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**Keynote Speech**  
**Sustainable Development Goals and the**  
**UN Guidelines for Consumer Protection**

Contribution by  
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*Sustainable Development Goals and the*  
*UN Guidelines for Consumer Protection*

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# **Sustainable Development Goals and the UN Guidelines for Consumer Protection**

**Sothi Rachagan**

**Keynote Address delivered at the  
Intergovernmental Group of Experts on Consumer Protection Law and Policy  
Third Session  
Geneva, 9 July 2018**

## **Introduction**

On 25 September 2015, the UN General Assembly adopted the 2030 Agenda for Sustainable Development and identified 17 Sustainable Development Goals (SDGs) as the plan for action to end poverty, protect the planet's biosphere and ensure prosperity for all.<sup>1</sup> It is a magnificent Agenda that is meant to guide our actions in all fields of endeavour.

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<sup>1</sup> United Nations. (2015, September 22). General Assembly Resolution 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development, A/RES/70/1. Retrieved June 25, 2018, from [http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_RES\\_70\\_1\\_E.pdf](http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf)

Three months later, on 22 December 2015, the General Assembly adopted the UN Guidelines for Consumer Protection (Guidelines).<sup>2</sup> Again, a landmark document.

The commonality of the objectives and general principles of the SDGs and the Guidelines are striking. Let me just refer to the general sections of the Guidelines, those that state the Objectives and General Principles. These prescribe the parameters for the operation of all of the provisions of the Guidelines.

The preamble to the Objectives section of the Guidelines refers in its first paragraph to "...the right to promote just, equitable and sustainable social development and environmental protection...", and specifically includes in Para (h) the objective "To promote sustainable consumption."

Guideline 5, on the legitimate needs which the Guidelines are intended to meet, begins with "(a) access by consumers to essential goods and services" and "(b) the protection of vulnerable and disadvantaged consumers".

Guideline 7 states that "Policies for promoting sustainable consumption should take into account the goals of eradicating poverty, satisfying the

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<sup>2</sup> Annex: United Nations Guidelines for Consumer Protection. From United Nations. (2015, December 22). General Assembly Resolution 70/186 Consumer Protection, A/RES/70/186. Retrieved June 25, 2018, from [http://unctad.org/meetings/en/SessionalDocuments/ares70d186\\_en.pdf](http://unctad.org/meetings/en/SessionalDocuments/ares70d186_en.pdf)

basic human needs of all members of society and reducing inequality within and between countries.”

And Guideline 8 states that “Member States should provide or maintain adequate infrastructure to develop, implement and monitor consumer protection policies. Special care should be taken to ensure that measures for consumer protection are implemented for the benefit of all sectors of the population, particularly the rural population and people living in poverty”.

I could go through the rest of the Guidelines pointing out the many instances where the wording of the Guidelines is consonant with those in the SDGs – the Guidelines are replete with references to the disadvantaged and vulnerable, the poor and those in the rural areas requiring special attention, and to sustainable consumption. The UNCTAD publication ‘Achieving the Sustainable Development Goals through Consumer Protection’ deals with this theme in greater detail.<sup>3</sup> Suffice it for us to note that the Guidelines are consonant with the SDGs; in fact, the Guidelines are best regarded as a subset of the SDGs.

Ladies and Gentlemen,

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<sup>3</sup> United Nations Conference on Trade and Development (UNCTAD). (2017). *Achieving the Sustainable Development Goals through Consumer Protection*, UNCTAD/DITC/CPLP/2017/2. Retrieved June 25, 2018, from [http://unctad.org/en/PublicationsLibrary/ditccplp2017d2\\_en.pdf](http://unctad.org/en/PublicationsLibrary/ditccplp2017d2_en.pdf)

The focus of my address today is SDG 16 and its implication for dispute resolution and redress as contained in paragraphs 37 – 41 of the Guidelines. In relation to that, I shall highlight three areas:

1. The need for SDG 16 to focus on the civil justice system
2. Making the civil justice system serve consumer needs; and
3. Quality control of consumer ADR mechanisms.

## **SDG 16 and the Civil Justice System**

It is in the nature of multilateral negotiations that one does not get all that one seeks. So it was with SDG 16. The text of SDG 16 is broad. It reads:

“Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.”

This surely must also include consumer dispute resolution and redress especially since Target 16.3 states as follows:

“Promote the rule of law at the national and international levels and ensure equal access to justice for all.”

