

**CARIBBEAN COURT OF JUSTICE (CCJ):  
CARIBBEAN INTEGRATION OR  
DISINTEGRATION?**

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**GLOBAL THINKING RESEARCH & DEVELOPMENT**

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## THE ECONOMIC DEVELOPMENT INSTITUTE

"The essence of the knowledge is, having it, to apply it; not having it, to confess your ignorance. Ignorance is the night of the mind, but a night without moon or star".

Confucius.

"It is not the degree that makes a great man; it is the man that makes the degree great"

Nicoli Machiavelli.

The Economic Development Institute under the theme **Global Thinking Research** was established in 2001. We are group of past students of the University of the West Indies living in and outside Jamaica. We came to the realization from when we were on the Mona Campus that in the **Information Age** we live in, successful people are those who have access to information. We formed a group to share in this **New Way of Thinking** and found it fruitful to our endeavours . Unfortunately, we had to restrict our information bases in many cases as our lecturers and tutors deemed it fit to remain in a vacuum of limitation with regards to the evolution of the **New Information Paradigm**. We were clearly ahead of our time. We have developed this new product called the **Information Booklet Series (which there is a need for)**, the product provides **information on topical issues** in the areas of Management, Sports, Information Technology, Public Administration, Information and Communication, Economics, Economic Development, Social Development, Legal Education, Industrial Relations at competitive prices. We have kept it simple so that all can understand and appreciate. As such, we do not regard them as theses on the chosen areas and they do not seek academic recognition, however they do meet WIPO (World Intellectual Property Organization) Standards. We hope you will find the following informative and instructive and as usual your comments would be appreciated.

**Peter W. Jones**  
**Executive Director**

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## FOREWARD

*“I want to say very, very clearly that the decision to abolish appeals to the Privy Council was not born out of anything to do with capital punishment. The idea was first mooted in 1970, based on a very simple principle that you cannot be a sovereign nation with the interpretation of your laws being done externally. Laws have to reflect the customs and traditions of the people,”*

*“We live in a new world. The world in 2003 is a different world from 1953. The powerful nations of the world have grown more powerful...Many no longer remember how they became powerful in the first place, what was the exploitation of the resources of the colonial world and of the people from the colonial world. We know what Jamaicans did and what people from the Caribbean did to rebuild the United Kingdom after the last World War. But let me tell you something, in today’s world you can’t rely on that,”*

*“I have no problem when English judges are interpreting English laws to suit English traditions and customs, but I have a great problem when English judges are interpreting laws passed by a sovereign Jamaican Parliament, It’s the business of a sovereign Jamaica to decide on its laws and it cannot be the business of external judges to make laws for Jamaica by the process of judicial interpretation,”*

Most Honourable P.J. Patterson, Prime Minister of Jamaica speaking on February 27, 2003 at a meeting of the Jamaican community in the United Kingdom (UK), at the Jamaican High Commission.

*“.....As Prime Minister at that time, this was the perspective in which the Government of Jamaica saw the proposed regional court. We did not view it with disfavour, provided a mechanism could be devised to ensure that Judges would be so appointed as to be entirely free of political connections to ensure that their independence would not be in question.”*

*“ I expressed this view as Prime Minister at that time and, had conditions not changed drastically, I would perhaps have held the same view today. However, times have changed, indeed, drastically so.....”*

*“.....The economic climate of 15 years ago, no longer prevails. There was certainty and predictability, robust economic growth, relatively stable social conditions in which crime was not of epidemic proportions and the justice system worked. Today, each of these conditions have now been reversed. The economy is out of control; the society has been destabilized by fear and the criminal justice system has broken down.”*

Most Honorable Edward Seaga, Leader of The Opposition, speaking in CCJ Debate, Parliament, May 2003

*..I am yet to be persuaded that it is quite in order to build a judicial superstructure entitled the Caribbean Court of Justice, which envisages the abolition of the Privy Council as the final appellate authority, but leaves the base, the Magisterial Courts' system in shambles. The ordinary folk in the Caribbean seek*



*judicial redress at the Magistrates' Court in over ninety percent of the cases."*

Hon. Ralph Gonsalves, Prime Minister of St. Vincent and the Grenadines, in addressing the opening ceremony of the twenty-second meeting of the conference of Heads of Government of the Caribbean Community July 2001

## **ANSWERS TO YOUR BURNING QUESTIONS ON THE CCJ**

### **What is the Caribbean Court of Justice ?**

The Caribbean Court of Justice (CCJ) is the proposed regional judicial tribunal to be established by the Agreement Establishing the Caribbean Court of Justice. It has a long gestation period commencing in 1970 when the Jamaican delegation at the Sixth Heads of Government Conference, which convened in Jamaica, proposed the establishment of a Caribbean Court of Appeal in substitution for the Judicial Committee of the Privy Council.

### **How is the proposed Caribbean Court of Justice different from the Caribbean Court of Appeal proposed by Jamaica at the sixth heads of government conference?**

The Caribbean Court of Justice has been designed to be more than a court of last resort for Member States of the Caribbean Community. For, in addition to replacing the Judicial Committee of the Privy Council, the CCJ will be vested with an original jurisdiction in respect of the interpretation and application of the Treaty Establishing the Caribbean Community. In effect, the CCJ would exercise both an appellate and an original jurisdiction.

### **How is the appellate jurisdiction different from the original jurisdiction ?**

In the exercise of its appellate jurisdiction, the CCJ will consider and determine appeals in both civil and criminal matters from common law courts within the jurisdictions of Member states of the Community and which are parties to the Agreement Establishing the CCJ. In the discharge of its appellate jurisdiction, the CCJ will be the highest municipal court in the Region. In the exercise of its

original jurisdiction, the CCJ will be discharging the functions of an international tribunal applying rules of international law in respect of the interpretation and application of the Treaty. In this regard, the CCJ would be performing functions like the European Court of Justice, the European Court of First Instance, the Andean Court of Justice and the International Court of Justice. In short, the proposed CCJ is intended to be a hybrid institution - a municipal court of last resort and an international court with compulsory and exclusive jurisdiction in respect of the interpretation and application of the Treaty.

## **Is there general agreement on the establishment of the Caribbean Court of Justice?**

No! Opinions are divided on the need for, or desirability of, the Caribbean Court of Justice. Opposition to the CCJ appears to be informed by various considerations. One such consideration is suspicion of the unknown and professional resistance to change which is, more often than not, reinforced by the vigour of inertia. Some members of the legal community also entertain legitimate reservations about the ability and willingness of Member States of the Caribbean Community to provide adequate funding for the Court on a sustainable basis. Other stakeholders question the likelihood of the CCJ attracting to its benches judges of the required expertise and legal erudition to inspire confidence among members of the legal community and litigants generally. Some of these considerations have been addressed below. Proponents of the Court perceive of this institution as completing the independence of Commonwealth Caribbean States. Other supporters of the Court consider that an indigenous Court consisting of regional judges is best suited to pronounce on issues of regional importance and, in so doing, contribute to the development of a regional jurisprudence.

## **THE APPELLATE JURISDICTION OF THE CARIBBEAN COURT OF JUSTICE**

### **Why does the Region need its own court of last resort for civil and criminal matters?**

The simple answer is to ensure autonomy of judicial determinations in the Region in order to complete the process of independence. However, on a more pragmatic basis, for the laws of the Region to inspire confidence and ensure voluntary compliance, they should mirror the collective

social ethos of our peoples and, to be relevant and responsive, should be interpreted and applied by Judges who would have internalised the values informing the content of that collective social ethos.

**But is it not reasonable to assume that the Judges of the Privy Council being removed from the social environment are likely to be more dispassionate in interpreting and applying the law?**

Yes! And herein lies the problem! Law is not a static corpus of abstract normative principles to be applied mechanistically in order to arrive at objectively valid solutions to resolve problems of human intercourse. Law is the normative outcome of the cut and thrust of human interactions based on collectively determined or generally accepted social values and subject to a process of continuing adjustment to its environment of control. Consequently, persons interpreting and applying the law should be attuned to the relevant dynamics of social interaction, which determine the quality and intensity of human intercourse, and the values conditioning such dynamics. And by this is meant the values that make us cry; the values that make us laugh; the values that make us happy or sad; the values that make us responsible, productive, creative, caring, proud people. In short, the values that condition our uniqueness as a people. In the premises, to be far removed from the immediate environment of social interaction to which the law applies would facilitate a dispassionate analysis of human events and judicially objective decisions but only to the detriment of desirable social behaviour and social cohesion.

**Would the Judges of the CCJ be vulnerable to political manipulation?**

It is generally accepted in our societies that independence of the judiciary is a vital and essential ingredient of the rule of law, a basic principle of social engineering in CARICOM Member States. To ensure independence of the members of the Court, appropriate provisions have been elaborated in the Agreement Establishing the CCJ to provide for credible institutional arrangements. Firstly, unlike the situation with the European Court of Justice, where Judges are appointed by the Ministers of Government, Judges of the CCJ are to be appointed by a Regional Judicial and Legal Services Commission whose composition should offer a reasonable degree of comfort to the Court's detractors. Of its nine members, four are appointed on the recommendations of the legal fraternity; two are to be chairpersons of national judicial services commissions, one is to be a chairperson of a national public service commission, one is to be the Secretary-General or his Deputy and the other is to be the President of the Court.

