

distance of the Chief Justice. I do not want that in this country at all. There is nothing in our history that requires us to alter the system even to the extent of looking into administrative functions. There are plenty of examples in other countries showing that if you give a frustrated executive the opportunity to demolish the judiciary, they will do it. (*Sunday Guardian*, September 12, 1999)

What emerges from the debate in Canada, the United Kingdom, and in the Caribbean is that there is no incontestable view as to how best to maintain and promote the valued ideal of judicial independence. Some, like former Canadian Chief Justices Dickson and Bora Laskin, believe that complete separation of the judiciary from the other two branches of government is essential, a separation which implies complete administrative and financial autonomy. Laskin believes that the Attorney General should be a mere conduit between the Judiciary and the Executive. One is however aware that the Attorney General could dither and use even this limited role as an administrative weapon to bring the judiciary to heel. Others feel that the concept of judicial independence is an evolving one, and that it would be unwise to freeze it in any particular mould. Function (culture, style) could be more important than institutional structure, though the latter is of course equally important.

Chapter 7

THE CARIBBEAN COURT OF JUSTICE



he proposal to abolish appeals to the Judicial Committee of the Privy Council (JCPC) and to replace it with a Caribbean Court of Justice met with various levels of resistance throughout the region. In no country was opposition more strongly asserted than in Jamaica where the abolition issue became deeply intertwined with contentious issues relating to the chaotic state of the Jamaican justice system, party competition, populism, nationalism, and the long festering anti-federal sentiment that had led Jamaica to withdraw from the West Indian Federation in 1962. The arguments advanced for abolition of the former imperial court were varied. The most important was that one could not be half-independent; one was either independent and sovereign or not. One could not demand one's political and economic independence and remain subject to a foreign colonial court. Legal independence was deemed to be the logical capstone of political independence. As Jamaica's Prime Minister P.J. Patterson expressed it, "if we are fit to enact our own laws, we should be fit to interpret them ourselves" (cited in Vascianne 1996:2). Patterson was even more explicit in an address given February 2000 when he asked:

Can our sovereignty be complete when the final word on the law as an essential ingredient in the functioning of our

state is still the subject of external decision-making and interpretation by a ... court that is not indigenous? (cited in Vasciannie 1998:47)

This view had earlier been endorsed by the Organisation of Commonwealth Bar Associations at its Sixth Biennial Meeting in Jamaica in 1970 and by the Trinidad and Tobago Constitution Commission Reform which, under the Chairmanship of Sir Hugh Wooding, submitted its report in 1974. One notes that several former colonial states had abolished appeals to the Privy Council. Among them were Grenada, Guyana, Australia, India, Canada, Cyprus, Ghana, Nigeria, Tanzania, Malaysia, Kenya and Zanzibar. It is however worth noting that being sovereign also means that a state could share responsibilities with another state or with some other regional or international body. It could also contract out functions to some extra-territorial agency, including bodies like the Caribbean Court of Justice or the Privy Council. Sovereignty could thus be devolved and reclaimed (Vasciannie 1998: 45-51).

One of the most critical arguments advanced by those opposed to the Caribbean Court of Justice (CCJ) was that it would be at the mercy and caprice of the political directorates of the region who may seek to starve it of resources if it did not do their bidding or offended them by their rulings. It was also feared that heads of governments might not always do what is right when appointments to the Courts are being considered. The experience of what had occurred in the Eastern Caribbean where Heads of government punished judges for perceived or imagined offenses was also not lost on those who articulated these fears. It was felt that the proposed method of appointing judges to the Court involved a political input by Heads of governments which raised questions about the security of judges. It was also argued that since countries could withdraw from the proposed appellate court, no judge would have security of tenure or guarantee that he would receive his pension. The fear was that judges would think about this when considering serious questions affecting governments. The appointment by the People's National Party of Jamaica of a former

Attorney General in a PNP government as President of the Jamaican Court of Appeal, the appointment to the Cabinet as Attorney General of a former Chancellor of the Court of Appeal in Guyana and the appointment to the Bench of two former cabinet colleagues by the Prime Minister of Barbados were also seen by many as conclusive evidence of the inability of Caribbean politicians to avoid inseminating every important national institution with the virus of partisan politics.

Opponents of abolition in various parts of the Caribbean felt that in the small politically and tribalistically charged environments of the islands, many judges seek to appease political directorates, vested interests or friends. Their personal feelings influenced their judgements. It was feared that they would do so with greater impunity when there was no prospect that their judgements could be appealed and overturned by an extra-regional body. It was likewise felt that the decline in the standard of judicial ethics and the increasing authoritarian tendencies of the political directorate together constituted a threat to the liberty of the citizen, and that the Privy Council was a valuable umpire or long stop to which one could appeal, if necessary. It was felt that the risk of giving up such a facility was not worth taking.

Another critical argument advanced in Jamaica and elsewhere in the region was that the governments should devote such scarce resources as there were to upgrading the courts especially those at the lower level which were said to be in a deplorable state. The Jamaica Bar Association (JBA) and Jamaicans for Justice (JJ), a civil society grouping, complained bitterly about the non-existence of basic facilities in Jamaica's lower court system. These included such things as copies of the Laws of Jamaica and even Jamaica Law Reports. It was said that cases were often held up because photocopiers did not work. Infrastructural and structural problems were also said to be common place, while the atmosphere in the courts brought to mind "cattle sales."²⁴ The JBA argued that there should be basic improvements at the local

level before the appellate process was changed. As David Batts, a JBA Council Member whinged:

We are concerned that the United Kingdom Privy Council may be replaced by a court which is or will become inferior. This concern is not imaginary but stems from the fact that governments, since Independence, have presided over the decline in the local judicial system and structures. If the courts now in existence have been so treated, what reason is there to believe that a new court will be in any different position. It is therefore the view of the Jamaican Bar Association that until and unless things are put right with the courts now in existence, no new court should be created. The courts in Jamaica share the following problems:

The size and number of court buildings have not kept pace with the massive population increase and consequential increase in demand for its services. The courts across the island are generally in a deplorable condition. The facilities afforded the Resident Magistrates are inadequate. The public has no proper convenience and often stand outside due to inadequate seating. Police officers still "bellow" the names of witnesses as no court has a public address system. There is often no air conditioning or noise control. In Annotto Bay, the police canteen was until recently being used as a court room.... (*Sunday Herald*, August 29, 1999)²⁵

There was also concern about the extent to which the justice system in Jamaica was characterised by delay. Steps had been taken to reduce such delay in both the civil and criminal procedures, but it was generally agreed that Jamaica had a long way to go to achieve an efficient use of judicial time and to improve courtroom facilities. Similar complaints were made by spokesmen of Bar Associations throughout the region.

To meet some of the objections raised about possible political manipulation, it was agreed at the 1999 meeting of Heads of Government that the members of the Court would be chosen

by a nine man Judicial and Legal Services Commission and not by ministers of government as was the case in the European Court of Justice. The Commission's composition was to be regional and would include persons recommended by the regional legal fraternity, members of national Judicial and Legal Services Commissions and Public Services Commissions, as well as the Secretary General of Caricom. While the President of the Court (the member) was to be appointed by a majority of the Heads of Government, they were to do so on the recommendation of the JLSC. He and other judges were only removable for cause on the recommendation of the Commission acting on the advice of a tribunal established for the purpose.

