment, corporal punishment, imprisonment of young people and sexual orientation (homosexuality). This is not an exclusive list; there are other examples, but time does not allow us to go through them all.

CAPITAL PUNISHMENT

It is right to point out that Article 6(2) the International Convention on Civil and Political Rights does recognise that some states have not abolished the death penalty, but states that such a penalty can only be imposed for the most serious of offences. Your Constitution is consistent with that position therefore. However, in light of the Optional Protocol, even though it has been denounced by Trinidad and Tobago, this should not be a source of complacency. Apart from the obvious question of why the death penalty is still extant, given that there have been no executions since 1999, there are a number of issues on the present law which bear discussion.

As you will know, the definition of murder is the same as in the United Kingdom— namely that there has to be an intention either to kill or cause serious bodily harm. The lesser intention is sufficient to justify a death sentence. The Court has no discretion; it has to pass the mandatory death sentence, so much is clear from the case of Matthew v. State of Trinidad and Tobago (2004 UKPC 33). For the purposes of sentence in the United Kingdom, an intention to kill is considered to aggravate the offence. So one question is: Can it be right that a person should be sentenced to death when their intention was not to kill? Is it fair that a person who commits a heinous murder is sentenced to the same punishment as someone who has
committed a less serious one? Depending on the facts, does the punishment fit the crime?

The Privy Council in the case of Daniel v State of Trinidad and Tobago (2014 2AER 461) re-iterated that the mandatory death penalty constitutes cruel and unusual punishment and is inconsistent with sections 4(a) and 5(2)(b) of the Constitution (see Matthew 2004a). The validity of the mandatory death penalty is preserved by section 6 of the Constitution because the law of murder was an existing law. Daniel was a case of felony murder in which the Privy Council held that, because the relevant section was not existing law at the time of the Constitution coming into force, the mandatory death penalty did not apply. One only has to pause to think about it— depending on the facts and the circumstances, a felony murder could be far more serious (as for example the facts of the case of Daniel) than a straightforward murder and even though Judges have a discretion in the former to pass a sentence of life imprisonment or the death penalty, there is still the potential for anomalies.

When I was reading the law and the cases I was surprised. Has nobody done something about this, I asked myself? A little more research showed that in fact there had been some attempts to mitigate— not eliminate— the circumstances in which the death penalty could be passed. There was the Offences against the Person (Amendment) Act 2000 where only certain types of murder known as Murder 1 (aggravated murders such as murder of police officers, judicial officer in furtherance of another crime etc. would attract the death penalty. Murder 2 would be where there was a previous conviction for murder. As far as I know it was never implemented.

In 2011, The Constitution (Amendment) (Capital Offences) Bill was tabled in Parliament to categorise murder. This required an amendment to the Constitution which needed a three quarter majority in the House of Representatives and two thirds majority in the Senate. The necessary majority was not achieved, so the bill failed. Is it not time that the Judiciary help galvanise the necessary majority needed to repeal the death penalty by making a case for its abolition, given the anomalies, the fact that nothing has happened since 1999 and given that the Privy Council has declared the death penalty to be cruel and unusual punishment?

The effect presently of the death penalty is that those convicted of
murder are sentenced to death, yet the death penalty is not being carried out. They sit in prison with this sentence over their head, their time in prison exceeding the period that the case of Pratt and Morgan found amounts to inhuman and degrading treatment; moreover, there is no certainty. That cannot surely be right?

Another issue arises from the denouncement of the First Optional Protocol, the effect of which is that a person sentenced to death in Trinidad and Tobago is, unlike many other jurisdictions, deprived of the opportunity to present his case to the Human Rights Committee. Does this not compound the unfairness? Is this not a case where the Judiciary should be calling for the Protocol to be adopted?

**Corporal Punishment**

The Corporal Punishment (Offenders over Eighteen) Act 1953 makes provision for a sentence of corporal punishment of up to twenty lashes to be imposed in addition to any other punishment to which the offender is liable for certain serious offences—mainly offences of violence where injury was caused as well as cases of rape and incest. It pre-dates the Constitution.

Rule 272 of the Prison Rules makes provision for a punishment of corporal punishment in certain cases where the male prisoner is under sentence of hard labour. The maximum number of lashes is 24.

The European Court of Human Rights had no hesitation in concluding that judicial corporal punishment which was being carried out on the Isle of Man was degrading punishment under the European Convention on Human Rights (Tyrer v United Kingdom 1978 2 EHRR 1).

Corporal punishment as a judicial sentence was abolished in England and Wales by the Criminal Justice Act 1948 and corporal punishment in prisons by the Criminal Justice Act 1967. We are not alone.

The Namibian Supreme Court has declared that sentences of corporal punishment by a judicial or quasi-judicial authority or corporal punishment in state schools is unlawful, confirming that such treatment is inhumane and degrading punishment for the compelling reasons which it set out (Ex A-G of Namibia: In re Corporal Punishment by Organs of State 1992 LRC (Const) 515).

A similar approach has been taken in South Africa.
The European Court found that corporal punishment in state schools could amount to degrading treatment or punishment and the Education Act of 1986 led to the statutory abolition of corporal punishment in state schools (Campbell and Cosans v United Kingdom 1982 4 EHRR 293). A case involving a private school was brought a decade later with the same result (Costello-Roberts v United Kingdom 1993 19 EHRR 112). The Education Act of 1996 abolished corporal punishment in both state and private schools.

In Winston Caesar, the Inter-American Court of Human Rights declared that flogging with a cat-o-nine tales was cruel and inhuman and amounted to torture if the prisoner was made to witness its effect on other prisoners before being flogged himself. Trinidad has ignored the decision.

It is said that corporal punishment is rarely used as a sentence or as a punishment today. But why is the Act still on the statute books? We know from your local press that there have been reports of violent beatings in prisons and one of your Judges referring to the conditions in prison referred to them as cruel and inhuman. Taking these clearly inappropriate punishments from the statute books is one step in the direction of sending out the message that corporal punishment in any form will not be tolerated.

So far as corporal punishment of children at school is concerned, the position is little better. The Children Amendment Act No 68 of 2000 has provisions to abolish corporal punishment in schools. It is not in force. This provision is also contained in Section 4(7) of the Children Act 2012 which is awaiting proclamation. So it too is not in force. Section 22 of the Children Act is the current law. This allows any parent, teacher or other person having the lawful control or charge of a child or young person to administer reasonable punishment to that child or young person. That the 2000 Act has been assented to shows that there has been recognition that Trinidad and Tobago needs to move to be in line with its international obligations. So how can the Courts help achieve implementation of the Act?

**Imprisonment for Young Persons**

Section 43 of the Children Act currently in force provides that where a young offender is charged with an offence punishable in the case of an adult offender with imprisonment, such offender if aged between 10 – 16 may,
if the Court is satisfied, be sent to a certified industrial school. One infers from this provision that if the Court is not so satisfied and there seem to be no criteria spelled out, then the offender will be sent to prison — this applies to both male and female offenders.

Between 2009 and 2010, juvenile offending increased in Trinidad and Tobago (Newsday, 16 January, 2011) and this increase had the effect of bolstering calls for tougher action including imprisonment of juveniles. Despite a recent drop in the number of children incarcerated for criminal offences in Trinidad and Tobago, the country still has one of the highest rates of child imprisonment in the Caribbean and one of the lowest ages of criminal responsibility, which is seven years.

Concerns have been expressed in the past including by the Convention for the Rights of Children (CRC) Committee (2006) about juvenile incarceration in Trinidad and Tobago and in particular for our purposes the lack of facilities for female juvenile offenders, which result in girls being detained with adult female offenders; persons below 18 who are placed in adult detention facilities due to “unruly character” or “depraved character”, as stipulated in sections 74 (2) and 78 (3) of the Children Act.

The concerns of the Convention for the Rights of Children Committee are unsurprising given that international standards dictate that criminal justice systems should always distinguish in the manner in which they treat adults and juveniles. Further, Article 10(1)(b) of the International Covenant on Civil and Political Rights states that all juveniles shall be separated from adult prisoners and should be treated in a way appropriate to their age and legal status.

The reality is that this is still a huge problem in Trinidad and Tobago. In his address at the launch of the Juvenile Court project on 24 November, 2014, the Chief Justice said this:

“In Trinidad and Tobago most juveniles below eighteen years old who are in conflict with the law are sent to designated children’s homes and industrial schools or to the Youth Training Centre. We have a particularly acute situation with the young ladies which has caused concern and distress to everyone in the justice system including judicial officers and prison officers who, contrary to opinion in some quarters, have demonstrated a very progressive and compassionate approach to young offenders in particular. None of us believes that the use of incarceration therefore has
been very effective in reducing the incidence of juvenile offending. On the contrary, early preventive measures provide a more efficient means of reducing juvenile delinquency and steering juveniles away from adult prison.

We must also be mindful of our obligations as a matter of basic human rights and international law. There are several international conventions that deal with juvenile offending and the suggested approach to the problem. The common thread which runs through the fabric of the conventions is that incarceration should be used as a ‘last resort’ for juveniles.

For example, the Beijing Rules, which were adopted by the United Nations in 1985 to define a set of principles for the proper administration of juvenile justice, speak directly to these concerns. These rules specifically outline that “no minors should be held in a facility where they are vulnerable to the negative influences of adult detainees” and that “the danger to juveniles of ‘criminal contamination’ while in detention pending trial must not be underestimated. It is therefore important to stress the need for alternative measures. . . . to avoid such detention in the interest of the well-being of the juvenile.”

The degree to which we observe, or rather fail to observe these principles is of concern as the provisions for juveniles are deficient. We need proper alternatives to detention prior to trial, we do not have adequate facilities established to support juveniles while they are kept in detention. Juveniles, both males and females, have been housed with adults in detention facilities. This increases the risk of all sorts of abuse, including sexual abuse.

Nothing could be clearer in those words of the Chief Justice. The project is intended to embed the provisions of the Children’s Act 2012. Section 60 of the Act states that a Court shall not order a child to be detained in an adult prison. However, the Act is not in force. Three years have elapsed. Why is this new legislation including the relevant part of the Children Authority Act not in force? What can be done to get this legislation into force before you have new elections? So far as imprisonment is concerned— what can the Court do to ensure that the child does not end up detained in an adult prison in order for the international obligations to be complied with?

Sexual Orientation—Homosexuality
Section 8 of Trinidad and Tobago’s Immigration Act prohibits entry of, inter alia, homosexuals. This provision is currently subject to challenge in the Caribbean Court of Justice in the case of Tomlinson and Belize and Trinidad and Tobago (judgement is awaited—heard March 2015). At the application stage, both states specifically accepted that they were bound by the decision of the Caribbean Court of Justice in Shanique Myrie v The State of Barbados (2013 CCJ 3 (OJ)) and that they intended to apply it fully and that in practice the provision was not carried out. It was explained to the Court that in a number of CARICOM countries there are outdated laws with anachronistic references still on the statute books but never invoked in practice. Is that a satisfactory answer? Is it suggested that the non-enforcement of the law amounts to implementation of human rights norms?

One only has to note a case which was reported prominently in the local papers where the police for their own amusement arrested a gay man, stripped, humiliated and abused him, and then let him go. You will be aware of another recent case of abuse by the police, where they arrested a young man some weeks ago, stripped him and poured boiling water on his thighs and genitals, causing serious injury. Whilst such laws exist, it gives those members of the police who are wont to abuse their authority the pretext and opportunity to do so. What should the Judiciary be doing to rid the statute book of these archaic laws?

Let us turn to discrimination law. So far as your Constitution is concerned, there is no explicit provision covering non-discrimination on grounds of sexual orientation; there is no explicit protection therefore. The equality legislation of Trinidad and Tobago is more focused on equality of opportunity and does not outlaw discrimination on grounds of sexual orientation. The Sexual Offences Act criminalises buggery (section 13). It is to be noted that this covers both buggery on men and women. The Act also criminalises acts of serious indecency. However there is an exception for married persons conducting the activity in private and heterosexual couples over the age of 16 engaging in consensual activity in private. There is no such exception for two adult men engaging in consensual activity in private.

Civil partnerships or marriages between consenting males are not
recognised in Trinidad and Tobago. Elsewhere in the world, there is a gradual acceptance of the rights of such persons to respect for family life and also the right not to be discriminated on grounds of their sexual orientation.

There have been two cases recently on almost identical facts one in the United Kingdom and one in South Africa where a gay couple booked accommodation at a bed and breakfast establishment, but were then refused accommodation when the owners realised that it was a gay couple. Both claimants won their discrimination claims. How would you deal with a case of this nature given the absence of specific legislation or provision in the Constitution?

**Conclusion**

Now, whilst the focus of the second part of the talk is to highlight the remnants of old laws which are arguably not human rights compliant and for this to form the basis of the panel discussions tomorrow, I do not want to end the talk by giving the impression that I am seeking to be wholly negative about your legislation. Trinidad can do good legislation— one only has to look at the provisions in relation to human trafficking, which should be an example to other jurisdictions in the world. Also to be noted is that Trinidad and Tobago was the first state to ratify the Rome Statute for the International Criminal Court. So what does this indicate? Is it that Trinidad recognises the rule of law— but is reluctant to apply it to its own citizens consistently? Because it does seem anomalous that some of the antiquated non-human rights compliant legislation still exists.

I have recently been to Zimbabwe which has a fairly new Constitution (2013). I met with the Attorney-General who explained that he was busy with the exercise of going through all the current legislation to identify where it is not compliant with the Constitution and making proposed amendments. Is it not time that section 6 of the Constitution, or better still, legislation was amended to make Trinidad and Tobago truly human rights compliant in pursuant of the 2020 vision? In the meantime, I invite you as Judges for whom fairness is part of your DNA to apply a critical eye to consider how you can ensure that what you do gives effect to international human rights norms, even in the face of difficulties posed by the legislation
and the Constitution; and, more than that, what you can do to encourage ratification of those instruments which have not yet been ratified and the enactment of appropriate legislation. You may say to me, “You don’t understand our legislation, our Constitution and the weight of authority—our hands are tied. No can do.” I am aware of the obstacles; but in inviting you to take a “can do” attitude, therein lays the challenge or dilemma. I hope very much that you will rise to it fearlessly and engage in some judicial activism.

Thank you very much, indeed.
Vote of Thanks

The Honourable Madame Justice Mira Dean-Armorer

Distinguished Ladies and Gentlemen,

Permit me to adopt the protocols identified by our very proficient MC Ms. Kelsea Mahabir.

The American Poet, J.A Shedd wrote:

“He who thanks with the lips,
Thanks but in part
The full the true thanksgiving
Comes from the heart”.
It is from the heart, Dame Linda, that I extend thanks to you on behalf of the Judiciary of Trinidad and Tobago.

I wish to thank you for your erudite address, rich in its historical perspective, which has served to place in context significant events. We learned, for example, that the genesis of the Magna Carta was born out of the self-interest of the barons and the political machinations of King John and Pope Innocent III. We learnt as well as of the significance of World War II in providing a catalytic base for the creation of the Bills of Rights for many nations.

