The rule of law implies legal accountability, fairness, respect for minorities, the observance of human rights, judicial independence, the separation of powers, equality before the law, the absence of arbitrariness. The advancing of good governance and the rule of law is central to the role of Courts of Appeal in our developing democracies. It creates the conditions for the optimal social and economic development.

Second Distinguished Jurist Lecture 2012
by Mr. Justice Adrian Dudley Saunders
The Role of the Court of Appeal in Developing and Preserving an Independent and Just Society
The Honourable Mr. Justice
Adrian Dudley Saunders
The Role of the Court of Appeal in Developing and Preserving an Independent and Just Society

Trinidad and Tobago Judicial Education Institute
Second Distinguished Jurist Lecture 2012
By the Honourable Mr. Justice Adrian Dudley Saunders
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From left to right: Mr. Justice Stollmeyer JA, retired, Mr. Justice Mendonca JA, Mr. Justice Bereaux JA, Honourable Chief Justice Mr. Justice Ivor Archie, Mr. Justice Narine JA, Mme. Justice Weekes JA, Mr. Justice Smith JA, Mme. Justice Yorke-Soo Hon JA, Mme. Justice Rajnauth-Lee JA.

Inset: Mr. Justice Jamadar JA and Mr. Justice Kangaloo JA.
Appreciation

Kent Jardine

On behalf of the Board and Staff of the Trinidad and Tobago Judicial Education Institute, I would like to express my appreciation of, and gratitude to, all those persons who have contributed to the work of the Institute in the past year. Events like the Distinguished Jurist Lecture or the Annual Continuing Education Seminars require hours of dedication and hard work.

This has certainly been the case with this publication of the Second Lecture which could not have happened without the cooperative assistance of Justice Saunders and the members of the panel including Chief Justice Archie, Professor Ryan and Mr. Russell Martineau, as well as of Justice Jamadar and the staff of the Judicial Education Institute. We also owe a considerable debt of gratitude to Paria Publishing Company for their patience and professionalism.

It has been a privilege to be part of the collaborative effort from dozens of people, within and outside the Judiciary, who have given their best to attain the standards established by our predecessors in the Institute. Secure on the foundation laid by these efforts, we look forward to a challenging and inspirational future promoting excellence in the Judiciary of the Republic of Trinidad and Tobago.

Kent Jardine
Judicial Educator
10th May 2013
The focus of the Trinidad and Tobago Judicial Education Institute’s (TTJEI) 2012 Distinguished Jurist Lecture was on ‘The Role of the Court of Appeal in Developing and Preserving an Independent and Just Society’. The enduring post-independence context for the majority of Commonwealth Caribbean States remains one in which these states have as their final court the Privy Council, which is located outside of the Caribbean region and staffed almost exclusively by non-Caribbean persons, mainly British.

The postmodern approach to both the interpretation and application of the law, particularly in common law jurisdictions, has, however, recognised the centrality of ‘context’. Indeed, it has been said that “In law context is everything” (Steyn, 2001). While that may be a bit of an overstatement, it certainly indicates the centrality and importance of context at this time in the evolution of the law.

It is exactly because of the unique context in which most Courts of Appeal function in the English-speaking Caribbean, as the final indigenous courts, that their special role in creating a just society emerges. This lecture by the Honourable Justice Adrian Saunders, delivered on Thursday, 12th July, 2012 at the Convocation Hall, Hall of Justice, Port of Spain, Trinidad, examines this issue with great clarity and probing insights, mixed with a measure of refreshing story and anecdote, and argues affirmatively and compellingly for the relevance, role and responsibility of Courts of Appeal in the development of their societies.

The Courts of Appeal have been and remain acutely relevant to the creation of just societies as the final indigenous courts in the region—uniquely ‘in touch’ with local conditions. As such, the role of the Courts of Appeal in interpreting and applying the constitutions and the laws in each state is vital not only to the fair and just resolution of disputes, but also in shaping the evolution of society and in preserving the democratic way of life. Indeed, Courts of Appeal have a constitutional duty and responsibility, within the context of the separation of powers, to play their part in governance (as a branch of government), which
includes not only leadership, but also maintaining the balance of power among the other branches of government and between the state and its citizens.

The panel discussion that followed on Friday, 13th July, 2012, was groundbreaking for our jurisdiction in that it involved an interdisciplinary dialogue on the topic. Eminent sociologist Professor Selwyn Ryan joined the Honourable Chief Justice of Trinidad and Tobago, as well as Justice Saunders and Mr. Russell Martineau S.C., one of the region’s most senior and respected attorneys, at the Convocation Hall to interrogate the topic. The contributions of the panellists were all deeply insightful and the overall picture that emerged from this gathering was truly enlightening. Moderated by Madam Justice Paula Mae Weekes with aplomb, this panel discussion was truly engaging.

Caribbean people can only benefit from reading and considering what was shared by these ‘sons of the soil’. The breadth and depth of information and analysis make this publication an invaluable historical source and record. It is with these things in mind that the TTJEI has published its Second Distinguished Jurist Lecture and Panel Discussion. Within these covers one will find the texts of the lecture and of the contributions by the panellists. Included also are some of the questions from the audience and responses by the panellists. It is our hope that many will read and consider what is contained in this publication; and that the conversations initiated here will continue and will inform and influence the Courts of Appeal in the region and contribute to the development and preservation of independent and just societies.

The Honourable Mr. Justice Peter Jamadar JA
Chairman, Trinidad and Tobago Judicial Education Institute
10th May, 2013
Good evening everyone. I join with Mr. Madeira in welcoming you all here on behalf of the President, the Honourable Chief Justice, Mr. Justice Ivor Archie, Board and staff of the Trinidad and Tobago Judicial Education Institute. For us it is with great pride that we host this, the second Distinguished Jurist Lecture of the TTJEI. Together with our President, it is with equal joy that we are privileged to have as our 2012 feature lecturer, the Honourable Mr. Justice Adrian Saunders, Judge of the Caribbean Court of Justice. We know that this lecture will have immediate impact and also enduring value and meaning for the understanding and development of law in Trinidad and Tobago and in the region.

I am happy to report that the TTJEI continues to fulfil its vision and mission ’to promote excellence in the administration of justice ... through continuous training and development of judges, other judicial officers and non-judicial staff attached to the Judiciary.’ For the year 2011 to 2012 three significant milestones were:

First, the hosting of a three-day residential, interdepartmental Continuing Education Seminar on ‘Appreciative Inquiry’ and on ‘The evolving role of the judge/judicial officer.’ The latter involved explorations of: ‘What is Justice?’; ‘Judicial Settlement Conferencing’; ‘Restorative Justice’; and ‘The
Constitutionality of the Privatisation of Justice. Several of our judges and judicial officers played significant roles in facilitating these discussions. Appreciative Inquiry is a strengths-based methodology for effecting and managing change and for facilitating institutional growth and development. For this seminar, the Chief Justice of Barbados and the Chancellor of Guyana joined us and shared their experiences and insights.

Second, the publication of two books:

(i) The 2011 Inaugural Distinguished Jurist Lecture by Sir Shridath Ramphal on the topic ‘Creating a Regional Jurisprudence’.

(ii) An ‘Awards of Damages for False Imprisonment and Malicious Prosecution’ handbook, which collates, analyses and presents all such cases in Trinidad and Tobago for the period 1991 to 2011. This entire project has been led and executed by members of our Judiciary and its support staff. This book will be available in 2013.


What is most significant about these three undertakings is the fact that they are largely ‘home-grown.’ There was a time when most of our workshops were facilitated by foreign and international presenters. Now, happily, in this 50th year of independence of the Republic, we can report that in most, if not all, of our training and workshops, our own judges, judicial officers and judiciary staff play both leadership and facilitative roles. This is something that we are quite proud about.

On behalf of the TTJEI, allow me to thank you in advance for your support of the Institute and its work. We are committed to education, development and formation in all spheres of activity within the Judiciary that fall within our remit. These Distinguished Jurist Lectures are one way in which we discharge this responsibility to the wider population and to the profession in particular. The topic for tonight’s lecture is intended not only to educate, but also to stimulate reflection, introspection and constructive critical analysis. Until such time as the Judicial Committee of the Privy Council is no longer our final court or different arrangements are made, the Court of Appeal remains the highest indigenous court in the Republic of Trinidad and Tobago. Few know, and fewer recognise,
the significance of the subtle change that was made on independence to the office of Chief Justice and its implications and signification for the Judiciary.

The 1962 Independence Constitution provided for the creation of the office of ‘Chief Justice and President of the Court of Appeal.’ (See chapter vi of the 1962 Constitution). This new post was a joint post. As Chief Justice, the office holder was made responsible for the administration of all courts in Trinidad and Tobago. As President of the Court of Appeal, the office holder was to preside over the final indigenous court in Trinidad and Tobago. The Chief Justice was now, for the first time, both Chief Administrator and Chief Judge of the Judiciary of Trinidad and Tobago. This joint status was preserved in the 1976 Republican Constitution. In fact, this approach to the office of Chief Justice is illustrative of the constitutional arrangements agreed upon in 1962 in relation to the Judiciary and the administration of justice, which were continued in 1976. Clearly the intention was to create, administratively and judicially, an independent and robust local judiciary; headed by a single equally independent chief judge and chief administrator. And why not. The Judiciary was, after all, the ultimate defender of the Constitution, constitutional values, and of the People.

In our 50th year of independence, several legitimate questions can be asked about the Judiciary. This lecture and tomorrow’s panel discussion are intended to focus on one area of inquiry: Does the final indigenous court have a role and function in developing and preserving an independent and just society? And if so, how has it fared? We therefore welcome you and look forward to seeing most of you here tomorrow when we engage an interactive panel discussion on tonight’s topic: Celebrating fifty years of the Court of Appeal of an Independent Trinidad and Tobago: The Role of the Court of Appeal in Developing and Preserving an Independent and Just Society.

I now hand you over to the Honourable Madame Justice Alice Yorke-Soo Hon, Judge of the Court of Appeal and member of our Board, who will introduce our feature speaker.

Once again, thank you and welcome.

THE HONOURABLE MR. JUSTICE PETER JAMADAR JA
Chairman, Trinidad and Tobago Judicial Education Institute
10th May, 2013
On behalf of the Judicial Education Institute of Trinidad and Tobago, it is my pleasure to introduce to you our feature speaker the Honourable Mr. Justice Adrian Dudley Saunders. Justice Saunders obtained a Bachelor of Laws degree from the University of the West Indies (Cave Hill) in 1975 and the Legal Education Certificate of the Hugh Wooding Law School in Trinidad and Tobago in 1977. In that same year, he was called to the Bar of St. Vincent and the Grenadines.

Mr. Justice Saunders remained in private practice as a barrister and solicitor from 1977 until 1996, at which time he was the Senior Partner in the firm of Saunders & Huggins. In 1996 he was appointed as a Judge of the Eastern Caribbean Supreme Court (ECSC) and in 2003, he was confirmed as a Justice of Appeal of the ESCS. One year later he was appointed to act as Chief Justice of that Court. In 2005 Mr. Justice Saunders was sworn in as a Judge of the Caribbean Court of Justice.
During the period of his tenue as a Judge in the Eastern Caribbean, Mr. Justice Saunders was deeply involved in judicial education and judicial reform issues. He chaired the Committee established to introduce court-connected mediation in the Eastern Caribbean. As Chairman of the Ethics Committee of the ECSC he presided over the production of a code of ethics for judges of the Eastern Caribbean. He also served as Chairman of the Judicial Education Institute of the ECSC from 2001 to 2004. He regularly participates in judicial education programmes for Judges from throughout the Commonwealth as a faculty member of the Halifax-based Commonwealth Judicial Education Institute.

Mr. Justice Saunders is currently the Chairman of the Caribbean Association of Judicial Officers (CAJO). He also chairs the West Indies Cricket Board’s Disciplinary Committee and is a member of the International Cricket Council’s Code of Conduct Commission.

Mr. Justice Saunders has written and published several legal articles and he is a Consulting Editor of The Caribbean Civil Court Practice.

As we celebrate fifty years of the Court of Appeal of an independent Trinidad and Tobago, we note the fearless and liberal approach Justice Saunders has charted in the development of Caribbean jurisprudence. What comes to mind are his expressions in *Spence* ¹ and *Hughes v The Queen* ², a case from of St. Vincent and the Grenadines, where the Eastern Caribbean Court of Appeal seized the opportunity to consider and pronounce on the issue of the mandatory death penalty. In that case, Mr. Justice Adrian Saunders dealt head-on with what became one of the first successful challenges to the inhumanity of the mandatory death penalty in the Commonwealth Caribbean. He stated that he was “unperturbed” that “in the past, the mandatory death penalty may have been regarded as a natural, inescapable, even acceptable consequence of all murder convictions” and refused to compromise the rights assured to citizens “by the paying of homage to unenlightened common law relics or by slavish adherence to the outmoded mores of yesteryear.”

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1. [2001] UKPC 35
In *R v Wilson Exhale*[^3], Justice Saunders was foremost in creating the criteria for determining whether a case was sufficient to fall within the category requiring the imposition of the death penalty. His guidance has been adopted and applied throughout the Eastern Caribbean where the death penalty is now reserved for the worst cases and sparingly imposed under the new discretionary system.

The Judicial Education Institute takes pride in the work of Mr. Justice Saunders and we are honoured to present him to you as the most befitting person to enlighten us on “The Role of the Court of Appeal in Developing and Preserving an Independent and Just Society.”

Please join me in welcoming to the podium the Honourable Mr. Justice Adrian Saunders.

**Madam Justice Alice Yorke Soo-Hon JA**

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[^3]: [ECSC][2003] ECSC J0512-2
The Role of the Court of Appeal in Developing and Preserving an Independent and Just Society

Introduction

I thought I should begin with an amusing story of an appellate tribunal. We have all heard the expression as sober as a judge. How many of us know its origin? I was intrigued to learn that the expression dates back to King Philip of Macedon, the father of Alexander the Great. Philip exercised supreme appellate authority over his people. This monarch required no Privy Council to advise him. He advised himself. One day, as he was holding court, one of his female subjects petitioned him for justice after she had been unfairly found guilty. She stood before Philip who had been drinking heavily. To be blunt, Philip was drunk. In short order he dismissed the petition. “I will appeal this judgment!” the woman exclaimed defiantly. “To whom?” Philip indignantly roared. Without losing a beat, the woman responded, “I will appeal to Philip, sober!” Now, according to the Roman historian Valerius Maximus, the worthy appeal was indeed re-submitted. And it succeeded. The moral of the story? Clearly, if first instance judges may get away with it, the first obligation of the Court of Appeal is for its judges to be sober.
I must say that it is a profound honour to have been invited to deliver the second address in this extraordinary series and I salute the Trinidad and Tobago Judicial Education Institute for the excellent work it has been doing over the years. Here is a body that I have seen grow steadily over the years, from strength to strength. The impact of the training the JEI facilitates is not restricted to Trinidad and Tobago. It extends to and is felt and deeply appreciated throughout the region.

