

PANEL DISCUSSION: MEASURING THE RULE OF LAW¹

Chairperson: **The Honourable Judge of Appeal Justice V.K. Rajah**
Supreme Court, Singapore

Distinguished guests, friends.

Einstein observed, “Not everything that can be counted counts and not everything that counts can be counted”. There is much wisdom in this penetrating observation. Since this session is devoted to the abstruse science of measurement, may I amplify this Einsteinian gem by adding that not everything after counting counts because those who ought to count cannot always be counted upon to properly count. We evaluate indices in terms of validity. That is to say, are they measuring what they purport to be doing? Reliability, do they produce consistent measures for repeated efforts? And bias, are the values objectively true?

Measuring the rule of law is a particularly complex task, not unlike the squaring of a circle. The underlying concepts are both complex and multi-dimensional. There are two basic challenges: ‘conceptualisation’ and ‘measurement’. There are, as you heard this morning also ‘thin definitions’ and ‘thick definitions’. There’s also an enormous difference between the ‘rule of law’ and ‘rule by law’.

Further, there is an evolutionary dimension that militates against wholesale importation of ideals. Legal systems have evolved differently and at different velocities because they are invisibly tied to a society’s historical roots, socio-evolution, societal values and political maturation. Some who hail from the most mature legal systems are impatient for change and for subscriptions to their definition of rights. They manifest amnesia in not acknowledging that in the not too distant past, these systems too were afflicted by not dissimilar vices.

Evolutionary anthropologists will prescribe for them a therapy consisting of patience and understanding. On understanding, a good starting point might be Maslow’s celebrated work on the ‘Hierarchy of Needs’ which suggests that most mature societies will eventually arrive at some broad consensus as to how best to strike an appropriate balance between community and individual rights.²

With this in mind, perhaps the rule of law is best thought of as an ever-evolving configuration of structures, social attitudes and traditions. However, that does not

¹ The following Panel Discussion took place during the Rule of Law Symposium 2012, held on 14 February 2012, Tuesday, 4 p.m. in the Supreme Court Auditorium.

² See Abraham Maslow, “Theory of Human Motivation” (1943) 50 *Psychological Review* 370.

mean, in the meantime, that steps should not be taken to facilitate open discussions and the creation of aspirational comparators to improve the lives of our communities. This has particular significance for developing nations as there appears to be a general consensus that a co-relationship exists between respect for the rule of law, economic performance and the well-being of a particular society. While acknowledging that there are several aspects of every current index measuring the rule of law that remain debateable, there can be no gainsaying that these indices create international awareness and may also improve tangible deliverables over the longer run. In short, while they may not be universally welcome, they have at the very least stimulated a healthy debate about what ought to come.

At the risk of over-simplification, there is a simple taxonomy involved in every index. The first dimension is: What do we measure? And the second: Whose views should we rely on? In relation to both these dimensions, there are perennial problems of aggregating information, weightage, the need for granularity and the thorny issue of subjectivity. Surveys are often an imperfect measurement proxy for ascertaining ground sentiment. Surveys of business communities reflect a particular point of view inclined towards focusing on economic efficiency. More general surveys may suffer from unbalanced responses as respondents satisfied with the status quo may be less enthusiastic in conveying their views.

The challenge is first finding and then taking the right path. We are indeed privileged today in having on this panel, three internationally acclaimed experts on rule of law indices and more. Their efforts have led to a greater understanding of the benefits of the rule of law as well as the areas of improvement that different countries can make in measuring up to evolving international standards.

Each of them spends countless hours every year in promoting greater global awareness that there's room for improvement everywhere.

Mr. Mark Agrast is the Rule of Law Index Chair of the World Justice Project.

Mr. Stuart Kerr is the Director, Legal and Regulatory, of the Millennium Challenge Corporation, which is a U.S. foreign aid agency.

Mr. James Silkenat, a private practitioner in the leading U.S. firm of Sullivan & Worcester, is the President-Elect of the American Bar Association.

Now, we're going to do things differently from the previous session. I'm going to invite the first two panellists, Mark and Stuart, to do a presentation about the work they are doing, and James will then make some observations. And after that, we're going to have a question-answer session from the floor and while I welcome topics or questions on the subject that we have just covered, I am not averse to taking other questions as well. So let's see how it goes. That's how I'm going to tempt all of you to stay on a little longer. Thank you.

Panellists:

Speaker: **Mr. Mark Agrast**
Rule of Law Index Chair of the World Justice Project

Thank you very much Justice Rajah. It's a great pleasure to be here, to be serving on the panel with you and with my fellow panellists. I also want to echo what has been said in the previous panels about what an extraordinary experience this is for all of us—for those of you who live here and for those of us who are visiting—to

be able to participate in a discussion of such seriousness about this topic. To echo Professor Weiler, it takes a society that has the confidence, not to say courage, to be willing to have this kind of discussion in such a full and open way, and I hope that your questions will be equally open and uninhibited when the time comes.

You have heard a lot about the *Index* already today from others who have expressed their thoughts about it.³ So it is high time that you actually get to see the *Index* for yourselves.

The World Justice Project has spent the past five years developing, testing and refining the *Rule of Law Index* that you have in your materials.⁴ What began as a pilot programme in six countries now measures major population standards in 66 countries throughout the world that make up 84% of the world population.

In this presentation, I am going to provide a quick outline of the content, the structure, the goals and the methodology that we use and a few of the key questions that we have confronted in trying to design this particular instrument.

First of all: The purpose of this *Index*. It is an innovative quantitative assessment tool developed by the World Justice Project to provide a detailed and comprehensive picture of the extent to which countries adhered to the rule of law in practice across multiple dimensions.

It is designed to offer a robust, reliable and independent source of information for governments, policy makers, businesses, and civil society.

The *Index* has three principal goals:

The first goal is to assess a nation's adherence to the rule of law, not in theory, but in practice, as perceived and experienced by the average person. Now, the Minister told us this morning, and I agree with him, that we must look not at doctrine, but at reality. And that is exactly what this *Index* tries to do.

The second goal is to identify a nation's strengths and weaknesses in comparison to similarly situated countries. For those of you who have a chance to page through the *Index*, you know that every country has its strengths and every country has its weaknesses.

The third goal is to promote practical improvements by tracking incremental changes over time.

The *Index* has a number of features that distinguish it from other quantitative indices.

First, it is comprehensive. Other indices cover aspects of the rule of law. This *Index* provides a full picture of rule of law compliance in each country.

Second, the findings are based on new data collected by the World Justice Project from independent sources in each of the countries we measure. This contrasts it with other indices that rely on data aggregated from third party sources or sources that are self-reported by governments or other interested parties.

Third, the *Index* measures adherence to the rule of law by looking not to the laws as written but at how they are actually applied in practice. So, for example, with

³ *Infra* note 4.

⁴ A soft-copy of this may be found at Mark David Agrast, Juan Carlos Botero & Alejandro Ponce, *The World Justice Project Rule of Law Index 2011* (Washington D.C.: The World Justice Project, 2011), online: <http://worldjusticeproject.org/sites/default/files/WJP_Rule_of_Law_Index_2011_Report.pdf> [*Index*].

respect to your *Internal Security Act*,⁵ we do not look only at what it says; we look at how it is used. And that is what we do with respect to the laws in every country.

Fourth, the *Index* measures the rule of law as it is actually experienced. By combining expert opinion with rigorous polling of the general public in each country, the *Index* methodology ensures that the findings reflect the conditions experienced by the population—including marginalised sectors of society that often are not measured at all.

And finally, the *Index* is action-oriented. Findings are presented in disaggregated form, identifying strong and weak performers across the nine rule of law factors that we examine in each country.

