

# **THE FIFTH ANNUAL CARIBBEAN MEDIA CONFERENCE**

## **THE CARIBBEAN COURT OF JUSTICE**

### **PUBLIC CONFIDENCE AND THE ROLE OF THE MEDIA**

It is with a considerable degree of trepidation that I stand here this morning to invite you to reflect upon the apparent advent of the **CARIBBEAN COURT OF JUSTICE (CCJ)**. Trepidation because the subject spawns much heated debate; trepidation because the debate has been cultured in such a maelstrom of political controversy that the responses to the Court have been informed more by emotion than by rational thought. Like the War against Terrorism, any discussion of the topic of the CCJ is beleaguered by the mantra “If you are not with me, you are against me.” “If you do not support the regional court, your stature as a Caribbean person is diminished because you are short on regional pride.”

Today, I invite you to lay aside all those emotional responses and, in sober, reflective mood, contemplate how the media can shape the debate into rational and dispassionate focus, if the Court, once instituted, is to serve the region in a viable and effective manner.

I admonish myself of the axiom that “Courage is not always Wise.” At the end of the day, you can always write me off as an Old Fool.

### **BACKGROUND**

On the 14<sup>th</sup> February, 2001, at Barbados, ten (10) Heads of Regional Governments, as contracting parties, signed **The AGREEMENT ESTABLISHING THE CARIBBEAN COURT OF JUSTICE**. Those Governments were:-

Antigua And Barbuda

Barbados

Belize

Grenada

The Co-operative Republic of Guyana

Jamaica

St. Kitts and Nevis

St. Lucia

The Republic of Suriname

The Republic of Trinidad  
and Tobago

The premises of the Treaty are stated in the Preamble, but are best amplified in the promotional literature put into circulation by the Caribbean Community Secretariat on 8<sup>th</sup> April 2000:

“At a time when the Caribbean Community is forging ahead with the creation of a Caribbean Single Market and Economy {CSME} as an answer to the aggressive pace of globalization and configuration of international trade, the establishment of a Caribbean Court of Justice is a critical component in this effort, especially in its original jurisdiction. The CARIBBEAN COURT OF JUSTICE will be called on to apply and interpret the Treaty of Chaguaramas as revised by the nine protocols to create the Caribbean Single Market and Economy.

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 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 jurisdiction of Member States of the Community and which are parties to the Agreement Establishing the Caribbean Court of Justice. 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.”

## **STRUCTURE OF THE AGREEMENT**

Part I, Articles II- IX, addresses the Establishment, Membership and Constitution of the Court, as well as the establishment, role and functions of the **REGIONAL JUDICIAL AND LEGAL SERVICES COMMISSION**.

### **Composition and Appointments**

Article IV of the CCJ AGREEMENT provides that the judges of the Court shall be the President and not more than nine (9) other judges.

The qualifications of the judges are also detailed and go to such matters as experience, integrity, high moral character, intellectual and analytical ability, sound judgment and understanding of people and society.

The President of the Court takes precedence over all other judges and is both appointed and removed as well as disciplined by the Heads of Government on the recommendation of the Regional Judicial and Legal Services Commission.

### **The Regional Legal and Judicial Services Commission**

The Commission will have responsibility for the appointment, discipline and removal of all judges, other than the President, as well as all other offices of the CCJ. Subject to Article V, the Commission will regulate its own procedure.

The President of the Court is the Chairman of the Commission and together with six (6) other categories of members constitute the

Commission. There are eleven members altogether. The term of office for members other than the President will be three (3) years.

### **The Original Jurisdiction of the Court**

Part II of the Agreement addresses the jurisdiction of the Court in its role as an international tribunal having an original jurisdiction to hear and deliver judgment on:

- a) Disputes between Contracting Parties to the Agreement;
- b) Disputes between any Contracting Party and the Community;
- c) Referrals from national courts or tribunals of Contracting Parties;
- d) Applications by nationals of a Contracting Party to whom special leave of the Court has been granted in certain particular circumstances.

