




CARIBBEAN JUDICIAL DIALOGUE

EQUALITY FOR ALL IN THE ADMINISTRATION OF JUSTICE

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Securing Equality for All

The Evidence and Recommendations

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1. INTRODUCTION

The theme of this dialogue is: securing equality for all in the administration of justice—with a special focus on the impact of discrimination, vulnerability, and social exclusion on access to justice. Our task is to examine evidence and elaborate on discrimination, vulnerability, and social exclusion through the lenses of bias, trust, and fairness, and in the contexts of access to justice and equality of treatment in the administration of justice.

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

In this regard, the rule of law encompasses the constitutional values of due process, protection of the law, and equality of treatment.² The principle of equality, which is premised on the inherent equal worth and dignity of all human beings, regardless of individual or group differences is linked to the constitutional value of non-discrimination. This latter value has been explained as follows:

This general prohibition against non-discrimination thus prohibits laws that differentiate between people on the basis of their inherent personal characteristics and attributes. A court is entitled to consider granting ... relief, where the claim is that a person has been discriminated against by reason of a condition, which is inherent and integral to his/her identity and personhood. Such discrimination undermines the dignity of the person, severely fractures peace and erodes freedom.³

What this means is that any unjustifiable (on an aims/means proportionality assessment) bias or discrimination towards vulnerable groups in society is simply unconstitutional—whether that bias or discrimination occurs procedurally or substantively. Further, all unjustifiable impediments to access to justice, again whether procedurally or substantively and also infrastructurally and systemically, are unconstitutional.⁴ This is so on several bases, including the infringement of the

¹ For example, in the Trinidad and Tobago Constitution, the preamble states:

Whereas the People of Trinidad and Tobago—

...

(d) recognise that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law;

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

³ *Sanatan Dharma Maha Sabha of TT v. The Attorney General of TT (2009)* 76 WIR 378, 426.

⁴ See for example *George Daniel v Attorney General* (20 July 2007, HC T&T) HCA No 393 of 2005, [27]:

Our Constitution mandates that they be treated in a far more civil and dignified manner. It is in the Hall of Justice that our citizenry come to pursue and enforce their rights. Physical access to it is an important part of their right to the protection of the law and ultimately to due process. They must be able to pursue their remedies and to witness proceedings, the latter of which is an important part of the legal process. It allows the litigant and the public the opportunity to view and to assess the fairness of the legal process. Without actual physical access to witness the process, credibility of the legal system will be undermined. Such access must be readily available to all. It is not sufficient that one’s attorney can access it. The physically impaired

constitutional values of the rule of law (including the entitlement to due process) and equality (the entitlement to equal treatment and the protection of the law).

This paper does *not* propose to examine these jurisprudential aspects of discrimination and access to justice, as they are comprehensively explored in other background papers which underpin this dialogue. However, it is important to state the constitutional foundations upon which this analysis rests. The delivery of access to justice and equality of treatment for *all*, has its sources in the highest constitutional mandates that exist in all Caribbean societies. It is, therefore, a matter of duty and responsibility; constitutionally non-negotiable except for the most legitimate reasons.

What this paper *does* look at is empirical evidence of bias and discrimination against certain vulnerable groups in Caribbean societies, the experiences of these court users, and the socio-cultural reasons for this, and finally evidence in support of interventions that can ameliorate these impediments to justice—particularly those that are under the power and control of judicial officers (in the form of “Procedural Fairness” for example).

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

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

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

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

This is then followed by a brief methodology section and overview of the research objectives behind the JEITT’s on-going research project into local aspects of procedural fairness, and a summary account of what did we did, why we did, and how we did it. The heart of the paper is a

must themselves have easy and direct access to the Hall of Justice to personally pursue the upholding of their rights and to witness proceedings if they so choose. “Liberty” requires that they have that option. A lack of unimpeded access can act as a disincentive to the legitimate pursuit of one’s legal rights. Such access may be, to able bodied persons so routine as to seem trivial but for persons who are physically impaired such physical access is neither trivial nor routine. It can be a daily challenge. But such access is a right not an option and is indelibly part of due process of law.

presentation of the data section, with some brief discussion points, where we share some quantitative and qualitative data extracts around gender and sexuality, ethnicity and religion, wealth and class, and general access to the courts, to flesh out what court users and court officials shared with us about their experiences dealing with the administration of justice in Trinidad and Tobago.

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

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

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

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

UNDERSTANDING:⁵ The need to have explained clearly, carefully, and in plain language, court protocols, procedures, decisions, directions given, and actions by decision makers and judicial personnel, ensuring that there is full understanding and comprehension.

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

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

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

ACCOUNTABILITY: The need for decision makers and judicial staff to fulfil; their duties in an efficient manner; to reasonably justify and explain their actions and inactions, decisions and

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

judgments in a timely manner and to be held responsible and accountable for them, particularly in relation to decisions, delays and poor service.

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

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

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

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

A. Perceptions of the legitimacy of law, legal authorities and fairness

The concept of procedural fairness and confidence in the justice system

According to Professor Tom R. Tyler, the Macklin Fleming Professor of Law and Professor of Psychology at the Yale Law School in North America, and as demonstrated in his several books and articles⁶, if confidence in a justice system to uphold and respect rights is lacking, so too will be compliance to obey the laws that are put in place to ensure an orderly society. Seen from the perspective of the courts then legitimacy is the contextual framework by which the effective maintenance of law and order through the delivery of justice is achieved.

The empirical study of legitimacy has demonstrated that when authorities are viewed as legitimate they are better able to motivate people to comply with the law. In such research legitimacy is typically operationalized as (1) people's authorization of legal authority to dictate appropriate behavior and (2) people's trust and confidence that legal authorities are honest and act in ways that have citizens' best interests at heart. Thus defined, legitimacy has been linked to a number of different law-related behaviors, including compliance with the law and cooperation with legal authorities.⁷

⁶ *Why People Cooperate* (2011); *Legitimacy and Criminal Justice* (2007); *Why People Obey the Law* (2006); *Trust in the Law* (2002); and *Cooperation in Groups* (2000).

⁷ Tom R Tyler and Jonathan Jackson, 'Popular Legitimacy and the Exercise of Legal Authority : Motivating Compliance, Cooperation, and Engagement Popular Legitimacy and the Exercise of Legal Authority' [2013] *Psychology, Public Policy and Law*.

Furthermore, in his book *Why People Obey the Law*, Tyler suggests that compliance with the law is not driven by punishment, but rather whether people believe and see the administration of justice to be fair and the system in which it operates is legitimate.⁸

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

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

1. the ability of persons to offer their side of the story (also known as ‘Voice’)
2. the ability to trust in the neutrality of the authorities (also known as ‘Neutrality’)
3. whether they are treated with dignity and their rights are respected (also known as ‘Respectful treatment’)
4. their perception of benevolence in the authorities’ actions¹¹ (also known as ‘Trustworthy Authorities’)

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

Fair procedure in others words might make people feel better dealing with authorities but it does little to structurally transform uneven social relations in society. “Fox and MacCoun explain that mainstream psychologists of law fall into the ‘legitimacy trap’ of uncritically accepting that the

⁸ Tom Tyler, *Why People Obey The Law* (Princeton, 2006).

⁹ Ibid (4).

¹⁰ Kevin Burke and Steve Leben. 2008. Procedural Fairness: A Key Ingredient in Public Satisfaction. *Court Review, Special Issue on Procedural Fairness*. Vol. 44, No. 1/2. Pages 4-25.

¹¹ Ibid (5).

¹² Avram Bornstein and others, ‘Tell It to the Judge: Procedural Justice and a Community Court in Brooklyn’ (2016) 39 *Political and Legal Anthropology Review*. (190).

¹³ The central criticisms are that procedural justice is at heart a form of false consciousness and cultural hegemony designed to make the less powerful consent and comply to the vision of the world of the powerful no matter long standing issues of injustice, inequality and substantial unfair or biased treatment.

¹⁴ Avram Bornstein and others, ‘Tell It to the Judge: Procedural Justice and a Community Court in Brooklyn’ (2016) 39 *Political and Legal Anthropology Review* (206).

social order and rule of law should be maintained and that compliance should be improved even if that may not be best for everyone”.¹⁵

Historical distrust of the state in the Caribbean

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

Unreliable and inequitable application of punishments fail to deter crime

Regional researchers, Professor Roger Hood, Professor Emeritus of Criminology at Oxford University (a world leading expert on the death penalty), and Dr Florence Seemungal, a visiting Trinidadian scholar at the Centre for Criminology in Oxford, have also suggested in a body of publications with Judicial Officers and the general public in 2006, 2009,²⁰ and 2011²¹ that a lack of procedural fairness in the eyes of the public has been identified as a reason that authorities are seemingly unable to deter violent crimes such as murder.²²

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

In order to explain why the law was not functioning as a deterrent, they investigated prosecution of murders between 1998 and 2005, and highlighted the low number of convictions relative to the number of murders committed. In addition to this, they also found that the process of

¹⁵ Ibid (206).