It was also agreed that judges could be drawn from any commonwealth country. This provision was inserted to ensure that the regional bench could, if necessary, draw on expertise from jurisdictions other than the Caribbean. It was also felt that the establishment of a Caribbean Court of Justice could serve to motivate Caribbean judges who would see their possible appointment to such a Court as an important career goal. This, it was felt, could encourage them to develop their capacity as jurists. And as Vascianne and others suggest, responsibility could have its spin-offs. "Nothing is more conducive to personal growth than responsibility; by the same token, if Caribbean jurists were to render judgements in a situation where final responsibility were to rest in the Caribbean, there is every likelihood that such judgements would display reasoning and analysis on par with the world's most acclaimed judicial institutions" (Vascianne 1996:11). Caribbean judges have in fact been known to complain that they were inhibited in their freedom to be creative by concerns and fears about being overruled. As Justice Panton of Jamaica observed in a submission to the Jamaican Constitutional Commission in 1992:

After thirty years of so-called independence, Jamaican judges have to face the infradig situation where we cannot afford to think without seriously considering what our English counterparts sitting in England would wish us to

do. The decisions of the judicial Committee of the Privy Council bind us - however non-sensical they may be (cited in Vascianne 1998: 45).

The cost of funding the Caribbean Court of Justice was a factor which gave great concern to all and sundry. In 1994, the Caricom secretariat estimated that this would be EC\$4m per annum. How would these funds be sourced? How would the costs be shared? Would states meet their contributions regularly or at all? What would happen if there were budget constraints in one state or if one state chose to withdraw? Was the establishment of the CCJ the best use that could be made of scarce resources? The *Barbados Advocate* did not think so. As it said editorially:

... 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. (cited in Rawlins 2000:40-41).

Justice P.T. Georges, a long time supporter of a Caribbean Court of Appeal, did not agree with the *Advocate*. As he opined:

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 have to be made independent and had to be liberated from the vestiges of the colonial past, but not the administration of justice. (*ibid.*)

In response to those who expressed concern that the operations of the Court could be endangered by the refusal of states

to fund the recurrent and other expenses of the Court, it was agreed that funding would be provided by the issue of bonds guaranteed by national governments as well as by international grants for a period of five years. To this end, a Trust Fund of the order of US\$25m was to be established which would be administered by the Caribbean Development Bank or some other institution to ensure that the proceeds would be used for the purposes for which the capital was provided. In this and other ways, the recurrent expenditure of the Court, including the remuneration of the judges and their pensions would not be dependent on the dispositions of governments. It was also contemplated that these obligations would be the first charge on the Consolidated Funds of each state. As such, the provision of funding would not be the subject of an annual parliamentary vote as is the case with other items of expenditure. Just the same, sanctions, involving denial of access were to be imposed on states which default.

This latter provision however bothered opponents of the Court who noted that if a state failed to make its contributions, litigants from that territory could not be heard in court. It was suggested that each participating state should post a bond as a reserve against default in addition to the five years prepayment costs. It was also suggested that a three year notice of withdrawal was too short and that a minimum of five years should be stipulated. It was further suggested that the legislation establishing the Court should give the individual a right of action against the state if a breach of its treaty obligations caused him to lose his/her right of access to the Caribbean Court. Some persons argued that the right to withdraw, whatever the constraints placed on it was the factor which would prove most fatal to the Court. In the view of the President of the St. Lucia Bar Association, Mr. Kenneth Monplaisir, the CCJ should be patterned on the Eastern Caribbean Central Bank from which no state could withdraw. The strength of the latter, in his view, was a function of the "no escape" clause.

The JBA was not entirely happy with the concessions which were made. Objection was taken to the proposal to have the

Secretary General of CARICOM serve as a member of the regional JLSC as well as the proposal to give Heads of State a role in approving the President of the Court. It was felt that these provisions could give rise to undue political interference in the activities of the Court which would undermine confidence in it. As The Jamaica Bar Association argued, "the appointment of the President will involve political compromise as between the Heads of participating states as well as the need to exclude perceived enemies of respective states." The controversy between the Prime Minister of Trinidad and Tobago and the Chief Justice whom the former deemed an "enemy" fuelled such concerns. So too did the attack from a political platform on a High Court Judge hearing an elections petition which was launched by the Prime Minister and the Attorney General. President of the Jamaica Bar Association wondered whether "that kind of boorish behaviour [was] going to be reserved exclusively for Trinidadian judges or whether the judges of the Caribbean Court of Justice can expect that as part of their diet when they take up residence in Trinidad and Tobago. (*Trinidad Guardian*, March 26, 2001). The JBA felt that the President of the Court ought to be appointed, removed, and disciplined in the same way as the other judges, and that he should not chair the JLSC (*Sunday Guardian*, August 20, 2000). It was also felt that he/she should merely be "first among equals" and should be appointed and removed by the members of the Commission from among their number.

In the final analysis, the JBA believed that the arguments for the retention of the Privy Council were persuasive, and had the following to say about the Privy Council:

- It is an appellate court of undoubted experience and of the highest quality which has inter-national stature and appeal.
- It brings an objective approach to matters as distance and time separate it from local prejudices.

- It is a court which costs the public purse nothing.
- It is a court which is strong on individual rights with a proven record in that regard.
- In a world of multinational corporations, it may enhance Jamaica's ability to attract foreign investors if the Privy Council is retained as a final court. (*JBA Position Paper* 1999: 8)

There were also many human rights activists who were of the view that Caribbean governments were only driven to abolish the JCPC and establish the CCJ because they were unhappy with the judgements being delivered in the Privy Council which made it difficult for them to execute convicted murderers without going through a variety of other national and international human rights loops such as the Inter-American Convention on Human rights and the Optional Protocol on Civil and Political rights which were expensive and time consuming, and which made it difficult to execute those guilty of murder in a timely manner. One particular landmark judgement, (*Pratt and Morgan vs Attorney General* [1993] 43 W.I.R. 340), was particularly irritating. The judgement provided that the death penalty was a "cruel, degrading and unusual punishment" when not executed within five years of the initial sentence. The judgement in which the Privy Council reversed itself (cf. *Riley and Ors vs Attorney General of Jamaica* [1993] IAC 719), in effect forced governments to substitute life imprisonment for the death penalty where the appeals process was not completed within a five year period. (We note that in the case of Pratt and Morgan, the gap between conviction and planned execution was 14 years).

Critics of the JCPC judgement observed that condemned prisoners and abolitionist attorneys deliberately stretch out the appeals process to cheat the hangman. The judgement however strengthened the determination of Caribbean politicians to abolish the JCPC. As a former Attorney General of Barbados, Maurice

King admitted, "the argument [for abolition] is premised on the assumption that a Caribbean Supreme Court would inevitably and of necessity reject and reverse the jurisprudence of the Privy Council in determining issues of what amounts to cruel and inhuman punishment and treatment. It is premised too on the assumption that the judges of a Caribbean Supreme Court would determine such issues by reference only to local views and without reference to international human rights norms and standards as agreed on by the international community" (*Barbados Advocate*, December 25, 1996, cited in McIntosh 1997: 153).

Concern grew in September 2000 when by a margin of 4 to 1, the JCPC commuted the death penalty of 6 Jamaicans, giving them life sentences instead. The Council ruled that the accused did not have lawyers present when their appeals for clemency before the Jamaican Privy Council were being considered. The judgement, which had implications throughout the region, meant that every prisoner on death row had to have his/her matter reheard since their human rights might have been violated during that process. Spokesmen for Caribbean governments argued that the law permitted capital punishment once the trial was fair and all the processes available under the law were exhausted. In their view, the death penalty was not a human rights issue once the trial was fair. Human rights advocates however wanted to ensure that the appeals process was indeed fair, and that those who were poor or otherwise handicapped were not denied justice.

The Governments of the region were unhappy with the Privy Council's judgement, which, in their view, constructively abolished the death penalty.²⁶ The Prime Minister of Jamaica regarded the judgement as yet another "compelling reason" to create a Caribbean Court to replace the "Council of aristocrats in London" (*Express*, September 15, 2000). The Government of Jamaica took particular note of the dissenting opinion of Lord Hoffman who did not agree that proceedings before the Inter-American Council of Human Rights constituted a legal process in the domestic law of Jamaica. Hoffman also advised that the final

interpretation of a Constitution should be handled with care. "A Court should not reverse itself because its members had a doctrinal disposition to come out differently. If it did so, the rule of law would be damaged, and there will be no stability in the administration of justice in the Caribbean" (Privy Council Appeals Nos. 60 of 1999, 65 of 1999, 68 of 1999 and 10 of 2000).

