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The Caribbean Court of Justice: A Unique Institution of Caribbean Creativity

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THE CARIBBEAN COURT OF JUSTICE: A UNIQUE INSTITUTION OF CARIBBEAN CREATIVITY

HONORABLE SIR DAVID SIMMONS*

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I. INTRODUCTION

For more than thirty years, a debate has engaged the attention of lawyers across the Commonwealth Caribbean. It concerned the appropriateness of the independent states of that sub-region continuing to seek final appellate justice, not from a Caribbean Court of last resort, but from the Judicial Committee of the Privy Council (JCPC) in England.

In the last decade of the twentieth century, observers of the contemporary scene in the sub-region will have noted that the phenomena of globalization, trade liberalization, and the emergence of new trading blocs, have all combined to pressurize the democracies of the sub-region to re-think, re-structure, and reposition their economic perspectives and arrangements. Change is inescapable if these democracies are to survive and be competitive and relevant in the new global environment.

From colonial times, the JCPC has been the final court of appeal for Commonwealth Caribbean States,¹ and its jurisdiction has continued notwithstanding those states' attainment of political independence during the period 1962 to 1980.² In the twentieth century the jurisdiction of the JCPC, as the final court of appeal for the countries of the Commonwealth, has narrowed to the point where it is now the court of last resort only for the majority of Commonwealth Caribbean States and five others, including Mauritius and Brunei.³

However, a change in the relationship with the JCPC is imminent. Similarly, a change in the economic and trading arrangements among Commonwealth Caribbean States is also imminent. The Treaty of Chaguaramas of 1973, which created a limited Common Market régime in the sub-region, has been substantially revised to provide for the free movement of capital,

1. Rhea P. Hamilton, *Alumni Research Guide: A Guide to Researching the Caribbean Court of Justice*, 27 BROOK. J. INT'L L. 531, 532 (2002) (citing HUGH RAWLINS, *THE CARIBBEAN COURT OF JUSTICE: THE HISTORY AND ANALYSIS OF THE DEBATE* 9 (2000), available at http://www.caricom.org/archives/ccj_rawlins.pdf; Roget V. Bryan, *Toward the Development of a Caribbean Jurisprudence: The Case for Establishing a Caribbean Court of Appeal*, 7 J. TRANSNAT'L L. & POL'Y 181, 183-84 (1998).

2. RAWLINS, *supra* note 1, at 5; Hamilton, *supra* note 1, at 531 (citing Bryan, *supra* note 1, at 183 n.8).

3. Bryan, *supra* note 1, at 185 (citing Honorable Mr. Justice M.A. de la Bastide, *The Case for a Caribbean Court of Appeal*, 5 CARIB. L. REV. 401, 402 (1995)).

goods, and services, and ultimately, the free movement of people across the borders of national states.⁴

A new legal architecture is being designed, and central to the new Commonwealth Caribbean of the twenty-first century will be the Caribbean Court of Justice (CCJ).

Sometime in the first quarter of 2005, the CCJ will be inaugurated in Port-of-Spain, Trinidad.⁵ Inauguration of the Court will finally demonstrate the self-confidence of the people of the Member States of Caribbean Community (CARICOM)⁶ that we are mature enough to manage and operate our highest judicial institution. In his recent book, *The Caribbean Court of Justice: Closing the Circle of Independence*, Duke Pollard⁷ captures the meaning, relevance, and importance of the appellate jurisdiction of the CCJ in the following words:

The establishment of the Caribbean Court of Justice in its appellate jurisdiction will not only sever the last remaining vestige of a colonial condition, but will signal the birth of autonomous judicial decision-making in Member States of the Caribbean Community and close the circle of independence which commenced as early as 1962. In a real sense, too, the establishment of the Court will mark the culmination of initiatives to create our own regional institutions to facilitate and promote the development of an indigenous jurisprudence reflective of the moral, political, social and economic imperatives of our Region and which commenced with the establishment of the Council of Legal Education in 1970.⁸

The CCJ is a unique adjudicatory body—*sui generis*—in the world. For in addition to it being a final appellate court for the States of the Common-

4. See Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy, July 5, 2001, <http://www.caricom.org/archives/revisedtreaty.pdf> [hereinafter Revised Treaty].

5. Press Release, CARICOM, Postponement of Inauguration of the Caribbean Court of Justice (CCJ) (Oct. 11, 2004), at http://www.caricom.org/pressreleases/pres157_04.htm [hereinafter CCJ Press Release]. The inauguration, previously set for November 6, 2004, has been deferred to a date in March, 2005. *Id.*

6. The states are: Antigua and Barbuda, Barbados, Belize, the Bahamas, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, and Suriname. Their membership is at different levels. For example, contrast Montserrat (a British overseas territory) to the Bahamas, which is not yet prepared to be fully integrated in the regional integration process.

7. Mr. Pollard is the Director of the Legislative Drafting Facility at the CARICOM Secretariat in Georgetown, Guyana.

8. DUKE E. POLLARD, *THE CARIBBEAN COURT OF JUSTICE: CLOSING THE CIRCLE OF INDEPENDENCE* 204 (2004) (emphasis added).

wealth Caribbean, the CCJ will have a central role to play in the adjudication of disputes arising under the CARICOM Single Market and Economy (CSME) due to come into effect also in 2005.⁹

In this paper, the historical development of the CCJ will be sketched to explain the context in which this new institution has evolved. It is a new Caribbean venture, and no innovation or change is easily explained in the absence of a sense of history and an appreciation of the factors or forces that influenced the new direction.

The reasons for and against the establishment of the Court are discussed next in order that readers may better understand the regional debate and the lofty motives which inspired the creation of the Court. The paper then seeks to justify the assertion that the CCJ is indeed a Court *sui generis* by highlighting some of the distinctive features of the Court, including its constitution and jurisdiction under the Revised Treaty of Chaguaramas, modalities of appointment of its judges and staff, and the creative solution devised to finance its operations. I then suggest that the decision to establish the CCJ is having a positive effect on national justice systems and briefly indicate how regional States may de-link from the JCPC. In the final section of the paper, I endeavour to provide a glimpse into the next steps to be taken prior to inauguration and the actual adjudication of cases.

II. HISTORICAL BACKGROUND: THE ORIGINS OF THE IDEA

It must be made very clear at the outset that the CCJ is *not* the product of some sudden or knee-jerk reaction to recent decisions of the Judicial Committee of the Privy Council (JCPC), our highest appellate court. Researchers have unearthed information which suggests that the idea of a final indigenous court for the Commonwealth Caribbean had its origins as long ago as 1901 in an editorial in the Daily Gleaner newspaper of Jamaica.¹⁰ Hugh Rawlins suggests that the idea was first mooted at a high level during a meeting of colonial governors in Barbados in 1947.¹¹

In 1962, Jamaica and Trinidad and Tobago gained their political independence from Britain.¹² Other countries in the region became independent in the 1960s,¹³ and those of the Organisation of Eastern Caribbean States

9. See Revised Treaty, *supra* note 4.

10. POLLARD, *supra* note 8, at 199.

11. RAWLINS, *supra* note 1, at 5.

12. Robert B. Lubic, *The Present Status of International Commercial Arbitration in the English Speaking Caribbean*, 63 REV. JUR. U.P.R. 117, 121 (1994).

13. *Id.* at 121 n.12. Barbados and Guyana both became independent in 1966. *Id.*

(OECS) became independent during the decades of the seventies and eighties.¹⁴

Political independence implied autonomy for Commonwealth Caribbean states in legislative and executive affairs. No longer would the legislative arm of government reside in Westminster; no longer would executive actions and policy-making be dictated from Whitehall. Upon independence, Commonwealth Caribbean countries assumed responsibility for the legislative and executive arms of government. However, final decision-making in judicial matters has continued to reside in Downing Street at the premises of the JCPC.¹⁵ Appeals from the Courts of Appeal of the several Commonwealth Caribbean countries still go to the JCPC, and, as indicated above, this circumstance has spawned the debate as to the appropriateness of those countries continuing appeals to the JCPC as independent nations.

Since 1970, when the Faculty of Law was established at the University of the West Indies (UWI), there have been principled calls for the repatriation of the final appellate court to the Commonwealth Caribbean. It is one of the paradoxes of the legal history of the Commonwealth Caribbean, for reasons which will appear later, that it was Jamaica which first sounded the bell for the establishment of a regional court of last resort.¹⁶ Two years later, in 1972, the Organisation of Commonwealth Caribbean Bar Associations (OCCBA) made a similar proposal.¹⁷ Having been closely associated since 1994 with the movement to establish an indigenous final appellate court, it is my opinion that the movement for such a court gained momentum after the inauguration of the Faculty of Law of the UWI. The Faculty inspired, promoted, and published a wealth of learning in support of a final court of appeal for the region. Many learned and carefully researched papers were written by the academic staff of the Faculty.¹⁸

14. *Id.* at 118 n.3, 121 n.12.

