

## The Establishment of the Caribbean Court of Justice: the History and Analysis of the Debate.

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### I INTRODUCTION

A chronicle of the history of the debate on the establishment of a court of final appellate jurisdiction, or apex court, in the Caribbean affords a very helpful background for an analysis of the issues in that debate. This paper will therefore, first, set the debate into its historical context in Part II. That Part will afford a brief historical outline of the Privy Council which now serves as the Court of last resort for all Commonwealth Caribbean jurisdictions, except Guyana. Everyone is aware that Grenada severed links with the Privy Council for a brief period<sup>1</sup> following the 1979 *coup d'etat* which displaced the Government and the 1973 Independence Constitution of that country. Grenada however returned to the jurisdiction of the Privy Council in 1991.<sup>2</sup>

A knowledge of the historical background of the Privy Council is intended to be more than a mere passing interest. It is expected to give a brief, but interesting, insight into the genesis and development of this body. This, in some measure, will put the considerations for the establishment of the Caribbean Court of Justice into their proper perspectives. The history of the debate which revolves around the abolition of the Privy Council, and the establishment of a court of last resort in the Caribbean, will then be outlined.

From the historical outline of this debate, four apparently distinct periods, which are now merging into the present fifth period or phase, will be identified. The first phase is that which immediately follows April 1970, and goes to the middle of the 1970s. It is noteworthy that as early as 1947, a Meeting of West Indian Governors reportedly reflected on the need for a West Indian Court of Appeal and urged its establishment.<sup>3</sup> However, April 1970 stands out as a very

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<sup>1</sup> Grenada abolished appeals to the Privy Council by The Privy Council (Abolition of Appeals) Law, 1979 (People's Law No. 84 of 1979), s. 2. This was confirmed by Act No. 1 of 1985, s. 2. The Privy Council itself upheld the validity of that legislation in *Andy Mitchell and Others v. The D.P.P.* (1986) L.R.C. (Const.) 35; (1986) A.C. 73.

<sup>2</sup> By the Constitutional Judicature (Restoration) Act, No. 19 of 1991 and the West Indies Associated States Supreme Court (Grenada) Act (Re-enactment) Act, No. 20 of 1991.

<sup>3</sup> See the Address of Welcome by the Hon. Owen Arthur, Prime Minister of Barbados, to the Conference of the Heads of State of CARICOM Countries, 11 October 1999, at page 3. The 1947 Meeting which was hosted by Barbados, also "voiced strong support for the creation of a very strong and vibrant University College of the West Indies, and pressed the case for the free movement of Caribbean people throughout the region".

critical juncture from which to trace the debate for the establishment of a court of last resort for the Caribbean. The idea was then first mooted when Jamaica tabled a Resolution at the Sixth Meeting of the Heads of Government of the Caribbean Community, which was held in Kingston, Jamaica. The hallmark of this first period is the openness and intensity of the debate. Above all, it is notable for the attempts which were made by various interested persons, Commissions and groups to come to terms with the idea of relinquishing final appeals to the Privy Council and to make position statements.

The second period began around the latter half of the 1970s and extends to 1988. During this period, the intensity in the open debate on the subject apparently subsided considerably. It was, however, a time of reflection. The debate shifted from merely stating positions and focused upon the rationalization of the issues.

The third period, from 1989 to 1993, was undoubtedly the most dynamic phase because of the important initiatives which were taken towards the goal of realizing the institution of a Caribbean Court of Justice. During the second period, the matter had remained a very live item on the agenda of the relevant CARICOM Committees. Their various studies and recommendations culminated in a firm decision by the Heads of Government at the Tenth Meeting of the CARICOM Heads of Government in Grand Anse, Grenada, in 1989, to establish a Caribbean Court to replace the Privy Council. This marked the beginning of the third or immediate pre *Pratt and Morgan* phase in the history and the debate. It lasted until 1993 and the advent of the landmark decision of the Privy Council in *Pratt and Morgan v. Attorney General of Jamaica*.<sup>4</sup>

The fourth phase of the debate was marked by the period which followed the decision in *Pratt and Morgan*. The debate intensified after this decision. This period also saw the rationalization of the issues for the establishment of a Caribbean final court overtaken by the emotions which were awakened by *Pratt and Morgan*. In this case, the Privy Council declared that it would be a violation of the constitutional rights of the appellants to execute them after the prolonged delay which followed their conviction for murder. The constitutional right which was at issue in that case is provided in section 17(1) of the Constitution of Jamaica. It stipulates:

"No person shall be subjected to torture or to inhuman or degrading punishment or other treatment."<sup>5</sup>

In *Pratt and Morgan*, the appellants were convicted in 1979 for a murder which was

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<sup>4</sup> (1993) 43 W.I.R. 340.

<sup>5</sup> For a helpful appraisal of the approach of courts in other Commonwealth countries, as well as in the United States and, to some extent, the European Court of Human Rights to similar provisions, see, John Hatchard, "A Question of Humanity: Delay and the Death Penalty in Commonwealth Courts." [1994] *C.L.B.* 309.

committed in 1977. Their execution had been scheduled to take place on 7 March, 1991. In applications which were filed on their behalf, they contended that their death by hanging after so long a period of delay during which they were held in sub-human conditions on death row, living in mental agony at the prospect of facing such a death, constituted a violation of section 17(1) of the Constitution. During the period following their conviction, death warrants were read to them on at least three occasions. They were also moved to the condemned cells close to the gallows.<sup>6</sup>

It is instructive that the delay in this case was caused, in part, by the appellants. They were pursuing appeals and petitions through the courts, and to the United Nations Human Rights Committee and the Inter-American Commission on Human Rights. The delay was also due to inadvertence on the part of the Court of Appeal of Jamaica. Through an oversight, that Court did not hand down the reasons for its dismissal of the appellants' application for special leave to appeal to the Privy Council for almost four years.

The hallmark of the immediate post *Pratt and Morgan* period is emotionalism and a departure from rationalism in the debate. The period also witnessed the rise of two factions which express support or otherwise for the establishment of a Caribbean final court in accordance with their various positions on capital punishment.

Emerging from the emotionalism which was thrown up by the *Pratt and Morgan* decision, Part III of this paper considers emotionalism as an issue in the debate. It seeks to show that emotionalism featured prominently in the termination of appeals to the Privy Council from some other Commonwealth jurisdictions. It also looks briefly at emotionalism in the context of the debate in the Caribbean.

Part IV considers the present state of the debate. It indicates that a degree of emotionalism is still attached to the debate following *Pratt and Morgan*. However, it highlights the attempts which are being made to move the debate away from the emotional and back to the rational, and which distinguishes this period from the immediate post *Pratt and Morgan* era.

Part V follows the movement to return the debate to the rational. It therefore distills the issues which have been preferred both against and for the establishment of the Caribbean Court of Justice in their classical theoretical context. It goes further, however, to focus on the practical steps which are being taken to address the concerns which have been raised by these issues. Among other considerations, this Part alludes to the extremely critical role which the Court will perform in the deepening of the regional integration movement and the CARICOM Single Market and Economy (CSM&E). Part VI is, however, substantially dedicated to this aspect, while Part VII looks at the way forward towards the establishment of the Court. First, however, the historical perspectives.

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<sup>6</sup> See *supra* n. 4, at page 343. It is little wonder, therefore, that the Privy Council thought that this was a particularly bad case.

## II THE HISTORICAL PERSPECTIVES

### A Brief History of the Privy Council

Lloyd Barnett, in his book on the Constitution of Jamaica,<sup>7</sup> indicates that the Privy Council is derived from the residuary jurisdiction which the Sovereign, as the fountain of justice, possessed over all British subjects. In its early years, the Privy Council was an important instrument of English government. It was directly responsible for the majority of the administrative functions of that government.<sup>8</sup> It conducted its work by means of a system of Committees, one of which was the Committee for Trade and Foreign Plantations. It was to this Committee<sup>9</sup> that petitions from what became known as the British Empire were directed.

From earliest times, the Privy Council exercised some functions as a court in England. However, in 1640, during the Civil War in England, it lost this function there. It has, since that time, functioned as a court for the purpose of hearing appeals from the overseas possessions of Britain. As the British Empire expanded and courts were set up in various colonies, it became the norm to include in the Charters which gave the right of settlement, provisions establishing local courts with a right of appeal to the Privy Council. The Judges of the Privy Council were not usually legally trained persons, but, in the main, administrators.<sup>10</sup>

The decisions of the Judicial Committee of the Privy Council were reported from about 1829. However, this judicial arm of the Privy Council was only formally constituted by legislation in 1833.<sup>11</sup> Viscount Radcliffe tells us in *Ibbdale v. Reg.*<sup>12</sup> that the institution of the Judicial Committee by the 1833 legislation had the effect of transferring judicial powers from the Privy Council proper to its judicial arm, the Judicial Committee. This formally constituted that

<sup>7</sup> *The Constitutional Law of Jamaica*, Oxford University Press, 1977, at page 314.

<sup>8</sup> Louis Blom-Cooper and Gavin Drewry, in *Final Appeal: A Study of the House of Lords in Its Judicial Capacity*, indicate, at page 103, that the Privy Council and the House of Lords share a common ancestry, being direct descendants of the judicial and legislative powers originally vested exclusively in the King in Council.

<sup>9</sup> In those early times it was comprised of 5 or 6 persons, 1 or 2 of whom were lawyers.

<sup>10</sup> Since the Privy Council was a Council of Her Majesty's government, using that term in its widest sense, its decisions took the form of advice to Her Majesty. The advice is accepted and implemented by Orders in Council. This gives the advice the effect of a binding judgment: See *per* Sir James Colville in *Pitts v. La Fontaine* (1880) 6 App. Cas. 482, at page 483.

<sup>11</sup> The Judicial Committee Act 1833, (c. 41).

<sup>12</sup> [1964] A.C. 900 at page 919.

Committee as an independent court of law. Thereafter, the Committee has consistently guarded and maintained its independent legal status and only nominal connection with the Privy Council, its parent administrative body. From the time of the passing of the 1833 legislation, the Judicial Committee of the Privy Council<sup>13</sup> has resembled an open court. Its judgments did not admit of dissenting opinions until 1966. These judgments are read in open court. Rules as to costs and procedure were also formulated.

The 1833 Act, as well as a series of Acts which followed,<sup>14</sup> provide for the composition of the Privy Council. By these provisions, the Privy Council is to be comprised of members of the higher judiciary in England,<sup>15</sup> as well as senior judges and ex-judges of other Commonwealth countries.<sup>16</sup>

The greater part of the jurisdiction of the Privy Council lies in the area of appeals from overseas territories. However, this jurisdiction has dwindled in recent years to the point where it only hears appeals from the independent countries of the Commonwealth Caribbean, Brunei, Zambia, Mauritius, Tuvalu, Kiribati, the British dependent territories in the Caribbean, and the Channel Islands. In the Caribbean, the independence Constitutions provide for appeals from Caribbean Courts of Appeal to the Privy Council. Appeals may be made either as of right, with leave of the Court of Appeal, or with the special leave of the Privy Council.<sup>17</sup>

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<sup>13</sup> This is the body which will hereinafter be referred to as "the Privy Council".

<sup>14</sup> The Judicial Committee Acts of 1844, (c. 69) and 1871, (c. 91); The Appellate Jurisdiction Acts of 1876, (c. 59), 1913, (c. 21), 1929, (c. 8) and 1947(c. 11).

<sup>15</sup> The Lord Chancellor, ex-Lord Chancellors and Lords of Appeal in Ordinary.

<sup>16</sup> This includes other persons who hold or who have held high judicial office, and such retired judges of superior Commonwealth Courts as the Queen may appoint. Thus Sir Hugh Wooding, the late Chief Justice of Trinidad and Tobago, as well as Sir William Douglas, formerly Chief Justice of Barbados and Sir Vincent Floissac, the Chief Justice of the Organization of Eastern Caribbean States (OECS.) Supreme Court have sat with the Privy Council and delivered judgments in Privy Council cases. Five (5) judges usually sit to constitute a panel for the hearing of matters in the Privy Council.

<sup>17</sup> The reference is to appeals to Her Majesty in Council. See the relevant provisions in the Constitutions of the various territories as follows: Antigua & Barbuda, s. 122; The Bahamas, Arts. 104-106; Barbados, ss. 87 & 88 as amended by Act No. 17 of 1990; Belize, s. 104; Dominica, s. 106; Grenada, s. 104; St. Kitts and Nevis, s. 99; St. Lucia, s. 108; St. Vincent & the Grenadines, s. 99; and Trinidad & Tobago, s. 109. Additional provisions for the OECS are contained in s. 3 of the West Indies Associated States Appeals to Privy Council Order 1967 (U.K.), S. I. 1967 No. 224.

## The History of the Debate in the Caribbean

### The first half of the 1970s

The Resolution which was tabled at the Sixth Meeting of the Heads of Government of the Caribbean Community in Kingston in 1970, urged the establishment of a Committee of Attorneys-General to consider the question of establishing a final appellate Court in the Caribbean. It further urged the Committee to take into account proposals on the subject from the Bar Associations in the Commonwealth Caribbean.

On the basis of this mandate, the Attorneys-General met in Barbados in August 1970, and in Guyana in March 1971. They put forward their Draft Report for study by, and discussion with, the Organization of Commonwealth Caribbean Bar Associations (OCCBA), at a meeting of that Association which was held in Guyana on 4 September 1971. The initial views and concerns with regard to the establishment of the Court can be best captured from some writings and utterances from that era.

#### *Junior Evanson and the Advocate Newspaper, 1971*

Writing in the Advocate Newspaper of Barbados of 9 August 1971, Junior Evanson stated that the reasons which was by then advanced in favour of the Court were, first, that its establishment would be in keeping with the idea of an independent Caribbean and would assist in the loosening of the old colonial links. A Second reason was the high cost of taking appeals to London. A third reason was that judges in London were not qualified to make legal decisions in a Caribbean context. In the fourth place, there was confidence that the region possessed sufficient qualified persons to build up a Caribbean jurisprudence. As he saw it, the main concern at that time related to the physical location of the Court. In this regard he stated:

"A legal source in Bridgetown said that the [A]ttorneys-[G]eneral had been considering whether it should best be established in a particular country or [whether it should be] made itinerant. There have also been discussions [as] to whether each country should establish its own court of appeal but in the interest of the smaller countries it was decided that a regional body would be preferable."<sup>18</sup>

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<sup>18</sup> In the item which was written under the caption, *Proposals for Appeal Court*, Evanson reports that about 100 cases were referred to the Privy Council from the Caribbean in the five year period prior to 1971. The largest number of these came from Guyana.

Another item which was written in the same issue of the Advocate newspaper made reference to the proposed meeting of OCCBA which was scheduled to be held in Guyana in that same month.<sup>19</sup>

*The Advocate and Leacroft Robinson, 1971*

In its editorial for Monday 6 September 1971, the Advocate newspaper of Barbados also reported on the Fifth Council Meeting of OCCBA.<sup>20</sup> It noted, *inter alia*, the concerns which were voiced at the Meeting by Leacroft Robinson, the President of the Associations, as he then was, in the following words:

"... he warned ... that the independence of the judiciary and the independence of the legal profession as a whole from political influence are not to be ignored in any consideration of a Court of Appeal or a jurisprudence of the West Indies."