Unfortunately, the two indicators that have been introduced by the UN Inter-Agency and Expert Group (IAEG) to monitor progress towards

Target 16.3 focus exclusively on state-reported aspects of the criminal justice system. The indicators are:

“16.3.1 Proportion of victims of violence in the previous 12 months who reported their victimization to competent authorities or other officially recognized conflict resolution mechanisms

16.3.2 Unsented detainees as a proportion of overall prison population.”<sup>4</sup>

Also not included in the SDG targets and indicators is any mention of legal empowerment or legal aid. This is despite legal aid having been mentioned in the Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels.

Para 14 of the Declaration reads as follows:

“We emphasize the right of equal access to justice for all, including members of vulnerable groups, and the importance of awareness-raising concerning legal rights, and in this regard we commit to taking all necessary steps to provide fair, transparent, effective, non-discriminatory

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<sup>4</sup> The global indicator framework was developed by the Inter-Agency and Expert Group on SDG Indicators (IAEG-SDGs) and agreed upon, including refinements on several indicators, at the 48th session of the United Nations Statistical Commission held in March 2017.

The global indicator framework was later adopted by the General Assembly on 6 July 2017 and is contained in the Resolution adopted by the General Assembly on Work of the Statistical Commission pertaining to the 2030 Agenda for Sustainable Development (A/RES/71/313), Annex. Annual refinements of indicators are to be included in the indicator list as they occur. The official indicator list below includes the global indicator framework as contained in A/RES/71/313 and refinements agreed by the Statistical Commission at its 49th session in March 2018 (E/CN.3/2018/2, Annex II). (From: United Nations Statistic Division. (2018). *SDG Indicators: Global Indicator Framework for the Sustainable Development Goals and Targets of the 2030 Agenda for Sustainable Development*. Retrieved June 25, 2018, from <https://unstats.un.org/sdgs/indicators/indicators-list/>.)

and accountable services that promote access to justice for all, including legal aid.”<sup>5</sup>

Meaningful access to justice for the disadvantaged and vulnerable cannot exist without their legal empowerment. The Transparency, Accountability and Participation (TAP) Network document, ‘Advocacy: Justice and the SDGs’ articulates this well<sup>6</sup>. Absence of legal assistance:

“... means that poor and marginalised people risk disastrous consequences in every dispute, large or small.”

“In civil and administrative matters, the inability to access the advice and assistance of legal professionals leaves already marginalised communities with no recourse for enforcing their fundamental health, education, economic, environmental and political rights, leaving these people at the mercy of State or private actors with far greater resources.”

“The SDGs specifically mention “access to justice” but not “legal empowerment.” It is important to stress an inclusive definition of justice that includes legal empowerment because legal empowerment ensures that justice is for all people.”

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<sup>5</sup> United Nations. (2012, November 30). General Assembly Resolution 67/1, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels. Retrieved June 25, 2018, from <https://www.un.org/ruleoflaw/files/A-RES-67-1.pdf>

<sup>6</sup> Transparency, Accountability & Participation (TAP) Network. (2016). Advocacy: Justice and the SDGs - How to Translate International Justice Commitments into National Reform. p. 7 and p. 9. Retrieved June 25, 2018, from [http://tapnetwork2030.org/wp-content/uploads/2015/04/TAP\\_Advocacy\\_JusticeandtheSDGs.pdf](http://tapnetwork2030.org/wp-content/uploads/2015/04/TAP_Advocacy_JusticeandtheSDGs.pdf).

“This is one of the five priority justice areas that civil society, governments and the private sector identified as essential for promoting legal empowerment.”

Stacey Cram and Vivek Maru state it more bluntly:

“The draft indicators focus on criminal justice, including pre-trial detention times and crime reporting rates. Those numbers matter, but justice is bigger than police and prisons. Justice requires that every organ of the state treat citizens fairly.