To draw a medical analogy, the *Index* is a check-up, not a cure. It is a diagnostic tool that provides a general assessment of the health of the rule of law in a given country at a particular moment in time. It does not explain the causes of the conditions it describes and it does not offer remedies or prescriptions—although we hope it will be useful to those who seek to understand the etiology of rule of law problems and to develop remedies to address them.

The *Index* measures four rule of law dimensions, which are derived from a set of four principles that together make up our working definition of the rule of law. Some of these would fit within a thin conception, as some advocated earlier today; others would not.

To ensure the cultural universality of these principles, we have derived them from established international standards and vetted them through extensive consultations with experts from around the world. With all due respect to some earlier speakers, these standards are not Western. They are not Anglo-American. They are standards that have been broadly certified by the international community. If they are not certified by the international community, we do not use them.

The four principles encompass four indispensable attributes or dimensions of the rule of law.

The first is ‘accountable government’: the government and its officials and agents are accountable under law.

The second is ‘security and fundamental rights’: the laws are clear, publicised, stable and fair, and protect fundamental rights, including the security of persons and property.

The third is ‘open government and regulatory enforcement’: the process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient.

And finally, ‘access to justice’, which is provided by competent, independent, and ethical adjudicators, attorneys, representatives, and judicial officers who are of sufficient number, have adequate resources, and reflect the make-up of the communities they serve.

These four dimensions provide a basic structure for the *Index*, and they are broken down into nine building blocks, which we call ‘factors’. The factors, in turn, are further disaggregated into 52 sub-factors. The full list of factors and sub-factors can be found on the diagram on page 11 of the *Index* volume.

The first dimension, ‘accountable government’, consist of two factors: factor one, ‘limited government powers’; and factor two, ‘absence of corruption’.

⁵ Cap. 143, 1985 Rev. Ed. Sing.

Factor one measures the extent to which those who govern are subject to law. It covers the means by which the powers of the government and its officials and agents are limited, and by which they are held accountable under the law. It also includes non-governmental checks on the government's power, such as a free and independent press and other civil society institutions.

Factor two measures the extent to which the society is able to limit corruption, including bribery, improper influence by public or private interests, and misappropriation of public funds or other resources—all of which, I think you'll agree, have a corrosive effect on public confidence in the rule of law.

The second dimension, 'security and fundamental rights' consists of factor three: 'order and security'; and factor four: 'fundamental rights'.

Factor three measures how well the society assures the security of persons and property. It encompasses three dimensions: crime, civil conflict, and the use of violence to redress grievances.

Factor four measures the success of the society in protecting fundamental rights. As you've heard today, there is no universal agreement as to which rights are 'fundamental', and in the 63 years since the adoption of the *Universal Declaration of Human Rights*,⁶ new rights have continued to emerge and gain acceptance. However, factor four focuses on the relatively limited menu of rights that are firmly established under international law and most closely related to rule of law concerns, including equal protection; freedom of thought, religion and expression; freedom of assembly and association; fundamental labour rights; rights to privacy and religion; the right to life and security of the person; and due process for the accused.

The third dimension, 'open government and regulatory enforcement', consists of factor five: 'open government'; and factor six: 'regulatory enforcement'.

Factor five measures open government, which includes at its core the opportunity to know what the law is and what kinds of conduct are permitted and prohibited. This is one of the fundamental preconditions for achieving and maintaining a rule of law society.

Factor six concerns the fair and effective implementation and enforcement of administrative rules. This includes administrative procedures that are fair, consistent, and predictable.

The fourth rule of law dimension is 'access to justice', which consists of the final three factors: factor seven: 'access to civil justice'; factor eight: 'effective criminal justice'; and factor nine: 'informal justice'.

Factor seven measures whether ordinary people have access to a civil justice system that enables them to peacefully and effectively resolve their disputes without resort to violence or self-help. This requires that the system be affordable, effective, impartial, and culturally competent.

Factor eight measures whether the criminal justice system is capable of investigating and adjudicating criminal offences impartially and effectively, while ensuring that the rights of suspects and victims are protected.

Finally, factor nine concerns the role played in many countries by 'informal' systems of law in resolving disputes—including traditional, communal, tribal and religious courts. These systems often play a large role in cultures in which formal

⁶ GA Res. 217(III), UN GAOR, 3rd Sess., Supp. No. 13, UN Doc. A/810 (1948).

legal institutions fail to provide effective legal remedies for large segments of the population. This factor looks at whether informal systems are impartial and effective, and the extent to which they respect and protect fundamental rights. This factor is starred because the 2011 *Index* does not in fact measure it. The variety and complexity of these systems pose serious measurement challenges that we frankly have not yet been able to overcome. We're continuing to work on this problem and are hopeful that we'll be able to develop and present measures of informal justice systems in the near future.

As the challenges of measuring informal justice systems may illustrate, it is essential that the *Index* be culturally competent, taking proper account of diverse patterns of governance and differing political, economic, and legal systems, and cultural norms. The 2011 *Index* has been extensively tested to ensure that it meets that requirement.

The findings of the *Index* are based almost entirely on new data collected by the World Justice Project from two independent sources.

The first is a general population poll, or "G.P.P.", based on a probabilistic sample of 1,000 respondents per country. The poll is conducted in the three largest cities of each country and is administered by leading local polling companies.

The second source of data is a qualified respondent's questionnaire, or "Q.R.Q.", completed by in-country experts in civil and commercial law, criminal justice, labour law, and public health. The Q.R.Q. is deployed annually in each country and the G.P.P. is repeated every three years.

The resulting data set contains more than 400 variables, which are derived from the assessments of 66,000 members of the general population and 2,000 local experts in the 66 countries that are included in the 2011 *Index*.

This slide and the one that follows show you an example of the country profiles—in this case, the country profile for India—that result from the data we collect.

At the upper right, you will see the three cities we measured—Mumbai, Delhi and Kolkata.

Along the left margin, we indicate the country's income level and region. We also note the percentage of the country's population that is urban, and the proportion residing in the three cities we're measuring.

India is a predominantly rural society with only 30 percent residing in urban centres, and four percent in the three largest cities.

At the other end of the spectrum are highly industrialised urban societies, such as the United Kingdom, South Korea and New Zealand, and city states like Singapore.

The chart shows the country scores for each of the eight factors we're measuring. The first column shows the country's score for each factor, normalised from zero to one. The second column shows its global ranking; the third, its regional ranking; and the fourth, its ranking among its economic peers.

The second part of each profile presents a graphical representation of the country's performance. The four graphs, sometimes called 'spider web' graphs, display the results for each of the four rule of law dimensions.

Let's examine one of these dimensions: 'security and fundamental rights'. You will see that the scores are normalised from zero to one, with the lowest possible score—0.00—at the centre of the circle, and the highest possible score—1.00—at the outer edge.

Each sub-factor is represented by a radius running from the centre of the circle to the periphery. For example, highlighted at 10 o'clock, is sub-factor 4.7, 'freedom of assembly'. And at 1 o'clock is sub-factor 3.2, 'effective limitations on civil conflict'. India's scores are mapped on this chart using a heavy blue line. The regional scores—in this case, for the South Asian Region—are shown in green. The scores of India's economic peers—the lower middle income nations—are shown in red. And the top score worldwide is the purple dot along each radius at or near the periphery of the graph. The graphs enable the reader to grasp very quickly the relative state of the rule of law of the country in question. A very high rule of law would yield a large and almost perfectly round web. A low rule of law would be dictated by a small irregular web clustered nearer to the centre of the graph. In this instance, India scores relatively well on freedom of assembly, outpacing its regional and economic peers, while doing less well than its peers in limiting civil conflict.

