SECURING EQUALITY FOR ALL IN THE ADMINISTRATION OF JUSTICE
Participants of the 2017 Caribbean Judicial Dialogue held in Port of Spain, Trinidad, November 30–December 1, 2017
SECURING EQUALITY FOR ALL IN THE ADMINISTRATION OF JUSTICE

PROCEEDINGS OF THE CARIBBEAN JUDICIAL DIALOGUE

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The 2017 Judicial Dialogue was a small gathering of approximately 25 appellate, High/Supreme and summary court judges and magistrates from around the English-speaking Caribbean, who met in Port of Spain, Trinidad and Tobago on November 30 and December 1, 2017.

The Dialogue was sponsored by the Judicial Education Institute of Trinidad and Tobago (JEITT), in collaboration with the Faculty of Law The UWI, St Augustine; the Institute for Gender and Development Studies (IGDS), The UWI, St Augustine; the Faculty of Law The UWI Rights Advocacy Project (U-RAP), and CARICOM’s Pan Caribbean Partnership against HIV/AIDS (PANCAP). The JEITT hosted the Dialogue at its training facilities in Port of Spain and worked closely on the development of the agenda with U-RAP, a collective comprising of six public law teachers on the three UWI campuses of the Faculty of Law UWI. The UWI law teachers, through U-RAP, have assumed the responsibility of compiling this volume along with the JEITT.

The theme of the Judicial Dialogue was ‘Securing Equality for All in the Administration of Justice: With a Special Focus on the Impact of Discrimination, Vulnerability and Social Exclusion on Access to Justice’. It was informed by national, regional and international instruments, including Caribbean constitutions, the Charter of Civil Society for the Caribbean Community, and the various Codes for Judicial Conduct in the Caribbean, which all emphasise equality before the law and equal treatment as core mandates of the judiciary.

The Judicial Dialogue, among other things, considered the gaps in trust and fairness that currently exist in the administration of justice in the Caribbean, having regard to evidence produced by socio-legal research; the impediments in accessing justice commonly faced by groups at higher risk of discrimination, vulnerability and social exclusion in society; the legal

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1 The Dialogue was funded by the Robert Carr Network Fund (RCNF), which focusses on groups or persons that face a higher HIV risk, mortality and/or morbidity when compared to the general population, and have, at the same time, less access to information and services.
concepts of equality and non-discrimination; and steps and actions that judicial officers can take to improve access to justice and secure equality before the law for vulnerable groups.

The presenters at the Judicial Dialogue included several faculty at The UWI who are experts not just in the field of law, but also criminology, anthropology, linguistics and gender studies. This volume is a compilation of academic research and commentary on the structures and parameters of equality and access to justice across the region. The materials are both theoretical and substantive, offering frameworks of analysis and application, as well as case studies and social science data. Despite reflecting proceedings from the two-day Caribbean Judicial Dialogue, the analytical conclusions and frameworks in this volume are of general relevance for judicial officers across the region.

As editors of this volume, we would like to thank all those who contributed to the success of the Judicial Dialogue, especially the JEITT and the Hon. Mr Justice Peter Jamadar, the former Chair of JEITT, who led in the development of the curriculum for the Judicial Dialogue and the Hon. Justice Gillian Lucky, the Chair of the JEITT who has supported the publication of this volume.

Janeille Zorina Matthews and Jewel Amoah (Editors)
The pursuit of equality for all has been a clear underpinning and objective of all Western democracies post World War II. It remains an unfolding and evolving project, still only partially realised, and even so, imperfectly. It has been hindered from inception by the human condition – our individual, social, communal, environmental and territorially-based limitations and biases, grounded in ideological, cultural, historical, economic and religious/cosmological world views and mindsets, that are rooted in our always partial existential understanding of reality as made up of separate entities. This human condition has manifested in structures, systems and relationships that perpetuate discrimination and undermine Project Equality.

‘I am not you, and I am different from, other than, you’ – elementally, individually, societally, territorially, ideologically, culturally, developmentally and so on, and therefore my survival and actualization must take priority over you and yours. This attitude leads to a sense of entitlement to preferential treatment, rationalized in justifications based on your otherness and less deservedness. Indeed, this pervasive ‘separation’ belief is one, if not the main, root cause of inequality and discrimination (and indeed, violence) in all of their myriad faces. We are all striving ‘to be’, but all too often doing so in purely individualistic and oppositional ways; ways that have little regard for the equal rights of all others to also ‘be’, and so at times in ways that actually undermine equality for all!

Until we come to the recognition, and not just intellectually but experien-
tially, that our identities are somehow joined with that which is both ‘more than’ and ‘one with’ who we know and experience ourselves to be, Project Equality will always be aspirational, and our pursuit of it all too often frustrating. We need to come to the primary and *a priori* realisations that, even though I am not you, I am at the same time not other than you; and, even though I am not the earth, I am at the same time not other than the earth.

Project Equality is not simply an individual, human endeavour, even if individual humans are its stewards. Project Equality is a cosmic endeavour, that encompasses individual humans, communities, nations, as well as the earth and entire cosmos. This is the Large Vision that Article 1 of the 1948 Universal Declaration of Human Rights (UDHR) anticipates, and as such may in our times be reworded to say ‘All beings are born free and equal in dignity and rights . . .’. In this rewording, ‘beings’ includes all of Gaia, understood as life itself – rivers, forests, oceans, flora and fauna, even earth itself as the ground of being. The consequence of this Large Vision is a truly inclusive social, cultural and environmental consciousness and conscience that leads spontaneously and responsibly to respect, regard and equality for all in the broadest sense.

This publication consists of the opening remarks of the Chief Justice of Trinidad and Tobago, four substantive papers from the Caribbean Judicial Dialogue that all reach out of historical reality into the future, in efforts to chart courses of increasing equality, especially for the vulnerable and socially marginalised in our Caribbean communities. The publication closes with an afterword from the editors – a review of the well-known case of *Fisher v Minister of Home Affairs*, in light of the principles articulated in the publication – and includes the agenda of the Caribbean Judicial Dialogue and excerpts from Caribbean judicial codes as appendices.

The opening remarks of the Chief Justice of Trinidad and Tobago found in Chapter 1 articulate one root cause for discrimination and inequality, as the failure of legal systems and constitutions in particular, to ‘effectively . . . define “personhood”’. As he put it ‘It seems to me that in articulating fundamental rights and freedoms we have neglected the most fundamental right of all—the right to simply “be”’. Recognising that no one ‘can ever fully enter into the subjective awareness of what it is like to experience the world through the eyes and feelings of another human being’, the Chief Justice suggests that ‘the best that we can do is to constantly train and retrain and

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educate ourselves in the hope that we can progressively identify and reduce implicit bias in our structures, procedures and thought processes.\(^3\) For him, this is a special imperative ‘in a society still riven by deep structural inequalities on the basis of sex, race, ability and other . . . grounds of discrimination.’\(^4\)

This imperative to ‘train and retrain and educate’ judicial officers was the whole purpose of the Judicial Dialogue. In the four substantive papers in this collection, there is a wealth of information that both exposes causes of and discloses cures for inequality of treatment and discriminatory behaviour. They are all virtual treasure troves for anyone who is serious about pursuing Project Equality in the Caribbean.

Chapter 3 on ‘Equality and Social Inclusion’ is developmental in intent and far reaching in scope.\(^5\) It seeks to chart a course for the structural and systemic development of Caribbean societies in order to achieve the realisable and practical goal of a truly just society, where all persons and all communities enjoy inclusion and meaningful participation in all aspects of national life, while at the same time aspirationally individuating along personal and communal developmental lines.

One key insight, is that equal treatment manifesting as structures, systems and attitudes that are supportive of individuals and communities ‘achieving their own life project’, and experiencing substantively ‘the conditions that guarantee a dignified existence,’ are ‘essential to peace, security and economic and social development’ within a State.\(^6\) This is quite radical once internalised. Many Caribbean States are pursuing peace and security by means of sanctions based human regulation. Yet, what the research in this paper asserts, is that the positive and practical facilitation of equal treatment in all domains – economic, social, cultural, human and developmental, with a conscious focus on social inclusion, is essential to the so desperately sought after, but continuously elusive, goals of peace and security.

A second key insight is that a special focus of Project Equality must be the historically marginalised, alienated, and vulnerable groups and communities in the society. Equality as social inclusion means ‘the needs of the most vulnerable are met’, and involves the resolve ‘to leave no one behind’.\(^7\) This focus on the vulnerable is also linked to ‘sustainable development’, which therefore re-envisioned equality and non-discrimination as instrumental at a macro-

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\(^3\) Ibid 10.
\(^4\) Ibid.
\(^6\) Ibid 26.
\(^7\) Ibid 30.
economic level and as drivers for sociological, cultural and environmental developmental coherence. Serious consideration of this insight is desperately needed at both the executive and legislative spheres of governance in our Caribbean States.

The paper also examines several areas of actual discrimination and inequality of treatment that exist in Caribbean societies and how courts have responded to these situations. This exploration is a true adventure across Caribbean space and time, woven together with threads of principle; principles lifted out of precedents that shed light on how one may proceed to achieve the goal of a truly just society. Lessons to be learnt are invaluable for all involved in the administration of justice.

Here one key takeaway is the distinction between formal and substantive equality. The idea that ‘same treatment’ (formal equality) equates to equality of treatment is exposed as flawed, because its underlying premise that comparable persons are in fact similarly circumstanced is simply not always true. As is pointed out ‘Making sense of difference, has always been a challenge for the sameness approach . . .’8 Substantive equality thus does not rely rigidly on a search for consistent (similar) comparators, but rather seeks to discover whether treatment is consistent with the inherent value of human dignity and with core principles of fairness and justice and whether there is disadvantage by reason, say, of personal or group characteristics. ‘For example, instead of asking are women treated better or worse than men in a given context, courts can look at whether there is substantive disadvantage that is related to sex or gender.’9 A heightened awareness of intersectional discrimination strikes me as particularly relevant in the Caribbean, where many intersecting forms of discrimination are the by-products of our history.

Chapter 4 arises out of research undertaken by the Trinidad and Tobago Judicial Education Institute, and focuses on the actual systems, structures, processes, practices and culture in the courts and how these can operate to undermine equality and to promote discrimination, particularly for court users.10 It importantly suggests a practical and immediate solution that can ameliorate these negative experiences, in the form of Procedural Fairness. The thesis is that the creation of a more inclusive and enabling court culture, that is truly fair, and that facilitates a sense of belonging (Procedural Fairness), particularly for the more vulnerable groups in society, can go a long way to facilitating the subjective experience of fairness by court users and to

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8 Ibid 24.
9 Ibid 59.
improving access to justice for these groups. The paper also suggests that a consequence of this ‘felt sense’ of fairness and inclusion, is increased public trust and confidence in the administration of justice, as well as increased voluntary compliance with court orders and directions.

However, it is to be noted that Procedural Fairness is not presented as a complete solution to all inequality and discrimination. Indeed, it does not necessarily operate to transform, say, structural inequalities in a society and in the administration of justice, or to magically rid judicial officers of personal (and unconscious) biases. What the research does do, is bring to light the many areas within the court systems that operate in discriminatory ways, that undermine equality of treatment, and that hinder access to justice. It is this discovery and awareness that leads to the articulation of nine elements of Procedural Fairness, that are necessary at this time for the subjective experience of a qualitatively fair, just, efficient and effective court system, that is considered legitimate and that inspires trust and confidence in court users and the general public. These nine elements are: voice, understanding, respectful treatment, neutrality, trustworthy authorities, accountability, availability of amenities, access to information, and inclusivity.11

This chapter suggests that four interventions are required to transform existing court systems and cultures into more procedurally fair ones.12 These are: widespread (whole-system) institutional education, widespread public education and empowerment, continuous interdisciplinary research and publication, and the development and deployment of best practices. Institutional education to be effective should include: (i) sensitisation of judicial officers and court administrators and staff about the Procedural Fairness research and insights, (ii) scrutiny, individually and institutionally, for evaluation of Procedural Fairness, and (iii) compliance, in the form of behavioural change aligned with the nine elements of Procedural Fairness.

A key takeaway from this chapter, is that the transformation of court systems into more equitable and inclusive spaces for the resolution of conflicts, is possible through the implementation of Procedural Fairness. And, that such an intervention can provide greater access to justice and equality of treatment for the most vulnerable and marginalised groups in society, and do so immediately and at a relatively low cost. Another takeaway is that process, particularly a fair, attentive, open, trustworthy, impartial, empowering and accountable process, really matters to court users, and actually matters more than outcomes only (even favourable ones).

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11 Ibid 64–65.
12 See ibid 96–98.
Chapter 5 focuses on the individual judicial officer, and how s/he is inherently (implicitly) biased, and how this undermines impartiality and fair decision-making. The paper makes the point that being biased is a part of the human condition, and that all humans are biased in one way or another. However, and significantly for judicial officers, ‘social science research suggests that the more objective we believe ourselves to be, the more likely we are to act on our biases and overestimate our invulnerability to them.’ This is quite a wake-up call for judicial officers, many of whom pride themselves on being especially objective and more immune from bias than other ‘lesser mortals’. Moreover, as the paper points out, constitutional imperatives and judicial codes of conduct mandate neutrality and demand from judicial officers, impartiality. However, ‘this call for impartiality contemplates a model of human behaviour that has a conscious actor at its core . . . [and] . . . judges cannot avoid biases that they do not even realise they have.’

A key takeaway, is the insight that ‘the insidiousness of implicit bias means that laws that are prima facie neutral can never really be; laws that on their face seem fair and objective, when applied [by persons who are biased], will necessarily produce unfair results impacting certain communities disparately’. Addressing this issue seriously is therefore non-negotiable, if equality for all is a genuine goal.

This chapter, as ‘a primer on implicit bias’, is an excellent one. It clearly, concisely and effectively explores equality negating ‘schemas’ and ‘implicit bias’. It then very helpfully offers five concrete interventions to allow for ‘judging while biased’, that are ‘strategies that judges can employ to mitigate the effects of implicit bias on the administration of justice.’ These strategies are: (i) exposure to diverse communities, as ‘exposure to members of unfamiliar groups can facilitate understanding and decrease bias’; (ii) mindfulness of the fact ‘that we all have implicit biases’, which will remove the ‘illusion of objectivity’ and lead to greater humility; (iii) exposure to ‘countertypical exemplars’, persons and groups that do not reflect existing stereotypes; (iv) consciously improving the conditions of decision making, by ‘taking the time to engage in meaningful, effortful deliberation’; and (v) commissioning research to measure and expose patterns in decision making that may be indicative of underlying bias.

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14 Ibid 100.
15 Ibid 104.
16 Ibid 88.
17 Ibid 100.
Judicial officers and all involved in court administration need to take this issue of implicit bias very seriously. As the research on Procedural Fairness has demonstrated, in Trinidad and Tobago (and likely throughout the Caribbean), the existence of deep rooted perceptions and experiences of bias by court users in their engagements with the court systems, fundamentally undermines public trust and confidence in the administration of justice and erodes the legitimacy of the system.

Chapter 6 in this collection is one on ‘language and the law’.\textsuperscript{18} It is a fascinating exploration of ‘the importance of language to public access to justice’, and the impact of language on inequality and discrimination. Specifically, this paper examines ‘the link between language and the fair administration of the law’ and brings to light the injustices that may be rendered to Caribbean peoples because of the dichotomy between the use of formal English in the court systems and in legal discourse and the use of vernacular languages as the common means of communication by many Caribbean court users.

For example, vernaculars are often viewed as dialects and not as distinct languages (contrary to the opinions of many Caribbean linguists). One consequence is that in the court systems, no (or little) consideration is given to the use of expert interpreters for vernacular speakers. This can result in miscommunication and misinterpretation of evidence, with potentially adverse effects on court users, as the paper ably and convincingly demonstrates using concrete examples from court related proceedings in the United Kingdom and the United States. In addition, within the Caribbean, there are prevailing views that ‘vernaculars are inferior speech forms and signal negative characteristics . . . about speakers who habitually use them.’\textsuperscript{19} The paper points out that this negative stereotyping (and implicit bias) is supported by ‘evidence of discriminatory practices attributable to language. The consequences are inequality of treatment for speakers of vernacular languages, as well as the potential for substantive injustice in their dealings with Caribbean court systems. Finally, the paper demonstrates the impact of formal English illiteracy on vernacular speaking jurors (to the extent that jury instructions are given in standard English and use legal terminology) and court users (when court forms and procedures assume formal English literacy).

Jurisprudentially, this paper invites the consideration of ‘the issue of the applicability of constitutional language non-discrimination provisions . . . to situations involving vernacular-dominant speakers.’ It is an invitation deserving of acceptance. Certainly the plea to judicial officers to be ‘alert to

\textsuperscript{18} Celia Blake, ‘Language and Access to Justice’, Chapter 6.
\textsuperscript{19} Ibid 111.
issues in language and the law’ is worth heeding, as ‘judicial sensitivity to linguistic issues will become more necessary in certain cases to promote fairness.’

There is a flow to these papers, presented in the order that they are, that broaden and build the essential framework necessary for the construction of a sustainable Project Equality. In the end it comes down to a single thing – the effective operationalising of the idea and reality that all beings are inherently free and equal in dignity, value and rights, and the recognition that we all have a shared duty and responsibility to play our parts in achieving this noble goal.
It gives me great pleasure to address you today on the issue of equality for all in the administration of justice. Of course, as a Judicial Officer it may be tempting for us to say this is all old hat! After all, that is included in the oath we all take that requires us to exercise our functions in an independent and impartial manner. Many of us have been dispensing ‘justice’ for years, if not decades.

But it behoves us to constantly enquire and be mindful of whether, as a substantive outcome, genuine equity in treatment and outcome is the lived experience of our clients. It is a challenging task, especially if as judges we are unaware of the stereotypes we are using to define or characterise parties before the court. When the stereotypes underlying the assessments made by a judge reinforce established patterns of discrimination, the judicial decision itself has the effect of perpetuating inequality despite the superficial appearance of equality of access to justice.

You have set yourselves a daunting task as your focus is both broad and specific – ‘broad’ in the sense that the ‘Administration of Justice’ is such a wide concept involving many actors inside and outside of the Courts, but ‘specific’ in is focus on the more vulnerable elements of our society who are subject to discrimination and social and economic exclusion.

The 1976 Republican Constitution of Trinidad & Tobago recognises in its subconsciously sexist preamble ‘that men and institutions remain free only

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1 These were the opening remarks of the Honourable Mr Justice Ivor Archie, ORTT the Chief Justice of the Republic of Trinidad & Tobago, at the Caribbean Judicial Dialogue on November 30, 2017.
when freedom is founded upon respect for the rule of law.’ The Constitution enshrines as a fundamental right – the right of every individual ‘to equality before the law and the protection of the law’ and declares that every person is entitled to a ‘fair hearing in accordance with the principles of fundamental justice’ and ‘by an independent and impartial tribunal’.\(^2\) What no constitution can or has ever effectively done is define ‘personhood’. It seems to me that in articulating fundamental rights and freedoms we have neglected the most fundamental right of all – the right to simply ‘be’.

No judge or justice system actor can ever fully enter into the subjective awareness of what it is like to experience the world through the eyes and feelings of another human being but that has profound implications for how each individual perceives and experiences the justice system differently. The best that we can do is to constantly train and retrain and educate ourselves in the hope that we can progressively identify and reduce implicit bias in our structures, procedures and thought processes.

In administering justice it is necessary for judicial officers to understand their own biases as well as those of the litigant before making a decision. If one does not, a judge’s biases may lead him or her to ‘mould’ the facts of a case and thereby arrive at a decision based on an understanding that does not correspond entirely to reality. To understand context, judges must understand people and powerlessness, in particular the protected or vulnerable class or group, their values, the reality of their lives and the relationship of that group to other groups in our society.

In a society still riven by deep structural inequalities on the basis of sex, race, ability and other prohibited or unstated grounds of discrimination, a judge is charged to exercise his/her functions independently based on his/her assessment of the facts before him/her, and the application of the laws. She/He therefore should free her/his mind of any indirect, extraneous influences and or pressures from anyone and or institutions.

The Judicial Officer sits in a position of power and takes an Oath to ‘do right to all manner of people after the laws . . . without fear or favour, affection or ill will . . .’ It therefore means that a judge must, to quote Lord Bingham:

\[\ldots\] free himself of prejudice and partiality and so conduct himself in court and out of it, as to give no ground for doubting his ability and willingness to decide cases coming before him solely on their legal and factual merits as they appear to him in the exercise of an objective, independent and impartial judgment.\(^3\)

\(^2\) Trinidad and Tobago Constitution, ss 4(b), 5(2)(e), (f).

I have focused thus far on judicial officers because we sit in a peculiar power relationship with the rest of society. But a person’s experience with the justice system begins much earlier with the first encounter with the police or social services or other public institutions. The administration of justice is a much broader concept that includes the norms, institutions, and frameworks by which states seek to achieve fairness and efficiency in dispensing justice: criminal, administrative, and civil.

The rules applicable to the administration of justice are extensive and not limited to a fair trial, presumption of innocence, independence and impartiality of the tribunal, and the right to a remedy. The integrity with which the state conducts criminal investigation, arrest, pre-trial detention, bio-social inquiry reports, trial proceedings, and sentencing all fall within the domain of administration of justice. Consequently, various actors, such as judges, lawyers, court clerks, police, prison officers, social workers, health service providers and policy makers play various roles in achieving fairness in the administration of justice.

Why is all of this important? The way the administration of justice within a state is organised has enormous practical significance for and impact on the affairs of ordinary individuals and groups. First, the fair administration of justice is important for the rule of law, in that it ensures that state practice and policies protect against the ‘infringement of the fundamental human rights to life, liberty, personal security and physical integrity of the person’ (and I would add – the right to simply be and express who you are).

Second, as the main vehicle for the protection of human rights at the national level, a fair and well-functioning system for administration of justice is necessary for the peace and stability of the state. The preamble to the Universal Declaration of Human Rights (UDHR) acknowledges that, ‘it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected.’

Third, an equitable and effective system for the administration of justice is essential for protecting minority rights, which is important to ensure the flourishing of an inclusive democracy. We sometimes forget that the true test of a mature democracy is not the expression of the will of the majority but the recognition of and respect for the voice of the minority and the marginalised.

The Charter of the United Nations testifies to the fact that international peace and security depend to a large extent on ‘universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion’.4

4 UN Charter 1945, Art 55(c).
In this regard and to bolster public confidence in the judicial system globally the United Nations was instrumental in creating principles and guidelines for judicial conduct, thereby identifying six core judicial values essential for maintaining public trust and confidence. The six values identified were: independence, impartiality, integrity, propriety, equality and competence and diligence. It was these core values which saw the formation of codes for conduct for judiciaries throughout the Caribbean, Trinidad, Jamaica, Grenada, St Lucia to name a few.

As judges, if we are therefore to ensure equality of treatment of all before the law we must be aware of our society, understanding issues of gender, race, colour, national origin, ethnicity, sexual orientation and such like. Understanding societal norms with respect to gender, race, ethnicity or sexual orientation does affect judicial decision making and requires a commitment to examine both the substance and process of the law in these broader contexts. Equality seekers argue that to fully understand the requirements of equality, judges must also augment and update their education on a regular basis to be sensitive to increasingly insidious forms of discrimination, hone their abilities to critically evaluate existing and evolving concepts of equality, and develop their capacity to formulate new methods of thought and understanding.

Most of us already know what the research tells us – that the natural human process of categorising like objects together and related cognitive biases can result in our implicit reliance on stereotypes. This in turn influences how incoming information is interpreted and remembered. It has been found that this can make people remember stereotype behaviour that did not occur and less readily remember stereotype inconsistent behaviour which did occur.

We know that although we are expected to exercise our functions without any biases, we do experience ‘unconscious bias’. It is only if we are humble enough to recognise this and immediately address it that we can render justice fairly.

We do need to have a conversation about discrimination. Discrimination may have many different causes and may affect people of different racial, ethnic, national or social origins. It can also be aimed at people of different cultural, linguistic or religious origin, persons with disabilities or the elderly, persons living with the HIV virus or with AIDS. Further, and this is no secret in the Caribbean context, persons may be discriminated against because of their sexual orientation.

Discrimination based on gender is also commonplace in spite of the progress made in many countries. Laws still exist which, inter alia, deny women
the right to matrimonial property, the right to inherit on an equal footing with men, and the right to work and travel without the permission of their husbands. Women are also particularly vulnerable to domestic violence and abusive conduct, which continue unabated in many societies, and they thus often suffer double discrimination, both because of their race or origin and because they are women.

Discriminatory incidents or practices always portray victims in a particularly negative way because they constitute a denial of their distinctive human characteristics and thus negate their intrinsic right to be different among human beings who all have equal value, independently of the colour of their skin or of their origin, gender, religion and so forth.

As judges, prosecutors and lawyers we have a professional duty to turn existing legal provisions on the right to equality and non-discrimination into truly effective tools and, must also apply, or at least be guided by, international legal norms on these matters. If done consistently and effectively, there would be a genuine possibility of slowly turning our world into a less hostile place for all.

The sad truth is that if discriminatory practices persist around the world, it is not for the lack of legal rules but rather for lack of implementation of these rules in the everyday life of our societies. Of course, there can be no effective implementation without monitoring and measurement. One of the challenges we must grapple with, therefore, is the development and adoption of relevant and meaningful performance standards and assessment tools that will help us to keep moving in the right direction. The determination of impartiality of the judiciary can be based on both objective and subjective criteria. Objectively, an absence of personal bias, prejudice, or pre-judgment must be demonstrated, while subjectively, a reasonable third-party must discern behavioural impartiality based on the manner in which proceedings are conducted.

As a bare minimum the right to a fair trial includes, inter alia, the right to receive notice of charges, the presumption of innocence, right of the accused to counsel, right to a prompt and public trial before an impartial tribunal, privilege against self-incrimination, equality before the law, and right not to be tried on the basis of a retroactive law. But a fair trial is not a singular event. Rather, it is an outcome predicated upon a complex set of rules and practices. It has both a structural component (the legal environment within a state) and a technical meaning (the specific procedural safeguards). The structural dimensions impose a financial burden on the state to put the necessary infrastructure in place. The technical aspects of the right require constitu-
tional, legal, and policy safeguards to facilitate the attainment of a fair trial. There must be an unwavering commitment to both.

In concluding, may I take the opportunity to welcome you all and to express my hope that your deliberations will be fruitful and have long-lasting impact. I thank you for the courtesy of your attention.
INTRODUCTION

It has been said that equality is one of the most difficult rights to define and protect in part because its legal protection relates to the past and turns on one’s ‘view of society and what it should be’.¹ Invariably, equality in a legal system has multiple meanings. Professor Bob Hepple, former Dean of the Department of Law, University College of London, identified no less than nine meanings in the United Kingdom’s Equalities Review and the Discrimination Law Review: consistent treatment; the removal of barriers to equal treatment; respect for equal worth or dignity of the individual; recognition of identity, difference, and diversity; equal opportunity; redistribution; individual choice or freedom; equality of capabilities; and fairness.²

This chapter does not aim to explore all these different notions of what equality means in law. Instead, we want to put side by side concepts of equality, non-discrimination and access to justice – familiar ones for lawyers and judges – with ideas that they are less commonly juxtaposed with in Caribbean jurisprudence, notably those of vulnerability, disadvantage and social exclusion (Figure 1).

One reason why equality matters in the Caribbean is our history and the foundational role of inequality and exclusion, and the struggle against it, in the formation of the modern Caribbean, as well as persistent legacies of those inequalities evidenced in the challenges the Caribbean faces today. Professor Rex Nettleford interpreted the Caribbean’s history stretching back 500 years

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‘in terms of claims and counterclaims to land, entitlement, power and personhood’. From another angle, jurist Dr Lloyd Barnett reminds us that ‘in the interstices of Caribbean history there have been continuous and continuing conflicts between exploitation and humanism, democracy and demagoguery, revolt and reconciliation, racism and tolerance, absolutism and liberalism.’ In reflecting on the history of Trinidad and Tobago in the ground-breaking case of *Sanatan Dharma Maha Sabha of Trinidad and Tobago Inc v Attorney General*, Jamadar J observed that, ‘It is self-evident that there can be no real and meaningful peace or freedom without equality, fairness and nondiscrimination. Thus, these values are essential if a truly democratic way of life is to be achieved and their protection critical.’

The nascent coming to terms with the land claims of the Caribbean’s first peoples as claims to equality in the face of centuries of marginalisation is an important step for the region. The conventional claim that Caribbean indigenous peoples were extinguished was used to deny their existence and avoid the responsibilities consequent upon acknowledging their presence. A more
meaningful ‘constitutional space’ for indigenous peoples has only started to emerge in the Caribbean in the twenty first century. The Belizean courts have recently examined the history of precolonial land tenure of the Maya people and the impact of colonisation on their property and way of life. Conteh CJ in *Cal v Attorney General* concluded that the failure of the State to provide the Maya with the necessary mechanism to exercise their rights to property equally with other Belizeans was race discrimination that arose from the fact the claimants were Maya and had a customary land tenure system.

One of us has evaluated the Anglo-Caribbean’s equality jurisprudence as impoverished. Indeed, for many years it appeared that mainly political figures used the anti-discrimination provisions in Caribbean constitutions. Notions of social inclusion enrich our discussions of equality and take us well beyond the handful of discrimination cases that come to Caribbean courts. The juxtaposition of principles of equality with those of social exclusion also yields deeper learning from Caribbean courts about the complex relationship between justice, peace, social inclusion and equality in the Caribbean today.

A crucial milestone in that court-led learning and thinking is the 1971 Court of Appeal decision in *R v Hines and King* from Jamaica. There it was

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9 (2007) 71 WIR 110 (SC Bze) [113]. See also *AG v Maya Leaders Alliance* 25 July 2013 (CA Bze).


11 A small sampling of cases include: *Camacho and Sons Ltd v Collector of Customs* (1971) 18 WIR 159 (CA A&B); *Att Gen v Lake* (1998) 53 WIR 145 (PC A&B); *SVG Green Party and O’Neal v Att Gen* VC 2005 HC 30 (HC SVG); *Rambachan v TTT TT* 1985 HC 8 (HC T&T). In addition, much of the litigation of expression rights in the Caribbean also involved, whether claimed or not, allegations of discriminatory treatment on the basis of political opinion or membership of an Opposition political party.

12 (1971) 17 WIR 326 (CA Jam).
held that a Rastafari criminal defendant should not be forced to take an oath in court that was inconsistent with his religious beliefs. Even though by 1971 the climate was shifting and Rastafari was beginning to gain more acceptance, there was still hysteria about the growth of the movement. Rastafarians were often branded criminals and unsociable elements unwilling to abide by the rules for the orderly existence of a society. Their criminalisation diverted attention away from the forms of state sanctioned social exclusion that had alienated poor black youth in the twentieth century.

There has been social exclusion in the Caribbean on the grounds, including gender and gender non-conformity, health and disability, race and/or colour, and possibly most pervasive of all, poverty and social background. Yet, in spite of the formal recognition of equality rights in the Caribbean, there is a tension with respect to what the famous German-born, American political theorist, Hannah Arendt, described as the right to have rights. Social exclusion is often premised on the notion that some persons do not possess or deserve the right to have rights.

This paper considers the response of Caribbean judges in confronting social exclusion and its link to the imperative of securing equality. These responses have included highlighting the historical antecedents of contemporary forms of discrimination and stigmatisation, questioning forms of superiority and privileging, including in law, that have become normalised and naturalised and place some at significant disadvantage; and challenging deeply-held fears about others that are not rational or supported by the evidence.

ALL ARE BORN FREE AND EQUAL IN RIGHTS AND DIGNITY:
EQUALITY AND NON-DISCRIMINATION AS LEGAL NORMS

The principles of non-discrimination and equality are the bedrock of all human rights systems. The Inter-American Court on Human Rights said almost thirty years ago that:

The notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to

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discrimination in the enjoyment of rights which are accorded to others not so classified.\(^{15}\)

Principles of non-discrimination and equality are articulated in a range of international and regional human rights instruments, constitutions and national laws.

