

Chapter 5

Eradicating Inefficiencies and Abuses of Process

Without question, it was this part of the Ottawa meeting and its working sessions – concerning the eradication of inefficiencies and abuses of process – which gave rise to the most concern. The value of these deliberations is that the failings have been clearly identified. The measures for reform do not lie with the individuals within a court or tribunal or any particular system within a registry, but rather with the member states of the various regional organisations. Considerable resources are being spent in connection with the resolution of disputes in this area. However, unless these concerns are addressed, the results may at best create a limited benefit for participants and no clear advantage to the community at large.

5.1 Reasons for inefficiencies

For a number of reasons, some regional courts and tribunals have not managed to achieve a sustained record of success in the clearing of case backlogs, the enforcement of judgments and forum shopping.

A number of reasons were identified for this state of affairs:

- The ad hoc nature of some regional courts has led to their proceedings being organised at the convenience of judges. There are obvious difficulties in getting together a number of judges from different states for a hearing. The solution put forward at the meetings, and firmly supported, was that there be at least a number of judges who are permanently based at the seat of the court or tribunal in question. Having said this, it is important that there be enough work for the judges to do at the court or tribunal. In addition, a permanent base is likely to be expensive in terms of accommodation and security.
- Manual case management systems, which are still commonly used, can contribute to delay. Best practice points strongly to a need for some level of technological support along the lines already discussed in chapter 3.
- The need to tighten up the rules of practice in order to:
 - Impose time limits for litigants at every stage,
 - Avoid adjournments,
 - Have continuous hearings so as to eliminate the very long delays which can occur,
 - Make costs an effective sanction,
 - Encourage judges to produce more timely judgments,⁷
 - Provide facilities for linguistic assistance in multi-lingual proceedings, and
 - Give greater attention to the financial assistance and the recruitment of qualified staff to operate regional courts and tribunals.

5.2 Issues with the appointment of judges

In most cases, judges of regional and international courts and tribunals are appointed and nominated by individual states. Appointments are frequently made by state departments, such as a ministry of justice. These appointments are made without a system of inquiry, such as a Judicial Services Commission inquiry, which looks into the nature of the appointment and the independence and impartiality of those appointed.

Urgent attention needs to be paid to the concept of judicial independence in this regard. A commission that is independently appointed and that has a function in connection with judges can also be used as an authoritative body for making judges accountable.

5.3 Parallel jurisdictions and forum shopping

Experience has shown that the main culprits of forum shopping are often the member states. Experience has also shown that, notwithstanding a ruling from a regional court or tribunal, without the will of the states to agree to effective enforcement, judgments are 'written on water'.

The record shows that institutions established under regional economic community treaties, having jurisdiction conferred upon them to resolve differences between members and individuals who wish to bring an action against a member state, have not taken full account of the possibility of abuse from forum shopping and the difficulties that arise from the existence of parallel jurisdictions. It has been demonstrated that there is urgent need for this to be addressed by states.

The Caribbean Community (CARICOM) Treaty contains a pointer in the direction to which states should go by having a requirement for all treaties between states in connection with commercial or general association or co-operation to be logged with the CARICOM General Secretariat. There the treaty will be considered in order to determine whether it is inimical to the obligations of any member state of CARICOM. However, more specific action is required to deal with the problems faced by other courts and tribunals, particularly those of regional economic communities.

Box 5.1 Parallel jurisdictions within the East African Community (EAC)

Much as the East African Court of Justice (EACJ) is the main judicial organ of the Community that has been tasked with the resolution of disputes arising out of the Treaty [for the establishment of the EAC] and other Community laws, the EAC continues to establish other quasi-judicial bodies or mechanisms with the same mandate as the EACJ. The Customs Union and Common Market Protocols [provide examples] where such parallel mechanisms have been established with potentialities for making the EACJ redundant.

(Ruhangisa, 2010)