As I consider the work of the Institute and its development—literally from scratch—I can't help but remember and reflect on my friendship with a dear friend and colleague, a true pioneer of post-independence judicial education in the region, a judge well known to all of us here. I first met Justice of Appeal Kangaloo in 1998 in Halifax, when we both participated in the Commonwealth Judicial Education Institute’s summer programme. Wendell and I became instant friends. During the three weeks in Canada we were inseparable. We had much in common. We were both then baby judges, not just because we had not been very long appointed to the trial Bench of our respective judiciaries, but also because each of us was on that appointment the youngest judge of our respective courts. We shared the same deep commitment to and passion for the law and that programme in Canada had a similar effect on us. It fired us up. We returned to the Caribbean and kept in close touch, encouraging each other in our respective careers, which followed similar paths. Unsurprisingly, not long after his return to Trinidad he was appointed to chair the Trinidad and Tobago JEI. About the same time I too was appointed to chair the JEI of the Eastern Caribbean Supreme Court. He was appointed to the Trinidad and Tobago Court of Appeal. And I too was appointed to the Court of Appeal of the OECS. When I was invited to deliver this lecture, he and I had a preliminary exchange on the topic. He sent me some materials. We agreed to have further discussions. We were never able to do so. I know that like me you will all keep Wendell in your thoughts and prayers.

**Approach to the Topic**

This evening I propose to focus not so much on cases decided by the Court of Appeal over time, but instead on the institutional role of that court. I wish to look at the Court of Appeal as a body having a responsibility to society that goes beyond merely deciding cases, a body that must meet the needs of the social
order. I would like to touch on various aspects of this institutional role Courts of Appeal enjoy in an independent society.

The colonial Courts of Appeal did not function in the same way. Their role lay in simply hearing and deciding cases. Interestingly, these pre-independence Courts of Appeal were regional courts. There was, for example, the West Indian Court of Appeal created as a result of a law passed in 1919. That statute established a West Indian Court of Appeal whose members were the Chief Justices of the colonies of Trinidad and Tobago, British Guiana, Barbados, the Leeward Islands, Grenada, St. Lucia and St. Vincent. The Chief Justice of Trinidad and Tobago was the President of that court. The court heard appeals from the courts of the colonies just mentioned. Its process ran throughout these colonies. A judgment of the court had full force and effect in each of them. Any such judgment could be enforced in the same manner as if it were an original judgment from the colony from which the appeal was brought. In 1958 that court gave way to the very highly respected Federal Supreme Court, which had jurisdiction to interpret and apply the Federal Constitution and to hear appeals from the countries that made up the Federation and also British Guiana and the British Virgin Islands. Thanks to the West Indian Reports it is still possible for all to see and admire the very high quality of judgments rendered by the Federal Supreme Court. Upon the dissolution of the West Indian Federation, exactly fifty years ago, we had indigenous Courts of Appeal being established, with the Windward and Leeward Islands opting to create for themselves not just a regional Court of Appeal but an entire court system. These indigenous Courts of Appeal have responsibilities that are additional to those carried out by their predecessor bodies and this evening it is these additional responsibilities I would like to discuss.

As befitting a member of a Caribbean court I wish to look at the role of the Court of Appeal more from a regional or Commonwealth Caribbean perspective than from a purely Trinidadian one. In any event a regional focus would hardly deprive this audience of any insights that might otherwise have been provided if I were specifically to confine myself to the Trinidad and Tobago Court of Appeal. Among the English-speaking Caribbean states there is a degree of integration,

1 See Wooding, as quoted by Selwyn Ryan in THE PURSUIT OF HONOUR, The Life and Times of H.O.B Wooding, Paria Publishing Company, 1990 at p.156
2 West Indian Court of Appeal Act, 1919
convergence, cooperation in the field of law, justice and jurisprudence that is unmatched in other fields. The establishment of both the Council of Legal Education and the Faculty of Law of the University of the West Indies has paved the way for institutionalising such integration. And of course, the seminal decision by CARICOM states to subscribe a regional treaty to establish and maintain a common final Court of Appeal for the region has put the icing on the cake. The creation of the Caribbean Court of Justice (CCJ) has far-reaching implications for the future of regional and regionalised justice, and it rekindles and realises at least a part of the dream that was shattered fifty years ago.

THE JUSTIFICATION FOR AND ROLE OF APPELLATE COURTS

Why do we allow litigants to launch an appeal? What is the justification for a system of appeals? With reference to civil appeals in the United Kingdom, Messrs Drewry, Blom-Cooper and Blake^3 cite seven reasons justifying a facility to cater for an appeal. Some of these reasons overlap, but it is interesting to consider each of them:

First, appellate courts enable aggrieved litigants to have their decisions reviewed for mistake by a multi-judge bench. Having been a trial judge myself I know only too well that in delivering justice, honest mistakes may be made during the course of a trial. The first instance judge—and throughout this lecture when I speak of a trial or first instance judge I refer to every conceivable first instance judicial officer imaginable, including magistrates—sits alone. When trying a case, he or she may not desire or may not even be able to discuss with a colleague the weighty issues with which he or she is grappling. Quite apart from normal human fallibility, it is obvious that on this lonesome sojourn not infrequently errors are made. An appeal allows the aggrieved litigant an opportunity to correct the mistake.

Second, appellate courts promote public trust and confidence in the justice system. They do so by, among other things, ensuring that the errors that are made in individual cases do not remain uncorrected. Like the stock market, the justice system thrives on public confidence. If obvious mistakes go uncorrected, the public loses faith in the system of justice as a whole and this opens the way for extra-judicial resolution of disputes. The need to engender public trust and

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confidence resonates particularly strongly in the Caribbean and so in due course I wish to say more on this issue.

Third, appeal courts seek to achieve a fair and correct decision in the particular case that comes before them. Well, this is quite obvious. Quite apart from affording to the losing side before the trial judge a second bite at the cherry, appellate courts and the public at large have an interest in making sure that the justice system produces the right result.

Fourth, Courts of Appeal enhance judicial accountability. We hear a lot about judicial independence but that independence must naturally be balanced with accountability. Exposing decisions made by first instance judges to the scrutiny of a panel of more experienced judges is one aspect of judicial accountability. An appeal affords the opportunity to test first instance decisions.

Fifth, an appeal enables the Judiciary to develop and refine legal doctrine. This is facilitated in several ways. We have already alluded to the circumstance that appeals are heard normally by a panel of judges, usually three. In the Commonwealth Caribbean these three are invariably more experienced judges, judges who are senior to the trial judges. One gets promoted to the Court of Appeal. As a case is appealed, the issues in dispute become clearer and sharper. A Court of Appeal is therefore better able to concentrate attention on the essential facets of the dispute. This enables the appellate court to apply the law to narrower, more focused questions and in this way, legal principles are refined and developed.

Sixth, through the doctrine of precedent, Courts of Appeal help to promote consistency of decision-making among the courts below and so contribute to maintaining the rule of law. A few weeks ago I was involved in the use of The Merchant of Venice in a judicial education exercise. Those of you who remember this Shakespeare classic may recall the trial to determine whether, for Antonio’s failure to pay a debt of which time was of the essence, Shylock should be permitted to forfeit the bond that was secured by a pound of Antonio’s flesh. During the trial, Antonio’s counsel sought to persuade the judge that, in lieu of forfeiture of the bond, Shylock could accept as much as ten times the amount of the debt. The judge rejected out of hand this belated attempt to repay the debt. According to the judge:

“There is no power in Venice, Can alter a decree established.”
“Twill be recorded for a precedent,
And many an error by the same example
Will rush into the state.”

So, even in the 16th century, judges were mindful of the corrosive effect of bad precedents. To have a bad precedent remain uncorrected will encourage similar errors to “rush into the state” and thereby damage the rule of law and open the door to a corruption of the entire legal process. It is appellate courts that have this function of eradicating bad precedents, of maintaining consistency and upholding the rule of law. This, too, is an issue which I would like briefly to explore a little later.

Finally, appellate courts provide for trial judges a means of assessing their mettle. Conscientious and ambitious trial judges welcome appeals from their judgments. It guarantees that their work is brought to the attention of the senior judges and it affords them an opportunity to obtain in a formal way extremely valuable and informed feedback.

The United States National Center for State Courts, after much consultation and deliberation, has published an excellent reference point for their state appellate court systems. That publication identifies the central goals of state appellate courts. Those goals are divided into four performance standards, namely: (1) protecting the rule of law, (2) promoting the rule of law, (3) preserving the public trust, and (4) using public resources efficiently. These performance areas are further broken down into 15 standards of performance which provide broad statements of what objectives appellate courts should pursue. I would suggest that Courts of Appeal in the region could benefit from a study of this publication, which is available online.

These justifications for having an appeals process in civil cases and the statement of performance standards for appellate court systems give us more than a sense of what is the role of Courts of Appeal in the Caribbean. The output of such courts should be geared at correcting errors, unifying and clarifying the law, developing the law in a sound and coherent manner, and furnishing guidance to judges, attorneys, and the public in the application of the law.6

5 ibid
6 See Appellate Court Performance Standards, ibid
I found it interesting that one of the four performance areas cited by the National Center for State Courts lay in the efficient use of public resources. I think this strikes a chord in our region. The cases tried by our Courts of Appeal may come from a wide variety of sources. In Trinidad and Tobago, for example, appeals may reach the court from the High Court, the Magistrates’ Courts, the Family Court, the Industrial Court, the Environmental Court, the Tax Appeal Board, the Equal Opportunities Commission and, if more specialised courts are created in the future, appeals may also reach the Court of Appeal from those specialised courts as well. Increases in the volume of cases decided by these lower courts will almost certainly lead to a concomitant rise in the number of cases filed in the Court of Appeal especially as, for the most part, losing litigants at first instance have an almost automatic right of access to the Court of Appeal. In the Eastern Caribbean, as many as 387 appeals were filed in 2009 and in 2010, in Trinidad and Tobago, 482 cases were filed in the Court of Appeal.

I think there is a danger that our Courts of Appeal can become overburdened if they are not already so. Appellate courts may therefore have to devise measures to balance generous rights of access to them against the desire to hear annually only so many cases as can fairly and reasonably be dealt with by the appellate judges. In particular, it is important to guard against a disproportionate amount of the court’s precious resources being consumed by clearly unmeritorious appeals. All this points, perhaps, to the need for greater pro-activity by appellate judges. Strategies that may be considered in this context could include tighter control of the court’s processes, the employment of methods of Alternate Dispute Resolution, perhaps more proceedings being done purely on paper and even rule changes to require permission to appeal in certain cases.

Factors Conditioning the Role of Courts of Appeal in the Caribbean

What are some of the factors conditioning the role of our Courts of Appeal? In the first case, Caribbean Courts of Appeal are all intermediate courts in the sense that in the hierarchy of courts they are positioned between the apex court and trial courts. But this formally intermediate position is to some extent artificial, given that Caribbean judicial systems outsource their final appeals. Those states that still send their final appeals to the Privy Council must confront a situation where the role of the apex court is relegated to deciding the extremely small number of cases that manage to reach it. And even when we consider the
limited adjudicatory role of the final court, where cases do reach that court the view earlier taken by the Court of Appeal may be decisive because of the Court of Appeal’s greater familiarity with local conditions.

The case of Panday v Gordon provides an excellent illustration. Mr Panday had been successfully sued for labelling Mr Gordon a “pseudo-racist”. Mr Panday appealed all the way up to the Privy Council the finding that those words were defamatory and, if they were, the amount of damages awarded to Mr Gordon. In affirming the Court of Appeal, Their Lordships took the view that the Court of Appeal was so much better placed than they were to decide each of those two questions that in effect it was pointless for them to review the Court of Appeal’s determination of them.

My basic point is that the Privy Council is entirely unconcerned with the range of judicial policy issues and judicial education and judicial reform issues that face the local judicial branch of government. Those issues must be addressed by the local Judiciary of which the Court of Appeal is in effect the highest rung on the ladder. Regional Courts of Appeal are intermediate only so far as the adjudication of disputes is concerned. For other purposes, their role is indistinguishable from that of a final court and so for those purposes, they must function as such.

The second circumstance that affects the role of local courts relates, naturally, to the context in which they carry out their work. Courts do not carry out their functions in a vacuum. The role of our courts in the region must naturally be located in the context of the surrounding environment. Courts are dynamic institutions. To be truly effective, their role must be a responsive one; responsive to the social and economic realities and to the democratic and rule of law imperatives of the day.

What is the state of the region in which we live? CARICOM states are developing countries, with most of them being small islands. Excluding Haiti’s 14 million, the overall population of CARICOM is only about 6 million and the average GDP per capita, again excluding Haiti whose peculiar statistics tend to skew the mean, is US$4750. If we include Haiti, the figure drops by as much as US$350 per capita.

Caribbean countries continue to be challenged by economic, political and social factors that have their foundation in our colonial past. According to the

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7 (2005) UKPC 36; (2006) 2 WLR 39 8
UNDPs Caribbean Human Development Report of 2012, the legacy of very high levels of income inequality, gender inequality, high rates of unemployment, high rates of rural and urban poverty and social exclusion, has continued after independence.\(^9\) While CARICOM countries show decent rankings as high-level human development countries, these advances in social standing are offset by “poor economic performance, high debt burdens, and significant rates of poverty.”\(^{10}\)

**Responding to the Challenges - Fostering a Dialogue with Social Scientists**

How do Courts of Appeal respond to the specific challenges they face? I have often felt that, especially now that ultimate responsibility for judicial decision-making rests (or shortly will rest) with a court located in the Caribbean, it is important that opportunities be created for a continuing dialogue to take place between our social scientists on the one hand and judges on the other. I really do believe that the judicial function would be enhanced if occasionally judges were to sit around a table with political economists and sociologists and discuss informally and in broad terms the interface between justice and national development. Such a dialogue can enable judges to make linkages between their decision-making in general and national development goals. If judges are better informed by experts in the field about what is happening in the society in which the judges live and work, then judicial decision-making in general and fact-finding in particular will benefit.

I believe if Courts of Appeal are properly to fulfil their role, the judges need to take a little time to examine our societies so as to discover appropriate reference points from which to approach their role. What exactly is implied, for example, in the expression “an independent and just society”? How do I begin to conceive of my role, however modest, in the building of such a society if I have little or indeed a poor understanding of society? Understanding of society is a critical source of the elements that inform the exercise of judicial discretion! How do we ensure, for example, that just sentences are given if judges do not see beyond the penalty clause in a criminal statute and the guilt of the offender? These are not new questions. Selwyn Ryan’s biography of Sir Hugh Wooding quotes

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9 ibid
10 ibid
Wooding as professing that judges must not merely administer justice, they must further it.\(^{11}\) It is perhaps for these reasons that Article 4(11) of the Agreement Establishing the CCJ clearly prescribes that in making appointments to the office of CCJ Judge, among several eligibility requirements regard shall be had to the candidate’s understanding of people and society.

It is of course the role of the executive and the legislature to determine national policy directed at the construction of a just society. But the manner in which judges carry out their work can advance or thwart the unfolding of that policy. It can do so in a variety of obvious ways. For example, it is not so difficult to see how the level of competence of the judges, the timeliness of judicial decision-making, the efficiency with which cases flow through the courts and the accessibility of the courts all contribute to or retard social progress. There are other, perhaps less obvious ways in which the work of judges can have a significant impact on national policy and help to shape its direction. These would include such matters as the choices judges make during adjudication when, as is invariably the case, there are policy choices before them to be made and, in making such choices, the weight given to competing interests (which in turn presupposes, I continue to stress, a full understanding of those interests).