The next example shows Russia's performance on another of the dimensions: 'accountable government'. Russia tracks its peers quite closely in most respects, but scores significantly below both its Eastern European and Central Asian peers and its upper middle income peers on the three sub-factors that measure checks and balances that limit the executive. This finding received international coverage, including this story from *The Washington Post*, noting that the World Justice Project had described "deficiencies in checks and balances... leading to an institutional environment characterized by corruption, impunity and political interference".⁷

The next slide shows another result that sparked a lot of press attention: the low score earned by the U.S. among high income countries for factor seven: 'access to civil justice'. The country with the highest score for this factor was the Netherlands; the lowest was Poland. The U.S. ranked 20th out of 23. It ranked 11th out of 12 nations in Western Europe and North America. The U.S. and the world press were not slow to take note of it.

A few examples of the international attention that the *Index* has generated: Here, the President of Colombia cited the *Index* in a speech to the Colombian judiciary, saying the government "must put all our effort into achieving a more efficient and effective criminal justice system".⁸

Here in Singapore, the media gave full and very balanced coverage to the *Index* report when it came out. *The Straits Times* wrote: "Singapore is ranked second [globally] in providing security to its citizens... The public administration of the country is also effective and corruption is minimal (ranked third), and the criminal justice system is among the most effective in the world (ranked fifth)."⁹

They then noted that "[n]otwithstanding the country's outstanding performance in most categories, there are substantial limitations on freedom of speech and freedom

⁷ *Index*, *supra* note 4 at 32; Kathy Lally, "Medvedev tells investors Russia will reform" *The Washington Post* (18 June 2011), online: The Washington Post <http://www.washingtonpost.com/world/medvedev-tells-investors-russia-will-reform/2011/06/17/AG7mOAZH_story.html>.

⁸ See "Gobierno le pide la Corte más proactividad para reformar la justicia" *El Espectador* (15 November 2010), online: El Espectador <<http://www.elespectador.com/noticias/politica/articulo-229897-gobierno-le-pide-corte-mas-proactividad-reformar-justicia>> [translated by author].

⁹ "Singapore ranks 2nd in providing citizen security" *The Straits Times* (14 June 2011), online: The Straits Times <http://www.straitstimes.com/print/BreakingNews/World/Story/STIStory_679616.html> (last accessed 20 July 2012; link no longer accessible).

of assembly, with Singapore in 50th and 61st place, respectively, out of all 66 countries.”¹⁰

The *Index* is the product of a rigorous data collection and aggregation methodology. But all indices are subject to measurement errors, erroneous assumptions and other uncertainties. To help us identify any such problems and address them, we asked the Econometrics and Applied Statistics Unit of the European Commission’s Joint Research Centre to undertake an independent review, known as a ‘sensitivity analysis’, which examined the conceptual and statistical coherence of the *Index* and the impact of modeling assumptions on country scores.

Their findings, which are included in the *Index* volume, provided the independent confirmation we were seeking, confirming the soundness and integrity of the *Index* methodology.

While we were very pleased by this result, the *Index* remains a work in progress. It has come a long way over the past five years, but we continually seek to improve and refine it. Conferences like this one are one of the best ways we have of doing that.

The final slide shows the timeline of the development of the *Index*, from its design phase beginning in 2006 to the pilot we conducted in six countries in 2008, field testing in our first 35 countries in 2009, the publication of the first *Index* in 2010, and the current version of the *Index* in 2011. This coming fall, we will release the 2012 *Index*, which will include reports on 100 countries.

And so on behalf of the World Justice Project, I want to thank you for your hospitality and your interest in the *Index*. I look forward to your comments and questions.

Speaker: **Mr. Stuart Kerr**
Director, Legal and Regulatory,
Millennium Challenge Corporation

Good afternoon to all of you, I am here on behalf of the U.S. Government. I regret that I am not one of these academics or scholars who put together the fancy indices. I am here to speak as a consumer of the indices, both law-related and others. I have to, in talking about my organisation’s use of indices, do a little bit of MCC 101 now—a little introduction to our organisation. We’re a little different than some other government aid institutions.

So I am going to tell you a little about MCC itself, Millennium Challenge Corporation: how we work, our own institutional transparency, our focus on selectivity of the countries we work with, and I will focus a little bit about the aspects of how we work. I’ll try to move along briskly.

We are a Government agency. We’re small. We’re probably the newest foreign assistance agency globally—we were rolled out in 2004. We’re an independent agency. We have our own legislation and our own Board. My boss is the Secretary of State as she chairs the board, but there are other government representatives, other ministers on our Board, as well as private sector representatives; so we operate independently, but the Board makes the final decision on the upper level things. For

¹⁰ *Ibid.*

a bit of scale, we have a budget of about a billion dollars a year. We concentrate on a small number of countries and I'll explain how that works.

Compared to the U.S. Agency for National Development which is a large and more important agency with a budget of about 12 billion dollars a year, we are very small. I think the World Bank normally loans about 20 billion dollars a year, even if it's soft loans in many cases. All our money moves purely as grants. We have a staff of about 275 people, so we're small. We work very closely with other aid agencies both in our Government and in other countries and internationally. This is just a quick graphic on the screen of where we are working, the blue countries are places where we have what we call 'compacts', the large grants, and I'll explain that a little more later. In the green countries, we have some small programmes, called 'threshold programmes', for countries not yet eligible for the very large grants. These small grants tend to be in the 15, 20 or 30 million dollars range. The large grants are worth 400, 500 or 600 million dollars per country, and they are pure grants.

We mainly operate in low income countries, using more or less World Bank standards, but up to 25% of our budget can be allocated to lower-middle income countries.

This slide basically explains the three areas in which the indices' measurements are very important for us and on which our selections are based. Good governance includes a good rule of law measurement, a number of other law related aspects on how countries organise themselves, and other sorts of descriptions like economic freedom.¹¹

The whole premise of our institution is that we will basically reward the small number of countries that can be shown as performing better than their peer countries. This means that low income countries are only judged against other low income countries, and the middle income countries likewise are normally judged against peers. This can lead to awkward moments but they are sort of intended to lead to awkward moments. A specific example, Tanzania has a compact with us that's worth about 697 million dollars, a good amount of money to a poor country. And Kenya, next door, has no compact, nothing; they've actually got a small threshold programme. Tanzania, very pleased. Kenya not very pleased. That makes a point. We'll now get into the actual indices and show how countries are judged.

We are an experiment as an institution in a lot of aspects. As I mentioned before, the selection of countries is competitive. Once the countries have been selected, the first step is for the countries to prepare a 'constraints analysis'. This is basically looking at what their major constraints to economic growth are. The country then proposes projects that they would like to undertake with our funding. The countries do the design work, and in cooperation with our economists must put together convincing arguments that those projects will have significant economic rates of return. This is not in terms of MCC getting its money back; the money does not come back to the U.S. However, the individual projects must indicate a higher rate of return against the current rate of economic growth in the given country.

¹¹ See "Selection Indicators", online: Millennium Challenge Corporation <<http://www.mcc.gov/pages/selection/indicators>> which broadly states the selection indicators utilised by MCC in determining a country's eligibility for its programme assistance. The three broad categories within which their various indicators are classified under include: 'economic freedom', 'investing in people', and 'ruling justly'.

Consultative process: this means that the kinds of activities suggested by the governments must be tested with their populations in a way that is transparent. We want to make sure that the activities proposed, even if they have good economic rationales and even if they have good outcomes for raising incomes among the poor, are not merely the projects that are the most popular with the Ministry of Works or Ministry of Finance, but that they have support within the country.

The countries implement the programmes as well. They set up large units, typically, 40 to 80 people to manage these projects over the five-year timeline of the compacts. Very extensive monitoring and evaluation programs are implemented from the start. If the country is not performing in a way that they had promised to perform, the money will vanish. Unlike most aid agencies, we're rather strict both at the beginning and the middle. I managed the project in Benin, a 34 million dollars 'access to justice' project. The government was, continually over a couple of years, not making the changes that had been part of the deal and so a lot of the project funding was removed. We felt bad but it's all part of the contract, part of the compact.

