

in the European Convention. It was a tour de Force, when Malaysia passed its Human Rights Commission Act 1999, as a rite of passage, into the new Millennium. Section 4 of the Act requires us to have regard to the Universal Declaration of Human Rights 1948 for the purpose of determining human rights in so far as the Declaration is not inconsistent with Part III of the Federal Constitution. We thus joined the ranks of countries in the world which holds dear the concept of human rights. Given its novelty, it has its teething problems, but a curious mélange of people in the country seem to be elated at its prospect and potential.

It is time now to speak of the delicate balance between accountability and independence in Judicial office. The issue of Judicial independence has most times, in most Jurisdiction, been its Doppelganger. This results from the consistently competing

interests from the other branches of the Government. It is commonplace that in a conflict, the decision maker has to be competent, independent and impartial. A look at case laws in Commonwealth countries shows just how much Judicial independence had been put to the test. Respect must always be paid to the right of each Judge to decide matters according to his understanding of the facts and the law and his own conscience. It is difficult to see how that space can be invaded, without compromising the Judges' own position. Each one of us in the end must choose for ourselves how far we would like to leave our fate to the wayward vagaries of life. Part of the genius of Judicial development has been the willingness and ability of the courts to interpret the language of the law to embrace socially changing circumstances and new technology.

Issues of Judicial Independence in the Caribbean Court Room

By David Simmons, BCH, QC, MP
Attorney General and Minister of Home Affairs

[This paper was presented at the CMJA's Caribbean Regional and Gender Section Conference, held from 15-21 July 2001, in Barbados]

When the local organising Committee for this Conference assigned me the topic, they left me free to determine the parameters and particular perspective which I might set for myself:

In this Paper I shall deal with seven issues:

1. The doctrine of the separation of powers in the Commonwealth Caribbean Constitutions;
2. Providing for the independence of the judiciary in Barbados;
3. Tensions between the executive and the judiciary in the region;
4. Some realities of judicial office in small jurisdictions;
5. Judicial review
6. Usurpation of the legislative function by the Judicial Committee of the Privy Council (J.C.P.C.); and
7. Judicial independence in the Caribbean Court of Justice (C.C.J)

My intention is simply to highlight these issues in the hope that in depth consideration may take place in the Workshops and flesh be added to the bones of this Paper. I am not presenting a learned academic treatise.

1. The Separation of Powers in Commonwealth Caribbean Constitutions

When the French jurist Montesquieu wrote the "Spirit of the Law" in the 18th Century he argued that:

"There is no liberty if the judiciary power be not separated from the legislature and the executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression."

It is now generally accepted that the doctrine of separation of powers by

Montesquieu essentially recognises that there are three arms of government: the legislative, the executive and the judicial and there should be three main organs of government, namely, the Legislature, the Executive and the Judiciary. To concentrate more than one kind of function in any one person or organ of government would pose a threat to individual liberty.

The Constitutions of independent Caribbean States of the Commonwealth sought to enact the doctrine and to give effect to the principle of the independence of the judiciary. Thus, all of our constitutions raise to the status of positive constitutional law the mandate of the International Covenant on Civil and Political Rights that everyone shall be entitled to "a fair hearing by a competent, independent and impartial tribunal established by law"¹

All of our constitutions devote a separate chapter to the Judiciary in which provision is made for the establishment of the Supreme Court, the appointment of judges, tenure of office of judges, the oath of office and appeals. Constitutions also provide for the establishment, composition and procedure of a Judicial and Legal Services Commission.

Our constitutions have all been exported from Westminster and, since their enactment in the 1960s and thereafter, little fundamental change has taken place. In respect of the doctrine of separation of powers as provided for in Commonwealth Caribbean constitutions, Professor Albert Fiadjoe of the University of the West Indies has succinctly observed:

*"What is clear is that the Caribbean constitutions adopt a halfway house between the doctrine as understood in the constitutional law of the USA and as applied to the British Constitution"*²

In the courtroom of the Caribbean, however, the doctrine has been held to exist in our constitutions. For it was the Judicial Committee of the Privy Council sitting as the final Court of Appeal of Jamaica that so held in the case of *Hinds v R* [1977] A. C. 195

2 Providing for Judicial Independence of Barbados

In this Paper, I cannot embark upon an analysis of the constitutions of the various States of the Caribbean Community in respect of the manner of appointment of judges. But I think it is a fair statement to say that, whereas all of the States have a similar method of appointing the Chief Justice (namely, by the Head of State on the recommendation of the Prime Minister after consultation with the Leader of the Opposition), there is a fundamental difference between Barbados and other States in respect of the manner of appointment of judges. In most territories the Judicial and Legal Services Commission is involved in the process of appointment. This is not the case in Barbados.

