CAJO NEWS

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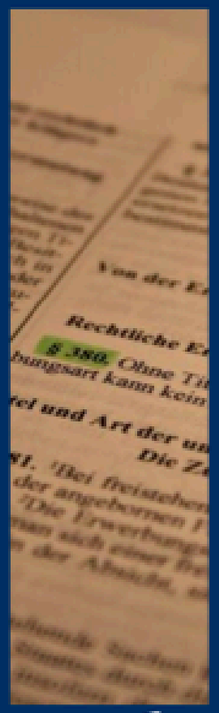
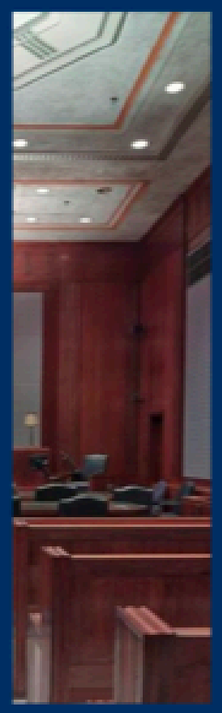
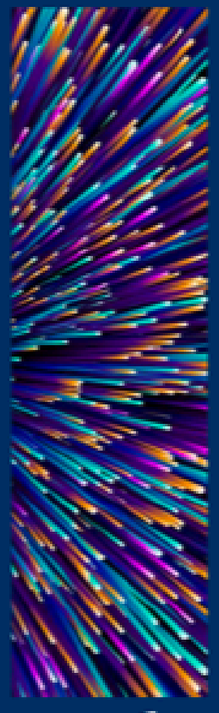
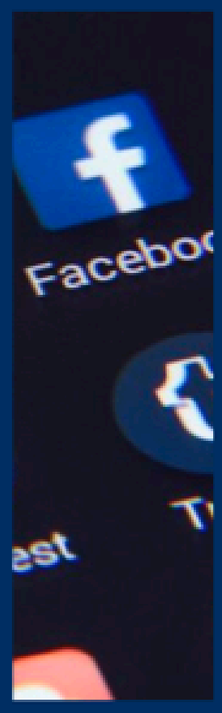
THE FUTURE IS NOW

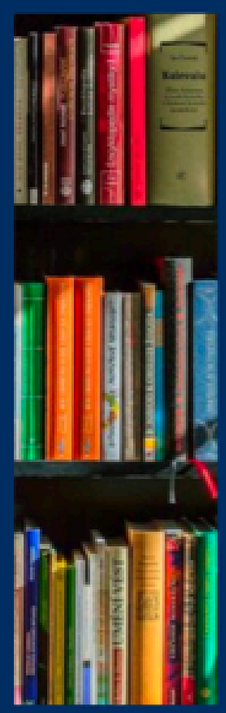
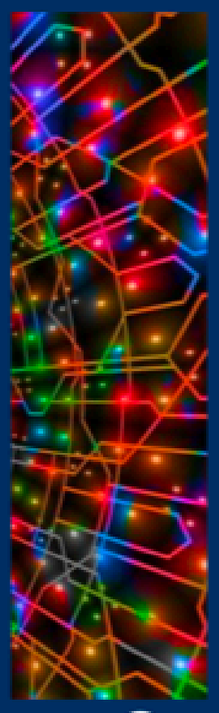
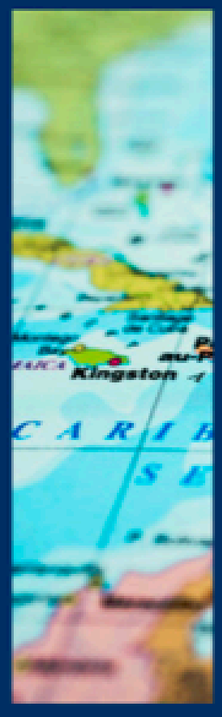
ADVANCING THE ADMINISTRATION OF JUSTICE IN THE CARIBBEAN

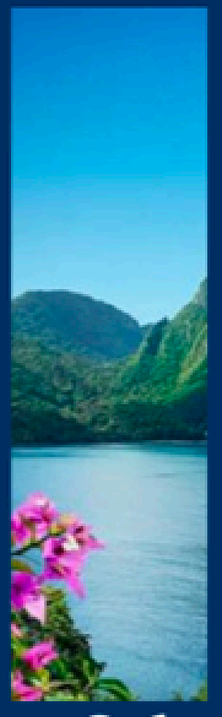
CAJO

IN THIS ISSUE

THEMES AND CONTENTS



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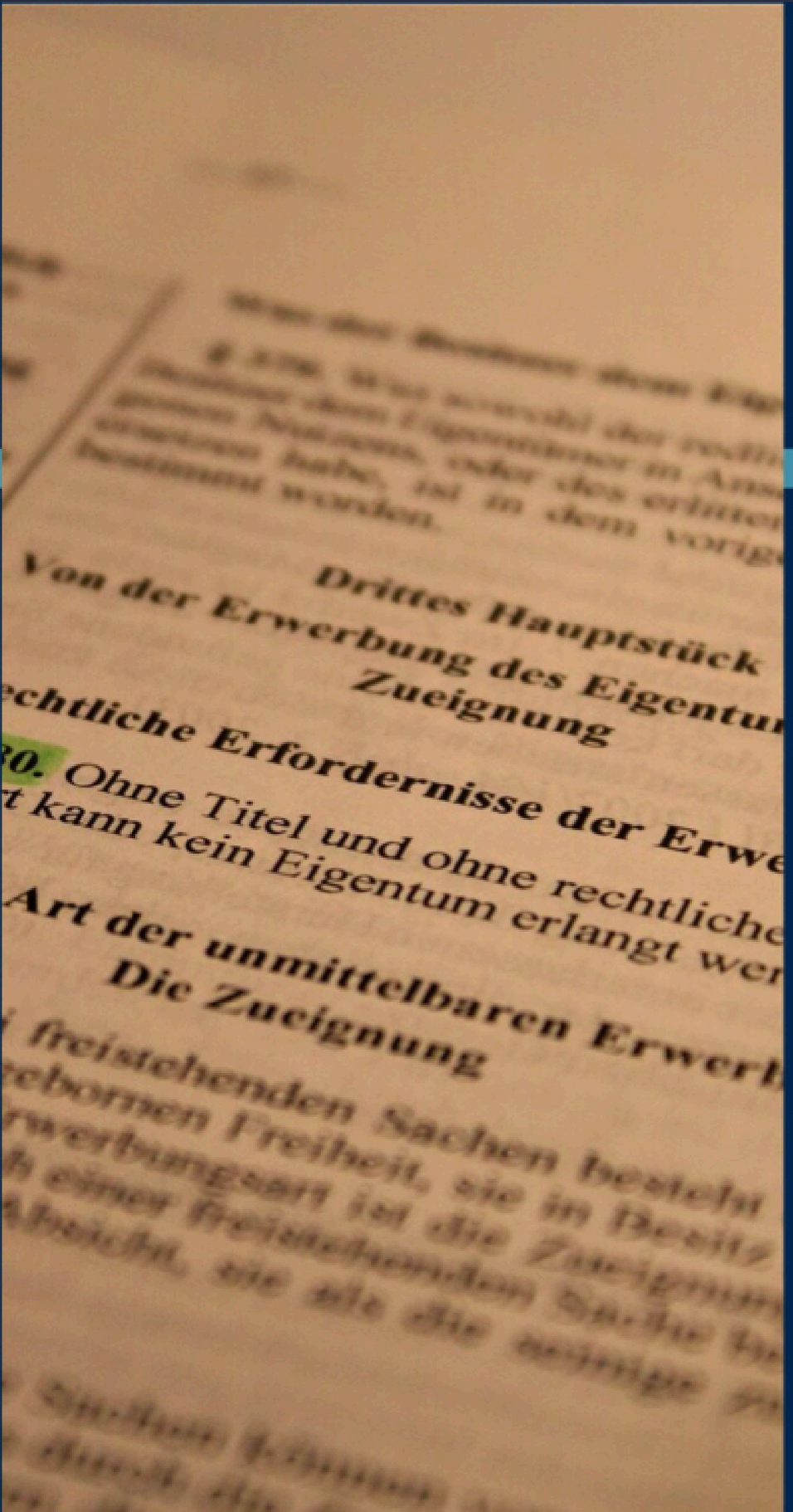
MESSAGE FROM THE MANAGEMENT COMMITTEE

The CAJO has had an eventful 2021 as we continue to pivot in the face of the various challenges brought on by the COVID-19 pandemic. Our 7th Biennial Conference would have occurred this year in the beautiful island of Saint Lucia. However, to ensure health, safety, and mindful of the resource issues which many judiciaries have faced, the CAJO's Management Committee opted to postpone the Conference to 2022. In light of this, the CAJO continued online workshops and judicial education sessions to ensure that judicial officers across the Caribbean region are brought together to engage timely and necessary topics.

From May — December, the CAJO hosted five virtual sessions: **Judgment Writing Refresher Courts, International Public and Private Law from the Civil Law Perspective, Judge Alone Trials: Views from the Bench, The Future of Caribbean Courts: A Service or a Place, and Social Media and Caribbean Courts: Risk or Opportunity**. Each of these sessions was quite successful and garnered significant interest and engagement. Additionally, the CAJO also undertook its own research to explore regional judicial officers' wellbeing as it relates to integrity and judicial performance. Relatedly, Issue 13 of CAJO News which was published in July 2021 focused on Wellbeing in the Caribbean judicial context; a meaningful Issue that played a key role in regional judiciaries' and judicial officers' focus on the area.

As we enter into 2022, the Management Committee wishes to thank all Heads of Judiciary, judicial officers, and stakeholders of the CAJO for continued support. We truly hope that we can meet in-person in 2022 and continue to explore, together, issues and topics relevant to our evolving judicial practice.



Perspectives from the Civil Law Jurisdiction

In this Section:

Exploring the Integration of Private International Law in the Caribbean

Public International Law in the Civil Law Jurisdiction

Exploring the Integration of Private International Law in the Caribbean

Rogier van den Heuvel

Rogier is an attorney who practiced in the Netherlands (Simmons & Simmons) until 2012, and has been based in Curaçao since. He is admitted to the bar of the Common Court of Justice of Aruba, Curaçao Sint Maarten, and of Bonaire, Sint Eustatius and Saba and to the bar of Amsterdam (The Netherlands).

I am a civil lawyer practicing in the Dutch Caribbean. Civil lawyers and common lawyers speak different languages. And as Grosswald writes: "Many flaws, especially in comparative legal analysis have resulted from an unfortunate tendency to overlook the profound and fundamental nature of those differences." (Vivian Grosswaldd Curran, Romantic Common Law, Enlightened Civil Law: Legal Uniformity and The Homogenization of the European Union, Columbia Journal of European Law, Vol. 7, 2001, p. 71)

The comparative law scholar Max Rheinstein once found that of 40 private international law decisions appearing in US casebooks, 32 involved a wrong application of foreign law (Ralf Michaels, Comparative Law and Private International Law, Elgar Encyclopedia of Private International Law Ch. C.23). I don't see why a similar investigation would turn out differently in other jurisdictions. If that means anything today, it could be that there is an 80% probability that what I would be saying about common law is incorrect, but I would probably be overestimating myself. It is likely more accurate to state that there is a 100% probability that at least 80% of what I am saying about common law (or any foreign law, for that matter) is incorrect. To make matters worse, these statistics work two ways. Common lawyers may well misinterpret 80% of what I would say about civil law incorrectly, even if I would not be incorrect.

Now, therefore, we could agree that whenever you would disagree with anything I say, it is probably just a mutual misunderstanding. However, I could probably only hold the civil lawyers among you to that agreement. To hold a common lawyer to it, would require adequate consideration. Therefore, I decided that all I should ask from the audience is some consideration.

I wish to share with you some thoughts on integration of common law and civil law, more specifically in the Caribbean through the Draft OHADAC Model Law relating to private international law. Throughout history, integration of civil law and common law has proven challenging, but we have done it before and we've been doing it for over a thousand years.

States integrate because it brings peace and socio-economic benefits to their inhabitants. From that point of view one can hardly be against it. The more states integrate, the more they need their laws to harmonize or even unify. Integration of laws therefore is only yet another step in the integration of States, which means that it requires that politicians establish that the benefits of integration of laws outweigh the costs thereof. The costs however, may be considerable, because in the extreme case it could mean doing away with parts of a well-established legal tradition, with legal literature, established jurisprudence or case law, and having to start over. Needless to say, integration is a gradual process.

In this paper I will have shared with you that we have been integrating legal systems, even private international law, for over a thousand years, since Roman law. That part of my discourse may be a symbolic gesture, but symbolic gestures are important to hold on to when things become challenging, and challenging integration certainly is, which is why it needs the commitment and persistence of not merely lawyers, but also politicians to succeed.

I will remark upon some challenges of integration of laws based on the differences between civil and common law. I will set out that in my view the one real safeguard of successful integration of laws is ensuring the uniform application thereof, and why I fear that that is the biggest challenge to overcome with the OHADAC Model law. If examples and remarks that I give along the way would not be entirely representative or even material, I hope you will find them, at least, thought provoking.

INTEGRATION OF PRIVATE INTERNATIONAL LAW HAS BEEN AROUND FOR OVER 100 YEARS

A very concise introduction to civil law for common lawyers would be to say, as my Leiden Professor Zwalve put it, that civil codes are mere extracts in the language of the ordinary people, of Justinian's Corpus Juris Civilis, or the Justinian Code.

Justinian's laws lived a rather short first life. His Codex dates from the year 529 AD and in 568 the Western Roman civilization ended after the Romans where essentially defeated by Germanic tribes, sending Europe into the dark ages and degenerating what remained of the Codex to barbarized versions.

I am, of course, still mentioning the Justinian Code in this discourse of private international law, because there was an important part of the Code that had been lost during the Middle Ages. This part was called the Digests, which were the selected and condensed ancient legal commentaries that had been given force of law in the Code. These were rediscovered only in the eleventh century. And these digests (D.1.1.9) contained what I think is the oldest codification of a rule of private international law that we know of, by the scholar Gaius: "All people who are governed under laws and customs observe in part their own special law and in part a law common to all men." And of course, that which the Romans perceived as the law common to all men, was the law laid down in the Code. When lawyers in the 11th century noticed that this was the ancient way of looking at matters, they figured that if this was the case before, it would certainly still be the case now. And that line of reasoning provided immediate legitimacy to Roman law in Western Europe, thanks therefore, to this one rule of private international law, that can be summarized as: If local custom would not apply, the matter is governed by Roman law.

It is my understanding that Roman law was also received again in Brittania in the very same way as in continental Europe, and at some point it was even well underway to becoming the dominant law, for Pollock and Maitland in their History of English Law write that "if English law survives at all, it may break into a hundred local customs, and if it does so, the ultimate triumph of Roman law is assured." (Pollock and Maitland, English Law before the Time of Edward I, Vol. I (1895), p. 87.)

I find too amusing to leave out of this contribution, that Roman law may not have triumphed in England, but has been much more successful in Scotland. I find that amusing, because the Roman empire stretched all the way around the Mediterranean Sea all the way North up to around Hadrian's wall. More northwards, however, the Romans did not wish to go, because, as the great English historian Edward Gibbon put it in The History of the Decline and Fall of the Roman Empire (E. Gibbon, The History of the Decline and Fall of the Roman Empire (1782), Vol. 1, Ch. 1, para. 6.):

"***The masters of the fairest and most wealthy climates of the globe turned with contempt from gloomy hills assailed by the winter tempest, from lakes concealed in a blue mist, and from cold and lonely heaths, over which the deer of the forest were chased by a troop of naked barbarians***."

Against that background, it is a small jewel of legal history that the only Western-European country where Justinian's Code is still a direct source of law, is Scotland, where the Romans never ruled but where 5.5 million people, to some extent, still live under the laws of Rome (W. Gordon, 'Roman Law in Scotland', in R. Evans-Jones, The Civil Law Tradition in Scotland (1995): "***Roman law is still referred to in twentieth century cases but it has not been decisive in any of those in which it has been cited. It has been used rather to support a decision in areas in which Roman law has already been used in the past*** […]"

Pages from the Justinian Code
source: https://lib.ugent.be/catalog/rug01:000791372

Perhaps, if things would have taken a slightly different turn, the world would not have had a common law system. It is my impression that, in summary, our paths only separated when the kings of England and the continental successors to the Roman Emperors took opposite approaches in solidifying their power over their realms. Where the continental rulers sought to do away with local custom as much as possible through a very strict interpretation thereof while letting their civil law fill in the gaps, the English rulers had their own circuit courts, that traveled around and created the law on the basis of the cases that they assessed, with their decisions having to be followed in subsequent cases (stare decisis) and laws of parliament being interpreted as strictly as possible, so as to minimize their influence (comp. Joseph Dainow, The Civil Law and the Common Law: some points of Comparison, The American Journal of Comparative Law, Vol. 15 (1967), pp. 419-435).

And because of this, perhaps even random course of events, in our Caribbean societies we have these two fundamentally different systems of law, and in some jurisdictions even a mix thereof.


Hadrian's Wall

PRIVATE INTERNATIONAL LAW IN CIVIL LAW vs PRIVATE INTERNATIONAL LAW IN COMMON LAW

Despite their common ancient roots, civil law systems based on law and common law systems, based on precedent, are fundamentally different. The legal literature is different. The legal education is different, research is different. In civil law legal commentaries used in research and practice are systematic expositions about broad legal principles. On the other hand, works of common law scholars that I am familiar with are "cases and materials", in which individual points are progressively established in a series of judicial decisions. And how differently judgments are drafted.

Nevertheless, in civil law systems, at least in the ones that I am familiar with, there is surely a general practice to cite legal cases. And while indeed the courts in civil law systems are not strictly bound by previous decisions or even higher courts' judgments, no lower court judge is intent on being overturned in appeal for misapplying higher court rulings. Higher court judgments, especially supreme court rulings, have authority that only grows once a certain point is becoming more consistently decided in the same way. On the other hand, common law systems, originally based on precedent and stare decisis, have been seeing increased codification. And while in the common law tradition equity can set aside a precedent if its consequences are unduly harsh, the laws of, for example, the various countries in the Dutch Kingdom, also in the Caribbean, provide that a legal provision is unenforceable if that would be unacceptable by the standards of reasonability or equitability. So, yes, they are two fundamentally different systems, but they have grown slightly more understanding of each other.

Rules of private international law in the civil law system have traditionally been seen as value neutral rules, identifying the applicable law and the international jurisdiction, based on the closest connection to the matter at hand. Values and policies underlying the different national laws from which to choose were traditionally ignored. As a correction mechanism, there was only the emergency brake of the public policy, meaning that a court would only refuse to apply a rule of the otherwise applicable foreign legal system if that were contrary to the public policy of its own jurisdiction.

The private international law of the common law system, more based on ideas of sovereignty, seems to have understood earlier than the civil law systems, that private law also plays a role in effecting state policy objectives and in influencing human behaviour (Laura Carballo Piñeiro and Xandra Kramer, The Role of Private International Law in Contemporary Society, ELR 2014, No. 3). The "better law approach" in which the court would apply from concurring legal systems the law that gives the most desired socio-economic outcome, is in its origin the invention of Robert A. Leflar, a common lawyer.

Under the influence of these kinds of developments in common law countries, the civil law private international law systems opened up more towards the needs of society; they became more socialized. As such they started to allow for party autonomy such as a choice of law and forum in voluntary matters. And inspired by the governmental interest analysis developed by Currie (another common lawyer), the substantive law to which a conflict of laws rule directs, became of more importance. This led to protective conflict rules in legal relationships that included unequal parties, such as consumer and labor agreements, and to the applicability of "overriding mandatory provisions" in civil law jurisdictions. The Rome Convention on the law applicable to contractual obligations (1980) is an example of integration of common and civil law private international law. that also applies in the Dutch Caribbean Islands, and contains examples of all these phenomena.

And sometimes, in civil law the better law approach is even followed. For example, the Hague Convention on the law applicable to traffic accidents (that also applies on the Dutch Caribbean Islands), allows injured parties in traffic accidents three shots at a direct action against the liable party's insurer, since apparently the contracting States consider the law that offers a direct action the better law. This is an interesting example because no common law states are a party to this convention.

INTEGRATION OF LAWS - POLITICAL CHALLENGES AND A GRADUAL PROCESS AT BEST

Talking about integration of laws, one must be aware that integration of civil law and common law systems has shown not to be a quick and easy process. In 2018 the Hague Conference on Private International Law celebrated its 125th anniversary with a conference themed "Ways Forward: Challenges and opportunities in an increasingly connected world". The below picture could look like a sheet at a presentation delivered there.

They are, however, words of Arthur Kuhn in the Columbia Law Review of 1912 (A. Kuhn, Doctrines of private international law in England and America contrasted with those of Continental Europe, Columbia Law Review, Vol. 12, No. 1, Jan. (1912), pp. 44-57). Kuhn had just criticized the lack of common law countries' attendance to the Hague Conference on Private International Law in 1911, who blamed their absence on the "peculiarities" of their laws, and he had gotten unanimous approval for a motion at the Heidelberg Conference "***that the Anglo-American and Continental European Systems of Private International Law should through mutual concessions, aim at a closer approach toward uniformity.***"

The Hague Conference has of course been a huge propellor of unification for the last 128 years, it still is, but its most successful conventions have nothing to do with unification of private international law in the strict sense, but rather with facilitation and co-operation in processes (HCCH 125, session 7, https://www.youtube.com/watch?v=q7AgRez9Tlw at 11:22:00.). One can certainly tell by that how difficult it is to get to agree on unification of private international law. Politically, States must really feel the need to do it and see how benefits outweigh the costs of doing things differently. And then it is a tediously slow process still.

"In an age where physical barriers between nations have been broken down by ever more efficient means of transportation and inter-communication and when guarantees for permanent friendship and peace are daily multiplying, a closer bond of interest in the administration of private justice, though long delayed, would seem inevitable."

INTEGRATION OF PRIVATE INTERNATIONAL LAW IN THE CARIBBEAN: THE OHADAC MODEL LAW

I would like to take a step ahead to our present local circumstances and talk about the idea of integration of private international law in the Caribbean by drawing your attention to the effort made by the Caribbean Organization for the Harmonization of Business Law in the Caribbean (OHADAC) to present a Draft Model Law on private international law. The purpose of the OHADAC project is to advance legal and judicial integration of the Caribbean in order to ensure that a harmonised legal framework applies to the activities of Caribbean businesses. The OHADAC Model Law seeks to contribute to harmonization or even unification of private international law, in order to facilitate cross border relationships, improve predictability and remove dead weight loss.

The Caribbean integration seems rather complex to me, with various organizations such as ACS, CARICOM and OECS co-existing and with various Caribbean jurisdictions maintaining strong or somewhat looser constitutional ties with their post-colonial partners in Europe and with even the European Union and its highly integrated legal system having a presence.

The Draft Model Law's motto is "to promote a debate". Let me contribute a few points to that debate.

The drafters have preferred proposing a model law over a treaty, apparently considering that all minds and the level of integration realized so far are not yet ripe for a unification by means of a treaty and that the quicker way to get things moving would be through a model law. That is probably a realistic approach. The model law therefore is intended as a legislative text recommended to be adopted in whole in part or gradually in national legislations. That should lead to an increasing approximation of the various domestic Caribbean private international rules at possibly a faster pace compared to when states would try to achieve this through treaties.

The Model Law has certainly seen some quick results in that sense, for I understand that about 80% of the text of the Model Law can already be found in the Dominican Republic's private International Law Act of 15 October 2014. Noting that the Model Law presentation dates back to April 2014, that is a lightning-fast adoption.

But perhaps the drafters of the Model Law have simply proven themselves to be incredibly good salesmen, that applied a rather aggressive sales technique of describing, in the Model Law Presentation, the Dominican rules on international jurisdiction as a "rather confused and misleading picture", so inciting the Dominican legislator's immediate desire for an all-encompassing regulation. In any event, we should be grateful for this early adopter, for it will allow us to learn many things about the practical application of the Model Law. I do not know how many other states already followed suit. Perhaps we will learn that from the audience today.

I wish to acknowledge that the drafters have observed many international developments in the codification and integration of private international law, of which I mention the far-reaching integration of private international law in the European Union. This is of course a wise decision, because in my opinion the European legal integration is a success, regardless Brexit, and regardless the observations made by some that is has become so big and diverse that it is falling apart. Regardless those challenges, its integration has extended well beyond the original idea of creating just a common market. The drafters have also investigated how domestic private international law survives in European Union Member States in those areas that are not (yet) Unified. Perhaps that can be an inspiration for addressing the multiple loyalties that some Caribbean jurisdictions, including my own, must observe as a constitutional matter.

The code is ambitious in the sense that it aims to regulate all fields of private international law: Caribbean jurisdiction, determination of applicable law (except in certain cases) and the recognition and enforcement of foreign decisions. Methodically, the Model Law is predominantly a modern civilist regulation of private international law, so it will likely feel more natural to civil law jurisdictions than to common law jurisdictions.

Overall, comparing it to the private international law in my jurisdiction, the Model Law would bring about differences, but not a fundamental change in the way we look at private international law. Substantively, I think that is because of the application of the domicile principle rather than the nationality principle, and because of the many European law influences that have found their way into our legal system. The domicile principle, of course, means that in private international law, a person's domicile is the connecting factor to determine applicable law in matters of personal or family law. If the nationality principle applies, the connecting factor is of course the person's nationality.

The core of the Model Law is of course the determination of the applicable law. As far as that is concerned, oftentimes the drafters' choice of the connecting factor that determines applicable law is either obvious, or, if other choices were conceivable, not worse than the alternatives. In that case, the benefit is in the legal certainty of having made the choice and having laid it down in a written rule of law — which Dutch Caribbean private international law often lacks.

Some of the bigger changes to our current private international law would be in the field of jurisdiction and recognition and enforcement. I will give some examples:

Article 9 (under: grounds of jurisdiction) of the Model Law provides:
"***The Caribbean courts shall have sole jurisdiction for disputes whose subject matter is: i) rights in rem in immovable property and tenancies of immovable property when the property is located in Caribbean territory; […] vii) provisional and conservatory measures which must be enforced in the Caribbean***; […]"

Article 74 (under recognition and enforcement of foreign judgments) of the Model Law provides:
"***Foreign judgments shall not be recognised: […] iii) if they conflict with the provisions established in article 9 of the present Law or if the jurisdiction of the foreign court was not based on one of the grounds provided for in Chapter II of this Law or on an equivalent reasonable connection***;"

Pursuant to these articles the Caribbean court would claim exclusive jurisdiction and refuse recognition of judgments of other States that are in breach of that exclusive jurisdiction — even if that other state would not have committed itself to that exclusive jurisdiction in any way. While the rule is inspired by the European rule that applies between all member states, at this point, the Model Law takes a unilateral approach. In the Dutch and Dutch Caribbean legal tradition the rules of recognition are a lot milder than the Model Law. According to the Dutch Supreme Court, that also has jurisdiction in the Dutch Caribbean, a foreign judgment would be recognized if four criteria are met:

(1) the foreign court would have accepted jurisdiction on an internationally broadly accepted ground;
(2) elementary rules of due process were followed,
(3) the recognition would not be in contravention or our public policy and
(4) the recognition would not be contrary to an older domestic judgment between the same parties.
(Dutch Supreme Court, 26 September 2014, ECLI:NL:HR:2014:2838, (Gazprombank))

I do not think that all of the substance of article 9 would touch upon Dutch Caribbean public policy. So the provision on sole jurisdiction and the consequences thereof for recognition of foreign state judgments would certainly take some getting used to on the Dutch Caribbean islands.