15. Hamilton, *supra* note 1, at 531 (citing RAWLINS, *supra* note 1, at 5; Bryan, *supra* note 1, at 183).

16. RAWLINS, *supra* note 1, at 5; Hamilton, *supra*, note 1, at 532 (citing Duke Pollard, *The Caribbean Court of Justice: What It Is, What It Does*, at <http://www.caricom.org/archives/ccj-q&a.htm> (Apr. 17, 2000)). The proposal that a regional court of last resort be established to replace the JCPC was made by the Jamaican delegation to the Heads of Government Meeting in 1970. *Id.*

17. Neil Dennis, Note, *Using One's Head to Sustain One's Heart: A New Focus for the Establishment of the Caribbean Court of Justice*, 26 *FORDHAM INT'L L.J.* 1778, 1807 n.140 (citing RAWLINS, *supra* note 1, at 56). Aubrey Fraser, a former Justice of Appeal of the Supreme Court of Trinidad and Tobago, produced a report for OCCBA, known as the "Fraser Report," in which he advocated the establishment of a Caribbean Court of Appeal to replace the JCPC. *See id.* at 1807 n.140.

18. *See, e.g.*, Dr. Francis Alexis, *The Case Against West Indian Appeals to the Privy Council (1975) Bulletin of East Caribbean Affairs*; Hugh Rawlins, *The Privy Council or a*

In the years after 1970, Commonwealth Caribbean countries began to review the Westminster-type constitutions imported from Britain upon independence. There was a need to examine and analyse the continuing relevance of these constitutions to the requirements of contemporary Caribbean societies. Various commissions were set up to review the independence constitutions in some territories. In Trinidad and Tobago, the Commission on Constitutional Reform, presided over by the great Trinidadian jurist, Sir Hugh Wooding, reported in 1974 and recommended discontinuance of appeals to the JCPC.¹⁹ In fact, every Constitution Commission appointed in any Commonwealth Caribbean country since 1974 has recommended severance of ties with the JCPC.²⁰

It was not, however, until 1988 that any firm *decision* was taken to establish a final appellate court in the region, although in 1987 the Trinidad and Tobago delegation to the Eighth Meeting of Heads of Government in St. Lucia proposed the establishment of a Caribbean Court of Appeal to replace the JCPC.²¹ Between 1970 and 1988 there was much talk, much writing, but no concrete action to transform the idea into a reality.

It all changed in 1988. The Heads of Government of the region met in Antigua and Barbuda.²² They made the decision to establish a court to replace the JCPC.²³ The very next year, at their meeting in Grenada, the Heads made another equally significant and far-reaching decision.²⁴ They established the West Indian Commission (the Ramphal Commission) under the

Caribbean Final Court of Appeal?, 6 CARIB. L. REV. 235 (1996); Jeff Cumberbatch, *Appeals to the Judicial Committee of the Privy Council – A Re-examination of the Issues* (1994); SIMEON C.R. MCINTOSH, CARIBBEAN CONSTITUTIONAL REFORM (2002).

19. RAWLINS, *supra* note 1, at 13, 20 n.10, 21 n.21.

20. Most recently, *The Report of the Constitution Review Commission of Barbados 1998*, which was chaired by former Attorney General of Barbados, Sir Henry Forde, K.A., Q.C. THE COMMUNICATIONS UNIT, CARIBBEAN COMMUNITY SECRETARIAT, ANNUAL REPORT OF THE SECRETARY-GENERAL OF THE CARIBBEAN COMMUNITY (CARICOM) 1998, at <http://www.caricom.org/archives/sgreport/rep98over.htm> (last visited Feb. 7, 2005).

21. Press Release, CARICOM, Communiqué of the Eighth Meeting of the Conference of Heads of Government of the Caribbean Community held at Castries, Saint Lucia from June 29-July 3, 1987, at <http://www.caricom.org/archives/communiqués-hgc/8hgc-1987-communique.htm> (last visited Dec. 20, 2004).

22. Press Release, CARICOM, Communiqué Issued at the Conclusion of the Ninth Meeting of the Conference of Heads of Government of the Caribbean Community held at Deep Bay, Antigua and Barbuda from July 4-8, 1988, at <http://www.caricom.org/archives/communiqués-hgc/9hgc-1988-communicé.htm> (last visited Jan. 17, 2005).

23. *Id.*

24. Press Release, CARICOM, Communiqué Issued at the Conclusion of the Tenth Meeting of the Conference of Heads of Government of the Caribbean Community held at Grand Anse, Grenada from July 3-7, 1989, at <http://www.caricom.org/archives/communiqués-hgc/10hgc-1989-communicé.htm> (last visited Jan. 17, 2005).

chairmanship of Sir Shridath Ramphal, a former Secretary-General of the Commonwealth, to consider and report on the way to deepen and widen the process of regional integration.²⁵ The time had come to revisit the Treaty of Chaguaramas (1973).

This Treaty had, as its principal objective, the economic integration of the thirteen States of the Commonwealth Caribbean by the establishment of a common market régime commencing the process of regional economic integration. But, in 1989, there was the realization that a common market was too limited an economic mechanism for deeper and wider integration. More had to be done to deepen and widen the regional integration process.

The Ramphal Commission set out to consult the views of Commonwealth Caribbean nationals all over the world.²⁶ They discussed the future structures for the region in London, North America, and across the Caribbean.²⁷ After the widest possible consultation, the Commission handed in its report, *Time for Action*, in May 1992.²⁸ The report made a very strong case for an indigenous final court and, most importantly, located the need for such a court in the process of regional integration itself.²⁹

The Report concluded: “[T]he case for the CARICOM Supreme Court, with both a general appellate jurisdiction and an original regional one, is now overwhelming—indeed it is fundamental to the process of integration itself.”³⁰

The Heads of Government took action to implement the recommendations of the Ramphal Commission.³¹ A two-pronged strategy was devised. In order to establish a single market and economy, the Treaty of Chaguaramas had to be revised.³² A Task Force³³ was therefore established to prepare the several protocols necessary to amend and revise the 1973 Treaty. So far as a final court was concerned, the Legal Affairs Committee of

25. *Id.*

26. TIME FOR ACTION: REPORT OF THE WEST INDIAN COMMISSION 11 (2d ed., The Press 1993) (1992) [hereinafter TIME FOR ACTION].

27. *Id.*

28. *Id.* at xxix.

29. *See id.* at 497–501.

30. *Id.* at 498.

31. Press Release, CARICOM, Communiqué of the Special Meeting of the Conference of Heads of Government of the Caribbean Community held at Port-of-Spain, Trinidad and Tobago from October 28 to 31, 1992, at <http://www.caricom.org/archives/communiqués-hgc/sphgc-oct1992-communiqué.htm> (last visited Jan. 17, 2005).

32. *Id.*

33. The Task Force was chaired by Ambassador Nigel Barrow, Barbados’ Ambassador to CARICOM.

CARICOM (LAC)³⁴ was instructed to draft the various instruments necessary to underpin the establishment of the Court and, at the same time, to refine the Protocols before commending them to the Heads for signature.³⁵

During my tenure as Attorney General of Barbados (1994-2001), I was directly involved in the finalisation of every Protocol and every instrument relating to the CCJ. It was a huge task.³⁶ The LAC began its work in earnest at a meeting in Barbados in December 1994. There was in existence an Inter-Governmental Agreement signed by Heads of Government in July 1990 which provided a rudimentary basis for action upon the decision of 1988.

In July 1999, the Heads appointed a Preparatory Committee (Prep. Comm.) to supervise the work leading to the inauguration of the Court³⁷ and later, they approved the creation of a full-time Coordinating Unit at the CARICOM Secretariat in Georgetown, dedicated to driving the necessary day-to-day work to facilitate the establishment of the Court.³⁸ I had the honour to chair the Prep. Comm. until my retirement from political office in August 2001. The drafting of eight instruments specific to the establishment of the Court was completed by the time of my retirement, and I had the satisfaction of commending the Agreement Establishing the Caribbean Court of Justice³⁹ to Heads of Government for signature on February 14, 2001 at a ceremony in Barbados. We were on the way to inauguration of the CCJ. The

34. The Committee comprises the Attorneys-General or Ministers who are responsible for legal affairs in CARICOM States.

35. See Press Release, CARICOM, Communiqué Issued at the Conclusion of the Second Meeting of the Legal Affairs Committee held at Nassau, The Bahamas from September 7-10, 1998 (Sept. 9, 1998), at http://www.caricom.org/pressreleases/pres73_98.htm.

