THE REPUBLIC OF TRINIDAD AND TOBAGO

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JUSTICE THROUGH A GENDER LENS

Gender Equality Protocol for Judicial Officers

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This is a publication of the Judicial Education Institute of Trinidad and Tobago in collaboration with the organisations listed below.

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The Caribbean Court of Justice (CCJ) is the Caribbean regional judicial tribunal. Its mission is to protect and promote the rule of law as a court of final appeal and as guardian of the Revised Treaty of Chaguaramas by guaranteeing accessibility, fairness, efficiency and transparency, delivering clear and just decisions in a timely manner.

The Caribbean Association of Judicial Officers (CAJO) is a voluntary association of Judges throughout the Caribbean region. CAJO was established in 2009 in part to promote and implement judicial education and reform measures throughout the CARICOM region.

UN Women is the United Nations organisation dedicated to gender equality and the empowerment of women. A global champion for women and girls, UN Women was established to accelerate progress on meeting their needs worldwide. UN Women supports UN Member States as they set global standards for achieving gender equality, and works with governments and civil society to design laws, policies, programmes and services needed to implement these standards.

The Judicial Reform and Institutional Strengthening (JURIST) Project is a five year regional Caribbean judicial reform initiative funded under an arrangement with the Government of Canada. The Project is being implemented on behalf of Global Affairs Canada and the Conference of Heads of Judiciary of CARICOM (the Conference), by the Caribbean Court of Justice (CCJ). Further information on the Project is available at www.juristproject.org.

The Trinidad and Tobago Association of Women Judges (TTAWJ) is a non-profit, non-governmental organisation which seeks to create a network of women Ws with a view to promoting and protecting equal access to justice and collaborating on issues which affect female represenatation in the court system at every level.

The Judicial Education Institute of Trinidad and Tobago (JEITT), as an arm of the Judiciary of the Republic of Trinidad and Tobago (JRTT), is responsible for overseeing the administration of training and development programmes for all Judicial Officers of the JRTT, thereby furthering its mandate of "Transformation through Education".

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LIST OF ABBREVIATIONS

ACHR	American Convention on Human Rights
BdP	The Belém do Pará Convention (The Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women)
CARICOM	Caribbean Community
CEDAW	Convention on the Elimination of Discrimination Against Women
CRC	Convention on the Rights of the Child
I.A.Ct.H.R	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESR	International Covenant on Economic and Social Rights
JEITT	Judicial Education Institute of Trinidad and Tobago
JRTT	Judiciary of the Republic of Trinidad and Tobago
OAS	Organization of American States
UNCTOC	United Nations Conventions against Transnational Organized Crime
UN Women	United Nations Entity for Gender Equality and the Empowerment of Women

FOREWORD

Gender equality is more than a goal in itself. It is a precondition for meeting the challenge of reducing poverty, promoting sustainable development and building good governance.
Kofi Annan

Gender equality is about women's rights but it is not only about women's rights. It treats with the right of every member of society to an equal share of the available resources and benefits of that society. It is about the dignity of the human person and the affirmations made on our behalf contained in the preamble to the 1976 Republican Constitution of Trinidad and Tobago. In particular, it is about the equal and inalienable rights of all persons.

The idea of the establishment of this protocol was born at a Caribbean Association of Judicial Officers ("CAJO") Biennial conference held in Jamaica in 2015. It arose out of a presentation made on Gender Equality by UN Women and the Judicial Reform and Institutional Strengthening (JURIST) Project, which is funded by Global Affairs Canada. At that conference, the Chief Justices of the Region committed to have prepared a Gender Protocol for Judicial Officers in each Judiciary in the region. To further this commitment a generic draft protocol was prepared for each Caribbean region by UN Women, the JURIST Project, and CAJO. Each draft protocol was modeled on the Mexican Supreme Court's 'Judicial Decision-Making with a Gender Perspective: A Protocol' developed in 2014.

The draft protocol was presented to the Chief Justice of Trinidad and Tobago in 2016, and the Judicial Education Institute of Trinidad and Tobago was mandated to use it as the basis for developing a Gender Protocol specifically for Trinidad and Tobago. The JEITT engaged a process whereby a Committee of judicial and non-judicial staff was appointed to consider the draft and come up with a Gender Protocol suitable for Trinidad and Tobago. That Committee consulted with the wider Judiciary, deconstructed the draft, and significantly reworked it. This is that Gender Protocol.

Over the last year, both internationally and locally, we have seen many institutions, governmental and non-governmental, declare the need to establish gender protocols. Internationally, coming in the wake of the "Me Too" movement and the issues of the lack of equality in job opportunities and remuneration, and nationally, confronted by the frequent and alarming reports of gender-based violence, many ending in deaths of women, the question is no longer why a gender protocol.

This protocol is directed to Judges, Masters, Registrars, and Magistrates on whom the duty to dispense justice is entrusted. Dispensing justice is not an easy task. As Judicial Officers we are bound by precedent and encaged by laws which are themselves hard-pressed to maintain their relevance and applicability in a twin-island State struggling towards first-world status. As individuals we are all constrained by morals and standards inculcated by what we have been taught and our experiences.

The world is changing and in this vortex of changing norms and mores of society we, as Judicial Officers, are tasked with the responsibility of applying these laws and doing justice. Doing justice is much more than simply applying the laws. Computers can do that. It is also about applying the laws to the cases before us so that, as far as possible, we can ensure equality of results and the protection of the vulnerable. It is about applying a gender perspective to any adjudication that involves a power imbalance regardless of the source of that inequality. It is also about facing and confronting those individual biases that have the potential to impair our judgment.

As Judicial Officers, our oath of office requires us to conscientiously, impartially, and to the best of our knowledge, judgment and ability discharge the functions of our office and do right to all manner of people. This Protocol seeks to assist Judicial Officers in attaining these goals. This is reflected in the Statements of Principle and Guidelines for Judicial Conduct applicable to Judicial Officers in Trinidad and Tobago.

> *No two leaves are alike, and yet there is no antagonism between them or the branches on which they grow.*
> *Mahatma Gandhi*

To ensure the ownership of the Protocol by the Judiciary of Trinidad and Tobago, the Committee tasked with the job of finalizing the Protocol embarked on a series of consultations with Judicial Officers. Each Judicial Officer in Trinidad and Tobago was afforded the opportunity of participating in the process. These consultations comprised informal meetings and included the conduct of a survey, prepared jointly by UN Women and the JURIST project. This survey was aimed at engaging the Judiciary's perception of gender roles and determining the extent to which Judicial Officers might benefit from having a gender protocol to provide guidance when engaged in judicial decision-making.

The results of the consultations and the survey brought five things to the fore. The use of the word gender provoked in some Judicial Officers a negative reaction. It was categorized as a "woman thing" therefore unimportant and not relevant to them or to their role as a Judicial Officer. Many Judicial Officers felt that the focus of the draft protocol was on areas of law more appropriate to the jurisdiction of the Magistrates and to Judges sitting in the family jurisdiction and criminal jurisdiction and therefore not relevant to Judges sitting in the civil jurisdiction. The draft protocol lacked a practical approach. Judicial Officers wanted specific guidance on how they should operate on a day-to-day basis. No or no sufficient consideration was given to the treatment of LGBTQI persons. Finally it was clear that for the Protocol to be effective there needed to be some training for Judicial Officers.

Common questions arising out of the discussions on the Protocol were the status of the Protocol; public or private, its enforceability, and concerns on how to reconcile personal, mainly religious, beliefs with the need to acknowledge and treat with LGBTQI persons coming before the Court.

With regard to the latter concern, the position taken by the Committee was that this was an issue that we, as a Judiciary, had to face full frontally. The reality was that the LGBTQI communities existed, were accessing the courts, and were as entitled to the benefit of a fair and unbiased court system as any other litigant. The position taken by the Committee, and in this Protocol, was that while we could not presume to change a Judicial Officer's beliefs or values, nor would we attempt to do so, by our oath as Judicial Officers we have all committed to provide justice for all whether we approve of their lifestyle or not. The section of the protocol dedicated to the special consideration for the treatment of non-traditional gender identities comprises three pages of a document that comprises approximately one hundred pages. It remains an important part of the Protocol but the Protocol is not defined by it.

This Protocol is not for use by the public. Like publications as the 'Statements of Principle and Guidelines for Judicial Conduct' and 'Model Guidelines for Sexual Offences Cases in the Caribbean Region' it is to be used by Judicial Officers. It simply represents suggestions on the best practices to be adopted when faced with inequality as a result of gender or any other source of discrimination. It seeks to provide the Judicial Officer with guidance on how to approach adjudication in a manner that will allow for more than just a strict application of the laws.

In order to address the concerns voiced by our Judicial Officers, the Trinidad and Tobago protocol materially

differs from the draft protocol originally provided to us. It places the need for gender equality in a historical context. It recognizes and emphasizes the validity of the protocol to persons other than women. It includes local material and examples. Apart from the sections described earlier on treating with non-traditional gender identities and achieving gender sensitive adjudication, the Protocol also includes a section on Procedural Fairness and includes practical tips on particular legislation and embarking on gender sensitive adjudication.

The Protocol is formatted in two parts. The first deals with the more theoretical aspects of gender adjudication. The second examines specific legislation that requires the Judicial Officer to take active steps to ensure the minimization of gender discrimination. In doing so we hope that we have made the Protocol relevant to all Judicial Officers; so that it can be of assistance in their day to day adjudication and judgment writing and have provided a practical guide to ensuring gender and equality justice in the determination of the cases before them.

Of course, this Protocol would not have become a reality without UN Women, The JURIST Project, and the foresight of the regional Chief Justices. Also invaluable to the final product has been the work of the JEITT and the Chairman of its Board, Justice of Appeal Peter Jamadar. The sections on Gender through a Historical Lens, Procedural Fairness, and Embarking on Gender Sensitive Adjudication are solely due to their work and research in these areas. On behalf of the Committee and Judicial Officers of Trinidad and Tobago, I thank you.

And finally I must introduce the Committee tasked with this responsibility. The Committee, of which I was the Chair, comprised nine other persons: Justice Andrea Smart, Justice Nadia Kangaloo, Justice Kevin Ramcharan, Master Vigel Paul, Acting Master Carl Quamina, Dr Charisa-Marie Alexis-Francois, Ms Trisha Dassrath, Mr Elron Elahie and Ms Jennifer Leach. Every member contributed to the final product. In addition, over the last eleven months we all received training in Gender Sensitive Adjudication conducted for Judicial Officers in the region by the JURIST Project, UN Women and the JEITT. This training not only provided us with the theoretical expertise to more adequately engage in the process of establishing the final protocol but also equipped us to embark upon the training of other Judicial Officers in the use of the Protocol and achieving gender sensitive adjudication.

To you, Judicial Officers embarking on the task of gender sensitive adjudication in the quest of justice, in presenting the Gender Equality Protocol for Judicial Officers of Trinidad and Tobago I can do no better than to adopt the words of Martin Luther King Jr.:

> *Human progress is neither automatic nor inevitable... Every step toward the goal of justice requires sacrifice, suffering and struggle; the tireless exertions and passionate concern of dedicated individuals.*

Judith Jones

Justice of Appeal and Chair of the Committee for the finalization of the Gender Equality Protocol for Judicial Officers of Trinidad and Tobago.

SECTION 1

- GENDER THROUGH A HISTORICAL LENS: AN OVERVIEW
- UNLOCKING THE GENDER BOX
- AIM OF THIS PROTOCOL

GENDER THROUGH A HISTORICAL LENS: AN OVERVIEW

Gender interrogations have always been an integral aspect of the historiography of the Caribbean region. Since the presence of indigenous people groups, gender roles and ascriptions have governed ways of being and shaped social interaction. With the entry of Christopher Columbus, the West Indian terrain became bombarded with new, Eurocentric gender-based values which exacerbated patriarchal and hegemonic practices. As the Caribbean region morphed into the "gayelle"[1] of Europe, it readjusted itself under new colonial parentage and imported ideological and legislative positions that would not only sanction the continued abuse of women and girls, but moreover encourage the marginalization of persons of colour, and instigate violence toward difference. Unfortunately, these barbarous traditions continued throughout the periods of slavery, indenture, and colonialism, critiqued only by those who were prepared to question the established order.

In modern times, however, advocacy for gender equality has become a more perceptible conversation. Unfortunately, this has not always translated into statutes that inculcate fairness for ALL members of Caribbean society. This Gender Equality Protocol for Judicial Officers has thereby employed a very specific methodology that has considered two significant factors. First, the Protocol recognizes that due to the socio-historical background of the region, numerous factors apart from gender inequality, created unbalanced scales within Caribbean jurisprudence. As such, exploring the theoretical nature of intersectionality[2] was a fundamental feature of the procedural design process. Second, it acknowledges that while Feminism has advanced women's advocacy globally; as a concept legislative "gender" equality in the Caribbean should not be confined to women's issues only. Instead, it must be inclusive of all persons. With this consideration at the forefront of technical deliberations, a document has been fashioned that seeks to chart a new course for gender-sensitive adjudication.

Upon examination of the colonial history of the West Indies, the preponderance of gendered issues within the fabric of historical events was quite evident. In his presentation at a Conference on Caribbean Masculinity, historian, Professor Hilary Beckles expressed some interesting sentiments. He pointed out that while the right to life and social liberty in the region was not denied based on gender; gender inequality provided the lens through which the construction of masculinity/femininity and racial differentiation, could be analysed.[3] He thereby contends that for a person to gain an understanding of the dynamic nature of

1 A gayelle or Cockpit in this case is the original meaning of an enclosed space or pit where cock fighting took place. Historical use of the term cockpit reflects a space where intense fighting and battles occurred. Historian have used this term to describe the rivalry between different European states and their battles in the Americas.

2 Kimberlé Crenshaw is credited with coining the term "intersectionality" to describe "the various ways race and gender interact to shape the multiple dimensions of black women's employment experiences." However, the concept of Intersectionality was developed over the course of the twentieth century by various advocates of black feminism—a social movement based on the premise that black women's interests were not represented in either black movements or women's movements in the United States (for reviews of black feminist thought, see Collins 1990; Crenshaw et al. 1995).

3 Beckles, Hilary. "Black Masculinity in Slavery." The Construction of Caribbean Masculinity: Towards a Research Agenda Symposium. The University of the West Indies Institute for Gender of Development Studies, 12 Feb. 2017, St. Augustine, St. Augustine.

Caribbean civilizations, gender, race and social placement collectively play a significant role in contextualizing societal development.

In 1989 American professor, Kimberlé Crenshaw referenced an underutilized gender concept termed Intersectionality, and defined it in the following way:

> *Intersectionality speaks to the view that women experience oppression in varying configurations and varying degrees of intensity. Cultural patterns of oppression are not only interrelated but are bound together and influenced by the intersectional systems of society. Examples of this include race, gender, class, ability, and ethnicity.*[4]

Intersectionality thereby enables one to recognize the fact that perceived group membership can make people vulnerable to various forms of bias, yet because we are simultaneously members of many groups, our complex identities can shape the specific way we each experience that bias. This Gender Protocol understands the significance of the configurations of Intersectionality in Trinidad and Tobago and how these ascriptions feed into stereotypes that impede access to justice. For example, an Afro-Trinidadian, poor older male living in Laventille approaching the courts vs. a young mixed-race female with post-graduate qualifications, resident of Fairways approaching the court, who has the upper hand?

During the period of European expansion and African enslavement in the Caribbean, European males were acknowledged as the centres of power. Legitimised by the hue of their skin, geographical placement and economic standing, the white male was an ideological representation of supremacy, profit, and glory. Numerically outnumbered by the black male, he took pleasure in dominating the enslaved male's body and mind. An act that would essentially dichotomize the constructions of masculinity, and inevitably force the African male to forever justify his standing as worthy – even after the abolishing of slavery and to date. Juxtaposed to her male ruler, the European women also existed in the upper tiers of the social hierarchy, albeit being secondarily positioned. A hierarchical structure rooted heavily in religiosity and patriarchy. When Caribbean historian, Cecily Jones reflected on the intersections of gender, race and the status of white women in the Caribbean, she stated, "Subordinated subjects by virtue of their gender, their racial identity conferred on European women superior social status and the attendant privileges of whiteness – though social class at all times mediated that whiteness."[5] A statement directly pointing to the complex elements that governed West Indian societies from as early as the 15th century.

In contrast to the white European woman, African enslaved women alongside female Indian indentured servants were doubly marginalized due to their sex as well as their skin colour. They encountered the worst treatment of all; falling victim to the tyranny and sexual abuse of the white man as well as the physical thrashings from jealous wives. In Robert Wedderburn's, The Horrors of Slavery he described the experience of living with his white father and his engagement with the domestic female workers:

> *My father's house was full of female slaves, all objects of his lusts; amongst whom he strutted like Solomon in his grand seraglio, or like a bantam cock upon his dunghill... My father ranged through the whole of his household for his lewd purposes; for they were his personal property, cost nothing extra; and if anyone proved with a child-why, it was an acquisition which might one day fetch something in the market, like a horse or pig in Smithfield. In short, amongst his slaves, my father was a perfect parish bull; and his pleasure was the greater because he at the same time increased his profits.*[6]

4 Kimberlé Crenshaw, On Intersectionality: The Essential Writings of Kimberlé Crenshaw (New York: New Press, 2018)

5 Cecily Jones, 'Contesting the Boundaries of Gender, Race and Sexuality in Barbadian Plantation Society,' (2003) Volume 12 Women's History Review, 195–232.

6 Robert Wedderburn, 'The Horrors of Slavery exemplified in the Life and History of Rev. Robert Wedderburn' in Ian McCalman (ed), The Horrors of Slavery and Other Writings by Robert Wedderburn (Marcus Wiener, 1991), 46.

This narrative speaks mildly to the horrors that women experienced on a daily basis at the hands of plantation owners. It also set the standard by which black women would be perceived as inferior objects to be used for the sole purpose of labour and sexual exploitation. In fact, the stereotyped role of the "Jezebel" became characteristic of the enslaved women. A term used during European imperialism as a rationalization for the sexual exploitation of women of colour.[7] Further to the stereotyping of women's sexuality, there were other conceptions of Afro Caribbean womanhood that have continued to beleaguer local identity formations and social engagements to date. According to Patricia A. Turner "a truly fictional character," the mammy traces back to Slavery.[8] She became an asexual grandmother type who dedicated her life to her white family. Through this mythological construction Afro Caribbean older women are set up as symbols of maternal care and instinct. They are many times viewed as suitable only to engage in domestic work and secondarily position within the professional space.

When Slavery became abolished in 1838 in the British Caribbean, one may have thought that there would have been a movement toward a more humane and considerate society. Unfortunately, with the arrival of Indian Indentured labourers to the territories of Trinidad, Guyana, Jamaica, St. Lucia and Suriname, the abuse and marginalisation of the "other"[9] continued. Indian men and women also encountered exclusion by the creolizing forces, not solely based on gender constructions but also as a result of their ethnicity and "different" cultural practices. Indo Caribbean women have also been constructed through the white male gaze. Historian Patricia Mohammed states that the colonial gaze slotted racialized women (the indigenous woman, the black washerwoman, the mulatto woman) into a hierarchy of Venuses for the purposes of rationalising fantasies of intimacy.[10] Termed the "coolly belle" there was an attempt to insert the new contender for the position of Sable Venus[11] (previously occupied by mulatto women), the Indian women was similarly abused by the male planter and pitted against the Afro Caribbean women as a more acceptable version of femininity.

The marginalization of Indian women however was still a reality, in particular, this was multiplied by internal Muslim and Hindu social structures that made caused the ascription of negative labels. Caribbean historians described Indian women as discursively constructed and positioned within a colonial Creole social hierarchy which placed men and women not only at the bottom of the social hierarchy but also completely disconnected from the other ethnic groups as well.[12] These intricacies would serve to frame and shape the future construction of Indian identity formation within the Caribbean landscape.

With a society constructed by a majority African and Indian population, it is evident that these groupings are the ones that frequent the judicial system. It is therefore critical that this Protocol incorporate the realities of the historical traumas experienced to ensure that there is a holistic approach to the delivery of justice to all.

The impact of the International Women's Movement caught fire in the Caribbean in the 1970s. As light was shed upon women's social and legislative inequality, women in the region like their sisters abroad, began to advocate for equal rights and greater access to justice. Persons such as Elma Francois, Audrey Jeffers, and Selma James established organizations that would

7 Patricia Hill Collins, Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment (New York: Routledge, 2000)

8 Patricia Turner. Ceramic Uncles and Celluloid Mammies: Black Images and Their Influence on Culture. University of California: Anchor Books (1994), 43.

9 The characteristics of the other, is the state of being different from and alien to the social identity of a person and to the identity of the Self. The term Othering describes the reductive action of labelling a person as someone who belongs to a subordinate social category defined as the other. The practice of Othering is the exclusion of persons who do not fit the norm of the social group, which is a version of the Self.

10 Amar Wahab, 'Race, Gender, and Visuality: Regulating Indian Women Subjects in the Colonial Caribbean' (2008) CRGS.

11 The 'Sable Venus' represented male erotic fantasies, but also the widespread practice of concubinage and sexual exploitation of black women. The term has been used to refer to mulatto women.

12 Amar Wahab, 'Race, Gender, and Visuality: Regulating Indian Women Subjects in the Colonial Caribbean' (2008) CRGS.

bring women together with the aim of strategizing on how greater empowerment could be achieved. These women became the recognizable voices of the revolution in Trinidad and Tobago.

As the cause for improved wages and greater access to education gained traction, the focus was also given to recovering and retrieving the histories of women and their impact on the society's development. During that time gender advocacy was mainly associated with the promotion of women's rights. However, as the years progressed, there was an understanding that various societal groups experienced different forms of discrimination and exclusion. A shift was then made from writing and speaking about "women's histories" to that of "gendered histories," which recognized disparities across the board. As historian Jean Stubbs puts it:

> *The gender history approach, tries to analyse significant differences in the historical experiences of men and women in a given society and chronological period; it concentrates on gender roles and ideologies, how they develop and are transformed over time, and how they help to shape historical change.*[13]

Similarly, the Gender Protocol for Judicial Officers embraces the holistic definition and does not pivot its adjudicative agenda solely on women's issues but that of subordinated masculinities as well.

Over the past decade, significant strides have been made in Trinidad and Tobago to facilitate difficult conversations regarding the home-grown constructions of masculinity and femininity. Gender activists have sought to highlight the historical underpinnings of patriarchy and hegemony that continue to shape local gender perceptions in an attempt to move toward a more progressive way. The perspective of the law as a closed logical order is a thing of the past. Based on the complex constructions of the Caribbean society, it is critical for Judicial Officers to harness the techniques of the social sciences, cultural studies, and history for a more holistic approach to its execution. From around the 1960s, the term "socio-legal" studies was used to reflect an approach to the law that sought to have an understanding of the social world first before the law was applied. Through the implementation of this culturally specific framework that refuses to stand in isolation, for the first time there will be a formalization of a methodology that seeks to consider the beauty and flaws of our Caribbean history with the enlightenment of the jurisprudential future.

With the judicial and legislative structures of the State being the most critical to the maintenance of democracy, these institutions are inevitably tasked with the responsibility of confronting its own gender biases. The end thereof being an adjustment to the institutional frameworks that continue to be exclusionary to subordinate masculinities, women, and members of the LGBTQI community. Through the creation of an instructive roadmap for gender engagement, this Protocol can serve as an initiator to moving the gender equality debate away from the margins where it often resides to the centre where it truly belongs.

13 Bridget Brereton, 'Women and Gender in Caribbean (English-speaking) Historiography: Sources and Methods', (2013) CRGS, 2.

UNLOCKING THE GENDER BOX

These working definitions are the keys that will allow Judicial Officers applying this protocol to unlock the gender box. They are not dictionary definitions but have been developed and adapted by The Gender Protocol Committee (The Committee) using as a base the UN Women Training Centre's Gender Equality Glossary.[14]

Equality

Equality ought to be understood as the equal treatment of equals, different treatment for the differently circumstanced, and special treatment in certain circumstances. Equality arises out of the equal and inherent dignity and value of all persons.

Equality in this context refers to the right of every individual to an equal opportunity to make the most of their lives and talents, and not to be unfairly disadvantaged in relation thereto. It recognizes that no one should have reduced life chances because of where, what or whom they were born or are. Equality means that irrespective of differentiating features all people will be treated equally unless there a legitimate justifying considerations.

In the context of gender:

> *Equality does not mean that women and men will become the same but that women's and men's rights, responsibilities and opportunities will not depend on whether they are born male or female.*[15]

Discrimination

Differentiation and different treatment on the basis solely of (i) inherent personal or group characteristics, and/or (ii) conditions integral and inherent to identity and personhood. Differentiation and different treatment is permitted when the purposes are legitimate, the means used are proportionate and fair, and the standards applied are reasonably and juridically justifiable (sections 5 (1) and 13 of the Constitution).

Sex

This refers to the biological characteristics that have been used to define persons as female or male. This is conventionally established and recorded at birth based on external anatomy. These biological characteristics, however, are not mutually exclusive. There are individuals who have been defined as male or female but who possess some biological characteristics traditionally associated with the other sex; that is they are properly defined as intersex.

This protocol therefore recognizes that there are persons who do not fall within the traditional conventions. While recognizing that the sex assigned at birth may in reality cover a whole array of combinations of biological characteristics, **for simplicity in this Gender Equality Protocol we will use the conventional gender description of sex, man and woman, to include those persons who are or consider themselves to be transgender.**

Gender

Gender refers to the socially ascribed roles, behaviours, activities, and attributes that at any given time a society considers appropriate for men and women. It denotes the social attributes and opportunities associated with being male or female as well as the relationships between and among men and women. These attributes and relationships are socially constructed and are learned through socialization. They are context and time specific and changeable and are therefore fluid.

14 https://trainingcentre.unwomen.org/mod/glossary/view

15 UN Women, OSAGI Gender Mainstreaming – Concepts and definitions

Gender Identity

Gender identity refers to a person's innate, deeply felt internal and individual experience of gender which may or may not correspond to the person's physiology or designated sex at birth. Where they do not conform to a persons designated sex at birth such persons may refer to themselves as transgender. Gender identity includes both the personal sense of the body which may involve, if freely chosen, modification or bodily appearances or function by medical, surgical or other means and other experiences of gender manifested in some cases by dress, speech and mannerisms.

Transgender

An umbrella term for people whose gender identity is different from cultural and social expectations based on the sex they were assigned at birth, but does not include gender non-binary/genderqueer.

Gender non-binary/Genderqueer

This refers to a person who does not subscribe to conventional gender distinctions but identifies with neither, both, or a combination of male and female genders. It is often used as an umbrella term for identities that fall outside the man woman dichotomy.

Intersex

Intersex is defined as a person who is born with a combination of male and female biological characteristics, such as chromosomes or genitals that can make it difficult for doctors to assign their sex as distinctly male or female. There are many different intersex variations. Some intersex people have ambiguous genitalia or internal sex organs, such as a person with both ovarian and testicular tissues. Other intersex people have a combination of chromosomes that is different than XY (male) and XX (female), like XXY. Some people are born with what looks like totally male or totally female genitals, but their internal organs or hormones released during puberty do not match.