Provisions of the draft Agreement also address the security of tenure of Judges. Removal of Judges from office requires an affirmative recommendation of a tribunal established for the purpose. The

President of the Court is appointed by the Heads of Government of participating States on the recommendation of the Commission and may be removed for cause only on the recommendation of the Commission acting on the advice of a tribunal established for the purpose. The Judges of the European Court of Justice, as indicated above, and the European Court of First Instance, are appointed by the Ministers of Government and those of the Andean Court of Justice are elected by States. In effect, the Caribbean Community is the only Integration Movement whose Judges are not directly appointed or elected by States!

### **But are not the Judges of the Court paid by Governments which can exert decisive informal pressure on them to deliver self-serving judgments?**

In order to preempt this eventuality, the Heads of Government have mandated the Ministers of Finance to provide funding for the recurrent expenses of the Court for the first five years of its operation. In this connection, it should be noted that significant capital expenses have been assumed by the host Government and that the building for the seat of the CCJ is being provided by Trinidad and Tobago.

During this initial period, a Trust Fund is to be established and capitalised in an adequate amount so as to enable the recurrent expenditure of the Court to be financed by income from the Fund. The Fund is to be administered by the Caribbean Development Bank or some other agreed institution. In this way, the recurrent expenditure of the Court including the remuneration of the Judges would not be dependent on the capricious disposition of Governments.

Contributions to the Trust Fund should not be a cause of anxiety. Extra-regional interests have genuine, legitimate concerns about the functioning of the CCJ. Remember, that as a court of last resort, the CCJ would be pronouncing on the operations of international criminal cartels whose activities impact adversely on the economies of third States. The CARICOM Secretariat has had indications of interest in contributing to the Fund from sections of the international donor community. Most importantly, the political directorate have agreed that non-payment of contributions to the budget of the Court would result in the denial of access to its services by defaulting Member Governments. Agreement by Member States of the Community on such a sanction must be seen as a very significant development in the history of the economic integration movement where, historically, sanctions tended to be conspicuous by their absence!

### **Is there any plausible assurance that the judicial pronouncements from the CCJ would be of the desired quality?**

In this connection, it must be borne in mind that the selection of Judges would not be confined to the Caribbean region. Candidates may come from any territory of the Commonwealth. And having cast the net so widely, there is a plausible assurance that Judges of the required expertise and legal erudition would come forward for appointment. In any event, critics from the legal community expressing misgivings about the quality of judges should not forget that, in the final analysis, the quality of judicial determinations is not unrelated to the quality of submissions by Counsel. Indeed, the record would confirm that behind any sound judicial pronouncement in the Region, and there are numerous of them, the submissions of Counsel were very well researched, informed and persuasive in respect of both issues of law and fact. Finally, some comfort must be taken from the fact that most appeals to the Privy Council are dismissed underscoring the quality of judicial determinations of local Judges.

### **Does the renewed interest in the establishment of the Caribbean Court of Justice have anything to do with the decision of the Privy Council in "Pratt and Morgan"?**

The unfortunate coincidence of those events is a matter of grave concern. However, the answer must be in the negative and should be placed in historical perspective. What is often forgotten by detractors of the Court is that the revived interest in the Caribbean Supreme Court or Caribbean Court of Justice, as it is now called, had its origin in the Report of the West Indian Commission (1992) which predated the landmark decision of the Privy Council in Pratt and Morgan (1993) by one year.

Indeed, the recommendation for the establishment of a Caribbean Supreme Court in substitution for the Privy Council and vested with original jurisdiction concerning the interpretation and application of the Treaty of Chaguaramas, even though one of the most seminal determinations of the West Indian Commission, was anticipated twenty years before by the Representative Committee of OCCBA set up to examine the establishment of a Caribbean Court of Appeal in substitution for the Judicial Committee of the Privy Council. In short, if Pratt and Morgan was a watershed in Caribbean jurisprudence, the West Indian Commission's recommendation for a Caribbean Supreme Court was not an innovation in Caribbean judicial institutional development and is largely unrelated to popular perceptions of required sanctions for socially deviant behaviour.

In point of fact, one of the most compelling arguments for the establishment of the Caribbean Court of Justice is the need to have an authoritative, regional institution to interpret and apply the Treaty, as amended, in order to create the CARICOM Single Market and Economy. But, unfortunately, the original jurisdiction of the Caribbean Court of Justice and its importance for the success of the

CSME is little understood and even less appreciated by many members of the legal fraternity at the present time.

### **Why does the Agreement Establishing the Caribbean Court of Justice provide for withdrawal from the regime thereby conveying a perception of political convenience and impermanence?**

It is trite international law that treaties must be observed in good faith (*pacta sunt servanda*). However, in exceptional cases, such as a fundamental change of circumstances (*rebus sic stantibus*), a State may, as an attribute of sovereignty and in the national interest, withdraw from a treaty regime irrespective of the provisions of the relevant instrument, subject, of course, to the engagement of any international responsibility that may be involved. As such, provisions inhibiting withdrawal from an international regime is of marginal juridical significance. And the same observations hold good for the Agreement Establishing the Seat of the Caribbean Court of Justice.

### **Would the retention of appeals to the Privy Council inspire foreign investor confidence, especially in the case of large investments, thereby facilitating a better investment climate?**

There can be no doubt that credibility of the judicial sector reinforces investor confidence and promotes foreign direct investment. Undoubtedly, the Judicial Committee of the Privy Council has an international reputation for sound judgments and does inspire investor confidence. However, the stark reality is that the process of judicial settlement involving the Privy Council is too tardy to offer much comfort to the foreign investor. In fact, foreign investors with large sums to invest opt for self-contained instruments which include disputes settlement provisions tending to favour the ICSID route, that is the International Convention for the Settlement of Investment Disputes sponsored by the International Bank for Reconstruction and Development (IBRD).

### **There are obviously many aspects of the CCJ to be understood. How are the people of the Region expected to learn and understand the facts surrounding the CCJ, the benefits that can come with its establishment, and how to access those benefits?**

The communication component is certainly a very important consideration, and one that has been given deserved emphasis. That is why there is already in progress a regional Public Education Programme which is designed to foster understanding in relation to the CCJ, the reasons for its establishment, the rules which will guide it, and especially, implications relating to its Original Jurisdiction and the critical relationship to the CSM&E. This public education effort is being

spearheaded at the national level, by national debate and dialogue, in order to adequately represent various interests, and address any questions or concerns arising within the national context.

At the regional level, there have already been very valid concerns raised in relation to the CCJ, especially with respect to its structure, funding and the independence of its officers. Opportunity must be afforded for the questions to be asked and answered. The people of the Caribbean are, therefore, being encouraged to air their views, no matter where they are, through the various media, including the Internet, and in different fora, such as town meetings, and to ask the probing questions of persons who can answer them.

The views of the people will naturally be instructive in helping the framers to further settle some aspects of the Court's establishment, and to create the structure which is both progressive and comfortable for the people of the Region.

The idea of a Caribbean Court is not new. It has been thirty years in incubation. Now that its time has come - this critical investment in our future viability - the real concern must be how do we get it right.

## THE ORIGINAL JURISDICTION OF THE CARIBBEAN COURT OF JUSTICE

### **What is the relationship between the Caribbean Court of Justice (CCJ) and the CARICOM Single Market and Economy?**

The CARICOM Single Market and Economy (CSME) is established by the Treaty of Chaguaramas as revised by nine Protocols. The Treaty, as revised, is to be interpreted and applied by the CCJ in the exercise of its original jurisdiction.

### **But how does this function of the CCJ impact on the CARICOM Single Market and Economy?**

By interpreting and applying the Treaty which establishes the CSME, the CCJ will determine in a critical way how the CSME functions. The CSME creates an extensive range of rights and obligations for States parties to the Treaty and, through these States parties, for Community nationals.

## **Why must Community nationals enjoy rights and discharge obligations through their States? Why cannot such nationals enjoy rights and discharge obligations without the intervention of their States of nationality?**

This is an important question which requires a clear and comprehensive response. Firstly, it must be borne in mind that treaties, like the Treaty of Chaguaramas, are governed by international law. International law is based on rules which are quite different from the legal rules normally applied by judges in our national courts. One important difference is that rules of international law ordinarily apply only to States which are called subjects of international law. Only in exceptional cases are those rules directly applicable to individuals. Consequently, individuals only enjoy rights in international law through their States of nationality on which those rights are conferred by international law. For private entities or individuals to enjoy rights under an international instrument, the instrument would have to be implemented into local law by the State concerned.

## **What are the exceptional circumstances in which rights and obligations under international law are conferred on individuals directly?**

One such exceptional circumstance is the example of the European Union created by the Treaty of Rome as amended by the Treaty of Maastricht and which grants rights and creates obligations directly for citizens.

## **How is the Treaty of Chaguaramas different from the Treaty of Rome?**

The Treaty of Rome created institutions like the Council of Ministers and the European Commission which could make laws directly for European nationals - that is, without the intervention of their national assemblies.



**Why cannot the Organs of the Caribbean Community like the Conference of Heads of Government make laws directly for Caribbean Community nationals without the intervention of their national assemblies?**

This is because any such arrangement appears to be politically unacceptable! Consequently, the Caribbean Community has always been an association of sovereign States and any decisions of the Organs of the Community must be enacted into local law by national assemblies before such decisions can create rights and obligations for nationals of the Caribbean Community. And this is an extremely important feature of the Caribbean Community!