The editorial passed these as "worthy sentiments". It had earlier voiced its own sentiments that with the establishment of such an institution, "... we will have our national self-respect further increased". It also raised concerns at the fact that anyone could still have been comfortable with the idea that justice has a better chance outside the Caribbean,<sup>21</sup> when there are persons in the region who possess the same experience, integrity and intellectual capability as the judges of the Privy Council. It also referred to the establishment of a Faculty of Law at the University of the West Indies, which provided a unique opportunity for research of the law in a Caribbean context. The editorial was of the view that there was no need to fear for the independence of the Caribbean judiciary, since in all of the territories, it had managed, since independence, to assert its separation from the political system.

For the purpose of these discussions, the concluding words of that editorial are worthy of extensive reproduction. They state:

"But ... in the final resort it is not the traditions of an institution that make it what it is at any particular time but rather the qualities of those who man that institution. It will be left to the judges who will be called upon to give service not to allow themselves to be influenced ... by the several devious ways that could be tried.

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<sup>19</sup> See Advocate Newspaper, Monday 9 August 1971 under the caption, *Lawyers to discuss Court of Appeal*.

<sup>20</sup> The item is under the caption, *We need have no fear over our judiciary*.

<sup>21</sup> The Editorial was of the view that such feelings were based upon suspicion, as well as upon a feeling that since our legal systems are based on the British system, some British connection should be retained just to be on the safe side.

There is no greater trust placed in human hands than that which allows a man, or a body of men, to sit in judgment over other men."<sup>22</sup>

*Sir Roy Marshall, 1971*

The foregoing statements from the editorial of the Advocate Newspaper were, in the main, very optimistic. There were, however, contrary views. Not the least were those which were expressed by Sir Roy Marshall, the Vice-Chancellor of the University of the West Indies, as he then was. Sir Roy addressed the Annual Dinner of the Barbados Bar Association and the Barbados Law Society in September 1971.

In the address, he said that the assertion that the continuation of appeals to the Privy Council was a negation of independence, though politically persuasive, had no logical or legal validity. This was because, in his view, no Caribbean country had a choice whether to sever ties with the Privy Council and set up its own final court prior to independence. The independent states only acquired a choice by which they could have exercised sovereignty after the attainment of independence.

Sir Roy doubted whether a proper case had been made out for a Caribbean court to replace the Privy Council. This, in his opinion, was because the proponents of a Caribbean court did not see its establishment as an end in itself, but rather as another institution which would lead to closer political integration. In his view, a Caribbean court of last resort would only be an expensive judicial instrument with no important jurisdiction.<sup>23</sup> He thought that these drawbacks could mean a failure, which would damage the hopes of the most ardent protagonists if the Court was established prematurely.<sup>24</sup>

Within these overly pessimistic statements, however, Sir Roy sounded what may well now be seen as a prophetic caution. It came out of his view that if there will in fact be a Caribbean court to replace the Privy Council,

"... it is better to place the ultimate responsibility on the local judiciary immediately independence is obtained, rather than to delay it until the occurrence of an acute constitutional controversy makes their assumption of ultimate responsibility less secure."<sup>25</sup>

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<sup>22</sup> The Editorial was reproduced *in extensu* in the Express Newspaper of Trinidad and Tobago of Tuesday 7 September, 1971, at page 3.

<sup>23</sup> Sir Roy thought that it could have an important jurisdiction if Caribbean countries were prepared to allow appeals from their High Court directly to the Court.

<sup>24</sup> See the Advocate Newspaper of Barbados, Friday 24 September 1971, under the caption '*Caribbean Undecided*' - *Problem over Court of Appeal*.

<sup>25</sup> *Ibid.*



Sir Roy reiterated these same sentiments in November 1991 when he delivered the inaugural Anthony Bland Memorial Lecture at the Cave Hill Campus of the University of the West Indies. What was noteworthy on that occasion, however, was his suggestion that a Caribbean final court could perhaps be established as a Court in the future to function as an arbiter with respect to the Treaty of Chaguaramas, a Human Rights Treaty and the miscellany of cases which are now appealable to the Privy Council.<sup>26</sup>

*The Trinidad and Tobago Constitutional Commission Report, 1974*

One concern which clearly emerged out of views which were stated in the Report of the Constitution Commission of Trinidad and Tobago, 1974,<sup>27</sup> was that opinions which were stated against the establishment of a Caribbean court to replace the Privy Council were the result of a lack of confidence and colonial dependency. These elements appear to have been more than just a passing concern in the Majority Report of the Commission. That Report expressed the view that the propositions which were put forward in favour of the retention of the Privy Council reflected "timorousness and a sense of insecurity". The Commissioners contrasted this with what they found was a clear expression of the will of the people of Trinidad and Tobago to determine their own destiny and to ensure that decisions affecting them are made by their own people and in Trinidad and Tobago.<sup>28</sup>

On the other hand, a memorandum which was submitted by lawyers, and which was contained in the Minority Report of the said Wooding Commission,<sup>29</sup> cautioned against the introduction of a Caribbean final court on the grounds, *inter alia*, that:

"To stand aloof from the Privy Council at this stage in favour of a 'local jurisprudence' is in our view an attempt to rationalise a political desire to remove ourselves from what was our colonial past."

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<sup>26</sup> See "The Response of the Law to the Challenge of Independence: A Review of the Past and an Agenda for the Future, with Particular Reference to Barbados" (1992) *Commonwealth Caribbean Legal Studies*. See also the Daily Nation Newspaper of Barbados of Wednesday 4 December, 1991, under the caption, *Scholar sees little need for Caribbean Court of Appeal - Two-tier appeal system redundant - Sir Roy*, at page 18A. In that Lecture he also pointed out that from January 1982 to the end of September 1988 there were 101 appeals to the Privy Council from the Caribbean. Of these, 38 were from Jamaica, 34 from Trinidad and Tobago, 9 from the Bahamas, 3 from Dominica, 2 each from Barbados, St. Lucia and St. Vincent, one from St. Kitts and Nevis and 10 from the British Dependent territories.

<sup>27</sup> This Report was presented January 22, 1974. Hereinafter, this Commission will be referred to as "the Wooding Commission".

<sup>28</sup> See esp. Paragraphs 347-357.

<sup>29</sup> At p. 11.

*Lord Denning, M. R., 1974*

Lord Denning, the late distinguished Master of the Rolls of the English Court of Appeal, toured the Caribbean during January 1974. During that tour, he paid a visit to Barbados at the invitation of the Barbados Bar Association. He held a Press Conference at the British High Commission on 9 January 1974. At that Press Conference, he spoke in favour of retaining appeals from Caribbean courts to a "modified Privy Council" which was in keeping with the needs of the Caribbean. In this regard he expressed the view that the Privy Council could be an itinerant court which would permit an exchange of Commonwealth judges in a manner which would have British judges sitting in the Caribbean and Caribbean judges sitting in England. He supported the retention of the Privy Council on the ground that this Court was insulated against the pressures to which judges in the Caribbean could be subjected.<sup>30</sup>

**The mid 1970s to 1988 - A respite in the open debate?**

The significance of this period of the debate appears to be underlined by the attempts which were made by Caribbean legal writers to assess the merits and demerits of the issues with respect to the establishment of the Caribbean court to replace the Privy Council. By and large, they came out in support for the establishment of a Caribbean court of final appellate jurisdiction. Thus, for example, Sir Isaac Hyatali, formerly Chief Justice of Trinidad and Tobago opined:<sup>31</sup>

"... it is offensive to the sovereignty of independent nations and therefore, politically unacceptable, to have a foreign tribunal permanently entrenched in their [C]onstitutions as their final court....".

Dr. Fenton Ramsahoye, a leading Caribbean lawyer, wrote in similar terms when he stated:<sup>32</sup>

"In the history of the Caribbean people there must be a time when they ought to manage completely their own judicial institutions. This is because nationalism and real independence require it."

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<sup>30</sup> See report by Courtney King in the Advocate Newspaper of Barbados of Thursday 10 January 1974, under the caption '*Modified Privy Council Could save Caribbean*'.

<sup>31</sup> In a Paper entitled "Towards a West Indian Jurisprudence" (Unpublished 1987, Law Library University of the West Indies, Reserve Collection), at page 9.

<sup>32</sup> In a Paper entitled "A Caribbean Court of Appeal for Caribbean Peoples" (Unpublished 1991, Law Library University of the West Indies, Reserve Collection), at page 11.

He continued by stating that human aspirations and dignity are best achieved and satisfied by the development of institutions which are created and managed by the people of a nation.<sup>33</sup> He thought that Caribbean people endorse a present need for a judiciary which is an entirely local institution with the highest court being a Caribbean court to replace the Privy Council. In this regard he further stated:<sup>34</sup>

"Every nation aspires to its own institutions. It has been said very often in public life that self government is better than good government ...".

Similarly, Dr. Francis Alexis contended<sup>35</sup> that the continued subordination of Caribbean judges to British judges should be an embarrassment to our zeal for localizing other areas of decision making, since we are mature enough to settle, among ourselves, the conflicts thrown up by our given circumstances. He continued,

"... if we are not yet so mature, given that we must inevitably so become, all the more pressing is the urgency to desist from sending our disputes abroad so that by dint of hard experience we must fashion a way to bring on that maturity...".<sup>36</sup>

### **The Immediate pre Pratt and Morgan period - 1989 - 1993**

The assertion has been made that this was perhaps the most dynamic period. It has been noted<sup>37</sup> that the commencement of this period can be traced to 1989 when the CARICOM Heads of Government took a firm decision to establish a Caribbean Court of final appellate jurisdiction. There were other important initiatives. The period is highlighted particularly by the Demas Report and by the recommendations contained in *Time for Action*, the 1992 Report of the West Indian Commission. This Commission, which was also established under the Declaration which came out of the CARICOM Summit at Grand Anse in 1989, was mandated to formulate proposals to advance the regional integration movement. It was also mandated to make proposals by which a course can be charted for the Caribbean in the community of nations, into the twenty-first century.

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<sup>33</sup> At page 1.

<sup>34</sup> *Ibid.*

<sup>35</sup> In "The Case against West Indian Appeals to the Privy Council" (1975) *Bulletin of East Caribbean Affairs*.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Supra* at page 2.

To a great extent, in relation to the establishment of a Caribbean Court, these Reports reiterated some of the recommendations which were made in the June 1972 Report of the Representative Committee of OCCBA on the Establishment of a Caribbean Court of Appeal In Substitution for The Judicial Committee of the Privy Council.<sup>38</sup> The Reports contain important recommendations for the establishment of a Caribbean Court of final appellate jurisdiction. They also contain proposals for vesting the Court with original jurisdiction to resolve disputes which arise from the regional Agreements which provide the legal framework for the regional integration movement.

The proposals which are contained in the Fraser Report, with respect to the original jurisdiction of the Court, were made in the following terms in paragraph 109:

"The Committee recommends ... that an original jurisdiction be vested in the court in respect of matters referred to it by agreement between the Caribbean States, or by two or more of them, arising out of such regional treaties as the CARIFTA Agreement or by the Council of the Area on such matters as interpretation of the Agreement. The Committee did not preclude the possibility that existing treaties such as that dealing with the Caribbean Development Bank could be amended to allow matters in connection with that body to be dealt with by the Court."

The proposals, as well as the recommendations which are made in the 1992 Report of the West Indian Commission with respect to the establishment of the Court have, in a large measure, influenced the provisions which are contained in the proposed Agreement Establishing the Court. They will be considered in Part VI of this paper.

### **Post Pratt and Morgan - emotional reactions**

It is not surprising that the majority of persons in the Caribbean now find it easy to associate this debate with emotionalism. This is, particularly, because it appears that since the *Pratt and Morgan* decision, the question whether to abolish appeals to the Privy Council has often arisen at those times when the Privy Council incurs the wrath or displeasure of Caribbean people. It is at those times that the print and electronic media have become saturated with calls for the abolition of appeals from Caribbean courts to the Privy Council.

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<sup>38</sup> This Committee was chaired by the late jurist and Principal of the Norman Manley Law School, Jamaica, Aubrey Fraser. It is therefore hereinafter referred to as "the Fraser Report".

In Trinidad and Tobago, calls for the abolition of appeals to the Privy Council reverberated through the media in the wake of the execution of Glen Ashby and the intervention of the Privy Council in the cases relating to *Guerra and Wallen*.<sup>39</sup>

Everyone will recall the consternation and controversy which the execution of Ashby in Trinidad and Tobago on 14 July, 1994 stirred in the Caribbean. At the time of his execution, the Court of Appeal of Trinidad and Tobago was hearing his appeal from a decision of the High Court. The High Court had refused his application for a stay of execution, following its dismissal of his petition. In that petition, he urged the court to declare that to execute him would have constituted a violation of his constitutional rights. It would appear<sup>40</sup> that his execution was carried out just a few minutes before the Privy Council issued an order for a stay of execution.

The order of the Privy Council was intended to become operative in the event that the Court of Appeal, before which his case was being heard, did not grant a stay. These events created a very embarrassing situation for the Court of Appeal of Trinidad and Tobago. They also had the effect of lending credibility to the case of the proponents for retention of the Privy Council, and particularly to their contention that our legal rights are safe and secure in the guardianship of the Privy Council. The point which is usually missed here, however, is that the execution of Ashby in these circumstances was a result of executive and administrative action taken in the face of commendable endeavours on the part of the Court of Appeal of Trinidad and Tobago to ensure due process of law in the matter.<sup>41</sup>

Against this background, the action of the Privy Council in *Guerra and Wallen* was, in the view of some persons, justifiable. Simeon McIntosh, a Caribbean academic, has seen it in this light.<sup>42</sup> He submits that in the light of the Ashby matter, the action of the Privy Council in the *Guerra and Wallen* case was proper and judicious. He justifies this on the ground that the Privy Council, as the highest appellate court for Trinidad and Tobago, has the moral obligation to take extraordinary steps to protect the fundamental rights of its citizens, and to ensure, in particular, that due process is observed in such cases.<sup>43</sup>

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<sup>39</sup> See (1993) 45 W.I.R. 370 and (1994) 45 W.I.R. 405. See The Hon. Mr. Justice M. A. De La Bastide, "The Case for a Caribbean Court of Appeal" (1995) 5 *Carib. L.R.* 401 at pages 412-421, where he gives a lucid and analytical account of these matters.

<sup>40</sup> From the account of De La Bastide, *supra* n.39, at page 416.

<sup>41</sup> That court had instructed the Registrar, whose presence is required at a hanging, to be present during the hearing in court. That instruction was disobeyed. It should be noted that, while De La Bastide (*supra* n. 39, at page 416) did not exonerate the State for its actions, he is of the opinion that the premature application to the Privy Council for a stay of execution may be in part responsible for the confusion which arose.

<sup>42</sup> In a commentary on the *Guerra and Wallen* case entitled, "In the name of Justice", (1994), published in *The Advocate* newspaper of Barbados. McIntosh is Professor Emeritus, Howard University School of Law, Washington D.C. and Professor in Jurisprudence, Faculty of Law, University of the West Indies.

