



THE EVOLVING IMPACT OF TECHNOLOGY ON THE JUDICIARY

The Hon. Mr Justice Adrian Saunders

Evolving Judicial Practice for the Digital Age

Virtual forum for judicial officers

20 October 2021

ABOUT THE CARIBBEAN AGENCY FOR JUSTICE SOLUTIONS

APEX is a Caribbean-based, special-purpose, not-for-profit agency, established by the Caribbean Court of Justice with a mandate to support and accelerate digital transformation in the justice sector.

The Evolving Impact of Technology on the Judiciary – by Justice Adrian Saunders

This feature address will provide a synthesis of the legislative, political, societal, and technological trends impacting the judiciary and the conduct of courts across the region. It will also explore the actors, threats and opportunities, and initiatives that can serve as catalysts for court excellence.

It is a tremendous privilege and pleasure to be afforded the opportunity to make this brief keynote address and I would like to congratulate the Caribbean Agency for Justice Solutions – APEX – for organising this forum. This non-profit company was created in large measure by the unswerving commitment of two outstanding Caribbean minds in Sir Dennis Byron and Mr Bevil Wooding, each a giant in their respective fields of justice and ICT - information and communication technology. Their insights and painstaking efforts, the hard work of many of us at the CCJ, the expertise of other technical and legal officers and the encouragement and material support of certain Caribbean governments have all contributed to the creation of this wonderful Caribbean vehicle that supports and accelerates digital transformation throughout the region.

Forums such as these fulfil one of the important goals that was envisioned for APEX when it was originally conceived. From the start, it was never considered sufficient for the company to be a mere provider of technology to justice institutions. APEX has always considered itself as also having, among a range of other responsibilities, an obligation to promote and facilitate a continuing

dialogue between ICT experts on the one hand and law and justice officials on the other.

And so, here we are today. There is so much to discuss. In each of these two spheres, justice and ICT, there are tremendous changes occurring in the world as we speak. These changes mirror the dynamic trends and developments we are witnessing in every facet of life. The challenge for us who inhabit the sphere of justice is severalfold:

How do we keep abreast of technological developments and their increasing influence on our societies?

How do we harness and apply that which is useful in order to enhance the administration of justice and the rule of law?

What steps do we take, in the face of contemporary expectations of service delivery, to promote public trust and confidence in the courts?

Forums like these are important precisely to assist us in answering these critical questions.

While it is true that had the pandemic not intervened, it would still have been necessary to hold this kind of dialogue, there's no denying that COVID-19 has brought several things into clearer relief. Firstly, it has reminded us that we inhabit a VUCA environment i.e. a space that is volatile, uncertain, complex and ambiguous. Secondly, it has

rendered more urgent, more serious and more imperative, the need for courts to transform themselves into agile institutions. And thirdly, it has confirmed that with the necessary motivation, courts can indeed utilise digital technology rapidly to at least try to adapt.

I recently read a report from Pluralsight, a technology workforce development company, in which it was stated that the top three trends impacting technology teams in 2021 were a) workforce transformation; b) tech modernisation and c) digital acceleration. This assessment was, I believe, principally aimed at private sector technology teams. But the priorities that were identified resonated with me. I thought that they uncannily spoke to the kind of imperatives that have been confronting courts even before the onset of the current pandemic.

Let us very briefly reflect on each of these trends in turn.

Workforce Transformation

The first is workforce transformation. For some time now, Court staff and judges alike have been and are being asked to do more, with fewer and fewer resources. Staff are also being asked to do new things. I can speak from personal experience as this has particularly been the case at my court. Over the last year or two, the CCJ has spent a considerable amount of time and effort in honing our approach to the implementation of our strategic agenda, fleshing out our court excellence and risk management frameworks and reviewing the design

of our organisational structure. Some of this is unfamiliar stuff for most of us. And so, we have had to invest heavily in workforce issues as we grappled with them. But we are convinced that we are on the right track and with each passing quarter, we are getting better at what we are about. It has required and will continue to require significant training, upskilling and cultural change to succeed in our objectives. But that is what workforce transformation is all about. A judiciary has to be committed to a culture of continuous learning.

