

JUDICIAL REFORM

by

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Topic:

JUDICIAL REFORM – “What are the changes that should be implemented for the judicial system to be more responsive to the expectations and needs of the people?”

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Summary:

Courts are service providers whose customers, the public, should be satisfied. Satisfying the public requires consistent judicial reform which must be undertaken in ways that are responsive to the expectations and needs of the public. Only in this way will public trust and confidence be maintained and enhanced. This short paper examines these principles through the prism of reforms and initiatives undertaken at the Caribbean Court of Justice (CCJ). These measures include the selection of its judges; the institutional measures to assure the court’s independence; judicial accountability; the promotion of human rights and the Rule of Law; the reform of court rules, structures and procedures; innovative court technology; strategic management; and a number of other measures.

Keywords

judicial reform – access to justice - judicial independence - accountability – rule of law – court management – technology – funding – Judicial outreach

JUDICIAL REFORM – “What are the changes that should be implemented for the judicial system to be more responsive to the expectations and needs of the people?”

Because we live in a dynamic world, it is natural for people to expect that the justice system should keep pace with, or at least, not retard the progress of society as a whole. People have an ongoing vital stake in the administration of justice. Only a just society can guarantee the opportunity for the human potential of each citizen fully to be unlocked.

Access to Justice is therefore of fundamental importance both to the individual and to the society. Essential public goods such as democratic governance, health, education, recreational opportunities, all require a sound justice system to underpin them if all of society is to benefit equally from them. When we consider the question of judicial reform we must keep uppermost in our minds the notion that the court is a service provider. The court is not a place. It is a service and the public are our customers. It is their expectations and needs that the justice system should aim to satisfy. The critical yardstick for measuring the effectiveness of judicial reform is the degree to which the needs of the public are satisfied, and public trust and confidence is enhanced. The public wishes to see judges that are impartial, ethical, competent, efficient and effective. They desire a justice system that is accessible, efficient, modern and one that produces fair and reasonably predictable outcomes.

Effective judicial reform should go beyond mere modernisation of processes. Modern technology alone would not necessarily improve systemic deficiencies. Technology is a mere tool. It is people assisted by technology who make the justice system work. Judicial reform should, therefore, equip judges and court staff to serve the public better and ultimately, judicial reform should lead to national stability and social and economic progress.

In this paper, in light of the above, I wish to address briefly some of the reforms and programs that the Caribbean Court of Justice has been engaged in so as to be more responsive to the expectations and needs of the people.

The approach I will take to the topic is to break down into discrete areas certain facets of judicial reform and to give an indication of what we have undertaken or are currently undertaking in the Caribbean.

“Judicial Reform and the Quality of Judges”

My court, the Caribbean Court of Justice, is actually two courts in one. We exercise two distinct jurisdictions. Firstly, we are a court that interprets and applies a regional economic treaty. In this jurisdiction, we function almost like the Court of Justice of the European Community or the Court of Justice of the Andean Community does. In our second jurisdiction, we exercise final appellate jurisdiction for those independent English-speaking Caribbean states that alter their Constitutions to accommodate us as their apex court.

In each jurisdiction, Caribbean people expect that their judges will be independent and courageous, competent, ethical, efficient and effective. How do we meet that expectation? What reforms have we been putting in place to meet the same? The first and paramount issue is the method by which the judges are selected. The English-speaking Caribbean follows a common law tradition. There is no formal training to be a judge at an academic institution. Instead, senior or experienced lawyers or law academics are recruited for judicial appointment.

Judicial appointments to the CCJ are made by a Commission comprising representatives from regional Bar Associations, regional law schools and civil society. The Commission is chaired by the President of the Court. Typically, when there is a vacancy on the court, the vacancy is advertised in the regional and international Press. The advertisement sets out the qualifications for appointment. Each applicant must submit a mountain of pre-determined information about herself or himself. The best of the applicants is then interviewed by the Commission and a selection is made partly on this interview and on the basis of a due diligence check done by the Commission. In making appointments to the office of Judge, the Commission pays careful regard to the following criteria: high moral character, intellectual and analytical ability, sound judgment, integrity, and understanding of people and society.