Further, article 14 (under grounds of jurisdiction) of the Model Law provides:
"***Article 14. Property law.***

1. Without prejudice to the jurisdiction established in the previous articles, the Caribbean courts have jurisdiction in the following matters: […] i) contractual obligations arising or to be performed in the Caribbean;"

The Caribbean courts can assume jurisdiction in matters concerning contractual obligations arising or to be performed in the Caribbean. First let me point out: that is valid ground for jurisdiction that is easily overlooked in the Dutch Caribbean daily practice for a particular reason. The Dutch Caribbean courts are free to develop their own rules on international jurisdiction, and I am aware of cases in which they have accepted the place of performance of a contract to be ground for jurisdiction, but many practitioners still take a more limited view. Pursuant to a Dutch Supreme Court ruling of 1915, they assess whether law attributes relative jurisdiction to the court, and then infer international jurisdiction from that. A bottom-up approach, that is. But our provisions on relative jurisdiction do not mention the place of performance of a contractual obligation as a ground for relative jurisdiction. So, these practitioners will not consider it. In the meantime, however, as I mentioned, the modern Dutch Caribbean theory is that all it takes for the court to assume international jurisdiction is an internationally accepted ground for jurisdiction. And the place of performance of a contractual obligation is an internationally accepted ground for jurisdiction. It is not for nothing that it was included in the Model Law; it features in various international instruments (see also R.F. van den Heuvel, Bij een honderdste verjaardag, over rechtsmacht van de burgerlijke rechter in de Cariben op grond van de regel 'distributie is attributie', Caribisch Juristenblad (2016) 3, pp. 179-187.) So in this sense, the model law would certainly be an improvement for the Dutch Caribbean practice.

Article 14 does bear a risk though. According to the explanatory notes, the place of performance of a contractual obligation can be interpreted as the subject matter of the contract, such as, the provision of a service. But the explanatory notes expressly leave open the possibility for a broader interpretation that would also include the obligation of payment. Again, this is inspired by European law, but in European law the broader interpretation is not leading. I do not think that this broader interpretation would be advisable since in most legal systems, payment is an obligation that must be performed at the address of the claimant. So in its broad interpretation, this jurisdictional rule would likely attribute jurisdiction to the home court of the claimant in almost any commercial case as the place where the payment obligation has to be fulfilled. From a Dutch Caribbean perspective, that would probably be exorbitant jurisdiction and would lead to problems when trying to obtain recognition of that judgment abroad.

My most important observation, or concern if you will, is the following. I appreciate that the Model Law instrument was chosen in order to facilitate quick and easy adoption and given the case of the Dominican Republic there is no arguing with that. But if the Model Law pursues true integration, it would require a uniform interpretation and by far the best — if not the only way to achieve that would be through appointing one dedicated court to interpret the law.

Let us take as an example the Vienna Convention on the International Sale of Goods (1980); the CISG. The CISG provides substantive rules on the international sale of goods in both civil law and common law jurisdictions, and having been ratified by almost a 100 countries it is generally perceived to be a successful integration of laws.

Nevertheless, if I am a little more pessimistic, the CISG is still often excluded from contracts. Sometimes that is just a case of cold feet, which after so many years of existence is not a good sign, but legal practitioners who are familiar with the CISG and still exclude it, have done so because of its lack of uniform application. That is the kind of legal advice that law firms even put on their websites for free.

Article 7 if the CISG provides for autonomous interpretation:
1. In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.
2. Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is ased or, in the absence of such principles, in conformity with the law applicable by virtue of the rule of private international law.

According to Opinion no. 3 of the Advisory Council (http://www.cisg.law.pace.edu/cisg/CISG-AC-op3.html) there is "no question of a gap in the CISG, and no grounds for recourse to non-uniform domestic law." Yet despite the requirement of autonomous interpretation, empirical evidence shows that courts and parties are (i) reluctant to review foreign cases in which the treaty was interpreted, and (ii) have difficulty in in stepping away from the domestic interpretations that they are used to. See for example Peter Klik, the OHADAC Principles on International Commercial Contracts: A European perspective (2016), http://www.ohadac.com/bibliographie/51/the-ohadac-principles-on-international-commercial-contracts-a-european-perspective.html.

Various authors (e.g. Klik, referenced work, p. 3 and Whittington, referenced by Larry A. DiMatteo, Case Law Precedent and Legal Writing in A. Janssen and O. Meyer (ed.) CISG Methodology (2009), pp. 113-114) would counter this by observing that the internet allows us more access to international CISG rulings, and that this would compensate the void of not having a dedicated CISG court that oversees its application throughout the world. I think however, that this is settling for less.

There is no doubt in my mind that the European integration would not have been nearly where it is today, if there would not have been a European Court of Justice, and instead, domestic courts of European Member States would have had to work with, for example, a database of European domestic judgments to determine the interpretation and application of European law, precisely since the judgments in that database would suffer from domestic preconceptions.

My opinion is that, if we choose to integrate Caribbean private international law, we would need a dedicated court to interpret it and we should think about how that can be achieved, bearing in mind the limitations inherent to a model law. For lawyers, even with a dedicated court, legal integration can be hard enough as it is even if our legal systems are no longer entirely devoid of mutual understanding. This does not only apply to common law jurisdictions having to learn to work with legal texts drafted in a civil law style. In Europe almost 30 Member States sometimes struggle with the interpretation of the autonomous European law, and most of them are not common law states. But few could have better expressed troubles that legal integration can bring about than the English judge Lord Denning, in his, I gather, famous opinion on the EC Treaty in the case Bulmer v. Bollinger ([1974] 3 WLR 2002):

"***The draftsmen of our statutes have striven to express themselves with the utmost exactness. They have tried to foresee all possible circumstances that may arise and to provide for them. They have sacrificed style and simplicity. They have foregone brevity. They have become long and involved. In consequence, the judges have followed suit. They interpret a statute as applying only to the circumstances covered by the very words. They give them a literal interpretation. If the words of the statute do not cover a new situation - which was not foreseen - the judges hold that they have no power to fill the gap. […] How different is this Treaty? It lays down general principle. It expresses its aims and purposes. All in sentences of moderate length and commendable style. But it lacks precision. It uses words without defining what they mean. An English lawyer would look for an interpretation clause but he would look in vain. There is none! […] It is the European way. Seeing these differences, what are the English courts to do?***"

CONCLUSION

My conclusions, therefore, are:

1. although challenging, history shows that civil law and common law can be integrated if there is will and persistence. This also applies to private international law.

2. But if there is the will to integrate, we will have to think about whether we wish to involve an international court in safeguarding its uniform interpretation and whether that is at all possible with an instrument such as a Model Law. Or do we wish to sacrifice uniformity and effectiveness of its application in favor of easier adoption?

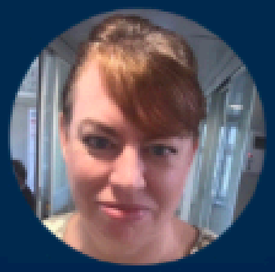
And with these final points for consideration, I thank you for your attention.

On Saturday 3rd July 2021, from 10:00 a.m. — 12:30 p.m., the CAJO hosted the second of its 2021 programming as part of its virtual conference year. International Public and Private Law from the Civil Law Perspective: Relevance for Caribbean Judicial Practice was facilitated by Professor Flora Goudappel, Dean, Faculty of Law, University of Curacao, Mr Rogier van den Heuvel, Attorney at Law, Justice Jacob Wit, Judge, Caribbean Court of Justice, and Justice Mauritsz de Kort, Vice-President, Joint Court of Justice.

The videos below are Rogier van den Heuvel's presentation at the webinar and the subsequent commentary.

Public International Law from the Civil and Common Law Perspectives

Prof Flora Goudappel



Flora Goudappel is currently dean of the School of Law of the University of Curaçao dr Moises da Costa Gomez and full professor of European Union law. She specializes in EU citizenship law, EU overseas territories law, and international and European migration law.

Civil law and common law traditionally have a different approach to the application of public international law, especially treaties, in the domestic legal system. A crucial role in this is often assigned to courts. This paper explores the way both civil law and common law have developed the way in which public international law is applied, and the role of courts in these processes, focusing on Caribbean cases.

A THEORETICAL BACKGROUND

Based on the theory of Hans Kelsen (H. Kelsen, Das Problem der Souveränität und die Theorie des Völkerrechts, 1920), there are two ways in which public international law can have effect in a domestic legal system: monism and dualism. In briet, in a monist system, domestic and public international law are in the same sphere. In a dualist system, the domestic system and public international law are in separate spheres. Studying this in more detail, monism is predominant in civil law systems. Monism means an automatic incorporation of public international law into the domestic legal system. A constitution or other higher type of legislation allows the incorporation, thus indirectly infringing on the sovereignty of the state, although willfully doing so. This means that, when courts apply treaty provisions, they more or less codify what already is valid legislation. Yet, there do not appear to exist any 'hardcore' monist systems: there are different shades of moderate monism in the modern civil law systems. The Dutch Constitution, for instance, in Artt. 97 and 98, states that all provisions of treaties have direct effect in the domestic legal system when a court constitutes it. Under dualism, a state is not bound by public international law in its domestic system unless it specifically recognizes it (Torben Spaak, 'Kelsen on Monism and Dualism', in: Marko Novakovic, Basic Concepts of Public International Law: Monism and Dualism, 2013).

Incorporation in specific national legislation is needed for public international law to have force in the domestic legal system. This is the system that common law systems usually have, with the United Kingdom as the relatively most dominant example, as is shown in for instance the European Communities Act 1972, which was deemed necessary for the European Communities Treaties to be part of the UK legal system, despite the fact that European law itself already contained this effect (Van Gend & Loos case, see also Robert Schütze, European Union Law, third edition, 2021, chapter 5).

MOVING TOWARDS EACH OTHER

The observations above that there are no strict monist or dualist legal systems when it comes to public international law, can be analysed as that the two systems are moving towards each other. This is mostly due to human rights obligations. The developments in dualist systems have been described in detail by David M. Aaron ('Reconsidering Dualism: The Caribbean Court of Justice and the Growing Influence of Unincorporated Treaties in Domestic Law', in: The Law and Practice of International Courts and Tribunals 6 (2007) 233-268). He highlights the international obligations following from the ratification of a treaty and the fact that courts play an important role in applying treaty provisions in practice, even when they have not been implemented in the domestic legal system. The latter is sometimes even refered to as 'friendliness to international law' (Luzius Wildhaber & Stephan Breitenmoser, 'The Relationship between Customary International Law and Municipal Law in Western European Countries', in: http://www.zaoerv.de , 1988) or as 'creeping monism' (Melissa M. Waters, 'Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties', in: Columbia Law Review, April 2007).

Moreover, as Waters observes, for several human rights treaties, there is the option for an individual to take a matter to a specific international court, which will apply the treaty obligations whether or not domestic incorporation legislation exists.

The domestic courts will therefore, in general, not ignore the content of human rights treaties which the state has ratified. For monism, however, it is very difficult to find any 'hard core' monist system. There always appears to be some role for courts per treaty provision as laid down in law (Nick S. Efthymiou & Joke C. de Wit, 'The Role of Dutch Courts in the Protection of Fundamental Rights', in: Utrecht Law Review, March 2013).

These observations can only lead to the conclusion that monist and dualist systems, in practice, have moved towards each other. In both systems, the courts are involved in deciding in the application of specific treaty provisions in a case, and therefore in the domestic legal system. Yet, the starting points differ. In a dualist system, there is legitimate expectation that a ratified treaty has effect in domestic cases. In a monist system, the court is expected to constitute that a specific provision has direct effect, not to create a non-existent direct effect.

CARIBBEAN CASES

The effect of public international law on the different types of domestic legal systems was discussed in two important cases of the Caribbean Court of Justice (hereafter: CCJ): the Joseph and Boyd case (West Indian Reports/Volume 69 /Attorney-General and Others v Joseph (Jeffrey) and Boyce (Lennox) - (2006) 69 WIR 104) and the Myrie case (Shanique Myrie and the Government of Jamaica versus the Government of Barbados, [2013] CCJ 3 (OJ). Both cases contain aspects in which the CCJ had to make a decision concerning the application of treaty provisions in a dualist legal system. Not only did the CCJ decide on the matter, the judgments of the judges reflect considerations concerning the way monist and dualist legal systems incorporate and apply treaty provisions.

In the Joseph and Boyd case, the CCJ held that:

That the ratification of a treaty or convention which was not incorporated into national law did not itself make processes pursued under that treaty or convention part and parcel of the national criminal justice system, even on a temporary basis; accordingly, such processes did not become part of 'due process' or 'the protection of the law' guaranteed by the Constitution.

The American Convention on Human Rights was ratified by Barbados, yet not incorporated in domestic law. The two respondents had, in brief, been condemned to death and wanted to refer to the American Convention in order to have the death sentence replaced by an order of life imprisonment. Especially Justice Wit discussed the issue of the effect of the relevant treaty and treaty provisions in detail. As Aaron points out, Justice Wit takes a rather radical view and asks for a more 'interpretive method' for dualist common law systems in the Caribbean, as these have written constitutions, unlike the United Kingdom, and as the state itself has already committed to the treaty.

The Myrie case concerned a Jamaican claimant who was detained at the airport of Barbados on the basis of provisions in the Revised Treaty of Chaguaramas of CARICOM. The question was whether the fact that a 2007 CARICOM Conference Decision was not incorporated into Barbados domestic law and would not even be binding, meant that it would not be applicable. The CCJ held that 'the efficacy of the entire CARICOM regime would be jeopardized' in case of a failure of a particular state to incorporate the Conference Decision. This is comparable to the direct effect of EU legislation in the legislative systems of the EU mentioned above (Wendy Grenade, 'New Dimensions of Regionalism in the Caribbean: An Analysis of the Shanique Myrie case', in: Debbie A. Mohammed & Nikolaos Karagiannis (eds), Caribbean Realities and Endogenous Sustainability, 2020, pp. 203-220). Although this case concerned a dualist legal system, the effects of the CARICOM legislation itself ensured that the Conference Decision had effect.

The question remains whether the outcome in these two cases would have been different in monist legal systems. For the Joseph and Boyd case, every monist system nowadays would have needed a form of court decision concerning the effect of the specific treaty provision. As the starting point would be different, any court decision would have had a comparable yet not similar outcome. In the Myrie case, in comparision to similar cases in the EU, the effect turns out to be independent of the domestic approach to public international law.

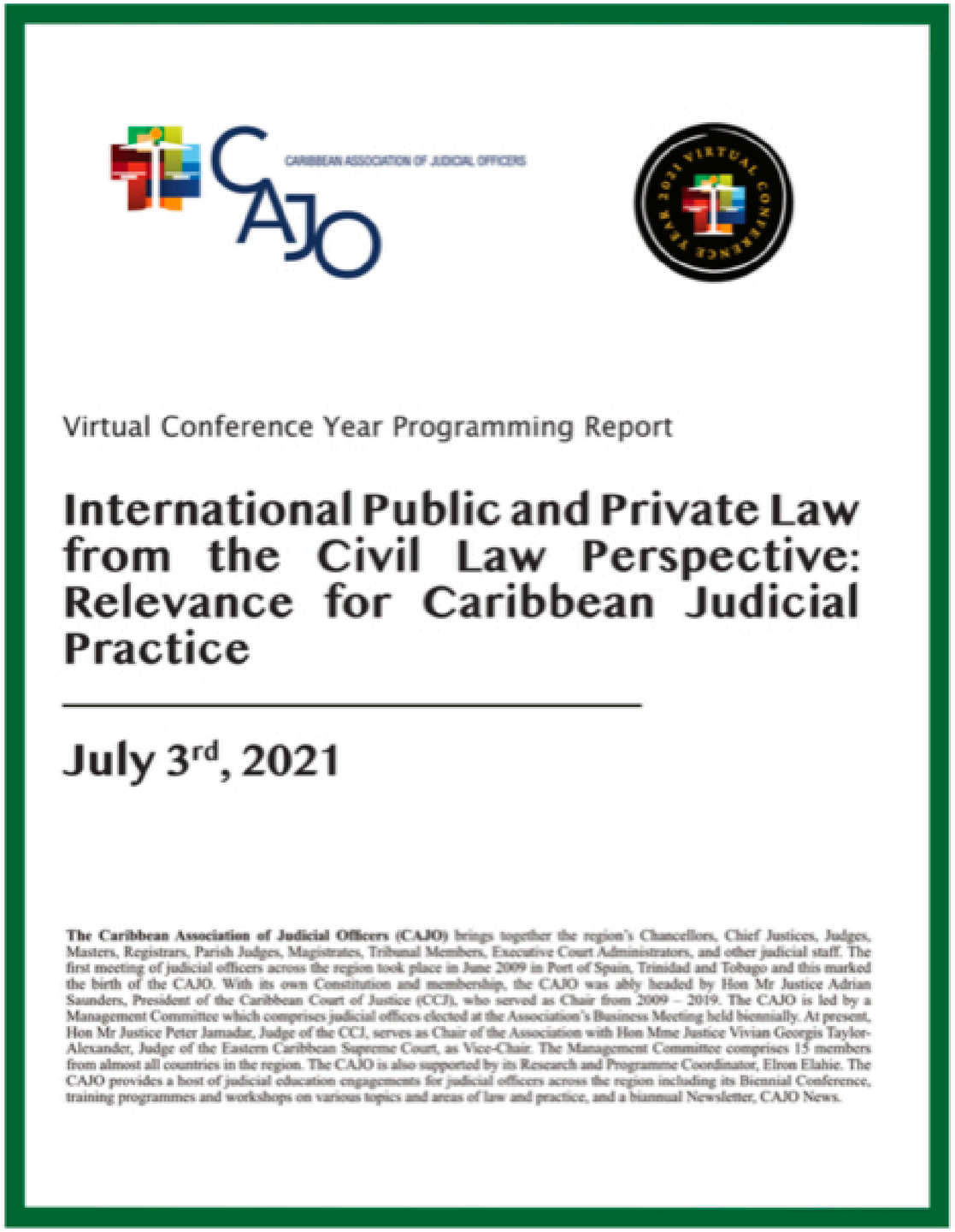
IN CONCLUSION

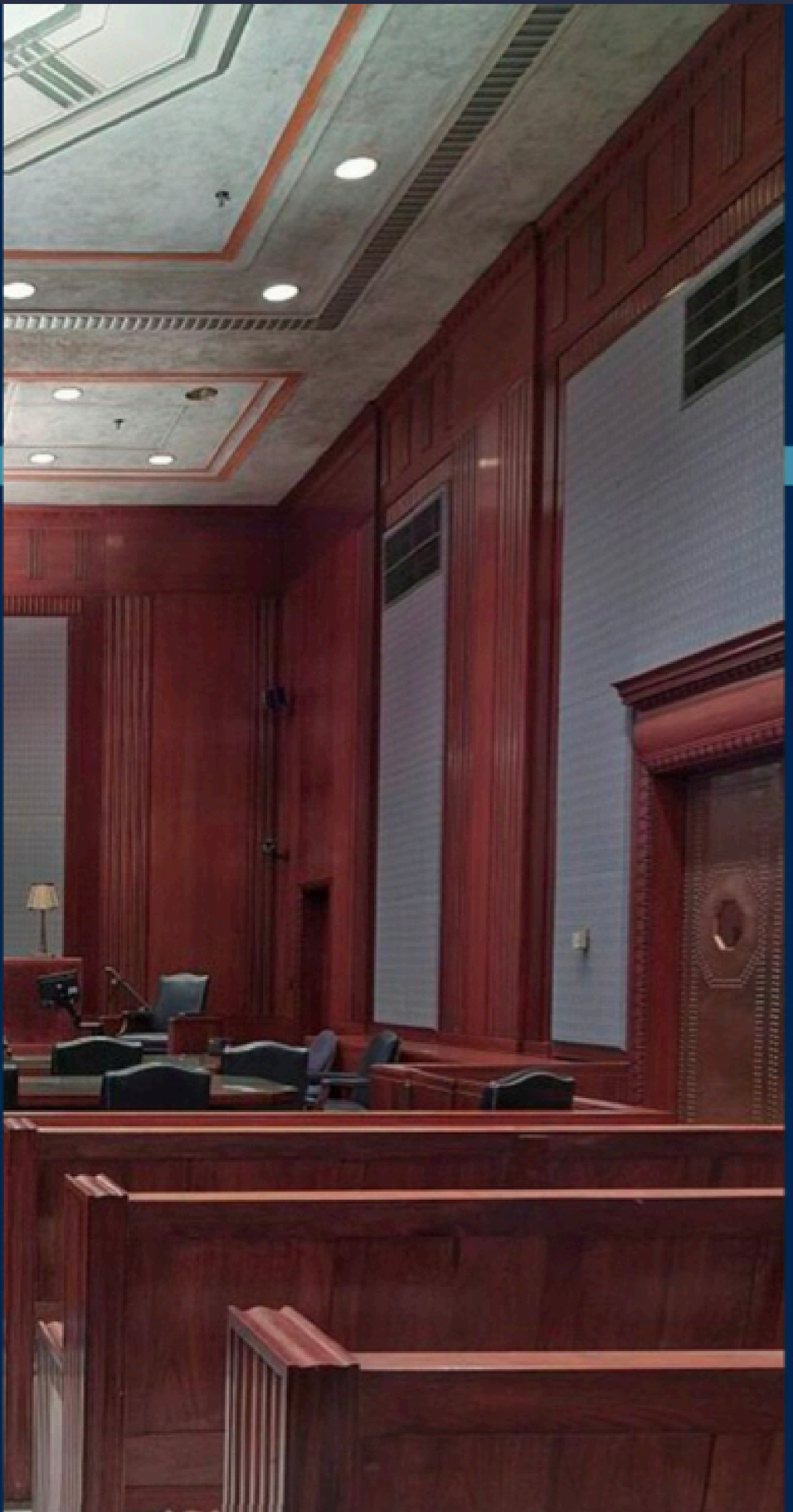
From the discussion above, two observations can be made in conclusion. Firstly, it can be noted that dualist and monist approaches to public international law have come closer to each other. Yet, although the outcomes may become more and more similar, the starting points are not. Outcomes may therefore differ in future cases. Secondly, when an individual can directly appeal to an international body on the basis of a treaty ratified by the state, he needs to be able to refer to the same treaty at the domestic level.

On Saturday 3rd July 2021, from 10:00 a.m. — 12:30 p.m., the CAJO hosted the second of its 2021 programming as part of its virtual conference year. International Public and Private Law from the Civil Law Perspective: Relevance for Caribbean Judicial Practice was facilitated by Professor Flora Goudappel, Dean, Faculty of Law, University of Curacao, Mr Rogier van den Heuvel, Attorney at Law, Justice Jacob Wit, Judge, Caribbean Court of Justice, and Justice Mauritsz de Kort, Vice-President, Joint Court of Justice.

The videos below are Professor Flora Goudappel's presentation at the webinar and the subsequent commentary.

To view the Webinar feedback report, click on the image below.





Judge Alone Trials : Views from the Bench

In this Section:

Recapping the Judge Alone Trials Webinar and Presentations

JUDGE ALONE TRIALS

VIEWS FROM THE BENCH

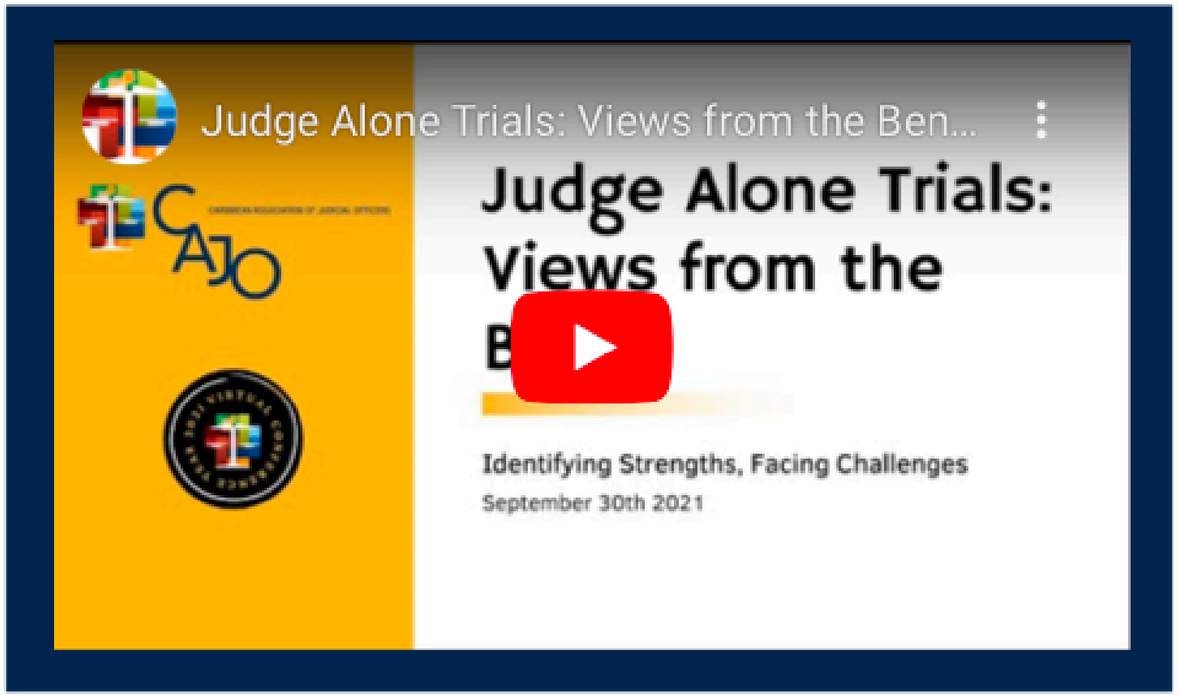
On Thursday 30th September, from 12:30 p.m. - 4:30 p.m. AST, the CAJO hosted the third of its 2021 programming as part of its virtual conference year. **Judge Alone Trials: Views from the Bench brought five presenters from across the Caribbean to share their views, insights, and practical tips on judge alone trials**.

The presenters were:
- Justice Jacob Wit, Judge, Caribbean Court of Justice
- Justice Vivene Harris, Judge, Jamaica
- Justice Carla Brown-Antoine, Judge, Trinidad and Tobago
- Justice Marlene Carter, Judge, Cayman Islands
- His Worship Juan Wolffe, Senior Magistrate, Bermuda

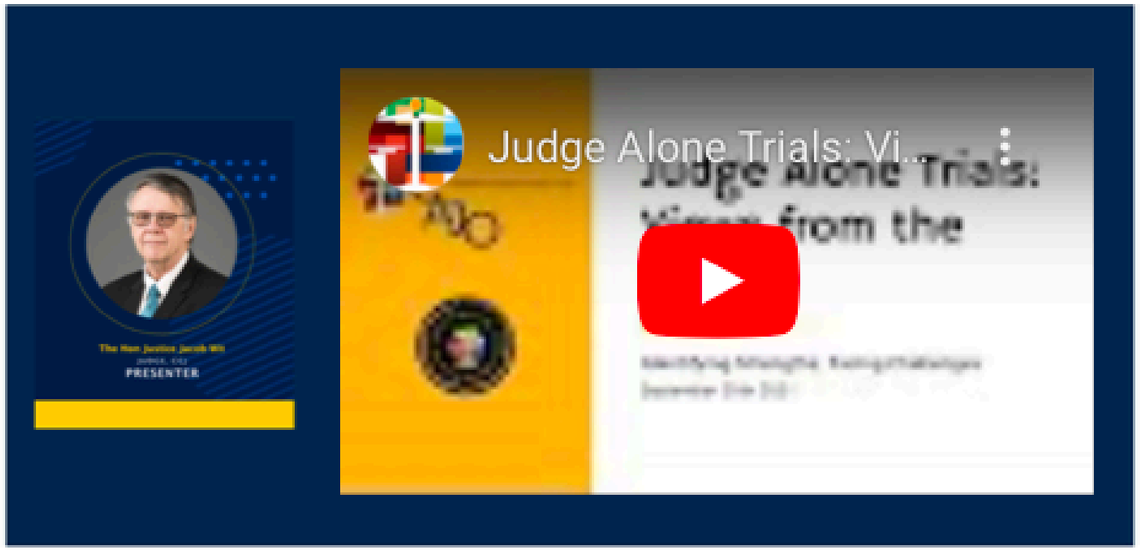
The session also included two commentary segments from the Honourable Chief Justice Bryan Sykes of Jamaica as well as the Honourable Chief Justice (Ag) Roxane George of Guyana. There were also two question and answer segments moderated by the Hon Chief Justices.