**Regional and international human rights instruments**

The Universal Declaration of Human Rights (UDHR) and the two other key instruments of the International Bill of Rights – the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESC) – all articulate the rights to non-discrimination and equality. The UDHR contains the following guarantees:

**Article 1**
All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

**Article 2**
Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

**Article 7**
All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Many Caribbean states have also ratified more specialised treaties which also seek to ensure equality to all, especially groups with vulnerabilities. These include the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Convention on the Rights of Persons with Disabilities (CRPD), Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), Convention on the Rights of the Child (CRC), Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (ICMW), and Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Belem do Para).

Even if not incorporated into national law, these treaties should not be regarded as ‘mere “window-dressing” capable of being entirely ignored on the domestic plane.’\textsuperscript{16} The region’s highest courts agree that a court should presume that Parliament intended to legislate in conformity with its treaty obligations, so that where there is ambiguity or uncertainty in a domestic law – ordinary legislation or the constitution – the court should adopt the meaning consistent with the international obligation.\textsuperscript{17} Since so many rights provisions in Caribbean constitutions are drafted in ‘general and abstract’\textsuperscript{18} terms, they have a measure of uncertainty or ambiguity, and that opens the door wide to constitutional interpretation in light of the state’s international obligations.\textsuperscript{19}

\section*{Constitutions}

Caribbean constitutions guarantee rights to non-discrimination and equality in various ways:

\begin{itemize}
  \item\textsuperscript{a} As guiding norms articulated in their preambles\textsuperscript{20}
  \item\textsuperscript{b} In the opening section to the bills of rights in the OECS and Barbados, the Bahamas and Belize;\textsuperscript{21}
  \item\textsuperscript{c} In stand-alone anti-discrimination clauses drafted as closed lists that mostly include race, place of origin, political opinions, colour, creed and sex as prohibited grounds of discrimination;\textsuperscript{22} and
\end{itemize}

\begin{footnotesize}
\begin{itemize}
  \item\textsuperscript{17} Ibid.
  \item\textsuperscript{18} \textit{Boyce v R} [2004] UKPC 32 [28].
  \item\textsuperscript{19} Tracy Robinson, Arif Bulkan and Adrian Saunders, \textit{Fundamentals of Caribbean Constitutional Law} (Sweet & Maxwell 2015).
  \item\textsuperscript{20} See, for example, the preamble to the Belize Constitution, one of the most expansive, which declares:
  \begin{quote}
  WHEREAS the people of Belize—
  (a) affirm that the Nation of Belize shall be founded upon principles which acknowledge . . . faith in human rights and fundamental freedoms . . . and the equal and inalienable rights with which all members of the human family are endowed . . .
  (e) require policies of state which . . . eliminate economic and social privilege and disparity among the citizens of Belize whether by race, ethnicity, colour, creed, disability or sex; which ensures gender equality; which protect the rights of the individual to life, liberty, basic education, basic health, the right to vote in elections, the right to work and the pursuit of happiness; which protect the identity, dignity and social and cultural values of Belizeans, including indigenous peoples . . .
  (e) require policies of state which protect . . . the identity, dignity and social and cultural values of Belizeans, including Belize’s indigenous peoples . . . with respect for international law and treaty obligations in the dealings among nations . . .
  \end{quote}
  \item\textsuperscript{21} See Tracy Robinson and Arif Bulkan, ‘Constitutional Comparisons by A Supranational Court in Flux: The Privy Council and Caribbean Bills of Rights’ (2017) 80 MLR 379.
  \item\textsuperscript{22} See, for example, Grenada Constitution, s 13(3).
\end{itemize}
\end{footnotesize}
d. In general equality provisions guaranteeing rights to equality of treatment and equality before the law that are not tied to any specific grounds.23

Early lists of prohibited grounds of discrimination were meagre, and in four of the first constitutions sex was the striking omission. Over time, with incremental constitutional reforms in multiple territories, the number of protected statuses increased. Jamaica now prohibits in its Charter of Fundamental Rights and Freedoms discrimination based on social class.24 Guyana covers the most grounds, including sex, gender, even marital status and pregnancy, as well as language, birth, social class, and culture.25 However, reform has not been even across the region. Up to now, the antidiscrimination provisions of the Bahamas and Barbados constitutions still do not include sex (or gender) as a prohibited ground. An attempt at constitutional reform in 2016 in the Bahamas to include sex as a prohibited ground of discrimination was rejected by a majority of voters in a referendum.26

**Anti-discrimination Legislation and Institutions**

Bermuda, Guyana, Trinidad and Tobago and St Lucia have all introduced stand-alone antidiscrimination legislation that covers a variety of arenas, notably discrimination in employment. The establishment of an Equal Opportunity Tribunal in Trinidad and Tobago to settle complaints of discrimination has been ruled to not improperly impinge on the jurisdiction of the High Court to hear discrimination cases.27

Antidiscrimination norms are also found in other legislation. For example, the St Lucia Labour Code 2006, drafted by Professor Rose-Marie Antoine, prohibits dismissals based on a much wider list of grounds than is found in

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23 See, for example, Belize Constitution, s 6; Guyana Constitution, art 149D; Jamaica Constitution, s 13(3)(g); Trinidad and Tobago Constitution, ss 4(b) & 4(d).

24 Jamaica Constitution, s 13(3)(i).

25 Guyana Constitution, art 149(2).

26 The CCJ’s ruling in *Nervais v R* [2018] CCJ 19 (AJ), 92 WIR 178 holds that the opening section in the bill of rights of Barbados Constitution is an enforceable provision. The opening section in the Barbados Constitution, like the Bahamas Constitution, provides that everyone is entitled to all the fundamental rights and freedoms regardless of sex. The CCJ’s interpretation of this section raises the question as to whether in fact the Bahamas Constitution, through its opening section, Article 15, already has a measure of protection against sex discrimination in the enforcement of the guaranteed rights. See also Robinson and Bulkan, ‘Constitutional Comparisons by a Supranational Court in Flux’ (n21).


(1) An employer shall not dismiss an employee or institute disciplinary action based on (a) an employee’s race, sex, religion, colour, ethnic origin, national extraction, indigenous origin, social origin, political opinion or affiliation, trade union affiliation or activity, disability, sexual orientation, serious family responsibility or marital status;

In *Deterville v Foster & Ince Cruise Services (St Lucia) Ltd*, a bisexual employee of a tour company, alleged that she was fired because of her sexual orientation. Belle J concluded that she was not unlawfully dismissed because her contract provided for two weeks’ notice, which was given. He also concluded that the dismissal was not caused by the General Manager’s intolerance towards homosexuals. The litigant, Deterville, said her manager learnt of her sexual orientation after hiring her, after which the manager expressed disquiet about her employment and said ‘she intends to address that issue’. The judge found that the employee had displayed a ‘lack of professionalism’ in ‘passionately kissing another employee of the same sex’ on a tour bus while being transported from a work assignment. He noted that sexual orientation is not a prohibited ground of discrimination under the Equality of Opportunity and Treatment in Employment Act, but did not refer to the Labour Code 2006, section 131, which prohibits dismissal based on an employee’s sexual orientation.

**IMAGINING EQUALITY BEYOND ARISTOTLE AND THE CONSISTENCY TEST**

In talking about equality, we often get stuck on equality meaning just one thing: the Aristotelian principle that like should be treated alike or consistent treatment. This notion of equality resonates strongly with our ideas of what is fair and rational. The idea of similar or consistent treatment for the similarly situated makes sense, not a small matter for the legally trained mind!

Yet equality as consistent treatment has been widely criticised as formal,
and not sufficiently robust.\textsuperscript{30} Professor Bob Hepple, former Dean of the Department of Law, University College London, who sought asylum in the United Kingdom from apartheid South Africa, describes the faith he had in laws that would embody the ideal of likes being treated alike.\textsuperscript{31} But he discovered that the formal equality declared in the common law still ‘upheld political, social, cultural and economic discrimination.’\textsuperscript{32} He added that it could not remove apparently neutral barriers (such as job selection criteria, distinctions between part-time and full-time workers, etc) which put ethnic minorities and women at a disadvantage.\textsuperscript{33} The Nobel Prize winning Indian economist, Amartya Sen, famously pointed out that ‘Equal consideration for all may demand very unequal treatment in favour of the disadvantaged.’\textsuperscript{34}

\textbf{Same treatment is neutral as to the nature of the treatment}

It isn’t that similar treatment adds nothing, but more that it misses a lot or is under-inclusive, not least because it is neutral as to the nature of the treatment and can result in a levelling down – treating both groups badly, what is sometimes termed ‘equality with a vengeance’.\textsuperscript{35} In addition, the notion of \textit{same treatment} is premised on persons being similarly situated and they often are not.

\textbf{Classifying groups as different is used to justify discrimination}

The Chief Justice of Canada Beverly McLachlin, has explained that Canada very early abandoned the notion of formal Aristotelian equality, because ‘it permits discriminatory acts simply by classifying groups as ‘unalike’\textsuperscript{36} Professor Susan Baer, who is a judge of the Federal Constitutional Court of Germany, notes that Nazis claimed that Jews were dissimilar to Aryans to support their genocide.\textsuperscript{37}

\textsuperscript{30} Ibid, 8–14.
\textsuperscript{32} Ibid.
\textsuperscript{33} Ibid.
\textsuperscript{34} Amartya Sen, \textit{Inequality Re-examined} (OUP 1992).
\textsuperscript{37} Susanne Baer, ‘Equality’ in Michel Rosenfeld and Andras Sajo (eds), \textit{The Oxford Handbook of Comparative Constitutional Law} (UP 2012) 982, 986.
Ensuring equality where there is difference

Making sense of difference, has always been a challenge for the sameness approach which often insists on judging the litigant against a similarly situated comparator. Which man is the comparator for a pregnant woman? This question has perplexed equality scholars for decades and had to be confronted by the Belizean courts when Maria Roches, an unmarried teacher at a catholic school, was fired when she became pregnant. As Conteh CJ noted, ‘At the risk of sounding trite, men do not get pregnant’. The Catholic School argued that the treatment of male and female teachers was similar since unmarried men who fathered children outside marriage were also fired. Both the Supreme Court and the Court of Appeal concluded that the policy was discriminatory. Conteh CJ acknowledged the difficulty of comparing men and women in this case, and he built his conclusion on sex discrimination around it. He said ‘there is however, this immovable object in the way of such a policy being even-handed or non-discriminatory. And this is biology, gender or sex’, adding that ‘In the nature of things, by biology, gender and indeed sex, the policy . . . would more assuredly, naturally and readily impact or affect a teacher of the gender or sex of Ms Roches, that is, the female of the species.’

Key concept: Substantive equality

The CCJ endorsed the concept of substantive equality in its recent decision, McEwan v Attorney General of Guyana. Saunders P said that a merely formal approach to equality ‘could lead to grave injustice and defeat the spirit of the equality provisions.’ He indicated that a substantive approach may demand ‘different treatment from those who are differently situated and special treatment for those who merit special treatment.’

Oxford Professor, Sandra Fredman, has developed her idea of what substantive equality means (Figure 2). It rejects the meagre idea that reduces equality to treating persons the same and conceptualises equality as equal dignity and worth and the need to acknowledge ‘different identities, aspirations and needs’.

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38 Wade v Roches 30 April 2004 (SC Bze) [46] Conteh CJ; affirmed at BZ 2005 CA 5
39 Ibid.
40 [2018] CCJ 30 (AI).
41 Ibid [66].
42 Ibid.
She talks about a redistributive element to equality that seeks to break the cycle of disadvantage that is related to one’s status. She describes redistributive measures as necessary to make real equality of opportunity and genuine choice possible. In other words, equality must respond to maladministration of resources, deprivation of opportunity to pursue one’s own valued choices. Fredman also talks about equality as having a recognition element that seeks to address stigma, discrimination, stereotyping, humiliation and violence that arises from one’s status as an ‘out-group’ and promotes respect and dignity for all. Ultimately, a robust notion of equality should oblige us to rethink the norm. It should respect and accommodate difference and create structural change. This is the transformative element. Fredman also says equality must have a participative element and mean that persons must have the ability to fully participate in their society and community. This is a theory of social inclusion.⁴⁴

THE MOUNTING, MULTILEVEL AND MULTIDISCIPLINARY CALLS FOR SOCIAL INCLUSION AS AN ASPECT OF EQUALITY

Lawyers and judges have, for decades, considered issues of inequality, discrimination and vulnerability in legal terms, referencing rights to due process, non-discrimination and equality in constitutions, legislation and treaties as critical standards for securing justice. Questions of access to justice and equality transcend legal instruments, and increasingly constitute universal demands in our national, regional and global life. Development practitioners, economists, security experts, theologians and many others now insist that securing just communities that leave no one behind are essential to peace, security and economic and social development.

What is Social Exclusion?

Professor Hugh Collins, the Vinerian Professor of English Law at the University of Oxford, explains that social inclusion ‘concentrates its attention not on relative disadvantage between groups, but rather on the absolute disadvantage of particular groups in society.’\(^{45}\) This understanding of equality considers not simply differential treatment but unequal power relations. He adds that the project of social inclusion emphasises a conception of the elements required for ‘well-being’ which includes not just material goods but the ability to pursue your chosen goals.\(^{46}\) Social exclusion is described as a process which is dynamic and multi-dimensional.\(^{47}\) It is:

- driven by unequal power relationships interacting across four main dimensions – economic, political, social and cultural – and at different levels including individual, household, group, community, country and global levels. It results in a continuum of inclusion/exclusion characterised by unequal access to resources, capabilities and rights which leads to health inequalities.\(^{48}\)

Another group of authors explains that:

It involves the lack or denial of resources, rights, goods and services, and the inability to participate in the normal relationships and activities, available to the majority

\(^{46}\) Ibid.
\(^{47}\) Jennie Popay, Sarah Escorel, Mario Hernández, Heidi Johnston, Jane Mathieson and Laetitia Rispel ‘Understanding and Tackling Social Exclusion: Final Report to the WHO Commission on Social Determinants of Health from the Social Exclusion Knowledge Network’ (February 2008) 2.
\(^{48}\) Ibid.
of people in a society, whether in economic, social, cultural or political arenas. It affects both the quality of life of individuals and the equity and cohesion of society as a whole.49

Professor Hugh Collins turns to the flipside of exclusion social inclusion. He describes this as a theory ‘that if everyone participates fully in society, they are less likely to become alienated from the community and will conform to its social rules and laws’.50

‘We want Justice!’ Building a Just Community

It is acknowledged that ‘[s]ocial exclusion is a contributing factor to violent outcomes’.51 Heather Berkman explains that, ‘Those who resort to violent acts most often lack access to legitimate economic opportunities and the personal or social contacts required to obtain many of the services and resources available to mainstream society.’52 She points out that ‘For those with few or no prospects for economic advancement, profitable opportunities to be gained through illicit and violent means serve as a deadly magnet. As state institutions fail to provide security and justice, others – such as violent community leaders, gangs, or corrupt police – may step in to mete out alternative forms of justice and revenge.’53 She notes that ‘violence is used by a minority to acquire justice, security, authority and economic gain. The use of violence by this minority, however, affects the lives of the majority of excluded people that do not resort to violence.’54

In a 2013 Grace Kennedy lecture in Jamaica, theologian at The UWI, Dr Anna Kasafi Perkins, linked what she termed the crisis of ‘moral disease’ to

49 Ruth Levitas, Christina Pantazis, Eldin Fahmy, David Gordon, Eva Lloyd, and Demy Patsios, The Multi-Dimensional Analysis of Social Exclusion (Department of Sociology and School for Social Policy Townsend Centre for the International Study of Poverty and Bristol Institute for Public Affairs University of Bristol 2007).


52 Ibid.

53 Ibid.

54 Ibid.
questions of justice and the marginalisation and social exclusion of some. She explained how the ubiquitous calls of ordinary citizens, ‘We want justice’ are linked to the vulnerability and continued marginalisation some face and the unfair distribution of resources. She said:

A just community has structures and systems that exist to serve the complete and authentic development of all persons and to ensure their participation in all aspects of the life of the community . . . The demands for justice by the marginalised in Jamaican society are seen nightly on prime time news as Jamaicans demonstrate against poor roads, police killings and political neglect, with placards demanding, ‘We want justice!’ For such persons to participate in Jamaican life requires the protection of liberties such as the right to life but also the provision of goods and services that allow for participation in the life of the community. All groups and persons should be treated fairly in the distribution of benefits and burdens within the society.55

Dr Kasafi Perkins added that a just community acknowledges and recognises how past injustice frames current injustice:

A just community is aware of its imperfections and areas of susceptibility to disease owing to historical and other social factors. It will endeavour to constantly reform its structures and institutions to prevent the continued marginalisation of the weak and less powerful.56

Vida Digna

In linking a ‘just community’ to enabling the development of all persons and giving all persons a chance to participate in the life of the community, Kasafi Perkins’ normative framework is similar to the articulation of the historic mission of the Americas as proclaimed in the OAS Charter as that of offering to all a ‘land of liberty and a favorable environment for the development of his personality and the realization of his just aspirations.’ In developing inter-American human rights standards, the Inter-American Court of Human Rights has explained that human beings should be free to articulate and work towards achieving their own life project, and that, they should have the ‘right to make the [choices] they feel are best, of their own free will, in order to achieve their ideals.’

56 Ibid.
In a separate opinion, Judge Trinidade, now of the ICJ, explained in *Gutiérrez Soler v. Colombia*\(^{57}\) the concept of the life project and its importance to human and societal development. He said:

3. We all live in time, which eventually consumes us all. Precisely because of this self-perception we have of ourselves as existing in time, each one of us seeks to envisage a life project. The term ‘project’ implies in itself a temporal dimension. The concept of life project has therefore an essentially existential value, grounded in the idea of complete personal achievement. In other words, within the framework of a transient life, people have the right to make the options they feel are best, of their own free will, in order to achieve their ideals. Therefore, endeavors to achieve a life project appear to have great existential value, and the potential to give meaning to each person’s life.

4. When this quest is suddenly torn apart by external factors caused by man (such as violence, injustice, discrimination), which unfairly and arbitrarily alter and destroy an individual’s life project, it is especially serious, – and the Law cannot remain indifferent to this. Life – at least the one we know – is the only one we have and has a time limit, and the destruction of the life project almost always implies a truly irreparable damage or sometimes reparable only with great difficulty.

In the landmark Street Children case, this court also developed the concept of ‘*vida digna*’ (the right to a dignified life), according to which ‘the fundamental right to life includes not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence’\(^{58}\).

Along these lines, a critical dimension of equality is ‘the ability to differ, by choosing to lead one’s own life’.\(^{59}\) Professor Baer in explaining the recognition of difference in notions of equality says that ‘Equality means to modify the standard we live with, rather than modify a person who does not ‘fit’. Here, equality law becomes a right to transformation, to change the structure and to redistribute power, rather than a right to change oneself to fit in.’\(^{60}\)

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\(^{58}\) Inter-American Court of Human Rights Case of the ‘Street Children’ (Villagran-Morales et al) v Guatemala Judgment of November 19, 1999 (Merits) [144].

\(^{59}\) Baer, ‘Equality’ (n 37).

\(^{60}\) Ibid 988.
Sustainable development means ‘a just, equitable, tolerant and socially inclusive world in which the needs of the most vulnerable are met’

At the same time, parallel conversations about the relationship of the administration of justice and the rule of law to development are a province of development agencies, international financial institutions and inter-governmental bodies like the United Nations (UN) through its myriad agencies and bodies. Through bilateral agreements, a significant part of development assistance to the Caribbean has focussed on justice improvement. In the last few years, these debates have taken on a global dimension with the adoption of the sustainable development goals.

On January 1, 2016, 17 Sustainable Development Goals (SDGs) were adopted as part of the 2030 Agenda for Sustainable Development at a historic UN Summit, with three pillars – social, economic and environmental. Sustainable development aims at meeting ‘the needs of the present without compromising the ability of future generations to meet their own needs’ and has a strong focus on ending poverty, promoting sustainable, inclusive and equitable economic growth, creating greater opportunities for all, reducing inequalities, fostering social development and inclusion and environmental protection.

The pledge of the SDGs is to leave no one behind and its vision is of a ‘just, equitable, tolerant and socially inclusive world in which the needs of the most vulnerable are met’. Goal 16 links the rule of law and development, and promotes peaceful and inclusive societies for sustainable development by ensuring access to justice for all and building effective, accountable institutions at all levels. SDGs are technically ‘soft law’ commitments that are not legally binding, but they are expected to be owned by counties and they have become a part of national goals and everyday conversations about development throughout the world, including the Caribbean. As authors Winkler and Williams explain, ‘At this moment in global politics, the SDGs provide a much-needed space to address issues of human dignity and equality.’

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Social exclusion and the Justice Gap

The 2012 report, ‘Justice Reform in CARICOM: Analysis and Programming Options’, produced by justice improvement experts, lists familiar, serious challenges to the justice sector that can be described as the ‘justice gap’. These include case backlogs, poor court infrastructure, under-funding and widespread public disillusionment with the justice system. \(^{62}\) The report tackled questions of access to justice and concluded that ‘[m]uch more work is needed in CARICOM to remove barriers of class, race, gender, language, religion and geography’ and adds that ‘[t]he success of any reform measures depends on the extent to which the region’s justice systems become more accessible to poor and excluded members of society.’\(^{63}\) In its list of ‘common access to justice deficiencies’ in CARICOM, the report identified:

- ‘weak implementation of laws designed to protect vulnerable groups, such as women, children and minorities;
- courts that are insensitive to the needs of women, youth and children;
- woefully inadequate legal aid;
- inadequate mediation services;
- a paucity of rehabilitation programs for young offenders; and
- lack of public education concerning the justice system and the rights of citizens.’\(^{64}\)

In the Caribbean, there are large numbers of unrepresented persons and persons with unmet legal needs. In most countries, state-funded legal aid is only provided for capital offences, which means that the bulk of those who cannot afford lawyers’ fees remain unrepresented, but even where legal aid is provided a persistent problem is its sub-standard quality, a fact that has attracted repeated judicial condemnation.\(^{65}\) The catastrophic implications of poor representation for due process and reliability of convictions have been described in detail in relation to the implementation of the death penalty,\(^{66}\)


\(^{63}\) Ibid 39.

\(^{64}\) Ibid 4.


but no less acute is the impact on non-capital cases. Indeed, most persons who come before courts appear before magistrates’ courts, district courts and parish courts in the Caribbean, and they are mostly unrepresented. The hierarchical relationship between ‘superior’ and ‘summary’ courts and the slow pace to fully incorporate magistrates into the judiciary is a big contributor to the justice gap. As the then Chief Justice (Ag) of the Eastern Caribbean Supreme Court, the Hon Mr Justice Brian Alleyne, pointed out, ‘the average citizen is impacted by [the] work [of magistrates] to a far greater degree than by the work of the “higher” judiciary’ and yet magistrates and magistrates’ courts are often treated as ‘the poor relative of the judiciary’.67

One commentator notes that ‘All too often, parties without lawyers confront procedures of excessive and bewildering complexity and forms with archaic jargon left over from medieval England.’68 In some jurisdictions, judiciaries have sought to close the justice gap by making court processes more accessible and welcome, especially hearings with self-represented litigants, and providing more additional informational services to litigants and using more plain language forms.69 These are all initiatives to reduce the need for lawyers, especially in summary proceedings.70

The question has arisen as to whether judges can respond to the situation of pro se litigants and still meet the requirements of fair and unbiased justice. Richard Zorzo argues that ‘our focus on the appearance of judicial neutrality has caused us improperly . . . to resist the forms of judicial engagement that are in fact required to guarantee true neutrality.’71 A new comment was added

70 Ibid.
to the American Bar Association’s Model Code of Judicial Conduct dealing with impartiality and fairness to clarify that making reasonable accommodations for pro se litigants is not in breach of their duty of impartiality. The new comment states that ‘It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.’ On the other hand, judges should resist unreasonable demands for assistance that might give an unrepresented party an unfair advantage.’

ACCESSING COURTS: ‘YOU SHOULD BE ABLE TO GET TO THE COURT ROOM DOOR’ AND BE HEARD

In the Privy Council decision *Toussaint v Attorney General*, Lord Hoffmann repeated a key tenet of the rule of law and procedural fairness. It is the principle that persons must be able ‘to get to the courtroom door’ and once there, they should not face undue impediments in having their case heard, especially where fundamental rights and freedoms are at stake. Various forms of vulnerability, disadvantage and social exclusion render this journey harder for some.

Oath-taking: Swearing by ‘Almighty God, King Rastafari’

Hines and King were criminal defendants on trial by jury on an indictment containing three counts charging them with assault, robbery with aggravation and malicious damage to a motor bus. King gave sworn evidence in his own defence. Hines, a Rastafari, elected to give sworn evidence but refused to use the words, ‘I swear by Almighty God . . .’ on the basis that it was inconsistent with this faith. Instead he asked for concessions to religious beliefs, beginning his oath with ‘I swear by Almighty God, King Rastafari . . .’ The trial judge refused to allow him to swear in this form. On an appeal argued by Hugh Small and Richard Small, Hines argued that he was deprived of his right to testify on oath in his defence.
The Jamaica Court of Appeal \textit{R v Hines and King},\textsuperscript{76} ruled that the trial judge erred in not allowing him to take the oath in the form he wished to and which would be binding on his conscience. Acknowledging his right even while expressing scepticism about his faith, Luckhoo JA said that

However misguided one may think Hines to be in his professed belief as a member of the Rastafarian sect that the Emperor of Ethiopia is a Divine Being, the fact remains that such is his professed belief and indeed the professed belief of the sect to which he belongs. The form in which Hines wished to take the oath was consistent with that professed belief and declared by him to be binding on his conscience.\textsuperscript{77}

The negative judgment of Rastafari in this statement should give us pause. Nevertheless, this early post-independence decision is a seminal case on access to justice and inclusion, with respect to a member of a group that historically has faced marginalisation.

\textbf{No roundabout access to court for persons with disabilities}

The Trinidad and Tobago Hall of Justice did not provide for wheelchair accessibility through its public entrance at Knox Street. Persons using wheelchairs had to, through prior application, seek entry through an elevator available through the basement car park. Once inside the Hall of Justice, persons with disabilities faced further challenges in using witness and jury boxes and public toilets.

George Daniel, a wheelchair user and the President of the Trinidad and Tobago Chapter of Disabled Peoples International, in 2005 issued an originating motion, arguing that the lack of access to the Hall of Justice was a constitutional violation. Bereaux J upheld Daniel’s claim that the conditions amounted to a breach of his right to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law. But the judge dismissed his complaints about breaches of his right to freedom of movement and equality of treatment. Ultimately on appeal, both the Court of Appeal and Judicial Committee of the Privy Council (JCPC) refused to hear an appeal against the trial judge’s decision on the latter rights because it was academic, given his victory below.\textsuperscript{78}

Nevertheless, the ruling of Bereaux J in 2007 underscores the importance

\textsuperscript{76} (1971) 17 WIR 326 (CA Jam).
\textsuperscript{77} Ibid [332].
\textsuperscript{78} Daniel v Att Gen [2011] UKPC 31 (T&T).
of equal access to the courts for all. He said, and is quoted in full by the JCPC that:

26. ... It is unacceptable that our physically impaired citizens, more so those who are wheelchair bound, must suffer the inconvenience and indignity of being wheeled into the Hall of Justice in so roundabout a manner [i.e. through the underground car park].

27. Our Constitution mandates that they be treated in a far more civil and dignified manner. It is in the Hall of Justice that our citizenry come to pursue and enforce their rights. Physical access to it is an important part of their right to the protection of the law and ultimately to due process. They must be able to pursue their remedies and to witness proceedings, the latter of which is an important part of the legal process. It allows the litigant and the public the opportunity to view and to assess the fairness of the legal process. Without actual physical access to witness the process, credibility of the legal system will be undermined. Such access must be readily available to all. It is not sufficient that one’s attorney can access it. The physically impaired must themselves have easy and direct access to the Hall of Justice to personally pursue the upholding of their rights and to witness proceedings if they so choose. ‘Liberty’ requires that they have that option. A lack of unimpeded access can act as a disincentive to the legitimate pursuit of one’s legal rights. Such access may be to able-bodied persons so routine as to seem trivial but for persons who are physically impaired such physical access is neither trivial nor routine. It can be a daily challenge. But such access is a right not an option and is indelibly part of due process of law.

28. I accept that there are very significant challenges posed to the modification of courtrooms of the Hall of Justice so as to accommodate wheelchair bound members of our society in jury boxes of the courts of the Hall of Justice and to allow them to serve as jurors. But I certainly do not accept that ramps or even elevators to allow for the public conveyance of motorised or manually operated wheelchairs could not already have been constructed at the entrance of the Hall of Justice on Knox or Abercromby Streets. It is quite unacceptable that even a Page 3 timeframe for such a construction has not yet been set. It is not that we do not possess the resources.

29. I shall grant the applicant a declaration that the non-provision by the State of direct public wheelchair access through the public entrance to the Hall of Justice, Knox Street, Port of Spain, is a breach of the applicant’s right to liberty under section 4(a) of the Constitution. Pursuant to the provisions of section 14, I shall direct that the State take such immediate steps as are necessary to provide within 18 months, direct access through the public entrance of the Hall of Justice, Knox Street, Port of Spain, to the applicant and other members of
the physically challenged who are wheelchair-bound. The defendant shall pay the claimant’s costs certified fit for two junior counsel.’ These paragraphs, it will readily be seen, contain a resounding endorsement of the rights of the disabled, a clear recognition that these rights were violated in breach of the appellant’s article 4(a) right to liberty by the failure to provide proper public access to the courts, and appropriate declaratory relief together with a direction to provide such access within 18 months.

‘Inappropriate dress’: Trans persons getting to the courtroom door

Trans people in the Caribbean

Professor Rosamond King, a scholar of African and Caribbean sexuality, literature and performance at Brooklyn College in her 2015 book, Island Bodies: Transgressive Sexualities in the Caribbean Imagination, defines trans as ‘a range of identities and the varieties of strategies people use to choose, inhabit, or express a gender other than that which society assigns to their body.’ She also describes what she calls the ‘Caribbean trans continuum’, and it:

... includes, at one pole, people who feel that their gender is different than – or more complicated than – that assigned to them at birth and who want to be able to express the gender they feel rather than the one they were assigned. At the other pole are those who only occasionally exhibit an unconventional gender and only in contexts that are culturally sanctioned (such as carnival and other festivals).

As Professor King points out, ‘cross-dressing has been a part of Caribbean festivals for over a century’, citing characters like Dame Lorraine, pis-en-lit (‘wet-the-bed’), and baby doll (Trinidad and Tobago), Mother Sally (Barbados and Guyana). For trans persons, it is generally not possible to be ‘clos-

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79 Rosamond King, Island Bodies: Transgressive Sexualities in the Caribbean Imagination (University Press of Florida 2014) 22.
80 Ibid.
81 Ibid 44.
eted’, which exposes them to discrimination in all spheres of their lives, including their homes. Dr Christopher Carrico, in his study *Collateral Damage: The Social Impact of Laws affecting LGBT Persons in Guyana*, found that for some of the trans persons he interviewed, they said that the:

the main tensions created by their gender identities were not in their families, but in the wider community. D told us that ‘community members call me names and pelt me with bottles and bricks.’ ‘People . . . point finger and say ‘bun batty boy,’ ‘move ya AIDSin’ self,’ and ‘ya antiman.” F said ‘Yes, people called me names: batty boy, fiya, bun, demon, Satan, dead.’ And U has been greeted with ‘cross,’ ‘batty boy’ and ‘the cause of AIDS is by anti-men.’

The Guyana Service Commission

In June 2017, the Guyana Judicial Service Commission informed members of Guyana Trans United, a civil society organisation, on its decision on the periodic exclusions of trans women from a Georgetown Magistrates’ Court because they were dressed in female clothing. The Commission said that it heard the magistrate’s account of what happened in court and found that there was a denial of access to justice. The Commission added in its letter:

> The members of the Commission are strongly of the view that access to justice is an important and necessary component of the administration of justice and any denial of it is not to be condoned. The Commission hold firm to the belief that depriving a litigant access to court or the means to defend his or her right, constitutes an impermissible interference with the right to access justice.