The management guru, Peter Drucker, famously stated that "culture eats strategy for breakfast". Culture is how an organisation thinks and acts; the values, customs, beliefs, habits and symbolic practices that, in our judiciaries, we live and breathe every day. The point is that these will always dominate and prevail over whatever strategy we develop or seek to implement. The kind of culture we allow to infuse our courts will ultimately determine that court's success regardless of how effective one's strategy may appear to be.

Bevil Wooding has rightly commented that "an organisational culture that is constantly curious, highly sensitive to social shifts and unwavering in its commitment to innovating and evolving is what is required to navigate life in the digital age."

For our courts, this requires investment in constant training, learning, upskilling.

When the Jamaican change management expert, Dr Leachim Semaj, addressed a group of us in Jamaica about five years ago, he illustrated in a very graphic manner that the usefulness of a lot of what we know and learn is transient. He noted that lawyers and judges are fond of referring to each other, sometimes with a touch of sarcasm, as “learned”. The learned judge! My learned friend on the other side! Dr Semaj impressed upon us that in today’s world, the definition of “learned” is not one who has obtained certification from some higher education establishment, or one who commands an exalted status. A person is truly learned if they are able quickly to learn, unlearn and re-learn. And you can think of this for example in relation to software in the most recent cell phone or computer you acquired.

Tech Modernisation

The second trend mentioned by Pluralsight was tech modernisation. Caribbean judiciaries have been struggling with the imperative of modernisation over the last 25 years or so. The need is still very much there. In May of last year, the CCJ together with the Caribbean Association of Judicial Officers (CAJO), collaborated with the CCJ Academy for Law (CAL), the JURIST Project and APEX to convene an online forum to discuss judiciary needs, challenges and best practices specifically in light of the global pandemic. The event was attended by 115 participants from across the entire Caribbean region. Judiciaries, Offices of Attorneys General, Directors of Public Prosecution and Bar

Associations from 22 Caribbean countries were represented. At the conclusion of the conference, several issues were identified. The first and paramount one was insufficient technology to adapt properly to the challenges posed by COVID-19. Law and justice institutions encountered technological challenges that included the following:

- a. Lack of proper electronic and case management systems**
- b. Insufficient access to virtual hearing platforms for the conduct of and participation in trials**
- c. Poor or inadequate internet connections**
- d. Disproportionate disadvantages faced by Magistrates' Courts**
- e. Lack of online systems for payments of fees**
- f. Lack of systems for electronic archiving, document storage and document exchange**
- g. High costs for the acquisition and implementation of appropriate technology**
- h. Problems in the standardisation and compatibility of software and programmes between and among the courts, state agencies, and the bar**
- i. Lack of support and training for the use of technology; and**

j. Uncertainty as to what technology is appropriate for use by courts

What is interesting about the items I have culled from the much longer list compiled in the report is that none of the above reflects a need that suddenly arose with COVID or that will disappear when COVID eventually does. Each and every one of them reflects a basic imperative of modernisation. And layered atop all of them, of course, is cybersecurity and data protection. The more we invest in tech modernisation, the greater the need to secure that investment and its fruits. Criminal and other nefarious elements are constantly lurking about to steal data and much more. It goes without saying that, as a matter of urgency, every judiciary must engage in tech modernisation even though mere modernisation, as we shall see, is insufficient to address many of our fundamental weaknesses.

Digital Acceleration

The third top trend identified by Pluralsight was digital acceleration. The potential of digitalisation increases at such a rapid pace that any innovation we implement today will be stale if not entirely obsolete in a few years' time. What this means is that firstly, failure to innovate today doesn't leave us standing still, it carries us backwards. Once you're on the digital treadmill you get off, if you can, at your own peril. Secondly, once aboard one must adopt and practise over and over again the four-step cycle – assess, analyse, implement and evaluate.

