Challenges Facing the Judiciary in a 'Novel' Era

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Keynote Address

delivered by

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President – Caribbean Court of Justice*[1]

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Protocols.

Thank you, Ms. Robinson for that very flattering introduction. And Good day to all.

Introduction

It is a distinct pleasure to be joining you today, albeit by virtual means, at this Symposium on Law, Governance and Society. As I am only too well aware that sometimes virtual seminars and lectures can be more exhausting than in-person events, I shall try my best to keep within my allotted time.

The theme for this Symposium, '*Law and Justice in a "Novel" Era*', presents me with an opportunity to reflect on how justice systems across the Caribbean are, not just coping with the scourge of Covid-19, but also drawing lessons from the consequences of the pandemic and simultaneously, consider how, in a pro-active manner, to apply those lessons to illuminate a path

[1] I express my gratitude to Kerine Dobson for her assistance in the preparation of this Address.

forward into the future. My address shall therefore focus on these two areas: how we cope and how we progress.

Covid-19 has been severely disruptive, to say the least. To curb and manage the spread of the virus, many countries were constrained to close their borders; institute curfews and to restrict the movement and congregation of people. These measures have gone through several phases of tightening, expansion and relaxation. Handshakes and hugs have suddenly been replaced by 'elbow bumps'. Amazingly, within the space of a few months, the wearing of a face mask, which many in the Western world used to regard with a mixture of ridicule or derision, has now become essential and in some cases mandatory. The novel virus has made commonplace a new lexicon involving words and phrases such as 'quarantine', 'lockdowns', 'flattening the curve', 'PPE', 'physical distancing', 'screening', and one can go on and on. There is absolutely no doubt that, in a mostly unwelcome manner, the pandemic has altered behaviour and permeated every single aspect of our daily lives.

A Perspective from the Courts

Covid-19 has naturally also had a tremendous adverse impact on the functioning of judiciaries. For the regional justice sector, and this was certainly the case at the Caribbean Court of Justice (CCJ), the response to the havoc being wreaked has centred largely around three (3) core pillars. Firstly, ensuring the health and safety of judges, staff and court customers; secondly, preserving fundamental rights; and thirdly, ensuring continued access to justice.

Ensuring the health and safety of judges, staff and court customers

In seeking to secure health and safety, judiciaries across the region have had to take pains to manage the physical space that encompasses courts. The measures taken have included restricting, and in some cases excluding, public access to the buildings; the establishment of work from home/remote work rotations for judges and staff alike; the institution of screening protocols to manage access to court buildings (including temperature checks and administering questionnaires); putting in place arrangements to ensure appropriate physical distancing; and even making some alterations to the physical infrastructure at the court– for example, to install protective screens around certain work stations. The value of these measures ought not to be underestimated. In these stressful times it is important that every effort is made to assure court staff and customers alike that the court environment is safe and that the leadership of the court has their health and safety foremost in mind.

Preserving Fundamental Rights

The second pillar has to do with the need for even more scrupulous efforts to protect and preserve fundamental rights. The management of crises such as a pandemic by the Legislature and Executive invariably results in the promulgation of emergency and public health regulations. These measures are in many cases accompanied by the deployment of the coercive agencies of the State who are called upon to enforce the measures. It is in times like these that it is easy, tempting, for these agencies to overreach and to encroach on fundamental rights – even where their intentions may be noble. The review function that the Constitution affords to the court therefore comes under heightened scrutiny. In a situation such as this, courts must jealously guard their independence and be astute to any unlawful diminution of the rights and freedoms of the citizenry. A pandemic, or

indeed any other crisis for that matter, provides no justification or excuse for trenching on the constitutional protection framework.

Lord Atkin's dissent[2] in the context of World War 2 Emergency legislation remains apt. One recalls his haunting admonition that, 'amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace'.[3] In times of crisis, courts must therefore strike the balance in determining what level of curtailment of our precious rights and freedoms is reasonable and proportional. In pursuing this delicate task, courts may consider the *Oakes*[4] test propounded by Chief Justice Dickson in a notable Canadian case: Are the 'measures adopted… carefully designed to achieve the objective in question'? Do they curtail 'as little as possible' the relevant right or freedom at stake? Is there 'proportionality between the effects of the measures… and [their] objective'?[5] Applying these questions to an impugned act or Regulation is one of the primary ways in which judges might maintain their independence and protect fundamental rights.