Sexual orientation

This refers to whom we are sexually and romantically attracted. Terms for sexual orientation can include heterosexual/straight, gay/lesbian, bisexual, pansexual, asexual, and queer/questioning.

Sexual Identity

This is not to be confused with gender identity and simply refers to a person's sexual identity in relation to whom they are attracted.

Gender Relations

This refers to the social relationships between men, women, girls and boys that shape how power is distributed between them and how that power translates into different positions in society. Gender relations vary depending on other social relations, such as class, race, ethnicity etc. Gender relations and other social relations greatly impact how individuals experience processes and institutions such as trials and courts and how they interact with other individuals within those institutions. Gender relations are therefore also impacted by intersectionality.

Gender Equality

This term treats with the equal rights, responsibilities, and opportunities of women and men. Gender equality "does not mean that women and men will become the same but that women's and men's rights, responsibilities and opportunities will not depend on whether they are born male or female[16]". Gender equality requires that the interests, needs, and priorities of all persons irrespective of their gender identity are taken into consideration, while recognizing and appreciating the diversity of different groups. Specifically, it means that there will be no unjustifiable discrimination based on gender.

Gender Analysis

Gender analysis is the critical examination of how differences in gender roles, activities, needs, opportunities

16 ibid

and right/entitlements impact on men and women, males, females, and intersex persons, in a certain situation or context. Gender analysis examines the relationships between and among these groups and their access to and control of resources and the constraints they face relative to each other and all others. It is a necessary component to ensure that gender-based injustices and inequalities are not exacerbated by interventions, and that, where possible, greater equality and justice in gender relations are promoted.

Gender Discrimination

Gender discrimination is any distinction, exclusion, or restriction made on the basis of sex, gender, or gender identity which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women and men of fundamental rights and freedoms in the political, economic, social, cultural, civil or any other field. Discrimination can stem from both law (de jure) or from practice (de facto).

Gender Justice

This is "[T]he protection and promotion of civil, political, economic and social rights on the basis of gender equality. It necessitates taking a gender perspective on the rights themselves as well as the assessment of access and obstacles to the enjoyment of these rights for women, men, girls and boys and adopting gender-sensitive strategies for protecting and promoting them."[17] Increasing access to justice, be it formal or informal, hinges on removing economic, political, and systemic and social barriers to meaningful participation. Achieving gender justice requires effective interventions to fulfil the enjoyment of all fundamental rights.

Gender-Based Violence (GBV)

A general term used to describe any harmful act perpetrated against an individual against their will based on their socially defined identity as man or woman (adapted from a UN document). Violence includes, but is not limited to: physical, verbal, sexual, psychological, and socio economic harm.

Gender Roles

Gender roles refer to social and behavioural norms that, within a specific culture, are widely considered to be socially appropriate for individuals of a specific sex. These often determine the traditional responsibilities and tasks assigned to men, women, boys and girls. Gender-specific roles are often conditioned by culture, social, and household structures, access to resources, specific impacts of the global economy, occurrence of conflict or disaster, and any other locally relevant factors such as ecological conditions. Like gender itself gender roles are fluid can evolve overtime.

Gender Stereotypes

Gender stereotypes are simplistic generalizations about the gender attributes, differences and roles of women and men. Stereotypical characteristics about men are that they are competitive, acquisitive, autonomous, independent, confrontational and concerned about private goods. Parallel stereotypes of women hold that they are cooperative, nurturing, caring, connecting, group-oriented and concerned about public goods. Stereotypes are often used to justify gender discrimination more broadly and can be reflected and reinforced by traditional and modern theories, laws and institutional practices.

Gender Neutrality and Gender Blindness

Gender neutrality is an assumption that development interventions will benefit men and women equally. It is susceptible to the 'same treatment fallacy – that applying policies, laws, and regulations results in equality of treatment'. It fails however to recognize that gender differences can themselves result in different privileges and opportunities for men and women. In this regard it therefore can be said to equate with gender blindness. Both may lead to a failure to properly analyse and plan for the unequal effects of developmental interventions.

17 Pam Spees, *Gender Justice and Accountability in Peace Support Operations Closing the Gaps* (IA 2004)

Intersectionality

The concept of intersectionality recognizes that social identities and methods of discrimination within a society, based on sex, gender, wealth, status, ethnicity, skin colour, language proficiency, and education level, do not exist independently but are instead interrelated and continuously shaped by one another. It recognizes that a person's gender identity is constituted differently depending on factors such as age, ethnicity, sexual orientation, social class or country of origin.[18]

18 P Jamadar and E 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* (JEITT 2018) 75

AIM OF THIS PROTOCOL

By this Protocol, Judicial Officers are being asked to embark upon adjudication using a gender perspective.

"This demands conscious human intervention from a gender sensitive perspective with a clear and purposive intent to ensure gender-equality in the process of adjudication," per Jamadar JA in a paper delivered to the Caribbean Association of Judicial Officers (CAJO) in 2017 on Gender Sensitive Adjudication: the Role of the Judicial Officer in Developing the Law to achieve Gender Justice in the Caribbean.

Adopting a gender perspective requires us, as Judicial Officers, to consider the roles usually assigned by society on the basis of sex, gender, and /or sexual orientation and how these roles determine the rights and responsibilities ascribed to individuals by society. It asks us to examine how laws and policies impact on the individual, particularly those in "suspect classes", that is, among classes of persons who are particularly vulnerable or whose characteristics have traditionally been undervalued by society. For us as Judicial Officers, this has special importance in light of our responsibility to ensure access to justice and equality of treatment for all, generally and by the court. Where there is a disparity in impact, the application of a gender perspective requires us to determine whether such disparity is arbitrary or justifiable and, where it is found to be arbitrary, seek to remedy the resulting inequality.

Access to justice and equal treatment are essential elements of our judicial system. Our Constitution recognizes and declares that there has existed and continues to exist "without discrimination by reason of race, origin, colour, religion or sex" the right of the individual to equality before the law and equality of treatment.[19] To this end Parliament is prohibited from enacting laws that offend against these rights. It is therefore the responsibility of the Judiciary as the guardians of the Constitution to ensure a judicial system to which there is equal access, equal treatment of, and equal justice for all users.

A component of this right of access to justice, equality before the law, and equal justice for all is the right to equal access to the redresses or remedies made available to the public by our judicial system. This protocol therefore also addresses the manner in which gender stereotypes and gender biases, implicit and explicit, and prejudices may affect a party's right to equal access to these remedies. It seeks to provide Judicial Officers with the tools necessary to make decisions that reflect gender sensitivity and which result in decisions that are ultimately transparent and fair.

Bias has been judicially described in a number of cases. A working description may be found in the case of *Panday and Another v Espinet and Another*[20]. Here bias was described as:

> *...an attribute of the mind which prevents the adjudicator from making an objective determination on the issues that he has to resolve (see re Medicaments and Related Classes of Goods (No. 2) [2001] 1WLR 700 para. 87). An adjudicator may therefore be biased because he has reason to prefer one outcome of the case to the other or one party to the other. Bias may take many forms. It may for example arise from particular circumstances which for logical reasons predispose an adjudicator towards a particular view of the evidence or issues before him. When we speak of the appearance of bias it describes a situation where circumstances exist which give rise to a reasonable apprehension that the Judge may have been or may be biased (see RE Medicaments and Related Classes of Goods (No. 2), supra, at para. 88).*[21]

19 Section 4 of the Republican Constitution of Trinidad and Tobago

20 Civil Appeal 250 of 2009

21 Civil Appeal 250 of 2009 [28]

Courts therefore recognize that biases are not only as a result of prejudgments but can also be as a result of individual predispositions.

The problem faced by the litigant is that while the law recognizes that biases exist and provide grounds to challenge a decision, bias is not easy to prove.

> *Bias, after all, is a human shortcoming that is sometimes difficult to recognize in oneself. It frequently happens that, when faced with a suggestion of apparent bias or even actual bias against a particular party, the average decision–maker may perceive that he is confident enough to approach the issue with an open mind in spite of the bias. That too is part of human nature simply because it is at times difficult to admit to such imperfection. As a result a person may with all good intentions, believe that he is acting impartially while the mind may be unconsciously affected by bias. – Hamel-Smith JA*[22]

For the litigant, bias is not easy to pinpoint, far less specifically identify. In the majority of cases it is felt more that seen. Gender biases are particularly difficult to detect because they are, in most cases, learned behaviour and generally follow societal norms. It is only in the most obvious of cases therefore that bias will form the basis of a successful challenge to a decision. Oftentimes the victim is hard-pressed to identify exactly where the decision has gone wrong. Sometimes this is because the bias reflects a commonly held position. For example, the notion that young children are better served by being in the custody of their mother or young males are more likely to be criminals than young females. Sometimes the bias reflects a deep-rooted personal prejudice, for example, homosexuality offends against God's laws or a family unit ought to include a man and a woman.

22 Attorney General v Caribbean Communications Network Ltd Civ App No 158 of 2000

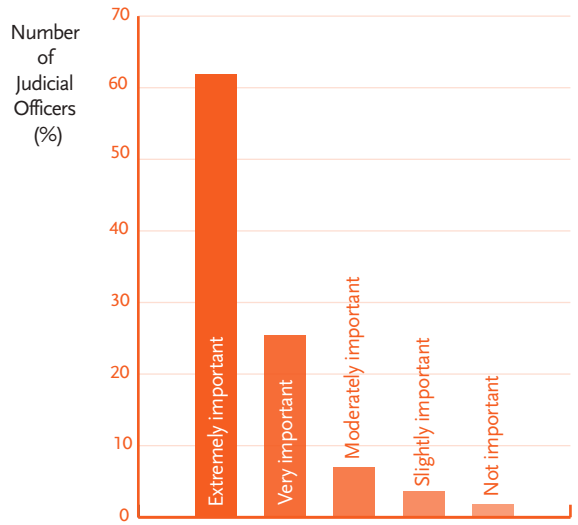
Either way decisions based on commonly held assumptions or deep-rooted personal prejudices are seldom ever stated for what they are, difficult to identify, easily justified on other footings, and often too humiliating for the victim to confront or challenge. Inevitably such decisions reflect on the quality of justice provided by Judicial Officers and ultimately the confidence that the public holds in the Judiciary as a whole.

The result of this is not simply a failure to achieve justice in a particular case but, more fundamentally, it contributes to a rejection of the judicial system by an increasing number of persons who feel that justice is unobtainable by them. It is this aspect of access to justice that is of concern to us here. In the view of the alienated they do not have the same access as other persons to the redresses made available by the court. In this case the adage 'justice is blind' has a completely different, and unwelcome, meaning.

Empirical evidence that Judicial Officers are themselves not immune from gender stereotyping has come from two similar surveys done on Caribbean Judicial Officers (the CAJO survey) and Judicial Officers in Trinidad and Tobago (the Trinidad and Tobago survey). In the CAJO survey done in 2015 on the role of gender in judicial decision-making, 53% of the Judicial Officers surveyed believed that women should generally be given custody of children and 41% thought that a man's primary role is to provide financial support for his family. In the Trinidad and Tobago survey done in 2017, 60% of the Judicial Officers felt that the general rule was that women should be given care and control of a child of tender years and 36%, felt that the man's primary role was to provide financial support for his children. This view was held despite the provisions of our Family Law (Guardianship of Minors, Domicile and Maintenance) Act Chapter 46:08 ("the Family Law Act"), enacted in 1981, and its Caribbean equivalents which provide that no claim by the mother or the father is superior to the other and that, in relation to custody, the rights and authority of the mother and father shall be equal.

FIGURE 1

Judicial Officers Explain Importance of Having Established Protocols on Gender



Source: CAJO/UN Women 2016 Survey on Gender and Judicial Decision-Making

In the same survey of Judicial Officers in Trinidad and Tobago, 44% of those surveyed believed that homosexuality was against 'God's laws' while 52% were of the opinion that attitudes regarding the appropriate roles of men and women in society influence the way in which Judicial Officers make decisions. While this protocol cannot presume to change Judicial Officers' strongly held positions, what it seeks to do is to ensure that these positions do not impair impartiality and/or affect the quality of justice dispensed by us as Judicial Officers.

An analysis done on the CAJO survey revealed that in spite of these strongly held beliefs Judicial Officers have a keen desire to apply a gendered perspective to their decision-making. In the same survey 78% of Judicial Officers agreed that it was either extremely or very important for them to identify their gender biases when adjudicating cases and, an overwhelming 82% agreed, that they would support having established protocols to combat gender discrimination. A similar conclusion can be drawn from the results of the Trinidad and Tobago survey. In this survey 64% of Judicial Officers felt that it was important to identify their own prejudices with regard to gender when adjudicating cases.

The results of both surveys emphasize the need to treat with the problem of gender inequality as it affects the quality of the justice meted out by the courts of the Judiciary of the Republic of Trinidad and Tobago ("JRTT"). The aim of this protocol therefore is to equip Judicial Officers to recognize and acknowledge their gender biases and apply a gender analysis to the cases before them. The protocol will provide the tools by which Judicial Officers can treat with gender-based injustices and inequalities.

There is also another benefit of this exercise to us as Judicial Officers. Gender discrimination is essentially but one manifestation of the power structure that evolves from differences in status of persons coming into contact with each other. Using a gender perspective when judging is simply a means of ensuring that the principle of equality of results governs our adjudication. As Judicial Officers we can use a gender perspective not only to address and correct structural and systemic inequalities that arise as a result of sex, gender or sexual orientation but wherever there are power imbalances that result in structurally unequal situations or outcomes. These structural and systemic inequalities can occur in a myriad of situations encompassing all areas of the law and society. A gender perspective therefore is applicable across the board to correct these inequalities and a useful tool for Judicial Officers as we seek to provide justice.

This was the approach taken by Seepersad J in the case of *Therese Ho v Lendyl Simmons*[23]. In this case the claimant sought injunctions and other relief against the defendant, a well-known cricketer, preventing him from disseminating private photographs of her which were in his possession. Determining that no action

23 CV 2014-01949

could be founded in this jurisdiction based on the failure to respect the privacy of a person, the Judge founded his orders on the common law concept of breach of confidence.

According to the Judge, at paragraph 31:

> *The instant case reinforces this Court's belief that it cannot confine itself to a myopic view of the law and in the absence of legislative protection, the common law concept of Breach of Confidence has to be moulded in such a way so as to address modern societal demands. The law has to be dynamic and has to develop in such a way to ensure that it remains relevant and it must be recognized that there is an obligation of conscience which requires that videos, photographs and/or recordings that capture private intimate relations, should be clothed with a quality of confidence.*

Later on the Judge, at paragraph 46, says:

> *...the behaviour of the Defendant cannot be condoned and demonstrated a flagrant disregard for the feelings, emotion and dignity of the Claimant with whom he shared sexual relation... The treatment of women as mere objects of pleasure is offensive, derogatory antiquated, has no place in a civilized society and is indicative of the general lack of respect... Respect for individuals regardless of gender, ethnicity sexual orientation, for the law and for authority, must define the way we live and interact with each other.*

Gender and sex stereotypes have and continue to lead to unjustifiable differentiation and therefore discrimination between men and women in the justice system. Gender stereotypes about the appropriate role of men and women consistently influence outcomes in cases that come before the court. The following table provides a non-exhaustive list of different stereotypes that result in discrimination for both men and women.

Type of Stereotype	Definition	Example of Stereotypes
Sex stereotype	Based on physical and biological differences between men and women.	• Women, by virtue of having a womb and the ability to give birth to a child, are 'naturally' better nurturers and caregivers.
Sexual stereotype	Based on sexual qualities that men or women are believed to have, as well as on ideas about sexual interactions between the sexes.	• There is nothing wrong with men having several sexual partners but a woman must be chaste
Sex-role stereotype	Based upon roles or behaviours attributed to, and expected of men and women, arising out of social and cultural constructions or physiology.	• Within the family, men should be the primary financial providers, while women should be the primary care givers for children and should take care of domestic matters.
Compounded or intersectional stereotype	When a gender stereotype interacts with another type of stereotype. These attribute different characteristics and roles to different subgroups of women.	• Lesbian and single women are not seen as fit to be mothers or gay and single men are not seen to be fit fathers. • Single women who are poor, uneducated, and suffer from a mental illness are not seen as fit mothers.

THIS PROTOCOL SEEKS TO:

- Equip the Judicial Officer to render decisions that are the product of a fair, transparent, and unbiased process;
- Increase the awareness in Judicial Officers of Trinidad and Tobago's international responsibilities toward the promotion of gender equality;
- Assist Judicial Officers in recognizing and eliminating individual biases which foster gender discrimination and provide signposts or markers for use by Judicial Officers to assist in identifying and treating with those issues which trigger individual gender biases; and
- Provide the Judicial Officer with the tools to identify, treat with and provide redress for power imbalances which hinder equality of treatment before the courts, structural inequalities in society and equal access by the litigant to the remedies and redresses available from the court.

SECTION 2

- **ELEMENTS OF PROCEDURAL FAIRNESS**

ELEMENTS OF PROCEDURAL FAIRNESS

Procedural fairness is concerned more with the procedures used by the Judicial Officer and the court system in which that Judicial Officer operates than the actual decision. It assumes that a fair and transparent procedure is required to arrive at a fair and just result. Procedural fairness inevitably results in a judicial environment that engenders in its users positive feelings about the legitimacy of the court's processes and the administration of justice.

At the heart of procedural fairness is the quality of relationships between Judicial Officers, judiciary staff, court systems and court users. This quality is defined by mutuality and recognition – of fairness, respect, trust, understanding, accountability, access, inclusivity, impartiality and of dignity. It is the responsibility of all persons within the judicial system – Judicial Officers, administrators, courtroom and courthouse staff, attorneys, as well as civilian and corporate court users.

Professor Tom Tyler is credited with being one of the leading voices in the area of procedural fairness. He has conducted wide-ranging research on the topic largely in the United States of America. He notes that when court users perceive that they have been and experience themselves as being treated fairly and with respect throughout the court process, three occurrences have been observed:

In relation to court matters, court users are more accepting of and compliant with the outcome – orders, directions and advice handed down by the Judicial Officer. This is so even when decisions are adverse and go against them;

This experience and perception of fairness and respect favourably shapes their overall view of the general Administration of Justice. Public trust and confidence in the legal system therefore increases and, consequentially, the legitimacy of the court system and its moral authority to be trustworthy and impartial arbiters of justice is enhanced.

Professor Tyler's research in the US revealed that there are four essential elements that constitute procedural fairness in the US court systems. These four elements are: Voice, Neutrality, Respectful Treatment and Trustworthy Authorities.

Tyler's four elements of procedural fairness are internationally considered as being important markers for Judicial Officers, court administrators, judiciary staff and court users in evaluating the experiences and perceptions of court users. According to Tyler, once they are present, court users experience positive feelings about the legitimacy of the court process and the Administration of Justice. These positive feelings have been found to arise regardless of the outcome of the matter.

In 2015 the JEITT embarked on a two-year research project to solicit views on, and discover the experiences of court users in relation to, the Administration of Justice in Trinidad and Tobago and, specifically, on the issue of Procedural Fairness. Surveys were conducted of the public, attorneys, judiciary staff, Judicial Officers and observations were done across courthouses and courtrooms in Trinidad and Tobago. To bolster this quantitative data, qualitative data was collected through ethnographic research which was conducted among court users across Trinidad and Tobago.

The JEITT research data showed that all the four elements of procedural fairness identified by Professor Tyler were recognized as crucial in Trinidad and Tobago. The data also revealed that there are five additional elements of procedural fairness also considered essential in Trinidad and Tobago. These nine elements that constitute procedural fairness in Trinidad and Tobago were defined to suit local experiences and expectations.

THE NINE ELEMENTS OF PROCEDURAL FAIRNESS APPLICABLE IN TRINIDAD AND TOBAGO

Voice: The ability to meaningfully participate in court proceedings throughout the entire process, by expressing concerns and opinions and by asking questions, and having them valued and duly considered ("heard") before decisions are made.

Respectful Treatment: The treatment of all persons with dignity and respect, with full protection for the plenitude of their rights, ensuring that they experience their concerns and problems as being considered seriously and sincerely, and having due regard for the value of their time and commitments.

Neutrality: The independent, fair, and consistent application of procedural and substantive legal principles, administered by impartial and unbiased decision makers and judicial personnel, without discrimination.

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

Accountability: The need for decision makers and judicial personnel to fulfil their duties, to reasonably justify and explain their actions and inactions, decisions, and judgments and to be held responsible and accountable for them, particularly in relation to decisions, delays, and poor service.

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

Access to Information: The timely availability of all relevant and accurate information, adequately and effectively communicated in clear, coherent language, through open, receptive, courteous, and easily accessible decision makers, judicial personnel and systems, particularly in relation to each stage of court proceedings.

Availability of Amenities: The need for all court buildings to be equipped with the necessary infrastructure (both structural and systemic) to enable court users full and free access to court buildings, efficient information systems, relevant operational systems, and the enjoyment of functionally and culturally adequate amenities.

Inclusivity: The need for court users to feel that they are, and experience themselves as, an important part of the entire court process, rather than outside of or peripheral to it; non-alienation, by being made to feel welcomed and included in court proceedings and to actively, easily, and effectively participate throughout the process.

In order for us as Judicial Officers to deliver decisions that are fair, transparent, and unbiased, the research shows that not only is there an operational need for the attention to, and active practice of, these elements of Procedural Fairness but there is also a jurisprudential requirement for ensuring that they are met.[24] All persons accessing the court are entitled to the benefit and enjoyment of these nine elements because they are essential to the constitutional guarantees of fairness and equality. What underpins this mandate for procedural fairness are the constitutional values of the rule of law, access to justice and equality of treatment set out in the Preamble and the Fundamental Rights and Freedoms sections of the 1976 Republican Constitution of Trinidad and Tobago. In relation to gender sensitive adjudication, it is therefore essential, even non-negotiable, that we as Judicial Officers adopt and apply these nine elements of procedural fairness throughout the court process.

24 See Exploring the Role of the CPR Judge pgs 21-22, and Her Worship Magistrate Marcia Ayers-Caesar v BS (by his kin and next friend Karen Mohammed) Civ App P252 of 2015 [37]

JEITT RESEARCH

As demonstrated in the charts below,[25] the JEITT's research shows that the majority of the Public, Judiciary Staff, Attorneys, and Judicial Officers either agree or strongly agree that court users are more likely to comply with and accept a court's decision where they perceive that the court process was fair, as seen in Figures 2 and 3 below. This opinion also holds even if the decision goes against them. Once the process is perceived as being fair, therefore, the majority of these groups feel that court users are going to be accepting of courts' decisions and outcomes even if they are not in their favour. This is in keeping with the impact of procedural fairness that has been demonstrated internationally.

The impact of procedural fairness on the public's trust and confidence in the Judiciary was also tested in the research.[26] Whereas the questions above asked those surveyed for their opinions of what court users might think, the following questions asked about one's personal feelings in a narrower context. And, as shown below, it is clear that in Trinidad and Tobago, the experience of fairness of proceedings has a large impact on this perception. This is regardless of the outcome of the matter.

The majority (58%), as seen in Figure 4 below, indicated that even if they were unsuccessful in their matters, their trust and confidence in the Judiciary would be positively or somewhat positively impacted if they experienced the proceedings as being fair. Conversely, shown in Figure 5, where a matter was experienced as being unfair, the majority indicated that their trust and confidence in the Judiciary would be negatively or somewhat negatively impacted. This is so even if they were the successful party in a matter. It is of note that this majority percentage was 76%.

25 Question 1— The number of responses from each group were as follows: Public (137); Staff (94), Attorneys (67); and Judicial Officers (20). Question 2— The number of responses from each group were as follows: Public (138); Staff (94), Attorneys (68); and Judicial Officers (22).

26 Question 3— There were 135 responses to this question. Question 4— There were 133 responses to this question.

FIGURE 2

1. Court users are more likely to comply with the court's decision if they feel the COURT PROCESS was fair

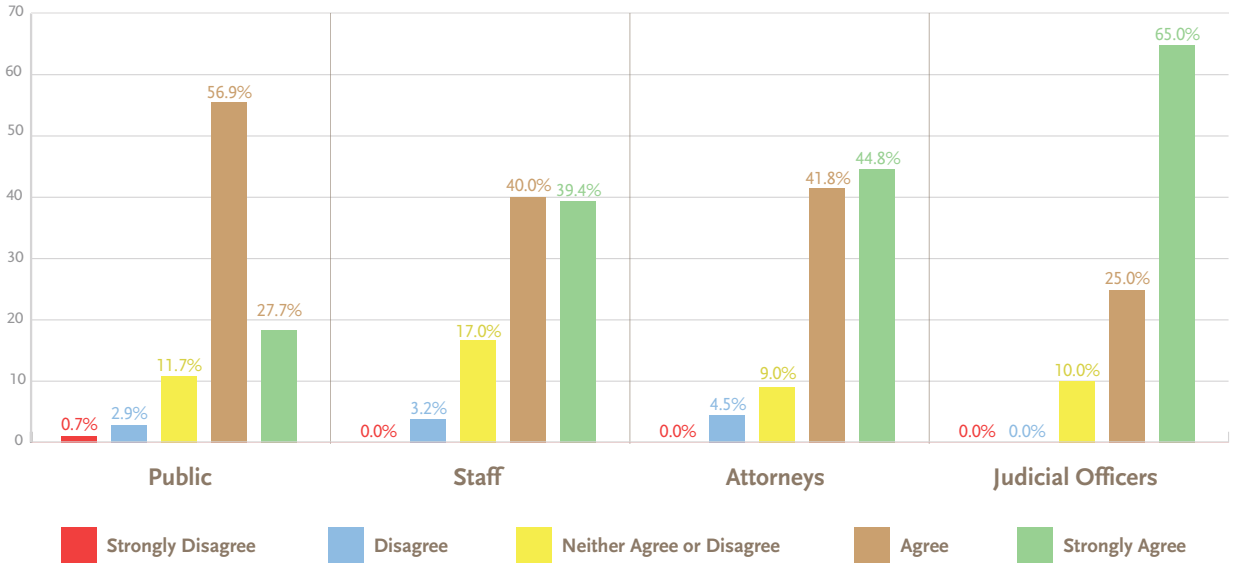


FIGURE 3

2. Court users are more likely to accept a court's decision even if it goes against them provided they feel the COURT PROCESS was fair

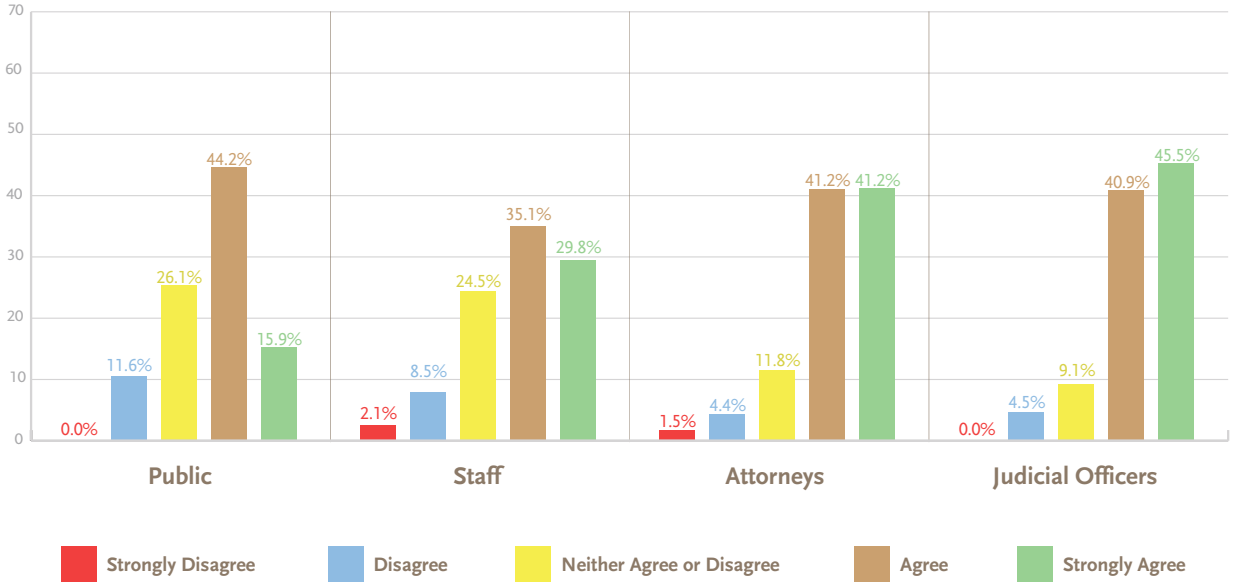


FIGURE 4

3. If I am the unsuccessful party in a matter, but I experienced the proceedings as being fair, my trust and confidence in the Judiciary would be impacted...

