

**ADDRESS TO THE LAW SCHOOL STUDENTS ASSOCIATION ON**  
**THE CARIBBEAN COURT OF JUSTICE**

**Hon. Chief Justice and Mrs. Smellie, Judges of the Grand Court, Madame Justice Levers, Hon. Justice Henderson and Mrs. Henderson, Magistrate Ramsey-Hale, Dr. Lloyd Barnett and Mrs. Barnett, Director of Legal Studies Mr. Mitchell Davies, and soon to be Colleagues of the Bar.**

*"An independent country should assume the responsibility for providing a court of its own choosing for the final determination of legal disputes arising for decision in the country. It is a compromise of sovereignty to leave that decision to a court, which is part of the former colonial hierarchy, a court in the appointment of whose members we have no say."*

These words of Justice Telford Georges, former President of the Court of Appeal in Belize and former Judge of the Court of Appeal of the Cayman Islands, perhaps best summarise the view held by most Governments in the region, one of judicial independence and sovereignty from the Privy Council.

Indeed such thoughts are echoed widely in the psyche of various Government leaders throughout the region since the notion of a final local appellate court was first introduced some thirty years ago.

First heavily debated at the sixth Meeting of Heads of Governments of the Caribbean Community in Kingston in 1970, the concept of a Caribbean Court of Justice ("CCJ") was seen to achieve two main objectives. First in its original jurisdiction, where, by virtue of Part II of the Agreement Establishing the Caribbean Court of Justice (the Agreement), exclusive jurisdiction would be vested in the Court to settle disputes arising from the interpretation of the Revised Treaty of Chauguramas under the Caribbean Single Market Economy (CSME). Second that of an appellate jurisdiction as provided for under Part III

whereby it would represent a final court or a court of last resort in which all contentious and municipal disputes within the national courts would be heard.

Although, in theory the idea of a Caribbean Court of Justice appears very promising for some countries, it is a concept that has been met with much reservation and in many instances harsh criticism.

### **Original Jurisdiction**

In an era of rapid and widespread globalisation, where for example Europe has made the transitional shift from a common market economy to the European Union, developing countries have found it increasingly difficult to trade and compete in the exchange of goods and services for regional and international markets. Such a concern amongst Caricom member states has brought about the inevitable Caricom Single Market Economy (CMSE).

The establishment of the CSME may be described as being the fruit emanating from the seeds of the Treaty of Chaguaramas. Essentially the Treaty of Chaguaramas was created to facilitate trade within the Caribbean Region and to provide its Caricom members with a more competitive edge thus establishing a level playing field both within the region and the international arena.

This approach is not dissimilar to that adopted in Europe. Europe has witnessed the evolution of the Coal and Steel Agreement and the Maastricht Treaty leading up to the formation of the European Union. Much attributed to the development of the European Union is the strong presence of the European Justice system whereby disputes are resolved in the interest of Europe as a whole rather than in the interest of potentially conflicting member states. This approach is seen as essential in shaping the way forward for Europe and crucial to the success of competing in a globalised era.

The role envisaged for the Caribbean Court of Justice in this regard is analogous to that of the European Court of Justice. It is intended to provide the judicial competence

considered vital to the success of the Caricom Single Market Economy. The Caribbean Court of Justice must therefore protect the basic rights of its Member States, in addition to interpreting the Treaty and maintaining a balance and settling issues constitutional in nature. It must also provide a solid judicial foundation that secures investor confidence and ultimately the success of the CSME. It is for these reasons that some advocates hold firm to the view that only the Caribbean Court of Justice would be endowed with the power to interpret Treaty provisions and ensure that the law is applied consistently and in the collective interest of all the member States.

### **Appellate Jurisdiction**

Part III of the Agreement provides that in the exercise of its appellate jurisdiction, the Court would be a superior Court of record with such jurisdiction and powers as are conferred on it by the Agreement or by the constitution or any other law of a contracting Party. Therefore Appeals shall lie to the Court from decisions of the Court of Appeal of the respective Caricom member States. It is anticipated that the CCJ in its appellate jurisdiction will better assist in the development of regional jurisprudence as opposed to the Privy Council, which is regarded by some countries as being far removed from the Caribbean both geographically and culturally.

Some persons are of the view that by referring matters to the Privy Council, independent Caribbean countries demonstrate that they remain only at the penultimate stage of independence. Their argument is that if Caricom is to achieve full independent status then a domestic judicial system with its own appellate jurisdiction is mandatory. This argument is a corollary to the view of most Caricom members that there are certain fundamental legal issues commonly shared by the most eminent jurists in the region in respect of which the Privy Council displays no interest or sensitivity. The argument concludes that the only way for the advancement and the facilitation of the region is to develop and shape a judicial system, which reflects the culture of that society.