But even where the court is unwilling or unable to strike down a Regulation passed by the Executive pursuant to powers granted by Parliament, I know of at least one case where the court was still concerned that the Legislature should retain or be afforded appropriate parliamentary scrutiny over the breadth of Regulations issued by a Minister. In a case from Trinidad and Tobago involving a challenge to the Covid-19 public health regulations promulgated by the Minister of

[2] *Liversidge v Anderson* [1942] AC 206.
[3] Ibid, 244.
[4] *R v Oakes* [1986] 1 SCR 103.
[5] *R v Oakes* [1986] 1 SCR 103, 139.

Health, Boodoosingh J (as he was then), while upholding generally the constitutionality of the Regulations, nevertheless:

> …urge[d] the Attorney General to consider, at minimum, some form of appropriate Parliament scrutiny for Regulations made by the executive where normal every day freedoms are affected, as ha[d] occurred [in that case].[6]

Ensuring continued access to justice

The third pillar around which judiciaries are fashioning their response to the pandemic is guaranteeing, as far as possible continued access to justice. Every effort is being made to assure the right to a fair hearing within a reasonable time and to afford the full protection of law to the citizenry. Courts have accordingly employed a variety of strategies. These have included issuing Practice Directions which relax some of the requirements for compliance with court rules including time compliances; the extension of bail; and the prioritising of certain categories of cases over others. At a more strategic level, courts have embraced technology-enabled court sittings and many are currently exploring electronic filing.

Implementation of these measures has not been without challenges. Some judiciaries were not yet equipped fully to utilise relatively sophisticated modalities but they had to adapt quickly so as to ensure that the business of justice delivery continued apace. In some instances legislation was required to enable the deployment of teleconferencing and videoconferencing solutions. Legal challenges to such legislation spectacularly failed. Many of you would have heard of one such instance in the Turks and Caicos Islands (TCI) where the challenge was to a Jamaican judge conducting virtually part of an ongoing trial while the judge remained in Jamaica. The matter made

[6] *Suraj and others v The Attorney General of Trinidad and Tobago; Maharaj v The Attorney General of Trinidad and Tobago* (High Court TT, 11 September 2020) at [110].

its way to the Judicial Committee of the Privy Council which only a week or two ago agreed with the TCI Court of Appeal that there was nothing wrong with the impugned Regulations deeming the place where the judge sat and connected remotely as being part of the courtroom in the TCI.

The Judiciary and Post-Pandemic Law and Governance Imperatives

So, preserving health and safety; protecting fundamental rights, affording access to justice, these have been pillars on which courts have sought to respond, to mitigate against the disruption and challenges caused by the Covid-19 crisis. This response has been a critical component of keeping the wheels of justice turning in these 'novel' times.

But, as I said at the outset, it is not enough merely to cope with the pandemic. In coping, valuable lessons have been and are being learnt. We must now resolve to apply those lessons to chart the way forward. How do we do that? How do we, as is now often asked, 'build back better'? The answer to this may be summed up in one word, 'Innovation'. Judiciaries must re-imagine and, in some respects, re-engineer the ways in which justice services are delivered. The image of the judiciary as a staid, conservative establishment impervious to change and contemptuous of novelty must give way to institutions that are agile; that earn the trust and confidence of a public that yearns for timeliness, efficiency and modernisation. This is what I want to focus on for the next few minutes.

I would identify three (3) conditions for building more robust and responsive judiciaries. There must be: (i) deeper and more meaningful collaboration on policy with the other arms of the State; (ii) there must be a ramping up of modernisation initiatives, with particular emphasis on the

deployment of ICT-based solutions; and, finally, (iii) there must be an even greater focus on strengthening the rule of law.

Deeper and more meaningful collaboration on policy development and implementation

What do I mean by deeper and more meaningful collaboration on policy with the other arms of government? In many respects, the efficiency and effectiveness of the administration of justice depends not on the judiciary operating in a silo but on all three (3) arms of the State moving in a synchronised manner towards a common and sufficiently articulated goal. Traditionally, and it is still the case, there has been a prevailing view that the Executive should be wary of too close an interface with the judiciary. But, for my part, I believe that it is crucial that on policy issues which impact on the administration of justice, it is sometimes necessary for all arms of the State to 'be on the same page' in relation to meeting needs, filling gaps and offering solutions.