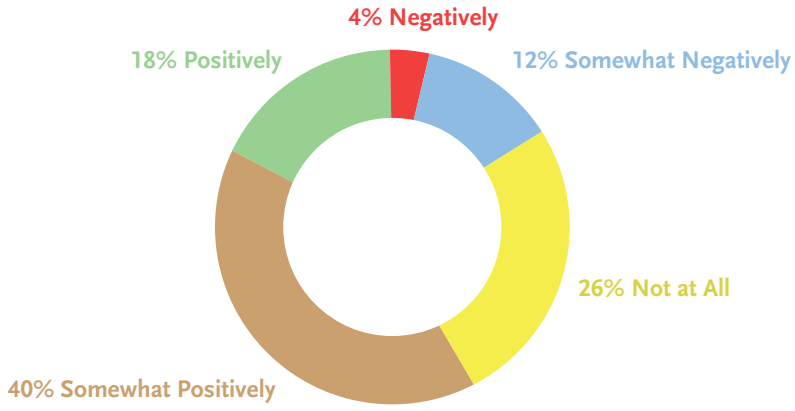
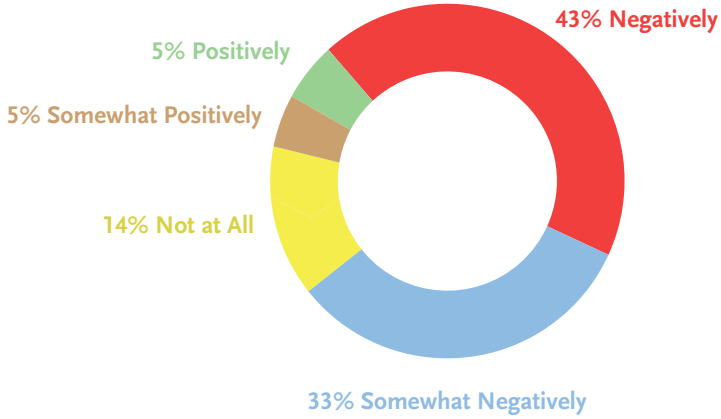


FIGURE 5

4. If I am the successful party in a matter, but I experienced the proceedings as being UNfair, my trust and confidence in the Judiciary would be impacted...



The JRTT report on Procedural Fairness in Trinidad and Tobago can be accessed at http://www.ttlawcourts.org/jeibooks/books/Proceeding_Fairly_Report.pdf. Arising out of this research, a Procedural Fairness Manual was also produced by the JEITT to facilitate the awareness and cultivation of all nine elements of procedural fairness. The Manual can be accessed at http://www.ttlawcourts.org/jeibooks/books/Procedural_Fairness_A_Manual.pdf.

SECTION 3

- SPECIAL CONSIDERATIONS FOR THE TREATMENT OF NON-TRADITIONAL GENDER IDENTITIES
- THE CONCEPTUAL AND LEGAL BASIS OF THIS PROTOCOL
- THE PRINCIPLE OF EQUALITY
- THE PRINCIPLE OF NON-DISCRIMINATION
- THE PRINCIPLE OF STATE OBLIGATION
- HOW DO WE AS JUDICIAL OFFICERS EMBARK UPON GENDER SENSITIVE ADJUDICATION?

SPECIAL CONSIDERATIONS FOR THE TREATMENT OF NON-TRADITIONAL GENDER IDENTITIES

An aspect of this Gender Protocol and the principles of procedural fairness that warrants special consideration is the treatment of non-traditional gender identities. As Judicial Officers in a developing society, we are constantly faced with situations that mandate us to re-evaluate the social constructs within which we usually operate, the values that inform our understanding of what is considered 'the norm', and which require us to change our thinking to meet the justifiable needs of an ever-evolving society. The public emergence of experiences faced by intersex, transgender, and persons of other non–traditional gender identities brings this to the fore.

The Intersex and Transgender Realities

The evolving treatment of Castor Semenya and Dutee Chand, two international intersex female athletes, bears witness to the complexities of sex and gender identity and pronounce the need to constantly rethink our attitudes on our treatment of persons who do not conform to traditional gender norms. With a reproductive/sexual build that does not fit the typical definitions of male and female, intersex persons have and can be subject to unfair, dehumanizing, and ultimately unconstitutional treatment. Thus, the protection of each individual calls on Judicial Officers to engage the principles of fairness, equality, and non-discrimination. For this to be effectively and appropriately dispensed, however, Judicial Officers must constantly analyse and dismantle the gender constructs that shape the environment in which such persons are usually deprived of their rights.

The recognition and treatment of transgender persons also requires of Judicial Officers, a shift in the conventional understandings of sex and gender and how legal rules and principles are applied to such. When an individual does not identify with the gender description (i.e. the socially constructed description) of their sex at birth, they are known as transgender. Prominent transgender figures like Jowelle De Souza of Trinidad and Tobago, regionally like Twinkle Bissoon, and internationally, Janet Mock, Chaz Bono, and Laverne Cox, among many others, continue to fuel the movement towards equality. The current debates on the 'Bathroom Bill'[27] in the United States bring the issues of access, equality of treatment, and due protection under the law into the spotlight. As Judicial Officers, we are required to reshape our conventional ideas about gender and do so with the aim of granting each individual due inherent dignity and the recognition and protection of their rights. This process involves engaging acute sensitivity, rational responsiveness to the justifiable needs of individuals, and being constantly informed by the constitutional values of equality and non-discrimination.

Equality and Non-Discrimination through Procedural Fairness

Our responsibilities to the public of ensuring equality of treatment and non-discrimination, as mentioned earlier in this Protocol, require us to treat all persons with respect in accordance with the preamble to our Constitution. This affirms that as a nation we are founded upon principles that

27 The common name for the legislation in the United States of America that defines access to public washrooms by transgender individuals.

include maintaining "the dignity of the human person". To do so, Judicial Officers must first disabuse themselves of the thinking that the adoption of these "different" or non-conventional gender identities are as a result of choice. We must recognize that while a public declaration of an individual's gender identity may be by choice, persons (even those who fit within the traditional categories) do not consciously choose their gender identity.

Five of the elements of procedural fairness are of particular assistance here: Respectful Treatment, Voice, Inclusivity, Neutrality, and Availability of Amenities. Though they are separate elements of procedural fairness, they are inevitably intertwined and work together to ensure that fairness in the court processes is experienced by each user of the court systems. Of these five elements four are directly relevant to our adjudication: Respectful Treatment, Voice, Inclusivity, and Neutrality. The fifth, availability of amenities, though often difficult to bring within the ambit of our direct control as Judicial Officers, has a major impact, particularly in the treatment of intersex and transgendered persons and their right to be afforded the means of maintaining their human dignity.

Respectful Treatment requires the Judicial Officer to deal with a person in a manner that gives due regard and acknowledges a person's entitlement to maintain and publicly declare their gender identity. Such treatment includes the requirement that the Judicial Officer refer to a person in a manner consistent with the gender that matches the individual's identity. This may, in some cases, require a tactful enquiry and ensuring that as far as possible the relevant pronoun is used throughout the proceedings by the Judicial Officer, the court staff, and other persons involved in the litigation. Consideration may also be given to the use of a preferred name where possible. Where not possible, the practice of adding the words 'also known as' should be considered and the need to do this must be explained to all parties. It is worth repeating, however, that how someone identifies is not a matter of what makes us (as Judicial Officers) feel comfortable, but rather, what serves to recognize the inherent and inalienable dignity of those coming before us.

Respectful Treatment may require the Judicial Officer, where possible, to treat with the matter in camera. Where this is not possible the Judicial Officer should consider giving warnings to persons present in court, including juries where appropriate, of the need to maintain proper decorum in the precincts of the court and the repercussions for not doing so. Warnings to the media may also be necessary to ensure responsible and accurate reporting of the court process.

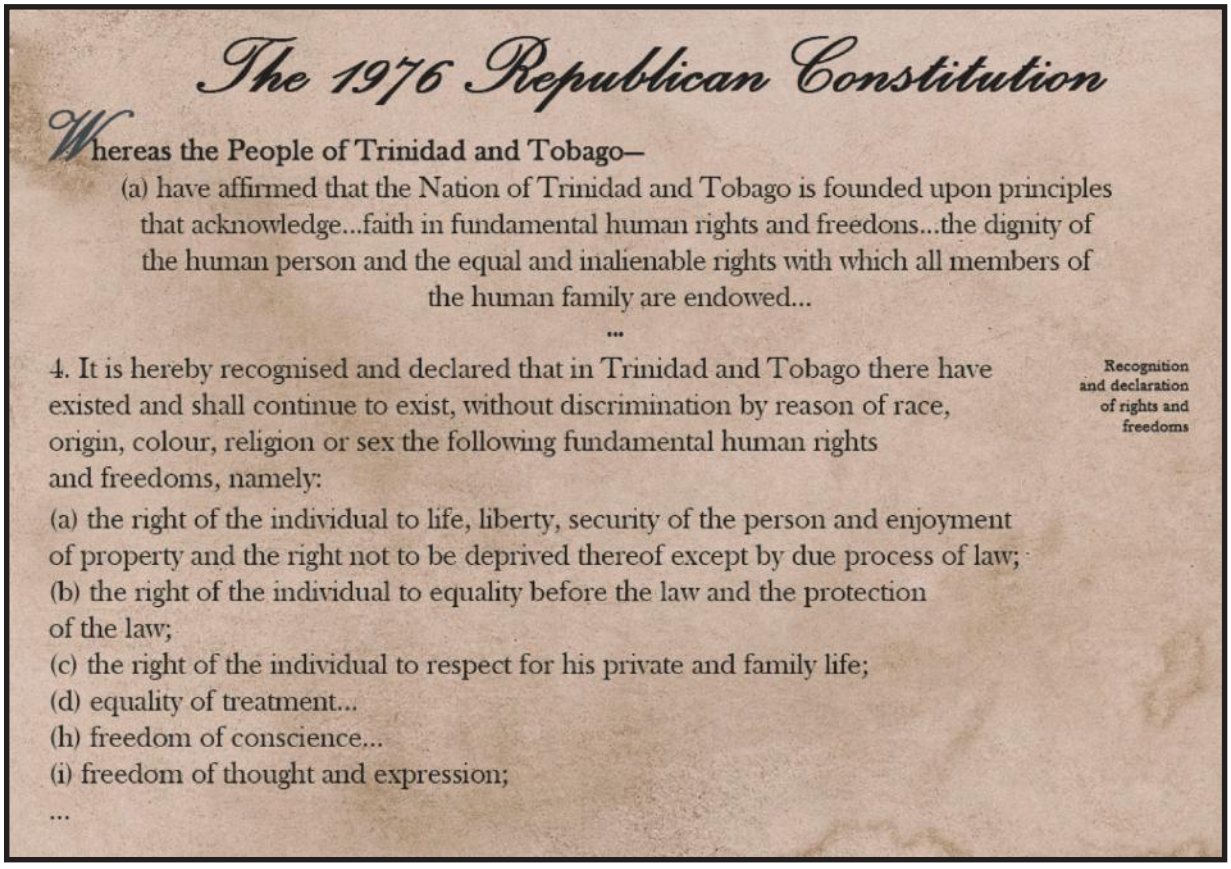
The requirement of Respectful Treatment, Inclusivity, and allowing the litigant a voice in the proceedings also means that litigants must not be denied physical access to the court because they are dressed in clothes that do not accord with our personal views on how a person of their sex ought to dress. While not denying the Judicial Officer's right to require that persons entering the court observe a minimum level of decorum in the mode of dress, this must not be confused with stereotypical notions of appropriate wear for men and women. Respect for the Court is not affected by persons adopting the gender characteristics, including dress, that are most appropriate to their gender identity.

One of the ways in which the lack of amenities has the potential to affect the manner in which matters are determined by Judicial Officers is in the exercise of our discretion in sentencing. In determining whether incarceration is an appropriate sentence, Judicial Officers should consider the effect of imprisonment on the physical safety of transgender persons. In Trinidad and Tobago there are no special facilities in our penal system to safely accommodate persons with non-traditional gender identities. In sentencing, therefore, Judicial Officers should bear in mind that the safety of persons undergoing terms of imprisonment is the responsibility of the State, of which the Judiciary is a part. Where it is becomes necessary to sentence a person whose gender identity does not accord with that person's birth certificate, the Judicial Officer should as far as possible, by the use of recommendations to the prison authorities, ensure that provisions are put in place to ensure the physical safety of the inmate.

THE CONCEPTUAL AND LEGAL BASIS OF THIS PROTOCOL

FIGURE 6

Preamble and Section 4 of the Constitution of Trinidad and Tobago



The 1976 Republican Constitution

Whereas the People of Trinidad and Tobago—

(a) have affirmed that the Nation of Trinidad and Tobago is founded upon principles that acknowledge...faith in fundamental human rights and freedons...the dignity of the human person and the equal and inalienable rights with which all members of the human family are endowed...

...

4. It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex the following fundamental human rights and freedoms, namely:

Recognition and declaration of rights and freedoms

(a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law;
(b) the right of the individual to equality before the law and the protection of the law;
(c) the right of the individual to respect for his private and family life;
(d) equality of treatment...
(h) freedom of conscience...
(i) freedom of thought and expression;
...

The conceptual and legal basis of this protocol begins and ends with the Constitution of Trinidad and Tobago and, in particular, the core constitutional values declared in the preamble to have existed and to continue to exist in Trinidad and Tobago and the fundamental rights and freedoms enshrined therein. This protocol addresses the means by which we, as Judicial Officers and the guardians of the Constitution, can make these core constitutional values a reality.

In this protocol we place a strong focus on two international treaties that deal with gender discrimination: the Convention on the Elimination of Discrimination against Women ("CEDAW") and the Inter-American Convention

on the Prevention, Punishment and Eradication of Violence against Women ("Belém do Pará"). These treaties deal specifically with discrimination and violence against women and the impact that actions that perpetuate discrimination against and violence towards women have on preventing women from achieving their full potential.

It is imperative to note, however, that the purpose of this Protocol, to achieve gender equality in the dispensation of justice, is wider than the focus of the aforementioned treaties. While we recognize that in Trinidad and Tobago there still exist barriers to women obtaining true equality, we also recognize that there are areas where men, and those who do not fall within the traditional perception of men and women, remain the subject of gender biases and discrimination by Judicial Officers. This latter category includes, but is not limited to, transgendered persons, homosexuals, and gender binary or non-conforming persons. Custody determinations provide a good example of an area where this type of discrimination exists.

The approach adopted by both CEDAW and Belém do Pará to eradicate gender discrimination and inequality therefore arms us with the conceptual and legal basis to attack gender and other types of discrimination, gives life to our Constitution, and provides us with practical approaches to achieve our goal of justice.

CEDAW recognises three core principles for ensuring effective realization of gender equality. These provide the conceptual framework for this Protocol. These core principles are: equality, non-discrimination, and state obligation. In this regard, the convention parallels our Constitution which, as we have seen, recognizes all three concepts. State obligation in the context of CEDAW however, refers not only to the obligation of the State to enact laws that comply with the human rights provisions of the Constitution, but includes the obligation of the State to abide by international treaties to which it is a party. Equality and non-discrimination are different sides of the same coin. One (equality) promotes a positive value while the other (non-discrimination) prevents that positive value from being taken away or diminished.

While the Trinidad and Tobago Constitution, by its preamble, declares that the nation is founded upon principles that acknowledge "the dignity of the human person and the equal and inalienable rights with which all members of the human family are endowed"[28] and while it treats with equality and non-discrimination in its recognition and declaration of human rights nowhere does it specifically acknowledge or seek to eradicate discrimination or inequality on the basis of gender. A dilemma for Judicial Officers therefore is how to marry our treaty obligations on the one hand and the failure by the State to specifically prohibit discrimination on the basis of gender and sexual orientation.

The two cases of *Kennty Mitchell v the AG*[29] demonstrate the dilemma faced by Judicial Officers in the absence of specific legislation prohibiting discrimination on the basis of sexual orientation. The claimant, Kennty Mitchell, brought two actions against the State alleging that he was wrongfully arrested and falsely imprisoned. In the first action he also sought relief under the Constitution. In both cases the factual position was practically the same and both Judges accepted that he had been wrongfully arrested and was entitled to damages. In each case Mitchell relied on the fact of his being a 'known homosexual' and, in the first case, alleged discrimination and unequal treatment as a result.

In the first case the Judge, while accepting that he was wrongfully arrested, specifically discounted the fact that he was gay as being irrelevant. In the second case, although no award was sought or made on the ground of discrimination or unequal treatment as a result of his sexual orientation, the Judge found that the fact of his being homosexual was directly relevant as it heighted the risk of physical injury to him while in custody, was the basis of inappropriate taunting and offensive comments, and served to increase the damages awarded to him. The award of damages in both cases reflected the positions taken by the respective Judges on the effect of Mitchell's homosexuality to the treatment meted out to him. In neither case was there any reference to international treaties or conventions.

28 Section 4 of the Constitution

29 HCA No S 209 of 2001 and CV 2007 – 03220

Nor did either Judge apply a gender perspective to the determination, although clearly doing so and applying international treaties or conventions would have been appropriate in both cases and may have resulted in a more consistent outcome and one more acceptable to the claimant. Contrast the position taken by the court in the Belizean case of *Orozco v Attorney General*[30] referred to later in this protocol when dealing with the principle of non-discrimination.

30 [2016] 90 WIR 161 [68] – [99]

THE PRINCIPLE OF EQUALITY

This protocol advocates a substantive approach towards gender equality. as in CEDAW and Belém do Pará. This approach recognizes that treating men and women in an identical manner may at times fail to address the systematic and social factors that prevent them from achieving true equality.

> *Applying the concept of equality, as both a principle and a right, does not mean seeking some kind of a mathematical formula to calculate and achieve absolute homogeneity. Instead, the concept of equality must be understood substantively. It requires equal treatment for equals, different treatment for those who are differently situated, and special treatment for groups whom, though they are considered equal from one perspective, from another perspective merit special treatment from the State.*[31]

For example, in a domestic violence complaint where there is violence alleged on both sides, treating the parties equally by the issue of mutual non-molestation orders may achieve formal equality but not substantive equality. This substantive equality cannot be achieved without also addressing imbalances between the parties as, for example, issues of financial support or custody and access to the children.

Applying a substantive approach recognizes that men and women experience the world differently and these differences are usually heightened by other social statuses such as race, socio-economic position, ethnicity, and sexual orientation. This is what is regarded as intersectionality. A non-white woman, for example, experiences life differently from a white woman. While both may be disadvantaged by the fact of being female their experiences, brought about by their race, are different. Factor in wealth and/or status, and another level of difference may come into play. Similarly, a self-employed or independently wealthy gay man or woman experiences the world differently from a person of the same sexual orientation whose income is dependent on being accepted for employment by others.

Using a substantive approach to gender equality helps us to understand the underlying cultural norms and assumptions about gender. This type of gender analysis helps us as Judicial Officers to appreciate how those assumptions produce and perpetuate disadvantages that prevent women and men from experiencing life on the same footing and can assist us in mapping out strategies or employing legal argumentation or reasoning in our decision making to correct those disadvantages. The focus is on equality of results rather than of treatment.

In assessing whether a law guarantees gender equality, a substantive approach requires the Judicial Officer to look at the effect or impact of the law on the individual (equality of results) and not on whether the law is applied to all who are similarly situated (formal equality). It therefore favours a subjective approach. This was the approach adopted by our Court of Appeal in *Johnson v Balwant* and affirmed by the Privy Council.[32] There, a regulation in the Police Service Commission allowed the Commission to terminate the services of a married woman on the grounds that her family obligations were affecting the efficient performance of her duties. There was no similar provision allowing for such a termination in the case of a male police officer. Both Courts

31 Constitutional Court of Colombia Case C-862/08

32 [2009] UKPC 53

were of the opinion that the regulation was discriminatory against women on the ground of their sex. The regulations were, however, not unconstitutional because they were saved by the existing law provision in the Constitution.[33]

A substantive approach was also applied in the Belizean case of *Roaches v Wade.*[34] In that case the issue for determination was the effect of a policy of dismissing school teachers who had children out of wedlock. The school had argued that the policy applied to both male and female teachers equally. According to Conteh CJ[35]:

> *The so-called policy of the respondent inevitably therefore impacts more on female unmarried teachers who even without letting on, become progressively and visibly pregnant. This automatically subjects them to the respondent's policy of dismissal.*
>
> *Their male unmarried counterparts on the other hand with their built-in biological incapacity to conceive and therefore get pregnant can, cavalierly ignore with impunity (some would say promiscuity) the respondents injunction of living according to Jesus' teaching on marriage and sex, without the slightest prospect of sanction, unless they are foolish enough by themselves to tell: they will carry on their person no tell-tale signs for none will be there on them to be visible to the respondent to apply its sanction.*
>
> *...Therefore, I think, to apply its policy of dismissal to both male and female unmarried teachers in case of pregnancy, is to treat unlike alike and therefore, I find, discriminatory of Ms. Roches to dismiss her because of her unmarried pregnancy when no male teacher can rationally be dismissed for being unmarried and pregnant.*

In eschewing formal equality, Judge McIntyre in *Andrews v Law Society* of British Columbia held that formal equality could lead to grave injustices and defeat the spirit of the equality provisions:

> *...it may be said that a law which treats all identically and which provides equality of treatment between "A" and "B" might well cause inequality for "C", depending on differences in personal characteristics and situations. To approach the ideal of full equality before and under the law -- and in human affairs an approach is all that can be expected -- the main consideration must be the impact of the law on the individual or the group concerned.*[36]

A simple but practical example how applying the substantive approach may be applicable in our day to day judging can be had by examining the practice in most of our courts of fixing cases for 9:00 a.m. In this regard it cannot be disputed that all parties are treated equally. Both sides have to arrive for 9:00 a.m. and both are subject to the same sanctions for a failure to do so. A requirement that a primary caregiver (usually the mother) attend court at 9:00 a.m., however, ignores the domestic realities of preparing children for and getting them to school. Adopting a substantive approach in such a case will therefore involve a recognition that for the primary caregiver a 9:00 a.m. fixture would not result in an equitable outcome. Being late incurs the wrath of the Judicial Officer making it to Court on time will either be to the detriment of the children or to the proper presentation of that parties' case.

33 The position on the savings clause is not subject to challenge by the case of Jones v The AG

34 Action No 132 of 2004 (Belize)

35 Ibid at [51]

36 [1989] 1 S.C.R [165] (McIntyre J)

Considerations Towards Achieving Equality

SUMMARY

In treating with cases before them, Judicial Officers should adopt the approach recommended by CEDAW and Belém do Pará and strive to incorporate a substantive approach to treat with gender and other inequalities. This substantive approach requires:

- Understanding that gender equality does not mean we always treat men and women the same or that we use a "mathematical formula to calculate and achieve absolute homogeneity"[37];
- Acknowledging and embracing the differences between men and women in the society and recognizing that justice lies in appropriate differential treatment to achieve equal opportunities for all;
- Ensuring their decisions result in gender equitable outcomes by taking into account the historical disadvantages women and other court users have and continue to face in accessing justice.

THE PRINCIPLE OF NON-DISCRIMATION

> *This general prohibition against non-discrimination thus prohibits laws that differentiate between people on the basis of their inherent personal characteristics and attributes. A court is entitled to consider granting (...) relief, where the claim is that a person has been discriminated against by reason of a condition, which is inherent and integral to his/her identity and personhood. Such discrimination undermines the dignity of persons, severely fractures peace and erodes freedom.*
> *Sanatan Dharma Maha Sabha of Trinidad and Tobago Inc v Attorney General of Trinidad and Tobago HCA Application No 2065/2004, at pp.55*

Commitment to the principle of non-discrimination is a necessary step towards achieving gender equality. A policy of non-discrimination prohibits the State from passing legislation or encouraging conduct that unreasonably differentiates between people based on either their sex or gender. It also requires the Judiciary as an arm of the State to interpret and apply the law to ensure non-discrimination.

The Trinidad and Tobago Constitution[37] expressly lists sex as a ground upon which discrimination is prohibited and section 5 of the Equal Opportunities Act Chapter 22:03 forbids discrimination that is based on an individual's status or personal characteristics. It is therefore arguable that since gender is both a personal characteristic and a status that usually forms the core of an individual's identity the courts in Trinidad and Tobago are therefore obligated to ensure that gender is not used as a basis for unjustifiable differential treatment between persons accessing the court. As we will see in the section following support for this position can be obtained from International and Regional treaties to which the State of Trinidad and Tobago has signalled its commitment.

It is important to note that the differentiation has to be unreasonable or unjustifiable since not all differentiation is a breach of the principle of non-discrimination. There are certain social and biological realities which might make it justifiable to treat people differently for example creating special ramps for the disabled to access buildings amounts to differential treatment. However, it does not breach the non-discrimination principle as it serves a reasonable purpose and actually promotes equality of physical access to building sites. In similar manner, the duty of a Judicial Officer in ensuring that the unrepresented litigant is aware of her or his rights and responsibilities in presenting a case, while differentiating between persons who are represented by attorneys and those who are not, is justifiable as it ensures that both categories of litigants have equal access to the remedies available from the court.