If the governments and the UN are serious about providing access of justice for all, global indicators must go beyond any one set of institutions. Measurement should instead focus on whether people faced with injustice are able to achieve a fair remedy.”<sup>7</sup>

This is a view supported by the OECD<sup>8</sup> and the World Justice Project. The World Justice Project Rule of Law Index scores for civil and criminal justice are used as complementary indicators for target 16.3 on rule of law and equal access to justice. As explained by the World Justice Project:

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<sup>7</sup> Cram, S., & Maru, V. (2016, January 1). *Access to justice for all? Now that would be a measurably good thing*. Retrieved June 25, 2018, from The Guardian: <https://www.theguardian.com/global-development/2016/jan/01/access-to-justice-for-all-sustainable-development-goal-16-indicators>

<sup>8</sup> OECD & Open Society Justice Foundations. (2015, November 3-4). *Understanding Effective Access to Justice - Workshop Background Paper*. Retrieved June 25, 2018, from <http://www.oecd.org/gov/Understanding-effective-access-justice-workshop-paper-final.pdf>



“In addition to the official IAEG global indicators ... WJP’s Index scores provide a holistic picture of the accessibility, affordability, impartiality, and effectiveness of civil justice systems, and of the capacity of criminal justice systems to investigate and adjudicate criminal offenses through an impartial system that protects the rights of victims and the accused.”<sup>9</sup>

The non-inclusion of the civil justice system and legal empowerment in the indicators has its ramifications. For a start, the Progress and Information reports of the United Nations Economic and Social Council (ECOSOC) Secretary General for 2016 and 2017 focus essentially on the criminal law system.<sup>10</sup> The omission will also have ramifications for inclusion of these in the UN system’s work programme and in obtaining the funding required for work in this area.

ECOSOC has stated that annual refinements of the indicators will be included in the indicator list as they occur. Some refinements were accepted at the 48<sup>th</sup> General Assembly on 6 July 2017. Hence, it could still be possible to include progress made in improving access to the civil justice system and of legal empowerment, particularly of legal aid, among

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<sup>9</sup> World Justice Project. (2016, July 25). *Launch of the SDG16 Data Initiative*. Retrieved June 25, 2018, from <https://worldjusticeproject.org/news/launch-sdg16-data-initiative>

<sup>10</sup> United Nations Economic and Social Council. (2016, June 3). *Progress towards the Sustainable Development Goals, Report of the Secretary-General, E/2016/75*. Retrieved June 25, 2018, from <https://undocs.org/E/2016/75>.; United Nations Economic and Social Council. (2017, May 11). *Progress towards the Sustainable Development Goals, Report of the Secretary-General, E/2017/66*. Retrieved June 25, 2018, from <https://unstats.un.org/sdgs/files/report/2017/secretary-general-sdg-report-2017--EN.pdf>.

the indicators of progress to achieving SDG 16. This is task that UNCTAD, as the guardian of the Guidelines needs to undertake.

## **Make the civil justice system serve consumer needs**

The criminal justice system is very important, but the fact is that the area that most people have a problem in the justice system is with regards civil law, not criminal law.<sup>11</sup> And in the civil justice system, consumer issues is the most cited category of problems people face. The Global Insights on Access to Justice: Findings from the World Justice Project General Population Poll issued in April 2018 confirm this.<sup>12</sup> The poll was conducted in the three largest urban centres of 45 Countries. For the classification 'Consumer Problems', the poll only included the following categories:

1. Problems related to poor or incomplete professional services  
(for example, services from a lawyer, builder, mechanic, etc.)

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<sup>11</sup> Pleasance, P., Balmer, N. J., & Sandefur, R. L. (2013). *Paths to Justice: A Past, Present and Future Roadmap*. London: UCL Centre for Empirical Legal Studies. Retrieved June 25, 2018, from <https://www.nuffieldfoundation.org/sites/default/files/files/PTJ%20Roadmap%20NUFFIELD%20Published.pdf>.; Pleasance, P. (2016, June 22). 'Legal Need' and Legal Needs Surveys: A Background Paper. East Sussex: Pascoe Pleasance Ltd for the Open Society Foundations. Retrieved June 25, 2018, from [https://namati.org/wp-content/uploads/2016/11/OSJI-Legal-Needs-Surveys-Background-Materials-1-An-Introduction-to-Legal-Needs-Surveys-1-v3.6-2016-06-22-web\\_Pascoe.pdf](https://namati.org/wp-content/uploads/2016/11/OSJI-Legal-Needs-Surveys-Background-Materials-1-An-Introduction-to-Legal-Needs-Surveys-1-v3.6-2016-06-22-web_Pascoe.pdf).; OSJI-WB (2016), Public access to effective and just dispute resolution – Technical Brief. (As cited in OECD & Open Society Justice Foundations. (2015, November 3-4). Understanding Effective Access to Justice - Workshop Background Paper. Retrieved June 25, 2018, from <http://www.oecd.org/gov/Understanding-effective-access-justice-workshop-paper-final.pdf>).

