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especially if we were lawyers. Now we see the challenges of our time through the world's eye'.[34]

Let the Isle of Man and the United States of America see the challenges of our time together through the world's eye. In that way we will both grow together as separate and independent jurisdictions and at the same time acknowledge the responsibilities that we have to the international community as a whole.

Justice Kirby again put it very well in a lecture to the American Society of International Law in Washington in 2005. He said:

> To survive, humanity must globalise and diversify. But we must do so... building on the jurisprudence of the past and adapting it to the world in which we now find ourselves.

All countries must work together to survive. Independence will inevitably be replaced by interdependence. Judges, lawyers and politicians should all appreciate that we are part of a global community. Whether a compact island, such as the Isle of Man, or a superpower, such as the United States of America, we are all part of (to use Justice Kennedy's words) a 'wider civilisation',[35] and we all have something to learn from each other.

We will both thrive in our internal independence and we will both increasingly thrive through the contributions we can make to the wider international community.

Greater cooperation and communication will generate greater knowledge and understanding. In turn, this will give us all the strength, wisdom and an extended reach that comes from working together. In that way we can all be part of a 'smoothly functioning international law regime'.

34 Kirby, M. (2000) *Through the World's Eye* (Sydney: Federation Press), p. xxv

35 *Lawrence v Texas* 539 U.S. 558 at 576 (2003).

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The Caribbean Court of Justice and the Legal Profession: Promoting a Caribbean Jurisprudence*

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The author submits that the main purpose in the establishment of the Caribbean Court of Justice (CCJ) is to promote the development of a Caribbean jurisprudence, based on the Commonwealth Caribbean's common historic, political, economic and cultural experiences and mutual history.

The article examines the role of final appellate courts, noting that judges of such courts must often choose between alternatives which are perfectly capable of being defended as rational, reasonable and consistent with 'the law'. Factors such as life experiences, socialisation, and backgrounds all play a role in determining the choices that are ultimately made. This is why, the author underscores that 'it is so important to have a diverse Bench, to have Judges from different backgrounds'.

For judges to come close to steering the right course they must have an understanding of the society that gives rise to the legal disputes. They must be grounded in that society. In this respect, the author argues, it is remarkable that the evolution of certain landmark judgments relating to human rights, particularly capital punishment, have been rendered by British judges, sitting and residing in England.

The article, which draws on a wealth of jurisprudence, proceeds to examine the original jurisdiction of the CCJ and the role of the Bar in defending the integrity of the Court and the justice system as well as in enhancing the quality of judgments.

Finally, it emphasises the need to promote Caribbean jurisprudence and access to local judgments. In this regard, it is lamented that many truly outstanding judgments of Caribbean judges do not receive the recognition they should because, if there is an appeal, they become almost automatically buried beneath the judgments of the higher court.

The Caribbean Court of Justice (CCJ) was inaugurated in Port of Spain, Trinidad, in 2005. The court is currently the final appellate court for the Caribbean States of Barbados and Guyana and it is hoped and expected that, in due course, most of the Commonwealth Caribbean States will cease accepting the Judicial Committee of the Privy Council as their final Court of Appeal and instead embrace the jurisdiction of the CCJ.

* This is an adaptation of an address given to the Eastern Caribbean Bar Association on 21 September 2007, in Grenada.

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In our judgment in *Boyce and Joseph*,[1] President de la Bastide and I stated in our joint opinion that the main purpose of the establishment of the CCJ is to promote the development of a Caribbean jurisprudence. The broad platform on which this jurisprudence rests is, of course, the Commonwealth Caribbean's common historic, political, economic and cultural experiences and our mutual history of slavery, indenture, displacement, resistance and struggle. On top of this, colonialism has bequeathed us a legacy of democratic structures and traditions premised on those that exist in the United Kingdom. With few exceptions, the Commonwealth Caribbean States boast the same imitations of the Westminster parliamentary system, a comparable body of pre-independence law and written constitutions modelled along the same lines. These constitutions all proclaim themselves to be the supreme law. They contain fundamental rights and freedoms, borrowed from the European Convention on Human Rights, which the courts are bound to enforce. Up until 2005, the Judicial Committee of the Privy Council (JCPC) was the same final appellate court for the Commonwealth Caribbean States and, in the absence of any material difference in the written law, a JCPC decision in an appeal from one country was and remains as binding for the other States as it was and is for the country from which the appeal emanates.[2]