Article XI deals with the Constitution of the Court sitting in its original jurisdiction.

In addition to its jurisdiction to hear contentious matters, the Court will be clothed with an advisory jurisdiction to deliver opinions concerning the interpretation and application of the Treaty. That jurisdiction can only be invoked at the request of a Contracting Party.

### **The Appellate Jurisdiction of the Court**

Part III, Article XXV prescribes that in its appellate jurisdiction the Court shall be vested with such jurisdiction and powers as are conferred on it by the Agreement or by the Constitution or any other law of a Contracting Party.

Appeals shall lie to the Court from decisions of the Court of Appeal of a Contracting Party as of right in any of the following cases:

- a) Final decisions in civil proceedings where the matter in dispute on appeal to the Court is of the value of not less than twenty-five thousand dollars Eastern Caribbean currency (\$25,000) or where the appeal involves directly or indirectly a claim or a question respecting property or a right of the aforesaid value;
- b) Final decisions in proceedings for dissolution or nullity of marriage;
- c) Final decisions in any civil or other proceedings which involve a question as to the interpretation of the Constitution of the Contracting Party.
- d) Final decisions given by a superior court of a Contracting Party in the exercise of its constitutional redress jurisdiction with respect to the protection of fundamental rights;
- e) Final decisions by a superior court of a Contracting Party relating to the determination of any question for which a right of access to the superior court is expressly provided by the Constitution of a Contracting Party.
- f) Such other cases as may be prescribed by any law of the Contracting Party.

In addition to those civil appeals which lie as of right, appeals shall lie to the Court only with the special leave of the Court from any decision in any civil or criminal matter given by the Court of Appeal of a Contracting Party. Provided, however, that an appeal may lie to the Court with the special leave of the Court of Appeal of a Contracting Party from a decision of that Court of Appeal if the decision is a final decision in a civil proceeding which in the opinion of the Court of Appeal is one of great general or public importance or is such that it ought to be submitted to the Court.

In relation to any appeal, the Court shall have all the jurisdiction and powers possessed in relation to that case by the Court of Appeal of the Contracting Party from which the appeal was brought.

The President in consultation with five other judges of the Court selected by him constitutes the Rule-Making Authority of the Court for the regulation of the practice and procedure of the Court in the exercise of its appellate jurisdiction.

### **Enforcement, Financial and Final Provisions**

Part IV deals with the enforcement of orders of the Court, provision for the officers of the Court, and the financial provision, rights of audience before the Court, and the immunities of privileges necessary for the protection of the independence of the Court. It also enables the Commission to make Regulations governing the appointment, discipline, termination and other conditions of service for judges other than the President, and officials and employees of the Court.

### **CCJ as The Final Court of Appeal**

It is the appellate jurisdiction of the CCJ which has become the sticking point in the controversy surrounding the establishment of the Court.

For a listening audience of your exposure, it is hardly necessary to re-hash the cases made for and against the replacement of the Privy Council by the CCJ as the final appellate court for the region. Indeed, I believe that you were addressed upon the subject at your Third Annual Convention held in Guyana on the 5<sup>th</sup> May, 2000.

Briefly put, the proponents, mainly the governments of the region, see the Court as:

A necessary symbol, the capstone of sovereignty which demands a final separation from our colonial past;

A determinative role in furthering the development of a Caribbean jurisprudence;

A step in the deepening of the regional integration process;

A more ready access to final determination of matters than is afforded by the costs and far distance of the Privy Council.

On the other hand, there are those who contend:

That the motivation for the implementation of the Court is power-driven by the governments of the day who have been stung by their reversals before the Privy Council in the death penalty cases. They see the argument of nationalism and sovereignty as a blind, lacking in consistency since in relation to the independent nations of the region the CCJ will be a non-national Court both in constitutional terms as well as in composition, and would therefore be in no different position than the Privy Council.