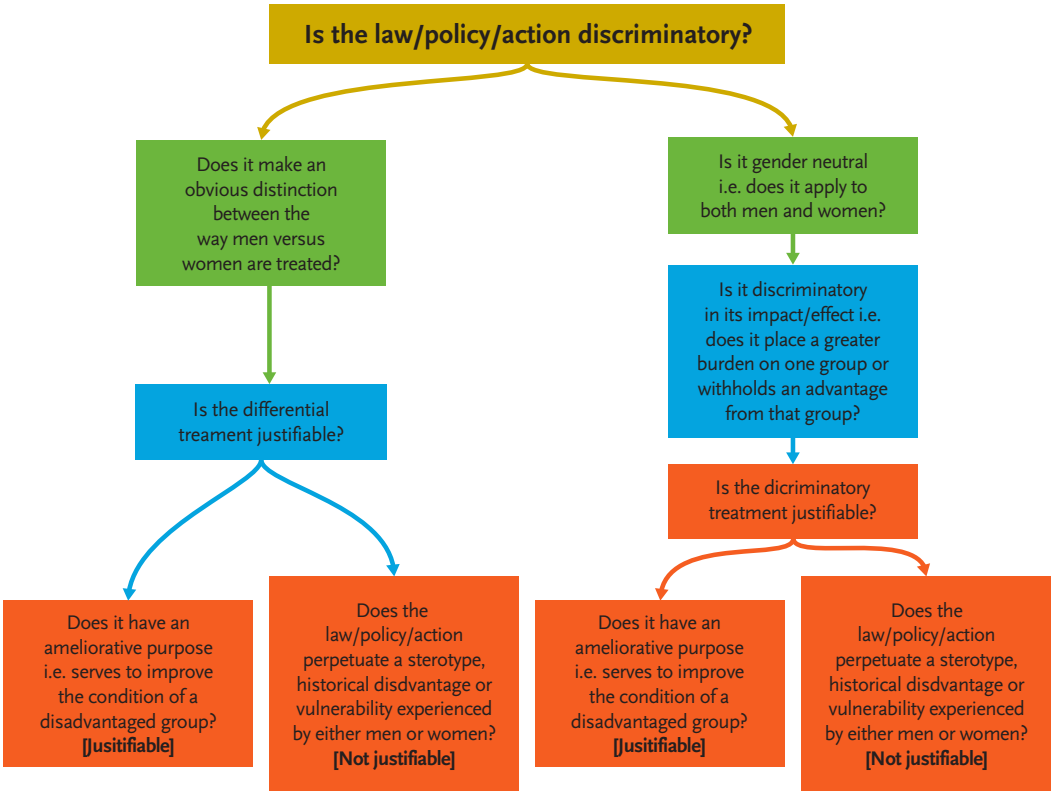
The principle of non-discrimination was applied in the case of *Orozco v The Attorney General*.[38] The claimant, a homosexual man, challenged the constitutionality of s 53 of the Criminal Code to the extent that it applied to anal sex between two consenting male adults in private. Section 53 of the Criminal Code Chapter 101 of Belize provided that every person who has carnal intercourse against the order of nature with any person be liable to imprisonment for ten years. Benjamin CJ accepted that on its face the section was gender neutral. He determined that notwithstanding its gender-neutral language section 53 of the Criminal Code was discriminatory in its effect in that it rendered the claimant a criminal by virtue of his homosexuality and no evidence had been adduced to show that such discrimination was justifiable. He found that the claimant had been discriminated against on the basis of his sexual orientation by virtue of sections 16(1) and (3) and there was an ongoing violation of his right under section 6(1) to equality before the law and the equal protection of the law without discrimination.

37 Section 4

38 [2016] 90 WIR 161

FIGURE 7

Legal Analysis to Determine if Law/Policy/Action Leads to Gender Discrimination



Considerations Towards Achieving Non-Discrimination

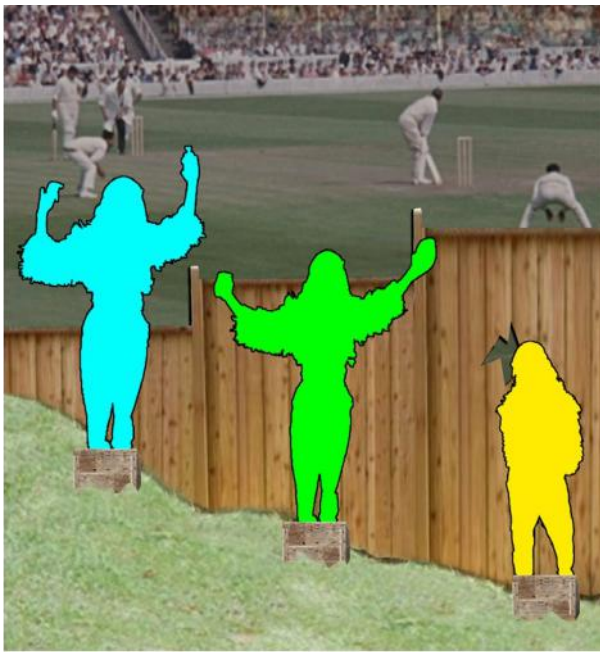
SUMMARY

Judicial Officers should:

- Ensure that in treating with litigants they do not unreasonably differentiate between persons based on sex or gender;
- Ensure that all litigants are treated with equal respect;
- Be aware that not all differentiation is a breach of the principles of non-discrimination. There are certain social and biological realities, which might make it justifiable to treat people differently, provided that they are also juridically legitimate and justifiable bases for differential treatment (See sections 5(1) and 13 of the Constitution);
- Ensure that neither gender nor sex is used as a basis for unjustifiable differential treatment between persons accessing the court;
- Be aware of the many different types of stereotypes that can result in gender or sex discrimination;
- Be conscious of the impact of intersectionality.

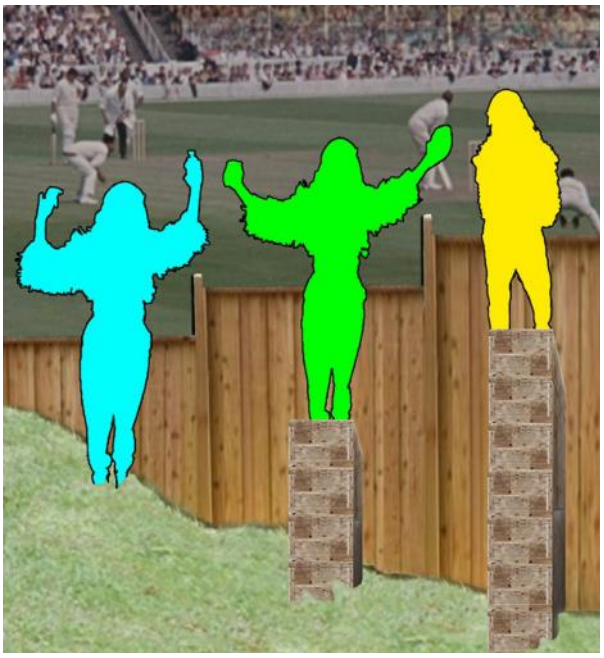
Diagrammatic Explanation of Equality and Non-Discrimination

FIGURE 8



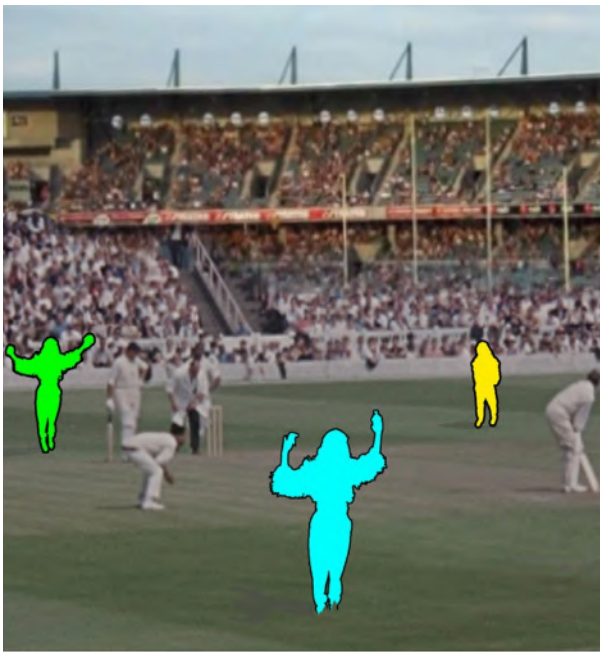
In **Figure 8,** notice that the three people **do not** have the same opportunity to participate in (view) the proceedings, because differences in the terrain and fencing affect them differently. As well, notice that the three individuals have different personal or group characteristics (represented by their colour and size). Treating them exactly the same by providing them with identical boxes to stand on does not effectively remedy or redress the situation. The effect or impact of the terrain and fencing still results in inequality caused by factors extrinsic to the individuals. The impact of discrimination based on personal or group characteristics also remains.

FIGURE 9



In **Figure 9,** affirmative action has been taken to achieve equality and non-discrimination, by giving those that need them different numbers of boxes to stand on. Each individual has been treated differently, so as to overcome the effect or impact of different external factors and/or individual differences.

FIGURE 10



In **Figure 10,** notice that the fence and graded terrain are absent, and the three people are no longer just "viewing" proceedings, but are now actively and meaningfully involved. Barriers to this access have been removed and their personal characteristics are no longer impediments to such access.

THE PRINCIPLE OF STATE OBLIGATION

The principle of state obligation places a duty on the legislature to incorporate and the Judiciary to interpret domestic law in accordance with international treaties. Trinidad and Tobago is a State party to conventions and treaties that promote gender equality. The main convention on gender equality is CEDAW. This Convention was adopted by the UN General Assembly in 1979 and is regarded as an international bill of rights for women. CEDAW was signed by Trinidad and Tobago on 27th June 1985 and ratified on 12th January 1990 with one reservation treating with the disputes procedure. The other convention that specifically deals with gender equality and the protection of women's human rights, and which together with CEDAW forms the basis of this protocol, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Belém do Pará), was adopted by Trinidad and Tobago on the 3rd November 1995 and ratified on 4th January 1996. This convention regulates the prevention, punishment and eradication of violence against women.

RELEVANT INTERNATIONAL CONVENTIONS AND TREATIES

Other conventions and treaties, signed ratified and/or acceded to by Trinidad and Tobago promoting gender equality include:

International Covenant Economic, Social and Cultural Rights (ICESCR)

The ICESCR was adopted by the United Nations General Assembly in 1966, and is the main convention on economic and social rights. The covenant seeks to ensure and protect the right of all persons to the economic, social and cultural rights including the right to work and to an adequate standard of living. This was acceded to by Trinidad and Tobago on the 8th December 1978 with a reservation not relevant to this Protocol.

American Convention on Human Rights (ACHR)

The ACHR also known as the pact of San Jose, is the American continent's declaration of human rights, and was adopted in 1969 by the General Secretariat of the OAS. This convention was ratified on 3rd April 1991 with reservations not relevant to this Protocol. It recognizes the right of each individual to basic human rights and in particular prohibits slavery or involuntary servitude, in all forms include trafficking in women.

International Covenant on Civil and Political Rights (ICCPR)

The ICCPR is considered the main convention for promoting civil and political rights. The Covenant was adopted in 1966 by the UN General Assembly. This was acceded to by Trinidad and Tobago on 21st December 1978 with reservations that are not relevant to this protocol. This, together with the Universal Declaration of Human Rights and the ICESCR, is considered the International Bill of Human Rights.

CARICOM Charter of Civil Society

This Convention is the Region's own declaration of human rights. This treaty was signed by Trinidad and Tobago in 1997. With respect to non-discrimination and equality before the law the Charter makes specific reference to gender. Among other things the signatory states pledge to respect the fundamental human rights and freedoms of the individual without distinction as to "age, colour,

creed, disability, ethnicity, gender, language, place of birth or origin, political opinion, race, religion or social class but subject to the respect for the rights and freedoms of others and for the public interest."

Similarly in treating with equality before the law the charter provides that "(i) no person shall be favoured or discriminated against by reason of age, colour, creed, disability ethnicity, gender, language, place of birth or origin, political opinion, race religion or social class"[39]. It further provides that a "law shall not be deemed contrary to (i) above if such a law provides for special measures for the sole purpose of furthering or advancing the development and advancement of hitherto disadvantaged communities or sections of the population to enable them to develop and realize their potential to the fullest."[40]

The Charter also requires the State in discharge of its legal, executive, administrative and judicial functions to ensure respect for and the protection of the human dignity of every person. These international treaties, and in particular CEDAW and Belém do Pará, put a duty on the State to protect the rights of women and girls. For example, Article 2 of CEDAW requires State parties to take measures to eliminate discrimination against women and girls.

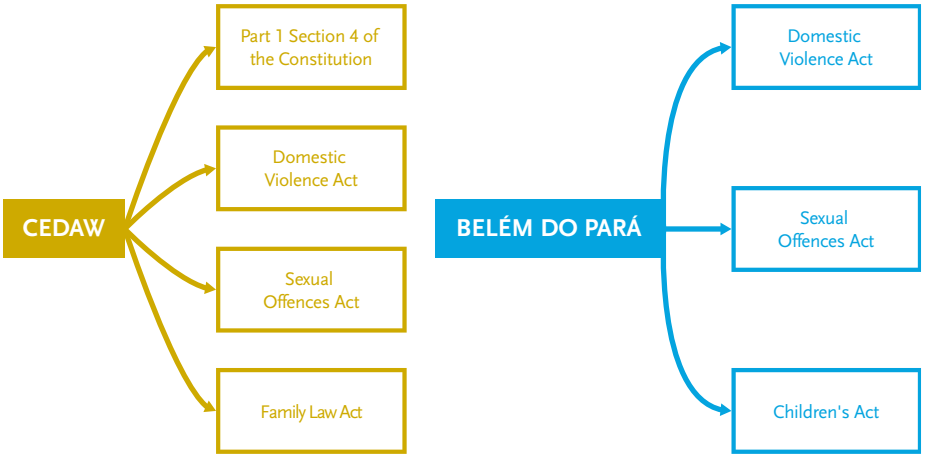
39 Article V (1) of the CARICOM Charter
40 Article V (2) of the CARICOM Charter

The CARICOM Charter by Article XII declares that women have equal rights as men including the right to equal opportunities for employment. And to receive equal remuneration for equal work; not to be discriminated against by reason of marital status, pregnancy, lactation or health related matters which affect older women and the right to legal protection which includes just and effective remedies against domestic violence, sexual abuse and sexual harassment. Of particular note to us in this protocol is the fact that the CARICOM Charter specifically recognizes that there must be no discrimination on the basis of gender.

Having either ratified or acceded to these treaties, Trinidad and Tobago has a legal obligation to remove all impediments which bar girls and women from equal access to justice, education, healthcare and the political process or discriminate against persons on the basis of gender. These treaties place a duty on state parties to not only make legislative changes aimed at promoting gender equality but, to also ensure that Judicial Officers and courts are applying those laws in a manner that creates equality of opportunity and outcomes for both men and women. This is illustrated in Belém do Pará's Article 8(c) which compels member States to train "all those involved in the administration of justice" to ensure the effective realization of gender equality. This obligation is also found in Article 2(c) of CEDAW.

FIGURE 11

Trinidad and Tobago Domestic Legislation that Incorporate the Principle of Gender Equality from CEDAW and Belém do Pará



INCORPORATING INTERNATIONAL STANDARDS INTO DOMESTIC LAW

The Judiciary, as the arm of the State responsible for interpreting the law and dispensing justice, therefore shares with the State the responsibility to remove obstacles that impede access to justice. Further by our acceding to these treaties the State is obligated to ensure that gender is not used as a basis for unjustifiable differential treatment. In this regard therefore we as Judicial Officers have an obligation to ensure that the standards set by these treaties are applied in the cases for our determination. By doing so we ensure that these standards become incorporated into our domestic law via case law.

The legal position in this regard has been succinctly stated by the CCJ in the cases of *Tomlinson v the States of Belize and Trinidad and Tobago* CCJ applications Nos OA1 and 2 of 2013. In their joint judgment at paragraphs 43 and 44, by way of obiter dicta, the court reminded itself:

> *...that in common law jurisdictions such as Trinidad and Tobago, there is a sacrosanct rule that statutory provisions should if at all possible be interpreted as compliant with the State's treaty obligations rather that in breach of those obligations; Salomon v Commissioners of Customs and Excise... The rule of construction is not confined only to statutes which are directed at implementation of an international convention but is directed at all statutes as a general canon of statutory interpretation...The Universal Declaration of Human Rights and the American Declaration of the Rights and Duties of Man are among the important international instruments that recognize the human dignity of every person. Sexual orientation is protected from discrimination (Article 2) and protected by the guarantee of equality before the law (Article 26) in the International Covenant on Civil and Political Rights (1966)... International human rights which have crystallized into customary international law form a part of the common law of Trinidad and Tobago.*

In Orozco, for example, the court received assistance from a decision of the UN Human Rights Committee in the case of *Toonen v Australia*[41] to conclude that the word 'sex' in the Belizean Constitution was to be interpreted as including 'sexual orientation'.

Once Trinidad and Tobago incorporates its international obligations into domestic law, the Judiciary is bound to apply, where applicable, the terms of the international treaty. Customary international law is also to be regarded as part of the common law and as such is also directly applicable in domestic law. Judicial Officers may, however, refer to international treaties and conventions even where the state is yet to incorporate its international obligations into domestic law. In the absence of domestic legislation that clearly contradicts international law, Judges may legitimately apply international human rights law or standards in their judicial decision-making in the following 4 ways:[42]

41 Communication 488/1992 (31 March 1994) UN HRC Document No CCPR/C/50/D/488/1992

42 SEA Judicial Colloquium final draft, 14

To resolve ambiguity

Example: *Matthew v The State of Trinidad and Tobago (2004)*

The Privy Council held that the courts will always construe domestic law so as to avoid creating a breach of the State's international obligation and where the 'provision of a state's domestic law is ambiguous and permits two interpretation, one of which will accord with the state's international obligations and the other of which will involve a violation of those obligations, a court will as far as possible adopt that interpretation which will accord with the state's international obligations".

As a source of legitimate expectation

Example: *Attorney General of Barbados v Joseph and Boyce [2006] CCJ 1, para.56*

In a case dealing with the death penalty, the Caribbean Court of Justice stated that when the Barbados government accepted, through ratification, the ACHR, publicised this acceptance, and citizens acted in conformity with this treaty, the Court would "uphold the citizens` legitimate expectations" to the fruits of the Convention, despite the treaty not yet being officially a part of domestic law.

As an interpretive guide

Example: *Reyes v R (Belize) [2002] UKPC 11, para.28*

In another case concerning the death penalty, the Privy Council stated that courts must seek to interpret domestic legislation as far as possible to conform to "international standards of humanity and individual right".

Example: *Caleb Orozco v AG of Belize (2016) 668/2010, para.94*

In this recent case, the Belize Supreme Court used the United Nations Human Rights Court (UNHRC)'s interpretation of articles 2 and 26 of the ICCPR to conclude that non-discrimination on the basis of sex in the Belize constitution, also extended to a prohibition on discrimination that was based on sexual orientation. The Supreme Court concluded that Belize having acceded to the ICCPR , "tacitly embraced the interpretation rendered by the UNHRC".

To fill gaps in domestic law

Example: *Stockhausen v Willis (JM 2008 SC 83)*

In this supreme court decision from Jamaica, Anderson J referred to Article 9 of the CRC to illustrate the development of the principle that children have a right to a relationship with both parents and that it is generally in the best interest of a child to have a relationship with both parents.

Example: *Grant v Grant (LC 2002 HC 30)*

In this Supreme Court decision from St. Lucia, Hariprashad-Charles J observed that there was no statute in St. Lucia directing the court to have regard to children's views but she noted its prominence in the CRC, which St. Lucia had ratified. She therefore accepted that it was a principle to be applied in St. Lucia.

Considerations in Furtherance of our Obligations Under the International Treaties and Conventions to which We are Signatories

SUMMARY

Consequently, in order to ensure that Judicial Officers and courts are applying the laws in a manner that creates equality of opportunity and outcomes for both men and women Judicial Officers should:

- Consider whether cases before them show elements of gender discrimination or stereotyping as outlined above and ensure that their decisions do not perpetuate these stereotypes;
- Apply laws in a manner that takes into account how gender or sex intersects with other social statuses to create disadvantages for both men and women;
- Be cognizant of how their own personal notions or biases can impact on concepts of procedural fairness and in their decisions;
- Where necessary to ensure compliance with the Constitution and treaties signed or acceded to by the State have recourse to the terms of these treaties and the body of international case law applying the relevant provisions of these treaties.

HOW DO WE AS JUDICIAL OFFICERS EMBARK UPON GENDER SENSITIVE ADJUDICATION?

Gender sensitive adjudication describes an adjudicative approach that can be taken by Judicial Officers to achieve substantive equality in the interpretation and application of the law, particularly in relation to matters and issues in which there may be discrimination on the basis of gender and all other sources of inequality. It obliges us to adopt the gender perspective referred to earlier in this Protocol in all matters before us. It is an approach that seeks to achieve both procedural and substantive justice in relation to all aspects of court proceedings, including both pre and post proceedings, in and out of court. It requires the Judicial Officer to understand and be able to apply appropriate legal argumentation or reasoning that is legitimate and justifiable.

A PLURALISTIC MODEL OF LEGAL ARGUMENTATION

Professor Wilson Huhn describes a pluralistic model of legal argumentation[43] that can assist us as Judicial Officers in achieving adjudication that is gender sensitive. He identifies five basic types of legal argumentation; each of which is based on distinct sources of law and evidential underpinnings, and corresponds to five essential values required for an effective legal system. The bases and sources of the five types of legal argument are: text, intent, precedent, tradition, and policy[44]. The five essential legal system values are: certainty, the will of the people, stability, societal norms and expectations, and flexibility and evolving notions of justice.

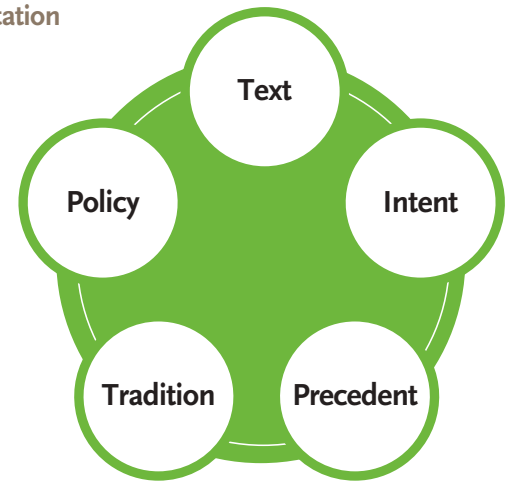
43 Wilson Huhn, Teaching Legal Analysis Using a Pluralistic Model of the Law, Gonzaga Law Review, Vol 36 [2000/01], 434-452

44 These have been explicitly recognized and applied in the Court of Appeal decision of The Law Association of Trinidad and Tobago v The Honourable The Chief Justice of Trinidad and Tobago Mr Justice Ivor Archie ORTT, Civ App No P075 of 2018; Jamadar JA

The Five Types of Legal Argumentation

FIGURE 12

Five Types of Legal Argumentation



Text, Intent, and Precedent

The first three types of argumentation are well known and do not require detailed explanation in this Gender Protocol.

Textual argumentation looks primarily at the language used in and the structure of the text to be interpreted and deploys three main methods of interpretation – plain meaning, intratextual analysis, and application of the usual canons of construction. The evidence relied on is essentially the text itself.

Intent, as a source of argumentation, seeks to discover and give effect to the legislative intention (in the case of statutes) and to the intention of the makers of the document (where regulations, rules, contracts, wills and other such documents are to be interpreted). The evidence can include the language used in the text itself, as well as other sources, such as contemporaneous references which may reveal the intention of the makers (e.g. earlier versions of legislation, or official/formal, and reliable, discussions and comments made about it).

Precedent describes the practice of relying on previous judicial decisions and pronouncements for the interpretation and application of the law in (similar) current matters. It includes the policy of stare decisis which deems the decisions of higher courts binding on lower courts which have to interpret and apply the same legal principles. Precedent also functions as evidential illustration of how previous Judicial Officers have dealt with particular legal and factual circumstances and constructs. It therefore also permits reasoning by analogy across different legal and factual scenarios.

Tradition

Of particular interest for gender sensitive adjudication are the last two types of legal argumentation: tradition and policy.

Tradition describes reliance on sources, on evidence found in customs, conventions, and settled practices as aids to interpretation. This is usually employed where the meaning and intent of the law is not altogether clear or apparent, or where social, commercial, or other customs and realities underpin the law and the circumstances that are to be adjudicated upon.

Traditions such as these are viewed as giving life and context to the words used in the text and as aids to interpretation. 'Trade usage' is a well-established source of tradition that is recognised and used by the courts in commercial and other contractual situations; and work place customs and settled practices are other examples often relied on in the areas of tort, real property law and industrial relations. Huhn explains that evidentially, what is considered is the "historical evidence of a people's beliefs and behaviour patterns over decades or centuries" (Huhn, at page 451).

A local example of reliance on tradition as an aid to interpretation is the court of appeal decision in *Israel Khan v Sherman McNicholls.*[45] In this case, the long-standing historical recognition by magistrates of non-traditional court attire that was culturally diverse was upheld. Culturally decorous wear, as befitting the dignity of the court, was held to confer a right of audience on attorneys so attired. The tradition, embedded in local culture, was therefore relied upon to determine what manner of dress could warrant a decision to deny an attorney the right of audience before a Magistrates' court in Trinidad and Tobago. In *Mitchell v Cowie*[46] the court looked at the practice in the Caribbean of renting land for the purpose of constructing a dwelling house to determine whether a tenant's house was a chattel or a fixture. Similarly another example is the decision of the court of appeal in *Sabga v Solomon*[47] in which long standing and well established customs of banking practices were relied upon to uphold the validity of a cheque.

Significant to us as Judicial Officers in the construction of an argument based on tradition is the evidence that must be relied upon to justify it-evidence of traditions and cultures that support the propositions advanced. This requirement is essential to making this type of argument rational, legitimate, and jurisprudentially sound. Clearly, it can include

45 Civ App No 153 of 2006
46 7 WIR 118
47 [1962] 2 WIR 66

a wide variety of evidence, including evidence derived from the social sciences.

Policy

Policy as a type of legal argumentation has, at times, been viewed with some skepticism and has been pejoratively deemed judicial activism. It consists of two basic analytical steps: first, a predictive set of statements by which a court "predicts the consequences that will flow from giving the law one interpretation or another" (Huhn, at page 449); and second, an evaluative assessment by which a court determines "which set of consequences is more consistent with the underlying values of the law" (Huhn, at page 449). What makes policy analysis distinct from the other four types of argumentation is the Judicial Officer's function in making the final policy choice.

This choice is, however, not arbitrary, but is done by "balancing all of the relevant values and interests affected by the decision to pursue a particular policy" (Huhn, at page 449). In terms of the supporting evidence, policy argumentation permits consideration of all "underlying facts which bear upon the policy choice" (Huhn, at page 452). And, a court is therefore not limited to evidence brought forward solely by the parties, but is permitted to consider a wider scope of matters that may "bear upon the policy choice". Thus, the evidence in support of policy arguments is virtually unlimited, and courts may inquire into and take judicial notice of a wide variety of relevant factors.