In a real sense therefore, so far as the judicial power is concerned, the States have been practically united. It is on this solid edifice that there has been and is being constructed a shared body of law and judicial decision-making. This jurisprudence is not new. It has not commenced with the establishment of the CCJ; but its existence, which cannot be denied, has contributed and continues to contribute to an enrichment of common law. I can think of no more fitting description than to label that jurisprudence 'Caribbean' and, in the promotion of it, say that there is no better-suited entity to sit at its apex than a Caribbean Court of Justice.

Role of a Final Appellate Court

The judges of final courts must often bear the responsibility of determining important questions of policy that touch and concern the daily lives of the general populace. Such judges do not simply reveal the law. The law they proclaim is not like gold in a mine for which the judges merely need to – having the right tools and technique – dig in the right place and expect to discover nuggets of shining truths that lie there waiting to be discovered. The Judges of final appellate courts are invariably involved not so much in the *discovery* of the law, but in its *creation*. Such is the nature of the common law. Judges of final courts often have choices before them that they must make. Each different choice may be perfectly capable of being defended as rational, reasonable and consistent with 'the law'. The choices that are eventually made often reflect, to a greater or lesser degree, and sometimes quite subconsciously, the personal, philosophical outlook of the judges who made them. The judge's life experiences, socialisation, attitude to wealth-creation, to gender and family life, to the authority of the State, to individual rights, to the role of religion – all these things – play some part in determining the choices that ultimately are made. This is why it is so important to have a diverse Bench, that is to have judges from different backgrounds.

1 *Attorney General of Barbados v Joseph & Boyce* [2006] CCJ 3, (2006) 69 WIR 104.

2 See *Bradshaw v The Attorney General* Appeals Nos. 31 and 36 of 1992 (Barbados) and (1995) 46 WIR 62 (PC).

Yet, with the variety of choices that can be made, there are common goals to which the judges should aspire. Aharon Barak, former President of the Israeli Supreme Court, put it best when he observed that:

> the primary concern of the supreme court in a democracy is not to correct individual mistakes in lower court judgments. That is the job of courts of appeal. The supreme court's primary concern is broader, system-wide corrective action. This corrective action should focus on two main issues: bridging the gap between law and society, and protecting democracy.[3]

These are ongoing imperatives and the manner in which judges give expression to them must change over time. As society is forever on a forward march, so too the law if it is to be relevant; if it is to win the respect of the citizenry, the law must also go forth and adapt. The law must be stable, but it cannot be static.

The field of human rights, for example, provides an illustration of the manner in which, in response to new social and political realities, our courts have adapted their approach to the fundamental rights and freedoms contained in the constitutions of the Commonwealth Caribbean States.

In the immediate post-independence period, the 60s and 70s, the general approach taken to these fundamental rights was a very conservative, 'austere' one. The citizen's rights were, by today's standards, construed somewhat restrictively. In keeping with English common law current at the time the State was given a wide margin of discretion. It was a rare thing for the judges to rely on foreign precedents in their decision-making when construing our fundamental rights.

With the end of the Cold War, with the heightened attention paid to the observance of human rights internationally following the Holocaust, with the citizen expecting scrupulous fairness on the part of the State, interpretation of the rights has not remained the same. The State is now being held to strict standards of accountability and individual rights are given greater prominence. Human rights have become globalised. International jurisprudence and the reasoning of judges in other jurisdictions now play a decisive role in influencing interpretation of our rights on the domestic plane. The written expression of the rights has not changed, but interpretation of the written statement has evolved.