<sup>43</sup> *Ibid.*

However, the action by the Privy Council in *Guerra and Wallen* has been aptly referred to as:

"an order which was made by the Privy Council in circumstances which produced an embarrassing confrontation between the Judicial Committee and the Trinidad and Tobago Court of Appeal."<sup>44</sup>

The murders which were committed in the case were gruesome. Lincoln Guerra and Brian Wallen had ambushed a young couple, James and Leslie Girod, who were having a New Year's Day picnic with their seven month old son, Gregg. They slit James' throat, raped his wife and bludgeoned her to death, and decapitated the baby. James survived and testified at the trial at which Guerra and Wallen were convicted and sentenced to death. Wallen died in prison, reportedly of AIDS related causes. The case created great public outrage and hysteria in Trinidad and Tobago. It occasioned the establishment of a Commission of inquiry which recommended the retention of capital punishment in that jurisdiction.

On 18 May, 1989, the appellants were convicted of murder and sentenced to death.<sup>45</sup> Their execution was scheduled to take place on 25 March, 1994. They petitioned the High Court, on the day before their scheduled execution, for a declaration that to execute them would have infringed their constitutional rights under section 4(a) of the Constitution of Trinidad and Tobago.<sup>46</sup> The Court dismissed the petition.

On 25 July 1994, the Privy Council granted a conservatory order on the decision of the Court of Appeal. That order was made two days before the Court of Appeal actually handed down the judgment on which the conservatory order of the Privy Council was made.<sup>47</sup> The Privy Council issued its conservatory order before the Court of Appeal was able to consider granting a conservatory order on its own decision. The effect of the conservatory order of the Privy Council, however, was to defer the execution of the appellants, ultimately, until it had itself finally determined the matter.

There have been other cases, in the recent past, which have caused some concern among the people of Trinidad and Tobago as to the motives of the Privy Council. Their concerns were raised, for example, by the so-called Muslimeen cases which culminated in the two Privy Council

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<sup>44</sup> By De La Bastide, *supra* n. 39, at page 412.

<sup>45</sup> The date which was scheduled for their execution was a mere two months short of the five years which, according to the Privy Council in *Pratt and Morgan*, gives rise to the presumption of delay which may constitute the violation of the constitutional right.

<sup>46</sup> That provision seeks to protect the individual against the deprivation of his life except by due process of law. It was considered by the Privy Council in relation to delay in *Abbott v. A.G.* (1985) 32 W.I.R. 347.

<sup>47</sup> The Court of Appeal did this on 27 July, 1994, at which time it was informed of the Privy Council's Order.

decisions in *Lennox Phillip and Ors. v. The D.P.P.*<sup>48</sup> and in *Attorney-General v. Phillip and Others*.<sup>49</sup>

The issue in the first case was whether a pardon which armed insurgents, who had occupied Parliament, extracted from the Acting President of the Republic by use of threats was valid. The Prime Minister and the Attorney-General were seriously injured in the bid by the insurgents to extract that pardon. People were killed during the insurgency. The Acting President relented in order to end the carnage and save the lives of the hostages. He issued the pardon under his powers under section 78 of the Constitution. The Courts of Trinidad and Tobago ruled that the pardon was valid. In so holding, it appears that those courts were influenced by an impression which the Privy Council had conveyed when it heard the first *Lennox Phillip* case.<sup>50</sup>

The people of Trinidad and Tobago were perhaps rightly indignant as their courts also ruled that the insurgents were entitled to substantial damages to be paid from the coffers of the State. This, however, was happily overturned by the Privy Council in *Attorney General v. Phillip*,<sup>51</sup> when it held that the pardon was invalidated when the insurgents did not fulfill a condition of the pardon - to end the insurrection promptly after they received the pardon.

In Barbados, there were calls for the abolition of appeals to the Privy Council in the wake of the anger which many members of the populace felt when, in the case of *Bradshaw and Roberts v. R.*,<sup>52</sup> the Privy Council commuted the death sentences of the appellants on the same ground as it had done in the *Pratt and Morgan* case. In the opinion of a wide cross-section of the public of Barbados this was a particularly horrendous case.

The applicants were convicted of murder and sentenced to death in 1985 and 1986 respectively. Warrants for their execution were read to them in May, 1992. According to the judgment of the Privy Council, the delay over that 7 year period was caused mainly as a result of financial difficulties which the appellants had experienced, and the pursuit of petitions to various authorities, including the UN Human Rights Committee. In the opinion of the public, however, the applicants had committed particularly brutal murders. Additionally, they had been involved with other persons, including another convicted murderer,<sup>53</sup> in a daring prison break. They were

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<sup>48</sup> [1992] 1 A.C. 545.

<sup>49</sup> [1995] 1 All E.R. 93.

<sup>50</sup> *Supra* n. 48.

<sup>51</sup> *Supra* n. 49.

<sup>52</sup> [1995] 1 W.L.R. 936.

<sup>53</sup> A person who had broken out of prison twice before and who had been at large for some years before his re-arrest. He has not been recaptured since the third prison break.

allegedly responsible for a spate of serious crimes which were committed during the time when they were at large.

There has been some concern that the rulings of the Privy Council in the foregoing cases threatened to achieve that which would normally be achieved by the legislature - a partial abolition of the death penalty. In the United Kingdom for example, this was brought about by legislation.<sup>54</sup> In spite of this, there are those persons who have urged that these decisions should be considered objectively, without hysteria or emotion, using them only to assess their impact on the case for a Caribbean final court.<sup>55</sup>

This desire for objectivity may have, in part, been informed by an initiative which was recently taken in Barbados. The Honourable David Simmons, Q. C., the Attorney-General of Barbados, has taken steps to have legislation enacted to avert the impact of the *Pratt and Morgan* decision. This action was initiated on information which suggested that the Privy Council wishes Caribbean countries to institute proper procedures for appeals in criminal cases in which, *inter alia*, time limits for filing appeals at each stage of the process are clearly provided.<sup>56</sup>

However, there is need for great caution even on this as recent events in Belize have indicated. In September, 1995, Sir George Brown, the Chief Justice of Belize, as he then was, had occasion to criticize the Privy Council for granting special leave to appeal out of time to five persons convicted of murder, notwithstanding that there is legislation which stipulates strict time limits for such appeals in Belize.<sup>57</sup>

These are but some of the instances in the recent past in which emotional responses which arose out of *Pratt and Morgan* and kindred cases have occasioned renewed calls for the establishment of a final court of appeal in the Caribbean to replace the Privy Council. The following Part attempts to cast emotionalism as a basis for replacing the Privy Council with a Caribbean court into an historical context. It will show that there are countries which have in fact severed links with the Privy Council and established their own courts of final appellate jurisdiction mainly on the basis of emotionalism. The ultimate question is, however, whether post *Pratt and Morgan* emotionalism provides a sufficiently wholesome and secure basis upon which to establish the Caribbean Court of Justice. And if not, what are some of the other elements which must be taken into account.

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<sup>54</sup> *The Murder (Abolition of Death Penalty) Act*, 1965.

<sup>55</sup> See De la Bastide, *supra* n. 39, at pages 428-429.

<sup>56</sup> See e.g., the *Daily Nation*, Wednesday January 17, 1996 at page 3A under the caption "Capital punishment laws to be Tightened".

<sup>57</sup> Statutory Instrument No. 62 of 1978.



### III EMOTIONALISM AS AN ISSUE

#### *Introduction*

There have been warnings that the charged emotion is not a sufficient ground on which to rest the institution of a Caribbean apex Court. It has also been urged that a decision to establish such an institution is too critical to be made solely on what may be merely intermittent indiscretions which can all too easily be repeated by the body which replaces the Privy Council. It will be helpful to note, however, that similar emotion based factors have in the past featured in the decisions of other countries to end appeals to the Privy Council.

#### *Emotionalism and the termination of appeals to the Privy Council from other jurisdictions*

It is noteworthy that issues relating to apartheid apparently played a part in the abolition of appeals to the Privy Council by South Africa in 1950. That country followed by seceding from the Commonwealth in 1961. In the United States of America, the Supreme Court was firmly established when the Independence Constitution of that country was promulgated in 1789. This was formalized by the passing of the Judiciary Act in that same year.

It should be remembered, however, that at the time of the outbreak of the American Revolution, the jurisdiction of the Privy Council to hear appeals from the American colonies was already limited on grounds of concern for "the individual customs and needs of each colony, and because travel was difficult and expensive and communications slow".<sup>58</sup> Fiji discontinued appeals to the Privy Council when it left the Commonwealth as a result of a coup.

Canada presents one of the clearest cases, perhaps, of emotion based factors affecting the phasing out of appeals to the Privy Council. That country has no provision for appeals to the Privy Council since 1949. The Supreme Court of Canada has become firmly fixed with that jurisdiction. This occurred in the wake of protracted debates which followed decisions of the Privy Council in a number of cases. In these cases, certain powers, which the Dominion government sought to exercise on behalf of the Dominion as a whole, were contested by the Provinces. The Privy Council seemed to many to have ruled, in the main, against the Dominion government. The Provinces, on the other hand, saw the decisions as protecting minority rights.

The cases were of critical importance to the very viability of Canada as a sovereign nation. Take, for example, *The Labour Convention Case*.<sup>59</sup> This case was concerned with the question of the competence of the Dominion government to make legislation giving effect to I.L.O. Conventions in Canada. In this case, the Dominion (Federal) government concluded certain I.L.O. Conventions for Canada. Those treaties required legislative implementation in order to

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<sup>58</sup> See F.J. Klein (ed.) *The Improvement of the Administration of Justice* (6th ed. 1981), at pages 1-4.

<sup>59</sup> [1937] A.C. 326.

give effect to the obligations which it incurred under the Conventions. Under the Canadian Constitution,<sup>60</sup> however, the subject-matter of the Treaties fell within the competence of the Provinces, rather than within that of the Dominion. The Dominion government asserted its constitutional competence to make the treaties, even in relation to provincial matters. It also asserted constitutional competence to enact the legislation to implement the Treaties. The government of Ontario contested both competencies.

The Privy Council held for Ontario on the issue regarding the implementation of the legislation. It thereby denied the competence of the Dominion Parliament to legislate for provincial matters, by virtue of having incurred treaty obligations which require the making of such legislation. However, by applying the judicial restraint policy, the Privy Council refused to decide whether it was within the competence of the Dominion Government to make the Treaty (the Conventions). This decision has led to continuing uncertainty as to the extent of the Dominion's treaty-making power. This issue has figured prominently in subsequent years in the Quebec separatist issue. It contributed to strained relations with France in the 1960s over the French negotiation of a Treaty with Quebec.

The assertion has been made<sup>61</sup> that it was the inept handling by the Privy Council of this and other cases concerning the distribution of political power in Canada, between the Federal and the Provincial governments in the 1930s, which led directly to the abolition of all appeals to the Privy Council in London by Canada. The concern was that by these decisions, the Privy Council placed serious limitations upon the power of the Federal government to manage the international affairs of Canada.

During the 1930s and 1940s these decisions stimulated widespread academic criticism from within and outside of Canada and emotionalism was a prominent feature in the criticism which these decisions evoked. J.D. Holmes, for example, criticized the Privy Council for what he referred to as "a reactionary method of interpretation".<sup>62</sup> F.R. Scott in a commentary on the possible economic, political and social consequences of those decisions,<sup>63</sup> captured the prevailing mood quite well. He stated:<sup>64</sup>

"The decisions of the Judicial Committee on Mr. Bennett's New Deal Statutes will have grave and far-reaching consequences. It is probably not too much to say that they have created for Canadians

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<sup>60</sup> The British North America Act, 1867.

<sup>61</sup> By Louis Blom-Cooper and G. Drewry, *supra* n. 8, at page 105.

<sup>62</sup> In "An Australian View of the Hours of Labour Case" (1937) 15 *Can. Bar R.* 495, at page 503.

<sup>63</sup> In "The Consequences of the Privy Council Decisions" (1937) 15 *Can. Bar R.* 485.

<sup>64</sup> At page 485.

a constitutional situation scarcely less critical than that which led to confederation itself. Only our present tenuous hold on 'prosperity' prevents the realization of this fact."

F.C. Cronkite noted, for example, that in relation to the *Social Legislation References*,<sup>65</sup> those judges of the Supreme Court of Canada who, like the Privy Council, found the legislation *ultra vires*, or outside of the powers of the Dominions Parliament, arrived at their decision out of a concern for the liberty of the subject as a result of the apparent enlargement of Dominion powers. He however bemoaned the fact that although parliamentary sovereignty is a basic principle of the jurisprudence of Canada, "we have to go through life depending on the good sense of others ... Great Britain ... regarded as the defender of liberties."<sup>66</sup>

From outside of Canada, the concluding suggestion of J.D. Holmes, an Australian commentator, is particularly worthy of note. He stated:

"Short paragraphs have appeared in the Australian press referring to the possibility of Canada taking steps to abolish Privy Council Appeals. The desirability of retaining them is very doubtful and Australian experience demonstrates that they are unnecessary."<sup>67</sup>

In the main, this appears to have been the tenor of the commentaries, notwithstanding that there were those who attempted to raise a clarion call to reason and away from emotion based conclusions. F.A. McWilliams, for example, noted that it had become fashionable to cast blame on the Privy Council for its decisions on Canadian Constitutional cases.<sup>68</sup> In his opinion, however, those attacks were "wholly without justification".<sup>69</sup> He indicated that, of 12 such cases which came before the Privy Council on appeal from the Supreme Court of Canada between 1881-1912, the decisions of the latter Court were sustained in 9 cases.

McWilliams additionally submitted that it was erroneous to say that the decisions of the

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<sup>65</sup> On which the *Attorney General Reference Cases* are based.

<sup>66</sup> In "The Social Legislation References" (1937) 15 *Can. Bar R.* 478 at p. 484. See also V.C. MacDonald, "The Canadian Constitution Seventy Years After" (1937) 15 *Can. Bar R.* 401, and N.A.M. MacKenzie, "Canada and Treaty Making Power", (1937) 15 *Can. Bar R.* 436.

<sup>67</sup> In "An Australian View of the Hours of Labour Case", (1937) 15 *Can. Bar R.* 495 at p. 507. See also pp. 495, 504 and 506. See also criticisms by A.B. Keith in "The Privy Council Decisions: A Comment from Great Britain" (1937) 15 *Can. Bar R.* 428; W.I. Jennings "Dominion Legislation and Treaties", (1937) 15 *Can. Bar R.* 455; C. W. Jenks, "The Present Status of the Bennett Ratifications of International Labour Conventions", (1937) 15 *Can. Bar R.* 464.

<sup>68</sup> In "The Privy Council and the Constitution", (1939) 17 *Can. Bar R.* 579.

<sup>69</sup> *Ibid.* at page 582.

Privy Council reflected that it favoured the Provinces over the Dominion government. He noted, further, that in the cases which at the time of his writing had evoked the controversy, the Privy Council had in fact ruled in favour of the Dominion in the same number of instances as it had ruled against it, but had in all of those cases sustained the judgment of the Supreme Court.

*Emotionalism in the Caribbean*

In the Caribbean, it will be difficult to divorce emotion based issues from considerations which relate to the institution of the Caribbean Court of Justice. It is clear, however, that the warning ought to be heeded that due consideration must be afforded to reason, weighing and analyzing those factors which appear to be in favour of the setting up the Court, as well as those which do not.