The organisation first made a formal complaint to the Chancellor in 2016 after one particular magistrate refused to hear a criminal matter involving Ms Twinkle Bissoon, a trans woman, if she was dressed in female clothing. The Chancellor received the complaints in person and the exclusions thereafter appeared to stop until the eve of his retirement in early 2017. In an interview with Ms Bissoon during a protest outside the Georgetown Magistrates Court in 2016, she said:

> Definitely, yes, this is violation to my human rights, of course. And if I respect the magistrate on his bench, I do think the magistrate should also respect me as a human being. It does not matter how I am dressed, or my lifestyle is not the case, it is that I have matters there, and he should listen to my matters . . . We will stand

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Christopher Carrico, *Collateral Damage: The Social Impact of Laws affecting LGBT Persons in Guyana* (UWI Faculty of Law 2012) 26. This study was commissioned by the Faculty of Law The UWI Rights Advocacy Project (U-RAP) which we, the authors, cofounded and coordinate.
up for who we are . . . and Magistrate [] will do what he feel he have to do but I will not come out of female attire . . .

The President of the Guyana Bar Association, when asked to comment on the issue, referenced a 2013 ruling by then Acting Chief Justice Chang who said that the expression of one’s gender identity through clothing was not itself a crime, unless there is an improper purpose involved. He said:

I thought Justice Chang’s decision on this matter is fairly clear, that once you don’t do it for an improper purpose . . . what is an improper purpose? A person going to the courts [can] hardly be considered an improper purpose, in fact, you have a right of access to the court.

The complaint to the Judicial Service Commission in 2017 followed the exclusion by the magistrate of another trans woman dressed in female clothing, Ms Petronella Trotman. She was a complainant in respect of an assault against her that she believed was motivated by prejudice. Ultimately her case

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83 See: <https://www.youtube.com/watch?v=9ltKGuDoJ18>.
84 In McEwan v Att Gen [2018] CCJ 30 (AJ), the CCJ invalidated the law that made it a summary offence for a ‘male’ to be dressed in ‘female attire’ for ‘an improper purpose’ on the ground that the law lacked legal certainty. (U-RAP which we, the authors, cofounded and coordinate was involved in this litigation. Author Bulkan appeared in this case before the High Court and Court of Appeal and U-RAP advisor Douglas Mendes SC appeared before CCJ on behalf of the litigants.)
was dismissed because she was deemed to have not appeared, even though she was outside the courtroom and denied entry dressed in female clothing.\textsuperscript{86} While the Service Commission concluded that Trotman was denied access to justice, it did not indicate if any disciplinary action followed that finding. Even so, this is likely an unprecedented ruling from a Caribbean Judicial Service Commission in a complaint of this nature.

\section*{RELIGION, POWER AND THE STATE: REVIEWING THE ASSUMPTION THAT ‘THIS IS A CHRISTIAN NATION’}

Jamaican sociologist at the Sir Arthur Lewis Institute of Social and Economic Studies (SALISES) The UWI Cave Hill, Dr Latoya Lazarus, explains that notwithstanding the theoretical separation of church and state in Jamaica, ‘the important roles played by various Christian churches in socio-educational, economical and nation-building projects at different periods of Jamaica’s history have played a part in inculcating the widespread impression that Jamaica is “essentially a Christian country”’.\textsuperscript{87} Lazarus has been interested in how the idea that ‘This is a Christian nation’ influences national conversations about gender and sexuality. Caribbean jurisprudence has considered another aspect of this, the privileging of Christianity in governance and the allocation of state resources in a region with a diversity of religious traditions. As concerning should be the extent to which religious dogma may unconsciously influence law-making, or may be disproportionately influential in the courtroom.

Laws LJ, of the Court of Appeal of England and Wales, articulated why religious considerations are inappropriate, and even undemocratic, in a case where a religious exemption was sought from the application of a general law:

\textsuperscript{86}See Carinya Sharples, ‘Guyana’s Transgender Activists Fight Archaic Law’ BBC News 26 March 2017, available at <http://www.bbc.com/news/world-latin-america-39292599>. None of the persons excluded from court are clients in the litigation initiated by U-RAP, which the authors are a part of, in Guyana challenging the constitutionality of the law criminalising cross-dressing for an improper purpose. However the attorneys involved in the litigation on behalf of four trans persons also wrote to the Chancellor with respect to the exclusions and U-RAP issued a joint press release with GTU and the Society Against Sexual Orientation Discrimination (SASOD) denouncing the exclusions. See <https://www.kaieteurnewsonline.com/2016/04/03/transgenders-face-fresh-levels-of-discrimination-says-spokesman/>.

The promulgation of law for the protection of a position held purely on religious grounds cannot . . . be justified. It is irrational, as preferring the subjective over the objective. But it is also divisive, capricious and arbitrary. We do not live in a society where all the people share uniform religious beliefs. The precepts of any one religion – any belief system – cannot, by force of their religious origins, sound any louder in the general law than the precepts of any other. If they did, those out in the cold would be less than citizens; and our constitution would be on the way to a theocracy, which is of necessity autocratic. The law of a theocracy is dictated without option to the people, not made by their judges and governments. The individual conscience is free to accept such dictated law; but the State, if its people are to be free, has the burdensome duty of thinking for itself.88

Understanding Power and Privilege: Church Schools as Alter Egos of the State

A catholic school is deemed to be a public body amenable to the Constitution

Nowhere is the privileged position of Christianity in the provision of a public good more evident than in education. In Wade v Roches both the Supreme Court and Court of Appeal affirmed a partnership between the Roman Catholic Church and the State that existed for hundreds of years, ‘regardless of the hue of the political parties or the political divide.’89 Conteh CJ said this partnership had ‘been a constant motif and an enduring feature in the architecture, structure, system and provision of education in this country.’90 In that context, and with catholic schools receiving government funding and

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89 Wade v Roches 30 April 2004 (SC Bze) [20] (Conteh CJ); affirmed at BZ 2005 CA 5 [10] (Mottley P).
90 Ibid.
also governed by the Education Act, the religious schools were public bodies subject to the standards of the Constitution. Conteh CJ said:

. . . it does not take a leap of faith to hold that in the field of education today in Belize, the respondent carries out important functions of enormous public ramifications and impact that it can reasonably and properly be regarded as the alter ego of the government, or its emanation, such as to make it a person or authority for the purposes of the Constitution’s prohibition against discrimination, and therefore amenable to redress for any alleged violation of the constitutionally guaranteed fundamental rights and freedoms.91

Maria Roches, represented by Dean Barrow and Magali Marin Young, successfully argued before Conteh CJ and the Court of Appeal panel of Mottley P, Sosa JA and Morrison JA and that her dismissal because she was unmarried and pregnant violated her constitutional rights to work and to protection against sex discrimination since the policy was inherently more onerous on female teachers. The school argued that Roches had signed a contract that she would live according to Jesus’ teaching on marriage and sex and said her termination was the result of her failure to do so, but the trial judge said that evidence of that contract was not established.

91 Ibid [36].
Muslim girl allowed to wear hijab to catholic girls school

In many Caribbean countries, church-run schools are the most sought after and elite schools. Sumayyah Mohammed, a Muslim girl, was successful in her bid to be admitted to Convent, one of the best girls schools in Trinidad and Tobago, run by the Catholic Church, on the basis of her performance in the 11 plus examinations. The school refused to allow her to wear a modified uniform consistent with her Muslim faith and insisted she could go to a school where she would be allowed to wear the hijab. While Warner J did not find that there was a breach of her right to freedom of religion, she ruled that the school’s refusal was an unreasonable decision which took irrelevant factors into account such as the fact that Mohammed could apply to another school where a uniform consistent with the hijab would be permitted.

Abandoning some traditions: Religious exclusivity and honours

The Trinity Cross

The highest national award in Trinidad and Tobago was named the Trinity Cross. In 2009 the Judicial Committee of the Privy Council affirmed the ruling of Jamadar J that the award was legitimately seen by Hindus and Muslims as having Christian associations and it was reasonable that the latter would not fully participate in the process of nominating persons or being nominated to receive and wear the Trinity Cross. It was therefore indirectly discriminatory ‘in that it represents and constitutes preferential treatment, approval and acceptance of overt, exclusive and historically marginalising Christian symbolism and associations, in a multi-religious, multi-cultural State with significant proportions of Hindus and Muslims’ discriminated against non-Christians, particularly Muslims and Hindus who would not wish to receive an honour which recognised Christian symbols.

Detailing the history of Trinidad, Jamadar JA observed that for 300 years it ‘was an exclusive Christian Roman Catholic colony, with an overt policy of Christian religious exclusivism’. Jamadar J utilised the work of authoritative historians and primary archival sources such as the Royal Cedula on Colonization. He observed that the non-Christian East Indian immigrant

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labourer experienced alienation and marginalisation in Trinidad based not only on class . . . but also because of culture and religion.’\textsuperscript{95} Jamadar J added that:

It is indisputable that the generally prevailing attitude of the governing class in Trinidad was that Trinidad was a ‘Christian’ country and that ‘non-Christians’, certainly Hindus and Muslims, were by reason of their religions, ‘heathens’, ‘idolaters’, ‘deluded’ – inferior in a significant way and so ‘less than’ Christians.\textsuperscript{96}

This preferential approach lived on and formed part of the ‘collective “ancient memory” and psychological contexts of Hindus and Muslims’ in Trinidad and Tobago.\textsuperscript{97} But he pointed out that life of Jesus Christ stood in contrast to these practices since his ‘life was a critique of religious exclusivity and discrimination.’\textsuperscript{98}

**Key concept: Indirect Discrimination**

Discrimination can be direct, in the sense that the act or law explicitly authorizes differentiated treatment which adversely affects the enjoyment of rights of one group in particular. But it can also be indirect where the action or law appears to be neutral but its consequences adversely affect the enjoyment of rights of one or more groups in particular. Some Caribbean constitutions reference the concept of indirect discrimination when they talk about discrimination in effect.\textsuperscript{99}

**Key concept: Unintentional Discrimination**

One response to allegations of discrimination is that the differential and disadvantageous treatment is unintentional. It is now widely accepted that the bad faith of the actor or Parliament is not relevant to establishing discrimination.\textsuperscript{100} In fact the more deeply embedded the discriminatory practices, the more unlikely it will be unconscious.

\textsuperscript{95} Ibid 439.
\textsuperscript{96} Ibid 391.
\textsuperscript{97} Ibid.
\textsuperscript{98} Ibid.
\textsuperscript{99} See, for example, Belize Constitution, s 16.
ARE WE ‘PUNISHING VULNERABILITY’?

The punishment of crime is indispensable to the rule of law and the maintenance of order. Nevertheless, the scope of criminalisation must always be subject to review, especially if its overall effects appear to be doing harm to the vulnerable rather than safeguarding society and promoting peace. Reviews of practices of criminalisation in the Caribbean have shifted towards harm reduction for drug users, a dramatic reduction in the criminalisation of ganja use in Jamaica, discussions about criminalisation of HIV transmission, and recent rulings that the criminalisation of consensual sex between adults violate the Constitutions of Belize and Trinidad and Tobago.101

Religion, class, gender and ganja use: Criminalisation has ‘a most deleterious effect on our young people’

The stigmatisation of Rastafari as criminal has a long history and elements of the culture of Rastafarians have been used to fix the limits of the legal definition of crime.102 The increased criminalisation of ganja use accompanied the rise of Rastafarianism in Jamaica especially around the periods that followed the raid on the Pinnacle Community in 1941, the Claudius Henry incidents in 1959 and 1960, and the Coral Gardens episode in 1963. It was maintained by many in the early days of the movement that there was a strong link between ganja use and criminal conduct, even though research tended not to support that inference. For example, the Jamaican Prime

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101 Orozco v Att Gen (2016) 90 WIR 161; Jones v Att Gen 12 April 2018 (HC T&T). (U-RAP, which the authors coordinate, is directly involved in the Belize litigation. U-RAP member Westmin James is one of the attorneys who represented Orozco and UNIBAM.)

Minister gave warnings about his intention to radically change the existing drug laws at about the same time as the Coral Gardens incident in 1963. Despite the declarations that regulation of ganja was related primarily to international concerns, an interest in controlling violent crimes locally seemed to inform the debates and was reflected in the actual amendments.\textsuperscript{103}

**Judicial review of the Dangerous Drugs Act**

In *Forsythe v DPP*,\textsuperscript{104} the Supreme Court of Jamaica considered a constitutional challenge to the Dangerous Drugs Act and its criminalisation of ganja use in so far as it violated the right to freedom of religion for Rastafari. Forsythe, a Rastafari lawyer, argued that personal use of ganja for religious purposes could not be justified as ‘reasonably required’ in the interests of ‘defence, public safety, public order, public morality or public health’, as specified in the now repealed provisions of the Jamaica Constitution. The Supreme Court rejected his claim, primarily because it said that the Act was a pre-independence law which was immune from a bill of rights challenge under the then applicable savings law clause. The Court also held that the impugned legislation was reasonably required in the interests of public health and safety, though it did not point to any evidence or argument in support of this justification. On the other hand, copious submissions by the applicant as to the beneficial uses of ganja were rejected as irrelevant, and as a result the Dangerous Drugs Act was upheld without any scrutiny as to how it promoted any of the constitutional goals of health or safety.

**The 2001 Report of the Ganja Commission**

In 2001, a few years after the decision in *Forsthye*, the Chevannes Commission on Ganja presented its report.\textsuperscript{105} The Commission stated that ‘after reviewing the most up-to-date body of medical and scientific research’ it was ‘of the view that whatever health hazards the substance poses to the individual . . . these do not warrant the criminalisation of thousands of Jamaicans for using it in ways and with beliefs that are deeply-rooted in the culture of the people.’\textsuperscript{106} A retired Assistant Commissioner of Police said the longevity

\textsuperscript{103} Ibid.

\textsuperscript{104} JM 1997 SC 80, 27 October 1997.

of criminalisation of ganja use, the sentence served and the criminal record that followed were destructive and had ‘a most deleterious effect on our young people’. The Sergeant of Police opined that ganja smoking did not cause crime but that its prohibition drove cultivation and trafficking underground. The Archbishop of Kingston told the Commission that decriminalisation of ganja for private use would have the blessing of the Roman Catholic Church and that the Church supported sacramental use of ganja for religious purposes. The Anglican Bishop of Jamaica told the Commission that the fact that you don’t support something does not mean it should be a crime and supported decriminalising limited private use by adults, including for religious purposes. He said this law targets ‘the young, vulnerable and poor’.

Key concept: intersectional discrimination

As the Bangkok General Guidance for Judges on Applying a Gender Perspective in Southeast Asia adopted in Bangkok on 25 June 2016 notes, ‘A person or group of people may be discriminated against based on more than one ground. Discrimination is not usually an isolated occurrence; rather, intersectional forms of discrimination often occur in the context of discriminatory assumptions, norms and practices.’ It recommends that judges be aware of ‘intersecting forms of discrimination and exclusion based on race, color, language, religion, belief, caste, employment, political opinion, nationality, social origin, disability, age, location, region, indigenous and minority status, sex, gender, sexual orientation, gender identity, or other status’ and carefully review such cases especially in determining remedies.

South African Constitutional Court considers the constitutional protection of religious use of ganja

In 2002, the South Africa Constitutional Court in *Prince v President of the Law Society of the Cape of Good Hope and Others* held by a slim majority

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106 Ibid.
107 Ibid.
108 Ibid.
109 Ibid.
that the prohibition of ganja use violated the constitutional right to freedom of religion but could be justified as a proportionate response in a democratic society for the legitimate purpose of the war on drugs. A substantial minority disagreed with the latter conclusion, arguing that Rastafari were forced to choose between following their religion or complying with the law and that the prohibition cast all Rastafari as criminals whose religion was not worthy of protection and thus stigmatised Rastafari. The minority said that the suppression of illicit drugs did not require a blanket ban on sacramental use of ganja but that strict control of religious use of ganja could address the state concerns.

**The dread Dread Act**

The region’s most notorious and draconian anti-terrorism legislation, the ‘Dread Act’ of Dominica, ascribed immense organisational structure to the Dominican Dreads and branded them a prohibited and unlawful association. In the midst of high rates of unemployment and inflation, economic hardship among the poor black population was acute and there was growing dissatisfaction in the island with the high levels of foreign ownership of the economic resources. The crime rates were escalating and violent crimes against white visitors, praedial larceny and trade in ganja were increasingly attributed to the ‘Dreads’. The crisis point was reached when a white tourist was murdered and one of the ideological leaders of the Dreads was arrested and convicted of murder. Dealing with the Dreads became a matter of national concern. The government’s response was to pass the Prohibited and Unlawful Societies and Associations Act 1974, otherwise known as the ‘Dread Act’.

The statute made provision for the ‘suppression of societies established for unlawful purposes and for the better preservation of public safety, public order and public morality’. A ‘society’ was a group or association of persons intended to be longstanding, formed for the purpose of sharing and propagating a common ideology and unlawful objective, whose members distinguish themselves by a uniform, or by their dress or manner of wearing their hair. The most important signifier of being a Dread, wearing dreadlocks, became a crime.

This law was unanimously passed. Opposition leader Eugenia Charles of the Freedom Party mounted little opposition to the law. One of its few critics

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was Charles’ professional and political colleague Brian Alleyne, who later became the Chief Justice of the Eastern Caribbean Supreme Court. In an article published in the *New Chronicle* on 7 December 1974, Alleyne offered the view that:

\[\ldots\] this [Act] is the inevitable result when people (and more so with a body of people rather than an individual) allow themselves, in fits of emotion, to be ruled by irrational fear rather than by reason, which we have the right to demand from our legislators in enacting a law which it is unanimously agreed, drastically cuts into our fundamental rights and freedoms and, at the very least, comes perilously close to offending against the Constitution.\[113\]

### Criminalisation of HIV

**The Global Commission on HIV and the Law**

The Global Commission on HIV and the Law which issued its report in 2012 noted that ‘in much of the world it is a crime to expose another person to HIV or to transmit, especially through sex.’\[114\] It titled its chapter on this subject ‘punishing vulnerability’, and having carefully reviewed all the evidence, the Commission concluded that:

Fundamentally unjust, morally harmful, and virtually impossible to enforce with any semblance of fairness, such laws impose regimes of surveillance and punishment on sexually active people living with HIV, not only in their intimate relations and reproductive and maternal lives, but also their attempts to make a living.\[115\]

The Commission says that criminalisation is justified only where individuals maliciously and intentionally transmit or expose others with the express purpose of causing harm and that existing criminal laws are usually sufficient in these cases.

### Extradition of George Flowers

In an extradition case, Jamaican judges had to review existing criminal laws in relation to HIV. The Canadian Government sought the extradition of George Flowers from Jamaica in respect of charges of sexual assault against


\[115\] Ibid.
four women. It was alleged that he had unprotected sex with these women in Canada knowing he was HIV+, without informing them of his status. Three of the women contracted HIV. Thompson-James J said it was open to a Jamaican court to find that Flowers had inflicted grievous bodily harm, contrary to the Jamaica Offences against the Person Act. She observed that while the deception is criminalised in Canada, at common law it is the reckless transmission of HIV which is a crime.\textsuperscript{116}

**Right result/Wrong focus?**

The Bermuda Criminal Code section 324 provides that it is a sexual assault for an HIV positive person to have sex with another without informing the person he or she has the disease. In 1999, the Bermuda Court of Appeal reduced the sentence of a man so convicted from 10 years to six years. Huggins JA described infection with HIV as ‘tantamount to passing a death sentence on [a person], albeit that sentence is suspended’.\textsuperscript{117} It seemed to have accepted the evidence of the appellant that the sex was consensual and said it was unclear whether the appellant used a condom. It assumed this fact in his favour because condoms were found in his house and he said he did use a condom and the woman said she did not remember. This finding is troubling in light of the evidence that the complainant, a 43-year-old woman who lived in a nursing home, was ‘mentally challenged’ and ‘worldlywise’. The appellant had a past history of convictions for unlawful and indecent assault and for unlawful assault on a woman which caused bodily harm.

In Cardinez v R,\textsuperscript{118} an appellant convicted of rape argued that his HIV positive status should be viewed as a mitigating factor in sentencing. Instead the

\textsuperscript{117} Mapp v R BM 1999 CA 12, 16 June 1999 (CA Berm).
\textsuperscript{118} BZ 2009 CA 2, 27 March 2009 (CA Bze).
Court of Appeal found that his conduct ‘in having sexual intercourse’ – raping – the complainant knowing that he was HIV positive was a grave aggravating factor and the Court of Appeal reaffirmed his 18-year sentence. Mottley P said:

[20] . . . Women must be protected from men who, knowing that they are HIV positive, nonetheless for their sexual gratification force themselves upon them. It is difficult to conceive that this or any young woman would have consented to having unprotected sex with the appellant if she was aware that she was HIV positive. This young woman must now live and hope that she has not been infected with this disease as a result of this wanton and callous conduct by the appellant to satisfy his sexual urges oblivious to the harm, both physical and mental, that he was inflicting upon her.’

This statement is complicated by the conflation of sexual violence with ‘sexual gratification’ and stereotypes of men as having difficult to control ‘sexual urges’. Dr Halimah Deshong, from the Institute of Gender and Development Studies at The UWI Cave Hill, describes the need for more egalitarian alternatives to existing narratives of heterosexual love since ‘violence continues to be enveloped into romantic love discourses’.119

**PREJUDICE, STIGMA AND THE STRICT SCRUTINY STANDARD: ‘DISCOURAGING THE BEHAVIOUR IN WHICH PREJUDICE FINDS EXPRESSION’**

Caribbean constitutions demand equality of treatment before the courts and Caribbean judicial codes state that judges should not manifest any bias or prejudice towards a person based on irrelevant considerations, which include gender, race, colour, national origin, religious conviction, culture, ethnic background, social and economic status, marital status, age, sexual orientation, disability and other like causes. Noticeably, this list has more expansive enumerated grounds in Caribbean laws.

**Strict scrutiny**

Normally, where laws or action amount to different and disadvantageous treatment on these grounds, a heavy burden exists to justify it. In American

jurisprudence this standard of review is termed strict scrutiny, which means
that the state must establish that it is acting in furtherance of a compelling
interest and that the means chosen is narrowly designed to avoid violation
of the right to equal protection under the laws. In the US, strict scrutiny is
applied to discrimination on the basis of race, national origin and alienage;
for other types of discrimination, a lesser standard involving either ‘inter-
mediate scrutiny’ (requiring a substantial purpose) or ‘rational basis’ (for
which any legitimate purpose qualifies) is employed. Generally, where the
characteristic involved is some inherent, personal attribute, one which the
individual cannot change or cannot easily abandon because of how it may be
intertwined with identity, the appropriate standard is one of heightened scru-
tiny. In the case of McEwan v Attorney General, Saunders P described the
expression of one’s gender identity as ‘a fundamental part of their right
to dignity’ that deserved constitutional protection under Article 149D that
provides for equality before the law.

Custody disputes: ‘Notwithstanding his sexual orientation [he] is
entitled to equal treatment’

In the 2007 case of E v A, Thompson J awarded joint custody to a couple
during a divorce in which the husband after ten years of marriage revealed
he was gay. At the time of the hearing their daughters were 14 and 10 years
old. The wife on learning of her husband’s sexual orientation asked him to
‘change’ to maintain the marriage, but he told her that ‘his sexual orientation
was a state of nature’ and left the matrimonial home the following year. The

120 Korematsu v United States 323 U.S. 214 (USA SC).
121 John Knechtle and Christopher Roederer, Mastering Constitutional Law (Carolina Academic
husband told the children of his sexual orientation to the displeasure of the wife. During the separation, the husband had access to the children on weekends, paid maintenance monthly and all of the children’s school fees and their medical, dental and optical expenses. The wife asked for sole custody and that the husband be given supervised access.

Thompson J noted that these requests were not accompanied by any evidence that the children were in any way being harmed in the existing arrangements. The Chief Welfare Officer gave evidence that there was no evidence of the children being exposed to the husband and any ‘friend’ in a compromising situation and that the husband was ‘unlikely to expose the children to anything which would adversely affect them’. The court noted that the children had undergone counselling to assist them with dealing with their father’s sexual orientation. The judge said that ‘from the petitioner’s evidence and her unsubstantiated fears, she is possibly basing her application for supervised access on ill-informed reactions to homosexuality, although she accepts that the respondent is a good father who has always shown love to his children.’ The judge concluded that joint custody had not posed any harm to the children and refused to disturb that order.

Thompson J agreed that ‘notwithstanding his sexual orientation the respondent is entitled to equal treatment in matters relating to custody of and access to his children.’ He cited from the first Race Relations Report of peer Lord Bonham Carter who said:

A law is an unequivocal declaration of public policy. A law gives support to those who do not wish to discriminate but feel compelled to do so by social pressure. A law gives protection and redress to minority groups. A law provides for the peaceful and ordinary adjustment of grievances and the relief of tensions. A law reduces prejudice by discouraging the behaviour in which prejudice finds expression.\(^\text{124}\)

**HIV stigma at work: Being ‘ruled by irrational fear rather than reason’**

Brian Alleyne’s 1974 concern about the results when people ‘allow themselves, in fits of emotion, to be ruled by irrational fear rather than by reason’ applies profoundly to HIV/AIDS. As early as 1999, the High Court of Trinidad and Tobago ruled that a laboratory technician who refused to take blood for an HIV+ patient was guilty of gross misconduct, which in contractual terms amounted to a repudiation by the technician of the contract of employment. Moosai J in *Parris v Workman*,\(^\text{125}\) said that the carrying out of the blood

\(^{124}\) Ibid [14].

\(^{125}\) TT 1999 HC 34, 31 March 1999 (HC T&T).
tests was essential work in the technician’s contract and that there were protocols for the safe taking of blood from HIV+ persons. The technician’s failure to take the blood, together with the actions of other employees, put the life of the patient in jeopardy, the judge said, by their ‘deliberate and calculated act’ and also put the employer in legal jeopardy.

In 2001 in *Hoffmann v SAA* \(^{126}\) the South African Constitutional Court concluded that HIV status is a prohibited ground of discrimination analogous to those mentioned in the open-ended list in the Constitution. South African Airlines had a policy of not employing HIV+ persons as flight attendants. The crux for expansion of the grounds was infringement of human dignity; it was a violation of human dignity to refuse persons a job because of their HIV status without having regard to their ability to perform the duties required. \(^{127}\) This discrimination could not be justified. It was based on fears and ill-informed prejudices and the court thought it only freshly stigmatised persons.

**BATTLING STEREOTYPING AND CONVENTIONS**

**Disrupting gender stereotypes**

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**Key concept: Gender Stereotypes**

According to the preeminent experts, a gender stereotype ‘is a generalised view or preconception about attributes or characteristics that are or ought to be possessed by, or the roles that are or should be performed by women and men.’ \(^{128}\) The Office of the High Commissioner for Human Rights says that a ‘gender stereotype is harmful when it limits women’s and men’s capacity to develop their personal abilities, pursue their professional careers and make choices about their lives and life plans.’ They explain that ‘harmful stereotypes can be both hostile/negative (e.g., women are irrational) or seemingly benign (e.g., women are nurturing).’ Former High Commissioner for Human Rights, Navi Pillay noted at the 26th Session of the UN Human Rights Council that, ‘These attitudes may be so widely and deeply held within the community that they are almost invisible – except in their effects. For they perpetuate discrimination, violence and humiliation.’

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\(^{126}\) 2001 (1) SA 1.

\(^{127}\) See also *McEwan v Att Gen* [2018] CCJ 30 (AJ).

\(^{128}\) Rebecca Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (University of Pennsylvania Press 2011).
The Bangkok General Guidance for Judges on Applying a Gender Perspective in Southeast Asia, adopted in Bangkok on 25 June 2016, listed some common stereotypes judges should take care to avoid. These include:

- Women cannot make decisions on their own;
- Men are the head of the household and must make all the decisions related to family;
- Women should be submissive and obedient;
- Good women are sexually chaste;
- Every woman wants to be a mother;
- Women should be the ones in charge of their children;
- Being alone at night or wearing certain clothes make women responsible for being attacked;
- Women are emotional and often overreact or dramatize hence it is necessary to corroborate their testimony.\textsuperscript{129}

The Guidance recommends that when determining which law to apply to a particular case, judges should:

a. Evaluate if the law is based on a stereotype or a sexist view of a person;
b. Evaluate the purported gender neutrality of the law and the consequences of its application, including whether the law may lead to indirect discrimination and discriminatory impacts;
c. Consider whether there are reasonable constructions and interpretations of the law that better guarantee substantive equality, equal protection and non-discrimination and, where appropriate, apply such an interpretation;

d. Consider the domestic application of international treaties to which their State is a party and adopt an interpretation that is consistent with the application of any such applicable treaties.\footnote{Ibid.}

**Rape Myths**

In two cases, Williams JA of the Barbados Court of Appeal can be seen to be confronting gender stereotypes that have implications for justice in the case. In *Mayers v R*\footnote{BB 2009 CA 9, 3 April 2009.} the appellant appealed against his sentence of eight years for the rape of his employee. The complainant, eighteen years old at the time, worked for the appellant, then aged 44, as a shopkeeper. She was premenstrual and having stomach pains and the appellant closed his shop and offered to take her home. He detoured and demanded sex. He put his hand on her throat and across her chest and raped her. His attorney argued that although rape is normally a crime of violence, the ‘evidence in this case does not indicate any physical violence really ... It ... was not a particularly violent crime.’ The Barbados Court of Appeal rejected this argument and maintained the sentence. The sentence was a proper reflection, Williams JA said, of ‘the concern of the courts to protect the vulnerable members of society’. He added, ‘Young working women and girls receiving low wages are very often at the financial mercy of their employers. The courts must denounce strongly the sexual exploitation of this group by their employers and supervisors.’

Williams JA responded to the deep-rooted gender ideology expressed in the submission made by the appellant’s counsel. He sought support for the proposition that rape is a crime of violence from the UN Declaration on the Elimination of Violence Against Women 1993 and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, which has been ratified by Barbados. The judge thought it was also very important to understand the nature and impact of a rape on the victim which involves both physical and psychological injuries and invaded the victim’s privacy and objectified her.

In *R v Woodall*,\footnote{BB 2005 CA 25, 29 November 2005.} Williams JA noted that traditional corroboration warnings ‘were disparaging and reinforced false stereotypes’ and that judges were obliged to have regard to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) which had been ratified by Barbados and sought to eliminate discrimination and prejudice based on stereotyping women.\footnote{Ibid.}
Disrupting stereotypes and practices that perpetuate gender-based violence

Caribbean judges have turned to international human rights law in a number of contexts as ‘reflective mirror’ for the court to assess its own interpretation and understandings about what is ‘necessary’, ‘natural’ and ‘normal’. They used developments in international human rights law and the commitments of their state to point out that violence against women could not be dismissed as a private matter or an unimportant one, refuting assumptions that were prevalent and even reflected in legal rules to that effect.

In R v Paddy a criminal case, Hariprashad-Charles J referenced international human rights law to emphasise that ‘offences committed in a domestic violence context should be regarded as being no less serious than offences committed in a non-domestic violence context’ and to shape her decision on sentence. The defendant pleaded guilty to unlawfully and maliciously causing grievous bodily harm to his wife by hitting her repeatedly with a hammer. She described domestic violence as ‘a crime of moral turpitude that causes far more pain than the visible marks of bruises and scars.’ She continued:

Violence against women is an appalling human rights violation. In the broadest sense, it is the violation of a woman’s personhood, mental or physical integrity, or freedom of movement through individual acts and societal oppression. It is so

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133 See generally, Ramona Biholar, Transforming Discriminatory Sex Roles and Gender Stereotyping: The Implementation of Article 5(a) CEDAW for the Realisation of Women’s Right to be Free From Gender-Based Violence in Jamaica (Intersentia 2013). See also Natalie Persadie, A Critical Analysis of the Efficacy of Law as a Tool for Achieve Gender Equality (University Press of America 2012).
135 27 April 2011 (HC BVI).
136 Ibid [25].
137 Ibid [1].
woven into the fabric of society to such an extent that many women who are victimized feel that they are at fault. Many of those who perpetuate violence feel justified by strong societal messages that these violence against women, be it sexual harassment, rape, child abuse are acceptable.\textsuperscript{138}

She described the progress towards recognizing domestic violence as a violation of women’s human rights at the international and national levels: CEDAW, the enactment of domestic violence legislation and various state policies and agencies with a mandate to address gender based violence. The judge sentenced Paddy to 8 years and ordered compensation of $5,161.68 for medical expenses his wife incurred. She concluded:

It is now the duty of the courts to send out a strong message that domestic violence in any form will not be tolerated and that men do not have an unfettered licence to batter women. The only way the courts can effectively show this is by the sentences that are passed which are aimed at ensuring that the wrongdoer does not repeat the offence and that potential offenders get the message that society will not condone such behaviour.