The cases best demonstrating this shift have been dominated by cases on capital punishment. The judgments are typified by decisions such as those in *Pratt & Morgan*[4] which required executions to be carried out within five years of the pronouncement of a death sentence, *Reyes v R*[5] which held that the mandatory death penalty constituted inhuman treatment and *Lewis v The Attorney-General*[6] which decided, *inter alia*, that it was unlawful to execute a prisoner while the prisoner's petition was pending in the Inter-American Human Rights process. In each of these decisions, there was also significant reliance on international jurisprudence.

What is remarkable about this evolution is that these judgments that radically reshaped this area of the law were rendered by British judges, sitting and residing in England. It is remarkable because if the judges who interpret our laws are properly to bridge the gap between the law and Caribbean society, like Odysseus they must avoid two dangers. On the one hand, a judge can be so absorbed in the society's internal dynamics, so impervious

3 *Harv. L. Rev.* (116)16.

4 Attorney General of Jamaica v Pratt & Morgan (1994) 2 AC 1

5 (2002) 2 AC 235.

6 (2001) 2 AC 50.

to international developments and emerging trends, so focused on the past and on maintaining stability that the judge is unresponsive to the need for the law to grow and evolve. On the other hand, the judge may be so remote from society, so consumed with international trends, so dismissive or ignorant of what is actually unfolding in the society that the judge becomes out of touch and prescribes solutions that the society as a whole had difficulty accepting. In either case the legitimacy of the judicial function is placed at risk.

For judges to come close to steering the right course, they must have an understanding of the society that gives rise to the legal disputes. They must be grounded in that society. Ideally, if the judge is not a product of the society, the judge should live in it or else be in a position to feel its pulse. But equally, the judge must maintain a sense of detachment and be open to new and diverse influences, some of which may come from outside the society. The judge must be able and prepared to weigh and appropriately meld the new with that which exists.

Undoubtedly, the death penalty decisions referred to above were intended: to humanise the Caribbean's capital punishment jurisprudence; to limit executions; to advance human rights in that area of the law; to promote good governance; and to encourage high standards of public administration. These are of course all noble goals; but their pursuit also produced other consequences.

In the period after *Pratt & Morgan* was decided, local government officials frequently engaged in public, forceful condemnations of their own final court. States in the region denounced human rights treaties they had previously ratified. The pro-death-penalty lobby in the region became vigorously re-energised. At least one parliament saw fit to amend its Independence Constitution specifically to nullify the major death-penalty decisions of the JCPC and legitimise treatment declared inhumane by both the JCPC and Caribbean courts alike. A poisonous and divisive atmosphere was created for the establishment of the CCJ with many persons being led to believe that the CCJ would, willy-nilly, engage in rolling back all the human rights advances made in recent times.

In short, the pursuit of noble goals seems to have been completely offset by a sharp erosion of confidence, by a deterioration in the human rights climate and by an unwholesome exacerbation of the natural and easy tensions that one might expect to find between different branches of government. Sustained and violent confrontation between judicial power, on the one hand, and executive power, on the other, cannot produce fertile conditions for democracy and human rights to flourish.

It is naturally absurd to believe that establishment of the CCJ was intended to usher in an approach to legal interpretation that is insular or anti-international or illiberal. It would be most extraordinary for the CCJ to consign itself passively to reflect values that have been discredited or that are inconsistent with the advanced Bills of Rights that Commonwealth Caribbean constitutions have all adopted. Change in the law sometimes precedes societal change and is even intended to stimulate it.[7] However, because the CCJ judges are in a position to place their fingers on the Caribbean pulse they are in a much better position to pursue the goals of a final court in a more nuanced manner and to avoid both Scylla and Charybdis when they make the choices that are placed before them. The jurisprudence of any State or group of States must surely advance in a more wholesome manner and be better suited to the needs of the people if responsibility for its development is placed primarily in the hands of judges and lawyers grounded in such States.