The criminal justice system is a prime example that illustrates the need for such collaboration. In most English-speaking Caribbean countries, the criminal justice system is beset by delays, backlogs, unacceptably high rates of pre-trial detention, overcrowded prisons, inefficient trial processes, low conviction rates in some states, inappropriate and inadequate mechanisms for treating with drug addicts and youth who come into conflict with the law, and one can go on and on. The criminal justice system, however, is not a single system but an amalgam of several separate but inter-dependent ecosystems, many of which fall under the purview of the Executive, including – the police; prosecutorial agencies; prisons; probation and welfare services; parole boards; *et cetera*. We should also list Parliament here as a key player. In order for the wheels of the criminal justice machinery to turn smoothly, there needs to be an alignment of interests and meaningful

collaboration among the high command of these various entities. Solutions to the fundamental problems plaguing criminal justice will not be sustainable if the judiciary on its own does a little jiggling here and there, or parliament passes this or that law without first discussing its implications with representatives of the judiciary or if a state agency embarks on policies whose impact on the courts is insufficiently thought through. Effective criminal justice reform requires a holistic and not a piecemeal approach and that is only possible with collaboration among the various branches at both policy and implementation levels.

Yesterday, I witnessed a joint presentation by representatives of the Trinidad and Tobago Ministry of Works and Transport and the Magistracy that fully demonstrated the point. That country has introduced a modern demerit points system that harnesses modern technology and it was pleasing to witness the obvious collaborative efforts of the judiciary and the Ministry.

Modernisation of the judiciary

This segues to my second area, modernisation of the judiciary. The onslaught of Covid-19 has brought into even sharper focus the need for technological solutions to the challenges associated with case intake, case management, caseflow management and court performance monitoring.

There is undoubtedly a value in the law being predictable, certain and stable; but we absolutely must eschew that tendency towards conservatism that seems endemic in judiciaries. It is a tendency

that I believe common law practice and tradition encourage. The common law method is one that rarely looks forward. It is essentially backward looking. Judges look backwards for the law we apply. We follow precedents established in the past. But in charting our way forward into the 'new normal', there must be a conscious effort made to overcome this backward looking approach and to innovate – to adopt court processes and rules of procedure that are customer friendly, effective and designed to enhance efficiency and earn public trust. Creative solutions must be tested in order to meet current and future needs.

Courts have traditionally been associated with the notion of being an exalted, a sacred, place of robed priestesses and priests who dispense justice from on high. The physical infrastructure of most courts reinforces this image with the judge seated on a lofty perch looking down upon supplicants seeking justice. Well, the pandemic has graphically illustrated a mantra that has been repeated for several decades now by the British Professor, Richard Susskind. Susskind has suggested that in fact the court is not to be regarded as a place, but rather as a service. In other words, courts, and I suppose this may also apply to other public service bodies as well, but courts must see themselves principally as a provider of services and, as such, they must leverage appropriate technology to enable these services to be provided without necessarily requiring the physical attendance of service recipients or stakeholders.

Let us illustrate this concept by reference to the criminal justice system and jury management, in particular. Jury trials have been significantly disrupted because of the pandemic and the need to maintain appropriate physical distancing. Many judiciaries have actually been forced to halt jury

trials. I recently had a very intriguing conversation with Mr. Bevil Wooding, the Executive Director of Advanced Performance Exponents Inc. (APEX) - a CCJ established not-for-profit, court-technology company that provides the CCJ's electronic case filing and case management platform. Bevil's view was that a possible approach to getting jury trials going in the current climate would be to use cinemas. Cinemas too have been largely affected by the Covid-19 restrictions. But cinemas have big screens, ample seating and sophisticated audio-visual equipment. And cinemas rarely operate by day. What of seating the jurors in the cinema, more than adequately physically distanced, and establishing a video link from the court to the cinema? Of course, there are small details that would be necessary to make this work, but this is an example of devising innovative solutions to seemingly intractable problems. This we can do once we start with the notion that the court is not a place, it is a service!

Strengthening the Rule of Law

Lastly, I believe judges must continue to emphasise the strengthening of the rule of law, a concept that is expressly provided for in our Constitutions. I believe that more can and must be done to reduce arbitrary action on the part of State officials and to ensure greater accountability on the part of those who exercise public power.

Courts must ensure respect for and protection of the human dignity and personhood of every single member of society and have appropriate respect for their autonomy. Courts must advance the rights of minorities, women and girls, the poor, the vulnerable, and those consigned to an existence at the margins of society. Judges must strive to have a greater understanding of issues such as gender

equality and intersectionality so that we see those who appear before us as persons entitled to equal consideration devoid of any prejudices and not merely as an abstract complainant, claimant or defendant.

To these ends we must be willing to interrogate in a bold and honest manner the laws and practices we have inherited from colonial times. Do they represent who we are and what we stand for? Do they advance our Caribbean civilisation? Have they outlived any useful purpose? Should we as independent and sovereign nations simply accept laws from a particular era – no matter their provenance or impact – simply because they were bequeathed to us as colonies?