Dame Linda, I also want to thank you for your in-depth research into our own laws in Trinidad and Tobago, and for demonstrating how we have unfortunately lagged behind international developments, particularly in the areas of the death penalty and corporal punishment. But more than anything else, Dame Linda, I’d like to thank you for challenging us as Judges, for encouraging us to adopt a “can do” approach where you have said that fairness is part of our DNA. I paraphrase you in saying that you’ve invited us to apply a critical eye to consider how we can ensure that we give effect to international human rights norms, even in the face of difficulties presented by our legislation and Constitution. Dame Linda, I assure you that the seed that you have planted will find fertile soil in the Judges here in our country and that we will adopt a “can do” approach.

Ladies and gentlemen, I also wish to thank from the heart our musician, Mr. Daryl Reid. If music is the food of love, play on! It was a very inspiring rendition.

I also want to thank Mrs. Francis Pollonais La Foucade, who transformed this room into a virtual Garden of Eden.

Thanks also extend to our photographer, Pierre’s Photography, and our media service provided by I95.5FM and CCN TV6 Live Streaming.

And last but not least, none of this would have been possible without the hard working team of the JEITT under the visionary leadership of our Honourable Chief Justice and Justice of Appeal Jamadar.

We say thank you to you all, our very attentive audience, and I wish you all a very pleasant evening.
Photographs
Distinguished Jurist Lecture 2015

Photographs
Photographs
Photographs
Panel Discussion
Convocation Hall

Moderator
The Honourable Madame Justice Charmaine Pemberton

Panellists
Dr. Francis Alexis QC
The Honourable Madame Justice Maureen Rajnauth-Lee
Professor Rose-Marie Belle Antoine
Dr. Dylan Kerrigan
The Honourable The Chief Justice, Mr. Justice Ivor Archie.

Our very distinguished feature speaker, panellists and special guests, The Honourable Dame Linda Dobbs D.B.E., Justice Maureen Rajnauth-Lee, Dr. Francis Alexis QC, Professor Rose-Marie Belle Antoine and Dr. Dylan Kerrigan.

Chairman of the Judicial Education Institute, Mr. Justice Peter Jamadar, Justice of Appeal, Mr. Justice Roger Hamel-Smith, Director of the Judicial Education Institute, and other distinguished members of the Board of the Institute.

I ask to adopt the protocol list of Ms. Mahabir.
Distinguished ladies and gentlemen.

The pleasure is mine this afternoon to be your moderator of what I anticipate to be a lively and instructive session on Human Rights, with a modern flair.

What are human rights?

Last evening we were indeed privileged to be the audience as The Honourable Dame Linda Dobbs D.B.E. presented on the topic “Who’s Afraid of Human Rights? The Judges’ Dilemma”. Our Learned Distinguished Jurist shared with us her thesis on the application of human rights by Judges, which is and I quote “... a Judge in carrying out his/her duty of fairness and impartiality, need not fear upholding human rights, even where national legislation does not so provide, and should use all tools properly at his/her disposal to do so.” According to Dame Linda, human rights are “part of a Judge’s DNA” and Judges should be intrepid in upholding human rights in cases which come before them. In addition, Dame Linda posited: if it seems that the Judge’s hands are tied, in the sense that the Judge cannot “act in accordance with internationally accepted human rights standards,” should it not be that a Judge has a duty to make his views known whether by way of pertinent judgements, legal writing, opportunities at public events and submissions to Parliament?

In the interests of selectivity, Dame Linda chose to focus our attention on civil and political rights, “the first generation rights,” whilst recognising the existence of social and economic rights.

In the first part of the lecture, Dame Linda enlightened us on the United Kingdom experience, by giving a brief history of the 1998 Human Rights Act and some insight into the areas of law impacted by the passing of that Act. We learnt that human rights as we know them had their conceptual origins 800 years ago in the Magna Carta Libertatum, pronounced by Lord Denning as “the greatest constitutional document of all times ...” introducing the remedy of habeas corpus and the practice of trial by jury, the lawyer’s view, whilst concretising commercial rights, that is, the securing of the Barons’ interests, the historian’s view!

The role of the Common Law in the development of human rights was discussed as were international and regional treaties which spoke
to the advancement and protection of human rights and how these were incorporated in the Human Rights Act.

Dame Linda reminded us that the Human Rights Act adheres to the concept of parliamentary supremacy and therefore Courts in the United Kingdom would not declare void any legislation which is in breach of the provisions of the European Convention on Human Rights. There are, however, two mechanisms which are at the disposal of United Kingdom Courts in pronouncing on threatening legislation: the use of the purposive approach in interpreting those Acts and the use of the declaration of incompatibility, the remedy of last resort. In Dame Linda's view this declaration of incompatibility in effect “creates a dialogue between the Courts and Parliament.”

We were put on notice to observe emerging trends, that is, the possible changing relationship between Courts in the United Kingdom and the Court at Strasbourg.

It was noteworthy that both the Bench and Bar had to undergo rigorous training as to the interpretation and application of the Human Rights Act. Lawyers had to be retrained on how to present human rights arguments. We learnt that for the first time Magistrates were obliged to give reasons for their decisions as the right to a reasoned decision was secured by Article 6 of the European Convention on Human Rights.

There was a change in culture within public authorities and policy makers on the passage of the Human Rights Act as now, policy makers and decision makers have to think more carefully about human rights issues in the interests of transparency and accountability.

In the second part of her lecture, Dame Linda examined various international human rights treaties ratified by Trinidad and Tobago, in which reservations or opt-out provisions have been employed. International treaties of this genre, which have not been ratified by Trinidad and Tobago, were discussed as well. This was pitted against instances in which national legislation has not been changed to bring it in line with ratified treaties; where fundamental rights of certain classes of persons remain unaddressed and areas which may create dilemmas for Courts, the launch pad for today’s panel discussion.
The question was posed in this way: “What can a Judge do if he/she thinks that the national legislation and moreover the Constitution are incompatible with fundamental human rights?” These areas were addressed in the Distinguished Jurist Lecture against the backdrop of capital punishment, corporal punishment, imprisonment of young persons and sexual orientation. We were urged as Judges to “apply a critical eye” to consider how to ensure that what is done by the Bench gives effect to international human rights norms whilst recognising the difficulties posed by legislative constraints, the Constitution in particular, to promote the ratification of the important instruments which have not been ratified and to encourage that appropriate legislation is enacted by Parliament, in other words to start an effective dialogue.

This, to me, leads neatly into the business of this afternoon’s proceedings. One of my roles as Moderator is to introduce to you an eminent and well-known Panel of Speakers in the persons of Justice Maureen Rajnauth-Lee, Dr. Francis Alexis QC, Professor Rose-Marie Belle Antoine and Dr. Dylan Kerrigan. You would have read the interesting short biographies on your programme, which of course do not tell the entire story of any of our speakers. I beg to add some short details to what you have before you please.
Moderator’s Introduction of Dr. Francis Alexis

Our first panelist, Dr. Francis Alexis QC started his professional journey as a Lecturer at the University of the West Indies, Faculty of Law, Cave Hill Campus, Barbados. I met him fresh from his PhD studies at Cambridge University. Many will remember his keen wit and drive as he had the ability to bring out the best in his students; yours truly can personally attest to that! He had a genuine interest in student welfare. In fact, one of my colleagues reminded me that Dr. Alexis had a view on any matter and was not afraid to express it. He stood his ground which was always based on sound legal principle.

Dr. Alexis’ career path took an expected turn to politics and he served as the Attorney General of Grenada where he piloted many pieces of legislation which have improved the life of the citizens in that island. At present, Dr. Alexis’ commitment to public service sees him as the Chairman of the Grenada Constitution Reform Advisory Committee, the Leader of the Democratic Labour Party in Grenada and Lecturer at the LLM degree programme in Administrative Law, Constitutional Law and Human Rights at the University of the West Indies, Cave Hill Campus. He has authored several treatise and texts, the latest being “The Eastern Caribbean Supreme Court— Modern Regional Court”, documenting the history, jurisprudence and challenges faced by the Court and its record in the areas of Human Rights, Public Law, Criminal Law, Civil Law and Civil Procedure Reforms. This work is the first of its kind in the Caribbean region.

I am deeply honoured and proud to present to you Dr. Francis Alexis QC.
Thank you very much indeed, Your Ladyship, for such a very warm and generous introduction.

May I too adopt the protocol as established, after His Lordship the Chief Justice, Mr. Justice Ivor Archie.

The Judicial Education Institute of Trinidad and Tobago is very kind to have me over here from Grenada for this occasion, and I have been interfacing in particular with Mr. Justice Roger Hamel-Smith (Ret.), Mr. Justice of Appeal, Peter Jamadar, Mr. Kent Jardine and Ms. Kendra Sandy, and I’m very grateful to them for making very excellent arrangements for me being here.
I have written a paper, and I don’t intend to read it. What I propose to do is to walk us through it, starting by making the point that we are very much indebted to the Honourable Dame Linda Dobbs for affording us a very thought-provoking paper last night. The topics selected by Dame Linda are very appropriate to us in the Caribbean. Indeed, across in Grenada, where we have been talking about constitutional reform since 1985, these topics chosen by Dame Linda are the ones which are engaging our attention in a very profound way.

You will bear in mind that the topics I’m responding to are those chosen by Dame Linda. The provisions protecting fundamental human rights and freedoms that we call the Bill of Rights in the Constitution, are rather elastic, which is characteristic of contemporary Bills of Rights. Now, they fit third-world status, they suit developing-nation status and they are in accord with developed-nation status, which Trinidad and Tobago aims at achieving by 2020, Dame Linda reminds us. After all, the Bill of Rights which the United States adopted in 1791, long before Abraham Lincoln, and which will be left in place by Barack Obama, that Bill of Rights with some little tweaking across the decades is as relevant today as it was in 1791. And comparisons may indeed be made with the Magna Carta 1215, to which Dame Linda referred.

A Bill of Rights endures this way because it is not confined to guaranteeing rights and freedoms, as these existed when the Bill of Rights was promulgated or, for that matter, at any other particular time. On the contrary, it expands dynamically. “It is capable of growth and development to meet new social, political and historical realities often unimagined by its framers,”1 if I may quote Lord Bingham in the Privy Council.

Dame Linda expects certain attributes of Judges. To paraphrase Dame Linda, “Human rights principles should be part of a Judge’s DNA and Judges should be bold in upholding such rights.” Well, that call to fearlessness is very appropriate to the Caribbean today. After all, every Caribbean Bill of Rights expressly vests in the Judges jurisdiction to determine allegations of contraventions of the Bill of Rights. And this is a good place to remind ourselves of that because it was in this country that that duty was first asserted by Chief Justice Wooding in the Wooding Quote in 1967. And that is all the more remarkable because the Bill of Rights in 1962 here did not

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1 Khan v The State (2003) 64 WIR 319 [32] (Lord Bingham for UKPC) [T&T].
even have a Supreme Law clause and yet the Wooding Quote pronounced in favour of the paramountcy of the Bill of Rights over even Parliament.

On such solid foundations in the Constitutions and in judicial pronouncements, Caribbean Judges at times display the judicial activism called for by Dame Linda. Other times, though, Caribbean Judges practise restraint; they are modest in discharging the duties of guardianship of the Constitutions. And let it be noted that this is in accordance with a call made by Lord Diplock in a public lecture in 1978 in Jamaica, which is published in the West Indian Law Journal. So you can have both a call for activism by a member of the Judiciary, albeit past, and a call for judicial restraint by no less a jurist than Lord Diplock. An optimum blend of a DNA of boldness and judicial restraint leaves no one afraid of human rights and frees Judges of any dilemma as to whether they may uphold human rights.

This balance is, in large measure, attained and maintained by Caribbean Judges, with a little help sometimes from the Privy Council, as was handed out in that case in 1993, to which Dame Linda gives pride of place, Pratt v The AG. I’m not going to go into the details of that case; everyone is familiar with it. One point, though, might usefully be made. Their Lordships in this case set out an outer time frame, with some inner time lines. One inner time line is that petitions or applications to international human rights tribunals, for example the Inter-American Commission on Human Rights, should be disposed of within 18 months. I’ll say a little about that to illustrate the development of the jurisprudence in relation to human rights.

Now, Pratt itself was a volte-face by the Privy Council on its decision in 1982, that carrying out a death sentence after delay did not constitute inhuman treatment. So Pratt in itself demonstrates the extent to which the very Privy Council might move from the North Pole to the South Pole as we go along. And the outer time frame of five years indicated by the Privy Council in Pratt is not rigid. A general outer time frame of three and a half years set by the Privy Council for the Bahamas in 1996 was abandoned by the Privy Council in 1998. However, an outer time frame of four years and
ten months was applied by the Privy Council in a Trinidadian case, though not as a general principle.\footnote{Guerra v Baptiste (1995) 47 WIR 439, 450 f (UKPC)[T&T].}

So let’s go back to the 18 months time line, within the outer time frame allowed by the Privy Council in Pratt for disposing of petitions to international human rights tribunals. The Privy Council was later to admit that that time line was unduly optimistic.\footnote{Thomas v Baptiste (1999) 54 WIR 387 (UKPC)[T&T].} But their Lordships have not changed that inner time line, so we are operating in an inner time line which, on the admission of the Privy Council itself, is unduly optimistic. However, the bottom line is “well caught” by the amender, which is that as regards decisions of the Judges, it may be said that execution of a capital punishment sentence should follow sentence as swiftly as practicable, allowing reasonable time for determination by appellate Courts, international human rights tribunals and mercy bodies.

While the Privy Council has been moving, if not oscillating, vacillating between these outer time frames and the inner time lines, some Caribbean parliaments have been weighing in. Barbados in 2002 amended the Constitution to say that the protection from inhuman treatment is not contravened by any delay in executing a death sentence.\footnote{See Bdos s 15(3)(b) inserted by Act 14 of 2002 ss 2, 5. Then see Bdos s 78(7) inserted by Act 14 of 2002 s 4 and Jam s 91 amended by Act 13 of 2001 s 2: G-G, advised by national PC, may set time-limits for such bodies.} However, it seems as though the Barbadians are reconsidering this. They introduced a Constitution Amendment Bill in 2014, intended to reinstate Pratt. The Jamaican Charter of Rights in 2011, Section 13(8) (a) provides that: “The execution of a sentence of death is not inhuman by reason of the length of time spent in carrying out the sentence.”

So here, you have both Barbados and Jamaica responding to Pratt in varying ways. There really ought to be a time line set. It cannot be proper that the State can take any amount of time in carrying out a death sentence.