Ultimately, it is the court that makes the policy choice after having balanced competing interests, values and predicted outcomes. A local example of explicit policy argumentation is to be found in the court of appeal decision in *Dumas v Attorney General*.[48]

48 Civ App No P218 of 2014

CRAFTING LEGAL ARGUMENTS

Inclusion and Assimilation

These five types of argumentation are constructed by relying on different sources and evidence. And, as explained, they also tend to uphold different legal system values. However they can also be, and often are, interrelated and combined in legal analysis.[49] Of note is the widening scope of evidential considerations as one moves from textual arguments through intent, precedent, tradition and to policy. All types of argumentation can be both included and assimilated as bases for a single decision; and in fact the more bases that can justify a decision, the more robust that decision becomes. What must however always be borne in mind is the relationship between categories of evidence and the five different types of arguments, as the rationality of their justification lies in the alignment of both.

49 The Law Association of Trinidad and Tobago v The Honourable The Chief Justice of Trinidad and Tobago Mr Justice Ivor Archie ORTT, supra at note 40

The Form of Legal Arguments

The form that legal arguments take can be distinguished from the types of legal arguments that can be relied on. The prototypical legal argument is well known: FACTS + LAW = JUST OUTCOME. All proper decision making involves the application of the law to the facts and in particular of the application of RELEVANT law to RELEVANT facts. To construct a legal argument therefore requires the discovery by Judicial Officers of two categories of relevance – law and facts.

FIGURE 13

The Forms of Legal Arguments

Determining the Relevant Law/Facts

What are the relevant facts? What is the relevant law? What does it (the law) mean? How is it (the law) to be applied effectively and justly in this particular factual circumstance? These are fundamental questions that every Judicial Officer must ask. The questions seek to ascertain the relevant facts and law, how to interpret them, and to determine how to apply the law to the facts.

What Facts are Relevant?

In the context of gender sensitive adjudication, and bearing in mind the different types of legal argumentation discussed above, this exercise of ascertaining the relevant facts assumes special significance.

Arguments based on tradition and policy require the discovery of certain facts (evidence) that are relevant to those kinds of argumentation. Factual evidence as to social and cultural realities, relationships, and power imbalances may be relevant depending on the issues. Here, the research and findings of the social sciences can be vital to achieving substantive equality and justice. An inquiry therefore into historical, social, political, economic, cultural and real lived experiences of people may be necessary to uncover inequalities and point to what is necessary to achieve substantive equality. The CCJ decision in *Katrina Smith v Albert Shelby*[50] affirms this approach as legitimate: "The social and historical context can be decisive in ensuring that the words (of a statute) are interpreted to give effect to the meaning and purpose of the Act" (at paras 9 & 10; per Sir Dennis Byron). In this instance, the court considered the local social and historical contexts of cohabitational relationships as an aid to discovering the intention of Parliament. A similar approach was taken by our Court of Appeal in *Narine v Chune*.[51] Social context matters.

What law is relevant?

Determining the relevant law also may require a broadening of the scope of inquiry. The question to be posed and answered may be: What is relevant to the proper understanding, interpretation, and application of the law in this particular case? Bearing in mind that a gender sensitive approach to adjudication necessarily includes a developmental approach, given the historical realities of inequality and power imbalances, an awareness of local context and the willingness to interpret and apply the law to achieve practical and effective justice is vital.

What then may this wider scope of legal relevance include? To begin with it must include local constitutional values. The 1976 Republican Constitution declares the State of Trinidad and Tobago as Sovereign (section 1). It also declares the Constitution to be the supreme law (section 2). Constitutional values such as the rule of law, access to justice, equality, non-discrimination, and fairness are therefore core jurisprudential values that, using a gender perspective, can and should legitimately inform the interpretation and application of ALL other laws. Thus, a rule of law approach to statutory interpretation in Trinidad and Tobago demands

50 [2017] CCJ 13

51 Civ App FHP No 11 of 2009

that core constitutional values, such as those identified above, form a part of and inform the legal context for the interpretation and application of all law.

The second area of relevance for the interpretation and application of the law is international treaty values. Sovereign States must be presumed to have made covenants in order to uphold and apply them. By entering into these covenants a State declares both intentionality and purpose. And, the law is settled that even when a treaty has been ratified and not incorporated into domestic law, local law ought to be interpreted and applied to bring it, so far as is possible, in line with such international treaty values. This is so even in relation to the interpretation of constitutions). In *Charles Matthews v The State*[52] the Judicial Council opined that "... the principle that domestic law should as far as possible be interpreted consistently with international obligations ... supports the conclusion that sections 4 and 5 of the Constitution should be similarly interpreted." This position was affirmed by the CCJ in *Shanique Myre v The State*[53] and has affirmed this position, reiterating that domestic courts are constrained to interpret domestic laws so as, if possible, to render them consistent with international treaty values.

52 [2004] UKPC 33
53 [2013] CCJ 3

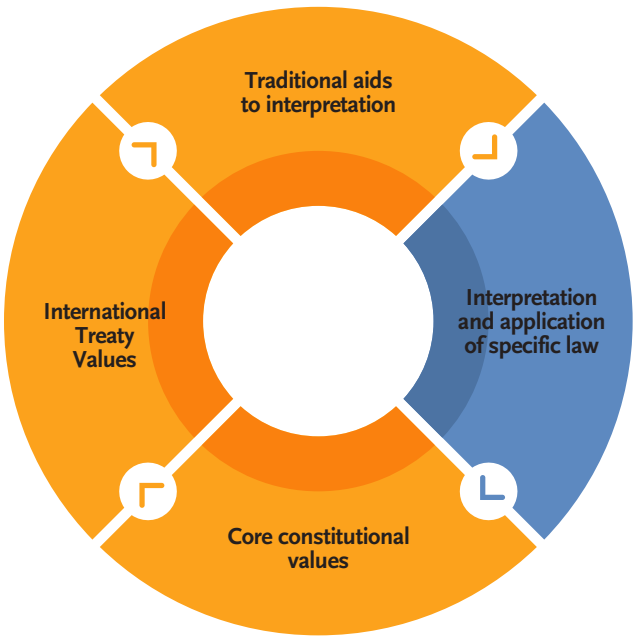
Justice According to Law

The quintessential function of the Judicial Officer is to do justice according to the law, which begs the question: which law and which facts? Gender sensitive adjudication seeks to find ways to resolve the tension that can arise when applying the 'letter of the law' or a particular law itself, which can give rise to inequality of treatment in relation to certain groups in society, for which there can be no reasonable justification.

To achieve this resolution Judicial Officers can legitimately have resort to any and all of the five different types of legal argumentation explained above. In particular, courts can place reliance on historical and social context and analysis, constitutionally supreme values, and covenanted international treaty values. The method of policy argumentation is a useful tool, because it first analyses and then predicts the consequences that will flow from different interpretations of the law, and then evaluates which of these is most consistent with the relevant underlying values of the law. It also fulfils the need for legal systems to be flexible and responsive to evolving understandings and experiences of justice. It therefore engenders in the public a sense that the law and courts are both relevant and responsive to its changing sense of what is fair and just.

FIGURE 14

Relevant Law: Broadening the Scope of Enquiry



Effects Matter

In a gendered approach to equality of treatment, the focus is on the effect of the law under consideration, that is, whether the effect of applying a law in one way or another causes unjustifiable discrimination. The 'Trinity Cross' case[54] is an example of this kind of analysis. In this case it was held that "a law may be discriminatory by reason of its adverse effects" and concluded that the Trinity Cross by virtue of its name was inherently discriminatory in a plural, multi-religious society such as Trinidad and Tobago because of its discriminatory effects. In Katrina Smith[55] the CCJ noted that "it is the duty of the court to consider the ... intended remedies which made it necessary to pass the legislation, and to add force to the intended cure, according to the intent of Parliament, for the benefit of the Public" (at para. 9). This "adding of force to an intended cure for the benefit of the Public", is very much an evaluative exercise that is intended to be responsive to current and existing needs and that incorporates the policy making function of courts in the interpretation and application of the law.

54 Sanatan Dharma Maha Sabha of Trinidad and Tobago Inc v The Attorney General of Trinidad and Tobago (76 WIR 378)

55 [2017] CCJ 13

The Role of Judicial Officers

Gender sensitive adjudication is an invitation therefore to Judicial Officers to develop:

Firstly, a sensitivity to the existence of inequality and discrimination in laws and behaviours.

And secondly, the technical competency to construct legitimate legal arguments that can, though the interpretation and application of the law, effectively deconstruct inequality and reconstruct equality for the benefit, and the fair and equitable development of the real lives of people and societies.

It is not a licence to usurp the law or the law making power of the Legislature; but it is essentially the exercise of lawful judicial decision making in furtherance of the rule of law and the upholding of primarily constitutionally and internationally covenanted core State values.

Considerations In Order to Achieve Gender Sensitive Adjudication

When called upon to, Judicial Officers should:

- Consider and apply any/all of the five types of legal argumentation: text, intent, precedent, tradition and policy;
- Consider the essential legal system values of certainty, the will of the people, stability, societal norms and expectations, flexibility and evolving notions of justice;
- Consider and determine all relevant facts and law;
- Consider the following questions and/or factors at the various stages of the process:

Initial procedural issues

1. Does the case require a protection order? Is there someone in need of protection even if only during the pendency of the case?
2. Are any other interim orders necessary to achieve gender sensitive adjudication from the inception of proceedings?
3. Does deciding whether or not to allow the claim to proceed require a gender analysis? Is the claim one in which there is a glaring unequal power relationship between the parties which calls for intervention or extra-legal resolution?

Fact determinations and interpretation of evidence

1. What was the context in which the facts took place?
2. Is any party poor, marginalized, vulnerable, or facing discrimination on the basis of sex, gender, or sexual orientation/preference?
3. Is there an asymmetrical power relationship between any of the parties? How might this influence the evidence or testimony requested and the weight given to it?
4. Is any party a member of a traditionally-subordinated, marginalized or historically disadvantaged group?
5. Does any party belong to a historically disadvantaged group?
6. Does any party have characteristics evincing possible overlapping discrimination?
7. Does the behaviour that we expect of the parties or of the victims conform to stereotypes or to one of the manifestations of sexism?
8. Would our expectations of the victim's response be different if we imagine them being of a different gender or sexual orientation? Would anything change in our expectations of behaviour if we assigned an opposite stereotype to a party e.g. if a man were seeking paternity leave, would our response change if it were instead a woman?

Determining the applicable law

1. What constitutional, international, and/or domestic legal framework, applies to the case?
2. Are there any cases or opinions from international bodies that address the question at issue?
3. Are there any international cases decided against Trinidad and Tobago or other countries in the region that must be followed?
4. Are there any other international cases decided against other countries that should be considered?
5. Do any General Observations from U.N. treaty-monitoring bodies or analyses from the Inter-American Commission on Human Rights contain relevant legal analysis to the issue(s) in the case?
6. Is the person's gender identity protected by the applicable legal framework?
7. Does that applicable legal framework reflect a stereotyped or sexist view of the person?
8. Does that applicable legal framework impose a different impact on the person or the context at issue?

9. What law best guarantees the right to equality for the victims or parties in the case?

10. What legal strategies can counteract a norm that is discriminatory in purpose or in effect?

11. Does the case require us to deconstruct a paradigm, concept, or legal construct? How could our analysis achieve that?

12. What tools does the applicable legal framework provide to resolve power asymmetries and structural inequalities in the case? Does the case merit differentiated treatment?

Reasoning

1. Apply the constitutional principles of equality before the law and the protection of the law, respect for privacy and family life, equality of treatment from public authorities and the rights of parents, guardians, and children.

2. Apply, and explain, your reasons for applying the law or rule that provides the best protection to persons who face power asymmetry or structural inequality. This means not just citing e.g., international treaties, but explaining the reasons for applying those principles or the case and explaining why they determine the outcome.

3. Understand the problems that can arise from the use of interpretive legal approaches such as analogy, when formal, material, and structural equality are not taken into account.

4. Incorporate persuasive gender-related analyses from comparative law and from legal scholarship.

5. Explain why applying a given norm in the case would cause a different or discriminatory impact.

6. Elucidate the stereotypes and sexisms detected in the facts, in the way the evidence was interpreted, in the allegations and claims of the parties, or in the norms that could have been applied.

7. If a balancing act is to be undertaken, adequately account for power asymmetries.

8. Explain why an unequal power relationship, or structural inequality, underlies the case.

9. Determine the appropriate legal strategy to minimize the impact of the structural inequality in the case.

10. Recognize and describe any gender biases encountered at any stage in the process.

11. Make sure that neither the reasoning nor the ultimate outcome of the opinion re-victimizes or stereotypes the victim in any way.

Remedies

1. Did any party suffer disproportionate harm on the basis of sex, gender, or sexual orientation?
2. What type of remedies could best provide redress for this kind of different impact?
3. If we identified power asymmetries and structural inequality, what remedies would be most useful in undoing those asymmetries and inequalities?
4. Does the remedy we selected reflect stereotyped or sexist notions?
5. Given the sex, gender, and sexual preference/orientation of the victim -- and the type of harm suffered -- what remedy would be the most appropriate way to make the victim whole?
6. When deciding on the form of redress, are we taking the victim's desires into account?
7. How did the problem affect the familial, workplace, and community roles and responsibilities of the victim? How could the remedy selected address those impacts?
8. Is there any kind of collective damage in the case? Is it possible to redress it?
9. Did anyone suffer a harm based on any kind of group membership?
10. Will the remedies selected provide redress for all of the different types of harm that have been identified?

FIGURE 15

Gender Analysis and Adjudication

- Identify whether there is an equal power relationship at play, and if any person is facing a situation of vulnerability or of formal, material, and/or structural inequality.
- Apply strict scrutiny if suspect classes, such a sex, gender, and/or sexual preference or orientation, are implicated.
- Pay particular attention to cases in which two suspect classes overlap – such a sex and socioeconomic position – and which occur in contexts such as poverty, homelessness, and migration.
- Read and interpret the facts without discriminatory stereotypes, and take into account any contextual inequality already identified.
- Question the supposed neutrality of laws or norms, and evaluate disparate impacts that facially neutral laws may impose.
- Determine whether stereotypes are reinforced or relied upon in the law, norm, or in the behaviour of authorities, and make sure to combat those stereotypes in the judicial decision.
- Establish the proper legal framework by applying the principles of equality and non-discrimination as identified in domestic law, the terms of international human rights treaties, general observations from U.N. treaty-monitoring bodies, or analyses from the Inter-American Commission of Human Rights.
- Provide holistic and comprehensive remedies to (1) adequately address all the different types of harm caused by unequal power relations as well as vulnerabilities and inequalities, which are the result of sex, gender, sexual orientation, race, age, or social-economic position and (2) support the ability of the affected individual to achieve his/her life's project or purpose.

FIGURE 16

The Barriers to Accessing Justice

The following sections provide Judicial Officers with practical recommendations for treating with cases of gender-based violence and discrimination. This part specifically deals with the legislation covering domestic violence, sexual offences, custody and maintenance of children and human trafficking.

SECTION 4

- DOMESTIC VIOLENCE

DOMESTIC VIOLENCE

"Violence against women is an appalling human rights violation. In the broadest sense, it is the violation of a woman's personhood, mental or physical integrity, or freedom of movement through individual acts and societal oppression. It is so woven into the fabric of society to such an extent that many women who are victimized feel that they are at fault. Many of those who perpetuate violence feel justified by strong societal messages that these acts of violence against women, be it sexual harassment, rape, child abuse are acceptable."
The Queen v Vernon Anthony Paddy (The Eastern Caribbean Supreme Court, 2011) paragraph 47, page 11.

To combat gender-based violence in a domestic situation, and in accordance with our domestic and international responsibilities, a Domestic Violence Act was first introduced in Trinidad and Tobago in 1991. This Act was repealed in 1999 by the existing Domestic Violence Act Chap 45:56 ("the DVA"). This later act was amended in 2006. The DVA proclaims itself to be an Act to provide greater protection for victims of domestic violence. Its objects are: (1) to provide immediate injunctive relief to victims of domestic violence; and (2) to ensure a prompt and just legal remedy for victims of domestic violence. The redress provided by the DVA is limited to courts exercising a magisterial jurisdiction. Consequently this section is addressed primarily to those Judicial Officers who sit as Magistrates but also contains useful information to any Judicial Officer who is called upon to adjudicate in any matter in which gender-based violence is alleged.

DEFINING DOMESTIC VIOLENCE

The DVA protects persons in a recognized domestic situation from four (4) main types of abuse:

Emotional or psychological abuse

Defined as a pattern of behaviour, the purpose of which is to undermine the emotional or mental well-being of a person. This includes intimidation, stalking, forceful confinement and use of abusive or threatening language;

Financial abuse

Defined as a pattern of behaviour used as a means of exercising coercive control over someone or limiting that person's access to resources in an attempt to ensure the individual's financial dependence;

Sexual abuse

Defined as non-consensual sexual contact of any kind, including those that contravene the Sexual Offences Act Chapter 11:28;

Physical Abuse

Any act or omission which causes physical injury.[56]

The DVA achieves its purpose by empowering the Magistrate to issue protection orders.[57] These orders may be prohibitory in nature as well as mandatory or directory, but may only last for 3 years. The power to issue protection orders includes the power to make interim protection orders. These interim orders may be made ex parte but may not exceed a period of 42 days[58] from the date of the application.

56 Section 3 of the DVA
57 Section 6 of the DVA.
58 An interim order shall not exceed 21 days initially but may be extended to a period of 42 days section 8(3) and (5) of the DVA.

LIMITATIONS OF THE DVA

Scope

Section 4 of the DVA and the definition section identify the persons who are protected by the Act. This protection does not extend to persons of the same sex who cohabit or are in a visiting relationship. It also does not protect persons engaged in a visiting relationship unless those persons have been engaged in a visiting relationship as defined by the Act[59] with a person of the opposite sex for a period in excess of 12 months.

As a result of this omission, victims of gender-based violence who do not fall within the relationships recognized by the DVA are unable to access the protection of the Act. This does not accord with our responsibility to ensure equality of treatment to all who seek redress from the court. To ensure that we meet our obligations under the Constitution and under the international treaties referred to in this Protocol, Magistrates who are faced with this situation are therefore advised to give the DVA as broad an interpretation as is possible. Where that interpretation does not permit redress, the Magistrate must ensure that persons who not within the scope of the DVA and who seek redress from the court are brought before the court and advised of alternative avenues open to them, and as far as possible, facilitate an urgent hearing of the necessary application.

Delay

Another of the major limitations of the effectiveness of the DVA is the delay suffered by persons in accessing its remedies. In accordance with the DVA's objectives, the Court is mandated by the legislation to provide prompt and immediate relief and remedies to victims of domestic violence. Treating with these cases promptly is in keeping with the object and purpose of the DVA and consistent with Trinidad and Tobago's obligations under article 4 (g) of Belém do Pará.

59 "A non-cohabitational relationship which is otherwise similar to the relationship between husband and wife."

MAGISTRATES ARE ADVISED TO CONSIDER, AMONG OTHER MEANS OF REDRESS:

- Applications pursuant to section 30 of The Offences Against the Persons Act Chapter 11:08 as amended for assault occasioning actual bodily harm and under section 30A and B for harassment. Under sections 30A and 30B the Court has power to grant prohibitory and directory orders including orders for the payment of compensation;
- Applications pursuant to Part 1 of the Summary Offences Act Chapter. 11:02 for assault and battery or section 45 of the Malicious Damage Act Chapter 11:06;
- In addition to other remedies under existing legislation, as for example the Community Service Orders Act Chapter 13:06, the imposition of bonds to keep the peace as a sentencing option to ensure peaceful coexistence and other sentencing options such as counselling and referral to the probation department pursuant to the Probation of Offenders Act Chapter 13:51;
- Delaying sentencing to ensure enrolment and completion of voluntary programmes and counselling and to monitor the parties' progress.

Delay in obtaining relief manifests itself in repeated adjournments by the court after the filing of the application. While these adjournments may be for any number of reasons, some within the control of Judicial Officers and some out of such control, the fact of the delay ultimately redounds upon the court and the responsibility for reducing the delays caused as a result of these adjournments falls on us as Judicial Officers.

One of the means of mitigating the effect of delay is by the granting of interim orders. By section 8(1) of the DVA on an application for a protection order, the court has the power to make an interim order at any time before

or during the hearing of the application. An interim order can be made in the absence of the respondent whether or not the respondent has received notice of the application. The order is for a limited period but the DVA does not prohibit the making of a further interim order if the circumstances permit.

In considering whether to make an interim order, the Magistrate should consider whether a quick, albeit temporary, remedy to ensure the safety and protection of the applicant is necessary. In these cases protection of the applicant's right to security of the person will outweigh the respondent's right to be heard. Interim orders are particularly useful in cases where the applicant: (1) has suffered emotional and physical abuse; (2) is fearful of facing the abuser, and (3) might be exposed to and is to be kept free from exposure to further harm, especially where the applicant and the respondent live in the same home.

The interim order should not lapse before the hearing of the substantive application. Nonetheless, in granting the interim order, the court has to be mindful of not unnecessarily infringing the respondent's right to be heard or to confront their accuser. Consequently, section 8(5) of the DVA makes it clear that a date for hearing of the substantive matter should be made as soon as possible and that the respondent can make an immediate application to have the order discharged. To ensure that the respondent is aware of the right to do so and to lessen the likelihood of retaliatory action, Magistrates are advised to ensure that the interim protection order advises the respondent of the right to apply to the Court to have the order discharged. Given the protection of the respondent's right to be heard being built into the legislation and the fact that by the order the respondent is made aware of this protection, Magistrates should not be hesitant in granting the necessary protection to applicants by way of an interim order.

Courts are therefore strongly advised to treat domestic violence complaints with urgency and ensure that procedures are put in place to have an application for an interim order brought before a Magistrate within 24 hours or sooner of being filed. This could be the difference between life and death.

Even in cases where an interim order might not be necessary or has been granted, it is highly desirable for applications to be heard as soon as possible. By reporting the matter, applicants place themselves at a high risk of being further abused or being driven into engage in extreme retaliatory action. In order to ensure an early determination of domestic violence matters and to avoid adjournments caused by lack of time, Magistrates are urged to devise means of ensuring that the necessary time is scheduled and set aside for the hearing of the application.

The fact that the hearing of domestic violence applications is to be in camera requires a Magistrate to be creative in ensuring that fixed times are allotted for the hearing of these matters and that matters are conducted and completed within the scheduled times. This may mean setting aside a particular day or days of the week solely for the hearing of domestic violence matters; fixing of specific and realistic times for the hearing; and the adoption of appropriate case management techniques. Trial date and time certainty and ensuring that adequate time is set aside to deal with the hearing not only promote efficiency and eliminate the time wasted in adjourning matters, but ensure that at least three elements of procedural fairness are engaged:

1. Respectful Treatment: by avoiding recurrent adjournments and time wasted in court waiting for the matter to be called and adjourned it acknowledges that the party's time is valuable;

2. Trustworthy Authorities: by hearing the matter when scheduled parties are more likely to accept that the court means what it says; and

3. Voice: by scheduling a realistic time for the hearing the court ensures that sufficient time is set aside to properly listen to the parties without the pressure of or need to hear or adjourn other matters. In addition,

it allows the Magistrate sufficient time to consult with the parties and their attorneys as to appropriate dates and times for subsequent hearings and as far as possible to accommodate their needs.

Another benefit of scheduled hearings is the effect that this has on limiting the time spent by the parties in each other's presence. This is particularly important where this time is spent outside of the direct supervision of the court while waiting for the case to be called. Best practice advises the use of separate waiting rooms for litigants (see below). While this is ideal in the vast majority of cases, financial constraints will not permit this best practice. Fixing strict time schedules and keeping to those schedules is one way of ensuring minimum contact by the protagonists.

In cases of domestic violence tensions are expected to be high and the applicant may likely feel intimidated or threatened. This has the potential to negatively impact the quality of evidence and the outcome of the case before the court. The policy of arranging separate waiting areas for the parties to a domestic dispute is therefore desirable in ensuring the best outcome in the case and safeguarding the comfort of the applicant and the integrity of the evidence. This will reduce the likelihood of the respondent either unwittingly or knowingly intimidating the applicant. Where this is physically impossible because of the lack of separate waiting areas, arrangements should be put in place for a police presence and for the use of specific time slots for the hearing of the application.

Lack of service of the application is another source of delay. In the majority of cases, service of the notice of the proceedings on the respondent is done by the police. While, given the nature of the proceedings, this is understandable this in itself has been a cause of delay in the hearing of applications. The DVA provides that service of a notice of application can be done by the applicant or the applicant's agent.[60] In the appropriate case therefore, while ensuring for the safety of the applicant, Magistrates are advised to make use of this section to ensure prompt service of notices of applications and to advise applicants of the avenues open to them to effect service. Note that by section 12(3) of the DVA, service of the notice of application by the applicant or the applicant's agent is deemed to be service under the Summary Courts Act Chapter 4:20.

Service of protection orders on respondents is another source of frustration for the applicant and causes delay in obtaining an effective remedy. To be effective the DVA requires the order to be served on the respondent. The DVA provides that the Court shall cause a copy of the order to be served on the respondent; any other person affected by the order and the police officer in charge of the Station located nearest to the area where the respondent or the applicant resides. In addition to personal service, the DVA also allows the Magistrate to make an order for substituted service of the notice of proceedings or order by way of registered post to the respondent's last known address; leaving the order at the respondent's last known address, by advertisement or "such other manner as the Court may direct"[61]. Orders served on the respondent in this manner are binding on the respondent.[62] Magistrates are urged to avail themselves of this section where service of the protection order proves difficult.

SPECIFIC PROVISIONS OF THE DVA

Protection Orders

The Protection Order is the main vehicle for achieving the purposes of the Act.[63] Apart from its prohibitory aspect, among other things, the court may direct that the respondent or applicant or both receive professional counselling or therapy from any person or agency, or from a programme approved by the Minister in writing.[64]

60 Section 12(5) of the Act.

61 Section 17 of the DVA

62 Section 18 of the DVA

63 To whom the responsibility for Social Development and Family Services is assigned.

64 Section 6(1)(c)(viii) of the DVA

Attitudes to domestic violence, from both the perspective of the applicant and respondent, are often the result of socialisation. Counselling is therefore critical to behaviour modification. Sending someone to prison or granting a protection order is only a temporary fix to a deep-seated psychological issue for the abuser and, in the majority of cases, for the applicant as well. Counselling is therefore a useful tool in preventing further abuse and assisting applicants with beginning the healing process. The fact that protection orders have a maximum life of 3 years means that it is critical for there to be some behaviour modification during that period. Magistrates are required to keep up-to-date lists of qualified providers under this section.

In making orders for the parties to attend counselling, the court should consider whether joint or separate counselling is appropriate and bear in mind that the purpose of the DVA is not to maintain the institution of marriage but for the protection of the victim. Perpetrators of domestic violence need specialised counselling. Simply recommending that the applicant and abuser attend counselling sessions together will not suffice. This only places the applicant in a situation where he/she may feel intimidated by the respondent.

Moreover, specialised and expert counselling is necessary for the respondent to interrogate the causes for his/her abusive conduct and to develop specific measures to deal with conflict management. As such, Magistrates must ensure that where counselling is ordered, where appropriate, the applicant and respondent receive separate counselling from providers with the necessary expertise and qualifications. Where the cost of a private counsellor is prohibitive, Magistrates must advise and refer the applicant and the respondent to the counselling services provided by the Family Court and the Family Services Division.

