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## Introduction for the Goodwin Seminar Articles: Trade inds in Caribbean Law - Evolution of Legal Norms and Quest for Independent Justice

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## **INTRODUCTION FOR THE GOODWIN SEMINAR ARTICLES: TRADE WINDS IN CARIBBEAN LAW— EVOLUTION OF LEGAL NORMS AND QUEST FOR INDEPENDENT JUSTICE**

JANE E. CROSS\*

During the fall semester of 2004, Nova Southeastern University Shepard Broad Law Center (NSU Law Center) devoted its Goodwin Seminar series to an examination of emerging legal trends and institutions in the Commonwealth Caribbean. Accordingly, the seminar series invited a number of speakers to explore the ongoing legal reform and change within the region. Along these lines, the Goodwin Seminar speakers provided insights into the long-term efforts to address contemporary national, regional, and international concerns by advancing Caribbean law and legal institutions. These innovations have culminated with such historic regional undertakings as the inauguration of the Caribbean Court of Justice (CCJ) scheduled for April 2005 and the establishment of the Caribbean Single Market and Economy (CSME).

The speakers for the Goodwin Seminar were selected in order to provide a full variety of perspectives on the current legal developments in the Caribbean. As the list below indicates, the featured speakers included individuals from the legal academy, government, judiciary, and the legal profession. NSU Law Center was honored to host the following distinguished speakers:

- The Honorable Dr. Kenny Anthony, Prime Minister of St. Lucia;
- Dr. Rose-Marie Belle Antoine, Director of the Master of Law Program at the University of the West Indies and a Senior Lecturer in Law;
- C. Dennis Morrison, Q.C., Partner, DunnCox Law Firm, Kingston, Jamaica;
- The Honorable Mia Amor Mottley, Q.C., M.P., Deputy Prime Minister, Attorney General and Minister of Home Affairs, Barbados; and
- Sir David A. C. Simmons, K.A., A.C.H., Chief Justice of the Supreme Court of Barbados.

Nova Law Review has graciously consented to publish the papers of four of these speakers – Dr. Antoine, Mr. Morrison, Minister Mottley, and

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Chief Justice Simmons. This issue of the *Nova Law Review* includes the papers of Dr. Antoine and Chief Justice Simmons.<sup>1</sup> The remaining two papers by Mr. Morrison and Minister Mottley will be published in a forthcoming issue of *Nova Law Review*. For that reason, these two papers are not referenced below. This introduction does, however, reference points from the unpublished keynote address by Prime Minister Anthony.

As underscored by each of the Goodwin speakers, the Commonwealth Caribbean community is undergoing a post-colonial renaissance as shown by its emerging legal institutions and identity. Caribbean institutions and the actors within those institutions have continually explored the bounds and parameters delineating the character of Commonwealth Caribbean jurisprudence. By themselves, such efforts would prove highly significant. These legal initiatives, however, are now taking shaping in an increasingly collaborative environment in the Caribbean. Most importantly, these endeavors seek to benefit all of region's parts, by strengthening the whole. At the core of this effort is the establishment of the CSME. The establishment of the CSME will be reinforced by the coincidental establishment of the CCJ. Thus taking all of these trends together, the consolidation of regional self awareness with this remarkable culmination of the legal philosophy and organization will categorically transform law and the legal systems in the Caribbean.

The first featured Goodwin Visiting Professor is Dr. Rose-Marie Belle-Antoine who is Director of the Master of Law Program at the University of the West Indies and a Senior Lecturer in Law. In addition to these positions, she works as an attorney-at-law and has worked as international legal consultant on projects that have included international organizations such as the ILO, the World Bank, UNICEF and the Inter-Development Bank.

Dr. Antoine received her LL.B. with honors from the University of the West Indies, Barbados and her Legal Education Certificate from the Norman Manley Law School in Jamaica. She continued her studies in England, earning her LL.M. with distinctions at Cambridge University and her Doctorate in Law from Oxford University. To add to those distinctions, Dr. Antoine is the recipient of a Certificate in International Human Rights Teaching from the Centre for International Human Rights Teaching in France, and a Diploma in International Human Rights Law from the International Institute of Human Rights at the Court of Human Rights in Strasbourg, France.

