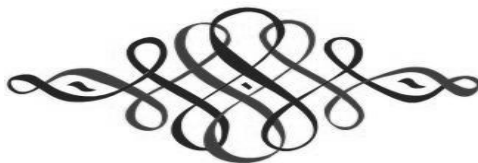


Considering Diversity: The Judicial Process for the Caribbean Court of Justice and Beyond*

by

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I. Introduction

Judicial appointments, and the place of diversity within this process, are a topic fraught with complexities. A growing number of articles are being written, panels assembled, arguments voiced, and policies drafted that reflect on the question of whether appointment of judges in a democratic state, governed by the rule of law, should be guided solely by merit or whether diversity should be also be considered. Even the International Bar Association’s Human Rights Institute, concerned about the increasingly politicized nature of judicial appointments, recently weighed-in on this topic, issuing a resolution in 2011 on “*the values pertaining to judicial appointments to international courts and tribunals.*” This Resolution gives diversity a tie-breaker role, stating that:

*where several candidates are equally eligible for appointment and it is considered appropriate and reasonable to do so, preference in appointment may be given to a candidate who: Possesses the characteristics that will **promote diversity** amongst those who will hold office in the court or tribunal in question (IBAHRI 2011a, 2).*

While diversity might be used as a tie-breaker in that Resolution, it is handled in myriad ways across the globe at every level of the judiciary. Indeed, research on the topic of diversity in judicial appointments runs the gamut: national diversity in international courts, subcultural diversity in national courts, gender diversity in criminal courts, religious diversity in courts over time, racial diversity in post-apartheid tribunals, etcetera, etcetera, and etcetera. Determining where and how I might be able to make a novel contribution to these expansive discussions is challenging. I believe, however, that I have identified an area in which I can say something new, and that is on the topic of judicial selection at the Caribbean Court of Justice, specifically; a

Court that is at once international and national, handles criminal and civil, serves a public with extraordinary diversity, faces a history of colonialism with its consequent contemporary effects, and is only eight years old. It is my intention that my reflections on the Caribbean Court of Justice will also have relevance to other international (and national) courts, as they struggle with similar issues of whether, and how diversity should be taken into consideration in judicial appointments.

II. Distinguishing Diversity from Merit

It is important to begin with a closer look at the underlying question – “diversity or simply the best?” The mere phrasing of this question is a vestige from times past; it is a set-up suggesting that a diverse bench can never be the best bench. But this suggested dichotomy between diversity and merit, I suggest, is much more than merely a provocation. Instead, it is something deeply embedded in the process and understanding of judicial appointment around the world. I will cite two examples.

First, the dichotomy – this supposed division between merit and diversity – is reiterated in the background paper to the International Bar Association Human Rights Institute’s Resolution, which states:

Whilst geographical and other diversity is a relevant consideration for the selection of candidates, and appointment or election of judges to office within the UN, the primary considerations reflected in international human rights law are not geographical, racial, cultural or social but concern the personal qualities of competence, independence and integrity expressed in international law. Those qualities transcend geographical, racial, cultural or social characteristics ... (IBAHRI 2011b, 8).

We see here the apparently evident distinction between characteristics of diversity and considerations of merit.

My second example comes from the efforts to diversify the courts of the United Kingdom. Kate Maleson, who has written extensively on the topic of diversity in judicial appointments, notes that in the U.K., “*almost without exception, official expressions of support for proactive measure to encourage diversity have been qualified by a statement of commitment to a strict application of the merit principle*” (2006, 131). In other words, a sharp distinction has been drawn between diversity and merit; a distinction, I believe, that has stymied any sort of notable diversification of the judiciary.

The simple point that I want to draw from these two examples is that diversity and merit are treated regularly as completely distinct qualities of a person the world round. I want to challenge this distinction, but not in the usual way. I am *not* going to make the argument that a highly diverse bench can be every bit as academically qualified, competent, and independent as a non-diverse bench – which is, parenthetically, something that I believe to be categorically true. Instead, I will proffer an argument based on stereotypes, appearances, and the importance of public perception. As a starting point, we should all be able to agree that the way in which the public perceives a court, no matter the court and no matter the part of the world, is important for the effective functioning of the rule of law (Maleson 2009).