¹⁶ Devon Johnson, Edward R Maguire and Joseph B Kuhns, ‘Public Perceptions of the Legitimacy of the Law and Legal Authorities: Evidence from the Caribbean’ (2014) 48 *Law and Society Review* (947).

¹⁷ Ibid (950).

¹⁸ The results of their study in Trinidad and Tobago problematise the assumption that legitimacy and procedural justice are distinct concepts. Johnson, Maguire, and Kuhns also point out that it is possible to see an institution as legitimate, and yet not trust it. The researchers posit that within the minds of the local population, procedural justice and legitimacy may be the same thing, thus requiring changes to Tyler’s model to fit the Caribbean context.

¹⁹ Louise Henry, Marika Dawkins, and Camille Gibson. 2012 *Race, Ethnicity, Crime and Criminal Justice in Jamaica in Race, Ethnicity, Crime and Criminal Justice in the Americas*, Anita Kalunta-Crumpton (eds.) (210).

²⁰ Roger Hood and Florence Seemungal, (2009) ‘Experiences and Perceptions of the Mandatory Death Sentence For Murder in Trinidad and Tobago: Judges, Prosecutors and Counsel’ in *A Penalty Without Legitimacy: The Mandatory Death Penalty in Trinidad and Tobago*, London: The Death Penalty Project.

²¹ Hood and Seemungal 2011. ‘Public Opinion on the Mandatory Death Penalty in Trinidad’ *Death Penalty Project*.

²² Roger Hood and Florence Seemungal, ‘Conviction for Murder, the Mandatory Death Penalty and the Reality of Homicide in Trinidad and Tobago’ (2006).

conviction and sentencing was drawn out over a long period of time, and in many cases where offenders were sentenced to death, the sentence was not carried out. The researchers pointed out that deterrence can only be accomplished when those who commit crime are given sanctions that “are applied with a high degree of certainty and without too long a delay.”²³ The researchers noted how focusing on resuming the death penalty overlooks the crux of the matter that severity was not the driving force in deterrence, but rather, it is the certainty of punishment that deters²⁴.

Furthermore, their research documented conclusively, “that in general the probability of a recorded murder resulting in a conviction for murder in Trinidad and Tobago was not only very low, but that no category of cases could be identified with a very high probability of conviction and mandatory sentence to death for murder. Nor even of a conviction either for murder or for manslaughter”.²⁵

B. Alternate systems of Justice

Inner cities and informal justice systems

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

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

Traditions of community dispute resolution

As various scholars from anthropology, history, and the law such as Mindie Lazarus-Black²⁸, a Professor of Criminal Justice and Anthropology at the University of Illinois and historian Professor David Trotman at York University note in Trinidad and Tobago, as with other islands and nations

²³ Ibid (59).

²⁴ In 2011 Hood and Seemungal conducted further survey research in Trinidad and Tobago this time to collect the opinions of a representative sample of 1,000 residents on views about the mandatory death penalty for all murders. The results showed that while 91% were in favour of the death penalty only a quarter of that groups, 26%, agreed with the current law where the death penalty is mandatory for all murders no matter the circumstances.

²⁵ Hood and Seemungal 2011. ‘Public Opinion on the Mandatory Death Penalty in Trinidad’ *Death Penalty Project*

²⁶ Rivke Jaffe, ‘The hybrid state: Crime and citizenship in urban Jamaica’ (2013) 40 *American Ethnologist* 734-748 (738).

²⁷ Rivke Jaffe, “*They ain’t gonna see us fall*”: affect, popular culture, and criminal governance in urban Jamaica. Available: <http://media.leidenuniv.nl/legacy/jaffe.pdf>.

²⁸ Mindie Lazarus-Black and Patricia McCall, ‘The Politics of Place: Practice, Process, and Kinship in Domestic Violence Courts’ (2006) 65 *Human Organization* (140) .

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

New methodologies for dispute resolution in the administration of justice

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

In a report on Caribbean mediation, Justice Kokaram notes that community mediation is now available across Trinidad and Tobago.³⁴ He defines community mediation procedures as those identifying any social problems that are present within the dispute, so that social programmes may be advocated to address the underlying issues. He goes on to note, that “at present in a population of 1.4 million there are 524 certified mediators. From this 20% per cent are attorneys and 80% represent an eclectic representation of various social backgrounds from manager, to school teachers, from ministers of religion to engineers”³⁵ Mediators and judicial officers are held to the standards laid out by the 2004 Mediation Act, which stipulates that they must be “properly trained and certified before embarking upon mediation”.³⁶

As documented by Dr Catherine Ali, a consultant in mediation and restorative justice, the “Bail Boys” Project in Trinidad and Tobago, is “a pre-trial diversion using bail and intensive probation supervision,” and a restorative justice alternative. The “Court offered a change opportunity, under certain conditions, to those who would otherwise have been locked up for a decade. The bail

²⁹ Trotman, David Vincent. 1987. *Crime in Trinidad: Conflict and Control in a Plantation Society 1838-1900*. Knoxville: University of Tennessee University Press (233) .

³⁰ Justice Vasheist Kokaram, *The Foundations of a Peace Jurisprudence Movement: Lessons Learnt from Caribbean Mediation* (2017).

³¹ Catherine Ali, ‘The bail boys court: Conflict transformation and restorative justice in Trinidad’ (2013) 1 *Caribbean Journal of International Relations & Diplomacy* 3–22.

³² In a 2012 address at the launch of the Drug Treatment Court Pilot in San Fernando , Chief Justice Ivor Archie noted, “The “Drug Treatment Court”... offers a path that links “Treatment” to a structured court supervised system. I am confident that the establishment of such a Court will not only result in savings to the Judiciary, Prison service and other state agencies, but more importantly, it offers those persons who are afflicted with the disease of addiction an opportunity to access a series of services, under the umbrella of the court and to equip them for a productive life with healthy relationships.

³³ Justice Vasheist Kokaram, *The Foundations of a Peace Jurisprudence Movement: Lessons Learnt from Caribbean Mediation* (2017).

³⁴ *Ibid* (9).

³⁵ *Ibid* (15).

³⁶ *Ibid* (9).

conditions were curfew and drug testing, attending classes, skill training, and talk therapies which were designed to force a response and develop the capacity to respond to obligations and responsibilities. Bail boys participated in a needs and risks assessment and analysis, and in developing a personal strategic plan”.³⁷ Such approaches reduce the “spectacle” or theatricality of legal matters, and place importance on building communities through targeted development and reconciliation.

The force of the law

From her ethnographic work in the courts of Antigua and Trinidad, Lazarus-Black noted the power dynamics in the court room as a theatre of conflict where problems and social hierarchies are performed and not resolved, and how “[g]iving instructions flows in one direction: from the powerful to the subordinated”.³⁸ Court users she observed are often ordered around by court officers; their behaviour is dictated to them, their facial expressions may be deemed unsuitable, or their attire may be admonished. This behaviour often places most pressure on the working class, who are readily identified as likely to contravene “respectable” modes of dress and speech.³⁹

This is a similar point made by Justice Kokoram in his research into the need for alternate court systems and mediation in the region. He notes that, “institutionally the legal system as the force of the State compels people. Orders them to do things. The force of the law legitimizes violent acts such as the destruction of homes, the removal of crops, the laying of oil pipes in forests, the taking of a life!”. His suggestion being in such light there is a need for alternate systems.

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

Courts are theatres for conflict

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

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

³⁷ Catherine Ali. (2013). The bail boys court: Conflict transformation and restorative justice in Trinidad. *Caribbean Journal of International Relations & Diplomacy*, 1(4), 3–22. (9).

³⁸ Mindie Lazarus-Black, ‘The Rites of Domination: Practice, Process and Structure in Lower Courts’ (1997) 24 (628).

³⁹ Ibid 635-636.

⁴⁰ Trotman, David Vincent. 1987. *Crime in Trinidad: Conflict and Control in a Plantation Society 1838-1900*. Knoxville: University of Tennessee University Press. See also Cynthia Mahabir, 1985. *Crime and Nation-Building: The Legacy of Legal Barriers*. Cambridge, Mass.: Schenkman Pub.

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

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

Gender wars in the courts

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

In a follow up piece of piece at the turn of the century⁴⁴ LaFont returned to this question of "gender wars" between men and women that she saw in the courtroom and experienced for a year as a family court counsellor. LaFont's description of the family court in Jamaica is a battlefield between the genders, where "both genders utilise their knowledge of the dominant ideology relating to gender relations to manipulate the system to their advantage". Connecting gender to class, LaFont also describes how "the elite and middle-class have the luxury of much greater privacy surrounding their gender behaviour [in court]. They use the High Courts where lawyers may be employed to handle domestic affairs in private" and that this suggests – because their matters happen behind close doors – an impression of conformity to the dominant gender roles and stereotypes in the society when this is not the case.