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In 1999, she completed her doctoral thesis on *Legal Issues in Offshore Finance*.<sup>2</sup> Since then, she has written a number of books on this subject, including *Legal Aspects of Offshore Finance Law*,<sup>3</sup> *Trusts and Related Tax Issues in Offshore Financial Law*,<sup>4</sup> and *Confidentiality in Offshore Financial Law*.<sup>5</sup> Dr. Antoine has also authored numerous chapters and articles for a variety of publications, including the *Caribbean Law Bulletin*, the *Caribbean Law Review*, the *Oxford Journal of Legal Studies*, and the *International and Comparative Law Quarterly*. Her most recent book is *Commonwealth Caribbean Law and Legal Systems*, second edition, scheduled for publication in August 2005.<sup>6</sup> Finally, in addition to being the Leo Goodwin Senior Chair in Law, Dr. Antoine has received numerous awards and honors, and has represented Barbados and the Caribbean as an official delegate at regional and international conferences.

In her paper, entitled, *Waiting to Exhale: Commonwealth Caribbean Law and Legal Systems*, Dr. Antoine provides a brief overview of Caribbean legal system from a historical perspective.<sup>7</sup> In this section, she explores the psychological legacy of slave societies and its influence of the adoption of British jurisprudence without fully adapting these norms and institutions to the diverse demands of Caribbean society.<sup>8</sup> In the remainder of her paper she delves into four momentous legal themes in the region. These are: (1) the replacement of the English Judicial Committee of the Privy Council with the Caribbean Court of Justice;<sup>9</sup> (2) the controversial issue of the constitutionality of the death penalty in the Caribbean;<sup>10</sup> (3) the innovative legal régime of the offshore financial sector;<sup>11</sup> and (4) the legal transformation need for political and economic regional integration.<sup>12</sup> Throughout her article, she dis-

2. Dr. Rose-Marie Belle Antoine, *Legal Issues in Offshore Finance* (1999) (unpublished thesis) (on file with author).

3. ROSE-MARIE BELLE ANTOINE, *LEGAL ASPECTS OF OFFSHORE FINANCE LAW: CONFIDENTIALITY IN OFFSHORE FINANCE LAW & OFFSHORE TRUSTS AND RELATED TAX ISSUES IN OFFSHORE FINANCIAL LAW* (2005).

4. ROSE-MARIE BELLE ANTOINE, *TRUSTS AND RELATED TAX ISSUES IN OFFSHORE FINANCE LAW* (2005).

5. ROSE-MARIE BELLE ANTOINE, *CONFIDENTIALITY IN OFFSHORE FINANCIAL LAW* (2002).

6. ROSE-MARIE BELLE ANTOINE, *COMMONWEALTH CARIBBEAN LAW AND LEGAL SYSTEMS* (Cavendish Pub. Ltd. 2000) (1999).

7. Rose-Marie B. Antoine, *Waiting to Exhale: Commonwealth Caribbean Law and Legal Systems*, 29 NOVA L. REV. 139 (2005).

8. *Id.* at 141–42.

9. *Id.* at 144–50.

10. *Id.* at 150–54.

11. *Id.* at 154–61.

12. Antoine, *supra* note 7, at 162–64.

cusses the factors supporting the impetus for legal evolution within the Caribbean and also highlights the internal and external forces that both seek to support and inhibit such change.<sup>13</sup> Overall, Dr. Antoine's article provides judicious insight into the critical contemporary challenges facing Caribbean Law and Legal Systems.<sup>14</sup>

The second featured Goodwin Visiting Professor is Sir David A.C. Simmons, who became the twelfth Chief Justice of Barbados on January 1, 2002. Justice Simmons is a graduate of the Faculty of Law at the London School of Economics where he received his L.L.B. (with honors) in 1963 and was the first Barbadian to receive his L.L.M. awarded in 1965 from the University of London. He is also a barrister of Lincoln's Inn. Sir David Simmons has lectured law in London and at the Faculty of Law of the University of the West Indies (UWI). In June 2003, he became an Honorary Fellow of the UWI. In December 2003, he was the first Caribbean person ever awarded an honorary L.L.D. by the University of London.