In this regard, Professor McIntosh noted, for example,<sup>70</sup> that the issue of abolishing the Privy Council as the region's final court had surfaced again with great intensity after it granted a stay of execution for convicted killers Guerra and Wallen. He suggested, however, that while the idea of a Caribbean final court is most laudable, its introduction should not be justified on the ground that it would have, or ought to have, decided the *Guerra and Wallen* matter differently. In the view of McIntosh, in the circumstances of that case, the decision of the Privy Council was clearly in the interest of justice and the rule of law; and a Caribbean final Court in place of the Privy Council would have been enjoined to act likewise.<sup>71</sup>

McIntosh's assertion might have been borne out in the recent decision in *Morrel Cox v. The Honourable Attorney General and Others*.<sup>72</sup> In this case, the High Court of St. Lucia commuted the sentence of death which had been passed on the applicant and substituted a sentence of life imprisonment. The Court made this decision on the ground that a delay of four (4) years and nine (9) months between the sentence and the date of execution was cruel and inhumane and therefore infringed Section 5 of the constitution of St. Lucia.

In the case, the applicant, Cox, had in fact taken no legal steps to pursue any appeals since his conviction on 6 December 1994. In his Affidavit, he stated, *inter alia*, that he had not been able to do so because he did not have the financial means. In arriving at its decision, the Court accepted the contention, which was, made on behalf of the applicant that the five-year period in *Pratt and Morgan* was not intended to provide a limit or a yardstick for all cases.

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<sup>70</sup> See *supra* n. 42.

<sup>71</sup> *Ibid.*

<sup>72</sup> Civil Suit No.714 of 1999, High Court, St. Lucia (Suzie d'Auvergne J.), 22nd September 1999.

It is very likely that the influence of *Pratt and Morgan* will be evidenced in the decisions of the Caribbean Court of Justice for two reasons. The first is that it will be difficult for the judges of the Court to break with the body of common law principles upon which they have been nurtured. Second, and very significantly, the way has been made clear for the judges to follow the *Pratt and Morgan* principles. This assertion is based on the accords which were announced in the communique at the end of the Tenth Meeting of the Conference of the Heads of Government of the Caribbean Community which was held in Grenada in 1989. The communique referred, *inter alia*, to the agreement that the Court will treat all decisions of the Privy Council as highly persuasive.<sup>73</sup> Very early, the Court will be challenged to bring some rationalization to the uncertainty and confusion which have been created by the decision of the Privy Council in *Pratt and Morgan* and subsequent cases.<sup>74</sup>

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<sup>73</sup> See Sheldon McDonald, "Tiptoeing Between the Tulips - The Proposed Caribbean Court of Appeal", [Unpublished Paper, 1989], at page 8. When the Paper was written, the author was Special Advisor to the Ministry of Foreign Affairs and Foreign Trade in the government of Jamaica.

<sup>74</sup> See Hon. David Simons, "Conflicts of Law and Policy in the Caribbean - Human Rights and the Enforcement of the Death Penalty - Between a Rock and a Hard Place" [Unpublished Paper, 1999, Reserve Section, Faculty of Law Library, University of the West Indies.]. The Paper contains a Lecture which was delivered at the Florida State University on 31 March 1999. It discusses the jurisprudential dilemma which has been created by the judgments of the Privy Council in *Pratt v. Morgan* and subsequent cases such as *Thomas Reckley v. Minister of Public Safety* [1996] 2 WLR 281; *Henfield v. A. G. of the Bahamas* [1997] 1 A. C. 413; *Fisher v. Minister of Public Safety (No. 1)* [1998] A. C. 413; *Trevor Fisher (No. 2)* [1999] 2 WLR 349, and *Thomas and Hilaire v. Baptiste et al*, Privy Council Judgment, 17 March 1999.

#### IV THE PRESENT STATE OF THE DEBATE

##### *Introduction*

The move to institute the Caribbean Court of Justice at this time appears to have caused anxiety among some lawyers and social commentators who do not look kindly upon Caribbean Courts and their record in their guardianship of constitutional rights. In their view, the steps towards the institution of the Court have now become more strident in what they see as welcomed attempts by the Privy Council to prevent executions for murder. On the other hand, there are concerns that this perception should not blur the real reasons for the urgency in establishing the Court. The present state of the debate has therefore been aptly summarized by Jeff Cumberbatch when he stated:

"Unfortunately, its [the Court's] ultimate establishment has also now become shrouded in controversy. Originally, it was conceived as a necessary element in the creation/development of a Commonwealth Caribbean jurisprudence and as a natural corollary of regional sovereignty. However, some subsequent ill-chosen comments viz-a-viz the court's role in the regional debate ... concerning the execution of convicted murderers have enmired its establishment in a struggle between the forces who would hang and the abolitionists."<sup>75</sup>

This Part will afford consideration to the reservations which have been expressed, as well as the assurances which have been given that the motives for moving to establish the Court are far loftier than a mere intention to facilitate executions.

##### *The expression of reservations*

The anxieties of those who have reservations about the establishment of the Caribbean Court of Justice and who therefore wish to retain appeals to the Privy Council found expression in a statement which was made by Lloyd Noel. He was the President of the Grenada Association of Lawyers in 1994 when he voiced opposition to the establishment of the Court. In his view, political influence in the appointment of the judiciary in the Caribbean had compromised the independence of the judiciary and put the individual at a marked disadvantage in cases against the state. Noel had at that time purported to express views that were supported by OCCBA when he said:

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<sup>75</sup> See the column "Musings" in the Sunday Sun of Barbados of 7 March 1999, under the caption, *The rule of Law - Part V (Caribbean Court)*, at page 8A.

"We feel that until politicians are sufficiently mature and responsible in their attitude to justice, irrespective of who is involved, we cannot take the risk of having a final Court of Appeal..."<sup>76</sup>

This statement drew a very sharp retort from Dr. Francis Alexis, Attorney General of Grenada, as he then was, in the following words:

"(The Court) would promote our sense of self-confidence and self-respect (and) would be a fitting complement to the political independence for which we have fought. Any man who keeps saying that we have to go to London to get justice is saying that he does not have respect for himself and his people and that is a very, very sad state of affairs indeed."<sup>77</sup>

The views of Noel were however re-echoed, albeit somewhat more euphemistically, by Allen Alexander, the President of OCCBA in 1996. He spoke at the conclusion of a meeting of the Association in Trinidad and Tobago, at which the question of the establishment of a Caribbean court of last resort was canvassed.<sup>78</sup> Alexander said that all of the delegations, except that of Guyana, had come out in favour of retaining appeals to the Privy Council. He indicated, however, that the delegations thought that the establishment of a Caribbean Court was desirable. He noted that the delegates had expressed grave concerns about the machinery for the appointment and removal of judges in the region. They felt that the available financial resources should first be used to improve the administration of justice and to enhance the independence of the judiciary throughout the region.<sup>79</sup>

In response to this statement, the Barbados Bar Association denied that its delegates had favoured the retention of appeals to the Privy Council at the meeting. It insisted that it "has always been and continues to be in favour of the establishment of a Caribbean court of final appellate jurisdiction as soon as possible."<sup>80</sup>

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<sup>76</sup> *Ibid.* Alexis also expressed the view that Noel's comments were "an insult and affront" to the judges in the region.

<sup>77</sup> See the Sunday Advocate Newspaper of Barbados, 20 February 1994, at page 11, under the caption, *Bar Against Regional Court.*

<sup>78</sup> The Meeting was attended by delegations from the Bar of Anguilla, Barbados, Grenada, Guyana, Jamaica, St. Lucia, St. Vincent and the Grenadines and Trinidad and Tobago.

<sup>79</sup> See the Daily Nation Newspaper of Barbados, 6 May 1996, at page 3A, under the caption, *A Case for the Privy Council: Region's Lawyers all for taking Appeals to Britain.*

<sup>80</sup> See letter to the Editor by Eva Jeffers, the PRO to the Barbados Bar Association, in the Weekend Nation Newspaper of Barbados, Friday 17 May 1996, at page 11.

The reservations have persisted. Thus Rickey Singh, a leading Caribbean journalist, commentator and Human Rights advocate reported that the establishment of a Caribbean court to replace the Privy Council as the court of last resort was an item on the agenda of a meeting of Attorneys-General and Ministers of Legal Affairs of CARICOM which was held in St. Kitts and Nevis in November 1996. In his report he noted that:

"Deep reservations exist among national bar associations in the region against scrapping the Privy Council. The anxiety of some Attorneys-General to expedite judicial executions in the face of rulings by the Privy Council, have helped to reinforce such reservations."<sup>81</sup>

This reservation was expressed even more poignantly in the Barbados Advocate in 1993 when it stated:

"As expected, a frantic dash - mostly by influential lobbyists - to snatch comfort from the British Privy Council's ruling on capital punishment in Jamaica has quickly been followed by new regional calls for a West Indian Court of Final Appeal."<sup>82</sup>

Further, Caribbean Rights, the umbrella Human Rights organization in the Caribbean, held a Symposium on the Caribbean Court of Justice in Barbados on 28 November 1998. The Report of that Symposium is also very instructive with respect to the concerns of members of the private Bar on the question of the establishment of the Court. In its introduction, the Report states that the Symposium was organized:

"...to help sensitise public opinion on the Proposed CCJ over which there continues to be serious questions in terms of the level of consultation, and the independence of the Court from political interference in appointments and also in its jurisdiction."<sup>83</sup>

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<sup>81</sup> See the Weekend Nation of Barbados, Friday 11 November 1996, at page 9, under the caption, *This Caribbean Supreme Court*.

<sup>82</sup> See the Editorial of Tuesday 9 November 1993, at page 8, under the caption "*Privy to Justice: We must be sure where we'll land*".

<sup>83</sup> See the Report entitled *Caribbean Court of Justice: Critical Viewpoints from a Caribbean Rights Symposium*, 1998, at page 1.



It is noteworthy that the Report also indicates<sup>84</sup> that none of the panelists argued against the establishment of the Caribbean Court of Justice. It noted, however, that in the general discussion, the participants expressed a need for more meaningful consultation in the process, in order to ensure that there is wide support for the Court. There are statements, which were made in the Welcoming Remarks by Victor Cuffy, the Executive Secretary of Caribbean Rights, which fairly encapsulate those concerns. He said:

"There is a perception throughout the legal circles in the Caribbean and also by a large cross section of Caribbean people, that the creation of a regional appellate court is being pursued with indecent haste, for a reason that cannot be a sound rationale for breaking from the Judicial Committee of the Privy Council... It seems to me that [this] is not a matter for emotionalism. It is [a] matter that needs reason and rationality and measured thinking. The fears of Caribbean people must be heard and they must also be given a chance to express their views on the moral integrity and [the maintenance of ] the independence of the Judiciary ..."<sup>85</sup>

Even very recently, an assertion was made that the move by Caribbean governments to replace the Privy Council with an indigenous Caribbean court, is a direct result of a view which is held in the Caribbean that the Privy Council is an obstacle to the execution of persons who are on death row. In this regard it was stated:

"...the issue of capital punishment is constantly referred to by governments, when advocating the ending of appeals to the Privy Council...Regrettably, the status of the Privy Council as the final court of appeal for Commonwealth Caribbean countries and the desirability of capital punishment, have incorrectly been treated as one and the same issue."<sup>86</sup>

Through it all, however, it is clear that some of the foremost proponents of Human Rights in the Caribbean have consistently supported the establishment of a Caribbean court to replace the Privy Council. Oliver Jackman, an advocate of Human Rights, a noted columnist, and presently a Judge of the Inter American Court of Human Rights is one of these persons. He commented on the sentiments which were voiced by Alexander after the 1996 OCCBA Meeting in Trinidad and

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<sup>84</sup> At page 2.

<sup>85</sup> See *supra* n. 83, at page 4.

<sup>86</sup> See Saul Lehrfreund, "The Death penalty and the continuing role of the Privy Council" [1999] *New Law Journal*, pages 1299-1300.

Tobago.<sup>87</sup> From a perspective of the manner in which Judges are appointed to the Privy Council, he stated, *inter alia*:

"What seeps through is the sense that the lawyers present at the meeting have more confidence in the British Prime Minister than in the judges appointed in various ways in the West Indies."<sup>88</sup>

In the face of the persisting expressions of reservations, however, assurances have been given that the establishment of the Court is critical at this juncture of Caribbean development, and further, that it not based on issues which relate to capital punishment.

### *Affording assurances*

The Attorney-General of Barbados, David Simmons Q. C., is the Chairman of the Preparatory Committee on the Establishment of the Caribbean Court of Justice.<sup>89</sup> He sought to give assurances that the death penalty issue is not an important consideration for the establishment of the Court. In an address to the Graduating Class of the Hugh Wooding Law School on 10 October 1998, he expressed concern that the debate on the institution of the Court has been distorted by persons who seek to convey this impression.<sup>90</sup> In his view, this is an "unbecoming argument", since, for one thing, it implies that the judges of the Court will approach their judicial functions "consumed by prejudice and bias". He insisted that the true reasons for the establishment of the Court are much loftier than this.<sup>91</sup>

In the Address, the Chairman drew attention to the fact that practical initiatives have been taken, by way of draft legal instruments, which were intended to give effect to the actual establishment of the Court. He noted that there were provisions in these instruments which have taken into account the proposals which have been distilled from views expressed in the debate. In this regard, he noted that particular attention has been paid to the concerns which have been raised with respect to the independence of the judiciary. In this regard he stated:

"As the debate on establishing the Court has proceeded across the region I think it is fair to say that the Caribbean public have expressed two main concerns. First, they wish to be assured that

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<sup>87</sup> See *supra*, the texts to nos. 78 and 79.

<sup>88</sup> See the Sunday Sun Newspaper of Barbados, 12 May 1996, at page 6A under the caption, *Who shall judge the judges?*

<sup>89</sup> Hereinafter referred to as "the Preparatory Committee".

<sup>90</sup> See the Address under the title "The Caribbean Court of Justice. Where are we now.", at page 5.

<sup>91</sup> *Ibid.*

the process of appointment of the judges of the Court is insulated from political influence. Secondly, they wish to be assured that the Court is properly financed. ... we have tried in drafting the agreement establishing the Court, to insulate the process of appointment of judges from political influence as far as practicable."<sup>92</sup>

The Attorney-General of Trinidad and Tobago, the Honourable Ramesh L. Maharaj S. C., is a member of the Preparatory Committee. He spoke of the provisions for the appointment of the judges of the Court in similar terms when he stated:

"... we have tried to put safeguards [in place] in order to ensure that the judges would be independent; that no politician would be able to dictate to the judges how they should decide cases [in order] to ensure that the public will have confidence in the judges."<sup>93</sup>

In his address,<sup>94</sup> Attorney-General Simmons also referred to Article IV of the Draft Agreement for the Establishment of the Court and noted that the President as well as the other Judges of the Court are to be appointed or removed directly by or on the recommendation of a Regional Judicial and Legal Services Commission. In this regard he commented:

"It is noteworthy that although the existing Constitutions of most regional States provide for the appointment of Judges by the Prime Minister after consultation with the Leader of the Opposition, the Heads of Government have accepted the recommendation of the Attorneys-General that the Services Commission should recommend the appointment of the President and itself appoint the other judges. We have listened to our publics."<sup>95</sup>

Additionally, the Chairman noted that the Commission will be constituted as an independent body which will include representatives of the Private Bar and the University of the West Indies. In this regard he said:

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<sup>92</sup> See *supra* n. 90, at page 8.

<sup>93</sup> See the Express Newspaper of Trinidad and Tobago, Friday 4 June 1999, at page 7, under the caption "Ramesh: Caribbean Court of Justice next year."

<sup>94</sup> *Supra* n. 90.

<sup>95</sup> See *supra* n. 90, at page 9.