<sup>12</sup> World Justice Project. (2018). *Global Insights on Access to Justice - Findings from World Justice Project General Population Poll in 45 Countries*. Retrieved June 25, 2018, from [https://worldjusticeproject.org/sites/default/files/documents/WJP\\_Access-Justice\\_April\\_2018\\_Online.pdf](https://worldjusticeproject.org/sites/default/files/documents/WJP_Access-Justice_April_2018_Online.pdf).

2. Problems related to obtaining a refund for faulty or damaged goods
3. Major disruptions in the supply of utilities (e.g. water, electricity, phone) or incorrect billing

In the poll, many categories of consumer problems were included under other headings. These include:

- Being behind on and unable to pay credit cards, utility bills (e.g. water, electricity, gas), or a loan.
- Injuries or health problems sustained as a result of negligent or wrong medical or dental treatment.
- Difficulty obtaining a place at a school or other educational institution that you or your children are eligible to attend
- Insurance claims being denied.
- Difficulties obtaining public benefits or government assistance such as cash transfers, pensions, or disability benefits.
- Difficulty accessing care in public clinic and hospitals.

(These are all matters dealt with as consumer problems in the Guidelines.)

Even when focusing on only the three problems areas classified as consumer problems, the largest percentage of respondents in 35 of the 45 countries surveyed stated they faced consumer disputes or problems.

In the ten other countries, consumer disputes and problems came second to those related to housing.<sup>13</sup>

Small claims procedures do serve the needs of consumers with small value claims. However, access to the higher courts is essential.

Consumers still need the ordinary civil justice system to resolve larger claims. They still need the civil justice system to provide justice for collective consumer claims. They need the system to interpret and enforce the law. And they need the courts to develop the law by its system of precedents and judicial review (such as in curtailing mandatory arbitration clauses and enabling collective redress.)

The notion that we are consumers of the legal system often grates practitioners in the system. They would prefer that we use the term litigants and potential litigants. And when we do, we end up playing by the rules of the practitioners.

Users of publicly-provided services, be they patients, passengers, homebuyers, students, or social services recipients, are all consumers. So it must be for litigants; they are consumers of the civil justice system and their interests are different from that of those who provide those services.

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<sup>13</sup> World Justice Project. (2018). Incidence of Legal Problems - Access to Civil Justice Summary Statistics. Retrieved June 25, 2018, from [https://worldjusticeproject.org/sites/default/files/documents/WJP%20Access%20to%20Civil%20Justice\\_Summary%20Statistics\\_2017.xlsx](https://worldjusticeproject.org/sites/default/files/documents/WJP%20Access%20to%20Civil%20Justice_Summary%20Statistics_2017.xlsx).

Judges, prosecutors, attorneys and other court officials are there to provide their service to consumers.

Court rules need to be drafted, and they need to be operated, such as to cater to the needs of the individual user and potential user of the justice system. The rules as currently drafted in most countries make the courts remote, incomprehensible and intimidating, something that the practitioners in the system seem to want to perpetuate. The entire system is designed and largely run on the basis that its users will be professional lawyers. In most countries, the drafting and reviews of Rules of Court do not involve non-legal persons. Consumers need to be actively involved in rule making and review and in monitoring the functioning of the justice system. Consumer concerns with the systemic flaws in the rule making and operation of the judicial system have to be addressed if consumer confidence in the judicial system is to improve and consumers feel confident enough to use the system. <sup>14</sup>

Providing information on the services, speed, control of cost, reduced complexity, and providing reasonable settlements, needs to be the focus.

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<sup>14</sup> An early paper that cogently canvasses this point is Thomas, R. (1990). Civil Justice Review - Treating Litigants as Consumers. *Civil Justice Quarterly*, 9, pp. 51-60. Richard Thomas served as solicitor for UK Citizens Advice Bureau legal service and then legal officer for the National Consumer Council and then as Director of Consumer Affairs at the Office of Fair Trading. He was a member of the Lord Chancellor's Advisory Committee on the Civil Justice Review. The Committee's Report is found in the *Report of the Review Body on Civil Justice*, Cm. 394, 1988. This theme was subsequently developed more fully by the UK National Consumer Council. *Ordinary Justice*, HMSO, 1989. The UK pioneered a citizen-focused approach with the Paths to Justice Survey that has been used to shape UK policy since 1996. Several other jurisdictions have also adopted a similar approach.