What about the mandatory imposition of the death sentence? The United Kingdom Privy Council— the Privy Council— asked the Eastern Caribbean Court of Appeal whether the mandatory imposition of the death penalty constitutes inhuman treatment. A majority of
the Court, Sir Dennis Byron, Chief Justice, and Mr. Justice of Appeal Saunders answered that question affirmatively, over the dissent of Mr. Justice of Appeal Redhead. The majority felt that the imposition of a death penalty should be individualised, reckoning the circumstances of each murder and the culpability of each offender. It was based on that advice that the Privy Council, in time, agreed that the mandatory imposition of the death penalty is unacceptable.10

In so holding, the Privy Council came a long way, because in 1981, their Lordships had held that there was nothing unusual in the mandatory imposition of the death sentence. As a matter of fact, they upheld the death sentence even for trafficking in drugs, across in Singapore.11 So things unfold as they move along. However, the United Kingdom Privy Council suffered some sort of relapse in 2004. In a case each, from Barbados and Trinidad and Tobago, their Lordships said that the mandatory death sentence is not un-constitutional where the Bill of Rights has a clause saving from un-constitutional duty, pre-constitutional laws which provide for such a sentence.12

So we wonder what had become of that saving clause all the years their Lordships had been implementing it. They just suddenly rediscovered it. And in doing so, their Lordships had to overrule a decision from Trinidad and Tobago, handed down not too long before that.13 Now, those rulings in 2004 from the Privy Council came two years after Barbados amended the Constitution to say that a mandatory death sentence is not inhuman.14 Did their Lordships take fright from that Barbados provision? I can’t answer that for Dame Linda, but the time line is very interesting. In 2002, Barbados says, “We can have a mandatory death sentence.” In 2004, the Privy Council reverses itself. That is not responding to the call for fearlessness, which Dame Linda is advocating, if that analysis is

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10 R v Hughes (2002) 60 WIR 156 (CA-SLU), (2002) 60 WIR 209 (UKPC); but while ECCA felt that the jury should decide penalty, UKPC left that with the Judge. See too Reyes v R (2002) 60 WIR 42 (UKPC)[Bel]; Fox v R (No 2) (2002) 61 WIR 169 (UKPC)(SKN); Watson v R (2004) 64 WIR 241 (UKPC)[Jam].
11 Ong Ah Chuan v Public Prosecutor [1981] AC 648, 674 (Lord Diplock) for sizeable heroine and morphine trafficking in Singapore.
13 Rooldal v The State (2003) 64 WIR 270 (UKPC)[T&T]; see n 77 above. A post-indep Trinidad and Tobago Act catering for mandatory death penalty was struck down in Miguel v The State [2011] UKPC 14 [T&T]; Daniel v The State (2014) 83 WIR 496 (UKPC)[T&T].
14 Bdos s 15(3)(a) inserted by Act 14 of 2002 s 2.
correct. There may be no connection at all, but there could be, too. This though, would be repealed by the Barbadians if their 2014 Constitution Amendment Bill passes.

The mandatory imposition of the death penalty is always to be rejected. The profile that every person convicted of murder in each situation deserves death must shock the conscience of humanity and it is an affront to human dignity. It is right, therefore, that the Privy Council would hold to be inhuman, reproductions of pre-constitution laws altered so as to provide for mandatory imposition of the death penalty in a new situation, for example, where the felony-murder rule is reintroduced and without requiring an intention to kill. The saving law clause has long been the subject of debate. It’s my opinion, that way back in the public law—that’s about 1987 or thereabouts on the subject— which raises the question, should we be hanging or not hanging in the Caribbean?

The Privy Council, in moving between the time frames and the time lines and the “mandatoriness” and so on, is hinting at a certain issue, which is that the question whether to abolish the death penalty, whether to hang or not to hang, may not be answered conclusively without legislative intervention by Parliament, as distinct from interpretational action by the Courts. And yet, abolishing the death penalty does not require constitutional amendment. An ordinary Act would suffice. But we are fortunate to have on the panel this afternoon, not only lawyers, but an anthropologist who would be able to assist us because the question needs input from the sociologists, the psychologists, the anthropologists.

Meanwhile, it would be safe to say that the local Courts in the Caribbean and the Privy Council are striking a happy balance. What they are saying is that the carrying out of the death penalty requires a murder which is the worst of the worst and the rarest of the rare. I think we can live with that for the time being. Dame Linda raised the question whether an intention to do serious bodily harm should suffice for murder. By pure coincidence, where I come from in Grenada, since 1897 in our criminal Court, and equally in St. Lucia, the only mental element which will suffice for murder is, and I quote from both Courts, “Intentionally causing the death of another person”, not intention to do grievous bodily harm. So maybe other Caribbean countries could come across to St. George’s and find out how we do it there.
The Barbados Court of Appeal was happy to hold that the punishment of whipping with the cat-o-nine tails is inhuman and degrading but that was because no pre-constitution law regulating such punishment was saved.15 And a Vincentian decision is also to the same effect.16

I shouldn’t spend much time on youth offenders. All will agree that it is improper to expose youth offenders to adult offenders, especially of the recidivist kind. Graduation in criminality is something we can do without.

What about sexual orientation though? As we go across Grenada, young people would come to us in the Constitution Reform Advisory Committee. When they put the question to you, you would think that, because of their youth and the way they put the question, they are all in favour of same-sex marriages. And we answer saying that we have heard from the ministers of the gospel, we have heard from the laypeople, and our considered view in the committee is that we will call upon the State to do away with discrimination against people in the workplace based on their sexual orientation. We shouldn’t go prying into people’s bedrooms to see what’s going on there. But when it comes to liberation to the extent of same-sex marriage, we are not sure that we have reached the stage in Grenada where we can call upon Parliament to amend the Constitution to do that.

We’re not going the way the Jamaicans have gone. In the Human Rights Act, so to speak, of 2011, the Jamaicans make it clear that: “The only form of marriage or other obligations similar to marriage which will be accepted...” and this is the Bill of Rights speaking in Jamaica, 2011, the Charter of Rights, “…is the union of one man and one woman.” So as far as we are concerned in Grenada, what we need for the time being is more discussion on the subject. We are not prepared to go the Jamaican route, nor are we prepared to go entirely to the other route. We should continue to engage people on dialogue on the matter.

Dame Linda is asking, what about the effects of international human rights treaties on our countries, even in advance of a particular treaty being domesticated? And the answer is simple, thanks to the Caribbean Court of Justice. The Caribbean Court of Justice has shown that even when a treaty is not yet domesticated, incorporated into national law,
even then, you can have the treaty influence the development of our national human rights situation, which they did, as is well known, in The Attorney General v Joseph and Boyce\textsuperscript{17}; because they were able to find there can be a legitimate expectation to the enjoyment of certain human rights and definitely in relation to capital punishment, even in advance of the treaty being incorporated into the national law. So the decision of the Caribbean Court of Justice in Attorney General v Joseph and Boyce, we submit, is very instructive.

Just to sum up in the last half a second I have, our Judges at times display boldness, at other times they show restraint. This is not untypical of any Judiciary anywhere in the world upholding human rights. But what must be emphasised is that not the least difficult to anticipate, in this regard, is the Privy Council, given the way they have been enjoying their liberty as a final Court. And in the end, it may be said that our Judges have been fearless, generally speaking, in upholding human rights in the Caribbean.

Thank you very much indeed.

\textsuperscript{17} (2006) 69 WIR 104 (CCJ AJ) [Bdos].
Justice Maureen Rajnauth-Lee, Judge of the Caribbean Court of Justice, is no stranger to most of us in this audience. Justice Rajnauth-Lee’s journey in the Law began at the Solicitor General’s Department. Thereafter she embarked on an illustrious career at the private Bar, where she mentored many young attorneys-at-law some of whom, I daresay, have tried to emulate her in all respects. The entire Judiciary of Trinidad and Tobago and the profession were thrilled when she was elevated to the Court of Appeal and even more so when she became the first Trinidad and Tobago female to ascend to the Caribbean Court of Justice.

May I present to you The Honourable Madame Justice Maureen Rajnauth-Lee.
Before I begin, let me take this opportunity to express my sincere appreciation to the Honourable Chief Justice Mr. Justice Ivor Archie, the Honourable Mr. Justice Jamadar, JA, and the Board of the JEITT for the invitation extended to me to be a part of these very interesting discussions. I wish to thank as well Dame Linda Dobbs for her thought-provoking lecture.

The theme of this short presentation is “Examining Human Rights through the lens of the Caribbean Court of Justice: Considering International Treaty Obligations”.

Mr. Justice Anderson, Judge of the Caribbean Court of Justice, in his lecture dealing with the role of the Court in adjudicating human rights
issues in the light of international treaty law (2011) considered the interplay between international law and domestic law in three distinct areas:

1. use of international law as a tool of legislative interpretation;
2. use of international law to grant rights to citizens in domestic law; and
3. the treatment of international law as a superior corpus of law which trumps domestic law.¹

**Jurisprudential Approaches to the Interaction between International/Foreign Law and National Constitutions²**

Professor Jackson points out that Courts around the world have taken at least three different approaches towards the use of international/foreign law. Very simply, they can be categorised as follows:

1. Convergence— where Courts favour constitutional interpretations that converge with international law.
2. Resistance— where Courts refuse to be guided by international law principles in the interpretation of domestic law.
3. Engagement— where Courts embrace the invaluable insight provided by international law without necessarily allowing those principles to dictate their conclusions.

It is interesting that convergence can be seen by the text of a Constitution, and I’m sorry that I don’t have time to go into details in each of these categories because really, it’s worth a study for some bright Judicial Research Assistant to do, and to present to the profession.

But consider first the **Constitution of Belize**. In the Belize Constitution, at letter (e) of the preamble, the people of Belize require policies of State which protect and safeguard the unity, freedom, sovereignty and territorial integrity of Belize, which eliminate economic and social privilege and disparity among the citizens of Belize, whether by race, ethnicity, colour, creed, disability or sex. And it goes on for almost

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two thirds of the page that I’m reading, and it says, “...with respect for international law and treaty obligations in the dealings among nations.” So it’s there, in their preamble.

The Constitution of Guyana goes further. Article 39(2) of the Constitution, a 2003 amendment, set out certain guiding principles in relation to a bill of rights. It says, “In the interpretation of the fundamental rights provisions in this Constitution, a Court shall pay due regard to international law, international conventions, covenants and charters on human rights.” The question must be therefore, having regard to this provision, can the death penalty be carried out in Guyana, in the light of the additional protocol to the American Convention on Human Rights to abolish the death penalty even though Guyana has not signed that additional protocol? That is something that I hope we would hear something more on from the floor, later.

Caribbean Court of Justice (The Court)

In the lecture referred to earlier, Justice Anderson3 made the point that the Court has had to reconcile conflicting judicial objectives in human rights adjudication. He observed that:

“The Court naturally will strive to uphold international treaty obligations accepted by Caribbean States on the basis that the governments do not intend a breach of those obligations, but it is equally bound to uphold the constitutions as the supreme law of the land. Extreme difficulty arises where the treaty and the Constitution conflict or appear to conflict with each other. The CCJ will then be called upon to navigate between the conflicting edicts of constitutional supremacy and international responsibility.”

I propose to look at a few cases. I want to look at the Court in its original jurisdiction; something that we don’t hear enough about in Trinidad and Tobago.

Original Jurisdiction

When sitting in its original jurisdiction the Court has compulsory

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3 Supra, pages 2-3.
and exclusive jurisdiction over the interpretation and application of the Revised Treaty of Chaguaramas. The original jurisdiction of the Court, unlike its appellate jurisdiction, is not optional. Rather it is compulsory for all CARICOM member states who participate in the Caribbean Single Market and Economy (CSME). The Revised Treaty has been given the force of law in most CARICOM member states through legislation similar to the Caribbean Community Act Chap. 81:11 of Trinidad and Tobago.

The Agreement Establishing the Caribbean Court of Justice specifically empowers the Court to apply principles of international law when sitting in its original jurisdiction. Article XVII of the Agreement states that:

“The Court, in exercising its original jurisdiction under Article XII (b) and (c), shall apply such rules of international law as may be applicable.”

This provision sets the tone for a high degree of convergence between international law and community law. Despite the fact that the language of the Revised Treaty is couched in economics and that most of the cases in the original jurisdiction have arisen in the arena of trade law, the work of the Court has not been divorced from the international human rights conversation.

The Court has had to grapple with human rights issues in its original jurisdiction; most notably in Trinidad Cement Limited and TCL Guyana Incorporated v The State of the Co-Operative Republic of Guyana and in Shanique Myrie v Barbados.

1 Trinidad Cement Limited and TCL Guyana Incorporated v The State of the Co-Operative Republic of Guyana concerned a claim under Article 222 of the Revised Treaty consequent upon the decision of the Government of Guyana to suspend the Common External Tariff on cement. This suspension was not authorised by the Council for Trade and Economic Development (COTED), a point conceded by the State. The State admitted liability for breach of the Revised Treaty in oral argument before the Court. Thus the thrust of the Court’s decision was the question of remedies. The Court affirmed that damages could be granted for breach of the Revised Treaty once it is shown that “the
provision alleged to be breached was intended to benefit that person, that such breach is serious, that there is substantial loss and that there is a causal link between the breach by the State and the loss or damage to that person.”

In dismissing the claim for exemplary damages the Court cited, inter alia, the decision of the Inter-American Court on Human Rights in Velásquez Rodríguez v Honduras. This human rights decision was used in explaining the concept of punitive damages in international law. Ultimately, the damages claim failed to meet with success. The Court issued a declaration that Guyana had been in breach of the Revised Treaty since October 2006 and ordered Guyana to reinstate the CET within 28 days, thereby confirming and asserting its jurisdiction to make coercive orders against member states.

2 Shanique Myrie v Barbados is a watershed moment in the Court’s jurisprudence for several reasons.

Firstly, it illustrates that the original jurisdiction does not exist solely for the purpose of settling trade disputes but can be utilised by ordinary CARICOM citizens who allege a breach of their rights under the Revised Treaty. Put simply, Myrie demonstrates the relevance of the original jurisdiction to the everyday lives of CARICOM citizens.

Secondly, it is the first case to clarify the parameters of the right to free movement as contained in Article 46 of the Revised Treaty and expanded by the 2007 Conference Decision of the Heads of Government of the Caribbean Community.

Thirdly, it marked the first occasion on which the Court made an award of non-pecuniary damages. Ms Myrie was awarded Bds$2240.00 for pecuniary damages. In making the award of non-pecuniary damages the Court drew on international law principles governing moral damages. These are damages awarded as compensation “for an injury inflicted resulting in mental suffering, injury to his feelings, humiliation, shame, degradation, loss of social position or injury to his credit or to his reputation.” Owing to the body cavity search, the condition of the detention cell and the psychological trauma suffered by Ms Myrie, the Court felt justified in making an award of Bds$75,000.00 for non-pecuniary damages.

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8 Supra, TCL and TCL Guyana at [27].
11 (United States v Germany) (1923) 7 RIAA 32.
Some may argue that the Myrie decision is demonstrative of a decidedly anti-human rights stance, given the fact that the Court refused to adjudicate upon the human rights aspect of the application brought by Ms Myrie\textsuperscript{12} and further emphasised that in awarding non-pecuniary damages it was not awarding damages for breaches of human rights or fundamental rights.\textsuperscript{13}

Ms Myrie had argued that Barbados had violated her rights under the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the American Convention on Human Rights. By way of relief, Ms Myrie asked the Court to order Barbados to issue an apology for violating her fundamental rights and to conduct further investigations to identify the perpetrators of the assault, rape and unlawful detention and prosecute and punish such perpetrators in domestic criminal proceedings. By way of rejoinder, Barbados argued that the Court had no jurisdiction over this aspect of Ms Myrie’s claim in so far as it was grounded on specific international human rights treaties.