In \textit{Francois v AG}\textsuperscript{139} in 2001, Barrow J used the developments in international human rights law to reject the claim that domestic violence was simply a private matter. Barrow J disrupted the orthodoxy that constitutional rights were negative liberties and did not give rise to positive obligations on the part of the state. He said, given the right to life, liberty and security of the person, the state had a duty to ensure protection against domestic violence.

**Conventional grooming codes**

One of the areas very resistant to sex discrimination claims is grooming codes for males and females. In \textit{A-G v Jones}\textsuperscript{140} a four year old boy was kept out of primary school because he had a ponytail. The school and Ministry of Education said it did not conform with its policy that boys’ hair must be cut short. The child’s doctor said cutting the boy’s hair would cause him significant trauma and his parents argued that girls were not subject to the same rule, hence its argument of sex discrimination. Barrow JA, giving the decision of the Court of Appeal, said that Jones did not receive less favourable treatment than a similarly situated girl since both were asked to wear their hair in conventional ways for girls and boys. The Court of Appeal held that the essence

\textsuperscript{138} Ibid [47].
\textsuperscript{139} LC 2001 HC 16, 24 May 2001.
\textsuperscript{140} 2 January 2008 (CA SKN).
of sex discrimination under the Constitution of St Kitts-Nevis is different and less favourable treatment. A school policy that required boys, but not girls, to wear their hair short and placed different restrictions on girls was held to be even-handed because all the rules as a whole were designed to ensure the conventional appearance of students, which included the wearing of uniforms.

Then Hofstra Law School professor Joanna Grossman, explains the problem with this reasoning that as long as both boys and girls are being asked to conform to generally accepted social norms then there is no discrimination. She notes ‘if generally accepted social norms are themselves the product of stereotyping, why should they be allowed to justify an obviously discriminatory law?’\footnote{Joanna L. Grossman, ‘Hair Makes the Man: Federal Appellate Court Says Short-Hair Requirement for Male Athletes Is Sex Discrimination’ (2013) Verdict. Available at <http://scholarlycommons.law.hofstra.edu/faculty_scholarship/345>.} Moreover, as she observes, social norms are not static and change.

The South African Constitutional Court frontally considered and rejected an explanation for discriminatory treatment premised on social norms, or convention as it was called in the case. In \textit{MEC for Education v Pillay},\footnote{(CCT 51/06) 2008 (1) SA 474 (CC SA).} a student challenged a school rule which prohibited her from wearing a nose stud to school. The practice embodied a South Indian cultural tradition, but at first instance the school rule was upheld as promoting ‘acceptable convention’. Overturning the finding of no discrimination, the Constitutional Court noted that ‘the norm embodied by the Code is not neutral, but enforces mainstream and historically privileged forms of adornment, such as ear studs which also involve the piercing of a body part, at the expense of minority and historically excluded forms’.\footnote{Ibid [44] (Langa CJ).} The court presciently observed how a rule based upon convention favoured the mainstream and resulted in the exclusion of others who did not conform, whether because of cultural or other reasons.

In \textit{Khan v McNicholls}\footnote{12 January 2012 (TT CA).} Jamadar J described culture and tradition as dynamic and evolving. In that case, he rejected the arguments of the Chief Magistrate that the wearing by a man of a Nehru suit was not permitted in the Magistrates Court. A key theme of his decision in \textit{Khan} was that conventions or traditions change. You can see evidence of that ecumenical approach when he used women as an illustration, pointing out that women’s attire in court has


\footnotesize\textsuperscript{142} (CCT 51/06) 2008 (1) SA 474 (CC SA).

\footnotesize\textsuperscript{143} Ibid [44] (Langa CJ).

\footnotesize\textsuperscript{144} 12 January 2012 (TT CA).
changed, quite dramatically at points, over time. There was a time when women never wore trousers to the Courts. Now they do. There was a time when a conventional jacket was expected, even over a dress. Now that is no longer so and there is more variety in what is considered a ‘jacket’. Indeed, dresses *per se* are no also worn and there is no uniformity as to style, cut or cloth. Furthermore, saris have been worn in all the courts of the land . . . And recently, Muslim women have been wearing hijabs in all the courts of Trinidad and Tobago.

He insisted that what befits the dignity of the court must speak to Trinidad and Tobago courts, not English ones. Recognising our history involves the making and remaking of Caribbean selves he also said that the Court consider the ‘legitimate assimilation (and re-appropriation) and expression of authentic indigenous cultural identities and meaning, freely assumed, and which are no longer shackled to British colonial and imperialist norms in acts of masked mimicry.’

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**Key concept: Comparators**

Some legislation and constitutions explicitly make the question of discrimination one of comparison, between similarly situated persons whose only difference is their sex, race etc. But where the law does not so stipulate – for example where it guarantees equality before the law or equal treatment, without more – courts should recognise the limitations of the consistency concept and adopt approaches that can generate substantive equality. For example, instead of asking are women treated better or worse than men in a given context, courts can look at whether there is substantive disadvantage that is related to sex or gender.

Oxford University Professor Sandra Fredman explains the problem of identifying comparators in many sexual harassment cases and argues that, ‘Substantive equality does not require a comparator in the same way: it simply prohibits sexual harassment because it is inconsistent with respect for a woman’s basic dignity and humanity.’

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**CONCLUSION**

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145 Ibid.

Caribbean Codes of Judicial Conduct advance the dialogue about equality and vulnerability and exclusion by clarifying in more detail the obligation of judges to ensure equality of treatment to all and equality before the law. The Codes state that judges should not manifest bias or prejudice to any person or group based on irrelevant considerations. Assuming that judges have control of their courts, they also prescribe that judges ensure that others do not use the courtroom to manifest prejudice or bias. The Codes also ask judges to strive to be aware of and to understand difference and diversity in society and to make proper accommodation for persons who experience challenges or who may be at a disadvantage.

These standards are an important starting point for discussions about equality and social inclusion. They presume a recognition of unequal power relations in society and adopt as a clear mandate a core principle of another profession, ‘do no harm’. In the last five decades Caribbean judges have embodied these principles of respect and equality before the law by understanding law in the larger historical and social context; regarding the common law as dynamic, needing continuous development and contributing to that development; and gaining wisdom from colleagues in courts around the world as well as non-legal experts close to home.
INTRODUCTION

The theme of the Caribbean Judicial Dialogue, whose papers form the chapters of this volume, was ‘securing equality for all in the administration of justice – with a special focus on the impact of discrimination, vulnerability, and social exclusion on access to justice’. Our task is to examine evidence and elaborate on discrimination, vulnerability, and social exclusion through the lenses of bias, trust, and fairness, and in the contexts of access to justice and equality of treatment in the administration of justice.

The broadest framework for this discussion rests on the constitutional value of the rule of law. All Caribbean constitutions have expressly or impliedly incorporated the rule of law as a core constitutional value. For many, it appears in the preambles to their constitutions.¹ Be this as it may, there is now no question that the rule of law, as both a procedural and substantive enabling constitutional value, also informs the proper approach to both access to justice and equality of treatment.

In this regard, the rule of law encompasses the constitutional values of due

¹ For example, in the Trinidad and Tobago Constitution, the preamble states: Whereas the People of Trinidad and Tobago—

... (d) recognise that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law;
process, protection of the law, and equality of treatment. The principle of equality, which is premised on the inherent equal worth and dignity of all human beings, regardless of individual or group differences is linked to the constitutional value of non-discrimination. This latter value has been explained as follows:

This general prohibition against non-discrimination thus prohibits laws that differentiate between people on the basis of their inherent personal characteristics and attributes. A court is entitled to consider granting . . . relief, where the claim is that a person has been discriminated against by reason of a condition, which is inherent and integral to his/her identity and personhood. Such discrimination undermines the dignity of the person, severely fractures peace and erodes freedom.

What this means is that any unjustifiable (on an aims/means proportionality assessment) bias or discrimination towards vulnerable groups in society is simply unconstitutional – whether that bias or discrimination occurs procedurally or substantively. Further, all unjustifiable impediments to access to justice, again whether procedurally or substantively and also infrastructurally and systemically, are unconstitutional. This is so on several bases, including the infringement of the constitutional values of the rule of law (including the entitlement to due process) and equality (the entitlement to equal treatment and the protection of the law).

This paper does not propose to examine these jurisprudential aspects of discrimination and access to justice, as they are comprehensively explored in other background papers which underpin this Dialogue. However, it is important to state the constitutional foundations upon which this analysis rests. The delivery of access to justice and equality of treatment for all, has its sources in the highest constitutional mandates that exist in all Caribbean

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2 See, for example, *Att Gen v Joseph* [2006] CCJ 3 (AI). [60]: ‘the right to the protection of the law is so broad and that it would be well nigh impossible to encapsulate in a section of a constitution all the ways in which it may be invoked or can be infringed.’ See also *Maya Leaders Alliance v Att Gen* [2015] CCJ 15 (AI) [47].


4 See eg *Daniel v Att Gen* 20 July 2007 (HC T&T) [27]:

Our Constitution mandates that they be treated in a far more civil and dignified manner. It is in the Hall of Justice that our citizenry come to pursue and enforce their rights. Physical access to it is an important part of their right to the protection of the law and ultimately to due process. They must be able to pursue their remedies and to witness proceedings, the latter of which is an important part of the legal process. It allows the litigant and the public the opportunity to view and to assess the fairness of the legal process. Without actual physical access to witness the process, credibility of the legal system will be undermined. Such access must be readily available to all. It is not sufficient that one's attorney can access it. The physically impaired must themselves have easy and direct access to the Hall of Justice to personally pursue the upholding of their rights and to witness proceedings if they so choose. ‘Liberty’ requires that they have that option. A lack of unimpeded access can act as a disincentive to the legitimate pursuit of one's legal rights. Such access may be, to able bodied persons so routine as to seem trivial but for persons who are physically impaired such physical access is neither trivial nor routine. It can be a daily challenge. But such access is a right not an option and is indelibly part of due process of law.
What this paper does look at is empirical evidence of bias and discrimination against certain vulnerable groups in Caribbean societies, the experiences of these court users, and the socio-cultural reasons for this, and finally evidence in support of interventions that can ameliorate these impediments to justice – particularly those that are under the power and control of judicial officers (in the form of ‘Procedural Fairness’ for example).

This evidence is two-fold. First, a general overview of the scholarly literature from the region and beyond on ‘Bias, Trust & Fairness in the Administration of Justice’. Second, an overview of data collected over the last two years in an on-going mixed-mode research project undertaken by the Judicial Education Institute of Trinidad and Tobago (JEITT) into Procedural Fairness locally.

Ultimately, we address the core issue of how can Caribbean judicial officers create an increasingly more inclusive and enabling court culture that facilitates a sense of belonging for vulnerable groups in society, and in so doing achieve the constitutional imperatives of equality of treatment, fairness and justice for all members of society.

We outline what the empirical research data shows about the experience of vulnerability by court users, examining what it means to be vulnerable in relation to court users. In what follows we first layout an overview of social science literature around:

a. Perceptions of the legitimacy of law, legal authorities, and fairness
b. Alternate systems
c. Functionality of courts in resolving disputes as distinct from being a theatre for conflicts
d. ‘Rites of domination’ in Caribbean: the implications for and the experiences of groups vulnerable to discrimination
e. The impact of sex and gender on judging in the Caribbean: the vanishing complainant and cultures of reconciliation
f. Due process, minor crimes, and sexual and gender minorities

This is then followed by a brief methodology section and overview of the research objectives behind the JEITT’s on-going research project into local aspects of procedural fairness, and a summary account of what we did, why we did it, and how we did it. The heart of the paper is a presentation of the data section, with some brief discussion points, where we share some quantitative and qualitative data extracts around gender and sexuality, ethnicity and religion, wealth and class, and general access to the courts, to flesh out
what court users and court officials shared with us about their experiences dealing with the administration of justice in Trinidad and Tobago.

A final summary section contains suggestions and potential interventions for how to fix gaps in the equality of treatment and access to justice for vulnerable groups in the region provides practical knowledge that may be applied by judicial officers.

**THE NINE ELEMENTS FOR PROCEDURAL FAIRNESS BASED ON OUR RESEARCH IN TRINIDAD AND TOBAGO**

We identify nine key elements of procedural vulnerability that our research has unearthed, as well as pervasive historical, economic, social, and cultural elements of substantive vulnerability, and locate these contextually by reference to existing social science research. We also suggest how stereotypical biases create a sense of alienation and suspicion in these vulnerable groups in relation to courts of law and erode their trust and confidence in the legitimacy of the administration of justice, and further, the impact these have as hindrances to access to justice.

**Voice**

The ability to meaningfully participate either directly or indirectly in court proceedings throughout the entire process, by expressing concerns and opinions and by asking questions, and having them valued and duly considered (‘heard’) before decisions are made.

**Understanding**

The need to have explained clearly, carefully, and in plain language, court protocols, procedures, decisions, directions given, and actions by decision makers and judicial personnel, ensuring that there is full understanding and comprehension.

**Respectful Treatment**

The treatment of all persons with dignity and respect, with full protection of their concerns and problems are considered seriously and sincerely, having due regards for their time, commitments and other constraints.

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5 This element emerged out of the data collected at the Supreme Court Level.
**Neutrality**

The independent, fair and objective application of procedural and substantive legal principles, administered by impartial and unbiased decision makers and judicial personnel.

**Trustworthy Authorities**

Decision makers, judiciary personnel and court processes that have earned legitimacy by demonstrating that they are competent and capable of duly fulfilling their functions, responsibilities and duties in an efficient, effective, timely, fair and transparent manner; and by demonstrating to all court users respect, compassion, caring, and a willingness to sincerely attend to their justifiable needs and to assist them throughout the court process.

**Accountability**

The need for decision makers and judicial staff to: fulfil their duties in an efficient manner; to reasonably justify and explain their actions and inactions, decisions and judgments in a timely manner and to be held responsible and accountable for them, particularly in relation to decisions, delays and poor service.

**Availability of Amenities**

The need for all court buildings to be equipped with the necessary infrastructure (structural and systemic) to enable Court users (internal and external) appropriate access to court buildings with efficient and effective information and operational systems and the enjoyment of functionally and culturally adequate amenities whilst observing health, safety and security standards.

**Access to Information**

Availability of accurate information communicated in a simple language to all court users about all court processes in a timely manner.

**Inclusivity**

The need for Court users to believe that they are an important part of the court process, rather than outside of, or peripheral to it, by being made to
feel welcomed and included in court proceedings and to actively easily and effectively participate throughout the process subject to rules of fairness and procedure.

REVIEW OF EMPIRICAL RESEARCH ON THE ADMINISTRATION OF JUSTICE IN THE CARIBBEAN

Perceptions of the legitimacy of law, legal authorities and fairness

The concept of procedural fairness and confidence in the justice system

According to Professor Tom R. Tyler, the Macklin Fleming Professor of Law and Professor of Psychology at the Yale Law School in North America, and as demonstrated in his several books and articles, if confidence in a justice system to uphold and respect rights is lacking, so too will be compliance to obey the laws that are put in place to ensure an orderly society. Seen from the perspective of the courts then legitimacy is the contextual framework by which the effective maintenance of law and order through the delivery of justice is achieved.

The empirical study of legitimacy has demonstrated that when authorities are viewed as legitimate they are better able to motivate people to comply with the law. In such research legitimacy is typically operationalized as (1) people’s authorization of legal authority to dictate appropriate behavior and (2) people’s trust and confidence that legal authorities are honest and act in ways that have citizens’ best interests at heart. Thus defined, legitimacy has been linked to a number of different law-related behaviors, including compliance with the law and cooperation with legal authorities.

Furthermore, in his book, Why People Obey the Law, Tyler suggests that compliance with the law is not driven by punishment, but rather whether

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people believe and see the administration of justice to be fair and the system in which it operates is legitimate.\textsuperscript{8}

For Tyler, his research in North America suggests that the practice of procedural fairness is ‘the key antecedent’ when investigating both the positive or negative views the public hold of the authorities, as well as their acceptance of the legitimacy of the authorities.\textsuperscript{9} Tyler’s research purports that the need to belong and feel a part of the legal process, what he phrases as ‘procedural fairness’ or justice, is imperative and if it is lacking the judicial treatment of courts users will create groups who feel alienated from justice.

According to Tyler, when the public perceives procedural fairness (voice, neutrality, respectful treatment, and trustworthy authorities) is present, they had more positive views of the authorities and the legal system, and while this does not mean they are happy with decisions made against them, it does suggest they are more willing and satisfied to comply and abide with the decision handed down. Tyler’s four elements of procedural fairness are:\textsuperscript{10}

1. the ability of persons to offer their side of the story (also known as ‘Voice’)
2. the ability to trust in the neutrality of the authorities (also known as ‘Neutrality’)
3. whether they are treated with dignity and their rights are respected (also known as ‘Respectful treatment’)
4. their perception of benevolence in the authorities’ actions\textsuperscript{11} (also known as ‘Trustworthy Authorities’)

In their ethnographic write up of observations of procedural fairness at the Red Hook community court in Brooklyn, Bornstein et al.\textsuperscript{12} recognise that ‘procedural justice scholars, mostly from law and psychology, have emphasized the positive benefits of fair treatment as a way of promoting harmony in contexts of different interests and scarcity, but they have been reluctant to explore ‘the darker side of the fair process phenomenon’.\textsuperscript{13} As such, Born-
stein et al also remind us, that ‘the state and the law are not experienced as monolithic, but as multiple entities that enjoy uneven levels of legitimacy’.14

Fair procedure, in other words, might make people feel better dealing with authorities but it does little to structurally transform uneven social relations in society. It has been said ‘that mainstream psychologists of law fall into the ‘legitimacy trap’ of uncritically accepting that the social order and rule of law should be maintained and that compliance should be improved even if that may not be best for everyone’.15

**Historical distrust of the state in the Caribbean**

A Caribbean and more culturally relative perspective on some of these issues can be seen in research by Johnson, Maguire and Kuhns, who investigated the perceptions of legitimacy of the law and legal authorities in Trinidad and Tobago.16 Important for regional considerations, Johnson, Maguire and Kuhns note the deep-rooted colonial past of policing in the Caribbean, which ‘treats the policed, like subjects rather than citizens’17 and suggests certain groups in society are treated differently by the state and the alienation from justice such experiences can produce. Their discussion speaks of a significant historical distrust of the police and authorities in the region by the citizenry.18 A similar distrust for the authorities was documented in 2002 by the National Committee on Crime and Violence, and listed as one of the main causes of crime in Jamaica.19

**Unreliable and inequitable application of punishments fail to deter crime**

Regional researchers, Professor Roger Hood, Professor Emeritus of Criminology at Oxford University (a world leading expert on the death penalty), and Dr Florence Seemungal, a visiting Trinidadian scholar at the Centre for

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14 Bornstein, Marcus, Curtis, Rivera and Swamer, ‘Tell It to the Judge’ (n 12).
15 Ibid 206.
17 Ibid 950.
18 The results of their study in Trinidad and Tobago problematise the assumption that legitimacy and procedural justice are distinct concepts. Johnson, Maguire, and Kuhns also point out that it is possible to see an institution as legitimate, and yet not trust it. The researchers posit that within the minds of the local population, procedural justice and legitimacy may be the same thing, thus requiring changes to Tyler’s model to fit the Caribbean context.
Criminology in Oxford, have also suggested in a body of publications with Judicial Officers and the general public in 2006, 2009, and 2011 that a lack of procedural fairness in the eyes of the public has been identified as a reason that authorities are seemingly unable to deter violent crimes such as murder.

In their 2006 statistical study, ‘Conviction for Murder, the Mandatory Death Penalty and the Reality of Homicide in Trinidad and Tobago’, funded by the European Commission and the Global Opportunities Fund of the Foreign & Commonwealth Office, Hood and Seemungal connected the phenomenon of a rising murder rate to the unreliable and inequitable application of punishments to defendants, which in turn fails to deter offenders.

In order to explain why the law was not functioning as a deterrent, they investigated prosecution of murders between 1998 and 2005, and highlighted the low number of convictions relative to the number of murders committed. In addition to this, they also found that the process of conviction and sentencing was drawn out over a long period of time, and in many cases where offenders were sentenced to death, the sentence was not carried out. The researchers pointed out that deterrence can only be accomplished when those who commit crime are given sanctions that ‘are applied with a high degree of certainty and without too long a delay.’ The researchers noted how focusing on resuming the death penalty overlooks the crux of the matter that severity was not the driving force in deterrence, but rather, it is the certainty of punishment that deters.

Furthermore, their research documented conclusively, ‘that in general the probability of a recorded murder resulting in a conviction for murder in Trinidad and Tobago was not only very low, but that no category of cases could

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20 Roger Hood and Florence Seemungal, ‘Experiences and Perceptions of the Mandatory Death Sentence for Murder in Trinidad and Tobago: Judges, Prosecutors and Counsel’ (Death Penalty Project Conference, Port of Spain, March 2009). Available at <http://www.deathpenaltyproject.org/assets/7/original/09.08.10_Trinidad_Publication.pdf?1259080068>.
21 Roger Hood and Florence Seemungal, Public Opinion on the Mandatory Death Penalty in Trinidad (Death Penalty Project and The Rights Advocacy Project of the University of the West Indies Faculty of Law 2011).
23 Ibid 59.
24 In 2011, Hood and Seemungal conducted further survey research in Trinidad and Tobago this time to collect the opinions of a representative sample of 1,000 residents on views about the mandatory death penalty for all murders. The results showed that while 91% were in favour of the death penalty only a quarter of that group, 26 per cent agreed with the current law where the death penalty is mandatory for all murders no matter the circumstances.
be identified with a very high probability of conviction and mandatory sentence to death for murder. Nor even of a conviction either for murder or for manslaughter’.²⁵

Alternate systems of Justice

Inner cities and informal justice systems

In the region, the official courts have not always been the default option for the resolving of personal or legal disputes among the population. In Jamaica, for example, the Dutch anthropologist Dr Rivke Jaffe now at the University of Amsterdam, and formerly of The University of the West Indies, Mona Campus, has looked extensively at such systems and describes ‘local informal courts’ and ‘community justice’ presided over by elders under the direction of a Don, and often supported by State agencies.²⁶

Jaffe’s work illustrates how such informal systems emerge in a context where many inner city residents of Kingston experience ‘the formal justice system as deeply unequal and prejudiced.’ And that amongst the urban poor it is widely accepted ‘that state agencies such as the police and the judiciary discriminate against people who live Downtown, against those with a darker skin colour, and who speak Jamaican Creole rather than English’. Jaffe concludes that because inner city residents perceive the nonformal system of justice as more impartial than the formal system they perceive it as more legitimate than State justice, which they suggest to be only available to specific segments of the population.²⁷

Traditions of community dispute resolution

As various scholars from anthropology, history, and the law such as Mindie Lazarus-Black²⁸, a Professor of Criminal Justice and Anthropology at the University of Illinois and historian Professor David Trotman at York University

²⁵ Hood and Seemungal ibid.
note in Trinidad and Tobago, as with other islands and nations in the region, there is a socio-cultural history of alternative court systems such as the Elder system, Village Councils, or the Panchayat, which all served to settle disputes in the community. The Panchayat, which is generally associated with the Indo-Trinbagonian community, involved selected villagers who were given the responsibility of making a decision on behalf of the community. Panchayats functioned until the late nineteenth century in Trinidad and until the 1950s in Guyana.29

New methodologies for dispute resolution in the administration of justice

The legacy of these traditions can be seen in the introduction of a mediation movement and mediation processes to the Judiciary of Trinidad and Tobago since 1994,30 as well as the introduction of specialised problem-solving courts such as those that handle family issues, the ‘bail boys’ courts,31 the juvenile court, and drug treatment courts.32 As mentioned previously, the introduction of mediation in the Judiciary of Trinidad and Tobago has sought to continue the success and history of community-based procedures like Elder trials, village councils and the panchayat, all of which focused on amicable community resolution and relations rather than a decision on ‘right’ or ‘wrong’.33

In a report on Caribbean mediation, Justice Kokaram notes that community mediation is now available across Trinidad and Tobago.34 He defines community mediation procedures as those identifying any social problems that are present within the dispute, so that social programmes may be advocated to address the underlying issues. He goes on to note, that ‘at present in

32 In a 2012 address at the launch of the Drug Treatment Court Pilot in San Fernando, the Hon Chief Justice, Mr Justice Ivor Archie noted:

The ‘Drug Treatment Court’ . . . offers a path that links ‘Treatment’ to a structured court supervised system. I am confident that the establishment of such a Court will not only result in savings to the Judiciary, Prison service and other state agencies, but more importantly, it offers those persons who are afflicted with the disease of addiction an opportunity to access a series of services, under the umbrella of the court and to equip them for a productive life with healthy relationships. Available at: http://www.ttlawcourts.org/index.php/newsroom-69/speeches/3308-chief-justice-address-on.
34 Ibid 9.
a population of 1.4 million there are 524 certified mediators. From this, 20 per cent are attorneys and 80 per cent represent an eclectic representation of various social backgrounds from manager, to school teachers, from ministers of religion to engineers. Mediators and judicial officers are held to the standards laid out by the 2004 Mediation Act, which stipulates that they must be ‘properly trained and certified before embarking upon mediation’.

As documented by Dr Catherine Ali, a consultant in mediation and restorative justice, the ‘Bail Boys’ Project in Trinidad and Tobago, is ‘a pre-trial diversion using bail and intensive probation supervision,’ and a restorative justice alternative. The ‘Court offered a change opportunity, under certain conditions, to those who would otherwise have been locked up for a decade. The bail conditions were curfew and drug testing, attending classes, skill training, and talk therapies which were designed to force a response and develop the capacity to respond to obligations and responsibilities. Bail boys participated in a needs and risks assessment and analysis, and in developing a personal strategic plan’. Such approaches reduce the ‘spectacle’ or theatricality of legal matters, and place importance on building communities through targeted development and reconciliation.

The force of the law

From her ethnographic work in the courts of Antigua and Trinidad, Lazarus-Black noted the power dynamics in the court room as a theatre of conflict where problems and social hierarchies are performed and not resolved, and how ‘[g]iving instructions flows in one direction: from the powerful to the subordinated’. Court users she observed are often ordered around by court officers; their behaviour is dictated to them, their facial expressions may be deemed unsuitable, or their attire may be admonished. This behaviour often places most pressure on the working class, who are readily identified as likely to contravene ‘respectable’ modes of dress and speech.

This is a similar point made by Justice Kokaram in his research into the need for alternate court systems and mediation in the region. He notes that, ‘institutionally the legal system as the force of the State compels people. Orders them to do things. The force of the law legitimizes violent acts such

36 Ibid 9.
37 Ali, ‘The Bail Boys Court’ (n 31) 9.
as the destruction of homes, the removal of crops, the laying of oil pipes in forests, the taking of a life!’ His suggestion being in such light, there is a need for alternate systems.

Functionality of courts in resolving disputes as distinct from being a theatre for conflicts

Courts are theatres for conflict

The perception of courts as a theatre for conflicts is pervasive in both the research literature and the accounts given by many court users – it is also something noted in the historical literature of Trinidad and Tobago’s courts in the late 19th century and first half of the twentieth century.40 As such, instead of being a space for the adjudication of justice, Caribbean courtrooms have often been described by researchers as a place for members of the judiciary and members of the public to become the actors and audiences in spectacles of power, i.e. who has power and who does not.

As Dr Suzanne LaFont, an Assistant Professor at the City University of New York, who conducted research in the family courts in Jamaica during the 1990s and published the book, The Emergence of an Afro-Caribbean Legal Tradition: Gender Relations and Family Courts in Kingston, Jamaica, noted:

men feel that they are being used for their financial contributions and, therefore, their ill treatment of women is justified. If they don’t use women, they will be fools. Women believe that men’s use of them sexually justifies their manipulation of men for financial favours. The cycle is complete. One of the consequences of this cycle is a weak conjugal bond that is interpreted as irresponsibility by the elite and middle-class, because it does not conform to ideals of gender relations within the dominant gender ideology.41

As LaFont, Robinson,42 and Lazarus-Black all note in their own ways, such court interactions and conflicts rely on a socio-cultural world where stereotypes of ‘women’s work’ and a ‘man’s world’ are normative. LaFont’s 1990s study of the Jamaican family court context, discusses a socio-economic and class environment, ‘which fosters conflict between men and women’.43

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40 Trotman (n 29). See also Cynthia Mahabir, Crime and Nation-Building: The Legacy of Legal Barriers (Schenkman Publishers 1985).
43 Suzanne LaFont, The Emergence of an Afro-Caribbean Legal Tradition: Gender Relations and Family Court Use in Kingston, Jamaica (Austin and Winfield 1996).
Gender wars in the courts

This situation she described as a familiar one, not least because family legislation in Jamaica does not adequately capture the culturally distinct realities of Caribbean family forms, which fall outside the Eurocentric nuclear form, and instead reflect outsider social norms and morality around nuclear family structure. LaFont’s conclusion is that rather than defuse and reconcile, Jamaican family courts have come to be used as ‘weapons of redress and retaliation’ first, with considerations of the children as a secondary concern.

In a follow-up piece at the turn of the century LaFont returned to this question of ‘gender wars’ between men and women that she saw in the courtroom and experienced for a year as a family court counsellor. LaFont’s description of the family court in Jamaica is a battlefield between the genders, where ‘both genders utilise their knowledge of the dominant ideology relating to gender relations to manipulate the system to their advantage’. Connecting gender to class, LaFont also describes how ‘the elite and middle-class have the luxury of much greater privacy surrounding their gender behaviour [in court]. They use the High Courts where lawyers may be employed to handle domestic affairs in private’ and that this suggests – because their matters happen behind close doors – an impression of conformity to the dominant gender roles and stereotypes in the society when this is not the case.

Reducing legal proceedings to a ‘theatre for conflicts’ has the real effect of alienating and excluding vulnerable defendants. For example, in a study by Lazarus-Black, a survivor of domestic abuse recounted her experience giving testimony in the courtroom. Although the magistrate attempted to circumvent any possible theatricality by emptying the courtroom before she testified, she noted that the police that remained continued to comment amongst themselves, smirk, and snicker as she spoke.

Rites of domination in Caribbean: The implications for and the experiences of groups vulnerable to discrimination

Professor Mindie Lazarus-Black, the preeminent legal anthropologist of the Caribbean, has done long-term studies of the Magistrates courts of Antigua and Trinidad, and published this varied work in numerous articles and books

44 Lafont, ‘Gender Wars in Jamaica’ (n 41) 233.
including, *Everyday Harm: Domestic Violence, Court Rites, and Cultures of Reconciliation*. Lazarus-Black’s research highlights the experiences of vulnerable groups to obtain their legally available rights and protections. She notes that while the law serves to guide the court in its duty, there are also socio-cultural processes and practices existing alongside the law that can make invisible relations of power, visible.

Lazarus-Black\(^46\) calls these power dynamics and practices in a court room, ‘rites of domination,’ and explains how they reinforce historical power dynamics in the courtroom like the gender and class hierarchies of a society. ‘Rites of domination include such practices as the intimidation, humiliation and objectification of litigants. Individually, the rites are generated in the interactions between legal officials and ordinary citizens.’\(^47\) She notes that the term ‘rites of domination’ refers to ‘events and processes that occur regularly in and around legal arenas and explains why everyday activities at the courthouse reproduce rather than eliminate hegemony.’\(^48\) The rites of domination model therefore helps to make sense ‘of how a society’s relations of domination and subordination are perpetuated in legal arenas.’