## **Concerns**

In as much as there appears to be an optimistic view held by most Governments in the Caribbean region as to the implementation of the CCJ as the final Court of Appeal, one can see that with some thirty years in the making, they have approached the matter with what appears to be extreme caution.

The sensitivity of this subject matter is evidenced in the widespread debates that have ensued. Emerging from these intense debates are delicate concerns to which Caricom has devoted much time and resources.

Concerns which still remain to a certain extent unresolved, make the prospect of the institution of the CCJ less attractive for those who altogether oppose its institution. These concerns may be broken down into four main categories: cost, judicial independence free of political influence, judicial competence, and international relations particularly with respect to foreign investor confidence.

## **Cost**

It is estimated that the construction of the CCJ could cost upwards of US\$100 million. Needless to say, critics are alarmed at expenses of this level and have condemned any suggestion of a Caribbean Court of Appeal at this cost. Instead they recommend that these monies be spent to facilitate growth and development of essential infrastructure and institutions of greater importance, which are capable of providing an economic return and better health and education for their countries' citizens. There are additional concerns that "the person who pays the piper calls the tune." In other words critics are fearful that the more wealthy Caricom members may influence the CCJ by manipulating the entire judicial system and ultimately result in corruption and thereby compromise the impartiality of the Court.

In contrast the independence, impartiality and integrity of Her Majesty's Privy Council has remained without question for centuries.

In an attempt to ensure the impartiality of the CCJ and to be certain that its Judges are not subject to or held ransom by the self-interests of various Governments, a Trust Fund has been established to address these and other concerns of potential corruption. The Trust Fund is geared towards the general day to day expenses of the Court and in addition will provide remuneration for the Judges.

Further concerns as to corruption are often dismissed on the basis that the composition of the Judges of the Caribbean Court of Justice will be made up from a wide range of jurists from within the Commonwealth, who are competent and of sound character.

### **Judicial Competence**

With regard to the competence of the Judiciary and its ability to carry out the desired functions of the CCJ, some express concern that jurists within the region may not be experienced enough to deal with complex Treaty issues and resolve disputes in the interest of CSME. Such concerns have received very little attention since much confidence is gained from the nature of the selection process of the Judges. Additionally, it cannot be overlooked that most appeals to the Privy Council are dismissed, which therefore confirms the competence and credibility of the jurists within the region. Having said this however, the converse is true that it would also appear to be a good reason to retain the Privy Council which is usually in general agreement with the decisions of the jurists of the region and which would save on the costs of establishing and administering the CCJ.

The Agreement establishing the Court provides for the appointment of Judges. Article V provides for the establishment of the Regional and Legal Services Commission commonly referred to as the "Commission". By virtue of Article IV the Judges of the Court, other than the President, shall be appointed or removed by a majority vote of all the members of the Commission. Also, the President shall be appointed or removed by the qualified vote or three-quarters of the contracting Parties on the recommendation of

the Commission. Article IX of the said Agreement also addresses the concern as to the tenure of office of Judges.

As a whole the Agreement does go some way to addressing the existing concerns. Some say it does not go far enough and that matters are fine on paper but the practical reality of implementation, which is often the problem in Caribbean countries, may leave matters unresolved.

### **International Relations**

Critics commonly refer to the CCJ as a "Hanging Court" or a "Calypso Court". This view emanates from the decision of the Privy Council in **Pratt & Morgan v. Attorney General of Jamaica** (1993) 3 ALL ER 769.

In that case, the Privy Council ruled that a delay in excess of five years or more would constitute "cruel and inhumane punishment" so as to render it unconstitutional. This rather unrealistic timeframe for the not so swift Caribbean Courts, has caused much consternation among member States who favour capital punishment.

It is often heavily debated as to whether or not the decision in **Pratt** witnessed the rebirth of intentions to establish a Caribbean Court of Justice. Critics assert that because the decision in **Pratt** seemingly upset certain Caricom members, it has produced a sense of urgency to move towards the development of the CCJ in an attempt to secure more desirable judgements on capital punishment cases contrary to the ruling in **Pratt**.

On the other hand, it is denied that the desire to move towards a Caribbean Court of Justice is motivated by a need to secure capital punishment within the jurisdictions. Such denials have been supported on the basis of the argument that the Courts of Caricom members are shrewd protectors of human rights. Further it has been suggested that the rebirth of the intention to implement the CCJ predates the decision in **Pratt** by at least one-year, so that it could not properly be argued that **Pratt** was in fact the reason for the re- emergence of such debates.