Since 1974 in Barbados there has been political involvement in the appointment of the judges. The executive arm stretches straight into the judiciary. Thus it is provided in S81 of the Constitution:

"81(1) The Chief Justice and other Judges of the Supreme Court shall be appointed by the Governor-General... On the recommendation of the Prime Minister after consultation with the Leader of the Opposition"

In other Commonwealth Caribbean countries, however, apart from the Chief Justice, other judges are appointed by the Head of State on the recommendation of the Judicial and Legal Services Commission. Barbados is unique.

The timing and theme of this year's Conference are particularly significant for us in Barbados. We have recently gone through a constitution review exercise. A broad-based Commission was appointed under the chairmanship of Sir Henry Forde QC, MP a former Attorney General and it reported on 15 December 1998. Its recommendations have been discussed by the general public and in Parliament but the Cabinet has not yet decided which of its recommendations to adopt.

However that may be, one key recommendation of a majority of the

COUNCIL OF LEGAL EDUCATION
NORMAN MANLEY LAW SCHOOL LIBRARY
U.W.I. MONA, KINGSTON, 7 JAMAICA

1 See S18(1) of the Constitution of Barbados
2 A. Fiadjoe - Commonwealth Caribbean Public Law p 158

Commission is that a new constitution should provide for the appointment of the Chief Justice by the Head of State (who is recommended to be a non-executive Barbadian President) on the joint recommendation of the Prime Minister and the Leader of the Opposition, after consultation with the Judicial and Legal Services Commission.³

The other judges should be appointed by the Head of State, acting on the recommendation of the Judicial and Legal Services Commission, after the Commission has consulted with the Prime Minister and the Leader of the Opposition.⁴

In reaching its recommendations, the majority of the Constitution Review Commission (CRC) said that they were convinced that *"whether or not the 1974 provisions have, in practice, been abused by sitting Governments, those provisions leave open large and unjustifiable possibilities of abuse by the Executive.... As the ultimate guardian, under Parliament, of the Constitution itself and the sole authorised interpreter of the Supreme Law, the judiciary should be guaranteed the appearance as well as the substance of independence."*⁵

Pointedly, the Commission also recognised that *"absolutist concepts of separation of powers have no place in the evolutionary constitutional culture of Barbados"*⁶

The dissenting voice in the Commonwealth on these matters was that of my immediate predecessor in office as Attorney General, Mr Maurice King QC. He argued that throughout the constitutional history of Barbados, the Chief Justice has always been appointed by the Head of State on the advice of the political executive and, it is his view that *"the integrity and independence of the judiciary is secured NOT by the method of appointment but by other provisions of the Constitution providing for security of tenure of office and that their salaries, allowances and other conditions of service shall not be altered to their disadvantage after appointment."*⁷

Mr King concluded that *"a perfect system for the appointment of judges has not yet been designed, but the least unattractive seems to be one where the authority is exercised by the elected representatives of the people through their chief executive and after appropriate consultation with the political opposition and other appropriate persons."*⁸

Section 84 of the Barbados Constitution deals with the tenure of office of the judges and, in this regard, it is not unique. It speaks to vacation of office at age 65 (for judges) and 70 (for the Chief Justice) and there is a provision for an extension of time to 67 and 72 respectively. As is customary in most Commonwealth jurisdictions, removal from office is for inability to discharge the functions of office or misbehaviour. Thus, our judges have constitutional security of tenure.

Clearly, however, the efficacy of legal and constitutional protection is limited. And however much the law may seek to insulate a judicial officer from pressure or influence, ultimately judicial independence can only be guaranteed by the *character, personal integrity and responsible professional conduct* of the judicial officer.

3 Tensions between the Executive and the Judiciary

Recently in the Commonwealth Caribbean we have seen the emergence of tensions between the executive and the judiciary, particularly in Trinidad and Tobago. I think that this tension is rooted in the momentum given to the debate on the independence of the judiciary by the Latimer House Guidelines for the Commonwealth in 1998.