Hoffman noted that unlike the US Supreme Court which sits in *banc* and is not subject to frequent changes of membership, a Privy Council Board hearing an appeal consisted of five members drawn from the twelve Law Lords, Judges from the Commonwealth, and a number of retired Justices of Appeal. "It is thus possible for a Board to be constituted without anyone who was a party to a recent governing precedent or to be composed largely of members who were previously in dissenting minorities" (*ibid*: 40). Following the "wisdom" of the US Supreme Court, Hoffman argued that "no judicial system could do society's work if it viewed each issue afresh in every case that raised it." Such action would undermine the rule of law and respect for precedent which is indispensable.

The Prime Minister of Jamaica charged that the Privy Council was not deciding cases relating to capital punishment on legal grounds, and that the Council was persistently moving the goal posts. As he told the Annual Conference of the People's National Party:

I want to make my position clear. This government has taken the decision that there are appropriate cases of capital homicide where the death sentence must be the punishment and the final result. I am not going to allow any group, anywhere, under the guise of judicial [interpretation] to ... take policy decisions on social matters that are the prerogative of Jamaica as a Sovereign and Independent Country. (cited in *Position Paper of the Council of the Jamaican Bar Association* 1999)

One human rights critic of the proposed Caribbean Court of Justice, Attorney Richard Small, accused the Jamaican and other Caribbean governments of wanting a court which they could control. He was of the view that in the immediate post-independence era, the Privy Council generally supported post-colonial governments, and that in pursuance of this goal, some of their judgements had been "pathetic." In response to lobbyists in Britain, the Privy Council had since changed its stance, and its judgements had begun to irritate Caribbean governments. The radical nationalist language of the PNP was, in Small's view, a cover for the party's authoritarian impulses. Small notes that elsewhere in the Caribbean, authoritarian political elites saw liberal judges as the "enemy" whom they must "do in" before the judges "do them in." ²⁷

Amnesty International also campaigned against the CCJ. As the London based group warned:

...this court is being created to make it easier for these states to put people to death. When Privy Council decisions were unpopular with the electorate, Caribbean leaders chose to attack the court. The new regional court may be susceptible to this kind of pressure, and that could impact on its ability to uphold international judicial standards in contentious cases. (*Express*, February 17, 2000)

Even those who were sympathetic to the creation of the CCJ felt that Caribbean politicians were doing it an injustice by seeming to justify it mainly in terms of the need to get around the abolitionist stance of the Privy Council. The former Attorney General of Grenada, Dr. Francis Alexis, was saddened by some of the comments of Caribbean Prime Ministers which sought to link the establishment of the CCJ to the Privy Council's "constructive abolition" of the death penalty.

No matter how unhappy they may be, [Caribbean politicians] cannot give the impression that because they

cannot have their way [in hanging cases], they want to expedite bringing about a final Caribbean Court of Appeal.... When they speak like that, they are being the worst enemies of the Caribbean Court of Appeal.... They add fuel to the fire and confirm all the fear Caribbean people have... that we as a people cannot have our own Court of Appeal and give to it the respect it is due. (*Guardian*, September 26, 2000)

The CCJ became a burning issue in the debate between the two main political parties in Jamaica and their respective supporters. One key spokesman of the Jamaican parliamentary opposition, Attorney at Law, Delroy Chuck, was explicitly nationalist and anti-federalist:

A Caribbean Court of Justice is an anomaly. There is no Caribbean nation, and thus the arguments, such as sovereignty and nationality, against the JCPC are similarly true against the CCJ. I support a final Jamaican court, which should consist not only of Jamaican judges, but Caribbean and international judges who are prepared to give us the benefit of their experience, learning and judicial expertise. I believe when we can no longer appeal to the JCPC, we should have a final court sitting as a Jamaican court and not as an appendage of a non-existent Caribbean court system. I think it is wrong for the Government to take us into a Caribbean court system for which there is no long-term commitment and sustainability.

In fact, it is a truly telling blow to the setting up of the CCJ when the Attorney-General of Barbados, Hon. David Simmons, stated that the funding for the court may well come from international donors and a trust fund would be set up to look after the operation of the court. So, if international donors do not want the court, we may not have it?! Do we not have any shame, when our final court of justice may well have to depend on the goodwill of foreigners? Justice undoubtedly depends on trust and credibility, and our Government is presently devoid of all these qualities. That is why opponents of the CCJ will fight

and oppose it, as they believe the CCJ will not be a suitable replacement for the JCPC. That is why the Government must go to the people to get a mandate; to use its parliamentary majority to force the issue would further undermine the commitment of Jamaicans to the CCJ and makes it only a matter of time before it is abandoned. The constitutional rights of the Jamaican people must be respected and they ought not to be deprived of any without full consultation and, as in this contentious case, a referendum. (*Gleaner*, March 8, 2000)

The Leader of the Opposition in Jamaica, Mr. Edward Seaga, an ardent anti-Federalist, also made it clear that he wanted to scuttle the idea of the CCJ in perpetuity. Mr. Seaga was quite emphatic in his view that the Privy Council must be preserved. "Justice is one of the biggest concerns in Jamaica today. Hence, the need to ensure that the Chamber of Justice in which Jamaicans have the greatest faith, the Privy Council, will remain available to them" (*Gleaner*, June 23, 1999). Seaga firmly believed that the CCJ was not an acceptable substitute for the Privy Council. The latter, he says, "is the finest judicial body in the system of British based jurisprudence, and Jamaica is fortunate to be able to have access to its judicial services. In these days of globalisation, all progressive countries seek the best services in the world. The Privy Council has proven to be the best in matters of justice. The issue is not about location or cost. It is about 'pure and true justice'" (*Gleaner*, February 14, 2001).

Seaga also argued that the creation of the CCJ without a referendum to entrench it in the Constitution would impact negatively on judges whose security of tenure was governed by Sections 100 and 106 of the Constitution, both of which were entrenched, and which therefore required either a special majority or a referendum to be amended. He noted that judges could not now be removed from office without the advice of the Privy Council. Security of tenure for judges was now at risk. "Abandon the Privy Council and judges will be exposed to removal from office by

another body with unproved experience and reputation for fair hearings, capable of being influenced by Caribbean political leaders." In his view, the CCJ was a "luxury, and warned" that if the government proceeded without due process and consensus, another government, at another time, would have the power to withdraw from it in the same way, since the Court would not have been entrenched in the Jamaican Constitution or that of the other territories.

Colin Henry, a Jamaican Attorney-at-Law, urged the people of Barbados and Trinidad to "tame their zeal for judicial federalism." They should look at what has happened in Jamaica over the years and thank their good fortune that the Federation had collapsed (*Gleaner*, June 30, 1999).

The Council of the Jamaica Bar Association shared the JLP's view that the matter should ultimately be determined by the Jamaican people in a referendum. As it argued:

- (a) Firstly, legal considerations aside, it was desirable that such a fundamental matter as a change in a State's ultimate Court of Appeal should be the subject of decision by way of referendum.
- (b) Secondly, that whereas the abolition of Appeals to the Privy Council can be achieved by simple majority in Parliament, it was our view that on a correct reading of Sections 49, 100 of the constitution, the replacement of the Judicial Committee of the Privy Council requires amendment to deeply entrenched provisions requiring a 2/3 majority vote in both Houses of Parliament, and if that cannot be achieved, then by referendum requiring a 3/5 majority vote.
- (c) Finally, it has been held that no court or tribunal may properly be created which departs from or is immune to the jurisdiction of the Constitutionally entrenched

court unless such court or tribunal is afforded similar protection under the Constitution. *Hinds vs DPP* (1976) 1 ALLER 353 and *Akonaay vs A-G* (1994) 2 LRC 399.