36. Nine Protocols were developed by the Task Force, and were then examined and amended where necessary by the Legal Affairs Committee of CARICOM – prior to being sent for signature by the Heads of Government and State. The Protocols have since been reformulated and incorporated in the several chapters and articles of the “Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy,” signed by Heads of Government and State of the Caribbean Community on July 5, 2001. Revised Treaty, *supra* note 4.

37. Press Release, CARICOM, Communiqué Issued at the Conclusion of the Twentieth Meeting of the Conference of Heads of Government of the Caribbean Community held at Port-of-Spain, Trinidad and Tobago from July 4-7, 1999, at <http://www.caricom.org/archives/communiqués-hgc/20hgc-1999communique.htm> (last visited Jan. 17, 2005). The Prep. Comm. comprises the Attorneys-General of Barbados (Chair), Guyana, Jamaica, St. Kitts and Nevis, St. Lucia, and Trinidad and Tobago. *Id.*

38. Press Release, CARICOM, Communiqué Issued at the Meeting of Members of the Caricom Ministerial Sub-Committee for Resource Mobilisation for Crime and Security and a United Kingdom Senior Level Time on Security Cooperation held at Kingston, Jamaica on March 3, 2004 (Mar. 5, 2004), at http://www.caricom.org/pressreleases/pres28_04.htm.

39. Agreement Establishing the Caribbean Court of Justice, Feb. 14, 2001, <http://www.caricom.org/ccjagmnt.htm> [hereinafter CCJ Agreement].

CCJ was a few years away from realization. After thirty-one years of debate and discussion, an important milestone in Caribbean legal history had been reached. The completion of our independence was at hand.

III. THE COMPETING ARGUMENTS

During the many years of debate and discussion, some of them acrimonious, the competing arguments in support of and against the Court had crystallized. The Prep. Comm., as a deliberate strategy, determined to discuss the establishment of the Court with the regional public. We were conscious that the region had experimented with a political Federation of the West Indies for four years (from 1958-1962), and that experiment had failed. Failure was attributed to many reasons but it is generally agreed that a lack of understanding of the Federal idea among the mass of Caribbean people was one of the main reasons. The Prep. Comm. was determined that the CCJ should not founder because the people of the region did not support the Court or did not understand the reasons for its creation. Thus, members of the Prep. Comm. and the Coordinating Unit went across the region promoting and explaining the Court. It was during these interactive consultations with the people of the region that we were able to discuss the competing arguments for and against the Court and understand the legitimate concerns of the people.

A. *Arguments in Favour*

1. Access to Justice

The foremost reason for an indigenous final court is a conviction that such a court will increase access to justice. Especially in civil appeals, the sheer distance of the JCPC in London from the Caribbean has denied access to litigants. In addition, the costs associated with taking appeals beyond local Courts of Appeal are an inhibiting factor. It is true that, comparatively recently, there has been an increase in civil appeals to the JCPC, but these appeals have largely been pursued by litigants who can afford the costs. During my years in private practice in Barbados (from 1970-1994) few civil appeals went from Barbados to the JCPC. I appeared in the first civil appeal from Barbados in thirty years in *Elias v George Sahely & Co.*⁴⁰

On the other hand, access to justice in criminal appeals is relatively easy. There is a regular flow of appeals to the JCPC. The vast majority are appeals against convictions for murder or appeals raising constitutional

40. [1983] A.C. 646, 648 (P.C.).

points arising out of the imposition of the death penalty. Even though these criminal or constitutional appeals do not cost the appellants personally, there are substantial costs to be borne by the governments which fund these appeals since the appellants are invariably poor and make applications in forma pauperis.

To the extent that the CCJ will be an itinerant court taking justice to the people of the region, it will immeasurably increase access to justice. I pause here to mention that we are not short on experience of itinerant courts. During the federal experiment there was a Federal Supreme Court.⁴¹ It was headquartered in Trinidad,⁴² but it moved around the region. In contemporary times, the Eastern Caribbean Supreme Court has its Seat in St. Lucia but travels to all of the States of the OECS dispensing justice.⁴³

2. Development of a Caribbean Jurisprudence

There are two fundamental functions of a final appellate court: first, the correction of errors of lower courts, and, second, development of the common law. A rational reason for the establishment of the CCJ is rooted in a desire to promote the development of a Caribbean jurisprudence giving its own flavour to the common law. Over time, countries which severed relationships with the JCPC have contributed in quite unique ways to the growth and development of the common law. One thinks immediately of the High Court of Australia, the Supreme Court of Canada, the Supreme Court of India, and the Constitutional Court of South Africa.

It has been persuasively argued that retention of the JCPC has restricted the development of a Caribbean jurisprudence. In the words of the Ramphal Commission, "it must be to a local not an external, court that we must look for the sensitive and courageous development of our law"⁴⁴ in the post-independence phase of our development.

In 2002, the Honorable Michael de la Bastide, former Chief Justice of Trinidad and Tobago (and recently appointed first President of the CCJ)⁴⁵

41. See Sheldon A. McDonald, *The Caribbean Court of Justice: Enhancing the Law of International Organizations*, 27 *FORDHAM INT'L L.J.* 930, 1010 (2004).

42. See *id.*

43. See *id.* at 960 n.96, 1010.

44. TIME FOR ACTION, *supra* note 26, at 499.

45. The Honorable Michael de la Bastide was appointed by the Heads of Government at their meeting in Grenada in July, 2004. Press Release, CARICOM, Communiqué Issued at the Conclusion of the Twenty-Fifth Meeting of the Conference of Heads of Government of the Caribbean Community held at St. Georges, Grenada from July 4-7, 2004 (July 8, 2004), at <http://www.caricom.org/archives/communiqués-hgc/25hgc-2004-communicé.htm> [hereinafter Twenty-fifth Communiqué].

speaking extra-judicially, emphasised that: “It is very important that the judges who make the decisions which create our jurisprudence have a close and very intimate connection with our societies.”⁴⁶

Even more pointedly, Lord Hoffman, one of the serving Privy Council judges, seemed to lament the remoteness of the JCPC from the Caribbean societies for which they are the final appellate court when he addressed the Law Association of Trinidad and Tobago on October 10, 2003. His Lordship said:

It is an extraordinary fact that for nearly nine years I have been a member of the final court of appeal for the independent Republic of Trinidad and Tobago, a confident democracy with its own culture and national values, and this is the first time that I have set foot upon the islands. No one unaware of the historic links between the islands and the United Kingdom would believe it possible.⁴⁷

Lord Cooke of Thorndon, a New Zealander who sat in the JCPC for many years, wrote in similar vein in *The Commonwealth Lawyer* (April 2003) in support of New Zealand’s withdrawal from the JCPC, that: “Since 1987 I have been and remain converted to the view that the development of our legal system requires replacing the Privy Council. . . . Judges in the United Kingdom, however eminent and enlightened, can have only a superficial acquaintance with New Zealand conditions and problems.”⁴⁸

3. The Single Market and Economy

A third reason for the CCJ, as the Ramphal Commission observed, lies in the process of regional integration itself. The contemporary world order (or disorder) is generating more and more regional arrangements for economic cooperation and integration. Inevitably, disputes will arise between states in any regional economic grouping. Those disputes require resolution

46. Honorable Michael de la Bastide, Address at a Convocation on the CCJ, Kingston, Jam., (Apr. 9, 2002); Government of Jamaica, Ministry of Commerce, Science and Technology, News Stories, *St. Lucian Prime Minister and Trinidad and Tobago’s Chief Justice for CARICOM Single Market and Economy/Caribbean Court of Justice Convocation*, at http://www.mct.gov.jm/csme_forum.htm (last visited Jan. 28, 2005).

47. The Right Honorable Lord Leonard Hoffmann, Speech at the Annual Dinner of the Law Association of Trinidad and Tobago, at 5 (Oct. 10, 2003).

48. LORD COOKE OF THORNDON, NEW ZEALAND CENTRE FOR PUBLIC LAW, FINAL APPEAL COURTS: SOME COMPARISONS 17–18 (2001), at <http://www.law.vuw.ac.nz/vuw/fca/law/files/-occasionalpaper7.pdf>.

by an independent and impartial tribunal applying appropriate rules of international law or international trade law.