They point to the lack of capacity to fund the Court, the apparent lack of independence of the Court infected as it would be by the political influence in the appointments process;

Last year I pointed out that **SOVEREIGNTY TODAY IS NOT AS CRITICAL AS CIVIL SOCIETY**. Pinochet and Milosevic had demonstrated that sovereignty is under attack and retreating in face of advancing global concerns for the protection of **HUMAN DIGNITY**. That position is confirmed by Afghanistan, Iraq and the whole world order since September 11<sup>th</sup> 2001.

Though the pros and cons of the debate may be vital for working out the mechanisms upon which the Court may ultimately function, they are all but peripheral matters to the feasibility and acceptability of the Court by the people of the region. At the heart of the debate, whether Caribbean countries should abolish appeals to the Privy Council and, by way of substitution, create its own final appellate court in the form of the **CARIBBEAN COURT OF JUSTICE**, is the matter of **CONFIDENCE**.

In promoting the original jurisdiction of the Court, the Caribbean Community Secretariat had this to say:

“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”.

Further on it went on to state:

“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”. {page 12}

Then (at page 22):

“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}”.

On the other hand, Professor Selwyn Ryan points out:

“What the region-wide debate about the CCJ revealed, inter alia, is that while it seems obvious to Caribbean nationalists that the time had come to deepen the integration movement, there were still powerful forces throughout the region which did not see de facto judicial federalism as being necessary, practical, cost effective, or

even desirable. Opposition was fostered not only by insular nationalism, but also by deep seated fears that the political executives of the region would make a mess of a regional judiciary, just as they had with other regional institutions. All that had been done or not done over the past four decades with respect to the relationship between political and judicial elites informed the debate and emotional postures that various groups took on the issue.”

### **THE ISSUE OF PUBLIC CONFIDENCE IS COMMON CAUSE**

both for the proponents as well as those who stand in opposition to the Court. For the former, confidence is important for the foreign investor, and for the latter it is paramount for his own protection.

There is a need, therefore, to ensure that we enjoy a judicial culture in which the requisite climate of confidence exists before we embark on this uncharted voyage. If it does not exist, then we must find a mechanism to create and secure that confidence. It would be foolhardy to proceed to adoption of the Court without that confidence being assured. Without that confidence, nothing else matters.

### **The CRISIS IN CONFIDENCE**

Dr. Cyrus Das of the Malaysian Bar has wisely said:

“Justice is a consumer product and must therefore meet the test of confidence, reliability and dependability like any other product if it is to survive market scrutiny. It exists for the citizenry ‘at whose service only the system of justice must work.’ Judicial responsibility, accountability and independence are in every sense inseparable.”

### **Is CONFIDENCE a ready commodity in the region?**

In our modern-day constitutionalised societies we must find that confidence radiating from the four (4) separate but indivisible branches of

government if we are to survive market scrutiny. I call them the **FOUR ESTATES** of the people, and they are, the Legislature, the Executive, the Judiciary and the Media.

In theory our nations are now founded as constitutional democracies, centred around the development of the dignity and worth of the individual, but expressed in terms of majority rule.

The attainment of the ideal of the dignification of the individual in the cultural, social, political and economic sense demands an emission of public confidence with respect to all four estates.

It is for that reason, that in a constitutional democracy such as ours, the powers of the Legislature and the Executive are made subordinate to the over-riding supremacy of the Constitution; the exercise of those powers are constitutionally rendered subject to the scrutiny of the Court.

The Judiciary is the guardian of our rights. But we must have confidence in the guards. So the perennial question arises – “Is it necessary to guard the Guards? And if so, who guards the Guards?”

The *raison d’etre* of the proliferation of the democratic form of government in the twentieth century is the recognition that absolutism of unfettered and arbitrary sovereign authority must give way to well regulated systems of government at the centre of which stand the human worth and dignity of man.