Sir David Simmons has had an impressive career as an attorney, Member of Parliament, and Attorney General in Barbados. He was appointed Queen's Counsel in Barbados in February 1984, served in the Parliament of Barbados from February 1976 to August 2001, and served twice as Attorney General of Barbados from 1985 to 1986 and from 1994 to 2001. On several occasions during the latter period as Attorney General, Sir David Simmons acted as Prime Minister of Barbados. Due to his distinction in public service and politics, in January 2001 he was awarded the Barbados Centennial Honour (B.C.H.), and on November 30, 2001, he received Barbados' highest national honor when he was named a Knight of St. Andrew (K.A.).

As Attorney General, Simmons has chaired numerous committees, initiatives and conferences, including the Caribbean Financial Action Task Force (1997/98), the Regional Committee for the Establishment of a Project for Maritime Cooperation Against the Traffic in Illicit Narcotic Drugs in the Caribbean (1999-2002), the Preparatory Committee to Establish the Caribbean Court of Justice (1999-2001), the Regional Judicial and Legal Services Commission (2003-2004), EU/Caribbean Conference (1996), and the Joint U.S./Caribbean Sub-Committee(1997). He has also represented Barbados at regional and international forums and is the author of numerous papers and publications.

In the *Caribbean Court of Justice: A Unique Institution of Caribbean Creativity*, Sir David Simmons describes the historical background leading to

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13. *Id.*

14. *Id.* at 140.

the planned inauguration of the CCJ.<sup>15</sup> In this paper, he also explores a series of arguments supporting and opposing the establishment of the CCJ,<sup>16</sup> and justifies the designation of the CCJ as a court *sui generis*.<sup>17</sup> Justice Simmons then explains (1) the impetus the CCJ will create to upgrade regional and local justice systems,<sup>18</sup> and (2) the process of severing links with the JCPC.<sup>19</sup> He then briefly outlines some final steps to the anticipated inauguration of the CCJ in 2005.<sup>20</sup> He ends by concluding that the creation of the CCJ “will complete our independence and finally remove the self-doubt and lack of self-confidence which have been deeply ingrained in the psyche of our former colonial peoples.”<sup>21</sup>

The themes elaborated by Dr. Antoine and Justice Simmons were reinforced by the insightful remarks of Prime Minister Kenny Anthony during his keynote address during the Goodwin Seminar series. Elected Prime Minister of St. Lucia in 1997, Dr. Anthony is an educator, former General Counsel to CARICOM, and leader of the St. Lucia Labour Party. In this keynote address, Prime Minister Anthony noted that although much of the opposition to the establishment of the CCJ comes from the notion that it will be a “hanging court,” this has never been the primary goal or purpose of the CCJ.<sup>22</sup> He explained that while the series of death penalty cases beginning with *Pratt v. Attorney General*<sup>23</sup> have intensified both support for and opposition to the CCJ, the efforts to establish the CCJ pre-date this seminal decision.<sup>24</sup> In addition, Prime Minister Anthony noted other compelling reasons for the establishment of the CCJ, such as creating affordable access to justice,<sup>25</sup> transforming Caribbean jurisprudence,<sup>26</sup> and fostering a Caribbean legal culture.<sup>27</sup> He also explained that the establishment of the CCJ will be critical to ensuring the success of the CSME.<sup>28</sup> He stated that without the CCJ, “[c]ompeting

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15. Honorable Sir David Simmons, *The Caribbean Court of Justice: A Unique Institution of Caribbean Creativity*, 29 NOVA L. REV. 169 (2005).

16. *Id.* at 177–84.

17. *Id.* at 186–93.

18. *Id.* at 195.

19. *Id.* at 196.

20. Simmons, *supra* note 15, at 196–97.

21. *Id.* at 198.

