

**Symposium put on by the Criminal Justice Research and Planning
Unit in celebration of the 50th Anniversary of Independence
at Solidarity House October 25th 2016.**

**Paper presented by: The Honourable Sir Marston Gibson KA, Chief Justice
of Barbados; and
The Honourable William J Chandler, Judge of the
High Court of Barbados.**

Topic: Building a more efficient Criminal Justice System

Introduction:

The Role of Criminal Justice agencies within the system

Definition: The Criminal Justice system may be briefly defined as the system by which allegations of criminal wrongdoing are investigated, persons accused of committing those crimes are brought before the courts of law for trial and the disposition of those trials within the legal framework of this country. For those convicted, it involves the imposition of punishment or other appropriate sanctions. The object of the system is to ensure that justice is done in an open, transparent and fair manner applying the rule of law.

The criminal justice system involves agencies such as the police, the prosecution services (the office of the Director of Public Prosecutions and the Police prosecutors), the High Courts, the Magistrates Courts and the Appellate Courts), the Probation Department and Her Majesty's Prison Service. The title of this panel discussion is most appropriate in this celebration of 50 years of Independence as we look upon the past fifty years as a sovereign state and prepare ourselves for the challenges of the future in a globalised world. Recently we have been treated to a plethora of criticisms of the Criminal Justice System focused almost exclusively on the Judiciary.

What this discussion manifests and what is absent from most of the critics' essays is that there is a criminal justice system in which several agencies, departments of government and other stakeholders or major players. There is an interplay between these agencies and the work of each individual agency is crucial to the success of the system as a whole. In this paper we briefly analyse (1) the role of the judiciary in the criminal justice system (2) the challenges faced by judicial officers and (3) we offer some suggestions on the way forward.

Judicial v prosecutorial functions

Our focus is on the judicial role which, in layman's terms is, (1) the trial of criminal matters brought before the Court and (2) the punishment of convicted persons within

the boundaries of the legislation which guides the sentencing functions of the judicial officer.

The role of the judge is totally different to that of the prosecuting authority. In the High Court the prosecution role is performed by the Director of Public Prosecutions whilst in the Magistrate's Court it is performed by the Commissioner of Police on behalf of the State.

This simple, but vital, fact is often lost on the community which feels that the trial of offences is the sole province of the Courts, it is not. Judges stand ready to try those matters which are brought before them and we challenge anyone to produce any evidence of a failure of any judge to try any matters placed before him or her save and except for legitimate reasons of recusal.

We give as an example the calls by Justices **Reifer** and **Cornelius** during the periods that they presided over the continuous criminal sessions for matters to be brought up for trial on 03 February 2015. **Justice Reifer** made it abundantly clear that she stood ready to try matters which were said to be in backlog. (see Nation Newspaper article of 04 February 2015)

Judicial Reforms - change from Assizes to continuous criminal trials and the introduction of a third criminal court

Prior to 2004 we had assizes four times a year in January, April, July and October. With the increase in crime the system was changed to allow for continuous criminal

trials throughout the year with the rotation of judges between the civil and criminal divisions.

In 2006 it was decided by my predecessor in office Sir David Simmons to increase the number of Courts trying criminal matters from two to three. That innovation had to be abandoned because of the insufficiency of prosecutors and other staff to properly prosecute matters before the Court which were ripe for hearing rendering the third Court more or less redundant.

What are the Factors which impact the Judicial Function?

- (1) There are several matters in which witnesses have died, police officers have left the RBPF or have died and those facts are only realised when these matters are brought before the Court. It would help if these facts were ascertained beforehand so that the appropriate steps could be taken to discontinue these matters.
- (2) Matters involving physical assaults on children and victims of rape sometimes take long to come before the Court because of (a) the impact of the circumstances on young victims (b) the need to not only protect their identities but to ensure that the victim is mentally and sometimes physically capable of giving evidence. That may require a sociological or psychiatric evaluation over which the Court has no control.

(3) The paucity of lawyers practicing at the criminal bar. This will be looked at later as we discuss the reform of the legal aid system.

(4) There are other reasons why matters take long to be brought before the Court, such a discussion is really for other agencies and it would not be right to encroach upon their jurisdictions in their absence.

For the purposes of this discussion we were to make it clear that, once a matter is properly brought before the High Court, there are two distinct jurisdictions which must be understood. The judge's role is to determine the legal principles applicable to the charge(s) and to conduct the proceedings including summing up the case for the jury and the jury who are the sole arbiters of the facts. They decide innocence or guilt. Summations are commenced very shortly after the addresses of prosecution and defence sittings so that there can be no reasonable criticism of the judging role in high court criminal trials.