Reducing legal proceedings to a "theatre for conflicts" has the real effect of alienating and excluding vulnerable defendants. For example, in a study by Lazarus-Black, a survivor of domestic abuse recounted her experience giving testimony in the courtroom.⁴⁵ Although the magistrate attempted to circumvent any possible theatricality by emptying the courtroom before she testified, she noted that the police that remained continued to comment amongst themselves, smirk, and snicker as she spoke.

⁴¹ Suzanne Lafont, *Gender Wars in Jamaica*. 2000. *Identities*.

⁴² Tracy Robinson. *Gender, Equality, Justice and Caribbean Realities: The Way Forward* (2013). *CAJO 3rd Biennial Conference*.

⁴³ LaFont, Suzanne. 1996. *The Emergence of an Afro-Caribbean Legal Tradition: Gender Relations and Family Court Use in Kingston, Jamaica* (Austin and Winfield).

⁴⁴ Suzanne Lafont, 'Gender Wars in Jamaica' 2000 7(2) *Identities* (233).

⁴⁵ Mindie Lazarus-Black, 'Vanishing Complainants: The Place of Violence in Family, Gender, Work, and Law' (2008) 36 *Caribbean Studies* (25).

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

Professor Mindie Lazarus-Black, the preeminent legal anthropologist of the Caribbean, has done long term studies of the Magistrates courts of Antigua and Trinidad, and published this varied work in numerous articles and books including, *Everyday Harm: Domestic Violence, Court Rites, and Cultures of Reconciliation*. Lazarus-Black's research highlights the experiences of vulnerable groups to obtain their legally available rights and protections. She notes that while the law serves to guide the court in its duty, there are also socio-cultural processes and practices existing alongside the law that can make invisible relations of power, visible.

Lazarus-Black⁴⁶ calls these power dynamics and practices in a court room, "rites of domination," and explains how they reinforce historical power dynamics in the courtroom like the gender and class hierarchies of a society. "Rites of domination include such practices as the intimidation, humiliation and objectification of litigants. Individually, the rites are generated in the interactions between legal officials and ordinary citizens."⁴⁷ She notes that the term "rites of domination" refers to "events and processes that occur regularly in and around legal arenas and explains why everyday activities at the courthouse reproduce rather than eliminate hegemony."⁴⁸ The rites of domination model therefore helps to make sense "of how a society's relations of domination and subordination are perpetuated in legal arenas."

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

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

⁴⁶ Mindie Lazarus-Black, 'The Rites of Domination: Practice, Process and Structure in Lower Courts' (1997) 24 (628).

⁴⁷ Mindie Lazarus-Black, *The Rite of Domination, Tales from Domestic Violence Court* (2002) IGDS Working Paper no. 7

⁴⁸ Ibid (7).

⁴⁹ Mindie Lazarus-Black, 'The Rites of Domination: Practice, Process and Structure in Lower Courts' (1997) 24. (637).

⁵⁰ Ibid (631).

⁵¹ Lazarus-Black in this sense reconsiders the use of the word "agency" in the context of court users and within legal discourse. She reframes agency within the legal process as "discursive, inherently unstable and constantly negotiated" term. Lazarus-Black explains that agency cannot be divorced from wider structural influences and situations of historical inequity—which includes the common-sense norms and values surrounding kinship, race, class and gender. Agency is not simply the ability of all individuals to act and access rights equally, rather agency is "made and remade in peoples' encounters with police, courthouse staff, lawyers, probation officers and judges" An individual's ability to act and access

E. The impact of sex and gender on judging in the Caribbean: The vanishing complainant and cultures of reconciliation

Gender, family and power in the magistrate's court

Lazarus-Black's investigation of child maintenance cases in Trinidad, illustrated that contested paternity was in fact, a "contestation about power — men's, women's and the state's"⁵² and that the rites of domination affecting gender in the Caribbean courtroom are especially visible when paternity is contested. For example, when a woman seeks maintenance for her child, a man may deny paternity, which Lazarus-Black notes has several implications: 1) by contesting paternity, he implies the woman is promiscuous, and thus not only attempts to damage her reputation, he suggests that she and her child are unworthy of his kinship; 2) When paternity is contested, the magistrate will advise the woman to retain an attorney, "a clear indication that she now faces a situation beyond her ability to manage herself", which has an added economic burden; and 3) Contested paternity can often be a form of revenge against the woman for "calling his name in court", which forces her to beg for kinship status through the courts. The burden of proof is often on the woman, who is re-framed as the "complainant" and may be forced to "line up witnesses to speak openly in a public space about the most intimate details of her life".⁵³

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

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

Family structure and the dual justice system

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

rights in Court therefore is not equal for all but rather it is shaped by the wider sociocultural landscape, both by its influence on the person seeking agency and on those who have the power to deny or validate that agency.

⁵² Mindie Lazarus-Black, 'Interrogating the Phenomenon of Denial: Contesting Paternity in Caribbean Magistrates' Courts' (2001) 24 *Political and Legal Anthropology Review* 13.

⁵³ *Ibid* (23).

⁵⁴ Mindie Lazarus-Black, *The Rites of Domination: Practice, Process and Structure in Lower Courts*' (1997) 24. (631).

The vanishing complainant

Further fieldwork by Lazarus-Black⁵⁵ discusses “the problem of the vanishing complainant”, in the context of the frequent vanishing of domestic violence cases from courts, and specifically women who seek protection orders against family members—usually their spouses. She notes how sometimes the decision to stop the process without gaining the order may be based on personal relations, or social and economic reasons, a situation Robinson has described as a “protection gap”.⁵⁶ “With the successful enactment of domestic violence everywhere, we now have sobering evidence of a ‘protection gap’. Complainants ‘vanish’ and few orders relative to applications seem to get made”. But as Lazarus-Black notes there may also be negative experiences with legal and Judicial Officials, which can include “gatekeeping” or ridicule when the complainant seeks to have their case heard⁵⁷ and such experiences also contribute to the vanished complainant.

Cultures of reconciliation

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

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

Cultures of reconciliation explain the ways in which violence against women and further violence within the family (such as the violence perpetrated against children by their parents) have been rationalised. For instance, corporal punishment in this light becomes “for the good” of the child, or in the case of a woman abused by her spouse “the police tell an abused woman to ‘have a little

⁵⁵ Mindie Lazarus-Black, ‘Vanishing Complainants: The Place of Violence in Family, Gender, Work, and Law’ (2008) 36 *Caribbean Studies* (25).

⁵⁶ Tracy Robinson, *Gender, Equality, Justice and Caribbean Realities: The Way Forward* (2013) (10)

⁵⁷ Mindie Lazarus-Black, ‘Vanishing Complainants: The Place of Violence in Family, Gender, Work, and Law’ (2008) 36 *Caribbean Studies* (37).

⁵⁸ Tracy Robinson, “A Caribbean common law”, (2007) 49(2) *Race and Class* (A special issue: Caribbean Trajectories: 200 years on (eds) A. Trotz, A Kamugisha), (118).

patience’.” This illustrates what Lazarus-Black notes as “acceptable” forms of violence within the society that have historical roots across racial, ethnic and religious groups within the Caribbean.

As she points out, “gender is relational; that masculinity is constituted in opposition to femininity, but also that these two categories, the masculine and the feminine, each encompass hierarchical domains that implicate differences in class, employment, education, sexuality, ethnicity, religion, disability, and citizenship.” Thus, the boundaries of the “acceptable” and “unacceptable” are not just defined by laws—they are framed and re-framed using societal norms and values. As Robinson too noted about the relationship between justice and socio-cultural and historical realities, “Law and justice don’t stand outside these social forces.”⁵⁹

F. Due process and sexual and gender minorities

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

The 2012 Carrico report published by the Faculty of Law UWI Rights Advocacy Project was a qualitative study conducted in the Georgetown area of Guyana by the anthropologist Dr Christopher Carrico.⁶⁰ It was based on interview data with 21 Guyanese nationals who self-identified as lesbian, gay, bi-sexual and transgender. The report considered the ways in which laws within the country, even when those laws are considered to be “un-enforced” or “under-enforced” impact the LGBTQI community and have “serious negative social effects” for same-sex love and non-conforming gender presentation. The illegality of sexual or gender expression, the report suggested, feeds into the legitimisation of prejudice against these groups. The report also notes that laws against loitering and soliciting disproportionately affect sexual and gender minorities. For example, one Indo-Guyanese transgender sex worker who dresses as a women noted that “she once was arrested and held for three months before being told what crime she was being charged with.”