The Court emphasised that the parameters of its jurisdiction were set out in the Revised Treaty and in the Agreement Establishing the Court.\textsuperscript{14} Thus the Court had no jurisdiction to adjudicate violations of international human rights treaties and conventions since those instruments generally provided for their own dispute resolution mechanisms which must be the port of call for an aggrieved person who alleged a breach of those instruments. However, the Court went on to emphasise that this could not be taken to mean that the Court could not have recourse to international human rights law when adjudicating upon claims brought in the original jurisdiction. After all:

“the Court is an international Court authorised to apply ‘such rules of international law as may be applicable’ of which human rights law is an inextricable part. It stands to reason therefore that, in the resolution of a claim properly brought in its original jurisdiction, the Court can and must take into account principles of international human rights law when seeking to shape and develop relevant Community law.”\textsuperscript{15}

\textsuperscript{12} Supra, Myrie at [9] and [10].
\textsuperscript{13} Supra, Myrie at [100].
\textsuperscript{14} Supra, Myrie at [10].
\textsuperscript{15} Ibid.
Any suggestion that the Myrie decision demonstrates a resistance to the application of international human rights law is therefore wholly misplaced. In fact the decision clarifies that principles of international human rights law may be transplanted and become part of community law. Indeed, the Court observed that the domestic Courts of Barbados, including this Court in its appellate jurisdiction, were constrained to interpret domestic laws so as, if possible, to render them consistent with international treaties such as the Revised Treaty.16

Appellate Jurisdiction

In its appellate jurisdiction, the Court has addressed various human rights issues, ranging from death penalty to labour rights and, most recently, the concept of socio-economic rights. I will look briefly at three cases.

1 The Attorney General of Barbados v Joseph and Boyce17 (from the Court of Appeal of Barbados) remains the only death penalty case upon which the Court has adjudicated. The Court held that the go-ahead given for the execution of the respondents shortly after they had initiated proceedings before the Inter-American Commission for Human Rights was a contravention of the right to the protection of the law. In the Court’s view, an unincorporated treaty could grant rights to a citizen. In this regard, the ultimate conclusion of the Court did not materially differ from that of the Judicial Committee of the Privy Council in Thomas v Baptiste18 and Lewis v the Attorney General of Jamaica.19 The point of distinction between the decisions lay in the reasoning of the Court.

The decision of the majority was grounded in the doctrine of legitimate expectation. In their joint opinion, President de la Bastide and Mr. Justice Saunders, traced the different judicial authorities treating with the effect of an unincorporated treaty through the lens of the doctrine of legitimate expectation. They also emphasised the increasing prominence of international human rights; a phenomenon spurred on by the increasing tendency of international human rights treaties to grant directly enforceable rights to individual persons and

16 Myrie at [80].
18 [1999] 3 W.L.R. 249.
the increased recourse to international law by domestic Courts. As such, both Judges concluded that there was a “distinct, irreversible tendency towards confluence of domestic and international jurisprudence.”20 Given this trend, the Court felt justified in holding that the respondents had a legitimate expectation that the death sentence would not be carried out while their petitions to the Inter-American Commission were still pending. The fact that Barbados had not incorporated the American Convention on Human Rights into its domestic law was not dispositive. As the two Judges observed:

“When a treaty evidences internationally accepted standards to be applied by administrative authorities in dealing with basic human rights, Courts will be hesitant to regard the relevant terms of the treaty as mere “window-dressing” capable of being entirely ignored on the domestic plane.”21

2 In Mayan King Limited v Jose Reyes et al22 (from the Court of Appeal of Belize) the Court refused to uphold the dismissal of workers who had engaged in pro-union activities. The employers sought to defend the dismissals under the guise of a cost-cutting exercise. The Court held that these dismissals violated the Trade Unions and Employers Organisations (Registration, Recognition and Status) Act 2000. The Court emphasised both the international and constitutional dimensions of the statute. The Court noted that the Act was passed in part in order to comply with two International Labour Organisation Conventions: the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) which had been ratified by Belize. These international instruments provide “the foundation upon which trade union activity is premised.”23 The Court emphasised that the Conventions expressed concepts that were fully in line with the Belize Constitution and that the Act expressly referred to the freedom of assembly and association granted by section 13 of the Constitution, thereby providing meaningful insight into the meaning and import of that fundamental right. In dismissing the appeal filed by the employers, the Court emphasised the significance of the rights captured under the Act, which had a beneficial impact on work and living conditions and the development and progress of the economic and social system. This in turn prompted the Court to

20 Supra, Boyce, Joint Opinion of President de la Bastide and Saunders JCCJ at [106].
21 Ibid at [107].
23 Ibid at [2].
describe the Act as promoting “better job security and a more stable industrial, social and economic environment.”

3 Juanita Lucas and Celia Carillo v the Chief Education Officer et al\*[25] (from the Court of Appeal of Belize) — this case arose out of a decision of the Chief Education Officer to suspend Ms. Lucas and Ms Carillo, the Principal and Vice Principal of the Escuela Secundaria Técnica de México (“the school”) after a series of administrative upheavals at the school. The Court upheld the decision of the Court of Appeal quashing the suspensions on the ground that the power to suspend the Claimants lay with the school board. The Claimants had also argued that the suspensions breached their right to work contained in section 15 of the Constitution of Belize. The Court did not find sufficient evidence of a breach of the right. However it did note the importance of section 15, a unique provision in our Commonwealth Constitutions which gives voice to a fundamental socio-economic right heavily grounded in international human rights discourse. The following observations of the Court are worthy of note:

“The right to work is an important socio-economic right that has found expression in the 1966 Human Rights covenants adopted by the United Nations. However, the scope of that right must vary from country to country dependent on a State’s economic well-being. Thus, the Belize Court of Appeal has properly concluded that the right to work is not a guarantee of employment but merely an opportunity to earn a living. No legislative or administrative fetter or regulation may be placed on that right. An unmarried female may not be deprived of the opportunity to work on the ground of pregnancy as in Maria Roches. Membership of an association cannot be placed as a pre-condition to obtaining a statutory licence to be a commercial hauler of petroleum products as occurred in Belize Petroleum Haulers Association v Daniel Habet et al.26 Nor should a person be deprived of work contrary to the provisions of the Constitution (Inniss v Attorney General27) and Fraser v Judicial and Legal Services Commission28 (cases involving summary termination of a yearly contract without providing the protections guaranteed by the Constitution).”

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24 Ibid at [3].
26 Civil Appeal No. 20 of 2004 (unreported).
27 [2008] UKPC 42.
29 Ibid at [48].
Looking Ahead (the Charter of Civil Society for the Caribbean Community)

Human Rights law is poised to become an even more integral part of Community law once the Charter of Civil Society for the Caribbean Community is fully operationalised. The Charter was adopted by the Conference of the Heads of Government on 19 February, 1997. The Charter is an important part of the deepening of the regional integration movement that lies at the heart of the Revised Treaty. The Charter is mentioned in the Preamble of the Revised Treaty in the following terms:


Affirming also that the original jurisdiction of the Caribbean Court of Justice is essential for the successful operation of the CSME

Recalling further the Charter of Civil Society adopted by the Conference of Heads of Government on 19 February 1997 reaffirming the human rights of their peoples.”

The Charter recognises a wide array of human rights.

- Human Dignity (Article III)
- Right to Life, Liberty and Security of the Person (Article IV)
- Equality before the Law (Article V)
- Political Rights (Article VI)
- Meetings, Demonstrations and Petitions (Article VII)
- Freedom of Expression and Access to Information (Article VIII)
- Religious Diversity (Article IX)
- Cultural Diversity (Article X)
- Rights of the Indigenous Peoples (Article XI)
- Women’s Rights (Article XII)
- Children’s Rights (Article XIII)
- Rights of Disabled Persons (Article XIV)
- Access to Education and Training (Article XV)
- Rights of the Family (Article XVI)
- Good Governance (Article XVII)
- Participation in the Economy (Article XVIII)
- Workers’ Rights (Article XIX)
- Health (Article XX)
• Basic Necessities (Article XXI)
• Social Partners (Article XXII)
• Environmental Rights (Article XXIII)

To date, the requisite steps have not been taken by CARICOM member states to give legal effect to the Charter. It remains, however, an important collective Caribbean statement of the human rights which are intended to ensure for the benefit of all CARICOM nationals. By appending their signatures, all States party to the Charter “declare their resolve to pay due regard” to its provisions.30 As drafted, the Charter imposes a reporting obligation on States as a mechanism to monitor their level of compliance.

The idea has been mooted by learned academic Norman Girvan that the Caribbean Court of Justice may be called upon to assist in the enforcement of the Charter in an effort to cure the ‘participation deficit’ that threatens to stymie the advancement of the regional integration movement. He highlighted the utmost importance of having the Charter transformed into a legally binding instrument under the Revised Treaty and subject to the Caribbean Court of Justice. He observed:

“It would be a somewhat revolutionary step, wouldn’t it, if civil society organisations and individual citizens had ultimate recourse to the Caribbean Court of Justice, after all national avenues have been exhausted, in pressing to have their rights and responsibilities ‘clearly established’ as well as ‘effective systems of ongoing consultations’ in order to ‘further their participation of the people in the democratic process’

The same would apply to the parts of the Charter designating the rights of vulnerable groups including Indigenous Peoples, Women, Children, Disabled Persons; and of the Family and of Workers; all of which are the subject of separate Articles.

Surely this would be significant step taken towards advancing the goal of “Safeguarding the interests of the vulnerable in A Community for All”.”

I wanted, as I mentioned, to look very quickly at the role of the Judge,
the role the Judge plays in judicial activism. This is a little different than what I have done. But I thought of it overnight, after having heard Dame Linda. Thank you, Dame Linda. The word is being used over and over—“thought-provoking.” Thank you for your thought-provoking lecture.

It is my view that Judges are already involved in a measure of judicial activism, perhaps in very quiet ways. Firstly, in the interpretation of legislation where a broad and purposive approach is applied. One example, and it’s one that many of us who—let’s put it this way—many of the Judges of the Court of Appeal would be aware, would have come out of Oma Maharaj, where a Court presumes that Parliament intended to legislate for a purpose that was consistent with fundamental rights and not in violation of them.

The second method of judicial activism is judgement writing, where a Judge may observe that legislation, though existing law, is not consistent with human rights provisions respected worldwide.

How far a Judge goes after that is often a matter that the Judge must give careful thought about. Must we be careful that we don’t cross a particular line? And that is something for discussion.

Thirdly, Judges can participate in organisations such as the Caribbean Association of Judicial Officers, the Trinidad and Tobago Association of Women Judges, or the Caribbean Association of Women Judges, where Judges can play a role in highlighting the plight of the vulnerable.

Last year, the CAJJ Conference dealt with girls in women’s prisons, domestic violence, human trafficking. Note, however, that it is my view that the Judge should always avoid commenting on pending cases or issues which are before the Court. And what about—let us describe them as extrajudicial—statements a Judge may make at a function or at a lecture? Will that cause a Judge to have to recuse in a matter, should the very issue come before the Judge? Or might that affect trust and confidence in the Judiciary if one Judge is in San Fernando at a lecture saying one thing about how he perceives the law, and another Judge is in Tobago and she is speaking quite in a different way, and one which conflicts with the other Judge? What does the public think about that when it comes to trust and confidence?

And lastly, because of something that Dr. Alexis said yesterday, I thought
really that heads of judiciaries, the Chief Justices generally play a role in highlighting certain issues which they consider to be unjust, or some laws which they consider to be archaic. An example would be Chief Justice Archie’s statement about marijuana charges against persons held with insignificant amounts. I do not think though — and I’ve contemplated it’s what, 14 years as a Judge — that we have a tradition where Judges outside of the heads of judiciaries normally make those statements. I’d like to hear more about that.

I do not, in my view, see the above roles as infringing the doctrine of separation of powers. I leave to other panellists to consider other forms of judicial activism and the question of separation of powers.

I cannot conclude this paper without giving credit to Mrs. Ria Mohammed-Davidson, Judicial Research Assistant at the Caribbean Court of Justice, for her tireless efforts in providing the relevant research and for the tremendous part she played in the preparation of this paper. Thank you, Mrs. Mohammed-Davidson.

And thank you all so very much.
Moderator’s Introduction of Professor Rose-Marie Belle Antoine

Professor Rose-Marie Belle Antoine is the current Dean of Studies at the Faculty of Law, University of the West Indies, St. Augustine Campus. She holds the Chair as Professor of Labour Law and Offshore Financial Law. Professor Antoine has had a remarkable academic career, which saw her winning many awards and scholarships, one of which is the Oxford Commonwealth Scholarship which led to her reading for her PhD at Oxford University. Professor Antoine is a trailblazer through many of her accomplishments. She is the first person from the Faculty of Law to win the prestigious UWI Vice-Chancellor Regional Award for Excellence in Research and created history when she copped the award for a second time, in 2013 for Public Service. Her international awards for research and publications include the United Kingdom based Emerald Literati Prize for a published work.

Professor Antoine is an award winning author who has written twelve books, some used as standard texts by students and professionals alike. Several of her articles have been published in international journals on a wide array of subjects, including well known reports on regional issues such as Children’s Rights/Juvenile Justice, HIV, Constitutional Reform, Human Trafficking and Trusts. She can lay claim to drafting the St. Lucia Labour Code. She has served as Adviser to all the Governments of the Commonwealth Caribbean and internationally, the United Kingdom, The United States of America, Canada, Venezuela and to several international and regional organisations. Her most prestigious works have been described as “path breaking and amazing” by international jurists.

Despite all of these accomplishments in the world of academia and public service, Professor Antoine presents as a balanced and gifted human being who is an avid gardener, a trained vocal soloist, not only in classical music, but also in folk and our calypso.
Good afternoon everyone. I am very honoured to be here and thank you for the invitation. So much has been said about human rights at this forum already that I think that it is best if I examine, not the substantive legal rights or human rights issues in and of themselves, but some broader conceptual, even philosophical questions. Perhaps too, I can play a bit of a ‘Devil’s advocate’, in terms of this question of the nature of rights, and even the nature of Constitutions, especially for young developing countries like our own that exist still in a very colonial framework. I believe that this is important for us, especially when we are being told that we are “afraid of human rights.”
Actually, in some ways I agree that human rights is indeed a very alienating concept still to the average citizen in the Commonwealth Caribbean, and that it continues to operate in a very narrow prism. We do not recognize it for the pervasive phenomenon that it is. In fact, when we consider human rights in the region, we tend to think about the death penalty and more recently, we have started to address LGBTI rights, but clearly, human rights is a much broader concept. I am of the view that there is, at least, a thinly veiled hostility in relation to human rights, largely because of a lack of understanding of what it really is, but also, I believe, and that has to do with what all the speakers so far have mentioned, because of this notion of the international sphere of reference to human rights. Indeed, in terms of your kind introduction of myself, the one thing which I think probably is important is that I actually sit on the Inter-American Commission on Human Rights (the Commission). I am the President of that esteemed organisation at this time. Consequently, my thinking about human rights is very much rooted in this concept of international human rights. I recognise that there is a level of antagonism and some sort of suspicion, or worse, perhaps apathy, in relation to human rights, particularly when we see it within that international sphere and when we reference the aforementioned death penalty and LGBTI rights, in particular. I often wonder if this has something to do with our colonial make-up. We seem to be saying: “Why are they telling us what to do?” This is something that we have to take on board as we move forward in terms of how we are going to get our citizens to ‘buy in’ to human rights.