Sentencing function

It is now routine for persons to criticise sentences imposed by judges. It must be understood that, whilst members of the public may be motivated by emotive issues, judges are guided by sentencing guidelines, legislation such as the **Penal System Reform Act (PSRA)** and the requirements of that legislation. The pre-sentencing report is not seen by the public so that the public is largely unaware of the mitigating

and aggravating factors which are important to the sentencing function. The protection of the public is only one part of the sentencing role. This vital innovation requires the judge or magistrate to expend more time in imposing sentences on convicted men. The judge must order the report and await its availability before imposing sentence. Such reports are now prepared fairly expeditiously. It must be borne in mind that the workload of the Probation Department has been increased and there has been no corresponding increase in personnel.

Increased workload/criminal activity

It cannot be doubted that crime is on the rise. The police force is to be commended for its work in detecting, preventing and investigating crime. In 2003 128 indictments were lodged, 2004 152, 2005, 130 and 125 in 2006 since then the figures have increased. Whether a case is prosecuted in the High Court or the Magistrate's Court there are legal procedures which must be followed. Examination of witnesses, cross-examination and re-examination. The High Court procedure is a little more formal and time consuming. Procedural requirements ensure the fairness of the trial process. Judges must be vigilant to ensure the accused man receive a fair trial. One cannot sacrifice fairness for expediency. That would lead to arbitrary or palm tree justice. Barbados has a fine reputation for the fairness of its judicial process and we

are not going to sacrifice that reputation. It is said that it is better for a 1000 guilty men to go free than that an innocent man be condemned.

On the civil side, we must consider that in 1967 some 687 cases were lodged compared to 1987 where just under 2000 cases including family applications were filed. The same corps of judges are required to try both civil and criminal matters. It must clearly be understood that without an increase in judicial personnel and staff one cannot expect a disposal rate which would favourably compare with the rate of lodgement.

In 2008, the judges of the High Court were able to dispose of over 200 criminal cases whereas prior to that year the average disposal rate was about 140.

Innovations – Plea and directions hearings

On 15 July 2003 plea and directions hearings were introduced by practice direction no. 1 of 2003. This was an attempt to ascertain upfront what would be the accused's plea at trial, whether he would challenge any alleged confession statement and whether he would be calling witnesses or needed assistance in summoning them and whether he was relying on the defence of alibi? This would have speeded up trials eg. if it was known that a man desired to plead guilty, then his matter could be brought on early and disposed of and would have promoted efficiency in the trial process.

We understand that this system proved ineffective. In some instances, lawyers did not complete and submit the forms whilst unrepresented men did. In fairness to the lawyers sometimes they may be unwilling to sign off in circumstances where they have not been properly retained. I am also made to understand that, in many instances, unrepresented accused men would fill out the forms but would be unwilling to indicate what course of action they would take at trial. This we see as a major drawback to expediting trials but may be overcome by educating accused men to the benefits of the procedure.

If the plea and directions system worked as it was envisaged, we would be able to isolate guilty pleas and get these matters out of the system quickly as well as mapping out the future progress of criminal matters. This is a form of case management in criminal proceedings.

Plea bargaining

We now consider practical ways of expediting criminal trials and getting rid of some of the backlog. It may be useful to institute a system of plea bargaining whereby the prosecutor, defence counsel or unrepresented persons may discuss with the trial judge the range of sentencing options in the event that the accused person desires to plead guilty to the charge(s). This will involve statutory intervention and will have to be placed on a firm footing taking into account that offenders are to be given a

discount for an early plea of guilty in addition to the mitigating factors set out in the PSRA.

This concept is not a natural feature of our criminal justice system and may create some **consternation** in the estimation of the public but it would be a useful innovation for expediting matters. Public awareness through sensitisation programmes may be required.

A scientific approach to reform

There has been no scientific study of the criminal justice system to the best to our knowledge, information and belief. Any attempt at reform of the system should not be willy nilly or ad hoc. If Barbados is to take its proper place in the regional and international legal system, we must approach reform in an open transparent and outcome oriented manner. We cannot succumb to social or political pressure. We must look to the root causes of the problem, analyse the existing system and, utilising appropriate scientific and statistical information, come up with solutions to our local problems. We cannot simply import solutions from other countries whose social, cultural and legal norms differ from our own.

Reform of the Right to Silence

Too often accused men come to Court and there is no clue as to (1) what their defence is or (2) the viability of the defence. We consider that statutory reform which requires accused persons to disclose their defences, if any, as is done in

England, might be a useful tool in eliminating the waste caused by trials where there is no viable defence.