III. Perceived Linkages between Diversity and Merit

In the Caribbean, as elsewhere, appearances matter. They matter because appearances have come to be associated with other qualities – so closely associated that the external appearance of a person may be seen as inextricably linked to that person’s violent proclivities, athletic abilities, level of intelligence, political affiliation, degree of sophistication, judicial competence, capacity for independence, or proclivity for integrity. A man’s green skin colour, for instance, might be understood as a proxy for his political allegiance. Nationality, too, has entered the mix, such that nationality has also been linked to other traits. A woman’s Ruritanian citizenship, for example, might be “proof” of her level of intelligence. Same, too, with language and accents and religion and gender and ethnicity – all of which have grown to be associated with characteristics that have nothing to do with language or accents or religion or gender or ethnicity.

What I am talking about, of course, are stereotypes, stereotypes that social scientists have worked very hard to disprove and discourage, but stubbornly persist. While I agree that a man's green skin is neither always nor necessarily an accurate indication of his political party, his intelligence, or his integrity, I am not here to talk about the general lack of validity of stereotypes. Instead, I want to comment on how these stereotypes operate and, more specifically, how they affect the operation and perception of law in the Caribbean, and how they, consequently, must be taken into consideration in the judicial appointment process for the Caribbean Court of Justice. It should be obvious, but I will point out that the Caribbean is hardly unique in its experience with stereotypes. My comments regarding the Caribbean, then, should be taken to represent merely one example – an example with which I am intimately familiar – of a much more widespread phenomenon.

First, allow me to describe briefly the population served by the CCJ. The CCJ is a court of original jurisdiction for twelve Caribbean nations. In this capacity it decides issues arising from the Revised Treaty of Chaguaramas, a regional economic treaty. It is also the highest court of appeal for the Commonwealth Caribbean nations that abolish appeals to the Privy Council. Three countries have done this so far: Barbados, Guyana, and Belize. If we look only at these three countries, we can already begin to understand the tremendous diversity of peoples served by the CCJ. We begin with three independent nations. Then we look at the breadth of ethnicities: Afro-Caribbean, Indo-Caribbean, Maya Indian, Garifuna, European, Chinese, and others. And religions: Anglicans, Catholics, Pentecostals, Jehovah's Witnesses, Seventh-day Adventists, Spiritual Baptists, Hindus, Muslims, Mennonites, Methodists, Rastafarians, and practitioners of Maya religion, Garifuna religion, and Obeah. If we expand this to all twelve countries, the complexity of the diversity of peoples only increases. We are dealing, then, with twelve nationalities, at least a dozen ethnicities, a rainbow spectrum of skin colours, and a dizzying number of religions.

What is more, the stereotyped characteristics associated with skin colour, religion, nationality, etcetera often differ in each country. Let us take Trinidad and Tobago as an example. There, skin colour and political affiliation have historically been understood to be so tightly intertwined (with Indo-Trinidadians associated with UNC and Afro-Trinidadians with PNM) that a whole

cascade of unchallenged predictions, assumptions, and accusations about how someone will or won't act are often made simply on the basis of skin colour. To be even more specific in this example, the absence of an Indo-Caribbean judge on the CCJ bench has led to a host of concerns published in Trinidad's newspapers as to the ability of the Court to render impartial, apolitical, independent decisions (see e.g. Padmore 2005; Trinidad Express 2008). I acknowledge that the Trinidadian political-racial stereotype has been shifting in recent years, but to some extent the words that were uttered continue to colour perceptions today and it is likely that such perceptions – and conflation of diversity and merit – affect the politicians' and the public's faith and confidence in this Court. And, this is just one example of one stereotype in one country. One might imagine the complications that ensue when a dozen countries with dozens of stereotypes are considered.

The existence and operation of these stereotypes in Caribbean society means that the stark distinction between merit and diversity in the process of judicial selection might exist on paper (though, the Agreement Establishing the CCJ does not specifically contemplate diversity of this sort – a point I will return to later). But, the same delineation between merit and diversity is not similarly present in the lived realities of many Caribbean people. I note, from my experience at the ICTR, that this is also true in other parts of the world – diversity and merit are seen to be inextricably linked based on long-held and deeply felt stereotypes (as misguided and mal-informed as those stereotypes might be). The result is that the merit of a judicial candidate, a sitting judge, a bench, or a Court as a whole may, unfortunately, be determined based on characteristics like skin colour, religion, ethnicity, gender and nationality that should have nothing to do with merit whatsoever. In other words, the meritorious reputation of a Court or even an entire legal system – *despite the fact that excellent judgments might be emanating from it* – is at least partially dependent on diversity, and, I add, especially in the Caribbean. Diversity, I suggest, matters, and it matters a lot.