Moreover, for me, there is a dilemma between our Constitutions and constitutionality, what a Constitution should mean, and the notion of universality. Clearly, we speak a lot about universality in relation to human rights. We therefore need to hold a close inquiry to get to the heart of what is really meant by these concepts.

We appreciate that our Constitutions symbolise a break from independence and what all of that entails, but we also understand that we had very little say in the framing of these defining instruments. Nonetheless, I do believe that provisioning human rights under our Constitutions is probably one of the few areas where, in fact, we did break away from our colonial masters, and where we are in many ways, with all due respect, perhaps a little more ahead of the game than the UK. I see
how much of a struggle the UK has had and continues to have with its 1998 Human Rights Act, to get on board with a concept of human rights that is consonant with the rest of Europe, its lifeline to universality. We on the other hand, have had a longer history of human rights, focusing more on the European Court on Human Rights, other international tribunals and international definitions of those rights. Indeed, it is perhaps the only area of jurisprudence where we have not relied almost exclusively on UK law for precedents.

What Should a Constitution, in particular a Bill of Rights, Mean for Us?

For me, the question of the meaning of a Constitution is central, because a Constitution should have an identity and should be a reflection of uniquely conceived answers and solutions for a particular community. It should be grounded in the community. Or should it? This is the paradox: Is a Constitution truly a symbol of a so-called civilized State which should be in sync with the rest of the world, with these universal standards? Can self-identity and universality meet in harmony? Perhaps, the right answer is somewhere in the middle, but I fear that there has been too little reflection about that deep question and the role of our Constitutions and in particular, our Bills of Rights, as responding to our own social ills and ideals. Instead, we seem to favour convenient, stock answers whether it is from the British Privy Council or international human rights courts and tribunals, as the case may be, often in the name of liberalism and dynamism of the constitution. Of course, I will say a little bit about the CCJ, but not yet. So we are comfortable with adopting what is ‘out there’. The European Court said this, or that, so it must be the best answer which we should embrace.

Perhaps this is unsurprising, given our particular history as plantation economies and societies, always looking outward and serving non-national interests. However, there is at least a need to re-evaluate the weight of the respective rights which we have incorporated into our Constitutions, especially given that rights often conflict.

So when we look to the Constitutions and the Bills of Rights, my question is, are they truly dynamic if they are too outward looking, and
fail to contemplate the deep troubling issues of the society. As I have said, it is something that I have struggled with for a long time.

Historically, finding the raison d’etre of our post-independence Constitutions has been problematic. It was hardly a soul-searching exercise when these Constitutions were being constructed and it left us with a deep dilemma— are our Constitutions meant to be evolutionary or are they revolutionary? Were they intended to create new rights or do they merely save the existing rights which we inherited from Britain with their inhibiting saving law clause designs and the like? To some extent, the question-mark surrounding the creation of new rights is an old controversy. Thankfully, we have come out of the dark ages when Caribbean jurists such as Wooding in the 1960’s interpreted our Constitutions by simply asking— was this right available under the British common law? If it was not, it was defeated. That was the old Collymore¹ debate. In Collymore, Wooding talked about looking to the common law to discern whether there was a right to strike under the newly formed independent Trinidad and Tobago Constitution. It is still one of my favourite cases when I lecture on labour law. I think that that is clearly a discredited approach in the modern context. We no longer look to the common law to locate constitutional rights, human rights. Rather today, we typically look toward international frames of reference. Indeed, there have been many landmark cases which have heralded in new rights. However, we are still grappling with the issue as to what our Bills of Rights really mean, or what should they mean in terms of dynamism and relevance. My concern remains that when we examine these new rights and these more liberal and purposive interpretations of our Constitutions, we see that they do not always serve the needs of Caribbean societies as a whole and sometimes even alienate the Caribbean citizenry. We can ask, therefore, is this a true renaissance as we are moving more toward this supposed progressiveness, or is it a sort of a false pattern in insular liberal constitutional interpretation?

Dr. Alexis and others spoke about some of these landmark cases and so called legal development. I am not sure however, whether we had subjected these apparently liberal responses of international human rights, to very mature conscious evaluation and whether they tell us much about how we have been coping with those issues.

¹ Collymore v The Attorney General of Trinidad and Tobago (1967) 12 WIR 5.
On the other hand, there is no doubt that we are somewhat stuck in a time warp in some respects in relation to human rights, whether we are not considering some rights at all, or whether we have failed to re-evaluate some of our old approaches.

**The Tension between the Domestic and International Human Rights Constructs**

These are some other issues that in the region we rarely consider before our Courts, Legislature or Parliaments: abuses of police powers; citizen insecurity, violation of children’s rights and the rights of indigenous rights, which is fast becoming a huge issue for countries like Belize, Suriname and Guyana. We should also mention sexual and reproductive rights in this group, including the issue of abortion, which no one talks about again in Trinidad and Tobago. We have had some fascinating examples of such rights at the Commission, even in terms of how that relates to HIV, IVF and so on. In contrast, these are issues of great vibrancy in the international arena. At the Commission, for instance, we deal with a wide range of human rights issues. For example, we have examined issues of citizenship and migration, such as the situation of persons born in the Dominican Republic who were of Haitian descent. We thought that such issues were far removed from our Caribbean reality, but just last month, we had a hearing which interrogated that identical situation happening right there in the Bahamas, proving that it is already on our shores, although the region has been relatively silent.

One must ask the question whether the domestic system has the capacity to deal with these issues, whether they would even have a voice if it were not for an international human rights system. Often, these issues are not even reported in the newspaper. They are only now beginning to emerge as important issues of human rights in our courts.

I have to give ‘kudos’ to the CCJ and say that it has made a concerted effort to bring human rights into the debate. The case of Myrie, which involves its original jurisdiction, was mentioned in this forum already, and is acknowledged here again. Our local courts have sometimes, on their own, tried to grapple with these sorts of very difficult questions in the

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absence of domestic law. These rights issues emerge not only with respect to Constitutions, but could arise through ordinary legislation.

I recall, for example, the case of Republic Bank,\(^3\) from quite a few years ago, when the courts in Trinidad and Tobago, in the absence of sexual harassment legislation, looked to international human rights in order to identify a norm which could provide protection on the grounds of sexual harassment.

The lesson to be learnt, therefore, is that courts can find ways to introduce meaningful human rights principles into the law to address pressing social concerns. Certainly, from the point of international bodies, like the Inter-American Commission that I sit on, I can tell you that they make short shrift of the sort of self-imposed limitations of courts. They simply say, “Oh, it does not matter what your Constitutions or legislation say or do not say . . . the State has an obligation to ensure the right.” The nagging questions of dualist legal traditions and non-enforceability are simply ignored. States simply have obligations to ensure that rights are protected in the legal system. So that is that.

Nevertheless, it is clear that the Commonwealth Caribbean is out of sync with many of these international human rights norms and they can be rendered invisible in our domestic legal systems if we do not make a concerted effort to highlight them.

Yet, if our Constitutions are supposed to reflect universality, what room, I ask, is there for indigenization where there are conflicts on substantive issues of law, such as whether a state can hang a convicted murderer without being in violation of the right to life. Is the Caribbean in the minority of world opinion on this issue? Is it that we can have different responses to some of these questions, or does universality mean always the same answer for everyone? For example, in terms of indigenous rights, Suriname and Belize, where there are hugely important indigenous populations, have argued that they are small developing states with limited land mass, so that the principles that have to do with rights and ancestral property should apply differently to these young countries. They have not gotten very far with it, but I mention it for you to consider in our discussion.

\(^3\) Bank Employees Union v Republic Bank Ltd (Unreported) No. 17 of 1995, decided 25 March 1996, (Industrial Court) Trinidad and Tobago.
Hijacking the Constitution or Broadening the Agenda?

In the past, before I was at the Commission, when I confess that I probably was a bit more cynical, I used to ask whether international human rights law is ‘hijacking’ our Constitutions. I think that this question still has some resonance, because I am of the view that sometimes, these supposedly universal answers are not: (1) as just or egalitarian as they appear to be; and (2) are not always suitable for the realities of our societies.

Typically, despite the label of pluralism in our societies, legal human rights discourse has tended to conform to a uniform, majoritarian, ideological position based essentially on an Anglo-Saxon, Christian type of morality and viewpoint. This perspective often has the effect of precluding minority interests, whether in terms of gender or religion. In Girard, for example, the State was able to use morality and Catholicism to argue that an unmarried female could legitimately be dismissed because of her pregnancy.

I can give you other examples that I think are important for us in pluralistic societies. This has to do with the internationalist jurisprudence that has moved in relation to religion and rights. For instance, the rights of Muslims, in the European context, in particular, have actually regressed; they have gone backwards, in terms of the head-dress, for example, or the failure to respect established due process safeguards. This of course, has to do with 9/11 mania. In contrast, the courts in Trinidad and Tobago, in the Mohammed v Morraine Case, in one of the rare examples of original decision-making, gave a far more enlightened decision protecting religious freedom, even manoeuvring our way through judicial review and through administrative law, to get an adequate response, given that the Constitution itself was limited because of a restrictive interpretation which mandated that malice in terms of the abrogation of rights be proven. It is, therefore, not always the case that the answers ‘out there’, in the international sphere are, in fact, the better answers for our societies.

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4 Girard and St Lucia Teacher’s Union v AG (Unreported) Civil Suit No 371 of 1985, decided 17 December 1986, H Ct, St Lucia. The judgment was affirmed in AG v Girard and the St Lucia Teachers’ Union, Civil Appeals Nos 12 and 13 of 25 January 1986; digested in (1991) 1 Carib LR 90.
The other example that we could consider is the law’s response to Rastafarianism. I am the Chair for the newly established CARICOM Regional Commission on Marijuana, so perhaps I am thinking about ‘ganja’ these days. However, we have had several cases where we tested the courts in terms of smoking marijuana, et cetera, as part of religious freedom. The answer in every case was, “no way.” We even failed to judicially acknowledge Rastafarianism as a religion based on very Eurocentric notions of what a religion should be. Now, of course, largely because some US States have legalized it, and dare I say legitimised the issue, we are thinking about this matter once again.

There is, therefore, a certain one-sidedness about this question of a universal jurisprudence in terms of human rights. Further, from where I sit, there is more than a little irony too, in that some of the most important examples of our jurisprudence when we deviated from precedent have resulted in the jurisprudence being more out of step with the average person. We are supposed to be deviating and “striking out and moulding the Common Law” to meet the needs of our societies, and so on, as we were implored to do in Persaud and Boyce, but this “striking out” instruction is most emphatically obeyed to directly confront and contradict what the average West-Indian perceives as her ‘needs’. That is true for controversial rights decisions but equally true for more mundane issues such as the nature of the chattel house, a symbol of liberation from the slave plantation, which some courts told us was a fixture in accordance with the English common law! It is perhaps not such a bad thing that we are just a little bit afraid of human rights in its original formula.

Unfortunately, in our eagerness to embrace a ‘Caribbean jurisprudence’ we can fall into the easy trap of believing that overruling precedent automatically equates to dynamism and development in the law. But have we instead simply substituted one colonial construct for another? We should not be afraid to challenge one-dimensional perspectives of justice and rights.

Thus, my ultimate question is not what is the right answer or the wrong answer, in terms of the principle of law, but what I am concerned about is

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that we are not engaging in, or in some cases not even participating in the
debate, as to how we arrive at these principles of international rights law
which are translated into domestic human rights law.

In some cases we are not only failing to engage, but we have actively
opted-out, as in the case of Trinidad and Tobago, where we opted-out of
the Optional Protocol on Human Rights,\(^8\) so that we are not even present.
Consequently, these jurisprudential developments are happening around
us— these principles that are constantly being shaped by international
tribunals and courts. Notwithstanding, we adopt them in decisions
without our societies getting into the ‘nitty-gritty’ of the discussion.
Perhaps the anthropologist among us today will tell us some more about
that. I ask further, what room is there for meaningful dialogue on our
Constitutions and their place in today’s society in the form of democratic
constitutional reform? Do we simply accept judicial dialogue, or is it a
monologue, as adequate? In other words, in our fear to confront genuine
and ‘hard’ human rights questions, are we merely allowing our judges to
decide for us, the shape and flavour of our Constitutions?

Therefore, I do believe that we have to create spaces to engage, to
participate, so that we too can shape international human rights law.

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\(^8\) On 27 March 2001, Trinidad and Tobago withdrew from the (first) Optional Protocol to The International
Covenant on Civil and Political Rights (ICCPR), denying individuals the right to petition the UN Human
Rights Committee. The government justified the withdrawal on the grounds that the UN Human Rights
Committee was preventing executions, despite the execution of 10 men in 1999. http://www.refworld.org/
pdfid/3b1de3904.pdf.
labour. Our externally driven ‘universalist’ easy answers are not yet in that place except in ways which do not serve the interests that the ordinary citizen desires. Given that I am a labour lawyer, I turn to labour law issues to demonstrate my point.

We have spent an enormous amount of time interrogating death penalty cases, developing a large body of constitutional jurisprudence on the death penalty, securing more and more rights for convicted persons and that is all well and good. However, we have not seen the same kind of social re-engineering and liberalism when it comes to other important social issues in the society. We may argue that this disproportionate attention to death penalty matters means that issues which are perhaps more pressing to our societies as a whole, are not being addressed, so that our constitutional jurisprudence continues to languish in other areas.

How, we may ask, has the ‘ordinary’ individual fared? How has the Constitution served persons not convicted of crimes, but who have implored the courts to pronounce against religious discrimination, gender discrimination, political victimisation, property rights, trade union rights, the right to work, to education and even rights associated with freedom of movement? In these areas, the protection afforded under the Constitution seems to be interpreted more conservatively. At minimum, it would appear that the universality of values attached to the death penalty cases has not found its place as easily in other areas of human rights. There appears to be a selective appreciation of universal human rights norms when applied to our Constitutions, or, as discussed above, international human rights law itself has failed to give satisfactory answers.

One could say legitimately that those legal norms have remained relatively static and very conservative in many, many ways. Yet, this is the kind of jurisprudence that is very important for our own histories as young nations, to try to redress some of those imbalances that we have had in relation to class, which in the region is often related to race and historical circumstance.

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9 See e.g. Collymore v AG, above, n. 1. holding no right to strike; Banton v Alcoa Minerals of Jamaica (1971) 17 WIR 275, finding no right to bargain collectively; No rights to salary or property in one’s job: In The Matter of Rosemond John, (Unreported) Civil Suit No. 492 of 1996, decided March 1997, SC, Dominica; no general right to enjoyment of property: AG of Antigua v Lake [1990] 1 WLR 68; Public Order Acts deemed constitutional. For further discussion on jurisprudence on religion see Rose-Marie Belle Antoine, Commonwealth Caribbean Law and Legal Systems, Routledge-Cavendish, 2nd edn, 2008; UK, chapters 1, 3 and 10.
Therefore, we have not seen the same kind of liberalism when it comes to issues of race. Additionally, we have not seen this adventurous, egalitarian liberalism when it comes to issues of gender and sexual orientation. It must be appreciated that it is those kinds of answers that really will upset the status quo and truly develop our historically disadvantaged societies. We owe this to the marginalised and the vulnerable.