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

Abuse and violence by state actors

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

⁵⁹ Tracy Robinson. *Gender, Equality, Justice and Caribbean Realities: The Way Forward* (2013). *CAJO 3rd Biennial Conference*. Robinson went on to note, “what difference does gender make to our analyses of equality, justice and Caribbean realities? I think in some respects it is a quite subtle one; it suggests that we must have a much closer look at and contextualise the nature and features of social disadvantage in our region.”

⁶⁰ Christopher Carrico. 2012. *Collateral Damage: The Social Impact of Laws Affecting LGBT Person in Guyana*. Faculty of Law UWI Rights Advocacy Project.

Police harassment and abuse were reported by nearly every person interviewed in our study. Many were arrested, threatened with arrest, or charged with crimes. Some were prosecuted and punished by the courts. Many reported police abuse of power, including serious offences, such as demanding bribes, extortion, demanding sexual favours, or turning a blind eye to sexual abuse by other prison mates⁶¹

Thus the report suggested that the context for discrimination and violence is hugely accelerated for members of the LGBTQI community. This can also be seen in the wider societal effects of the laws against sodomy, same sex sexual activity, and crossdressing used to target homosexuals and the negative effect the criminalisation of sexual and gender differences has on LGBTQI experiences not just in the legal realm but also with employment, access to health and social services, looking for accommodation and the freedom to express their sexual orientation publically.

In his research in Trinidad, Dr Amar Wahab, an Assistant Professor of Sociology at York University in Canada, investigated when Kennty Dave Mitchell, a gay man, was arrested, ridiculed, and strip searched by police in Princes Town⁶². Mitchell's subsequent lawsuit brought to the surface the entrenched biases toward the LGBTQI community within policing, the court system, and by extension the State. Wahab, much like Trinidadian Professor of Women's Studies at the University of Toronto, Jacqui Alexander previously⁶³, noted that "respectable citizenship" is defined by heterosexual norms and morality, placing homosexuality firmly outside the realm of respectability and reputation, a process Alexander called "redrafting morality".

4. METHODOLOGY: THE RESEARCH IN PHASES

Phase 1

In 2015 the JEITT began preparation work for an upcoming 2016 'Continuing Education Seminar' for the nations' Judges and Magistrates. The theme of inquiry was an exploration of the potential biases within the adjudication decisions of Judges, Magistrates and Judicial Officers in the Courts of Trinidad and Tobago.⁶⁴ In order to explore the terrain of opinions around such a theme the JEITT worked with Professor Cheryl Thomas from University College London Judicial Institute. Professor Thomas held a three-day training session with JEITT staff on creating and executing quantitative research. Under her guidance, four questionnaire instruments were created, each targeting a different group of stakeholders. The specific target groups were: the Public, Judiciary Staff, Attorneys, and Judicial Officers. Once the data was received, Professor Thomas then guided the JEITT on the analysis of the data which involved rounds of recalculation to ensure representativeness.

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

Members of the Public (Court users)	160
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⁶¹ Ibid (31).

⁶² Amar Wahab, 'Homophobia as the State of Reason: The Case of Postcolonial Trinidad and Tobago' (2012) 18 *GLQ: A Journal of Lesbian and Gay Studies* (481).

⁶³ Ibid (484).

⁶⁴ Please visit <https://jeitt.weebly.com/> for more information.

Judiciary Staff	110
Judicial Officers (Judges/Magistrates/Registrars)	22
Attorneys	68
Total	360 survey responses

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

Phase 2

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

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

The research objectives were:

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

In order to pursue the research question and its various objectives three teams of three JEITT judicial researchers underwent training in 'rapid assessment ethnography'.⁶⁵ The teams were then deployed to all the Magistrates courts in Trinidad and Tobago where over three months they spoke with court users and recorded the stories those court users shared with them about their experiences with the administration of justice. At a later date the collection of experiences from some users of the High Court was also undertaken.

Phase 3

A third phase of the research involved transcribing all the data from the open-ended interviews and developing a "code book" to thematically explore our research objectives. With Tyler's

⁶⁵ "Rapid assessment is a type of participatory action research and shares many of the characteristics of ethnographic research. Rapid assessment, however, uses intensive, team interaction and multiple cycles of data collection followed by data review/analysis, instead of the prolonged fieldwork normally associated with traditional qualitative research. Results can be used for planning, monitoring, and evaluating activities and for the design of additional research". Beebe, J. (2005). Rapid assessment process. In K. Kempf-Lenoard (Ed.) *Encyclopedia of social measurement: Three volume set*. (Vol. 3, pp 285-291) San Diego, CA: Academic Press/Elsevier.

premise around procedural fairness being based on research conducted in the United States of America, our third phase of the research project raised the question: are the expectations which encompass Procedural Fairness in the mind of Trinbagonians the same as, or different to, that of US court users?

Based on the qualitative feedback and thematic analysis of the narrative responses of 54 lower court users and 24 higher court users, Tyler’s four expectations of Procedural Fairness in the US case also proved to be present, with small amendments, in Trinbagonian society and important to court ; however, these were not the sole expectations found. Five further expectations for the perception and process of procedural fairness also emerged from our Code Book of 78 qualitative interviewees. These were: understanding, accountability, availability of amenities, access to information, and inclusivity (please see page 4 and 5 of this paper for the full listing of the 9 elements and their definitions).

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

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

5. PRESENTATION OF DATA AND DISCUSSION

A. Access and accessibility

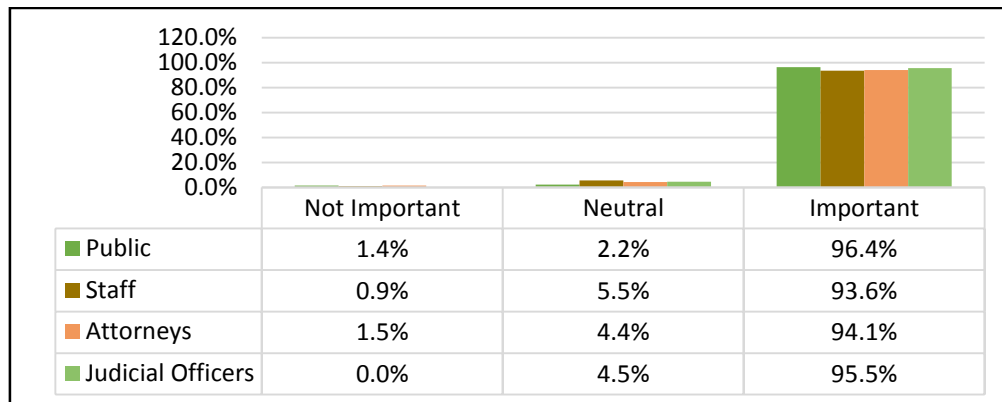


Figure 1. How important do you feel having the court process explained by the judge/judicial officer in a clear and understandable manner is in ensuring a court user's compliance with court order?

⁶⁶ Elron Elahie, 2017. *Reflections of an Interested Observer: Ethnographic Musings of the Court User’s Experience in T&T*. Trinidad and Tobago: JEITT.

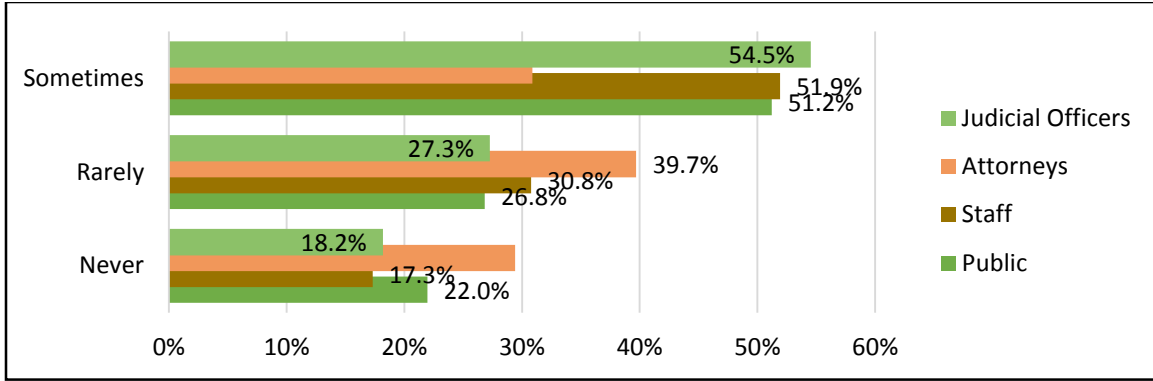


Figure 2. To the best of my knowledge, individuals who visit the courthouse to conduct transactions, but do not appear before the courts in Trinidad and Tobago are invited to express their views