When directing counselling, Magistrates should consider whether counselling is an appropriate alternative to more serious forms of punishment in circumstances where (1) the accused has engaged in less serious non-criminal acts, and (2) the incident was an isolated one. However, counselling cannot be a substitute for criminal sanctions in cases where there has been a pattern of physical and/or psychological abuse. In those cases, counselling should be seen as complementary to the respondent facing the full weight of the criminal law.

When making orders for the abuser to receive counselling, section 6(3) of the DVA stipulates that the court must also ensure that the respondent is actually attending the counselling sessions and that the counsellor sends a report to the court. Magistrates should remind the respondent that failure to comply with the terms of a protection order, including mandatory counselling, will lead to the imposition of a fine or imprisonment.[65] Magistrates should also ensure that the steps should also be put in place to ensure that the Magistrate receives written notification of sessions missed and reports by the therapist or counsellor in accordance with the requirements of section 6(3)[66] and put steps in place to ensure the necessary follow up. It is also important for Magistrates to consider whether there are children who would need counselling to deal with the effects of the violence in the home.

The DVA also provides for certain other orders or directions complementary to the injunctive relief given by the protection order. These orders are found at section 6(1)(c). In particular section 6(1)(c)(iv) gives the court the power to order the abuser to vacate the home. These orders can be vital in ensuring that the applicant is not left homeless in his/her attempts to escape the abuse. This type of order is especially useful in cases where there are children involved and the applicant has nowhere else to live. Courts should bear in mind that an exclusion order can be made against the abuser even if the applicant does not have a proprietary interest in the premises.

In addition to the order giving the applicant exclusive occupation of the home, where appropriate Magistrates are advised to consider complementing such an order with an order mandating the respondent to pay rent and/or utilities [section 6(1)(c)(vi)]. This is especially appropriate

65 Section 6(3)(viii)

66 Section 6(3) requires the court to receive written notification from the counselor and therapist of sessions missed and reports from the counselor or therapist.

where paying for rent and utilities was the respondent's responsibility prior to the application for protection order.

Exclusion orders should not, however, be made without a consideration of the social reality. If, for example, the home is situated in an area where the abuser's family is likely to influence or intimidate the applicant or in an area where the respondent is required to frequent, e.g. for work purposes, it might be more suitable for the applicant to move out of the home. In such cases the Court can order the abuser to pay for the applicant's rent and utilities in the new location.

In granting an exclusion order, or any other order provided by section 6(1) of the DVA, the Court must be cognizant of the real possibility that the application for the protection order might trigger the abuser to engage in even more abusive behaviour – sometimes resulting in the applicant being killed. In most cases of domestic violence, the abuser uses violence to control the applicant. The protection order signals to the abuser that the abuser is no longer able to control the applicant. As such, an abuser may go to extreme lengths to regain this control. It is therefore necessary to ensure that, when granting the exclusion or any other punitive order, the court uses the wide range of orders in section 6(1) to safeguard the applicant and reduce the likelihood of the applicant coming into contact with the respondent.

A common factor that has hindered women's access to the remedies available from the court is the misconception that the need for protection is not imminent because the victim failed to leave the abuser or has in earlier times returned to the joint home or relationship. Judicial Officers are advised to be cautious against the belief that protection is not important or less important in cases where an applicant has not left the abuser. This type of thinking reflects an inability to fully grasp the complexities surrounding an applicant's decision to leave his/her abuser. Among those considerations is the reality that leaving the abuser could lead to the abuser killing the applicant.

MAGISTRATES ARE ADVISED TO RECOGNISE THAT APPLICANTS MAY BE INCLINED TO STAY WITH THE RESPONDENT FOR THE FOLLOWING REASONS[67]:

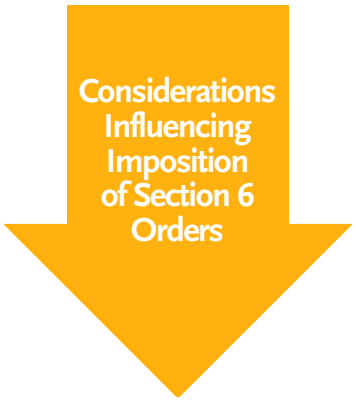
- Commitment to the relationship: Deep emotional ties to the relationship, which fuels the applicant's hope that things may change and the abuse may eventually stop;
- Economic dependence: The nature of the relationship may mean that the applicant may not have resources or property to relocate. The applicant may also be economically dependent on the respondent to meet the needs of the children and the household;
- Threats from the respondent: The applicant may have been threatened by the respondent and may entertain justifiable fears that the respondent will carry out those threats. The fear of being beaten or killed will influence the applicant's decision to remain in the home with the respondent.

As Judicial Officers we must appreciate that women, even though they are victims of abuse, have many legitimate reasons to return to their abuser, and this should not be a factor that militates against the need for protection. Judicial Officers must acknowledge and accept the applicant's reality and not substitute their own views. This is particularly crucial when dealing with repeat applications.

67 http://www.newchoicesinc.org/educated/abuse/DV/whynotleave

FIGURE 17

Overarching Considerations when Deciding on the Terms of Protection Orders



- Nature, history and pattern of abuse, including the existence of any previous protection orders made against the respondent
- Need to protect the applicant and other members of the family
- Welfare of any child
- Accomodation needs of applicant and any child/dependent
- Income, assets and financial obligations of respondent
- Preserving and protecting the family unit
- Any other relevant factor

Monetary Awards to Applicants

In addition to ordering that the respondent make rent or mortgage payments section 6(1)(c) of the DVA permits the court to order that the respondent make payment for the maintenance of dependents of the victim and to pay compensation for monetary loss incurred by the applicant as a direct result of conduct that amounted to domestic violence. These expenses include but shall not be limited to: loss of earnings, medical and dental expenses, moving and accommodation, and reasonable legal costs including the costs on an application pursuant to the DVA. With respect to such compensation the DVA provides that the Court shall have the jurisdiction to award compensation not exceeding fifteen thousand dollars for medical expenses, loss of earnings, cost of accommodation and other reasonable expenses, including the cost of the application.[68]

THESE PROVISIONS OFFER INITIAL PROTECTION TO VICTIMS OF DOMESTIC ABUSE, AND ARE IN LINE WITH TRINIDAD AND TOBAGO'S INTERNATIONAL OBLIGATIONS ON THIS MATTER. IN MAKING THESE ORDERS THE MAGISTRATES SHOULD CONSIDER THE FOLLOWING:

- In domestic violence cases the abuser should be made to pay restitution for any losses the applicant incurred as a result of the abuse;
- The compensation awarded is not limited to the heads identified in the section so that it is possible under the section to award compensation for pain and suffering or any damage to property or any additional measures the applicant had undertaken in order to avoid the abuse;
- For medical expenses, it should not always be necessary for the applicant to provide a medical certificate in order for the court to award compensation. If the injuries are self-evident or there are corroborating witnesses, the court can order that the respondent reimburse the applicant.

68 Sec. 6(2) (a) and (b)

Magistrates are advised to consider whether financial compensation would be an appropriate remedy for applicants in domestic violence cases.

Economic dependence is one of the main reasons victims choose not to report domestic violence and fail to leave their abusers. To ensure financial independence as far as possible Courts must grant maintenance orders that provide sufficient money to cover living expenses for victims and their dependents.

Magistrates should keep in mind the fact that the maintenance provision under the DVA is temporary and is for the purpose of providing interim monetary relief "where there is no such existing order relating to maintenance until such time as an obligation for support is determined pursuant to any written law."[69] Consequently, in addition to the financial provisions under the DVA, Magistrates should avail themselves of section 6(7) of the DVA which allows the Court to make more permanent orders under section 25 of the Family Law Act. Section 25 of that Act allows the Court to make financial provision for the applicant and minor children of the family which are not necessarily interim and includes the payment of lump sums; orders for legal custody of minor children under the age of 16 years and orders which have the effect of a judicial separation between the parties. This then is a useful tool in ensuring the further protection and financial wellbeing of the applicant and the minor children of the family beyond the three-year limitation period provided by the DVA.

Standard of Proof and Assessing the Evidence

The issue of a Protection Order is dependent on applicants providing sufficient evidence to establish that they are in need of protection. When assessing evidence in a domestic violence case the standard of proof required is the civil standard of proof.[70] Magistrates must bear in mind that although the offences may seem criminal in nature the standard of proof required by the DVA is not as high as the criminal standard of proof – beyond a reasonable doubt – but rather is the civil standard of proof – on a "balance of probabilities".

Furthermore, the nature of domestic violence sometimes makes it difficult for the applicant to provide corroborating evidence to support their oral testimony. Most times the only witnesses, if any, are the children of the family. Therefore, the quality of the applicant's testimony will be of great importance. That said, Magistrates should therefore bear in mind that domestic violence is an extremely traumatic experience and which, in many cases, is ongoing and long standing. Magistrates should be on the alert to guard against the applicant being re-victimised during cross-examination. In particular Magistrates should ensure that the applicant is not unduly subjected to questions that reflect stereotypical and discriminatory perceptions on how women should act in abusive relationships.

For many applicants the process of approaching the Courts can be very intimidating and as such their oral evidence might not be very articulate or coherent. Magistrates are therefore advised to pay significant regard to medical/expert reports as well as initial police reports containing the applicant's statement where available.

Custody of Children in Cases Where a Protection Order is Issued

Section 6(7) of the DVA states that the Court can, with respect to custody or access to a child, grant custody to the applicant as a part of the protection order. Judges are advised on such occasions, to give primary consideration to the welfare of the children as required by section 7(c) of the DVA and section 25 of the Family Law Act.[71] In domestic violence cases the important point to consider is whether the children have been abused or are at risk of being abused. If so, Courts should grant custody of the children to the guardian or parent where the abuse is less likely to occur. Courts should also consider the likelihood of the child being abused when giving rulings on visitation rights. Even though

69 Section 6(1)(c)(iii) of the DVA

70 Section 5(1) of the DVA

71 See Family Law Act sect. 43 (1) (a) conjoined with the Domestic Violence Act sect. (6) (1) (a) (vii)

the court might not want to sever the parental ties between the abuser and his children visitation rights must not be given unless the court is satisfied that measures are put in place to protect the children from any potential abuse.

If the applicant's financial circumstances do not allow him/her to look after the children Courts should, with reference to the Domestic Violence Act section 6 (4), impose a financial obligation on the abuser to maintain the applicant and the children. Therefore, in such cases, the applicant's financial circumstance should not be a relevant factor in determining custody.

Breach of Protection Orders, and Relationship Between Protection Orders and Punishment

The Domestic Violence Act section 20(1)(i) states that if a protection order is contravened by the respondent, then he/she is "liable (...) to a fine of $9 000 or imprisonment for a term of 3 months". In such cases, the court must assess whether: (1) a fine is sufficient deterrence, (2) there is a risk of the applicant being violated if the abuser was allowed to escape a prison sentence, and (3) if the respondent's conduct amounts to a criminal offence under the Offences Against the Persons Act, the Sexual Offences Act, or other relevant law.

Although a protection order offers legal protection to the applicant, Judicial Officers must keep in mind that perpetrators of domestic violence must also be held responsible for their actions in criminal proceedings. Dealing with domestic violence in the justice system is not solely about protecting the victim from the abuser, but also about society criminally sanctioning the abuser's reprehensible conduct. The fact that the violence occurred in an intimate context does not, and should not, make it less criminal.

Holding the abuser criminally liable for his/her actions sends the signal that the State, including the Judiciary, has a zero tolerance policy towards the scourge of domestic violence. Consequently, where the breach of the protection order amounts to a non-indictable criminal offence under any relevant law, Magistrates should where possible deal simultaneously with the breach of the order and the criminal act.

"It is now the duty of the courts to send out a strong message that domestic violence in any form will not be tolerated ... The only way the courts can effectively show this is by the sentences that are passed which are aimed at ensuring that the wrongdoer does not repeat the offence and that potential offenders get the message that society will not condone such behaviour" per Hariprashad Charles J in *The Queen v Vernon Anthony Paddy*[72] (The Eastern Caribbean Supreme Court, 2011).

72 BVIHCR 2010/0020

Considerations in treating with Domestic Violence applications:

- **With respect to the scope of the DVA:**

  When faced with a situation where violence is alleged in a relationship not within the scope of the DVA, Magistrates are advised to ensure the applicant is brought before the court as soon as possible; advised of alternative avenues open to the applicant and, as far as possible, facilitate an urgent hearing of the necessary application.

- **With respect to treating with the delay in obtaining remedies, Magistrates are advised to:**

1. put procedures in place to have applications for an interim order placed before a Magistrate within 24 hours or sooner of being filed;
2. issue interim protection orders in cases where delay would or might cause serious injury, undue hardship or create a risk to personal safety;
3. ensure that an interim protection order advises the respondent of the right to apply to the Court to have the order discharged;
4. in the appropriate case, while ensuring for the safety of the applicant, make use of section 12 of the DVA to ensure prompt service of notices of proceedings and advise applicants of all the avenues open to them to effect service;
5. except in situations where the interim order has specifically been discharged for cause ensure that the substantive hearing is heard and completed before the expiration of the interim protection order; and
6. ensure that the sufficient time is scheduled and set aside for the hearing of the application.

- **With respect to the hearing of the domestic violence application, Magistrates are advised to:**

1. where possible arrange for separate waiting areas for the parties;
2. fix specific dates and times for the hearing of DV applications to avoid the 9 am bottle neck;
3. treat special fixtures as peremptory;
4. be cautious against the belief that protection is not important or is less important in cases where an applicant has not left the abuser;
5. acknowledge and accept the applicant's reality and not substitute their own;
6. bear in mind that although the offences may seem criminal in nature the standard of proof required by the DVA is not as high as the criminal standard of proof but rather is proof on a balance of probabilities;
7. ensure that the procedure for adducing evidence is gender sensitive and does not re-victimise or traumatise the applicant;
8. recognise the complexity of abusive relationships and not deny the applicant protection because of prejudiced and stereotypical perceptions of how women should react in such relationships;
9. guard against the belief that protection is not important or less important in cases where an applicant has not left the abuser or has returned to the abuser in the past.

- **With respect to making a protection order Magistrates are advised to:**

1. keep up-to-date lists of qualified providers of counselling and therapy;
2. be mindful of the benefits of counselling and, where ordered, ensure that where appropriate the applicant and respondent receive separate counselling from providers with the necessary expertise and qualifications;
3. remind the respondent that failure to comply with the terms of a protection order, including mandatory counselling, will lead to the imposition of a fine or imprisonment;
4. ensure that the steps are put in place to receive written notification of sessions missed and the receipt of reports by the therapist or counsellor and to ensure the necessary follow up;
5. consider whether there are children who would need counselling to deal with the effects of the violence in the home;
6. bear in mind that an exclusion order can be made against the abuser even if the applicant does not have a proprietary interest in the premises;
7. use the wide range of orders under section 6 of the DVA to ensure the physical and financial safety of the applicant.

- **With respect to the custody of minors and financial provision Magistrates are advised to:**

1. in addition to the financial provisions under the DVA avail themselves of section 6(7) of the DVA which allows the Court to make more permanent orders under section 25 of the Family Law Act;
2. ensure that children are protected from abuse when issuing protection orders;
3. consider the likelihood of the child being abused when giving rulings on custody or access.

- **With respect to enforcement of orders Magistrates are advised to:**

1. avail themselves of the provisions for substituted service where service of the protection order proves difficult;
2. ensure that they punish a breach of the protection order so as to deter the respondent from interfering with the applicant;
3. consider whether breach of the protection order also amounts to a non-indictable criminal offence under any relevant law and thereafter deal with both in the same hearing;
4. encourage applicants to follow through with criminal proceedings if the nature of the abuse also constitutes a criminal offence.

SECTION 5

- SEXUAL OFFENCES

SEXUAL OFFENCES

This section is to be read in conjunction with the Model Guidelines for Sexual Offences Cases in the Caribbean Region. While some of the areas explored here touch on areas explored in the model guidelines they are to be read as complementary to the guidelines. Judicial Officers are therefore advised to be aware of and apply the model guidelines in treating with sexual offences cases.

Of relevance here is: the Sexual Offences Act; the Offences Against the Persons Act and, with respect to persons under the age of 18 years, the Children Act Chapter 46:01.

The prosecution of sexual offences, as with other criminal offences, is undertaken by the State and by Attorneys or police prosecutors whose job it is to secure a conviction. Accused persons are themselves, more often than not, represented by attorneys whose job it is to prevent a conviction. In this scenario, if sufficient care is not taken, the virtual complainant can be unwittingly treated as a means to an end. The end being the conviction or acquittal of the persons accused of these offences.

As Judicial Officers, our duty is to ensure that this does not happen. This section is concerned with the protection of the victims of sexual offences, the virtual complainants, before and during the prosecution of the accused person for offences under these Acts. This accords with our responsibility under Belém do Pará to put in place 'protective measures', including providing appropriate specialized services for women subjected to violence.[73] Such protection is essential to ensure that the efficacy of prosecutions, the prevention of the re-victimisation of the virtual complainant, and the legitimacy of the judicial process. This section is therefore specifically addressed to those Judicial Officers who sit as Magistrates, Children Court Masters and Judges who conduct criminal trials including those sitting in the Children Court.

The Criminal Proceedings Rules[74] ("the CrPR"), made under the Criminal Procedure Act Chapter 12:02, is applicable to all criminal cases in the High Court and the Magistrates' Court. The CrPR mandates the Judicial Officer to deal with all cases justly and introduces the requirement of case management into the conduct of all hearings and trials. By the CrPR Judicial Officers are mandated to deal with cases justly this includes "considering the interests of the accused, victims and jurors and keeping them informed of the progress of the case as necessary."[75]

Matters before the Children Court treat with the prosecution of all criminal cases brought against persons under 18 years. The Children Court Rules 2018[76] apply to these prosecutions. As with the CrPR these Rules also introduce the requirement of case management in the conduct of trials. As well, and in somewhat similar terms, the Children Court Rules ('the ChCR") require the court deal with children matters justly this includes a requirement that the court treat the prosecution, the defence "and all the participants fairly."[77] The ChCR also mandates the Court to take into account the welfare of any child who appears before it as a virtual complainant or as a witness.[78] The applicable rules, that is the CrPR and the ChCR collectively referred to as 'the Rules', therefore require Judicial Officers to ensure the protection and welfare of the virtual complainant during the course of the prosecution for a sexual offence.

73 Articles 7(f) and 8(d)

74 Legal Notice No 55 of 2016
75 Rule 3.3(c) of the Criminal Procedure Rules 2016
76 Legal Notice 22 of 2018
77 Rule 2.1 (2)(c) of the Children Court Rules 2018
78 Rule 2.2(1) of the Children Court Rules 2018

PRE-TRIAL CONSIDERATIONS

Support Services for Virtual Complainants

Psychological and, where appropriate, social support are essential to the recovery of virtual complainants of sexual abuse. This section specifically deals with the support required for virtual complainants during the prosecution of sexual offences. Judicial Officers must appreciate that the pre-trial and trial processes of the court put additional stress on the virtual complainant. Court processes themselves are generally confusing and traumatic for the uninitiated. For a virtual complainant of a sexual offence this confusion and trauma are intensified.

The pre-trial and trial processes usually require survivors of sexual assaults to repeatedly relive the traumatic experience of being violated. This can be emotionally and psychologically taxing. It is important therefore to ensure that these virtual complainants receive appropriate support during this period. The strain and anxiety of impending court proceedings can manifest in many ways. Judicial Officers are reminded that, even though there may be no outward manifestation of the toll taken on a virtual complainant by the litigation, it is always advisable at each stage of the proceedings to make enquiries of and ensure that the virtual complainant is informed of the availability of psychological and social support services and, where necessary, have available a list of those agencies who provide such services. In particular, organisations like the Victim and Witness Support Unit of the Trinidad and Tobago Police Service; the assessment centres established by the North West Regional Health Authority[79] and the Rape Crisis Centre are particularly equipped to assist victims of sexual offences. These organisations provide virtual complainants with a space in which they can express their feelings confidentially and obtain guidance on how to navigate the criminal justice system and, in the case of the assessments centres, psychiatric care. Where the virtual complainant is a child, assistance can also be sought from the Children's Authority who, in accordance with section 4 (2)(a) of the Children's Authority Act Chapter 46:10, may provide guidance and counselling to children assessed by them to be in need of same even where these children are still residing with their families.

International Provisions Justifying Survivors' Access to Psycho-Social Support Services

BELÉM DO PARÁ – Articles 7(f) and 8(d) – Demands that state parties put in place 'protective measures', including providing appropriate specialized services for women subjected to violence

Granting Bail to the Accused

Section 6(2) of the Bail Act Chapter 4:06 states that in cases where a defendant is accused or convicted of an offence that is punishable with imprisonment, the court may refuse an application for bail under specified circumstances. The circumstances relevant to sexual offence cases are: (1) whether the defendant will likely commit another sexual offence or another crime;[80] and (2) whether the defendant is likely to interfere with the complainant or witnesses or otherwise obstruct the course of justice.[81] Judicial Officers are reminded that where these conditions apply the grant of bail to the accused is not advisable.

Where the attacker and the virtual complainant are known to each other, threats, retaliation or repeat attacks are not unusual. It is also quite common for the accused, particularly in sexual offence cases involving minors, to make a payment or offer other inducements to the relatives of the minor in exchange for the complainant dropping the complaint.[82] Additionally, it is sometimes the case that persons accused of rape are serial offenders. If these circumstances exist or are likely to occur, Judicial Officers should refuse bail.

79 The intention is to have the assessment centers established throughout Trinidad and Tobago

80 Bail Act sect. 5(1) (a) (ii)

81 Bail Act sect. 5(1) (a) (iii)

82 US Department of State, Barbados 2013 Human Rights Report (8)

International Provisions Supporting Judges Refusing Bail to the Accused

BELÉM DO PARÁ 7(f): The States Parties (...) undertake to (...) establish fair and effective legal procedures for women who have been subjected to violence which include, among others, protective measures, a timely hearing and effective access to such procedures".

In the Children Court, when determining the conditions of bail, the court may take into account recommendations from the Children's Authority as well as all participants or their representatives. In these circumstances therefore, when considering what conditions ought to be attached to the grant of bail, Judicial Officers should consider receiving recommendations from the virtual complainant. In all other cases the Judicial Officer should consider specifically asking the prosecutor to indicate the position of the virtual complainant.

Overarching considerations for Judicial Officers when granting bail are: (1) the need to protect the survivor of the sexual assault; (2) the likelihood that the accused will endanger the complainant's safety, and (3) the possibility of the accused committing another offence or interfering with the course of justice while on bail. In appropriate cases it may be feasible to grant bail with conditions. Where there is no valid reason to refuse bail but concerns remain about whether it is prudent to grant bail Judicial Officers should consider attaching conditions to the grant of bail. Conditions like not coming within a certain distance of the virtual complainant and periodic reporting to the police station are useful. Judicial Officers should bear in mind that an accused is likely to agree to any reasonable prohibition as a condition for granting bail. In addition, Judicial Officers should not be hesitant in revoking bail if the conditions imposed are not complied with or where there are credible reports of threats or approaches to the virtual complainant or the virtual complainant's family or associates. It is always open to the accused to reapply for bail should conditions change.

Pre-trial Publicity Precautions

Consideration must be paid to the impact that the media and, in particular, social media, can have on the parties involved in sexual offence cases. This impact can be seen in three ways. First, for complainants, such exposure could cause embarrassment and this can in turn lead to a reluctance on the part of the virtual complainant to pursue the case. Second, particularly in small societies as ours, high levels of publicity can 'infect' the jury pool, causing the jury to make up their minds even before the trial begins. And third, this might give rise to claims from the accused that they is unable to receive a fair trial.

In the case of *Nankissoon Boodram v the Attorney General of Trinidad and Tobago* the Privy Council found that in cases where publicity is an issue the Judge can take certain measures to neutralise any threats posed to a fair trial process. They can decide whether measures such as "warnings and directions to the jury, peremptory challenge and challenge for cause, will enable the jury to reach its verdict with an unclouded mind, or whether exceptionally a temporary or even permanent stay of the prosecution is the only solution."[83] In addition, the court can consider using gag orders to prevent prosecutors, witnesses, law enforcement officials, jurors and others from talking to or making comments in the media.

Section 32(1) of the Sexual Offence Act provides that:

> *Before or after a person is accused of an offence under the Act, no matter likely to lead members of the public to identify a person as the complainant shall either be published in Trinidad and Tobago in a written publication available to the public or be broadcast in Trinidad and Tobago except where, on the application of the complainant, the court directs that the effect of the restriction is to impose a substantial and unreasonable restriction on the reporting of proceedings and it is in the public interest to remove the restriction in respect of the applicant.*

83 *Boodram v Attorney General of Trinidad and Tobago* [1996] AC 842 (Mustill LJ)

With respect to the use of social media, Judicial Officers are advised to consider a wide and liberal interpretation of this section for the protection of the virtual complainant.

TRIAL CONSIDERATIONS

Resolving Cases Promptly

The Rules require the court to deal with cases efficiently and promptly. The CrPR requires the Court to deal with cases efficiently and expeditiously.[84] This requirement is repeated in the ChCR which identifies as a component of treating the child justly the use of effective and efficient case management in order to secure a just and timely determination of each case before it.[85]

Paramount here is the need to resolve cases of sexual offences promptly. A failure to do so breaches the two of the principles of procedural fairness spoken about earlier in this Protocol; the need for trustworthy authorities and accountability and thus renders the prosecution of these offences procedurally unfair. Repeated adjournments and useless hearings do not instil in the participants a feeling of confidence or trust in the judicial system. Neither do unaccountable delays. It is our responsibility as Judicial Officers to ensure public trust and confidence in the justice system.

International Provisions Calling for Prompt Treatment of Sexual Assault Cases

BELÉM DO PARÁ art. 4(g): "Every woman has the right (...) to simple and prompt recourse to a competent court for protection against acts that violate her rights".

BELÉM DO PARÁ art. 7(f): "The States Parties (...) undertake to (...) establish fair and effective legal procedures for women who have been subjected to violence which include, among others, protective measures, a timely hearing and effective access to such procedures".

84 Rule 3.3 (d)
85 Rule 2.1(2)(d)

The more serious offences in this regard are committed in the hearing of indictable matters. Under the present system these hearings go through two stages: the preliminary inquiry and the trial. With respect these cases on an average it takes about 8 years from the report of a criminal offence to trial. This is not a fact of which we can be proud.

This delay is particularly egregious in the prosecution of sexual offences. These victims usually represent the most vulnerable in society. Sexual abuse and attack in whatever form is a most traumatic experience. Most times true recovery cannot begin until the offender is punished for the crime. Even in situations where the prosecution results in an acquittal a virtual complainant cannot begin along the road to recovery until the trauma of publicly reliving the experience is over.