The structure of our Constitutional arrangements is rightly predicated upon the premise that the fundamental rights and freedoms reflective of that human worth and dignity stand as the core value of a civilized society, and as such, they must be **PROMOTED** by the State, but be **PROTECTED** and guarded by the Judiciary.

These twin obligations – to promote and protect human rights – constitute a revolution both in State-Craft as well as in Judicial functions in constitutional democracies.

From the standpoint of the State, that revolution warranted a reconstitution of the culture of governmental authority from one in which the sovereign could do no wrong, to a culture in which constitutional restrictions and limitations are placed upon the hitherto unfettered exercise of state power all in the defence of human rights.

So far as the regional states are concerned, the plethora of constitutional cases which have been brought before our Courts bear their own testimony of the extent to which our governments have honoured or failed in their obligations of good governance and the promotion of the rights of citizenry.

The right to freedom of expression, the right to protection of property along with the right to life are active and alive issues which have repeatedly sought the sanctuary of our Courts.

But here today, we are not primarily concerned with the level of public confidence which our state governments enjoy. We are concerned with testing our confidence in our existing municipal courts to deliver the constitutional protection of our rights and secure our democratic way of life in order to determine whether at this point in time we ought to chance upon indigenizing our final appellate court. We are asking, What kind of sanctuary have our Courts afforded so far?

### **Judicial Responsibility**

Before the advent of constitutions in the latter half of the twentieth century, courts in our Common Law jurisdictions were primarily engaged with the regulation of the social behaviour of citizens inter se. In the social order in which the sovereign, through a parliamentary democratic form of government was supreme, our Courts became rooted in a culture which espoused an infallibility in government. Courts were the king's courts, and the king could do no wrong. It was the obligation of a benign parliamentary monarchy to regulate the social order for its subjects, and to that end to do justice between contending citizens. The courts as agent of the sovereign were restricted primarily to dispensing justice on behalf of

the sovereign in matters criminal, or adjudicating and resolving civil disputes between citizens.

Until the reforms culminating in the Crown Proceedings Legislation, the acts of an omnipotent sovereign could not be challenged in the king's own courts before which the citizen came as a supplicant. In such a climate judges and the courts became as inscrutable as the king himself wrapped in sub iudice rules, clothed with power to issue gag orders as well as to punish with imprisonment for the contempt of **SCANDALISING THE COURT**. Indeed all the pomp and ceremony including the use of Orderlies was designed to secure the veil against scrutiny. When **ORACLES SPEAK, LET NO DOG BARK!**

In to-day's constitutional democracies in which the protection of human rights and the promotion of human dignity are paramount, the role of the judiciary has been revolutionized. The courts are no longer the benign conscience of the king, but they are constitutionally charged to be the protectors of the citizen against the king himself.

Per Beverley McLLachlin, a Chief Justice of the Canadian Supreme Court:

“Gone are the days when judges could spend their days musing on the principles of contract, tort and criminal law. Their field includes these, but much more as well.

The necessary concomitant of the increasing insistence on human rights and the new social face of the law is an independent judiciary, ready and able to review a wide range of governmental action.

While the legislative and executive branches of government have an important role to play in supporting human rights, the difficult burden of interpreting the rights and maintaining them even in the face of governmental intransigence if need be rests on the shoulders of the courts”.

In a Constitutional Democracy, it is the Courts which stand between the power of the state Government to formulate and execute legislation and policy and the citizen's right to the exercise of his fundamental rights. The Courts regulate social tension by holding the scale in balance and determining how far government's policy can be allowed to go and infringe upon the citizen's rights. Such is the role of our Courts today.

### **Judicial Reliability**

Public confidence in the judiciary will be measured by the extent to which the courts have successfully made the transition from the old traditional common law culture of sovereign dependence to constitutional independence, and have met the new constitutional challenges demanded by their new leadership role.

In the Caribbean, the judiciary's commitment to its new leadership role has been at best sporadic and lacking in consistency. Sometimes our Courts have taken a stand for the rule of law; on other occasions, they have struck severe and deadly blows against the rights and freedoms.