From her multiple research projects across two decades, Lazarus-Black has identified rites of domination in Caribbean Courts such as ‘delegalizing’, which involves the conversion of a discourse about legal rights to one of a ‘complaint’, which is unworthy of legal recourse. Lazarus-Black connected delegalizing to gender in her fieldwork, when she described how ‘gate-keeper clerks’ in an Antiguan courthouse who often ask for additional, often unnecessary paperwork, created a pattern where women felt discouraged from bringing custody petitions to court. Another pertinent rite of domination is the use of euphemism and legalese in the court — a system of language that is often inaccessible or unfamiliar to the public and reinforces hierarchy and separation from the agents of the state.\(^49\)

Rites of domination can also be seen when Lazarus-Black highlights that while women and men are meant to be ‘equal’ in the eyes of the law, gender hierarchy, along with its strict interpretation of societal gender roles remain pervasive socially and fills the court space.\(^50\) This she suggests calls for a ‘regendering of the state’ to mark out that the state is not objective, neutral and ‘without gender’; law and the making of laws is not gender neutral.\(^51\)

\(^{46}\) Lazarus-Black, ‘The Rites of Domination’ (n 38) 628.
\(^{48}\) Ibid 7.
\(^{49}\) Lazarus-Black, ‘The Rites of Domination’ (n 38) 637.
\(^{50}\) Ibid 631.
The impact of sex and gender on judging in the Caribbean: The vanishing complainant and cultures of reconciliation

Gender, family and power in the magistrate’s court

Lazarus-Black’s investigation of child maintenance cases in Trinidad, illustrated that contested paternity was in fact, a ‘contestation about power – men’s, women’s and the state’s’ and that the rites of domination affecting gender in the Caribbean courtroom are especially visible when paternity is contested. For example, when a woman seeks maintenance for her child, a man may deny paternity, which Lazarus-Black notes has several implications: 1) by contesting paternity, he implies the woman is promiscuous, and thus not only attempts to damage her reputation, he suggests that she and her child are unworthy of his kinship; 2) When paternity is contested, the magistrate will advise the woman to retain an attorney, ‘a clear indication that she now faces a situation beyond her ability to manage herself’, which has an added economic burden; and 3) Contested paternity can often be a form of revenge against the woman for ‘calling his name in court’, which forces her to beg for kinship status through the courts. The burden of proof is often on the woman, who is re-framed as the ‘complainant’ and may be forced to ‘line up witnesses to speak openly in a public space about the most intimate details of her life’.

Based on fieldwork in Antigua, Lazarus-Black used the colonial history of the island to explain the roots of these still-relevant social hierarchies, as well as the laws that served to reinforce them. For example, she discussed how family structure on the island was inextricably linked to class privilege and how unions common amongst the enslaved and indentured were valued less than the unions of the wealthy.

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51 Lazarus-Black in this sense reconsiders the use of the word ‘agency’ in the context of court users and within legal discourse. She reframes agency within the legal process as ‘discursive, inherently unstable and constantly negotiated’ term. Lazarus-Black explains that agency cannot be divorced from wider structural influences and situations of historical inequity – which includes the common-sense norms and values surrounding kinship, race, class and gender. Agency is not simply the ability of all individuals to act and access rights equally, rather agency is ‘made and remade in peoples’ encounters with police, courthouse staff, lawyers, probation officers and judges’ An individual’s ability to act and access rights in Court therefore is not equal for all but rather it is shaped by the wider sociocultural landscape, both by its influence on the person seeking agency and on those who have the power to deny or validate that agency.


53 Ibid 23.
Thus the hierarchy of social class and family structure laid down from slavery and the colonial encounter remained and those ‘visiting’ unions and long-term non-legal partnerships more common amongst the poor were deemed deformed or malfunctioning. The children of such unions were deemed ‘illegitimate’ by the State, and were not entitled to inherit from their father until the Antiguan Parliament changed the laws post-independence.

Family structure and the dual justice system

However, the hierarchy that privileged married couples over unmarried couples remained entrenched socio-culturally in the legal system: while married persons may apply to the magistrate’s court or High Court, unmarried partners are only allowed to apply to the Magistrate’s court. As Lazarus-Black notes, this had tangible effects on the outcomes of these matters, ‘the two courts are widely acknowledged to have different consequences for individuals’ family ties and the economies of their households’.\(^{(54)}\)

The vanishing complainant

Further fieldwork by Lazarus-Black\(^{(55)}\) discusses ‘the problem of the vanishing complainant’, in the context of the frequent vanishing of domestic violence cases from courts, and specifically women who seek protection orders against family members – usually their spouses. She notes how sometimes the decision to stop the process without gaining the order may be based on personal relations, or social and economic reasons, a situation Robinson has described as a ‘protection gap’\(^{(56)}\). ‘With the successful enactment of domestic violence everywhere, we now have sobering evidence of a ‘protection gap’. Complainants ‘vanish’ and few orders relative to applications seem to get made’. But as Lazarus-Black notes there may also be negative experiences with legal and judicial officials, which can include ‘gatekeeping’ or ridicule when the complainant seeks to have their case heard\(^{(57)}\) and such experiences also contribute to the vanished complainant.

\(^{54}\) Lazarus-Black, ‘The Rites of Domination’ (n 38) 631.

\(^{55}\) Lazarus-Black, ‘Vanishing Complainants’ (n 45) 25.

\(^{56}\) Robinson.’Gender, Equality, Justice and Caribbean Realities’ (n 42) 10.

\(^{57}\) Lazarus-Black, ‘Vanishing Complainants’ (n 45) 37.
Cultures of reconciliation

In this context Lazarus-Black also explains how ‘cultures of reconciliation,’ shape women’s choice in such matters and often work against women accessing justice. This is because ‘cultures of reconciliation’ encompass how societal norms and values supposedly separate from the law, still impact the legal process nonetheless. For example, domestic violence disputes – particularly the existence of vanishing complainants within these disputes – are an illustrative example of how these ‘cultures of reconciliation’ function within the legal process. Lazarus-Black points at the dominant socio-cultural norms framing family disputes as ‘private matters’ that outsiders should not be involved in, which includes the court and as such lead to the gaze of the court being diverted away from formal justice and instead encouraging women to reconcile with their abusers. Robinson goes further to explain how local social norms and culture in Caribbean societies enter the court room and create rituals of domination wherein the historical legacies in which men believe they have propertied rights over women’s bodies dominate, and the implications this has for justice.58

‘Cultures of reconciliation’ and ‘vanishing complainants’ reflect the complex navigations around family, gender, and work that exist outside of the law. Cultures of reconciliation can ‘dissuade victims of violence from pursuing legal remedies.’ Factors like religious affiliation, class, and geographic location (rural or urban) can all play into how cultures of reconciliation function and become normative.

Cultures of reconciliation explain the ways in which violence against women and further violence within the family (such as the violence perpetrated against children by their parents) have been rationalised. For instance, corporal punishment in this light becomes ‘for the good’ of the child, or in the case of a woman abused by her spouse ‘the police tell an abused woman to ‘have a little patience’. This illustrates what Lazarus-Black notes as ‘acceptable’ forms of violence within the society that have historical roots across racial, ethnic and religious groups within the Caribbean.

As she points out, ‘gender is relational; that masculinity is constituted in opposition to femininity, but also that these two categories, the masculine and the feminine, each encompass hierarchical domains that implicate differences in class, employment, education, sexuality, ethnicity, religion, disability, and citizenship.’ Thus, the boundaries of the ‘acceptable’ and

58 Tracy Robinson, ‘A Caribbean common law’ in Alissa Trotz and Aaron Kamugisha (eds), Caribbean Trajectories: 200 Years On (Race & Class 2007) 118.
‘unacceptable’ are not just defined by laws – they are framed and re-framed using societal norms and values. As Robinson too noted about the relationship between justice and socio-cultural and historical realities, ‘Law and justice don’t stand outside these social forces.’

Due process and sexual and gender minorities

Minor crimes and due process violations experienced by sexual and gender minorities

The 2012 Carrico report published by the Faculty of Law UWI Rights Advocacy Project was a qualitative study conducted in the Georgetown area of Guyana by the anthropologist Dr Christopher Carrico. It was based on interview data with 21 Guyanese nationals who self-identified as lesbian, gay, bi-sexual and transgender. The report considered the ways in which laws within the country, even when those laws are considered to be ‘un-enforced’ or ‘under-enforced’ impact the LGBTQI community and have ‘serious negative social effects’ for same-sex love and non-conforming gender presentation. The illegality of sexual or gender expression, the report suggested, feeds into the legitimisation of prejudice against these groups. The report also notes that laws against loitering and soliciting disproportionately affect sexual and gender minorities. For example, one Indo-Guyanese transgender sex worker who dresses as a women noted that ‘she once was arrested and held for three months before being told what crime she was being charged with.’

Carrico’s discussion and analysis of fairness in due process and pre-trial detention suggested that many respondents expressed fear of reporting crimes committed against them because they ‘believed or were told charges would also be brought against them because of their sexual orientation’. The report also suggested that attacks and crimes committed against sexual and gender minorities ‘are enabled because perpetrators know they will not be punished, or believe they are privately enforcing the law.’

59 Robinson, ‘Gender, Equality, Justice and Caribbean Realities’ (n 42). Robinson went on to note, ‘what difference does gender make to our analyses of equality, justice and Caribbean realities? I think in some respects it is a quite subtle one; it suggests that we must have a much closer look at and contextualise the nature and features of social disadvantage in our region.’

60 Christopher Carrico, Collateral Damage: The Social Impact of Laws Affecting LGBT Person in Guyana (Faculty of Law The UWI Rights Advocacy Project 2012).
Abuse and violence by state actors

The report provides evidence about the relationship with the justice sector members of the LGBTQI community face. For example all interviewees for the report recounted injuries done to them by the police and court process. While some suggested, that the detention process itself is carried out by people who are not invested in their case and have personal biases in contra of their situations.

Police harassment and abuse were reported by nearly every person interviewed in our study. Many were arrested, threatened with arrest, or charged with crimes. Some were prosecuted and punished by the courts. Many reported police abuse of power, including serious offences, such as demanding bribes, extortion, demanding sexual favours, or turning a blind eye to sexual abuse by other prison mates. Thus the report suggested that the context for discrimination and violence is hugely accelerated for members of the LGBTQI community. This can also be seen in the wider societal effects of the laws against sodomy, same sex sexual activity, and crossdressing used to target homosexuals and the negative effect the criminalisation of sexual and gender differences has on LGBTQI experiences not just in the legal realm but also with employment, access to health and social services, looking for accommodation and the freedom to express their sexual orientation publically.

In his research in Trinidad, Dr Amar Wahab, an Assistant Professor of Sociology at York University in Canada, investigated when Kennty Dave Mitchell, a gay man, was arrested, ridiculed, and strip-searched by police in Princes Town. Mitchell’s subsequent lawsuit brought to the surface the entrenched biases toward the LGBTQI community within policing, the court system, and by extension the State. Wahab, much like Trinidadian Professor of Women’s Studies at the University of Toronto, Jacqui Alexander previously, noted that ‘respectable citizenship’ is defined by heterosexual norms and morality, placing homosexuality firmly outside the realm of respectability and reputation, a process Alexander called ‘redrafting morality’.

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61 Ibid 31.
63 Ibid 484.
METHODOLOGY: THE RESEARCH IN PHASES

Phase 1

In 2015 the JEITT began preparation work for an upcoming 2016 ‘Continuing Education Seminar’ for the nations’ judges and magistrates. The theme of inquiry was an exploration of the potential biases within the adjudication decisions of judges, magistrates and judicial officers in the Courts of Trinidad and Tobago. In order to explore the terrain of opinions around such a theme the JEITT worked with Professor Cheryl Thomas from University College London Judicial Institute. Professor Thomas held a three-day training session with JEITT staff on creating and executing quantitative research. Under her guidance, four questionnaire instruments were created, each targeting a different group of stakeholders. The specific target groups were: the public, judiciary staff, attorneys, and judicial officers. Once the data was received, Professor Thomas then guided the JEITT on the analysis of the data, which involved rounds of recalculation to ensure representativeness.

In terms of numbers of people/stakeholders spoken to, the survey respondents were:

<table>
<thead>
<tr>
<th>Stakeholders</th>
<th>Survey Responses</th>
</tr>
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<tbody>
<tr>
<td>Members of the Public (Court users)</td>
<td>160</td>
</tr>
<tr>
<td>Judiciary Staff</td>
<td>110</td>
</tr>
<tr>
<td>Judicial Officers (Judges/Magistrates/Registrars)</td>
<td>22</td>
</tr>
<tr>
<td>Attorneys</td>
<td>68</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>360</strong></td>
</tr>
</tbody>
</table>

Additionally, courthouse and courtroom observations were done. Every courthouse in Trinidad and Tobago was visited, with courtrooms being randomly selected and observed. These observations were recorded using a standardised form which allowed for the quantification of the observations. Photographs of each courthouse and various courtrooms were also taken.

Phase 2

Using data produced from the initial survey collection, crossed with background literature on procedural fairness the JEITT working with UWI...
anthropologist and political sociologist Dr Dylan Kerrigan developed a research design to further investigate bias; however, this time the research was developed to distinctly enquire for open-ended, qualitative responses that dug deeper into the actual experiences persons had when interacting with the courts and specifically their experiences of the administration of justice in the court environment.

A central research question for this second phase was developed: ‘To what extent do the elements of Procedural Fairness, as discovered in Tom Tyler’s research, exist in the Judiciary of Trinidad and Tobago?’

The research objectives were:

- to determine the presence and level of both perceived and actual ‘voice’, ‘neutrality’, ‘trustworthiness’, and ‘respect’ in courts across Trinidad and Tobago;
- to understand the reasons for the discoveries made above;
- to discover elements which may impact upon procedural fairness in courts across Trinidad and Tobago and;
- to devise ways of improving procedural fairness in courts across Trinidad and Tobago.

In order to pursue the research question and its various objectives, three teams of three JEITT judicial researchers underwent training in ‘rapid assessment ethnography’. The teams were then deployed to all the magistrates courts in Trinidad and Tobago where over three months they spoke with court users and recorded the stories those court users shared with them about their experiences with the administration of justice. At a later date the collection of experiences from some users of the High Court was also undertaken.

**Phase 3**

A third phase of the research involved transcribing all the data from the open-ended interviews and developing a ‘code book’ to thematically explore our research objectives. With Tyler’s premise around procedural fairness being

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65 ‘Rapid assessment is a type of participatory action research and shares many of the characteristics of ethnographic research. Rapid assessment, however, uses intensive, team interaction and multiple cycles of data collection followed by data review/analysis, instead of the prolonged fieldwork normally associated with traditional qualitative research. Results can be used for planning, monitoring, and evaluating activities and for the design of additional research’. See James Beebe, ‘Rapid Assessment Process’ in Kimberly Kempf-Lenoard (ed), *Encyclopedia of Social Measurement: Three Volume Set* (Elsevier Academic Press 2005) 285–291.
based on research conducted in the United States of America, our third phase of the research project raised the question: are the expectations which encompass Procedural Fairness in the mind of Trinbagonians the same as, or different to, that of US court users?

Based on the qualitative feedback and thematic analysis of the narrative responses of 54 lower court users and 24 higher court users, Tyler’s four expectations of Procedural Fairness in the US case also proved to be present, with small amendments, in Trinbagonian society and important to court; however, these were not the sole expectations found. Five further expectations for the perception and process of procedural fairness also emerged from our Code Book of 78 qualitative interviewees. These were: understanding, accountability, availability of amenities, access to information, and inclusivity (see pages 64–65 of this chapter for the full listing of the nine elements and their definitions).

One tangible project output so far from our research in the context of the production of new knowledge was the publication of a ‘thick description’ collection by Judicial Researcher Elron Elahie.66 One further paper from this research is currently under peer review while two other research papers are soon to be submitted for peer review.

What follows is a brief presentation, discussion, and contextualisation of some of the extensive research done on Trinidad and Tobago Judiciary across the three phases of data collection by the JEITT over last twenty-four months.

**PRESENTATION OF DATA AND DISCUSSION**

**Access and accessibility**

The accessibility of the court and its proceedings encompasses several areas, ranging from physical access to buildings and facilities to the access to knowledge and procedural information about the judicial proceedings. Some respondents expressed concern about the state of the facilities, with one stating, ‘They have no seating accommodations and stuff – well, proper seating accommodations. Because what they have there is for upstairs. They have nothing for the court section’ (See for example Photos 1–4).

The plight of hearing-impaired court users as noted by two courtroom sign language interpreters interviewed for this project encompass several pressing concerns in terms of access to information, inclusion, and the availability of amenities for vulnerable groups who use the courts. Many times, there is a lack of interpreters, and when one is present, the cross-talk and jargon of the courtroom often creates untranslatable chaos for the interpreter. Thus, the hearing-impaired court user is left without a full idea of what has gone on in their case. This situation is analogous to members of other vulnerable groups.
who use the court and who suggested to us not having the court proceedings explained to them by their attorneys or a judicial officer (Figures 1–5). This situation illustrates the need for inclusivity as a component of procedural fairness so that court users feel that they are, and experience themselves as, an important part of the entire court process.

**FIGURE 1:** How important do you feel having the court process explained by the judge/judicial officer in a clear and understandable manner is in ensuring a court user’s compliance with court order?

**FIGURE 2:** To the best of my knowledge, individuals who visit the courthouse to conduct transactions, but do not appear before the courts in Trinidad and Tobago, are invited to express their views.
As the quantitative data illustrates in Figure 4, 72.7 per cent of judicial officers believe that users sometimes have proceedings explained to them; however, 41 per cent of the public suggest they rarely to never have proceed-
ings explained to them. Yet, almost all the respondents (as seen in Figure 1) agree that having the process explained in a clear manner is important. When it came to the opportunity to ask questions (Figure 5), a necessary component of ‘Voice’ as understood in the Procedural Fairness literature, 77.3 per cent of judicial officers believed that they afforded this opportunity to court users. However, 63 per cent of the public said that they are either sometimes or never given the opportunity to ask questions.

When asked if they believed that the court provides information to users before they attend the proceedings, 45.5 per cent of judicial officers did not know, and furthermore, only 27.3 per cent of judicial officers stated that the courts in their jurisdiction provided adequate signage directing court users to the courts, registries or departments. 71.9 per cent of the public stated that they are either sometimes or rarely provided with information about the process before coming to court while a slightly smaller amount of Attorneys, 57.2 per cent, shared this view.

Further examples of these instances can be seen in the qualitative fieldwork done by JEITT in courthouses across Trinidad and Tobago. One court user explained how he perceived the workings of the courtroom and how they alienated him by placing him on the periphery of the elaborate performance:

“You have to speak to a lawyer for the lawyer to speak to the magistrate. That ain’t making no sense. The magistrate in front of you, why I can’t speak to she? They said that last time – you can’t speak to the magistrate. The lawyer have to speak to the magistrate. But I am right in front the magistrate. She is a human being, why can’t I speak to her?”

The forced reliance on an attorney to be an intermediary between the magistrate and the court user serves to create distance between the two parties; the court user feels not included and lacks voice, while their attorney and the magistrate are allowed to converse on more equal footing. Taken in the light of further responses suggesting state authorities are not trustworthy, the perceived friendly and cozy relationship between elites (lawyers and judicial officers) can also impact court user ideas around the existence of procedural fairness.

For example, in the qualitative data of court users across the lower courts, the suggestion of lawyers and judicial officers as a sort of parasitic class – untrustworthy authorities – that help each other to make money, rather than having the client and their matter as the number one priority was captured. As one court user at the Port of Spain magistrate’s Court told us,
they keep putting off the case, so the lawyers get more money every time you come... Most of the time, the lawyers themselves end up being magistrates. So therefore, it’s a reoccurring decimal that is happening all the time.’

At the San Fernando Magistrate’s Court someone told us that, on two occasions here, I was forced to pay a bribe in order to go upstairs [to the registry]. The Security did tell me “you know how the thing does go”. And at Princess Town one user told us, nobody doing nothing for nobody here. It’s a bribery something have to pay or something to be honest.

Another user at Princess Town lower court suggested not being able to participate in his matter because he couldn’t afford a lawyer. ‘I didn’t have an opportunity to speak like that because he have a lawyer and I can’t afford a lawyer because I’m a student.’ While in the Port of Spain Magistrate’s Court, one person explained being made to feel peripheral and lost in his matter.

‘You felt more lost at the end of going before them than you was before you go before them. Because you don’t understand what’s going on. You just hearing certain terminologies being used. You don’t understand what it means.’

From our Tobago interviews one respondent spoke to not feeling included because the Magistrate was not welcoming to her side of events, she [the magistrate] telling you what she want to hear. When you telling her, she says, ‘No, I don’t want to hear that. While many of the court users in Tobago complained about general issues of access in Tobago.

‘The Judge is normally in Trinidad. To me, this is a disadvantage in the sense that sometimes you cannot hear effectively and communicate efficiently. Also the other party that is involved in the matter, they are physically with the Judge in Trinidad whereas we doesn’t have that advantage.’

While another told us,

‘None of the matters were explained. What happens is that the attorneys talk and then the judge sends back a written whatever to the attorneys a couple of weeks after. Nothing is said. You don’t know what’s said, what the decisions are. You don’t know what the judge is thinking. This is strange. I have to keep wondering.’
Gender and Sexuality

The quantitative data on gender and sexuality highlights, the differences between the public’s perception and the perception of the judicial officers when asked about their agreement with the statement, ‘A person who “appears to be” or is known to be straight is more likely to receive favourable treatment than a person who “appears to be” or is known to be lesbian, gay, bisexual or transgender’ (Figure 6). 40.8 per cent of the public agreed, while only 18.2 per cent of judicial officers agreed. Similarly, 53.2 per cent of the public polled thought that sexual orientation influenced the outcome of court matters in some aspect, compared to 22.7 per cent of judicial officers (Figure 7).

The stigma associated with being a member of the LGBTQI community was further evidenced by the lack of LGBTQI representation in the ethnographic data collection we conducted. When asked to voice opinions on their perceptions of the judicial system and its treatment of court users, LGBTQI

![Figure 6](image-url): A person who ‘appears to be’ or is known to be straight is more likely to receive favourable treatment than a person who ‘appears to be’ or is known to be lesbian, gay, bi-sexual or transgender.

![Figure 7](image-url): What impact, if any, do you believe SEXUAL orientation has on the outcome of a court matter?
individuals refused to respond, even in anonymity, because of the fear of persecution. Remaining ‘closeted’ or staying as close to the norm as possible reveals the same fear of Caribbean LGBTQI people in Trinidad and Tobago to respond to any query involving their sexual orientation as recorded by the Carrico report in Guyana.

The qualitative data on gender reveals that some male respondents feel as though they are discriminated against in favour of women. For instance, one respondent said, “When it come to maintenance they don’t listen to the man. They all for the woman.” Another said, “the Magistrate mostly for women” and another expressed the belief ‘when it come to maintenance they don’t listen to the man. They all for the woman.’ In the family court, the majority of comments from men centred on perceived gender bias against them. As one man there told us, ‘I still believe the male point of view, the man’s side of it isn’t always appreciated as much as the other side is.’ Another man in Tobago suggested:

‘So I realize it’s not a man’s world – it’s a women’s world. It doesn’t matter what the woman say, the magistrate, judge or whoever they believe the opposite sex. That’s what I observe.’

As noted in the literature by LaFont, Robinson and others, that such male viewpoints exist is not an uncommon line of thought based on the historical, cultural and social realities of the Caribbean.

As Patricia Mohammed points out, however, this idea of male marginalisation is premised on the assumption that male dominance is the natural order\textsuperscript{67} – when women are afforded (or appear to be afforded) equal treatment, that ‘natural order’ is unbalanced. Therefore, when men perceive that women will always be granted maintenance or custody for children, they may assume that women have been given this ‘privilege’ at the expense of men.

Another respondent commented, “So some of the magistrates need to give you a fair hearing as to what going on and stop being so spiteful or go on their personal experiences”, which assumes that a female magistrate will make her ruling specifically on the basis that she is female. This not only reduces a female judicial officer to her gender, it also continues the narrative that men are persecuted by women – when in fact, men are ‘still overwhelmingly represented in parliaments, businesses and courts’.\textsuperscript{68}


\textsuperscript{68} Aaron Kamugisha, ‘The Coloniality of Citizenship in the Contemporary Anglophone Caribbean’
Ethnicity and Religion

Within the quantitative data, 73.2 per cent of the public polled think that skin colour has at least some impact on the outcome of a court matter, while only 31.8 per cent of judicial officers agree (Figure 8). Similarly, 69.3 per cent of the public polled believed ethnicity could impact the outcome of a court matter, when only 31.8 per cent of Judicial Officers concur (Figure 9). This signals that there is a disparity between the public and judicial officers – while the public assumes that the courts have biases based in colour and ethnicity, the judicial officers themselves do not. The public perception falls in line with the academic literature’s understanding of ethnicity, race and colour being inextricably linked and blurry concepts within the region.69 Importantly, the literature notes that perceptions of ‘darkness’ and ‘lightness’ were linked with other physical markers such as hair texture to connote status, despite the person’s ethnic affiliation.70 Thus, the lighter skinned a person is, even if that person is ‘brown’ or ‘black’, they are ranked higher in the social hierarchy. Socially, ‘lightness’ is linked to respectability, which Segal notes is an ‘approximation to whiteness’ and the colonial legacy of white elite culture which had the power to define ‘respectable’.71

Religion72 also plays a factor in perceptions of fairness, especially amongst the public. When asked about whether religion could influence the outcome of a court matter (Figure 10), 56.3 per cent of the public polled thought at least some impact was possible, while again, only 27.3 per cent of judicial officers agreed. The courts themselves have a historical precedence of religious influence, where ‘religion was actively (though unequally) made and unmade by both the colonial elites and subalterns’.73 This legacy has not faded in Alissa Trotz and Aaron Kamugisha (eds), Caribbean Trajectories: 200 Years On (Race & Class 2007).

69 Daniel Segal, ““Race” and “Colour” in Pre-Independence Trinidad and Tobago’ in Kevin Yelvington (ed), Trinidad Ethnicity (University of Tennessee Press 1993).
71 Segal, ““Race” and “Colour” in Pre-Independence Trinidad and Tobago’ (n 69) 93.
72 In the context of procedural fairness, ethnicity and religion can be understood sociologically as a ‘worldview’. A worldview in sociology is the set of personal beliefs about fundamental aspects of reality that ground and influence all one’s perceiving, thinking, knowing, and doing about the world. A worldview shapes an individual’s sense of what is morally right and wrong on both the implicit and explicit levels. It is something each of us is socialised into, what anthropologists call a ‘languaculture’. Thus a central means of enhancing procedural fairness is for Judicial Officers to recognise both their own worldview and the worldview of others as at play in any interaction within and outside the court room and that a worldview shapes how each of us sees the world. As such, we do not all see the world in the same way.
FIGURE 8: What impact, if any, do you believe the skin colour has on the outcome of a court matter?

FIGURE 9: What impact, if any, do you believe ethnicity has on the outcome of a court matter?

FIGURE 10: What impact, if any, do you believe religion has on the outcome of a court matter?
Wealth and Class

As shown in Figure 11, 31.8 per cent of judicial officers agreed that a person of lighter skin colour is likely to receive favourable treatment whilst 48.3 per cent of the public shared this view. When asked a similar question (Figure 12) about wealth, 87.3 per cent of the public believed that a person who appears to be wealthy is more likely to receive favourable treatment than a person who appears to be poor. 36.4 per cent of Judicial Officers agree with this. Linked to this, as Figure 14 shows, a person of perceived high social status is likely to receive favourable treatment according to 90.1 per cent of the public, but significantly less (36.4 per cent) judicial officers agree. Education and erudite English are also factors that affect treatment of court users (Figures 13 and 15). 65.7 per cent of the public believed that a person who appears to be highly educated is more likely to receive preferable treatment whilst 66.6 per cent of the Public thought that someone who speaks proper English is more likely to receive favourable treatment.

The above charts demonstrate the idea that, in the courtroom, and what some of those biases are today. Just like in the 19th and 20th centuries, in the 21st century, the cultural qualities of the elite – respectable dress, wealth, status, proper language, profession, able-bodied – and their necessity and role in accessing Justice can be clearly identified. In the context of procedural fairness, this suggestion of bias in favour of respectable culture and the symbols of wealth damages the conception court users would have of the courts as being neutral and trustworthy. As one Tobagonian court user said:

“I observed other people not getting the same level of respect I get . . . There are folks who will get respected by everybody. There are others that don’t, for whatever reason. But people make decisions based on how you dress, how you look, and that’s how you get treated accordingly. They don’t treat every man equally.”

74 Dylan Kerrigan, ‘Justice Out of a State of Injustice: Culture, Implicit Bias and the Inequality of Post-Colonial Sentencing in Trinidad and Tobago’ in Rhoda Reddock and Encarnación Gutiérrez Rodríguez (eds) Local Entanglements of Global Inequalities: Caribbean-European Conversations and Decolonial Thought (Anthem Press 2020)[Forthcoming].
FIGURE 11: Please indicate whether you agree with the statement a person of light skin colour is more likely to receive favourable treatment than a person of dark skin colour (Agreed).

FIGURE 12: Please indicate whether you agree with the statement a person who appears to be wealthy is more likely to receive favourable treatment than a person who appears to be poor.

FIGURE 13: Please indicate whether you agree with the statement that a person who appears to be highly educated is more likely to receive favourable treatment than a person who appears to be uneducated.
Another court user told us in such light, ‘The courts more for the higher people than the poor people.’ Another told us ‘I didn't have an opportunity to speak like that because he have a lawyer and I can't afford a lawyer because I’m a student,’ which also suggests a lack of inclusion and access in the matter. While at the Couva court another man told us point blank that the judicial process favours the wealthy and those who can afford the process. ‘The person I was challenging, they had their lawyer, but their lawyer wasn’t coming as regular as my lawyer. I paid him upfront to get things done, so things ruled in my favour.’

**RECOMMENDATIONS: WHAT DO WE DO?**

Historically the Caribbean is not a place of equality but rather one of inequities. Such environmental processes have shaped the social realities of
all individual lives in the Caribbean and their interactions with the State and its institutions. As such, and as Tracy Robinson notes, we must always be cognisant of ‘how [Caribbean] history has marked the administration of justice today.’

As noted in the introduction, the theme of this Dialogue is to secure equality for all in the administration of justice – with a special focus on the impact of discrimination, vulnerability, and social exclusion on access to justice. Following our examination of the research literature alongside the data set of evidence collected by the JEITT, which it was impossible to include all of here, what conclusions and steps can we take in the context of discrimination, vulnerability, and social exclusion through the lens of judicial fairness, and in the context of access to justice and equality of treatment in the administration of justice?

What are some concrete ideas on how these ideals can be achieved? Here are some suggested interventions to address gaps in equality of treatment and access to justice for vulnerable groups.

**Widespread (whole-system) institutional education**

The motto of the JEITT and also its mandate, is that the transformation of attitudes and behaviour is possible through education. In this regard a continuous threefold approach can be considered, as follows:

- Sensitisation;
- Scrutiny; and
- Compliance/Conformity.

**Sensitisation** is both knowledge and experientially based. Its purpose is to increase awareness around: (i) agreed ideal standards/expectations – best practices; (ii) existing standards – current behaviour and experiences; (iii) gaps; and (iv) why these gaps exist and what needs to be done to close the gaps.

**Scrutiny** is both individual and institutional monitoring and measurement (evaluation) to facilitate evaluation of the extent to which ‘best practices’ are being met. Check lists, peer/staff feedback, reflective self-evaluation (e.g. looking at video recordings of court proceedings, in which the judicial officer is involved and which show both the judicial officers as well as the other...
court participants), surveys, interviews etc., are all tools that can be deployed.\textsuperscript{77}

\textit{Compliance/Conformity} is the stage allowing for reshaped thinking and attitudes, changes to behavioural patterns and processes, as well to infrastructure and systems, to be made so as to achieve best practices. Learning through \textit{doing} is the preferred model of education. Here, role-plays, participatory enacting, empathetic involvement etc. can be deployed.

This three-stage process is a continuous feedback loop intervention that has already been deployed in the Judiciary of the Republic of Trinidad and Tobago (JRTT) via the JEITT with a measure of success. The goal is to achieve sustainable behavioural change and constructive institutional transformation.

\textbf{Widespread public education and empowerment}

Ultimately it is the members of these vulnerable groups and the wider public who will insist on ‘compliance’ by judicial officers and the judiciaries. For this to be achieved vulnerable groups must be empowered to demand and insist on best practices being met. The best persons to empower them are the judicial officers and the institutional judiciaries themselves. Why? First, it forces judicial officers and judiciaries to accept and take responsibility for creating, monitoring, and sustaining these standards. Second, the empowerment is direct – from the persons/institution who/which will be called to account.