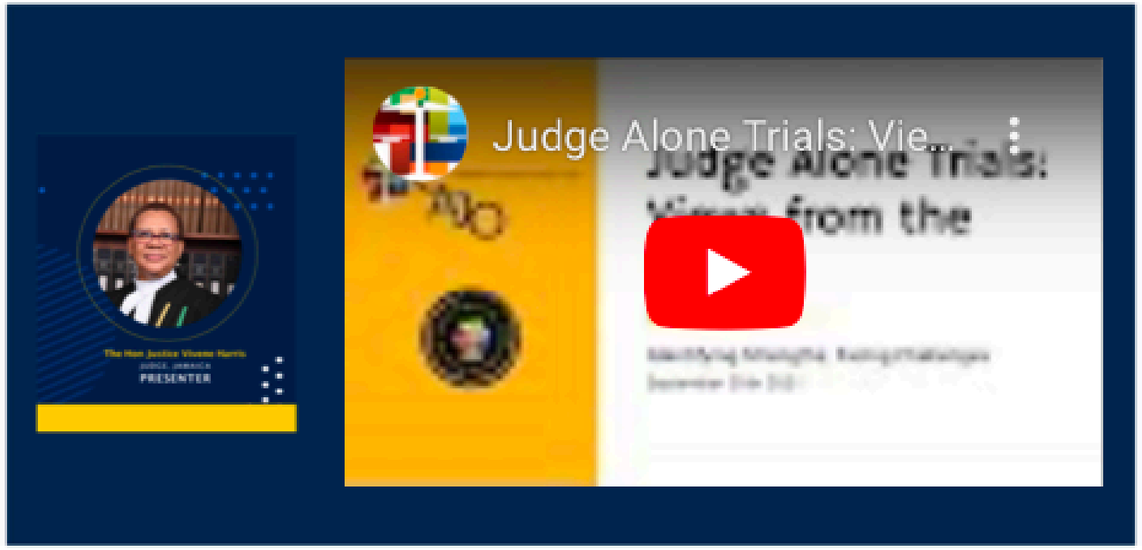
Over 100 participants joined the webinar and engaged with the presenters and moderators.

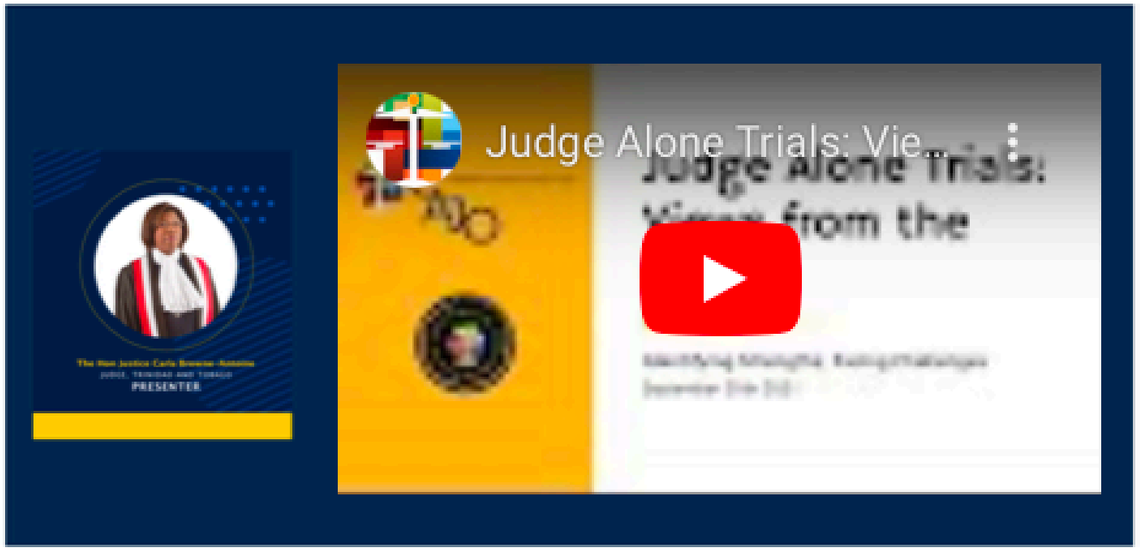
The video presentations and commentary from the webinar are shared below.

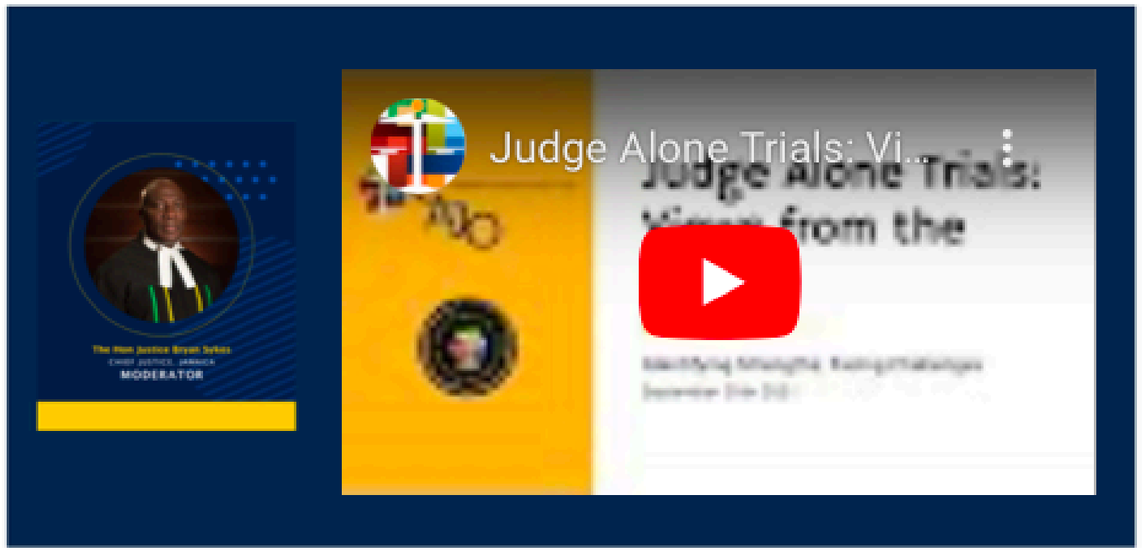


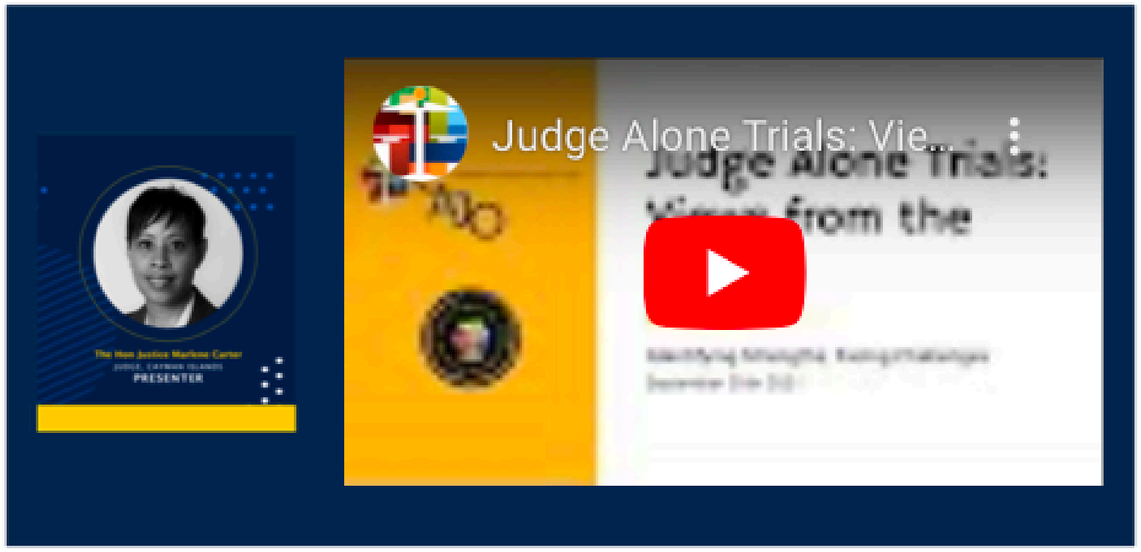
Judge Alone Trials: Views from the Bench - Introduction

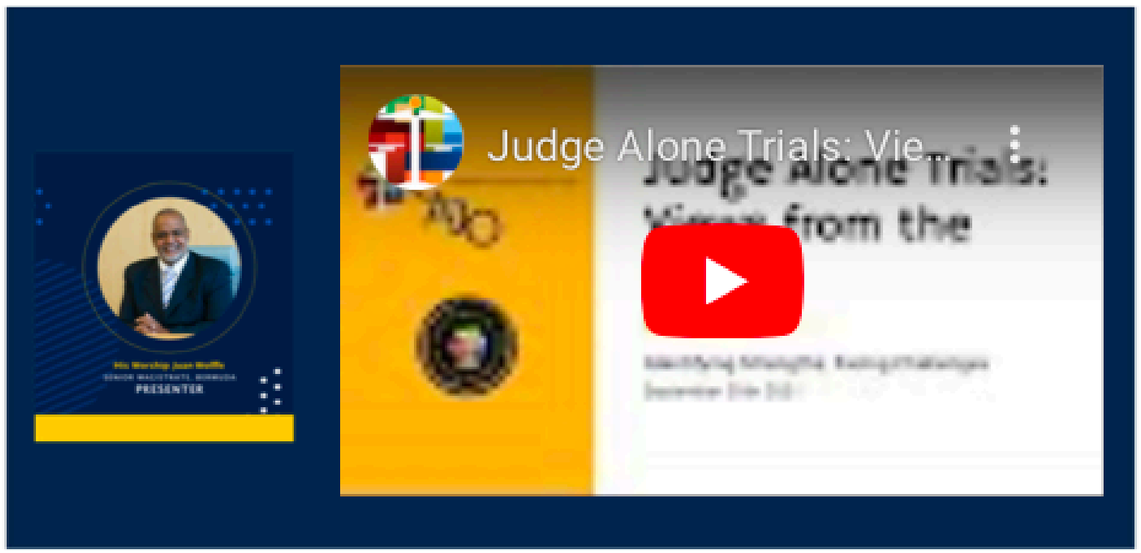


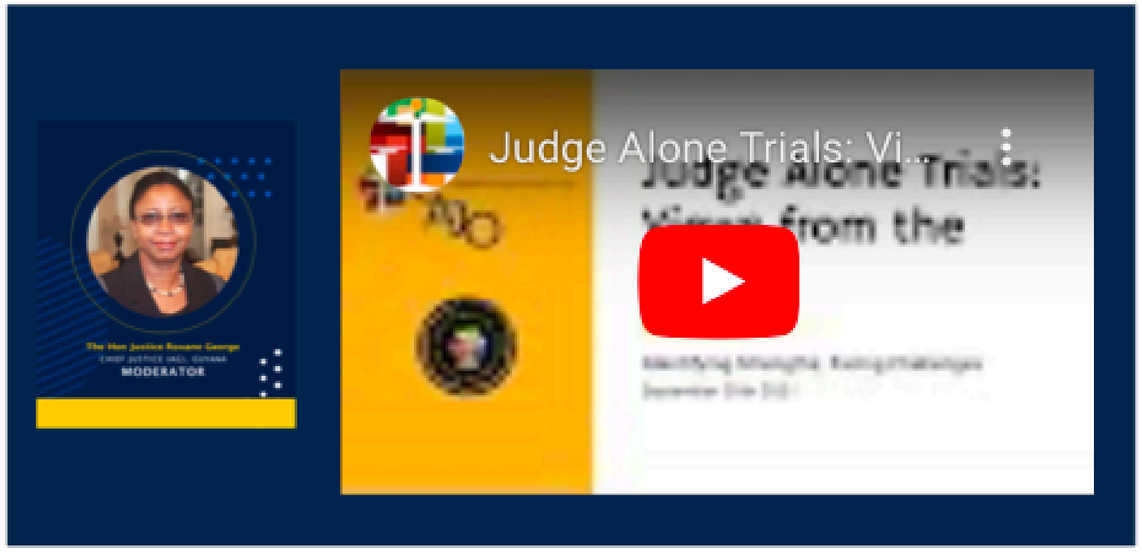












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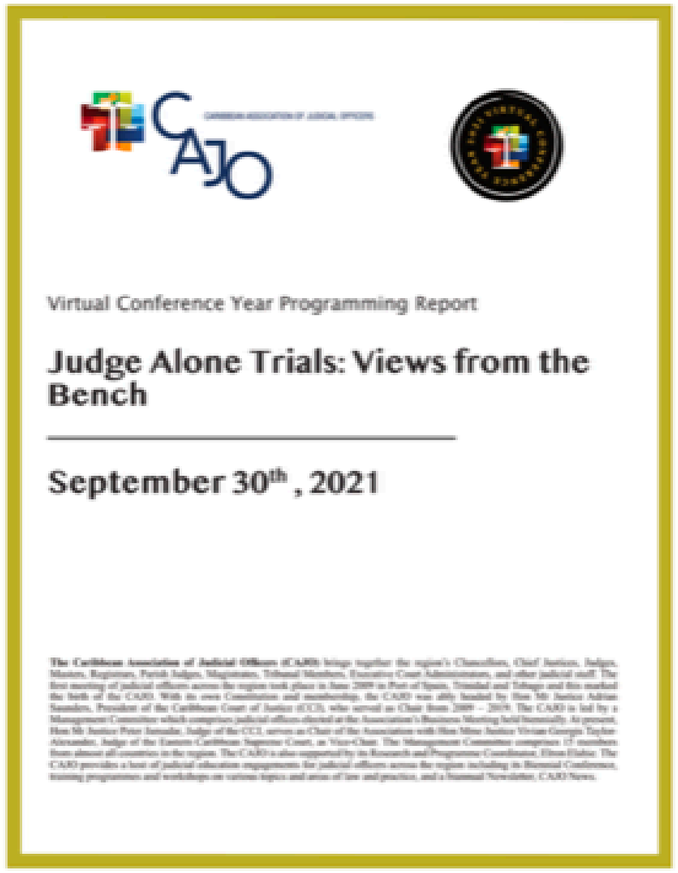
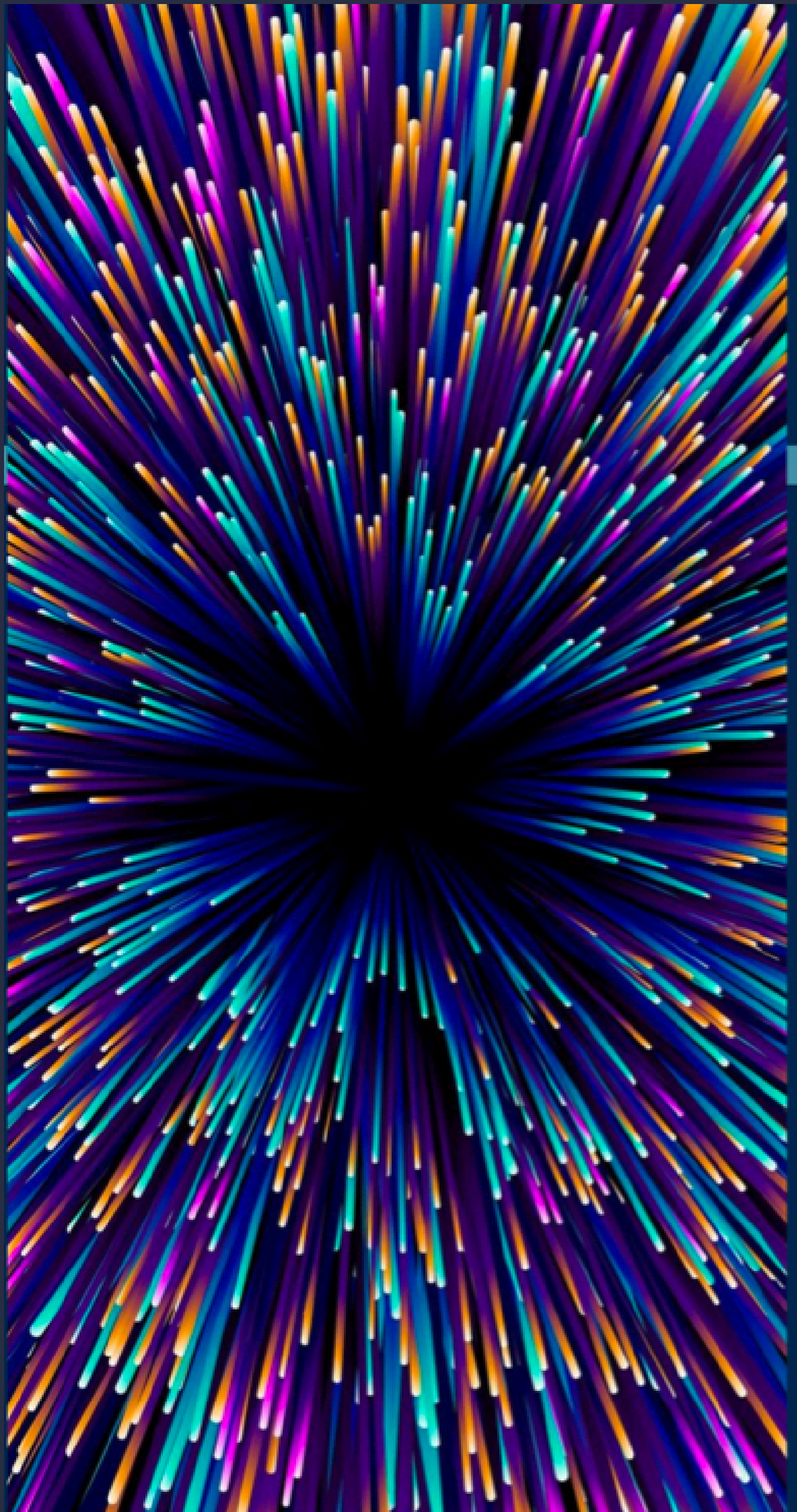


Virtual Conference Year Programming Report

Judge Alone Trials: Views from the Bench

September 30th , 2021

The Caribbean Association of Judicial Officers (CAJO) brings together the region's Chancellors, Chief Justices, Judges, Masters, Registrars, Parish Judges, Magistrates, Tribunal Members, Executive Court Administrators, and other judicial staff. The first meeting of judicial officers across the region took place in June 2009 in Port of Spain, Trinidad and Tobago and this marked the birth of the CAJO. With its own Constitution and membership, the CAJO was ably headed by Hon Mr Justice Adrian Saunders, President of the Caribbean Court of Justice (CCJ), who served as Chair from 2009 – 2019. The CAJO is led by a Management Committee which comprises judicial officers elected at the Association's Business Meeting held biennially. At present, Hon Mr Justice Peter Jamadar, Judge of the CCJ, serves as Chair of the Association with Hon Miss Justice Vivian Georges Taylor-Alexander, Judge of the Eastern Caribbean Supreme Court, as Vice-Chair. The Management Committee comprises 15 members from almost all countries in the region. The CAJO is also supported by its Research and Programme Coordinator, Elton Elahie. The CAJO provides a host of judicial education engagements for judicial officers across the region including its Biennial Conference, training programmes and workshops on various topics and areas of law and practice, and a biannual Newsletter, CAJO News.



Innovation, Technology, and Caribbean Courts

In this Section:

Recapping the Future of Caribbean Courts Webinar and Video Presentations

The First Internet Policy Forum for the Judicial Sector: Evolving Judicial Practice for the Digital Age

THE FUTURE OF CARIBBEAN COURTS

A SERVICE OR A PLACE?

On Friday 29th October , from 1:00 p.m. - 3:00 p.m. AST, the CAJO hosted the fourth session of its 2021 programming, and Part I of its virtual conference. **The Future of Caribbean Courts: A Service or a Place?** Featured Professor Richard Susskind OBE who is the leading authority in technology and court systems.

The webinar sought to provide critical insights to judicial officers, legal practitioners, and faculty of legal education institutes as well as encourage discussion around the future of courts in the Caribbean.

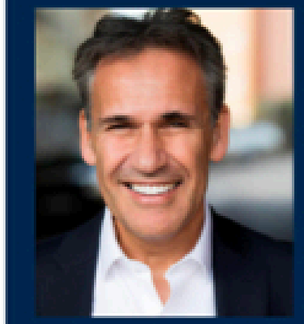
The session also included commentaries from Justice Adrian Saunders, President of the Caribbean Court of Justice and Justice Yonette Cummings-Edwards, Chancellor of the Judiciary of Guyana. There was also a question and answer segment moderated by Elron Elahie, the CAJO's Research and Programme Coordinator.

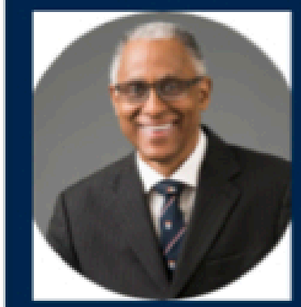
Included below are the following video segments from the Webinar: Introductions, Keynote and Q&A, Contribution from Chancellor Cummings-Edwards, and Contribution from President Adrian Saunders.

The Future of Caribbean Courts - Introduction

After what was shared at the webinar, the CAJO was interested in participants' views on how important is it that Courts remain mindful of court users' access to justice when implementing technology to make processes more efficient and effective? Rated on a scale of 1-5 with 5 being very important, 10% of respondents gave a rating of 4 and the remaining 90% gave a rating of 5.

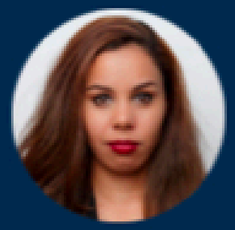
More information, including the full webinar report, can be accessed at https://thecajo.org/newcajo/the-future-of-caribbean-courts-a-service-or-a-place/





Report on the 1st Internet Policy Forum for the Judicial Sector: Evolving Judicial Practice for the Digital Age

Laurissa Pena



On 20 October 2021, **the Caribbean Agency for Justice Solutions (APEX) in collaboration with the American Registry for Internet Numbers, The Caribbean Court of Justice, Internet Registry for Latin America (LACNIC), The Caribbean Association of Judicial Officers, Connected Caribbean and Caribbean Telecommunications Union** hosted a thought-provoking webinar dealing with relevant modern issues such as cybersecurity, data protection, misinformation, and privacy issues.

This webinar was held between the hours of 9am-12:30pm AST, with a small break in between. The webinar was attended by approximately 53 participants from throughout the region.

This webinar was especially timely as judiciaries have been grappling with the challenges posed by the COVID 19 pandemic. Many judiciaries have moved from the brick-and-mortar court room to the virtual court room. Not surprisingly, the criminal element and unlawful activity are now taking place online creating many new challenges and jurisdictional issues.

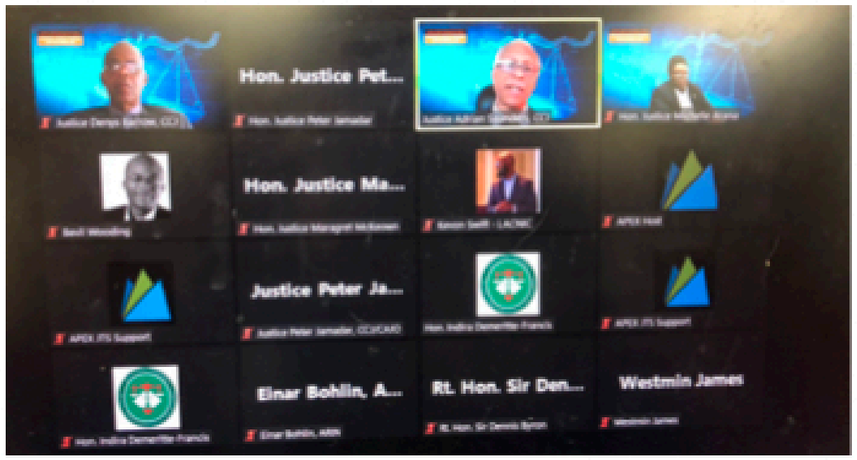
At the forum, regional and international leaders in the internet and justice sector shared their expert insights and evolving strategies to deal with these new issues and challenges. The discussions were also focused on improving the function and effectiveness of regional courts to positively impact public trust and confidence.

PRESETNERS, MODERATORS, AND SPEAKERS

The forum had feature presentations, thought provoking round table discussions, question and answer segments and lively moderators.

The first feature presentation was delivered by the Hon. Mr Justice Adrian Saunders (President of the Caribbean Court of Justice) who spoke about **"The Internet, Law and Society (Evolving Impact of Technology on the Judiciary"**.

The second feature presentation was delivered by the Rt Hon. Sir Dennis Byron (Chairman, Commonwealth Judicial Education Institute) whose presentation was **"Towards Intelligent Courts (How to Balance Digital Risks and Rewards)"**.



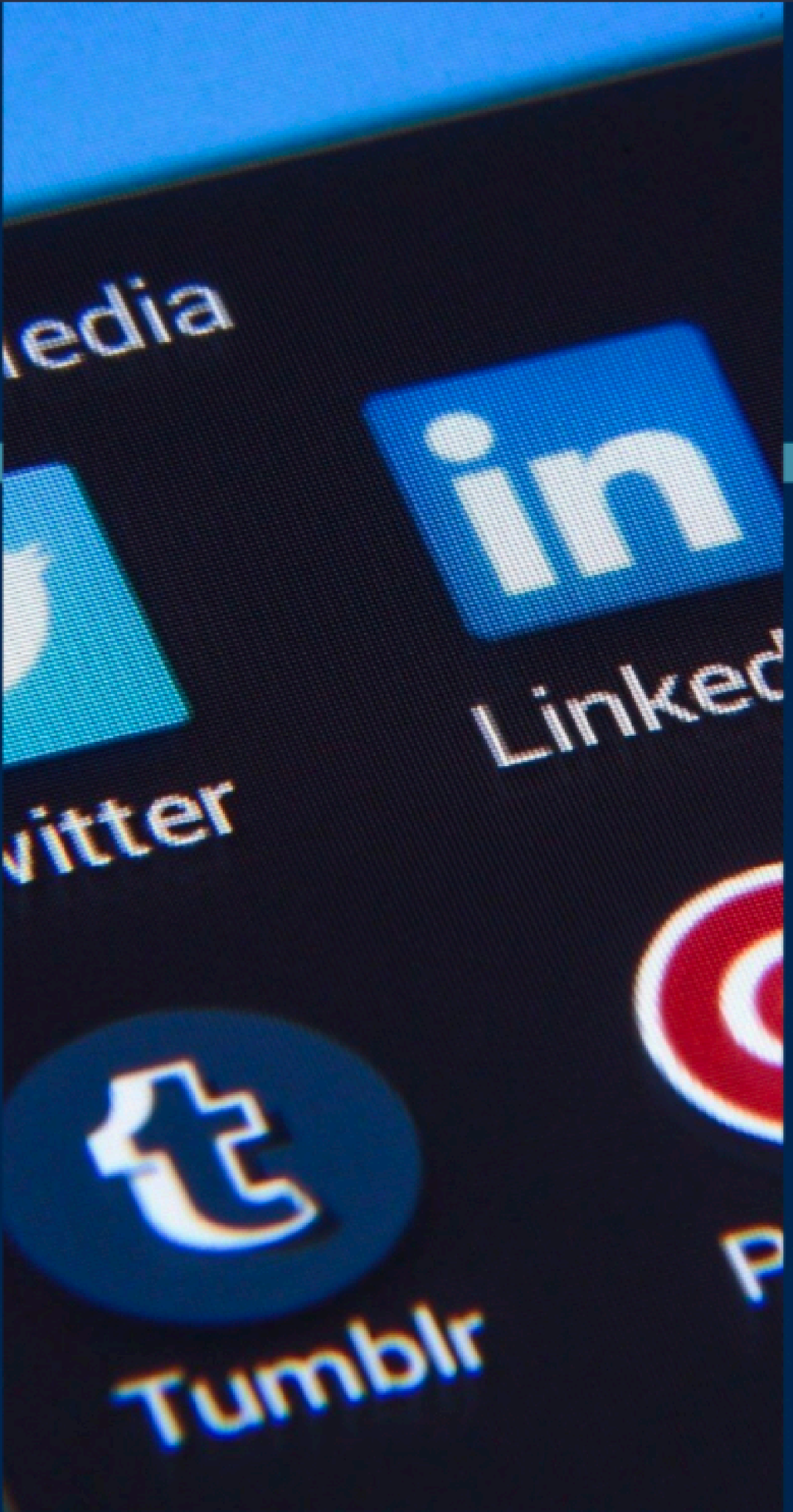
The feature presentations were followed by short question and answer sessions the first of which was moderated by the Hon. Mr Justice Peter Jamadar (Judge of the Caribbean Court of Justice, Chair of CAJO and Vice President of Programming, Commonwealth Judicial Education Institute) and the second was facilitated by Justice Westmin James (Judge, Caribbean Community Administrative Tribunal).