Various commentators have observed upon a ready willingness in the judiciary to sanction and approve unlawful state intrusion upon the constitutional rights of the citizen. The Jamaican case of **REVERE JAMAICA ALUMNI LTD V A. G.** has been held up as a stark example of the Jamaican judiciary validating the unlawful conduct of the government in a climate of constitutionalism where human rights should be sacrosanct.

Jeff Cumberbatch of the Faculty of Law, U.W.I., Cave Hill in the course of his commentary on cases concerning the protection in the Eastern Caribbean of the right to Freedom of Expression observed:-

“One of the planks of the argument against a Caribbean Court of Justice is that in matters of constitutional law involving the fundamental rights, the regional judiciary, in many cases, appears to be only tepidly solicitous of, and adventurous in, the protection of

the rights of the citizen. Far less so, the argument runs, is the Judicial Committee, where a more generous and purpose construction is given to the freedoms so as to ensure them full recognition and effect”.

There is a trilogy of cases arising out the Eastern Caribbean jurisdiction which informs us on the extent to which our Courts have made the transition out of the judicial Common Law culture and passed into the enervating climate of constitutionalism. In all three the fundamental right to freedom of expression was engaged.

The first is the case of case of De Freitas, a civil servant employed in the Ministry of Agriculture in Antigua and Barbuda. De Freitas had the temerity to participate in three political demonstrations protesting against corruption in government. He was warned to cease and desist from such behaviour. Nevertheless, on the 2<sup>nd</sup> October, 1990 and during his lunch hour, he left his office carrying the placard “Humphrey must go and all corrupt politicians ALSO!”

He was interdicted under the Civil Service Act 1984, which prohibited a civil servant from publishing any information of expressions of opinion on matters of national or international political controversy. In his challenge to the interdiction and the validity of the legislation, he raised his fundamental rights to freedom of expression and freedom of assembly and of association.

The Court of Appeal reconciled the state’s incursion upon those rights by falling back upon the common law principle of the presumption of regularity applied as the principle of presumption of constitutionality.

According to that presumption, the court opined that the legislature is presumed to have intended harmony between the statute and the Constitution and proceed to interpret the section by implying the words “when his forbearance from such publication is reasonably required for the proper performance of his official function”.

In applying the prohibition as revised by the Court, the President went on to find that the prohibition was justified, and he likened the relationship of De Freitas' employment with the state with that of the common law relationship of Master and Servant.

The second case is that of John Benjamin and others V A.G. of Anguilla et al.

Again this case invoked the issue of the citizen's fundamental right to freedom of expression.

Benjamin was the host of a call-in programme, aired on the government owned radio station, designed by himself and the Ministry of Information for the open exchange of ideas among the people of Anguilla subject to the restraints which protect the rights and reputations of members of the community. It was an exceedingly popular programme in which even ministers of government participated. Inevitably, callers on the programme became critical of the government, and this criticism culminated in a radio discussion concerning a government supported lottery which was being operated at that time without the requisite licence. Benjamin, a lawyer, in response to a direct question from a caller expressed the view that the operation of the lottery was illegal. The owners of the lottery immediately wrote to the government threatening legal action and the government forthwith pulled the plug upon the programme. Benjamin sued alleging, inter alia, a breach of his fundamental right to freedom expression, that the time slot on the radio station was a dedicated public forum where he had a right of access to express his views.

The Court of Appeal rejected his claim, asserting that the radio station was "property which is not by tradition or designation a forum for public communication." And that in the circumstances Benjamin was merely enjoying a licence from the Minister of Information "a forum for and encouraged expression". In the view of the court the licence was properly revoked, and it rejected the

claim that there was a fundamental right in issue.