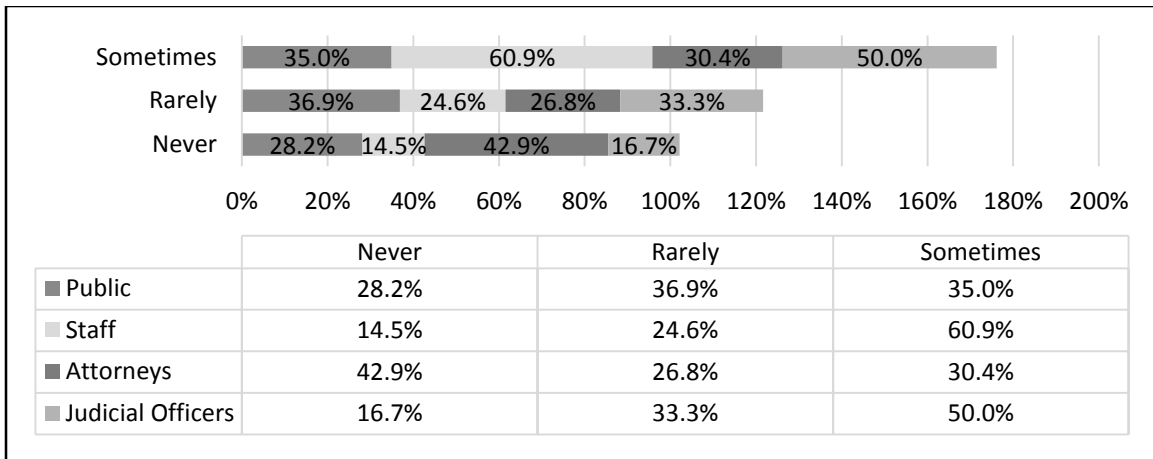


Figure 3. Please indicate the extent to which the courts in your jurisdiction provide information to court users BEFORE they come to court explaining what will happen at court

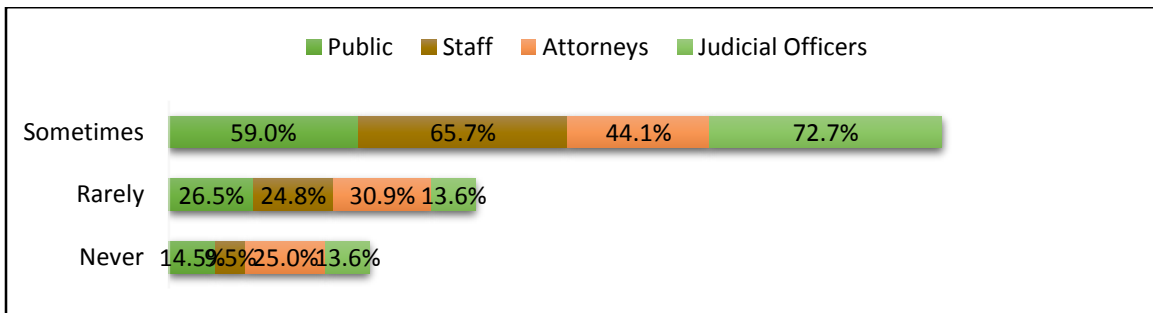


Figure 4. To the best of my knowledge, individuals who appear before the courts in Trinidad and Tobago have proceedings explained to them?

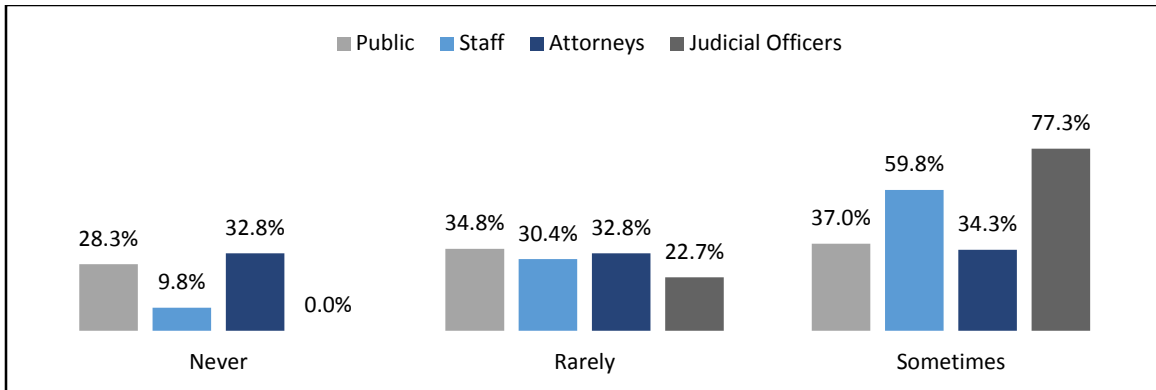


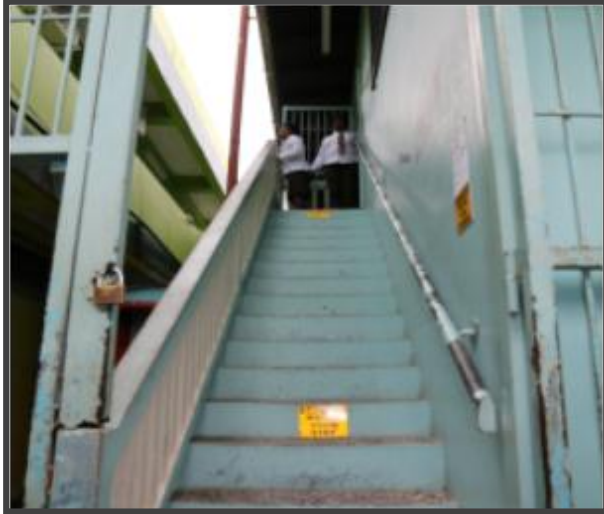
Figure 5. To the best of my knowledge, individuals who appear before the courts in Trinidad and Tobago are encouraged to ask questions

The accessibility of the court and its proceedings encompasses several areas, ranging from physical access to buildings and facilities to the access to knowledge and procedural information about the judicial proceedings. Some respondents expressed concern about the state of the facilities, with one stating *“They have no seating accommodations and stuff - well, proper seating accommodations. Because what they have there is for upstairs. They have nothing for the court section.”*

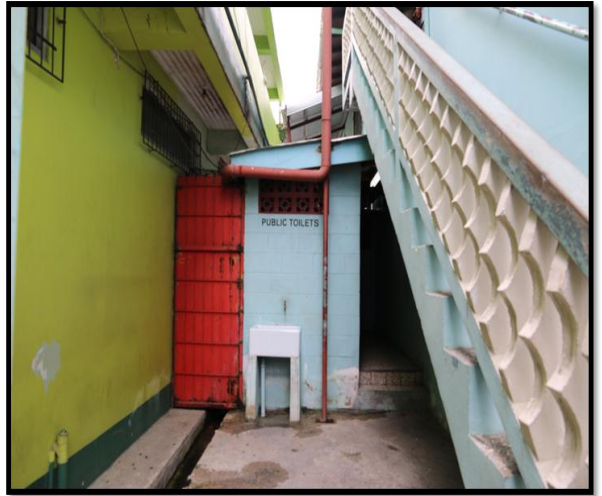
The plight of hearing-impaired court users as noted by two courtroom sign language interpreters interviewed for this project encompass several pressing concerns in terms of access to information, inclusion, and the availability of amenities for vulnerable groups who use the courts. Many times, there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

As the quantitative data illustrates in Figure 4, 72.7% of Judicial Officers believe that users sometimes have proceedings explained to them, however, 41% of the public suggest they rarely to never have proceedings explained to them. Yet, almost all the respondents (as seen in Figure 1) agree that having the process explained in a clear manner is important. When it came to the opportunity to ask questions (Figure 5), a necessary component of ‘Voice’ as understood in the Procedural Fairness literature, 77.3% of Judicial Officers believed that they afforded this opportunity to court users. However, 63% of the Public said that they are either sometimes or never given the opportunity to ask questions.

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



Sangre Grande Magistrate Court, Registry Stairs



Sangre Grande Magistrate Court, Washroom



Moruga Magistrate Court, Roofing



Princess Town Magistrate Court Waiting Area

Photos showing the condition of some courthouses across Trinidad and Tobago

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

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

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

For example, in the qualitative data of court users across the lower courts the suggestion of lawyers and Judicial Officers as a sort of parasitic class – untrustworthy authorities – that help each other to make money, rather than having the client and their matter as the number one priority was captured. As one court user at the Port of Spain Magistrate’s court told us,

“they keep putting off the case, so the lawyers get more money every time you come...Most of the time, the lawyers themselves end up being Magistrates. So therefore, it’s a reoccurring decimal that is happening all the time.”