**Why cannot the Member States of CARICOM agree to have the Treaty of Chaguaramas interpreted and applied in some way other than the CCJ? The Treaty of Chaguaramas has existed for more than twenty-five years without a Court. What is all this fuss now about the need for a Caribbean Court to interpret and apply the Treaty?**

Yes! Indeed, the old Treaty of Chaguaramas provided for arbitration in the event of disputes concerning the interpretation and application of the Treaty. Unfortunately, however, the arbitral procedure was never used and serious disputes were never settled, thereby causing the Integration Movement to be hampered. Moreover, the rights and obligations created by the CSME are so important and extensive, relating to the establishment of economic enterprises, the provision of professional services, the movement of capital, the acquisition of land for the operation of businesses, that there is a clear need to have a permanent, central, regional institution to authoritatively and definitively pronounce on those rights and corresponding obligations. The Caribbean Court of Justice is intended to be such an authoritative institution.

**Would the absence of such a Court adversely affect the development and functioning of the CSME?**

Definitely! The Caribbean Community is not known for significant capital accumulation. Consequently, it is largely a capital importing Region. Foreign investors seeking to invest normally prefer a stable macro-economic environment based on predictable laws in order to determine outcomes. Such an environment can and must be created by the CCJ!

## **How can the CCJ create a stable macro-economic environment suitable for the attraction of foreign capital?**

The CCJ has been configured to ensure that the laws of the CSME are uniform and predictable. Firstly, the CCJ will have exclusive jurisdiction in respect of the interpretation and application of the Treaty. If it had concurrent jurisdiction with other Courts of the Community, there is a likelihood of conflicting opinions on important economic, commercial and financial issues thereby creating uncertainty and unpredictability in the business climate and macro-economic environment!

## **So what happens where another Court in the Caribbean Community is seised of an issue which involves a question concerning the interpretation and application of the Treaty? Must the Court decline to accept jurisdiction and pronounce on the case?**

No! The Court must accept jurisdiction and refer the particular issue to the CCJ for determination before delivering judgment, which must respect the CCJ's determination of the relevant issue! A similar requirement of referral obtains in the European Union and it has been credited with promoting social and economic cohesion among the Member States.

## **What happens if a delinquent party to a dispute refuses to submit to the jurisdiction of the CCJ?**

By signing on to the Agreement Establishing the CCJ, all Member States of the Community would be submitting to the jurisdiction of the CCJ in the exercise of its original jurisdiction which is compulsory and exclusive. The European Court of Justice does not enjoy exclusive jurisdiction but when a court of last resort is seised of an issue concerning the interpretation or application of the Treaty of Rome, the court must refer the issue to the European Court of Justice for determination.

## **How are decisions of the CCJ enforced?**

Member States signing on to the agreement Establishing the CCJ would agree to enforce its decisions in their respective jurisdictions like decisions of their own superior courts.

## **What recourse is open to an aggrieved party where the defaulting State refuses to enforce a decision of the CCJ?**

A. The simple answer is none! But in this respect the regime establishing the CCJ is not different from similar regimes establishing the European Court of Justice or the Andean Court of Justice.

Participants in the regime would have undertaken to respect and enforce the decisions of the Court and one would have to depend on a culture of respect for the rule of law and obedience to the determinations of competent tribunals to ensure enforcement of judgments.

### **Can the CCJ reverse itself as it considers fit thereby creating uncertainty in the applicable norms?**

The Agreement Establishing the CCJ does provide for the revision of decisions in specified circumstances. But such revisions are intended to satisfy the ordinary requirements of justice! Revision of judgments is not to be secured lightly or capriciously. Indeed, in the ordinary course of events, decisions of the CCJ constitute stare decisis.

### **What do you mean by stare decisis?**

Stare decisis is peculiar to common law jurisdictions but it has been imported into the Agreement Establishing the CCJ to ensure certainty in the applicable norms. The doctrine of stare decisis or judicial precedent, requires the Court to pronounce in the same manner provided the circumstances of the case are similar.

### **You have mentioned the term "norms". What are norms and are they peculiar to the original jurisdiction of the CCJ?**

"Norms" are rules of law prescribing the conduct to be observed. Norms are not peculiar to the original jurisdiction of the CCJ. However, the norms applied by the CCJ in the exercise of its original jurisdiction would normally be rules of international law. In the exercise of its appellate jurisdiction, the CCJ would apply the norms peculiar to common law jurisdictions as distinct from civil law jurisdictions.

### **Since Suriname and Haiti have civil law jurisdictions, can they participate in the regime establishing the CCJ?**

A. The response to this question would depend on the jurisdiction of the CCJ to which access is desired. Both civil law and common law jurisdictions can participate in the CCJ in the exercise of its original jurisdiction. This is so because the CCJ in exercising its original jurisdiction is discharging the functions of an international tribunal applying rules of international law. International law rules

are common to both common law and civil law jurisdictions. However, problems would occur if Suriname or Haiti wished to participate in the appellate jurisdiction of the CCJ where municipal law rules and not international law rules apply. Conference has established a Working Group to examine the issue with a view to finding an acceptable solution.

### **Can private entities, like enterprises or individuals, appear in proceedings before the CCJ?**

The simple answer is yes, but only by special leave of the Court in special circumstances where the Court determines that the interest of justice requires it. However, in the ordinary course of events only States would be allowed to espouse a claim in proceedings before the CCJ. Consequently, where a private entity is aggrieved, the State of nationality concerned would espouse its cause in proceedings before the CCJ. This is one of the peculiarities of international law. For example, the parties to the "banana issue" involving private producers were States - the European Union and the USA. One may hazard a guess, however, that in the context of the CSME, States would allow their nationals to espouse their claims in proceedings before the CCJ wherever the opportunity presents itself.

## **CARIBBEAN COURT OF JUSTICE(CCJ) PARLIAMENTARY DEBATE, JAMAICA**

### **MOST HON. P.J. PATTERSON, PRIME MINISTER OF JAMAICA**

Mr. Speaker,

The resolution now before us was drafted with meticulous care.

It sets out accurately and in very precise sequence, the commencement in 1970 of the efforts by the Caribbean Bar and the GOJ to establish a Caribbean Court as the Final Appellate Body for our region and the steps which we have taken since then.

In opening the Debate, I did not think it was necessary to recite the entire history of the Court nor to retrace ground which we have already covered.

I deliberately confined myself to two principal issues which have been the subject of interests and concerns by those who want to ensure a Court that is immune to political influence and can operate in the knowledge that its funding is secure and well assured.

In adopting this approach to my opening, I failed, however, to recognize that with the passage of time there are often lapses of memory.

Moreover, the composition of Membership in this House is somewhat different from our earlier debate. While Hansard is there for the record, I can no assume that the new Members of this Honourable House, on both sides, are privy to the arguments which have previously been advanced in favour of the Court and my earlier refutation of those objections which have been more recently advanced.

So Mr. Speaker, in closing the Debate, I owe it to this House and to history to reiterate much of what you heard during the Debate in February 2001, when this House gave its support for me to sign the CCJ Agreement.

Mr. Speaker,

The Government did not have to bring this Resolution to Parliament. Nothing in constitutional law or practice required us to do so.

Having signed the Agreement with our CARICOM partners, two years ago, we could quite legitimately have moved to ratification without further discussion or reference to the Legislature.

From the outset, it was my view that Parliament, representing the collective voice and authority of the People of Jamaica, should be fully involved. I wanted nothing to be done in Nicodemus fashion.

There is no precedent in this Parliament since 1944 or elsewhere in the Caribbean for this two-pronged Debate which we are completing today.

Let us therefore put an end once and for all to any suggestion that we are being arrogant in the exercise of political power or abusing the reality of a Parliamentary majority in this House and the Senate.

Mr. Speaker,

It was my hope that members of this House and of the Senate would seize the opportunity to have an informed and reasoned debate which would enhance the value, effectiveness and reputation of the Court to be established.

A number of speakers on both sides of this and the Senate have in fact made this kind of contribution and I thank them for it.

They may rest assured that, in settling the final content of the common legislation that will establish the Court, all reasonable suggestions and genuine concerns will be taken into account.

The passage of this Resolution will not bring the CCJ into being – just one important step closer. The legislation will still have to come before us. So will the repeal of Section 110 and whatever will replace it, be brought to Parliament.

It was not by accident that my opening was carefully modulated to avoid any semblance of partisan rhetoric or to score political points.

Unfortunately, the Leader of the Opposition could not resist the temptation to flash outside the off-stump. As long as he keeps on convincing himself that nothing which is good has happened during the last fourteen years that the PNP has formed the elected government of this country and is

convinced that his assessment of a perfect Government when he was in charge is shared by the majority of the electorate, so long will he remain where he is and we will stay where we are.

According to him, this whole exercise is a plot by the PNP to deny justice to the people of Jamaica.

While I could, if necessary, reply in kind, I will resist the temptation to reduce this debate to the level of street corner brawl. When he was championing the CCJ, was it not to give the people of Jamaica greater access to justice for all?

I cannot, however, ignore the fact that he has sought to give the impression that the judges of the CCJ are going to be subjected to irresistible pressure by the political directorates, not only by Jamaica, but by all the CARICOM countries that are members of the court. He states:

***“Retention of the Privy Council, which is beyond political manipulation, is essential to our future support”.***

Why should there be greater confidence in Judges of the Privy Council chosen by a system in the UK over which the Lord Chancellor presides? Does he not believe that we can devise a system to ensure judicial probity in a Parliamentary Democracy?

We must have more confidence in ourselves.

If after 40 years, we need judicial surveillance from London, we are unworthy of the heritage which our National Heroes and great ancestors have entrusted to us.