Under the Treaty of Chaguaramas there was no satisfactory dispute resolution mechanism.⁴⁹ The Heads of Government in Conference were the ultimate arbiters. The Revised Treaty of Chaguaramas of 2001, enacting a specific protocol for dispute settlement,⁵⁰ provides for judicial resolution of the disputes which will eventuate upon the coming into force of the Single Market and Economy in 2005. It would be difficult to conceive of a role for the JCPC once the Single Market and Economy becomes a reality in the Commonwealth Caribbean. I shall discuss the adjudicatory function of the CCJ in relation to its original jurisdiction under the Revised Treaty of Chaguaramas later. But for the moment, it is submitted that in the light of the decision to establish a Single Market and Economy, the CCJ is a necessary regional institution responding to the realities of regional integration and the prevailing global economic environment.

4. Sovereignty and Independence

Duke Pollard disagrees with my view that notions of sovereignty are sound reasons justifying the establishment of the CCJ.⁵¹ It is freely admitted that such notions may appear to be hoisted on a flag of emotionalism. But, having regard to our colonial past, considerations of sovereignty and independence (independence that is both legal and psychological) are, in my opinion, central to the self-respect, self-confidence, and self-definition of Commonwealth Caribbean people. I reiterate my view that if Commonwealth Caribbean countries can legitimately claim political independence, it must surely be the case that they are not truly and fully independent while their highest court sits outside the region, in London, and is staffed by judges from outside the region. Our statute laws are no longer made for us in the United Kingdom; our Cabinets, exercising executive authority, no longer receive dictates of policy from the United Kingdom. Why should our law continue to be interpreted and fashioned in Downing Street? The third arm of government, the judicial, requires repatriation. Continuation of appeals to the JCPC is an affront to sovereignty and inconsistent with independence.

One of our most distinguished jurists, the Right Honorable Telford Georges, who himself sat as a judge in the JCPC, wrote in 1998:

49. See Treaty Establishing the Caribbean Community, July 4, 1973, 12 I.L.M. 1033, http://www.jis.gov.jm/special_sections/CARICOMNew/CARICOMTreaty.pdf.

50. See Revised Treaty, *supra* note 4, art. 211.

51. See POLLARD, *supra* note 8, at 238.

It appears to me that an independent country should assume responsibility for providing a court of its own choosing for the final determination of legal disputes arising for decision in the country. It is a compromise of sovereignty to leave that decision to a court which is part of the former colonial hierarchy, a court in the appointment of whose members we have absolutely no say.⁵²

And Lord Cooke makes a similar point:

It is inconsistent with that nationhood to submit our legal issues to the adjudication of those, whoever they may be, who happen at any one time and in any particular case to comprise a majority of Judges of another country, appointed and sitting far off in that country and primarily versed in the laws of that country.”⁵³

B. *Arguments Against*

1. Quality of Judges

The arguments against the CCJ are essentially three. Some of the opponents of the CCJ speak of the quality of the judges of the JCPC almost in terms of infallibility. It is undeniable that the JCPC has been a regional court of the highest quality, comprising as it does, a majority of House of Lords judges. It is also undoubted that in the area of constitutional law, the JCPC has been a great protector of the fundamental rights and freedoms of Caribbean people. Lords Diplock and Wilberforce were extremely influential in shaping our constitutional law and jurisprudence.

For example, Lord Wilberforce advised in *Minister of Home Affairs v. Fisher*⁵⁴ that the interpretation of a Constitution should be large, liberal, and purposive eschewing as far as possible “the austerity of tabulated legalism.”⁵⁵ *Hinds v. R.*⁵⁶ established that the doctrine of the separation of powers is implicit in the Westminster model Constitutions of the Commonwealth Caribbean. In *Maharaj v. Attorney-General of Trinidad and Tobago*,⁵⁷ Lord Dip-

52. Right Honorable Telford Georges, Address to a Symposium on Caribbean Rights, Barbados, (Nov. 28, 1998); Attorney General, Honorable Godfrey Smith, *The Caribbean Court of Justice: An Overview of the Challenges & Prospects*, Aug. 28, 2001, at http://www.belize.gov.bz/features/Caribbean_court/challenges&prospects.html.

53. THORNDON, *supra* note 48, at 20.

54. [1980] A.C. 319 (P.C.).

55. *Id.* at 328. This celebrated phrase was coined by the late Professor Stanley de Smith, a British Constitutional lawyer.

56. (1975) 24 W.I.R. 326, 328 (P.C.).

57. (1978) 30 W.I.R. 310, 310–11 (P.C.).

lock created a public law remedy of damages for breach of fundamental rights caused by judicial error. *Thomas v. Attorney General of Trinidad and Tobago*⁵⁸ held that public servants were not dismissible at pleasure under the Constitution of Trinidad and Tobago. More recently, Lord Bridge ruled that where the Cabinet of Barbados was exercising a statutory power (the award of a contract), its decision was judicially reviewable.⁵⁹

However, to suggest that a kind of infallibility inheres in the judgments of the JCPC is a wide *proposition* not supported by recent evidence. In fact, our highest court has shown itself to be exceptionally fallible especially in developing the jurisprudence on the death penalty. One merely has to examine the long list of decisions in the death penalty cases between November 1993 and March 2004 to discover how often the JCPC judges have reversed themselves by the slenderest majorities (for example, three to two, or five to four) on the same point!⁶⁰ The judicial gymnastics of the JCPC in the death penalty cases prompted one of the very judges of the JCPC to warn his brethren in 2000 that “the rule of law itself will be damaged and there will be no stability in the administration of justice in the Caribbean,”⁶¹ if JCPC judges continue to give decisions on the basis of “a doctrinal disposition to come out differently. . . .”⁶² I go so far as to say that it is disconcerting that our highest court should be a source of instability in the administration of justice in the Commonwealth Caribbean. One of the functions of a final appellate court is to bring certainty to the law. But, it might be explicable on the ground that no Caribbean judge was ever invited to sit on the panels of judges when the JCPC was fashioning the death penalty jurisprudence in the period between November 1993 to December 2003.⁶³

58. [1982] A.C. 113, 126-7 (P.C.).

59. *C.O. Williams Constr. Ltd v. Blackman*, (1994) 45 W.I.R. 94, 100 (P.C.).

60. *See, e.g., Guerra v. State*, (1994) 45 W.I.R. 400 (P.C.); *Reckley v. Minister of Pub. Safety and Immigr.*, (1995) 47 W.I.R. 9 (P.C.); *Henfield v. A-G*, (1996) 49 W.I.R. 1 (P.C.); *Fisher v. Minister of Pub. Safety and Immigr.*, (1997) 52 W.I.R. 1 (P.C.); *Fisher v. Minister of Pub. Safety and Immigr.*, (1998) 53 W.I.R. 27 (P.C.); *Thomas v. Baptiste* (1999) 54 W.I.R. 387 (Trin. & Tobago C.A.); *Lewis v. Attorney Gen.*, (2000) 57 W.I.R. 275 (P.C.); *Roodall v. State*, (2003) 64 W.I.R. 270 (P.C.).

61. *Lewis*, 57 W.I.R. at 309 (Lord Hoffmann, dissenting).

62. *Id.*

63. A change of attitude came in December 2003. The JCPC was hearing an appeal from Barbados. *Boyce v. R*, (2004) 64 W.I.R. 37 (P.C.). During argument it appeared to the Bench of five judges that it might be necessary to overrule the decision they had given a few months before in the Trinidadian case, *Roodall*. *Boyce*, 64 W.I.R. at 42; *see also Roodall*, 64 W.I.R. at 287. An enlarged panel was convened in March 2004 to hear re-argument in *Boyce*, along with two other appeals from Jamaica and Trinidad and Tobago viz. *Watson v. The Queen*, (2004) 64 W.I.R. 241 (P.C.), and *Matthew v. State*, (2004) 64 W.I.R. 412 (P.C.) on whether the mandatory sentence of death was constitutional in Barbados, Trinidad and Tobago, and

However that may be, fairness and objectivity demand that the great contribution which the JCPC has made to the development of the common law in the Commonwealth Caribbean must be acknowledged.

2. Lack of Judicial Talent

It has been suggested by detractors of the CCJ that there is a lack of judicial talent in the Caribbean. I take issue with the suggestion. The Caribbean has long been an exporter of judicial talent to other countries of the Commonwealth and to international courts or tribunals.⁶⁴ More to the point, in July 2004, three Caribbean judges were appointed to the JCPC by the Prime Minister of Britain. They are Honorable Michael de la Bastide, Sir Dennis Byron, and Dame Joan Sawyer.⁶⁵ Those appointments clearly imply that it is recognised that there are persons in the Commonwealth Caribbean who possess the qualities to sit as equals with the judges of the JCPC. The argument of a lack of judicial talent fails in the face of these recent appointments. It is also an empty argument which ignores the contributions made by the University of the West Indies (U.W.I.) and the Council of Legal Education (CLE) to the graduation of our own, home-grown lawyers since 1973. A regionally trained lawyer, Justice Adrian Saunders, is today Acting Chief

Jamaica. *See also Boyce*, 64 W.I.R. at 37. When the panel was constituted, the Rt. Honorable Edward Zacca, a former President of the Court of Appeal of Jamaica, was added. *See Boyce*, 64 W.I.R. at 40; *Watson*, 64 W.I.R. at 214; *Matthew*, 64 W.I.R. at 412. Overruling *Roodall*, the JCPC, by a majority of five to four, held that the mandatory death sentence was constitutional in Barbados and Trinidad and Tobago, but not in Jamaica. *Boyce*, 64 W.I.R. at 60; *Watson*, 6 W.I.R. at 262; *Matthew*, 64 W.I.R. at 425.