It follows therefore that if a court is to be created to which an appeal is to lie, then our legislature must give to that court and its members at least that protection which is afforded the court from which the appeal is to lie. Such entrenchment will require constitutional amendment by the appropriate constitutional procedure. (*Summary of Positions taken by the JBA in Respect of the Proposed Caribbean Court of Justice* 2000)

Not all attorneys agreed with the JBA's arguments. The issue as to whether a referendum to decide the matter was constitutional, was raised by Attorney-at-Law, Bertham Macaulay Q.C., who argued that a referendum would be *ultra vires* the Constitution. He noted that the Privy Council was not deeply entrenched in the Jamaican Constitution and that the section that deals with it (Section 110) could be repealed by an Act of Parliament passed by a majority of members of both Houses. While the Constitution provides for the use of a referendum where deeply entrenched clauses are being amended or where a bill is rejected twice in the same session by Parliament or in two successive sessions, it did not do so for other provisions. Macaulay argued that before a referendum could be held, Parliament had to pass a law authorising it:

... to talk of a referendum for establishing a Caribbean Court displays unforgivable ignorance of the Constitution. Government attempts to hold a referendum without the authority of any law would not only be illegal and unconstitutional, but would constitute a silent encroachment on the liberties enshrined under the Constitution. Any Court established by Parliament forms

part of Chapter VII (The Judicature) of the Jamaican Constitution. The Privy Council is part of the Judicature of Jamaica under this same Chapter VII, and so would a Caribbean Court of Justice if enacted by the Parliament of Jamaica. Other Caribbean countries can enact a Caribbean Court of Justice to form part of their Judicatures and all Caribbean countries can give their respective Caribbean Courts of Justice extra territorial jurisdiction to hear appeals from the Courts of Appeals of the other territories. I have the impression that many Government and private legally qualified persons have not studied the mechanics of establishing a common Court. I would advise that they study the establishment of the East African Court of Appeal and the Federal Court of Appeal of the West Indies. (*Gleaner*, May 9, 2000)

PNP spokesmen were of the view that those opposed to the CCJ were advancing spurious arguments which merely masked their entrenched hostility to any kind of regional body. As the Minister of National Security observed, "they will find every reason why there should not be a Caribbean Court of Justice because they do not believe that there should be one. Anything at all that appears to be deficient in our system will be held as a basis for saying we ought not to have the Court" (*Gleaner*, December 20, 1999). The PNP, which no doubt remembered what happened when the issue of Federation was put to the people of Jamaica in 1962, opposed the use of the referendum mechanism, arguing that if it were used, the debate would become enmeshed in "tribal" politics. People would vote along party lines. The JLP was told to "forget about" a referendum. The PNP also argued that the issue might turn on whether voters were pro or anti-capital punishment. The Attorney General, Mr. A.J. Nicholson, noted that while the latter might favour the PNP, it would be "quite irresponsible" for the Government to allow "opportunism" to contaminate a matter that was of such great importance. The Attorney General admitted that all was not well with respect to the state of justice in Jamaica, but argued that one could not possibly wait until all was well at

home before one established a CCJ. This argument applied to all Caribbean jurisdictions. As he put it:

We have to fight this battle on two fronts. The administrations across the Caribbean must be made even more aware than they are at this time that the justice system in Jamaica and other territories need updating. At the same time, because the Caribbean Court of Justice is such an important instrument to the integration movement, a way has to be found for that court to be established at the same time advancing the methods by which we go about our business in the justice system. (*Gleaner*, December 14, 1999)

The Attorney General admitted that fears about political interference with the judiciary were "deep" even though "there [was] no historical experience to prove [allegations of interference]." He however agreed that the judiciary, especially the CCJ, should be "properly insulated from political whim or fancy." He nevertheless also took issue with those who argued that the Privy Council was a cheap alternative to the CCJ. He noted that it costs Jamaican citizens a minimum of £40,000 to take a matter to the Privy Council, and that in most matters, it was the state which bore the costs of indigents who were given leave to appeal to the JPC. Most of these appeals were in murder cases. The Privy Council in fact invariably declines to hear matters relating to family disputes unless egregious errors of law are involved (cf *Johnson vs Johnson* 1992 WIR 41:92-93).²⁸ "Access to justice, as far as the Privy Council is concerned, is for all practical purposes non-existent for the man in the street in the Caribbean. It means then that you have to bring the court to him! This is what will take place in respect of the CCJ which would be an itinerant court whenever necessary, as was the case with the former West Indian Appeal Court during the years of the defunct Federation" (*Gleaner*, December 14, 1999).

With respect to the questions raised about funding for the Court, the Attorney General acknowledged that Caribbean governments had quite an "unsavory history when it came to

financing Caribbean institutions. As such, creative ways had to be found to fund the court. One could not be strictly dependent on the Consolidated Fund whether it is a first charge or not." Mr. Nicholson noted that the World Bank and the IDB had indicated that they had an "abiding interest in the court," and promised that Caricom Governments would not sign off on the Court until two things happened: One, a fully established instrument for financing the Court, and two, the money to finance the Court for at least five years (*Gleaner*, December 14, 1999).

Opposition to the CCJ was often informed by the view that Caribbean judges were not as competent as the judges who sat on the Privy Council. This assertion was dismissed by those who do not accept the view that things foreign were *ipso facto* inferior to local versions. Some judges were indeed inferior, but some were also as good as others. One had to compare the best of the two systems. It was noted that Caribbean judges such as H.O.B. Wooding and P.T. Georges had sat on the Privy Council and the International Court of Justice with distinction. It was also noted that more often than not, the Privy Council sustained the judgements of Caribbean courts, except, and this was a relatively recent development, in matters relating to capital punishment cases in which the Privy Council had a pro-abolition bias.

The West Indian Commission (1992:499), it should also be noted, shared the view that many Caribbean judges had performed with distinction. As it noted, "we suspect that there is sometimes an unspoken question. Can the West Indies produce a court that will function with the independence and erudition of the Judicial Committee of the Privy Council? We have not the slightest hesitation in answering that question in the affirmative." The Commission also noted that many Caribbean lawyers had been invited to appear before the Privy Council and that Caribbean lawyers have been in demand as Appeal Court and Chief Justices in several countries. It was further argued in support of the need for an autochthonous court that social reality was as important as symbolism. It was therefore important to have one's highest courts

manned by individuals who were part of the environment in which the dispute arose and who understood the society and its dynamics.

Ironically, some members of the Privy Council itself seemed anxious to force Caribbean countries to establish their own final court. Privy Council spokesmen in fact signalled that appeals from Caribbean jurisdictions, especially in hanging cases, were taking up too much of the PC's attention. In May 1999, the President of the Privy Council, Lord Browne-Wilkinson, complained that the Privy Council was spending about one quarter of its time hearing appeals in criminal cases coming from the Caribbean. Browne-Wilkinson blamed UK lawyers for aggravating the problem. As he complained, "the only reason we are completely laden with Caribbean cases is because City firms have taken them up and ensuring the cases are well presented, and finding a great deal there that would otherwise not be observed." Browne-Wilkinson however noted that business firms were also keen to keep the Privy Council since it protected their investments in the Caribbean. The Privy Council, he noted, was a "top class commercial council" (*The Lawyer*, May 17, 1999). Ironically, Lord Browne-Wilkinson used one of the arguments advanced by Caribbean nationalists for abolition *viz.*, that the ultimate court of appeal of a state should be in that state, staffed by citizens of the state and not by outsiders. As he put it, "the practice whereby a Court in Downing street seeks to decide what country in the Caribbean should or should not do is not proving satisfactory, and our decisions in death row cases are not very well received.... Take the Caribbean cases away from the Privy Council and give those countries their full legal independence" (*Gleaner*, May 7, 2001; Rawlins: 2000:51). Browne-Wilkinson's arguments were seized by supporters of the proposal to create a Caribbean Court of Justice with original and appellate jurisdiction.