As must be quite obvious by now, I see courts, and the Court of Appeal in particular, as institutions that do a whole lot more than simply decide cases. In light of the Court of Appeal’s position, in effect, as the highest indigenous court, there is a heavy responsibility on that court to interest itself in and to assist the Chief Justice with the entire range of matters that are ancillary to the adjudication of disputes, such as for example, formulating and guiding appropriate judicial policy, structuring relevant judicial education, identifying and executing much needed judicial reform and ensuring that the interests of the judicial branch is not encroached upon by the other branches of government.

**INTERPRETATION AND APPLICATION OF THE LAW**

Courts of appeal also play a critical role in interpreting and applying the law. Interpretation and application of the law can also promote or retard the building of a just society. Interpretation of law is never “neutral”. The law serves interests, and judges must seek to discover precisely what those interests are in order to

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\(^{11}\) THE PURSUIT OF HONOUR, The Life and Times of H.O.B Wooding, Paria Publishing Company, 1990 at p.155
inform themselves better about the manner in which effect should be given to the law. The interpretive function should always consider the history of the law, the purposes it served when it was made and the interests it currently serves.

This is especially the case with us in the Caribbean in light of our fractured past of slavery, indentureship and colonialism. Just as in those days it was in the interests of the state that the law be used as a tool for advancing the goals of the coloniser, so now, in constructing an independent and just society it is in the interest of the people that the law be used as an instrument for expanding democracy and human rights, for promoting better governance, for stimulating social and economic development and for securing the welfare of the citizenry. The social order that existed during colonialism has not entirely been dismantled and re-fashioned to serve an independent people. Practices and prejudices developed during those days have lingered on. In the construction of an independent and just society, courts and law enforcement agencies alike must be mindful of this and be careful to focus their energies on safeguarding the interests of the citizenry as a whole.

CRIMINAL JUSTICE REFORM

Sandwiched as we are between the major producers and consumers of illegal drugs, the Caribbean is a significant transit point in the drug trade. This is a major determinant in spiralling homicide rates involving gang-related violence.12 My understanding is that crime in the region reveals an interesting pattern. A relative decline in petty and property crime is accompanied by alarming increases in homicides. This marks a change from high rates of property crime and low rates of violent crime that characterised the colonial era.13 The increase in violent crime has reached the point where, in many CARICOM states, it poses a very serious threat to national security and heightens to intolerable levels the citizen’s sense of insecurity.

These indicators point to the critical need for criminal justice reform designed to address, inter alia, low conviction rates, inordinate delays and backlogs, inefficient caseflow, sentencing anomalies and low levels of public confidence in the criminal justice system. Since low crime rates and respect for the rule of law will attract investments and lead to increased productivity,
the gains to be realised from addressing these problems extend as well to economic development.

It is essential that, along with the other branches of government, the Judiciary should play a leadership role in guiding a holistic approach to criminal justice reform; an approach that integrates programmes that simultaneously improve and coordinate the functioning of the various actors and institutions within the criminal justice system.\textsuperscript{14} Such reforms cannot simply be left to the other branches of government because judges are too busy trying cases. If the Judiciary is not fully involved in conceptualising and overseeing at least those aspects of the reforms that affect the work of the courts, the reforms will fail or else they will never realise their full potential. It must be said that from all indications, the Trinidad and Tobago Judiciary is very conscious of this role and one sees and hears of active steps being taken to accept and fulfil it.

\textbf{The Court of Appeal and the Lower Courts}

As we saw earlier, a principal role of Courts of Appeal is to supervise and review the decisions of lower courts. The efficiency and workload of the Court of Appeal are, to some extent, contingent upon trial court performance.\textsuperscript{15} The relationship between Courts of Appeal and trial courts is pivotal to the way in which each level performs its judicial function. The manner in which this relationship is publicly expressed may bolster or damage the confidence of trial judges and severely affect their work.

Appellate and trial judges alike are colleagues engaged in a joint, a collaborative search for justice. Appellate court decisions that overturn trial judgments should clearly advise the lower court, the litigants and the public of the nature of the perceived error made by the first instance court and the reasons why the judgment of the court below is being reversed. The appellate judgment is a judicial education tool. The first instance judge should receive sufficient guidance such that the same mistake is not repeated.


The overturning by the Court of Appeal of a judgment at first instance is sometimes considered an admonishment of the trial judge. Where a decision at first instance is overturned, I see no reason why the mere reversal of the decision ought not to be regarded by itself as a sufficient rebuke to the court below, 16 if indeed it is even reasonable or necessary for one to conceive of the reversal as a reproach as distinct from a difference in point of view. No good purpose is served if and when a reversal is accompanied by incivility towards the trial judge. In some states outside the region, at the very highest level, there have been occasions where an appellate judge has characterised a colleague’s opinion as “foolish” 17 and “irrational”. 18 But I trust that we shall never get to the stage where, as was lamented by a judge in Texas, judges lose the ability to disagree without being disagreeable. 19

Incivility, especially in our small societies, erodes the court’s legitimacy, lowers the dignity of the court, diminishes the esteem in which the courts are held, demoralises lower court judges and “confuses the law by interjecting a high level of contentiousness and verbosity into judicial opinions which should be designed to provide guidance”. 20 Intemperate language cuts across the objective of the appellate judgment being used as a satisfactory teaching tool for lower court judges.

There is much value in regarding an appeal, not as being separate and distinct from the trial process, but as a complementary process; a continuation of the litigant’s claim or defence that was advanced in the court below. The judges at both the trial and appellate levels are part and parcel of a single justice system in which those at the appellate level have tremendous advantages that trial judges do not and cannot enjoy. Appellate judges can discuss the case among themselves before, during and after oral argument. They have the luxury of approaching the evidence and legal submissions uninfluenced by the drama of the trial process. By the time the case reaches the appellate court the lawyers have a better grasp of the essence of the dispute. Not infrequently points are taken on appeal that were not canvassed in the court below. For all these reasons it is often entirely unfair that an appellate judgment should be cast in the vein that a trial judge who is reversed was less than competent. It is part of the role of

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16 See CIVILITY AMONG JUDGES by William G. Ross (1999) 51 Fla. L. Rev 957
18 See: Webster v Reproductive Health Services 492 US 490, 532 and 536
19 ibid
appellate courts to nurture trial judges, to boost their confidence and to defend and promote their right to exercise discretion within the permitted parameters. This is one of the reasons why due deference is usually accorded to trial judges in their role as finders of fact.

Judicial education programmes assist in discharging some of these responsibilities of the Court of Appeal but I believe that, in addition to formal judicial education exercises, more contact, both formally and especially informally, should be encouraged between judicial officers of different tiers. I was surprised not long ago to discover that in one state there still seemed to have been a view taken that, for judicial education purposes, magistrates should be segregated from judges where both sets of judicial officers had more or less the same interest in the subject matter of the training. I think the Court of Appeal has a role to play in breaking down these barriers. Regular contact between the Court of Appeal and subordinate judicial officers helps to eliminate mutual misunderstanding and contributes to the forging of a common judicial ethos. The Court of Appeal may be at the top rung of the local ladder but there is only one ladder and public attitudes towards the Judiciary focus on the ladder as a whole, without any regard to an individual assessment of its various rungs.

**THE RESPONSIBILITY OF THE COURT OF APPEAL TO BUILD PUBLIC CONFIDENCE IN THE JUSTICE SYSTEM**

One of the very serious challenges Courts of Appeal in the region face is how to build public trust and confidence. As we saw earlier, this is one of their key performance areas. It is not an easy task, not least because in the region public confidence in the Judiciary is often lumped together with confidence in all facets of law enforcement including those for which the Judiciary is not responsible.

In the Caribbean a noticeable gap exists between on the one hand, judicial performance—even where the same is characterised by excellence—and on the other hand, public trust. The Caribbean public exhibits an appalling lack of trust in their judges. Does this lack of public trust extend as well to officialdom occupying other organs of the state? Is this attitude perhaps a hangover from a people’s instinctive cynicism towards the institutions of the colonial state? Does it reflect a mentality that suggests that judicial office is too sacred for occupancy by those with whom we went to school? I don’t know. Perhaps our social anthropologists can help us here; which is another reason why we need
to dialogue with the latter. What is apparent, however, is that, sadly, across the English-speaking Caribbean, people, even those who you think should know better, are quick to voice a lack of confidence not so much in a particular judge but in the Judiciary as a whole. Significantly, this is not something that occurs among the people of the non-English speaking Caribbean, Suriname for example.

One Caribbean judge recounts how shocked he was when a lawyer in a Caribbean state told him, even as he was then appointed as a judge of that state, that all the judges in that state took bribes. Justice Telford Georges records that after he had delivered judgment for the Prime Minister in one Caribbean country, it was reported to him that there was a rumour being spread that he was building a grand mansion in the most glamorous housing development of that country. Now, as many of us here know, even while he was alive and more so since his death, Telford Georges, a judge of the highest rectitude, was rightly regarded throughout the entire Commonwealth as one of the icons of the Judiciary. But not even he could escape the slander that is often heaped on judges in the region.

This lack of trust is frustrating. And it must be confronted. It is one thing to hold judges to high standards. It is quite another to cast unfair and malicious imputations on honest hard working judicial officers. Courts must do everything possible to disprove such characterisations of judges, most of whom accept judicial appointment at considerable personal sacrifice. Courts of appeal have a duty to strive to re-build trust and confidence. This can be approached in a variety of ways. Obviously, care must be taken to ensure that judicial officers conform to the highest standards of conduct and that ethical infractions among judicial officers are immediately and adequately addressed. Beyond these measures, courts must engage with the public in meaningful ways.

A comprehensive communication and public education outreach would help to inform the public better about the methods of work of the courts. Court staff must demonstrate the highest levels of courtesy and efficiency. Court processes should be user friendly and Court of Appeal decisions should be readily accessible. Courts can periodically survey their stakeholders to discover so as to address promptly those areas in which the latter wish to see improvement.

22 TELFORD GEORGES, A LEGAL ODYSSEY, ibid
In their dealings with the other branches of government, courts must insist on treatment which respects the Judiciary as a co-equal branch of government. The first Chief Justice in an independent Trinidad and Tobago understood well the importance of this. CJ Wooding and his judges did not hesitate to stay away from all official functions until the appropriate protocol arrangements were established for the office of the Chief Justice and the judges of an independent Trinidad and Tobago. If the public is to respect the Judiciary it is important that they see respect being demonstrated by the other branches of the state.

THE RESPONSIBILITY OF THE COURT OF APPEAL TO PROTECT DEMOCRACY AND ADVANCE THE RULE OF LAW

In each of the states in the region there is a constitution that represents the supreme law. Every institution of the state must comply with the constitution. As this country’s Court of Appeal instructs us in Collymore, the courts are the guardians of the constitution. This guardianship role is central to the broad role of the Court of Appeal in protecting democracy and advancing the rule of law. The rule of law in this context means a lot more than guaranteeing simple adherence to the law. It implies as well legal accountability, fairness, respect for minorities, the observance of human rights, judicial independence, the separation of the powers, equality before the law, the absence of arbitrariness. Ultimately, the final court sets the standard in these matters but it does so only if and when appropriate cases reach it. And even before those cases get there they must first be dealt with by the Court of Appeal.

The advancing of good governance and the rule of law is central to the role of Courts of Appeal in our developing democracies. It creates the conditions for the optimal social and economic development of our societies quite apart from producing justice for the citizenry. In multi-ethnic and multi-cultural societies in particular courts have a special responsibility to ensure equality of treatment.

Black letter law, the printed words of the law on a sheet of paper proclaiming, for example, the human rights of the individual, those words, irrespective of how flowery or comforting the language in which they are written, would not by themselves guarantee the full measure of those rights. Each generation of judges must examine and re-examine those printed words to ensure that their interpretation is in sync with evolving standards of humanity and with internationally accepted norms. Law must be certain and predictable, but it
must also be just and evolve with the times. It is the ongoing role of courts to resolve this delicate tension.

Take for example the law that states “Whosoever shall be convicted of murder shall suffer death as a felon”. For centuries, spanning the period both before and after those words were placed in the 19th century Offences Against the Persons Act, it was accepted by all that the punishment of death for murder was automatic, lawful and just. Lord Diplock said so repeatedly. In 1977, a Court of Appeal in the region expressed genuine puzzlement that a prisoner sentenced to death could seek a declaration that it could be unconstitutional to enforce the death penalty. But by 2001 Courts of Appeal in the region were declaring the mandatory death penalty to be inhumane, unconstitutional, unjust. A point had been reached where the courts were satisfied that the virtue of stability stood in the way of meeting the ends of justice in the 21st century.

I do not agree that humanising the law in this fashion is a task that should always be left to the legislature. Elected representatives in a democracy are not often best placed to make some of the tough calls and policy decisions that must be made on issues of social justice. If you owe your place in the legislature to the electorate to whom you are accountable, if you have been sent to parliament to represent the interests of your constituents, then it is understandable that you will always be very sensitive to popular views. But the rule of law will not flourish if the Judiciary also embraced majoritarianism as a fundamental principle. On deeply divisive and emotive social questions that impact on the enjoyment of human rights, on those issues that are fed by prejudice but which appear to have popular support, it is to the courts that society often must turn for fair, just and decisive answers.

Courts of appeal are uniquely equipped to perform this role. The independence of the judges is constitutionally protected and their fidelity to the law and the constitution is not compromised by any need to please a particular constituency as their tenure is not dependent upon votes obtained at an election. Judges must be sober, cautious, deliberate, but they must also be self-confident, courageous, strong, willing to go where no judge has gone before if after mature consideration that is the path one thinks is right.

The common law provides us with a legal heritage that is hailed throughout the world, but the law is a living instrument. In the building of a just and

23 Kitson Branche vs The A.G Civil Appeal No 63 of 1977
independent society I think our judges have an obligation to interrogate the common law to discover those features of it that have been constructed for a different time and a different society. Appellate courts should subject the common law to a rigorous analysis to ensure that, in being faithful to precedent, we are not inadvertently retarding the progress of our societies.

The treaty establishing the Caribbean Court of Justice states in its preamble that the member states of CARICOM are convinced that the CCJ would play a determinative role in the further development of Caribbean jurisprudence. Undoubtedly, part of the role of the Court of Appeal is to partner with the CCJ in discharging this responsibility. Caribbean jurisprudence has never been precisely defined but it must naturally embrace the alignment of judicial decision-making, and the entire culture that supports the work of the judicial branch, with the aspirations and goals of our society. This does not mean that in reflecting local values, Caribbean judges are free to ignore international norms and standards. That would be a serious error. The very independence of Caribbean mini-states and the fundamental law that governs these states, the national constitution, draw their life blood from international law. It is international legal norms that helped us to win our independence and that continue to guarantee that independence and give us a voice in the world community. The rights we take for granted derive from and are rooted in values contained in such international instruments as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the American Convention on Human Rights. In the promotion of Caribbean jurisprudence, judges must therefore pay close regard to the judgments of the courts established by the international community.