This slide is really just a quick description of the two distinct types of programmes we use, the 'compacts', the big programmes, and the 'threshold programmes'. This is not a 2010 number but I think we have about 10 billion dollars allocated now.

Again, there's competitive selection, here are the indicators that we use and I'll get to those quickly because that's where the fun is. I'll put up a more visible score card, as we call it, in a minute, but I just want to illustrate our selection process. We call these 'score cards'. They are produced for low income countries, and lower-middle income countries, so we don't have a score card for Singapore, although I'm sure you would see a vast array of green (or 'passing scores') for Singapore.

This is Ghana versus Zimbabwe on the screen. You can wonder, or argue about many of the individual pieces, but I think it's generally pretty clear that Ghana is doing a better job for its people than Zimbabwe. Just again sample indicators: 'civil liberties', 'control of corruption', 'immunisation', and our three big categories, 'ruling justly', that's one of the factors in the area of rule of law. I will get into that later but we really want to use an array of law related points in our 'ruling justly' section. The 'investing in people' section—that's basically asking, "What is your government doing for you?"—involves things like education and health, to the extent that they are easily measurable. One point about these indicators: many of them are proxies, and individual indicators obviously don't tell everything. For health, we look at vaccines and vaccinations of children. It's easier to measure those than many other things, but again they tend to serve as useful proxies for broader policy concerns.

Again, these are the indicators in the three areas, broken down. Let's talk about 'ruling justly' and 'civil liberties'. Actually a point about all of these, in the indicators that we have used, there's not a single U.S. Government set of measurements used for this. They are all from international organisations: the United Nations Educational, Scientific and Cultural Organisation, World Health Organisation, World Bank, International Fund for Agricultural Development, International Finance Corporation, and very large non-governmental organisations ("N.G.O."). Therefore, one of the things in the whole concept of the MCC is that the decisions for how the money moves should be as transparent as possible, not subject to political pressures from

Capitol Hill or from the administration. We're meant to be a window for development financing that is somewhat separated out from the short term political concerns that all governments are subject to.

The State Department may on a given day want to provide a great deal of assistance to a particular country. Our whole point, and this is in a set up by the administration and by our legislation, is that by rewarding those countries that perform well in these factors, that are doing good things for their people and which we think are more likely to succeed economically, we will be able to help raise their rate of economic growth, and reduce poverty in them in the long term. We're trying to separate these factors from merely politically based decisions.

I just put a slide up so it is a little bigger and you can see some of these 'ruling justly' terms, and an interesting case, Uganda. Also, we've changed our format so in this fiscal year 2012, we have two slightly different formats. We're changing what the indicators mean and how we weigh them.

On the top row, you will see a big red box. It's for the 'control of corruption'. Until this year we considered it our one 'hard indicator'. That is, even if the rest of the whole sheet were a sea of green, if a country rates below the median of its peers on 'control of corruption'—no compact is possible. All the black lines in the middle of each individual indicator are median points, so each country is not scored on absolute terms. I'm sure that even in some lovely European country, corruption exists, probably even in Sweden. But these judgments are against peer countries, lower income countries are rated compared to the median against their peers; similarly with lower-middle income countries.

This slide shows the somewhat new form that we're shifting into this year. We added a couple of factors in 'economic freedom': 'access to credit' and 'gender in the economy'. That's brand new, but we're still basing our selections on the three main areas, 'investing in people', 'ruling justly', and 'economic freedom'.

Look in the upper right hand corner again. In response to questions from the public and from Capitol Hill, we have mandated another hard requirement (not quite a single hard requirement like the 'control of corruption'), but for this second factor, 'democratic rights', countries must be in the green, meaning above the median, for either the civil liberties or the political rights indicators. Until this year, each country had to be in the green, a passing score on half or more in each of the three distinct categories. Now, you can mix and match virtually as you will so long as you are above the median on half of all factors, plus 'control of corruption' and 'democratic rights' factors.

Again, are all these indices great? Will they always tell everything? Absolutely not. Personally,—and people at MCC know—I don't like two of them. I don't like the trade one, because it is basically bound tariff rates and I don't think that tells everything, and the business start-up indicator for which we use a World Bank/Brookings indicator. I think it was a nice proxy for most countries five or six years ago on how easy it was to do business in them. However, I think it is a relatively gameable index compared to many. In a lot of the countries where we work, they put a lot of effort in the last four or five years into making it easier to register, making it faster, making it a little cheaper. However, they haven't always shown such alacrity in trying to make it easy once you are legally established. You may still be expected to offer bribes to someone coming to inspect on a regular basis. They may have a terrible tax regime,

it doesn't capture that. I mean, we need to look for something other than the business start-up index.

Then again, all these, they're all human constructs, they are imperfect, but interesting. I can't recall anybody saying these are terrible things to be measuring, these aren't the right things to measure. Last week I met with a group of political leaders and N.G.O. leaders from a dozen francophone African countries, including some pretty tough cases and nobody said, "No, no, no, you shouldn't be measuring these, it's invalid to look at these factors". Some said, "Well, they don't really capture the evolution that is taking place in our country, we think this is a bad measurement of what the reality is". However, it is very interesting, I have never heard anyone saying that these aren't things that are worth measuring, or that they aren't important for a country's progress.

Here's a little more detail on one indicator, that hard indicator: 'control of corruption'. Note that it's not just a perception-based indicator. It's an array of 22 different assessments and surveys, some of which are perception indicators. It does include Transparency International's 'corruption indicator', among others. Then again, some of the other surveys included look specifically at existing laws in the country. Do you have Law A, B or C? It looks at how vigorously the given laws are enforced, as is the case for most of the other indicators. It's not merely a perception-based set of measurements. Similarly, the rule of law indicator that we use, which is from the World Bank, is a relatively 'thin' indicator, in the parlance of today. That said, it's combined with all these other 'ruling justly' area indicators which do include human rights related indicia.

As a lawyer, it is very interesting to be at MCC because we're full of economists and most of my career has been in this business of law reform, which is every working day for the last 30 years. Until I came to MCC I worked mainly with lawyers, so we could all talk about terms we understood in common. Lawyers in general value the rule of law, however defined. If you're with economists, you're starting from scratch. You have to basically make your argument every day with them on "why does any of this matter?" because they are hard to convince and they want to see the numbers. It is, actually, frankly, a kind of failing I would say for all of us who work in the world of law reform. We're not necessarily as numbers-oriented as we might productively be in proving the rationale for those changes that we think are useful for measuring the economic value and the outcome of the work done.

Frankly, a lot of MCC's work institutionally tends to be largely physical infrastructure. If a country has a chance for 500 million dollars, they are unlikely to want to spend it on fixing up their bankruptcy law. I'd rather spend it on fixing up the bankruptcy law than the highway or the airport but I'm not the chief executive of these countries.

I think we're seeing some interesting evolution in the U.S. on how foreign assistance should be applied. There is a much greater emphasis in the last couple of years on focus and selectivity; working with those countries that are heading in better directions, focusing efforts with many government agencies. Over time I think you'll see more foreign aid institutions adopting some of MCC's practices. We're still just a small piece of a very big puzzle.

One point I want to make—in the website for this programme, there's a very detailed guide to each indicator that we use, how it's put together, how it's used, the

rationale for the use of it.¹² I would sort of urge those of you who are curious about these arcane subjects to have a look at that. It's a nice document, but it would take too long to discuss right now.