22. Kenny D. Anthony, Establishment of the Caribbean Court of Justice: The Political and Legal Imperatives, Address at the Nova Southeastern University Shepard Broad Law Center Goodwin Seminar 4–5 (Oct. 7, 2004).

23. (1993) 43 W.I.R. 340.

24. Anthony, *supra* note 22, at 3–9.

25. *Id.* at 13–14.

26. *Id.* at 14–15.

27. *Id.* at 15–16.

28. *Id.*

judicial interpretations [of the CSME] could cause confusion, uncertainty and delay.”<sup>29</sup> He ended by noting that ultimately while the CCJ has been designed to be insulated from political interference, the support or opposition to the CCJ rests with one’s belief or disbelief in the personal integrity of the appointed justices.<sup>30</sup>

It is notable that all of the speakers in this Goodwin Seminar series expressed strong optimism in the impending establishment of the CCJ. Following the submission of the papers by Dr. Antoine, Chief Justice Simmons, and Prime Minister Anthony, however, the establishment of the CCJ suffered a major setback due to a decision by the JCPC delivered on February 3, 2005 in *Independent Jamaica Council for Human Rights (1998) Ltd. v. Marshall-Burnett*.<sup>31</sup> In this decision, the JCPC struck down three acts passed by Jamaican Parliament in 2004.<sup>32</sup> These acts were: (1) the Caribbean Court of Justice (Constitutional Amendment) Act 2004, Act 20 of 2004,<sup>33</sup> (2) the Caribbean Court of Justice Act 2004, Act 21 of 2004,<sup>34</sup> and (3) the Judicature (Appellate Jurisdiction) (Amendment) Act 2004, Act 19 of 2004.<sup>35</sup> Respectively, these acts were passed (1) to replace the Privy Council with the CCJ as the final court of appeal from decisions by the Jamaican Court of Appeal,<sup>36</sup> (2) to implement in Jamaica the CARICOM Agreement Establishing the Caribbean Court of Justice as amended by the Protocol to that Agreement Relating to the Juridical Personality and Legal Capacity of the Court,<sup>37</sup> and (3) to substitute the Deputy of Public Prosecutions’ right of appeal to the Privy Council in criminal cases with the right of appeal to the CCJ.<sup>38</sup>

The Privy Council held that the first two acts described above effectively amended entrenched provisions of the Jamaican Constitution.<sup>39</sup> As such, the acts could not take effect by a mere majority of the parliament, but required a two-thirds vote as required by the Jamaican Constitution.<sup>40</sup> In addition, the passage of amendment to an entrenched provision requires a six-month lapse between the bill’s introduction into and passage by Parlia-

29. Anthony, *supra* note 22, at 20.

30. *Id.* at 23.

31. [2005] U.K.P.C. 3, available at <http://www.privacy-council.org.uk/files/other/independent%20jamaica.jud.rtf>.

32. *Id.* ¶ 24.

33. *Id.* ¶ 5.

34. *Id.* ¶ 6.

35. *Id.* ¶ 8.

36. *Marshall-Burnett*, [2005] U.K.P.C. 3, ¶ 5.

37. *Id.* ¶ 6.

38. *Id.* ¶ 8.

39. *Id.* ¶ 21.

40. *Id.* ¶ 10.

ment.<sup>41</sup> Finally, amendment of an entrenched provision requires approval by the majority of the Jamaican electorate.<sup>42</sup> Although the third act did not amend an entrenched provision and could be affected by a majority vote in the Parliament, that constitutional amendment was voided as well.<sup>43</sup> The reason for its voiding was that this legislation was inextricably linked to the first two acts and, therefore, could not accomplish its intended effect if severed from the two voided acts.<sup>44</sup> As such, the Privy Council held that all three acts were void due to unconstitutionality.<sup>45</sup>