The first Round Table discussion was delivered by Justice Margaret McKeown, US Appeals Court Judge who reflected on the issues of jurisdiction, criminal activity, privacy and the efficacy and limitations of court orders to organizations that exist only in cyber space. Justice McKeown contextualized these discussions by drawing reference to several cases in her jurisdiction. The subject presentation was entitled "Judging the Internet: Lessons from Internet Related Cases from Across the Region". Lively discussions followed encouraged and moderated by the Hon. Mr Justice Peter Jamadar.

The second round Table discussion was delivered by the Hon. Mme. Justice Michelle Arana (Chief Justice (ag). Belize) on the topic "Considerations For Digital Transformation: Digital Paradigms and Partnerships — The Human Factor" This entailed reflections on the lessons learned from the Belize experience. The Hon. Mme Indira Demeritte-Francis (Chief Justice of Bahamas (ag.)) and Mr. Bevil Wooding (APEX, Executive Director) were the discussants. Best practices, local experiences, and strategies for implementation of technology were shared with the attendees.

Mr. Micheal Abejuela, (General Counsel American Registry for Internet Numbers)and Mr. Eduardo Jiménez de Aréchaga, (General Counsel American Registry for Internet Numbers) presented on RIR Perspectives: Cyber Trends (A look into Internet Developments, Incidents and Trends Impacting the Judiciaries).

The entire webinar was competently and ably facilitated by the Hon. Mr Justice Denys Barrow.



Social Media: Risks and Opportunities for Caribbean Courts

In this Section:

Recapping the Social Media and Caribbean Courts Webinar and Video Presentations

Non-Binding Guidelines on the Use of Social Media by Judges

SOCIAL MEDIA AND CARIBBEAN COURTS

RISK OR OPPORTUNITY?

On Thursday 18th November , from 1:00 p.m. - 3:30 p.m. AST, the CAJO hosted the fifth session of its 2021 programming, and Part II of its virtual conference. **Social Media and Caribbean Courts: Risk or Opportunity?** featured presentations by UNODC's Global Judicial Integrity Network team, Judge Cristi Danilet, PhD, of the Romanian Judiciary, and Ms Semone Moore of the CCJ's Public Education and Protocol Unit.

The webinar sought to explore the risks and opportunities that social media has for judicial officers and judicial institutions in the Caribbean, and will offer both philosophical and practical explorations.

The session also included the use of breakout rooms in which participants explored a case study on the use of social media and engaged in discussion once returned to plenary.

Social Media and Caribbean Courts - Introduction

The CAJO also asked participants to say if they think that the benefits outweigh the risks regarding the institutional use of social media as well as whether they found the UNODC's Non-binding Guidelines on the Use of Social Media by Judges helpful.

Notably 83% of respondents state that the benefits outweigh the risks when using social media for institutions. With regard to the Guidelines, 95% found them helpful.

More information can be accessed in the full webinar report by visiting https://thecajo.org/newcajo/social-media-and-caribbean-courts-rick-or-opportunity/

NON-BINDING GUIDELINES ON THE USE OF SOCIAL MEDIA BY JUDGES

United Nations Office on Drugs and Crime

UNODC
United Nations Office on Drugs and Crime

GLOBAL JUDICIAL INTEGRITY NETWORK

INTRODUCTION

The Global Programme for the Implementation of the Doha Declaration was launched by the United Nations Office on Drugs and Crime to assist Member States in implementing the Doha Declaration, adopted by the Thirteenth United Nations Congress on Crime Prevention and Criminal Justice in 2015. The Declaration reaffirms Member States' commitment to "make every effort to prevent and counter corruption, and to implement measures aimed at enhancing transparency in public administration and promoting the integrity and accountability of our criminal justice systems, in accordance with the United Nations Convention against Corruption".

In order to achieve these objectives, one key initiative of the Judicial Integrity pillar of the Global Programme was the establishment of a Global Judicial Integrity Network last April 2018 in Vienna, Austria. The Global Judicial Integrity Network is a platform to provide assistance to judiciaries in strengthening judicial integrity and preventing corruption in the justice system.

During the launch event of the Global Judicial Integrity Network in April 2018 and through an online survey disseminated in 2017, judges and other justice sector stakeholders from around the world expressed their concerns regarding the use of social media by members of the judiciary.

This concern has also been reflected in the Declaration on Judicial Integrity, adopted at the end of the launch event and setting out the Network's priorities. In particular, the Declaration highlighted the importance of the development of guidance materials and other knowledge products to help judges address challenges to judicial integrity and independence, including those created by the emergence of new information technology tools and social media.

With this in mind, the Global Judicial Integrity Network has embarked on the development of a set of international, non-binding guidelines that could (a) serve as a source of inspiration for judiciaries that are contemplating addressing the topic; and (b) inform judges on the various risks and opportunities in using social media. As part of this initiative, an Expert Group Meeting took place at the United Nations Headquarters in Vienna, Austria in November 2018, and a worldwide survey was launched in the same year to determine what specific challenges judges are facing when using social media.

The following text and recommendations stem from the discussions during the Expert Group Meeting, the outcomes of the survey as well as wider consultations with Network participants.

PREAMBLE

Social media has become an important part of the social life of many people and communities, changing the way in which information about them is collected, communicated and disseminated. Given the nature of judicial office and the vital importance of public confidence in the integrity and impartiality of the courts, the use of social media by judges, both individually and collectively, raises specific questions and ethical risks that should be addressed.

Although judges, like other citizens, are entitled to freedom of expression, belief, association and assembly, they should always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary. The way an individual judge uses social media may have an impact on the public perception of all judges and confidence in judicial systems generally.

The topic of the use of social media by judges is complex. On the one hand, particular instances of judges using social media have led to situations where those judges have been perceived to be biased or subject to inappropriate outside influences.

On the other hand, social media can create opportunities to spread the reach of judges' expertise, increase the public's understanding of the law, and foster an environment of open justice and closeness to the communities that judges serve. Additionally, there have been instances where social media has served as a platform for online abuse or harassment of judges.

The universally recognized Bangalore Principles of Judicial Conduct identify six core values that should guide each judge's work and life, namely independence, impartiality, integrity, propriety, equality, and competence and diligence. When using social media, judges should always be guided by the Bangalore Principles as well as the detailed accompanying Commentary. However, it should be noted that when these documents were first drafted, social media platforms did not exist, and so neither document makes specific reference to their use or provides advice regarding the unique challenges and opportunities that social media platforms may create.

There is nowadays a vast array of social media platforms available, with each platform offering different services, providing different opportunities for interaction, and targeting different audiences. Thus, different expectations may arise regarding the content, type and frequency of engagement for different platforms. In addition, most social media platforms constantly evolve. Consequently, different approaches may be appropriate depending on the nature and type of the social media platform.

Social media facilitates increasing opportunities for a wide variety of online connections and relationships with judges. This may have an impact, among others, on rules and principles governing ex parte communications, bias or prejudice, and outside influences.

Concepts like "friending", "following" in the social media context usually differ from traditional usage. In some cases, they may not mean much more than the relationship established between a content provider (such as a newspaper columnist) and a reader or subscriber. In other cases, however, the degree of online interaction may become more personally engaged or even intimate and thus will require circumspection on the part of the judge, and possibly disclosure, disqualification, recusal, or other actions similar to those established for conventional offline relationships. Much will depend on the nature of the social media platform itself and the methods it has developed for facilitating contact between its users.

What follows is intended to provide guidance to both judges and judiciaries (as well as other judicial office holders and court personnel, as applicable, given that their conduct can also have an impact on judicial integrity and public confidence in the judiciary), and to delineate a broader framework on how to guide and train judges on the use of different social media platforms consistent with international and regional standards of judicial conduct and ethics and existing codes of conduct.

Finally, differences in cultures and legal traditions should also be taken into consideration when addressing the various questions related to the use of social media by judges and tailoring guidance and training to be provided to them.

RISKS AND OPPORTUNITIES IN JUDGES' AWARENESS AND USE OF SOCIAL MEDIA

1. It is important that judges, both as citizens and in their judicial role, should be involved in the communities they serve. In an era where such involvement increasingly includes online activities, judges should not be prohibited from appropriate participation in social media. The public benefit of such judicial involvement and participation must, however, be balanced with the need to maintain public confidence in the judiciary, the right to a fair trial and the impartiality, integrity and independence of the judicial system as a whole.

2. The Bangalore Principles of Judicial Conduct and other existing international, regional, and national rules, standards, and conventions of judicial conduct and judicial ethics apply to judges' digital lives as much as to their real lives. Social media opens up interesting challenges and opportunities and engages the Bangalore Principles in different ways, and judges should be aware of those. There may also be additional requirements that would inform judges' discretion in using this technology. Any such additional requirements should not, however, be specific to particular technologies in use at any given time but should be of general applicability.

3. Irrespective of whether they use social media or not, judges should have a general knowledge of social media, including how it may generate evidence in cases that judges may decide. Judges should also have an understanding of existing online communication tools and technology, including artificial-intelligence-powered technology.

RISKS AND OPPORTUNITIES IN JUDGES' AWARENESS AND USE OF SOCIAL MEDIA cont'd

4. Judges should receive specific training on the benefits, risks and pitfalls of their personal use of social media, as well as on its use by their family members, close friends and court personnel.

5. Use of social media by individual judges should maintain the moral authority, integrity, decorum, and dignity of their judicial office.

6. Judges should be aware of, and take into consideration, practical aspects of online forms of expression and association. These aspects include a potentially greater reach in terms of publicity or amplification to larger networks, and greater permanence of statements, as well as the potentially significant implications of relatively small and casual actions (such as "liking") or otherwise relaying information presented by others.

7. Judiciaries are encouraged to seek the assistance of the legal profession and civil society in demystifying courts and access to justice concepts. Judges should be aware that the competent bodies of the courts or judiciaries at large may consider and act upon the opportunities presented by social media and online communities in this regard.

8. Where the Bangalore Principles of Judicial Conduct and the Commentary refer to judges' ability to educate the public and the legal profession or engage in public commentary, that may include the use of social media in addition to other forms of communication.

9. Judges should ensure that the level of their social media use does not adversely impact their capacity to perform judicial duties with competence and diligence.

10. Institutional (as opposed to individual) use of social media by the courts can, in appropriate circumstances, be a valuable tool for promoting issues such as (a) access to justice; (b) administration of justice, in particular judicial efficiency and expedition of case processing; (c) accountability; (d) transparency; and (e) public confidence in, understanding of, and respect for, the courts and the judiciary.

11. Courts working to create online portals for litigation should consider the risks of allowing court users to use their social media profiles to access such portals, in particular with regards to the data aggregation practices of social media platforms.

12. Judges may use their real names and disclose their judicial status on social media, provided that doing so is not against applicable ethical standards and existing rules.

13. During the development of the present guidelines, contrasting views have been shared with regard to the use of pseudonyms by judges on social media and no consensus has been reached on this issue. As such, the present guidelines neither recommend nor forbid the use of pseudonyms. However, it can be said that, in their behaviour on social media, judges must comply with all ethical standards related to their profession. Pseudonyms should never be used to enable unethical behaviour on social media. Additionally, the use of a pseudonym offers no guarantee that the real name or judicial status will not become known.

14. Judges should have regard to the range of social media platforms and should recognize that, with some platforms, it may be beneficial to separate private and professional identities. Understanding how the various social media platforms operate and what type of information may be necessary or appropriate to share on various social media platforms would be an appropriate area for the training of judges.

CONTENT AND BEHAVIOUR ON SOCIAL MEDIA

15. Existing principles relating to the dignity of the courts, judicial impartiality and fairness apply equally to communications on social media.

16. Judges should avoid expressing views or sharing personal information online that can potentially undermine judicial independence, integrity, propriety, impartiality, the right to fair trial or public confidence in the judiciary. The same principle applies to judges regardless of whether or not they disclose their real names or judicial status on social media platforms.

17. Judges should not engage in exchanges over social media sites or messaging services with parties, their representatives or the general public about cases before or likely to come before them for decision.

18. Judges should be circumspect in tone and language and be professional and prudent in respect of all interactions on all social media platforms. It may be helpful to consider in respect of each item of social media content (such as posts, comments on posts, status updates, photographs, etc.) what its impact on judicial dignity might be if disclosed to the general public. The same caution applies when reacting to social media content uploaded by others.

19. Judges should treat others with dignity and respect, not use social media to trivialize the concerns of others, or make remarks that discriminate on any prohibited ground.

20. It is recognized that social media makes it much easier to research parties online and discover things that are not part of evidence that is before the court or tribunal. Subject to the rules of evidence of different jurisdictions, judges should refrain from researching the aspects of a case online, including parties and witnesses, as this could potentially influence judges' decisions on a case (or lead to a perception that it has had such an influence).

21. Judges should consider whether any digital content antedating their ascension to the bench might damage public confidence in their impartiality or in the impartiality of the judiciary in general. Judges should follow the applicable rules of their jurisdictions regarding the disclosure and removal of such content. If no rules are in place, judges should consider removing the content. It may be necessary to take advice on whether it would be correct to remove it and how to do so.

22. If a judge has been insulted or abused online, he or she should seek advice from senior judicial colleagues or other mechanisms in place in the judiciary but should refrain from responding directly. Judiciaries are encouraged to provide guidance for judges on how to deal with harassment or abuse online.

23. A judge may use social media platforms to follow topics of interest. It may be worth following a diverse range of topics and commentators to avoid creating their own "echo chambers". However, a judge should be wary of following or liking particular advocacy groups, campaigns, or commentators where association with them could damage public confidence in the judge's impartiality or the impartiality of the judiciary in general.

24. Judges should ensure that they do not use their social media accounts to directly or indirectly advance their own or third-party's financial or commercial interest.

FRIENDSHIPS AND RELATIONSHIPS ONLINE

25. Judges should be aware that concepts like "friending", "following", etc., in the social media context, can differ from traditional usage and may be less intimate or engaged. However, where the degree of interaction, online or otherwise, becomes more personally engaged or intimate, judges, should continue to observe the Bangalore Principles of Judicial Conduct, necessitating, in appropriate situations, circumspection, disclosure, disqualification, recusal, or other actions similar to those established for conventional offline relationships.

FRIENDSHIPS AND RELATIONSHIPS ONLINE cont'd

26. Judges should periodically monitor past and present social media accounts and should take steps to review content and relationships as and when necessary.

27. Judges should develop and consistently apply an appropriate etiquette for removing and/or blocking followers/friends/etc., especially where failure to do so would reasonably create an appearance of bias or prejudice.

28. It is prudent and wise for judges to exercise due care and diligence when creating online friendships and connections and/or accepting online friend requests.

29. Whenever there is uncertainty as to either online relationships or content, judges are encouraged to seek guidance of approved social media experts and/or judicial ethics advisers provided by the judiciaries.

30. Judges should avoid accepting or sending friend requests from or to parties or their legal representatives, and engaging in any other social media interactions with them. The same applies to witnesses or any other known interested persons.

31. Judges should be trained on how to inform their immediate families, close friends, court personnel, etc. about the ethical obligations of a judge and how use of social media can undermine compliance with those obligations.

PRIVACY AND SECURITY

32. Judges are advised to acquaint themselves with the security and privacy policies, rules, and settings of the social media platforms they use, periodically review them, and exercise caution, with a view to ensuring personal, professional, and institutional integrity and protection.

33. Regardless of the settings, it is advisable for judges not to make any comment or engage in any conduct on social media that might be embarrassing or improper were it to become public knowledge.

34. Judges should be aware of the risks and propriety of sharing personal information on social media. Judges should be particularly aware of the privacy and security risks of revealing their location or any similar information directly or indirectly through posts on social media. Additionally, judges should be aware that even if they are not active social media users, privacy and security risks may arise from the use of social media by their family members, close friends, court personnel, etc.

35. Judges should be aware that how they are perceived on social media may be based not only on their active use of social media, but also based on what information they receive and from whom they received it, even if the contact was not requested by them.

36. Irrespective of whether they use social media or not, judges should be wary of how they behave in public because photos or recordings may be taken that can be spread quickly on social media platforms.

37. Courts and judiciaries should prioritize and facilitate the training of judges on the use of social media to enable them to effectively manage the accounts they use.

TRAINING

38. Judges should be periodically provided with training to address pertinent questions and issues, such as:
i. What social media platforms are available for use;
ii. How these platforms operate;
iii. What benefits there are to participating in these platforms;
iv. What the potential risks/consequences of such participation are;
v. How judges should participate with appropriate reticence to protect their security and to fulfil their obligations to maintain judicial independence, the dignity of office and public confidence;
vi. How family members should be adequately informed to play their part in ensuring that judges are not subject to security risks and are successfully fulfilling their obligations as judges;
vii. How the use of social media by court personnel may also have an impact on public confidence in the judiciary, judicial integrity, impartiality and independence; and
viii. Why to avoid researching parties and discovering things that are not part of evidence that is before the court or tribunal.

39. Training should be provided to newly appointed judges. In addition, training should be provided to judges with some level of permanency and on a continuous basis and, if possible, should also be available electronically.

40. There should be ongoing confidential resources for inquiry and advice as needed. The judiciary should consider publishing an anonymous compilation of such advice and direction. The judiciary may also consider preparing other practical guidance for judges on the topic of the use of social media.

Ethics and integrity are fundamental for the exercise of justice in all its forms. With this in mind, the Global Judicial Integrity Network was created with the aim of supporting judges and judiciaries in addressing these challenges to strengthen judicial integrity and prevent corruption in justice systems.

Since its launch, in April 2018, the Network has reached nearly 200,000 participants from 189 countries. This number is growing and reflects the commitment of the actors involved in this initiative, from judges and presidents of supreme courts to judicial councils, judicial associations and relevant judicial experts, among others. This experience illustrates how the Network addresses a real and pressing need worldwide.

For more on the Network, click on the image below.

Caribbean Legal Scholar Series

In this Section:

Norma Monica Forde: A Champion for Feminist Jurisprudence and the Modernisation of Family in Barbados and Beyond

Norma Monica Forde: A Champion for Feminist Jurisprudence and the Mordernisation of Family Law in Barbados and Beyond

Krystal Sukra

"The law is stable yet it cannot stand still" is Geoffery Sawer's statement. The principle embodied in this statement has been accepted by legislators through the ages. More specifically, acceptance of such a principle may have provided, consciously or unconsciously, the impetus for reform of the law relating to the status of women during the past decade. This principle must continue to inform our thinking now and in the future." (Forde, Aspects of law relating to the status of women in the Caribbean with particular reference to selected CDCC countries, 1989).

Outmoded, static laws and the philosophies which imbue them are disconsonant to a progressive and dynamic democratic society underpinned by the Rule of Law. Axiomatic to a modern democracy are governance structures, laws and a legal system planted in the garden of equality, justice, and fairness. For eminent Caribbean woman jurist, Norma Monica Forde, the ideology of legal egalitarianism catalysed her lifelong commitment to advancing the status and empowerment of women in all spheres of life.

THE EARLY YEARS: A BRIGHT AND ALL-ROUNDED YOUNG WOMAN

The story of Norma Monica Forde ("Ms Forde", as she is known to her students) begins in the island of Barbados. She was born on 9 October 1927 at Queen's Street, Bridgetown to Enid Forde. Eight years later, Enid gave birth to another girl who she named Gwenyth (now, Mrs Gwenyth Hughes) (Interview with Gwyneth Hughes, November 2021). In the early years, Ms Forde attended St Michael's School for girls and in 1945, she entered the renowned Queen's College to pursue her Higher Matriculation Certificate in Modern Studies.

Very early on, a young Norma distinguished herself by the degree of commitment and dedication which she applied to her schoolwork. She was revered by her younger sister, Gwyneth, who fondly remembered in an interview that —

"Norma was very bright, she was always at the top of her class because she gave her all in her studies and in addition to her academic prowess, she was very vibrant, involved and all-rounded."

Indeed, Ms Forde was a young woman who found joy and fulfilment in participating in extra-academic activities. She was very much interested and involved in the performing arts, and she was an active participant in the Church. The Forde family were devoted Methodists, and they would regularly attend the Bethel Methodist Church. Mrs Hughes recalled that her sister was a member of the Church choir and she reminisced about her heavenly singing voice. In addition to her choir activities, from the age of sixteen Ms Forde began teaching in Sunday School. It was at that point where her love for teaching began to brew and as will be seen later, this materialised as an enduring love that could not be shaken.

Her teaching philosophy could be summed with the following simple yet profound statement —

"Once I knew something, someone had to know it too." (Jacqueline Cornelius, Norma Monica Forde: the quintessential teacher, in Winston Anderson and Maureen Rajnauth-Lee (eds) Pioneering Caribbean Women Jurists, Paria Publishing Company Ltd, 2021).

Music must also be added to Ms Forde's array of interests. Her close friend and legal advisor, Mr Clement Lashley QC related that in those days it was commonplace for young women to take up the piano and she wasted no time in realising her musical talents. Ms Ford is described as an excellent pianist and even though she is now into her nineties, her superb piano skills are still very much intact (Interview with Clement Lashley QC, November 2021).

HER LIFE BEFORE THE LAW

Interestingly, law was not Ms Forde's first choice. Upon graduating, she applied for a job with the Government and was assigned to the Radiography Department of the General Hospital in Bridgetown. She decided to further her studies at the Royal Northern Hospital in London, where she shone, in fact, her performance was so exceptional that one of her lecturers awarded her a perfect score of 100% in his course. After completing her studies in London, which intriguingly is one of her favourite cities, she returned to Barbados and joined the Radiography Department at the Queen Elizabeth Hospital. At that time, she was one of the few woman Radiographers in the Caribbean and the Commonwealth at large. Years later, Mrs Hughes, would follow in her sister's footsteps joining the same field (Cornelius, 2021).

Keeping with this emerging theme of all roundedness and versatility, it should be no surprise that Ms Forde explored another career field. She eventually delved into the world of broadcasting and became a Radio Announcer at the Caribbean Broadcasting Corporation, the lone radio and television station in Barbados at the time (Interview with Norma Monica Forde, November 2021). She began hosting a popular children's programme, which aired on Saturday mornings, and it did not take very long for "Aunty Monica" to become a household name. Mrs Hughes related that her sister thoroughly enjoyed her time as a Radio Announcer because of her "love for children" (Interview with Hughes, 2021).

A WOMAN WITH A PLETHORA OF "FIRSTS": HER JOURNEY AT CAVE HILL

In 1970, the Faculty of Law at the University of the West Indies (UWI), Cave Hill Campus, first opened its doors to thirty-five undergraduates. The establishment of the Faculty was an achievement of West Indian regional cooperation, promoted under the leadership of the late Sir Hugh Wooding and Sir Roy Marshall (The University of the West Indies Cave Hill Campus, Barbados, West Indies, 'History of the Faculty' as available at https://www.cavehill.uwi.edu/Law/about-us.aspx (5 , 11 November 2021). Ms Forde was part of that historical first set of students alongside other pioneering women jurists like Her Excellency Dame Sandra Prunella Mason, GCMG, DA, QC, First President of Barbados and First woman judge of the Court of Appeal in Barbados, as well as, Dr Eileen Boxhill QC, Retired Director of Legal Reform, Jamaica. Also part of that set was Dr Francis Alexis QC and Mr Clement Lashley QC (Joan Brathwaite, Women and the Law, The University of the West Indies Press 1999).

No one was surprised by Ms Forde's entry into law given her scholarship. Learning the law was, according to Mr Lashley, "the logical next step for her". She was inspired by the erudition and humility of Professor Ralph Carnegie, a founding father of Caribbean jurisprudence. Her close friends described her as, "top class", "meticulous", "sharp as a tac", and a "woman with a first-class brain" (Interview with Lashley, 2021).

Mr Lashley fondly remembered that "while everyone else was sleeping, she was burning the midnight oil". Perhaps unbeknownst to many is that Ms Forde had to, "burn the midnight oil" because she was a single, independent, and self-supporting woman. She could not afford to leave her job in broadcasting, so she took many shifts to finance her education. Ms Forde kept her nose to the grindstone, and even though she spread herself so thin, she was still able to graduate with second class honours (upper division) in 1973.

She later decided to further her studies in law by pursuing a Masters. Her Law in Society thesis was written on, "The Evolution of Certain aspects of the Law on Marriage in Barbados"; undoubtedly a semaphoring of the ground-breaking contributions in the area of women's rights and family law which would soon come to fruition (Cornelius, 2021).

Ms Forde reignited her passion for teaching by becoming a Lecturer in family law at the Cave Hill Campus. She was the first woman Faculty of Law graduate to join the academic staff of that Faculty, commencing as an Assistant Lecturer in 1974 until 1976. She eventually became the first and only female Head of the Teaching Department of law at Cave Hill in 1986. Ms Forde remained at Cave Hill for the rest of her working life. She retired as a Senior Lecturer in law in 1998. Students who have long graduated speak in awe of her. She will forever be regarded as an "exceptional and insightful" Lecturer of the law. (Brathwaite, 1999)

ADVANCING THE STATUS OF WOMEN IN BARBADOS AND BEYOND

It came as no surprise when Ms Forde was appointed Chairperson of the National Committee on the Status of Women in November 1976, which quickly became known as the "Forde Commission". The mandate of the Forde Commission included reporting on all legislation, practices and policies which affected women in various areas of life, some of which were: the status of women; family law; matrimonial property; labour legislation; employment law; the role of women in the labour force; and the cultural and historical attitudes which lead to the discrimination and prejudice against women, making it difficult for them to realise their full potential.

Additionally, and imperatively, the Forde Commission was charged with the responsibility of evaluating the mental and physical health of women, including all aspects of family planning.

In May 1978, Ms Forde co-authored a report with other notable Barbadian women, including, Patricia Symmonds, Dorothy Allsopp and Marjorie Blackman (Brathwaite, 1999). This report was then submitted to former Attorney General, Sir Henry Forde who in September 1978 presented it to Parliament. The report comprised an astounding 212 recommendations for developing the status and rights of women and children in various spheres of life. It immediately prompted the landmark Status of Children Reform Act (1979), which removed the distinction in law between children born to married parents and those born to unmarried parents. It also led to the formulation of the Family Law Act of Barbados (1982), an Act which, among other things, recognised the rights of cohabiting couples in "unions other than marriage". The Act removed the historical grounds for divorce by replacing them with the sole ground of "irretrievable breakdown of marriage". It also simplified maintenance laws and proceedings so that the same provisions would apply to both during marriage and upon its dissolution (Cornelius, 2021).

The work of the Forde Commission was praised by former Chief Justice of Barbados, Sir David Simmonds in Proverbs v Proverbs (2002) 61 WIR 91 where he notably stated that:

"***Twenty years ago, on 1 February 1982, the Family Law Act ('the Act'), came into force. It was a direct consequence of certain of the recommendations contained in Ch III of Vol I of the excellent and seminal report of the National Commission on the Status of Women in Barbados of May 1978. The commission, chaired by Miss Norma Monica Forde, then a lecturer in law at the University of the West Indies, made a total of 212 recommendations touching and concerning the status of women in Barbados. There were 46 recommendations relating to 'Women and the Law.***"

The recommendations encapsulated in the Forde Commission's report impelled a shift in the societal and legislative attitude towards women's affairs. Ms Forde's work, however, did not end with the issuance of that report. Her commitment to promoting the status of women in Barbados was exemplified by her authorship of two notable articles: 'The Status of Women in Barbados: What has been done since 1978' (Forde, The Status of Women in Barbados: What has been done since 1978, No. 15. Institute of Social and Economic Research Eastern Caribbean, University of the West Indies, 1980); and 'Where are we now. An Assessment of the Status of Women in Barbados' (Forde, "Where are we now." An Assessment of the Status of Women in Barbados, Bridgetown, Barbados: Government Printing Department, 1985). It is noteworthy that since 1975, 212 pieces of legislation have been amended, repealed, or replaced following the recommendations of the Forde Commission (Committee on the Elimination of Discrimination against Women, 'Concluding observations on the combined fifth to eighth periodic reports of Barbados' as available at https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/BRB/CEDAW_C_BRB_CO_5-8_25112_E.docx (3 November 2021).

In 1987, Ms Forde was appointed as a member of the United Nations Committee on the Elimination of Discrimination Against Women (CEDAW). Her work was first-class, so much so that it secured her re-election on the Committee for a further term. Ms Forde travelled to many countries advancing the rights of women. At one point she even met Queen Elizabeth II. She enjoyed travelling and there is, in fact, a wall in her home adorned with emblems from her various trips (Interview with Lashley, 2021).