The British Government did not however formally endorse the position taken by Browne-Wilkinson. At the Second UK/Caribbean Forum which was held in London in May 2000, the British Government made it clear that the facility provided by the

Judicial Committee of the Privy Council would remain so long as the countries of the Caribbean wished it to do so without any pressure being exerted by the UK for countries to establish their own system. The British Government however promised support and assistance, "if that were desired, to countries wishing to terminate access to the Privy Council with the creation of an appellate institution of their own" (*Trinidad Guardian*, May 22, 2000).

The need for such a court was not only seen as an act which would serve to symbolise Caribbean unity and sovereignty, but one which was critical to the adjudicative process in a Caribbean Single Market and Economy. As Prime Minister Owen Arthur told the third Annual Media Conference in Guyana in May 5 2000:

Whatever might be the appellate jurisdiction we accord to the proposed Caribbean Court of Justice, we need a Caribbean Court of Justice as a court of original jurisdiction to deal with disputes arising from the Revised Treaty of Chaguaramas. Without a Caribbean Court of Justice to interpret Community Law and to settle disputes arising from the new Treaty of Chaguaramas, a Caribbean Single Market and Economy and the entire Caribbean integration process will experience only the most profound difficulty in succeeding.... It is essential.... that the vital function to be executed by the Court in underpinning our regional economic development be understood by all. (*Gleaner*, May 16, 2000)

It was noted that investors needed to have such a regional body to assure them of a stable, uniform, credible, and predictable macro-economic environment. The Jamaica Bar Association was however not persuaded that the CCJ was superior to the Privy Council in this regard. As it argued:

Nowadays, globalization and international trade were tending towards a unifying approach particularly in relation to commercial matters and international maritime matters.

The Privy Council was in this context a decided advantage. Insofar as the Treaty of Chaguaramas was concerned, the Committee felt that in the absence of a federal state there was no compelling reason to create a court for this purpose. As with all international treaties, an appropriate arbitration facility could be created. This in itself was therefore not a reason for a Caribbean Court. (*JBA Position Paper* 1999: 10)

Supporters of the CCJ did not however concede this point. They argued that one needed a regional court to ensure that there was predictability, certainty and transparency in the decision making process. In their view, this would not be ensured if one were to rely on arbitration to resolve disputes. Opponents however noted that arbitrators were also concerned about predictability and transparency and that many regional trade bodies, including NAFTA, had established arbitration arrangements for the resolution of disputes (Vasciannie 1998: 61). It was also believed that there would not be a sufficient number of disputes to justify the setting up of such a Court. The case for it therefore had to hinge on other more compelling factors.

Mr. Arthur was however at pains to remind those who were opposed to the Court on the ground that its purpose was linked to the death penalty issue that the proposal to create such an institution predated the Pratt and Morgan judgement, and was not, as alleged, the Caribbean's answer to the abolitionists on the Privy Council who seemed bent on constructively abolishing capital punishment. He noted that the Caribbean Court idea was one that could be found in many statements and documents, including the Report of the Wooding Commission on Constitutional Reform and the Report of the West Indian Commission (1992). Similar views were expressed by the Attorney General of Barbados, Mr. David Simmons Q.C.. Simmons described the view that the CCJ idea was being driven by concerns about the death penalty as an "unbecoming argument" which implies that judges of the Court would approach their functions "consumed by prejudice and bias." Simmons also noted that the Preparatory Committee on the

Establishment of the Caribbean Court of Justice had listened to its publics and had made several changes to ensure that the Court was sustainable and insulated from arbitrary political interference (cf. Rawlins 2000:30-31). These assurances were repeated by the Attorney General of Trinidad and Tobago. Mr. Ramesh L. Maharaj, who declared that "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" (*ibid.*:32). The Attorney Generals in the region in fact felt that they had taken on board 78 percent of the concerns raised by objectors to the CCJ.

On November 21, 2000 the Parliament of Jamaica officially gave the Government of Jamaica a mandate to sign an agreement to establish the Caribbean Court of Justice at a meeting of Caricom Heads in Barbados in February 2001. Rejecting calls for a referendum, Prime Minister Patterson however promised that once the Court was inserted in the Constitution, "we will go to the country and seek to have it entrenched." The Senate of Jamaica also endorsed the mandate. In both cases, the vote was along party lines. Patterson however agreed that consensus was desirable. "I think there are some things in the life of a nation where we have got to strive for unanimity even in cases where the government ... has to lead the way, but [also] has to go out ... in search of national consensus. I think the CCJ is one such matter" (*Sunday Guardian*, March 12, 2000). The government noted that this was merely the first of about ten steps which had to be taken, and that the others would be spread over a period of two to four years (*Trinidad Guardian*, November 23, 2000; *Trinidad Express*, December 13, 2000).

The Framework Agreement establishing the CCJ was formally signed on February 14, 2001 in Barbados by the Heads of Government of Jamaica, Grenada, St. Lucia, Barbados, Belize, Antigua, Suriname, St. Kitts, Nevis and Trinidad and Tobago. The Prime Ministers of Dominica and St. Vincent did not sign, the latter arguing that general elections were due within a month. The then

leader of the Opposition in St. Vincent indicated that he would urge his supporters to vote against the CCJ if and when a referendum on the matter was called (*Express*, February 16, 2001). Despite the imminence of elections, the government of Guyana signed the Agreement having been assured by the Leader of the Opposition that he endorsed the decision. Hoyte had in fact been urged by Caricom officials to support the CCJ initiative.

The Agreement left intact the provisions as to how the President of the Court was to be appointed or removed, *viz.*, by a qualified majority vote of three quarters of the Contracting Parties on the recommendation of the Regional Judicial and Legal Services Commission. The membership of the RJLSC, which was for a 3-year renewable term, was however substantially altered. It provided a role for regional bar associations, the University of the West Indies, and groups in Civil Society. Article V provided for membership as follows:

- (a) the President, who shall be the Chairman of the Commission
- (b) two persons nominated jointly by the Organisation of the Commonwealth Caribbean Bar Association (OCCBA) and the Organisation of Eastern Caribbean States (OECS) Bar Association
- (c) one chairman of the Judicial Services Commission of a Contracting Party selected in rotation in the English alphabetical order for a period of three years
- (d) the Chairman of a Public Service Commission of a Contracting Party selected in rotation in the reverse English alphabetical order for a period of three years
- (e) two persons from civil society nominated jointly by the Secretary-General of the Community and the Director General of the OECS for a period of three

years following consultations with regional non-governmental organisations

- (f) two distinguished jurists nominated jointly by the Dean of the Faculty of Law of the University of the West Indies, the Deans of the Faculties of Law of any of the Contracting Parties and the Chairman of the Council of Legal Education and
- (g) two persons nominated jointly by the Bar or Law Associations of the Contracting parties.

Notwithstanding what was provided for in terms of the appointment of the President and the members of the RJLSC, the Agreement specified that in terms of their first appointment, the membership of the Commission would be for one year and its members would be appointed by letter under the hand of the heads of judiciary of the Contracting Parties. The RJLSC was also given responsibility for making a recommendation for the appointment of the first President.

THE CASE FOR A CARIBBEAN COURT OF JUSTICE

A passionate and well argued case for the desirability of abolishing appeals to the Privy Council was made by the Chief Justice of Trinidad and Tobago, Michael de La Bastide in a lecture delivered to the Faculty of Law, The University of the West Indies in March 1995. de La Bastide was previously a Member of the Wooding Constitution Reform Commission which had also argued a powerful case for abolition. de La Bastide noted that most Commonwealth States had withdrawn from the Privy Council's jurisdiction. Apart from the Caribbean, only Brunei, Mauritius, Zambia and New Zealand had retained the right of appeal to the JCPC. He also noted that very few cases went to the Privy Council. In the last 10 years, there were 214 such appeals of which 163 had

been determined with 68 of these having been dismissed without a hearing. Of the appeals determined, the local Appeals Court was upheld in 102 cases while 61 were reversed. Most of the appeals, 89, came from Jamaica, followed by Trinidad and Tobago with 51, Bahamas with 16, and Barbados with 11. Most of the appeals related to matters involving capital punishment.