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

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

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

From our Tobago interviews one respondent spoke to not feeling included because the Magistrate was not welcoming to her side of events, *“she [the magistrate] telling you what she want to hear.”*

When you telling her, she says, ‘No, I don’t want to hear that’”. While many of the court users in Tobago complained about general issues of access in Tobago.

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

While another told us,

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

B. Gender and Sexuality

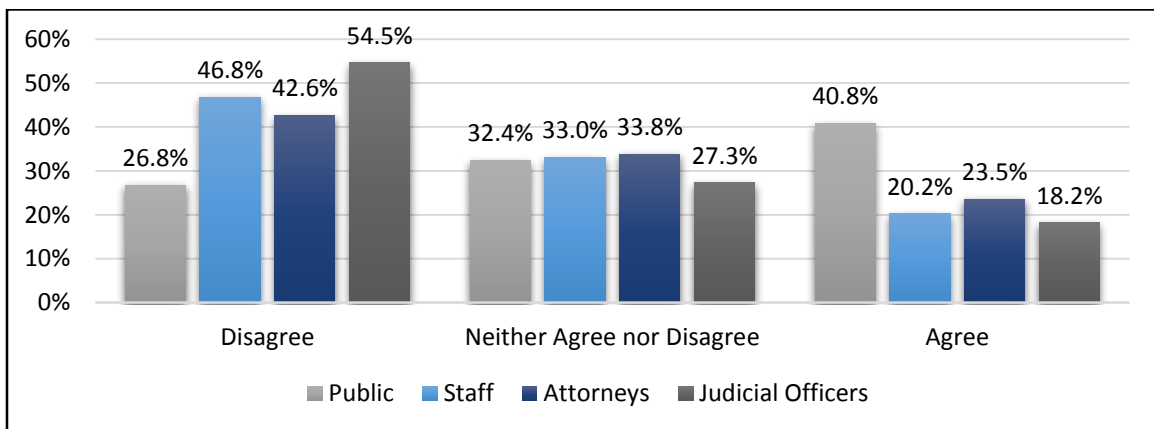


Figure 6. A person who 'appears to be' or is known to be straight is more likely to receive favourable treatment than a person who 'appears to be' or is known to be lesbian, gay, bi-sexual or transgender

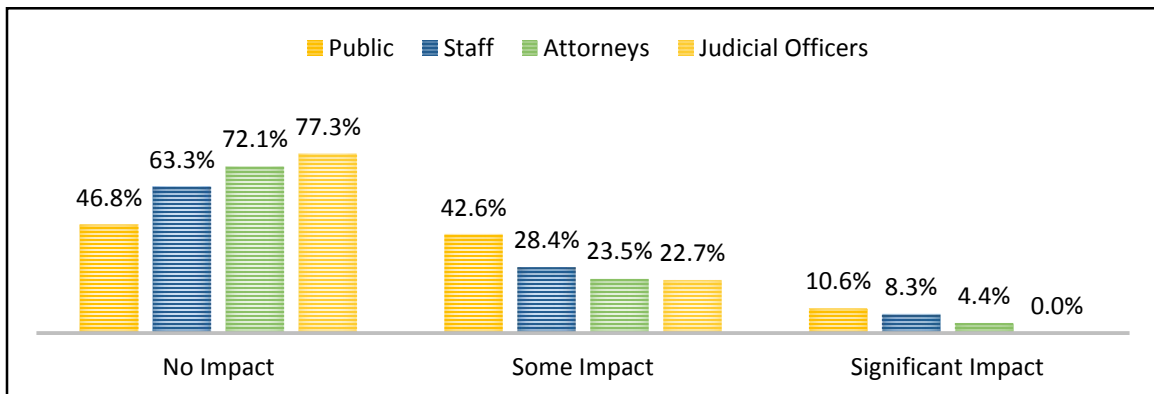


Figure 7. What impact, if any, do you believe SEXUAL orientation has on the outcome of a court matter?

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

The stigma associated with being a member of the LGBTQI community was further evidenced by the lack of LGBTQI representation in the ethnographic data collection we conducted. When asked to voice opinions on their perceptions of the judicial system and its treatment of court users, LGBTQI individuals refused to respond, even in anonymity, because of the fear of persecution. Remaining 'closeted' or staying as close to the norm as possible reveals the same fear of Caribbean LGBTQI people in Trinidad and Tobago to respond to any query involving their sexual orientation as recorded by the Carrico report in Guyana.

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

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

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

As Patricia Mohammed points out, however, this idea of male marginalisation is premised on the assumption that male dominance is the natural order⁶⁷— when women are afforded (or appear to be afforded) equal treatment, that "natural order" is unbalanced. Therefore, when men perceive that women will always be granted maintenance or custody for children, they may assume that women have been given this "privilege" at the expense of men.

Another respondent commented, "So some of the magistrates need to give you a fair hearing as to what going on and stop being so spiteful or go on their personal experiences", which assumes that a female magistrate will make her ruling specifically on the basis that she is female. This not only reduces a female Judicial Officer to her gender, it also continues the narrative that men are

⁶⁷ Patricia Mohammed, 'Unmasking Masculinity and Deconstructing Patriarchy: Problems and Possibilities Within Feminist Epistemology' [2004] *Interrogating Caribbean Masculinities: Theoretical and Empirical Analyses* 38.

persecuted by women—when in fact, men are “still overwhelmingly represented in parliaments, businesses and courts”.⁶⁸

C. Ethnicity and Religion

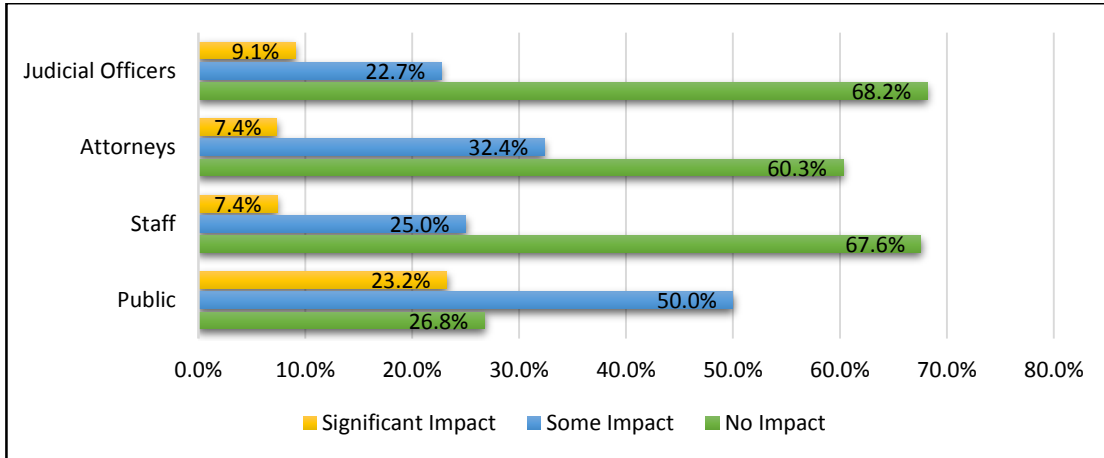


Figure 8. What impact, if any, do you believe the skin colour has on the outcome of a court matter

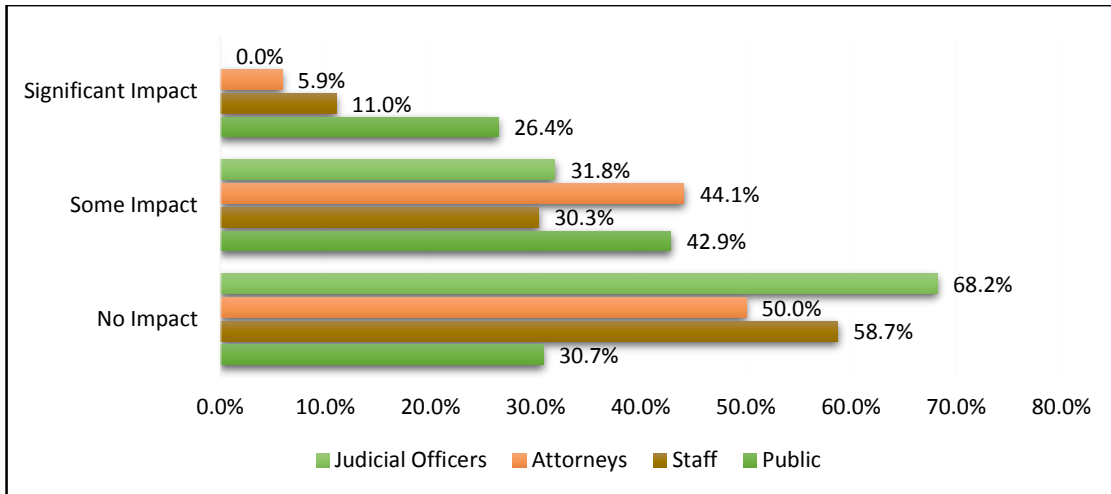


Figure 9. What impact, if any, do you believe ethnicity has on the outcome of a court matter

Within the quantitative data, 73.2% of the public polled think that skin colour has at least some impact on the outcome of a court matter, while only 31.8% of Judicial Officers agree. Similarly, 69.3% of the public polled believed ethnicity could impact the outcome of a court matter, when only 31.8% of Judicial Officers concur. This signals that there is a disparity between the public and

⁶⁸ Aaron Kamugisha, ‘The Coloniality of Citizenship in the Contemporary Anglophone Caribbean’ (2007) 49 *Race & Class* 20.