64. Sir Hugh Wooding (Trinidad and Tobago), Sir William Douglas (Barbados), Rt. Honorable Telford Georges (Trinidad and Tobago), and Sir Vincent Floissac (St. Lucia) all sat as judges in the JCPC. Privy Council, *Privy Council Members*, available at <http://www.privycouncil.org.uk/output/Page76.asp> (last visited Feb. 7, 2005). Sir Dennis Byron (Chief Justice of the Eastern Caribbean Supreme Court) is currently presiding over the Rwandan tribunal regarding alleged genocide. Press Release, International Criminal Tribunal for Rwanda, Sir Charles Michael Dennis Byron Appointed as Permanent Judge of the ICTR (Apr. 20, 2004), at <http://www.icttr.org/ENGLISH/PRESSREL/2004/384.htm>. The Honorable Patrick Robinson of Jamaica is presiding over the Milosevic hearing. The Telegraph (UK), *Milosevic accused of presiding over era of 'medieval savagery'*, at <http://www.balkanpeace.org/hed/archive/feb02/hed4683.shtml> (last visited Feb. 7, 2005).

65. Dame Joan Sawyer is President of the Court of Appeal of The Bahamas. The Government of the Bahamas, *Supreme Court Justices*, available at <http://www.bahamas.gov.bs/BahamasWeb/aboutthegovernment.nsf/Subjects/Members+of+the+Judicial+System> (last visited Feb. 2, 2005).

Justice of the Eastern Caribbean Supreme Court.⁶⁶ Many graduates of the U.W.I. and C.L.E. hold high offices as Attorneys-General, Directors of Public Prosecutions, Solicitors-General, *inter dios*.

3. A Hanging Court?

Before concluding the discussion on the pros and cons of the CCJ, it is necessary to address a distorted argument and perception that has gained currency. It is the unworthy suggestion that the CCJ is being established as “a hanging court.” The argument has its genesis in the line of cases following the landmark decision in *Pratt v. Attorney General*.⁶⁷ Broadly, the effect of those cases has been to prevent the use of the death penalty in the region. Caribbean people and their governments became frustrated and angry that the reasoning of the judges of the JCPC in case after case went beyond acceptable judicial activism and was clearly judicial legislation in an issue of social policy. The parliaments of the region were not abolishing the death penalty; the judges of the JCPC were. “It is impermissible for [judges] to develop the law in a direction which is contrary to the expressed will of Parliament.”⁶⁸ “[C]ourts [should be] slow to develop the common law by entering . . . a field regulated by legislation.”⁶⁹

The spate of death penalty decisions came between 1993 and 2000, precisely at the time when serious work was going on in the region to make the CCJ a reality. There was therefore a coincidence, even a collision, of events that gave rise to the distorted argument. At the same time, as the proponents of the Court were promoting it throughout the region, dissatisfaction was being expressed with the decisions of the JCPC. It is not hard to see how the debate got derailed. The JCPC judges were accused of using Eurocentric attitudes and values to seek to abolish the death penalty in the region contrary to the wishes of the people of the region and usurping the powers of national parliaments as the only constitutional authorities to repeal statute laws. Abolition of the death penalty in the region must be the function of the parliaments in the region. As Chief Justice de la Bastide remarked in 2002:

66. Eastern Caribbean Supreme Court, *Honorable Justices of the Eastern Caribbean Supreme Court, Honorable Adrian Saunders, Biography*, <http://www.ecsupremecourts.org.lc/index.htm> (last visited Jan. 28, 2005).

67. (1993) 43 W.I.R. 340 (P.C.).

68. *Re McKerr*, [2004] 2 All E.R. 409, 425 (H.L.) (quoting *R. v. Chief Constable of the Royal Ulster Constabulary*, [1997] 4 All E.R. 833, 838 (H.L.)).

69. *McKerr*, [2004] 2 All E.R. at 419.

“We are firmly of the view that if the death penalty is no longer to be mandatory in Trinidad and Tobago, this change must be effected by Parliament.”⁷⁰

That view of the Court of Appeal of Trinidad and Tobago has been endorsed in the recent decisions of *Boyce* and *Matthew* by the majority in the JCPC.⁷¹

I am bound to say that the suggestion that the Court is being established for the collateral purpose of accelerating hangings in the region distorts reality and flies in the face of history. I have demonstrated above that the idea for such a Court (raised in both 1901 and 1947) predated *Pratt*, which took place in November 1993, and so did the *decision* of Heads of Government in 1989 to replace the JCPC with an indigenous Court. The *raison d’être* of the CCJ is *not* to accelerate hangings. Gossip to the contrary is all the more frivolous when it is remembered that no judges were appointed to the CCJ when the gossip was at its height. In truth, the gossip is an attack on the integrity and impartiality of the body charged with responsibility for appointing the judges and it implies that the judges, will be appointed on the basis of their personal views on the death penalty. Nothing could be further from the truth.

On balance, the arguments in favour of the CCJ far outweighed those against it and convinced the Heads to pursue their determination to establish the CCJ. They recognised that the Court is indispensable for the good governance of the region and has a critical role to play in the efficient administration of justice in Member States of CARICOM.

Our current judicial hosts, the JCPC, will not be sad to see us leave. Over the years the Commonwealth jurisdiction of the CCJ has steadily contracted. Canada, Australia, the states of East and West Africa, India, Pakistan, Singapore, inter alia, have all de-linked from the JCPC.⁷² Most recently, in October 2003, New Zealand enacted legislation to sever its relationship with the JCPC.⁷³

A feature of the termination of these relationships has been the resistance of the private bars to the rupture. The Government of New Zealand met stern opposition in its efforts to end the relationship with the JCPC.⁷⁴ We faced it in the Caribbean. The Bars of Jamaica, Trinidad and Tobago and, to a lesser extent, the OECS, have resisted the establishment of the CCJ.

70. *Roodall v. State* (Criminal Appeal No.64 of 1999) p. 21 (C.A. Trinidad & Tobago).

71. See generally *Boyce*, [2004] U.K.P.C at 32; *Matthew*, [2004] U.K.P.C. at 33.

72. TOM BINGHAM, *THE BUSINESS OF JUDGING: SELECTED ESSAYS AND SPEECHES* 387 (2002).

73. See *New Zealand Gets Own Justice System After 160 Years*, PAC. NEWS AGENCY SERVICE, July 1, 2004, 2004 WL 56683169.

74. BINGHAM, *supra* note 72, at 388.

The strident, almost virulent, opposition to the CCJ in Jamaica is, as I indicated above, paradoxical when it is remembered that as long ago as 1970, it was Jamaica which proposed to the regional Heads of Government that the region replace the JCPC with its own indigenous court of last resort.⁷⁵

However that may be, the concerns of the Bars were taken into account by the Prep. Comm. and helped to improve the text of the CCJ Agreement. In common with sections of the general Caribbean public, those concerns were focused on securing the independence of the Court in regard to the appointment of judges and the financing of the Court.

IV. THE UNIQUENESS OF THE CCJ

We shall now examine some of the distinctive features of this Court confident in the assertion that it is a court *sui generis*. The CCJ has two jurisdictions. It is a municipal court which will hear appeals in civil and criminal cases in the same way as the JCPC now hears appeals from Commonwealth Caribbean States. At the same time, regional governments accepted the recommendations of the Ramphal Commission: that the CCJ should have original jurisdiction, that is to say, jurisdiction to hear and determine disputes arising under the Revised Treaty of Chaguaramas governing arrangements for the CSME. To that extent, the CCJ is also an international court.