Thus, in these vital social areas, we have not seen a ‘stretching’ of the rights principles contained in our Constitutions as we saw in the death penalty cases, where we were able to derive from the concept of ‘cruel and inhumane punishment’, prohibitions in relation to undue delay on Death and Row, as exemplified in the now infamous Pratt and Morgan decision.10 We arrived at an understanding that five years and more on Death Row was unconstitutional and later, progressed to where even less time could be deemed unconstitutional. Yet, such elasticity has not been applied to gender equality, so that where gender rights are contained only in the Preamble of our Constitutions, though explicitly expressed, this was not sufficient to stretch constitutional principle to arrive at more just understandings of equality and justice. Who can forget the scourge of Girard v AG,11 the pregnant school teacher who was dismissed because of her pregnancy and was not able to secure constitutional protection on the grounds of gender or sex discrimination? Rather, our typically conservative courts have timidly professed themselves to be restricted, imposing self-inflicted limitations on freedoms and rights which should be expansive and dynamic.

In a similar vein, we have been afraid to be creative in terms of sexual orientation, apart from mere glimmers of hope from the Belize courts.12 It is, therefore, a lopsided progression when we examine how human rights has served the needs of our societies. Certainly, international human rights norms can help us to inch towards more egalitarian principles, in all its forms. Why is it so difficult to construe an intention that our Constitutions meant broad visions of gender, race, religion, genuine equality, which could include other aspects, apart from the most obviously stated ones?

Some of you may be shocked to discover that we still have on our

11 See, e.g. Girard, above, n. 4.
law books legislation that allows female police officers to be dismissed because of family obligations, as demonstrated in the case of Johnson, from Trinidad and Tobago.\(^{13}\) In that case, the court held that it could not provide a remedy because the offending law was saved under the Constitution. Certainly, the saving law clause has been one of the most restrictive mechanisms in our legal systems thus far and not easily reconcilable with the idea of an evolving or revolutionary human rights jurisprudence. It has been deeply damaging in terms of the development of our enjoyment of human rights. This leads to a striking observation that many of our Constitutions in the region still do not delineate sex or gender as a grounds of discrimination. Surely this must be a first task for constitutional reform!

The power of the obiter dictum judgment is a significant weapon here. I believe that this is very important for judges, because one can say so much by way of obiter. In the Johnson case, they did. They said: “Hello, this is remarkable in this day and age . . . “. Well, in truth, judges do not say things like ‘day and age’; they are much more eloquent. What the judges were really saying was: “How can we have the kind of legislation that allows women to be dismissed because of gender discrimination in the face of international human rights law? We may not be able to do anything about it directly at this time, but we urge the legislature to reform the laws.” These are important judicial sentiments that need to be expressed.

**Naming and Claiming Human Rights**

Notably, litigation on these cutting edge areas of human rights has been relatively sparse, and that is in part due to a lack of awareness of the rights of citizenry, our cultural attitudes and so on, so that we do not identify particular issues as human rights. To return to the sexual harassment example, I do not know if you remember from many, many years ago the Bico\(^{14}\) case in Barbados, where a female judge described conduct which was clearly sexual harassment, as “ungentlemanly conduct.” Thus, we need to identify these rights issues accurately, to be able to discern exactly

\(^{13}\) Johnson and Balwant v The AG of Trinidad and Tobago, [2009] UKPC 53 (Trinidad and Tobago).

\(^{14}\) Bico Ltd v Jones (1996) 53 WIR 49.
what human rights are, before we can say whether we are afraid of them. Sometimes we are simply not aware of them. In this exercise, I believe that the Judiciary (as does the legal fraternity) has a role and a duty to play in terms of its educating the populace about human rights.

I will not speak today about judicial activism. Some things have already been said about that. However, I want to mention just two more points. In reading the paper of our distinguished visiting jurist, Dame Linda Dobbs last night, I noted that she made a comment about not applying the rule of law and being afraid to apply the rule of law. I want to say in this forum that we in the Commonwealth Caribbean comment often about judges possibly being biased, including in relation to the CCJ. In fact, that is one of the things we are afraid of. However, I think that the rule of law really should apply more broadly. In terms of human rights, I consider that other arms of the State, whether it is the DPP, as the case may be, also need to be engaged in the discussion of human rights, particularly with regard to fears in relation to the rule of law.

At the Commission, a huge issue is equal protection of the law. That is one important way in which we conceive of due process and the rule of law. Every citizen is entitled to equal protection of the law and the arms of governance must be engaged in this human rights debate. Both omissions and actions must be interrogated in this way. Yet, it is something we never seem to even consider in terms of a human rights framework. Let us consider too the actions of the police. Have we ever had a case of police brutality and abuse of powers before the courts in Trinidad and Tobago? Indeed, I am not sure that we have ever had such a case in terms of the Commonwealth Caribbean region. These issues must be seriously examined.

Finally, I want to talk a little about economic, social and cultural rights, my pet subject. These bring important dimensions to the subject of human rights, and have tremendous significance for developing countries in particular. We have now entered an arena where judges in the international sphere, such as in the Inter-American system, are talking about visions of justiciability in relation to these rights. We have therefore moved away from the notion of economic, social and cultural rights as mere ideals.
We are also moving away from a now somewhat old-fashioned viewpoint of economic, social and cultural rights, as merely extensions of civil and political rights. For instance, the right to life has been interpreted to mean the right to better life, which in turn could mean, for example, the right to decent working conditions. It could mean also the right to health. That is one way of doing it, which incidentally we, here in the region, have not done either. We have not even arrived there yet, to these extensions of civil and political rights to reach economic, social and cultural rights.

However, rights jurisprudence has finally moved toward economic, social and cultural rights as independently justiciable, autonomous rights. Consequently, the right to health is seen as directly enforceable. Similarly, the right to work, which a couple of countries, specifically Belize and Guyana, have placed in their Constitutions, is directly justiciable. In fact, there is already one case in Belize on this subject. In the same vein, the right to water, a very important one for our region and in particular for indigenous peoples and Afro-descendants like the Garifuna who live off the land, are impacted positively by this jurisprudential development.

I believe this to be a very vital progression for us and we need to embrace this subject. Again, that would be upsetting the status quo, and there is resistance to these notions of rights which have the capacity to empower historically powerless peoples, so I imagine that we will be afraid of that as well. However, it is important for our societies, with their enduring characteristics of persistent poverty and persistent inequality, to move in that direction.

To close, I ask: Is it that we are afraid of human rights, or is it that we are afraid, still afraid, of defining ourselves, of thinking for ourselves?

I thank you very much for your attention.
Dr. Dylan Kerrigan is a Lecturer and Researcher in Cultural Anthropology, Political Sociology and Criminology at the University of the West Indies, St. Augustine Campus. His dissertation for the award of his PhD was “A Social History of Race, Class and Culture in Urban Trinidad with a specific focus on Woodbrook, Carnival and Violence”. That work examined the cultural connections between the different political and economic climate/structures of colonialism, post-colonialism and neo-colonialism in Trinidad and Tobago.

His teaching and research emanates from a Caribbean centre as he posits that the way that power is structured in the modern world is illustrative of the lack of understanding and appreciation of the importance of the Caribbean in world history and its role in shaping our future.

He is at present working on a book speaking to the militarisation of everyday life in urban Port of Spain.

Dr. Kerrigan shares with me that Dame Linda provided him with quite a menu for thought. We now look forward to his serving up his favourite dishes for our enjoyment.
Hello and good afternoon to all. All protocols observed. Firstly, thanks for having me. As I mentioned to a couple of my fellow panellists, I come from a family of lawyers, both my parents were lawyers, my grandfather a Judge of the Middle Temple, my uncle is an SC here in Trinidad, and my girlfriend is a lawyer; so I think they’d all be pleased and excited to know I have been invited and welcomed so warmly by the legal fraternity in Trinidad and Tobago. So again thank you to all the organisers and also of course to the Honourable Dame Linda Dobbs for her excellent keynote lecture.

Anthropologists, as a part of their training, develop a commitment to examining how inequalities in society are perpetuated both culturally and
institutionally. So when I was first invited to contribute to this discussion, my guess was I was being invited to offer the social and economic justice case about the law. That is, that built into the architecture of modern day societies and their socio-cultural and economic structures is a cumulative bias for certain groups and world views over others. This cumulative bias resides in supposedly objective categories, processes, and laws that cloak the workings of power. For example, bias can be seen in places such as a racially slanted criminal justice system, the sexual division of labour, wage inequality, and in the guise of supposedly neutral policies and decision-making.

Yet once I read and then had the pleasure of hearing Dame Linda talk, I realised quite clearly I was invited here to offer a slightly different take, and that is a take on culture, cultural relativity, and what I will call the cultural obstacles to achieving the implementation of our human rights obligations. But as Dame Linda did in her talk yesterday, let’s start with a little context. In 1947, in a statement against the proposed Universal Declaration of Human Rights, the Executive Board of the American Anthropological Association, of which I am a member today, submitted a prepared statement to the UN Commission on Human Rights. In it, many leading anthropologists of the time described the Universal Declaration of Human Rights as a type of imperialism— a type of cultural imperialism if you will. The anthropologists asked, “How can the proposed Declaration be applicable to all human beings, and not be a statement of rights conceived only in terms of the values prevalent in the countries of Western Europe and America?”

The anthropologists’ point wasn’t to say we don’t need to protect the disadvantaged and fight to ensure freedom for all. Rather it was a defence of the small and remote communities, traditionally the focus of anthropological research at the time, and places quite apart from the large urban centres and metropolitan countries of Europe and North America. It was also a defence of the position that cultural difference is itself a universal value and a human right that should be protected from ethnocentrism, rather than lost, as more powerful cultures driven by capital accumulation and territorial expansion lead to the homogenisation of all the world’s cultural differences into one nebulous blob of everyday life and debt slavery.
It’s important here to not misrepresent what these anthropologists were standing up for. In the defence and protection of cultural difference— which is really a driving ethos of all anthropological work— anthropologists were not claiming in 1947 nor are they claiming now in 2015 that the tolerance of cultural difference means a loss of morality and an inability to make moral judgements. In anthropology there is always a limit to cultural relativity, no matter if all do not always agree on where this limit is. The point to consider is that the culture people live, i.e. the values and norms they live their lives by, are learned and adopted through a process of enculturation— i.e. learning as a child, and socialisation. Enculturation and socialisation shape our values and the meaning we put to the world. They teach us what is normal and socially acceptable. It is an invisible power over us that includes things like culture, ideologies, religions, values, and customs. The take away here is not to think these cultural relative processes are a justification for ‘anything goes’ and moral vacuity, but rather when we want to understand human behaviour we need to be cognisant that people as individual members of multiple socio-economic and cultural groups become committed to who they are through socialisation into the values of these groups and, as such, we shouldn’t judge people by other standards like our own, but by those of the groups themselves under study.

Now these anthropological concerns are still a large part of the human rights debate today, and some critics still suggest the human rights approach being pushed around the world is a replay of imperial efforts to force change on culturally distinct societies. And this criticism has a variety of levels from the overt, like why should we do what the powerful tell us, when the powerful themselves do not live up to such standards? And I think the racial caste system in the USA and its ongoing examples of a racist criminal justice system, or the British Home Secretary’s statements in recent days about taking no responsibility for refugees caught up in Mediterranean boat crisis, are good demonstrations that the powerful societies running the world don’t themselves always live up to or implement their human rights obligations, no matter how they describe their actions to us.

The concerns of cultural imperialism are also important to consider on a less overt level. For example, one take away that leapt out to the
anthropologist from Dame Linda’s rich talk is that it focused on the implementation of fundamental human rights and stepped over the question of, “Has Trinidad and Tobago as a society agreed on what fundamental human rights are?” Dame Linda’s position of course makes sense for lawyers from legal systems and cultures that have developed over a long period of time like in the context of European States, where what are considered fundamental human rights there are fairly well-established, and the focus is more on the implementation of those rights rather than a consideration of whether certain individual rights should exist. Or why they should be considered “fundamental”. Although, of course, again, the new Conservative Government in the United Kingdom has said it intends to repeal the United Kingdom’s current Human Rights Act, so it’s never that straightforward in any society.

One observation I had about the questions being put to the panel is that there was an assumption in the keynote that our society has agreed on “fundamental” human rights and that we should move straight to the implementation phase. While I wish that were the case, and I do think for many members of our society it is the case, I think the example of sexual orientation and the law demonstrates that it is not truly the case. My personal feelings, as a private person, are that state homophobia— and I have written about this elsewhere— is a way the Trinidad and Tobago state uses the law to police and punish deviations from the dominant ideas of morality and religion that exist in our society.

Dame Linda encourages us, and specifically many of you in front of me, to deal with such outdated laws and I support her call. However, I would like to map out some cultural obstacles to this. The first is religion. While Trinidad and Tobago might describe itself as secular state, I think in practice this is a lot harder to support. For example, and just to name two quick examples: God and religion are regularly called down on hustings and political platforms, and if I’m correct the first clause in our Constitution states that the nation is, “founded upon principles that acknowledge the supremacy of God.”

Which leads us to the question, is it possible to have fundamental human rights if you do not have acceptance of a secular state? For example, various religious beliefs here impinge upon the acceptance of “fundamental” human rights. Some call for punishment that equates as
an “eye for an eye,” whilst others find gay or homosexual relationships against their fundamental belief in marriage or the relationship between men and women.

Now this brings us back to the terrain of cultural relativity again. Should we protect state homophobia and the larger impact it has on wider socio-cultural homophobia in Trinidad and Tobago because on one level homophobia is historical and cultural here? No, I would suggest we shouldn’t, and it would be a misunderstanding of the anthropological project to claim so. As I claimed at the outset, anthropology has a deep commitment to examining how inequalities in society are perpetuated both culturally and institutionally, and as such, something like section 8 of the Trinidad and Tobago Immigration Act would be something to fight against and raise awareness of. However, culture doesn’t change overnight, and anthropology as a bottom-up social science recognises that you have to carry a public composed of multiple beliefs, cultures and ideas with you, i.e. shift their culture frames, rather than simply think laws— or top-down pedagogy— will carry them for you. Although, of course, there is a relationship between the law and cultural change, we need to be clear on how this works. Unpopular laws make unpopular governments, so we need to find ways to make governments lead by example rather than run away scared.

Other cultural dilemmas emerge when you further consider the topic. In her talk, Dame Linda recruited the moral question of equality of marriage, and that there is a growing acceptance of civil partnerships or marriages between consenting males around the world. But I might suggest from first-hand experience and research in the field here in Trinidad and Tobago that that comparative argument does not work well here. The majority of men who have sex with men in Trinidad and Tobago are not members of a large community who self-identify as “homosexual”, although of course there are members of such a community. Homosexuality is not really a pole of political organisation and mobilisation as it is in Europe and North America. Here the idea of homosexuality and gay marriage are actually something you hear members of the public being firmly against, while at the same time they tell you that if gay men keep it private that is “okay with them”, a sort of a metaphor for the legal status quo— we have the law but don’t implement it— which of course, as Dame Linda noted, is a cop out
excuse with all the dangers of violence, harassment and discrimination it includes. So I would venture the general cultural obstacle to equality before law for gay men isn’t so much that the general public believe men who have sex with other men should be arrested, although of course the situation is extremely messy and complex, but rather that homosexuality is frowned on by God, and God is held higher in the local society than the UN’s Universal Declaration of Human Rights.