Final Words

The Caribbean is an extraordinary, a unique place. George Lamming writes in Coming, Coming Home:

“I do not think there has been anything in human history quite like the meeting of Africa, Asia, and Europe in this American archipelago we call the Caribbean. But it is so recent since we assumed responsibility for our own destiny, that the antagonistic weight of the past is felt as an inhibiting menace. And that is the most urgent task and the greatest intellectual
challenge: How to control the burden of this history and incorporate it into our collective sense of the future”. 24

I am convinced that the Caribbean can and will meet this enormous challenge. Our lack of self-belief and self-worth has not hindered us from producing for the world community the very best in the fields of literature, poetry, music, sports. The Caribbean Judiciary too has met and will continue to meet the challenge. The region continues to produce judges of great distinction. The cream of the Judiciary of this region can stand shoulder to shoulder with the finest judges anywhere, a fact readily recognised by people outside the region. As when, for example, the Privy Council in one case 25 said of a judgment from one of our Courts of Appeal,

“...the arguments and the authorities have been so fully and so meticulously rehearsed in the careful and instructive judgment of the Court of Appeal ... that it would be a work of supererogation for their Lordships to repeat what was there said in different and probably less felicitous language. They are content to accept and adopt the reasoning ... in toto”.

The author of that Court of Appeal judgment was Justice Telford Georges. One can cite many, many other commendations about our Court of Appeal judgments over the years by the final court, by academics and by observers. The problem that we face in the Caribbean is the herculean one of closing the gap between this demonstration of excellence and our people’s recognition and affirmation of it. But I am confident that, as the Courts of Appeal in the region continue to demonstrate excellence, in time that gap will be closed.

THE HONOURABLE MR. JUSTICE ADRIAN DUDLEY SAUNDERS

Movers of votes of thanks usually begin by saying how easy their task is. Having been appointed the person to say thanks at this function this evening, I want to emphasise how much I disagree with that statement, particularly in relation to a function such as the one we are bringing to a close this evening.

As seamless as it has been, it represents the culmination of a lot of preparation and hard work by so many. So I am faced with also apologising in advance for any omissions, or to anyone to whom greater emphasis is due.

The function, in line with its title, centred on a distinguished lecture, and that we had indeed by a distinguished son of our Caribbean soil, Justice Adrian Saunders. And to you, Justice Saunders, we say thanks not only for your scholarly delivery this evening, but for the depth of preparation reflected in how you were able to truly capture the theme: *Celebrating Fifty Years of the Court of Appeal of an Independent Trinidad and Tobago: the Role of the Court of Appeal in Developing and Preserving an Independent and Just Society*. 

**Her Worship Mrs. Marcia Ayers-Caesar**  
Chief Magistrate of Trinidad and Tobago
Inevitably, that society had to expand to the Caribbean, and you were so right. A purely local focus would have deprived us of any insights that might otherwise have been provided if you had confined yourself specifically to the Trinidad and Tobago Court of Appeal. Thank you for your most informative and indeed inspiring address, which must be quite encouraging to the Trinidad and Tobago Court of Appeal and the Caribbean as a whole via your observation that these institutions have and continue to produce judges of great distinction who can stand shoulder to shoulder with the finest judges anywhere. Thank you once again, Justice Saunders.

An occasion of this kind requires leadership, it requires vision. This the second in the series that was launched in November last year by the Judicial Education Institute (JEI), and its quick implementation is indeed a credit to the hardworking Chairman, Mr Justice Peter Jamadar, no doubt inspired by the unswerving support of the President, the Honourable the Chief Justice, Mr Justice Ivor Archie and members of the Trinidad and Tobago JEI Board. Chief Justice, Mr Justice Jamadar and members of the Trinidad and Tobago JEI Board, you have every reason to be proud this evening and in your celebration of success do remember that you deserve our sincerest thanks. And I think it is only fitting to extend our deepest appreciation to your staff, and to the staff of the Court Protocol and Information Unit for their hard work.

This event was ably co-ordinated by Mrs Deanne Gittens and this evening, Mrs Gittens was true to form in seeing to all aspects of our programme. Thank you Deanne, and we know you will be working closely with Signature Collection and in particular Ms Gillian Bishop, who was responsible for the special look of this venue this evening and who we thank specially for her creativity – for the continued transformation of the Convocation Hall and some other areas of the Hall of Justice into an aura befitting the celebration of fifty years of the Court of Appeal of independent Trinidad and Tobago.

To our Court Executive Administrator, Ms Michelle Austin and all other members of the Judiciary who were in any way connected with providing support for this venture, we thank you most sincerely for your co-operation ... Thank you young pannist for the rendition of the National Anthem ...
And to all of you distinguished ladies and gentlemen, thank you for taking the time to come this evening and we look forward to your participation as we continue to celebrate. Thank you one and all and now that you appreciate how difficult my job was, let me wish you a good evening.

Chief Magistrate Marcia Ayers-Caesar
Photographs
Panel Discussion
Convocation Hall
Friday 13th July 2012

Moderator
Madam Justice Paula Mae Weekes JA

Panellists
Professor Selwyn Ryan
Mr. Russell Martineau S.C.
The Honourable the Chief Justice Ivor Archie
Mr. Justice Adrian Saunders
Good afternoon and welcome to this panel discussion titled “Celebrating Fifty Years of the Court of Appeal of an Independent Trinidad and Tobago: The Role of the Court of Appeal in Developing and Preserving an Independent and Just Society”.

Trinidadians and Tobagonians, this land belongs to every man.
Now since we got independency, it means hard work for you and me.
Independence means unity, means yuh got to fight,
It means we got cooperation, fight with all yuh might.
It means if yuh have to work, work yuh fingers to the bone,
It means that yuh on yuh own.

CHORUS
Twenty-five years have gone, how yuh feel?
Yuh feel yuh put yuh shoulders to de wheel?
Yuh feel yuh perspire and achieve?
Yuh feel yuh clean up de mess?
Yuh feel yuh cud stand up proud and say,
Yuh feel dat yuh did yuh best?
Yuh feel dat we just keep moving on, or backing-back on we heel?
Twenty-five years have gone, how yuh feel?

What you have just heard is the opening verse and chorus of calypsonian Donric Williamson, sobriquet Lord Funny’s, offering on the occasion of the Independence Calypso Competition as our nation celebrated its twenty-fifth anniversary. Twenty-five years later and with appropriate amendments for context, passage of time, and the odd word “independency”, it is a question that might be apposite as we consider the theme of this afternoon’s discussion. “How yuh feel” or as Madam Justice Soo Hon expressed it, in a far more courtly manner, during her welcome to Mr Justice Saunders as he delivered his address during yesterday’s distinguished jurist lecture “How has it fared?”

Those of you that missed Mr Justice Saunders’ address last evening have done yourselves a disservice. In a masterly presentation, Justice Saunders first placed our regional and local Courts of Appeal in their proper historical perspective and then examined their current role, recognising that modern-day courts have far weightier responsibilities than their pre-independence predecessors.

He posited that since local Courts of Appeal, though technically intermediate courts, are in fact the final court for the vast majority of litigants, they must function as such and therefore bear the responsibility of responding to the challenges facing our societies. They need to be responsive to the current social and economic realities and to the democratic and rule of law imperatives if they are to carry out their role effectively.

The Honourable Judge turned the spotlight on the institutional role of Courts of Appeal in independent societies. He examined the justifications for having an appeals process and the desirability of having performance standards for appellate court systems. Among the obvious justifications were the ‘nuts and bolts’ business of allowing aggrieved litigants to have their decisions reviewed by a tribunal for error. More subtle justifications were also identified for example promoting public trust and confidence in the administration of justice by ensuring that errors made do not remain uncorrected, enhancing judicial accountability by subjecting decisions at first instance to the scrutiny of a panel of more experienced judges and contributing to the maintenance of
the rule of law by promoting consistency of decision making among the lower courts through the doctrine of precedent.

In respect of performance standards, Justice Saunders referred to a publication of the United States National Centre for State Courts, which identified the central goals of their State Appellate Courts and divided those into four performance standards (1) protecting the rule of law, (2) promoting the rule of law, (3) preserving the public trust, and (4) using public resources efficiently. He suggested that our regional Courts of Appeal might do well to take a page, out of that publication.

There was much more said by Mr Justice Saunders last evening that gave rise to introspection, examination and analysis. He gave us food for thought and I dare say food for action.

It is against that back-drop that we embark on today’s proceedings. The matters that he raised provide some benchmarks as we attempt to say how we, as Court, feel after fifty years of independence. To be certain, over the last half century we have witnessed many changes in our courts. Have they been merely cosmetic or have they demonstrated a coming of age, a maturity in our rightful role?

Is there reason to “celebrate” fifty years of the Court of Appeal in Trinidad and Tobago, or are we limited to merely observing this milestone?
Last evening Justice Saunders opined that in order to best respond to their challenges, it is important for judges to maintain a dialogue with our social scientists, to discuss informally and in broad terms the interface between justice and national development. This would assist judges to better examine and understand the society in which they function and their fact finding and judicial decision making would benefit. The TTJEI has embraced this approach as evidenced by the interdisciplinary composition of today’s panel. And so, without further ado, allow me to introduce our panellists.

Madam Justice Paula-Mae Weekes JA
Introduction of Prof. Ryan by Justice Weekes

It is perhaps serendipitous that among our panellists we have a preeminent social scientist in the person of Professor Selwyn Ryan, who has graciously and intrepidly agreed to step into a den of lawyers. Like all our panellists, Professor Ryan is well known to this assembly by face, credentials and reputation and so I present him to you. It is my pleasure to invite Professor Ryan to the podium.

Professor Selwyn Ryan

This being the nation’s jubilee year, many institutions are taking the opportunity to assess their performances over the past decade and also make plans to improve their performances over the years ahead. The courts are among those institutions engaging in this exercise. How have they done? What has been the quality of mercy? Has it been strained or did justice prevail?

Some might recall that the Judiciary was one of the institutions that generated a great deal of passionate controversy in the run up to independence. Many minority groups, including the then Bar Society, wanted the status quo to remain in terms of how the Chief Justice was to be appointed.

Speaking at the Queen’s Hall Conference on behalf of the Society, Mr. Gerald Furness Smith expressed the view that the Governor General should appoint the Chief Justice and not the Prime Minister. Fears were expressed that in making appointments to the Judicial and Legal Services Commission, the Prime Minister might be inclined to choose individuals who were partial to the executive’s point of view.
The Bar Society’s view was that with the departure of the Colonial Office, more and more constitutional issues would be presented to the Judiciary for settlement. “Judges, more than before, will be the guardians of the law against political parties.” This was particularly necessary, since unlike what obtained in the United Kingdom, the Constitution and not Parliament was supreme. Judges thus had to hold the balance between the executive and the legislature.

Prime Minister Dr. Williams refused to consider the Bar Society’s proposal. He, however, conceded that the CJ would be appointed after consultation with the Judicial and Legal Service Commission, which in practice would come to mean that there would be no meaningful consultation at all.

The conservative elements in the society, of which there are still many, and the Indo-based political parties had reason to be concerned. They were aware that the battle to control appointments to the Judiciary had been fought in Ghana and that that battle had ended disastrously. President Nkrumah, against the advice of George Padmore and others, detained the CJ, claiming that he had made a major “misstep.” He had set free one of Nkrumah’s political enemies on a treason charge without advising the Osagefo in advance. Similar threatening action was taken against the Judiciary in Singapore and Tanzania. The judges bent with the wind.

That the Judiciary in Trinidad and Tobago was successful in maintaining its independence was due in part to traditions it inherited, more than was the case in West Africa, a tradition of strong judicial governance, but also because of Dr. Williams’ deep respect for Westminster traditions, and also because of who the then Chief Justice was.

The CJ was of course Sir Hugh Wooding, someone who had the reputation of being one of the most distinguished men in the island and the wider Caribbean, someone who was a match for Williams whom the man in the street regarded as the “second brightest man in the world.”

Williams, who was used to making men cower, thought more than twice before confronting Wooding. He knew the Wooding would resign as CJ and walk away rather than genuflect, which Wooding had done before over a matter involving the running of the affairs of the Carnival Development Committee. That there was no love between Wooding and Williams was a boon for the development of certain codes of political behaviour which still persist.
Wooding, for example, refused to attend any function relating to the independence celebrations if the Judiciary was not put third in the table of precedence rather than behind the members of the Cabinet, the Speaker and the President of the Senate. Wooding prevailed much to the applause of the entire bench with the exception of one judge who broke ranks.

Telford Georges, a member of court, puts the matter well when he observed that “Wooding brought to the office of the Chief Justice tremendous personal prestige and worldly experience which was hard to ignore.” Trinidad and Tobago was fortunate that two of its best opening political batsmen were at the wicket at the same time. That was one of the happy accidents of our post-independence experience.

It is perhaps worth recalling that Ellis Clarke was Williams’ choice for the job and not Wooding. The parliamentary opposition and the vested interests felt that Clarke was too close to Williams and that Wooding was a safer pair of hands as far as the Judiciary was concerned. They were correct in that assumption.

Let us turn next to the Judiciary as it faces some of our current crises. The Judiciary in many parts on the world, especially in Central and South America—Mexico and Colombia—and also in parts of the United States, has been accused and charged with corruption. So far as I know, no judge in Trinidad and Tobago has ever been accused with being involved in a corrupt transaction. One senior judge has been accused of attempting to pervert the cause of justice, while one magistrate has been charged and found guilty of having being involved in a corrupt transaction. That record is not a bad one considering what has happened in the field of politics and what has happened elsewhere and in the Eastern Caribbean where such accusations have been made. I, however, have fears and concerns that we are not going to be that free of challenge in the decades ahead. We may find ourselves being targetted by the narco-trafficners as the war for “turf” in the region intensifies.

Fears have already been expressed in Jamaica and Guyana that “dons” have begun targetting officials, and we know that as rule of thumb, Trinidad is always ten years behind Jamaica in these matters. As the late Carl Stone wrote:

“Jamaica is on the verge of developing various levels of narco-terrorism that could easily mature into the kind of Colombian situation where drug gangs operate as a state within a state and can dictate terms to governments,
communities and whole societies, if we fail to take decisive action to wipe out or diminish the power of these gangs, that is where we are heading.”

We shall see whether Stone was right then as he was on other matters.

In the meantime, we note that public opinion does not seem to be as well disposed towards the Judiciary. In an opinion survey which I did in March 2000, 56 percent of those polled said they had no trust in the Judiciary. Only 26 percent said they had. In another survey conducted in 2006, only 7 percent said they had a “great deal” of confidence in the Judiciary, while 25 percent said they had “quite a lot”. Close to half (49 percent) confessed to having little confidence in the Judiciary, with another 20 percent having no confidence in the courts of the land.

We note that the latter survey was conducted before the Chief Justice and Chief Magistrate had their times of trouble. The figures might have been higher if the survey had been done in 2007 when Manning took on Sharma CJ.

Lack of trust is deeply troubling. I know that the CJ is aware of it and would like to do something about it. As he said at the beginning of the 2011 Law Term, “timeliness, efficiency and attracting public trust and confidence are not just feel good objectives. They are our raison d’être.” It is, however, hard to rebuild trust once it is lost.
One area where the record of the Judiciary’s performance was equivocal is that of “undue delay.” Over the years, several judicial officials and investigatory committees have referred to the problem. As one former Attorney General put it: “Judicial delay not only caused despair and stress, but increased costs to litigants. In many cases, the victims were little people, widows, people injured by motor vehicles or in the work place, public servants—who often give up in despair. Some countries like the Philippines had sought to deal with the problem by withholding or suspending the payment of salaries and pensions for non-delivery of judgments.”