A. *Compulsory and Exclusive Original Jurisdiction*

The Ramphal Commission envisaged a central role for the CCJ in a deeper and wider regional integration process, and Article 211 of the Revised Treaty of Chaguaramas gives the Court compulsory and exclusive jurisdiction in the settlement of disputes concerning the interpretation and application of that Treaty.⁷⁶ No other courts in the region have competence to hear and determine disputes involving the interpretation and application of the Revised Treaty.⁷⁷ Indeed, if an issue as to the interpretation and application of the Revised Treaty arises before a national court, that court must stay the proceedings and refer the issue to the CCJ for its determination.⁷⁸

In the context of its role as a judicial institution in a regional integration movement, the CCJ will apply rules of international law, but it may also em-

75. RAWLINS, *supra* note 1, at 5.

76. Revised Treaty, *supra* note 4, art. 211.

77. *See id.*

78. CCJ Agreement, *supra* note 39, art. XIV.

ploy other principles of law or equity where necessary.⁷⁹ In this regard, the jurisdiction of the CCJ differs from that of other regional courts such as the European Court of Justice, which must apply Community Law (the norms peculiar to the European Union).⁸⁰ The CCJ is not a supra-national institution. The States of the Caribbean which have signed the Revised Treaty and submit to the original jurisdiction of the Court are all sovereign, independent states. They have not ceded any of the attributes of sovereignty to any supra-national entity as, for example, is the case with the European Union.

So far as original jurisdiction is concerned, Article XII of the CCJ Agreement, as well as Article 211 of the Revised Treaty, provides that the CCJ will

have *compulsory and exclusive jurisdiction* to hear and determine disputes concerning the application and interpretation of the Revised Treaty including:

- (a) disputes between Member States parties to the Agreement;
- (b) disputes between Member States parties to the Agreement and the Community;
- (c) referrals from national courts of the Member States parties to the Agreement;
- (d) applications by persons in accordance with Article 222, concerning the interpretation and application of this Treaty.⁸¹

The circumstances in which such persons, or nationals, may have standing before the Court are where:

- (a) the Court has determined in any particular case that the Treaty intended that a right conferred by or under the Treaty on a Contracting Party shall enure to the benefit of such persons directly; and
- (b) the persons concerned have established that such persons have been prejudiced in the enjoyment of the benefit mentioned under (a) . . . ; and
- (c) the Contracting Party entitled to espouse the claim in proceedings before the Court has:

79. Revised Treaty, *supra* note 4, art. 217.

80. E.g., Jürgen Schwarze, *Judicial Review in EC Law—Some Reflections on the Origins and the Actual Legal Situation*, 51 INT'L & COMP. L.Q. 17, 28 (2002).

81. *Id.* art. 211. Article XII of the CCJ Agreement is very similar to Article 211 of the Revised Treaty, and its subsection (d) refers to applications by nationals who, with special leave, are given locus standi to appear in three specific cases under Article XXIV of CCJ Agreement. CCJ Agreement, *supra* note 39, art. XII.

- (i) omitted or declined to espouse the claim, or
- (ii) expressly agreed that the persons concerned may espouse the claim instead of the Contracting Party so entitled; and
- (d) the Court has found that the interests of justice requires that the persons be allowed to espouse the claim.⁸²

B. *Non Liquet*

Closer examination of the original jurisdiction of the Court highlights in a stark way some of the other distinctive characteristics of the Court apart from its dual jurisdictions. First is the principle of non liquet. Article XVII, subsection two of the CCJ Agreement prohibits the Court from refusing to determine a matter on the grounds of “silence or obscurity of the law.”⁸³ Whereas in civil law systems, a court might decline to give a decision if there were particular difficulties in reaching a decision and leave the issue for future determination, both the CCJ Agreement and the Revised Treaty require decisiveness of the CCJ.⁸⁴ Although the non liquet provision has been criticised by H.R. Lim A. Po,⁸⁵ it is justified on grounds of certainty and predictability in the interpretation and application of the Revised Treaty. It would not be appropriate for national courts to seek to resolve disputes arising under the Revised Treaty. Clearly it would be preferable to have a separate court, independent of individual states, adjudicate issues under the Revised Treaty. Such an arrangement would better promote certainty, predictability, and impartiality, hence the role of the CCJ.

C. *Stare Decisis*

A third unique feature of the original jurisdiction is seen in the incorporation of the doctrine of stare decisis in that jurisdiction.⁸⁶ It is true that, traditionally, this doctrine has had no application in international law or civil law jurisdictions and is absent from the Articles of the European Court of Justice.⁸⁷ The doctrine of binding precedent is a common law phenomenon

82. *Id.* art. XXIV.

83. *Id.* art. XVII(2).

84. CCJ Agreement, *supra* note 39, art. XVII; Revised Treaty, *supra* note 4, art. 217.

85. H.R. Lim A. Po, Bridging the Divide, An Address to a Symposium on the CCJ in Suriname (October 31, 2003).

86. CCJ Agreement, *supra* note 39, art. XXII. “Judgments of the Court shall be legally binding precedents for parties before the Court unless such judgments have been revised in accordance with Article XX.” *Id.*

87. See Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3.

facilitating certainty in the law as far as practicable. And, although the framers of the CCJ Agreement and the Revised Treaty were conscious of the membership of Haiti and Suriname (two civil law jurisdictions) in the Caribbean Community, and although it was appreciated that courts in civil law jurisdictions may depart from previous decisions, the drafters nevertheless were persuaded to write the doctrine into the documentation.

The justification for the decision to include Article XXII lies in a recognition of a movement in the European Court of Justice and other courts to promote greater certainty in the law by an adherence to previous decisions. Inconsistency in judicial decisions promotes uncertainty and injustice.

D. *Locus Standi for Private Entities*

A fourth distinctive feature of the original jurisdiction can be seen in Article XII. This Article introduces an important exception to the general principle that in traditional international law only States and States' entities are subjects of international law and competent to espouse claims in an international form.⁸⁸

The Legal Affairs Committee in 1998 accepted a recommendation to include in the CCJ Agreement a procedure to provide an opportunity for *non-States parties* to appear before the CCJ in special circumstances. There is no automatic right for a private entity to move the Court, but access may be accorded either through the State of the national or via Article 214 of the Revised Treaty.⁸⁹

The Revised Treaty is intended to be a rules-based mechanism widening and deepening the integration of the Caribbean region. But, at its centre, it is intended to benefit *the people* of the region. It is right, therefore, that the régime for the settlement of disputes should provide a mechanism by which the people of the region, natural and corporate, should be able to invoke the Court's jurisdiction in appropriate cases.

E. *Constitution of the Court*

Turning to the constitution of the Court, the Agreement makes provision for the Court to be staffed by nine judges and a President.⁹⁰ The Judges, other than the President, will be appointed or removed by a majority vote of all of the members of the Regional Judicial and Legal Services Commission

88. See CCJ Agreement, *supra* note 39, art. XII; Statute of the International Court of Justice, 1945 I.C.J. Acts & Docs. art. 34(1).

89. Revised Treaty, *supra* note 4, art. 214.

90. CCJ Agreement, *supra* note 39, art. IV(1).

(RJLSC).⁹¹ In the case of the President, however, he or she is appointed by a vote of three-fourths of the Heads of Government on the recommendation of the RJLSC.⁹² This formula owed much of its final form to the comments of the Jamaica Bar Council and the concerns of the regional public. They were all determined that, as far as practicable, judicial appointments should be insulated from the possibility of political influence. Some of the detractors of the Court preferred that *all* of the judges should be appointed by the RJLSC, but the Prep. Comm. was not persuaded and saw no compelling reason to deny the Heads of Government the privilege of a final say in the appointment of the President. Those detractors ignored the glaring facts that the judges of the JCPC, our highest court, are appointed upon the recommendation of the British Prime Minister, and that Chief Justices of the region are appointed by the Head of State acting on the recommendation of a Prime Minister after consultation with the Leader of the Opposition.

F. *The Judges*

Any Caribbean or Commonwealth judge with five or more years of service or judges from civil law jurisdictions are eligible for appointment as judges of the CCJ.⁹³ In addition, a practitioner or teacher of law with fifteen years of experience in any part of the Caribbean, the Commonwealth, or a civil law jurisdiction, may be eligible for appointment.⁹⁴

The Agreement has deliberately cast a wide net for the judges of the Court in order to capture the best available talent in common law and civil law jurisdictions and to invest the Court with the kind of diversity that a final Court deserves. Specific provision is made in the Agreement for at least three judges of the Court to have expertise in international law and/or international trade law.⁹⁵ It is my opinion that extending eligibility for judicial appointment to academic lawyers is a highly progressive and desirable innovation.

Again, the provisions for appointment of the judges are so crafted as to highlight the uniqueness of the Court. As Duke Pollard observes: "The CCJ is the only international institution of its kind in the world where judges will not be appointed, directly or indirectly, by the political directorate of the

91. *Id.* art. V(3)(1)(a).

92. *See id.* art. IV(2), VI(1).

93. *Id.* art. IV(10)(a).

94. *Id.* art. IV(10)(b).