Another way to look at this issue is to say homosexuality is mostly invisible, and when it is public, it is ridiculed and attacked. For example, in culturally relative terms we have no openly gay ministers in our Government; there may be ministers who are in the closet, but none who feel safe, brave enough, or morally obligated to come out of the closet. As the United Kingdom Guardian recently reported of the United Kingdom, Chris Smith became the first openly gay Secretary of State in 1984, more than 30 years ago. “And today the United Kingdom finds itself with the queerest legislature in the world: 32 of the United Kingdom’s 650 MPs calling themselves gay, lesbian or bisexual. At 4.9%, this is pretty close to what academics claim is the sexuality of the population as a whole.”¹ So while I support Dame Linda’s call for judicial activism against state homophobia, I think there are many cultural obstacles to this change that will take at least a generation to filter through.

What is the Judges’ dilemma in that scenario, and how far should they take their activism? For instance, should Judges be writing op-eds in the local papers to contextualise matters of the law for others less legally minded? And what of a rogue Judge who takes his or her judicial activism in a negative and prejudiced manner? And if religion is an obstacle to human rights obligations, do we not need ecumenical activism alongside judicial activism too?

Now this contextualisation of our international obligations in the face of local cultural obstacles and pressures isn’t meant as a cop out from change. This isn’t a recruitment of cultural relativism to excuse any of us from doing what we as learned professionals know is morally correct, however, it is to recruit anthropological reality and suggest implementation is not

so simple. Again, this is not to say culture doesn’t change, and if I had more time to speak I would have described how culture is not static and unchanging, but rather always in a process of change, and how groups and their values do shift under wider environmental changes. So more public visibility of important people in the society coming out is going to be an important element of shifting the cultural frame of the society, just as judicial, academic and ecumenical activism against state homophobia are also important elements. Of course there are other elements to change too, like the power of religion, of tradition, and of historical legacies. None of these obstacles are insurmountable, but rather cultural change is behavioural change, which doesn’t happen overnight— it is a long-term process. Changing the law is part of that long-term process.

In connection with the other matters for the panel’s consideration, capital punishment, corporal punishment and the imprisonment of young people, I would also describe these as forms of state violence, but not in identical cultural ways to the issue of sexual orientation. My fellow panellists and yesterday’s talk, I think, covered well the ethical reasons for their needed legislative reform. Yet let me conclude my contribution by offering three short cultural questions about each piece of legislation that might help us to understand how each has a distinct cultural messiness to resolve.

In the context of corporal punishment, a ritual that many people who are still alive endured and some still practice and support— how is corporal punishment any different to bullying? And why would any members of a society support a form of abuse that clearly does not make society safer and persons more respectful of others? Education is the necessary tool in the long-term to prevent the strong abusing the weak in this way, but culturally this is not something currently agreed upon as a fundamental fact of life in Trinidad and Tobago. Might we then not ask if an element of a Judge’s everyday dilemma around human rights is a failure in the wider local society to agree on what are fundamental rights?

In the context of capital punishment, again let me side-step the ethical arguments against it, and remark I am against the death penalty, and ask why this issue would be considered a culturally relative one. How do “history and tradition,” as Dame Linda put it yesterday, stop its repeal? Is capital punishment really about punishment and deterrence as some
claim or is it, like sexual orientation, an issue tied to God and religion? And, if so, how do you get buy-in from politicians who answer to God before they answer to the Universal Declaration of Human Rights?

The imprisonment of young people—now, perhaps I missed the connection here, but I thought this legislation had the least to do with cultural relativism and the most to do with social and economic rights, and as a consequence institutionalised prejudice against poor, predominately black men: a form of state anti-black racism, if you will; a class warfare type of argument; that politicians must be seen to punish and not save the criminal. That we don’t build the right facilities or choose to educate and retrain our young offenders and instead punish them, perhaps also has connections to religious doctrine, but of course also local structural issues to do with our young poor men.

Which leads me to my final question that has emerged from these discussions and Dame Linda’s paper on the implementation of our human rights obligations, and this is that, perhaps the Judge’s dilemma is not actually “who is afraid of human rights,” but rather, “who is afraid of local culture and the politics of its vested interests in the implementation of our human rights obligations?”

Thank you.
Mr. Gregory Delzin: One of the things that I keep thinking about when I ask the question, “Who’s Afraid of Human Rights?” is: have Judges defined, in the Trinidad and Tobago’s context, what is the Constitution that they are seeking to interpret?

As a practitioner, I find that very often when you are trying to get a Judge or a Court to rule on Constitutional issues, the very thing, as Madame Justice Rajnauth-Lee mentioned, is the elephant in the room, which it is getting the Judge to cross the line. What I find is that often, the preoccupation seems to be crossing the line rather than drawing the line.

For example, we often think of the Saving Law Clause and Matthew and Roodal as the clause in the Constitution itself. But we never ask, “what is the Constitution?”

In Trinidad and Tobago, the Constitution is the Constitution Act that brought in the Constitution in a Schedule. And in the Constitution Act, there’s a section that says, “Prior to the Constitution coming into being, there was a presumption that all the laws of Trinidad and Tobago would be reviewed to bring them in line with the Constitution.” So that when you speak of existing law, the Constitution, it presumes it’s the reviewed laws. And those reviewed laws were never reviewed.

So when a Judge is being asked, “what is the existing law?” is he or she bound by the actual law that exists, or by the presumed intention that the law is the law that was brought into conformity in the Constitution? And that has a lot to do with what is the Constitution, whether it is a combination of the Act and the Constitution itself. Because the Constitution is a Schedule
to the Act, and unless I am wrong, a Schedule is part of an Act, and the enabling section is presumed to be supreme over the Schedule.

So the point I’m making: is there the level of judicial activism to say, “Let’s cross the line. Are we bound by the 6:7 judgement in Roodal or in Matthew?” Sorry, because that’s not authority; 6:7 is not an authority.

So cross the line or draw the line? I think that’s the dilemma that the Judge faces in human rights.

Dr. Francis Alexis: What is the Constitution? The Constitution Act answers that question. In Section 2 it says, “The Constitution means the Constitution set out in the schedule.” If this provision is correct, the Constitution is not the Constitution Act, but the Constitution set out in the schedule. Therefore, when we are answering the question, what do we do with the pre-Constitution vows, you then have to go the Constitution, but read it together with Section 5 of the Constitution Act, which tells you what is to be done.

In the Eastern Caribbean, we don’t have that challenge. The only pre-Constitution law we have over there, and also in Belize to some extent, says very clearly in the provision that the pre-Constitution laws shall be brought into conformity with the Constitution by the process of construction, which requires modification. But you in Trinidad and Tobago and in Barbados continue to grapple with the question, “How do you treat with the pre-Constitution laws?”

Jurisprudentially and commonsensically, the pre-Constitution laws ought to be brought into conformity with the Constitution by the process of modification construction. Roodal or no Roodal, Matthew or no Matthew. That is my answer to the question.
Indep. Senator (Fmr.) Diana Mahabir-Wyatt: This whole afternoon has been absolutely fascinating, but the question still is not answered. If it is the obligation in the DNA, as Dame Linda said, of all members of the Judiciary to keep human rights, however one defines them, in the centre of everything they do, and if we need to change or review the legislation throughout the Caribbean for them to do so, then why has that not been done? What has stopped people from doing it? What has stopped governments from doing it and legislation from doing it? Maybe Professor Antoine can answer. Is it because people are frightened? Is it anthropologically, because we are too mired in our colonial past and we are not going directly into another colonial situation, because everybody is so afraid of terrorism and crime? Why is it that we do not have the political will to review those laws and to do something about them? Nobody?

Professor Rose-Marie Belle Antoine: We have to redefine the Constitution and the citizenry has to participate in it. I do talk about, like a new colonial construct, really. We just adopt whatever is out there. So this is meaningful dialogue.

If I look at the LGBTI issue, there is a feeling that somehow we cannot engage in these discussions. I actually disagree. Was it you who said that cultures change and so on? I myself, with my own work with HIV over the years, have seen a tremendous amount of change and growth, for example, in the churches. But you do need the leadership. And leadership is not only political leadership. That’s why I was saying, Judges, when you have obiter dicta— even if you feel limited by a Saving Law Clause— and that is a debatable thing, you can make statements. You can bring the issue out there.

I feel that where our Constitutions have lost legitimacy— and I think it has on the issue of LGBTI rights, for instance; and we’ve outgrown it— it’s we who assume that people are unready. But people are not as unready.
When I have asked people, they tell me, “No, no no, you can’t decriminalise sodomy laws. No, leave them alone.” But when I interrogate people, I say, okay, we believe in equality of all persons — personhood, the dignity of man and all of that — do you feel that an employer, for instance, should fire a person if they discover that person is gay? Everybody tells me no.

I had to defend the university and the Brendan Bain issue recently in the Courts in Jamaica, which is the most homophobic place there is, and even there, the church leaders, the church leaders, “No, we should not discriminate.” What is that? Not a right to equality? But we don’t have this kind of dialogue, so people are not aware. We don’t bring them along with the conversation. But I think we can bring the average person along.

I do agree with you; culture does change. I don’t know if that helps in any way at all, but that’s how I view some of these. It brings the Judge into the question. But it’s not the Judge alone.

**Dr. Dylan Kerrigan:** I think there is also a question of class in here. When I interview people about the homosexuality issue, you get different responses from people who are more middle to upper class, compared to people who are more working class. I also noticed when I lecture students at UWI in my introduction to anthropology class — these are 18 and 19 year-olds — that, usually out of a class of 100, around 95 would be anti-gay rights. Their reasons will often be — and this is no exaggeration — always about God, always about religion. It’s almost like fear of the unknown.

If you get somebody in your classroom, and in your personal sphere, you can maybe affect them. But on a national level, I think it’s complex. You have lots of different people who need to buy in: the law, the Judges, the politicians, the public personalities.

So to answer the actual large question, why have we not had the political will to change these laws, I think the political will wouldn’t be there if people think it’s going to cost them political capital.

**Professor Rose-Marie Belle Antoine:** The chicken or the egg? Which comes first?
Ms. Sharon Granado: How can we as a people, or as intellectuals within this room, or as the jurist, help the people of the Caribbean or Trinidad and Tobago move forward to modernise our colonial views on this issue, whether it is LGBTI rights, whether it be capital punishment, whether it be corporal punishment?

We as the think-tanks within the community or within the Caribbean have to effect change, whether it be through what Professor Antoine was speaking about, whether it would be within your judgements, within whatever little room you have to try to progress change within the thinking of the community. Because when, for instance, the Chief Justice spoke about the marijuana issue, it went to all the papers. People started discussing it. And that’s how we can probably help with the human rights. In what other ways does the panel think that we as the people could help modernise our colonial or neo-colonial views post “9/11” on human rights?

Mme. Justice Pemberton: Might I ask Professor Antoine, when she’s wearing her cap on the Commission, what remedies are granted if there is perceived to be an infringement of human rights?

Professor Rose-Marie Belle Antoine: Well, clearly, we’re in the realm of international law, so we don’t throw States in jail. But we do have several methods. One of the things for the Caribbean that I think has been quite effective in helping to inform the dialogue has been when NGOs come up to Washington, and we have these hearings. The State has to respond; they’re right there in the room. But also, they’ve asked for something we call “precautionary measures”, as opposed to a petition, which is like a case.

A “precautionary measure”— for example, Maurice Tomlinson— has really pressed this issue of sexual orientation, discrimination, and the basis of that, before the Courts, and before the Commission. He would make a claim that his life is threatened or his rights. It can be another right. But
in his case, right to life, because of the homophobia, and so on. And the Commission can issue, and will issue, a “precautionary measure”— which is something like an injunction—to the State, and say, “Stop and desist”, but it can also make recommendations.

In some countries, of course, the Commission’s work has had to do with some issues of people being disappeared, and dictatorships and so on. They have a long history of giving very concrete protections in relation to life. They can actually tell States, as they have done in Colombia, for example provide a police officer to safeguard. I don’t know if we’ve done that in the Caribbean, but those are the kinds of things that you can do.

Mr. Mervyn Extravour: What is so special about Belize? Every presenter referenced Belize as some model, for example. Based on the fact that Belize has come up in nearly all the discourses, why is it that this judicial environment seems to be able to manage the geographical, cultural, social and political nexus of the legal relations, or in short, can we say that there exists judicial activism in that anthropological space?

Thank you.

Professor Rose-Marie Belle Antoine: Yes to both. I think there is a difference in the Constitution. For example, in the Saving Law, they don’t have as deep a Saving Law restriction as the rest of us have, so they have been able to have these cases which proclaim and have granted rights on the basis of sex orientation, gender, and a whole host of things like that, which are very enlightened decisions. But I think also, they have engaged in judicial activism.

As you just asked that question, I wondered to myself— I’ve never thought of it before— if it has anything to do with their being a part of Latin
America as well, where the jurisprudence is way ahead in terms of human rights and Constitutional Reform. Perhaps they are influenced. But that is true. Belize is a really important example.

*Judge, Justice Rajnauth-Lee*: Belize, where the CCJ had an itinerant sitting last month, is a place that is both Caribbean and yet so very much Central American. The police officer who was put to bodyguard me was Garifuna, and the matter before the Court on the Wednesday morning concerned the claim of the Mayans, for breach of constitutional rights.

A Consent Order was entered between the Government and the Mayan villages of a certain portion of the south of Belize, that customary, indigenous, land rights exist in certain villages. What is left for the Court is the issue of damages. What do we do with that?

I won’t speak any further on that aspect, because that will come before the Court. But one, no doubt, will understand that there are other people there, like the Mestizo, who would also have an interest in certain things. So it’s a very interesting place. Suriname might be a similar place, and Guyana should have similar issues as well.

*Senator (Fmr) Anthony Viera*: I want to congratulate all of you for a very excellent series of presentations. I thought they were really very helpful. This is an initiative of the Judicial Education Institute, which I think is also going a long way towards effecting the cultural changes that we talked about. I think there’s a tendency to assume that people in office know what they’re supposed to do. And why is it always? I think that there is an error there. So my suggestion would be, perhaps we should have ongoing sustained education for Judges and parliamentarians, in respect of things like anthropology, treaties and the impact that they might have, and human rights.
Justice James Aboud: I just wanted to say that the title: “Who’s Afraid of Human Rights? The Judge’s Dilemma” is somewhat misleading. I believe Judges aren’t afraid at all. I think Judges are, in fact, very brave. I recall the release of the insurgents who, in the glare of TV cameras, kidnapped a Parliament, brutalised prisoners et cetera, and I think that a High Court Judge acquitted, or I should say released, them on a habeas corpus. And in the Court of Appeal, though divided, they also said, “set them free.” Now, what could be more unpopular than that? I can think of nothing.