We, of course, reject the notion that the Magistrates and Judges of Jamaica are incapable of resisting coercion and corruption unless our judicial system is kept under the control of the Privy Council. We prefer to believe, in common with the majority of Jamaicans, that the integrity of a judge is determined primarily by his own character and his professional training.

The author of an article in the Caribbean Review, Hugh Rawlins, puts the matter this way: “ultimately institutional framework cannot alone guarantee judicial independence. True independence of mind and spirit cannot be dictated. It comes from within. It is written in the heart and springs only from strength of character exemplified by a burning desire to be impartial and to do justice to all and under all circumstances.”

With all due respect to the Leader of the Opposition and those who may think like him, I do not believe that these qualities of character and integrity are the monopoly of a single nation or ethnic group.

I am pleased that a number of Speakers, from the Opposition side, clearly disassociated themselves from any such view.

## THE CHANGING STANCE OF THE JAMAICA LABOUR PARTY

This recent stance by the Leader of the Opposition comes against the background of thirty years of support from his Party for the abolition of appeals to the Privy Council and the substitution of a Regional Appellate Court.

It also comes against the background of their support for the Caribbean Single Market Economy and the establishment of a regional institution with juridical status to determine questions arising under the Treaty of Chaguramas and the day-to-day operations of the CSME.

Strangely enough, they do not object to a regional court with Caribbean Judges deciding on disputes between Member States.

If our judiciary is so susceptible to political influence as the Leader of the Opposition appears to believe, is this not more likely to happen when the issue involves a dispute between the States themselves?

From where does this notion come, that the more remote the Court is from the people, the sounder its judgments are likely to be? If that is true, why are English Courts not subject to the same dangers for cases between British citizens and Corporations?

And what of cases, originating in the Caribbean, to which a citizen or company of the UK is a Party? I firmly believe that the Courts of the UK can render a ruling in accordance with the law, but I also th to be the situation with Judges of integrity and learning, who can be found in the Caribbean.

If Caribbean judges are incapable of exercising independent judgment in disputes between citizen and citizen, or between a citizen and one state, unless they are under the tutelage of our former colonial masters, why do they accept that they will have this independent capability in disputes between one state and another?

I repudiate any argument based on contempt for the capability of Caribbean jurists to justify the rejection of the CCJ.

Mr. Speaker,

The Opposition Leader has also discovered some strange reasons for rebutting the grounds advanced by those who support the idea.

What are the grounds which have caused him this complete reversal of his previous enthusiastic support?

These are:

- a. Sovereignty
- b. Development of an indigenous jurisprudence
- c. Making justice more affordable by the people.

He claims that the contention that the CCJ is necessary to complete the attainment of full sovereignty is “faulty reasoning riddled with self-serving purposes”. Is he not aware that the pooling of sovereignty is in itself an exercise of sovereignty? e.g. joining the UN or NATO.

It is an act of sovereignty that empowers us to devise and establish this Regional Court. The UK subscribes to the EU Court, as a sovereign power. This is what explains the “volte face” on Capital Punishment.

With respect to the development of an indigenous jurisprudence to “reflect the moral social and economic imperatives of its people”, he says that this is “the most dangerous reason advanced to support the CCJ”. It opens the door, he says, to a devious political directorate to fashion the law to its own suit.

Is he not suggesting here that Caribbean Judges will be either coerced or corrupted to the “machiavellian” schemes which the political directorates of the region are even now fashioning in some secret conspiracy?

Since that was not his conviction in 1988, where is the evidence for this newfound fear now and who are the participants in this wicked conspiracy?

With respect to the greatly increased accessibility of the CCJ by reason of the reduced cost to the litigants, he dismisses this as of no real importance. It will, he asserts, only benefit “some litigants” but will be more expensive to the states. Furthermore, it will only provide “cheap justice riddled with injustice”.

Mr. Speaker, the new members of this Honourable House, on both sides, who listened to this powerful and contemptuous dismissal of the reasons justifying the CCJ will, I am sure, be exceedingly surprised to learn that these were, in fact, the very same compelling reasons advanced and wholly accepted by the Jamaican Cabinet presided over by the then Prime Minister, in May of 1988.

The recommendations for the establishment of the CCJ as conveyed to Cabinet were specifically stated to be on the basis of six reasons which were as follows:

1. That the Privy Council involves considerable expense in the pursuit of the right of the citizens having regard to the location of the court in the United Kingdom;
2. That appeals to the Privy Council have been abolished by most jurisdictions outside the Caribbean;
3. That it is an inhibiting factor in the development of an indigenous jurisprudence which is more responsive to the values within our society and our aims and aspirations as an independent nation;
4. That it militates against the development of the potential of our local judges;
5. That it is regarded as a burdensome appendage by the English judicial system and by some as even anachronistic;



6. That it is inconsistent with the full attainment of political sovereignty and independence.

It will be seen, from the foregoing, that the reasons now so strongly dismissed by the Leader of the Opposition were the very ones that convinced his Cabinet in May of 1988 that the CCJ was the way to go.

This was the decision on which he acted on in July 1988 when he joined with other CARICOM Heads of Government in accepting the decision to abolish appeals to the Privy Council and substitute the CCJ.

Since 1988, the Leader of the Opposition has therefore repudiated not only the decision to which he was a party, but the very reasoning on which it was based.

What more need I say?

We will not allow him to forget the contents of his own party manifesto in respect of this matter.

Let me be charitable and assert that he suffered an uncharacteristic lapse of memory in replacing the Privy Council with the CCJ – which was certainly one of the issues in the last general election campaign.

He says that these changes in his views on the CCJ are due to changing circumstances. The only change I can detect is his movement from this side as Prime Minister to that side as Leader of the Opposition.

## **CERTAIN CONSTITUTIONAL ISSUES**

Let me turn now to some constitutional issues that have been raised by other speakers.

### **WHY WAS SECTION 110 NOT ENTRENCHED**

The decision not to entrench the right of appeal to the Privy Council in the Jamaican Constitution was a considered and deliberate act of the Joint Select Committee of Parliament that drafted the Constitution immediately prior to Independence.

For most of its sittings, this Committee was chaired by Norman Manley. It was guided and advised by Sir Leslie Cundall, the then Attorney General, who later became President of the Court of Appeal. The Committee contained other experienced and distinguished lawyers, notably, Sir Neville Ashenheim, Douglas Fletcher, Donald Sangster and Clem Tavares.

The Committee decided unanimously to retain appeals to the Privy Council because the Federal Court of Appeal would no longer have jurisdiction in Jamaica and a new and hitherto untried local Court of Appeal would have to be established. It was recognised, however, that many Commonwealth countries, on becoming independent, had either after some lapse of time or immediately (as in the case of India), abolished appeals to the Privy Council.

It was therefore decided to leave it to the unfettered decision of the Parliament of Independent Jamaica to decide whether to make our local Court of Appeal the final court or to retain the right of

appeal to the Privy Council until such time as other arrangements are made, including a court to continue in the fine traditions of the Federal Court of Appeal.

Furthermore, commonsense dictated that it would not be sensible to enshrine in the constitution an institution whose continued willingness to hear appeals from Jamaica could not be enforced by us. The Privy Council is an institution of the United Kingdom government. It was thought unwise to entrench an institution that could be abolished without any input from ourselves.

### **ABOLITION OF APPEALS BY SPECIAL LEAVE OF HER MAJESTY**

The government intends, Mr. Speaker, to put forward legislation not only to abolish appeals to Her Majesty in Council where those appeals are as of right or by leave of the Court of Appeal as provided in sub-sections 1 and 2 of section 110 of the Constitution, but also expressly, to abolish such appeals where they are appeals by special leave of Her Majesty.

There is express reference, in sub-section 3 of section 110, to the right of Her Majesty to grant such special leave to appeal. This is what is referred to in practice as a prerogative right, that is, the residual royal prerogative right of the sovereign.

*Now, there have been arguments raised in some quarters and in this Honourable House, that as long as the Queen remains the Head of the Jamaican state, the prerogative right to grant special leave to appeal cannot be abolished by legislation enacted by the Jamaican Parliament.*

As long ago as 1935, before most of the members of this Honourable House were even born, that very point fell to be determined by the Judicial Committee of the Privy Council, itself in a case from Canada. They held that such an argument is invalid.

What happened in that case was that a petition for special leave to appeal to His Majesty in Council against a conviction by a Canadian Court was brought, despite the fact that the Canadian legislation had enacted legislation abolishing all rights of appeal to His Majesty in Council. A question therefore arose as to the validity of the legislation in so far as it abolished appeals by special leave to His Majesty.

In that case, the Privy Council described the nature of appeals to His Majesty in Council. Basically, this is what it said, although I here refer to Her Majesty:

The Judicial Committee of the Privy Council is a statutory body and, in accordance with statute, appeals to Her Majesty in Council are referred by Her Majesty to, and are heard by, the Judicial Committee.

*The Judicial Committee then makes a report or recommendation to Her Majesty in Council for Her decision, the nature of such report or recommendation being always stated in open court. Although all the Committee does is to make a report or recommendation to Her Majesty in Council, by whom an Order in Council is made to give effect to the report or recommendation of the Committee, the Committee is clearly a judicial body or court.*

So, an appeal to Her Majesty in Council is such an appeal in form only, and has, in truth, become an appeal to the Judicial Committee which, as such, in reality exercises, as a court of law, the residual

prerogative of Her Majesty in Council. The position is no different where the appeal is by special leave to Her Majesty.