What is to be done about the problem? In some jurisdictions, judges have been called upon to resign for failure to deliver timely judgments. Some critics of judicial sloth have also suggested that all judges should not be paid the same, and that use should be made of increments to encourage performance. Doing so is, however, neither practical nor desirable. Moreover, it is ultra vires the constitution, which does not admit to changing the terms and conditions of a judge’s appointment to his or her disadvantage. Such action could provide an opening for the executive to punish judges who disagree with them.

One group of people who are very angry with judicial delay is the remand prison population who believe that they are hard done by. They blame the Judiciary for the length of time they have to spend in the remand yards without having their matters heard or fully heard. They complain bitterly about the issue, and one was not surprised that there have been eruptions are there were in 2006.

Persons concerned with prison reform believe that delay helps to generate overcrowding of the remand yard, which has the effect of nurturing frustration and a belief that justice is not being done. The system also serves to incubate criminals. Inmates are not stratified because of space limitations, with the result that inexperienced offenders learn the tricks of the business from sophisticated veterans.

The Chief Justice, who understands that the Judiciary is an essential pillar of the criminal justice system, has drawn attention to the overcrowding phenomenon, and has pledged to work with the Ministry of Justice and the Minister of National Security to address the problem. There have been various attempts made to introduce new rules which improve the case handling process. There have also been innovations in respect of bail management by Justice Carmona, but these only scratch the surface.
There are also plans to introduce a drug court in the next few weeks, which should help to reduce loads. The reality, however, is that the queue for justice never seems to get shorter. It has always been so. The more matters you dispose of, the more litigation you seem to attract. The trick is to find ways to reduce the number of matters that go to trial. The CJ recently provided us with a sobering statistic, that “if every matter went to trial, each judge would have to do over 400 trials per year, a clear impossibility”.

The CJ, however, indicated that there is some good news. Seventy-six percent of matters are now being disposed within two years of filing, 58 percent in less than one year. This is a remarkable turnaround from what previously obtained. The news is, however, not so good in respect of the magistracy, which some say has pre-collapsed. There were 104,155 new cases in 2011, up from 89,416 the year before.

What then is to be done? There are a few things that could be tried or are being planned, but none is easy and costless. You can increase the number of courts and judges, and you can try night courts, family courts, and drug courts as have been done elsewhere. These will help, especially the drug courts. But there are cultural and other constraints.

The Judiciary has a resource and a capacity problem, and the responsibility for dealing with the problem does not lie solely with the Judiciary. The lawyers also contribute to the delay. There are, I am told, not enough criminal lawyers, note takers et cetera. There are also not enough police. It is a many-sided problem. It is, however, an urgent matter to which all energies should be bent.

Perhaps we should borrow the Pratt and Morgan precedent in respect of those inmates of the remand yard. If a detainee cannot have his matter dealt with in say three years, he or she should be set free unless doing so constitutes a serious threat to peace and security. Undue delay could be deemed cruel and unusual punishment. In my view, one night spent in the remand yard is equivalent to two, particularly if the charge relates merely to using marijuana. Doing so would lift a great burden that now afflicts the court and those in it who might be guilty of a minor offence.

To return to where I began: my judgment is that notwithstanding what the opinion surveys say about the population’s lack of trust in the Judiciary, and occasional lapses and missteps (eg the Jamaat al Muslimeen amnesty trial, or the charges relating to the charges alleged in respect of the Chief Justice), my own
judgment is that its general performance has been acceptable and that the fear once expressed by Justice Isaac Hyatali that too much water was being mixed with the brandy has proven to have been exaggerated. Wooding and his court did well, and laid a good foundation. Williams did well to have recognised the limits of his power.

Challenges, however, lie ahead. One has to keep several steps ahead of the drug lords who will no doubt test our probity as they have already sought to do in respect to the other branches of government in Guyana and around the region.

Professor Selwyn Ryan
Distinguished Jurist Lecture 2012

Mr. Russell Martineau S.C.

Introduction of Mr. Martineau by Justice Weekes

Many of our senior practitioners’ professional maturity developed in step with our nation’s. They would have cut their legal teeth around the same time that Trinidad and Tobago achieved independence and so would be in the ideal position to tell whether our Court of Appeal has kept in step with them.

Mr. Russell Martineau SC is one such legal luminary. Mr. Martineau was called to the local Bar in 1972, apart from the five years 1981–1986 that he served as Attorney General of Trinidad and Tobago, he has maintained a private practice and was called to the inner Bar in 1993. Over the years he has rendered service teaching at the University of the West Indies and Hugh Wooding Law School. He has also occupied the office of President of the Law Association of Trinidad and Tobago from 2004–2008 and has practiced law in various Caribbean countries such as Antigua, Grenada, St. Lucia, St. Vincent and Dominica, just to name a few.

So, Mr. Martineau, who has come to his, can I say, professional maturity, along with the nation’s and hopefully, the maturity of the Court of Appeal, will now tell us how we should feel.

Mr. Russell Martineau S.C.

Thank you very much Madam Chairman, Justice Paula Mae Weekes. Honourable Chief Justice, Justice Saunders, our judges from the Caribbean Court of Justice, judges of the Court of Appeal, my friend and colleague, Professor Ryan, and other judges from our courts, my colleagues from the Bar, distinguished ladies and gentlemen. I hope that all the protocols have been observed. If any have been omitted, please forgive me.
I came here and I was told, prepare something, have something written to put in the next publication of the Institute. Well, I saw Professor Ryan and I suppose that’s why he is a professor, and I realise that although he had something written, he didn’t read very much from it, and I feel like putting away what I have done and doing as he did, taking that page out of his book, and just making brief references to my paper and talking generally.

Madam Chairman, you say the question is – How do I feel? I feel good. No two ways about it. And I also say you should feel good, in spite of the balls that Professor Ryan has bowled you. Because what I intended to say and I think what has been said by Justice Saunders yesterday, basically summarises the position that we should be proud that our Judiciary, and although this is concentrated on the Court of Appeal, I think we can say the whole of the Supreme Court of Trinidad and Tobago, we have done well. That is my feeling and it is an honest opinion. I think anybody who has done a full and careful review of the situation will come to that conclusion.

In my remarks today, when I come to what I have to say, I will indicate to you why it is I say “we have done well, the Judiciary has done well, the Court of Appeal has done well.” Indeed, that is not just our feeling, but the consensus in a lot of jurisdictions. This was one of the points Mr. Justice Saunders was making yesterday when he spoke of Justice Georges and so on, but there is more to come on that.

I join Justice Saunders, again, in saying that in many ways our Court of Appeal is a final court. Not only because a number of cases that go to the Court of Appeal do not go to the Privy Council, the Judicial Committee of the Privy Council; but because they end in the Court of Appeal and they end there, most of them, I am sure, because the clients, the litigants are satisfied with the judgments.

It reminds me of a story that is not in my script. There was one judge, Justice of Appeal Alcalde Warner, before whom I lost many cases. But I always left his court feeling that I had gotten a just decision. There was something about him that made you feel that he was administering the law and that he not only got it right, but that it was a just decision. While I pick him out, it’s a feeling I got generally with the Judiciary over the years. Since I started as a junior counsel at the Bar, I get the feeling that I am getting justice, I am getting a hearing, and with that I am happy and satisfied.
Returning to my script, I was on the point about the final court. As I said, it is not just because most cases end in the Court of Appeal, but the fact of the matter is that in some of our most important matters, as Justice Saunders pointed out yesterday, the Judicial Committee (which you know is our final court) often say “go back to the local courts”. They are reluctant to give a decision in a number of matters or on certain aspects of the matter. While they will deal with the law, a lot of the cases depend on what the local conditions are and you will find a number of them where the Privy Council make that point and make it very forcefully.

The first example is not from Trinidad and Tobago, but it was from Dominica, the Maipin Telecom case ¹, where they were dealing with telecommunications. While the Privy Council said that the judges below got certain aspects of it wrong (I don’t know if Mr. Justice Saunders was on that Court; I doubt it, he wouldn’t get it wrong, I taught him at law school), they also said that this case was a constitutional matter involving telecommunications, and that they wanted to hear what the local judges had to say. We have had that happening time and time again in Trinidad and Tobago.

One of my cases, in which I was successful in the Court of Appeal, went to the Privy Council and we lost. It was the equal opportunities case ², and Lord Bingham, in his dissenting judgment, said that:

“To the extent that the answer to the present problem is doubtful, weight should be given to the judgment of the Trinidad and Tobago Courts. A judge sitting in a local constitutional environment in which he has grown up and with which he is familiar, is likely to have a surer sense of what falls within the purview of the constitution and what falls beyond that, than a Court sitting many, many miles away. For this reason alone, in the absence of manifest error, the Board should be slow to disturb the unanimous conclusion of the local Courts on a question of this kind, involving, as it does, the question of judgment and degree.”

I think, although Lord Bingham was dissenting, his statement is a common feature of a number of the judgments that come out of the Privy Council. It is particularly important in the field of constitutional law and human rights, as they themselves say, because, whether we like it or not, the fundamental rights do not remain static, they change. The meaning of their content changes. Something

¹ Cable and Wireless (Dominica) Limited v. Marpin Telecoms and Broadcasting Company Limited (Dominica) [2000] UKPC 42
² Suratt & Ors. v The Attorney General of Trinidad and Tobago [2007] UKPC 55.
that might be acceptable in a democratic society today, may no longer be so tomorrow. Therefore, it is our judges who, at the end of the day, will determine the meaning of the content of the rights. And that is why it is very important to see the role of the Court of Appeal—and for the Court of Appeal to see its own role—as the final court on those matters.

Sometimes I get the feeling that in these matters, some of our judges do not bear in mind that we are really the final court and so say ‘let us do it.’ We have had some interesting judgments along this line. The Trinity Cross case, for example, I have always found a very interesting one, although I was on the wrong side. The fact of the matter is, I see that as a case where Justice Jamadar was interpreting the law, putting the content to rights in the context of Trinidad and Tobago, given our cosmopolitan society, and saying, “Look, that’s good enough for Trinidad and Tobago.” And I always wondered, as I said before him, what would happen if the Victoria Cross came up in England, what would the Privy Council judges say, what would Their Lordships there say? Would they say, “Well, the Victoria Cross – is it something discriminatory?” But that is England and we are in Trinidad and Tobago.

The Trinity Cross case is an example of the sort of approach that our judges have adopted and the independent spirit which they have shown. I think we are well underway to building our own society and to what we consider a just society in the context of the people we have in Trinidad and Tobago.

Yesterday, the point about the importance of our judges as a final court was brought out by Justice Saunders also. Although he referred to the Panday case, which was not a constitutional law case, but was, as you know, a defamation case. And Justice Jamadar was in that one also! The point I am making is that the finality aspect and the importance of the Judiciary in Trinidad and Tobago—in particular the last court in Trinidad and Tobago, the Court of Appeal—is not limited to constitutional cases. It traverses a number of areas, whether it has to do with damages or whether the meaning of words is defamatory, indeed the whole gamut of it. Even in a “running down” case, the Privy Council said, “The judges in Trinidad and Tobago said this is what was wrong with the way the chaps were driving.”

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3 Sanatan Dharma Maha Sabha of Trinidad and Tobago Inc. & Ors. v The Attorney General of Trinidad and Tobago, H.C.A No. 2065 of 2004; Civ. App. No. 71 of 2006; [2009] UKPC 17.
Which brings me to another story Sir Isaac Hyatali always told. The Privy Council, with Lord Diplock, had reserved one of their decisions from Trinidad and Tobago in a “running down” case. Lord Diplock, shortly after, came to Trinidad (I remember in those days we had judicial exchanges and judges from England came to Trinidad and some of our judges would go up from time to time), and went with Sir Isaac and a couple of other judges to San Fernando. Sir Isaac, of course, had his driver driving them down. On the way, they got what we call a ‘bad drive’. Lord Diplock almost collapsed. And then Sir Isaac turned to him and said, “You see that case you did the other day and you said you couldn’t believe that would happen? You’ve experienced it yourself now.” And Lord Diplock agreed.

In fact, yesterday, one of the cases I was looking at in preparing for this lecture was a decision where the Privy Council was actually saying in a “running down” case: “The local judges know better about this driving business in Trinidad and Tobago.”

In a lot of areas that our courts have the opportunity to say what the law is and say what it should be in Trinidad and Tobago. I think I could summarise all of that by saying that I would like to see our judges a little bolder in this area and if I am wrong, Chief Justice, it will come out later in the contributions to the discussion. What I would like to see is our judges saying how they see it through Trinidad and Tobago’s eyes.

I could think of Chief Justice de la Bastide, who made it quite clear in one of his decisions (it was a straightforward case that had to do with stay of execution). After paying his respects to the English Court of Appeal, he said, “Look, I am not bound by them.” He went out of his way to say that and he put it in the record and then did what he thought was right for us.

We have had a number of other examples. Again, in this kind of setting, I suppose nothing is wrong with calling names. Suggested re-write for the first paragraph: Chief Justice Sharma—I think he was then Justice of Appeal Sharma—took an approach to summary judgment which, at the time, was not consistent with the thinking in the United Kingdom. However, in the week after Justice Sharma gave his decision, the English Court of Appeal was doing exactly what they themselves hadn’t done before and in fact were saying that shouldn’t be done! So Justice Sharma had just been earlier than the English Court of Appeal in his decision. I think we tend to follow the United Kingdom fairly
slavishly, and too much so. I get the impression, if I look back over the years, that we could be a little bolder in our approach here.

On this question of our judges, I have found an interesting contrast in two cases, which I would just like to mention, and perhaps there may be some discussion on it. One is the Trinidad case of Sumayyah Mohamed v Moraine, known as the “hijab case”, where a school refused to allow the child in unless she wore a school uniform, with which the hijab did not conform. Madam Justice Warner, although she didn’t rule for the child on the constitutional point, did say in her 1995 ruling, among other things, that “The fact that the applicant may make an application for transfer to another school is an irrelevant consideration.” She dealt with it from the point of view of irrationality in judicial review.

Now I want to read for you what Lord Hoffman, whom I consider to be one of the more liberal Law Lords and members of the Judicial Committee, said in 2006 about a hijab case. I’ll just read a bit from him, because to me, it’s a good contrast and it shows the importance of having our judges give their opinions. I think after the hijab case in Trinidad, nobody complained, everybody was quite happy and that was it. Just as with the Trinity Cross. In fact, I think Justice Jamadar forced the hand of the Government and got them to act. For a long time they had been hesitating to move from the Trinity Cross. Once he gave his judgment, the Trinity Cross had gone—goodbye! And we were also satisfied with Justice Warner. No one complained.