IV. So what?

There are those, of course, who will argue that we should not allow ourselves to be swayed by incorrect perceptions and stereotypes; what matters most, they argue, is that the Court continues to give sound judgments and bring justice to the region. While this argument has its place and

this is undoubtedly a fundamental goal of any court, I think that it misses the broader impact that a court can and does have in society. A court plays a symbolic role, a unifying role, a role in which all are treated equally before the law. And, what is notable is that a judge from a so-called ‘diverse’ category of people may become a symbol of inclusivity or may be taken to hold a certain point of view because of her appearance, *even though this judge may not necessarily hold the same viewpoints as the community that she appears to represent* (Chandrachud 2013, 491). And, as Tracy Robinson, a Jamaican legal scholar, notes, there is real “*value [to] the principle of representation*” (2013, 19). In her words, it is fundamentally “*a matter of justice*” because it signifies an equal right to participate in public life (ibid.). Moreover, it can engender pride, confidence, and trust amongst the public (see e.g. Neuberger 2010, 4).

Conversely, the absence of such ‘diverse’ figures can have the opposite effect. The court can be seen as exclusive, divisive, and unrepresentative of the full breadth of the society it is meant to judge. It can breed mistrust and a lack of confidence. As Malleon has noted,

Once a cycle of public mistrust has developed, even a court with impeccable institutional arrangements may struggle to build public confidence. Conversely, once public confidence in the independence of a court is embedded, its judges are able to draw on a relatively deep well of support irrespective of the institutional arrangements or indeed the popularity of their decisions... (2009, 687).

What this suggests to me is that not only is diversity on the bench an important consideration because it can lead to public confidence, but, perhaps, diversity should be *a highly important* consideration in the development of a court. If I overstate this, I do so only by a matter of degree.

You see, the CCJ is fairly explicit about its symbolic role. It is meant, in part, to be a symbolic step in the closing of the circle of independence, the final step in a decades-long process of complete de-colonization, a sign that a Caribbean Court with Caribbean judges who share the

values and customs and beliefs of the Caribbean people will be developing a particularly Caribbean jurisprudence. To be seen to exclude certain members of society cuts to the foundation of what this Court stands for. It is truly distressful, then, to know that certain groups felt and continue to feel this way.

And, now, eight-years after the CCJ's inception and following over one hundred judgments, some concern over the lack of diversity and representativeness of the CCJ bench remains. In her keynote lecture delivered at the Caribbean Association of Judicial Officers Conference in late-September 2013, Robinson raised the issue of the lack of female judges in the CCJ. Currently, there is one female amongst the seven sitting judges– the Honourable Justice Desiree Bernard; she is set to retire early next year. Robinson argues:

It would be a shame if the CCJ in 2014 becomes a court only represented by men ... this is a court built around the principle that as a matter of legitimacy, democracy and fairness, the region should have its own court. An all-male court sends a message that is not in sync with this (2013, 19).

Her words I believe, underscore everything I have been saying. Public perception – often based on unfortunate and inaccurate stereotypes, but also based on substantive concerns of justice and fairness – makes a difference. While Justice may be blind, the people to whom it is administered are surely not. We must pay attention to how we are being perceived.

V. CCJ's selection process

The question remains, then, how should a Court like the CCJ, serving a public as diverse as it does, take into consideration the diversity of its judicial candidates? Complicating this question even more is the fact that it is unlikely that the pool of candidates, itself, will reflect the full diversity of the population. So, what *should* we do and what *can* we do?

The judicial selection criteria contained within the Agreement Establishing the Caribbean Court of Justice does not offer much assistance. These criteria focus on what we might consider to be merit. Article 4.11 states:

In making appointments to the office of Judge, regard shall be had to the following criteria: high moral character, intellectual and analytical ability, sound judgment, integrity, and understanding of people and society.