There are myriad ways that these twin goals of education and empowerment can be achieved. However, what is critical is \textit{impact}. Who are the target audiences? Both adult and young adult (including school) populations must be covered – and continuously over at least the medium term (5–7 years). How is this information to be presented? In ways that are easily and readily accessible to all target audiences. Hence the need to invest in, develop, and deploy multiple modes of packaging and marketing the product. Collective (regional) interventions may be more likely to be cost effective and achievable.

\textbf{A commitment to interdisciplinary continuous research and publication}

What the JEITT ‘experiment’ in research on Procedural Fairness in the region has shown, is that there are indigenous and culturally relevant insights that

\textsuperscript{77} In this regard, the suggestion here in procedural fairness terms is that a Judge or Magistrate can influence and direct the behaviour and conduct of all persons in their courtroom including staff such as police and daily court room staff.
can only be gleaned by robust local research. The suggestion is this research must be interdisciplinary and should have a significant judicial ‘leadership’ input as well as rigorous social scientific supports. Without this judicial involvement, buy-in and transference of knowledge is generally too slow, if it happen at all.

**The development of best practices only after consultation**

No protocols should be developed without the inputs from all relevant stakeholders. In particular, these protocols should be built ‘from the bottom up’. That is, the inputs of the persons and groups *most directly involved* must be sought out, appreciated and valued, and included in any best practices related to equality of treatment to and access to justice. Simply put, the hierarchical model of top-down governance (governance by elites) has been responsible for current exclusion, marginalisation, alienation, and disrespect. A *bottom-up* approach is now essential, both to get the necessary insights to achieve avowed intent and purpose, as well as to redress and heal historical wrong-doings.
INTRODUCTION

Birds fly. Fish swim. Neither of these assertions is particularly controversial. It feels perfectly acceptable to ascribe automatically the trait of flying to birds, as a category, and the trait of swimming to the category of fish. And, on some level it is perfectly acceptable to categorise birds and fish in these ways because automatically or unconsciously categorising people, places and things is one way that our brains perform the herculean task of making sense of a world that is inherently complex.¹ To process the extraordinary amount of information with which we are constantly bombarded, in real time, our brains must necessarily rely on such mental shortcuts.² But, our mental shortcuts are not always accurate. Ostriches and penguins are birds, but they do not fly. Spiny devilfish are fish, but they do not swim. The accuracy of our mental shortcuts relies heavily on the associations we have at our disposal – unconscious or implicit associations that we have developed over time based on attitudes and stereotypes that we might not even realise we hold.³

Understanding these implicit associations is critical because they are the corrective lenses through which we see and experience the world. Beyond

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² Ibid.
³ Ibid.
seeing and experiencing, these associations are implicit biases that affect how we behave in the world – in our personal lives and in our professional lives. While automatically categorising birds and fish is relatively innocuous in most instances, when we begin to automatically or unconsciously ascribe traits to people who we have placed in socially-constructed categories according to gender, class, ethnicity, race, sexual orientation – the stakes become infinitely higher. Such implicit biases can result in a man not being afforded paid paternity leave at his place of employment simply because the traits with which he is associated do not include family, the home or caregiving. A woman may not be promoted to leadership positions as she progresses in her career because she is not associated with the trait ‘manager’ but with being passive, weak and more communal than her male counterpart. Little girls may be discouraged from pursuing science and engineering courses and careers. Black men and gay men may literally lose their lives because weapons and criminality are traits that are associated with blackness and sexual deviance and predatory behaviour are traits associated with homosexuality.

Moreover, social science research suggests that the more objective we believe ourselves to be, the more likely we are to act on our biases and overestimate our invulnerability to them. This insight is invaluable for members of the legal profession and those charged with administering justice in a way that is fair and unbiased.

The purpose of this paper is twofold. First, this paper is meant to serve as a primer on implicit bias and its role in judicial decision-making. Secondly, this paper suggests strategies that judges can employ to mitigate the effects of implicit bias on the administration of justice.

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UNDERSTANDING IMPLICIT BIAS

Cognitive and social psychologists and behavioural economists explain that we have two systems of cognition: intuition and reasoning,\(^\text{10}\) or as some scholars have labelled them, System 1 and System 2.\(^\text{11}\) Intuition, or System 1, is characterised as automatic, largely unconscious and undemanding of computational capacity.\(^\text{12}\) System 1 encompasses heuristic processing, implicit inferences, and implicit cognition. Decision-making is very fast, highly contextualised, socialised and personalised.\(^\text{13}\) In contrast, reasoning, or System 2, is characterised as conscious, rule-based, analytic, and demanding of cognitive capacity. System 2 encompasses rational choice strategy, explicit learning and explicit thought processes. Decision-making is relatively slow, based on cultural exposure and formal tuition, depersonalised, decontextualized and asocial.\(^\text{14}\)

Despite earlier research suggesting that much of our behaviour is guided by careful System 2 deliberation and conscious intentions to act,\(^\text{15}\) new research suggests that much of our behaviour is actually governed by System 1. We have far less conscious, intentional control over the fundamental cognitive processes that motivate us to act than we would like to believe.\(^\text{16}\) Accordingly, notwithstanding whatever aspirations we may have to make decisions based on the result of careful System 2 deliberation, in reality, most decision-making takes place as a result of the mental shortcuts that characterise System 1.\(^\text{17}\)

Schemas

Housed by System 1, schemas are ‘templates of knowledge that help us to organise specific examples into broader categories.’\(^\text{18}\) Schemas are mental

\(^{10}\) See, for example, Daniel Kahneman, ‘Maps of Bounded Rationality: Psychology for Behavioral Economics’ (2003) 93 Am Ec Rev 1449.


\(^{12}\) Ibid 658.

\(^{13}\) Ibid.

\(^{14}\) Ibid.


\(^{16}\) Ibid.

\(^{17}\) Ibid.

short cuts that operate as sorting mechanisms allowing us to make sense of people, places, objects and situations very quickly with minimal effort. In so doing, schemas rely on attitudes and stereotypes that are implicit in nature. An attitude is an evaluative disposition – the tendency to like or dislike, to approach or avoid, or to act favourably or unfavourably toward someone or something, while a stereotype is a mental association between a social group or category and a trait. Stereotypes may be a statistical truth but they need not be.

Given their composition, schemas are necessarily informed by our experiences with people, places, objects and situations. But, while schemas are informed by direct experience, they are mostly shaped by vicarious experiences transmitted through stories, books, movies, media and culture. Because schemas rely on the experiences that we have at our disposal, they can be a blessing and a curse. That is, as helpful as they may be, schemas can also lead to discriminatory behaviour in the absence of any mitigating interventions. It is for this reason that our schemas serve to facilitate our implicit biases.

Implicit Bias

Implicit bias refers to ‘the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner.’ Staats et al continue to explain that:

These biases, which encompass both favorable and unfavorable assessments, are activated involuntarily and without an individual’s awareness or intentional control. Residing deep in the subconscious, these biases are different from known biases that individuals may choose to conceal for the purposes of social and/or political correctness.

According to Greenwald and Krieger, implicit biases are simultaneously intriguing and problematic because they can produce behaviour that diverges from our avowed or endorsed beliefs or principles. This behavioural divergence poses a particular challenge for legal practitioners and those charged with administering justice because legal doctrine, jury instructions, jurispru-

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20 Kang (n 18).
21 Ibid.
23 Ibid.
dential theory and judicial codes are premised on the fact that we are all guided by our avowed beliefs, attitudes and intentions. In other words, the very foundation of our legal system is built on an anachronistic understanding of human behaviour that may actually serve to undermine justice and subvert the commitment of securing justice for all.

Measuring Implicit Bias

Because people may either be unwilling or simply unable to tell researchers what they really feel, cognitive scientists have created reliable techniques to measure implicit attitudes and stereotypes. One such technique is the Implicit Association Test (IAT). The IAT is essentially a videogame in which the player is asked to match categories of pictures with a range of words. The video game measures how quickly the player is able to make the association. The shorter the time, the more closely the player associates the picture with the word. For example, the Gender-Career IAT tests the association between family and females and reveals that most people more quickly associate family with females and career with males. The Skin-Tone IAT tests preferences for light skin and dark skin and reveals that most people more quickly associate light skin with favourable attributes and dark skin with unfavourable attributes thus revealing an automatic preference for light skin relative to dark skin.

Data captured from the 14 million geographically dispersed people who have taken the IAT over the past 20 years reveal systematic and pervasive reaction time differences in every country tested. As such, researchers have concluded that these reaction time differences are not the result of chance.

JUDGING WHILE BIASED

In democratic societies, laws are thought to ‘set up standards which are applied in a neutral manner to formally equal parties.’ The view is that the

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25 Ibid.
26 See, for example, Jerry Kang and others, ‘Implicit bias in the Courtroom’ (2011) 59 UCLA L Rev 1124.
27 The test is available at <https://implicit.harvard.edu/implicit/>.
28 For a more technical explanation of the IAT, see Greenwald and Hamilton Krieger, ‘Implicit Bias’ (n 15).
29 See Gender-Career IAT (n 27).
30 See Skin-Tone IAT (n 27).
law is objective rather than subjective; it is free from bias and somehow divorced from the ailments of the society that it governs. But, the research on implicit bias suggests that we should view this formulation of the law with scepticism because the insidiousness of implicit bias means that laws that are *prima facie* neutral can never really be; laws that on their face seem fair and objective, when applied, will necessarily produce unfair results impacting certain communities disparately.

For example, in her study on the adjudication of homicide cases involving lesbian, gay, bisexual and transgendered persons in the Commonwealth Caribbean, Se-shauna Wheatle rightly points out that in the Commonwealth Caribbean justifiable homicide is now used solely to defend the killing of gay men and pleading provocation is often futile for those persons who do not conform to gender stereotypes. On their face, the doctrines of justifiable homicide and provocation do not appear discriminatory. However, Wheatle explains that:

> The roots of justifiable homicide and provocation are steeped in attitudes which perceive the ‘reasonable’ or ‘ordinary’ person as male, and privilege the protection of the male body and masculine honour. Further, in applying both defences in cases involving LGBT persons, the judgments reflect a perception of the gay man as dangerous and of same-sex sexuality as inherently abnormal and criminal. Hence, a same-sex advance by a gay man is perceived as an ‘attack’ within the law of justifiable homicide as applied in the Caribbean. The gay man is cast in the role of perpetrator and attacker and the defendant is cast as ‘the [potential] victim of a homosexual act.’

Equally, the judicial codes across the region presuppose the law’s objectivity and neutrality and demand from judges that they avoid, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds. But, this call for impartiality contemplates a model of human behaviour that has a conscious actor at its core. Judicial code of ethics notwithstanding, judges cannot avoid biases that they do not even realise they have.

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32 Wheatle (n 7) at Foreword.
Wheatle sheds further light as she asserts:

in appellate decisions in which a ‘homosexual advance’ defence has been accepted, there is an undercurrent of a belief and fear that same-sex sexuality is threatening and dangerous. This fear has implications for the court’s view of the main individuals in the case, that is, the deceased and the accused, which are reflected in the courts’ reasoning. This therefore reflects a stereotype of LGBT persons in that it adopts a generalized or preconceived view of the characteristics possessed by LGBT members of society. This stereotyping results in the development and application of the law in ways that undermine the constitutional right to equality.\(^{35}\)

Implicit biases are pervasive and robust and we all have them.\(^{36}\) Contemporary cognitive science research suggests that judges are not immune to implicit bias despite their commitment to fairness and impartiality.\(^{37}\) As Papillon explains, ‘[a]ssuming that judges can simply try harder to be fair, take more time when making decisions, or utilize their egalitarian value systems to eliminate bias in their decision-making process is naïve’\(^{38}\) – the solution must be more than this. Fortunately, the data show that implicit biases are malleable and can be changed as well as mitigated.\(^{39}\)

DE-BIASED JUDGING

Exposure to Diverse Communities

There is ‘no seeing without looking, no hearing without listening, and both looking and listening are shaped by expectancy, stance, and intention,’\(^{40}\) adjudication that assumes judges are unaffected by the implicit attitudes and stereotypes they harbour can subvert the goals of impartiality and equality.

In combatting implicit bias, data suggests that exposure to members of unfamiliar groups can facilitate understanding and decrease the bias. For example, Dasgupta and Rivera found that the more number of gay friends that study participants reported, the fewer the negative implicit attitudes

\(^{35}\) Wheatle (n 7) 26.
\(^{36}\) Staats and others (n 22) 16.
\(^{37}\) Kang, Bennett, Carbado and Casey, ‘Implicit Bias in The Courtroom’ (n 4) 1124.
towards gay people they had. Kang et al. explain that such evidence gives further reason to encourage intergroup social contact by diversifying the bench, the courtroom, the staff and law clerks as well as our residential neighbourhoods and friendship circles. Indeed, exposure to different groups can facilitate the requirement by judicial codes of ethics across the region to:

- strive to be aware of and to understand diversity in society and differences arising from various sources, including, but not limited to gender, race, colour, national origin, religious conviction, culture, ethnic background, social and economic status, marital status, age, sexual orientation, disability and other like causes.

**Mindfulness**

Data show that the more objective we believe ourselves to be, the more likely we are to act on our biases. This ‘illusion of objectivity’ has particular relevance for judges and those whose very job it is to be objective. When objectivity is literally a part of the job description and we believe that we are striving to be objective, the data suggest that this empowers us to act on our biases. Similarly, the more objective we think we are, the more we tend to overestimate our invulnerability to our implicit biases. Indeed, one study of judges found that most judges view themselves as objective and especially talented at fair decision-making and another study found that when asked to compare themselves to other judges in the room with respect to avoiding bias, just over 97 per cent of judges put themselves in the top half.

It is essential for judges to assess each case on its own merits keeping in the fore their inherent biases and those of others that affect system. Humility and being mindful that we all have implicit biases that are operating all of the time irrespective of whether we are at work and are consciously striving for objectivity will facilitate the de-biasing effort. Moreover, judges should take the imperative to seek to create and experience diverse spaces very seriously.

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42 Kang, Bennett, Carbado and Casey (n 4) 1124.
43 See, for example, Caribbean judicial codes of ethics (n 34).
44 Uhlmann and Cohen, “I Think It, Therefore It’s True” (n 8).
45 Ibid.
46 Pronin, Gilovich, and Ross, ‘Objectivity in the Eye of the Beholder’ (n 9) 781.
Motivation and wanting to combat implicit bias, can actually work to achieve that goal.

Countertypical Exemplars

Another effective de-biasing strategy involves exposure to examples that do not reflect the existing stereotypes. For example, one study concluded that when women were in social contexts that exposed them to female leaders, they were more likely to associate women with leadership. Moreover, when these women have long-term exposure to such social contexts, they were less likely to hold stereotypic attitudes about gender. As with diversity, exposure matters. To combat their implicit biases, judges should seek to gain exposure to countertypical people.

Improve Conditions of Deliberation

Inducing deliberation is another effective de-biasing strategy. Notwithstanding the fact that the judicial system is typically under-resourced, overburdened, and there are significant time pressures, taking the time to engage in meaningful, effortful, deliberation can be very effective. As Kang et al., explains, it is precisely when time and resources are short and the pressures high that judges need to pause and guard against their biases. Allotting more time for deliberation is likely to induce deliberation.

Moreover, data suggest that elevated emotional states – positive or negative – can result more biased decision-making especially if the emotion is consistent with the stereotypes associated with members of the social category involved in the adjudication. For example, if a judge has feelings of anger, disgust or resentment toward a particular social category of which a party to the adjudication is associated, and those emotions are consistent with the stereotypes or anticipated threats associated with that social category, then those negative emotions are likely to exacerbate implicit biases.

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50 Ibid.
51 See Kang, Bennett, Carbado and Casey, ‘Implicit Bias in the Courtroom’ (n 4) 1124.
52 Ibid.
53 Ibid.
Commission Research

Ideally, judges should commission confidential research focused on a review of decisions of the court as increased accountability has been shown to decrease the influence of bias.54 A study that reviews a range of decisions can reveal patterns and concerns in ways that a single decision could not. Knowing of such impending review would also provide motivation for judges to actively engage in combatting their implicit biases. If judges do not seek the information on their own potential biases, those biases become more difficult to correct.55

CONCLUSION

That judges have implicit biases that they carry with them to work is unremarkable. But, acknowledging that a more nuanced approach to their work – an evidence-based approach that recognises that ‘neutral’ means might not produce neutral results, can make a difference.56

Chief Justice Conteh famously asserted that ‘true justice does not give the same to all but to each his due.’57 Calling attention to the disparate impact of facially neutral laws, seeking to create and inhabit diverse spaces, taking the time to deliberate even in the face of immense time constraints and being mindful of the biases that plague us all will enable judges to do a better job of administering true justice and securing equality for all in its administration.

54 Ibid.
55 Ibid.
56 Ibid.
57 Roches v. Wade, (unreported) 30 April 2004 High Court Belize (No. 132) [27].
INTRODUCTION

The importance of language to public access to justice tends to be reflected in constitutional fair trial provisions that typically provide that a person charged with a criminal offence must be informed of the nature of the charge in a language he or she understands and must be provided with an interpreter at the state’s expense where he or she does not speak or understand the language of the court. The efficacy of other fair trial provisions may also be adversely affected on account of issues connected with language. For example, in the Barbadian case of *Ariza v R*¹ the Court of Appeal opined that the appellant’s fair trial right to have adequate time and facilities to prepare a defence had been violated where his request to have Spanish translations of his depositions had been refused by the trial judge.

At common law, the right to cognitive presence at one’s trial forms the basis of the right to be provided with free language interpretation services where an accused does not speak the language in which the trial is conducted. International conventions² also reflect the link between language and the fair administration of justice in corresponding language-related fair trial provisions. It is clear, though, that language-related fair trial rights are not language preference rights since they may not be invoked where the accused has adequate proficiency³ in the language of the court but has a preference for

² See, for example, European Convention on Human Rights 1953, Art 6(3)(e); International Covenant on Civil and Political Rights 1966, Art 14(3)(f).
another language.\textsuperscript{4} Jurisprudence from international tribunals supports the view that a trial judge has a critical role to play in ensuring that an accused’s need for interpretation is met.\textsuperscript{5}

Some international conventions reach beyond these language-related fair trial rights by proscribing discrimination on the ground of language.\textsuperscript{6} The notion of non-discrimination arguably inheres in the concept of equal protection of the law. This is reflected in the Statements of Principle and Guidelines for Judicial Conduct of the Republic of Trinidad and Tobago.\textsuperscript{7} Guideline 5.1 urges judges to be aware of differences emanating from a number of factors, and while language is not expressly cited as a factor, it may be covered under the general words of the guideline, ‘other like causes’.

\textbf{THE FIELD OF LANGUAGE AND THE LAW IN THE CARIBBEAN}

\textbf{Language in the Caribbean}

The \textit{de facto} official language in Commonwealth Caribbean jurisdictions is English. By virtue of this official status, English is the acceptable language for communication across government institutions, including the justice system. These jurisdictions, though, also have speakers of vernacular languages. Many of these vernacular languages, while resembling English at the level of vocabulary, differ from it in structure and, to some extent, in their sound systems\textsuperscript{8}. Some jurisdictions, notably St Lucia and Dominica and to a lesser extent Trinidad & Tobago and Grenada, also have vernaculars whose vocabularies derive from French.

Several Caribbean linguists\textsuperscript{9} have long regarded these vernaculars as distinct languages although these vernaculars have traditionally been popularly

\begin{footnotes}
\item[7] Judiciary of Trinidad and Tobago, \textit{Statements of Principle and Guidelines for Judicial Conduct} (Judicial Education Institute of Trinidad and Tobago 2008). Note, for example, Principle 5 (especially Commentary 1).
\end{footnotes}
perceived as dialects of their respective European superstrates. This perception has been coupled with the view that the vernaculars are inferior speech forms and signal certain negative characteristics (e.g. poverty, ignorance) about speakers who habitually use them. Habitual speakers of these vernaculars\(^{10}\) tend to be of low socioeconomic status and tend to have relatively little formal education.\(^{11}\) These social realities become projected onto their speech behaviour and account for the negative social evaluations of the vernaculars. It may be that given the sociolinguistic situation, social class could be regarded as a crude proxy for language.\(^{12}\)

The lexical similarity between English and the English-lexicon vernaculars tends to disguise the distinctions between English and these vernaculars, and arguably contributes to perceptions that they are largely mutually intelligible with English. There is evidence, however, that intelligibility between English and these vernaculars is significantly reduced.\(^{13}\) There is also evidence of discriminatory practices attributable to language,\(^{14}\) which are perhaps linked to the negative social perceptions traditionally associated with the vernaculars.

### The Field of Language and the Law

A relatively young discipline, studies in *language and the law* burgeoned since the late twentieth century. It is also referred to as *forensic linguistics*, but this term is sometimes used in a more restricted or technical sense i.e. evidence provided in court by language experts. Such evidence may relate to author analysis and attribution including alleged plagiarised texts, voice or speaker identification and questions involving trademarks. The wider field incorporates a range of topics such as language and disadvantage in legal contexts, multilingualism in legal settings, analysis of courtroom discourse, legal

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10 A Language Competence Survey for Jamaica carried out by the Jamaican Language Unit, The UWI, Mona, in 2007 shows that over 36% of respondents were monolingual speakers of Jamaican.

11 Knowledge and competence in English is usually acquired via the formal education system though increasingly television and other media, now widely accessible, now constitute other sources via which competence in English may be acquired.

12 It is noted that during the deliberations of the Joint Select Committee of Parliament on Jamaica’s Charter of Rights, a civil servant in attendance suggested that language discrimination was principally a matter of social class discrimination. See Verbatim Notes of Joint Select Committee Meeting on the Charter of Rights, 31 May 2001. It may be, though, that this is indicative of a reluctance to confront the issues surrounding language ideology and even as an attempt to conceal those issues.


language and pre-trial interactions (e.g. police interrogation of suspects, police interviews with witnesses). While many researchers in the field are, unsurprisingly, linguists, contributions emanate from a cross-section of disciplines including law, psychology, sociology and anthropology.

**Linguistic Discrimination**

While relatively newer fundamental rights protection provisions in Commonwealth Caribbean constitutions tend to include language as a prohibited ground, it is uncertain whether these anti-discriminatory provisions were designed with local vernacular languages in mind. Jamaica’s Parliament, in its revision of the constitutional fundamental rights and freedoms, did, though, specifically contemplate Jamaican in considering whether language ought to have been included as a prohibited ground. In fact, it was recognition by a then senator that Jamaican-dominant speakers experienced linguistic discrimination in their interaction with state agencies that triggered the suggestion for language to be included as a prohibited ground. The parliamentary committee considering the Bill raised several concerns and expressed the desire for research and preparatory work to inform the debate on whether language should be included as a prohibited factor. Although these concerns were, to a significant degree, addressed by the Jamaican Language Unit at The UWI, Mona, language was not ultimately included as a prohibited ground in the new Charter of Rights and Fundamental Freedoms when it was passed in 2011. Emerging non-anecdotal evidence of language-based discriminatory practices in the public sector raises the issue of the applicability of constitutional language non-discrimination provisions, such as Art 149 of the Guyana Constitution, to situations involving vernacular-dominant speakers.

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15 See, for example, Guyana Constitution Art 149. It may be that the social status of the local English vernaculars is diminished by the popular perception that they are mere dialects of English and, consequently, constitutional provisions such as these, are not conceived as extending to English vernaculars such as Guyanese.


17 The Unit was established as a direct response to the parliamentary committee’s concerns.

18 Walters, ‘The Anatomy of Linguistic Discrimination in a Diglossic Situation’ (n 14). Her thesis finding that vernacular-dominant speakers are made to feel inferior on account of the language they speak when interacting with state agencies is supported by survey results for Trinidad and Tobago reflected in Dylan Kerrigan, Peter Jamadar, Elron Elahie and Tori Sinanan’s, ‘Equality and Social Inclusion’ in Chapter 4 of this publication. See Figure 15 which shows that two thirds of the public agree that a person who speaks ‘proper English’ is more likely to receive favourable treatment than a person who speaks heavy dialect.
CARIBBEAN VERNACULAR SPEAKERS IN LEGAL SETTINGS

Miscommunications in Foreign Courts

Jamaicans who have come into contact with the criminal justice system in the UK have experienced language communication problems in their interaction with police and customs officers.\(^{19}\) In these interactions, interpreters have not traditionally been routinely made available for speakers of the Jamaican vernacular (patois) who are not highly proficient in English. This is arguably attributable to the fact that the Jamaican vernacular is widely perceived as a form of English. In several instances, the miscommunication between the speaker of Jamaican and the English-speaking police or customs officer presents a danger that could have undermined the proper administration of justice.

Consider the following, extracted from an official written transcript,\(^{20}\) which purported to reflect the audio version of an interview between a UK police officer and a Jamaican-speaking witness to an incident. The official written transcript stated:\(^{21}\)

**Witness:** When I heard the shot (bap, bap) I *drop the gun* and then I run.

(emphasis added)

The audio equivalent of this line was:

**Witness:** Wen mi ier di bap bap, *mi drap a groun* and den mi staat ron.

(Gloss: ‘When I heard the bap bap [the shots], I fell to the ground and then I started to run.’)

For native speakers of Jamaican, the linguistic error on the part of the transcriptionist is obvious, and the legal mind is struck by the potential legal ramifications of such a transcription error.

Expert linguistic evidence regarding recordings of Jamaican speech by an accused in a US murder trial has been solicited by the prosecution with a view to shedding light on two competing accounts of a text.\(^{22}\) The prosecu-

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\(^{20}\) Circa late/early 2000.

\(^{21}\) The excerpt is discussed in Blake, ‘The Jamaican Creole Speaker in the UK Criminal Justice System’ (n 19).

\(^{22}\) The case and the nature of the linguistic evidence is documented by Peter Patrick and Samuel Buell in ‘Competing Creole Transcripts on Trial’. Available at <http://privatewww.essex.ac.uk/~patrickp/papers/CreoleTranscripts.pdf>.
tion had employed a lay-translator whose rendition of the critical text implicated the accused by way of a confession, whereas the defence’s language expert, a non-speaker of Jamaican, offered a transcription and translation that, at the very least, weakened the potency of the prosecution’s assertion. Contrast the following:

Prosecution translator: It’s Scarry’s gun I used too, you know.

and

Defence language expert: ‘Scarry gun me used to, ya know.’ This expert translated this as ‘Scarry’s gun, I am used to, you know.’

As Patrick and Buell report, the question as to whether the accused used Scarry’s gun (presumably to commit the killing) or was merely familiar with Scarry’s gun turned on a particular linguistic feature – how the sound represented by the letter /s/ in the word ‘use’ was pronounced by the accused in the recording. Patrick, a linguist and a near-native speaker of Jamaican, testified, among other things, that (i) the sound he consistently heard in the recording was /z/ (yuuz) – Scarry gun me use, too, y’know/It was Scarry’s gun I used, too, y’know; and (ii) this /z/ sound in ‘use’ is incompatible with the meaning suggested by the defence language expert since where the meaning of familiarity is intended, the sound is invariably rendered as the unvoiced sibilant, /s/. Patrick’s evidence challenged that of the defence language expert.

Language Difference and Credibility in Caribbean Courts: ‘a’ vs ‘o’

Ignoring the local language question can in some cases pose a threat to the proper administration of justice. For example, one version of the sound represented by the letter /o/ in English is rendered as /a/ in Jamaican in the cognate sound environment. So, for example, the English word, office is /afis/ in Jamaican. In addition, sometimes Jamaican speakers over-apply the Jamaican-to-English conversion rules in the sense that, in attempting to speak English, they may incorrectly change Jamaican /a/ to English /o/ - so Jamaican /aki/ wrongly becomes /oki/.

In *R v Kirk Williams* the critical aspect of the defence mounted in the case was that the accused thought he had been asked by his colleagues about an iPod even though his colleagues had said ‘iPad’, consistent with the Jamaican language pronunciation of both iPod and iPad, the latter being the actual

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23 RM Court for the Parish of St Catherine, Info No. 454/12.
subject matter of the larceny for which the accused was indicted. His denial that he had seen (and indeed retrieved) an iPad were interpreted by both the prosecution and the trial judge as inescapably signalling a deliberate attempt by the accused to mask his intention to steal the iPad. The apparent cogency of this interpretation of the denials is arguably challenged by the linguistic context, coupled with other strands of evidence.\(^{24}\) The Resident Magistrate did not appear to consider the local language issue presented by the defence. This arguably had implications for a fair trial, in the sense of not affording a balanced consideration of the case.\(^{25}\) The judgment of the Court of Appeal\(^{26}\) endorsed the Resident Magistrate’s approach, also without apparent consideration of the local language issue.

Right to an interpreter: Jamaican accused in Canadian court

In a relatively recent Canadian case, *R v Douglas and Bryan*,\(^{27}\) the defence applied for a mistrial on the basis that the interpretation provided for one of the Jamaican-speaking accused was faulty and thus compromised the minimum standard that should be met to satisfy the constitutionally protected right to the assistance of an interpreter for a party or witness who does not understand or speak the language in which the proceedings are conducted. The court granted the application, citing a slew of interpretation deficiencies,\(^{28}\) evidence of which was largely provided by a second interpreter who had been present at the trial. It is perhaps interesting to note that the judge also cited the fact that he had received a note from the jury requesting that he direct the interpreter to cease paraphrasing.\(^{29}\) Specific deficiencies were also itemised from which, the judge stated, it had been obvious to him

\(^{24}\) Such evidence include testimony that the accused had been, at the time of the incident, unaware of the existence of iPad devices (which, incidentally, were only then appearing on the market), as well as evidence that the device, as retrieved, was located in a case.

\(^{25}\) The notes of the trial do not reveal any consideration of the language issue by the Resident Magistrate. Indeed, in-court comments made by the Resident Magistrate to counsel suggest her incredulity at the suggestion that a Jamaican could confuse iPad with iPod. It is considerably ironic that the Crown’s case presented flagrant evidence of the very linguistic confusion upon which the defence relied – the indictment read, ‘…did steal an iPod’ and, in the question & answer of the suspect, the word used by the police officer in questions to refer to the item stolen is, in all instances, recorded as ‘ipod’! (my emphasis).

\(^{26}\) [2013] JMCA Crim 51.

\(^{27}\) [2014] ONSC 2573.

\(^{28}\) These included, *inter alia*, alteration of the meaning of what the accused said in his testimony, failure to interpret aspects of what was said and mere paraphrasing as opposed to accurate interpretation.

\(^{29}\) The court noted that it was apparent that some jurors were sufficiently knowledgeable about Jamaican to assess the quality of the interpretation.
that the interpreter was ‘clearly struggling’. The court was of the view that
the only reasonable remedy for the nature and degree of the deficiencies
which amounted to a violation of a fundamental guarantee would be a
re-trial. The court’s concluding observation demonstrates impatience for the
shortage of Jamaican interpreters in the particular area of Canada:

I am shocked that, in a jurisdiction like Brampton, with the diverse population and
the criminal caseload including narcotics matters involving Pearson International
Airport, the availability of accredited Jamaican Patois interpreters is so slim.

This robust Canadian judicial approach does not appear to be replicated
in the US in relation to Jamaican-dominant speakers or indeed habitual
speakers of other Caribbean English vernacular languages. A local newspaper
in Jamaica has published letters addressed to the Editor that have highlighted
the plight of speakers of Jamaican in the US who come into contact with the
legal system. The following is an extract from one such letter, titled, ‘Patois
in the courts’:

I am the PR person for the Jamaican American association in central Florida and
on several occasions our organisation has been called upon to attend depositions
for Jamaican clients. Yes, whether we want to accept it or not, there is a problem
and some Jamaicans are at a disadvantage if accused and do not have competent
interpretation at their deposition . . .

[The Gleaner, Monday, February 3, 2003]

Should vernacular-dominant speakers be afforded interpreters
in court proceedings?

The role of language ideology in the treatment of accused is poignantly exem-
plified in the St Lucian situation. In this territory, Kwèyol, a French-lexicon
vernacular is spoken. When these speakers appear in St Lucian courts, it has
been reported they that are not accorded equality of treatment with persons
who speak foreign languages in relation to the kind of person who is
appointed as an interpreter. 30 Evans cites an extract from an interview con-
ducted with a St Lucian attorney which addresses this inequality of treatment
between St Lucian French Creole speakers and speakers of European
languages, such as French:

30 See R Sandra Evans, ‘Language Rights and Legal Wrongs: Examining the Right to an Interpreter
in the Magistrates’ Courts in St Lucia’ (2011–2012) II Sargasso: Language Rights & Language Policy
in the Caribbean 53.
Lawyer [01] ‘Say, for example, you want to interview a doctor and the client is French. You would need a translator, you would need to get an independent translator which would have to be sanctioned by both parties, by both the defence and the prosecution. If it is just a simple case of, say, for example, a Creole speaker, the clerk of the courts would interpret.’