Part II of the Guidelines deals with the preservation of judicial independence and a contentious issue is the funding of the judiciary. The Guidelines recommend that *"sufficient funding to enable the judiciary to perform its functions to the highest standards should be provided"*. Further, *"the administration of monies allocated to*

*the judiciary should be under the control of the judiciary."*⁹

These revolutionary proposals have engendered a hot debate across the Commonwealth. One view holds that the dependence of the judiciary on the executive for resources is a factor which may impair independence. There is a need, it is said, for *"budgetary independence"* where the judiciary exercises control over its funds and allocates them in accordance with its own pre-determined priorities. Senior judges in England have supported this view including Lord Mackay LC, Lord Browne-Wilkinson and Purchas LJ.

Lord Mackay has expressed the opinion that *"in order to preserve the independence, the judges must have some control or influence over the administrative penumbra immediately surrounding the judicial process"*.¹⁰ And Purchas LJ firmly asserts that *"constitutional independence will not be achieved if the funding of the administration of justice remains subject to the influences of the political market place"*.¹¹

On grounds of legal theory, it is easy to be attracted to these powerful, high-ranking opinions but they have been countered by contrary views grounded in the very realities of governance. Opponents of the *"Mackay View"*, for example, Lord Bingham, a former Master of the Rolls, approach the debate on the basis of practicalities. He says that the judiciary cannot, in reality, operate independently of the executive.

Lord Bingham puts it this way *"After appointment, judges sit in courts provided by the State; they have offices provided, heated and lighted by the State; they have clerks paid by the State; they use books and computers mostly provided by the State; they are themselves paid by the State"*.¹²

A Canadian Chief Justice has gone further and points out that whereas it is true that the independence of the judiciary is a constitutional principle, there is yet another constitutional principle of equal importance

that is the right of Parliament to determine how public money is to be spent.¹³

The realist view is that the executive has a primary role in the provision of resources. Parliament votes supplies and the Estimates of Expenditure are proposed by the Government. The decision to allocate expenditure between the various parts of Public Service is a matter for the executive to determine, subject to the approval of Parliament. And there is considerable competition for funds between various parts of the Public Service.

In small jurisdictions like ours in the Commonwealth Caribbean, there is the undoubted problem of too few financial resources to meet satisfactorily all the needs of the judiciary in one budgetary cycle. A Caribbean Minister of Finance has a limited budget born of the very limited nature and extent of island resources. He has carefully to spread government's expenditure strategically, bearing in mind the overall developmental needs of the country and the manifesto upon which his government is elected.

Thus, it is no accident that the lion's share of Barbados budget must necessarily be allocated to education and health. As countries without vast natural resources, it is crucial that, strategically, there be the optimum development of our human resources sustained by healthy lifestyles.

One of the region's outstanding judges, the late Sir Allen Lewis, warned, in 1974, that there must be co-operation and understanding between the organs of government. He thought that *"for practical purposes, it is essential, if developing countries are to be moved forward quickly, that there should be the utmost trust and co-operation between the legislature and the executive and the administration to facilitate implementation of the government's social and economic policies."*¹⁴

The issue ultimately is one of priorities.

In Barbados my experience has been that, traditionally there have been

3 See Recommendation 11.10.1

4 See Recommendation 11.10.2

5 Report of the Constitution Review Commission para 11.8

6 Ibid para 11.9

7 Ibid Appendix 1 p 110

8 Ibid p 111

9 Published 19 June 1998

10 Cited by Purchas LJ in NJL, September 30, 1994, para 1308

11 Ibid p 1324

12 T. Bingham - the business of Judging - pp 57 and 58

13 Hon. Allan McEachern cited in Bingham at p57

14 Foadjo op.cit p160

understandings and co-operative appreciation between the executive and the judiciary. It is recognised that the salaries of judges and magistrates are too low; it is recognised that the physical environment for judging needs to be improved; it is recognised that there is a need for the rapid introduction and use of the contemporary technology in the justice sector. At the same time the judicial officers themselves appreciate that the country must be developed in a holistic way and we are at a different stage and level of development from the developed countries of the North.

In practice, there has been dialogue and the exchange of information and views between the Chief Justice and the Attorney General.

Having said that, it is true that, historically, Commonwealth Caribbean Governments have underestimated the inextricable link between justice and development. Our justice systems have suffered from a lack of strategic planning and consistent under-provision of funding to ensure the proper development of the administration of justice.