Legal Aid Reform

Expansion of the Criminal Bar. At present the pool of lawyers who practice at the Criminal Bar is very small. This creates a situation where these lawyers' services may be required in several courts at the same time causing delays. Whilst we recognise that an accused man has a constitutional right to retain a lawyer of his choice, regard must be had to the practical aspects of state provided counsel under the Community Service Act (Legal Aid). To this end, it may become necessary to reform the system so that matters are assigned to a panel of lawyers in rotation or by some other methodology which will avoid the present bottleneck situation.

We think that more matters could be tried if the Criminal Bar was expanded. This is beyond the control of the Chief Justice and requires innovative ways of making the practice of criminal law more attractive to young lawyers through the legal aid system. We also note that reform in terms of creating a public Defenders office may be necessary in this regard.

Such innovations require the input of the Honourable Attorney General and the Barbados Bar Association and depends on the availability of financial resources.

Case Management in Criminal Proceedings

It is suggested that a system of case management in criminal proceedings may assist in the expeditious trial of criminal matters in the High Court. This would involve judges, prosecutors and defence counsel attending scheduled hearing where orders are made including but not limited to:

- (a) Scheduling of hearings
- (b) Pleas and directions
- (c) Challenges to statements and scheduling trials of such challenges as preliminary matters.
- (d) The estimated length of trial and the summary of witnesses for both prosecution and defence
- (e) Plea bargaining and ordering of pre-sentencing reports in the cases of pleas of guilty.

Case Management will help both the Court and the lawyers to calendar the matters in a more efficient manner so that trials may proceed according to the calendar which should be signed off on by counsel for the defence.

The Judicial Council

The judicial Council has been at the forefront of suggesting methodologies for improving the delivery of criminal justice in Barbados. In its report for 2007, some 102 recommendations were made only three of which have seen the light of day

namely (1) the abolition of preliminary enquiries (2) Plea bargaining and the establishment of the drug treatment court.

Allocation of Resources to the Judicial Branch of Government

Reform necessarily require analysis, synthesis and resultant recommendations. All these tools are not necessarily possessed by judicial officers. Reform requires a wide range of skills which must be paid for such as criminologists and social scientists. These financial resources will have to be provided to the judiciary in order to have the needed reforms properly identified and implemented.

Legislative Intervention

To achieve some of the above reforms it will be necessary to persuade Parliament to pass legislation to facilitate the reforms which may require fundamental changes to the Constitution and the Criminal Justice System.

Additional Judges and personnel

It is unchallengeable that the crime rate has increased dramatically in the last 15 - 20 years especially in the area of illegal drugs and firearm possession. Murders are also on the rise. The new matters when added to the existing backlog requires management of the prosecution and judicial processes.

If a backlog case is defined as a case which is ripe for hearing and which has not been heard because of faults attributable to the Courts, we may be surprised to find that the number of backlog matters is not as great as publicly portrayed. A matter

is ripe for trial when you have completed all preliminary processes and have your witnesses ready to proceed. Courts are not responsible for matters which are not in backlog as above defined, however, criminal case management will allow the Court to manage the processes which can reduce backlog and promote efficiency in the system. If these reforms are achieved then it will be possible to put on a third Criminal Court so as to assist in the process of adjudication. This will require additional judges so that the civil trial process is not compromised.

It will also require additional prosecutors and support staff. Up until 1990 there had been no increase in the number of judges and until the establishment of a separate Court of Appeal in 1990 the same judges sat in the High Court, the Divisional Court and the Court of Appeal.

The allocation of human and other resources to the judicial arm of government is absolutely necessary if efficiency is to be achieved. An example is the Singapore experience where that country took a deliberate decision to employ more judges, support staff and innovative information technology solutions to reduce their backlog and make their legal system more efficient.

Standardisation of Sentences

To prevent judge shopping, which is always a consideration especially in the sentencing process, it is envisaged that sentencing guidelines will be introduced especially where the more serious offences are concerned. We already have such

guidelines in Manslaughter in **Pierre Lorde v R Crim Appeal No 11 of 2003**, however, as circumstances require, such guidelines may have to be instituted in other crimes and reviewed periodically to keep current with contemporary social, legal and normative changes.

Technology

Technological changes have been implemented in the criminal courts through the use of audio visual aids, computer assisted transcription and recording devices. We are keeping pace with developments in the technological world, however, limited financial and human resources present a challenge to the full utilisation of other available technologies which could enhance and expedite criminal trials.

Judicial Training

We have an ongoing system of continuous education for judges. Training of judges and staff in the new technologies to enable them to be able to flag relevant evidence, access the latest decisions of our Caribbean Court of Justice and other relevant authorities is necessary to achieve efficiency in trials and the delivery of summations.