For this, there has to be an understanding of “the reality of what it is like for litigants throughout litigation”.<sup>15</sup> It is this that makes it necessary for consumers to be part of the drafting and review of the rules of court.

Unfortunately, the courts do not enjoy the reputation we wish for them; a large number of consumers do not consider the justice system as fit for its purpose. Confidence in the justice system is low in many countries:

“Slightly more than 50% of adults across 123 countries surveyed in 2013 expressed confidence in their judicial systems and courts. In 73 of these countries, less than half of residents are confident in their country's judicial system, illustrating the importance of one of the United Nations' new Sustainable Development Goals (SDGs): to "promote rule of law at the national and international levels, and ensure equal access to justice for all.”<sup>16</sup>

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<sup>15</sup> Relis, T. (2002). Civil Litigation From Litigants' Perspectives: What We Know and What We Don't Know About the Litigation Experience of Individual Litigants. *Studies in Law, Politics and Society*, 25, p.152

<sup>16</sup> Rochelle, S., & Loschky, J. (2014, October 22). *Confidence in Judicial Systems Varies Worldwide*. Retrieved June 28, 2018, from Gallup: <https://news.gallup.com/poll/178757/confidence-judicial-systems-varies-worldwide.aspx>

<b>Regional Confidence in Judicial Systems and Courts</b>			
	<b>Yes</b>	<b>No</b>	<b>Don't know / Refused</b>
<b>Asia</b>	<b>65%</b>	<b>25%</b>	<b>10%</b>
<b>Europe</b>	<b>49%</b>	<b>45%</b>	<b>6%</b>
<b>Sub-Saharan Africa</b>	<b>48%</b>	<b>45%</b>	<b>7%</b>
<b>Middle East and North Africa</b>	<b>47%</b>	<b>38%</b>	<b>15%</b>
<b>Northern America</b>	<b>47%</b>	<b>52%</b>	<b>0%</b>
<b>Latin America and the Caribbean</b>	<b>35%</b>	<b>59%</b>	<b>6%</b>
<b>Former Soviet Union</b>	<b>28%</b>	<b>55%</b>	<b>17%</b>
<i>All results are based on 2013 survey data. Survey results for Asia do not include China, Middle East and North Africa results do not include Jordan, Syria, Egypt, Libya, Algeria, or Gulf Cooperation Council countries.</i>			
GALLUP			

Many of the reasons for this low confidence are those that were addressed in the small claims procedures that have been established in some countries – such as delay, high cost and formality. But these reasons continue, in fact they are amplified in the higher courts.

Delay, for instance, is very debilitating. In itself, it serves as a penalty on consumers and forces them to accept unjust settlements from producers. One oft-cited article gives a graphic description of the extent of delays in the Indian justice system. At the end of 2013, there were 31,367,915 open cases working their way through the Indian judicial system, from the lowest chambers to the Supreme Court.

“If the nation’s judges attacked their backlog nonstop—with no breaks for eating or sleeping—and closed 100 cases every hour, it would take more

than 35 years to catch up, according to Bloomberg Businessweek calculations. India had only 15.5 judges for every million people in 2013, then-Prime Minister Manmohan Singh said at the time. The U.S. has more than 100 judges for every million."<sup>17</sup>

India may not be the worst case. It would be worth calculating such data for other countries as well.

Procedural matters such as cost, delay and formality are not the only concerns of consumers and the reasons why they avoid using the court system. Bribery, political interference, and a judicial process in which extortion of the judicial professions, victims and witnesses abound, is reported in many countries:

"Our findings suggest that bribery is perceived to be a serious concern in several of the Study Countries. The responses from the sub-Saharan Study Countries, Uganda and Nigeria, perceive a high incidence of bribery in their judicial systems: 87 per cent and 50 per cent, respectively. Among the Latin American Study Countries, respondents from Mexico perceive the highest incidence of perceived bribery, with 82 per cent of the respondents believing there is a high incidence of bribery cases occurring within the judicial system. Among the Asian Study Countries, responses from the Philippines and India suggest there is a high incidence