For as much as these deficiencies have been the function of Governments, it is no less true that international financial institutions have also failed to appreciate the connection between justice and development. Happily, however, the message in finally getting through to reception cars. Both the World Bank and the Inter-American Development Bank (IADB) in the last three years have shown a distinct willingness to invest in the justice system and projects are currently being developed for assistance to the justice sector of the region. Barbados itself will soon sign a loan agreement with the IADB for US\$ 12.5 million to modernise the administration of justice and the penal system.

4 Some Realities of Judicial Office in the Caribbean

I wish now to discuss some of the challenges to the independence of the judiciary in the Caribbean Courtroom. There are many but I shall highlight only four.

i. In small jurisdictions there are difficulties in the recruitment and appointment of judicial officers. The unattractiveness of emoluments or the simple desire to accumulate wealth make appointments to the Bench from the private Bar very difficult in our societies. In some territories, resort is had to appointment of officers on contract. But such appointments can be fraught with danger. The contracted judicial officer may be tempted to look over his shoulder uncertain as to whether his contract may be renewed by reason of the unpopularity of some decision.

In the Caribbean there has been some evidence - not much - of judicial officers incurring the displeasure of governments angered by particular decisions. The matter of the non-renewal of a Magistrate's contract was tested in the High Court in Dominica some years ago. It was held that the non-renewal of the contract without the involvement of the Public Service Commission was tantamount to wrongful dismissal - **Emmanuel v. The Attorney General (1989)**.

We in this region are groping to provide the Magistracy with greater security of tenure since there is no reason, in principle, for differentiating between the two levels of judiciary if the aim is to strengthen and safeguard the independence of the judiciary as a whole, *HINDS v. R*, notwithstanding.

In this regard the Constitution Review Commission has recommended that the Magistracy be recognised in the Constitution as a part of the judicial system of Barbados and the Government should give detailed study to the entire question of the status of the Magistracy.¹⁵

During this Conference we may usefully discuss the types of mechanisms which could be used to promote greater security of tenure of Magistrates.

ii. Social pressures are the constant companion of the judicial officer. But it is worse in small countries. I think the magnitude of the problem is not understood and appreciated by politicians, public servants or the public at large.

The officer's circle of friends is necessarily restricted. But at cocktail parties, in the supermarket or at a public event, the officer is liable to be approached by an actual or potential litigant or even a released prisoner. In small societies, anonymity is impossible.

One has to be careful also of financial investment (if there is any money left over). Capital markets are underdeveloped and investment in certain companies runs the risk of later litigation in matters involving the company. Perhaps it would be a safer investment for the judicial officer to buy Government paper.

iii. Pressure from the media has not, so far as I am aware, come in the form of attacks upon the judiciary itself. The Press seems hesitant to criticise judicial officers. But the system has received its share of blows. The Press is certainly not reticent about criticising the justice system or the political directorate. Of course, by the Standing Orders of the House of Assembly, members of Parliament are precluded from referring to the conduct of Judges or the performance of judicial functions by any person except upon substantial motion. S.O. 28 Rule 9.

I do not believe that the past experience will necessarily carry over into the future. It has to be remembered that the proper functioning of a democratic society requires a free Press. And the Press is beginning to display a consciousness of its rights.

In the odd case of an attack upon the judiciary the difficulty has been how to respond. It has been traditional for judges not to respond. But in the

last 10 years or so in England, the former posture of judicial reticence has been reviewed. The former Lord Chief Justice of England, Lord Taylor, was frank. He said:

"It is simply no longer sensible to remain silent when so much attention, much of it highly critical, is focussed on courts and the judicial process."¹⁶

The judiciary in the past has looked to the Attorney General to defend it against attack and this is consistent with principles of ministerial responsibility where the Attorney General has responsibility for the judiciary.

Perhaps, however, the time has come for the judiciary itself to develop an appropriate mechanism for response.

iv. Threats will be posed to the judiciary by the machinations of transnational organised crime, especially through the corruption that attends the illicit traffic in narcotic drugs and psychotropic substances. One of the aims and consequences of transnational organised crime is the destabilisation of democratic societies and the corruption of officials.

Regional judicial officers will be under the severest pressure from the insidious effects of illegal drugs. It will require the greatest of strength of character to keep the new criminal element at bay.