7 *Op cit*, Barak.

The Original Jurisdiction

Caribbean jurisprudence and its promotion are not just about civil and criminal matters. There is also the original jurisdiction of the CCJ to consider. There are no Privy Council or other international precedents to adopt, discard or massage. The CARICOM Single Market and Economy (CSME) jurisprudence of the court starts with a blank slate. There is of course a considerable body of case law of the European Court of Justice (ECJ). It is also true that many of the provisions of the Revised Treaty of Chaguaramas derive from the European Union treaties.

Last year in Barbados, Professor Alina Kaczorowska of the University of the West Indies published a paper[8] on the European Community experience with respect to the role of the ECJ. The Professor identified six fundamental principles that she regarded as the present bedrock of the European Community. She listed them as:

(1) the supremacy of Community law;
(2) the direct effect of Community law;
(3) the direct applicability of Community law;
(4) State liability for breach of Community law;
(5) the recognition of, and incorporation of, fundamental human rights; and
(6) common principles of administrative law.

As she noted, none of these principles was contained in or provided for in the founding Treaty of Rome in 1957. These principles were all 'progressively created by the ECJ, and each of them provided impetus that appeared, at different times, to be lacking on the part of different Member States'. The reality is that the judges of the ECJ in many ways made the European Community what it is today.

Of course, the Caribbean is not Europe. The Revised Treaty of Chaguaramas is not the Maastricht Treaty. The precise course that has been taken by Europe need not be the course that invariably the Caribbean must or is likely to follow. What is clear is that in embarking on the process of the CSME the Caribbean people are in many respects in uncharted territory and the manner in which the CCJ fills the interstices of the Revised Treaty may well have a decisive influence on the shape and direction of the Community and the pace at which integration proceeds. Here too, the CCJ will be called upon to make tough decisions and to determine critical policy issues.

The Role of the Bar as Defender of the Integrity of the Court and the Justice System

The difficulty that courts experience when they must determine important matters of policy is that they are called upon to do so without the conventional political resources that are so readily available to the other branches of government. Courts have no party apparatus to call on for guidance and encouragement, no political organisation ready and equipped to go out and drum up support for the decisions that they must make, and no party machine

8 Supremacy of Community Law – An Essential Step for Nations United in Commitment to Achieve a Single Market and Economy.

that can be activated to defend the court from unjustified attacks. Yet, no institution in a democratic society could become and remain potent unless it can count on a solid block of public opinion that would rally to its side at a pinch.[9] If the integrity of the CCJ is to be maintained at a high level, the court should be able, at all times, to command support and receive encouragement from what should comprise its natural constituency.

That natural constituency is, of course, the legal profession. It is the legal fraternity upon whom the CCJ must rely to stand up for the right of the Court to make the choices it is called upon to make. In this regard the CCJ should expect full support because truly, the CCJ and the Caribbean Bar have a special relationship. It is a relationship that is the envy of other Bar Associations. It was the interventions of the regional Bar, and the Jamaica Bar in particular, that led to such innovative, internationally acclaimed measures as the Regional Judicial and Legal Services Commission[10] and the Trust Fund,[11] both of which serve as guarantors of the Court's independence. The judges and all the senior staff of the Court have been selected by a Commission on which the legal profession and representatives of the Bar predominate. By comparison, for example, a few years ago, George W. Bush went out of his way to curtail the very limited consultative role that the American Bar Association used to enjoy as an official part of the nomination process of US Supreme Court judges.[12]

The regional Bar should take justifiable pride in the CCJ and play an even more active role advocating for the Court, encouraging regional governments to subscribe to its appellate jurisdiction and educating the general public of the advantages of having a Caribbean court hear their final appeals. In this the 21st century, it is an affront to the dignity of our people that, as a hang over from the colonial period, we should continue to entrust the task of protecting our democracy to the judges of another civilisation when we have demonstrated the ability and forged the requisite institutions with which to do so for ourselves.