95. CCJ Agreement, *supra* note 39, art. IV(1).

States participating in the regime. Cases in point are the International Court of Justice (ICJ), the European Court of Justice (ECJ).⁹⁶

In early 2004, when advertisements ran worldwide for judges of the Court, the RJLSC received ninety applications from all over the world. At their meeting in Grenada during July 4-7, 2004, the Heads of Government unanimously accepted the recommendation of the RJLSC that the Honorable Michael de la Bastide, T.C., Q.C., a former Chief Justice of Trinidad and Tobago, be appointed as the first President of the CCJ.⁹⁷ The RJLSC met on the 27th and 28th of September, 2004 and selected a further five judges for appointment.

In my opinion, the Agreement establishing the CCJ makes adequate provision for ensuring the judges' security of tenure. For example, the President can serve for a period of seven years (non-renewable) or until the age of seventy-two.⁹⁸ The other judges must retire at age seventy-two, and there is no power to extend a judge's term of office.⁹⁹ This is an important provision aimed at reducing the possibility of a judge submitting to improper influence. Similarly, the office of a judge cannot be abolished while there is a substantive holder of it.¹⁰⁰ The salaries and allowances payable to the judges, as well as their other terms and conditions of service, cannot be altered to their disadvantage during their tenure of office.¹⁰¹ And removal from office is not an easy process. A judge may only be removed from office if he or she is unable to perform the functions of office by reason of ill-health or mis-behaviour.¹⁰² I will not set out in this paper the detailed procedure for removal of a judge from office. Suffice it to say that there is an elaborate procedure which makes ample provision for securing a fair hearing and involves the appointment of a special tribunal to hear and determine a proposal for removal.¹⁰³

So far as the emoluments and perquisites of judicial office are concerned, salaries and allowances are free of tax, and judges will be entitled to

96. POLLARD, *supra* note 8, at 38.

97. See Twenty-fifth Communiqué, *supra* note 45. *The Honorable Michael de la Bastide* was sworn in as President on August 18, 2004 at a ceremony in Port-of-Spain. Caribbean Net News, *Chief of New Caribbean Court Sworn In* (Aug. 19, 2004), at <http://www.caribbean.netnews.com/2004/08/19/ccj.htm>.

98. CCJ Agreement, *supra* note 39, art. IX(2).

99. See *id.* art. IX(3).

100. *Id.* art. IX(1).

101. *Id.* art. XXVIII(3).

102. *Id.* art. IX(4).

103. See generally CCJ Agreement, *supra* note 39, art. IX(4), (6) (outlining the reasons and procedure for removing a judge from office).

housing allowances, cars, drivers, and other benefits.¹⁰⁴ Superannuation benefits are as follows:

(a) less than 5 years' service – a gratuity of 20 per cent of the Judge's pensionable emoluments at the time of retirement for every year of service;

(b) 5 to 10 years' service – a monthly pension equivalent to two-thirds of the Judge's monthly pensionable emoluments at the time of retirement.

(c) more than 10 years' service – a monthly pension equivalent to the Judge's monthly pensionable emoluments at the time of retirement.¹⁰⁵

G. *Mode of Appointment of Judges and Staff: The RJLSC*

More and more throughout the Commonwealth, it is accepted that appointments to judicial office should be made by an independent, impartial, autonomous body. In the constitutions of the Commonwealth Caribbean States, a Judicial and Legal Service Commission is a common feature of such a body. In the case of the CCJ, a deliberate attempt was made to ensure that the appointments of judges were made by such a body. Thus, the Agreement has adopted the constitutional mechanism of appointment (and removal) of the judges of the CCJ by the RJLSC.¹⁰⁶

The RJLSC is an independent body comprised of persons nominated or chosen by institutions or persons with no political affiliation.¹⁰⁷ It consists of the President of the Court as Chairman and ten other persons drawn from the Caribbean region and includes: the Chairman of a Judicial and Legal Services Commission of a Contracting Party, the Chairman of a Public Service Commission of a Contracting Party, two persons from civil society appointed by the Secretary-General of the Caribbean Community (CARICOM), two persons nominated by OCCBA and the Bar Association of the OECS, two distinguished regional jurists, and two nominees of the Bar Associations of Contracting Parties.¹⁰⁸ The independence of the Commission is reinforced by a Protocol conferring various privileges and immunities on it, and its independence is specifically incorporated in the Agreement: "In the exercise of their functions under this Agreement, the members of the Commission shall

104. *Id.* at App. II.

105. *Id.*

106. *Id.* art. V(3), IX(5)(2).

107. *See id.* art. V(1).

108. CCJ Agreement, *supra* note 39, art. V(1).

neither seek nor receive instructions from any body or person external to the Commission.”¹⁰⁹

The RJLSC assumed office on August 20, 2003. Among its responsibilities is the appointment of the Judges, officials, and staff of the Court.¹¹⁰ The President took up office on August 18, 2004, but prior to his appointment, the Commission met every month after August 20, 2003 to prepare and put into place a wide range of necessary administrative and infrastructural arrangements. These included, inter alia, the establishment of budgets for library materials and technological support systems, preparation of a code of judicial conduct, identification of human resource requirements, and advertising for judges and staff of the Court. The Commission has worked hard and well.

H. *Headquarters*

The Seat of the Court will be in Trinidad and Tobago, but, as mentioned earlier, the Court will be itinerant.¹¹¹ The Government of Trinidad and Tobago is providing a building in Port-of-Spain to house the Court, and the offices of the RJLSC are also presently located in Port-of-Spain.

V. FINANCING THE COURT: AN EXAMPLE OF UNIQUE CREATIVITY

Now to the very important matter of financing the Court. As indicated earlier, the people of the region were concerned that the financing of the operations of the Court should be put on a secure and sustainable basis. This concern was born of the experiences of many of our regional institutions which have, from time to time, suffered from fiscal disequilibrium owing to the delinquency of some governments in paying their contributions in a timely manner. Caribbean peoples were determined that the CCJ should not be subjected to fiscal uncertainty or embarrassment. To meet these concerns, the Prep. Comm. designed a mechanism to secure the efficiency, effectiveness, financial independence, and viability of the Court,¹¹² and the Heads of Government courageously accepted the arrangement proposed. It called for

109. *Id.* art. V(12).

110. *Id.* art. V(3)(1).

111. *Id.* art. III(3).

112. On the evening before a meeting of the Legal Affairs Committee of CARICOM in Jamaica (June 18, 2000), Duke Pollard discussed with me the creation of a trust fund to provide financial independence for the Court. We agreed it was an idea worth canvassing with the Prep. Comm. Upon sharing the idea with the Prep. Comm., it agreed to develop the broad idea in more concrete terms.

their willingness to enter into substantial borrowing to invest the Court with sustainable financing and enhance its independence. A truly unique mechanism was designed to secure the financing of the Court.

VI. THE TRUST FUND

The mechanism ultimately agreed upon by regional governments was the creation of a trust fund.¹¹³ Broadly, the arrangement is as follows: It was estimated that 100 million U.S. dollars would be required to sustain the operations of the Court in perpetuity. Heads of Government agreed that the Caribbean Development Bank (CDB) should raise this amount on their behalf on the international capital markets.¹¹⁴ Each Government undertook to borrow a part of the sum raised and to be liable to repay the CDB the part borrowed of the 100 million U.S. dollars according to an established formula in CARICOM on the basis of a long term loan. In the meantime, the sum raised will be transferred to trustees who will use it to constitute the corpus of the Trust Fund and the trustees will then invest the corpus in securities to yield income.¹¹⁵ This income will thereafter be used to finance the recurrent and capital expenditure of the Court and the Commission. The trustees are expected to administer the Trust Fund, keeping in mind considerations of economy, efficiency, cost-effectiveness, and the need to safeguard the independence and sustainability of the Court.

The trustees are a group of highly respected, prominent, Caribbean persons with a wealth of expertise and experience in a variety of disciplines. None has any known or obvious connection with the political directorates of the region. The trust fund arrangement has been well received in the region and applauded outside of the region. I believe that this novel creation has substantially buttressed the independence of the CCJ.

Both the mechanism for the appointment of the judges, and the mechanism for financing the Court, have indeed been testaments to the creativity of Caribbean people and offer excellent paradigms for securing judicial independence. New norms for ensuring judicial independence have been established by small countries.

113. See generally Press Release, CARICOM, Caribbean Court of Justice Trust Fund Agreement Enters into Force – Court Arrangements Advance (Feb. 11, 2004), at http://www.caricom.org/pressreleases/pres17_04.htm.

114. *Id.*

115. *Id.*

VII. THE INFLUENCE OF THE CCJ ON NATIONAL DEVELOPMENT

The influence of the CCJ is being felt throughout the region. National justice systems are going through a process of modernisation to improve the delivery of justice as a contributor to national development generally. Many of the economies of the region are service-oriented and it is vital that national justice systems be modernised to assist in the facilitation of the delivery of services.