The third case is the **OBSERVER PUBLICATIONS LIMITED v CAMPBELL 'MICKEY' MATHEW, ET AL.**

Once again, Freedom of Expression was involved, as well as deprivation of property. The Government of Antigua frustrated the company's application for a radio broadcasting licence, and ultimately, the company by letter advised the licencing authority that it would proceed to commence broadcasting on a certain date. Whereupon, the Commissioner of Police armed with a warrant obtained upon an affidavit in which it was deposed that there were reasonable grounds to believe that unlawful equipment was concealed in the premises, entered into the company's premises, and seized the equipment.

In the ensuing proceedings, where the right to freedom of expression was a precondition of the Licence and the basis of the challenge to the validity of the telecommunications legislation, our Courts once again rested upon the presumption of constitutionality, and the absence of a right to a broadcasting licence. As far as the Court of Appeal was concerned no fundamental right or constitutional provision was engaged. In the circumstances, the court thought it improper that "by just merely shrieking breach of a fundamental right one can knock on and disturb the sanctity of the constitutional door".

Upon a challenge that government's conduct or legislation invalidly abrogates the fundamental rights of the citizen, the disposition of our Courts is to start with the presumption of constitutionality, to regard that as an insuperable hurdle which the applicant cannot mount, and on this basis to pronounce in support of the conduct or legislation. This is exactly what happened in this trilogy of cases.

In fairness to our Courts, they were lured onto this path by the Privy Council itself since the days of the **ANTIGUA TIMES** case in 1975. But ever since then, the courts in this jurisdiction have been urged to address the primacy of these rights; that the primacy of fundamental rights engages

the issue of compatibility between the right itself and the impugned legislation or conduct; that the approach of compatibility calls for the government being able to show that the conduct or legislation was justified by reason of over-riding social circumstance and that the measures adopted by government were no more than what was reasonably required to meet the relevant social problem. (The **OAKES** test of Canada).

Our Courts have failed to heed the call. And we have had to wait until the Privy Council could nibble away at its own principle of presumption of constitutionality pronounced in the Antigua Times case, and at last in **BROWN V STOTT [2001] 2 All ER 97** to declare in favour of the compatibility approach. Per Lord Hope:

“I would hold therefore that the jurisprudence of the European Court tells us that the questions that should be addressed when issues are raised about an alleged incompatibility with a right under art 6 of the convention are the following: (1) Is the right which is in question an absolute right, or is it a right which is open to modification or restriction because it is not absolute? (2) If it is not absolute, does the modification or restriction which is contended for have a legitimate aim in the public interest? (3) If so, is there a reasonable relationship of proportionality between the means employed and the aim sought to be realized?”

It is such a test which our Courts have failed to apply.

It is true that there are cases in which our Courts have upheld the supremacy of the Constitution. There have been cases such as **DUNCAN v AG, GOODWIN, LOCKHART et al V The A.G. ; A.G. OF ANTIGUA AND BARBUDA V LAKE**.

**DUNCAN** turned upon the arbitrary exercise of the constitutional power of the Public Service Commission whereby it sought to deprive a public servant of all of his benefits by sending him on permanent leave instead of retirement.

**GOODWIN** turned upon the validity of legislation whereby the State sought to control professionals by putting them through the hoops of an elaborate and intricate system of annual licencing. **LAKE** turned upon the usurpation by the Prime Minister of the constitutional authority of the Public Service Commission with respect to the termination of a public officer with whom the Prime Minister was personally and politically at variance.

The common feature of the first two cases is that the Courts' decisions engaged areas of the Constitution other than the fundamental rights. In **GOODWIN**, a challenge with respect to fundamental rights was raised, inter alia. The Court of Appeal made short shrift of that right, stuck with its approach of considering primarily the question of the presumption of constitutionality and ruled against the applicants with respect to those rights. The very approach which was adopted in 1975. In **DUNCAN**, the Court of Appeal also ruled against the arbitrary exercise of the powers of the Public Service Commission. Only in **LAKE** was the claim to a violation of the constitutional protection against discrimination upheld in addition to the breaches of the other Constitutional rights. **MARPIN**.