It is interesting to note that Evans also reports that lawyers in St Lucia have observed that sometimes interpretation by clerks is inaccurate or erroneous, raising questions about the level of competence and professionalism of the ‘interpreters’ provided for Kwèyol speakers.

The fact that our judges and lawyers tend to have some measure of bilingual competence in English and the respective local vernaculars differentiates the local Caribbean situation from the diasporic situations to which references have been made above. There is, nonetheless, the risk that this bilingualism may conceal problems regarding language-based comprehension and communication. It is noteworthy that the 2007 Jamaican Justice System Reform, Final Report raised the issue of a language barrier problem between the public and the justice system. It highlighted certain texts, e.g. the language of subpoenas, which could be adjusted in accordance with a ‘plain language’ approach in order to facilitate public access to, and understanding of the justice system. While some judges engage in ad hoc codeswitching to accommodate Jamaican-dominant speakers, this is arguably too sporadic and arbitrary to be a satisfactory solution. A considered systematic approach to deal with the language gap which contemplates an official bilingual policy for local courts is required not just to facilitate communication, but also to secure the right to a fair trial and due process.

The recently published Supreme Court of Judicature of Jamaica Criminal Bench Book, 2017, explicitly recognises English as the language of the court and provides extensive guidance in relation to the provision of interpreters. Though this part of the Bench Book may not have envisaged interpretation for speakers of Jamaican, it could, theoretically, given the generic nature of the language used in this part, apply to cases involving accused who are Jamaican-dominant speakers with insufficient command of English.

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31 Ibid 59.
32 Ibid 61.
34 Ibid.
A conceivable hurdle to the applicability of the Criminal Bench Book guidelines and indeed the constitutional provision regarding interpreters relates to the ideology that English vernacular speakers are essentially speakers of a version of English, that they thereby understand English, and consequently the basis for the right to an interpreter does not arise. It is arguable that this ideology has contributed to the fact that, despite the language situation, no case seems to have arisen in which an application was made for a Jamaican-dominant speaker to have an interpreter in the local courts. In addition, given the traditional stigma associated with the vernacular, Jamaican-dominant defendants may not wish to admit explicitly that they are not proficient in English so as to activate the right to an interpreter. In light of these factors, it might be useful to have a specific court policy regarding interpreters or communication facilitators for Jamaican-dominant speakers.

Are jury instructions widely understood by juries?

The 2007 Jamaican Justice System Reform, Final Report has suggested that the inconsistency between verdicts and evidence in some cases may be ascribed partly to ‘jurors’ inability to understand complicated directions’. Empirical research is clearly necessary to substantiate or refute this suggestion. But studies in the US have indicated that, in addition to legalese, some linguistic constructions tend to pose comprehension problems for jurors who, presumably, are competent in English. In Commonwealth Caribbean territories, linguistic distinctions and reduced intelligibility between Caribbean English vernaculars and the official language of our courts, English, may tend to compound the degree to which jury instructions are properly and sufficiently understood by vernacular-dominant jurors.

LITERACY AND LANGUAGE

Participation in juries by vernacular-dominant speakers

Literacy is intricately linked to language. In the Commonwealth Caribbean, there tends to be a crude correlation between the two, i.e. lack of functional

36 As to what may be a legal yardstick for measuring insufficient command of a language for the purpose of allowing an interpreter, see the Canadian case of R v Tran (1994) 117 DLR (4th) 7, which sets (in my view, correctly) a low threshold for allowing for the appointment of an interpreter.

literacy signals minimal or no proficiency in English because literacy is generally acquired in the English language via the school system. People of the Caribbean who are not literate are thus also likely to be habitual speakers of the respective Caribbean vernacular with little or no competence in English. Functionally illiterate users of, or participants in the justice system may present peculiar complications. Provisions of jury legislation across the Commonwealth Caribbean typically set up literacy in English as a qualifying criterion for jurors. In Jamaica, there does not appear to be any formal screening of jurors for English language competence. A likely upshot of this is that vernacular speakers with limited English proficiency may be admitted to jury service.

Language-dependent legal procedures

There are aspects of procedure which are premised on literacy or virtually assume literacy in their application. In this latter regard, I refer to a procedure,\(^{38}\) not infrequently invoked in practice by advocates in Jamaica as a means of testing the evidence or credibility of a witnesses, for which the case of *R v Peter Blake*\(^ {39}\) is the Jamaican authority. Where the procedure is deployed in respect of an illiterate witness as it was, for example, in the Jamaican case of *R v Shawn Bowes*, it raises questions of the effectiveness of the use of the evidence-testing technique\(^ {40}\) and indeed its legal appropriateness. Distinctions between the written and the spoken medium will be typically compounded in the Jamaican context by differences between the language of the document presented and the language in which the illiterate witness is competent. In the case under discussion, the document sought to be put to the witness was a station diary. The tabular format and layout of these diaries arguably did not facilitate the reading over of the text to the witness – a compromise resorted to upon the witness’ declaration that he was unable to read.

\(^{38}\) The procedure allows the cross-examiner to put a document to a witness (without laying the usual evidential foundation), who having silently read it, will typically be asked whether he/she still maintains a particular prior assertion.


INCREASED RELIANCE ON LINGUISTIC EVIDENCE

The late Professor Mervyn Alleyne, an eminent Caribbean linguist, made a brief reference to the fact that, in Jamaica, he was ‘called by the defence to give an expert opinion on whether or not the accused could have been the source of a confession which the police alleged he had made’. He noted that the defence was trying to establish that the accused’s speech behaviour was not consistent with the language variety contained in the confession. This is one area in which linguistics may be brought to bear on the evidentiary process to assist the fact finders. In Jamaica, in a trademark dispute case for injunctive relief, the defendant advanced linguistic evidence in an attempt to distinguish the marks. Indications, then, are that as the field of forensic linguistics develops, our judicial process is likely to be supplemented by linguistic evidence.

CONCLUSION

Being generally alert to issues of language and the law may be useful for judicial officers, particularly where they also function as fact determiners. Increasing occurrences of cases involving linguistic questions coupled with the research suggest that both linguistic evidence as well as judicial sensitivity to linguistic issues will become more necessary in certain cases to promote fairness.

41 Alleyne (n 8).
42 Tapper (t/a Fyah Side Jerk and Bar) v Watkis-Porter (t/a 10 Fyah Side) [2015] JMCC Comm 5, [5].
INTRODUCTION

The Caribbean is plural and diverse. One challenge has been for these pluralistic societies to be inclusive, such that all persons are considered fairly and respectfully, not just in social interaction, but in the administration of justice as well. The Caribbean’s history of dehumanising colonialism has made the focus on social inclusion considered in Chapter 4 all the more important. In a recent decision, the President of the CCJ, Saunders P, alluded to both diversity and the need for respect for differences. He said:

Difference is as natural as breathing. Infinite varieties exist of everything under the sun. Civilised society has a duty to accommodate suitably differences among human beings. Only in this manner can we give due respect to everyone’s humanity. No one should have his or her dignity trampled upon, or human rights denied, merely on account of a difference, especially one that poses no threat to public safety or public order.¹

This volume of materials tackles important questions of equality and access to justice across the Caribbean region. The question of the impact of discrimination, vulnerability and social exclusion are discussed as both empirical facts and theoretical questions. Our afterword, takes a slightly

¹ McEwan v Attorney General of Guyana [2018] CCJ 30 (AJ) [1].
different direction. It considers the significance of the analyses in these chapters by asking, what difference do they make to a review of a canonical case in the English speaking Caribbean, that of *Minister of Home Affairs v Fisher*.

This Privy Council case on appeal from Bermuda, decided in 1979, is oft-cited for the notion that constitutions are *sui generis* instruments that call for principles of interpretation of their own. *Fisher’s* recommendation that a generous approach be taken to the interpretation of the fundamental rights provisions in Caribbean constitutions has been followed by judges all around the world. Though an important and progressive decision, *Fisher* would have been a far more valuable *Caribbean* case if it had regard to the discussions presented in this volume about the concepts of implicit bias, discrimination and stereotypes and the importance of having regard to the socio-historical context in adjudication as recommended in Chapters 3, 4 and 5. The important case ultimately sidesteps the weighty socio-cultural questions about Caribbean families raised by the definition of ‘child’ in the Bermuda Constitution. It also pays no regard to patterns of intra-regional migration.

We acknowledge that our review has the benefit of hindsight, intervening jurisprudence and legal developments. Its imaginative turn takes liberties in referring to legal sources that postdate the forty year old decision of Lord Wilberforce but we also pay close attention to sources available in 1979 when this case was decided.

**THE COURTS’ DECISIONS IN MINISTER OF HOME AFFAIRS V FISHER**

In 1972 Eunice Fisher, a Jamaican mother of four children from a previous relationship, married Collins Fisher, a man who possessed Bermudian status. In 1975, Eunice Fisher and her four children, all under the age of 18, moved from Jamaica to Bermuda to live with her husband. Upon arrival in Bermuda, immigration authorities admitted Mrs Fisher and her four children and shortly thereafter the children were placed in state schools. In 1976, following a routine check, Mr Fisher was informed that the Ministry of Labour and

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2 (1979) 44 WIR 107 (JCPC); (1980) AC 319 (JCPC).
Immigration had refused permission for two of the children to remain at school. Subsequently, the ministry informed Mrs Fisher that she and her four children were ordered to leave Bermuda.

The Fishers applied to the Supreme Court seeking to quash the order and obtain a declaration that (i) the children were ‘deemed to possess and enjoy Bermudian status’ as per section 16(4) of the Bermuda Immigration and Protection Act of 1956 (the ‘Act’) and (ii) the children ‘belong[ed] to Bermuda’ pursuant to section 11(5)(d) of the Bermuda Constitution 1968. Section 11 of the Bermuda Constitution guarantees the right to freedom of movement. Subsection 2 permits limits on that right in respect of persons who ‘do not belong to Bermuda’. Section 11(5) defines belongers to include a ‘child’ or ‘stepchild’ of a belonger under the age of 18.

The Supreme Court found that although section 16(4) of the Act applied to stepchildren of persons enjoying Bermudian status, and although Mr Fisher enjoyed Bermudian status, the word ‘stepchild’ did not include ‘illegitimate’ children, or children born to an unwed mother, as Mrs Fisher was at the time of the children’s birth. Similarly, the Supreme Court reasoned that the children did not ‘belong to Bermuda’ as per section 11(5) of the Bermuda Constitution because the words ‘child’ and ‘stepchild’ in section 11(5)(d) of the Constitution did not include persons who were ‘illegitimate.’

The Fishers appealed to the Court of Appeal, which found that while the children were not deemed to enjoy Bermudian status as per section 16(4) of the Act, the children did ‘belong to Bermuda’ within the meaning of section 11(5) of the Constitution. The Ministry of Home Affairs appealed the decision to the Privy Council arguing that the Court of Appeal erred in finding that the children of an unwed mother ought to be included in the Constitution’s definition of ‘child’ and ‘stepchild’. Accordingly, the question before the Privy Council was whether the word ‘child’ in section 11(5)(d) of the Bermuda Constitution included a child born to an unwed mother.

The Privy Council affirmed the decision of the Bermuda Court of Appeal holding that a Constitution should be treated as *sui generis* and may be construed differently than Acts of Parliament. Thus, the presumption that applies to certain statutes concerning property, succession and citizenship, that ‘child’ means ‘legitimate child’, does not apply to the Constitution. Moreover, the Privy Council held that although constitutional interpretation should give effect to the language used, there must also be recognition of the ‘character and origin’ of the Constitution and interpretation must ‘be guided by the

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4 *Fisher*, n 2 (1979) 44 WIR 107 [113].
principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences.\(^5\) For their Lordships, the Constitution should be read as a whole. As such, ‘belonging’ in section 11(5) encompasses a ‘clear recognition of the unity of the family as a group and acceptance of the principle that young children should not be separated from a group which as a whole belongs to Bermuda.’\(^6\)

**UNDOING DEPERSONALISATION AND ABSTRACTION**

**TO SEE PERSONS AND SOCIAL EXCLUSION**

The *Fisher* case is known for the principles, not the people involved, an immigrant Jamaican woman and her four children. Reimagining *Fisher* would not mean reaching a different conclusion, but being far more aware of the litigants, the significance of the litigation and the socio-historical realities of Bermuda. In this case, the appellants argued that, ‘the fact that social circumstances in Bermuda are different from 19th century England and that there is a high proportion of illegitimate births on the island should not make any difference to the starting point [of analysis].’\(^7\) Yet, the effect of an almost singular focus on constitutional interpretation was a depersonalisation of the petitioners making Mrs Fisher and her four children mere names in a case. The children at the heart of the matter became the background noise to an argument largely about the interpretation of the Constitution versus ordinary statutes rather than the focal point of an argument about their dignity and personhood.

It very much matters that Mrs Fisher and her children were in a society that likely deemed immigrants like them a social problem. Although Bermuda’s economy has always relied on imported labour, the island’s immigration policies have also been the source of local tensions. The thought of foreign labourers who may never return to their country of origin contributed to fears of unsustainable population growth, a growing black population and increased competition for scarce resources. Given Bermuda’s history of *de jure* and *de facto* segregation, Government effected immigration policies that demonstrated a clear preference for white labourers over those African descendants from other parts of the Caribbean and elsewhere.\(^8\)

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\(^{5}\) Ibid.

\(^{6}\) Ibid [114].

\(^{7}\) Home Affairs (Bermuda) v Collins Fisher 1980 AC 319 (PC)[321G].

\(^{8}\) See, for example, Sir Hugh Wooding, Bermuda Civil Disorders 1968 Report of Commission and Statement by the Government of Bermuda (Wooding Commission 1968) 143.
Caribbean labourers were successful in entering Bermuda and finding work, they encountered economic and racial discrimination from their employers.\(^9\) For example, at the turn of the twentieth century, the common feeling toward black labour in Bermuda was that, ‘[t]he Negro is always at a discount and employers of labour would rather have Italians and pay them more, than satisfy the demands of the West Indian labourer for a wage which will assist him in meeting the demands of a growing civilization.’\(^10\)

A view that has persisted over time is that black West Indians coming to Bermuda were troublemakers and would bring with them radical ideas.\(^11\) Black Bermudians were encouraged to see themselves as better than these West Indian immigrants,\(^12\) which contributed to tensions between black Bermudians and this immigrant population. *Fisher* would have been a much richer case had the court considered the deportation orders against the backdrop of antipathy towards black West Indian immigrants and the constitutional prohibition against discrimination on the basis of place of origin and race.\(^13\) Georges JA, sitting in the Court of Appeal better captured the impact of the interpretation question on whether these children were ‘persons’ in the eyes of the Constitution, when he said that ‘technical rules should not be invoked to exclude persons from their protection.’\(^14\) The decision could have gone further in acknowledging the social exclusion that these children experienced and the vulnerability that came with their immigrant status and the way in which the interpretation advanced by the Supreme Court further entrenched this.

As Kerrigan et al demonstrate in Chapter 4 of this volume, equality before the law requires the court to appreciate the pervasive inequities and the role that environmental processes have had in shaping the social realities of all individual lives in the Caribbean. Writing against an unacknowledged backdrop of racial discrimination, antipathy towards West Indian immigrants and eugenic social policies, the Privy Council missed an opportunity to bring the subtext into the text – to challenge those unstated norms and biased assump-

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10 Ibid.

11 See, for example, Quito Swan, *Black power in Bermuda: The Struggle for Decolonization* (Springer 2009) 184.

12 See, for example, See, for example, Ira Philip, ‘Fear of black power caused policy change’ the Royal Gazette (Bermuda, 31 October 2009) http://www.royalgazette.com/article/20091031/ISLAND/310319993 accessed 4 May 2019.

13 Bermuda Constitution Order, Schedule II, section 12, made under the *Bermuda Constitution Act*, 1967 UK.

14 *Fisher v Minister of Labour and Immigration* (unrep) 15 July 1977, Civ App No 2, 3, 5 of 1977 (CA, Ber), (emphasis added) affd (1979) 44 WIR 107 (PC Ber).
tions in the way that Matthews advises in Chapter 5. As some have argued, ‘the story of the case is critical to the legal outcome; how the decision maker sees the story, what that person sees as relevant and irrelevant, and what inferences the decision maker draws from the facts often drive the ultimate decision.’

**CONTEXTUALISING ENDEMIC SOCIAL DISCRIMINATION**

_Fisher_ could have arrived at the same conclusion through very different means. The decision would have benefited from the sociolegal perspective that Bulkan and Robinson champion in Chapter 3 – interpreting the law against the backdrop of Bermuda’s larger historical and social context.

For centuries, in the Anglophone Caribbean laws that governed reproduction, marriage, sexual conduct and inheritance were crafted to establish and maintain a hierarchical society based on the ruling elite’s perceived requirements for the local division of labour. Bermuda was no exception. And, in Bermuda, race and religion influenced the construction, application and text of these laws. For example, there were laws that governed interracial sex, fornication, incontinency or fornication between two people who subsequently married, adultery, and bastardy. Indeed, for most of the seventeenth century, Bermuda’s courts punished Bermudian women of colour for unlawful sex, including bastardy.

As some scholars note, these laws effectively created the class, kinship, racial, and gender hierarchies that persisted throughout the region well into the twentieth century and left an indelible mark on both Caribbean family life and Caribbean law. Christine Barrow, a Caribbean sociologist, underscores this point as she argues that twentieth century research and social policy on Caribbean family life was marred by culturally inappropriate conceptions of what constitutes a ‘family’ and a ‘conjugal union’.

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18 Ibid.
19 Ibid.
21 Christine Barrow, _Family in the Caribbean: Themes and Perspectives_ (Marcus Wiener, 1996) 458.
1959 article titled ‘Some Aspects of Marriage and Divorce in the West Indies’, Keith Patchett, who would become the first dean of the Faculty of Law, The UWI in 1970, points out the discrepancy between laws that treat children born outside marriage as nullius fillius and lived Caribbean realities, noting that such divergence 'merits the attention of the lawyer no less than that of the sociologist.'

The lower-class system of values permits certain relationships which are unrecognised by the law, whilst legal marriage remains, for a large number in the population, an ideal which is attainable, if at all, only when certain conditions are fulfilled. The law makes no concessions to the Negro family structure: it grants no recognition in any form to other relationships than legal marriage: it draws a rigid dichotomy of legitimacy-illegitimacy in situations where it is disregarded: it insists upon principles of inheritance out of touch with social facts and customarily ignored: it makes no provision for rights customarily observed.

Judged according to ‘Eurocentered ideals’, Barrow explains that Caribbean families were described as deformed and malfunctioning and constituted a threat to the social order. Children were described as ‘illegitimate’ and ‘outside’ if they were born out of wedlock or to a parent who was in another committed relationship and for much of the twentieth century faced de jure discrimination. Thus, the children of non-marital unions were somehow ‘incorrect, untitled and unentitled’ or diametrically opposed to the valid lawful children who were ‘legitimate’ and born in the context of marriage.

Despite the lived realities, these descriptions of Caribbean family life were harmful and seeped into the collective consciousness of the society. For example, in Bermuda, as elsewhere in the Anglophone Caribbean, many saw children born out of wedlock as ‘particularly troublesome.’ In his 1968 report to the government on civil disorders, Sir Hugh Wooding asserts that:

[t]he comparatively high number of children born out of wedlock has long been a cause of concern to responsible and socially conscious inhabitants of the colony . . . [and] the occurrence of a high rate of illegitimacy in a society where modern Western middle class norms prevail is socially disturbing . . .
Many Bermudians felt the ‘illegitimate boy was destined to fill the ranks of the unemployed and riotous, while the illegitimate female child was more liable to turn a prostitute than her sister who has been born in wedlock.’\textsuperscript{29} Some held the view that children born out of wedlock would eventually become ‘loafers’ and criminals as ‘they were allowed to run wild because their mothers, unaided, could not look after them properly.’\textsuperscript{30} Additionally, adding to anxiety over birth rates that outstripped death rates and fear of resulting economic competition and potential large-scale unemployment, in 1934 Dr Wilkinson, the head of Bermuda’s Medical and Health department, cited the Bermudian children born out of wedlock as a driver of the country’s increased birth rate. Wilkinson further claimed that the ‘illegitimacy rate’ fuelled irresponsibility and stoking racial tensions proclaimed that these non-marital births occurred almost exclusively among Afro-Bermudians.\textsuperscript{31}

In part to cure the ‘illegitimacy problem’ and control the birth rate, a 1937 report prepared by nine members of a select committee of the House of Assembly called for compulsory sterilisation for women who mothered two illegitimate children and men who fathered one illegitimate child.\textsuperscript{32} Although this controversial suggestion drew the ire of key segments of the population and was quickly abandoned, twenty years later Bermuda encouraged voluntary sterilisation as a method of contraception.\textsuperscript{33} And, in the 1960s during a series of radio talks on birth control, Bermuda’s Director of Health openly lamented that, ‘I do know from my own work that we do have a number of women who seem, to put it kindly, singularly stupid and who have produced [a] large number of children out of wedlock.’\textsuperscript{34} Thus, in keeping with Barrow’s research, the task of colonial officials was to restructure Caribbean families and change the patterns of relationship, ‘what existed had to be removed, not understood. Social policy, therefore, along with the Church, the educational system and the law, set about constructing proper families in the Caribbean, in accordance with European ideals.’\textsuperscript{35}

It is against this larger context of race, class and colonialism that the Bermudian courts and the Privy Council considered \textit{Minister of Home Affairs v. Fisher}. Affirming the decision in the Court of Appeal, the Privy Council effected a welcome departure from a long line of cases that further entrenched the subordinated status of children born out of wedlock and

\textsuperscript{29} Bourbonnais (n 27) 56.
\textsuperscript{30} Ibid.
\textsuperscript{31} Ibid 41.
\textsuperscript{32} Bourbonnais (n27) 44.
\textsuperscript{33} Bourbonnais (n 27) 212.
\textsuperscript{34} Ibid 343.
\textsuperscript{35} Christine Barrow, \textit{Family in the Caribbean: Themes and Perspectives} (Marcus Wiener 1996) 458.
made a bold attempt to administer a more nuanced rule of law that avoided ‘the austerity of tabulated legalism.’

The Privy Council called for the question of the definition of child to be considered with an ‘open mind’, but ultimately the approach it took was an abstract and ahistorical one that did not address the concern raised by Telford Georges below that the doctrine of child illegitimacy was inappropriate in the Caribbean where children being born outside marriage is normal. Georges understood the importance of acknowledging that the children at the heart of Fisher were in a society that viewed the circumstances of their birth as deeply problematic despite the fact that nearly a third of all children in the territory were born to unwed parents. Similarly, it mattered that these children were in a society that went as far as to call for compulsory sterilisation of unwed parents, a society that feared immigrants from the country of their birth. A more thorough questioning of the category ‘illegitimate’ to describe persons would have also further laid bare the illogic in excluding children of the wife of a Bermudian because they were born outside marriage. Birth status ought to have no bearing on their entitlement under the Constitution, which is based on the family relationship now established between the Bermudian, his wife and her children. The children’s relationship to Mr Fisher was through his marriage to their mother and has nothing to do with the circumstances of their birth.

From the 1960s, Caribbean jurist Aubrey Fraser complained that law related to children born outside marriages was ‘the most outstanding example of legal discrimination.’ Fraser cited the Universal Declaration of Human Rights, that ‘All persons are born free and equal in dignity and rights’ to question the continued discrimination against children born outside marriages.

He advocated that ‘the law be changed and that the reality of West Indian social conduct be stared in the face and not avoided and apologised for as a manifestation of West Indian sinfulness.’ Although Fraser was one of the region’s leading critics on the laws relating to children born outside marriage, Sir Hugh Wooding scolded him in private correspondence in 1973 for continuing to use the word ‘illegitimate’. He wrote back to his good friend, who

36 Fisher (n 2) 112[1].
39 Alexis, ibid.
40 Aubrey Fraser, Youth in the Developing Caribbean: The Church’s Responsibility (mimeo) (1968) 7, in Alexis ibid, 126.
was then Director of Legal Education, who shared one of his recent papers on the subject in these terms:

‘If I may say so, the one quarrel I have with it is the use in various places of the terms “illegitimate” and “illegitimacy” in reference to children born out of wedlock. I get furious when children are described as legitimate or illegitimate and I think that a concerted effort should be made to see that these terms fall into disuse. I know that they are in common usage but, as Director of Legal Education, please set the example for their discontinuance.’

By the time Fisher was decided, post-independent Jamaica had introduced legislation to remove many of the forms of discrimination against children born outside marriage. The 1976 legislation has been called “smadditisation” lawmaking, that is, laws that claim the right of marginalised groups to be recognised as somebody.

In keeping with Jamadar JA’s insights in Chapter 1 of this volume, as well as those of Celia Blake in Chapter 6 with respect to language bias, the court in Fisher could have condemned continued usage of the term ‘illegitimate’ while more firmly articulating the ‘idea and reality that we are all inherently free and equal in dignity, value and rights’ irrespective of whether we are born within a marital union. Use of the very word ‘illegitimate’ euphemises or obscures ugly truths about society and couched in legal arguments and legal decisions allows those truths to proliferate because they remain invisible.

CONCLUSION: MIND THE GAP

Fisher provided a useful remedy to the Fishers and their children, but it failed to speak to the realities of their lives and the significance of the chapter protecting fundamental rights in responding to the intersecting forms of discrimination they faced. Methodologies discussed in this volume – debiased judging, recognition of history and context, understanding the realities of social exclusion and marginalisation and acknowledging the significance of language – all allow us to reimagine Fisher in terms that contribute to more just communities in the Caribbean.

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41 Correspondence from HOB Wooding to Aubrey Fraser, 19 November 1973. Special Collection in the Alma Jordan Library, The UWI, St. Augustine.
43 Kathryn Stanchi et al (n 15) 16.
APPENDICES

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AGENDA

Caribbean Judicial Dialogue
Theme: Equality for All in the Administration of Justice
With a Special Focus on the Impact of Discrimination, Vulnerability
and Social Exclusion on Access to Justice

Thursday November 30 & Friday December 1, 2017
Trinidad and Tobago

Thursday, November 30, 2017

Opening

Chair: The Hon. Mr. Justice Jamadar JA, Chair JEITT
9:05–9:12 am Welcome and Opening Remarks
The Honourable the Chief Justice of Trinidad and Tobago, Mr. Justice Ivor Archie ORTT

9:12–9:15 am Greetings
Dereck Springer, Director, Pan Caribbean Partnership Against HIV/AIDS (PANCAP), CARICOM Secretariat
9:15–9:22 am Remarks
Prof. Rose-Marie Antoine, Dean, Faculty of Law,
The UWI St. Augustine

Session 1: Setting the Stage: Introductions, Objectives, Expectations
Facilitators: The Hon. Mr. Justice Jamadar JA, Chair JEITT,
Dr. Arif Bulkan, Tracy Robinson, Dr. Jewel Amoah
(The UWI)
9:25–9:50 am Introductions, Objectives and Expectations
9:50–10:30 am The Ins and Outs of Justice
10:30–10:45 am BREAK

Session 2: Bias, Trust and Fairness in the Administration of Justice
10:45–1:00 pm
Chair: The Hon. Mr. Justice C Dennis Morrison, OJ, President
of the Court of Appeal, Jamaica
10:45–11:05 am De-biased Judging
Dr. Janeille Matthews, The UWI Mona
11:05–11:35 am Bias, Trust and Fairness in the Administration of
Justice: Some Evidence
The Hon. Mr. Justice Peter Jamadar JA, Dr. Dylan
Kerrigan, The UWI St. Augustine
11:35–11:55 am Race, Poverty and Access to Justice: Ganja and
the Law
Prof. Rose-Marie Antoine, Dean, Faculty of Law,
The UWI St. Augustine
11:55-12:15 am Language and Access to Justice
Dr. Celia Blake, The UWI Mona
12:15-12:50 pm Discussion
12:50-1:00 pm Synthesis: Our Top Five
1:00-2:00 pm LUNCH

Session 3: Roundtable Conversation on Vulnerable Groups
2:00–3:45 pm
Chair: The Hon. Madam Justice S. Maureen Crane-Scott JA,
Court of Appeal of the Commonwealth of the Bahamas
Facilitator: Dr. Gabrielle Hosein, Head, Institute of Gender and
Development Studies, The UWI St. Augustine
Participants: Cindy Lee, ComTalk International
Nazaroon Mohammed
Twinkle Bissoon, Communications Officer, Guyana Trans United

2:00–2:40 pm  Interviews and Comments
2:40–3:30 pm  Discussion
3:30–3:45 pm  Synthesis: Top Five
3:45–4:00 pm  BREAK

Session 4: Understanding diversity and difference: Exploring terms and ideas
4:00–4:45 pm
Facilitators: U-RAP Team
Dr. Jewel Amoah, The UWI St. Augustine
Dr. Arif Bulkan, The UWI St. Augustine
Westmin James, The UWI Cave Hill
Dr. Janeille Matthews, The UWI Mona
Tracy Robinson, The UWI Mona

Friday, December 01, 2017
9:00–9:30 am  Recap and Review
Facilitators: The Hon. Mr. Justice Peter Jamadar,
Dr. Janeille Matthews

Session 5: Equality and Non-discrimination in context
9:30–11:00 am
Chair: The Hon. Mr. Justice Andrew Burgess JA, Court of Appeal, Barbados
Presenters: Dr. Arif Bulkan, Tracy Robinson
9:30–9:45 am  Equality and Social Inclusion: A Primer
9:45–10:15 am  Role Play: Rites and Rights
10:15–10:40 am  Equality and Social Inclusion: Key Concepts
10:40–11:05 am  Plenary Discussion
11:05–11:15 am  Synthesis: The Top Five
11:15–11:30 am  BREAK
Session 6: Court in Session, A Role Play
11:30–1:00 pm

Session 7: Synthesis and Next Steps
2:00–4:00 pm
Facilitators: The Hon. Mr. Justice Jamadar JA, Chair JEITT
Dr. Jewel Amoah
Dr. Arif Bulkan
Tracy Robinson

“. . . it may be healthy for the Judge to be seen on the beach in his [or her] shorts, [she or] he thereby ceases to be an abstract idea . . .”

Preamble

WHEREAS the Universal Declaration of Human Rights recognizes as fundamental the principle that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of rights and obligations and of any criminal charge.

WHEREAS the International Covenant on Civil and Political Rights guarantees that all persons shall be equal before the courts, and that in the determination of any criminal charge or of rights and obligations in a legal proceeding, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

WHEREAS the foregoing fundamental principles and rights are also recognised or reflected in the Constitution of Barbados, at common law and in judicial conventions and traditions.

WHEREAS an independent judiciary is essential to the maintenance of the rule of law and for ensuring good governance.

WHEREAS public acceptance of the moral authority and integrity of the judiciary contributes to the maintenance of the rule of law and the promotion of good governance.

The following principles and rules promulgated in these Guidelines are intended to establish standards of ethical conduct for judges. They are principles and rules of reason to be applied in the light of all relevant circumstances and consistently with the requirements of judicial independence and the law. They are designed to provide guidance to judges and to afford a structure for the regulation of judicial conduct. They are intended to supplement and not to derogate from existing rules of law or rules of conduct, which bind judges.
Values

The values which these Guidelines uphold, are:

- Propriety
- Independence
- Integrity
- Impartiality
- Equality
- Competence and Diligence
- Accountability

Equality

Principle: Ensuring equality of treatment to all before the courts is an indispensable precept that governs the due discharge of the duties of judicial office.

Guidelines

5.1 A judge shall strive to be aware of, and to understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, Social and economic status and other like causes.

5.2 A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds.

5.3 A judge shall carry out his or her duties with the appropriate consideration for all persons be they lawyers, parties, witnesses, court staff or judicial colleagues while upholding the paramountcy of adjudication according to law.

5.4 A judge shall not knowingly permit court staff or others subject to the judge’s influence, direction or control to differentiate between persons concerned, in a matter which is before the judge, on any irrelevant ground.