The Trinidad and Tobago Chief Justice reviewed a number of cases which he thought helped to justify his argument that appeals to the Privy Council should be disallowed. We draw attention to two of these cases, *Pratt and Morgan vs. Attorney General of Jamaica* ([1993] 43 W.I.R.) and *Lennox Phillip and Ors vs. the DPP* ([1992] A.C. 545), and its sequels. de La Bastide recalled that in coming to their decision in the Pratt and Morgan case, their Lordships took the following position:

In their Lordships' view a State that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows swiftly as practicable after sentence allowing a reasonable time for appeal and consideration of reprieve. It is part of the human condition that a condemned man will take every opportunity to save his life through use of the appellate procedure. If the appellate procedure enables the prisoner to prolong the appellate hearing over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it. Appellate procedures that echo down the years are not compatible with capital punishment. The death row phenomenon must not become established as a part of our jurisprudence. (cited in de La Bastide 1995:406)

The JCPC indicated its awareness that crime was a serious problem in Jamaica, and that the government had limited resources at their disposal to administer the legal system. It nevertheless felt that if capital punishment had to be retained, it must be carried out with all possible expedition.

In his critique of the Pratt and Morgan judgement, de La Bastide, noted that the rulings of the Privy Council came "perilously close to achieving that which would normally be achieved by the legislature, that is, a partial abolition of the death penalty." While he agreed that the judiciary was entitled to take such decisions in exercising its role as guardians of the constitution, the pertinent question, was whether such decisions should be taken by judges in London who had no first hand contact with the societies to which the problems applied. In his view, judges, including those of the Privy Council, were not looking for some uniquely correct common law solution to a problem, but balancing important interests that were in competition. The interests included those of the victims and their families, those of the condemned who had to face the dreadful prospect over a protracted period of death by hanging, and those of a society which wished to maintain proper standards of humaneness and compassion.

de La Bastide noted that there was a frightening increase in violent crime, and argued, without however providing any evidence, that the fact that criminals were not being executed seems to have resulted in a dilution of the deterrent effect of capital punishment. This in turn had its implications for the effectiveness of the judicial system. As he opined, "the irony is that it is the very increase in criminal activity which is responsible to some extent for the clogging of the judicial system and the resulting delays in processing criminal trials and appeals" (*ibid.*:408). Giving priority to capital punishment matters also had the unintended effect of increasing the backlog in the civil courts. "Given that capital cases are entitled to priority, surely the delays suffered by other claimants on the judicial system must have some relevance" (*ibid.*:408).

Good judicial governance is a many sided thing, and in the view of the Chief Justice, those who had responsibility for making the critical judicial decisions should be functioning members of that society and be accountable to it. As he argued:

It is difficult to resist the impression from some of their Lordships' language in *Pratt and Morgan* that they regard capital punishment with some distaste, and that would hardly be surprising given that the death penalty has been abolished in England for many years. There are no doubt judges in the Caribbean who share that distaste, but when one is making a decision as arbitrary as fixing the maximum period of time which may be allowed to elapse between a sentence of death and its execution, it is probably easier for a judge to weight the different factors appropriately if he has experienced them at first hand... One advantage enjoyed by a judge who lives in the jurisdiction is that he knows, in advance, pretty well what his fellow citizens will think of his judgement, and how they will react to it. He may or may not let that knowledge affect his judgement, but it must be of advantage to him to have it.

In sum, de La Bastide does not share the view that distance facilitates judicial objectivity and that it is to the society's advantage to have judges who are physically remote from the problems which they are called upon to resolve. If such a case is being made for the Caribbean, it should be equally valid elsewhere.

de La Bastide expressed regret that the Privy Council's judgement was binding on all courts that lay within its jurisdiction and that courts were not free to view each case on its own merits as was the case in India and elsewhere where judges took into account who and what was responsible for delay in executing offenders. In his view, Caribbean judiciaries were still very much like colonial institutions from which appeals could be made to the Secretary of State when the Governor took decisions that were unacceptable to those whom he governed (see Box).

The other case cited by de La Bastide related to those which followed the abortive attempt on the part of 114 insurgents led by Lennox Phillip (aka Abu Bakr) to overthrow the government of Trinidad and Tobago in July 1990. de La Bastide blamed the Privy Council for the manner in which the Muslimeen cases were

A number of these decisions, which have extremely important consequences for the whole community, are really policy decisions, involving the weighing of competing interests and considerations. The competition is typically between the interests of the individual, whether it is to humaneness or fairness or some such consideration, and the interests of the rest of society to be protected and to have the law of the land enforced. Neither the common law, which consists really of the principles derived from decided cases, nor statute law can provide a clear and certain answer to every question, and the decisions which a final Court of Appeal is called upon to make in order to fill the interstices are sometimes not very different from those made by a democratically elected Parliament. The cases which I have reviewed are examples of decisions of that type. In making such decisions, one is not unearthing some universal verity, but determining what is best for a particular society in the circumstances existing at a certain point in its history. I would have thought that it was essential for the decision-makers in such cases to have an intimate knowledge, acquired at first hand, of the society for whom the decision is made. Another aspect of the matter is that, while no one suggests that judges should make their decisions by reference to public opinion, it is a salutary form of accountability (if not the only one in practice) for a judge to live in, or at least close to, the society for whom he makes decisions of this kind. In any event, I would have thought that, after all these years of Independence, we would be uncomfortable, to say the least, about sending the decisions of our Courts on these policy matters for review to London, a practice not altogether dissimilar from that which obtained in colonial times, of appealing to the Secretary of State for the Colonies when the local Governor made decisions or took actions that were unacceptable to those whom he governed.

Source: de La Bastide 1995.

handled by the Trinidad and Tobago judges who had to determine whether the amnesty offered to the insurgents was valid. In a procedural judgement which sought to determine whether the perpetrators of the attempted *coup* had to await arraignment upon indictment before they could challenge the legality of their detention having regard to the fact that they had received a valid pardon, the Privy Council held that they did not have to wait. In doing so, however, the Privy Council not only settled the procedural point, but conveyed the impression that the state had little chance of successfully challenging the pardon.

In the JCPC's judgement, Lord Ackner made it clear that the JCPC regarded pre-conviction pardons as valuable tools for negotiating acute political crises such as those which took place in Trinidad and Tobago. The JCPC also hinted broadly that it was impolitic for the state to challenge the pardon. The judgement affected the judges who eventually heard the matters in that they were acutely aware that the Privy Council was going to have the last word (de La Bastide 1995: 423).

de La Bastide argued that while the pardon might have helped to save lives, it should not be a policy of the law to "make deals with terrorists." As he opined:

Ought the law to provide those who might be minded to take similar action in the future with an ironclad guarantee that, if things go awry, any pardon which they can extract for themselves by bartering the lives of others will be valid and binding? This is not an issue on which I would imagine the common law can claim to provide any universally or uniquely correct answer, and I question the credentials of their Lordships to determine the policy which our law should adopt with regard to pardons given in such circumstances.

Although the Privy Council held that the pardon was not invalidated by duress and therefore valid, it however found an expedient mechanism to deny the insurgents the fruits of their

victory. They argued that it was vitiated by the fact that the insurgents did not immediately end the insurrection but sought to negotiate for other objectives. This, in my view, was casuistry of the highest sort. de La Bastide noted that the substantive effect of the Privy Council's decision was to deny the insurgents the right to claim damages for incarceration and the cost involved in bringing their matter. The way in which the matter was resolved however provided the Chief Justice with the opportunity to comment on the manner in which the Privy Council's role as the highest court in the land affected the development of a Caribbean jurisprudence.