But this is Lord Hoffmann in this English case. And it is the case of The Queen v Governors of Denbigh High School [2006] 2 W.L.R. 719., for those who want to read it. At paragraph 50 he says this:

“I accept that wearing the hijab to a mixed school was, for her, a manifestation of her religion. The fact that most other Muslims might not have thought it necessary is irrelevant. But her right was not, in my opinion, infringed, because there was nothing to stop her from going to a school where her religion did not require a hijab…”

Remember Justice Warner said, “that is irrelevant,” but this is Lord Hoffmann: “… and where she was allowed to wear one.” Then he refers to Article 9 of the Convention and he says: “Shabina’s discovery that her religion did not allow her to wear the uniform she had been wearing for the past two years, created

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a problem for her. Her family had chosen that school and the local education authority in solving the problem, they would, no doubt, have advised her that if she was firm in her belief, she should change schools. That might not have been entirely convenient for her, particularly when her sister was remaining at Denbigh High, but people sometimes have her suffer some inconvenience for their beliefs. Instead, she and her brother decided that it was the school’s problem. They sought a confrontation and claimed that she had a right to attend a school of her own choosing, in the clothes she chose to wear.’

Do you see the different approach? So I don’t know what would have happened if the hijab case from here, had gone to the Privy Council. To me, it’s a very good illustration of the importance of having our judges, in our jurisdiction, deal with these matters.

And I add to that, Chief Justice and My Lords and Madam Justices, that when we deal with these cases here, we must put our reasons clearly, lucidly, cogently and compellingly, so that when they get to the Privy Council, they will find it difficult to reverse the decision. Sometimes I think the judgments could be a little stronger on the point. You make the point, but not strong enough. And I think if it’s made strong enough, it will prevail. We have had the Privy Council itself, over the years, bowing to as it were, or showing at least that they are influenced by, the cogency and strength of the local argument. And I think that is one area that needs to be looked at, the quality and strength of the judgments we send out sometimes.

We’ve had some excellent judgments from a number of our judges, for example, Chief Justice, you yourself in the case of Sahadeo Maharaj ⁶, were paid a rare compliment by I think it was Lord Hope, who talked about how succinct and compelling it was. We know about Justice Georges and we got a good example yesterday from Justice Saunders. To me, the classic was in his approach in Thornhill ⁷ where Their Lordships in the rare compliment of saying that he had, several years before, interpreted Sections 1, 2 and 3 of the then Constitution, the ’62 Constitution, correctly in their view. Indeed, in the way that Their Lordships in the Privy Council came to interpret it several years after in the Maharaj case. In other words, Mr. Justice Georges was there already. He didn’t wait on the Privy Council to tell him where to go, but he was one of the

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⁷ Thornhill v The Attorney General of Trinidad and Tobago [1979] UKPC 43
bold judges we had. Noteworthy was the strength of his argument. They referred to his compelling arguments in that case, and his judgment prevailed. That is what I would like to see from our local judges, some more of that from the Court of Appeal in the years to come.

We have had a number of good judgments. I always think of the judgment of Justice Sharma and the Court of Appeal with regards to the question of vindicatory damages, which in fact have now become very fashionable. As far as I am aware, he is the judge who started this idea of vindicatory damages when a decision from Mr. Justice Bereaux came up to the Court of Appeal. The question was whether you were entitled to exemplary damages in constitutional law cases or not. Justice Sharma said, "Well, we must have something. Let's get away from the common law and start talking about vindicatory damages." Since then, that's all people talk about. So again, we led the way. In that context of compelling judgments, I personally, as a member of the Bar, would like to see the quality of the judgments continue to improve.

I see Justice Charles here and Justice Tewarie. From them we have had good examples also in our fashioning of our own rights. Justice Tewarie ruled on the right of a Rastafarian prisoner to keep his locks in prison, and Justice Charles on a juror being allowed to wear a burqa in court. I think all those are good illustrations of our court moving in the right direction in fashioning our own rights ourselves.

The Court of Appeal has a duty to develop our society and make it more just. It is not something that must be incidental. It is an obligation it has to discharge and a duty it has to perform.

Professor Ryan spoke about delays and I may mention one or two things. In reference to what was said in the Boodhoo case, which came out of our own Court of Appeal, I would like you, if you have the time, to look at the judgment of Chief Justice de la Bastide, which, in fact, was reported in the Privy Council.

The whole question is whether delay in delivering your judgment is really at the heart of the denial of one's fundamental right to protection under the law. Chief Justice, we must work hard, and I think harder, at delivering judgments

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9 Damian Belfonte v The Attorney General of Trinidad and Tobago, Civ App. No. 84 of 2004.
11 Boodhoo & Ors v Attorney General of Trinidad and Tobago [2004] UKPC 17
on time. Judges are always right. You are right, until somebody reverses you. So say it. Give your judgment. There are many wrong judgments that are right and many right judgments that are wrong. But the point is, give the judgment. Get it out. It’s important; you run the risk of infringing the right to the protection of the law, and the right of the protection of the law will lose its luster, its shine, if you keep the judgment back.

Coupled with that is the point raised yesterday by the Chairman of the TTJEI that in relation to oral judgments, not only must we have more of them, but we also want access to them. At present, we do have a problem getting access to them. That’s something that must be addressed, because part of the protection of the law is that the public is entitled to know that a person has gotten a judgment and what the decision is.

Take, for example, a constitutional matter, where the only remedy a person may get is a declaration and no damages. If you infringe my constitutional right, the only thing I may have is my declaration; but I want the world to know that my rights have been infringed. I want my declaration known, so it is important that the decision be made available to the world.

Looking ahead to the next 50 years it’s fair to say, over the last 20 or 30 years since 1962, since we have had Independence, there has been a development in public law. We have had all these constitutional motions, beginning way back with Collymore 12, and Seereram (the TICFA case) 13, and so on. Then, judicial review has come and taken over especially when the no certiorari clause came out of the Constitution. So we have had a lot of public law cases.

We have always had criminal law cases, but with the increase in crime which we have to face, the courts will have to deal with a great increase in the number of criminal cases. I do not know what we have in place to deal with the number of cases that may come on stream, and what legislation will be introduced to speed up the process. You may well find an avalanche of cases in the criminal court. We have to take steps to deal with this to bring confidence back to people that the system is going to be working, and that there will be swift justice. Swift but good justice.

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12 Collymore and Another v The Attorney General of Trinidad and Tobago [1969] UKPC 11
If we look around here, the profession is changing, isn’t it? You have more women than men coming into the profession now. When I started practice, there was no female judge, and we had just five or six female attorneys at the Bar. But today, we have a number of women as judges, and I think the time will come when, perhaps, the whole of the Court of Appeal, or certainly the majority of the Court of Appeal, will be women. And this is a reality we face. I say it’s a good thing. I don’t know if there is anything wrong in my saying I am better treated by the women judges—not that the men treat me badly, but I feel comfortable in a court where there are women.

This may be a factor that the sociologists may wish to consider. Professor Ryan, you may be able to say something about it. Because there was a time when we had men alone in the courts, especially the Court of Appeal. I remember when I started, you had Chief Justice Wooding, you had Mr. Justice McShine and Justice of Appeal Phillips and Fraser and so on, only men. I don’t think that there was any dissatisfaction then about men being on the court. Therefore, I think there should be no dissatisfaction with a court of just women. That’s my position.

But I wonder, for example, if a rape appeal goes to the Court of Appeal made up only of women, how may the man feel? I really don’t know. These are things, while we do not have a problem now, we should be thinking of, because they may create problems later on. I mention that because we are not immune from this sort of thing. You remember a few years ago, there were voices in the society that were talking about the composition of the Court of Appeal, because various sections of the community felt they weren’t properly represented and they should have more representation. I think that is wrong. I think people should be there on merit and ability and integrity; it doesn’t matter what part of the country you come from. Because the next thing they’ll say is that as a Tobagonian I don’t qualify. I am glad Chief Justice Archie is there and he is from Tobago. The point is we have to think about these things. In England they’ve had brutally frank debates about the composition of the courts and the fact that you didn’t have minorities on it. These are issues which we should all be addressing, looking down the road. I do hope that some of these thoughts provoke a little discussion. Thank you again.

Russell Martineau S.C.
Encouraged by Mr. Martineau, I am going to write a bold, but restrained maverick judgment, not at all Privy Council shy, and I feel very good about it.

We move from the experience of Mr. Martineau, whose profession grew along with our Independence, to our Chief Justice Archie who, perhaps, is not quite at the opposite end of the spectrum, but will see things from quite a different perspective.

Mr. Justice Archie obtained his Bachelor of Laws at Southampton University and his Legal Education Certificate at the Hugh Wooding Law School in Trinidad. He was admitted to the local Bar in 1986, and began his legal career in private practice, but then went on to serve in the Governments of Trinidad and Tobago and in the Turks and Caicos Islands, and served in the Cayman Islands as Solicitor General and acted from time to time as that territory’s Attorney General. He returned to Trinidad and Tobago in 1998 and was appointed a puisne judge. He was elevated to the Court of Appeal in April 2004 and then sworn in as our Chief Justice in January 2008, being the 8th such office holder in the 50 years at which we are having a look.

They say heavy is the head that wears the crown. So that all of these matters that have been raised by Professor Ryan and Mr. Martineau fall into the Chief’s lap and he will now tell you how he proposes to make us feel.
I am very encouraged by Mr. Martineau’s exhortation to be bold. I think that it is time that we grasp the public policy mettle explicitly and acknowledge that is what we are doing. This applies particularly when we are making judgments in matters that pertain to the way in which our society functions and the way in which we see things, as opposed to the way an Englishman, for example, might perceive them.

I want to ask you to muse with me for a short while about the significance of what we are doing this afternoon and where we might be headed. This is the second in a series that we began last year; it simply had not been happening before. It signals a new understanding in the Judiciary about our role in a developing society, an understanding that I hope will be appreciated and shared by the wider citizenry.

There has been much debate in academic circles throughout the Commonwealth about the proper application and limits of judicial power. Phrases like ‘judicial activism’ have tended to attract more heat than light and to obscure that fact that the common law has always developed (and can only do so) when judges employ creative means to solve the issues that are presented to the court for just resolution. I emphasise the word ‘just’, because it is in that search for justice that the genius and real potential of the common law is revealed. For the best judges, the slavish application of precedent has never been the objective. Precedent is only one foundation for legal argument; history, culture and our own issues of public policy have always been part of the context in which justice is dispensed or indeed advanced.

Conversations with some of my colleagues in civil law jurisdictions have left the impression that they have never felt themselves as constrained as we have by written precedent. Perhaps our reticence has been due, in part, to our colonial heritage. We have been educated and encouraged to assume that our ‘masters’ knew better, and that the answer to every question already existed in a report somewhere. I have to confess to sometimes becoming a little irritated when counsel present an English Court of Appeal decision and say to me, “Simply read it; that’s the answer.” That, as Chief Justice de la Bastide has pointed out, is not the end of the matter. We are not bound by such decisions.

We need to move away from the notion that resort to precedent is a search for the answer, rather than a means of identifying the interest and the jurisprudential philosophy that lay behind the particular decision. I think that we have been
slowly moving away from that idea. I see, both at the Bench and at the Bar, a new willingness to look at non-traditional (and by non-traditional, I mean outside of England) and even extra-judicial sources in which to ground submissions in order to synthesize our own Caribbean jurisprudence. Something new and exciting is beginning to take shape.

I want to follow Justice Saunders in reinforcing the point that we are not engaged merely in the adjudication of disputes; what we really are about is the creation of a just and equitable society. What such a society would look like is far too important a question to be left only to the lawyers, and by ‘lawyers’, I mean judges as well. That is why the dialogue with economists, historians, political scientists and other disciplines is critical. We have tended to look at constitutions as defining rights and dividing powers. The challenge is to see your Constitution as a framework for a model of sustainable social and economic development.

In his recently published book, Power, Politics and Performance, Dr. Winston Dookeran explored the dissonance between what he called the logic of politics and the logic of economics and the negative implications that those colliding imperatives have had in practice for our development. As an engineer, I know that the triangle is the most stable architectural form. I would like to suggest that the missing arm of the triangle in Dr. Dookeran’s discourse is the logic of the law. Law, politics and economics are not mutually exclusive fields of endeavour; there are always, as Justice Saunders reminded us, deeper and broader interests and objectives being served.

To quote Dr. Eric Williams as we stood on the brink of a new experiment in democracy, as an independent nation: “Democracy means more, much more than the right to vote, and one vote for every man and woman of the prescribed age. Democracy means recognition of the rights of others. Democracy means equality of opportunity for all, in education, in the Public Service, in private employment. Democracy means the protection of the weak against the strong.”

It is instructive to recall the context in which all of the new independent Commonwealth countries were spawned after the dismantling of the British Empire post World War II. In the time when this would have been written, what was happening here was also going on in other parts of the Commonwealth. Many of the leaders were of a particular political and philosophical bent, and the vision of the societies that they were creating when our constitutions were written was very different from the vision of the colonisers. A lot of cross-
fertilisation was taking place. Professor Ryan mentioned that many of our regional intellectuals were involved in the developments that were going on in Africa. Telford Georges, for example, ended up serving in about three African countries, and was very influential. He told wonderful stories about how quiet diplomacy helped to avert many a crisis.

These leaders studied together, many at the London School of Economics, that hotbed of revolutionary thought at the time. Writers like Williams and CLR James offered an alternative interpretation of history as a basis for charting a new and independent course. One of the things that intrigues me is that the language of the constitutions that emerged would have sounded dangerously socialist to our former colonial masters. I wonder if what they promised may have largely been overridden in subsequent decades by the realities of structural readjustments by the International Monetary Fund, imposed by a world order over which we have had little or no influence.

The question for us is whether, and to what extent, the original vision remains relevant and achievable and what really is the role of the courts in all this? What does it mean when we say in the Preamble to our Constitution that the people of Trinidad and Tobago “respect the principles of social justice and therefore believe that the operation of the economic system should result in the material resources of the community being so distributed so as to subserve the common good, that there should be adequate means of livelihood for all, that labour should not be exploited or forced by economic necessity to operate in inhuman conditions, but that there should be opportunity for advancement on the basis of recognition of merit, ability and integrity”?

If we say then that our Constitution is the supreme law, then should we not judge the validity of any other law, any of our national institutions, or indeed any Executive action, by the extent to which it tends to create a society that we envisage in that preamble? This is a society based on very definite notions of social and economic justice and the Courts are charged with interpreting the Constitution and the law.

One of the major jurisprudential shifts of the latter half of the 20th century and the post-colonial era is the rise of an international human rights jurisprudence and the explosive growth of the administrative law, where we are increasingly being called upon to pronounce on the validity of Executive, and even on occasion Parliamentary, actions.
What implications does all of this have for our approach to judicial interpretation? What does it mean, for example, for squatters’ rights, or labour law, or environmental law, or any of a number of areas where policy considerations come into play? In his opening speech to the Parliament earlier this week, the President alluded to the fact, for example, that the Service Commissions are an essential component of the particular way in which the separation powers has been delineated in our Constitution, quite unlike the British model.

So, one of the questions we have to ask is: In an environment where there is no Back Bench and the Cabinet is indistinguishable from the Lower House majority, what is the proper positioning of the Judiciary in holding the balance of power?

As Justice Saunders also reminded us, populism may often be inimical to the human rights of minorities. Who holds the conscience of the nation where there is no conscience vote?

While the efficient disposition of cases and the reduction of backlogs are important and necessary tasks, we really are in search of something more fundamental, that I hope will be the legacy of this current Bench. It is the definition of our place in a nation, our place as a nation, in a manner that everyone accepts and that will allow the public to have trust and confidence in
us, to be relevant, to understand their needs and interests, and to be able to do justice in the broader sense that we have enunciated in our constitution.