We have just seen in Barbados how the scourge of illegal drugs has the ability to corrupt the justice system. A major drug 'baron' was being tried before a judge and jury for the importation of a vast quantity of drugs. A boatload. During the trial he offered money in exchange for the return of a 'not guilty' verdict to three jurors. Fortunately, the racket was uncovered. He got 25 years for the importation. The jurors were each given 18 months in prison for perverting the course of justice.

Judicial officers must be ever conscious that the price of

¹⁵ See Recommendations 11.33 and 11.34 at p.67

¹⁶ Daily Telegraph, 24 April 1994

freedom is eternal vigilance. Bribery subverts essential public regulatory systems. Commonwealth Heads of Government at their meeting in Edinburgh in 1997, underscored the importance of good governance and the elimination of corruption through greater transparency, accountability and the application of the rule of law.

v. No discussion of the independence of the judiciary can be relevant without some comment on the relations between the Bench and the Bar. They both seek after justice; they both have a direct interest in the proper administration of justice; they both cherish freedom to carry out their duties unfettered by extraneous influences.

Indeed the quality of decision making by the judiciary is largely dependent upon the quality of advocacy and argument.

We are all members of a noble profession with a long history and traditions that reverberate throughout the common law world. Those traditions are well known to the profession and I shall not dwell upon them.

However, I do wish to make some observations because I see signs of stress in the relations between the Bench and Bar.

An Attorney-at-Law must scrupulously preserve his independence in the discharge of his professional duties and defend the interests of his client without fear of judicial disfavour or public unpopularity.

The Barbados Legal Profession Code of Ethics, 1988, in Part V, sets out the duties of Attorneys-at-Law in relation to the courts and the administration of justice.

For example: Rule 40 is as follows:

"40 (1) An Attorney-at-Law shall maintain a respectful attitude towards the court and shall not engage in undignified or discourteous conduct which is degrading to the court."

(2) An Attorney-at-Law shall encourage respect for the courts and the judges

(3) An Attorney-at-Law shall support judges and magistrates against unjust criticisms"

Those injunctions imposed on the practising professions are meant to sustain the dignity of the profession and the majesty of the law. They are not meant to stifle the robust presentations of cases.

Thus I am concerned if standards of advocacy in this region degenerate into coarse and undignified forensic conduct. Equally, the judiciary must not be thin-skinned and super-sensitive. Legal literature is replete with anecdotes and examples of repartee between Bench and Bar which embellish the language of the law and which, in their own way indicate the boundaries of acceptable conduct.

In our jurisdictions, there is evidence that the Bar is challenging the constitutionality of delayed judgements. It behoves the judiciary, in the vocabulary of today's youth, to "get its act together".

5. Judicial Review of Administrative Action

The last quarter of the 20th Century saw the relentless march of judicial review. It will not halt. Rather, one can foresee possible collisions between the executive and the judiciary in the Caribbean as judicial review gathers pace in the courtroom of the Caribbean.

Our law in Barbados now rests firmly upon the Administrative Justice Act, CAP 109B although the RSC Order 53 provided an alternative but restrictive route to judicially review administrative action.

Judges of the region have shown a commendable independent spirit and have been afraid to rule against the executive when it has been found to be in error. With specific reference to Barbados, the JCOC in a landmark decision upheld the decision of the Chief Justice (and that of the present Governor-General when he sat in the case as President of the Court of Appeal) in the

case of *C.O. Williams Construction Co. Ltd v. The Attorney General*.¹⁷

Their Lordships held that although S.64(2) of the Constitution states that "the Cabinet shall be the principal instrument of policy and shall be charged with the general direction and control of the Government of Barbados....", nevertheless, when the Cabinet of Barbados is exercising a statutory power to award a contract under the authority of the Financial Administration and Audit Act¹⁸ and the 'Financial Rules' made the reunder, a Court may review the Cabinet's decision.

Other examples of judicial boldness are evident throughout the region: the Trinidad and Tobago, Jamaica, Guyana, Bermuda and the Cayman Islands to mention a few.

6. Usurpation of the Legislative Function

If we accept that the doctrine of the separation of powers implies that, as far as practicable, the three organs of governments should not intrude upon each other, it becomes relevant in the context of contemporary Caribbean society to examine to what extent, in the name of judicial independence, recent decision of our highest court, the J.C.P.C. appear to have usurped the function of legislatures.