In March 1998, Ms Forde completed a consultancy for the Caribbean Development and Cooperation Committee (CDCC). The subject of the consultancy was to record, generally, the law relating to the status of women in Caribbean Countries and specifically, in selected CDCC countries. Her comprehensive report concluded that countries in the Caribbean have made some effort to improve the legal status of women since 1975. She noted that there had been a measure of law reform, more extensive in some countries but more restricted in others. One of her key recommendations was that countries in the region ought to ratify or accede to CEDAW as it would provide a reference point against which developments in a country may be tested (Forde, Aspects of law relating to the status of women in the Caribbean with particular reference to selected CDCC countries, 1989).

Her interest in promoting gender equality and women empowerment landed her positions in various Women's Organisations in Barbados. She was a member of the Business & Professional Women's Club of Barbados (est. 1966), a "status-of-women" organisation focused on elevating the status of women, through training & development, business & entrepreneurship, improvements in health and freedom from violence. She was also a member of the National Advisory Council on Women's Affairs, the Commission of Social Justice, and the Constitution Review Commission (Interview with Hughes, 2021).

A LOVE FOR FAMILY LAW: HER MANY PUBLICATIONS

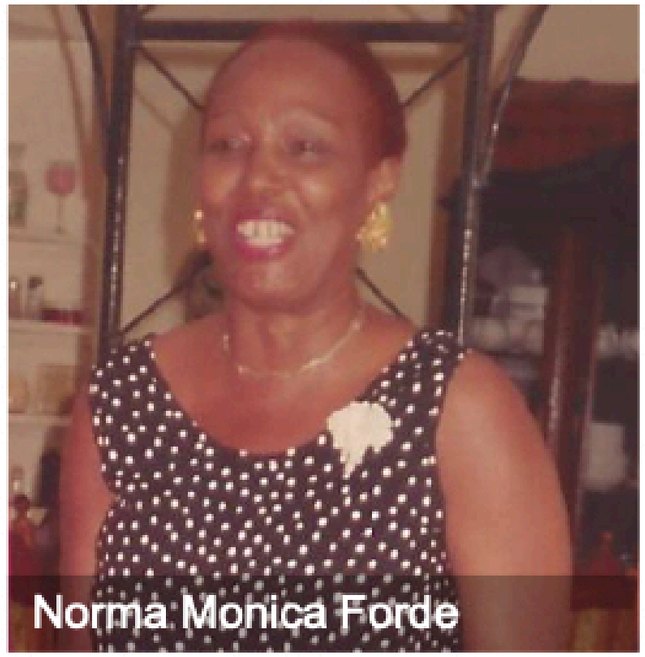
Before the introduction of the Family Law Act, family law in Barbados was a blend of English common law and local legislation that effectively restated English statutes. The review and reformation of Family Law by the Forde Commission symbolised a dissociation from the outdated and incompatible English laws, principles and traditions relating to family matters. The impetus for the break in continuity was owed to social change and evolution of thought; a recognition that the English legal principles that conflicted with Barbados's social and cultural reality should not be left on the books. This notion was one in which Ms Forde strongly advocated and it was the motivator which led to her many publications on the subject.

Some of her popular works include:'The Evolution of Marriage Law in Barbados' (Forde, The Evolution of Marriage Law in Barbados, The Journal of the Barbados Museum and Historical Society 35 (1975): 33-46); 'Family Inheritance, Provisions in the Barbados Succession Act: Redefining "The Family" (Forde, Family Inheritance Provisions in the Barbados Succession Act-Redefining The Family. Law. Am. 9 (1977): 115); 'Legal aspects of child abuse in the English-speaking Caribbean' (Forde, Legal aspects of child abuse in the English-speaking Caribbean, (1989): 179-92); Barbados: Family Law and Social Change' (Forde, Barbados: Family Law and Social Change, J. Fam. L. 30 (1991): 263); 'The Emerging Legal Status of the De Facto Family in Barbados' (Forde, The Emerging Legal Status of the De Facto Family in Barbados, Int'l Surv. Fam. L. (1995): 51); and 'Domestic violence legislation: The end of the battle or the start of a new conflict' (Paper presented at the Committee on Women's Rights Meeting of the Inter-American Bar Association Meeting, held at the Sheraton Hotel, Lima, Peru, May 1998).

AN ERUDITE WOMAN JURIST

Now that Ms Forde is retired, she spends most her time reading. As Mr Lashley puts it, she has an impressive collection of books in every room of her house. She is remembered by many as a "classy", "poised" and "highly respected woman" whose "diction was always formal". She is an erudite Caribbean woman jurist who dedicated her life in law to advancing the status of women and modernising family law to reflect social change. She casted a weighty hammer at the cultural and historical attitudes which lead to discrimination and prejudice against women. Her staunch belief was that laws must be embedded with the principle of equality so that both women and men could realise their full potential.

In 2022, she will be honoured by the Caribbean Academy for Law at the Eminent Caribbean Jurist Awards, as a pioneering Caribbean Woman Jurist in the field of legal education and scholarship. This is indubitably a deserving award for an extraordinary woman who championed feminist jurisprudence and the modernisation of family law in Barbados and beyond.


Norma Monica Forde

Judicial Sensitisation

In this Section:

Reflections on Judicial Responsibility

Eradication of Forced Labour, Human Trafficking, and Modern Slavery

The Silent Struggle of Migrants

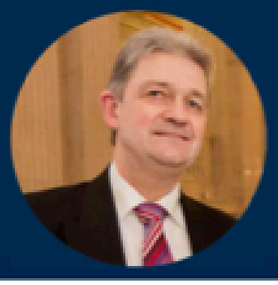
Judicial Education: from Bar to Bench and Beyond

Climate Justice in the Caribbean

Reflections on Judicial Responsibility

As delivered at the Commonwealth Law Conference 2021 , The Bahamas, September 2021

The Rt Honourable Lord Justice Bernard McCloskey



It is an enormous pleasure for me to contribute to this important event involving delegates from around the globe. Your countries have simply fascinating histories in which the rule of law and its constituent ingredients have frequently struggled to flourish.

There can be a tendency to overemphasise judicial independence, vital though it is to the rule of law. This concept is, of course, a cornerstone of the rule of law in every democratic state. But an excessive insistence on judicial independence as an indelible right runs the risk of diluting, even neglecting, other indispensable elements of judicial office in a state governed by the rule of law — and, perhaps, elevating judicial office holders to the lofty, untouchable perch of bygone times **There is a duty on every judge to appreciate all of the immutable tenets of judicial office, each of them rooted in the obligation and privilege of serving fellow members of the community, and to give effect to them daily**. They embrace both the judge's public persona as a judicial office holder and the judge as private citizen.

I shall explore in this paper the concept of judicial responsibility.

Initially I wondered whether there is anything genuinely novel to be said about judicial independence. Those who read what follows and reflect on my presentation and the ensuing discussion among participants at this prestigious event will be the arbiters.

Judicial independence is inextricably linked with the separation of powers and, fundamentally, the rule of law. It is a cornerstone of every democratic state. It is a shield against tyranny and despotism. Judicial independence and judicial impartiality combine to provide every citizen with the guarantee of fair, detached and disinterested adjudication of their disputes with state agencies and with private citizens and entities. The judges to whom such disputes are submitted are the guardians of the rule of law. This explains why in certain cases a judge must proactively disqualify himself on the ground of having an interest, however remote, in the outcome or do so giving effect to the principle of apparent bias. Justice must not only be done but must manifestly and undoubtedly be seen to be done.

The majority of the population do not have any direct encounter with the legal system of their country during their lifetime. Those who do are more likely to experience it in the context of administrative law and administrative courts or tribunals than in private law litigation. The members of this small minority become litigants who seek to hold the State, or their fellow citizens, accountable for acts, decisions and, in some cases, omissions detrimentally affecting the rights, interests or freedoms guaranteed to the citizen by the law. Every litigant has a right, of constitutional stature, to fair, impartial and independent judicial adjudication of every such dispute.

The populations of many nations have, during much of the last century and before, been subjugated to their own home grown dictators or the invading armies of tyrants. While in Europe in particular democracies have multiplied since 1989, many are young and still fragile. In contrast, in mature democratic states there is a tendency to take for granted the rule of law and its several constituent elements, including judicial independence.

Thus it has been said that complacency is the enemy of the rule of law. Even mature democracies are not immune from threats and incursions. This is vividly illustrated in the "Fortisgate affair in Belgium, which occurred as recently as 2009. During the course of legal proceedings involving Fortis, Belgium's largest financial service company which had been the beneficiary of a state bail out, it emerged that the government had twice tried to influence the judges of the court concerned. The Prime Minister was driven to admit in public that one of the officials of the Minister of Justice had contacted the husband of a judge of the Court of Appeal on several occasions during the proceedings. The Minister of Justice was obliged to resign in consequence.

This shocked the Belgium community. Looking back, one must be glad that the reaction provoked was indeed one of shock and abhorrence. One is equally glad that shock and outrage have been the dominant features of the mass protests stimulated recently by the unvarnished interference, under the thin guise of legislation, by the Polish government with the independence of the senior judiciary of that country. To the outsider, the name of the main coalition party driving these "reforms" — 'Law and Justice' - is supremely ironic.

Events in Poland have undoubtedly given rise to division and instability in society. However, they have had the shinning merit of bringing sharply to the attention of the population and the international community the nature and importance of judicial independence and the rule of law itself. The conduct of the state agencies in the Belgium and Polish examples may not have had the extreme trappings of the tyranny of the 19th and 20th centuries. But the dangers to the rule of law lie in incursions of a subtle and insidious nature. Thus alertness to the first steps, however tiny, is essential. The judicial oath of office (in the United Kingdom, at any rate) obliges the judge to swear that he or she will discharge their duties without fear or favour, without affection or ill will. Within these deceptively simple words one finds the essence of independence and impartiality. It is within the oath of office that one identifies the concept of judicial responsibility.

On the international plane, there is no shortage of materials relating to judicial independence. There is a veritable proliferation of instruments of respected international bodies: declarations, resolutions, memoranda, charters, recommendations et al. Judicial impartiality and independence are also enshrined in a series of international treaties and conventions, exemplified by the International Covenant on Civil and Political Rights (Articles 3 and 14), the European Convention on Human Rights and Fundamental Freedoms (Article 6) and the Charter of Fundamental Rights of the European Union (Articles 20 and 47). One finds the fons et origo of these instruments in the Universal Declaration of Human Rights, which as long ago as 1948 proclaimed unequivocally that every person is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of rights and obligations and of any criminal charge (see Articles 7, 8 and 10).

These noble international instruments are not merely aspirational. Rather they have practical effects and outworkings. They not infrequently stimulate debate and discussion, particularly among lawyers and judges. Sometimes they give rise to media comments and more public debate. These tend to be provoked by real cases raising issues of judicial independence or impartiality. The infamous Pinochet case in the United Kingdom provides one of the more striking examples in modern times. In a nutshell, Amnesty International was a party to legal proceedings designed to secure the extradition of General Pinochet from the United Kingdom to Chile to face trial for alleged multiple murders committed when he was the head of the governing regime. The highest court in the United Kingdom — then the Judicial Committee of the House of Lords — reversed its initial decision and reheard the case on the ground that one of the chamber of judges, Lord Hoffmann, had an association with a charity linked to Amnesty, with the result that the appearance of bias principle had been infringed. The Pinochet case prompts the observation that in the more mature democracies issues of judicial independence rarely arise, whereas in contrast issues of judicial impartiality are encountered with some frequency. It is uncontroversial to suggest that these are clear indicators of the strength of the rule of law in such countries.

Judicial independence provides guarantees and protections to both the citizen and the judge. It prohibits any attempt from any quarter — be it the executive, a litigant, a witness or the media — to subject the judge to fear, favour, affection or ill will vis-à-vis any party to the proceedings. The citizen asserts and demands judicial independence with the same strength and expectations as does (or should) the judge. In every instance of a possible threat to judicial independence the judge, as well as the citizen, emerges as the person under threat, the victim whether actual or putative. But there is a downside: this sometimes has a tendency to generate heavily one sided assessments and debates. Judicial responsibility barely flickers in such cases and discussions.

One view is that judicial responsibility is the reverse side of the judicial independence coin. It has a tendency to be outshone, even neglected. This is illustrated in a well-known Council of Europe instrument, namely the European Committee of Legal Co-Operation ("CDCJ") recommendation entitled "Judges: Independency, Efficiency and Responsibilities". This recommendation was furnished to the Committee of Ministers (see CDCJ/2010/34, dated 21 October 2010). In this instrument the front side or "upside") of the notional coin dominates, by some measure. Chapter after chapter addresses the topics of constitutional protection of judicial independence, external judicial independence, internal judicial independence, judicial councils, efficiency and resources, status and career, tenure and irremovability, training and assessment. What is there on the flip (or "reverse") side of the notional coin? If one digs energetically, one discovers just 12 lines devoted the subject of judicial duties. While followed by a very short section entitled "Liability and Disciplinary Proceedings", this is directed solely to judicial protection. Finally, there are six lines directed to judicial ethics, within which judicial protection also features.

Much the same may be said of the European Charter OnThe Statute For Judges (DAJ/DOC (98)23), another Council of Europe measure, published in July 1998. This instrument is divided into seven sections, none of which addresses the issue of judicial responsibility. Thus it belongs almost exclusively to the front side of the notional coin. I consider that the average European citizen reading each of these instruments would do so through inter alia this lens and would react with disappointment and concern in consequence.

The concerned reader would, however, derive at least some reassurance from a measure of more universal application, namely the Bangalore Principles Of Judicial Conduct. In this instrument the emphasis is on the duties owed by the judge to society rather than vice-versa. Judicial independence ("Value 1") is described in these terms:

"***Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee to a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects***."

Notably, in the text which follows, there is nothing about what the executive, society, the media et al owe to the judge. The value of independence is listed together with five further values: impartiality, integrity, propriety, equality and, finally, competence and diligence.

The Bangalore Principles are notably detailed and prescriptive. Judges will find most of the answers to recurring quandaries and dilemmas within their text. In my opinion this measure, one of the most important in the judicial landscape, receives insufficient attention and exposure. I wonder how many of the judges who attended a recent EU meeting to which I contributed (some 70 in total) had even heard of this instrument, never mind read it. This inference could be made from the questions and observations which were ventilated. This meeting, in common with others, served to confirm my growing belief that there is a significant deficit in judicial training and education in this respect. This deficit will not be addressed simply by adjustments to judicial formation programmes. Rather, this subject must also form part of recurring continuous professional development exercises thereafter. The issue is one of culture, philosophy and mindset.

The proactive and earnest implementation of what I have advocated immediately above should, as a minimum, bring home to judges the true meaning and import of the judicial oath of office, together with the full meaning of judicial independence. In this way judges will learn, and re-learn, the indelible duty of resisting fear or favour, affection or ill will, in all forms. They will further learn the value of responsibility and accountability to one's conscience and to the administration of justice, resisting even the most minimal influence in their decisions of even the smallest twinges of fear or the mildest blandishments of possible favour. They will discover that they must be impervious to negative reactions to their decisions extending in some instances to outright derision and intense public hostility. Submission to influences of this kind give rise to judicial corruption, in the true sense of the latter word. It is a notorious fact that senior judges in the United Kingdom were branded the enemies of the people by senior politicians and the press alike following their decisions in the "Brexit" case. This was doubtless distressing for certain judges and their families. But opprobrium, sometimes in extreme forms, is occasionally the price which a judge must pay for upholding the rule of law fearlessly and without affection or ill will. It may also be viewed as the price of the privilege of serving the public.

I turn to the outward face of justice, which I view as a matter of supreme importance. This is manifest in everything judges do and say in the court room and in their writings. It may also be manifest in attendance at legal seminars, the presentation of papers and the delivery of lectures to law students or lawyers. In every aspect of this kind of interaction, the judge must be acutely aware that respect for the judiciary and the confidence in the administration of justice must be earned and re-earned. These critical elements of the rule of law can never be assumed.

At a mundane level, in the court room a constant awareness of the broader audience is essential. The judge must not make the error of focusing exclusively on the legal representatives present. The audience includes the parties, witnesses, the media, interested spectators and, ultimately, those who are likely to read the judgment of the court, including teachers and students of law. Both the conduct of the judge and, ultimately, the judgment must be directed to this wide audience.

The modern judge also has duties of efficiency, expedition and good communication. Efficiency and expedition are required in the manner the judge manages his or her workload and in the provision of judgments. They are also required, particularly of presidents of chambers, in the broader organisation and administration of the court. Judges must also be self-taught in the matter of continuous professional development. They cannot complain that it is for others eg the Ministry of Justice or the relevant judicial president to make the necessary arrangements. indispensable.

If such arrangements are made, so much the better. But they are never a complete substitute for self-learning on an ongoing basis. The judge must always strive to be a better and more knowledgeable legal scholar than the lawyers presenting the cases. And there can never be any substitute for adequate case preparation through diligent advance reading preceded by assiduous case management. Equally, a detailed knowledge of and familiarity with procedural rules is indispensable.

The foregoing reflections serve to highlight that judicial independence can never be an excuse for judicial inefficiency or idleness. In the case of the indolent or uncommitted judge, the shield of independence is paper thin. And let it be remembered that the idle or less than diligent or uncommitted judge is not merely antithetical to the rule of law: judges of this kind also serve to undermine the judiciary as a whole and to weaken the public respect for and confidence in judges and judicial institutions so vital in every legal system. Increased emphasis on judicial responsibility and its multiple out-workings will also serve to enhance every judge's appreciation of the restrictions and challenges bearing on private life. In this way judges will be alert, or more alert, to, for example, their behaviour in leisure, social, cultural, sporting, community, voluntary, parochial and church contexts. The most conscientious judge will positively seize the opportunity to generate and enhance public confidence in, and respect for, the judiciary in these private life contexts also. There is nothing old fashioned or romantic about the notion of the judge as a visible, recognisable and upstanding and respected member of the community in which he lives and works; a person who gives example and provides inspiration to fellow community members. By his conduct and lifestyle the judge earns the respect of others which is a crucial component of judicial independence and the rule of law.

It is instructive to reflect on some concrete situations:

(i) Are there restrictions on the judge's ability to forge friendships and make acquaintances? The short answer is "yes". The judge, by definition, passes judgment on the conduct of others. A deeper understanding of fellow citizens can flow from active and normal participation in one's community. But there is an ever present need for caution and reticence in what the judge says and does, ever more so in the contemporary world of high speed communication, instant publicity and social media. The appearance is, as always, vital: thus while there may be some reasonable explanation for a judge's conduct or words on a particular extra-judicial occasion, this may not suffice to redeem or correct the appearance created in the eyes and minds of others.

(ii) Social conduct - an illustration: In **Bradford v McLeod (1986) SLT 244**, a Scottish case, a magistrate, on a social occasion (a local dance) in a conversation with others concerning television images of violent exchanges between the police and striking miners, stated that, in the event of prosecutions, he would not grant legal aid to a miner. Some three months later a striking miner was prosecuted in his court for disorderly conduct. The miner's solicitor, who was present on the social occasion, requested that the judge disqualify himself for bias. The judge refused and proceeded to hear 15 cases in which he convicted miners. On appeal the convictions were reversed on the ground of apparent bias. A comparable illustration is provided by **Takiveikata v The State [2007] FJCA 45**, a Fujian case.

(iii) Friendships:Can the judge's circle of friends include practising lawyers and prosecutors? "Yes" — but acting with caution and circumspection at all times. Thus, in a North Carolina case, the judge obviously acted improperly in posting comments about a pending divorce and custody case on the Facebook page of an attorney representing one of the parties and an acquaintance of the judge. Equally improper were the judge's actions in conducting independent internet research into the business of one of the parties without disclosing this to anyone.

(iv) Social Networking: What about the use of social networking sites by a judge? The general rule must be that while there is nothing unethical in this — after all they act as a substitute for other media such as a web page, skype or even the telephone — the question will always be how the judge uses the social network. The increasing use of guidelines on this in certain states and regions is to be welcomes. Here is an extract from the guidance in England and Wales:

"***Blogging by members of the judiciary is not prohibited. However, judicial office holders who blog (or who post comments on other people's blogs) must not identify themselves as members of the judiciary. They must also avoid expressing opinions which, were it to become known that they hold judicial office, could damage public confidence in their own impartiality or in the judiciary in general.***"

(v) Involvement in community organisations? The answer is "yes, of course": however, inevitably, this is followed by a "but ….". The guidance published by the Council of Chief Judges of Australia and New Zealand is instructive. It exhorts that (a) community commitments should not be too numerous or too time consuming, (b) they should not involve active business management and (c) there is a need to consider any government control of or intervention in the organisation or group concerned.

(vi) Religious affiliations: Every judge has the same freedom of thought, conscience and religion as every member of society. But alertness to any resulting appearance of bias is required. An illustration: The judge was a member of the International Association of Jewish Lawyers and Jurists. This association's quarterly publications included some articles that were fervently pro-Israeli and antipathetic to the PLO. The judge made a decision adverse to a litigant connected with the PLO. This was challenged on appeal. The ultimate decision was that apparent bias was not established because: the judicial members of the Association held widely differing views; the Association's publications did not reflect the views of all members; and there was no evidence that the judge said or did anything associating herself with the published material. [See Helow v SSHD [2008] 1 WLR 2016]. What does this mean in practice? It leaves each judge free to read what they like, so long as they do not say or do anything to associate themselves with the content.

(vii) Previous involvement in earlier proceedings, whether as judge or advocate. This touches on the DNA of the doctrine of apparent bias. See Hawthorne and White [2018] NIQB 5 at [147] — [155], a recent judgment of mine (Appendix 1).

In small communities judges may be expected to undertake certain leadership or advisory roles. This is a reflection of the size of the community and the limited number of candidates. In this illustration, the judicial office holder concerned is based in a small island community. The tiny population aspires to attract lucrative tourist trade. An investor seeks to acquire community owned land for this purpose. A process of agreeing a deal between the investor and the community is undertaken. The judge gives members of the community informal advice. The deal is struck. Later a dispute between the investor and the community arises and litigation follows. The judge is required to determine an urgent application for an interim injunction. There is no other judge on the island and the impoverished state consisting of a total of 30 islands does not have the resources to supply another judge. What would you, the judge, do in this situation?

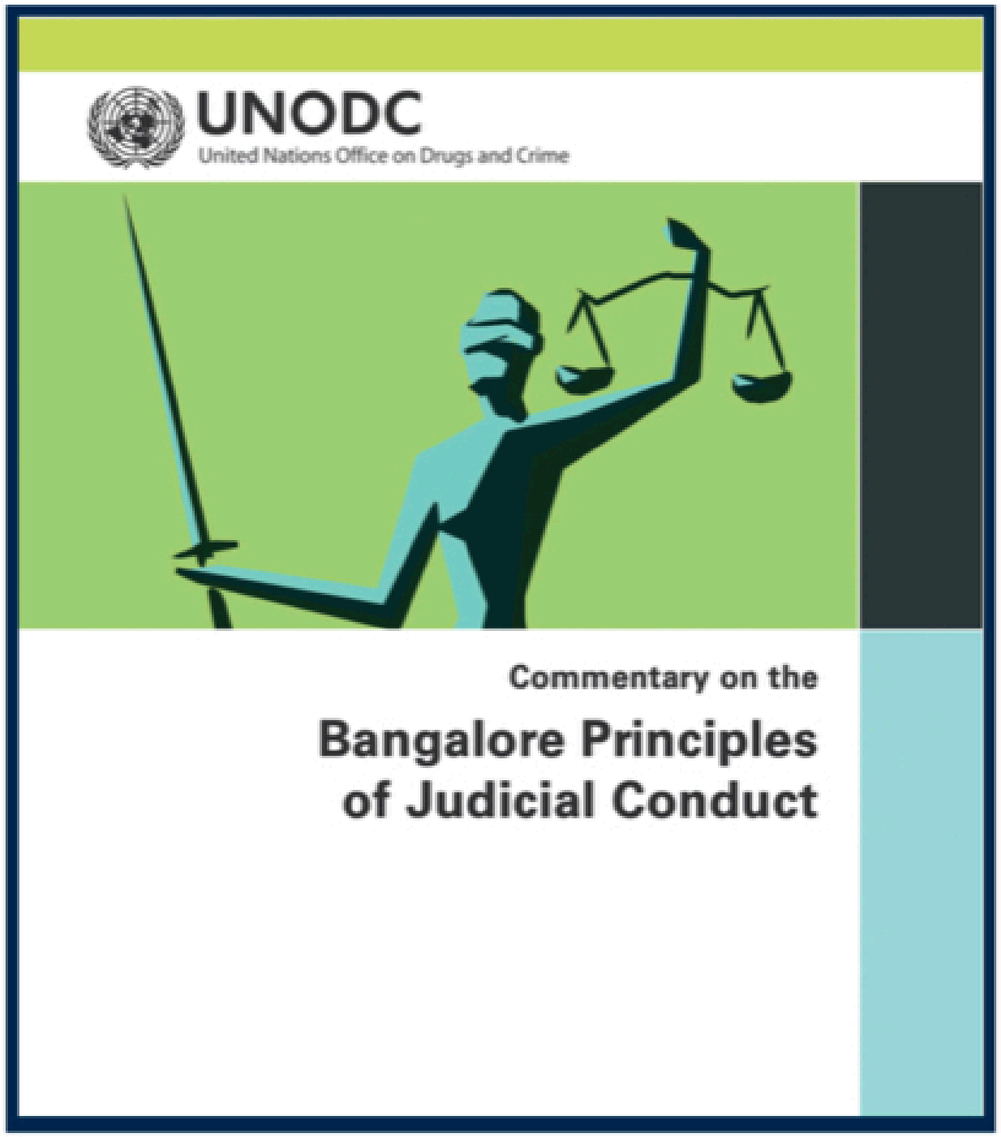
One further example. An elderly gentleman dies in the course of a hospital operation. His daughter, as personal representative, brings a claim against the hospital. Liability is conceded and damages are assessed by a first instance judge. The daughter appeals against this award. Some time before the hearing of the appeal there was an inquest into her father's death. At the conclusion of the inquest the jury delivered a verdict in certain terms. The daughter, being dissatisfied, brought an application for judicial review before the High Court. This was dismissed by a panel of two judges. The daughter's application for permission to appeal against this decision was refused. In the latercase concerning the award of damages, the Court of Appeal panel of three judges includes (a) one judicial member of the two judge panel which had dismissed the daughter's claim for judicial review and (b) one judicial member of the three judge panel which had subsequently dismissed her application for permission to appeal against the latter. Should these two judges recuse themselves on the ground of apparent bias? [For answers see Shaw v Kovac [2017] EWCA Civ 1028.]

SOME CONCLUDING REMARKS

A heavier emphasis on judicial responsibility will alert judges to the manifold dangers of social media and the private life restrictions which apply in this respect. All private life restrictions are a consequence of willingly accepting the burdensome responsibility and privilege of judicial office.

Unfortunately, there is good reason to bve profoundly concerned about the state of the rule of law in contemporary Europe. Short term political gain and personal advancement, coupled with quick fire and ruthless opportunism, are usually inimical to the rule of law. Worryingly, there are increasing illustrations of this disturbing phenomenon. Developments in several EU Member States — Hungry, Austria, Italy and Poland in particular — bear testimony to this inescapable fact. The shining beacon of the expert and dedicated activities of certain organisations - TAIEX, The Montenegro Centre ForTraining In JudiciaryAnd State Prosecution, the South Eastern Europe Regional Council, the International Bar Association and the OSCE and ODIHR in Warsaw - must be recognised and applauded in this context. The judicial oath of office obliges every judicial office holder to discharge all functions and duties "without fear or favour, affection or ill will". I consider that every debate about judicia independence and every issue raised about judicial impartiality must ultimately find its resolution within these profound words.

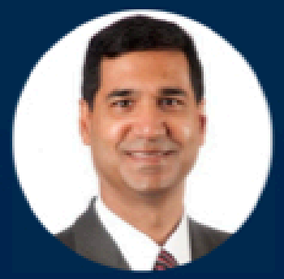
Finally, it has sometimes been said that there is a binary choice: either the rule of law or tyranny. I rather suspect that this stark choice has been present in the minds of, amongst others, many Polish citizens during the past two years. The constitutional crisis in Poland may have reminded many of the truism that complacency is the enemy of the rule of law. While I recognise, and readily confess, that this paper may have strayed a little from the narrow contours of the title of this session, I suggest that the topic of measures such as judicial disciplinary action belongs to the second of two notional chapters. It cannot be properly understood, or debated, in the absence of the first chapter, to which I have devoted my attentions.