As I close, I want to share a quote from the Chief Justice of Western Australia that sums it up well. He said, “Public confidence depends upon judges doing our jobs well and efficiently. It also depends upon judicial officers being sensitive to the needs of the communities they serve, and upon our ability to communicate effectively to those communities what we do and why. It depends on us being sensitive to the social context in which we perform our duties. And it requires us to perform them in a way which is relevant to the communities which we serve. If we do all that, we will enhance the public confidence of the community in the Judiciary and that is ultimately the vital protection of our independence.”

I will leave you a few questions to ponder. One, to what extent ought judges to intervene in the substantive, as opposed to merely procedural, aspects of processes or controversies in the other branches of Government? In other words, what are our legitimate boundaries?

Two, does so-called judicial activism promote or undermine democracy?

Three, to what degree should courts be serving as important participatory venues for citizens and groups to engage consciously in the development and enforcement of law?

Finally, is the supremacy of the judicial branch in constitutional matters incompatible, or sometimes even in dispute with the other branches and with democratic ideal of popular sovereignty?

I don’t pretend to have all the answers, but I do know that we have to find some collective consensus about this if we are to move forward as a society.

The Honourable Chief Justice Ivor Archie
Thank you very much, Chief Justice, for leaving us with some head scratchers to ponder on.

Our last panellist is the Honourable Mr. Justice Adrian Saunders who was born in St. Vincent in January 1954. He received his Bachelor of Laws from the University of the West Indies and his Legal Education Certificate at the Hugh Wooding Law School in 1977. Justice Saunders began private practice in St. Vincent and the Grenadines and practiced as both barrister and solicitor from 1977 to 1996.

From 1985 to 1994, he served as a member of the Bar Council of the Eastern Caribbean Bar Association. In 1996 he was appointed to act as a judge of the Eastern Caribbean Supreme Court. On the 1st May 2003, he was appointed Justice of Appeal of that court, and in 2004, was appointed to act as Chief Justice there. In 2007, Justice Saunders became a judge of the Caribbean Court of Justice in its inauguration ceremony.

I think most important in all of this information I have here about Justice Saunders is that he is a cricket fanatic, and I think cricket fanatics are fanatical about many things Caribbean; it just seems to all flow together.

I invite Justice Saunders to wrap up the panel part of the discussion and give you his perspective, which, perhaps, might include an overview of what he has heard from the other panellists.
Thank you very much, Justice Weekes. Chief Justice Archie, distinguished members of the panel, my colleague judges on the Caribbean Court of Justice, colleagues all, counsel, distinguished guests.

I don't want to be very long. I was very happy that Mr. Martineau and Professor Ryan spent a little time speaking about the quality of judges that have been produced, especially in Trinidad and Tobago, over the independence era. I think this country was very fortunate, first of all, that the argument won out that the Chief Justice should be appointed by the President of the Republic. It has meant that you have an appointments process now, where, unlike the case in some other Caribbean countries, the leader of Government does not play the most critical role in the appointment of your Chief Justice and President of the Court of Appeal. For obvious reasons this strengthens the principle of the separation of the powers.

This country has also been very fortunate that the first Chief Justice and your appellate Bench, at the time of Independence, were a Chief Justice and a Bench of extremely high quality. Chief Justice Wooding and Justice of Appeal Phillips, in particular, were really very, very fine judges and I think it is a shame that Professor Ryan's biography on Hugh Wooding is out of print. I myself am embarrassed that I only read it in order to prepare for my lecture last evening. But it really is a book that should be read by all of us here because you see, we are on a continuing journey and if we are unable to look back and appreciate the judges who have gone before us then we won't get a good enough understanding of where we are now and of where we still need to go.

It was good too, that Professor Ryan looked at the issue of probity among the judicial officers of this country, because as I was saying last evening, there is this huge gap in judicial performance between demonstrated excellence and public trust. I didn’t know about that survey mentioned by Professor Ryan; in my comments I was just going on anecdotal evidence but there it was: there is actually a survey that indicates that 67 percent of the population effectively claimed that they have no confidence in the Judiciary. And this is something that I would challenge our social scientists to explore a little deeper because I am not entirely convinced that this negative perception reflects a view of individual judges. My own little anecdotal experience, as I said last evening, is that when you challenge those same people who harbour those negative views, and you go down the list of individual judges, “What about Justice Stollmeyer, you don’t have confidence in him?” They would say, “Oh, yeah, he's okay, he is the
exception.” And you ask them about another, “What about Justice Bernard?” “She is okay, she is okay.” And if you go down the list, I suspect you will get quite a different picture. But if you were to ask the same respondents, “Well, what you think about judges in Trinidad?” They will likely say “Oh, man, jokers. No Confidence.”

There is a need for people like Dr. Ryan to help us explain that phenomenon. Sadly, it is real and it is certainly something that we have to grapple with because it’s a slander that is repeated over and over again, and it feeds into the media. Although magistrates in Trinidad and Tobago try ninety thousand cases a year, you get two or three decisions that are aberrations and one hears it all over the media feeding into the false narrative that, “Oh, those judicial officers, they are incompetent” or “they are lazy” and so forth. It is extremely unfair and we must combat it.

We also need to pay serious attention to the issue of judicial terms and conditions of service, because that impacts directly the quality of the judges we have on the Bench. Invariably, the cream of any Judiciary is there on the Bench at tremendous personal sacrifice. Each of them earns a fraction of what he or she can command in private practice. Here are men and women, who, if they remained in private practice or turned their abilities to other endeavours, could earn substantially more than they are earning on the Bench. If the gap is too wide and not supported with other inducements we cannot continue to expect that we will produce the best quality judges.

Professor Ryan also spoke about the looming danger of narco-trafficking and; I think he alluded to the judges in Colombia. I have respect for those judges of Colombia who lived through the havoc caused by the drug lords. The real choice facing many judges in Medellin in the 1980s was to collude with the narco-traffickers or death. Many of them chose death! We don’t want to get to that kind of situation. But I leave that there for now.

We need to deepen the discourse about how, judges not just administer justice, but also further it. How do we get our courts, our judges to go beneath the surface of the law, and to really have a grasp of what justice means and what is one’s role in furthering justice, as distinct from simply seeing what the words of the statute are, and just trying to see how we could fit a precedent into that? Judges are not automatons. As someone said, we need to look at precedents, not as something which locks us into an interpretation of the law, but rather, as a
guide, as a tool that challenges us to compare and to look at how the solution there applied (especially if it’s an English precedent applied for particular English conditions) relates to our own situation.

Mention was made of the question of criminal justice reform, which is something that I also briefly mentioned yesterday. I was glad that Professor Ryan went down into the Remand Yard. Now, I think all magistrates and judges—trial judges especially—who sit in the criminal courts should visit the prisons. When I was a trial judge, I used to visit the prisons. It is very instructive, because at a certain level there is something about sending somebody to a place where you don’t know how it is kept, which you don’t know anything about and which is just some theoretical concept to you. We have a judge in our court, Justice Wat, who any time he goes to any new country, the first place he wants to see is the prisons. I noted with interest Professor Ryan’s experience and his own assessment—and I am glad that this came from a non-lawyer—that the conditions he saw were so inhuman, that after keeping someone there on remand for three or four years, you really have to consider whether they ought to be tried at all thereafter for the crime for which they had been accused.

That discussion segues nicely into the question of our case flow and the issue of ensuring that we try the cases quickly. That is not something which can be achieved with a snap of the fingers. Modern case flow has to do with a range of processes, some of which the Judiciary may not even have a handle on, in the sense that there are other parts of the executive authority that may be responsible for them. Criminal justice reform actually requires the involvement of all branches of the state. No single branch could successfully reform the criminal justice system, eliminate the tremendous backlogs and delays, address the low conviction rates and so on. All three branches have to co-operate, collaborate and knock heads together in conceptualising a proper plan that will deal with effective and efficient case flow in the criminal justice sector.

I am extremely pleased to see Professor Ryan here. As I said last night, we need that discourse between social science and lawyers and judges. I think that Judiciaries need more constructive feedback from the public; we need to get a better sense from the public on how we are doing. Surveys may accomplish some of this. But at the end of the day, you want to be able to put a finger on some of the things which the public doesn’t like and some of the things that the public applauds. Anecdotal evidence is fine, but it is not enough. At the CCJ, we are currently engaged on our strategic plan and we brought in a group of
stakeholders and asked them questions about how the court is faring. Some of the answers surprised us, because there were comments that were made that we just never considered. No matter how efficiently you might be operating, to keep going along without getting a good sense from your clients, from your stakeholders, from your users, as to how exactly you are faring, is not enough for courts.

Our people, for good or for bad, hold us up to extremely high standards. In a certain sense that challenges us, but in a certain sense it also frustrates us, but let’s deal with the challenge that it poses and keep pressing on to try and satisfy the needs of the public.

Justice Adrian Saunders
Comments and Responses

Justice Weekes JA – Thank you, Justice Saunders. It is quite clear that we can’t hope to adequately address the many issues raised in the half hour available for your comments. While I might aspire to be like Justice Alcalde Warner and leave you feeling that you got a fair hearing and a sense of justice, may I warn you that I will ruthlessly curtail any comment that goes beyond the established times. So the floor is open; we have our learned panellists here, all ready to entertain comments or questions, Justice Kokaram, yes.

Justice Kokaram – Good afternoon all, all protocols observed. Justice Saunders, your speech yesterday was excellent. I met some attorneys in San Fernando who were not here physically but saw it on television; I wanted to let you know that you had a wide and appreciative audience.

You brought home some significant points yesterday and I want to ask three questions.

The Court of Appeal is the final court in all respects on questions of policy and the shaping of our society, the developing of a just society in Trinidad and Tobago. Due deference has been given to the Court of Appeal’s shaping of constitutional law, but I am glad that Mr. Martineau mentioned the question of common law. In *Auckland Law Society* 1, which is a Privy Council decision coming out of the Court of Appeal of New Zealand, they looked at the common law and absolute privilege. The Privy Council said that if the New Zealand Court of Appeal had adopted a policy of developing the common law along the lines of the Canadians of using a balancing exercise in determining the question of privilege, a question of legal professional privilege, then the Privy Council would have no choice but to accept that aberration in the development of the law on legal professional privilege. So that’s the kind of dynamism that I am taking away from the discussion.

My first question is to what extent in developing a question of policy for Trinidad and Tobago do we examine the social conditions of the Caribbean? Because the development of our society in Trinidad and Tobago must take place within a Caribbean context, and that has wide implications for the development

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1 *B & Ors v. Auckland District Law Society* (New Zealand) [2003] UKPC 38
of a common community. For example, let us look at a simple thing like the law of defamation. I don’t know whether the CCJ has decided on the Mirchandani case \(^2\) with regard to defamation laws and calypsos, but if, as a matter of policy, Trinidad and Tobago holds calypso as a category of social commentary which reserves the defence of qualified privilege but St. Lucia does not, then you have the anomaly of different countries in the Caribbean developing societies skewed in different directions. So should the Court of Appeal and, in the first instance, judges start looking at the judgments of our Caribbean brothers and not to develop our jurisprudence in a very insular way?

My second question is for those commentators who may want to question the role of the judge: is the role of the judge to adjudicate, to decide a case, or are you asking us to be sociologists and economists?

And third, to what extent can we tinker with the common law along policy lines when we have the Privy Council as the final Court of Appeal? And to what extent will the role of the Court of Appeal change, if at all, when the CCJ becomes the final Court of Appeal?

**Justice Saunders** – I think the first question as to the role of a final court in relation to a final Caribbean court is an interesting one with regard to resolving the tension that might arise between the particular needs of one Caribbean state and those of other Caribbean states. There may be a little tension because, on the one hand, the CCJ would try to see if it can develop a Caribbean-wide jurisprudence, which is applicable to all the countries that subscribe to it. However, on another level, that is, in a pure form, impossible. St. Lucia has a Civil Code, Guyana has Roman Dutch land law and if, in Trinidad and Tobago, you can demonstrate, with regard to the law of defamation, by very cogent arguments using evidence from Dr. Ryan and other social scientists, that for reasons peculiar to this society, the law of defamation in relation to fair comment should be interpreted in a particular way, then I see no reason why any court ought not to give deference to that approach.

When the court gives a judgment, it aims to satisfy the people of a particular member state, and it is conceivable that, in that member state, the common law may develop in a way that is different from the way in which the common law develops in another member State. However, I would warn that, considering our common heritage and the similarities in our social, political and economic

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\(^2\) [2005] CCJ 1 (AJ).
experiences, the threshold would be high in order to be able to demonstrate that
different development. It is an interesting question; perhaps we can hear from
some of the other panellists.

Mr. Martineau S.C. — I would like to focus on the second question. I think
you were asking whether judges should be sociologists and so on. I think the
judge has to be everything. I always give the example of the first case I did with
my senior, Tajmool Hosein. It was a tax case for Trinidad cement and when we
were finished preparing the case, I could make cement. That’s the way he worked.

A judge has to know about almost everything and taking everything into
consideration, you as the judge have to then apply the law to it. I don’t think that
we will have a black and white situation where you will say that you are a pure
judge and know just law, law and law. In my view, you have to be everything.

If I may touch on something else in another one of the questions, I am all for
boldness. We have talked about defamation. It was Lange 3 and the Australian
cases dealing with defamation that made the Privy Council—actually the House
of Lords—look at qualified privilege in a different way. Because when they had
Lange before them and the Australians had an approach which, I suspect, they
thought was a lot of nonsense, then they looked at qualified privilege and came
up with the Reynolds test.

I know that there was the case of Eden Shand 4, which never got to the Court
of Appeal, and similar arguments were raised. I think the judge here took into
account our constitution and our local conditions and gave a judgment which
was reflective of the kind of thinking that our society should have.

We have to be prepared to do our own thing. And if it is, because we are
different islands, that we all have our own mores, so be it. Let us do it and when
we get the Caribbean Court of Justice (soon, I hope) they will put everything in
bold and say what our Caribbean jurisprudence is. But for the time being, we in
Trinidad should look at Trinidad and Tobago and deal with it. For example, the
expressions we use In Trinidad and Tobago may not be understood in Barbados
or Guyana. I don’t know if they know what ‘fatigue’ means, for example.

Chief Justice Archie — I would like to jump in on two issues. First, the
question of different contexts in different societies: I agree entirely that we will

3  Lange v J.R. Atkinson and Another (New Zealand) [1999] UKPC 46
have to keep some separation. Perhaps the analogy here is to a Federal Supreme Court, where recognition is given to the different history and the development of issues in different states. For example, I remember when I was at UWI as a student, I once said to one of my Jamaican classmates, ‘Boy, whey you goin’?’ That almost caused a fight because you don’t call a Jamaican man “boy”! Perhaps a very simple example but indicative of the differences that do exist.

But I want to talk more about the second question. I think it is important that we remind ourselves that there is really no such thing as a value-neutral judgment. Almost every time a judge has to make an interpretive choice, underlying it is some notion or understanding of society. I think that the problem is that this was never expressly articulated in the past. The idea that the judge in a sort of vacuum discovered what the law is and articulated it has never really existed in common law. We have not been taught in our legal education the connection between economics, social conditions and the law. Take for example in England, the notions of ownership, land law and the enclosure of the commons: how could the Industrial Revolution have taken place unless you created a category of people who had nothing to sell but their labour? When we come straight out of A’ Levels, study law for five years and then practice, we tend to lose sight of the exercise in which we are actually engaged. That is why I said that the discussion with the social scientists must continue and be more robust, so that we ourselves gain a deeper understanding of what it is we are actually doing.