" ... we have sought to make this body as broad based as is practicable. It will consist of a Chairman, the nominee of a regional body representative of the profession, two Chairmen of Judicial Services Commissions of Contracting Parties, the Chairman of a Public Service Commission of a Contracting Party, the Secretary-General of CARICOM, a distinguished Caribbean jurist appointed by the President after consultation, two persons nominated by Bar Associations. "<sup>96</sup>

He also commented on the provisions in the Draft Agreement which are intended to guarantee the security of tenure of Judges of the Court thus:

"Salaries and allowances payable to the Judges of the Court and their other terms and conditions of service cannot be altered to their disadvantage during their tenure in office. Article VIII of the Agreement which speaks to the tenure of judges also seeks to bolster the independence of the court, for example, by providing an elaborate code for removal of a judge from office and preventing the abolition of the office of a judge while there if a substantive holder thereof. "<sup>97</sup>

He urged a return to rationalism in the debate on the establishment of the Court. The question, however, is whether the assurances that the death penalty issue is not the major consideration for the establishment of the Court have assuaged the concerns of the skeptics or shifted attention away from the emotional aspects of the debate. In any event, even as this question is debated, it seems both desirable and necessary that the rational factors for the establishment of the Caribbean Court of Justice should not be cast into oblivion.

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<sup>96</sup> *Ibid.*

<sup>97</sup> See *supra* n. 90, at page 9.

## V A RETURN TO RATIONALISM?

The preceding chronicle contains information which permits a distillation of the points which have been put forward for, and against, the establishment of a Caribbean court of last resort. The object of this Part is to analyze these points in a manner which returns the focus to a rationalization of the need to establish the Court. These are considered under two main heads. The first deals with the factors which have been proffered in support of the establishment of the Court. The second considers some factors which have been advanced against the establishment of the Court. First, the factors which have been posited in support of the establishment of the Court.

### The case against

#### *Judicial Independence*<sup>98</sup>

Perhaps the most convincing proposition set forth by those who favour the retention of the Privy Council in its present role is the security which its undoubted impartiality affords. This, of course, is seen, in part, as an incident of its geographic location, removed as it is from the Caribbean. This has afforded the comfort that it is untainted by local pressures of politics or patronage. Thus, Blom-Cooper and Drewry observe<sup>99</sup> that Commonwealth countries have welcomed the "Olympian aloofness" of the Privy Council and its freedom from political pressure, which has allowed its decisions, in times of acute political controversy, to bring a calming influence to constitutional problems.

Some of the statements which have been reproduced above indicate that there are those who insist that the role of judges in the modern Commonwealth is changing in a way that will require a greater involvement by them in social policy and a sensitivity to social concerns. According to this view, this will in turn demand an abandonment of their traditional aloofness, although not the abandonment of their institutional and personal independence.<sup>100</sup> The crucial question, however, is whether there are persons in the Caribbean who are capable of undertaking this role. One perceives that the real concern of those who wish to retain appeals to the Privy Council in this regard, however, is for the independence and integrity of the judiciary in the Caribbean.

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<sup>98</sup> The various facets, and the critical importance of this for the maintenance of the rule of law, justice and good governance are set out and analyzed in *Parliamentary Supremacy and Judicial Independence: A Commonwealth Approach* (Cavendish, 1999, edited by John Hatchard and Peter Slinn.). It contains the proceedings of the Latimer House Joint Colloquium, June 1998.

<sup>99</sup> *Supra.* n. 8, at p. 105

<sup>100</sup> See Beverley McLachlin, "The Role of Judges in Modern Commonwealth Society" (1994) *L.Q.R.* 260.

### *The institutional framework of judicial independence*

Caribbean Constitutions contain provisions for the appointment of judges,<sup>101</sup> their security of tenure<sup>102</sup> and their remuneration.<sup>103</sup> These provisions are designed to guarantee that independence which is a *sine qua non* to the maintenance of the rule of law. By and large, the provisions are reasonably adequate for the purposes for which they are designed, although there are a few areas which give cause for concern. There are no provisions, for example, which permit Bar Associations or social groups to participate in the process. From time to time concerns have been raised that the existing provisions tend to permit undue executive influence on the appointment of judges.<sup>104</sup>

There are also provisions which permit the term of office of a judge to be extended beyond the stipulated age of retirement on certain conditions. One of the conditions puts those extensions within the purview of the executive branch of Government. This may well be inimical to the best interest of the independence of the judiciary.

Against this background, two features of the Draft Instruments for the Establishment of the Caribbean Court of Justice are noteworthy. The first is that their framers have taken steps to provide for a broad based Regional and Judicial and Legal Services Commission by including therein representatives of the regional Bar Associations. It will also include a distinguished Jurist who will be appointed after consultation with the Dean of the Faculty of Law of the University of the West Indies and of other regional Universities, and with the Council of Legal Education.<sup>105</sup> The second feature is the setting of a realistic retirement age for judges,<sup>106</sup> with no provision for extension beyond that age.

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<sup>101</sup> See, for example, the following provisions in the Constitutions of the Bahamas, Art.s. 94, 95, 116 and 117; Barbados, ss. 81, 82 and 89; Belize, ss. 79, 101 and 125; Guyana, Arts. 127, 129 and 134; Jamaica, ss. 98, 99, 104, 105 and 111-113; Trinidad and Tobago, ss. 102-105; and ss. 5 and 6 of The West Indies Associated States Supreme Court Order, 1967, (S.I. 1967 No. 223, U.K.).

<sup>102</sup> See the following constitutional provisions: The Bahamas, Art. 96; Barbados, s. 84; Belize, ss. 98 and 102; Guyana, Arts. 131, 197, and 199; Jamaica, ss. 100 and 106; Trinidad and Tobago, ss. 106, 136 and 137; and s. 8 of the West Indies Associated States Supreme Court Order, 1967 (S.I. 1967 No. 223).

<sup>103</sup> See the Constitutions of Barbados, s. 112; Belize, s. 118; Guyana, Art. 222; Jamaica, ss. 101 and 107; and ss. 11, 18 and 21 of the West Indies Associated States Supreme Court Order, 1967 (S.I. 1967 No. 223).

<sup>104</sup> See e.g., Hugh Rawlins, "The Privy Council or a Caribbean Court of Appeal?" (1996) 6 *Carib. Law Review* 235, at pages 255-262. See also by the same writer, "Constitutional Reform in Barbados: Strengthening the Judiciary." (Unpublished Paper, 1997.), as well as K. W. Patchett, "Safeguards for Judicial Independence in Law and Practice." (Unpublished Paper.).

<sup>105</sup> See Article V of the Draft Agreement Establishment the Caribbean Court of Justice.

<sup>106</sup> By virtue of the provisions of Articles VIII(2) and (3), the age of retirement will be 72 years.

*Judicial independence and Personal attributes*

Ultimately, however, the institutional framework which has been provided in Caribbean Constitutions and which will be buttressed by Articles V and VIII of the Agreement Establishing the Caribbean Court of Justice will not in and of themselves guarantee judicial independence. To this end, the following assertion has been made:

"Ultimately, institutional framework cannot alone guarantee judicial independence, for ... true independence of mind and spirit cannot be dictated in any written document. It comes from within. It is written on the heart and springs only from strength of character, exemplified by a burning desire to be impartial and to do justice to all under all circumstances."<sup>107</sup>

There appears to be a view that judicial independence is to be determined on the basis of an inclination on the part of judges to take firm stands in matters against the State. From this perspective, concerns have been voiced that Caribbean judges have not been as vigilant as judges of the Privy Council. Ramsahoye, for example,<sup>108</sup> has stated that when Caribbean judges have failed or refused to enforce the fundamental rights provisions of the Constitutions, the people of the Caribbean have been rescued by the Privy Council.<sup>109</sup> This view was restated recently by prominent Human Rights Lawyers Richard Small of Jamaica, Miles Fitzpatrick of Guyana and Douglas Mendes of Trinidad and Tobago.<sup>110</sup>

Undoubtedly, the Privy Council has been very vigilant in its guardianship of the fundamental rights of Caribbean people. However, Caribbean judges have also shown similar vigilance on many occasions and have, in some appropriate cases, held the balance between the subject and the State commendably. Thus, in the case of *Hochoy v. N.U.G.E.*,<sup>111</sup> the Wooding Court of Appeal of Trinidad and Tobago held that the Head of State of that Nation was amenable to the ordinary process of the courts. In the case, therefore, that Court impugned the appointment of a Commission of Inquiry by the Head of State under statutory powers, on the basis of the *ultra vires* doctrine.

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<sup>107</sup> See Rawlins, *supra* n. 104, at page 257.

<sup>108</sup> *Supra* n. 32, at page 8.

<sup>109</sup> In support of this assertion he cites *Jaundoo v. A.G. of Guyana* [1971] A.C. 972; *Thornhill v. A.G. of Trinidad and Tobago* [1980] 2 W.L.R. 510; *Maharaj v. A.G. of Trinidad and Tobago* [1979] A.C. 385; and *Hector v. A.G. of Antigua* [1990] 2 W.L.R. 606.

<sup>110</sup> See *supra* n. 83, at pages 23-29.

<sup>111</sup> (1964) 7 W.I.R. 174.

Many other cases illustrate the point. One landmark decision that comes to mind is that which was handed down by the Chief Justice of Barbados in the case *C.O. Williams Construction Co. Ltd. v. Blackman and A.G. of Barbados*.<sup>112</sup> In that case Williams C.J. held that a decision of the Cabinet of Barbados which was made under statutory power was reviewable in principle. This very well reasoned decision was subsequently overturned by the Court of Appeal of Barbados. On appeal to the Privy Council, however, the Privy Council overturned the decision of the Court of Appeal and upheld the first instance decision.<sup>113</sup>

Yet another case which comes to mind is *Emmanuel v. A.G. of Dominica*.<sup>114</sup> In that case Adams J. came very close to guaranteeing the security of tenure, akin at least to that which is provided for public servants under the Constitution, to Magistrates who are employed on contract with the State.

In the end, however, it is submitted that any idea of judicial independence must encompass considerations which are wider than the mere taking of a firm stand against the State. It must be even more widely embracing than the constitutional provisions for the appointment, tenure, remuneration or the removal from office of judges. It must include fairly holding the balance between the State and the individual, doing justice to all men, and, while not necessarily living in aloof isolation from the society, living above influence and patronage from any source whatsoever.

From this perspective, the character of the persons who are, or will be charged with the exercise of judicial power at all levels in the Caribbean, including the Caribbean Court of Justice, is of such primary importance that the process by which they are selected will be a essential cornerstone of the integrity of the Caribbean Court of Justice, the respect which it will engender, and the confidence which it must foster.

#### *Learned, experienced and skilled judges*

Dr. Ramsahoye has expressed the view<sup>115</sup> that the Privy Council is one of the strongest tribunals in the English speaking world. This is because it is composed of persons of outstanding legal scholarship and intellectual ability, of proven legal experience and moral soundness, outstanding legal careers and many years of legal experience. On the other hand, the same author

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<sup>112</sup> (1989) 41 W.I.R. 31 (H.Ct. Barbados).

<sup>113</sup> See [1995] 1 W.L.R. 102 (P.C.). See for a commentary on this decision, Hugh Rawlins, "The Sentinel is at the Door of Cabinet" (1999) *UWI Stud Law Rev.* 179.

<sup>114</sup> Suit No. 194 of 1989 (H.Ct. Dominica).

<sup>115</sup> *Supra* n. 32, at pages 6-7.



indicates that, in the Caribbean, concerns have been voiced that Caribbean judges cannot be compared favourably with members of the Privy Council. In this regard he states:<sup>116</sup>

"... whether in the High Court or Court of Appeal, delays in delivering [a judgment] have become more and more inordinate to the frustration of the litigant. In England *ex tempore* judgments are always given upon the completion of a hearing and whatever delays there are can be accounted for not by delay in writing judgments but by the time it takes to have them printed. It is cause for sadness that this is not the position in the countries which now clamour for their own final Court of Appeal."

Against this background, there is a concern among some Caribbean legal practitioners that the process for the selection of judges in the Caribbean leaves much to be desired. They are of the view that the process has been subverted in some instances by the influence of the political directorate on the appointment of the Judicial and Legal Services Commissions, thereby rendering ineffective the guardianship of the judicial selection process which Caribbean Constitutions have entrusted to these bodies.

This view may have been overstated, as it appears that, in the main, these Commissions have and are functioning fairly commendably. Additionally, in the view of Oliver Jackman, it does not take into consideration that there have been English judges "who have been notoriously unlearned in the law".<sup>117</sup> This phenomenon, in his opinion, "is a fact that finds an echo in every jurisdiction where judges are chosen by human beings from among human beings".<sup>118</sup> The same point was made by Caribbean academician Dorcas White, somewhat euphemistically, in 1975 when she wrote in her own inimitable style:

"... funnily enough the arguments put forward for its retention are flattering neither to the Judicial Committee nor to its supporters. They all inhere in a deeply embedded syndrome - the typical 'freeness' mentality and a fear on the part of some lawyers that the abolition of the Judicial Committee might provide what to them may be the dreaded opportunity to think!"<sup>119</sup>

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<sup>116</sup> At page 15.

<sup>117</sup> See the Sunday Sun, 12 May 1996, at page 6A, under the caption "Who shall judge the judges?"

<sup>118</sup> *Ibid.*

<sup>119</sup> See "Jettison the Judicial Committee? You T'ink It Easy?" (Unpublished Paper, 1975, Reserve Collection, Faculty of Law Library, University of the West Indies.).

The Preparatory Committee has accepted that there is a need for new initiatives to be taken in order to enhance the integrity of the system by which persons are selected for judicial office. This is reflected in the Address which was made by its Chairman to the 1998 Graduating Class of the Hugh Wooding Law School.<sup>120</sup> It is also evidenced as well as in the provisions in the Draft Instruments for establishing the Caribbean Court of Justice, which set the criteria for judicial appointments. These, however, should be seen as minimum requirements.

Additionally, an open selection process may be invaluable. This refers to a process which advertises vacant judicial positions and which invites persons who appear to fulfill the set criteria to submit applications, supported by references. This will afford the opportunity to determine the available resources. It is suggested that a short-list of suitable applicants should be drawn up by the body which is responsible for the selection, and that those applicants should be required to be interviewed by that body.

This process can serve a dual purpose. First, it will allow another opportunity for the assessment of the candidates, particularly by those members to whom the candidates may not be known. In the second place, it can serve as an opportunity to permit a candidate to make representations in relation to any allegations which may be made against him or her. This will help to secure the integrity of the selection process. It will also satisfy the rules of natural justice.

In the final analysis, the critical consideration for the selection of Caribbean judges for the Caribbean Court of Justice, or for any other court for that matter, should be whether a particular candidate satisfies known criteria based on intellectual ability, integrity, capacity for hard work, character, moral soundness and independence of mind. It is submitted that intellectual ability must be of primary importance for the Caribbean Court of Justice in particular, since that institution will require the application of legal principles and rules of practice as well as the creation of legal principles to meet new circumstances. Most importantly, it will require the development of a Caribbean jurisprudence. There should be no lobbying for judicial positions.

### *Scarce financial resources*

This brings into focus another reason which has been advanced in favour of the retention of the Privy Council. The proposition here is that personnel as well as financial resources which are vital for the maintenance and the efficient performance of a Caribbean final court are in scarce supply. This proposition assumes serious proportions when viewed against the concern which have been voiced in relation to the present state of the administration of justice in the Caribbean. It does so as well when the issue of the financial security of the Court is considered.