The President of the Court is appointed by a similar process except that the person selected by the Commission must be approved by the Executive Authority. The latter cannot itself select a president but must be content to approve or reject the nominee of the Commission.

The appointment method just outlined has the advantage of being fair, transparent, merit-based and completely independent of the political directorate. On the other hand, it has been

suggested that a deficiency in the appointments process is that there is no public participation in the process. The public is unaware of who the applicants for judicial office are.

Once appointed, a judge is expected to engage in periodic judicial education seminars and conferences. These might address new competencies or approaches to judging. Consistent judicial education and a fair and transparent appointment process are critical to meeting the public's need for independent, competent, ethical, efficient and effective judges.

One of the areas of judicial education that has been consuming the attention of judges in the Caribbean in recent times is the issue of Gender sensitive judging. A few years ago, we came across a document prepared by the Mexican judiciary that was in effect a Gender Protocol for Mexican judges. It was a Guide that assisted judges to adjudicate cases utilising an appropriate gender lens. The Protocol also referenced the jurisprudence of international bodies that interpreted and applied important conventions on the rights of women and sexual minorities.

The Caribbean Association of Judicial Officers, with the support of the CCJ, has encouraged Caribbean judiciaries to devise similar Gender protocols and this has already begun to make a difference in the approach that judges take in this area of the law.

“Judicial Reform and Financial Independence of the Judiciary”

A reasonable degree of financial autonomy is another core element of judicial independence. When the CCJ was being established in the early part of this century, careful thought went into the creation of institutional arrangements that would enhance this aspect of the court's independence. The idea was conceived of utilizing the unique mechanism of a trust fund to secure the court's financial independence. A sum of US\$100 million was borrowed by the Caribbean Development Bank (CDB) and that money was loaned to the various States that subscribe to the Court. The US\$100 million was then placed in the hands of a group of trustees whose responsibility it is to manage and invest those monies so that the Court's expenses could be met from the interest or yield on the investment. The court's funding is therefore assured for many years ahead and the court does not have to interface with the political directorate in order to obtain its funding.

“Judicial Reform and Accountability”

Judges and courts are understandably often quick to claim and assert their independence. Judicial accountability is the converse side of independence. If the public is to give the judiciary their trust and confidence the judiciary must establish and publish performance standards and measures for which it is prepared to hold itself accountable.

Similarly, a judge of the CCJ must subscribe to the court’s published Code of Ethics. This code is patterned off the Bangalore Principles. The court seeks to update the code periodically through a process that involves all of the judges themselves. We have found that a collegial process of updating the Code is as valuable as the finished Code itself. Judicial ethical violations are often the product of ignorance. Going through and discussing the provisions in detail causes one to reflect on the various clauses in ways that strengthen one’s awareness of them.

“Judicial Reform and the Promotion of Human Rights and the Rule of Law”

The CCJ in recent times has issued a series of judicial decisions aimed at advancing the rule of law and the enjoyment of human rights of Caribbean citizens. In *Gibson v The Attorney General*¹ the court developed the concept of a fair trial to include the provision of non-legal expert assistance by the State to an indigent accused in circumstances where the accused was on trial for murder and the only evidence against him was of a highly scientific nature. The Court held that the State either had to make available to the accused the services of a forensic odontologist or else it had to withdraw the indictment.

The court has also developed the concept of the rule of law and its application. So, for example, the rule of law is now clearly established as a constitutional norm that can be independently enforced by a citizen even where the citizen is unable to point to a specific breach of the human rights chapter of the Constitution. This approach allowed the court to give relief to the Maya community in the southern part of Belize when they alleged that their right to the protection of the law was infringed because the existing property law regime failed adequately to protect Mayan interest in the lands within villages customarily occupied by the Maya.²

¹ [2010] CCJ 3 (AJ)

² See *Maya Leaders Alliance* [2015] CCJ 15 (AJ)

“Judicial Reform and Court Rules, Structures and Procedures”

Over time, court rules, court structures and court procedures become obsolete or else need to be revised in order for optimum court efficiency to be maintained. Such revision exercises, therefore, constitute a type of judicial reform that must be engaged in periodically so as to meet, for example, concerns about delays in the processing of cases. This is actually one of the chief areas of complaint from court users in the Caribbean, i.e. the inordinate time that elapses between the filing and final disposition of cases.