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<sup>17</sup> Lasseter, T. (2015, January 9). *India's Stagnant Courts Resist Reform*. Retrieved June 25, 2018, from Bloomberg Businessweek: <https://www.bloomberg.com/news/articles/2015-01-08/indias-courts-resist-reform-backlog-at-314-million-cases>



of perceived bribery within their judicial systems, as indicated by 40 per cent of the respondents in both countries.”<sup>18</sup>

<b>Judiciary - Percentage who had interacted and paid bribes</b>		
<b>Region</b>	<b>Percentage who had contact in past year</b>	<b>Percentage who paid bribes</b>
<b>Africa</b>	<b>20%</b>	<b>21%</b>
<b>Latin America</b>	<b>20%</b>	<b>18%</b>
<b>Newly Independent States</b>	<b>8%</b>	<b>15%</b>
<b>South East Europe</b>	<b>9%</b>	<b>9%</b>
<b>Asia-Pacific</b>	<b>5%</b>	<b>15%</b>
<b>EU / other Western European countries</b>	<b>19%</b>	<b>1%</b>
<b>North America</b>	<b>23%</b>	<b>2%</b>

*Source : Transparency International, Global Corruption Report 2007, p.17.*

Transparency International’s definition of corruption goes beyond bribery in the narrow sense of the word. It defines corruption as the abuse of entrusted power for private gain. This includes financial or material gain and non-material gain, including furtherance of political or professional ambitions: "Judicial corruption includes any inappropriate influence on the impartiality of the judicial process by any actor within the court system.”<sup>19</sup>

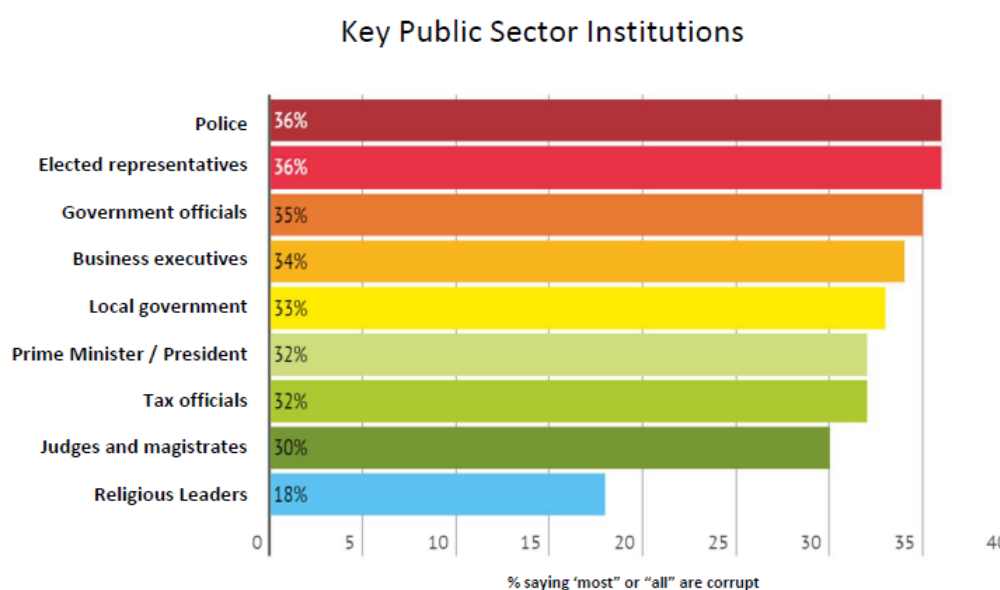
<sup>18</sup> The International Bar Association conducted in partnership with Basel Institute on Governance. (2016, May). *The International Bar Association Judicial Integrity Initiative: Judicial Systems and Corruption*. Retrieved June 25, 2018, from <https://www.ibanet.org/Document/Default.aspx?DocumentUid=F856E657-A4FC-4783-806E-6AAC6895D37F>

<sup>19</sup> Transparency International. (2007). *Global Corruption Report 2007 - Corruption in Judicial Systems*. p. xxi. Retrieved June 25, 2018, from [http://files.transparency.org/content/download/173/695/file/2007\\_GCR\\_EN.pdf](http://files.transparency.org/content/download/173/695/file/2007_GCR_EN.pdf)

Transparency International's Global Corruption Barometer measures the public's perception of corruption in the key public sector institutions.