In de La Bastide's view, the *Muslimeen* matter revealed glaringly, for all to see, the problems that are caused by abdicating to others the responsibility for determining judicial policy making. He also noted that the Privy Council deliberately and wrongly ignored the fact that the President had no authority to give a pardon in his sole discretion, and that he had to act on the advice of the Cabinet or Minister acting under the general authority of the Cabinet. "One thing is sure," moaned the Chief Justice, "The next time an occasion arises for the exercise of this power or pardon, both the President and the Prime Minister and those advising them will be in a quandary to know who has the power to take the decision" (de La Bastide 1995: 425).

de La Bastide did not accept the view that in small societies such as those in the Caribbean, the distance and detachment which was said to facilitate judicial fairness and impartiality was difficult to come by. The assertion was made, but in his view, it was not supported by the evidence. As he told the graduating students of the Law School:

From time to time those who argue for retaining appeals to the Privy Council have pointed to the risk that in small communities like ours, Courts may be unwilling to make decisions that are unpopular with the Government. The trouble with this argument is that it is very rarely, if ever, supported by empirical evidence. The judgements of the

Trinidad and Tobago judges in the *Muslimeen* case suggest, as they did some 20 years earlier in the case of *Lasalle and Shah vs. R.*, in which two of the officers who led an army mutiny in 1970 successfully appealed their convictions by a court-martial, that our Courts are staffed by persons who are not afraid to make decisions that are unpopular both with the public and with the Government of the day.

de La Bastide's arguments on behalf of a Caribbean Court of Justice is clearly not universally accepted throughout the region. There remains strong objections to it among bar associations, political opposition elements, and those opposed to capital punishment.²⁹ It was also opposed by the many who did not trust Caribbean governments to do the right thing. In the view of some of these persons, Caribbean politicians have made a mess of the independence project, and it would be better if the region were recolonised.

Interestingly, there was little public debate in Trinidad and Tobago, where, for many years, Indian elites strenuously opposed the abolition of the Privy Council. In part, this had to do with the fact that in the immediate post-independence era, the Bench was dominated by Afro-creoles. This is no longer the case either with respect to the Bench, the Bar, or the political executive. Even though the Government of Trinidad and Tobago agreed to host the court, the Attorney General remarked in June 8, 2000 that Trinidad and Tobago was not ready to proceed with the establishment of the Court (*Guardian*, June 8, 2000). He was also reported to have said that none of the sitting judges on the Court were good enough to sit on the regional Court (*Interview on Radio 104*, June 7, 2000). The Trinidad and Tobago Law Association also indicated that it had certain reservations and could not support the Court at this time. Some investors also expressed concerns, though it was not made clear what these were.

The Government of Trinidad and Tobago likewise displayed ambivalence, and it was evident that it had come to believe that

the Trinidad courts were anti-UNC. Mr. Panday himself indicated that there was a relationship between its hesitancy and the constitutional impasse in Trinidad and Tobago, and the conflict between the judiciary and his government. As he observed, "confidence in the Caribbean Court of Justice as the highest Appellate Court for our countries is not bolstered by the capricious adventurism with the Constitution and the Law that has been taking place in [Trinidad and Tobago]" (*Express*, February 15, 2001). Mr. Panday indicated that Trinidad and Tobago had at one time even considered withdrawing its offer to seat the Court. This possibility arose when the government let it be known that it was giving thought to having Trinidad and Tobago subscribe only partially to the jurisdiction of the Court. As Panday explained:

...there was a feeling in Trinidad and Tobago that we ought not to subscribe to the entire jurisdiction of the Court - that is to say, Trinidad and Tobago wanted to retain civil appeals to the Privy Council, not necessarily criminal appeals. It was remarked by some of my colleagues in CARICOM that it would be uncomfortable for the Court to be seated in Trinidad which did not accede to its entire jurisdiction. (*Express*, February 22, 2001)

Mr. Panday further explained that he thereupon consulted the Leader of the Opposition and the Law Association and got their support which enabled him to maintain his offer to seat the court. The Trinidad Prime Minister however noted that the support of the Law Association was not unequivocal, "because of the way the judiciary has been performing lately in Trinidad and Tobago. They have created great suspicions in the minds of people, and the country has lost the support of the Law Association. I am hoping that by the time we are ready to accede to the Court, ... we will have regained that confidence and will have the support we need" (*ibid.*).

What all of this made clear was that the UNC government had begun to have reservations about abolishing appeals to the

JCPC for civil matters, but was quite prepared to do so where capital punishment was concerned, confirming the suspicion that the abolition of appeals to the JCPC was being driven primarily by resentment of its stance on capital punishment and not because of any concern with justice for the poor or weak. As Lloyd Best complained, the CCJ was being offered "as a mere vehicle for the death penalty or worse, a place where trade and investment disputes are settled between and among governments and corporations.... There was little concern about how the Courts functioned to deliver justice in the different jurisdictions" (*Sunday Express*, February 25, 2001).

Many elites in the Eastern Caribbean and Barbados also still had reservations about the advisability of abolishing appeals to the Privy Council. The President of the Grenada Lawyers Association, Lloyd Noel, spoke for many when he said 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 (cited in Rawlings 2000:29). The fact that several recent judgements given by the Eastern Caribbean Court of Appeal have been reversed by the Privy Council also served to strengthen opposition to the abolition of appeals to the latter.

Opposition to the CCJ also came from Guyanese Senior Attorney, Dr. Fenton Ramsahoye, who predicted that abolition of appeals would lead to corruption in and possible collapse of the judicial systems in the insular Caribbean as he claimed had occurred in Guyana. To quote Ramashoye:

Nations do not always benefit from experience. West Indians have seen with their own eyes the destruction which came to pass in Guyana after appeals to the Judicial Committee were abolished. The result has been a subversion of the rule of law and the democratic process there. The destruction of Guyana could not have come about without the abolition of appeals to the Judicial Committee. It was not their intention

then to have any further appeals, and there have been none for one-third of a century. They cannot undo the destruction. Premature abolition in the other territories of the West Indies will bring no different result from what occurred in Guyana. It will, when it comes about, mark the beginning of the end of our institutions of government which were inherited from the imperial power. (*Guardian*, February 18, 2001)

Ironically, Ramsahoye had argued differently in 1991. "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. Every nation aspires to its own institutions. It has been said that self government is better than good government" (Ramsahoye 1991:11).

Ramsahoye also endorsed the position taken by retentionists that the money that would be spent on the CCJ would be better employed to fund measures to alleviate poverty in the region. He likewise drew attention to the fact that the West Indian legal profession was not unified in terms of membership, and that in some jurisdictions, attorneys had to obtain work permits before practicing. Also noted was the fact that the Civil Law of Guyana, St. Lucia and Suriname were influenced by Dutch and French canons of jurisprudence, and were thus different from those of the other states in the Caribbean. Most Caribbean lawyers and judges were not familiar with these canons:

The need for judges who are all learned in the systems of law in the Caribbean community is clear. They cannot be produced without a unified legal profession and continuous interchange. Appointments to a final appellate court which replaces the Privy Council cannot be made in the hope that an appointee will become distinguished by virtue of the appointment. The appointee ought to be required by the West Indian community to be distinguished in the learning and practice of the legal profession years before appointment and with a character, integrity and

independence which are unassailable and recognised by the community to be so.... This is not a time for community to bow to the dictates of nationalism. What is required is studied restraint. It is a laudable idea for the West Indies to remind itself that it must aspire to and establish its final appellate court. It is unfortunate the idea is being devalued or made worthless by the evil of prematurity (*Guardian*, February 18, 2001).

Ramsahoye was decidedly pessimistic about the likely future of justice system in the region should appeals be abolished. In his view, "justice itself would [one day] be bought and sold as a commodity, and there would be more of us and our descendants who will be unable to purchase [it]." It was however not made clear as to what was the precise link between the abolition of appeals to the JCPC and these dire events, other than that something similar was presumed to have occurred in Guyana.