*Against this background, Mr. Speaker, the Privy Council held that, by virtue of provisions in an Imperial statute conferring on the Canadian legislature certain legislative powers - now mirrored in those conferred on the Jamaican legislature by the Jamaica Independence Act - earlier limitations on the legislative powers of the Canadian Parliament had been abrogated and, hence, that the provisions of the Canadian Act abolishing appeals to Her Majesty in Council were valid. The Privy Council, therefore, held that the petition for special leave to appeal was accordingly barred.*

As established by the Privy Council itself, it is therefore well within the powers of the Jamaican Parliament to enact legislation abolishing all appeals to the Privy Council, including all such appeals as are brought by special leave of Her Majesty, provided of course that this is done expressly or where this is the necessary intendment of the legislature.

### **TRANSACTION OF BUSINESS BY THE REGIONAL JUDICIAL AND LEGAL SERVICES COMMISSION**

There have been certain complaints, coming from the Bar Association, in particular, concerning Article V.7 (a) of the Agreement Establishing the Caribbean Court of Justice which provides as follows:

Subject to paragraph 13 of this Article, the Commission shall not be:

- (a) disqualified from the transaction of business by reason of any vacancy in its membership and its proceedings shall not be invalidated by the presence or participation of any person not entitled to be present or to participate in those proceedings.
- (b) ... ..

Paragraph 13, to which paragraph 7 is subject, makes provision for what is to constitute a quorum for the transaction of business by the Commission, namely, not less than six members of the Commission including the Chairman or, where the Deputy Chairman is presiding, the Deputy Chairman.

The provision in Article V.7 (a) is neither new or uncommon. It is commonly found in constitutional provisions relating to constitutional Commissions including the Judicial Service Commission.

The provision in section 135(2) of the Constitution of Jamaica which relates to all the Commissions established by the Constitution – and this would include the Judicial Service Commission, the Public Service Commission and the Police Service Commission – is in very similar, almost identical, terms and to the same effect as the provision in article V.7 (a).

Section 135(2) of the Constitution provides as follows:

*At any meeting of the Commission established by this Constitution a quorum shall be constituted if three members are present. If a quorum is present the Commission shall not be disqualified for the transaction of business by reason of any vacancy among its members and any proceedings of the Commission shall be valid notwithstanding that some person who was not entitled so to do took part therein.*

Other Constitutions contain similar provisions. The Constitution of Barbados, for example, contains in section 92.3, a virtually identical provision. So too does the Constitution of Guyana in section 226(1),

As Dr Lloyd Barnett says in *The Constitutional Law of Jamaica* at page 120 when commenting on section 135 of the Constitution of Jamaica:

The Constitution provides that at a meeting of the Commission a quorum shall consist of three members and if this requirement is satisfied it remains qualified to exercise its powers despite vacancies in its membership...The proceedings of the Commission are valid despite the participation of unqualified persons but it does not appear that the presence of such a person can be taken into account in determining the quorum or in counting the votes.

It is to be noted that in his book Dr. Barnett makes no adverse comments on this provision as it appears in the Jamaican Constitution.

### **FINANCIAL SECURITY OF THE JUDGES**

**In dealing with** the financial security of the court, let us first examine the protection which our Constitution provides for the remuneration payable to Judges of our own Supreme Court and Court of Appeal.

According to Sections 101 and 107 of the Constitution of Jamaica, the salaries payable to judges of those courts under the Constitution shall be charged on and paid out of the Consolidated Fund.

Provision is also made under those Sections that the emoluments and terms and conditions of service of such a Judge, other than allowances that are not taken into account in computing pensions, shall not be altered to his disadvantage during his continuance in office.

In addition, the salaries of those Judges are set out in the Judiciary Act and the minister of Finance may, by Order subject to negative Resolution of the House of Representatives, increase those salaries.

The salaries and allowances of the Judges of the Caribbean Court of Justice are secured in like manner by the provision in Article XXXVIII of the Agreement which provides that the salaries and allowances payable to the President and other Judges, as well as other terms and conditions of service, shall not be altered to their disadvantage during their tenure of office.

### **FINANCING THE CARIBBEAN COURT OF JUSTICE**

In time, all matters relating to the financing of the Court, including the Loan Agreement and the Trust Fund will be laid in the Houses of parliament. Initially, it was decided that the expenses of the Court would have required an annual contribution by Jamaica and other Member States in accordance with the CARICOM assessed scale of contributions.

The Legal Affairs Committee of CARICOM reviewed various options regarding the financing of the Court since the history of payments by Member States of their contributions to CARICOM institutions did not instill confidence in the mechanism outlined above.

At first, there was a recommendation for the creation of a Revolving Fund of approximately US\$21 million which would cover the first five years of operations with subsequent annual contributions to the Fund to ensure that the fund maintained a balance equivalent to the operating costs of the succeeding five years.

The Conference of Heads of Government ultimately agreed with a recommendation of the Preparatory Committee for the Establishment of the Caribbean Court of Justice that there should be established a Trust Fund with a one time settlement of US \$88 million based on the ten year projected cash flows of operating the Court, along with approximately US\$12 million for the capital and operating cost for the first two years of the Court's operation.

The Heads of Government approached the Caribbean Development Bank to raise the amount to be placed in the Trust Fund on the international capital market and administered by that Bank or some other body, away from Government control or interference.

The interest received from the Trust Fund would cover the total annual operating costs of the Court *ad infinitum*. This figure takes into account the salaries and allowances of the Judges, registry and administrative staff, security, gratuities for Judges and administrative staff, other administrative costs, Fund management fees and capital expenditure.

Jamaica's contribution to the Trust Fund would be secured by a loan from the Caribbean Development Bank in the amount of approximately US\$27 million to be repaid in 40 quarterly instalments at an interest rate of 5.5 per cent per annum on the amount of the principal.

The amounts referred to above were arrived at after extensive consultations between representatives of CARICOM Ministers of Finance and representative of the Caribbean Development Bank. The Bank's staff is of the view that if the Trust Fund is to be sustainable in perpetuity, it will need to opt for an investment strategy that incorporates securities whose overall rate of return exceeds annual inflation in the market where the Court is located.

Toward this end, the Trust Fund will need to engage investment advisors who would design a suitable investment strategy and manage the relationship with professional asset managers on behalf of the Board of Trustees.

The Board of Trustees will be responsible for the overall administration of the Trust Fund including the appointment of the Executive Officer, the External Auditor and the approval of investment guidelines. The operation of the Trust Fund will be independent of the CARICOM governments and its annual income will be devoted to meeting the operating budget and financial requirements of the Court from year three of its operations in perpetuity.

We recognise that it is critical that the Caribbean Court of Justice be financed in a manner that promotes its financial independence and sustainability. The preservation of the independence of the Court is of paramount importance for promoting the credibility of the court and to maintaining the long and zealously guarded tradition within CARICOM of an independent judiciary.

It is also recognised that assured funding for the Court and, in particular, its financial insulation from annual budgetary subventions from CARICOM Member States, is vitally important for its transparent independence from political interference.

The criteria for choosing a financing option to capitalize the Trust Fund, therefore, included considerations of cost effectiveness, efficiency, financial reliability and robustness of the funding source and above all, minimizing the possibility of compromising the independence and sustainability of the Caribbean Court of Justice.

## JUDICIAL LEGISLATION

Mr. Speaker,

The Leader of the Opposition has sought to condemn me for an assertion that I have repeatedly made that I will not “allow any group anywhere under the guise of judicial hearings to make policy decisions which fall in our own sovereign competence”.

This statement I will neither withdraw nor modify and indeed I would expect this entire House to defend.

It is the prerogative of Parliament to enact the laws which govern our nation.

It is the duty of the Courts to interpret the Law and apply it to the cases which fall within their jurisdiction.

Mr. Speaker, how can we countenance judicial legislation?

This is not about the flexing of political muscle. In our system of law, as distinct from a Government of men, there could be no other way.

It is difficult to escape the conclusion that the rulings in a line of cases, beginning with *Pratt and Morgan*, in the early part of the last decade have amounted to judicial legislation.

Mr. Speaker,

The Leader of the Opposition contends that it is because of inefficiencies in our system why sentences of capital punishment handed down by the Court in Jamaica have not been fulfilled.

He says that the Privy Council has upheld convictions on hangings.

Let him tell this House, which was the last case before the Privy Council coming from any country in any part of the world, where the Privy Council has upheld a capital punishment decision.

When last?

Over these last few years, there has been the complaint coming not only from me, but from highly knowledgeable and experienced jurists, that certainly in constitutional issues concerning the death penalty, the Privy Council has been engaged in judicial legislation.

Many of those who previously espoused the compelling case for the creation of the Caribbean Court and who are violently opposed to capital punishment, have changed gear and reversed their position.

They are convinced that so long as the Privy Council exists, it will persist in rulings against capital punishment which have the result of effectively abolishing the death penalty.

To mask their true intent, which is to make sure that throughout the Caribbean, capital punishment will remain in desuetude, they now proceed disingenuously to argue that the CCJ is being established purely because of the wish of Caribbean Governments to carry the death penalty. Nothing could be further from the truth.

Mr. Speaker,

No one can foretell the kinds of ruling that will emanate from the Caribbean Court of Justice on these issues. Already, the Eastern Caribbean Court of Appeal has ruled that the mandatory nature of the death penalty provided for by some Caribbean territories is unconstitutional.

Barbados and Belize have moved to amend their constitutions to reverse the rulings of the Judicial Committee of the Privy Council by the legislative authority of Parliament.