On February 16, 1999, the Governor-General of Barbadians in the Speech from the Throne observed:

"Ever since November 1993, the will of the Government of people of Barbados - indeed the will of the Governments - indeed the will of the Governments and people of the Caribbean generally - has been frustrated by decisions of the J.C.P.C. which have had the effect of preventing the use of the death penalty as a punishment legally and constitutionally imposed by the State. The rule of law which is the foundation upon which civil society is organised and regulated is being imperiled by

*judicial decisions in England...."*¹⁹

In our Constitutions and Statutes, the right to life is enshrined. So too is the death penalty. However, in the last seven years a succession of constitutional motions has been adjudicated in the J.C.P.C. in which that court has been called upon to interpret the nature and extent of the constitutional imperative that outlaws cruel and unusual treatment or punishment.²⁰

While none of us today would deny judges a role as lawmakers and while we welcome the advance of the purposive approach to interpretation of statutes allowing for creativity in recognition of the dynamic nature of the common law, the judge must be wary that, as Lord Reid once said: *"Too much flexibility leads to intolerance uncertainty."*²¹

The contortions of the J.C.P.C. in cases such as *Pratt and Morgan*,²² *Guerra V. Baptiste*,²³ *Henfield V. The Attorney General of the Bahamas*,²⁴ *Reckley V. Minister of Public Safety*,²⁵ *Fisher V. Minister of Public Safety*,²⁶ *Thomas V. Baptiste*²⁷ and most recently *Neville Lewis V. The Attorney General*²⁸ almost always decided on a majority basis, have engendered the greatest uncertainty in the region about the ability of Governments to carry out the death penalty in suitable cases of murder.

Caribbean people believe the British judges have made a mockery of the law on the death penalty. They believe that, as a matter of policy, those judges have virtually abolished the death penalty in the Caribbean.

I entirely agree with the people of the Caribbean. It is utterly wrong that our highest court should twist and turn our jurisprudence every few months in a way that has led uncertainty of the state of the law, instability in our societies, disrespect for the administration of justice and abuse of politicians.

17 [1994] 45 WIR 94

18 Chapter 5 of the Laws of Barbados

19 Sir Clifford Husbands KA

20 Sec 5.15 (1) of the Constitution of Barbados

21 Bingham op. Cit p 32

22 [1993] 43 WIR 340

23 [1996] AC 397

24 [1997] AC 413

25 [1997] AC 527

26 FISHER (No 1) [1998] AC 680 and FISHER (No 20) [1999] 2 WLR 349

27 [1999] 3 WLR 249

28 [2000] 3 WLR 1785

but do not take it from me. Hear what one of the very Privy Council Judges was moved to say last September, obviously thoroughly offended by the intellectual gymnastics of his brethren who sought to justify their own subjective opinions through dubious legal reasonings.

Lord Hoffman echoing the Governor-General of Barbados in 1999, warned his brethren in the year 2000 that "*the rule of law itself will be damaged and there will be no stability in the administration of justice in the Caribbean*" if judges of the J.C.P.C. continually depart from previous decisions solely because they have "*a doctrinal disposition to come out differently*"²⁹

Lord Hoffman was the minority in **Neville Lewis** which has now held that the deliberations and decisions of regional Mercy Committees are judicially reviewable. Reasons for the decisions of a Mercy Committee are justiciable. It is not difficult to envisage such decisions being challenged by convicted murders all the way from first instance to the J.C.P.C..

In **Neville Lewis**, a Bench of five overturned three principles of law that had been settled by the Board between 1996 and 2000.

The three questions on which the J.C.P.C. had pronounced were:

- (a) whether a Mercy Committee was required to disclose to a condemned person the material before it when it considered a petition for mercy
- (b) whether it would be unlawful to carry out the death penalty while the condemned person had a petition pending before an international human rights organisation
- (c) whether it was unlawful to carry out the death penalty because during detention the prisoner had been subjected to unlawful treatment not related to his being under the sentence of death

All three questions had been answered in the negative during the four year period (1996-2000) by the J.C.P.C. - albeit variously

constituted and, mostly on a majority.

Reflecting upon the judicial gyrations of the Privy Council in the last seven years, I keep asking myself this question. Why was no Caribbean judge ever invited to sit in the J.C.P.C. during the last seven years when they were developing their new jurisprudence for the Caribbean on the death penalty? Strange. Chief Justices Wooding, Douglas and Floissac have been there. It would not have been an innovation.