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See *supra* n. 90.

*Does the Privy Council cost the Caribbean nothing?*

It is noteworthy that one of the reasons which is cited by Professor Patchett for the failure to introduce a Caribbean court to replace the Privy Council is the high cost of setting up that body in substitution for a largely free tribunal.<sup>121</sup> This in fact re-echoes a concern which he first raised in 1971. At that time, as a member of the Fraser Committee,<sup>122</sup> he stated the reservations to the idea of establishing a Caribbean court,<sup>123</sup> even as he expressed support for the recommendations of the Committee with respect to the desirability of abolishing appeals to the Privy Council.

He was of the view that the transfer of the jurisdiction of the Privy Council to a Caribbean court was not feasible at that time because there was an insufficient number of appeals to justify that court.<sup>124</sup> He also thought that the establishment of the Court on an uncertain basis could have disastrous consequences<sup>125</sup> and, significantly, on account of the cost.<sup>126</sup>

Patchett admitted that high cost should not be the sole determining factor. He was of the view, however, that sufficient consideration had not been afforded "to the economics of a three tier system of courts."<sup>127</sup> He questioned whether the money which will be expended on the establishment of a Caribbean court might not have been better spent to improve of the existing systems for the administration of justice.

This question is perhaps as live an issue today as it was in 1971 when Patchett wrote, and in 1974 when it was raised in the Wooding Constitution Commission Report in Trinidad and Tobago.

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<sup>121</sup> See, "Legal Problems of the Mini-State: The Caribbean Experience" (1974-1977) *Cambrian Law Review* 57, at page 66.

<sup>122</sup> The Representative Committee of the Organization of the Commonwealth Caribbean Bar Association on the Establishment of a Caribbean Court of Appeal in substitution for the Judicial Committee of the Privy Council.

<sup>123</sup> His "Reservations Concerning the Establishment of a Caribbean Court of Appeal" was published as Appendix IV to the Report of the Committee in 1972.

<sup>124</sup> At pages 58-59.

<sup>125</sup> At pages 60-62.

<sup>126</sup> At pages 59-60.

<sup>127</sup> At page 59.

*The issue of the financial security of the Court*

The editorial of the Sunday Advocate of 2 June, 1996, noted that the supporters of the establishment of a Caribbean final court had not taken into account the economic and financial realities of establishing the institution. It urged those supporters to remember that the economic realities could not be wished away. It raised one of the major concerns in this area by way of the following rhetorical questions:

"... will our Barbadian leaders assume that other members will pay their share? If the answer is yes, the next question would have to be: Is there any other regional organisation to which all other members have paid their dues fully and punctually?"

The editorial also made other statements which speak to financial issues. Thus it stated, for example:

"... we are obliged to face the harsh reality that a Caribbean Court of Appeal will be an expensive institution. ... At present the administration of justice in all the member states is suffering from a lack of money. Most of them need more staff and, even more urgently, they need improved facilities and the use of new technology. ... the first step should be to devote all available resources to improving the administration of justice in the member states of CARICOM."

A response to this latter suggestion has come from a most eminent Caribbean jurist, Professor Telford Georges, who has sat as a member of the Privy Council. In words which are worthy of detailed quotation. He said:

"The argument was recently advanced that the governments should place the issue of the final regional court of appeal on the back burner and concentrate on investing resources in the local courts to outfit them to work more effectively. As someone who has experienced the disadvantages of working in under-resourced local court systems, I can appreciate the fact. But it would be naive in my view to believe that there would be any connection between the two."<sup>128</sup>

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See *supra* n. 83, at pages 15-16.

He continued:

"For years money has been 'saved' by not being spent on a Court of Appeal, and none of it has found its way into improving local systems. The fact is that retention of the Judicial Committee, because it is free is just another manifestation of the low priority accorded to the administration of justice in the region. All the other institutions of State had to be made independent and had to be liberated from the vestiges of the colonial past but not the administration of justice."<sup>129</sup>

This latter statement draws attention to a perception which is held that the Privy Council saves Caribbean jurisdictions the burden of financing a third tier court. This perception has found expression, for example, in the following terse statement:

"The British Privy Council costs the Governments of these countries nothing. Their salaries and those of their support staff are all paid by the British Treasury."<sup>130</sup>

The question is, however, whether the perception which this statement conveys has a basis in fact.

The Attorney-General of Jamaica, Arnold J. Nicholson, QC, a member of the Preparatory Committee, is of the opinion that it does not. He responds<sup>131</sup> to the suggestion by drawing attention to a comment which is contained in paragraph 353 of the 1974 Constitution Review Commission of Trinidad and Tobago which states:

"The argument based on the absence of cost to the country in relation to the services provided for by the Privy Council brings us back again to the general demands for independence and leads us to wonder whether independence becomes meaningless when we are offered dependence without charge."

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<sup>129</sup> *Ibid.*

<sup>130</sup> See the Editorial of the Barbados Advocate Newspaper of Tuesday 1 March 1994, at page 8, under the caption "A final court of appeal: Important considerations have emerged".

<sup>131</sup> In a Paper under the caption "Towards a Final Regional Appellate Court", at page 17. It may also be of interest to note that the 1987 Constitution Commission of Trinidad and Tobago addressed this issue in paragraphs 270 - 272 of its 1990 Report. It noted as the price that Caribbean countries pay for access to the Privy Council as: (a) the cost to litigants who must pay Barristers and Solicitors fees in England, as well as transportation and maintenance costs; (b) the underdevelopment of a Caribbean jurisprudence, and (c) the price " .. in terms of our own respect and self-esteem."

The Attorney-General also responds from two other perspectives. First, he is of the view that the cost factor cannot be viewed independently of considerations of the accessibility which the Caribbean Court of Justice will afford to Caribbean litigants.<sup>132</sup> Second, he considers the issue in strict financial terms. In this latter regard, he asserts that the vast sums which are being expended annually by the Government of Jamaica in appeals to the Privy Council will significantly defray the proportionate share of that island's cost towards the establishment and maintenance of a Caribbean final court.<sup>133</sup>

In this context, it is noteworthy that in 1994, the CARICOM Secretariat estimated the annual cost of servicing the Court with 6 judges at about \$4 million, Eastern Caribbean currency, or about \$50 million, Jamaican currency, by the rate of exchange which was then current. Jamaica's proportionate share of the cost for servicing the Court was estimated at about \$14 million Jamaican currency under option A, and about \$12 million Jamaican currency under option B. During that same year, the Government of Jamaica spent about \$12 million Jamaican currency, solely for airfares, accommodation and fees for English Solicitors, for the prosecution of appeals to the Privy Council.<sup>134</sup>

#### *Towards a formula for the financial stability of the Court*

There is another critical financial issue. The expressions of concern with regard to the security, regularity and punctuality of the payment of dues for the expenses of the Court as a regional organization presents a real dilemma.<sup>135</sup> Article XIII of the Draft Agreement Establishing the Caribbean Court of Justice provides that dues for the financing of the Court are to be charged on the Consolidated Funds of the Member States. Everyone agrees, however, that this will not, by itself, guarantee the full and punctual payment of dues by member states.

The CARICOM Heads of Government are very concerned about the question of the financial stability of the Court. They have made it clear that the Court will not be brought into being, unless they are satisfied that adequate funds are committed to guarantee that the finances of the Court will be sound for at least five years. The Prime Minister of Jamaica, the Right Honourable P. J. Patterson, informed the Press that the Twentieth Meeting of the CARICOM Heads of Government in Trinidad and Tobago in July 1999 had issued a directive to the

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<sup>132</sup> See *post*, under the caption *Geographic location and access to Justice*.

<sup>133</sup> *Supra* n. 131, at page 17.

<sup>134</sup> This does not take into consideration other legal and incidental costs or the costs to the litigant which are not borne by the government.

<sup>135</sup> See *supra*, under the heading *The issues of the financial security of the Court*.

CARICOM Ministers of Finance to work on an arrangement for ensuring this.<sup>136</sup> This, no doubt, is intended to ensure that, in carrying out its mandate, the Court is not subjected to the limitations as a result of annual budgetary adjustments and restraints.

There are no easy answers to this problem. What is noteworthy, however, is the fact that the Preparatory Committee has brought the problem forthrightly into the public domain with a suggestion for its resolution. The Chairman of the Committee has urged the enactment of Serial Bond legislation, similar to that which was enacted by Barbados in 1997. In his view, such legislation, properly used, can guarantee the financial stability of the Court by allowing the governments of the region to issue bond to the institution. The Court could then raise the funds to finance its operations against the security of the bonds.<sup>137</sup>

Recently, another initiative has been taken with respect to this matter. At its meeting in Barbados on 15 February 2000, the Legal Affairs Committee of CARICOM drafted a Financial Protocol to the Agreement Establishing the Caribbean Court of Justice. The Draft Protocol provides for the establishment of a Trust Fund. Grants and other contributions towards the financing of the Court will be deposited into this Fund. The Committee anticipates that the proceeds from the investments of these funds will secure the lasting financial well being of the Court.

These suggestions are alternatives towards the goal of ensuring the financial stability of the Court. They should be taken as invitations to the people of the Caribbean to submit other proposals which are designed to set the Court on a sound financial footing not merely for five years, but in perpetuity.

### **Factors in support**

Four main factors have been advanced in favour of establishing the Caribbean Court of Justice. Of these, considerations of nationalism and sovereignty appear to carry very widespread appeal. This is perhaps the result of their hybrid character which touches both the emotional and the rational. Another factor which has been advanced is location. There is also an external factor. It is becoming increasingly evident that the Privy Council is tiring of its jurisdiction to hear appeals from the Caribbean, and will not always be available as our final appellate Court.

There is now, in addition, a fifth factor which is undoubtedly of major importance for the regional integration movement and future prosperity of the Caribbean. The transformation of CARICOM into a single market and economy presents, perhaps, the most compelling case for a very present need for the establishment of the Caribbean Court of Justice. The Court will perform

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<sup>136</sup> See the Express Newspaper of Trinidad, Thursday 8 July 1999, at page 5, under the caption, "Patterson: Jamaica Set for the Court".

<sup>137</sup> See *supra* n. 90, at page 10.

a pivotal function in this endeavour, since it will have original and exclusive jurisdiction in the adjudication of cases which require the interpretation or application of the Treaty of Chaguaramas<sup>138</sup> and its Protocols.<sup>139</sup> First, however, the considerations of nationalism and sovereignty.

### *Nationalism and Sovereignty*

There is a popular and, in the opinion of many, justified view that a Caribbean Court of final appellate jurisdiction will be a symbol of our efforts to assert our independence and forge a Caribbean unity. To many persons, herein lies the strongest ground for the abolition of appeals to the Privy Council.<sup>140</sup> On this consideration, the assertion is, in effect, that independence imposes an obligation to chart our own destiny. This in turn requires, *inter alia*, the creation of our own institutions. In the context of our judicial system, this is brought into focus by the rhetorical question which was posed, for example, by De La Bastide, when he asked:

"Is it not time ... to complete our independence?"<sup>141</sup>

The 1987 Constitution Commission of Trinidad and Tobago affords an elaboration of this point. The Commission stated in paragraph 269 of its Report:

"We talk of power being divided between the Executive, the Legislature and the Judiciary. With independence, such residual control as was exercised by the Colonial Office ... over our Executive and Legislature was removed, but in the area of the Judiciary, the final word is still spoken in London."

The following statements, which were made by the Honourable Telford Georges when he delivered the Feature Address to the Caribbean Rights Symposium in 1998, encapsulate the debate on this issue very well. They are therefore worthy of detailed quotation. He said:

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<sup>138</sup> This Treaty, which establishes the Caribbean Community, was signed by the Member States at Chaguaramas, Trinidad, on 4 July 1973.

<sup>139</sup> Part II of the Agreement Establishing the Caribbean Court of Justice contains the provisions which set out or elaborate the original and exclusive jurisdiction which the Caribbean Court of Justice will have in relation to the Treaty of Chaguaramas and its Protocols.

<sup>140</sup> This is clearly stated, for example, by Jeff Cumberbatch, Deputy Dean of the Faculty of Law of the University of the West Indies in, "Appeals to the Judicial Committee of the Privy Council - A Re-examination of the Issues" (A 1994 Study), at page 9.

<sup>141</sup> See *supra* n. 39, at page 431.



"Starkly put, it appears to me that 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 absolutely no say."<sup>142</sup>

He continued:

"The counter argument is that the territories of the British Caribbean had no choice when they were colonies. On achieving independence the countries had a choice of either allowing appeals to an external court to continue or of abolishing them. It is therefore not a derogation from sovereignty to allow appeals to continue. It was in effect an exercise of that right. I think this is the type of argument which the average person would call a lawyer's argument. It asserts that it is an exercise of sovereignty and of independence to choose a situation of dependency. In real life anyone who behaved in that way would evoke pity and exasperation, like the grown man who demonstrates his independence by continuing to live free at home."<sup>143</sup>

At the same Symposium, Douglas Mendes, a prominent Human Rights Lawyer and a Lecturer in Law at the Faculty of Law of the University of the West Indies, was one of the presenters in the panel discussion. He insisted that nationalism and sovereignty were the only logical bases for the establishment of the Caribbean Court of Justice. He was of the view that there is only one argument which really justifies the establishment of a Caribbean final court. He stated it thus:

"... you cannot as an independent nation, call yourself independent if you must go to a foreign court as your final Court of Appeal. It seems to me that that is the only argument that is logical and it is the only argument that is needed in support of the proposition of our own final court of appeal."<sup>144</sup>

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<sup>142</sup> See *supra* n. 83, at page 13.

<sup>143</sup> *Ibid.*

<sup>144</sup> See *supra* n. 83, at page 27.

Professor Simeon McIntosh approached this issue from a perspective of the need for self-definition, in the light of the fact that we now have written Constitutions. He stated:

"[C]onstitutional interpretation is fundamental, given that constitutional law is concerned with fundamental rules of governance, the allocation of the sovereign powers of the state, the relationship between the individual and the state, and the ground rules of the political institutions and processes. The Privy Council, like the British Monarchy, is a British institution. It never becomes a Caribbean Court when it renders decisions for the region. It could discharge this function only because the sovereign states of the region - Guyana excepted - have delegated to it a special judicial authority to act as their final court of appeal. In this instance, we have not appropriated the Privy Council, because the constituent power which established it and which regulates its workings, is Britain. ... Constitutional interpretation has a great symbolic importance: it is a public act of self-definition. With our independence of Britain, we acquired the authority to define ourselves as a community. The hope is that with a Caribbean court of appeal, we would be forced to reconstruct our discourse, to reshape our world, much in line with what our poets and novelists have already begun. A Caribbean court of final appeal must be the centre of any discursive advancement toward the development of a Caribbean jurisprudence. For the ground of the battle in constitutional adjudication is a fundamental conceptual debate about the way in which Caribbean political life is to be constituted, lived and justified. This important matter should not be left in the hands of a British institution."<sup>145</sup>

Seen from these perspectives, considerations of nationalism and sovereignty will undoubtedly be important factors in the decision to establish a Caribbean court of last resort. It is unlikely, however, that anyone in the Caribbean today will agree that this might ever dictate the acceptance by Caribbean people of an indigenous court, at the price of a good court which inspires confidence in its administration of justice. To this end, it is worthy of note that Ramsahoye insists<sup>146</sup> that there must be some minimum standards for a court of final appellate jurisdiction in the Caribbean, if irreversible damage to the Caribbean system of justice is to be averted.