Thirty per cent think that judges and magistrates are corrupt.<sup>20</sup>

## Perception of Corruption - Global Average



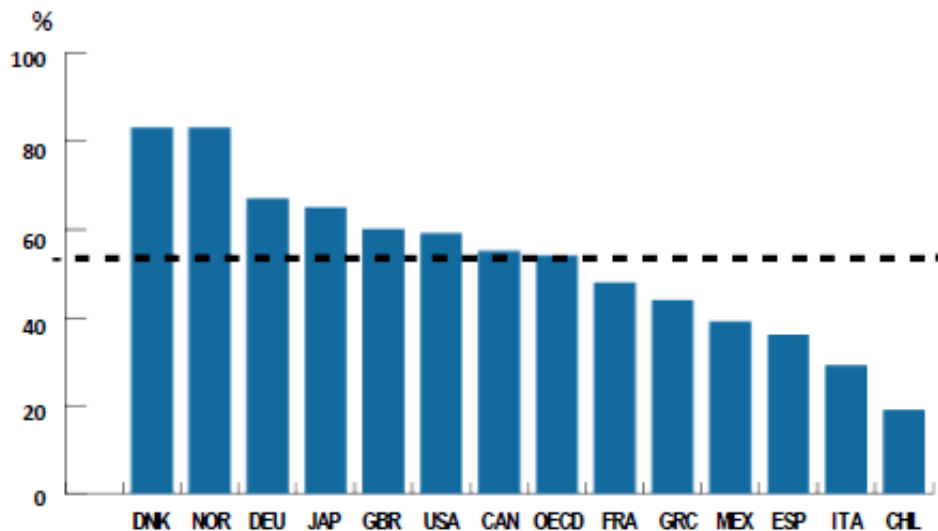
Source: Transparency International, Global Corruption Barometer 2017, p.5.

It is not surprising then that the procedural weaknesses in the courts (high costs, delays, formality, etc.) and corruption would lead to a lack of confidence in the judicial system and its reliability to resolve disputes.<sup>21</sup> This is not just a developing world problem; it is also true of many OECD countries.

<sup>20</sup> Transparency International. (2017, November 14). *Global Corruption Barometer: Citizens' Voices from Around the World*. Retrieved June 25, 2018, from [https://www.transparency.org/news/feature/global\\_corruption\\_barometer\\_citizens\\_voices\\_from\\_around\\_the\\_world](https://www.transparency.org/news/feature/global_corruption_barometer_citizens_voices_from_around_the_world)

<sup>21</sup> OECD. (2018). *Access to Justice*. Retrieved June 25, 2018, from <http://www.oecd.org/gov/access-to-justice.htm>

## Citizen confidence in the judicial system (2014)



Source: Gallup world Poll from Government at a Glance 2015

At the IGE and the national level, we need to focus on the civil justice system and strategize on how we can make it better serve the consumer cause.

### **Quality Control of Consumer ADR Mechanisms**

There is wide array of consumer Alternative Dispute Resolution (ADR) mechanisms. The following description of ADR schemes in the European Union (EU) is illustrative of the immense diversity of schemes that can exist:

“ADR schemes may be established by public authorities, by industry or be set up in cooperation between the public sector, industry and consumer

organisations. Their funding may be private (e.g. by industry), public or a combination of both...the geographical coverage of ADR can be national rather than decentralised at regional or local level. Both sector-specific and multi-sectoral ADR schemes exist...The vast majority of ADR procedures are based on the willingness of the parties to engage in the process...When participation to the ADR procedure is voluntary, the possibility for consumers to solve disputes depends on the willingness of the business to engage in ADR. ADR decisions may be taken collegially (e.g. by boards) or by individuals (e.g. by a mediator or ombudsman) and the nature of their decisions may vary considerably (e.g. non-binding recommendations, decisions binding on the trader or on both parties, agreement of the parties). In other words, each ADR scheme is virtually unique."<sup>22</sup>

For the purposes of the discussion today, I shall treat the varieties as in a continuum on the basis of their reliance on the judicial system for their validity. In such a conception, the small claims procedure is on one end of the continuum and the wholly industry managed mechanisms are on the other. In between are a range of statute based mechanisms.