The sad reality is that we live in a world where more people have access to the internet than they have access to justice¹. According to the Organisation of Economic Co-operation and Development, only 46% of the world’s population lives under the protection of the law.² On the other hand, the International Telecommunications Union stated in 2018, in its Measuring the Information Society Report³, that more than half of the world’s population is now online. At the end of 2018, 51.2% of individuals, or 3.9 billion people, were using the Internet. Almost 60% of households had internet access at home in 2018, up from less than 20% in 2005. There continues to be a general upward trend in the access to and use of ICTs. Mobile access to basic telecommunication services is becoming ever more predominant. These are stats that are irreversible, fast growing and awe inspiring. Information today is globalised, pervasive and extremely influential.

The Internet and Social Media

The influence of the internet and social media is not always positive. An historical fact - smallpox existed in the world for some 3,000 years. It was a terrible and lethal disease. On average, 3 out of every 10 people

¹ Richard Susskind, ‘Online justice: The way of the future?’ (LSJ Online, 29 January 2020) < <https://lsj.com.au/articles/online-justice-the-way-of-the-future/#>> accessed 18 October 2021.

² Richard Susskind, ‘Online justice: The way of the future?’ (LSJ Online, 29 January 2020) < <https://lsj.com.au/articles/online-justice-the-way-of-the-future/#>> accessed 18 October 2021.

³ International Telecommunications Union, ‘Measuring the Information Society Report: Volume 1’ (2018) <https://www.itu.int/en/ITU-D/Statistics/Documents/publications/misr2018/MISR-2018-Vol-1-E.pdf> accessed 18 October 2021.

who were infected died from it. Those who survived usually had scars, which were sometimes severe. The World Health Organisation commenced an intensified smallpox eradication programme in 1967. Thirteen years later, on May 8, 1980 the 33rd World Health Assembly declared the world free of this deadly disease. This phenomenal feat occurred largely through mass vaccination. The question is this: would Smallpox have been eradicated if social media existed between 1967 and 1980? I doubt it!

The point is that court customers are naturally captured in these trends that show the profound reach and influence, positive and negative, of the internet and internet-based platforms. What expectations would the population reasonably have of the operations of the courts and other public institutions when, for example, they are accustomed to the instantaneity of internet solutions? How do we, as judicial institutions, maintain the public's trust and confidence in the courts in the face of the tremendous information, misinformation, and cynical *dis*-information that is so easily accessed on the internet?

Unfortunately, courts are traditionally slow to respond to these kinds of challenges. Indeed, the administration of justice naturally tends towards conservatism. The law, after all, must be stable. Predictability and certainty in the law are attributes which, with good reason, are highly valued. Moreover, the common law method we in these parts

have inherited is one that is essentially backward looking. We are trained not to depart too readily from following precedents established in the past. We illuminate the way forward by looking backwards. All of this produces a culture of ingrained habits of thought, that often results in slowness and even resistance to embrace novelty. Where change is concerned, incrementalism is valued, not so much radical transformation.

A recent case from the Turks and Caicos Islands demonstrated the tension law and justice can have with novelty. There was a criminal case in that country. The former Chief Minister and others were in the dock. A Jamaican judge was recruited to preside over the case. The trial had been proceeding in the TCI for quite some time before COVID-19 struck. Travel was disrupted, the Jamaican judge returned to his native land. The TCI Governor then enacted the Emergency Powers (COVID-19) (Court Proceedings) Regulations 2020. Among other things, the Regulations made provision for court cases to be conducted via remote hearings. Courts all over the world adopted similar regulations given the pandemic. The clear idea here was to enable the judge to continue the trial while he was in Jamaica using one of the well-known remote platforms. The defendants complained that the regulations were unlawful to the extent that they purported to create a 'courtroom' outside the jurisdiction of the TCI. According to the lawyer for the defendants, “where the judge is, there the court is” so that if the judge