When one reads the jurisprudence, one realises that it’s a slow chipping away of the grundnorm that begins, as Professor Kerrigan said, in religious belief. But all the cases are showing me— and recently many more are on the books— that brave people, though lacking in finance, have been able to find lawyers— and some of these cases are, in fact, called “celebs”— and articulate their positions, and slowly emerging is a body of case law that is protecting the rights of minorities of every description. It began in the sphere of labour law.

So therefore I think Judges are very brave. The real problem is in Parliament. You see, the Act has to be presented, and the grundnorm that the Parliamentarian is faced with is his constituency, not in the living rooms of people like ourselves, all in jacket and tie. We’re talking about at a rum shop. Those are the voters. I have one vote, but in Carenage there are 150 votes. So he listens to them more than he listens to me. The real issue is, how do you educate that voter? I do not need any education. I think the Judges themselves have slowly been moving forward. It’s the voting population that has to now.
Chief Justice Ivor Archie: I think it is right to say that movement of culture as a whole has to take place, not just within the formal jurisprudence, but in the things that we do outside of Court, including the institution of this lecture series, which was a very deliberate step.

I think some of the presenters have touched on a number of things that are critical to the development and the implementation of human rights; however we choose to define them.

One of them is this kind of colonial attitude that requires us to get permission for everything we do that is different, that deviates from what went before. And I think it’s located in a view of the law that still sees the need for some kind of control. Perhaps the first human right that we should begin to agree on as a society is simply the right to be.

A lot of the debate about LGBT/LGBTI or LGBTQI, as it’s now coming to be referred to, and other things, like corporal punishment and the death penalty, is located in—first of all—a view of the law and a view of God, which, although we have referred to God in the Constitution, we don’t even have agreement about what he or she looks like, or what God is. Who is this God? But it’s still somebody who gives us the rights. Okay.

And so the corollary to that is that we are afraid to be as a people. And in the political sphere, in particular, we are afraid to pay the price of being different, of articulating a position that is different, because we don’t quite know sometimes what that price is going to be.

Where our local Courts have tried to step outside of the norm, — and this is a plug for the CCJ by the way, in terms of a Court that is located in the region— is, for example, in the case of Suratt, where the Courts tried to extend the notion of equality, to say you cannot have a law that purports to ensure equality in the provision of goods and services, employment, et cetera, and somehow stick in there a proviso that it’s okay to do it.

And in this particular context, sex does not mean sexual orientation. Why are we even going there, other than a fear of something? And the Privy Council not only overruled, but sidestepped the question completely. Who’s afraid of human rights? Not us. Not us. We are afraid as a people to really take charge of and to take responsibility for our jurisprudence, for what we define as permissible.
I think Professor Antoine is right, in a sense; the discussion needs to be broader than what, outside there, we can implement. Who are we? Those are some of the questions, when we talk about Constitutional Reform, when we talk about judicial activism, when we talk about social transformation; those are the real fundamental things that we need to ask.

If one examines the record of the Judiciary, not just in the last few years, but over the 50+ years of our Independence, we are the ones who have gone where the politicians have feared to tread, not just in Trinidad and Tobago and in the Caribbean, but internationally. If you look at some of the major developments in the USA, for example, Brown v The Board of Education, it is the judiciaries who lead, because we have the luxury that we don't pay a price, other than criticism, for daring to say the things that nobody else wants to say. One can understand, we don't have to get elected, hence the importance of judicial independence and hence the importance of security of tenure and all of those things.

I think we're coming to the place where we are ready to interrogate saving law clauses. I don't know where those arguments will go. I can't make that until the lawyers come and they bring it, and they articulate those arguments. And that is why it's important to have academics, anthropologists and sociologists talking, because it's only when you bring those arguments to us that we can begin to ask the questions.

For example— and I think Dr. Alexis and Mr. Delzin are asking—you have a clause which says that no law that already exists is invalidated because it's inconsistent with section 4 or 5. But are section 4 and 5 the whole Constitution? What about section 2, which says, “Anything that is inconsistent is void to the extent of its inconsistency.” We haven't interrogated that, you know.

So there are lots of opportunities. There are lots of areas in which we can begin to take this discussion forward. It is not the responsibility only of the Judiciary, but the Judiciary and the Judges have a huge part to play, partly because we are an institution— and there are few institutions left— that still commands some respect and deference within the society. It is for that reason that the whole question of judicial activism has to be approached with caution, incrementally, responsibly, having to balance between two extremes.
I don’t know if it’s a question of size of the society, or about our colonial heritage and the need to get permission— that we are very uncomfortable about having certain kinds of conversations because we are not sure whether we are somehow crossing a line or a boundary that we do not yet have permission to cross. I do think it’s a generational thing, and it will take a generation or so to happen.

It was very instructive— and it is by no means, Professor Antoine, a criticism— but it was interesting the almost apologetic body language and way in which you dealt with the last part of your presentation, because it was almost as if— and that was just my observation—it was almost as if we were entering onto a topic which somehow might offend. Maybe you were not conscious of it, but this is something I sense a lot of the times when we have discussions in areas of religion, in areas of gender and sexuality, even sometimes of corporal punishment, because somehow we are uncomfortable about having conversations.

I want to make a final, very provocative observation. Last week in the newspaper, it was reported that one of our well-known transgender personalities was running for election and there was a huge outcry from a number of prominent religious figures, who immediately assumed that that person was running with a particular agenda. I did not hear anybody in this society say that persons, for example, of a particular religious persuasion should not run for election because we have statutes on the books which might permit children to marry, because that might be their agenda. I think there is a lot of dishonesty and hypocrisy in our society. And until we call it out, we are not going to have any meaningful discussion about human rights.

Mme. Justice Rajnauth-Lee: Like many of you, I spent a good many years at the Bar, both with the Solicitor General and in private practice, and I believe, in the last two years, we have not seen the Bar operating the way it ought to. The independence of the Bar is crucial for Trinidad and Tobago. And I would hope that those who are attorneys among us, the young and the not-so-young, would take to heart the importance of your role before the Court. I don’t think we can say enough about that.

As for the independence of the Judiciary, Chief, you know that is my pet
subject, because I believe it has been so hard-won that we ought to guard it, as Judges, with all our might. But I leave the rest for the anthropologist.

Dr. Dylan Kerrigan: Anthropologists understand that the world is a very messy place. We don’t think that culture is a simplistic thing or that people are only influenced by the visible pressures on their life. We think there are a lot of hidden and invisible things that go into shaping how human beings see the world, see themselves, see issues.

Of all the different things you outlined were the size of the society and the colonial mentality. Do we need a different sort of democratic system in which we could get more different opinions at the table? All these different things are part of that messiness, so social change requires all of us to be pulling on the many levers of society.

I am very encouraged about talking with everybody on the panel in the various moments we have had. In conversation, you suddenly see a new part of the problem or part of the issue that was maybe obscured to you because you didn’t have all the pieces of the picture. So when you have more people from different disciplines — and we’ve all got a little picture of what the problem is — you don’t see the whole picture until everybody comes together and puts their bits together. So I do think we have a role to play.

Technically, we are a very young society. We are developing a self-confidence to move forward and do what we think is in our best interest, but also speak to the obligations we have as a sort of state in an international arena. I think we will change as we become a more mature society, and obviously not overnight, but within the next generations. I get a lot of excitement when I speak to young people, because I think that they are malleable; they are not set in their ways. They haven’t decided, “Well, this is out of bounds.” It’s more that, “Well, I didn’t have exposure to it so I fear it and I create a stereotype,” which then turns into prejudice. So this initiative: publishing it, streaming it, bringing in other members of the academy, getting the bridges, I think it’s an important step.

I was quite taken by your statement that Judges must go where others do not dare. That’s an interesting dilemma for you all to consider, but it’s something that, you know, I would be a fan of and support.

I don’t really have an answer to the solution to the problem, but apart
from saying it’s very messy and the more we are cognisant of the different parts of the mess, the better we can move forward.

**Dr. Francis Alexis:** Coming from Grenada, it would be almost unthinkable of me to step in here and say to Trinidad and Tobago, go for same sex marriage, and that’s why I speak so diffidently. It is a very touchy subject. I was saying to Dame Linda, strangely enough, it’s easier to answer the question, to hang or not to hang, than to have same sex marriage. That’s my own thinking as a stranger coming in here.

Secondly, I was interested to hear Sharon talk about modernising, because I thought that what ‘indeed’ the Professor was saying is that, in part anyhow, the idea that you modernise only when you follow a certain cultural line, is something we have to think about. Who says it is modern to do this or to do that?

Thirdly, getting permission; most of what I was saying was that, as long as you continue to need permission from the Privy Council, you are going to have problems because the Privy Council itself is not clear on what is to be done.

**The Honourable Madame Justice Maria Wilson:** We really need to encourage in-depth conversation about these issues. We can’t just leave it to Judges. I’ll give you an example. Everyone saw that video that went viral about a mother beating her child, and people were talking and it brought up the conversation about corporal punishment. So I went to a conference on that day and I was speaking about it with my colleagues— Judges, prosecutors, lawyers— and I was saying, “Isn’t it awful? It’s an abuse. What about the psychological scars?” And the response I got from some persons was, “Weren’t you beaten? Look at you. Did it harm you?” The point I’m making is that I have found that people are not really prepared to discuss these issues in any depth. So don’t wait until it reaches to the Judge. First, as people of Trinidad and
Tobago, we need to have these discussions. That’s the first point I wanted to make about corporal punishment.

About LGBT, another point; a senator suggested that gay couples should adopt. I met her at a function and I congratulated her about her contribution. And I heard from someone who is gay. They said, “But we’re not really interested in adopting. We just interested in having equal rights at work.” And that’s an example of the cultural awareness of our issues.

And the last point I would like to make is about religion. I was away for ten years and when I came back, what struck me was that every event I went to, usually starts with a prayer and a religious ceremony. Nothing is wrong with that, but I think we have to be very conscious and aware, and not make religion skew our views of issues of human rights, because sometimes it prevents us from thinking widely, openly and liberally about these issues.

**Dame Linda Dobbs:** As Judge, one doesn’t often have the luxury of reflection, and the luxury of understanding and thinking just what you are doing, and what you are there for, and the sort of protections that you are able to offer people. So I think, and I hope, that this will be the start of a series of this kind of reflection.

Three things I think can be done by Judges. First of all, one or two people had commented that they weren’t getting the assistance that they needed from the lawyers when it came to raising issues. Well, that shouldn’t stop you as a Judge. If I were a Judge and I felt that there was a point to be made, I would invite counsel to address me on the particular point and say, “This is what I’d like you both to address me on, and come back again when you’ve done some work on it.”

Secondly, I know Judges are very busy people, but I do think, and it’s much more common now, Judges are doing much more writing. They are writing, they are giving public lectures more frequently, and writing for legal journals. And I think that also is a very important form of education, as well as this obviously very good series.

And thirdly, I see no reason why Judges shouldn’t, and collectively the Judiciary shouldn’t, make various submissions to Parliament about the difficulties that arise and the anomalies that exist in relation to some of the issues that we have already discussed.
Whenever there are Government consultations, the Judiciary submits its formal responses, but individual Judges are also entitled to make their submissions to consultations. And it seems to me that there is nothing to stop the Judiciary as a body actually addressing and setting out, in a very legal way, the problems that they may apprehend and see as a result of the cases that come before them.

**Dr. Francis Alexis:** I’m sure that Judicial Education Institute of Trinidad and Tobago must be satisfied with yesterday and today; a very thought-provoking paper. Justice Aboud, when illustrating his point that the Judiciary in the Caribbean is not afraid, referred to 1990. But you can go back to 1970. The Court of Appeal of this country set free military officers who had engaged in mutiny, pure and simple. But it’s a psychological thing. We hero-worship others, but not those in our midst who do bold things. I’m grateful to you for that intervention.

**Dr. Dylan Kerrigan:** Some of the things I have taken away from this are how the law is living culture, and also, from Dame Linda’s talk yesterday, I saw so many connections that I considered between what Judges do and how they think, and how I also think being trained as an anthropologist. So I am quite heartened to see that as the characteristics that stuck out from this for me. I also think, in answer to the question, is the Judge afraid? I agree, the Judge isn’t afraid of human rights, but the question of culture and who’s afraid of culture, is a serious one that impacts all.

**Professor Rose-Marie Belle Antoine:** Well, I’m still a bit bowled over by the Chief Justice’s statement that he is ready to interrogate the Saving Law Clause. I mean, I’m just so happy to hear this. I have been talking about this for many, many years. That would be a great development, in order to develop human rights and so on.

But I also want to agree with Dame Linda that you don’t need to wait on counsels’ arguments to put forth proper dicta. And I’m thinking here of, probably, the most famous example is in Boyce, the case of Boyce v CCJ. That whole argument of legitimate expectation didn’t come from the
attorney, who I think was Douglas Mendes at the time, but came from the Judges themselves; they put forth that argument which was really the key.

I remain very optimistic, both for the Judiciary and the citizenry. I have seen growth in my own work over the years in human rights, but it’s important to encourage the Judges and the politicians, who say, “You have these conferences and you talk about these things, and then we go out there and we make statements, nobody backs us up, so then we’re not going forward.” And I’ve see that happen with LGBTI; politicians make statements and then they withdraw, because they don’t get this outcry from the NGOs. So we need to do that.

I’m going to put a plug for my faculty and say, yes, we need to make spaces and engage in dialogue to construct these meaningful human rights and Constitutions, as I said earlier, that represent us. And we in the faculty, I think we can help you with that. We can help talk to the Judiciary and help talk to the public.

**MME. Justice Pemberton:** I’m sure you will agree with me that we have been treated to a stimulating and exciting discussion this afternoon. And it just leaves me to thank each of the panellists for all of their contributions and insight.

Have a good afternoon, everybody.
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Dame Linda Dobbs D.B.E., the Distinguished Jurist for the Judicial Education Institute of Trinidad and Tobago’s Fifth Distinguished Jurist Lecture, delivered the lecture “Who’s Afraid of Human Rights? The Judge’s Dilemma” at the Convocation Hall, Hall of Justice, Port of Spain, Trinidad on May 13th, 2015.

In this lecture, Dame Linda plays devil’s advocate, exploring the legislative avenues that Trinidad and Tobago must take in order to achieve “developed nation” status by 2020. She first delves into her UK experience with an overview of the history behind the introduction of UK’s 1998 Human Rights Act. Following this, she looks at four specific areas where Trinidad and Tobago’s national legislation does not provide protection for various classes of citizens: capital punishment, corporal punishment, imprisonment of young people, and sexual orientation.

In the subsequent Panel Discussion, four panellists were invited to elaborate upon the issues raised by Dame Linda: The Honourable Madame Justice Maureen Rajnauth-Lee, Dr. Francis Alexis, Professor Rose-Marie Belle Antoine, and Dr. Dylan Kerrigan. Each panellist’s analysis of the human rights environment of Trinidad and Tobago, shaped by their varying academic and professional backgrounds, contributes significantly to a discussion with significant repercussions for the wider society of Trinidad and Tobago.