A final point I'd like to make is a little beyond the rule of law indices, but it is about Singapore and the world. I know that Justice Rajah has been involved in some programmes in Africa, reform and judicial organisations there. I know that Singapore works with the Commonwealth on activities here and there. However, given the success of Singapore in creating an extraordinarily successful business environment and in improving the speed, the response, the administrative effectiveness, and fairness, in the administration of justice, I really urge you to have a discussion about increased involvement in Africa. I'm sorry that your Minister of Law and Minister of Foreign Affairs isn't here right now because I'd like to make a pitch to him personally for a much more vigorous involvement of Singapore in the world of law and development beyond A.S.E.A.N. I'm looking to you as a Commonwealth country, a common law based country. There are an awful lot of countries in Africa where they are very aware of the need for improved judicial systems. MCC works with some of them in a small way. Obviously, the Commonwealth and many aid organisations work with others. I just think that Singapore has something very unique, very valuable to do and your success provides a powerful example. You have money and expertise, and you should be out there involving yourself even more so. My apologies for making a sales pitch in the end. Beyond my remit, but you know, this is my life—law and development. Thank you very much.

Speaker: **Mr. James Silkenat**
President-Elect, American Bar Association,
Member, Board of Directors, World Justice Project and
Partner, Sullivan & Worcester

Well, good afternoon, everyone. I'm very pleased to participate in this Conference and to be in Singapore again. My legal practice over the last 30 years has focused very much on Asia and I'm very admiring of all that Singapore has accomplished and the progress that's taken place here.

I was particularly pleased to be personally included in the Minister's remarks this morning, along with Lee Kuan Yew and Thomas Jefferson, although of somewhat less acceptance than either of those gentlemen. Still this may finally be something about my legal career that will impress my children and grandkids.

I'm going to talk today very briefly about the non-*Index* aspects of the World Justice Project and to suggest some ways in which all of us can work to support the rule of law. The World Justice Project is an independent non-profit organisation that works to advance the rule of law for the development of communities of opportunity and equity.

Started by the American Bar Association and a number of other Bar Associations around the world, but now a wholly independent freestanding entity, we have a very multi-national Board of Directors, including representatives from Qatar, Romania, Afghanistan, U.S., Brazil, South Africa and, as of last week, a representative

¹² See *ibid.*

from Singapore. A very prominent lawyer here has joined our Board and will be participating on our Board in the future and we are looking forward to that.

Our Board is also multi-disciplinary in character, not just lawyers and judges, but including educators, media personnel, and government officials. We're really trying to include all parts of society in what we do at the World Justice Project. Our efforts are multi-national and multi-disciplinary, aimed at government reform and the development of practical programmes on the ground, in support of the rule of law and an increase of awareness about the concept and impact of the rule of law.

Now, we heard here that the World Justice Project is based on two premises. First, that the rule of law is the foundation for creating compact communities of opportunity and equity. Second, that multi-disciplinary collaboration on rule of law programmes works best. Not just lawyers and judges, but all professionals and all parts of society have a meaningful stake in the rule of law. I think that's an important distinction between what we do and what some other groups may do on rule of law issues.

The World Justice Project has several different components, Mark Agrast has described one of our more important ones here, the *Index*. However, it plays into some of our other projects and I'm going to talk about some of those.

Mark has talked about the definition of the rule of law. This is a definition we've tested with numerous audiences both domestically in the U.S. and internationally in different forums, and is one that I think is now becoming accepted by most experts; although having heard the presentations this morning, I'm starting to question that a little bit. It is also one that addresses most important issues in almost all societies, and is neither based on, nor biased towards, I think, the West or U.S. practices.

We are continually looking for ways to improve it and we welcome your suggestions and ideas on ways we can improve the process. Having defined the rule of law, how do we measure it? How do we see whether particular societies are performing on a wide range of criteria dealing with different aspects of the rule of law? It must be measured. What steps can we take as leaders of the legal profession, or just as leaders of our families and communities, to strengthen the rule of law?

The other parts of the World Justice Project that are particularly relevant to this Conference include the Global Rule of Law Conferences that we hold every 18 months or so. We started holding them five or six years ago now, in Vienna, and the most recent one was in Barcelona. The idea is to hold events, sort of like the Davos World Economic Forum, that bring together leaders from a variety of professions to come up not only with strong discussions of the rule of law, but with practical ways to implement the rule of law initiatives when such leaders return home.

The World Justice Forum brings together 500 or so world leaders at a time to focus on these issues and represents up to 100 countries and more than 20 different disciplines or professions, ranging across business, government, media, faith leaders, military, human rights, educators, labourers, and science. All of those disciplines, all of these professions, have a stake in the rule of law.

Our regional conferences which we hold in between our major global programmes, have taken place in Prague, we've had one here in Singapore, one in Buenos Aires, Cape Town, Lima, Peru, Malaysia, Morocco, Ghana and Washington D.C. We've tried to engage with audiences, really around the world, to develop specific rule of law initiatives that these leaders can implement when they go home.

The World Justice Project then provides seed funding to finance the best of these projects, including ones on: women's rights in Sierra Leone; workers' health issues in China; environmental concerns in Peru; and election law reform in Eastern Europe. These are all a bit experimental in character. We're trying to see what works best in a particular country; what works best with a particular segment of society. As I indicated, this is a continuous process for us and the folks with whom we work.

Now, lawyers have a supporting role in many of these projects but they are intensely local in application and involve more than one discipline in each case. We find that that makes them most effective. Politicians will occasionally listen to lawyers and judges but they'll really pay more attention if voters are involved, if leaders from the education, leaders from labour, leaders from business and other parts of society are also involved. If they care about rule of law issues, then legislators will likely pay attention too.

On the domestic side of the U.S., which is an increasing priority for us, the World Justice Project has worked with local institutions in more than 35 states now, to create many versions of the World Justice Forum on a state-wide basis. Usually these efforts are led by State Bar Organisations, but sometimes by the State Supreme Court Chief Justice or a law school. They usually last for a day or so and bring together again leaders from a variety of segments of society to focus on these issues. Many of these state programmes are aimed at adult groups but several are also aimed at high school students and college students, which connects very well, I think, with the American Bar Association's Civics Education initiatives.

The World Justice Project also provides funding and logistical help to these state-run rule of law initiatives and we're hoping to see some of this regional outreach take place not just in the U.S. but in other countries where we've had rule of law initiatives; and we are starting to see that. Getting a response from perhaps the Singapore Bar Association, the Law Society here to focus on some rule of law projects and to pursue discussion in the same way here would be a very welcome step.

Another component of the World Justice Project is an academic component. Teams of scholars organised to provide a rigorous back-up to our natural inclination/belief that the rule of law matters. These teams are in both cases led by Nobel Prize-winning economists and have published a number of studies on why the rule of law really does matter to developing societies.

When we look at the changes that are taking place now in the Middle East and North Africa today, and see the hunger of the citizens for a democratic society and the rule of law, that's a very moving and powerful statement. However, there are problems in the U.S. and perhaps here in Singapore that we need to solve to protect and strengthen the rule of law. Conferences like this, whether they take place here or in the U.S., are an important step in that work, and there is much work for us to do and much for us to learn. Thank you very much.

Speaker: **Justice V.K. Rajah**

I am going to start off by inviting any observations, questions from the floor, anyone? Normally, I can count on one person, Michael Hwang. Michael, have you got anything to say, or ask, or any observations? I knew I wouldn't be disappointed.

Question from: Mr. Michael Hwang

I am just wondering why we are having this conference at this particular time, when the issue of the rule of law actually, as existed in Singapore, was highlighted as long ago as 2008, when the International Bar Association's Human Rights Institute ("I.B.A.H.R.I.") issued its country report on Singapore.¹³ I think it was publicised to some extent. What happened was that the I.B.A.H.R.I. published a draft report and furnished it to the Singapore Government and Law Society, asked for their comments, got the response, and then eventually issued the final report. Passing over the details of the report for the moment, that was the time when the issues raised in that report could have been discussed openly because the report had a conclusion which was not entirely favourable to Singapore. However, more interestingly, it ended with 18 specific recommendations which it said Singapore, mainly through the Government, but also the Law Society, should adopt in order to have a more enhanced version of the rule of law or human rights hidden regime.