[Refer to my letter of 4<sup>th</sup> December 2002 to Most Hon. Edward Seaga]

Its rulings in the appeals brought by Neville Lewis, et. al., the Privy Council overturned decisions to the contrary which had only recently been made. One of the judges, Lord Hoffman, disagreed with the other and was very critical not only of the decision, but the motives behind the rulings. He said

**“All these questions have been considered and answered in recent decisions of the Board ... The Board now proposes to depart from its recent decisions. I do not think there is any justification for doing so ... The power of final interpretation of a constitution must be handled with care. If the Board feels able to depart from a previous decision because its members on a given occasion have a ‘doctrinal disposition to come out differently’, the rule of law itself will be damaged and there will be no stability in the administration of justice in the Caribbean”.**

One of our eminent jurists, Mr. Justice James Kerr, has also commented on these issues. He states that the mandates laid down by the Privy Council in the Lewis Case as to how the Jamaican Privy Council should proceed in the exercise of the Prerogative of Mercy, are “essentially a matter for legislation”.

### **THIS ISSUE OF AN INDICATIVE REFERENDUM**

The Leader of the Opposition and his members have wrongly asserted that the question of the CCJ was not an issue in the last General Elections.

Long before the general election was announced, I had publicly stated that part of the mandate that we would seek from the people, would include the establishment of the Caribbean Court of Justice. The People's National Party views this as part of the process of Constitutional Reform and that is why the PNP Manifesto, at page 60 states:

**“CONSTITUTIONAL REFORM**

The concept of sovereignty in Jamaica, is a common factor which links four projects and manifesto issues included in the PNP's vision of our development as we embark on the second forty years of Jamaica's existence as an independent nation.

These relate to:

- A Charter of Fundamental Rights entrenched in the Constitution.
- The movement away from a monarchical to a republican system of government.
- The abolition of appeals to the Judicial Committee of the Privy Council and their replacement by appeals from the Court of Appeal to a Caribbean Court of Justice which would constitute Jamaica's final appellate tribunal.
- Jamaica's place and leadership role in the process of Caribbean regional integration.

The People's National Party (government) will, in the next term, complete the decolonisation journey with the repatriation of our justice process"

And at page 66, that the PNP led government will:

***“subscribe to the Caribbean Court of Justice as the country’s final Court of Appeal in its appellate jurisdiction and as the arbiter of trade disputes arising from the CSME jurisdiction”.***

On the other hand, the JLP Manifesto for the same general election held in October last year states, at page 176 that:

***“The threat by the government to withdraw from use of the Judicial Committee of the Privy Council as the final Court of Appeal for Jamaica poses serious concerns for the quality of final judicial review”.***

Therefore, not surprisingly, at page 180, it concluded that a JLP government will:

***“continue to utilize the services of the Judicial Committee of the Privy Council as the final Court of Appeal”.***

How could such clear differences of policy and intention now conveniently be forgotten?

The intention of the PNP was made clear and manifest.

Why does the JLP choose to pretend otherwise?

In our system of parliamentary democracy, there was a clear cut choice.

The people have spoken.



The vast majority of the former British colonies which became independent sovereign states have abolished appeals to the Privy Council. None of them considered it either necessary or desirable to hold a referendum on the subject. Where is the precedent and what is the compelling reason for an indicative referendum?

Remember the Opposition had stated unequivocally their intention to pull out of the Court if they had succeeded at the polls. We on the Government side clearly expressed our determination to have the Caribbean Court as our final appellate tribunal.

This is why, I signed but refrained from proceeding to ratify the Agreement before 16<sup>th</sup> October.

In any event, a Referendum at this stage would, in practice, be impossible to hold unless a special law was passed authorising the use of the existing electoral machinery for that purpose.

We had a Referendum on Federation.

Mr. Speaker,

When did we have a Referendum as to whether the Privy Council should be our Final Court?

Even if such a law were to be passed, it could not, of itself, confer any binding effect on the result of the Referendum.

In light of the Section 48 of the Constitution, only a constitutional amendment could have that effect. Furthermore, the structure and modalities of the court are still in the process of negotiation. They have not yet been made binding on the Member States.

For Jamaica to take further part in these final negotiations, it is necessary for us to ratify the agreement as we are now seeking to do and so become effectively involved in the eventual establishment of the Court.

Who is to determine whether or not the electorate gave a favourable verdict in the last General Election? Is it some private body, however, small but respected, or is it the will of the people as reflected in the election results?

How do we decide which of the present provisions in our Constitution that can be changed by the requisite Parliamentary majority should now be subject to a Referendum? Is there any section apart from 110 that deserves a variation from what the Order in Council required and if so which?

Please tell me why.

## **ENTRENCHMENT**

The government has always been in favour of entrenching the Court in our Constitution, once it has been established and becomes fully functional.

It is necessary to reiterate that even when the Court commences to sit, there are cases which will still be pending before the Privy Council and those litigants will not be denied access to the Privy Council.

It is important to understand what the process of entrenchment means and how it can be accomplished. Entrenchment means that the section of the Constitution establishing a particular institution, in this case Section 110, must be listed in Section 49 as requiring a special process for repeal or alteration. To accomplish this, however, requires an amendment to section 49.

In practice, such an amendment cannot take place unless the Opposition in both the House and the Senate are prepared to co-operate. Further, if it is desired to deeply entrench the provision than after the law is passed by both Houses in the appropriate manner, it has to be put to the voters for approval or rejection. Only if it is approved can it be signed by the Governor General and become the law of the land. That is the Referendum which the Constitution permits and which has lasting legal effect.

We are intent on the establishment of the court with both its original and final adjudication. Only then, can we take the required steps to enable its entrenchment.

This government will bring to Parliament, at the appropriate time, proposals to amend section 49 so as to entrench the Caribbean Court of Justice in our Constitution.

The first step in the entrenchment process is that the Bill in question must be approved by at least a two-thirds majority of both the House and the Senate.

## CONCLUSION

Mr. Speaker,

**The main concerns expressed by the Opposition and other groups have been fully addressed.**

The enabling Acts of legislation will have to be brought to Parliament and passed with the appropriate majorities.

The entrenchment of the Court should be seen as part of the parcel of constitutional amendments which will have to be brought before Parliament as we seek to complete our process of sovereignty.

We cannot do so when our final appellate jurisdiction is exercised by a foreign Court.

Mr. Speaker,

I have in this reply sought to respond fully in order to allay any genuine fear or concern.

I am confident my arguments will command the confidence of this Honourable House. They should also serve to explain why we cannot support the amendment on the Order Paper from the Leader of the Opposition.

Mr. Speaker,

After Parliament has given its approval to ratify the treaty, there is still time and room to discuss how and when we make the full transition from the Privy Council as the Court of last resort to the CCJ as our final Court of Appeal.

I am prepared as Prime Minister, (and so is the Government) to explore any avenue that would result in a possible agreement as to exactly how we proceed to repeal the non-entrenched provisions of Section 110 and what we put in its place. This will have to take into account the fundamental decision reached in Antigua that as to the best option of 4.

----- Refer here to Hansard Report

I am also cognizant that in new provisions to replace the present Section 110, it might be necessary and also feasible, to make special transitional arrangements for certain questions of constitutional interpretation and rulings that affect existing fundamental rights and freedoms.

I have always been prepared to engage in dialogue. Let us build on our tradition as a Parliamentary Democracy to foster continuing dialogue for the good of our nation and the future of our people.

**MOST HONOURABLE EDWARD SEAGA, LEADER OF THE OPPOSITION,  
JAMAICA**

**LET THE PEOPLE SPEAK!**

### **Introduction**

The history of the proposed Caribbean Court of Justice, has been documented. It was first mooted in 1970. Work proceeded by way of further discussions from time to time at official levels until the proposal re-surfaced at the Caricom Heads of Government meeting in Antigua in 1988.

The discussion at that time and at that level, was against the background of a relative sense of security in the region. There were no special economic threats; social stability prevailed; the criminal justice system was not under siege.

This scenario warranted a serious look at the proposal for an indigenous court which would be an appellate court of final jurisdiction for the region, including Jamaica.

As Prime Minister at that time, this was the perspective in which the Government of Jamaica saw the proposed regional court. We did not view it with disfavour, provided a mechanism could be devised to ensure that Judges would be so appointed as to be entirely free of political connections to ensure that their independence would not be in question.

I expressed this view as Prime Minister at that time and, had conditions not changed drastically, I would perhaps have held the same view today.

However, times have changed, indeed, drastically so.

The economic climate of 15 years ago, no longer prevails. There was certainty and predictability, robust economic growth, relatively stable social conditions in which crime was not of epidemic proportions and the justice system worked. Today, each of these conditions have now been reversed. The economy is out of control; the society has been destabilized by fear and the criminal justice system has broken down.

These conditions have cast an entirely different perspective over our future. The justice system, which was not of great concern, is now of prime importance to Jamaicans who see their future threatened by an unjust system.

The proposal for the establishment of a Caribbean Court of Justice is now being viewed as an uncertainty which cannot be risked amidst all the other fearful uncertainties of the times.

If the proposal under consideration was for the establishment of any other institution but a court of justice, it would not be as compelling to follow a path which offers certainty. But times have changed drastically over the past decade or more and circumstances now compel us to retain the security of what we know to be a tried and tested system of justice in the Privy Council, rather than to venture with a new institution, the proposed Caribbean Court of Justice. This is not a time for adventure.