In the Caribbean, it has been easier for courts to introduce reforms of court rules and procedures in civil, i.e. non-criminal cases. Over the last 20 years, new civil procedure rules have been adopted in most of the Caribbean states. The new civil procedure rules have not only addressed problems of delay. They have also dealt with other serious challenges. These included the existence of complex, arcane rules written in legalese; a civil justice system in which the role of the court was re-active and not pro-active; court rules that made no provision for the early settlement of disputes; a system that often countenanced a severe disproportion between the value of the thing in dispute and the time, effort and cost involved in adjudicating the dispute; and finally, a system that engendered a pervasive sense, on the part of the litigants, of alienation from the adjudication process.

These new rules have introduced modern methods of case management and a suite of alternative dispute resolution methods that provide less expensive and quicker alternatives to a full trial where appropriate. The new rules also assist the parties to reach an agreement as early as possible and they seek to restrict the scope of the dispute to relevant issues.

It has been far more problematic to introduce similar reforms in the criminal justice system. Reform in the criminal justice sector is intractable because there is not a single criminal justice system. The criminal justice sector comprises a variety of systems each with its own roles and priorities and command structures. There is the parliament that makes law; there's the police service; the private Bar; the Office of the Public Prosecutor; the Prison Service; the Probation and Welfare Department; Trial and Appellate judges; the Registry and court offices and so on. Fundamental reform of the criminal justice sector cannot succeed if each of these elements is not on the same page marching in step with each other. That is a goal that courts by themselves

cannot accomplish. The difficulty in coordinating the activities of these various entities has impeded thorough comprehensive and successful reform in the criminal justice system.

Finally, under this head, one can speak to appropriate Court Structures. Several courts in the Caribbean have begun to establish a range of specialist courts with specialised procedures to treat with special areas. So, there are Drug Courts, Juvenile Courts, Sexual Offences Courts and so on. The advantage of specialisation is too obvious to detail.

“Judicial Reform and Public Outreach”

In its appellate jurisdiction, the CCJ is the court that replaces the London based Judicial Committee of the Privy Council. This is the court which, from colonial times, has in effect functioned as a Supreme or Apex Court for all British colonies. Only in 2005 did English speaking Caribbean states establish their own Supreme Court. Even after its establishment, however, some Caribbean states still maintain the Privy Council as their final appeal court. Some of these governments would like to leave the Privy Council and accede to the CCJ but they are faced with national Constitutions that require a two-thirds majority vote at a national referendum in order to effect the requisite constitutional change.

Maintaining appeals to the Privy Council is an expensive option for likely appellants. Indeed, it is a denial of access to justice for all but those with substantial means. Moreover, the Privy Council, comprised of British judges, is obviously not as well suited as a Caribbean court is to make decisions in Caribbean cases. Interpretation and application of the law at any level, but particularly at the level of an apex court, is often about assessing competing reasonable choices. In constitutional matters, for example, Courts must often decide whether in any particular case public interests should prevail over individual rights.

Where a country must proceed to a national referendum, the CCJ considers it to be part of its responsibility to provide information to the public so that they can exercise their franchise in an informed manner.

The court otherwise maintains a regular extra-judicial dialogue with subordinate courts and their judges. This is aimed at promoting judicial collegiality and discovering the precise ways in which the CCJ can assist the subordinate courts in their judicial reform initiatives. The CCJ

has always stood ready to make available to those courts, human or material resources or simply to share with them the court's experience.

“Judicial Reform and Innovative Court Technology”

As people become more acutely aware of their rights and less tolerant of any interference with them there is a proliferation of cases filed in the courts. The resources made available to courts have not kept pace with this increase in the caseload. Innovative ways must be found to cope with the increased caseload. The problem for courts is that the administration of justice tends towards conservatism and there is usually a reluctance to embrace new or innovative solutions. Courts and Judges must consciously overcome this tendency towards a conservative approach to their work. Sometimes radical solutions must be fashioned to ensure that court processes are continually customer friendly, effective and designed to enhance independence, efficiency and public trust. This will entail the harnessing of modern information technology and management systems in order to expedite case flow, afford better and greater access to justice and generally enhance justice delivery.