Judicial Officers—while the public assumes that the courts have biases based in colour and ethnicity, the Judicial Officers themselves do not. The public perception falls in line with the academic literature’s understanding of ethnicity, race and colour being inextricably linked and blurry concepts within the region.⁶⁹ Importantly, the literature notes that perceptions of ‘darkness’ and ‘lightness’ were linked with other physical markers such as hair texture to connote status, despite the person’s ethnic affiliation.⁷⁰ Thus, the lighter skinned a person is, even if that person is “brown” or “black”, they are ranked higher in the social hierarchy. Socially, “lightness” is linked to respectability, which Segal notes is an “approximation to whiteness” and the colonial legacy of white elite culture which had the power to define “respectable”.⁷¹

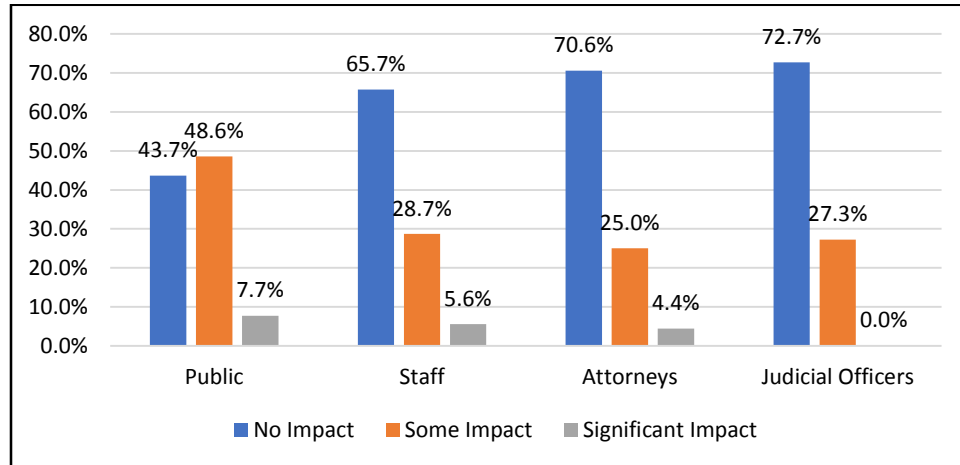


Figure 10. What impact, if any, do you believe religion has on the outcome of a court matter

Religion⁷² also plays a factor in perceptions of fairness, especially amongst the public. When asked about whether religion could influence the outcome of a court matter (Figure 10), 56.3% of the public polled thought at least some impact was possible, while again, only 27.3% of Judicial Officers agreed. The courts themselves have a historical precedence of religious influence, where “religion was actively (though unequally) made and unmade by both the colonial elites and subalterns”.⁷³ This legacy has not faded with Independence, as some Magistrates have admitted

⁶⁹ Daniel A Segal, “Race” and “Colour” in Pre-Independence Trinidad and Tobago’ in Kevin Yelvington (ed), *Trinidad Ethnicity* (University of Tennessee Press 1993).

⁷⁰ Anton Allahar, ‘At Home in the Caribbean diaspora: “Race” and the Dialectics of Identity’ (2010) 13 *Wadabagei* 2.

⁷¹ Segal (93).

⁷² In the context of procedural fairness, ethnicity and religion can be understood sociologically as a “worldview”. A worldview in sociology is the set of personal beliefs about fundamental aspects of reality that ground and influence all one’s perceiving, thinking, knowing, and doing about the world. A worldview shapes an individual’s sense of what is morally right and wrong on both the implicit and explicit levels. It is something each of us is socialised into, what anthropologists call a “languaculture.” Thus a central means of enhancing procedural fairness is for Judicial Officers to recognise both their own worldview and the worldview of others as at play in any interaction within and outside the court room and that a worldview shapes how each of us sees the world. As such, we do not all see the world in the same way.

⁷³ Alexander Rocklin, ‘Obeah and the Politics of Religion’s Making and Unmaking in Colonial Trinidad’ (2015) 83 *Journal of the American Academy of Religion* 697.

to basing their treatment of queer Caribbean court users on their religious beliefs, linking their conceptions of morality to the legal outcomes of citizens.⁷⁴

D. Wealth and Class

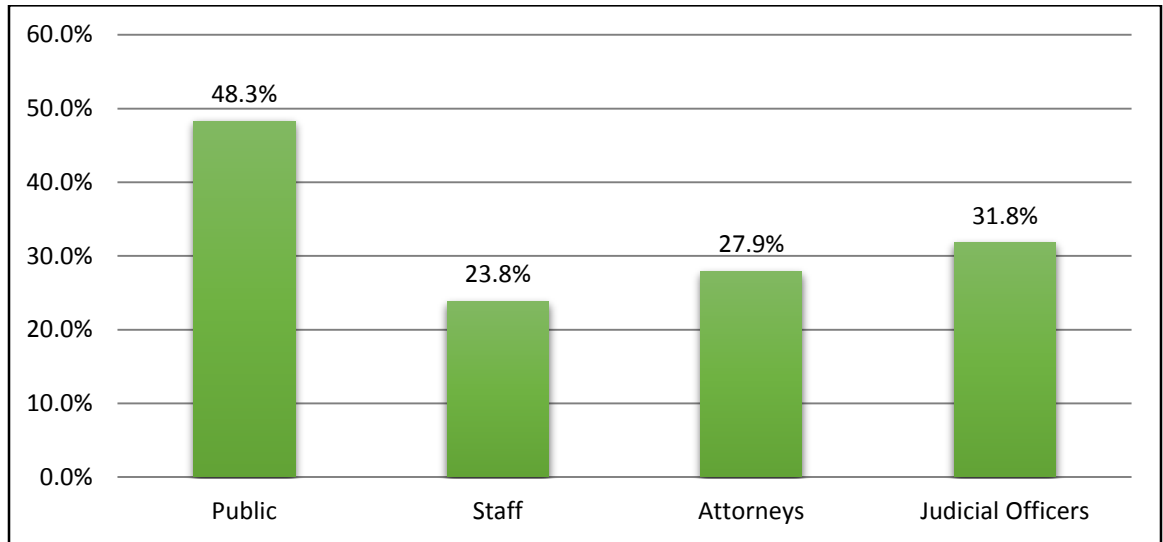


Figure 11. Please indicate weather you agree with the statement a person of light skin colour is more likely to receive favourable treatment than a person of dark skin colour (Agreed)

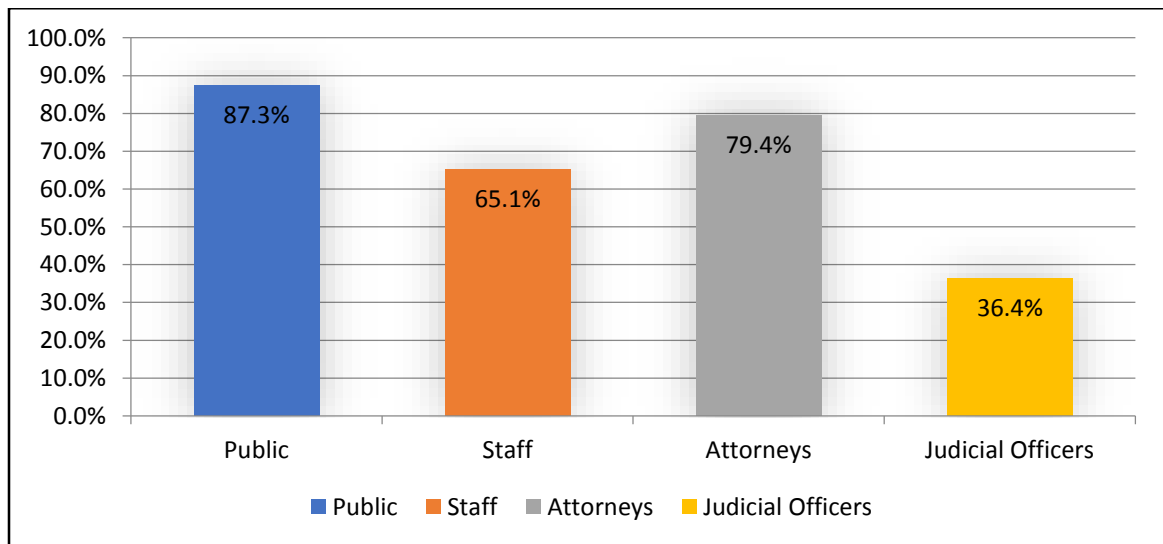


Figure 12. Please indicate weather you agree with the statement a person who appears to be wealthy is more likely to receive favourable treatment than a person who appears to be poor

⁷⁴ Dylan Kerrigan. 2017. Justice out of a State of Injustice. *Current Anthropology* [forthcoming].