Click on the image above to access the Commentary on the Bangalore Principles of Judicial Conduct

A Call to Action: The Critical Role of Judicial Officers in the Eradication of Contemporary Forms of Slavery

Justice Peter Jamadar



I was born in Trinidad, an early Spanish and then British Caribbean colony. I have lived and worked in the Caribbean for most of my life. These lands are the ancestral lands of mainly two Amerindian First Peoples, the Arawakans and Caribans, and archaeological research has yielded human artefacts and presence dating to 5000 BCE (The discovery of 'Banwari Man', at Banwari Trace, in South Trinidad). I acknowledge these First Peoples and their lands. And affirm, with remorse, that they were also among some of the first victims of post-Columbian slavery and exploitation. The Atlantic slave trade began in the mid-1660s. It involved the forced taking, transportation, and exploitation of human labour. In 1807 the British Government declared the African Trans-Atlantic slave trade illegal. Legal Emancipation of enslaved Africans in the British West Indian colonies occurred in 1834 (Officially on the 1st August 1834). Due to consequential acute labour shortages on the plantations, legally emancipated Africans became sources of indentured labour (contract-bound labour, usually enforceable by criminal sanction), and from 1837 mainly Indian and Chinese indentured persons also became the main source of cheap and forced human labour in Caribbean colonial territories. Indeed, British Indian Indentureship continued until the 1920s (It was abolished on the 1st January 1920).

These Caribbean events were neither limited to British colonies, nor to the Caribbean. The perverse ideologies that supported these inhumane practices, included a) legal systems operating under capitalist driven rule by law, b) immoral and systemic (institutionalised) patriarchal, racist, and classist cultures, and c) systemic othering, objectification, and commodification of human beings. Unsurprisingly, exploitation, misuse, abuse, and disregard were considered both rationally justifiable and 'morally' acceptable — permissible and permitted under the law.

In Caribbean spaces, these historical practices of overt 'chattel' slavery, human trafficking, and forced labour are woven into the fabric, cultures, and psyches of regional peoples. The trauma, injustice, and inhumanity of these experiences — and their consequences, persist.

Indeed, today, as we meet in recognition of World Day Against Trafficking in Persons, these very practices, morphed to suit modern perversions, are globally rampant, and increasingly so.

CONTEMPORARY EXAMPLE OF A MODERN FORM OF SLAVERY

In October 2006, a young woman (MM) was brought into the UK from an African country and entered a contract of employment. Between 2006 and 2010 she was made to work long hours (almost 24 hours a day), under-fed, hardly paid, not allowed to leave her hosts premises on her own, had little contact with her family in Africa, and any conversations she had were listened to and even recorded. Sounds fanciful? The matter reached the courts. The Court of Appeal had to interpret section 4 (1) of the UK Asylum and Immigration Act 2004, which made it an offence, among other things, to arrange or facilitate the entry into the United Kingdom of an individual with the intention to exploit that individual in the United Kingdom.

The Court of Appeal had this to say (at paragraphs 39, 41 and 42):

The essence of the concept of 'slavery' is treating someone as belonging to oneself, by exercising some power over that person as one might over an animal or an object…

Nor should the concepts be seen as archaic. To dismiss 'slavery' as being merely reminiscent of an era remote from contemporary life in the United Kingdom is wrong.

In the modern world exploitation can and does take place, in many different forms. Perhaps the most obvious is thai in which one human being is treated by another as an object under his or her control for a sexual purpose…

Where 'forced or compulsory labour' is concerned…It can be direct; it can also be indirect. Constraint can be mentai or physical. It can be imposed by force of circumstances.

ACADEMIC INSIGHT

Professor Christopher McCrudden (Professor of Human Rights and Equality Law, Queen's University Belfast), makes this important observation

The modern (legal) view of slavery takes the idea of legal ownership and views it as wrong because of the deeper meaning that it has: that it reduces humans to mere objects, and is thus fundamentally inconsistent with their humanity. History plays an important role in persuading the courts to come to that conclusion. But recent human rights courts (and the Court of Appeal) get it right, I think, in focusing on the essential wrong, rather than on the legal form in which that wrongness was encapsulated, however much that may have been the focus of attention of the abolitionists (In, Slavery and the Constitutional Role of Judges, UK Constitutional Law Association, Nov. 2, 2011)

IT'S 2021, WHAT CAN WE DO?

In 2021, 214 years from the cessation of the Trans-Atlantic slave trade, contemporary forms of modern-day slavery are prevalent and thriving, both in former colonies and globally.
We all need to be concerned! Judicial officers are not excepted. Indeed, they have pivotal roles to play in the mitigation, amelioration, and eradication of these modern forms of slavery, forced labour, and human trafficking. They are after all, one of the primary powers when it comes to trial procedures, determinations of guilt, and sentencing; all of which are deeply intertwined in good practices for protecting victims of contemporary forms of slavery.

Article 1 of the 1926 Slavery Convention, defined slavery as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.' Its terms were shaped by context, and thus by prevailing historical circumstances. The language is contractual - 'right of ownership', informed by the dominant form of chattel slavery, and shaped by existing ideologies. Viewed through modern constitutional lenses and in post-colonial contexts, a critical interrogation of this almost 100-year-old colonial era treaty may reveal the true potential of the roles and capacities of judicial officers in relation to contemporary forms of slavery. A potential un-shackled by both history and 'tabulated legalisms' (Marin v The Queen [2021] CCJ 6 (AJ) [31- 33]; McEwan and others v The Attorney General of Guyana [2018] CCJ 30 (AJ)).

What in truth is 'slavery' in our times? What are the values and principles that should inform a contemporary reimagining of these heinous practices, and the normative legal standards that should adjudicate its occurrences?

A RIGHTS-CENTRIC, RULE OF LAW APPROACH

In Caribbean jurisdictions, written constitutions are normative in the post-colonial era. This is true for most, if not all, independent Commonwealth States. Typically, these Caribbean constitutions contain three seminal provisions: sovereignty, supremacy, and human rights clauses. Significantly, these constitutions create a regime of constitutional supremacy (compared to parliamentary sovereignty, which prevails in the UK). As well, and often in preambular constitutive intent-creating clauses, these constitutions declare that certain core values and principles govern the interpretation and application of all laws and executive actions; that is to say, they are supreme (the supremacy principle) (Section 1 Constitution of Barbados; Section 2 Constitution of Trinidad and Tobago; Section 8 Constitution of the Co-operative Republic of Guyana; Section 2 Constitution of Belize).

These values-principles include the inherent dignity and freedom of all persons, fundamental equality, and the rule of law. The first two have their roots in Article 1 of the 1948 Universal Declaration of Human Rights. They are of indisputable centrality to democratic life and governance, and as well to international cooperation and comity. The third, as a feature of liberal democratic ideology, recognises the distinction between 'rule by law' and rule of law; and the inclusion of human rights as integral to the rule of law. In a democracy where the constitution is supreme, the Judiciary, as an arm of the State, is also obliged to align its functions and evaluative decision making with these principles.

The combined effect of the supremacy principle, taken in a rule of law context, is that all laws and governmental actions must be rule of law compliant. As well, that the approaches of courts to adjudication should prioritize this approach (the paramountcy principle). For our purposes, this means that the inherent dignity and worth, the freedom, and the unequivocal equality of all persons are constitutionally presumed inviolable (subject of course to lawful exceptions). These values must be protected as well as secured. They are therefore always, constitutionally, relevant considerations in adjudication.

The jurisprudential implications for contemporary forms of slavery may already be evident. Courts and judicial officers are obliged to orient themselves around these values — both procedurally and substantively. This is what a rights-centric, rule of law approach to our work requires of us.

Judges and judicial officers are the guardians of constitutional values. This is a fourth seminal principle of Caribbean and Commonwealth constitutionalism. It arises in part out of the universal principle of the independence of the Judiciary, but more fundamentally from the basic deep structure and principles of constitutive constitutional underpinnings. The effect is that, in broad and general terms, judges and judicial officers have a duty and responsibility to ensure that constitutional values are upheld, and that judicial, legislative, and executive actions are aligned with these values.

Judges are therefore under a constitutional imperative to act. Sitting on our hands, or turning a blind eye, or even getting too bogged down in 'legalisms', may simply not be options in the context of contemporary forms of slavery when viewed through the principles of constitutional supremacy and human rights paramountcy.

Indeed, a salient and unavoidable question that arises for judicial officers, is how does one achieve the constitutional imperative of substantive equality — equity (as compared to formal equality) throughout court proceedings and in outcomes, for victims/survivors of human trafficking, forced slavery, and contemporary forms of slavery?

PRACTICAL IMPLICATIONS

Considering this and drawing on the writings and analysis of others there are nine judicial approaches that can be of assistance:

1. Situational Awareness;
2. Intersectionality;
3. Use of the Non-Punishment Principle;
4. Procedural Fairness;
5. Avoiding Secondary Victimization;
6. Alignment with International Law and Practice;
7. Post-colonial approaches to the interpretation and development of law;
8. Mindful Judging; and
9. Judicial humility, compassion, and concern.

In pragmatic terms, to adopt the expression of Michelle Brewer in her November 2019 keynote address on The Critical Role of the Judiciary in Combating Trafficking in Human Beings, judicial officers may reimagine their roles under these heads.

SITUATIONAL AWARENESS AND INTERSECTIONALITY

This speaks to the recognition, understanding, and awareness that a matter may present itself as a straightforward case, when in reality it involves intersecting and other influencing considerations. The nature of human trafficking, how and why humans are trafficked and who is trafficked (currently there is an overwhelming and disproportionate number of women and children), is constantly changing; contemporary forms of slavery are shifting, changing forms, yet fundamentally the same (Walk Free Report, Stacked Odds, 2020, at https://www.walkfree.org). Judicial officers who operate in a closed-minded way, within the four-corners of a case, can miss the existence and impact of contemporary forms of slavery in those cases.

The case of R v L [2014] 1 All ER 113, a 2013 decision of the UK Court of Appeal, exemplifies the value of this approach. The Defendant was prosecuted and convicted for the cultivation of cannabis on a cannabis farm. The Court of Appeal recognizing that the Defendant was a child victim/survivor of human trafficking, quashed the conviction. Indeed, the Anti-Trafficking Training Material for Judges and Prosecutors Handbook, recommends that Judges must be sensitive enough to be able to identify a potential victim/survivor of human trafficking (International Centre for Migration Policy Development, Anti-Trafficking Training Material for Judges and Prosecutors Handbook (International Centre for Migration Policy Development 2006).

Those victims/survivors are sometimes unaware of their possible victim status as exploitation and abuse may be normative. Those victims/survivors may also be fearful of state authorities. Perpetrators often use a victim's/ survivor's immigration status; their economic and other discriminating and debilitating conditions, a) to create fear in the victims/survivors; and b) to manipulate and control them.

NON-PUNISHMENT PRINCIPLE

R v L is also instructive in its articulation of the non-punishment principle. In the words of the Chief Justice:

What, however, is clearly established, … is that when there is evidence that victims of trafficking have been involved in criminal activities, the investigation, and the decision whether there should be a prosecution, and, if so, any subsequent proceedings require to be approached with the greatest sensitivity. The reasoning is not always spelled out, and perhaps we should do so now...

The criminality, or putting it another way, the culpability, of any victim of trafficking may be significantly diminished, and in some cases effectively extinguished, not merely because of age (always a relevant factor in the case of a child defendant) but because no realistic alternative was available to the exploited victim but to comply with the dominant force of another individual, or group of individuals (Implementation of the non-punishment principle, UN General Assembly, Human Rights Council, 47th Session, 21 st June -9th July 2021)

What emerges is a holistic approach, that considers the wider context and life situations of an accused.

And as well, one that includes the investigative and prosecutorial arms of the State. All done with a curious adjudicative sensitivity to and an awareness of whether an accused is a victim of human trafficking, forced labour, and/or any contemporary forms of slavery.

Care needs to be taken to ensure that a right balance is struck between convicting criminals and shielding individuals from revictimization during both the trial process and outcomes. The public interest is served by both of these policy approaches. The non-punishment principle is in service of a 'both-and' approach (rather than an 'either-or' approach). It is aligned with a rule of law ideology that gives paramountcy to human rights.

PROCEDURAL FAIRNESS

It is well established that ensuring procedural fairness throughout court proceedings enhances just outcomes and increases public trust and confidence in the administration of justice. Indigenous research in the Caribbean has confirmed this and has articulated nine essential elements of procedural fairness (Peter Jamadar and Elron Elahie, Proceeding Fairly Report on The Extent To Which Elements Of Procedural Fairness Exist In The Court Systems Of The Judiciary Of The Republic Of Trinidad And Tobago (Judicial Education Institute of Trinidad and Tobago 2018). Two central elements of procedural fairness in Caribbean spaces are: voice and inclusivity. That is, ensuring that court users have a voice, can actively participate in, and are meaningly included throughout proceedings.

These approaches lend themselves to facilitating the effective participation of accused persons, who may also be victims of human trafficking, forced labour, and forms of contemporary slavery. Vital, and otherwise unknown or unknowable, information can be discovered. Situational awareness in turn allows a judicial officer to be sensitive to the intersectionality and effects of contemporary forms of slavery in any case.

Michelle Brewer makes the point that having in mind certain factors — called 'clusters', are a useful tool in understanding the intersecting vulnerability of a victim who is before the court. Procedural fairness approaches are facilitative of these. These factors are:

1. Individual vulnerability
2. Familial vulnerability
3. Socio-economic vulnerability
4. Structural vulnerability
5. Situational vulnerability

For example, imagine a child victim/survivor who is living with a mental illness, with little formal education, from a fragmented family, and impoverished circumstances, who is transported and coerced to live as a sex-worker, under the charge of persons who exercise power and control over them, in a foreign country, and who is not a native language speaker. Charged with say, prostitution.

By facilitating voice and inclusivity, including receiving victim impact statements, judicial officers can better discover and adjudicate appropriately cases of human trafficking (Linton Pompey v The Director of Public Prosecutors [2020] CCJ 7 [112, 117-125]). Through such fact and context sensitive approaches, cluster information can be obtained, and then considered at all stages of proceedings — from charge to sentence, in criminal proceedings.

These approaches are appropriate in all court proceedings, including civil and employment cases. Indeed, they are relevant because contemporary forms of slavery manifest in all domains.

AVOIDING SECONDARY VICTIMISATION

Building upon the above, particularly on procedural fairness requirements that include understanding, respectful treatment, availability of amenities, and access to information, judicial officers must be careful to avoid secondary victimization caused by court proceedings in relation to victims/survivors of modern-day slavery.

According to the Anti-Trafficking Training Material for Judges and Prosecutors Handbook, Judges should put all measures in place to eliminate security risks to the victim and manage the victim's psychological trauma and stress. Judges should treat the victim with compassion, fairness, respect, and dignity and encourage and arrange special support for the victim.

Examples given of such measures include:

a. Explaining the nature of the proceedings to victims in understandable terms;

b. Arranging for victims to be under the care of an established NGO;

c. Allowing victims to be accompanied to Court by a person they trust;

d. Ensuring access to translation services;

e. Ensuring access to competent experts to deal with trauma; and

f. Putting mechanisms in place to prevent intimidation an confrontation with a perpetrator, such as allowing victim testimony via video link.

Judges should also closely monitor the types of interrogation and cross examination questions allowed to be put to the victim/survivor and the length of cross examination. Great care must be taken, so that questions concerning "private and sexual life, the victim's consent to prosecution or trafficking, and questions merely aimed at discrediting the witness" are not casually allowed.

ALIGNMENTS WITH INTERNATIONAL LAW AND PRACTICE

Judicial officers also need to situate themselves (whether in dualist or monist traditions) in the context of their roles in a global community. Having a sense of local, regional, and international realities is vitally important. This is necessary because modern slavery is a multi-faceted cross-border global phenomenon.

In the Caribbean, courts are approaching the interpretation and application of law to ensure, as far as is reasonable, that their approaches are aligned with State international treaty obligations (The Maya Leaders Alliance and others v The Attorney General of Belize [2015] CCJ 15 (AJ); The Attorney General of Barbados v Joseph and Boyce [2006] CCJ 3 (AJ); McEwan and others v The Attorney General of Guyana [2018] CCJ 30 (AJ)). Judicial officers are therefore required to be aware of these treaties and how the content of their State's obligations may impact proceedings before them. It is an area often neglected, especially in jurisdictions where dualist positions to international law prevail (if treaties are not incorporated into domestic law, they are ineffective and non-justiciable). Modern jurisprudential trends are towards alignment. This approach is even more pressing in cases of contemporary forms of slavery, because of the multi-faceted and inter-territorial, even inter-continental, nature of the phenomenon.

POST-COLONIAL APPROACHES TO THE INTERPRETATION AND DEVELOPMENT OF LAW

One important consideration for judicial officers is what research and interpretative methodologies are apt in this context (Marin v The Queen [2021] CCJ 6 (AJ). Article 1 of the 1926 Slavery Convention, defines slavery as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.' How should Article 1 be interrogated in 2021.

In a foundational judgment delivered in June 2021, the Caribbean Court of Justice in Marin v The Queen, outlined its approaches to constitutional interpretation. One of a cluster of 'ideological approaches' is the use of interpretations that 'are consciously independently developmental'. In this regard, the court explained this approach as follows:

Applying a consciously anti-colonial interrogative approach to analysis is part of this developmental approach. It is an approach that considers a law's colonial antecedents and purposes and asks whether in light of these it is still constitutionally vires and legitimate.

Framed in a positive way, it is an approach that encompasses an independent (and postcolonial) developmental ideology and hermeneutic to Caribbean constitutionalism. One that recognizes that law and legal structures are historically contingent.

What is apparent is that colonial understandings of slavery and legal principles developed in relation to it in those times need to be carefully and rigorously scrutinized. The reason being its obvious historical settings and underpinnings.

Contemporary judicial officers need to be acutely aware of these precedential limitations. And to be independent and creative enough to ensure the development and use of appropriate procedural and substantive approaches to cases in which elements of modern slavery are present. The non-punishment principle is one such development. No doubt others will be developed on a case-by-case basis and in response to rights centric approaches in this area of the law.

MINDFUL JUDGING

Mindful judging requires judicial officers to adopt a 360-degree internal and external view of court proceedings and court relationships. This approach places an enhanced and specific focus on not only the substance of a case, but also on behaviours, the environment, and communications in the court room (and courthouse). Mindful judging offers judicial officers an opportunity to understand how victims/survivors may be impacted by judicial proceedings.

In Caribbean spaces, for example, judicial officers are required to become aware of whether there are factors which may influence 'rites of domination' and more generally whether there are incidences of power and control and of manipulation at play, that operate to intimidate, silence, and re-victimise (Mindie Lazarus-Black, The Rites of Domination: Practice, Process, and Structure in Lower Courts, American Ethnologist, Vol. 24, No. 3 (August 1997), pp. 628-651.). For victims/survivors who have notably endured trauma (which can be both immediate and long-term), the judicial environment can reinforce unequal power relations that negatively impact on the victim/survivor's safety and comfort, impact their levels of trust, and their capacity to meaningfully participate in proceedings. Mindful judging thus gives rise to enhanced degrees of courtroom consciousness that may otherwise be overlooked on account of familiarity.

In more concrete terms, this kind of judicial mindfulness may be described as:

'*… the ability to be fully present to what is happening at every moment in relation to all relevant considerations in the context of court proceedings …, with an attitude of openness and receptivity (non-judgmentally), and with the intention to deal with each case fairly, effectively, and according to the evidence, the law, and the Constitution (purposively)*' (Peter Jamadar and Kamla Braithwaite, Exploring the Role of the CPR Judge, pp 62-63 Judicial Education Institute of Trinidad and Tobago, 2017).

JUDICIAL HUMILITY, COMPASSION, AND CONCERN

Victims/survivors of human trafficking have already suffered trauma, exploitation, dehumanization. They enter court systems disadvantaged. Their core human rights to dignity, respect, and equality have already been compromised. Achieving substantive equality for them may necessitate appropriate differential treatment.

In this context, judicial humility is a necessity. It is an antidote to the hubris that judicial officers can be prone to develop following appointment; otherwise known as judicial arrogance, it creates a limiting and closed-minded approach to matters and court-users. Judicial humility begins when judicial officers give up their need to be right, be in control, have power over, and the predisposition to be judgmental (including their identification with these mindsets as part of their judicial personas). Judicial humility leads to genuine attitudes of openness and receptivity. And consequently, to judicial compassion and concern. Indeed, these three judicial attitudes may be exactly what victims/survivors of contemporary forms of slavery are both entitled to and need.

SOME PRELIMINARY CONCLUSIONS

In 2008, in Koraou v Niger (2008) AHRLR 182 (ECOWAS, 2008); ECW/CCJ/APP/0808 the ECOWAS Community Court of Justice (of the Economic Community of West African States), held that Hadijatou Koraou was a victim of slavery for the nine years she was held by her master, and that the state of Niger was liable for its failure to deal adequately with this form of slavery, awarding her about US$ 20,000. Niger had denied that Ms Koraou was a slave, asserting that she had 'lived in a more or less happy marital relationship' with her 'master'. What were the core facts? In 1996, aged 12, Ms Koraou was sold for a sum of money in the context of wahaya, a practice obtaining in the Republic of Niger, which consists of acquiring a young girl, generally under the conditions of servitude, for her to serve both as domestic servant and concubine. The person to whom she was sold, an older male, was known as her 'master' (Wahaya: Domestic and Sexual Slavery in Niger, A Report by Galy Kadir Abdelkader and Moussa Zangaou; https://www.antislavery.org/wp-content/uploads/2018/10/Wahaya-report.pdf).

For about nine years, Ms Koraou served in the house of her 'master', carrying out all sorts of domestic duties and serving as a concubine for him. She had to endure forced sex and was a victim of repeated acts of violence. In 2005 Ms Koraou was issued a certificate of emancipation, but her 'master' refused to allow her to leave. In 2006 Ms Koraou commenced court proceedings seeking her freedom.

In rejecting the State's argument, the ECOWAS Community Court explained:

"*Even with the provision of square meals, adequate clothing and comfortable shelter, a slave still remains a slave if he is illegally deprived of his freedom through force or constraint. All evidence of ill treatment may be erased, hunger may be forgotten, as well as beatings and other acts of cruelty, but the acknowledged fact about slavery remains, that is to say, forced labour without compensation. There is nothing like goodwill slavery. Even when tempered with humane treatment, involuntary servitude is still slavery.*"

And further:

"*…the moral element in reducing a person to slavery resides … in the intention … to exercise the attributes of the right of ownership over the applicant, even so, after the document of emancipation had been made. Consequently, there is no doubt that (Ms Koraou) was held in slavery…*"

Notice the tensions between the 1926 colonial concept of 'rights of ownership' and the more open and modern ideas of a) 'forced labour' and b) 'involuntary servitude' as definitive of contemporary forms of slavery. As well, notice the greater focus on intent, and less on form — 'the moral element in reducing a person to slavery resides … in the intention …' of the person exercising the power and control over another. And finally, notice the unequivocal disownment of 'humane treatment' as mitigatory or exculpatory in this area.

A full-blown rights centric approach that seeks to recognise and empower human dignity, freedom, equality, and respect may invite the jurisprudential consideration of consent as fundamental. Democracy is built upon consensus; it is birthed in the consent of the governed. The fundamental nature of slavery is the antithesis of consent; it lies in coercion. Indeed, within ideas of 'ownership', 'forced', 'involuntary' in relation to notions of slavery, is an absence of full and true consent, and a presence of coercion. However, dignity, freedom, equality, and respect are enabled in a context of consent.

Such a rights centric approach may also invite a more robust interpretation and application of the constitutional principle and value of equality, understood as substantive equality. The effect of which would be to ensure that the standards of treatment, deference, and facility afforded to victims/survivors of modern slavery meet both the procedural and substantive thresholds set by this principle. A generous and purposive application of the principle of equality can bear much fruit in this area.

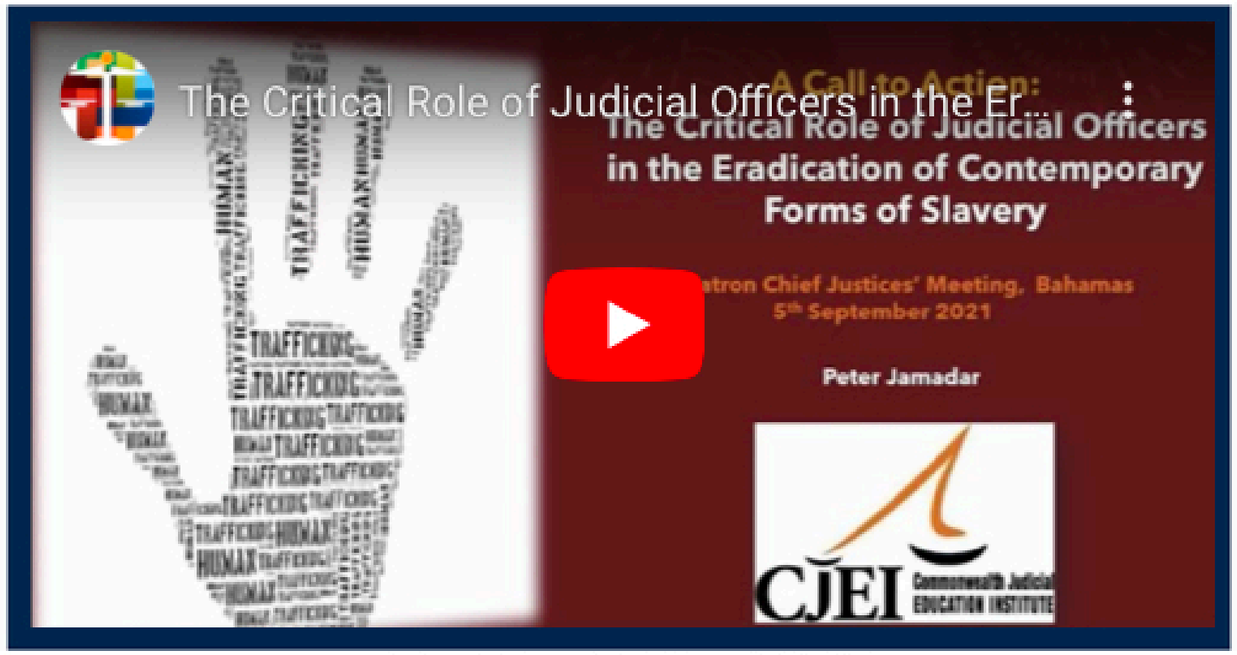
FINAL THOUGHTS: A CALL TO ACTION

There is much to think about. And there is much to be done. And we, as judicial officers, are the ones called upon to think and to do.

We have the tools. Are we up to the task?

For thousands of innocent and vulnerable lives, for hundreds of communities and families, we are their only hope.

Now is the time to act!



Presentation delivered by Justice Peter Jamadar

"My life as a modern day slave" - BBC News

Modern slavery, hidden in plain sight | Kate Garbers | TEDxExeter

The Silent Struggle of Migrants

Laurissa Pena

Trinidad and Tobago, being just 24 kilometres away from Venezuela has become the source of hope and refuge for thousands of immigrants, asylum seekers and refugees all desperate to escape the social, political and economic crisis in Venezuela.

To get to Trinidad and Tobago, Venezuelans have to brave dangerous waterways including the infamous "Bocas del Dragon" (Mouths of the Dragons) which have swallowed many hopeful immigrants seeking to escape to Trinidad and Tobago. This waterway is infamous for human smuggling, narco-trafficking, shipwrecks and even piracy. Three boats and at least 80 persons were reported missing in 2019. In 2020, another vessel sank in choppy waters, drowning at least 36 Venezuelans, including several children — the second such reported disaster of 2020.

Each step of the way immigrants, asylum seekers and refugees face great personal challenges from their journey from their home country to arrival at the shores of Trinidad and Tobago. Upon reaching Trinidad and Tobago a new struggle ensues, that of survival. But this still does not capture the unimaginable despair and trauma that these people experience when leaving their lives and loved ones in Venezuela.