If it is the intention of Government to contend that our original position of cautious and conditional agreement for and further evaluation should mean full approval at this time, 15 years later, let me remind them that it is the business of a thinking party to think and re-think its position, according to changing conditions. I need only remind them of the process of evolution of the Federation of the West Indies, a concept which was endorsed in the beginning by both parties, enthusiastically by one, cautiously by the other. But with the evolution of other ideas and changing conditions over time, the original position was re-thought and rejected by the JLP. I need further remind them that had we not re-thought our original position on the federation, we would all be sitting here today as a Parliament without real sovereignty, an appendage of some other Parliament elsewhere.

### **Evaluation**

The Resolution before Parliament is to seek ratification of the Agreement to establish the Caribbean Court of Justice as our final court of appeal for Jamaica, replacing the Judicial Committee of the Privy Council.

The arguments offered propose that the Caribbean Court of Justice is necessary in order to:

- Fulfill our political sovereignty by providing for an indigenous institution;
- Allow for a system of jurisprudence which takes into account “the circumstances of our society and the aspirations of our people”;
- Make justice more affordable to the people.

This is a partial list which is silent on whether the court would be:

- An improvement of the present judicial system in Jamaica;
- Independent of political interference;
- A permanent part of our judicial system.

These six queries define the position of the CCJ and its claim to establishment. Let us review the arguments, one by one;

### **Sovereignty**

To say that we must have an indigenous court to fulfill our sovereignty is faulty reasoning riddled with self-serving purposes.

Our sovereignty can only be defined in terms of a Jamaican position which we already enjoy. Any re-definition in regional terms has nothing to do with sovereignty as there is no existing regional Government which has been endowed with sovereign powers.

What is apparently meant is that the CCJ is to serve the purpose of achieving a greater Caribbean identity to satisfy a Caribbean citizenry which does not at this time exist, but is expected to emerge when all the pieces of the plan for Caribbean Integration are in place. This is a critical factor in understanding the real purpose and intent of the Government, as I will set out later.

What credibility exists to support an argument of attaining sovereignty by establishment of an indigenous court by a Government which has divested into the hands of foreigners much of the indigenous Jamaican financial system, telecommunication network, central production base, a national airport with another to come, vital public utilities and other critical underpinnings of national ownership and control?

Simply to wave the flag of sovereignty will not necessarily arouse us emotionally as it does at a football game or in some other event where we are proud of the performance of a Jamaican team. The flag of the CCJ goes to the heart of how our country is judged and who are the judges. To that extent, the flag is a flag of convenience and not a flag which is to be used as the prime argument and reason for creating a system of justice to satisfy the spurious question of sovereignty.

The concept of sovereignty is far different today than it was when the Jamaican Constitution was first drafted in 1962. There are new considerations of cross-border traffic in money and in trade; of systems of governance which are being tailored to a free market and market principles which have taken over the globe. These must be reviewed on the basis of whether they are only compatible with certain systems of governance.

In respect of sovereignty as a concept, Dr. Lloyd Barnett, the most eminent constitutional authority in the country has this to say:

***“Political sovereignty is at first blush emotionally compelling. However, in a world which is increasingly becoming a global village and in which jurisdiction over important areas of national life is more and more conferred***

***on regional and international bodies, this argument is losing much of its force.***

***In any event, the proposed court would not be a Jamaican court but a regional court on which it is theoretically possible that there would not be a single judge of Jamaican nationality”.***

It would be wise for those who only more lately have been seeking to champion the cause of sovereignty, to remember that Jamaica is a sovereign nation today because we on this side, did not doubt our capacity to be independent on our own. We trusted the people to make the right decision in the referendum of 1961. Do they now contend that the referendum was a wrong decision and that, without consulting the people, we should have continued on a federal path without national sovereignty?

All this tells us that sovereignty is not the real issue. From the reasons offered, we get the strong impression that what we are speaking of here, is not so much a matter of national sovereignty but of political destiny, and what we are playing out is not the strengthening of the sovereignty of Jamaica, but fulfilling the political destiny of an integrated Caribbean region. This destiny is spelled out in the recent report of the West Indian commission, in which it is said, and I quote:

***“The case for the CARICOM Supreme Court with both a general appellate jurisdiction in substitution for the jurisdiction of the Judicial Committee of the Privy Council and an original regional one in respect of the interpretation and application of the Treaty of Chaguaramas is now overwhelming. Indeed, it is fundamental to the process of integration itself”.***

We have no quarrel with those who want to go in the direction of completing the integration process by taking it to the political level, but we do not wish to pursue this course, and it is for this reason that we differ. By this position we mean no disrespect to our Caribbean sister states with whom we have had a strong record of cooperation at many levels for 30 years. It is not that by our stand we love them less, but that we love Jamaica more!

The Government of Jamaica does not have the credibility to convincingly deny that it is involved in the deception of moving undercover in a direction of political integration. It is a government which practices deceit on a monstrous scale. This last budget exercise was proof enough of that, to say nothing of all the cover-ups of massive corruption over the past decade. The credibility factor is not on the side of the Prime Minister of Jamaica, especially when it is recognized that the Caribbean Court of Justice is the only institution left to be put in place to take the final step to political integration of the Caribbean states. Everything else is in place and ready to go.

## (2) **Relevance of Court**

Perhaps the most dangerous reason advanced to support the Caribbean Court of Justice, is the argument which really lies at the heart of this matter, that an indigenous court is needed to “reflect the moral, social and economic imperatives of its people”.

There are universal values which our courts respect as the foundations of law and order, but there are other values which a devious political directorate can fashion to its own suit proclaiming then to be ‘in the public interest, or ‘public order’ or for ‘public safety’ as the case may be. The Constitution of Jamaica is riddled with them. The rights that we hold that have been provided in our constitution have been qualified by a greater right of the state to suspend our rights based on arguments of whether the action is in the public interest, public order, or public safety, as the case may be. It is a dangerous thing. These are the loopholes which facilitated the infamous State of Emergency in 1976. It is this loose framework of the value system which can be manipulated into law to provide legislative support in the name of what is proposed as the social good by whatever interpretation, to protect what is invoked as sovereignty by whatever definition. It is nothing more than a Machiavellian opening for the means to be justified by the end.

Our system of jurisprudence interprets the law based on the evidence presented in court, not by external circumstances flavoured by political will and spiced by emotional values. This is the system we now enjoy in our own courts and where our courts differ there has always been the comfort of appeal to the Privy Council. No mere majority of politicians in



Parliament must be allowed the right to interfere with this system of jurisprudence without the specific consent of the people.

The highest form of justice is most assured when the judge does not know prosecutor or prosecuted, petitioner or respondent, and when the judge is a stranger to the politicians in the state in which the offense before the court was committed. This is so with the Privy Council.

We are far from sure that this form of justice would rule when fraternal relations are inescapable in a small society and when the surroundings in which findings are made can influence the judgment of law.

### (3) Cost

It is contended that the cost of a Caribbean Court of Justice will be cheaper for litigants although it will be costly to sponsoring governments.

The lower cost to appellants, as contended, is misleading. While it is true that travel costs in the Caribbean would be less than to England where the Privy Council presides, most appeals to the Privy Council involve criminal charges and are defended at no cost, or at greatly reduced cost, courtesy of the conscientious English bar.

But then, what is the true cost of justice? Ask any accused, or appellant, if costly justice of quality is more desirable than cheaper justice which is suspect or riddled with injustice!

The cost factor which is more relevant is the operational expense of the CCJ. On the one hand, the Privy Council provides its services free of cost to participating governments. The CCJ is expected to be a costly exercise. To overcome this, US\$100 million is being raised by the Caribbean Development Bank to be vested in a trust from which the investment interest yielded will operate the court. But no itemization of the expected expenditure has been disclosed despite requests, leaving open the question as to whether the funding arrangements are sufficient.

What is more important to the question of financing, are the appalling conditions of the local courts and their operations. Parish courts are without up-to-date sets of the laws of

Jamaica and subsidiary legislation, as well as reports from other relevant judicial systems. Buildings are in many cases without basic facilities and in need of urgent repairs. Transcription equipment is a rarity, delaying verbatim reports on cases, sometimes for years. Training of staff is deficient.

The question is asked why then enter into substantial additional expenditure on a new judicial system for which an excellent system is already in existence at the Privy Council, instead of properly refurbishing the local courts and providing the necessary equipment and working libraries required to ensure justice?

Why ask? The present government believes in building new highways while local roads are in desperate need of repairs.

#### (4) **Independence from Political Influence**

In the original model of the CCJ as discussed in 1988, there was no provision to insulate the appointment of judges from political influence. This was the original objection voiced by me at that time. Other voices were added and, over time, new proposals have been incorporated by which seemingly non-political procedures have been introduced for selecting members of the Regional and Judicial Services Commission which will regulate the Caribbean Court of Justice. This will go a long way, if not all the way. But a problem still remains.

The objection to political connections in the administration of justice requires no need for justification. It is a factor which despite all the insulation of the appointment of judges which is being built into the system, the spectre of a political shadow will still haunt the court.

The commonly expressed disagreement of the Government of Jamaica with the handling by the privy council regarding appeals against convictions on charges of capital murder which provide for the penalty of capital punishment by hanging, have sent a strong signal of dissatisfaction by government and desire for a different court which will satisfy the political will of government for prompt hangings. To bolster the argument of a defaulting Privy Council, reasoning is advanced that the Privy Council is against hanging and this position is contrary to public preference in Jamaica. Hence, the need for a new court which will be more compliant to the political will, the Caribbean Court of Justice.