Justice Weekes JA – One of the matters raised by Justice Kokaram was the extent to which the role of the Court of Appeal will change if our final court were to change from the Privy Council to the Caribbean Court of Justice.

Professor Ryan – I wanted to comment on the question you raised about surveys and the general view of the institution as opposed to the individual level. I think the survey is indicative of a kind of generalised discontent with institutions the world over; it’s not a Trinidad problem. If you conduct that survey in New Zealand, Australia, the United Kingdom etc., you would get the same percentages, give or take ten percent. That does not mean that people don’t recognise that there are individuals who are performing and making a contribution, but there is a general discontent and unhappiness with institutions.

The second question had to do with judges and policy. My graduate training was in the United States and the question of whether judges are, or ought to be, involved in policy is normal. You have the judges, the clerks and the academics
all debating policy; *Brown v Board of Education* \(^5\) was driven by sociological analysis. So, it’s not unusual. I am always a little curious when I read judgments or judicial comment which seem to suggest that this is something that is unusual. They do it all the time.

In the early years of independence, there was a debate about policy too. The Collymore case \(^6\) prompted people to say that while Sir Hugh [Wooding] was typically excellent, he had made mistakes in terms of policy and that he wasn’t sensitive to the concerns of the workers. I don’t take the whole separation of powers thing as seriously as some of my comrades here do. It is important, but I think it masks the fact that all of those institutions make policy. Many institutions are involved in legislating, such as the University. Justice Jamadar had the good fortune to read my stuff about the Trinity Cross and decided to come to “hear the word”.

**Justice Saunders** – On the last question, because you deserve an answer before we get to other questions. My short answer is no, not really. If anything, there is a greater onus to try to interrogate the common law in order to assist the final court in promoting and developing Caribbean jurisprudence, but I don’t see a big change in the role of the court as such.

**Mr. Sankersingh** – I notice that the underlying theme of yesterday’s presentation and today’s discussion is really the integrated process of the development of the Judiciary and the development of the society.

The Judiciary is really a subset of a larger set—the society at large—and while you may see the Judiciary as well organised, if you compare it to what is happening outside, you may be shocked. Sometimes I try to compare steps in the Judiciary with steps taken in the wider society. So, for example, if there is a community meeting to deal with what is to be constructed in a particular community, how does that compare with a step in the judicial process, like a hearing in the Magistrates’ Court, for example? When lawyers go to the Magistrates’ Court there is a separation even in simple matters that is not happening on the outside when people go to their community meetings.

In other words, there appears to be a total disconnect between what takes place in the subset of the Judiciary and in the wider set of the society. If you go out among the public, you will find people who have lived 60, 70 years and not one

\(^5\) 347 U.S. 483.

\(^6\) Learie Collymore and Another v The Attorney General of Trinidad and Tobago [1969] UKPC 11.
day would they have had the opportunity to go to a meeting and say, “Chairman, I want the money to be spent in my community to be spent on the recreation ground rather than the community centre.” In other words, people would have lived all their lives and not once had an opportunity to participate in how the money should be spent or in decisions that would affect their basic needs. And if you try to define national development, you would see that meaningful development is the involvement of people in decisions that affect their basic needs, whether it is the Judiciary, water, roads, garbage removal, whatever it is. But that is the essence of development: the involvement of people in decisions that affect their basic needs.

Something is really, really wrong. I would like to see that there is some closer connection, some nexus being built between the Judiciary and the wider society as far as this could be created.

Justice Weekes JA – Mr. Sankersingh, I am sure you are preaching to the choir.

Chief Justice Archie – I think it comes back to how we see our constitution. But it does have implications for when we have to grapple with issues of, for example, judicial review and what constitutes proper consultation. More and more we have to see our constitution as a vehicle for development and participation. The preamble talks about participation of every citizen, to the extent of their abilities, in the process of national governance but we have not really been talking about it in that way before. The challenge is in stimulating the debate since I do think that the legal profession has a role here in highlighting and promoting these issues. So I would urge the Law Association to consider what its role is, as well, in partnering with the Judiciary to raise awareness.

Mr. Jairam S.C. – My question is directed more to Professor Ryan. I sat on the Police Service Commission, and I have seen the levels of crime and criminality grow tenfold. And I have no doubt, as Professor Ryan said, as to the impact it has had in Latin America. It is only a question of time before it catches up with us here in Trinidad and the wider Caribbean. And therefore, I fear for our Judiciary; Justice Saunders told us that the judges in Medellin chose death
rather than partnering with the narco-traffickers. What are some of the ideas or suggestions you can share with us this afternoon as to how our Judiciary can position itself to deal with that eventuality when it comes? Because it will come, in perhaps ten years or less.

**Professor Ryan** – That is not an easy one to answer. The matter is under consideration as we speak.

**Mr. Joseph** – Mr. Martineau, in his closing statement, spoke about the need for our judges to make bold and decisive judgments and he identified some examples. I am wondering, because our judges come from the wider society, whether that reluctance to be bold and decisive has to do with a lack of self-confidence in ourselves to chart our own destiny. You can see that manifest itself in the vacillating approach by decision-makers on whether we should be a full member of the CCJ or not. You can see that underlying lack of self-confidence in almost everything that we do in this society. That is why Lloyd Best, in constructing his plantation economy model, spoke about the saltfish bias, that is to say, our penchant for deifying all things foreign. So my question is, whether it is that lack of self-confidence that militates against us taking charge of ourselves?

**Chief Justice Archie** – Certainly, among the current Bench, I do not detect any lack of self-confidence. I think we are growing. I think, as lawyers, we always change in incremental steps. We have a growing appreciation of the responsibility that we have; that is all part of the reason why we are having this discussion. I see in some of the writing an acceptance of that mantle. But we have to develop the common law incrementally, because that is how we are trained. We have to be always mindful, as appellate courts, that we are creating binding precedent and so, we still have to be cautious in the formulation and the articulation of our public policy choices. That is not to say that we are not taking, or we ought not to take, bold steps, if such are required.

Rather than from us, I think that that assessment could come better from the attorneys and academics who examine our work. One of the things I lament is that there is not enough of that kind of academic writing and commentary going on. Perhaps we don’t have the time, but we should take a step back and look at how we are developing. Through the Judicial Education Institute, we are beginning to take the initiative to examine whether some kind of jurisprudential philosophy is beginning to coalesce. But I would not say that there is a lack of confidence.
Justice Saunders – Like Chief Justice Archie, I do think that it starts at the Bar. Very often, as a judge, the submissions that you get are “Lord So and So said this, here is this case, we ask you to follow this,” instead of an original analysis that relies on academic writings, that relies on something outside of what “Lord So and So” said. If “Lord So and So” said it and it is in sync with the position you are putting forward, then you cite the case as support for this analysis that you have come up with. I think that if judges got more of that kind of reasoning, more of that kind of assistance from the Bar, then that will in turn lead to more judgments exhibiting greater creativity. But even without that, I think it is fair to say that the Trinidad and Tobago Court of Appeal judgments in recent times have been showing a great level of creativity and boldness while in the past, even at trial level, you may have had more judgments that simply reflected a precedent without that kind of original analysis. It is a process that actually has been helped by the fact that the Privy Council has been using a lot of international jurisprudence to assist in their own analysis of how constitutional norms should be interpreted. That has given our own judges the confidence to look outside of the common law and the Privy Council and the House of Lords to international courts and domestic courts outside the Caribbean in order to find assistance in supporting propositions that they wish to put forward.

We need boldness, we need a great level of self-confidence on the part of the judges. There may still be a problem but it is much less so than it used to be in the past.

Mr. Martineau S.C. – I endorse entirely what Justice Saunders has said because the Bar has a tremendous responsibility in this area. The judge is listening to the arguments and may even get into trouble if he or she decides the case on a point that has not been raised or which people have not had the opportunity of arguing. So, it is the responsibility of the Bar to help the judges with forward thinking and new ideas. There was an excellent article written many years ago by Lord Steyn talking about the final Court of Appeal, the Privy Council, and this was one of the points he was making. He was saying that you have to read everything, read all over the place, come up with new ideas, read what the academics say, test your proposition by going to the extent of absurdity.

But we, as a Bar, have the responsibility. If we don’t do it, we cannot expect the judges to do very much about it. We, as lawyers, may also just look at some precedents and say, “Lord This said that,” or “Somebody said that” and so on.
I remember when I was in Hong Kong and the *Riley* case 7 had just been decided, Lord Scarman, who had dissented, was in the minority, three to two, and was furious with the decision, but he said to me, “Lord Diplock and the others were right.” About ten years or so afterwards, they reversed, saying that Lord Scarman, who was satisfied that he had been wrong, was in fact right. One of the strongest arguments used by the Privy Council that changed the decision was a decision coming out of Zimbabwe. They were persuaded by the arguments there and that helped them to switch their thinking.

Consider *Roodal* 8. Our Chief Justice gave a great judgment there, which went to the Privy Council who said, “No, no mandatory death sentence”. When they went to a panel of nine, it went five to four the other way. This is the thing: judges are always open to persuasion but they need to be persuaded. This is how the law develops. You shed new light on something, a new idea and you get forward thinking.

**Mr. Benjamin** – As someone who recently tried to persuade the Court of Appeal to take a different view of the proper interpretation of the Legal Profession Act, I want to say that if you do this job long enough, you get a pretty good idea where your tribunal is going to end up. There are judges in this room who have decisions for me and I know what the decision is, but they haven’t written it yet. The heartbreaking thing is when I do what Mr. Martineau and Justice Saunders challenge me to do, and I don’t get feedback. If you disagree with me, you have to tell me why, but that doesn’t often happen. And that is debilitating. Losing doesn’t bother me at all, but because I have no reason, I cannot articulate to my client what was in the judge’s mind.

One of the things I want to ask the Court of Appeal to be open to is genuinely and searchingly engaging in that dialogue. When I argued the *Independent* 9

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8 *Roodal v The State* (Trinidad and Tobago) [2003] UKPC 78.
9 *Independent Publishing Company Ltd v Attorney General of Trinidad and Tobago & Another* (Trinidad & Tobago) [2004] UKPC 26
matter in the Court of Appeal, Chief Justice de la Bastide sent us packing and said that our written submissions were not good enough. He adjourned the hearing of the appeal and said, “Come back with something more,” and we did. The Court of Appeal ruled against the newspaper, two to one, Chief Justice de la Bastide dissenting. When we went to the Privy Council, the thoughtfulness and the prescience that had been buried in his judgment was unearthed. Two things happened: the invitation was given to do something more than the rote, unexceptional production of precedents. Also, the compliment was given to the Court of Appeal—on this occasion through dissent but brought out by the debate between the majority and the minority—of pointing the law in a different direction, and without changing the common law.

Chief Justice Archie – If I might introduce a little lightheartedness before I answer your question seriously. When you said that you had no idea what was in the mind of the judge, I remembered being on a judgment writing course. We were analysing a judgment and the professor commented to the judge that it was not until he got to page 12 or 13 that he had any idea what the case was about. To which the judge replied, “Well, it wasn’t until I got to page 12 or 13 that I had any idea either.”

Mr. Martineau’s point is really true: the quality we produce is helped by the quality of the submissions that come from the Bar. One of the things that Justice Saunders raised last night was whether we are actually coming to the point where we need to be more selective and, as a result, give better treatment to the types of matters to which we devote the time to give written judgments, or even the matters we entertain on appeal. We have in the region of five hundred appeals being filed on a yearly basis and, surely, they do not all merit the same kind of consideration.

But, to the extent that there is a feeling that we can articulate more clearly some of the thinking that underlies judgments, it is something that we can and should take on board.

Justice Weekes JA – The final contribution from the floor.

Mr. Samraj Harripaul SC – I want to make a comment on the last question posed by the Honourable Chief Justice on the role of the Judiciary and popular democracy.

I think that we accept the fact that judges are not to be popular; that’s a politician’s purview. However, we depend on our judges to be just and reasonable.
The key role of the Judiciary is to be, as it were, the last bastion against abuse of power. We must be wary, at the end of the day, of Lord Acton’s warning that absolute power can create a lot of difficulties. So, I think that we look upon our Judiciary as the final protector of our rights.

Following from the lecture presented last night by Justice Saunders and Mr. Martineau’s comments, I think that we could probably say in Trinidad and Tobago that the Judiciary has stood strong in protecting the rights of the country and guiding us in the way that, perhaps, the constitutional makers may not have foreseen. The Judiciary has charted the way forward for us in relation to human rights development, for example. Whether we look from Thornhill\(^\text{10}\) down to Whiteman\(^\text{11}\), whether it is the hijab case or all the other cases that have broken new ground and developed the law, I think we can say that we are proud of the role that the Judiciary has played in protecting our rights, particularly in upholding the rights of the citizen against the view of the politician and probably the broader concept of democracy. The judge should not see himself as a person who is popular but, as Justice Saunders enunciated last night, someone who is reasonable, just and a vehicle for social engineering and change in the society.

**Justice Saunders** – I agree with what you are saying; the only thing that I would add is that we have to bear constantly in mind that the model of governance which we have, the Westminster model, is not predicated upon a situation where the Cabinet constitutes a majority in Parliament with the result that the check and balance that you ought to have between Parliament and the Executive is pretty non-existent. Therefore, the Judiciary provides the only realistic check that there is. So, it doesn’t bother me in the least when you hear about judges being judicial activists because I think that my role, which has been accorded to me by the constitution, is to provide a check on the abuses of the other branches and in a situation where, in reality, there is not a sufficient check among themselves, then I have a responsibility to live up to my role.

**Chief Justice Archie** – But this raises a deeper question. As a society, we must have the constitutional debate and it is apt at this time, when we are considering constitutional reform, because I know from conversations I have had with former senior politicians, that this is not a shared view. There is a feeling in some quarters that the legitimacy of the judicial power is somehow

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10 [1979] UKPC 43.
less because it does not derive from a popular mandate. The idea that “I have a mandate and, therefore, anything you do to criticize me is frustrating the will of the people” is actually believed by some. So, while we may sit here and agree with this, on a national level we need to have some kind of common understanding of our respective roles.

**Mr. Martineau S.C.** – I am glad that that has been raised because one of my concerns is that the public, the people, including the politicians, do not seem to understand the role of the Judiciary, or even the role of the legal profession. This is why I think that public education is important. Take judicial review, for example. When a judge strikes down a decision of a public body, everybody feels “Blows for the authority!” But, as Lord Donaldson said years ago, it is not blows for anybody. What could be wrong is that they might have acted illegally, in the sense that they have not followed the process they should have. What would be wrong is if they had lied when they came to you; what would be wrong is if they don’t obey what the court said. We have a way of not seeing things in proper perspective. A judge rules against you and there are headlines. We need to educate ourselves and educate the public. I think that this is a very important area in which the Law Association can do some public education.

**Justice Weekes JA** – It remains for me to thank our panellists for their contributions to this lively discussion. We hope that you will take these matters back to your various quarters and lively debate will continue there. Thank you too for being such interested and rapt participants in this exercise. Thank you very much.
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