This article was written after one-on-one interviews with immigrants, asylum seekers and refuges living within Trinidad and Tobago. This article will explore the experiences and struggles of these persons in Trinidad and Tobago. For the purpose of this article their names will be kept confidential, and fictitious names will be used.

JOURNEY TO TRINIDAD AND TOBAGO

It was midday, when Maria a 38-year-old mother boarded a tiny, overcrowded pirogue off the shores of Venezuela carrying in one hand her 5-year-old son and in the other, a small bag containing what little she could carry of her life from Venezuela.

The pirogue was so laden with other hopeful migrants, that the engine screamed and struggled to push the pirogue at any measurable speed. After what seemed like an eternity of waiting and moving very slowly with no place to eat, sleep or relieve themselves, it was not until 3 am the next day that Maria was finally approaching Trinidad and Tobago.

The closer the pirogue got to the shores of Trinidad and Tobago, the more menacing the waves became. With each passing wave the boat took on more and more water until the entire boat capsized. As the boat capsized and with exhaustion from the journey, Maria and her son fell out into the pitch-black waters. The waters were so deep that she could barely even tip toe. Maria exhausted from the journey scrambled to grab her 5-year-old son ingesting salty water as she struggled to find her footing. His weight was too much for her to carry and she had resigned herself to death by drowning. Thankfully for her though, a taller gentleman was able to take her son from her and lift her son above his head so that they could reach safely to the shores.

Reaching the shores was bittersweet as now her journey had just begun. She had no one, knew no English and had no idea what to do from that point on. This is just one aspect of the struggle that migrants, asylum seekers and refugees often experience when coming to Trinidad and Tobago.

PROJECT SURVIVAL

Arriving in Trinidad and Tobago to the onlooker may seem like it is the end of the struggle but now, a whole different struggle ensues. Mariana a 20-year-old teacher working in a nail salon in Port of Spain works for $100.00 a day. With this salary she is unable to afford Port of Spain rents and living expenses. As a result, Mariana has to travel every day back and forth from Penal to Port of Spain. The nail salon in which she works closes at 6:30pm and so she leaves Port of Spain at nights and arrives in Penal sometimes after 10:00pm.

Mariana has picked up an unwanted male stalker who has become more and more threatening as he seeks to exploit her vulnerable condition. Mariana afraid to report this activity to the Police and authorities for fear of herself being prosecuted walks home in fear every night, wondering whether this night would be her last. Mariana now looks for alternative accommodation but has experienced great difficulty finding same as she has expressed that many persons do not wish to rent to Venezuelan migrants.

FEAR OF PROSECUTION

This fear of reporting matters to the Police is a very real fear as many migrants live with the fear of being reported to the authorities and deported. They are sometimes arrested without explanation and detained for several nights enduring inhumane conditions in the Immigration Detention Centre.
Isabella, a Venezuelan refugee was arrested and detained on an outstanding warrant for illegal entry in October 2021. Isabella was not told the reason why she was arrested, and Immigration blatantly ignored her questions as to why she was being detained, or when she would be released. Luckily for her, she appeared before a Magistrate who noted her refugee status and ordered her release. But many are not so lucky.

Angelo, a Venezuelan migrant was physically assaulted, robbed of his belongings and then arrested by the Police in front of his home. He exclaimed "Help! Help! Help! They are beating me!". But to no avail, no one came to his assistance. Angelo was beaten so badly, that the Police could not take him directly to Immigration and so they chose to detain him for three days at the Police Station before taking him to Immigration. Immigration eventually released him, and he has received no recourse or redress for the wrongs done to him. He is also reluctant to do so as his experience at the hands of the Police has tainted his view of the justice system.

Too often, these immigrants, asylum seekers and refugees first experience with authorities is overwhelmingly negative. This taints their confidence and trust in the judicial system. They assume that they are going to be treated like the scum of society and often would rather avoid the authorities than seek recourse for abuses that they experience. These persons are often overwhelmed by the trauma that they have endured thus far, that it hampers their ability to participate in the judicial system. Many are unable to afford attorneys and experience language barriers which cause delays in instructing their Attorney at Law and understanding the process.

There is a lot of anecdotal evidence that suggests that these migrants, asylum seekers and refuges are often victims of forced labour because of their needs and circumstances. The intersection of their vulnerability, poverty and fear of authority makes them easy prey for exploitation and abuse.
If this is so for these immigrants, asylum seekers and refugees imagine how much worse it would be for victims of modern-day slavery and human trafficking. These persons are vulnerable persons, and it is crucial that in order to do justice, judicial officers and all persons who are tasked with judicial functions are aware of this silent struggle and the trauma that these persons live with. It is important to be sensitive and to be aware of the body of learning that dictate how these persons must be dealt with when entering the judicial system.

The Humanitarian Crisis of Venezuelan Migrants and Refugees | CID Harvard

Judicial Education: From Bar to Bench and Beyond

As presented at the Commonwealth Law Conference held in The Bahamas, September 2021

Justice Adrian Saunders

We hear a lot about judicial independence. The concept, if not the phrase itself, is enshrined in the fundamental law of those states that have written Constitutions. Judicial Independence is also the first and foremost of the Values set out in the Bangalore Principles of Judicial Conduct. It proclaims judicial independence to be "a prerequisite to the rule of law and a fundamental guarantee of a fair trial". Every judge, every judiciary is proud of their independence.

We don't hear as much about judicial accountability. And sometimes, when we do, what is said is cast in a frame as to suggest, quite correctly, that judges are not accountable to the Executive. Or else it is said, again accurately, that judges routinely demonstrate a high level of accountability because their hearings are for the most part conducted in public; they are obliged to give reasons, usually in writing, for their decisions; and dissatisfied litigants can appeal usually to more experienced judges. These accountability mechanisms are excellent, but they are not enough and failure to supplement them backfires on the judiciary spectacularly in a variety of ways.

First of all, the other branches of government are quick to take note of the deficiency. They feel encouraged to step in with the aim of remedying or at least attempting to remedy the deficit. And sometimes this is done in ways that are inimical to judicial independence.

In the Caribbean, some Parliaments have enacted measures dictating to the judiciary, for example, the time frame within which court judgments should be rendered, and even prescribing penalties for failure to adhere to these time limits. It should have never come to that. But who can blame Parliament if and when the judiciary refuses to take reasonable measures to police itself in a responsible manner? (Incidentally, I believe much the same thing happens in relation to the legal profession. When Bar Associations neglect to take measures for the profession to regulate itself, Parliament steps in).

The other way in which insufficient judicial accountability mechanisms boomerang is in the severe loss of public trust and confidence that is thereby occasioned. Research has shown that court users are more likely to comply with court orders when they trust the system and experience it as fair and accountable. Public trust and confidence in the courts are integral to the credibility and legitimacy of the judicial branch. But if court leaders do not foster and maintain an organizational culture that promotes integrity, transparency, performance measurement and evaluation, that trust and confidence will be seriously eroded. And an unpopular judiciary contributes greatly to a breakdown in the rule of law.

The foregoing provides the background for locating and appreciating the value of judicial education. Judicial Education is an essential means for ensuring judicial accountability. Society needs judges who are impartial, competent, efficient and effective. Judges like that don't fall from the skies. And even if they did, modern society is so complex and dynamic that it will still be necessary for us to provide such legal luminaries with the means to keep up. This is why judicial education is synonymous with judicial reform. Judicial education is all about ensuring that we keep up; that we have the skills and the perspicacity to discover where and when there are deficiencies to be remedied, areas in need of reform. Judicial education assists us to find the resolve and the resources to devise and implement programmes that enable us to keep up with the imperatives of the day.

We have to stay abreast of new laws. In response to the demands of a dynamic society, Parliament naturally enacts new legislative provisions. Since it is judges who interpret and apply these laws the judges must continually equip themselves better to fulfil this task.

We have to keep up with an enlightened appreciation for how our Constitution and laws should be interpreted. Interpretation of law is not fixed and permanent for all time.

As our understanding of phenomena around us increases, so too our interpretative methods are honed, and we begin to see things in new and more enlightened ways. It has actually been interesting to see how, over the years, law and the interpretation of the law have evolved in our understanding of equality before the law, to cite just one example.

We also have to keep up with innovative and cutting-edge court technology. The imperatives forced upon us by the pandemic have compelled us all to become savvy with Zoom and Microsoft Teams and a whole range of technological tools that are now critical in allowing us to continue to serve the public and maintain some modicum of efficiency in our operations. When I reflect on this area of information technology and court management systems I remember a session I attended a few years ago in Jamaica when we were addressed by a change management expert, Dr Leachim Semaj. He noted that lawyers and judges are fond of referring to each other as "learned". The learned judge, my learned friend, Dr Semaj impressed upon us that in today's world, the definition of "learned" is not one who has obtained certification from some education establishment, or one who commands a particular status. A person is truly learned if they are able quickly to learn, unlearn and re-learn. The relevance of knowledge is transient. And you can think of this for example in relation to the most recent cell phone you purchased or to new iterations of the same software on your computer.

In a general sense, judges have to keep up with society's reasonable expectations of us to be impartial and ethical, efficient, and competent, productive and effective. And increasingly, the public is becoming, and quite properly so, sophisticated in their expectations. Litigants, for example, demand court processes and rules of procedure that are continually customer friendly.

Judicial Education is a prime lever for satisfying these various demands and staying abreast. This is why every judiciary worth its salt equips itself with the means to dedicate time and resources to planned and ongoing judicial education programmes. The better judiciaries develop and deliver programmes for different sectors of judges in addition to those programmes that are suitable for all judges. Particular programmes may be organised suited for special cohorts of judges. For example, aspirant and newly appointed judges have special judicial education needs. So too, appellate judges, and mature and tired judges on the verge of retirement. The point is that it is necessary to discover the needs of specific target groups and to tailor the judicial education programmes accordingly.

What do we teach our judges? There is an infinite variety of suitable topics and I have already given broad hints at what the content of the curriculum could look like. We have to caution against a natural instinct to develop programmes that are geared only at improving our knowledge of the law. Often this is not the area where there are the greatest or most significant gaps. If we asked the public their views, as we should, we may hear that they are most concerned with ethical behaviour, for example, so that it would then follow that effective programmes targeting judicial ethics are critical for promoting public trust and confidence.

Indeed, a significant focus of judicial education initiatives today is on behavioural change education. It is aimed at changing how judicial officers do what they do. How we write judgments, how we behave in and out of the courtroom, how we find facts and construct legal arguments, how we manage cases, how we interface with modern technology, how we treat litigants … These are all ripe areas for continuing judicial education. And there are so many other areas.

It's a little invidious to identify a list of broad subject areas that, at this point in time, we should perhaps address as a means of building public trust and confidence. But if I were forced to, the following would be making my list. But first I should warn that these are purely subjective choices, and each judiciary must arrive at their own judicial education curriculum in keeping with their concrete realities.

So, here we go in no special order of importance.

Firstly, the relationship between international and domestic law. In one of our judgments at the CCJ, Joseph v AG of Barbados, in the context of human rights and the mandatory death penalty, we made the point that "there is every likelihood that this broad area of the law, namely, the legal impact of unincorporated international treaties upon the domestic body politic, will assume increasing importance given the tendency towards globalisation in the regulation of matters such as crime, trade, human rights and the protection of the environment, to mention but a few." I believe that it is important that domestic judges be trained on the reciprocal effect international and domestic law have on each other

Secondly, there is the issue of Appropriate Court technology. Courts and by extension judges must regard themselves as service providers. Professor Richard Susskind says it best. The court is not a place, it is a service. In a digital age, many of the services we provide will be electronic, digital. We must maximise the use of modern Information technology and electronic solutions. Some courts are already using AI to provide certain solutions. That's a whole new ball game and I have no desire to go there. Besides, that is not an area in which I have any special competence. on court procedures, rules and processes.

Thirdly, certainly in the Caribbean, a significant sector of the public is concerned with how we address the issue of Equality before the Law and how we give due recognition to each person's human dignity. Issues of Gender an sexual orientation pose a particular problem in the Caribbean. The legislature has its work cut out to do here as well but I believe judges need to be more gender sensitive

Fourthly, I would flag issues surrounding the linkages between the well-being of judges and judicial integrity. This is a matter that has been taken up by the CJEI and by CAJO for some years now. The GJIN is now seeking to address it as well. Judicial stress levels are high for many judges. What impact does this have on judicial integrity and performance; in particular on judicial decision making for example? What can we do to reduce or otherwise treat with these high stress levels? This too is an area that is ripe for exploration.

In the time allotted to me I have only been able to skim the surface of this very important topic but I trust that it has been enough to stimulate discussion on this important area.

Remarks by Judtice Peter Jamadar on the importance of judicial education training in building trust and confidence in the judiciary.

What qualifies someone to become a judge? The answer is surprisingly vague and even taboo to discuss. Lawyer Jessica Kerr sifts through the murky, mysterious process that sits at the center of the Commonwealth judicial system in countries like Australia -- and makes the case for "judge school," a legal education better fit to bring justice, legitimacy and public trust to any court.

You're in a room you don't want to be in. Something bad has happened, there's a stranger in a suit with your future in their hands, a judge four years ago that judge was me. The people looking up at me then had no choice but to trust me. But what had I done to deserve it? Australia's judicial system operates under a shroud of mystique which fends off tough questions like this, but you will have the right to ask how people like me prepare for the job of judging. And you may not feel comfortable with the answers the system needs to change.

To set the scene first, let's think about public confidence judges in Australia are not elected yet. The power they wield is immense. Ultimately, we trust the system because we believe that judges generally get it right. If we lose that belief, we risk unbalancing the whole constitution. But we live in a time when blind faith in elites is eroding fast. Judges are increasingly vulnerable to the why question why do you deserve the power we have given you? And so they should be. Second, it's fundamental that judges have to be seen as independent, doing their jobs without fear or favor to avoid any pressure from the government of the day. Judges have high salaries, which can never be cut, and they can't be fired for what they say or do unless they're obviously corrupt or mad. In exchange, judges agree to be OGX for restraint, both in and out of court. A kind of veau comes down when a judge is appointed. It's a lonely way to live, and it feeds into the sense that judges are somehow different from the rest of us.

A Call for Restorative Climate Justice to Take the Stage

CAJO Environmental Sub-committee and Christie Borely

Last year, amidst the scorching August heat and in the throes of a global pandemic, twenty-four tons of dust from the Sahara Desert floated thousands of kilometres over the Atlantic to veil the Caribbean skies. Among so many other pandemic-associated signals, the event placed our interconnectedness in sharp perspective. We share an atmosphere. We share waters. Mountains, rivers, deserts, forests — they don't observe borders.

As expressed by Peter Brannen, science writer at The Atlantic in The Terrifying Warning Lurking in the Earth's Ancient Rock Record, extreme climate events have crossed over land and sea "over and over, throughout the extremely mild stretch of time that is written history". Brannen cites several instances of these cross-border events. Notably, in A.D. 536 the explosion of a volcano in Iceland brought darkness to the Northern Hemisphere, summer snow to China and starvation in Ireland.

Recognising our global connectivity means recognising responsibilities for our influence across borders, in places invisible to us. The carbon emissions of one country, even one company, have an impact on carbon levels in the air we all breathe. Equally, the actions of generations past affect us now, and the effects of our actions today ripple into the future.

The concept of Climate Justice has emerged to confront the disproportionate impacts of climate change on those who contribute the least to global emissions. It got its start out of a wider environmental justice movement in the 1970's when a report by the Commission for Racial Justice demonstrated a consistent correlation between race and the location of hazardous waste sites in the US. It made recommendations for urgent review of environmental policies to protect black, Hispanic, and other minority communities.

Now, the issue has crystallised into the climate action movement. Its recent prominence has been attributed to the efforts of youth activists in revitalising the cause. In early November 2021, Uplink, an innovation platform of the World Economic Forum, launched a Climate Justice challenge: a call for solutions that uplift communities most impacted by climate change. The G20 Engagement Groups have jointly called upon the G20 to champion both climate and gender justice and minimise inequalities by protecting communities systemically vulnerable to climate change.

"***The climate crisis is a manifestation of the pervasive injustice that has brought us economic inequality, oppression, subjugation and exploitation.***" — Yeb Saño, Executive director of Greenpeace Southeast Asia

Those who face the highest climate risk form a wide and varied grouping–the historically marginalised, the under-resourced, the small islanders, the disabled & the young. It is undeniable that persons of colour and indigenous communities make up a significant portion of these groups.

At the 2021 United Nations Climate Change Conference (COP26), Barbados Prime Minister Hon. Mia Mottley delivered a resonant denunciation of this injustice: "***the pandemic has taught us that national solutions to global problems do not work… Failure to provide the critical finance and that of loss and damage is measured, my friends, in lives and livelihoods in our communities. This is immoral, and it is unjust… What must we say to our people living on the frontline, in the Caribbean, in Africa, in Latin America, in the Pacific? … What excuse should we give for the failure?***"

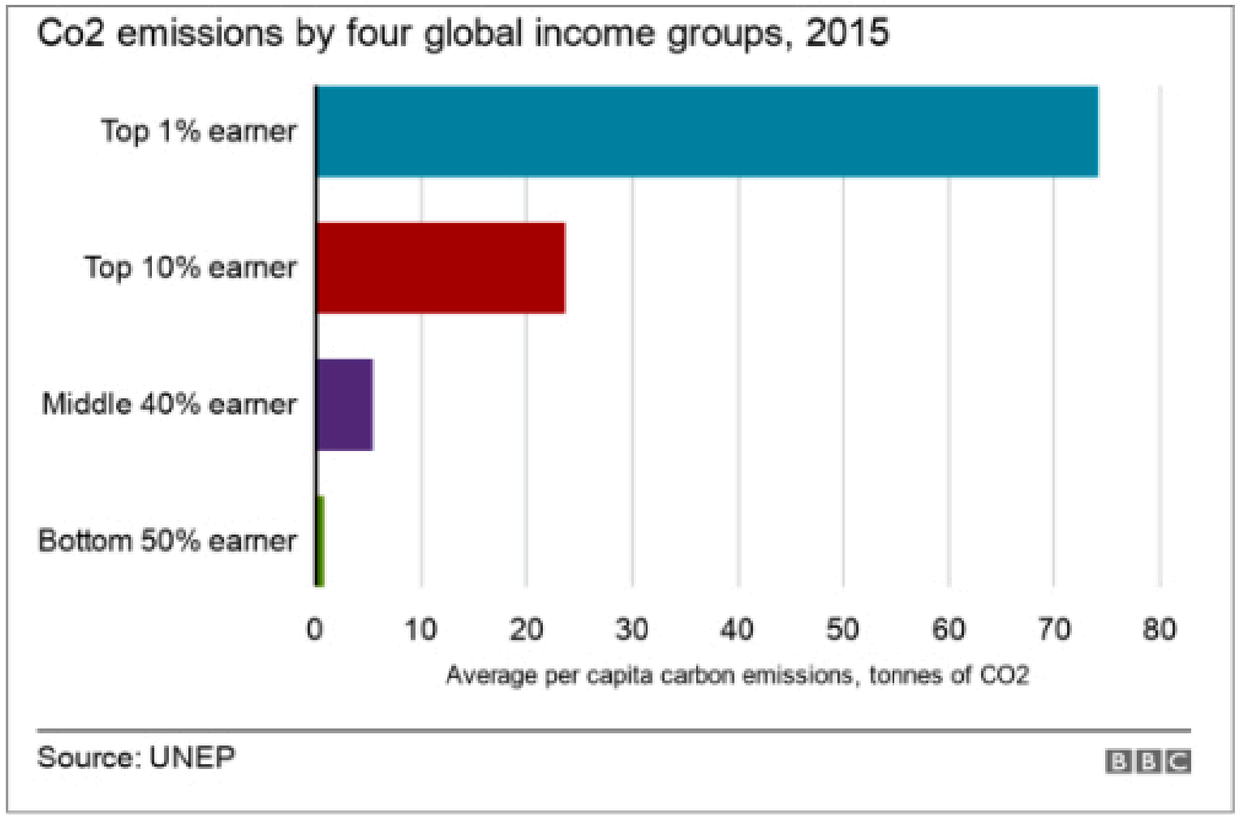
In jarring symmetry with global economic imbalance, studies have demonstrated that the combined emissions of the richest 1% of the global population account for more than the poorest 50%. Helen Briggs, BBC Environment correspondent reports that due to their economic vulnerability, the global south will bear the brunt of economic impacts from rising temperatures:

"In Nigeria, for instance, the poorest 20% of people are 50% more likely to be affected by a flood, 130% more likely to be affected by a drought, and 80% more likely to be affected by a heat wave than the average Nigerian. And in Bangladesh, India, and Honduras, poor people are losing two to three times more than the wealthy when hit by a flood or storm."

Fossil fuel, coal and forestry form a fundamental part of the earth's ecosystem. Their existence has contributed to healthy balance in our atmosphere and their depletion has shaken that vital balance out of sync. These resources - the wealth of the earth - have found their way into big pockets.

Adrián Martinez, Director, La Ruta del Clima proffers: "***We call for justice because the current crisis is no longer fuelled by ignorance but by wilful greed.***"

Indeed, profiteering fossil fuel companies have actively opposed climate advocacy. A 2018 article by Small and Farand entitled "What 30 Years of Documents Show Shell Knew About Climate Science" charts decades of Shell's understanding of climate science. It is documented that in the 1980s the company was acknowledging anthropogenic global warming. Palpably contrary to the growing scientific consensus, it began "introducing doubt and giving weight to a 'significant minority' of 'alternative viewpoints' as the full implications for the company's business model became clear."



Since 2019 The Guardian has reported herculean efforts by fuel companies to delay climate action: "The largest five stock market listed oil and gas companies spend nearly $200m (£153m) a year lobbying to delay, control or block policies to tackle climate change, according to a new report."

Ironically, these same companies "now spend about $195m a year on branding campaigns suggesting they support action against climate change."

Coming to terms with these statistics is a confronting experience with systemic injustice. The facts and figures paint a bleak picture of systematically-generated inequality, impending disaster for those without resources to adapt. Can we shift the trajectory? Speaking at the COP26, Sir David Attenborough shone a bright light in the face of despair: "If working apart we are a force powerful to destabilise our planet, surely working together we are powerful enough to save it".

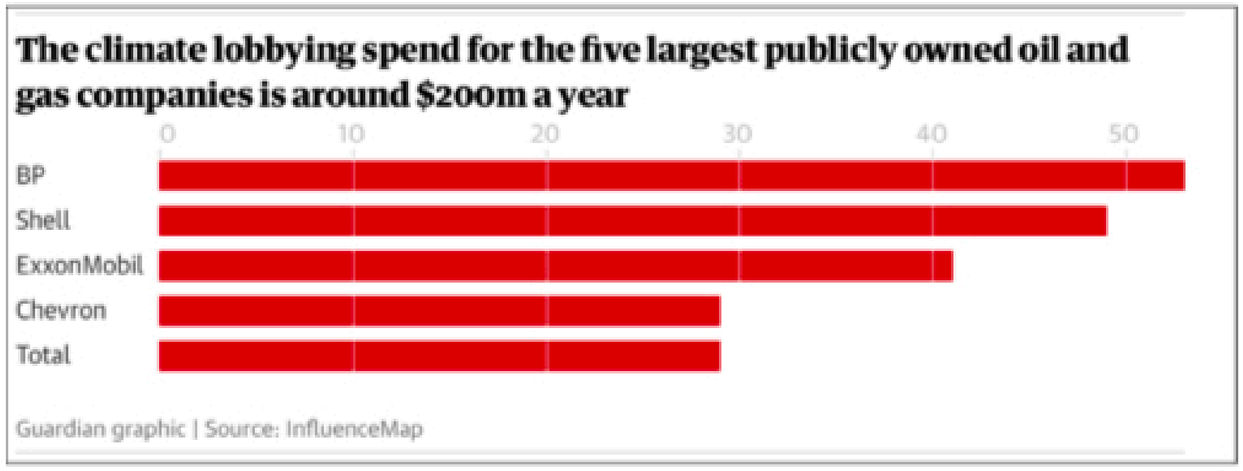
Any powerful force tackling climate injustice must ask itself an important question: What kind of justice do we want? It's easy in the face of unchecked "wilful greed", hollow promises and "blah blah blah" to demand retribution. Earth in Common, a Scotland-based grassroots movement, proposes another way: a model of restorative justice for climate issues.

The concept brings together elements of restorative justice and climate justice and contains a strong vision for a peaceful way forward: "Restorative climate justice is fundamentally about respect, and meaningful contrition, on the part of those responsible for climate change and those who have disparaged/displaced/destroyed the traditional cultures, technologies, etc., which did not/would not have caused climate change, and which could help combat it and/or boost resilience in the face of it."

The European Forum for Restorative Justice (EFRJ) commends the participatory and dialogic processes of the restorative justice framework for environmental issues. The Forum envisions engagement in such a process leading toward action plans or restorative contracts holding commitments to prevent or repair damaged ecosystems. Philosophically, the EFRJ sees deep alignment of the concept of restorative justice with "eco-centric and indigenous approaches".

According to the EFRJ, the mode creates space for "alternative narratives, and is more open to redefine and challenge notions of harm and justice", going beyond legal protections for victims of environmental harm i.e., it is possible in restorative processes for stakeholders to "define themselves as victims of environmental harm even if they are not so legally defined by the criminal justice system" and/or "to narrate of a type of harm that is not legally acknowledged".

Sakshi Aravind, lawyer and PhD student at University of Cambridge, works on encounters between law and indigeneity within settler courts. She considers climate justice as "our biggest opportunity to rebuild a world led by Indigenous knowledge forms, worldviews and ways of living."



Though the traditional justice path has seen slow progress over the years, it has recently canvassed some big wins. Since 2002, Tuvalu has threatened to sue Australia and the United States over the impacts of climate change. As recently as October 2021, an agreement between Antigua and Barbuda and Tuvalu established a Commission of Small Island States on Climate Change and International Law. The accord now sets the stage for the establishment of global environmental norms which will inform determination of responsibility for climate impacts.

Osprey Orielle Lake, executive director of Women's Earth and Climate Action Network (WECAN) International calls for "rights-based solutions grounded in justice and ecological integrity, while simultaneously building a new economy predicated on gender and racial justice, Indigenous rights, rights of nature and rights of future generations." Indeed, many have responded to such a call through rights-based litigation. The number of climate change-related cases has more than doubled since 2015.

In a judgment against Shell in May 2021, a Dutch district court ordered the fossil fuel corporation to cut emissions by 45% by 2030 in line with mandates by the Intergovernmental Panel on Climate Change. This ruling has opened doors for an uptick in climate litigation. The International Federation for Human Rights' #SeeYouInCourt campaign intends to initiate a coordinated litigation action against polluting corporations.

However, the breadth and success of climate litigation is limited by the constitutional set-up of each jurisdiction and by environmental legislation. Suzanne Spears, co-head of the Global Business and Human Rights Practice at Allen & Overy observes that "in the US, standing is much harder to establish for some plaintiffs against the government, and companies are not considered bound by constitutional and human rights norms in the same way as in, for example, the Netherlands".

The restorative justice process opens up new paths to recovery by facilitating essential expression of emotion, oft-overlooked acknowledgment and apology, as well as creativity in reparative action. The EFRJ posits a wide range of possible outcomes of restorative environmental justice: "apologies, restoration of environmental harm, prevention of future harm, compensatory restoration of environments… payment of compensation to the victims, community service work, environmental audit… and environmental training and education".

To restore our natural environment, we must also restore justice into our human systems and relationships to strengthen our global community. It is our ability to hold the hurt and confusion from historic abuses of power along with the inherent dignity of both victims and perpetrators that will facilitate unity in progress. Restorative climate justice can map a bright course to the future of collaboration.

Interconnected, our every step carries meaning. Eyes open to the consequences of overconsumption, depletion and waste, our choices now must be conscious and deliberate. Let our action be just, let our action be restorative!