Opposition to the Agreement remained strongest in Jamaica despite the responses which the Attorney Generals of the region had made to the JBA's submissions. The Government of Jamaica believed that the new Framework Agreement had met most of the objections raised by the JBA, and accused the Bar Council of raising "new" objections. The Bar Council argued otherwise. "We have not resiled from our position. There has been progress, particularly in the composition of the Judicial Services Commission, but there are still areas in the draft that are offending" (*The Daily Observer*, February 10, 2001). The Bar Council wanted the Government to give an unequivocal undertaking that the Court would be entrenched in the Constitution from the outset by means of a referendum, and that the right of Appeal to the Privy Council "would only happen simultaneously with the establishment of the Court." It feared that the government would abolish the JCPC and then go to the country by way of a referendum to have the CCJ entrenched. But what would happen if the government lost the referendum after the Privy Council had been formally abolished?

The JBA also wanted the CCJ entrenched in the Constitutions of all the other islands. "We have said that each territory must do the same or any one of them can walk away when they feel like it." (*ibid.*) The feeling was that any of these developments could lead to a collapse of regional judicial union in the same way that Jamaica's withdrawal from the Federation in 1962 led to the collapse of that union. Jamaica's Attorney General assured the JBA that abolition of appeals to the Privy Council would only take place after the constitutional, legislative, and financial arrangements that would secure the Court had been satisfactorily met. Signing the Agreement was "subject to ratification" without which, a signatory state was not legally bound by the Agreement. It was also assumed that elections would be called before the Court became a reality.

The country was deeply divided on the issue and many believed that a referendum was required before and not after the agreement had been signed. It was also argued that quite apart from what the JLP and its supporters claimed, the issue was one of trust. Many, perhaps most Jamaicans, did not have confidence in the system of justice in Jamaica. It was also claimed that the PNP, as did the JLP when it was in power, had a blemished record on the issue of human rights and freedoms, and that under their respective leaderships, the police had brutalised many citizens.

The issue of poor justice was however used as a political whip to excoriate the PNP. As one JLP MP asked polemically, "can this Government which has presided over glaring injustices and brutalities, promote better justice in setting up a Caribbean Court of Justice? How can the people believe the CCJ will deliver equal or similar justice as the JCPC when our governments have failed to provide our courts and other agencies within the justice system with the necessary resources to properly and effectively carry out their duties? When we make the mistake of removing the JCPC, setting up the CCJ, and then failing to fund the CCJ, our people will be left without a final court!" (*Gleaner*, February 14, 2001). The victory of the JLP in a bye-election held in mid-March

2001 confirmed the view of Mr. Eddie Seaga that the likelihood of a JLP government could not be ignored. Seaga in fact sought to use the issue to give bounce to his campaign to regain power.

The PNP and its supporters, for their part, regarded the CCJ as the capstone of Caribbean political and jurisprudential independence, and a too long deferred step in the long march towards Caribbean unity. In a full page advertisement which appeared on the day the Agreement was signed, a group calling itself Concerned Jamaicans argued that the retention of the Privy Council had been a temporary measure and that it was high time that Jamaica completed its independence. As the statement asserted:

After 38 years, we cannot depend on an external judicial body as the life line of our judicial system.... Judges in the UK cannot be expected to administer or uphold laws which they no longer regard as acceptable in their own domestic jurisprudence.

It also reaffirmed the view that there were persons of character, learning and ability in the region to ensure that the law was administered fairly and with unquestioned integrity at the highest level of quality (*Daily Observer*, February 14, 2001).

What the region-wide debate about the CCJ revealed, *inter alia*, is that while it seems obvious to Caribbean nationalists that the time had come to deepen the integration movement, there were still powerful forces throughout the region which did not see *de facto* judicial federalism as being either necessary, practical, cost effective, or even desirable. Opposition was fostered not only by insular nationalism, but also by deep seated fears that the political executives of the region would make a mess of a regional judiciary, just as they had with other regional institutions. All that had been done or not done over the past four decades with respect to the relationship between political and judicial elites informed the debate and emotional postures that various groups took on the

issue. The experiences with *defacto* or functional federalism and the many cultural exchange that had taken place over the years had not served to defuse the anti-federalism sentiment that was always abroad in the region, especially in Jamaica. If anything, this xenophobic sentiment seems to be growing, especially as many business houses which collapsed in the wake of the fiscal crisis that afflicted Jamaica in the nineties were acquired by firms from Trinidad and Tobago and Barbados (Ryan 1999: 33-34).

Compounding the problem was the debate about the desirability or otherwise of the abolition of capital punishment. While the majority of the people of the Caribbean supported capital punishment and were radically opposed to the Privy Council's stance on the issue, a powerful and persistent minority, reinforced by a well funded international lobby, led by Amnesty International, believed that the CCJ was first and foremost a "hangman's court," and was therefore opposed to it. The assumption was made, without any proof, that the CCJ would either see its mission as reversing the recent jurisprudence of the Privy Council, or would do so in the interest of its own legitimacy, sustainability, and survival.

The assumption that the CCJ would be pro-hanging may have no foundation. On April 2, 2001, the Eastern Caribbean Supreme Court in fact ruled that a mandatory death sentence for the crime of murder was unconstitutional in that it removed the discretion which a judge might have in giving a reasoned basis for sentencing. In doing so, the Court went further than the Privy Council had ever gone. It is assumed that the Privy Council would sustain an appeal to the judgement which is sure to be mounted (*Latin American Monitor*, Vol. 18, No. 5, May 2001).

One does not know what would be the future of the Caribbean Court. What is however clear is that its immediate future does not seem bright, and that it may in fact not see the light of day within the first decade of the 21st century. This is particularly so given the possible victory of the Jamaica Labour

Party when general elections are next held in Jamaica, the controversies between the UNC political executive and the judiciary in Trinidad and Tobago, and the uncertainty as to what would happen when the issue is put to the legislatures in the region and the people by way of referenda.

In Barbados, any amendment to the provisions relating to appeals to the Privy Council as the final court of appeal requires the votes of not less than two-thirds of both Houses of Parliament. In Trinidad and Tobago, such a Bill requires the support of three quarters of the votes in the House of Parliament and two-thirds of the Senate. In Belize, the requirement is three-quarters of the membership of the House of Representatives. In the case of Jamaica, a period of three months must elapse between the time when the Bill is first introduced and when debate is initiated. Another three months must elapse between the conclusion of the first debate and the passing of the Bill which must be by a majority of both Houses of the Parliament.

In the Eastern Caribbean, the people must also be consulted by way of referenda. In Dominica, a Bill affecting appeals not only requires a three month delay between first and second readings and approval on final reading by three quarters of the Legislature, but the approval of a majority of voters validly cast by the people of Dominica. The same applies in the case of St. Kitts and Nevis where the support of two-thirds of the members of the Assembly is required and that of the electorate in both islands. In the case of St. Lucia, a three-quarters majority is needed in the House of Representatives and a majority of the voters in the referendum. In St. Vincent and the Grenadines, a two-thirds majority is required in the House of Representatives and two-thirds of the votes validly cast. Whatever the combination of hurdles, it is clear that they are not going to be easy to vault.

Chapter 8

TOWARDS GOOD JUDICIAL GOVERNANCE



Recent experience in the Caribbean and elsewhere has shown that good judicial governance, like good governance generally, however desirable, is difficult to achieve. The role of the judiciary is to hold the balance between individuals and groups in their relationship with each other, and between individuals and the state and other organisations, basing their judgements on "neutral" and "objective" laws and principles rather than on the identities of the parties involved or the power or the reputation which they wield or enjoy in society. Most judiciaries are therefore deliberately entrenched in constitutions and thus insulated from day to day political and social pressures.

Most judiciaries see themselves as untouchable by "profane" political hands, and often resent and resist efforts made by political executives or other "outsiders" to force or command them to act. Invariably, the protective mantles of judicial autonomy and independence are trotted out to thwart the would-be political reformer. The judiciary also sees itself as a "specialized" institution, with judges believing that one has to possess a certain kind of expertise or sensitivity to understand its rules and folkways. Judicial hierarchies also have their own collective goals, which