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<sup>145</sup> See the Daily Nation of Barbados, Monday 28 November 1994, at page 6A, under the caption, *Holding our own Court*.

<sup>146</sup> *Supra* n. 32, at page 11.

It is obvious that the Preparatory Committee has paid some attention to these issues. In effect, these issues really stress the need to ensure the appointment of learned, experienced and competent personnel. They also stress the need to institute a mechanism which will secure the independence and integrity of the judges of a Caribbean court of last resort. The Chairman of the Committee alluded to this in his Address to the 1998 Graduating Class of the Hugh Wooding Law School, Trinidad, when he said:

"In order to ensure the appointment of Judges of the highest quality, it is further provided in the Agreement that the Commission must pay regard to certain criteria, namely, high moral character, intellectual ability, sound judgment, integrity and an understanding of people and society. Moreover, appointments are not to be limited to Caribbean lawyers in so far as distinguished judges of the Commonwealth are eligible for appointment to the Caribbean Court of Justice."<sup>147</sup>

He was referring to Article IV(10) of the proposed Agreement for the Establishment of the Caribbean Court of Justice.

It is also noteworthy that the judges of the Court will be governed by a Code of Judicial Conduct which emphasizes and buttresses these ideals. The proposed Code will, *inter alia*, impose a duty upon a judge of the Court to observe high standards of conduct, uphold the integrity and independence of the judiciary and contribute to the establishment, maintenance and enforcement of such standards of conduct.<sup>148</sup> It will also require a Judge of the Court to avoid even the appearance of impropriety in all activities and to conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.<sup>149</sup>

The proposed Code will further require the judges of the Court to uphold the law, perform their duties impartially and diligently;<sup>150</sup> and prevent the appearance of interest to influence their judicial conduct or judgments.<sup>151</sup> It will also forbid judges of the Court from serving in any capacity in any business enterprise which is likely to influence the discharge of their judicial functions.<sup>152</sup>

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<sup>147</sup> *Supra* n. 90, at page 10.

<sup>148</sup> See sub-paragraph (b) of the Code.

<sup>149</sup> See sub-paragraph (c) of the Code.

<sup>150</sup> See Sub-paragraph (d).

<sup>151</sup> See sub-paragraph (e).

<sup>152</sup> Sub-paragraph (h).

### *Location*

The 'location' of the Privy Council, in terms of its geographical distance from the Caribbean, brings to the fore two considerations which have important implications for the administration of justice in the Caribbean. The first is the question of relative inaccessibility to justice. The second is that Court's supposed lack of appreciation for the social mores of the Caribbean.

### *Geographical location and access to justice*

There is a view that the Privy Council is so far removed from the Caribbean, geographically, that it renders access to its services inordinately expensive for potential Caribbean litigants. Harriet Seenath, for example, has noted that this geographical distance makes it difficult for persons in the Caribbean to have access to the services of that Court.<sup>153</sup> She is of the view that this factor causes considerable disadvantage to Caribbean litigants, particularly since the expenses which they must incur for travel and legal costs alone are thereby rendered very prohibitive.<sup>154</sup>

The West Indian Commission also addressed this issue in its 1992 Report.<sup>155</sup> It noted that an inference which was sometimes drawn from the fact that there are not many appeals to the Privy Council annually,<sup>156</sup> is that there is unlikely to be enough work to justify the establishment of a Caribbean Court to replace it. In the view of the Commission, however, the figures really reflect an appellate process beyond the reach of Caribbean litigants.<sup>157</sup>

Attorney-General Nicholson has also considered the question of the paucity of cases which are heard by the Privy Council on appeal from Jamaica.<sup>158</sup> Noting the reasons which were advanced by Patrick Robinson for this phenomenon, he has commented that:

"The reason ... is obviously economic; litigants cannot afford the 4000 mile trek for justice. That is a most serious situation in civil

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<sup>153</sup> See "The Establishment of A Caribbean Court of Appeal: Is it a Practical Reality?" [1990] *Caribbean Affairs* 146, at page 151.

<sup>154</sup> *Ibid.*

<sup>155</sup> See *TIME FOR ACTION: The Report of the West Indian Commission*, 1992, at page 498.

<sup>156</sup> The Commission indicated that between 1982 and 1988, on average, there are about 15 substantial appeals to the Privy Council from the Caribbean.

<sup>157</sup> *Ibid.*

<sup>158</sup> *Supra* n. 131, at page 17.

cases, but even moreso in criminal cases where the liberty of the individual is at stake. What the figures mean is that the remedy of a right of appeal to our highest court is simply not available to the vast majority of our people in Jamaica."<sup>159</sup>

Stating his own view on the matter, the Attorney-General said:

"The value of the rights of the citizen must depend on their access to justice. As Attorney-General, I must be concerned that a Final Court of Appeal must be accessible to all and it is surely indefensible that the right to justice could be denied on the basis of inaccessibility."<sup>160</sup>

Interestingly, the data which is available reflects that the number of cases which have been heard by the Privy Council from Jamaica between the years 1962 - 1993 are as follows:<sup>161</sup>

<u>Civil appeals(1962-1990)</u>	<u>Criminal appeals(1962-1993)</u>	<u>Petitions for Special Leave</u>
Appeals heard - 36	Appeals heard - 65	Petitions heard - 235
Appeals allowed - 14	Appeals allowed - 27	Petitions allowed - 55
Appeals dismissed - 22	Appeals dismissed - 38	Petitions dismissed - 180
<u>Yearly average</u>	<u>Yearly average</u>	<u>Yearly average</u>
Appeals heard - 1.28	Appeals heard - 2.1	Petitions heard - 7.5
Appeals allowed - .5	Appeals allowed - .87	Petitions allowed - 1.77
Appeals dismissed - .78	Appeals dismissed - 1.2	Petitions dismissed - 5.8

Against this background it is easy to visualize the Caribbean Court of Justice affording Caribbean litigants more easy access to final appellate justice, particularly as it will be an itinerant Court.

<sup>159</sup> See transcript of a Statement by Mr. Nicholson to the Senate of Jamaica in mid 1999, at page 12. Mr. Robinson, who is now a Judge on the War Claims Tribunal of the former Republic of Yugoslavia had raised concerns over the relatively few cases on appeal to the Privy Council in an article which was published in the Daily Gleaner Newspaper of Jamaica of Monday 11 March 1991.

<sup>160</sup> *Supra* n. 159, at page 11.

<sup>161</sup> The tables are made from data which was sourced from the Ministry of Finance, as well as the Ministries of the Attorney General and National Security of Jamaica.

*An itinerant Court for easy access*

Article III(3) of the Draft Agreement Establishing the Caribbean Court of Justice provides that although the Seat of the Court will be in the territory of a Contracting Party as determined from time to time by a qualified majority of the Contracting Parties,<sup>162</sup> "but, as circumstances warrant, the Court may sit in the territory of any other Contracting Party". This provision has been informed by an intention to enable Caribbean people to have easier access to its final appellate jurisdiction than they have to the Privy Council. As an itinerant Court which sits in all jurisdictions, the Court will pass enormous cost benefits on to litigants.

Itinerant Courts do not present a novelty in the Caribbean. At present, the OECS Court of Appeal which serves the OECS territories<sup>163</sup> is also an itinerant Court. Additionally, during the years of the Federation of the West Indies, the Federal Supreme Court served the Commonwealth Caribbean States which were members of the Federation commendably as an itinerant Court.

*Location and lack of appreciation of local circumstances*

There has been an interesting assertion, that justice cannot be divorced from the local circumstances in which a case arises. An essential requirement of this assertion is that adjudicators should be familiar with those circumstances and, ideally, should themselves spring from them. The truth is, however, that the value which many persons in the Caribbean place upon decisions of the Privy Council, as well as their respect and confidence in its administration of justice, is, in part, incidental to its location, far removed from the Caribbean.

Closely related to the assertion, that justice cannot be divorced from the local circumstances in which a case arises, is the view that the Privy Council does not appreciate Caribbean local circumstances. There are times, however, when it appears that the Privy Council is quite willing to accept findings which Caribbean courts make in relation to local circumstances. The fact that a sufficient local circumstance jurisprudence has not evolved in the Caribbean is, in some measure, the result of an unwillingness on the part of Caribbean courts to advert to the local circumstance rule in appropriate cases. If this practice continues, the Caribbean Court of Justice may not influence the development of a Caribbean jurisprudence in a manner which will render the location factor meaningful. It will therefore be necessary for the judges of the Court to be mindful of the potential which the local circumstance notion holds for the development of that jurisprudence.

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<sup>162</sup> A decision has been taken that the Seat of the Court will be Trinidad and Tobago.

<sup>163</sup> The States which are served by this Court are St. Lucia, St. Vincent, St. Kitts and Nevis, Grenada, Dominica, Antigua, Montserrat, the British Virgin Islands and Anguilla.

### *Location and delay in litigation*

There is a third element in the location factor.<sup>164</sup> This finds expression in the view that the location of the Privy Council occasions delays in the hearing of cases at the final appellate level. It is submitted, however, that this proposition cannot be substantiated, particularly in the light of the many complaints which have been made in recent years concerning the lengthy delays which litigants in the Caribbean endure before Caribbean courts. Such delays, which are caused by various inefficiencies and deficiencies in the system for the administration of justice in the Caribbean were evidenced in the *Pratt and Morgan* case.<sup>165</sup> They appear to have been critical considerations which influenced the Privy Council to arrive at its decision in this case. Undoubtedly, there is a need to afford more priority to the administration of justice in these jurisdictions. This, it is submitted, should include, rather than exclude, the establishment of the Caribbean Court of Justice.<sup>166</sup>

### *An external factor - Exit the Privy Council!*

The foregoing factors appear to be weighted in favour of a present need for the establishment of the Caribbean Court of Justice. They are sufficient, it is submitted, to gain widespread sympathy to the cause.<sup>167</sup> In the end, however, it may very well be that the factor which ultimately determines whether there will be a Caribbean final court is one which is altogether external to the Caribbean.

The Privy Council is funded by the government of the United Kingdom. It may not continue to fund the Privy Council indefinitely, particularly in the light of the decrease in the number of jurisdictions which retain appeals to that body. With the passage of time there may be so few jurisdictions which require the services of that Court, that it becomes wholly uneconomical and unnecessary to maintain the institution.

Reportedly, there are interests in the United Kingdom which appear to be even more eager to be rid of the jurisdiction of the Privy Council in appeals from the Caribbean, than any interest in the Caribbean to end the jurisdiction of that Court. Reportedly, a Member of Parliament in England recently placed a proposal before that Parliament, encouraging it to end appeals to the

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<sup>164</sup> In addition to inaccessibility and cost deterrent, and the unfamiliarity with local circumstances.

<sup>165</sup> *Supra* n. 4.

<sup>166</sup> See *supra*, under the heading *The issue of the financial security of the Court*, esp. the text to nos. 128 and 129.

<sup>167</sup> It is submitted that this is necessary in the light of the role which Caribbean people, particularly those in the OECS countries who will have to vote in referenda on the matter, must ultimately play in the decision.

Privy Council from Caribbean countries.<sup>168</sup> This was in 1999. However, in 1990, Lord Wilberforce, an eminent English Law Lord and Member of the Privy Council reportedly urged the Caribbean to establish its own final court.<sup>169</sup> Similar advice was also given by English Queen Counsel, Lord Anthony Gifford in 1992.<sup>170</sup>

Yet, there are persons who still think that the idea that the Privy Council may one day grow weary of its jurisdiction to hear appeals from Caribbean jurisdictions is a forlorn thought. Those persons must have had quite an awakening recently when, in an interview which was published in the May 1999 issue of *The Lawyer*,<sup>171</sup> Lord Browne-Wilkinson, the President of the Privy Council, intimated that appeals to that Court from the Caribbean should end. He complained that appeals related to death row prisoners in the Caribbean had created a burden on the time and resources of that Court. He urged the Caribbean to establish its own final Court on the ground, *inter alia*, that the ultimate court of appellate jurisdiction of a state, which has to make important policy decisions on legal principles, should be in the state, staffed by citizens of that state and not by outsiders.<sup>172</sup>

According to the interviewer, the President complained of the heavy caseload, with cases coming on appeal from the Caribbean taking about twenty-five percent of the time of that body. Very interestingly, in the words of the interviewer, the President suggested that the authorities should:

"... take the Caribbean cases away from the Privy Council and give those countries their full legal independence."

The President of the Privy Council repeated these remarks in another interview in October 1999. These statements have no doubt served to reinforce the cause of those who wish to establish the Caribbean Court of Justice in a manner that the compendium of the rational arguments have so far failed to do. It should also serve to embarrass the people of the Caribbean into accepting the fact that the Privy Council has lost interest in its role as our final court.

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<sup>168</sup> See the Newsday Newspaper of Trinidad, Monday 5 July 1999, at page 5, under the caption "British can 'help' start Caribbean Court".

<sup>169</sup> This reportedly came in response to a question after he had delivered a lecture in Trinidad in March 1990. See the Trinidad Guardian Newspaper, 9 March 1990, at page 6, under the caption "WI appeal Court a Good Idea says Wilberforce".

<sup>170</sup> See the Trinidad Guardian Newspaper, 19 April 1992, at page 1, under the caption, "British QC urges WI Court".

<sup>171</sup> The interview was reproduced verbatim in the Newsday Newspaper of Trinidad, Sunday 13 June 1999, at pages 22, 44 and 45. See also the Trinidad Guardian Newspaper, Wednesday 23 June, 1999, at page 10, under the caption, "Lawyer says Caribbean slow with Appeals Court".

<sup>172</sup> See the Daily Nation Newspaper of Barbados, 22 June 1999, at page 6A, under the caption, *Final Court of Appeal*.



There has also been a related development which should serve to emphasize the urgent need for the establishment of the Caribbean Court of Justice. It arises out of the proposals for the devolution of Scotland. It has been suggested by English authorities, that when devolution becomes a reality, the Privy Council should become the ultimate court of appellate jurisdiction for Scotland. The caseload which this new and expanded jurisdiction will bring is likely to be so weighty, that it may leave no alternative but for the Privy Council to end its jurisdiction as the final Court for other jurisdictions, including the Caribbean.

## VI

### CARICOM Single Market and Economy, and the Original and Exclusive Jurisdiction of the Court

It has been seen that as early as 1972, the Fraser Report recommended the conferment of an original jurisdiction upon a Caribbean Court which replaces the Privy Council. This was in order to permit that Court to function as arbiter in disputes which arise from various regional Agreements.<sup>173</sup> It has also been seen that in 1991, Sir Roy Marshall advocated the conferment of a similar jurisdiction with respect to disputes which arise on the Treaty of Chaguaramas.<sup>174</sup> One year later, in 1992, when the question gained the attention of the West Indian Commission, that body afforded an unreserved endorsement of the establishment of a Caribbean Court to replace the Privy Council. It did this primarily on the ground that such a Court is a *sine qua non* for the deepening of the regional integration process. In this regard it stated:

" ... we are strongly of the view that we cannot, like characters in a Chekhov play, go on sitting around tables forever discussing the pros and cons of action and in the process forever deferring it. ... the case for the CARICOM Supreme Court, with both a general appellate jurisdiction and an original one, is now overwhelming - indeed it is fundamental to the process of integration itself."<sup>175</sup>

The Report continued,

"Integration rests on rights and duties; it requires the support of the rule of law applied regionally and uniformly. A CARICOM Supreme Court interpreting the *Treaty of Chaguaramas*, resolving disputes arising under it, ... declaring and enforcing Community law, interpreting the Charter of Civil Society - all by way of the exercise of an original jurisdiction - is absolutely necessary to the integration process. It represents in our recommendations one of the pillars of the CARICOM structures of unity."<sup>176</sup>

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<sup>173</sup> *Supra*, under the heading *The Immediate pre Pratt and Morgan period - 1989 - 1993*, in Part II of this paper.