The Role of the Bar in Enhancing the Quality of our Judgments

The special relationship between the Bar and the Court goes beyond the need to support and defend the integrity of the Court. Article XXIX of the Agreement establishing the Court grants an automatic right of audience to attorneys-at-law, legal practitioners or advocates duly admitted to practise law in the courts of a contracting party, but the Court is not precluded from conferring that right on others. In the appellate jurisdiction, the Court sees no need to grant a discretionary right to practise to other practitioners. In the original jurisdiction, apart from those who have an automatic right of audience, the right of audience is conferred upon an agent appearing on behalf of a Member State, and additionally, the court has the discretion to give a right of audience to (a) persons admitted to practice and who have a current right to practise in the country of which they are citizens or in which they are ordinarily resident or (b) persons with recognised expertise in international law and experience of litigation before international tribunals.

9 See McCloskey, Robert G. (1960) *The American Supreme Court* (Chicago: University of Chicago Press), pp. 71–76.

10 A broad based body on which sit several representatives of the Bar, responsible for, *inter alia*, selecting the judges of the CCJ.

11 The CCJ is funded by a fund administered by trustees who include representatives of the Bar. The devise of a Trust Fund ensures that there is no interface in matters of funding between the Court and the Executive authority.

12 See O'Connor, Sandra (2004) *The Majesty of the Law* (New York: Random House), p. 21.

What this means is that, certainly in the appellate jurisdiction, we are likely to see mostly Caribbean lawyers appearing before the CCJ. It would be regrettable if this circumstance resulted in a diminution of the quality of the legal submissions made to our final court. The quality of any judgment is necessarily dependent, wholly or partly, upon the nature of the submissions of counsel. The establishment of the CCJ therefore places a great onus on counsel from the Caribbean to sharpen their skills. When the Court is called upon to make the hard choices that must be made in developing a Caribbean jurisprudence, counsel should endeavour to place before the Court the views of other judges and academics, regionally and internationally, who have something to say about the relevant choices that can be made.

The CCJ is not bound by the determinations of the JCPC. But this does not mean that it intends to disregard JCPC precedents. We have made it clear that in the promotion of our Caribbean jurisprudence we shall naturally consider very carefully and respectfully the opinions of the final courts of other Commonwealth countries and, particularly, the judgments of the JCPC which determine the law for those Caribbean states that accept the JCPC as their final appellate court. In *Boyce & Joseph*, the CCJ determined the issues before it only after an exhaustive examination of decisions of the courts throughout the common law world. Each judge strove to arrive at a determination that seemed best suited for the advancement of our Caribbean jurisprudence. Ultimately, the reasoning that prevailed was in some respects similar to, but not identical to, that of Judges of the JCPC and the State of Barbados accepted the decision with much more grace than it had accepted some of the JCPC judgments that were endorsed by the CCJ.

Promoting Caribbean Materials

For my part, I would be open to opinions from every conceivable source as long as they are relevant and of assistance. In *Boyce & Joseph*, on a point having to do with legitimate expectations, the President and I were faced with a choice between the views of an English High Court judge and those of the English Court of Appeal that had overruled the judge. The Court of Appeal had actually labelled as 'heresy' the reasoning of the High Court judge. We unhesitatingly preferred the opinions of the heretic to the views of his illustrious appellate tribunal.[13] Where a decision of the JCPC is put forward for our consideration I would like to know what, if any, opinions on the matter were advanced by the local court of appeal. It is a sad fact that many truly outstanding judgments of Caribbean judges do not receive the recognition they should because, if there is an appeal, they become almost automatically buried beneath the judgments of the higher court.