The longer the case takes to come to trial the more difficult it is to ensure the voluntary participation of the virtual complainant. Eight years is a long time in the life of any person. It is even more so where the virtual complainant is a young person. A lot of life changes can occur during that time. One of the coping mechanisms for victims of trauma is to pretend that the incident never happened. It is not unusual therefore for virtual complainants to seek to get on with their life. For example, a virtual complainant may have married and have started a family; none of whom may know of the attack. The virtual complainant may have migrated in circumstances where returning to Trinidad and Tobago for the trial of the case is difficult if not impossible. The longer the case takes to go to trial the more tempting it is for the virtual complainant, or the virtual complainant's relatives in the case of a minor, to succumb to inducements or threats to not pursue the case.

Where the virtual complainant is unwilling to testify, in order to continue the prosecution, the Judicial Officer may be required to have the virtual complainant deemed a hostile witness. Particularly in sexual offences, this in itself can be a source of trauma for the virtual complainant, the Judicial Officer and the prosecution, who have to resort to the cross-examination of its own witness(es), and the jury.

At the very least it makes a successful prosecution of the offence more difficult.

The longer it takes to get to trial the more difficult it is to present the best evidence. The virtual complainant is more likely than not to be unable to remember minor details. Witnesses become difficult to locate. When located it is likely that they are unable to remember the facts clearly. They themselves may be reluctant testify. In these circumstances the resultant ineffectiveness of the prosecution's case becomes fodder for the defence attorney. Acquittals in these circumstances do not only cause further distress to the virtual complainant but reflect badly on the Judiciary and the administration of criminal justice.

Judicial Officers are reminded that the Rules require them to deal with the cases before them, whether heard summarily or indictably, efficiently, and expeditiously. The granting of unnecessary adjournments is neither efficient nor does it facilitate expeditious hearings. Further, it puts an unnecessary burden on the Judicial Officer's caseload and the flow of cases through the court system. A proper application of the rules and active case management will ensure that when cases are fixed for trial that the case is ready for trial and that the case goes on. Matters that are adjourned uncompleted or part heard after active case management reflect on the effectiveness of the Judicial Officer. Indeed, for those Judicial Officers sitting in the Children Court, the ChCR mandate the Court to make every effort to conclude the case at the hearing, and where not concluded, to give directions to conclude the case at the next hearing or as soon as possible.[86]

Active case management requires, among other things, that prior to the trial the Judicial Officer identify the real issues for trial[87]; set a time table for the progress of the case, monitor compliance with the timetable set and discourage delay and unnecessary hearings. It is important, therefore, for Judicial Officers to give cases involving sexual offences priority. Where possible a designated court, or in smaller magisterial districts special days, should be set aside for the hearing and determination of sexual offences. Such an allocation does not require legislation but can be done by way of administrative arrangements. In fact it has been done very successfully in St. George West where there is a specific court dedicated to hearing sexual offences.

With respect to complaints laid after 2005, the procedure set out in sections 16C, 23A and 23B of the Indictable Offences (Preliminary Enquiry) Act Chapter 12:02 allows for the admissibility of written statements of evidence in preliminary enquiries. The use of this procedure can go a long way in lessening the time spent in preliminary enquiries. Further the Judicial Officer, if satisfied that all the evidence consists of written statements, may under certain circumstances commit the accused for trial without a consideration of the contents of the statements.

Under the Preliminary Enquiry Act this procedure is dependent on the prosecutor adopting the procedure set out in section 16C. However, a proper application of the Rules and by the exercise of its case management powers given by the Rules, the Judicial Officers can give appropriate directions to the prosecutor in this regard. Judicial Officers are therefore reminded of the availability of section 16C and the other relevant sections in the Preliminary Enquiries Act and their ability under the CrPR to give directions for the filing of written evidence in accordance with the section.

In camera Hearings

Section 29 of the Sexual Offences Act stipulates that all rape cases, sexual assaults and cases involving children should be heard in camera. This stipulation does not however prevent the virtual complainant, should it be required, having present in the Courtroom a person who can provide the emotional and physiological support that may be necessary to put the virtual complainant at ease. Judicial Officers should bear in mind that there would be instances where the person most suitable for the provision of such support may be a witness in the case; for example a parent or guardian, and therefore unable to be present in court while the virtual complainant is giv-

86 Rule 5.4(4)

87 Rule 8.2(a) of the CrPR and 5.1 of the ChCR

ing evidence. In those circumstances Judicial Officers are advised to ensure prior to the hearing that, where required, another person is available and able to be present in court to provide such support to the virtual complainant. Such a person may include someone from the Victims Support Unit. In some cases it may be useful for the Judicial Officer to also consider limiting the number of police officers and supporting court personnel present in court in order to minimize the discomfort and embarrassment experienced by the virtual complainant.

In addition, where evidence is given by a child, the ChCR allows for additional special measures to be given to facilitate the child's evidence. These include a familiarization of the court room layout by the child; the presence of a supporting person and the re-configuration of the court room.[88]

Use of Alternative Means of Giving Evidence

The usual method of adducing evidence is by way of oral evidence in the Court. It is often difficult for virtual complainants, including children, to give evidence while in the same physical space as the alleged perpetrator. Virtual complainants often feel intimidated and re-victimized by the trial process. Additionally, they sometimes feel unjustified guilt in cases where the accused is a family member or an adult in a position of authority. Section 29A of the Sexual Offences Act and section 19B of the Administration of Justice (Miscellaneous Provisions) Act 1996[89] allow for the evidence of the virtual complainant in offences under the Sexual Offences Act to be given via the use of a video recording. These provisions however require that the virtual complainant be present for cross-examination. In these circumstances, and in cases where evidence via video cannot be employed, consideration can be given to the use of screens. The use of screens prevent or lessen the risk of the virtual complainant being intimidated by the presence of the accused.

Section 31E of the Sexual Offences Act gives the court the power to order that a screen be used to shield a child witness from the alleged perpetrator's scrutiny. Even though there is no legislation authorizing the use of screens to protect vulnerable adult witness when giving evidence, there is also nothing, which prevents the Judicial Officers from using such screens. It may however be necessary or prudent to obtain the consent of the defence before doing so. It may be easier to obtain this consent during the case management process before the cut and thrust and posturing of the trial begins.

The use of screens however requires the court to be provided with screens. It also requires that arrangements be made to have the virtual complainant enter and exit the courtroom in the absence of the accused.

Consideration should also be given to having the evidence of the virtual complainant taken by way of video link if such facilities are available. The giving of evidence via video link is another useful tool to protect the dignity of the virtual complainant in sexual assault cases. The CrPR enjoins the use of technology as an aspect of active case management. Judges and Magistrates should therefore carefully consider the circumstances where video recorded evidence would be suitable and seek at the case management stage to obtain the consent of the parties to this option. These measures allow for the maintenance of the dignity of the virtual complainant as well as ensure that the accused right to a fair trial is maintained.

With respect to the means of giving evidence in the Children Court, sections 91, 92, and 93 of the CA permit children to give evidence via video recording or video-conferencing. The ChCR permits a court to give directions for special measures for the taking of evidence of any witness.[90] These special measures include the use of alternative means of giving evidence.[91] These alternative means are identified as: video conferencing, video digital recording, depositions taken by the Registrar or a Master using computer-aided transcription or audio-digital recording or both, telephone or other alternate electronic means including telecommunications application software using Voice Over IP.[92] Judicial Officers sitting in the Children Court are advised to consider these alternative forms of adducing evidence in cases of sexual offences.

88 Rule 18.3(3) of the ChCR
89 Act No 28 of 1996
90 Rule 18.3(3) of the ChCR
91 Act No 28 of 1996
92 Rule 18.4 of the ChC

Separate Waiting Rooms for Accused and Survivor

The practice of providing separate waiting areas for the accused and the virtual complainant is an important element in putting the virtual complainant at ease and preventing the use of intimidating tactics in the vicinity of, but outside the supervision of, the court or court staff. Where this is impossible, Judicial Officers should consider the use of locating the virtual complaint in a witness room or another available room in the court building with the provision of security in the form of court personnel or the police officers to allay the virtual complainant's fears.

The Evidence Presentation and Cross Examination

Sexual offence cases should be treated with the utmost sensitivity in order to avoid further traumatising the virtual complainant. The Rules allow the Judicial Officers to give directions for the management of the trial that will ensure that the evidence is presented in the shortest way possible and limit the examination, cross-examination, and re-examination of any witness.[93] Section 30 of the Sexual Offences Act prevents an accused from adducing evidence which concerns the sexual activity of the virtual complainant with anyone other than the accused without the permission of the Judge or using the sexual reputation of the virtual complainant for the purpose of challenging or supporting the credibility of the virtual complainant. Judicial Officers should therefore ensure the prevention of cross-examination "which serve[s] no useful purpose apart from traumatising victims".[94] Further, evidence relating to the virtual complainants sexual history can tend to lead to gender discrimination by the promotion of stereotypes regarding a women's sexual history. Judicial Officers should therefore should allow evidence of the virtual complainant's sexual history only where it is necessary to safeguard the accused's right to a fair trial.

Examples of stereotypes include the following:

- "She look for it" – women who dress provocatively make themselves the target of male lust;
- A woman who takes money from a man must expect that he will want to have sex;
- It is hard for a man to control his sexual urges once he is turned on;
- Women should physically fight back when threatened with rape;
- Consent given under the influence of alcohol or drug is the same as consent given when sober;
- Women can implicitly – through their actions – consent to sex;
- Under-aged girls, who willingly have sex with older men are 'force ripe';
- A man cannot rape his wife;
- The trivialisation of sexual assaults as in 'It's just a little sex" or "he ent hurt she" referring to the lack of visible injury.

Judges should also remind the jury that it is usually unrealistic to expect the virtual complainant to recollect every detail, or to precisely match any previous testimony they had previously given. The IACtHR in *Rosendo Cantu et al. v Mexico* held that "it is not unusual that the retelling of acts of this nature (...) may contain some aspects that could be considered, a priori, as inconsistencies."[95] The IACtHR further held that the traumatic experience which the complainant suffered, and the impact, when recalling it, can lead to determined imprecisions in the testimony given. The same consideration applies to the lack of supporting witnesses where there is evidence that their absence is as a result the delay in the hearing of the case.

93 Rule 16 CrPR

94 Magistrate Lisa Ramsumair-Hinds, speech at the Commonwealth Magistrates' and Judges' Association Annual Conference, Georgetown, Guyana, Sep 2016

95 http://www.corteidh.or.cr/docs/casos/articulos/seriec_216_ing.pdf

Warning Juries Against Relying on Gender Stereotypes

When giving instructions to the jury regarding the assessment of evidence, Judges should as far as possible, warn the jury about relying on stereotypes of female and male sexuality when determining the credibility of the accused and the complainant. In 2008, the UK Court of Appeal in *R v Doody*[96] held that it is perfectly permissible for Judges in sexual assault cases to give balanced directions "aimed at correcting misconceptions where there is a danger of a jury coming to an unjustified conclusion without an appropriate warning."[97]

These ideas about female sexuality put an additional and unwarranted burden on the virtual complainant to establish that the act of sex was not consensual. Like bias, they are difficult, if not impossible, to counteract by way of evidence and may not be acknowledged or seen for what they are by the holder. Inevitably these stereotypical notions are exploited by the defence. These ideologies tend to give men a free pass for violating a woman's sexual autonomy and perpetuate the offensive idea that men are not responsible for their lack control of their sexual urges. More importantly, these ideas incorrectly suggest that rape is about sexual desire, when it is in fact about using sex as a means of exercising power over the virtual complainant.

Another stereotype that is pervasive but seldom acknowledged is the expectation that the fact of a sexual assault would be visible in the manner and demeanour of a survivor. The reality is that in the vast majority of cases the fact of a sexual assault cannot be determined by the survivor's manner and demeanour. Self-protection demands that survivors of sexual assaults assume an appearance of normality. People do what they need to survive. This is particularly so when the trial for the assault occurs a long time after the attack. In addition, people react differently to trauma. The fact that a survivor may present as a calm and rational witness even when recounting the assault ought not to be attributed to a lack of credibility.

It is imperative therefore for Judicial Officers to deal full frontally with these stereotypical ideas in their summing up notions and require the jury to independently and impartially assess the evidence in the case before them without reliance on their moral judgment of the virtual complainant in assessing the virtual complainant's credibility. In this regard, Judicial Officers are referred to the Criminal Bench Book 2015 and the section Caution Against Making Behavioural Assumptions.[98]

International Provisions Supporting Judges Warning the Jury about Relying on Gender Stereotypes

BELÉM DO PARÁ art. 8(b): "State Parties agree to(...) modify social and cultural patterns of conduct of men and women, including (...) stereotyped roles for men and women which legitimize or exacerbate violence against women".

CEDAW art. 5(1): "States Parties shall take all appropriate measures (...) [t]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices..."

Defining Consent for the Jury

In most cases of sexual offences where the virtual complainant is an adult, and invariably where the offence is rape, the issue that provides the most difficulty is that of consent. Judicial Officers are required to assist the jury in understanding what is consent. While there is no statutory definition of consent in Trinidad and Tobago, the UK's Sexual Offence Act 2003 represents the current accepted standard for consent in a sexual context. That Act defines consent as: (1) an agreement to engage in sexual activity that is given by choice where (2) the individual has the freedom and capacity to make that choice.[99] Additionally,

96 [2008] EWCA Crim 2394.

97 P Rook and R Ward, Sexual Offences: Law and Practice (4th edition, Sweet and Maxwell 2010) Chapter 1

98 Chapter 21

99 Sexual Offences Act 2003, s 75(UK)

the Canadian courts have defined consent as a "voluntary or freely given and mutually understood agreement to engage in sexual activity."[100]

Section 4 of our Sexual Offences Act identifies circumstances under which "consent" may be nullified where the consent is: (1) extorted by threats or fear of bodily harm; (2) obtained by personating someone else; (3) obtained by false or fraudulent representations as to the nature of the intercourse; or (4) obtained by unlawfully detaining the virtual complainant.

The chart following shows the 3 questions the Judge should ask the jury to address its mind to:

100 R v Ururyar (2016) ONCJ 448 (CanLII) 389

FIGURE 18

Giving Directions on Consent to the Jury

Did the Complainant have the capacity (age and understanding) to choose to engage in sexual activity?	Was the Complainant's choice freely or voluntary made (not constrained in any way)	Is there factual evidence from which the accused could reasenably assume the complainat was consenting (per section 28 of the SOA)?

• No capacity to make a choice if:
  • Child (under 18)
  • Person with disability that impairs his/her ability to understand the nature of the activity or makes him/her vulnerable to being manipulated
  • Person incapacitated by drug, alcohol or other means
	• Consent must be voluntarily or freely given
	• Consent is not freely given if a person is being subjected to:
	  • Emotional, psychological, physical, reputational or financial pressure or
	  • Threat, intimidation, force or coercion
		• The accused cannot use to following circunstances to assume that the Complaint was consenting:
		• The way the complainant dresses, smiles, looks or acts
		• Having a relationship or previous sexual activity with the complainant or any other person
		• Silence, passivity, lack of resistance, or immobility
		• Accepting money prior to or after sexual activity with the accused

Judicial Officers are advised to clearly explain to the jury that the choice to engage in sexual activity must be freely given, that is, it must not be constrained in any way and the complainant must have the capacity, age, mental understanding or not suffer from any temporary or other impairment, to make that choice. Judicial Officers are referred to Chapter 21 of the Criminal Bench Book 2015 section 4 under the heading Consent, Capacity and Voluntary Intoxication.

It is important that Judicial Officers be aware of and apply the Model Guidelines for Sexual Offences in the Caribbean Region.

FURTHER ADVICE, JUDICIAL OFFICERS:

- Are advised to refer the virtual complainant to available psychological and social support services and in particular the Victim and Witness Support Unit of the Police Service, the available assessment centers and the Rape Crisis Centre;
- Are advised to ensure prior to the hearing that, where required, a person is available and able to be present in court to provide support to the virtual complainant;
- Where there is a risk that the accused is likely to commit another sexual offence or another crime or interfere with the complainant or witnesses or otherwise obstruct the course of justice, be reminded that it is not advisable to grant bail;
- When considering what conditions ought to be attached to the grant of bail, should consider receiving recommendations from the virtual complainant where the matter is before the Children Court or require the prosecutor to present the virtual complainant's position on applications for bail;
- Should not to be hesitant in revoking bail if the conditions imposed are not complied with or where there are credible reports of threats or approaches to the virtual complainant or the virtual complainant's family or associates;
- Are advised to consider a wide and liberal interpretation of section 32(1) of the Sexual Offences Act for the protection and maintenance of the virtual complainant's anonymity;
- Are reminded that matters that are adjourned uncompleted or part heard reflect on the effectiveness of the Judicial Officer;
- Are reminded that it is important to give cases involving sexual offences priority;
- Are reminded that sexual offences case must be heard in camera;
- Should consider having a designated court for the hearing of sexual offences only or, where not possible they should set aside designated days for these hearings;
- Are advised to put steps in place to ensure that the virtual complainant and the accused have separate places to await the hearing;
- Are advised to robustly apply the provisions of the Rules with respect to efficiency and expedition and, where applicable, the provisions of sections 16C, 23 A and 23B of the Indictable Offences (Preliminary Enquiry) Act;
- Are advised to consider the use of alternative means of the virtual complainant giving evidence and in cases where evidence via video or other electronic means cannot be employed, consider the use of screens;
- Are advised to prevent repetitive questions and character assassinations, "which serve no useful purpose apart from traumatising victims" during cross examination and admit evidence of the virtual complainants past sexual history only when it is necessary to ensure the accused a fair trial;
- When summing up should remind the jury that it is usually unrealistic to expect the virtual complainant to recollect every detail, or to precisely match any previous testimony previously given.
- In summing up should warn the jury about relying on stereotypes of female and male sexuality when determining the credibility of the accused and the complainant;
- Should clearly explain to the jury the meaning of consent and that the choice to engage in sexual activity must be freely given.

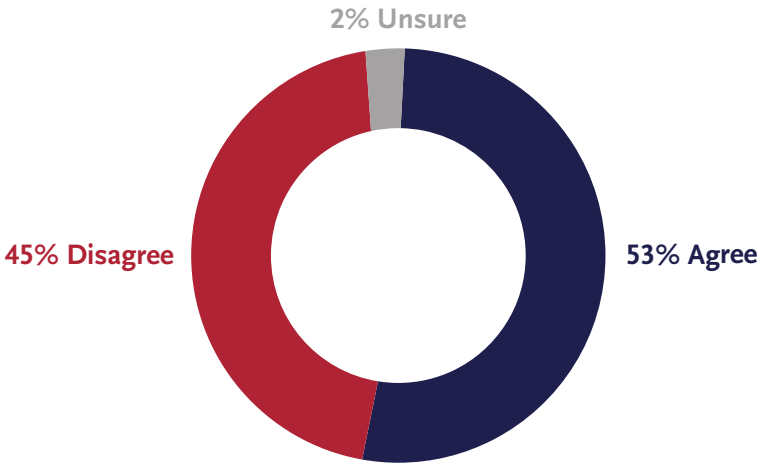
SECTION 6

- **CHILD CUSTODY AND MAINTENANCE**

CHILD CUSTODY AND MAINTENANCE

FIGURE 19

CAJO Survey, 2016
Judicial Officers' Attitudes Towards Women Getting Custody of Children as a Rule of Thumb



This section is directed to those Judicial Officers who have the responsibility of hearing cases of custody and maintenance of children. The Family and Children Division Act 2016[101] ("the FCDA") assented to on 5th July 2016 places the responsibility for the conduct of these matters into the hands of the Judges and Masters of the Family Court. The provisions of the Act come into force by way of proclamation by the President.

By a proclamation made on the 26th February 2018[102] certain of the sections of the Act, including sections 4(2) and 5, were brought into operation with effect from 28th February 2018. Section 4(2) of the Act vests the jurisdiction to hear all family matters in the Family Court. By section 5, however, the jurisdiction in family matters previously exercised by courts of summary jurisdiction, except in the Magisterial District of St. George West, and the jurisdiction in family matters previously exercised by the High Court shall continue to be exercised by these courts until the Chief Justice otherwise directs.[103] The upshot of these provisions is that, except for matters filed in the Family Court Port of Spain, family matters continue to be dealt with by Magistrates and High Court Judges until otherwise directed.

International Standards Supporting Equal Rights of Both Parents to Custody

CRC Article 9(4) and article 12 – right of the child to maintain personal relationships and ties with both parents (9(4)) and to have his/views taken into account during custody hearings (article 12)

Atala Riffo and Daughters v Chile – the sexual orientation cannot be used as a basis for refusing custody

101 Act No.6 of 2016
102 Legal Notice No.23 of 2018
103 Section 5 subsections (5) and (6)

Custody of Children

Section 3 of the Family Law Act states that in deciding issues concerning custody of a child, the welfare of the child is the first and paramount consideration. The Act however does not state the factors which may be relevant in determining the "welfare of the children". Part 1.1(3) of the Family Proceedings Rules however identifies as a one of the overriding objectives giving first and paramount consideration to the welfare of the child of the family where any question relating to the custody, supervision or access of the child is concerns and identifies this as including:

1 Seeking so far as practicable to encourage –

(a) better relationships between parents and others involved in caring for the child in particular communication and cooperation with regard to the parenting of such child; and

(b) improving and developing the relationship between each parent and others and the child;

2 Taking account of all the circumstances including in particular –

(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);

(b) his physical, emotional and educational needs; and

(c) his cultural and ethnic background;

(d) the likely effect on him of any change in his circumstances;

(e) his age, sex, background and any harm which he has suffered or is at risk of suffering; and

(f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs.

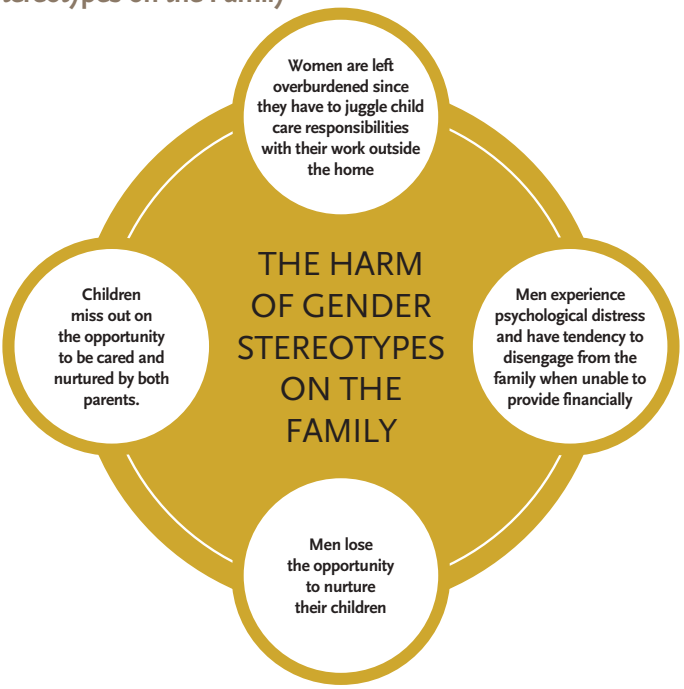
There is nothing to prevent Judicial Officers in courts other than the Family Court adopting this as a working guide when considering what is in the best welfare of the child.

In making custody determinations, Judicial Officers should be careful not to use stereotypes regarding the role of women as the caregivers or nurturers and men as the providers. Judicial Officers should, for example, refrain from acting on the commonly held assumption that custody, either of children generally or a young child in particular, should be given to the mother. This type of analysis discriminates against men and further entrenches the notion that a man's primary role in the family is to provide financial support.

These ideas harm the family in the following ways:

FIGURE 20

The Harm of Gender Stereotypes on the Family



There is nothing in the Matrimonial Proceedings and Property Act Chapter 45:51, which precludes the court from granting custody to either a parent or a guardian involved in a same sex relationship. The sole determining factor is what is in the best interest and welfare of the child.

FIGURE 21

Relevant Factors in Deciding on Best Interests of the Child

- Benefit of the child to have a meaningful relationship with both parents
- Protecting child from physical and physiological harm especially where violence is present in the home
- The view of the child based on his maturity level and understanding (article 12 of the CRC)
- The relationship of the child with each parent
- Each parent`s ability to provide for the child`s needs
- The attitude of each parent to the child and to the responsibilities of parenthood
- To what extent each of the parents participate in the decision-making about major long-term issues about the child
- How much each of the parents spend time with the child
- To what extent they met their obligation to maintain the child while in the relationship
- Will relocation impact detrminetally on the child's welfare and has the child developed positive and deep familial and social bonds in his/her current environment – in cases where one parent desires to relocate to another jurisdiction with the child *(Patterson v Patterson HCV 0811 of 2003)*

This has been the basis of more than one unreported decision in our jurisdiction. In two such cases the court determined that the sexual orientation of the mother was irrelevant to the issue of what was in the best interest of the children of the family and awarded custody to the mother. In *Atala Riffo and Daughters v Chile*[104] the IACtHR essentially found that the sexual orientation of either parent is not a relevant factor in determining which parent should have legal custody of the child. The IACtHR found that the Chilean court's decision to award custody to the father on the sole basis that the mother was a lesbian, breached the mother's right to equality.

The Family Law Act, sections 3 and 4, gives both parents equal parental rights and responsibilities towards a child of the family. The ideal situation for children of parents who do not, or no longer, live together is for each parent to have equal, but not necessarily the same, rights and responsibilities towards the children. Judicial Officers should always consider whether joint custody is a viable option. As a general rule however joint custody should only be granted if: (1) the parents are able to cooperate and amicably discuss the arrangements to be made in the best interest of the child[105] and (2) both parents are able to provide an environment that is conducive to the child's healthy development. This is only a general rule and at the end of the day it is a matter for the discretion of the Judicial Officer to be exercised on the facts of the case.[106]

The Family Law Act, however, prohibits an order being made giving legal custody to more than one person. While technically this prohibits the grant of joint custody under this Act, this section also provides that the court may order that a parent of the minor who is not given legal custody "shall

104 Inter-Am Comm HR, Case 12.502

105 Fenton v Fenton JA SC Suit No. F2003/D1797

106 See the cases of Applewhite v Applewhite TT1994 HC 59; Lucky v Ramrattan TT2010 HC 179 and Marcano v Marcano FH 01153 of 2009.

retain all or such as the Court may specify of the parental rights and duties comprised in legal custody (other than the right to the actual custody of the minor) and shall have those rights jointly with the person who is given the legal custody of the minor."[107]

Despite seeming to be biased against unmarried couples, this is a useful tool for Judicial Officers in determining custody issues as it requires the Judicial Officer to engage, and parents to examine, the parental rights and duties or responsibilities that are comprised in legal custody. Further it requires that the parents acknowledge these mutual rights and duties and make conscious decisions towards sharing them. Judicial Officers are advised to consider using the section for this purpose even in circumstances where had the parents been married joint custody would not be an option.

In order to properly assess the best interest of the child, it is advisable that Judicial Officers consider whether there is a need to have a probation officer or the social services unit investigate the living and family situation of both parents. This is particularly necessary in those cases where there are allegations and counter-allegations of improper behaviour of any kind, inadequate living conditions and other factual disputes relating to the arrangements for the child. Judicial Officers should, however, remember that these reports are to assist the Judicial Officer with the facts of the case and should not replace the Judicial Officer's responsibility to assess and determine those facts and to arrive at their own conclusions of what is in the best interests of the child. Judicial Officers should always consider identifying the factual issues on which they wish assistance from these officers.