To this end, the CCJ has invested time and resources in developing an electronic filing platform for our case processing. All our filing and service of case documents are now done electronically. This has considerably increased efficiencies and reduced costs. It has also enhanced access to justice and given the court far greater flexibility in the preparation of hearings. In May of this year, for example, we accepted, at 5:30 PM on a Friday afternoon, an extremely urgent appeal for filing. The 500 plus pages comprising the appeal record were filed, served and the appeal heard and determined by five judges within 48 hours.³ This would not have been possible without an electronic filing system.

The Court has also taken other measures to improve transparency and keep our customers and stakeholders fully abreast with information about the court. These measures include the use of modern communication tools. The CCJ live streams all its hearings and makes the video permanently available on our website. The court has also been increasing its social media footprint and plans to utilise Twitter and Facebook more robustly in the future.

³ See *Ventose v Chief Electoral Officer* [2018] CCI 13 (AJ)

These modest measures of judicial reform are embraced by the court in the full recognition that securing and enhancing public confidence is at the core of the court's mission.

“Judicial Reform and Strategic Management”

Judicial reform will hardly be successful without enlightened leadership. As has been made clear by the International Framework for Court Excellence, “strong leadership also requires the creation of a highly professional management capability as well as a focus on innovation within the courts and the anticipation of changes in society (which can lead to changes in demands for judicial services).”⁴ Judges are usually not trained in management. Successful judicial reform, therefore, requires that courts build up a cadre of competent court managers who can anticipate, recognise and manage change.

Judicial reform must also be part and parcel of strategic planning and management. To this end, the court is working on our second strategic planning cycle. Each of the Units of the court is currently engaged in creating management action plans to locate the work of the unit and each member within it within the context of the court's overall Strategic Plan.

“Judicial Reform and Partnerships with Funders”

Finally, I wish to say a few words on judicial reform and partnering with international funding agencies. Notwithstanding, the existence of the Trust Fund, the court is always on the look out for opportunities to augment its funding to support special programmes that strengthen either its own judicial infrastructure or the regional justice system. Internationally reputable donor agencies are correspondingly always ready to support well thought out judicial reform programmes.

Partnering with donor agencies must be on the clear basis that the relevant judicial reform programmes are locally developed and locally driven. If this occurs, then such programmes not only afford benefits to the recipients of the aid provided but also help to build much-needed management capacity among court staff.

⁴ International Framework for Court Excellence, 2nd edn March 2013

The CCJ is currently implementing a Canadian funded project that has been engaged in a series of reform activities throughout the Caribbean. These include the development of a Sexual Offences Model Court and the promulgation of Sexual Offences Model Guidelines. Both of these initiatives are aimed, among other things, at ensuring that the best possible evidence in such cases is obtained; expediting case flow; and avoiding the re-traumatization of survivors of sexual offences. The project has also developed a comprehensive Bench Book for first tier judges that, for the first time, sets out in one place the law and procedures relevant to the most commonly adjudicated cases before these judges.

Conclusion

These brief remarks are in no way intended to suggest that we in the Caribbean regard ourselves as the embodiment of excellence. That would be so very far from the case. Our court has tremendous challenges like all other courts. But we do hold to the view that, far from being a destination one reaches, excellence is really a continuous process of seeking an unattainable goal. The most important need of the poor and disadvantaged, of the vulnerable and the weak, is justice. Business persons and investors also require a strong and fair justice system. And state institutions too, if they are to be respected, if they are to function effectively, they must also embrace just principles. Justice, “embodying fundamental notions of fairness and equality, is elemental to social well-being and lies at the foundations of human civilization.”⁵ Continuous and effective judicial reform will always go a long way to meeting these demands.



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⁵ Livingstone Armytage, **Searching for Success in Judicial Reform: Voices from the Asia Pacific Experience**, Oxford University Press, 2009, page 4