This is deliberately misleading. The government is fully aware that the Privy Council has upheld convictions on hanging on many occasions. What the Privy Council requires is that all courses of appeal to other bodies should first be exhausted before the Privy Council hearing of the appeal.

To fully exhaust the various bodies which hear appeals can take several years during which the convicted prisoner could complete the five year limit set by the Privy Council in the Pratt and Morgan case for any convicted person to spend on death row. As a result, some sentences of capital punishment handed down by the court in Jamaica have not been fulfilled.

Having regard to the fact that because of lack of staff and equipment some two years of the overall period of appeal are generally required to complete the time consuming process of preparation of the notes of trial, government cannot properly justify its stand against the Privy Council and could be using failure to effectively implement the popular call for hanging to bolster its case to remove the privy council as Jamaica's final Court of Appeal.

The credibility of the campaign by government to remove the Privy Council is further weakened by the loaded statement of Prime Minister P.J. Patterson in which he flexes his political muscles on the judicial system in an assertion that he would not "allow any group anywhere under the guise of judicial (hearings) making decisions that make policy decision on social matters that are the prerogative of Jamaica as a sovereign and independent country".

The "social" issue in question in this case, is the matter of appeals against capital punishment which is, first and foremost, a legal matter. As such the issue lies well beyond the powers of the Prime Minister to determine. The very same political interference with the judicial system, regarding which I expressed fears in 1988, is apparently still in place as threatened by the Prime Minister of Jamaica: no matter how insulated the appointment of judges will be he will "not allow" them to interfere in his "social" policy positions, using his definition of "social".

The sinister record of the Peoples National Party in matters of justice is part of the consciousness of many Jamaicans who fear the devious tactics of PNP governments in

depriving them of their fundamental rights and freedoms. This real or perceived political signal of interference is in keeping with the fundamental fear that it could be manifest reality. This is one of the deep feelings in the country which fuel the view that retention of the Privy Council, which is beyond political manipulation, is essential to our future support.

The people of this country should have every reason to expect that the justice system can still be manipulated by men who put politics first. We must never forget the infamous gun court which was established by manipulation of the justice system by the Manley Government in 1976 using magistrates, without security of tenure, to try gun crimes which should properly be heard by judges whose tenures office were secured.

The Government of Jamaica should understand, therefore, that in the eyes of a great many Jamaicans it has little credibility as a defender of our fundamental rights and freedoms and that it is under great suspicion that, given an opportunity to extract political gain, it will enforce its political will no matter how many layers of insulation from political interference is built into the administrative structure of the Caribbean Court. That is why we will continue to support the Privy Council as our final Court of Appeal.

#### **(5) Improvement to the Judicial System**

The fundamental question is whether the Caribbean Court of Justice would offer an improvement to the services provided by the judicial committee of the Privy Council. No one can contend that this is the case.

The Privy Council consists of the highest calibre of the British judiciary and other invited heads of judiciaries in the commonwealth who together comprise a wealth of erudition and experience that is unmatched in our system of justice anywhere. And its administration costs Jamaica nothing.

Jamaicans of all walks of life have a deep respect for the quality of justice of the Privy Council, a status which any new court may or may not achieve and, in any event only over decades of practice.

The reputation of the Privy Council is a lynch-pin of great importance to agreements between foreign and Jamaican entities, for those foreign entities, who, through unfamiliarity, are not convinced of the reputation of Jamaican courts to provide the quality of justice they

expect, recourse to the Privy Council is the comfort that satisfies their concerns about hearing disputes in this jurisdiction. Recourse to the Privy Council provides the glue, without which, many substantial agreements would never hold.

I shudder to think what the reaction would be on future agreements if contracting parties are told that disputes would be handled by an unknown, untried CCJ.

**(6) Permanence of the Caribbean Court of Appeal**

There is one further point of great importance to assess. How permanent will be the Caribbean Court of Justice?

It is not intended, so far, by government that the CCJ should be established by way of entrenchment in the constitution. Entrenchment, to whatever degree would require political cooperation and, possibly, a referendum in which the people would decide.

The intention of government is to avoid putting the issue to the people as a safeguard against rejection by the people.

The CCJ can be established by a simple majority vote in each House of Parliament. Government proposes to take this course. It is fraught with danger and is self-defeating.

Such a court can have no permanency as by the same simple majority Jamaica's participation can be withdrawn. In these circumstances a court of this nature would be vulnerable to real or perceived threats of dissolution, leaving it open to fear and favour.

The strength of the highest court must rest in its impregnable position from all conditions which can unduly influence it. This can only be assured by entrenching its position in the constitution so that it cannot be affected by a simple majority vote in Parliament for establishment or dissolution.

The impact on the credibility of a Caribbean Court of Justice which is enacted by simple majority goes further. As the highest court of appeal in the system it must have maximum protection for the security of tenure of its judges.

This is not the case. Judges of the Jamaican Court of Appeal can be removed from office only the elaborate provisions of section 105 of the constitution which requires concurrence of the Privy Council. The section is entrenched giving permanence to the protection it offers to judges. No such provision exists for judges in the Carib Court which is itself not entrenched.

This is a highly undesirable condition which will expose judges in the CCJ to real or perceived threats of dismissal.

The spectre of the highest court in the system existing in a precarious structure while lesser courts enjoy constitutional permanence tells us that this perverted arrangement has been designed to fulfill a purpose regardless of the anomaly it generates and the abomination which it creates. It will carry the status, by reality or perception, of a weak, hybrid specie of a true court.

In all these circumstances the proposed Caribbean Court of Justice has little footing of support:

- Contrary to its proclaimed purpose, it is not an instrument of sovereignty for it will be attached to no sovereign nation;
- It maybe an instrument to fulfill the destiny in the political integration of the Caribbean, but, from all sides, we are not going in that direction;
- It cannot fulfill the “moral, social and economic imperatives of the people” unless it bastardizes itself, in which case it is half a court and half something else;
- Its provision of cheaper justice for litigants is beneficial only to some. To the state it is a costly exercise with an upside-down priority of spending where there is no urgent necessity and neglecting where appalling local conditions dictate an urgent need;
- Its independence is compromised by lack of protection from political interference on the threat of easy removal of judges;
- It offers no improvement to a judicial system built around an appellate court with an honoured tradition of justice which cannot be replaced;
- Its permanence as a judicial body, which permanence is a necessity if justice is to be served, is easily dissolved – here today, gone tomorrow.

In brief, there are no real convincing arguments for the establishment of a Caribbean Court of Justice. It will introduce, at this time, greater uncertainty than the great uncertainty which already exists amidst an economy which is out of control and a society which is falling apart.

In those circumstances, if the government persists in participating in the Caribbean Court of Justice then the people must be consulted. The Opposition will not accept any other course than to be guided by the people in a referendum. If a referendum is refused, the Opposition will withdraw Jamaica as a participating state whenever the opportunity arises and abandon the Caribbean Court of Justice. Let the people speak.

The decision at hand is the most far-reaching for Jamaicans since the people were asked to determine their future in 1961. Accordingly, I move the following amendment:

**Amendment to Resolution**

*Whereas the General Election to the House of Representatives was duly held on October 16, 2002;*

*And whereas at that election it was not an issue whether or not the Government of Jamaica should participate in the Caribbean Court of Justice;*

*And whereas the resolution before the House of Representatives now seeks to ratify an agreement for Jamaica to become a participant in the proposed court;*

*And whereas grave doubts have now been publicly expressed as to whether Jamaica should participate in the Caribbean Court of Justice;*

*And whereas it is right and proper that the people of Jamaica should be accorded an opportunity of expressing their opinion on this issue separately and apart from any other;*

*Be it resolved that government agrees to the holding of a referendum to seek guidance from the people and to act in accordance with the views of the people on the participation of Jamaica in a Caribbean Court of Justice.*

## CONCLUSION

There has been no more sinister attempt to subjugate our system of justice and to subvert the rights of the people, than this attempt to unleash on an unsuspecting people a lesser breed of justice which can be molded in the shape of the political will.

I do not care what political persuasion binds any man who may hope for advantage, or fear the disadvantage, of a political court of justice. I know that deep in their minds, they are suspicions that a court which has no true independence is a threat to themselves and future generations and that they feel in their hearts that it is not right to usurp the judicial process in a manner which can imperil their future and the future of their children born and yet unborn.

Let us not believe that the people are ignorant of the need for more, not less, justice. The infamous events of this decade, tells us that there is no weaker link in the political fabric of our society than the quality of justice.

These are days when every device is used to exploit every loophole that will allow the assumption of even greater political power over the people and abuse them of their rights. We must not allow a government which already fully controls all the centers of political power and weaves vast influence over the forces of law and order, to have any further extension on their grasp on our lives through a system of dubious justice which can allow greater political empowerment to threaten our fundamental rights and freedoms.

We will not accept that after all the epic struggles at the end of the thirties for workers rights, the fifties for independence rights, and the seventies to protect our society from an alien ideology, each a generation apart, that, at this time, the beginning of the first new generation of this century, we should see the doors of the highest form of justice being slammed in our faces.



In 1962, the people of Jamaica did not intend that one set of masters should be changed for another. It was their expectation that the colonial masters would leave and we the people would be our own masters.

To ensure this, we must have recourse at all times to the highest form of justice on which we can rely so that no new masters can subvert our inalienable fundamental rights and freedoms.

Let the people speak; if it is all so good, let the people speak. Let the people be polled in a referendum on the type of justice they want. Only the people can decide so fundamental a matter as to whether this country in which we live, is one in which freedom will run like a river and justice like an everlasting stream. Let the people speak!