With the delivery of this inopportune judgment by the Privy Council, the Caribbean Court of Justice has a more difficult future. More notably, the implications of this opinion once again shine a glaring light on the jarring effect of some Privy Council pronouncements. In essence, this case encapsulates the jurisprudential tension at the heart of the efforts to establish the Caribbean Court of Justice. As noted by Dr. Antoine in her paper, there remains a question of the impartiality of the Privy Council.<sup>46</sup> This issue of impartiality takes center stage in this most recent case even though the Privy Council expressly stated that “it must be understood that the Board [of the Privy Council], sitting as the final court of appeal of Jamaica, has no interest of its own in the outcome of this appeal. The Board exists in this capacity to serve the interests of the people of Jamaica.”<sup>47</sup>

Accordingly, despite the inexorably long historical march to the establishment of the CCJ, as outlined by Dr. Antoine and Justice Simmons, the Commonwealth Caribbean must continue its struggle at the doorstep of full regional judicial autonomy.<sup>48</sup> Correspondingly, judicial colonialism, though slated for death by the agreement to establish the CCJ, cannot yet be dealt its death knell because its execution has been temporarily stayed due to the intervention of the Privy Council. It is doubtful that this irony will be overlooked by proponents of the CCJ.

In the aftermath of the JCPC pronouncement, the process to establish the CCJ may falter somewhat, but will unquestionably continue. Edwin W. Carrington, the Secretary General of CARICOM, has stated that “[t]here is as yet no indication that the Privy Council’s ruling on Jamaica’s legislation introducing the Caribbean Court of Justice (CCJ) would delay the establish-

41. *Marshall-Burnett*, [2005] U.K.P.C. 3, ¶ 10.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at ¶¶ 22, 24.

46. Antoine, *supra* note 7, at 149.

47. *Marshall-Burnett*, [2005] U.K.P.C. 3, ¶4.

48. See Antoine, *supra* note 7; Simmons, *supra* note 15.



ment of the Court by CARICOM Governments.”<sup>49</sup> In addition, P.J. Patterson, Prime Minister of Jamaica, issued in part the following statement in reaction to the JCPC decision: “[t]he Jamaican Government remains committed to the establishment of the CCJ as our final appellate court. It intends to take the necessary steps, arising from this decision to honour our commitments to the Jamaican people and our partners in the region.”<sup>50</sup>

As this process to establish the CCJ continues to evolve and face new challenges, there will be a recurring need for academic forums to explore and discuss these salient topics both within and without the Caribbean region. Thus, although this Goodwin Seminar series at NSU Law Center undertook to contribute to the discussion of the evolving legal norms and institutions in the Caribbean, clearly the dialogue will expand to explore new possibilities, processes, and understandings.

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As always, the success of any undertaking like the Goodwin Seminar involves the collaboration and cooperation of a number of dedicated individuals. First, I would like to thank Dean Joseph Harbaugh and Associate Dean Bill Adams for entrusting me with this important responsibility. Next, I would like to give my profound thanks to Linda Lahey, Michelle Hurley, and Deborah Brown who were all invaluable in organizing and coordinating the seminar events. I would also express my deep appreciation to Paula Habib, Eleanore Jones, Richard Corbyons, and Jessica Chacon for their considerable help in carrying the administrative load created by the series. I would also like to thank Rhonda Gold for her wonderful support and creation of the Goodwin display in the Law Library. Also from the Law Library, I give my thanks to its Director, Lisa Smith-Butler, and its Assistant Director, Roy Balleste, for their kind assistance. Finally, I thank Ray Andrade for providing fantastic audiovisual support.

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49. Press Release 32/2005, Caribbean Community Secretariate, CARICOM States Move to Establish CCJ on Schedule (Feb. 4, 2005) available at [http://www.caricom.org/pres32\\_05.htm](http://www.caricom.org/pres32_05.htm) (last visited Feb. 23, 2005).

50. Press Release, Jamaica Information Service, Statement by Prime Minister of Jamaica the Most Honourable P. J. Patterson, ON, PC, QC, MP on the Privy Council Decision in the Litigation Concerning the Caribbean Court of Justice (Feb. 3, 2005) available at <http://www.caricom.org/newsflash-ccjruling-ja.htm> (last visited Feb. 23, 2005).

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