Similarly, a Judicial Officer should not be hesitant to have recourse to the reports of experts. Experts in the field of child psychology and child psychiatry are particularly useful in determining the psychological and emotional welfare of the child in circumstances where the Judicial Officer determines that the child may be at risk. Where the parties do not have the means to afford these services Judicial Officers should use the services of the Social Services Unit to arrange for the provision of these services.

While Judicial Officers are encouraged to use the evidence of experts in the appropriate case they are cautioned against over reliance on the opinions of experts and reminded that at the end of the day the decisions to be made must be their own after taking into consideration the opinions and advice tendered by expert witnesses and via expert reports.

Article 9(4) and article 12 of the Convention of the Rights of the Child emphasize that it is the right of the child to maintain personal relationships and ties with both parents and to have their views taken into account during custody hearings. In dealing with custody and other applications with respect to the child Judicial Officers should bear in mind that section 88(5) of the CA and section 21 of the FCDA gives the Court the power to request that the Solicitor General or the Senior Children's Attorney represent and safeguard the interest or voice of the child. This may be appropriate in acrimonious custody battles, where there are applications to take the child out of the jurisdiction, where teenage children are concerned or where there are allegations that suggest that the child is at particular risk.

Maintenance

Section 13(2) of the Family Law Act gives the court the power to order that maintenance payments be made to the parent with physical custody of a child. The maintenance payments are to be used for the child's needs. It is the responsibility of the parent, not having physical custody, to make these payments. In practical terms this means that if the father is given physical custody of the child, then the court can order the mother to pay maintenance and vice versa.

In the case of *C v C FH00418 of 2011* (unreported), a case under the Matrimonial Proceedings and Property Act, the Judge did exactly that. The husband was granted custody care and control of the child and the wife was granted access. The Judge considered the factors in section 27 (2) of the Matrimonial Proceedings and Property Act. Finding that the wife had ongoing financial obligations and responsibilities to the child the Judge ordered that the

107 Family Law Act, s18(1)

wife pay to the husband the sum of $1700.00 per month for the maintenance and upkeep of the child. In arriving at the decision the Judge took into account that the wife earned $9000.00 monthly on a part time basis and her monthly expenses were not outrageously high. She had the ability to earn a higher income if she obtained full-time employment and there was no evidence of any physical or other impediment to her obtaining full time employment.

In similar terms to section 27(2) of the Matrimonial Proceedings and Property Act, section 19 of the Family Law Act outlines the following as the factors the court should consider when making an order for maintenance:

1. The financial resources of both parents;
2. The existing financial responsibility of each parent;
3. The financial needs of the minor;
4. The educational needs of the minor;
5. Any special needs of the minor including disabilities.
6. The standard of living enjoyed by the family before the breakdown of the relationship between the parents.

Section 19 therefore places a duty on Judicial Officers to ascertain the financial resources of both parents and grant a legitimate sum that will be sufficient to take care of the child's (or children's) financial and educational needs. Judges and Magistrates are reminded to make full use of the provisions of the Act with regards to maintenance orders, their powers to summon persons to attend the court for the purpose of giving evidence.

Maintenance payments are usually made by the non-custodial parent to the parent with physical custody. In some cases decisions as to how the money is to be spent are made by the parent with custody without consultation with the other parent. Where such an expense is simply in accordance with what applied prior to the breakdown in the relationship the issue may simply be whether it is an expense that is still affordable. Where however the expense is new a failure to consult or discuss may find the other parent viewing themselves as a "supplier" rather than an equal contributor to the needs of the child. This undermines the feeling of equality between parents and ultimately the paying parties' willingness to comply. A common example of this is where one parent without consultation enrols the child in a particular school or an extracurricular activity and then requires that an order for maintenance take these expenses into consideration when seeking maintenance.

Judicial Officers should, as far as possible, encourage parties to take an integrated approach to assessing and meeting the child's needs. To do so it may be useful to change the conversation: content, language and tone. If the conversation starts with "How much can you pay?" the parties are likely to focus on the child's financial needs only and the conversation relegated to nurturer and provider. The focus should be on support-financial and non-financial. To emphasise the point Judicial Officers may wish to use that nomenclature when dealing with the parties rather than the word 'maintenance' used in the legislation.

It may be helpful for the parties to collectively focus on the child's needs as a starting point. These needs should be broadly defined to include all of the things the child requires: financial as well as emotional, physical and, nurturing. The parties should then be encouraged to explore non-financial methods of meeting the child's needs in addition to looking at the financial aspect. The court's order may include the provision of after school care, weekend and holiday supervision and care, transportation to school, homework supervision, lessons and other activities by the non-custodial parent or by that parent's family. Where the provision of these services reduces the expense for the parent with physical custody they can as far as possible be made a part of the order. The order should therefore also speak to the non-financial support that is expected from the parent.

Judicial Officers should acknowledge the right of the parties to construct the order in accordance with their realities. While the court should guide the parties the parties should be encouraged to" own" their order by their input.

For the success of this exercise, it is important that the Judicial Officer's tone and language are not impatient, condescending, or overly critical of the parties and their circumstances. Open, respectful conversation and compliance with the elements of Procedural Fairness,

Voice, Respectful Treatment and Inclusivity, is more likely to cause the parties to trust the process and comply with the final orders.

While there are court systems in place to ensure compliance with financial orders there are no such systems in place for compliance with non-financial orders except the option of contempt proceedings. In the majority of cases this is not a viable option as its ultimate recourse is to imprisonment. It is therefore important that Judicial Officers adopt and apply the nine elements of procedural fairness recommended earlier in this protocol to facilitate compliance with the orders made. It may be prudent, where appropriate, to attach a monetary value to the non-financial contributions agreed to by the parties. So for example where there is an agreement that the non – custodial parent transport the child to school the cost of such transportation can be included in the order to be paid by that parent in default of compliance. Similar consideration will apply to the provision of after school care.

In the appropriate case Judicial Officers should consider the use of the attachment of earnings legislation. This procedure is however cumbersome and does not engender a feeling of goodwill between the parties. In addition to the usual method of the payment of maintenance to facilitate a less stressful mode of payment and receipt of maintenance the judiciary has introduced the Court pay system. This method eliminates some of the difficulties experienced by both parties attendant on maintenance payments in the Magistrates' Court. The Court pay system allows the payor to make payments by using credit cards, direct deposit or vouchers purchased at any payment centre. It also provides for the recipient to receive payment into their account or via the judiciary custodial account and to receive notification of payment. The system is managed centrally by the Judiciary but gives the parties easy access to payment information and balances throughout Trinidad and Tobago. It simplifies the process for enforcement of non-payment of financial support since it makes proof of payment easier. It however requires the consent of the parties and is subject to a transaction cost payable by the payee. Judicial Officers are encouraged to advise parties about the existence of the facility, the fact that there is an additional cost to the payer and, where agreed, adopt its use in the making of orders for financial support.

Judicial Officers should consider using the following format, adapted from the sample order contained in the practice guide for the CourtPay system[108] in making orders for the support of children of the family:

108 Trinidad and Tobago Gazette for 8th March 2018. Vol. 57 No.28.

Draft Order Template for Financial Contribution

THIS COURT ORDERS that the Respondent do pay to the Applicant for the maintenance of "name of minor child" born (Day/Month/Year) the monthly sum of xxx Dollars ($xxx.00) with effect from (Day/Month/Year) and continuing on the 1st day of every month until further order;

The Applicant and the Respondent shall immediately register for CourtPay with the Court Office of the Family Court;

Both the Applicant and the Respondent shall accurately provide to the Court Office all information necessary to facilitate the registration process;

The Respondent shall pay the sum of xxx Dollars ($xxx.00) specified in 1) above for the maintenance of "name of minor child" born (Day/Month/Year), with effect from (Day/Month/Year) and continuing on the 1st day of every month until further order, into Court using CourtPay together with the transaction fee of five dollars ($5.00) or such other transaction fee which may be prescribed by rules or practice direction;

The Applicant shall receive the sum of $xxxxdollars ($xxx.00) per month specified in 1) above for the benefit and maintenance of the minor child, I [state the name of the minor child] via CourtPay;

The parties shall immediately notify the Registrar of the Supreme Court at the Family Court of any change of address, e-mail or telephone number of the parties or of any alteration to the account or method by which funds will be paid by the Respondent or received by the Applicant;

That the funds shall be paid into the Applicants bank account # at bank or into the judiciary's custodial account for the benefit and use of the Applicant for the minor. In either event the Respondent agrees to pay the prescribed transaction fee.

That there be liberty to apply to vary this order

Draft Order Template For Non-Financial Contribution

The parties agree that the respondent shall make the following indirect and /or non-financial contribution to the support and wellbeing of the minor child:

To collect the child from home no later than 7am and drop the child off at school and to pick up the said child from school no later than 4pm and to supervise the said child ensuring that he completes all homework and assignments and return the child to the applicants home by 7pm.

In default of the respondents contribution at 1 above the respondent shall be responsible for the cost of transportation at an agreed rate of $20.00 dollars per day and after school care at $10.00 per day.

The said child shall be in the care and supervision of the respondent on alternate weekends from Friday 4pm to Monday 8am, the respondent to collect the child.

Post-Hearing Considerations

Custody and maintenance applications often come on the heels of an acrimonious breakdown in the relationship between parents. The custody and maintenance hearings usually heighten the tensions between the parties and the outcome of the applications may leave at least one parent feeling as if they have been bested by the other. These attitudes may unwittingly affect the child and the child's relationship with the parents.

In order to assist parents in dealing with the acrimony in their relationships, Judicial Officers are advised to consider whether it is necessary to order both or either parent to receive counselling including, where available, co-parent counselling. It should be emphasized that the purpose of such counselling is not to persuade parties to reconcile but rather to minimize the acrimony between the parties and to facilitate their co-operation with each other. In this context separate counselling is advisable. These counselling services are readily available at the Family Court and the Family Services Division.

In addition, in an appropriate case, Judicial Officers should consider including in the order a provision for follow up visits by the probation officer or social worker to ensure out the proper working of the non-financial aspects of the order and the power to review same under a liberty to apply provision in the order.

IN DEALING WITH CUSTODY AND ACCESS, JUDICIAL OFFICERS ARE ADVISED TO:

- Always bear in mind that the guiding principle is the welfare of the child and that it is the child's right to maintain personal relationships and ties with both parents and, in the appropriate case, to have their views taken into account;
- Use the part 1.1(3) of the Family Proceedings Rules 1998 to assist in determining the best welfare of the child;
- Remember that section 88(5) of the Children's Act and section 21 of the FCDA gives the Court the power to request that the Solicitor General or the Senior Children's Attorney represent and safeguard the interest of or voice of the child;
- Be reminded that there is nothing in the Family Law Act or the Matrimonial Proceedings and Property Act, which precludes the court from granting custody to either a parent or a guardian involved in a same sex relationship;
- Guard against the use of stereotypes in their decision making and particular those stereotypes that assume the mother as the nurturer and the father as the provider;
- When commissioning reports from the probation or social services units clearly identify the factual issues on which they require assistance;
- Where appropriate use the expertise and opinions of experts;
- Be mindful that the reports from probation and social services, expert reports or the evidence of expert witnesses are to assist in and not replace the decision making responsibility of the Judicial Officer;

IN DEALING WITH MAINTENANCE ORDERS, JUDICIAL OFFICERS ARE ADVISED TO:

- Adopt the approach of the provision of support for the child, financial and non-financial, rather than of simply making orders for money payments;
- Facilitate a joint and integrated approach by both parties to the assessment of the child's needs and the financial and non-financial support of the child of the family;
- Acknowledge the right of the parties to construct the order in accordance with their realities;
- Adopt and apply the elements of procedural fairness to facilitate compliance with the orders made;
- Inform and advise the parties of the benefits and availability of an attachment of earnings order or an order for payment via the court pay system;
- In the appropriate case use the statutory powers of the court to summon persons to attend the court for the purpose of giving evidence of the means of the parties and for the enforcement of financial orders;

In making final orders consider including:

- A provision providing for counselling of the parties;
- A provision for post hearing supervision or visits by probation or social workers to ensure the workability of the provisions of the order; and
- A provision for liberty to apply in the event that the provisions are unworkable.

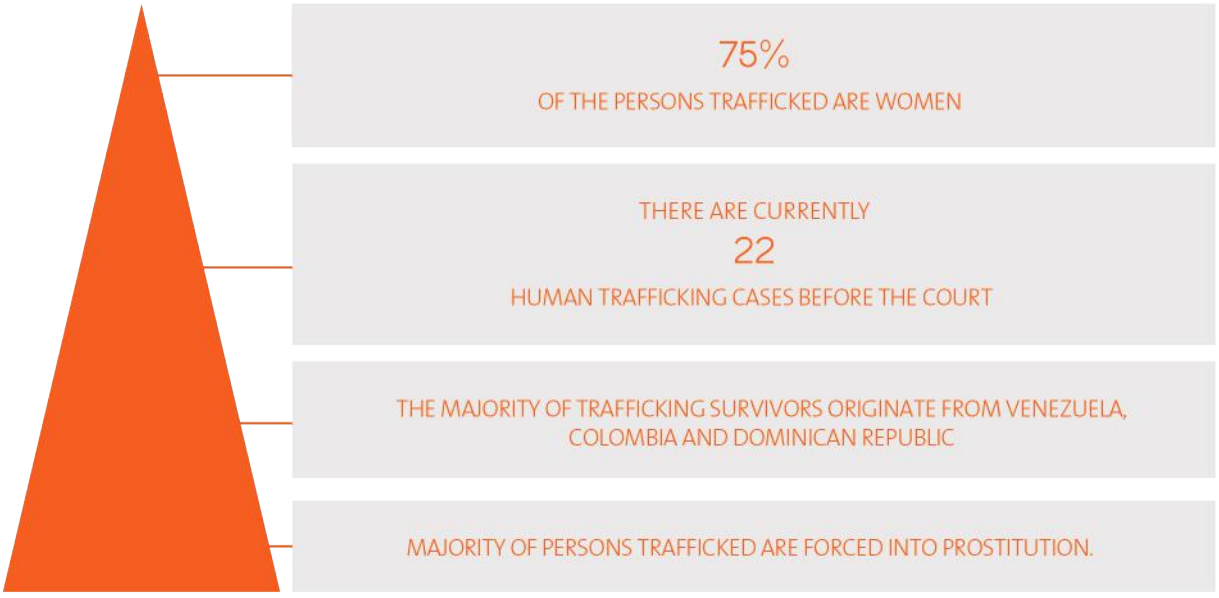
SECTION 7

- **HUMAN TRAFFICKING**

HUMAN TRAFFICKING

FIGURE 22

Key Statistics on Human Trafficking



Source: The Counter Trafficking Unit, October 2016

International Provisions Supporting Protection of Human Trafficking Survivors

BELÉM DO PARÁ – women ought to be protected from all sort of violence including being trafficked (article 2(b)) and women have the right to have their inherent dignity respected (article 4(e))

UNCTOC art. 24: "Each State Party shall take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings".

The Trafficking in Persons Act Chapter 12:10 ("the Trafficking in Persons Act") came into operation in January 2011. Its stated purpose is "to give effect to the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organised Crime and for matters connected therewith or incidental thereto."[109] Apart from our international treaty responsibilities the Act accords with rights enshrined in our Constitution, for example, the right of the individual to liberty, security of the person, and to freedom of movement. The Act provides that "In the investigation and prosecution of offences relating to trafficking in persons, the following guiding principles shall apply:

109 The long title to the Trafficking in Persons Act Chapter 12:10

- All steps necessary to identify the victims of trafficking shall be taken;

- A victim of trafficking shall be given reasonable protection to prevent recapture, and to secure him from threats, reprisals and intimidation by the traffickers and their associates;

- Where the victim's family resides in Trinidad and Tobago, they shall be given reasonable protection to secure the family from threats, reprisals or intimidation by the traffickers or their associates; and

- The victim shall have the opportunity to consult with an attorney-at-law or other appropriate person or agency with respect to his rights, safety and welfare."

Among other things the Act creates the offence of trafficking in persons. Section 17 of the Act provides:

> A person who, for the purpose of exploitation, incites, organizes or directs another person to—
>
> (a) recruit, transport, transfer, harbour or receive persons into or within Trinidad and Tobago;
>
> (b) recruit, transport or transfer persons from Trinidad and Tobago to another jurisdiction;
>
> (c) receive persons from Trinidad and Tobago into another jurisdiction; or
>
> (d) harbour persons from Trinidad and Tobago in another jurisdiction by means of —
>
> i. threats or the use of force or other forms of coercion;
>
> ii. abduction;
>
> iii. fraud or deception;
>
> iv. the abuse of power or the abuse of a position of vulnerability; or
>
> v. the giving or receiving of payment or benefits to achieve the consent of a person having control over another person,
>
> commits an offence of trafficking in persons and is liable on conviction on indictment, to a fine of not less than five hundred thousand dollars and imprisonment of not less than fifteen years.

Trafficking in persons is defined by the Act as: "the recruitment, transportation, transfer, harbouring or receipt of persons by means of the threat or use of force or other forms of coercion, abduction, fraud, deception, the abuse of power, the abuse of position of vulnerability or the giving or receiving of payment or benefits to achieve the consent of a person having control over another person for the purpose of exploitation."

Although the intent of the Trafficking in Persons Act is wider than just the prevention of sexual exploitation, this section of the protocol deals with the protection of the victims of sexual exploitation as a result of trafficking. Trafficking in persons for the purpose of sexual exploitation is not limited to the exploitation of foreign nationals. Both sections 17 and 32 contemplate the recruitment of or transportation etc. of persons within Trinidad and Tobago.

There are sections of our Sexual Offences Act that mirror the prohibitions in the Trafficking in Persons Act against coercing persons to engage in prostitution. For example section 18(a) of the Sexual Offences Act[110] makes it an offence to procure another to have sexual intercourse with any person either in Trinidad and Tobago or elsewhere by threats or intimidation. Section 19(1) of the Act makes it an offence to detain another against that other's will in or upon any premises with the intent that the person detained may have sexual intercourse with any person or in a brothel.

Judicial Officers must therefore be alert to the fact that it is possible that nationals of Trinidad and Tobago can also be victims of human trafficking. Although the presence of foreign nationals is the most obvious indicator of human trafficking it is not the only determining factor. Judicial Officers should be alert to the fact that the prosecution of offences under sections 18 and 19 of the Sexual Offences Act may also reveal the presence of victims of human trafficking.

The United States Department of State's Trafficking in Persons Report released in June 2018 declares Trinidad

110 Chapter 11:02

and Tobago to be a destination, transit and source country for adults and children subjected to sex trafficking and forced labour. The same report acknowledges an increase in the identification and protection of trafficking victims but also recognizes that some victims may be penalized due to lack of identification. The criminalization and moral condemnation of prostitution makes it sometimes difficult for us to recognize or acknowledge victims of trafficking for the purpose of sexual exploitation. As Judicial Officers it is our duty and responsibility under the Constitution, the relevant international treaties to which the State has ascribed and the existing legislation to make these enquiries and identification. This requires a determination by the Judicial Officer of whether the prostitution is by choice or as a result of coercion.

At present Judicial Officers may interface with victims of human trafficking as offenders when dealing with prostitution and solicitation offences. Section 23 of the Sexual Offences Act makes it an offence to knowingly live on the earnings of prostitution or to solicit persons for immoral purposes. Similarly section 46 of the Summary Offences Act makes it a criminal offence for a woman to loiter about and solicit passers-by for the purpose of prostitution. Persons, engaged in solicitation, who are not women may be brought to court for loitering in a public place under section 45(c) of the Summary Offences Act. In addition section 51 of the Summary Offences Act makes it an offence, in any building or place to which the public is admitted or has access, to be indecently attired or perform any lewd or suggestive dancing or actions. These are all sections by which victims of trafficking for sexual exploitation may be brought before the court as offenders.

In all of these offences, save section 23 of the Sexual Offences Act, the penalties of fines are relatively small. For a woman found guilty of loitering and soliciting passers-by for the purpose of prostitution it is imprisonment for two months. For a person who is not a woman, it is a fine of $200.00 or imprisonment for one month. For charges under section 51 it is a fine of $400.00. In these circumstances, therefore, not only is the person charged tempted to admit guilt and pay the fine through ignorance or fear of reprisals, but the Judicial Officers faced with a list containing 'more serious offences' may also be tempted to accept the guilty plea and move on to more pressing matters.

An enquiry as to the voluntariness of the commission of the offence may in some cases necessitate a refusal to accept a guilty plea until more in depth investigations are made. The fact that the person is a repeat offender does not necessarily mean that the person has not been coerced into the situation. In the appropriate case it may be necessary to stand down or adjourn the case for further investigations to be made. Where an adjournment becomes necessary, steps should be taken to ensure the protection of the victim. In addition, the victim should be referred to the Counter-Trafficking Unit established under the Act to, among other things, investigate reports of trafficking in humans. Further, where the results of the investigation reveal the likelihood of human trafficking, steps should be taken to ensure the further investigation and the laying of criminal charges by the police pursuant to the Trafficking in Persons Act and for the protection of the victims in accordance with that Act.

To access the protection under the Act, the person must fall within the definition of victim under the Act, that is the person must be "a person against whom an offence is committed or against whom an offence is alleged to have been committed under the Act".[111] The coercion of the victim can provide a defence to criminal charges brought against the victim. Section 31 of the Trafficking in Persons Act provides that the fact that the victim has been compelled to engage in unlawful activities can be offered as a defence to the prosecution of any criminal offence arising from those activities. These unlawful activities may include immigration-related offences. In those circumstances there is a duty on Judicial Officers, particularly in the case of an unrepresented or under-represented defendant, where there is a suspicion that the offence has been committed through trafficking, as a result of coercion to ensure that defendants are informed of the availability of this defence in terms that they understand before accepting a guilty plea.

111 Section 3 of the Act.

The Trafficking in Persons Act contains provisions aimed at giving assistance and providing protection to victims of human trafficking. Section 37(4) of the Act provides that child victims of trafficking once identified as such are not to be housed in prisons or other detention facilities for accused or convicted criminals under any circumstances. Similar provisions are made for adult victims, "in the absence of exigent circumstances"[112]. Victims who are not nationals of Trinidad and Tobago may receive, for the duration of their stay in Trinidad and Tobago, social benefits. These benefits include psychological counselling and legal and medical assistance.[113]

Section 30(1) of the Act makes victims of trafficking eligible to apply for relief under the Criminal Injuries Compensation Act Chapter 5:31. That Act, by section 29, permits the payment of compensation to victims of trafficking or, where deceased, their dependents with respect to certain pecuniary losses. This eligibility arises whether or not a person was prosecuted or convicted of the crime on account of which the application was made.

Where it is clear that English is not the first language of the person charged or that there may be the risk of a lack of understanding of what is said due to use of accented English or the 'creolisation' of the language, steps should be taken to ensure that official translators are present in court for the purpose of ensuring that the victim understands and is understood.

Judicial Officers also interface with victims of human trafficking as witnesses in cases for offences brought under the Trafficking in Persons Act. In sexual exploitation cases, Judicial Officers should bear in mind that the involvement of organized crime in most cases means that these victims may be even more vulnerable than victims of sexual offences under the Sexual Offences Act. It is therefore essential to ensure as far as is possible that these persons and their family, where residing in Trinidad and Tobago, receive the protection of the State.

Under the Act, unless the Court directs otherwise, the hearing shall be in camera.[114] Judicial Officers are requested to take this provision into consideration when determining what steps ought to be taken for the protection of the victims of human trafficking during the prosecution. In addition, the Act provides for the identity of the victim and the victim's family to be kept confidential and not released to any member of the public or published in the press or the media.[115] Judicial Officers should as far as possible ensure that the media is reminded that the publication of any identifying information of the victim or the victim's family, including photographs, can result in the prosecution under the Act for breach of confidentiality and, on summary conviction, to a fine of $100,000.00.

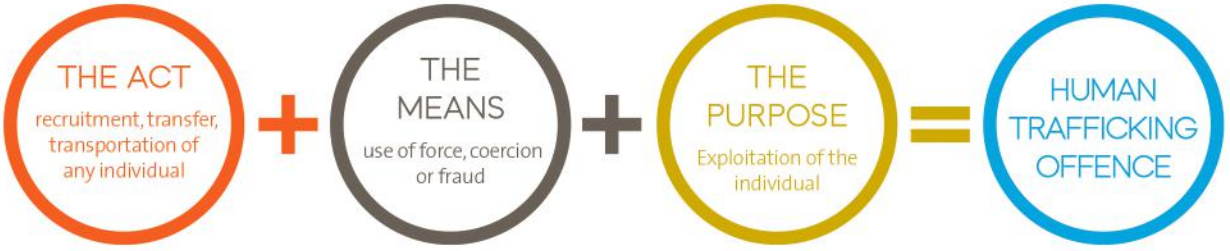
It is important to note here that in prosecutions pursuant to sections 16, 17, 18 or 19 of the Act an accused may not use an allegation of consent by the victim as a defence. Nor is evidence of the victim's past sexual behaviour admissible for the purpose of proving that the victim engaged in other sexual behaviour or the victim's sexual predisposition. Judicial Officers must therefore be vigilant in ensuring that the cross-examination of the victims of human trafficking is kept within the legal limits and that it is not used to re-victimise.

As with prosecutions for sexual offences, prosecutions under the Trafficking in Persons Act should be dealt with promptly. The longer the case takes to be heard the less likely it is that the victim will wish or be available to testify. This is particularly true where the victims are foreign nationals. It is also important for the court to adopt the methods used to put victims of sexual offences at ease, which are referred to earlier in this protocol. The use of screens, video recordings and video links are suggested.

112 Section 37(3) of the Act.
113 Section 37 of the Act.
114 Section 34(2) of the Act.
115 Section 34 (1) of the Act.

FIGURE 23

Defining a Human Trafficking Offence



In treating with the victims of human trafficking for the purpose of sexual exploitation, Judges are advised to:

Where persons are before the Court for offences other than offences under the Trafficking in Persons Act:

- Be astute in identifying victims of human trafficking who come before the court charged with prostitution, soliciting and other similar offences;
- Where the offence was committed as a result of coercion refer the matter to the Counter-trafficking unit for further investigation;
- Where possible defer the hearing of the offence until after the laying of charges against the coercer pursuant to the Trafficking in Persons Act
- Apply such provisions for the protection and welfare of the victim as are relevant and applicable under the Trafficking in Persons Act;
- In particular ensure that the victim understands that coercion is a defence to the criminal charges brought against them;
- Where the victim is not English-speaking ensure the availability of translators.

Where the victim is a witness in prosecutions brought under the Trafficking in Persons Act:

- Give priority to hearing human trafficking cases;
- Conduct human trafficking cases in camera;
- Judicial Officers should as far as possible ensure that the media is reminded that the publication of any identifying information of the victim or the victim's family is unlawful;
- Provide a friendly courtroom environment in much the same manner as is done with victims of sexual offences;
- Apply the measures provided for by the Act to ensure the safety and assistance to victims of trafficking;
- Ensure that the cross-examination of the victims is kept within the legal limits and that re-victimization does not occur.







CHECKLISTS