For our Caribbean jurisprudence to truly thrive we cannot afford so casually to ignore the opinions of our judges. Take for example, the recent case of *Toussaint v The Attorney General of St. Vincent and the Grenadines*.[14] This is a case decided by the JCPC in 2007. According to media reports, the judgment of Lord Mance has been hailed as breaking new ground and the case is being regarded as a seminal one on the relationship between parliamentary privilege and the enforcement of the Bill of Rights contained in the Constitution. Regrettably, few persons appreciate that these same issues had been the subject of a

13 See *Regina v Ministry of Agriculture, Fisheries and Food ex p. Hamble Fisheries (Offshore)* [1995] 2 A.E.R. 714 *per* Sedley, J, and where the appellate decision found, at [1997] 1 WLR 906, that Sedley, J's views were 'heresy'.

14 Privy Council Appeal No. 28 of 2006.

masterly analysis in *Boodram v The Attorney General*[15] by then Justice Roger Hamel-Smith of the Trinidad & Tobago High Court as long ago as 1989. *Boodram* is unreported and was not cited in argument in *Toussaint* even though a Trinidad & Tobago Senior Counsel took *Toussaint* to the JCPC.

This brings us to the question of access to local judgments, especially those that are not contained in the West Indian Reports. This has been a serious problem in the past. It is becoming a little less so now because most judiciaries have websites on which they place their judgments. However, there is great value in being able to access a single source from which one can get all the unreported Caribbean judgments. CARILAW, an online facility of the Faculty of Law of the University of the West Indies, comes closest to filling this vital need. It is a reservoir of Caribbean materials and judgments and we should all do everything we can to support it.

Easy access to Caribbean judgments and other legal materials is essential if we are to advance our jurisprudence. In this connection, the Caribbean Association of Law Librarians (CARALL) has a critical role to play and I would hope that this Association can be strengthened in order to play its part in this regard.

We have truly outstanding Caribbean legal texts and scholarly articles that are a wonderful source of Caribbean material. A. R. Carnegie, Lloyd Barnett, Dana Seetahall, Rose-Marie Antoine, Albert Fiadjoe, Margaret Demerieux, and many, many others have all published excellent material that make a profound contribution to the development of our Caribbean jurisprudence. I would love to see counsel incorporating the use of these materials in their legal submissions. If you cite them then judges will refer to them in their judgments. The authors will then derive greater satisfaction and be further encouraged by the recognition. So it is that our jurisprudence will develop nicely if we feed from each other: academia, the Bar, the Bench, the law reporters and librarians. Each has a role to play if we are to advance our jurisprudence and imbue our people with a greater sense of confidence in themselves and their judicial institutions. These are small but important steps in the strengthening of our justice system and our democracy in general.

Conclusion

Justice Pollard and I, along with other Commonwealth judges, a few months ago visited and held discussions with judges from the ECJ and the International Court of Justice (ICJ). It surprised me that our counterparts in Europe were well informed about the CCJ and they exhibited a keen interest in our Court and, in particular, in the singular institutional arrangements that guarantee our judicial independence. They were especially intrigued by the fact that the CCJ can be both the final domestic appellate court for a country and, at the same time, the court that interprets and applies a treaty promoting regional economic integration to which the country is a member. It is a circumstance that we should not take for granted as it creates enormous possibilities and at the same time imposes tremendous responsibilities. In Europe, the advancement and harmonisation of community and national law may be the subject of a continuing dialogue between the ECJ and the final domestic court of each European Member State. That dialogue is mutually enriching. We do not have that luxury. That is all the more reason why we need all the assistance we can get from counsel as we

15 Trinidad & Tobago High Court Action No. 6874 of 1987.

go about our task. I know that the regional Bar will rise to this challenge and I wish you every success as you do so.

I want to end by extending an open invitation – whenever any of you happens to be in Port-of-Spain – to come and visit the premises of the CCJ. We welcome such visits. I do not believe it is an exaggeration to say that our courtroom is superbly appointed and it is complemented by a splendid, friendly and knowledgeable staff. I certainly hope that it would not be too long before all the independent States of the Commonwealth Caribbean put the appropriate measures in place to channel their final appeals where they rightly belong.