Now, I come from the Bar and I've noticed that of the entire faculty over these two days, with due respect to Jack Lee who did practise at the Bar for a short while, we don't have a single practitioner on the faculty and so that perhaps explains the rather high level of discussion that we've had so far. I think basically, as far as today is concerned, I'm just wondering whether Singaporeans as a whole, as Thio Li-ann said, are rather pragmatic. We're less concerned with what you call something, than what the situation really is. In short, Singaporeans, I think are concerned with, "Are we happy with the situation that is this?" We are not particularly concerned about the terminology of what we are given and so while I enjoyed, really enjoyed, the keynote address as to the way in which we define the rule of law and with which I actually agree quite wholeheartedly, perhaps this Conference could develop some specific issues for discussion, taking for example, those 18 recommendations. I mean, not to say that the 18 recommendations are worthwhile in themselves, but they form a useful basis to examine how the world looks at Singapore and to see how Singaporeans respond to the way in which outsiders look at us. Jack Lee and Eugene Tan have examined what the local critics of the Singapore system are saying and what local response is, but we haven't looked at the international criticism, and I think, frankly from both points, or from two points of view, we are interested. We are interested to know what other people think about us. We should then debate amongst ourselves as to how we will respond.

There are two particular reasons. First is that, as the Minister said this morning, the rule of law is very important to the way in which a country's attractiveness as an investment and business destination is perceived by the outside world. Second, many of us have travelled abroad for business as well as for pleasure, and when we are abroad, we are rather proud to wave our little red books and say that we are Singaporeans. Sometimes, we get a little put off by reactions from certain communities who, of course, would praise our Singapore Mass Rapid Transit, but will also offer some comments about the way in which we run our system, and we would like ourselves to be able to convincingly rebut those criticisms of our system as well as

¹³ This report may be found at "IBAHRI – IBA Human Rights Institute – Singapore", online: I.B.A.H.R.I. <http://www.ibanet.org/Human_Rights_Institute/Work_by_regions/Asia_Pacific/Singapore.aspx>.

perhaps offer our own objective comments. We can't really begin to do that until we have a full and frank debate within ourselves which I think, at this stage of our development, we are ready for.

Speaker: Justice V.K. Rajah

Thank you, Michael. I knew I could count on you to get us going.

Let me first be very direct. Your first question was why are we having it, this conference today, some three to four years after the draft report and its responses were dealt with. I'm afraid I'm the wrong person to address the questions inside. I'm not responsible for organising it but I am sure that you can re-ask the question tomorrow and you'll probably get an answer. Having said that, you have made a number of interesting observations. Since James was intimately involved with the report and the dialogue session as well, I'm going to ask him first to respond and I'll add a few footnotes.

Speaker: Mr. James Silkenat

I was very impressed actually with how the Government here responded to the World Justice Project's first review of Singapore. The first response we received was really one of irritation, how come Singapore wasn't ranked number one in absolutely everything? Once we got over that part of the debate, though, we have really been able to engage very seriously with the Government on a number of issues. The openness that they've shown to comments and concerns from the outside, I think has been very impressive and the willingness of the Government or the sponsoring institutions here to engage in this kind of discussion, this kind of debate, even when we don't all agree, particularly, when we don't all agree, has been very impressive.

Speaker: Justice V.K. Rajah

Michael, I'm not in a position today to address each of the 18 issues you are referring to, but perhaps I can address it in a very broad way.

I think the approach that's been taken here is when we talk about the rule of law, when we talk about fairness, we look at the entire eco-system. We don't just focus on one or two issues. This is where the *Index* that Mark and the World Justice Project have put together is particularly relevant. While not everyone here may agree with some of the scores, as James has said Singapore wants to be number one on most scores and I think observers like the World Justice Project do not agree, the fact of the matter is that there is engagement, there is a conversation that has been started, and it's a meaningful conversation, and that, in itself, I will say is progress. You want to say something, Mark?

Speaker: Mr. Mark Agrast

I only wish that we had this level of interest and sophistication in all of the countries where we have conducted these measurements. It is tremendously valuable for us to engage at such a high level as we continue our efforts to perfect this instrument.

Speaker: Justice V.K. Rajah

Any other questions? Yes, Mr. Ravi?

Question from: Mr. Ravi

Whilst we express a lot of confidence in the way the system operates in Singapore and, of course, of how some of our foreign speakers are quite impressed with our development, I must say that the new generation, or the new normal generation of Singaporeans, quite constantly finds the discourse of the rule of law pathetically centring on distrust and fear mongering. I think this could also be the kind of authoritarian model which we are afraid that other states might emulate because of the economic success of Singapore.

One symptom of that is the *Legal Profession Act*,¹⁴ which was amended in 1987 to muzzle the Law Society of Singapore from speaking up on legislation. What kind of legislation restricts the Law Society and the distinguished members of the Bar from making their contributions to society? In fact, I suppose this may be one of the 18 points of recommendations of the I.B.A.H.R.I. Another mature approach lacking in the Singaporean regime is the response to international criticism. On the one hand, when there is actually a world competitiveness report on Singapore ranking it very highly based on western economic principles, or coming from western economic agencies, we are very gratified. On the other hand, when you have a freedom index, for example, criticising the rule of law in Singapore, the Singapore Government becomes overly sensitive and reacts negatively. This inconsistency is very difficult to digest, and an increasing number of Singaporeans are finding it difficult to swallow this kind of hollow arguments.

Finally I would like to touch on the topic that came in the earlier panel which was prosecutorial discretion and a question, a very important question, raised by the Attorney-General himself, who was chairing the session, was whether the prosecutorial discretion has an element of encroaching on the separation of powers. It is very clear that the prosecution's powers in Singapore—and borrowing the concept of an eco-system, this eco-system—is centred too much in favour of the prosecution and executive in Singapore. This actually calls for the courts' intervention to preserve the principles of natural justice. I'll be very specific here. In Singapore, you have the mandatory death sentence, instead of a death penalty *per se*. In fact the Attorney-General quoted the case of *Armstrong*, a U.S. case.¹⁵ However, if you were to compare Singapore with countries like the U.K. and Hong Kong, these two latter countries don't have the death penalty, and yet they have transparency—they have a code of conduct, or codes for transparency, for prosecutorial discretion. In Singapore, you don't have any. We lack transparency. Since there is so much transparency when dealing with economic indices and so on, why not have transparency in administrative decision making, why not have it when it comes to the death penalty? The right to life should include the right to disclosure and the right to highest scrutiny and transparency before an accused person's life is taken away. And that is when, when it comes to the prosecution's decision making on whether one is to live or die,

¹⁴ Cap. 161, 2009 Rev. Ed. Sing.

¹⁵ *United States v. Christopher Lee Armstrong*, 517 U.S. 456 (1996).

that is decided by the prosecution when they manipulate or rather they decide on the evidence whether to allow one person to die and one person to live. That should be left to the judges. Or for that matter, that should be where there is more latitude, where there should be a brief sentence report which the judges could have the benefit of. And also, you don't, in the last twelve years for example, there's hardly a single clemency granted, not a single clemency granted by the President. In fact, the clemency process is to mitigate the harshness of the mandatory death sentence. You don't have a single clemency granted. Even at the stage of the clemency process, the Attorney-General's advice is sought and even when it comes to charging decisions, the Attorney-General decides not only as the judge but also as the jury. That is where we have a difficulty with the separation of powers. We need judicial intervention for a progressive approach to the right to life. Thank you.

Speaker: Justice V.K. Rajah

I was just wondering, is there a question at the end of it? Oh, it's a comment. Well, I'm glad to see that you feel completely at ease to make all these comments and that itself is progress. I'll ask James to respond first, and then I'll make some observations.