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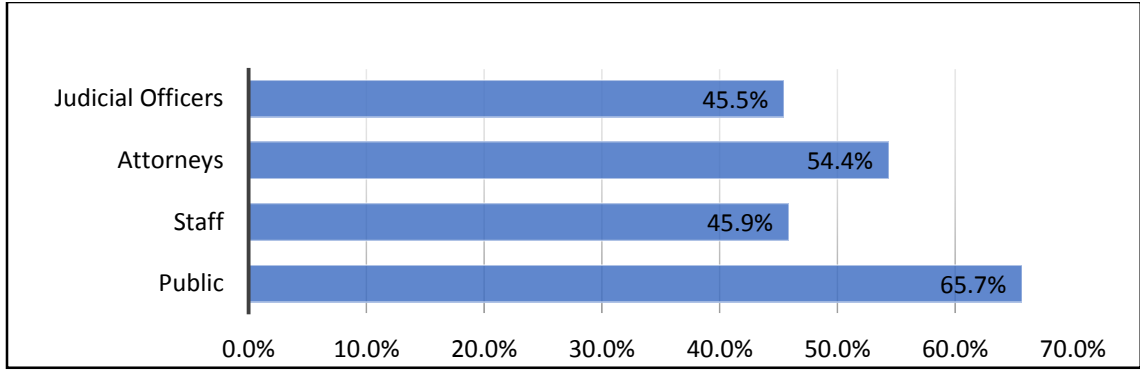


Figure 13. Please indicate whether you agree with the statement a person who appears to be highly educated is more likely to receive favourable treatment than a person who appears to be uneducated

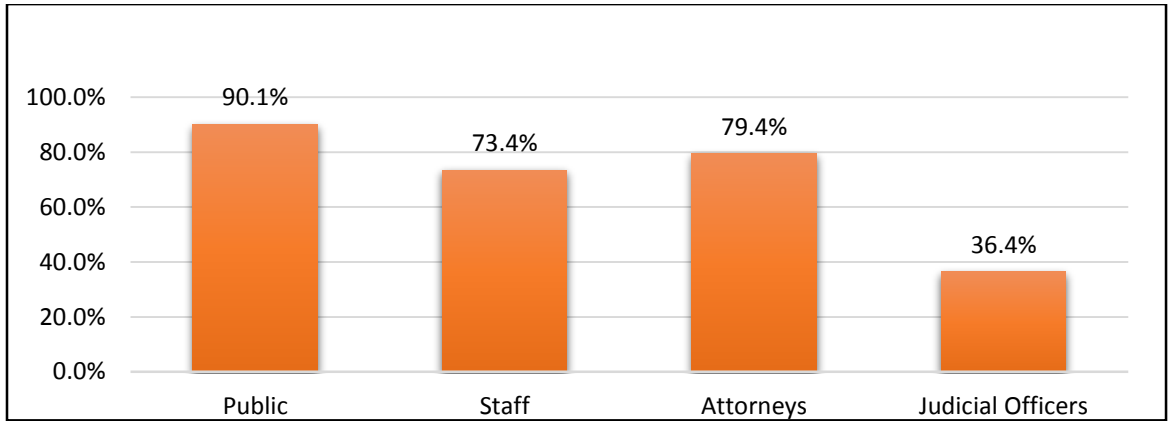


Figure 14. Please indicate whether your agree with the statement a person who appears to be of a high social status is more likely to receive favourable treatment than a person who appears to be a low social status

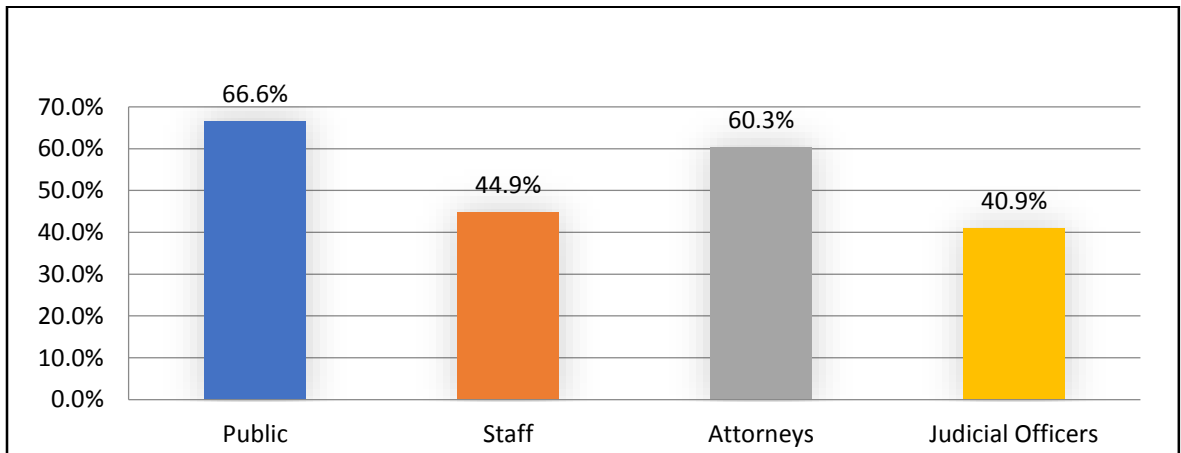


Figure 15. Please indicate whether your agree with the statement person who speaks 'proper English' is more likely to receive favourable treatment than a person who speaks heavy dialect

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

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

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

Another court user told us in such light, “The courts more for the higher people than the poor people.” While another told us “I didn’t have an opportunity to speak like that because he have a lawyer and I can’t afford a lawyer because I’m a student,” which also suggests a lack of inclusion and access in the matter. While at the Couva court another man told us point plank that the judicial process favours the wealthy and those who can afford the process. “The person I was challenging, they had their lawyer, but their lawyer wasn’t coming as regular as my lawyer. I paid him upfront to get things done, so things ruled in my favour.”

6. RECOMMENDATIONS: WHAT DO WE DO?

Historically the Caribbean is not a place of equality but rather one of inequities. Such environmental processes have shaped the social realities of all individual lives in the Caribbean and their interactions with the State and its institutions. As such, and as Tracy Robinson notes, we must always be cognisant of “how [Caribbean] history has marked the administration of justice today.”⁷⁵

⁷⁵ Tracy Robinson. *Gender, Equality, Justice and Caribbean Realities: The Way Forward* (2013) pg 5.

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

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

A. Widespread (whole-system) institutional education.

The motto of the JEITT and also its mandate, is the transformation of attitudes⁷⁶ and behaviour is possible through education. In this regard a continuous threefold approach can be considered, as follows:

- a. Sensitisation;
- b. Scrutiny; and
- c. Compliance/Conformity.

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

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

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

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

B. Widespread public education and empowerment

Ultimately it is the members of these vulnerable groups and the wider Public who will insist on ‘compliance’ by Judicial Officers and the Judiciaries. For this to be achieved vulnerable groups

⁷⁶ What some call “mind-sets” or “worldview”.

⁷⁷ In this regard the suggestion here in procedural fairness terms is that a Judge or Magistrate can influence and direct the behaviour and conduct of all persons in their courtroom including staff such as police and daily court room staff.

must be empowered to demand and insist on best practices being met. The best persons to empower them are the Judicial Officers and the Institutional Judiciaries themselves. Why? First, it forces Judicial Officers and Judiciaries to accept and take responsibility for creating, monitoring, and sustaining these standards. Second, the empowerment is direct – from the persons/institution who/which will be called to account.

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

C. A commitment to interdisciplinary continuous research and publication

What the JEITT ‘experiment’ in research on Procedural Fairness in the region has shown, is that there are indigenous and culturally relevant insights that can only be gleaned by robust local research. The suggestion is this research must be interdisciplinary and should have a significant judicial ‘leadership’ input as well as rigorous social scientific supports. Without this judicial involvement, buy in and transference of knowledge is generally too slow, if at all.

D. The development of best practices only after consultation

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