Justice and development are inextricably linked. Since the middle of the 1990s, international financial institutions such as the World Bank, the International Monetary Fund, and the Inter-American Development Bank, have accepted that thesis. In fact, those three institutions came together with the regional judiciary and the Attorney Generals in December 1999 in Jamaica to examine that link more closely. Broadly, it is acknowledged that the justice sector contributes as much as twenty-five per cent to the gross domestic product of Caribbean countries.

However, the justice sector of the Caribbean region has traditionally been under-provisioned. Justice infra-structure has lagged behind other sectors of the economies of the countries of the region. That inferior status of the justice sector prompted many opponents of the CCJ to call for a deferral in the establishment of the Court until local courts and the justice sector as a whole were brought up to respectable standards, according to the notional standards of the opponents. Quite simply, it was argued that the money being spent to set up the CCJ would be better spent improving the national justice sectors across the region while hanging on to the coat tails of the judges of the JCPC interminably. It was not an argument that commended the Prep. Comm. to abandon establishment of the CCJ, but it was a catalyst to spur action at the national level to improve the national justice systems.

Since 1999, therefore, all of the Commonwealth Caribbean countries have devised strategies and programmes for the modernisation of their justice systems with assistance from external sources. The OECS has made spectacular progress; Barbados is currently implementing a Justice Improvement Project with a loan of 12.5 million U.S. dollars from the Inter-American Development Bank.¹¹⁶ Jamaica is undergoing modernization, as well as Trinidad and Tobago. Rules of Civil Procedure are being harmonized across all countries of the Commonwealth Caribbean,¹¹⁷ and the pace of judicial education and training has been markedly accelerated.

116. Inter-American Development Bank, *Administration of Justice Program*, available at <http://www.iabd.org/exr/doc98/apr/ba1332e.pdf> (last visited Feb. 2, 2005).

117. See, e.g., GILBERT KODILINYE & VANESSA KODILINYE, COMMONWEALTH CARIBBEAN CIVIL PROCEDURE (1999).

It is unquestionable that the movement to establish the CCJ has inspired these several reforms. It is equally undoubted that the international financial institutions have seen the improvements in the justice sector as essential attributes for attracting investment necessary for sustainable economic development and are demonstrating a willingness to assist in tangible ways.

VIII. DE-LINKING FROM THE JCPC

In the Commonwealth, some countries have gone the route of creating a Supreme Court to replace the JCPC.¹¹⁸ Canada, Ghana, and Singapore are three examples. New Zealand also proposed a similar court when it decided to withdraw from the jurisdiction of the JCPC in October 2003.¹¹⁹ Australia, of course, created the High Court of Australia as its final court in 1986. For Commonwealth Caribbean States, the CCJ will be similar to the Supreme Courts mentioned or the High Court of Australia.¹²⁰ There is no difficulty in conceptualization. But there are practical difficulties in seeking to de-link the appellate jurisdiction from the JCPC because of Constitutional differences among the Member States. Some states, for example, Jamaica and Barbados, require a simple majority vote of Parliament to sever. In the majority of States of the OECS, it is thought that they require a referendum in addition to a qualified majority vote in Parliament. Let me hasten to add, however, that no special majorities or referenda are required in any of the states to join the *original jurisdiction* of the Court. That explains why all of the Member States of the Community have had no difficulty in acceding to the original jurisdiction of the CCJ. A challenge may lie ahead for some states in joining the Court in its appellate jurisdiction upon inauguration.

IX. THE NEXT STEPS TO INAUGURATION

How soon can it be expected that the CCJ will begin hearing cases? The RJLSC has made substantial progress towards the establishment of necessary administrative and procedural infrastructure. To the extent that the CCJ is a regional court, efforts must be made to recruit staff on a regional basis. It is necessary therefore to advertise posts regionally and these proce-

118. James F. Smith, *Comparing Federal Judicial Review of Administrative Court Decisions in the United States and Canada*, 73 TEMPLE L. REV. 503, 545–54 (2000).

119. See John Turner, *Review: Civil Procedure*, 2004 NEW ZEALAND L. REV. 345, 359. As of January 1, 2004, the New Zealand Supreme Court replaced the JCPC as the appellate court for New Zealand cases. *Id.*

120. Michael Kirby AC CMG, *Rules of Appellate Advocacy: An Australian Perspective*, 1 J. APP. PRAC. & PROCESS 227, 228 (1999).

dures consume time. However, it is anticipated that by the end of 2004, applicants for senior and executive posts of the Court will have been interviewed and selected. Response to the various advertisements has been massive, attesting to the interest in the Court and esteem in which it is held.

Judges sufficient to start the Court and fulfill Treaty obligations, such as the making of the Rules of Court,¹²¹ have been selected and it is confidently asserted that the first six judges of the Court will assume office early in 2005.¹²² Even after selection in September 2004, time has to be allowed for the selected judges to give reasonable notice to end their current employment.¹²³

There are other considerations which militate against inauguration before March 2005. The headquarters of the Court are not yet ready,¹²⁴ but the Government of Trinidad and Tobago forecasts completion of necessary works within six months.¹²⁵ This time frame ought also to be sufficient to allow some regional governments to take legislative action to transform the Agreement establishing the Court into local law and to proclaim dates after which cases will cease going to the JCPC.¹²⁶

Inauguration, however, does not imply that there will be an immediate end of appeals to the JCPC. Governments will have to proclaim the dates after which appeals will cease going to the JCPC. All appeals pending before those “cut-off dates” will be adjudicated by the JCPC since the appellants will have had accrued rights to hearings before the JCPC. Their legitimate expectations cannot be denied. There will also be enough time for all of the preconditions to the disbursement of the funds from the CDB to the trustees of the Trust Fund to be satisfied.

121. Under the aegis of the Preparatory Committee and the Legal Affairs Committee, Draft Rules of Court in both jurisdictions have been prepared. When the judges assume office, they will be required to consider the drafts and determine whether to adopt them as drafted or to amend them. See generally *Caribbean Court of Justice (CCJ): Draft Rules of Court*, available at <http://www.caricom.org/ccj-index.htm> (last visited Feb. 8, 2005).

122. CCJ Press Release, *supra* note 5. At its meeting of September 27-28, 2004, the RJLSC selected five persons for appointment as judges of the Court. *Id.*

123. *Id.*

124. *Id.*

125. The Government of Trinidad and Tobago recently determined to change the location of the headquarters of the Court from Richmond Street, Port-of-Spain to 134 Henry Street, Port-of-Spain.

126. CCJ Press Release, *supra* note 5. At the time of writing, Guyana, Trinidad and Tobago, and Grenada have not passed relevant legislation to invest the CCJ with jurisdiction in local law. *Id.*

X. CONCLUSION

Realistically, it is anticipated that inauguration of the CCJ is likely in March 2005. Upon its inauguration, the CCJ will be a final appellate court for the Commonwealth Caribbean and a court essential to the regional integration movement of which the entire Caribbean can be proud. Its establishment will enable the region to make its own contribution to the development of the common law and provide the stimulus for the development of Caribbean jurisprudence. As the Trinidad and Tobago delegation to the Eighth Meeting of Heads observed in 1987: “[In] the field of law, Caribbean jurists have long ago attained the maturity, competence and distinction to man a Caribbean Court of Appeal with honour.”¹²⁷

Its establishment 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.

In its creation, the decision-makers of the region have demonstrated to the world the creativity and ingenuity that inhere in the people of the region. New norms have been developed for the appointment of the judiciary; new norms have been established for bolstering judicial independence; new norms have been created for the financing of courts, expanding judicial autonomy and independence; new norms have been created in international law. This unique judicial paradigm stands ready to take its place among the final appellate courts of the Commonwealth and alongside other regional courts such as the Court of Justice of the Andean Community, the Court of Justice of the Common Market for Eastern and Southern Africa (COMESA), and the Central American Court of Justice (CACJ). The CCJ is essential for the structured and efficient functioning of the CSME.

Winds of change are blowing in the Caribbean in the dispensation of justice and in the integration of the economies of the region. The independence of Commonwealth Caribbean States is not yet complete. We are seeking to complete that independence by repatriation of the judicial arm of government at its highest level from the United Kingdom. In that search for independence in judicial matters, the people of the Caribbean have evolved several exciting new norms to promote and safeguard the independence, integrity, and credibility of the Court. The journey in the evolution of region-specific legal norms and the quest for independent justice in the Commonwealth Caribbean has begun. History will determine whether it succeeds.

127. POLLARD, *supra* note 8, at 2.