Speaker: Mr. James Silkenat

As a leader of the Bar Association in the U.S., I was particularly struck by your first point about the limitations on the Law Society here and its role and comments. This was actually a topic of discussion at lunch earlier today and my understanding is that the Law Society here is prohibited from offering legislative suggestions *unless asked*. Those were the two magic words. Since the Minister is not here, I think I can tell you that my advice to the Law Society at lunch was to ignore those two words and to go ahead and give advice if you felt it was appropriate. The Attorney-General is here, so maybe I shouldn't make that comment. In the U.S., and one need not use this as an example that one ought to follow, the Bar Association regularly takes very strong views, both the pros and cons, on legislation that is being proposed or that is in effect in the U.S., so I think that is something that lawyers naturally do and ought to do. I feel very strongly about that and I hope that the Law Society here will find a way to engage with the Government on these issues frequently.

Speaker: Justice V.K. Rajah

Well, I think Michael has been having conversations on some of these issues when he was the President of the Law Society and I'm sure these conversations are continuing. I don't think any further observations from me on this particular issue will make any real difference. However, you have raised a number of issues on a number of points.

Let me very briefly deal with the issue of prosecutorial discretion. You were involved in a recent decision and you are making an observation on that decision. I was a member of the quorum. I will just make two points in relation to that and I will say that everything else is in the judgment.

Singapore and the Court of Appeal have not taken such an unusual position in relation to the extent of prosecutorial discretion that has been vested in the Public

Prosecutor under a Westminster model. In fact, the decisions we relied on in coming to the conclusion were, *inter alia*, American and English decisions. At the end of the day, one can quibble and talk about the ideal system but there must be a system where there is a balance of rights and in this case as we explained, the Attorney-General, the Public Prosecutor, is an office of high constitutional importance and at the end of the day a certain presumption must operate that unless there are some grounds to show that he has abused its discretion, the courts cannot speculate or intervene in the exercise of the discretion.

Now, you may not agree with that but there are sound bases and sound reasons that are not purely Singaporean in coming to that conclusion. On the other points you have raised, I think we can certainly have a healthy debate on some of these issues but as some of them may be *sub judice*, I'm not going to get involved in that. You can certainly raise some of these questions tomorrow; there's another panel session and perhaps you may get more fulsome answers. Any other questions? Yes?

Question from: [Lady from the floor]

Thinking specifically of measuring the rule of law, I wonder what the panel members think of the inclusion of the following criterion: how a country deals with past abuses, whether they're prepared to acknowledge or not. It's very popular these days, even in Singapore, to say sorry. One wonders whether a country's willingness to come to grips with past abuses, let's say, for example, abuses of the *Internal Security Act*,¹⁶ whether a country's preparedness to do that should, as it were, be given a bit of a boost in the ranking, that's my question.

Speaker: Justice V.K. Rajah

Mark?

Speaker: Mr. Mark Agrast

It's an excellent thought. We have not incorporated notions of redress for past wrongs or the issue of impunity but I'll be very interested in talking with you further about it and seeing whether it has any appropriate application. Generally speaking, it is an issue that confronts the society that has had severe rule of law problems and would come under the general heading of 'remedies' which broadly speaking we do not address in the *Index*.

Speaker: Mr. James Silkenat

On the other hand, the *Index* does measure progress or lack of progress on this range of issues over time, so that if a government doesn't handle the issue well in year one, but by year three (for whatever reason) has responded and shown improvement, the *Index* will show that.

Speaker: Justice V.K. Rajah

Michael, you wanted to follow up?

¹⁶ See *supra* note 5.

Question from: Mr. Michael Hwang

I wanted to raise a question from Mark, I think, on the *Index*, the way he calculates it. I'm curious about the way that the factors are set out. Factor seven is 'access to civil justice'. Factor eight is 'effective criminal justice'. 'Access to civil justice' speaks for itself. 'Effective criminal justice', if you look at the analysis on page 11, describes ready enforcement, and what kind of system you have. Now, what happens to access to criminal justice? Most definitions of the rule of law have something to say about the right of indigent accused to have legal representation, right? I don't find that specifically measured in this *Index* and just looking through the way that it's classified, I just wondered whether it was classified under 'fundamental rights' because you've got "4.3 [d]ue process of law and the rights of the accused are effectively guaranteed".¹⁷ You know, we score very lowly in that regard, so I wondered whether the fact that Singapore does not have a mandatory system to provide for criminal legal aid was factored into the *Index* in some way.

Speaker: Mr. Mark Agrast

It is factored in and you've guessed exactly right. It is treated not under the 'effective criminal justice' factor (factor eight) but under the 'fundamental rights' factor (factor four) as a matter of due process of law. You measure it—

Question from: Mr. Michael Hwang

So it is taken as a given that the right to criminal aid is an integral part of the rule of law?

Speaker: Mr. Mark Agrast

Yes, not just the right to representation but to effective representation. That's a big problem in the U.S. It's a big problem in many developed countries, particularly in capital cases. The *Index* seeks to evaluate the quality of representation, not simply the fact that someone who can represent the accused is appointed. Thank you for that question.

Speaker: Justice V.K. Rajah

Are there any more questions? Yes, please.

Speaker: [Lady from the floor]

Hi, I have a quick question about the extent to which the *Index* is able to take into account the most disenfranchised or sort of the lowest income within each of these countries given that we have a problem with wider income gaps in all of the countries that were identified. India is thrown out as an example, and the sample is limited. Is the *Index* at all able to overcome the barrier that some of these people may not have

¹⁷ *Index*, *supra* note 4 at 11.

access to telephone lines, may not be reached, may not even exist on motor roads for instance. If they are accounted for in the *Index*, a major question: is there actually a trend that this particular disenfranchised or lowest income group faces a barrier in terms of benefitting from the rule of law compared to other segments within the same country?

Speaker: Mr. Mark Agrast

Yes, also an excellent question, thank you. The *Index* does attempt to capture the perceptions of people in marginalised communities by various means, including, as you mentioned, people who do not have access to the Internet, and people who do not have access to telephones. We use alternative means to try to poll those people, such as face-to-face interview techniques in lieu of the telephonic interviews that we would conduct in a country where access to modern telecommunications is widely distributed. Therefore, yes, we do try to do that. We also measure as much as possible—again, within the three largest cities that we measure in each country at the present time—the extent to which people are disenfranchised economically. That’s actually a major focus of the *Index*. It’s also a challenge for the *Index* because we confine our attention at present—for resource reasons—to large urban areas. In some countries, the poor are concentrated in such areas. In other countries, they are concentrated in rural areas and we do not yet have a methodology that allows us to administer the *Index* in a way that would be properly representative of those communities. We hope, as the *Index* grows, to not only increase the number of countries that we cover, but also the depth in which we cover each country and a larger and larger proportion of the population.

Speaker: Mr. James Silkenat

Covering the rural population is something that we want to do in the future and something that the government could actually be of a major help. A grant of say 10 million dollars from a government to the World Justice Project would help solve this problem for the coming years.

Speaker: Mr. Stuart Kerr

This is a quick and narrow comment on an area beyond my expertise really. There are often questions and comments talking about prosecutorial discretion. One thing that is not noted: in the U.S., the prosecutors aren’t allowed merely to go straight to court. They have to first go through a grand jury process, which means that the grand jury must first decide, “Yes, the case may proceed to trial”. If the prosecution does not present sufficient evidence, the case may not proceed. And these grand juries are not rubber stamps. I certainly know plenty of people who are prosecutors who haven’t gotten their way and plenty of people on grand juries who have said, “The prosecutors do not make their case, the police clearly weren’t doing what they were supposed to,” so they are not left entirely to their own devices.