## **Investor Confidence**

With regard to investor confidence and the CCJ, legitimate concerns are that the removal of the Privy Council may deter current as well as potential foreign investors from the jurisdictions and therefore ultimately compromise the economic development goals and objectives of Caricom in a significant way.

The Privy Council has been widely commended for its delivery of sound and consistent judgements and has truly distinguished itself as a Court with prestigious a reputation. Investors, usually foreign, have confidence in that Court, that it will consistently apply the Rule of Law, should there be for instance, disagreements as to loan arrangements and contractual terms. Against this background, it has been recommended that the Caribbean Community should remain with the Privy Council.

However this proposition has been rebutted by the rather unusual argument that every reason submitted as to why there should not be a Caribbean Court of Justice is a reason why Caricom members should not have moved towards independence in the first place. Critics are therefore reminded that if it is, that they regard the shift toward independence of their own member States as a success, then there is no reason why the same optimism should not be displayed in the context of the CCJ.

## **Alternatives**

It is important to note that Caricom was faced with several alternatives that may not have inevitably resulted in adopting either extremes of retaining the current arrangements under the Privy Council or completely severing all ties and adopting a full scale final domestic appellate Court.

Not everyone who supports a shift away from the Privy Council is of the view that the establishment of a CCJ represents a viable solution. In this regard it has been suggested that rather than allow the CCJ exclusive and compulsory jurisdiction over all matters, it

may be more appropriate to restrict it to original jurisdiction only therefore allowing adjudication exclusively on Caricom Treaty interpretation. With regard to the settling of municipal disputes, and the inherent jurisdiction of the Caribbean Court of Appeal, these persons feel that such judicial matters are best settled in a High Court located within each individual Caricom State.

A second alternative is to adopt the CCJ in its original jurisdiction only, but retain the Privy Council to settle municipal and judicial disputes. Such a compromise would achieve two very critical objectives. First, it would facilitate the development of the Treaty and ultimately the CSME as a whole and second, it would maintain relations with the UK, which from an international standpoint may be considered more desirable.

Adoption of this latter alternative would closely mirror the current arrangements in Europe where the European Court of Justice and European Court of Human Rights have greatly advanced jurisprudence on the European Convention on Human Rights whilst their Member States retain their own High Courts. It may prove to be the better course for Caricom members to follow this approach and to structure the incorporation of the CCJ in phases as opposed to hasty full-scale implementation, which could cause problems for the region.

Despite good argument that Caricom needs to change and compete on a frontier of rapid globalisation and the widespread single market structure, for many, the change to a Caribbean Court of Justice is not considered such an urgent need, such as to cause to be disregarded the views of the majority of the people of Caricom.

It is felt therefore that debates of this magnitude should warrant direct consultation of the people within each Member State by way of a referendum. However, various Government leaders in the region have justified moving towards the CCJ without the need for referenda on the basis that local constitutional arrangements do not stipulate such a requirement. Having said that, it must be noted that these Governments have

sought to ensure that the public is adequately educated on matters concerning the proposed implementation of the Court.

### **Conclusion**

The CCJ may be regarded as a necessary by-product of the success of Caricom. In a world of rapid globalisation and a swift diversion from the obsolete common market economy to a more sophisticated single market structure, it is vital that Caricom devise a suitable judicial system that will facilitate growth in this regard. In the absence of a Caribbean Court of Justice it might be difficult to envisage the possibility of such success. This is so because the CCJ whether having an original and/or appellate Jurisdiction will ensure that the Treaty of Chauguramas is interpreted in a uniform and predictable manner. It is further important that the CCJ maintains exclusive jurisdiction in this regard as understandably any concurrent jurisdiction may result in potentially conflicting rulings ultimately to the detriment of Caricom. All Member States must make and some have already made the difficult choice, whether for or against the CCJ, based on what is perceived to be for the greater good. The CCJ is on its way to becoming a reality. No doubt time will prove or disprove the correctness of the choices made.

At present the Caribbean is noted for the high quality of its jurisprudence, the erudition and learning of its Judges. Questions of corruption and political influence are not an issue for these Courts. With such a background, one can, despite the concerns, be optimistic about the implementation of the CCJ. One can be even more optimistic as to the future in the face of enthusiastic Law students such as yourselves, whom it is hoped will help to develop the jurisprudence in the region and will ultimately yourselves be the Jurists who will set the Legal trends and standards and be the decision makers of tomorrow. I encourage you in your labours and look forward to the stimulation of your arguments and discussions as new thoughts emerge and change becomes a way of life.

Hon. Samuel Bulgin  
Attorney General

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