In **GOODWIN**, had the courts addressed the primacy of the right to freedom of expression in the discharge of professional functions which involve the communication of ideas it should have been appreciated that the annual licensing of such professions after they have met the threshold of due qualification is as unacceptable as is the licensing of journalists.

Fortunately, we are now in the days of **Fox v The Queen, Patrick Reyes v The Queen, The Queen v Peter Hughes, and Jennifer Gairy v The Attorney General** when the Privy Council has had to bemoan the dark days of the **TIMES** case, "when international jurisprudence on human rights was rudimentary"- the words of **REYES** case - or in the words used and adopted in **JENNIFER GAIRY's** case:

“The modern social thinking of progressive societies and the judicial approach is to do away with archaic State protection and place the State or the Government at par with any other juristic legal

entity.” Or

“In interpreting and applying the constitution of Grenada today, the protection of guaranteed rights is a primary objective, to which the traditional rules of the common law must so far as necessary yield.”

It is not surprising that in Jamaica the proposed amendments to the Constitution encompass provisions which would expressly declare the presumption of constitutionality unacceptable and place upon the state the burden of proving the legitimate aim and proportionality of impugned legislation or executive conduct. This is a position which was sought to be established in Anguilla since 1975.

Looking at those cases we are left to ponder whether or not the true nature of constitutional government marked by its restriction and limitations upon state power would ever come within our grasp if that were the full scope of judicial reliability upon which we could count. Sometimes, our Courts bleat “Constitutional Heresy” or unctuously and punctiliously close the constitutional door in the face of the citizenry, a door upon which we must not knock, or that our Courts are not the walls within which we must bring our political contentions, simply because they imbue constitutional governments with the attributes of an absolute personal sovereign.

If we cannot take our grievances against the State before the constitutional arbiters, the Courts, then the law of self-help would dictate that we will have to meet at **HIGH NOON** and decide them in the streets. **THAT IS NOT ACCEPTABLE IN A WELL ORDERED SOCIETY.** Our Courts must rise to the challenges of the Constitutional Age, hear the complaints in a judicious manner, hold the scales between the Citizen and a possibly intransigent State and release the tensions between them so that we can revert to normalcy.

### **Judicial Independence**

In the discharge of its new role and function, the independence of the courts is a matter of paramount importance. Judicial independence connotes both personal independence of the judge as well as the independence of the institution.

Whenever personal independence or institutional independence is short in the judiciary, public confidence must necessarily be eroded.

It is the appointment's process contemplated in the Agreement establishing the Caribbean Court of Justice which has attracted the strongest opposition among commentators of the court, and thereby revealed the depth of the public's want of confidence.

**THE PRESIDENT** - The Heads of Government have steadfastly taken control of the appointment, discipline and removal of the President of the Court. Art. IV 4.6; Art. IV 4.9; Art IX 5 (1) and (6).

Even the Appointment of an Acting President remains tightly under their control. Art VIII. The President is appointed for a nonrenewable 7 year term or until he attains the age of 72 years which ever is sooner. The term is too short to allow the Court to conceive, plant and shape its own independence in an institutionalized manner before the appointment of the President falls again to be decided by the political will.

Most commentators agree that, with respect to our existing courts, the process of selection of judges even in face of reform does not insulate our courts from political interference. This is so with respect to all levels of the judiciary including Magistrates.

The Agreement establishing the Caribbean Court of Justice does not shield the process of selection of judges from political interference to any greater degree. The Heads of Government have too large an opportunity to influence the appointment of the President and the Chairman of the Regional Judicial and Legal Services Commission and consequently the whole process of the judicial appointments.

## **THE REGIONAL JUDICIAL AND LEGAL SERVICES**

**COMMISSION** - The Agreement now provides that there shall be 11 members of the Commission 6 of whom will be appointed by the Bar Associations and Academia and the remaining 5 including the President will be subject to appointment by the Political Directorate. Further, the three year term of membership itself brings the life of membership well within the five (5) year lives of Parliament and affords review of membership in accordance with changes of government.