Speaker: Mr. Mark Agrast

I should say that this is not an issue that the *Index* measures. How a country structures its prosecutorial system doesn't tell us how its people fare within the justice system. It's quite possible that a prosecutorial system that gives extensive powers to prosecutors might have positive criminal justice outcomes that we actually can and do measure. It's also possible that such a system would lead to the kinds of abuses that we detect in our findings because, again, what we are measuring are outcomes, not inputs. Our goal is to try to determine as best as we can what the 'lived' experience of the law is for the population at large.

Speaker: Justice V.K. Rajah

We can take a couple more questions. Yes, Jeffrey?

Question from: Mr. Jeffrey Chan

Thank you Mr. Chairman. Chairman, if I may have your permission to re-focus the discussion to Singapore, specifically, and I have in mind the charts pertaining to Singapore, which can be found in page 92 of the *Index*. Now, many of the scores that Singapore reflected as having in this chart are not surprising given the various comments that we have made about Singapore. However, there's one particular item which is rather surprising, at least to me, because this has not been the subject of much public comment whether internally or externally, and that is in the second chart. The second chart under 'security and fundamental rights' and it would appear from there that, at point 4.6, Singapore scores extremely low in the 'arbitrary interference of privacy'. Now that appears to be somewhat surprising to all of us. In fact, taking a quick look at all the charts, we appeared to have scored just about the lowest in the world on this particular item, I wonder whether there's any explanation for this?

Speaker: Mr. Mark Agrast

I appreciate the question. I would have to go back and look at the actual questions that were put to the respondents, both the experts and the general population, to determine what questions were asked that led to that result. I also invite you to do so yourselves. In the interests of transparency, we have posted all of the questions that we asked and a complete description of the methodology that we used, so that you can actually go to each of the sub-factors, which are summarised after the country charts (on the data tables that begin on page 107) and you will be able to see all the scores, global rankings, regional rankings, and income group rankings for every country *vis-à-vis* every other country and *vis-à-vis* its peers. You can see for yourselves what the particular questions were, and you can judge whether you think that they are valid indications of the state of privacy in this or any other country we measured.

Question from: Justice V.K. Rajah

Just one remark. When you have a conversation or when a government responds to the indices or index you published, do you publish the response on your website as well?

Speaker: Mr. Mark Agrast

We haven't actually received many systematic responses, but we welcome them. We don't engage with governments until after the report has been issued. But then, we do certainly invite comments and critiques. From time to time, we also meet with governments—although again, very few countries have been as interested or responsive as the Government of Singapore. There are few other places where people have pored over the *Index* with such care and asked us to look behind every statistic.

Speaker: Justice V.K. Rajah

Some of the audience have a particular eye for detail, and Mr. Chan, in particular as well. Any other questions? We take one final question.

Question from: Mr. Christopher Ong

Good afternoon Mr. Chairman, Christopher Ong from the Attorney-General's Chambers. I had the chance to look through the *Index*, very interesting work, to measure the rule of law empirically. I'm just wondering, in order to sort of emphasise or even to sell the idea that the rule of law is a vital component of any successful society. Has there been any work done to correlate the results of the *Index* with other empirical indicators, for example, gross domestic product, or crime rates, just to show that there is a link between having a good rule of law and developing as a society?

Speaker: Justice V.K. Rajah

Stuart?

Speaker: Mr. Stuart Kerr

I can only take it partially. First, I'll answer a question that hasn't been asked, that's: if MCC is a voracious consumer of indices, why aren't we using the *Index*? It's only because the indices we use need to cover all developing countries. And as that's a very difficult thing to do, we can't, but we would use it in a minute. I refer to it in countries where we work and I don't have a quick answer for you. But in this long, long discourse of the various indices that we use pertaining to justice and rule of law, there's a rationale for why these indices are used, how they correlate to economic development and so forth. There're a lot of studies on these issues. I don't know if any of you have particularly looked at those on the *Index* but there are a lot of studies on the related indices.

Speaker: Justice V.K. Rajah

Would you like to respond?

Speaker: Mr. Mark Agrast

Just briefly, it is an excellent question. I think it's one of our research projects for the future. We'd like to do it ourselves. In a number of countries, in a number of

regions, it is being done, they are using our results. One of the things we've tried to do is to make not only our results, but also our underlying data, available to scholars. It is now the largest rule of law dataset in the world. We make it freely available to researchers and encourage them to write papers, either to criticise the *Index* if they wish or to support it, or more importantly to explain why the findings actually matter. I would also encourage you to undertake that research project in your spare time. Or perhaps one of your professors will give you course credit to do it. We hope the *Index* will encourage everybody here to take an active part in promoting the rule of law not just in Singapore but around the world. That's really what we aspire to achieve.

One last point, we do consult the makers of other indices. As you know, there are literally hundreds of them out there and we like to check our results before we release a new report; we always spot-check the data for every sub-factor, and in some cases, for sub-sub-factors, which aren't even reported. We check to try to ensure that the indicators really measure what we think they measure, and one way to do that is to go to these third party sources with all these wonderful indices out there that measure other things. We look for correlations, and when we don't find them, we ask why. Sometimes, we throw out our results, and we do it all over again. That's very rare, it's only happened a few times. Then again, it's something we feel compelled to do.

Speaker: Justice V.K. Rajah

There's actually a large body of published material, particularly by economists, and the World Bank has actually sponsored a number of studies. There's a general belief that there is a co-relationship between respect for procedures, for rules, transparency and the economic well-being of societies. From that point of view, I think one wouldn't be too surprised, when the World Justice Project has matured, that they would find strong evidence to support that view. It remains for me now to thank our three panellists and the audience. I must say that I'm particularly encouraged by the diversity of views that have come from the floor. I think it would not be the same if everyone were to agree that we have a perfect society—we don't. It's healthy to have a difference of views as to where we want to go, what we want our society to look like and what really matters to all of us. There should be space for those with different views. We may not agree all the time that those are the views that should prevail now but as you know from history, what seems implausible sometimes becomes inevitable, and sometimes it takes a shorter time than one might think, so there you are. I think it's important that all the different sectors or stakeholders in society should have a conversation in a meaningful, mature way in discussions like this. And the other changes, I think, we should also welcome views from foreign friends. This is something where I think we can learn from each other by having such conversations. There is no monopoly on wisdom and I think we've done many things right but I also think those who wish us well are always welcome to share their views with us. We may not agree today, we may not ever agree but that does not mean that we should not have conversations.

On that note, I want to express on behalf of the Academy of Law, as well as the two Universities, our sincere appreciation to all the three panellists. They have come a long way—Mark is here in his personal capacity working for World Justice Project and no doubt this eats into his leave. James is a passionate evangelist when it comes

to creating a greater awareness, a greater global awareness about the rule of law. He wears many different hats, but he's been a friend of Singapore. He doesn't agree with everything we do and we will no doubt hear more from him tomorrow. Stuart has also come a very long way. He has been very active all over the world, particularly in Africa. I was pleasantly surprised to learn that we had a mutual friend in Uganda who's also trying to reform judiciaries in Africa. We are indeed very privileged to have three of them and may I, on behalf of everyone here, thank you.

Speaker: Lady speaking

Thank you, Panellists. We will also like to extend a special note of thanks to Mr. Agrast for having arranged for the shipment of the 320 copies of the *World Justice Project Rule of Law Index 2011* which are found now in the Conference packs.

Ladies and Gentlemen, we have now come to the end of Day 1 of the Rule of Law Symposium 2012.

The programme for tomorrow will commence at 10.15 a.m. sharp. Registration opens at 9.45 a.m., please be seated by 10.05 a.m. You are reminded that admission to this Symposium is strictly by Conference Pass. Please ensure that your Passes are worn at all times during the Conference. Thank you and have a Happy Valentine's Day.