I am disturbed that judicial independence has run amok in the Privy Council and, in the famous words of Lord Simmonds in **Magor and ST. Mellons R.D.C. V. Newport Corporation**,³⁰ there has been a "naked usurpation of the legislative function under the thin guise of interpretation". Only Caribbean Parliaments should abolish the death penalty in this region.

The current Bench in the Privy Council would do well to harken to the advice of Lord Bingham and tread carefully where the issue is one of current social policy on which there is no consensus in the community.

7. Judicial Independence in the Caribbean Court

The previous discussion of the J.C.P.C. necessarily provokes discussion of the Caribbean Court of Justice (C.C.J.).

On 14 February 2001, the Heads of Government of the Caribbean Community signed the Treaty establishing the Caribbean Court of Justice. This was an important step towards the completion of our psychological, political and judicial independence.

We reached this landmark after thirty-one years of debate although admittedly, the impetus for such a court as our final appellate court began in 1989 when Heads of Government at Grenada agreed to replace the J.C.P.C. by our own indigenous Court of Appeal. Then in 1992 the West Indian Commission put a compelling case for such a court. They saw a Caribbean Court of Justice as fundamental to the process of regional integration. All of this predated **Pratt and Morgan** and I take this opportunity once again to reiterate as

Chairman of the Preparatory Committee to oversee the establishment of the C.C.J. that the dominant motive for establishing this court is to complete our independence and to have an adjudicatory body to resolve disputes which will necessarily arise when the Single Market and Economy of CARICOM becomes a reality.

The C.C.J. will have two jurisdictions. In the exercise of its appellate jurisdiction it will replace the J.C.P.C. in civil and criminal matters. In its original jurisdiction it will be required to interpret and apply the Revised Treaty of the Caribbean Community using principles of international law.

Every effort has been made to preserve the independence of the ten judges of the court. All of the judges, save and except the President, will be appointed by a Regional Judicial and Legal Services Commission of eminent persons from throughout the Caribbean. In the case of the President, that body will recommend a person to the Heads for appointment.

Article IX provides for tenure of office of the judges. Inter alia, it provides that the office of Judge shall not be abolished while there is a substantive holder thereof and a Judge may sit until age 72. Removal from office is subject to an elaborate procedure essentially guaranteeing natural justice, and can only be for inability to perform the functions of office or misbehaviour.

To ensure the financial sustainability of the court, a Financial Protocol has been developed by regional Attorneys-General providing for the creation of a trust fund in the Caribbean Development Bank and into which contributions to the financing of the court will go.

Governments will be required to charge their contributions on their Consolidated Funds. Terms and conditions of service of the Judges will be determined by the Commission and salaries, allowances and other terms and conditions of service shall not be altered to the disadvantage of Judges.

We have also drafted as a Protocol to the Treaty an Instrument granting privileges and immunities to the judges. For example, they will enjoy immunity from legal process in respect of their official words or actions;

immunity from arrest or detention; exemption from immigration and customs restrictions; privileged communications; exemption from income tax.

On taking the oath of office, Judges of the C.C.J. will subscribe to a Code of Judicial Conduct including a commitment to deliver judgements in an expeditious manner.

Even though we seek to create an indigenous court, it is important to note that Commonwealth nationals (and not merely Caribbean nationals) are eligible for judicial appointment.

Broadly under Article IV, a person who satisfies certain listed criteria and has been a Judge for over five years in any part of the Commonwealth is a eligible. Additionally, a person who has practised or taught law for fifteen years in any part of the Commonwealth may be appointed. Any judges, practitioners or law professors with a civil law background may be appointed as Judges to the C.C.J.

The criteria to which the Judicial and Legal Services Commission is enjoined to have regard are: high moral character, intellectual and analytical ability, sound judgement, integrity and an understanding of people and society. It has become fashionable in North America and the Antipodes to publish criteria for judicial appointment and Article IV reflects this current trend.

Conclusion

Judicial Independence is indispensable to democracy and good governance. The State can provide tangible support structures to bolster judicial independence, for example, security of tenure of office, financial security, institutional and administrative freedom.

In the Caribbean, our constitutions, ordinary laws and practices provide these support structures. It is left, however, to the members of the judiciary themselves to give fullest meaning to the principle of judicial independence through their own personal integrity.

On this score, the record is good.

29 [2000] 3 WLR at 1817
30 [1952] A.C. 189