5.5 A judge shall require lawyers in proceedings before his or her court to refrain from manifesting, by words or conduct, bias or prejudice based on irrelevant grounds. This requirement does not preclude legitimate advocacy where any such grounds are legally relevant to an issue in the proceedings.

5.6 A judge shall not be a member of, nor associated with, any society or organization which practices unjust discrimination such that it may or might inhibit or thwart the judicial process.

5.7 Without authority of law and notice to, and consent of, the parties and an opportunity to respond, a judge shall not engage in independent, personal investigation of the facts of a case before him or her.
5.8 Without authority of law and notice to, and consent of, the parties and an opportunity to respond, a judge shall not, in the absence of the other parties to the proceedings, communicate with any party to the proceedings in the judge’s court such proceedings.
Preamble

WHEREAS the Preamble of the Belize Constitution states that the Nation of Belize is founded upon, among other things, the principles of faith in human rights and fundamental freedoms and the dignity of the human person and the equal and inalienable rights to which all members of the human family are endowed;

WHEREAS sections 3 and 6 of the Belize Constitution stipulate the entitlement of every person in Belize to fundamental rights and freedoms without regard to race, place of origin, political opinions, colour, creed or sex and that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law;

WHEREAS the importance of a competent, independent and impartial judiciary to the protection of human rights is given emphasis by the fact that the implementation of all the other rights ultimately depends upon the proper administration of justice;

WHEREAS an independent judiciary is likewise essential if the courts are to fulfill their roles as guardians of the rule of law and thereby to assure good governance;

WHEREAS the real source of judicial power is public acceptance of the moral authority and integrity of the judiciary;

AND WHEREAS it is essential that judges, individually and collectively, respect and honour judicial office as a public trust and strive to enhance and maintain confidence in the judicial system;

WE the members of the Judiciary of Belize hereby freely and voluntarily accept to be guided and bound by the values and principles stated in this Code of Judicial Conduct and Etiquette.

The values which this Code upholds are:

- Propriety
- Independence
- Integrity
- Impartiality
- Equality
- Competence and Diligence
- Accountability
Equality

Principle

Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.

Code

5.1 A judge shall strive to be aware of, and to understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, martial status, sexual orientation, social and economic status and other like causes (‘irrelevant grounds’).

5.2 A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds.

5.3 A judge shall carry out his or her duties with appropriate consideration for all person (for example, parties, witnesses, lawyers, Court staff and judicial colleagues) without unjust differentiation on any irrelevant ground, immaterial to the proper performance of such duties.

5.4 A judge shall not knowingly permit court staff or others subject to the judge’s influence, direction or control to differentiate between persons concerned, in a matter which is before the judge, on any irrelevant ground.

5.5 A judge shall require lawyers in proceedings before a court to refrain from manifesting, by words or conduct, bias or prejudice based on irrelevant grounds. This requirement does not preclude legitimate advocacy where any such grounds are legally relevant to an issue in the proceedings.

5.6 A judge shall not be a member of, nor associated with, any society or organisation that practises unjust discrimination on the basis of any irrelevant ground.

5.7 Without authority of law and notice to, and consent of, the parties and an opportunity to respond, a judge shall not engage in independent, personal investigation of the facts of a case.

5.8 Without authority of law and notice to, and consent of, the parties and an opportunity to respond, a judge shall not, in the absence of the other parties to the proceedings, communicate with any party to proceedings in the judge’s court concerning such proceedings.
Preamble

WHEREAS the Universal Declaration of Human Rights recognizes as fundamental the principle that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of rights and obligations and of any criminal charge.

WHEREAS the International Covenant on Civil and Political Rights guarantees that all persons shall be equal before the courts and that in the determination of any criminal charge or of rights and obligations in a legal proceeding, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

WHEREAS the foregoing fundamental principles and rights are also recognised or reflected in the Constitutions of Member States of the Caribbean Community (CARICOM), at common law and civil law and in judicial conventions and traditions.

WHEREAS an independent judiciary is essential to the maintenance of the rule of law and for ensuring good governance.

WHEREAS public acceptance of the moral authority and integrity of the judiciary contributes to the maintenance of the rule of law and the promotion of good governance.

AND WHEREAS it is essential that judges, individually and collectively, respect and honour judicial office as a public trust and strive to enhance and maintain confidence in the judicial system.

... 

V. Equality

Principle

Ensuring equality of treatment to all before the courts is an indispensable precept that governs the due discharge of the duties of judicial office.

Code

5.1. A judge shall strive to be aware of, and to understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes (‘irrelevant grounds’).
5.2. A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds.

5.3. A judge shall carry out his or her duties with appropriate consideration for all persons be they lawyers, parties, witnesses, lawyers, court staff or judicial colleagues while upholding the paramountcy of adjudication according to law.

5.4. A judge shall not knowingly permit court staff or others subject to the judge’s influence, direction or control to differentiate between persons concerned, in a matter which is before the judge, on any irrelevant ground.

5.5. A judge shall require lawyers in proceedings before his or her court to refrain from manifesting, by words or conduct, bias or prejudice based on irrelevant grounds. This requirement does not preclude legitimate advocacy where any such grounds are legally relevant to an issue in the proceedings.

5.6. A judge shall not be a member of, nor associated with, any society or organization which practises unjust discrimination such that it may or might inhibit or thwart the judicial process.

5.7. Without authority of law and notice to, and consent of, the parties and an opportunity to respond, a judge shall not engage in independent, personal investigation of the facts of a case before him or her.

5.8. Without authority of law and notice to, and consent of, the parties and an opportunity to respond, a judge shall not, in the absence of the other parties to the proceedings, communicate with any party to proceedings in the judge’s court concerning such proceedings.
Canon 1
A Judge Should Uphold the Integrity and Independence of the Judiciary

An independent and honourable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Commentary

1. Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depend in turn upon their acting without fear or favour. Although judges should be independent, they should comply with the law, as well as with the provisions of this Code. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this Code diminishes public confidence in the judiciary.

2. These Canons are rules of reason. They should be applied consistent with constitutional requirements and other law, and in the context of all relevant circumstances. The Code is to be construed so as to enhance the essential independence of judges in making judicial decisions.

3. The Code is designed to provide guidance to judges and nominees for judicial office. The Code may also provide standards of conduct for application in proceedings under the Courts Order, although it is not intended that disciplinary action would be appropriate for every violation of its provisions.

4. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable application of the text and should depend on such factors as the seriousness of the violation, the intent of the judge, whether there is a pattern of improper conduct, and the effect of the improper conduct on others or on the judicial system. Many of the proscriptions in the Code are necessarily cast in general terms, and it is not suggested that disciplinary action is appropriate where reasonable judges might be uncertain as to whether or not the conduct in question is proscribed. The Code is not designed or intended as a basis for civil liability or criminal prosecution.

5. The purpose of the Code would be subverted if the Code were invoked by lawyers or litigants for mere tactical advantage in a proceeding.
Canon 2

A Judge Should Avoid Impropriety and the Appearance of Impropriety in all Activities

A Judge should respect and comply with the law and at all times act in a manner that promotes public confidence in the integrity and impartiality of the judiciary; A Judge should not

• allow family, social, political or other relationships to influence judicial conduct or judgment;

• lend the prestige of the judicial office to advance the private interests of others; nor convey or permit others to convey the impression that they are in a special position to influence the judge.

• testify voluntarily as a character witness.

• hold membership in any organization that practises invidious discrimination on the basis of race, gender, religion, or national origin.

Commentary

1. Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. Judicial office carries with it the burden of constant public scrutiny. A judge must accept restrictions that might be viewed as onerous by other persons and should do so freely and willingly.

2. The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired.

3. The testimony of a judge as a character witness injects the prestige of the judicial office into the proceeding in which the judge testifies and may be misunderstood to be an official testimonial. This Canon, however, does not afford the judge a privilege against testifying in response to an official summons. Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness.

4. A judge should avoid lending the prestige of judicial office for the advancement of the private interests of the judge or others. For example, a judge should not
use the judge’s judicial position to gain advantage in litigation involving a friend or a member of the judge’s family. A judge should be sensitive to possible abuse of the prestige of the office.

**Canon 3**

**A Judge Should Perform the Duties of the Office Impartially and Diligently**

The judicial duties of a judge take precedence over all other activities.

The Judge should adhere to the following standards:

A Judge should:

- Maintain professional competence in the law, and should not be swayed by partisan interests, public clamor, or fear of criticism.
- Hear and decide matters assigned to him/her expeditiously and fairly.
- Maintain decorum in all judicial proceedings.
- Be patient, dignified, respectful, and courteous to all those who appear before him/her in an official capacity.
- Avoid public comment on the merits of a pending or impending action.

**Administrative Responsibilities**

1. A Judge should diligently discharge his/her administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.
2. A Judge should require court officials, staff and others subject to his/her direction and control to observe high standards of fidelity and diligence.
3. A Judge should initiate appropriate action when he/she becomes aware of reliable evidence indicating unprofessional conduct by a judge or a lawyer.
4. A Judge who is called upon to approve, make or participate in the making of appointments should make any such decisions on the basis of merit only avoiding favouritism.
5. The Chief Justice should take reasonable measures to ensure the timely and effective performance by judges of their judicial work.

**Disqualification**

1. A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to instances in which:
i. the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

ii. the judge served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness;

iii. the judge knows that, individually or as a fiduciary, the judge or the judge’s spouse or minor child residing in the judge’s household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding;

iv. the judge or the judge’s spouse, or a person known by the judge to be related to him or her:
   a. is a party to the proceeding, or an officer, director, or trustee of a party
   b. is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; or
   c. is, to the judge’s knowledge, likely to be a material witness in the proceeding;
   d. one of the lawyers appearing in the matter before the judge is the spouse of the judge or a member of the judge’s household or a member of the judge’s family
   e. the judge has expressed an opinion concerning the merits of the particular case in controversy.

2. A judge should keep informed about the judge’s personal and fiduciary financial interests, and make a reasonable effort to keep informed about the personal financial interests of the judge’s spouse and minor children residing in the judge’s household.

3. For the purposes of this section:
   i. ‘fiduciary’ includes such relationships as executor, administrator, trustee, and guardian;
   ii. ‘financial interest’ means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:
      a. ownership in a mutual or common investment fund that holds securities is not a ‘financial interest’ in such securities unless the judge participates in the management of the fund;
      b. an office in an educational, religious, charitable, fraternal, or civic organization is not a ‘financial interest’ in securities held by such organization;
      c. the proprietary interest of a policy holder in a mutual insurance company, or a depositor in a financial institution or credit union, or a
similar proprietary interest, is a ‘financial interest’ in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

iii. ownership of government securities is a ‘financial interest’ in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

iv. ‘member of the judge’s family’ includes a spouse, child, sibling, grandchild, parent, grandparent, or other relative or person, with whom the judge maintains a close family relationship or in relation to whom the Judge stands in loco parentis;

v. ‘member of the judge’s household’ means any person residing in the same house as that of the Judge.

Commentary

1. The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Courts can be efficient and businesslike while being patient and deliberate.

2. The duty under Canon 2 to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary applies to all the judge’s activities, including the discharge of the judge’s adjudicative and administrative responsibilities. For example, the duty to be respectful of others includes the responsibility to avoid comment or behavior that can reasonably be interpreted as manifesting prejudice or bias towards another on the basis of personal characteristics like race, gender, religion, or national origin.

3. The proscription against communications concerning a proceeding does not preclude a judge from consulting with other judges, or with court personnel whose function is to aid the judge in carrying out adjudicative responsibilities.

4. In disposing of matters promptly, efficiently and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs. A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts.

5. Prompt disposition of the court’s business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants and their lawyers cooperate with the judge to that end. Reserved judgments should be delivered within three months, or such longer time as the circumstances may reasonably require.

6. The admonition against public comment about the merits of a pending or impending action continues until completion of the appellate process. If the
public comment involves a case from the judge's own court, particular care
should be taken that the comment does not denigrate public confidence in the
integrity and impartiality of the judiciary or seem to promote the judge's own
image or personal interests.

7. Maintaining professional competence requires a judge actively to participate
in judicial education and training exercises on an ongoing basis and to keep
himself/herself reasonably informed on new developments in the law.

**Canon 4**

**A Judge Should Regulate Extra-Judicial Activities to Minimize the Risk of
Conflict with Judicial Duties And Obligations.**

**General Rule**

A judge may engage in such extra-judicial activities that do not, in the minds of
right-thinking members of the community:

- cast reasonable doubt on the Judge's capacity to act impartially as a Judge
- compromise the dignity of the office of the Judge; or
- interfere or be in conflict with the performance of the judicial duties or the
  office of the Judge.

**Vocational Activities**

A Judge is encouraged to write, lecture, teach, speak and participate in activities on
legal subjects provided that such vocational activities are not directly related to
matters pending or impending or that the judge's ability to make independent deci-
sions is not thereby compromised.

**Avocational Activities**

A Judge may speak, write, lecture, teach or participate in activities on non-legal
subjects, and engage in the arts, sports and other social and recreational activities,
provided that such avocational activities do not detract from the dignity of the
office of Judge

**Governmental Activities**

A judge should not appear at a public hearing before an executive or legislative
body or official except:

1. on matters concerning the law, the legal system or the administration of justice
   with the concurrence of the Chief Justice; or
2. when acting in a personal capacity in a matter involving the Judge or the Judges interests.

A Judge shall not accept appointment to a governmental committee or commission of inquiry that is concerned with political matters or matters which may affect the public perception of the independence impartiality and integrity of the judiciary as a whole other than for the improvement of the law, the legal system or the administration of justice.

A Judge may be a member or serve as an officer, director, trustee or non-legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice provided that such organization or agency is not likely to be engaged in litigation before any Court.

**Civic and Charitable Activities**

A judge may be a member or serve as an officer, director, trustee or non-legal advisor of an educational, religious, charitable, fraternal or civil organization not conducted for profit or political aims, subject to but not limited to the following prohibitions:-

1. A Judge shall not serve as an officer, director, trustee or non-legal advisor if it is likely that such organization will be engaged in proceedings that would ordinarily come before the Judge or will be regularly engaged in litigation in any Court.
2. A Judge shall not solicit funds or actively engage in fundraising activities for any such organization, or use or permit the use of the prestige of the judicial office for that purpose, but the Judge may assist such an organization in planning fund-raising and may participate in the management and investment of the funds solicited by the organization. A Judge may be listed only by name and office or other position held on the stationery of the organisation for funding or membership solicitation.
3. A Judge shall not personally participate in membership solicitation of such organisation if the solicitation might be perceived as coercive or is essentially a fundraising mechanism.

**Financial Activities**

1. A judge shall not engage in financial and business dealings that:  
   i. may tend to be reasonably perceived to exploit the Judge’s judicial position; or  
   ii. involve the Judge in frequent transactions or continuing business relationship with lawyers or other persons likely to come before the Court on which the Judge serves
iii. Subject to the General Rule, a Judge may hold and manage investments, inclusive of real estate, belonging to the Judge or members of the Judges family.

2. A Judge shall not serve as an officer, director, partner, adviser, employee or other active participant of any business other than a business controlled by the Judge’s immediate family.

3. A Judge shall manage the Judge’s investments and other financial interests in such a manner as to minimize the number of cases in which the Judge is disqualified. As soon as the Judge can do so without serious financial detriment, the judge should divest himself or herself of investments or other financial interests that might require frequent disqualification.

4. A Judge shall not accept, and shall urge members of his family and household not to accept a gift, bequest, favour or loan from anyone except:-
   
   i. a gift incident to a public testimonial, books, tapes and other resource materials supplied by publishers on a complimentary basis for official use, or an invitation to the Judge and the Judge’s spouse or guest to attend a bar-related function or an activity devoted to the improvement of the law, the legal system or the administration of justice;

   ii. a gift, award or benefit incident to the business, profession or other separate activity;

   iii. ordinary social hospitality;

   iv. a gift from a relative or friend for a special occasion such as a wedding, anniversary or birthday, if the gift is commensurate with the occasion and the relationship;

   v. a gift, bequest favour or loan from a relative or close personal friend whose appearance or interest in a case would in any event require disqualification;

   vi. a loan from a commercial lending institution in the ordinary course of business on the same terms generally available to persons who are not Judges; or

   vii. a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants.

5. Information acquired by a Judge confidentially in the Judge’s judicial capacity shall not be used or disclosed by the Judge in financial dealings or for any other purpose not relevant to the Judge’s judicial duties.

**Fiduciary Activities**

1. A Judge shall not serve as executor, administrator or other personal representative, trustee, guardian, attorney or other fiduciary except for the estate, trust or person of a member of the Judge’s family or a person not a member of the Judge’s family with whom the Judge had maintained a longstanding personal
relationship of trust and confidence, and then only if such service will not interfere with the proper performance of judicial duties.

2. The same restrictions on financial activities that apply to a Judge personally shall also apply to the Judge while acting in a fiduciary capacity.

Arbitration

A judge shall not act as an arbitrator, mediator or conciliator or otherwise perform judicial functions in a private capacity unless expressly authorised.

Practice of Law

A Judge shall not practice law. Notwithstanding this prohibition, a Judge may act for himself in his personal affairs. The Judge may, without compensation give legal advice to, draft or review documents for a member of the Judge’s family.

Chambers, Resources or Staff

A Judge should not use judicial chambers, resources or staff to engage in activities permitted by this Canon, except for uses that are de minimis.

Commentary

1. This Canon is aimed at preserving the independence, impartiality and integrity of the Judge, the Judiciary and the administration of justice, while acknowledging the right of the Judge to take his/her place and perform his/her chosen individual role as a family member, citizen and member of the community. Appropriate involvement in family, social intercourse and non-political civic activities can enhance the standing of the Judge in his official capacity and heighten his awareness of the community as a whole.

2. A judge must not abdicate his/her role as a leader in the administration of justice and should hold himself/herself responsive to requests to elucidate the law and the judicial function to legal and non-legal persons alike. A judge must be careful not to become engaged in the discussion of issues currently before or likely to come before any Court.

3. A Judge ought to be free to indulge in extra-legal activities of personal interest. A Judge should, however, avoid being ensnared in controversial issues that may do harm to the dignity of the judicial office. By the same token, the judicial office ought not to be used to advance the Judge’s point of view or to secure any personal advantage for the Judge.

4. A Judge should absolutely refrain from any partisan or other political activity as detailed in Canon 5.
5. A Judge should appear at a public hearing under the aegis of the Executive or Legislature only with the express consent of the Chief Justice for the purpose of advancing the cause of the administration of justice or where his or her personal interests are likely to be directly affected thereby.

6. The fact of a Judge sitting on a committee, commission or other body with a political agenda can be perceived as collusion between the Judiciary and the other arms of Government. Such perception carries with it the real possibility of the diminution of confidence in the judicial branch of government in the minds of litigants in particular and the public at large.

7. It is conceivable and indeed desirable that a Judge may lend his knowledge and experience to an entity, whether governmental or non-governmental, the sole stated purpose of which is to improve the legal system and the administration of justice.

8. The organizations contemplated under the heading ‘Civic and Charitable’ embrace service clubs such as Rotary, Lions, Kiwanis and Jaycees, other local charitable bodies, international bodies such as the Red Cross, Boy Scouts, Girl Guides and Saint John's Ambulance Brigade, denominational groups, fraternal organizations such as Freemasons, Foresters and other Lodges and sports governing bodies or clubs. With regards to such bodies, Judges in their capacity as members or office-bearers thereof should be wary of becoming involved in the soliciting of funds. Such involvement should be restricted to making an input in the planning of the activities. Judges should be alive to the possibility that the presence of their name and title on the letterhead of the organisation may have the effect of providing an incentive to a potential contributor for reasons other than philanthropy.

9. A judge must be sensitive to the fact that fraternal bodies are traditionally shrouded in mystery and clothed with a perception of secrecy and of members unconditionally coming to each other's aid in times of need, trouble and distress. Non-members are therefore apt to conclude that an opposing litigant belonging to the same Lodge as the Judge enjoys an unfair advantage. This is rendered more acute in smaller communities. In this regard, it would therefore be appropriate for a judge to disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned. If the judge is placed in a situation where he or she will be required frequently to disqualify himself or herself then the judge should consider disassociating himself or herself from such body.

10. A Judge should refrain from engaging in any business or financial activity that might interfere with the impartial performance of the Judge's judicial function. A Judge must nevertheless be free to make financial and investment decisions for his or her immediate family's well-being. A Judge may participate in his or her family's business to the extent that it does not occupy an inordinate amount of the judge's time or compromise the Judge's judicial duties.
A newly appointed Judge or a Judge at the time this Code is brought into force, should be afforded a reasonable opportunity to achieve compliance with these provisions.

**Canon 5**

A Judge Should Refrain from Political Activity

1. A Judge should not:
   i. Be a member or hold any office in a political organization;
   ii. Make speeches for a political organization or candidate or publicly endorse or oppose a candidate for public office;
   iii. Solicit funds for or pay an assessment or make a contribution to a political organization or candidate;
   iv. Attend political gatherings; or
   v. Purchase tickets for political party dinners, or other functions.

2. A judge should resign the judicial office when the judge becomes a candidate in a general election for any political office

3. A judge should not engage in any other political activity; provided, however, this should not prevent a judge from engaging in the activities described in Canon 4.

**Commentary**

The Judges of the Eastern Caribbean States preside in small islands where political rivalries are often intense. Judges should be extremely sensitive to the necessity for them not only to be absolutely non-partisan but also to refrain from any conduct that might appear to be partisan. The test to be used here is similar to the one set out in Canon 2 i.e. whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the judge’s ability to carry out judicial responsibilities with integrity and impartiality is impaired.
PART III

Conduct of Members of the Judicial Service

6. Subject to the Constitution, all officers appointed by the Commission shall conduct themselves in such a way as not to:-

(a) place themselves in positions in which they have or could have a conflict of interest;
(b) compromise the fair exercise of their official functions and duties;
(c) use their office for private gain;
(d) demean their office or position;
(e) allow their integrity to be called into question; nor
   (1) endanger or diminish respect for, or confidence in, the integrity of the Judicial Service.

7. All officers shall therefore:

(a) demonstrate the highest level of professional conduct and personal integrity in the performance of their duties and in serving the public;
(b) treat everyone, including public officers, clients and members of the general public with courtesy, respect, fairness and impartiality;
(c) display a positive attitude and be pro-active in the exercise of their duties; seek to understand and to satisfy the real needs of members of the public;
(d) in the exercise of their official duties, not confer any special benefit and/or give preferential treatment to anyone on the basis of any special relationship; and render service in a timely, efficient and effective manner.
Purpose

Statement: The purpose of this document is to provide ethical guidance for judges of the Court of Appeal and the Supreme Court, Masters of the Supreme Court and Resident Magistrates.

Principles

1.1 The Statements and Principles describe the very high standards toward which all judges strive. They are principles of reason to be applied in light of all of the relevant circumstances and consistently with the requirements of the Constitution of Jamaica, judicial independence and the law. Setting out the very best in these Statements and Principles does not preclude reasonable disagreements about their application or imply that departures from them necessarily warrant disapproval.

1.2 The Statements and Principles are advisory in nature. Their goals are to assist judges with the difficult ethical and professional issues which may confront them from time to time and to assist members of the public to better understand the judicial role. They are not intended to be and shall not be used as a code or a list of prohibited forms of behaviour and they do not set out standards defining judicial misconduct.

Commentary

1) Nothing in these Statements, Principles and Commentaries can, or is intended to limit or restrict judicial independence, because to do so would deny what this document seeks to safeguard: the rights of everyone to equal justice administered by fair and impartial judges.

... Equality

Statement: Respecting human dignity and ensuring equality of treatment for all persons who appear before the courts are essential to the due performance of the duties of judicial office.

Principles

6.1 Judges should carry out their duties with appropriate consideration for all persons, be they lawyers, parties, witnesses, court staff or judicial colleagues, without differentiation on any irrelevant ground.
6.2 Judges should strive to be aware of and to understand diversity in society and
differences arising from various sources, including, but not limited to gender,
race, colour, national origin, religious conviction, culture, ethnic background,
social and economic status, marital status, age, sexual orientation, disability
and other like causes.

6.3 Judges should not, by words or conduct, manifest bias or prejudice towards or
against any person or group.

6.4 Judges should not knowingly permit court staff or others subject to their
influence, direction or control to differentiate between persons concerned in
a matter which is before the court on any irrelevant ground.

6.5 Judges should require lawyers appearing in proceedings before the court to
refrain from manifesting, by words or conduct, bias or prejudice based on irrel-

Commentaries

1) Inappropriate conduct may arise from a judge being unfamiliar with cultural,
racial or other traditions or failing to realise that certain conduct is hurtful to
others. Judges should therefore attempt by appropriate means to remain
informed about changing attitudes and social values.

2) It is part of the judge’s role to ensure that proper accommodation is made for
people who experience certain challenges, might have difficulties or be at a
disadvantage.

3) Equality according to law is not only fundamental to justice, but is strongly
linked to judicial impartiality. A judge who, for example, reaches a correct
result but engages in stereotyping does so at the expense of the judge’s impar-
tiality, actual or perceived.

4) Judges should not be influenced by attitudes based on stereotype, myth or prej-
udice. They should, therefore, make every effort to recognise, demonstrate
sensitivity to, and correct such attitudes.

5) Judges should not hold membership in any organisation that practices discrim-
ination of any kind.

6) Judges shall not engage in speech, gestures, or other conduct that would rea-
sonably be perceived as bias or prejudice, including bias or prejudice based
upon ethnic or national origin, gender, age, disability, social status, health
status, religion, opinions, preferences, marital status or any other discrimi-

7) Judges must be firm but fair in the maintenance of decorum, and above all
even-handed. This involves not only observance of legal principles, but the
need to protect all parties, witnesses and counsel from any display of racial,
sexual or religious bias or prejudice of any kind. Judges should inform them-
seves on these matters so that they do not inadvertently give offence.
Preamble

Whereas the Constitution of the Republic of Trinidad and Tobago recognizes and upholds the rule of law and the principles of fundamental justice;
And whereas the said Constitution recognizes as the law and the protection of the law, and to a fair and public hearing by an independent and impartial tribunal;
And whereas an independent, impartial, competent and effective judiciary is essential to the maintenance of the rule of law and for ensuring good governance;
And whereas public acceptance of the moral authority and integrity of the judiciary contributes to the maintenance of the rule of law and the promotion of good governance; it is essential that Judges individually and collectively, respect and honour judicial office as a public trust and strive to enhance and maintain trust and confidence in the judicial system;
And whereas the Statements of Principle and Guidelines herein conform with the six “values” succinctly stated in the Bangalore Principles of Judicial Conduct endorsed by the United Human Rights Commission at Geneva.

Now, therefore, the following Statements of Principle and Guidelines are intended to provide guidance to judges and all other judicial officers and to afford the Judiciary a framework for regulating judicial conduct. They are also intended to assist members of the public to better understand the judicial role and to have objective criteria upon which to assess judicial conduct. They are, however, not and shall not be used as a code or list of prohibited behaviours defining judicial misconduct under section 137 of the Constitution.

V. Equality of Treatment

Statement of Principle

Ensuring equality of treatment to all before the courts is essential to the due performance of the duties of judicial officers. Judges should conduct themselves and proceedings before them so as to assure equality according to law.

Guidelines

5.1 A judge should strive to be aware of and understand differences arising from various sources, including but not limited to gender, race, colour, religious conviction, culture, national origin, ethnic background, sexual orientation, disability, age, marital status, social, political and economic status other like causes (irrelevant grounds”).
Statements of Principle and Guidelines for Judicial Conduct

5.2 A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds.

5.3 A judge should carry out his judicial duties with appropriate consideration for all persons, whether attorneys-at-law, parties, witnesses, court staff or judicial colleagues, without unjust differentiation on any irrelevant ground.

5.4 A judge, in the course of proceedings before him, should dissociate himself from and disapprove of comments or conduct which are predicated on irrelevant grounds by court staff, attorneys-at-law or any other person subject to the judge's influence, direction or control.

5.5 A judge should avoid membership in any organization that he knows which currently practices discrimination.

5.6 A judge shall not knowingly permit court staff or others subject to his influence, direction or control to differentiate between persons involved in any matter before him on irrelevant grounds.

5.7 A judge shall not engage in independent, personal investigation of facts of a case without authority of law notice to, and consent of, the parties and giving them an opportunity to respond.

5.8 A judge shall not communicate with any party to proceedings in his court in the absence of the other parties, except under authority of law and with notice to, and with the consent of the other parties.

Commentary

1. The Constitution and a variety of statutes enshrine a strong commitment to equality before and under the law and equal protection of the law without discrimination. This is not a commitment to identical treatment but rather treatment reflecting equal worth and human dignity. Discrimination is concerned not only with one's intentions, but also the effects of the alleged actions.

2. Equality according to law is not only fundamental to justice, but is strongly linked to judicial impartiality. A judge should avoid comments, expressions, gestures or behaviour which reasonably may be interpreted as showing insensitivity to or disrespect for anyone. All persons are to be treated with due regard and respect, recognising the dignity of everyone.

3. A judge should attempt, by appropriate means, to remain informed about changing attitudes and values and to take advantage of suitable educational opportunities, which ought to be made reasonably available, that will assist him to be and appear to be impartial. In doing this, however, it is also necessary to take care that these efforts enhance and do not detract from a judge's perceived impartiality.

4. A judge has a general duty to listen and act fairly but, when necessary, to also assert firm control over the proceedings and to act with appropriate firmness to maintain an atmosphere of dignity, equality and order in the courtroom.
About the Authors

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**THE HON. MR JUSTICE IVOR ARCHIE, ORTT** is the Chief Justice of Trinidad and Tobago. He is a trained mediator and qualified trainer of persons delivering judicial education. Before studying law, he studied mechanical engineering and worked as an engineer. He was the Solicitor General of the Cayman Islands. The Honourable the Chief Justice has spearheaded many initiatives geared towards the improvement of the administration of justice in Trinidad and Tobago. These include the widespread application of information communication technologies in the Courts, enhanced collaboration with stakeholders in the justice sector, and the creation of a business model approach to the administration of justice.

**DR CELIA BLAKE** is a senior lecturer in the Faculty of Law, The UWI Mona. She specialises in two distinct academic streams as she is an expert in forensic linguistics, the study of the confluence of language and the law, as well as insolvency, corporate law and financial regulation. In 2017, she was an international visiting scholar at Stanford Humanities Center, Stanford University, where she developed and shared her research on the disenfranchisement of Caribbean vernacular speakers in the legal system.

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**THE HON. MR JUSTICE PETER JAMADAR JA** is a Judge of Appeal in the Court of Appeal of Trinidad and Tobago. He is the Chair of the Caribbean Association of Judicial Officers (CAJO). He was the Chair of the JEITT between 2009 and 2019 and led the Institute’s ground-breaking research on procedural fairness in the court system of Trinidad and Tobago. The Hon Justice Jamadar develops programmes and trains judicial officers across the region and world in areas of Procedural Fairness, Judicial Education, and Judicial Arrogance. In July 2019, he will begin his tenure as a judge of the Caribbean Court of Justice (CCJ).

**DR DYLAN KERRIGAN** is a research associate with University of Leicester working with a multi-disciplinary team researching the definition, extent, experience and treatment of mental, neurological and substance disorders in Guyana jails. He was a lecturer at the Faculty of Social Sciences, The UWI St Augustine between 2010 and 2019 and remains a visiting lecturer at The UWI. He is a researcher in socio-cultural anthropology, political sociology, and criminology. Dr Kerrigan was a consultant to research project of the JEITT on procedural fairness in the court system of Trinidad and Tobago.

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**TORI SINANAN** completed an MSc in Sociology in the Faculty of Social Sciences, The UWI St Augustine in 2018. Her research was titled, “I am going to fight it to the last”: Trinidadian Women’s Survival Through Situational Analysis'.
This edited volume, the proceedings of a regional meeting of judicial officers held in Trinidad and Tobago, is intended to support members of the judiciary in furthering what the Hon. Mr Justice Peter Jamadar terms ‘Project Equality’ – the pursuit of securing equality for all in the administration of justice. Although not a panacea for all systemic challenges, the volume suggests that grappling with social inequality, implicit bias, procedural fairness and language discrimination is critical to this pursuit.