CAJO Insights and General Updates

In this Section:

Update from the Judiciary of Guyana

Updates from the JURIST Project

The CCJ: A Year in Review

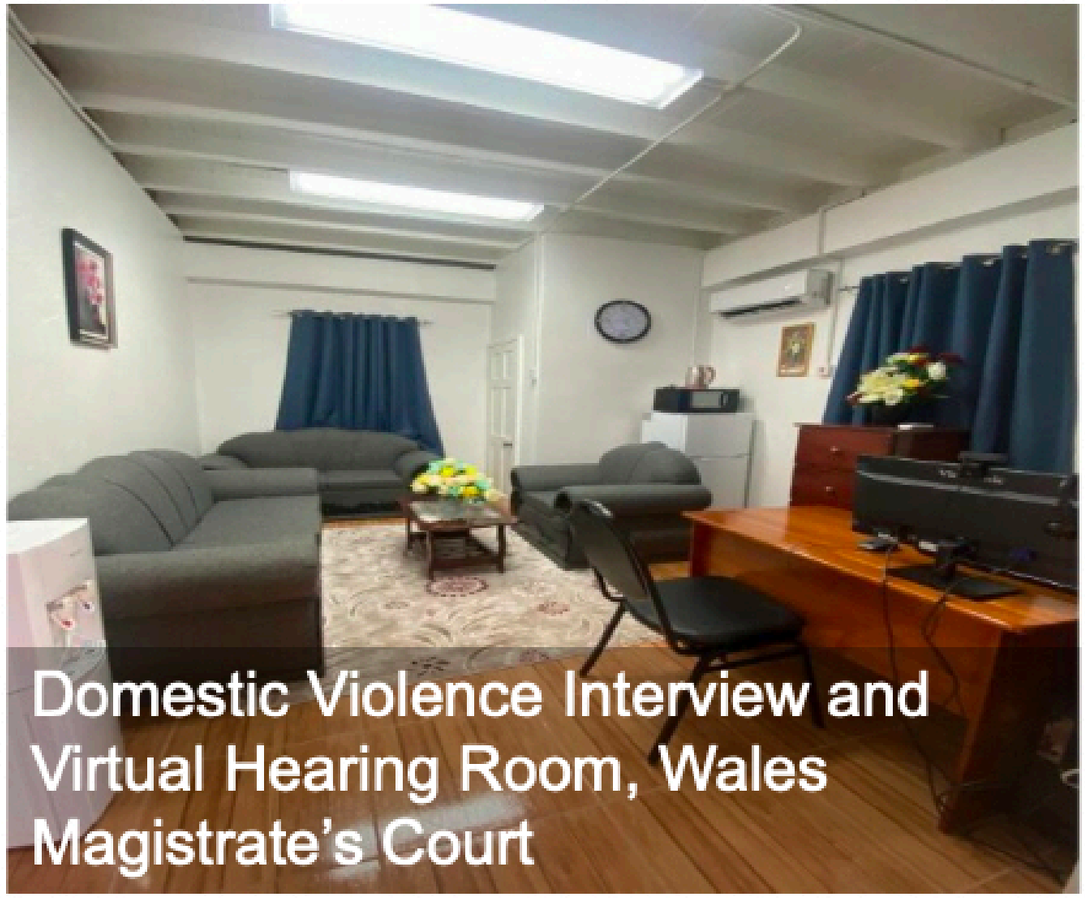
Update from the Judiciary of Guyana

Justice Roxane George

The Judiciary of Guyana launched its Revised Code of Ethics for Judicial Officers on October 5, 2021. The Hon. Justice Adrian Saunders, President of the Caribbean Court of Justice gave the feature address.

The Judiciary of Guyana has collaborated with UNICEF in the establishment of Domestic Violence Interview and Virtual Hearing Rooms at established magistrates courts. The first of these rooms was opened in the West Demerara Magisterial District on July 12, 2021 with others being opened in the West Berbice, Corentyne and Berbice Magisterial Districts on December 3, 2021.

All new magistrates' courts have or will have these rooms as part of the facilities offered in these courts. Domestic violence interview and virtual hearing rooms have been established at the new Diamond-Grove Court in a suburban area in Region 4 Demerara-Mahaica which is about 14 km from the capital city, Georgetown, and an interior court at Bartica, in Region 7, Cuyuni-Mazaruni.



Domestic Violence Interview and Virtual Hearing Room, Wales Magistrate's Court

With support from UNICEF, the Judiciary is also collaborating with the College of Behavioural Sciences and Research of the University of Guyana to provide two virtual courses. The first is 'Understanding and Addressing Gender Based Violence: A Practitioners Course for Members of the Legal Profession in Guyana". A number of supervisory staff, especially from the Family Court and Magistrates' Courts who interface with litigants seeking court services regarding domestic violence participated in this program which was conducted over four sessions in the period November 18 — 30, 2021. The second course is in the form of an online interactive workshop titled, "Gender Violence: Stop the Hurt Start the Healing", on December 10, 2021. These engagements are the judiciary's contribution to the observances of International Day for the Elimination of Violence against Women as part of 16 Days of Activism Against Gender-Based Violence.

There was on-going in person training throughout October to November 2021 for court supervisors and staff on leadership, professionalism and fostering a conducive working environment. In this vein, from November 26, 2021 the judiciary collaborated with the Occupational Safety and Health Department of the Ministry of Labour and the National Insurance Scheme to conduct a joint in person occupational safety and health workshop for some judicial officers, staff and members of the Occupational Safety and Health Committee.

Staff and other stakeholders associated with the drug treatment court participated in a five day in person workshop — "Training for Substance Abuse Counsellors" from November 22-26, 2021. This progam was also as a result of collaboration with UNICEF.

The Case Management Project for the magistrates' courts is moving apace with a demo of the system to be launched in April, 2022. This project is being executed in collaboration with the National Centre for States Courts (NCSC) and the Bureau of International Narcotics and Law Enforcement Affairs, Department of State, United States of America. In addition, Guyana is a member of an international consortium of States which includes Trinidad & Tobago, Barbados, Nigeria and Namibia which is coordinated by the NCSC for the development and improvement of case management systems in these jurisdictions.

Staff of the Court of Appeal, High Courts and Magistrates' Courts eagerly participated in the 2nd annual court horticultural competition, which was held from October 20 — 22, 2021.

Similarly, there was keen competition for the annual Rangoli competition on November 3, 2021 in celebration of Diwali, the Hindu festival of lights.

The staff of the Supreme Court of Judicature also joined in commemorating Breast Cancer Awareness Month. Staff at various court offices decorated their offices with pink balloons and buntings, as well as placed a large pink ribbon on the lawn of the High Court, Georgetown, Demerara. On October 29, 2021 staff organized the formation of a human ribbon which was photographed by a drone. The Hon. Chancellor (ag) and Hon. Chief Justice (ag) as well as the Registrar and Deputy Registrar joined in this activity.

Staff observed International Day Against Violence Against Women on November 25, 2021 by decorating their offices with purple balloons and placed a large purple ribbon on the lawn of the High Court, Georgetown, Demerara.

High Court, Georgetown, Demerara

Updates from the JURIST Project

JURIST PROJECT PROVIDES EQUIPMENT TO ENSURE CONTINUOUS SERVICE IN BELIZE

As the COVID-19 pandemic continues to wreak havoc around the world, the Judicial Reform and Institutional Strengthening (JURIST) Project, as part of its mandate, has been lending business continuity support to regional judiciaries to ensure that their operations remain unaffected during these challenging times.

According to the Belize judiciary, their current network, at its optimum, pre-COVID, was barely managing the workload and an inevitable upgrade was necessary for their systems to be brought into the virtual arena.

On July 12, 2021, the Judicial Reform and Institutional Strengthening (JURIST) Project donated Information Technology (IT) equipment to the Belize judiciary to assist in the upgrade of outdated equipment which is used in the delivery of justice.

The Honourable Mme. Justice Michelle Arana, Chief Justice (ag) of Belize, received the equipment at the court's headquarters in Belize City during a short handing over ceremony. Mr. Stephen Babb, Systems Administrator and Ms. Trienia Young, Registrar General, both of the Belize judiciary handed over the equipment to the Honourable Chief Justice as representatives of the Government of Canada and the JURIST Project could not attend, due to the pandemic.

Justice Arana said that the provision of equipment by the JURIST Project was the culmination of a partnership between the JURIST Project and the Supreme Court of Belize designed to improve the efficiency of the administration of our justice system.

The following developments are among the major judicial services that will be enhanced by the donation:

- New wiring for the network will allow for more than 1000 megabytes of data to be shared instead of the current 100 megabytes. This will allow for simultaneous recording in multiple courts, to have virtual courtrooms across the country, and quick digitization of case files.
- The network's backbone has been updated from a copper base to a fiber optic option which will allow for growth and meet the need for more online services.
- The wireless devices such as, access points and laptops are updated and replaced and will be made available for use at the courts, to aid citizens that are lacking the necessary technology to access the services of the courts.
- New desktops to replace the outdated equipment for the General Registry and the Case Management Unit, which will be able to work seamlessly with the scanners, network printers, and new web-based software.
- The enhancement of the case management software and database in the Family and Magistrates Courts was necessary to ensure that the magistrates would have immediate access to the digital case files.
- The current courtroom at the Belize Central Prison will be updated with wireless access points and laptops to connect remotely to the court. This will reduce the need to have prisoners being transported to and from the prison for preliminary court hearings.
- The professional training for staff of IT Unit of the judiciary with a CompTIA Network+ certification course which will strengthen the Unit's ability to configure the new equipment and monitor for emerging treats to the infrastructure.

"***This donation by the JURIST Project is timely as the current network at the Supreme Court of Belize is over 10 years old and in urgent need of repair. With the increased need for technology amplified by the COVID-19 pandemic, this equipment will greatly assist us as we move most of the services of our courts and Registry online***," Justice Arana explained.

She added that the judiciary was looking forward to embracing the opportunities now afforded to them through the new equipment and training, which will greatly assist them in providing the best quality of judicial services to national and international court users.

Mrs. Gloria Richards-Johnson, Director, JURIST Project said the equipment will redound to the benefit of the courts and everyone they serve. She added: "***The provision of this equipment to the judiciary will also assist the Project in achieving one of its overarching objectives which is to reduced delay and backlog***."

She noted that Project was pleased to support Belize and other judiciaries in the region to strengthen their capacities in improving court efficiency and effectiveness during this unprecedented time. "The JURIST Project is responding swiftly and fully to the pandemic and uncertainties in the environment. We recognize the need to adapt our approach to respond to the impact of COVID-19, which will be felt beyond Project completion," she emphasized.

Photo caption: (Centre) The Honourable Mme. Justice Michelle Arana, Chief Justice (Ag) of Belize, receives a laptop donated by the Canadian-funded JURIST Project from Mr. Stephen Babb, Systems Administrator (left) while Ms. Trienia Young, Registrar General, (both of the Belize judiciary) looks on.

JURIST PROJECT FINALISES STUDY ON PRE-TRIAL DETENTION

Pre-trial detention, in its current format, is being over-used.

This is one of the findings of a study into the state of pre-trial detentions in Antigua and Barbuda, Barbados, Guyana and Jamaica, commissioned by the Judicial Reform and Institutional Strengthening (JURIST) Project.

The study sought to identify inter alia:

- ***The type of charges that have been laid against inmates who are presently in pre-trial detention;***
- ***The date when pre-trial detention commenced:***
  - ***(i) Whether bail was granted?***
  - ***(ii) Whether prisoner(s) could meet bail conditions and if not, why?***
- ***The ratio of inmates that have obtained bail as opposed to those to whom bail was denied;***
- ***The options available to ensure that persons turn up for their court hearings;***
- ***The relevant prison conditions to which inmates are subject during the period of their pre-trial detention, such as physical conditions and length of time, and whether the inmate is separated from convicted criminals; and***
- ***How often detainees were visited by a judge, Justice of the Peace or relevant country official.***

The report indicated that the countries included in the study have experienced an increase in a range of criminal activities, more pointedly, violent crimes over the past few years. This has resulted in policy makers and the public wanting their respective Governments to adopt a more robust approach to tackling crime which normally equates to the request that more persons should be placed on pre-trial detention rather than on bail.

It was stated in the report, that in many countries, it has been argued that pre-trial detention continues to be imposed systematically on those suspected of a criminal offence without considering whether it is necessary or proportionate, or whether if less intrusive measures could be applied.

Further, this proportion of people being held in pre-trial detention facilities is extremely high and the periods of their detention are often prolonged well beyond any legal limits. This was evidenced in the countries in the study where on average, the pre-trial detainees are in custody for at least two to three years.

These numbers, the report noted, represent a very large number of people in prison who have not been convicted of a criminal offence but are waiting for their guilt or innocence to be established by a court. Some will eventually be acquitted of any crime, but all should be presumed innocent.

The report goes on to detail the pre-trial environments in Antigua and Barbuda, Barbados, Guyana and Jamaica, as well as propose measures that could likely reduce their pre-trial detainee numbers.

If you would like a copy of the report, please send your request to the JURIST Project at: jurist@juristproject.org.

The CCJ: A Year in Reveiw

The words **responsive, resilient and pivot**, have been used over the last twenty-one (21) months to describe individuals and organisations that were not bowled over by the pandemic but instead, adjusted their operations, leveraged the opportunities presented by the current situation and pressed on with vigour and renewed purpose. The Caribbean Court of Justice (CCJ) is one such entity. Over the past year, the Court remained focused on its strategic direction, while adjusting to the significant environmental shifts resulting from the ongoing COVID-19 pandemic.

Since the start of the COVID-19 pandemic, many courts worldwide were unable to immediately respond to the various lockdowns and measures implemented within their jurisdictions. The CCJ, however, was one of those that was able to provide uninterrupted service to customers while safeguarding the health and safety of judges, staff, and stakeholders. The Court's heavy trust and dependence on the Information and Communications Technology infrastructure paired with the commitment of our human resources, facilitated a seamless transition to a virtual space.

Our remote work arrangements and virtual court operations were ably bolstered by other support functions such as those discharged by the Library, which continued to provide service to judges and staff through the Online Public Access Catalogue. The transition to a fully virtual courtroom with staff working remotely for most of the period required certain improvements to our technological infrastructure. Through the kind assistance of the Judicial Reform and Institutional Strengthening (JURIST) Project, the CCJ along with other judiciaries, benefitted from the Project's regional business continuity support initiative. This initiative allowed the Court to procure critical equipment to enhance not only the core components of that infrastructure but also the data security capabilities. The Court also partnered with the JURIST Project and initiated other projects which served to improve access to justice across the region and enhance the capacity and performance of regional justice systems. The Court is appreciative of the support provided by JURIST.

COURT MATTERS

From October 2020 to July 2021, the Court convened a total of fifty-five (55) fully virtual sittings. Thirty-eight (38) of these were in the Original Jurisdiction and seventeen (17) in the Appellate Jurisdiction. Among the Original Jurisdictio cases filed was, for the first time, a claim brought by a Member State. In the past, claims were always made by individuals or companies against Member States and/or the Caribbean Community. The filing of a claim by a Membe State, therefore, represented an expansion in the use of the Original Jurisdiction.

In the last quarter of 2021, the CCJ introduced the revised Rules of Court, which included a revised structure for filing fees for both the Appellate and Original Jurisdictions. The drafting of a Referral Manual was also completed and will soon be launched to internal and external stakeholders. This critical document will provide guidance to would-be litigants, lawyers, domestic courts and other stakeholders on how referrals may be made from local courts to the CCJ when, in the course of a local court case, a question of law arises concerning the interpretation or application of the Revised Treaty of Chaguaramas (RTC).

STAKEHOLDER ENGAGEMENT

The CCJ also strengthened its relationships with several external stakeholders. A four-year Memorandum of Understanding on Institutional Cooperation was executed with The University of the West Indies (The UWI) to support our strategic intent of engaging the regional and international community. Consequently, through a collaborative project with the TradeLab Clinic at The UWI, Cave Hill Campus, a Digest of Original Jurisdiction (OJ) cases https://ccj.org/judgments-proceedings/the-digest-of-original-jurisdiction-cases/ was produced by the TradeLab Clinic and published on the Court's website. This Digest contains summaries of the decisions issued by the CCJ in the OJ and is intended to deepen the understanding of the Court's role in interpreting and applying the RTC and deciding on issues regarding freedom of movement, trade, services, and capital in the CARICOM region. At the launch of the Digest, the Court President, Mr Justice Adrian Saunders, lamented the fact that regional citizens have not been making greater use of the rights they enjoy under the Treaty. As such, he commended this collaboration, noting that "any initiative that highlights how the rights are to be enjoyed; that places a spotlight on the jurisprudence that has been developed in this area; and that makes this jurisprudence more easily accessible to the people and States of the Community, does a tremendous service to the region."

Our engagements with representatives of sovereign nations and international organisations continued over the last year with courtesy calls and meetings being held with the Minister of Foreign and CARICOM Affairs for Trinidad and Tobago, Australian High Commissioner to Trinidad and Tobago and the Eastern Caribbean and the Japanese Ambassador to Trinidad and Tobago and the Eastern Caribbean.

The President and Judges of the Court also represented the CCJ in several sessions hosted by The UWI Mona, United Nations Development Programme, Commonwealth Secretariat, Commonwealth Judicial Education Institute, Pan American Health Organisation, World Intellectual Property Office, The Judiciary of Guyana , The Bahamas Industrial Tribunal and the Caribbean Association of Judicial Officers. These engagements allowed the President and Judges to articulate the Court's position on several issues ranging from backlogs in the civil justice system, human trafficking, MPower package implementation and being LGBTI in the Caribbean.

In the realm of stakeholder engagement, the Court created a virtual 3D courtroom tour which offers an interactive, multimedia experience that provides an overview of our courtroom and court technology together with information about the Court's judges. Since our in-person Court tours have been suspended due to the COVID-19 restrictions, this feature provides stakeholders with an opportunity to understand the CCJ's courtroom layout. A video which summarised the work of the Court for the 2020/2021 Court Term was produced and shared via traditional media, digital media and throughout the region with support from UWITV. This initiative provided stakeholders with information on the work of the Court and details on how the Court serves the region. Work on the re-design of the Court's website also began this year with a proposed completion date within the first quarter of 2022. These activities are all intended to support our other communication and engagement efforts with our stakeholders.

Presentation of OJ Digest

STRATEGIC INITIATIVES

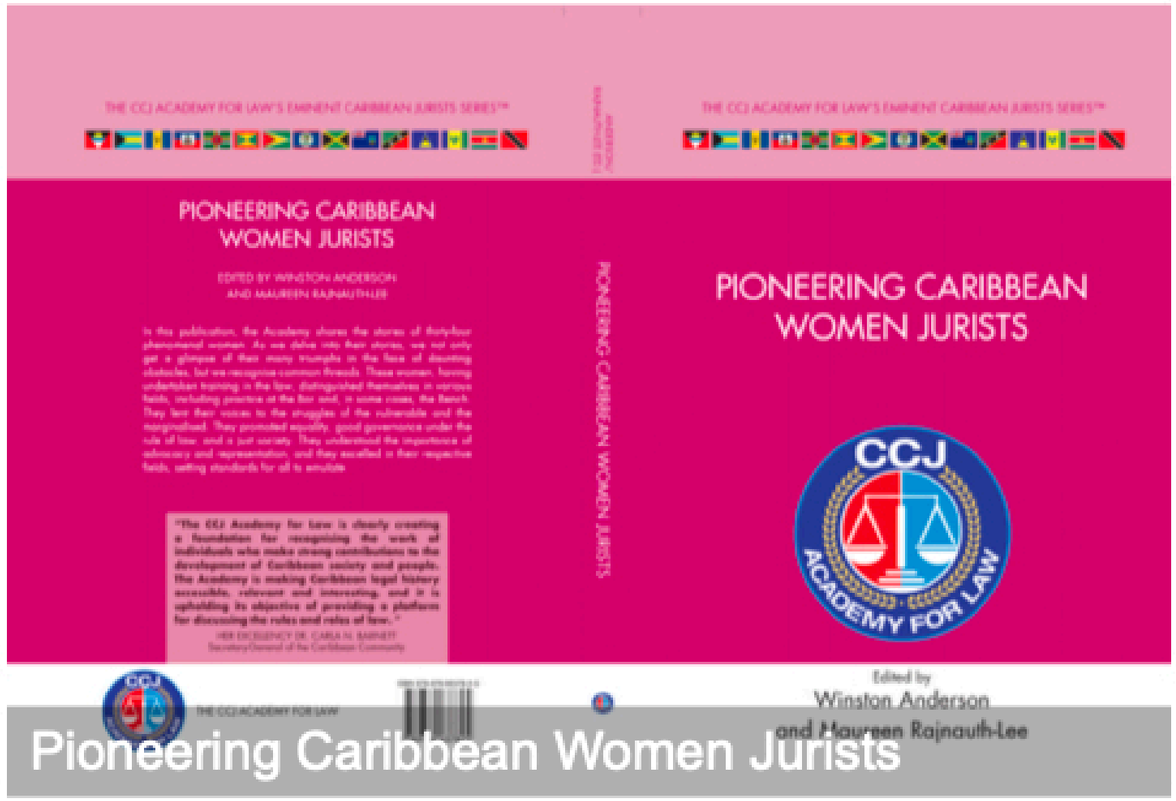
In addition to managing the cases brought before it and other activities related to our core mandate, the Court continued to refine and strengthen its strategic planning and management approaches. As a key part of this thrust, a Monitoring and Evaluation Framework was approved to better assess and oversee the implementation of the 2019 — 2024 Strategic Plan. Emphasis was placed on critical human resource management imperatives including employee development, promoting employee wellbeing, and maintaining a healthy work environment. A series of initiatives were undertaken to advance these efforts. A review of the Court's organisational structure was also initiated over the past year through the Regional Judicial and Legal Services Commission's (RJLSC) engagement with the Caribbean Centre for Development Administration (CARICAD). This organisational design review recently concluded and the Court has begun to implement these recommendations.

The Court also engaged in significant training of staff throughout the year. A raft of relevant legal and technical subjects was tailored so that each course would be accessible to every participant, not only those with qualifications in law. The topics covered a wide spectrum including our Court Rules and mandatory sensitisation sessions on our Harassment Policy, the latter being facilitated for all judges, staff of the Court and members of the RJLSC. Recognising the immense strain occasioned by the pandemic, the Court adopted a variety of approaches to offer psychological, institutional, and other forms of support to staff to help them and their families adjust to and cope with these challenging times. The Court also launched a policy sensitisation series for internal stakeholders to better understand the policies which were approved earlier in the year.

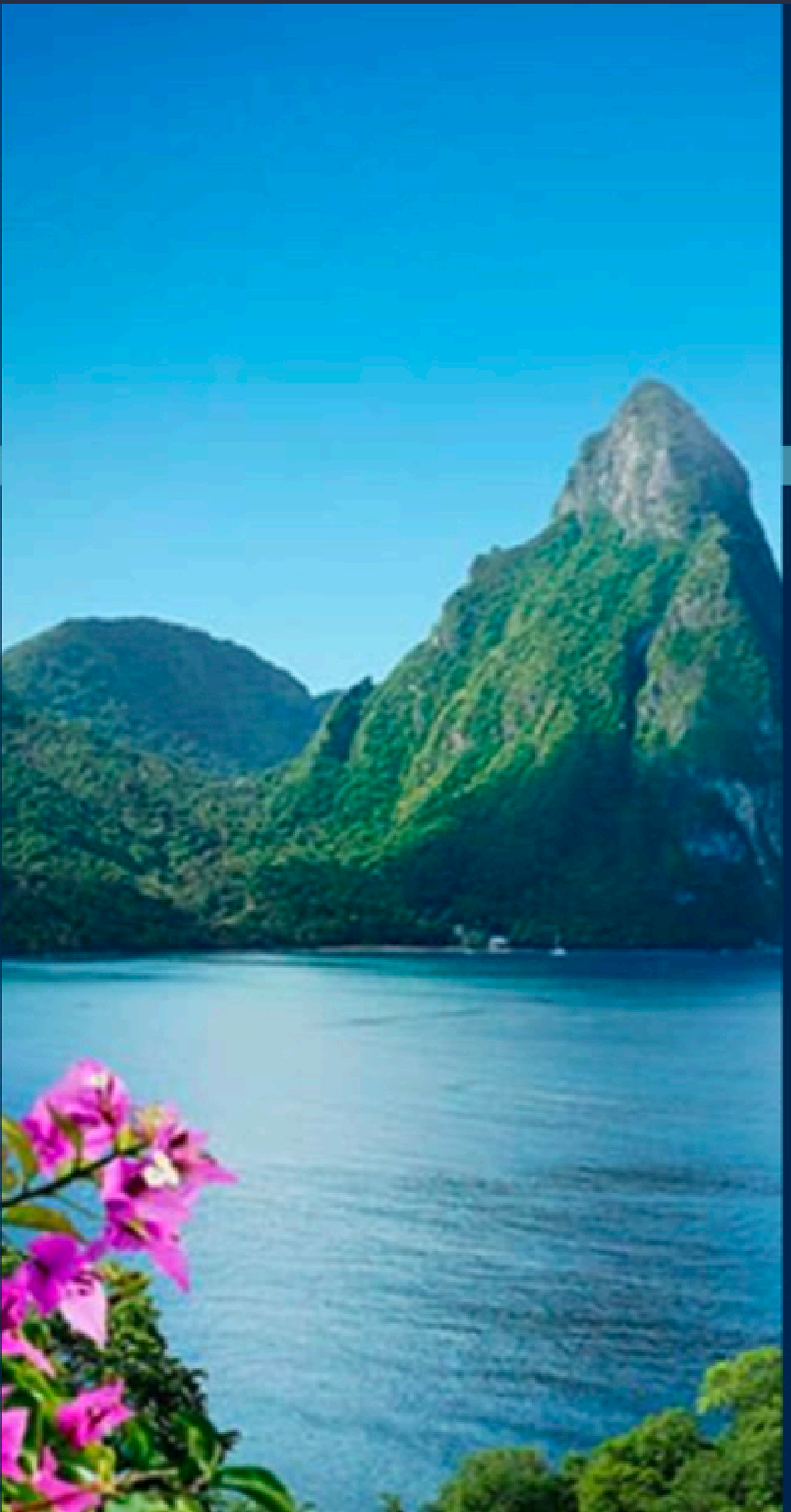
On our own and collaboratively, several local, regional and international legal and judicial education programmes were conducted with the CCJ Academy for Law, the Caribbean Association of Judicial Officers and the Global Judicial Integrity Network. The CCJ Academy for Law, launched a second publication, Pioneering Caribbean Women Jurists (PCWJ), as part of the 2021 Eminent Caribbean Jurists project, which aims to educate and inspire the upcoming generation of attorneys and legal practitioners. This year, the PCWJ publication and project focused on the contribution of women jurists to the institutional and policy-making infrastructure of our Caribbean society. Other aspects of this project include an awards ceremony and the production of ten (10) videos on the honourees.

In his remarks at the launch of the publication, CCJ Academy for Law Chairman, the Hon. Mr Justice Winston Anderson said "in these biographies, are memorialized their travails, and their triumphs; their profiles in courage that challenge all of us to a better version of ourselves … [and which should]; serve to motivate a new generation of lawyers to also leave their footprints on the sands of time." The Hon. Mme Justice Rajnauth-Lee, co-chair for the PCWJ working committee, noted that "these women used their knowledge and achievements in the law as a platform to serve their peoples, their countries, and the region, with a passion and determination, so frequently recognized in Caribbean women."

The Caribbean Court of Justice has achieved a lot over the year, even in the face of the challenges and uncertainties of the current environment, provoked by the ongoing pandemic. However, as the President stated in his remarks at the start of the 2021 Court Term, "we shall continue, fearlessly as always, to advance the rule of law in the region; we shall always protect the rights of the people; and we shall strengthen the legal framework underpinning the Caricom Single Market and Economy. We shall do our utmost to live up to our vision to be a model of judicial excellence."



CCJ 2020/21 Video



2022 Conference Update

In this Section:

Inviation to St Lucia for the 2022 CAJO Conference

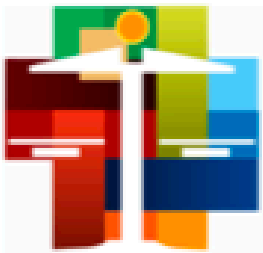
Highlights from the 6th Biennial Conference in Belize

Inviation to St Lucia from the Hon Dame Janice Pereira, Chief Justice of the ECSC

The 2022 CAJO Conference is scheduled to take place in the 4th Quarter of 2022.

Look out for more details from info@thecajo.org and check our website at www.thecajo.org

Highlights from the 6th Biennial Conference held in Belize, November 2021



CARIBBEAN ASSOCIATION OF JUDICIAL OFFICERS

CAJO