was in Jamaica, the court is in Jamaica, and it was impermissible and unconstitutional for a court located in Jamaica to try a TCI case. A TCI trial judge actually accepted those submissions and declared the particular regulation unlawful. Fortunately, and not surprisingly, both the Court of Appeal and the Privy Council came to a different view. They held that the regulation had properly deemed the place where the judge sat physically to be part of the courtroom in the TCI and that notwithstanding the physical location of the judge, the latter's judicial power and authority were being exercised in the TCI in keeping with the TCI constitution and laws.

This, I think was a sensible and just result. But the case does cause inquiring minds to ponder questions relating to cloud technology. Which country has jurisdiction over the data one's judiciary stores on the cloud? What are the regulations in that country governing access to that data? Who owns that data? Can the host country treat with that data in a manner that is contrary to the wishes of the owner?

The case also causes us to reflect on the courtroom. There are many judges, lawyers, litigants and other stakeholders who are fondly attached to the awe-inspiring majesty of the courtroom. The flowing robes of the judges and counsel, the arcane and high-flown vocabulary they alone use, the awesomeness and mystique that inhabits this

sacred sanctum all combine to produce an aura that we readily identify with the dispensation of justice.

Richard Susskind, an English professor, was the first to separate the function of a court from this lofty image with which we associate justice. Susskind is the world's most cited author on the future of legal services. He has been advocating this separation for decades now. He does so not because he is repulsed or alienated by the traditional image, but for the more prosaic reason that really, a court is not a place, it is a service! For decades now he has been advocating for online courts and demonstrating how court processes can and will be transformed by technology.

The CAJO is going to have Professor Susskind with us (online, of course) in just over a week's time at a conference in which he will be delivering the feature address. I urge everyone to log in because the proceedings promise to be more than a worthy supplement to the deliberations of this conference.

COVID has created an enabling environment for us to appreciate fully the wisdom of Susskind's 30-year-old mantra that the court is not a place, it is a service. This appreciation results from a new mind set; one in which we consider our stakeholders as customers and ourselves as service providers.

I would allow the Professor to speak for himself, as he will next week, but before closing I would just wish to indicate one of his ideas that resonated deeply with me. He advocates that we encourage the use of outcome thinking. People don't need or want doctors and nurses; they really want their health restored. People don't need architects and contractors. They want a fine edifice. They don't want judges and lawyers. They want justice. In other words, it behooves us to emphasise the importance of focusing on and attaining the desirable *outcome* rather than on the human expert or even the technological or process medium that we use currently to try to get us to that outcome. I thought that this approach of focusing on outcomes was especially prescient when the most important stock in trade of the administration of justice, the litmus test for measuring the value of courts, is the extent to which they enjoy public trust and confidence.

Colleagues, there is so much to say and much more to do. Just imagine, I haven't even said a word yet about artificial intelligence and the prospect of its usage in the delivery of some justice services. That is for another time!

In conclusion, I wish to reiterate how pleased and extremely proud I am to see that APEX is so admirably fulfilling its role. APEX currently

provides cutting edge technology services for judicial institutions in 11⁴ different English speaking Caribbean states. This provides a firm basis for all of these institutions, and representatives of other legal and judicial bodies as well, to collaborate on and coordinate our approaches to technological developments that will make a positive difference to the Caribbean justice sector. There is little substitute for investing in regional solidarity and a collective awareness of global trends, societal shifts and their implications for judiciaries.

I thank you for your attention.

⁴ Barbados, Belize, The Commonwealth of the Bahamas, The Cayman Islands, Jamaica, Turks and Caicos Islands, The Federation of St Kitts and Nevis, Saint Lucia, St Vincent and the Grenadines and Trinidad and Tobago