Financial Resources

The Judiciary of Barbados is erudite, young and enthusiastic but quite human. If crime and civil filings continue at the present rate, the judiciary will continue to be overwhelmed through no fault of its own. To combat this, additional judges are

required. Under the Jurist Project three additional temporary judges were recommended to ease the backlog situation. We were unable to get them appointed given the present economic constraints. We continue to press for these appointments.

Specialisation

The appointment of specialised judges in the area of criminal trials is one way of improving efficiency in the system. This idea, along with the others discussed in this paper, will have to be discussed with the body of judges as a whole to ascertain their suggestions. The judicial arm of government is and ought always to be a body politic acting as one and consultation and consensus is a requisite of ensuring that we go forward as one.

Magistrates Courts

Similar problems relating to resources plague the Magistrates Courts. Their jurisdiction ranges from Civil and Criminal to traffic and domestic and they perform the functions of hearing liquor license applications.

The Criminal Courts are overwhelmed given the number of matters which are filed each year. The same adjudication process must be applied to criminal trials even though the jurisdiction is described as summary.

The Magistrates Courts requirements include but are not limited to:

- (1) Information Technology (IT) resources

- (2) Training of magistrates and staff in the use of IT resources
- (3) Recording facilities which will obviate the need for lengthy hand written notes.
- (4) Personnel

Drug Treatment Court

We must remind ourselves that offenders must be reintegrated into society at some point in time. The drug treatment court was introduced to facilitate intervention so as to ward off the more serious stigma attached to being convicted of drug offences. It is an attempt to save young persons from the scourge of drug use and the culture associated with drug use. The court is presided over by a magistrate and a judge is assigned to oversee the overall functioning of the court. This is a time consuming exercise and impinges on the time available to the magistrate and judge in the exercise of their other functions. That investment in time and resources will pay dividends in the future if we can rehabilitate young drug offenders.

Increase in Personnel

Present day Barbados cannot be compared with Barbados 10 or 20 years ago. Whilst magisterial boundaries have been unaltered, the amount of work has increased phenomenally. Outside of improvements to buildings, there have been no changes to the terms and conditions of magisterial service. There is a need to

look at the workload of the magistracy in relation the number of persons who presently occupy the available posts.

Increase in Jurisdiction

One way of reducing the workload in the High Court of criminal system is to increase the magistrate's jurisdiction. This will place an additional burden on magistrates which may be off-set by increasing the number of magistrates assigned to any jurisdiction. This is also a question of availability of financial resources.

Issues in relation to standardisation of sentences and sentencing procedures above discussed are also relevant to the magistracy.

Collaborative measures

The Jurist Project

The Judicial Reform and Institutional Strengthening (JURIST) Project is funded by the Canadian Government and is being implemented through the Caribbean Court of Justice. It involves the injection of about Can \$19 mil throughout the regional judiciaries to develop regional judicial systems and help in delivering timely and transparent outcomes. The project has been ongoing for over two years and we have begun to see the fruits of its implementation.

It ought to be apparent from the above discussion that the judicial system is but part of a larger criminal justice system in which various players have a role. In 2016 a collaborative workshop entitled "National Jurisdiction Planning and Knowledge

Sharing Workshop” as part of the Jurist Project was held on the 19th and 20th of May, in which the following stakeholders in the criminal justice system made presentations on areas within their remit:

The Judiciary including the Magistracy

The Registration Department

The Office of the Director of Public Prosecutions

The Royal Barbados Police Force

Her Majesty’s Prison Service

The Juvenile Liason Scheme

The Criminal Justice Research and Planning Unit

The Probation Department

The National Council on Substance Abuse (NCSA)

A number of key recommendations were made by the named stakeholders including:

Networking and staying current and informed with the actions of the JURIST project

Educating the public (for e.g. speaking at public forums)

The evaluation of critical procedures and necessary follow up and implementation

Sharing information across stakeholders

Follow up meetings with stakeholders

The improvement of electronic systems

Conclusion

We believe that the criminal justice system must continue to ensure that the rule of law is applied in Barbados. The present system derives from the old English system which we inherited and over the years innovations have been made in an effort to improve the delivery of criminal justice. Reform will require the input of all stakeholders and the continuous revision and reappraisal of those reforms. We endorse the conclusions coming out of the collaborative workshop, which will require the injection of funds from the executive. Only in this way can we hope to reform the criminal justice system.

The Honourable Sir Marston Gibson K.A. , Chief Justice of Barbados

William J Chandler, Judge of the High Court