Based on our experience in Malaysia, which I have detailed in the paper entitled ***Access to Justice – Addressing Consumer Redress in Malaysia***, I do have reservations as regards wholly industry funded ADR schemes. I

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<sup>22</sup> Directorate General for Health and Consumers – EC (DG SANCO). (2011). *Consultation Paper: On the Use of Alternative Dispute Resolution as a Means to Resolve Disputes Related to Commercial Transactions and Practices in the European Union*. Retrieved June 25, 2018, from Overheid.nl: <https://zoek.officielebekendmakingen.nl/blg-109255.pdf>

doubt that fair, transparent and accountable resolution of consumer-provider disputes is possible where the provider determines the scope, operational rules and terms of appointment of the mediator/adjudicator. Even if the scheme begins as a 'guard dog', it quickly permutes into a 'watchdog' and then a 'lapdog' of its funders.

My own preference is for a statute-based Tribunal for Consumer Complaints to which all consumer disputes with providers can be referred, supplemented by statute-based specialised tribunals / ombudsmen (housing, financial services, aviation services, etc.).

The Malaysian experience suggests for the following emphases in such a system:

1. There needs to be a publicly funded Tribunal for Consumer Claims with jurisdiction to deal with consumer disputes with all suppliers of goods and services. This may be complemented by industry funded specialised Tribunals/Ombudsmen. Industry funding can be on the basis of levies with an additional charge for each dispute referred by the consumer. Such a financing scheme incentivises proactive measures by the supplier to resolve disputes before they reach the Tribunal/Ombudsman.
2. All tribunals/ombudsman are statute-based with regulations that specify the organisational structure, the qualifications of the

adjudicators, their jurisdiction and other details to ensure fairness, transparency and accountability.

The rules that govern the ADR schemes have to be drafted so as to ensure that the rights that are meant to be given to consumers are not compromised by the discretion given to the providers of the ADR schemes. Drafters of legal rules tend to be afflicted by the 'shall-may confusion malady'. In legal drafting 'shall' imposes an obligation; 'may' grants discretion. However, when the drafting is commissioned by the ADR provider, discretion is assigned to provider whilst obligations are heaped on consumers. Hence the scheme 'may' accept a reference, 'may' provide a written report, 'may' seek to enforce compliance etc., but the consumer 'shall' make the reference within two months, 'shall' be bound by the award and 'shall' pay a penalty for non-compliance. The purpose of such schemes is to impose obligations on providers of the ADR schemes to operate the scheme such that that consumers can enforce their right to redress.

3. The service needs to be free to consumers and consumers should have the option to reject the award and seek redress in court.
4. The schemes have to, not only grant individual redress, but also address systemic problems and thereby provide collective redress.

For this they have to be required to identify systemic problems, suggest solutions and oversee the implementation of them

A common feature of the available reports of the alternative redress mechanisms is that they provide data on the number and value of claims received, and the number and value of the awards made.

The data gathered needs to be more comprehensive. Consumer complaints that reach the redress stage are but the 'tip of the iceberg' of consumer distress. The data gathered must be able to identify systemic problems which regulators and industry need to remedy, and report on.

5. There needs to be regular audits and periodic independent reviews that assess the efficacy of the scheme and offer suggestions for improvement.

## **CONCLUSION**

The presentation I hope will inform the discussion that will take place at this IGE, in particular at the session on consumer dispute settlement and redress, so that the conference output and work programme can reflect the:

1. Need for the civil justice system and legal empowerment to be viewed as critical components of SDG 16, so that the mandate set out in paragraph 37 – 41 of the Guidelines may be realised;

2. Need to reform the civil justice system to meet the consumer interest; and
3. For the work programme of UNCTAD and the IGE to include the drafting of a comprehensive Code of Good Practice on Consumer ADR schemes which can be the basis of national guidelines or statutes. The UNCTAD secretariat has already developed a set of quality criteria against which consumer dispute resolution and redress may be evaluated.<sup>23</sup> This can be the basis for the development of the Code.

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<sup>23</sup> United Nations Conference on Trade and Development. (2018, April 30). Dispute Resolution and Redress - Note by the UNCTAD Secretariat, TD/B/C.I/CPLP/11. Retrieved June 25, 2018, from [http://unctad.org/meetings/en/SessionalDocuments/cicplpd11\\_en.pdf](http://unctad.org/meetings/en/SessionalDocuments/cicplpd11_en.pdf)