<sup>174</sup> See *supra* n. 26 and the text thereto.

<sup>175</sup> *Supra* n. 155, at page 498.

<sup>176</sup> At page 500. See similarly, Hon. P. J. Patterson, *Towards a New Jurisprudence*, 1996, at page 11. The Paper contains the Address which was given by the Prime Minister of Jamaica at the Graduation Ceremony, Norman Manley Law School, on Saturday 5 October, 1996.

This recommendation can now become a reality. When the Caribbean Heads of Government, at the Nineteenth Meeting of their Conference,<sup>177</sup> took the decision to establish the Caribbean Court of Justice, they decided that the Court will be invested, in addition to its appellate jurisdiction, with an original jurisdiction. By virtue of this jurisdiction, the Court will adjudicate trade disputes and make decisions with respect to the interpretation and application of the Treaty of Chaguaramas and its Protocols. The Treaty is being revised to create the CSM&E in the year 2000.

Commentators in the Caribbean have asserted that the Court will fill a very serious void by providing an effective mechanism for the resolution of disputes under the revised Treaty. The Chairman of the Preparatory Committee has stated it in this way:

"Inevitably, disputes will arise under the amended Treaty - especially among Member States. ... there must be a Court competent to resolve those disputes, interpret the Treaty and develop a body of Community law. For that reason Barbados [and Jamaica] proposed in Jamaica in 1997 that the Caribbean Supreme Court be re-styled "The Caribbean Court of Justice" and be invested with original jurisdiction to adjudicate matters under the revised Treaty."<sup>178</sup>

The commentators are firmly of the view that the imminence of the CSM&E makes it imperative that the Caribbean Court of Justice should be established simultaneously and be invested with this jurisdiction. Thus, for example, Sheldon McDonald has drawn attention to the fact that the European Court of Justice has been established as an institution under Article 4 of the Treaty of Rome to provide an effective disputes resolution mechanism under that Treaty. He notes that Article 164 of that Treaty has invested that Court with specific jurisdiction to " ... ensure that in the interpretation of this Treaty the law is observed." He draws attention to the lack of an effective mechanism for the resolution of disputes under the Treaty of Chaguaramas which, in his opinion, cry out for it. Against this background he states:

"For an integration movement which patterned itself to a remarkable degree after the European Community, the student will find it

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<sup>177</sup> This Meeting was held in Castries, St. Lucia in July 1998.

<sup>178</sup> See *supra* n. 90, at page 7. It should be noted that Article IX of the Draft Agreement Establishing the Caribbean Court of Justice will confer original jurisdiction in this matter upon the Court. The Chairman indicated that the Heads of Government, at their Meeting in St. Lucia in July 1998, accepted the Barbados and Jamaica proposal to invest the Court with both an original and an appellate jurisdiction. This was at the Nineteenth Meeting of the Conference of the Heads of Government of the Caribbean Community, which was held in that island on 30 June to 4 July 1998.

strange that Article 10 [of the Treaty of Chaguaramas] setting out the Institutions does not provide for any dispute resolving body."<sup>179</sup>

CARICOM's Legal Consultant, Duke Pollard, is of the view that since the original Treaty of Chaguaramas "was meagre on rights and weak on obligations" it may not have been critically important to have invested a Court with jurisdiction to resolve disputes under it.<sup>180</sup> He has pointed out, however, that the revised Treaty, which will establish the CSM&E will create extremely important rights and impose equally important obligations on member states.<sup>181</sup> He has also noted that, similarly, the Treaties which create the European Union and the Andean Common market confer binding rights and obligations, and that Courts have been established under these regimes to give binding force to the rights and obligations which those Treaties create.<sup>182</sup>

The conferment of original jurisdiction upon the Caribbean Court of Justice, by virtue of Article IX of the Draft Agreement Establishing this Court, will serve a similar purpose. Further, Articles IX(a) and (n) of this Draft Agreement will, in effect, confer an exclusive jurisdiction upon the Court in relation to the matters which fall within its purview under this original jurisdiction. This will be necessary for uniformity in the interpretation and application of the revised Treaty of Chaguaramas. The rationale for this is stated by Pollard thus:

"... not only should the proposed Caribbean Court of Justice have jurisdiction to interpret and apply the Treaty, but that jurisdiction must either be exclusive or final if legal certainty, which is indispensable for the successful development of the CARICOM Single Market and Economy, is to be secured."<sup>183</sup>

He notes, similarly, that legal certainty and uniformity in the applicable norms were also objectives under the Treaty of Rome and the Cartagena Agreement, and those objectives informed the conferment of what is, in effect, the conferment of similar jurisdictions, for example, upon the European Court, by Article 177 of the Treaty of Rome.

The question, what legal entities will have *locus standi* to move the Caribbean Court of Justice to exercise its original jurisdiction is important. Articles IX(a) and (n) of the Draft Agreement Establishing the Court will permit actions to be brought not only by Contracting States,

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<sup>179</sup> See *supra* n. 73, at page 19.

<sup>180</sup> See "The Caribbean Court of Justice: Challenge and Response", CARICOM Perspective, June 1999, (Georgetown, Guyana: Caribbean Community Secretariat) page 24, at page 27.

<sup>181</sup> *Ibid.*

<sup>182</sup> *Supra* n. 180, at page 29.

<sup>183</sup> *Supra* n. 180, at page 29.

but by nationals or private entities as well, with the special leave of the Court.<sup>184</sup> Where, therefore, Contracting States, nationals or business enterprises within the region become affected in any way by anti-competitive business conduct under the provisions of the CSM&E, they will have the competence to institute proceedings before the Court. What is important here is the fact that the Court will afford to Caribbean businessmen, journalists, hotel and other workers, farmers and other persons who are affected by such conduct decisions which are binding.

It is perhaps instructive that Britain has reportedly barred Montserrat, a British Dependent Territory, from having any appeals from that jurisdiction heard by the proposed Caribbean Court of Justice. Notwithstanding this, the Chief Minister of that island has reportedly indicated that the Territory will still access the Court for the adjudication of trade and other aspects under the CSM&E.<sup>185</sup> This, it is submitted, serves to buttress the assertion that the matters which will fall within the purview of the Caribbean Court of Justice in its original jurisdiction under Article IX of the Agreement, are clearly sufficient in themselves to justify the establishment of the Court.

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<sup>184</sup> See Pollard, *supra* n. 180, at pages 31-34.

<sup>185</sup> See the Express Newspaper of Trinidad, Sunday 18 July 1999, at page 25, under the caption *British bars Montserrat from Caribbean Court of Justice*.

## VII THE WAY FORWARD

To be or not to be? That is the question which the people of the Caribbean must now decide in relation to the establishment, integrity and maintenance of the Caribbean Court of Justice. This is because the written Constitutions of the Commonwealth Caribbean have put the answer to the question directly or indirectly within their purview by stipulating various parliamentary majorities and or referenda requirements, for the termination of the jurisdiction of the Privy Council as the court of last resort for these states. Additionally, the establishment of the Court will mean the surrender of some judicial sovereignty of each member state.

The disinclination of Caribbean States to surrender any of their judicial sovereignty was cited by Professor Keith Patchett as one of the reasons for the failure to introduce a Caribbean court of last resort as a co-operative venture.<sup>186</sup> The voluntary surrender of sovereignty in any form for the benefit of the Caribbean as a whole has been a perennial problem. It has plagued the operation of many regional institutions, even as the industrialized countries of the world have been surrendering aspects of their sovereignty in favour of the advantages which may be gained from cooperation.<sup>187</sup>

Unfortunately, it is this attitude which apparently has been buttressed by the provisions which are contained in Caribbean Constitutions which stipulate the procedures for the transfer of final appellate jurisdiction from the Privy Council to a Caribbean Court. The task appears even more daunting when it is realized that opposition parties of the day and some groups or individuals might not be supportive of practical initiatives for the establishment of the Court. Governments may, as a result, be wary of the adverse consequences which this may have upon their political fortunes. The strength and survival of the Court requires that debate, as well as practical steps to establish the Court, to be taken into open fora along non-partisan lines.

The debate as to the desirability of establishing the Court has ensued and continued over some three decades. Everyone will no doubt agree that there is great force in the exhortation by West Indian Commission that it is time to move from the debate stage to the establishment stage. Every Constitution Commission which has been appointed in any Commonwealth Caribbean

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<sup>186</sup> See *supra* n. 104, at page 66.

<sup>187</sup> Indeed, the West Indian Commission was minded to record, at page 3 of its Progress Report entitled *Towards A Vision of the Future*, that it was established as a result of a paper which was submitted to the Tenth Conference of the CARICOM Heads of Government in July 1989 by Hon. A.N.R Robinson, the then Prime Minister of Trinidad and Tobago. According to that paper, fundamental restructuring was taking place the world over, which put the Caribbean in danger of becoming a backwater, separated from the mainstream of human advance into the twenty-first century. In this regard, the paper specifically expressed concern for the far reaching effects which the formation of the Single European Market in 1992, and the birth of NAFTA could have on a Caribbean which did not take steps to face the emerging reality.

country since 1970 has recommended the establishment of a regional court of last resort. The Wooding Commission did in Trinidad and Tobago in 1974.<sup>188</sup>

With respect to the Judiciary, the Grenada Constitution Review Commission, 1985, was primarily concerned with the question of the return of that country to the Eastern Caribbean Supreme Court system, and so recommended. It nevertheless suggested that the cessation of appeals to the Privy Council "should be a matter of common action by the independent states."<sup>189</sup>

The 1987 Constitution Commission of Trinidad and Tobago<sup>190</sup> considered the question in some detail. It weighed up the pros and cons and strongly recommended the replacement of the jurisdiction of the Privy Council by a regional court.<sup>191</sup> The 1998 Constitutional Commission of St. Kitts and Nevis which was chaired by Sir Fred Phillips stated its support for a Caribbean final court thus:

"In 1970/71 our Chairman was a member of a high-level Commission of Caribbean jurists (headed by the late Mr. Justice Aubrey Fraser) which strongly recommended the establishment of a Caribbean Court of Appeal. Our Commission can only at this stage - 28 years later - express our delight that the recommendation seems at last to be about to bear fruit. Such a court is long overdue and we hope St. Kitts and Nevis will accede to the treaty as soon as circumstances permit."<sup>192</sup>

The Report of the Constitution Review Commission of Jamaica, 1993, noted that during the West Indies Federation, the Federal Court of Appeal performed its duties with commendable competence and, thereby, earned the esteem of the Caribbean Bar. It recommended the participation of Jamaica in the regional court when it is established in preference to the institution of its own final court.<sup>193</sup> These recommendations were adopted by the 1995 Joint Select Committee of the Houses of Parliament on Constitutional and Electoral Reform.<sup>194</sup>

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<sup>188</sup> See *supra*, the text to nos. 30-32 in Part II of this Paper.

<sup>189</sup> See the Report of the Grenada Constitution Review Commission, November 1985, at page 33.

<sup>190</sup> Hereinafter referred to as "the Hyatali Commission".

<sup>191</sup> See the Report of the Constitution Commission (1987) of Trinidad and Tobago, paragraphs 267-274. The Report was submitted to the President of the Republic on 1 June 1990.

<sup>192</sup> See paragraph 11 of Chapter 8 of the Report of the Constitutional Commission of St. Kitts and Nevis, 1998.

<sup>193</sup> See generally, paragraphs 64 - 65 and 37.1 - 37.3 of the Report of the Commission..

<sup>194</sup> See paragraph 129 of the Report of the Committee, which was presented to the Governor General of Jamaica on 31 May 1995.

There are persons who are of the view that the time is now right, because it will complete the independence of Caribbean countries. This has been given added urgency in the light of the recent call by the President of the Privy Council for Caribbean countries to establish their own court of final resort. There are those, on the other hand, who suggest that the matter should be deferred for a variety of reasons, even as the Privy Council is itself ready to relinquish its jurisdiction.

The fear should be that eventually, Caribbean jurisdictions may individually opt to establish their own courts of last resort if this matter is not pursued on a regional basis. This path has already been taken by Guyana. It is noteworthy that the Barbados Constitution Review Commission which submitted its Report to the Governor General of that country in 1998, made a majority recommendation that the functions of that country's court of final judicial instance should be assigned to its own Court of Appeal if the Caribbean Court of Justice does not come into being within a reasonable time.<sup>195</sup> Similarly, the 1987 Constitution Commission of Trinidad and Tobago recommended as follows:

"We feel ... that we cannot take for granted that other Governments in the region will decide to join in the establishment of a Regional Court. We, therefore, favour the view that until such a Regional Court is established, a final Court of Appeal to be called the "Supreme Court of Trinidad and Tobago" should be established for this country."<sup>196</sup>

These recommendations are understandable in the circumstances. Yet, for the continuity and enhancement of the regional integration process and the facilitation of the Caricom Single Market and Economy (CSM&E), it is clearly desirable that there should be a regional Court.

That there are areas of difficulties and differences with respect to the establishment of the Court cannot be gainsaid. The main concern relates to the independence and integrity of the judges of the Court. This is a positive concern, since it ultimately calls for a selection process which engenders confidence in its administration of justice, and one which facilitates the development of a sound Caribbean jurisprudence. There is also a healthy concern for the stability of the finances of the Court.

The fact that the Preparatory Committee has taken steps to address some of the concerns which have been expressed gives ground for optimism. Those steps are evidenced, for example, in its attempt to insulate the process of selecting the judges of the Court from political influence. Pro-action is also apparent from the provisions which will confer upon the Court not only an appellate, but an original and exclusive jurisdiction in matters which arise under the revised Treaty

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<sup>195</sup> See paragraph 11.35 of the Report of the Constitution Review Commission of Barbados, 1998, at page 67.

<sup>196</sup> See *supra* n. 191, at paragraph 276.



of Chaguaramas which will create the CSM&E. It is further evidenced in its suggestion for securing the financial stability of the institution.<sup>197</sup>

Ultimately, it is critically necessary that the Court should be established on a sound and secure foundation. This requires pro-action rather than reaction or inaction. It calls for a meeting of minds in a cooperative endeavour in order to address the concerns which have been expressed and to resolve the difficulties which there are and will be.

Through it all, however, it is clear that there is widespread agreement that there should be whether, now or eventually, a Caribbean final court. 'Eventually' seems to have been the watchword for about three decades. It may be the watchword for ever, if the will is not summoned to establish a regional court with some degree of urgency. Failing this, the legacy will eventually be a proliferation of courts of last resort across the Commonwealth Caribbean. This, it is submitted, will be an unkind and unwholesome legacy to be left in the Caribbean to generations yet unborn.

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See *supra*, under the heading *Towards a formula for the financial stability of the Court*, under Part V.