Having spent the last few years at the Australian National University, I have had the privilege of observing academic life at close quarters. Clearly it is the love of teaching and research that drives on the academic community. The senior academics also like their titles, awards and citations. But the glittering prize they most covet is international acclaim for an intelligent oxymoron. This is invariably a construction of two simple words, a noun described by an adjective, that together formulate an insight that people all over the world find useful.

Sir Isaiah Berlin’s ‘negative freedom’ in which he juxtaposed ‘freedom to’ and ‘freedom from’ is today widely understood and accepted. Marshall McLuhan’s ‘global village’ is perhaps the best-known intelligent oxymoron and its very use in every day speech has had a self-fulfilling quality. It is a sad sign of the times that the ‘global village’ is increasingly being replaced by the far less attractive term ‘globalisation.’

The intelligent oxymoron I wish to discuss with you today is unusual in that the person with whom it is most associated did not actually coin the term but he popularised it in a remarkable way. Less than ten years ago Robert Putnam gave fresh meaning to the term ‘social capital’ in a book entitled Making Democracy Work. The term has had an almost immediate impact on the way we look at civil society and on our appreciation of the importance of social connectedness and networking to the functioning of democracy. It has inspired researchers to delve into this mundane but neglected subject. Today one can read learned theses on concepts such as bonding capital, bridging capital and linking capital, all being new ways of understanding the importance of social capital.

I would like to draw on Putnam’s work to introduce another term as a category of social capital. The term I wish to put to you is ‘governance capital’ which I define as the people who make the executive, legislative and judicial branches of government function effectively. Every nation has a certain stock of governance capital and my assessment is that Australia is particularly well placed in this regard. We may well lampoon our leaders, pillory our parliamentarians and occasionally make jest of our jurists but on most comparative tests, Australia is a well-governed society.

It is that Australian comparative advantage in governance that the Centre for Democratic Institutions employs in its work to strengthen democratic governance in neighbouring developing countries in the Asia Pacific region.
Looking at the region leaves one in little doubt about the need to improve the processes of governance including the judicial systems. In Southeast Asia two fundamental problems bedevil attempts to improve the functioning of the rule of law – dominant incumbent political parties and corruption. In the communist systems, the party’s will predominates over that of the formal branches of government. In both the communist and the multi-party systems it is often corruption that determines the outcomes of executive and judicial decision-making. The underlying problems of poverty, lack of democracy and the weakness of the domestic legal profession in these countries will take many years to resolve.

But even where one or more of these underlying problems have been overcome, there is no guarantee of the functioning of a competent and impartial judiciary. Indonesia, Thailand and the Philippines are developing their democracies but nevertheless have continuing problems with corruption. Malaysia has a strong legal profession but it could not stand up to the government’s strong-arm tactics over the judiciary. Singapore has a high standard of living and virtually no corruption. The government often loses cases in the courts but, as one Singapore lawyer explained to me, never when it matters to the government. Maybe that is why Lee Kuan Yew is the world’s most successful libel litigant.

In the South Pacific we have also seen the functioning of law and order succumb to both the weight of criminality and unconstitutional political activity. The judiciary alone cannot resolve these problems but it does have an important role to play in their resolution.

There may well be a trend in the region for political issues becoming increasingly justiciable. The matters coming before courts in our region in the last few years have been of the greatest political moment. Fijian courts decided that the constitution, so easily abandoned by the politicians, remains in force. Thailand’s Constitutional Court, by the narrowest of majorities, 8 to 7, decided the Prime Minister had not committed an offence in not declaring his beneficial ownership of hundreds of millions of dollars worth of shares. Malaysian courts convicted the Deputy Prime Minister on trumped up charges. And the Philippines Supreme Court had to delve deeply to find a constructive resignation in the former President’s actions to assure the continuity of the current President’s incumbency.

In engaging with the region to try to assist neighbouring countries to strengthen their judiciaries, Australia necessarily can only play a modest role. Occasionally, Australian judges may sit on foreign courts and thus contribute their competence and probity to the process. It is a pleasing feature of South Pacific judicial systems that there is increasing resort to this option without attracting local resentment. There is also a role for our judges in exchanging information on practice and procedure with members of regional judiciaries. Where there is a willingness to learn, these exchanges can be highly beneficial. Finally, I believe that there is a benefit to be gained from regional judicial
collegiality. The collegiality may take the form of professional friendship as well as other forms of mentoring and providing role models.

It is in the areas of information exchange and building collegiality that CDI has concentrated its efforts in the judicial field. Our valued partner in this endeavour has been the Federal Court of Australia and I am most indebted to Chief Justice Michael Black and his colleagues for their enthusiastic cooperation. CDI has been involved in assisting judicial exchanges with the Philippines, Indonesia and Vietnam as well as programs to improve court management in PNG, Vanuatu and Thailand.

The challenge of these programs is to tailor the activities to the specific needs of the various judiciaries. In some cases this process is greatly facilitated by having a counterpart body such as the Philippine Judicial Academy. Discussions with Chancellor Herrera have led to programs focusing on issues such as case management, processes for granting leave to appeal and alternative dispute resolution. The quality of the participants in these exchanges has also been of the highest order with Philippines Supreme Court justices leading the visiting delegations and Justices Bryan Beaumont, Arthur Emmett and Robert Nicholson visiting the Academy.

With Vietnam, the exchanges have also involved justices of the Supreme People’s Court, and have focussed on issues concerning court management and judicial independence. Justices Michael Moore and Brian Tamberlin gave lectures in Hanoi. Other activities have included assisting Thailand to establish its Arbitration Institute as well as conducting workshops to develop a course for village mediators. In PNG and Vanuatu the focus has been on judicial administration.

Although the Federal Court is in a sense our partner institution in this venture I would also like to mention other courts that have assisted CDI including the High Court, the ACT Supreme Court, the Family Court of Australia and other courts in Sydney and Melbourne which have graciously hosted our visitors. I also would like to mention that the whole process is made possible by funding from the Australian government through AusAID.

My final point is to express the hope that the judicial exchanges are a two way process. While Australia’s governance capital delivers good dividends, one of the reasons for its success is our culture of criticism and reform. We must remain open to new ideas. There may well be aspects of Australia’s judicial process that could be improved. Might I suggest that Australia’s process of consultation over the appointment of judges is one area where re-evaluation is warranted. The Philippines Judicial and Bar Council, which recommends a short list of candidates from which the President is obliged to select, may be a possible precedent.

May I thank Justice Beaumont for extending an invitation to address this prestigious conference. I very much look forward to continuing to work with Australian jurists to strengthen the governance capital of our region.