The CCJ has made clear its position on many of these points – one might look at, for example, the cases of *Nervais v R; Severin v R*[7] and *McEwan v The Attorney General of Guyana*[8]. As I said in *McEwan*[9],

> Civilised society has a duty to accommodate suitably differences among human beings. Only in this manner can we give due respect to everyone's humanity. No one should have his or her dignity trampled upon, or human rights denied, merely on account of a difference, especially one that poses no threat to public safety or public order.

Conclusion

In closing, I must say that I am optimistic about the prospects for the judiciaries of the region to rise to the challenges ahead. And the Caribbean Court of Justice is committed to playing whatever

[7] [2018] CCJ19 (AJ).
[8] [2018] CCJ 30 (AJ).
[9] *McEwan* (n 12) at [1].

modest role we can to assist in this regard. The CCJ considers that we must not only model judicial excellence but also act as a transformative agent within justice sectors regionally. This commitment is embedded in our strategic framework and outlook. Strategic Issue 6 of our 2019 - 2024 Strategic Plan[10] addresses itself to 'Enhanced Regional Justice System Capacity and Performance'. Here, the CCJ identifies for itself a singular goal of playing '…a guiding role in the improvement of justice delivery'.[11] We have sought to achieve this goal by reinforcing our structured relationships with judiciaries across the region, by collaborating with Bar Associations, law institutions and other such bodies that play a defining role in promoting Caribbean Jurisprudence, and by working with regional courts on matters that would strengthen the effective delivery of Court services.[12]

In a sense, one might regard the CCJ as a centre, a hub for regional justice system enhancement. I'll share, very quickly, a few examples. The Office of the President of the CCJ currently serves as the Secretariat for the Conference of CARICOM Chief Justices and Heads of Judiciary, a body that is currently chaired by The Honourable Dame Janice Pereira, Chief Justice of the Eastern Caribbean Supreme Court. Notably, the Conference shares a very warm relationship with non-CARICOM judiciaries, including those of the British Overseas Territories and the Joint Court of Justice in the Dutch Caribbean.

[10] Caribbean Court of Justice, 'Strategic Plan 2019 – 2024: Unlocking Potential – Strengthening Caribbean Jurisprudence' < https://ccj.org/wp-content/uploads/2019/02/StrategicPlan-2019-WEB-compressed.pdf> accessed 20 November 2020.
[11] Ibid, 30.
[12] Ibid.

The CCJ also plays a distinct role as a centralised agency for administering externally funded judiciary improvement projects. We have, in the past, worked with the European Union which provided funding to secure video conferencing units for courts across the region and, over the last six years, the CCJ has served as the executing agency for the Judicial Reform and Institutional Strengthening (JURIST) Project – a Canadian-funded justice sector reform project in respect of which the Conference of Heads of Judiciaries is a partner. JURIST has been instrumental in a number of initiatives including providing equipment to judiciaries to enhance their service delivery amidst the pandemic, collaborating with UN Women and the Caribbean Association of Judicial Officers (CAJO) in creating Gender Protocols for judiciaries, and establishing a specialised Sexual Offences Model Court in Antigua and Barbuda.

JURIST is also in the process of rolling out a regional Knowledge Management System (KMS) to be hosted at the CCJ. The KMS will capture, store and make available a wide range of material produced by regional judiciaries including judgments, Court Rules and Protocols, best practices and other such knowledge products. In our thrust to promote Caribbean jurisprudence, we are also hoping to make available through the KMS theses from seminal Caribbean jurists that explore the application of the law to our post-independence societies and which represent autochthonous legal thought.

The CCJ has also been instrumental in providing the support to enable the emergence and growth of bodies such as the Caribbean Association of Judicial Officers and the CCJ Academy for Law. CAJO, which is currently led by The Honourable Mr. Justice Jamadar, is heavily involved in

judicial training and knowledge exchanges both in and outside of the CARICOM region. The CCJ's educational arm, the CCJ Academy for Law, currently led by The Honourable Mr. Justice Winston Anderson, has focussed, albeit not exclusively, on training of judges and lawyers in areas of international and comparative law.

So, yes, despite the dismal situation we now face in the circumstances of the Covid-19 pandemic, I remain optimistic about the prospects for the judiciaries in the region to rise to the challenge ahead. Naturally, the CCJ will continue to do all it can to enhance the efficiency and effectiveness of justice sectors across the region so that they can come out of this pandemic stronger than before.

Thank you.