To be fair, the Agreement does contemplate diversity, but only in the sense of intellectual diversity. It includes provisions requiring the inclusion of judges with expertise in international law and international trade law (Art. 4.1) and allowing for candidates that have substantial judicial experience (Art. 4.10a) or academic experience (Art. 4.10b) in either common or civil law systems. Additionally, the last six words of Art 4.11 do give some latitude to address the concept of diversity.

The CCJ judicial qualification criteria are not an aberration in this regard. The Statute of the International Criminal Tribunal of Rwanda similarly focuses on merit and intellectual expertise. Article 12.1 of that Statute requires that:

The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

Diversity is not contemplated otherwise. The Updated Statute of the International Criminal Tribunal for the Former Yugoslavia uses identical language, leaving diversity entirely out of the statutorily required characteristics.

It bears mentioning, however, that despite the fact that diversity is not listed in the selection criteria of the CCJ, the ICTR, the ICTY or other international tribunals, diversity does seem to be taken into consideration by those who are doing the selecting (in the case of the CCJ) or the electing (in the case of many other international courts). While we cannot know the details of the discussion surrounding the appointment of the first panel of judges at the CCJ, we can see the result- a panel, of only seven judges but with differences including those of gender, colour, ethnicity, nationality, places of geographical origin, religion and background experience, Common Law and Civil Law. This difference between what is on paper and what actually transpires during the selection process seems to be quite common when we look at other courts. In international courts like the ICJ, ICTY, and ICTR, where judges are selected through a nomination and election process, “traditions” and other “informal norms” often exist that determine the geographic representation in these bodies (see Corell 2011, 77; Chandrachud 2013, 495). The ICJ, for instance, always has a judge from one of the permanent five members of the UN Security Council, but this is not a written rule (see Corell 2011, 77). Similarly, as other panelists might note, judicial appointments to the Supreme Court of Canada, the Federal Constitutional Court of Germany, the Supreme Court of India, and other courts around the world tend to follow informal norms and practices to reflect various definitions of diversity – geographic, religious, gender, racial, etcetera (Chandrachud 2013, 497-501). Even the House of Lords and Privy Council, now the U.K. Supreme Court, which have been rightly criticized for their lack of diversity by Lady Hale (2013) and others, have a tradition of striving for (though not always achieving) a certain level of geographic representation (Scotland and Northern Ireland) (see Chandrachud 2013, 499).

I do not think, though, that these informal practices and conventions are quite enough to address the issue of diversity and public perception. Projecting a diverse and inclusive face – one that reflects to some degree the population that is served – should be a priority for every court. And I suggest that for the CCJ, a court that has been tasked with deepening regional integration, this is even more important and more urgent. We take this charge seriously, and we have strived to employ a regional work force, to represent the diversity of the region in the official languages of the Court, to sound like the region in the accents you hear on our phone system, to look like the

region in the faces and flags you see on the website. I think it is time to make this same dedication to regional diversity explicit in our judicial selection process.

While a quota system can never be appropriate for the CCJ, given the sheer range of diversity in our region, I believe that a conscious and forthright statement of dedication to achieving diversity as part of achieving the best CCJ bench, would be an enormous step in the right direction. Of course one must vigorously maintain that the qualities of sound intellect, extensive learning in the law and good character cannot be minimised or sacrificed.

But diversity should not be a tie-breaker, as it is in the International Bar Association's Human Rights Institute Resolution (2011), but a fundamental consideration in the selection of the Bench from the range of candidates who are up to the standards required of a judge of the relevant court. It should make the Bench as a composite, better than a mere aggregation of the individuals on it. It should not be portrayed as 'diversity or merit' or even 'diversity and merit,' but as 'diversity AS a vital component of merit.' But the solution comes at a price and cannot be automatic or magical. It is not up to the court or its selection process alone. The price may involve an element of public service. No one can be appointed to the CCJ Bench who does not apply, and it is well known in the Caribbean, that the levels of remuneration at the highest levels of the legal profession exceed that of the Bench.

Let us be honest and upfront about the role of diversity in the Caribbean region. I think it would do much to send a signal to the people of the region that while every religion, ethnicity, and nation cannot be represented simultaneously on the bench, we *do* pay attention to these things and they *are* taken into consideration openly and honestly in the development of Caribbean jurisprudence.

The Right Honourable Sir Dennis Byron



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