It is in this component of public confidence that the culture of our Courts have begun to cause anxiety and the perception of the independence of the courts, once unassailable, has suffered considerable scarring.

In some jurisdictions the struggles to maintain the courts' independence from political interference have erupted into open and traumatic tensions and conflict between the political and judicial elites all before the full glare of the public gaze. Each and every jurisdiction has had its own form of conflict, and each of you here will be able to draw upon your own jurisdictional experience. You will recall the troubles in Trinidad and Tobago which led to the Commission of Inquiry in the Judiciary. The recent controversy in Barbados concerning the appointment of a former political Attorney General to the office of Chief Justice reflected very much the situation and arguments surrounding the nomination of the late Lee Moore for appointment to the office of Chief Justice in the Eastern Caribbean.

Our Courts have not been adequately funded, and the sub-standard conditions of work and terms of service have profiled the Courts in an unsatisfactory manner. In an institution in which it should be an honour to serve, those unsatisfactory conditions led to the courts being staffed by a series of acting appointments which pattern of staffing strikes a blow to the foundations of judicial independence.

The guarantee of Fundamental Justice is the cornerstone of a vibrant democratic society and even of a market economy. The right to a fair trial

before an independent and impartial tribunal is the essence of fundamental justice.

Case law emanating from international jurisdictions including the Commonwealth have established that acting judicial appointments are inimical to the preservation of the independence of the judiciary. Indeed, that principle has been relied upon in the recent decision of **STARRS V THE PROCURATOR FISCAL**. Such acting appointments constitute a violation of the fundamental right to trial before an independent and impartial tribunal.

And yet we have been forced to staff our courts in breach of that right.

In some jurisdictions, we administer archaic legislation which strike at the heart of fundamental rights and freedoms, but because they are expressly saved as existing legislation, Common Law principles can be invoked to diminish the scope of the independence. For example, It has been judicially considered and accepted that in an indictable offence, a Magistrate functioning as an Examining Justice forms an essential part of the trial.

**(See HALSTEAD'S case)**

Such an Examining Justice has the statutory power to either commit or dismiss that charge.

Yet, there is retained in some jurisdictions an old statutory provision that where the Examining Magistrate dismisses the charge the Director of Public Prosecutions or the Attorney General as the case may be, may direct the Magistrate to commit the accused for trial despite the Magistrate's considered judgment. In face of such a power available to an executive officer to over-ride the judgment of the Magistrate, the independent judgment of the Magistrate is obviously eroded. And the defendant's right to trial by an impartial and independent tribunal goes out of the window. This becomes critical when the appointments of contractual Magistrates fall within the purview of the Executive.

## **Personal Judicial Independence**

In the round, the erosion of institutional judicial independence is no more at risk than is the erosion of personal judicial independence.

A climate of sub-standard working conditions is erosive of personal judicial independence.

The trend in judges who have come to the end of their tenure of service sliding off the judicial bench and slipping into an obscure department of government in the jurisdiction from which they retire in an advisory and consultative capacity to government triggers a great deal of discomfort with respect to the retention of their personal independence.

So too, we must ask upon what rational basis can we explain the temerity with which a Prime Minister can dispatch his guards to attend upon a judge in chambers for the receipt of a judgment deliverable in court and with respect to which government is represented by competent Counsel?

Professor Selwyn Ryan in his work on the Judiciary in the Caribbean speaks to the level of confidence enjoyed by the judiciary in some states in the region:

In Trinidad and Tobago his studies disclosed that only 6 percent had “full trust” in the judiciary while another 17 percent had “much trust”. In Guyana, 24 percent said they had “some trust” in the judiciary while only 8 percent felt they had “full trust”.

Such is the eddy in which we find ourselves.

We are in need of a raft upon which we can skull and punt our way out of the shallows of the crisis of confidence which threatens to overwhelm us.

## **Judicial Accountability**

Judicial **ACCOUNTABILITY** must be the loadstone, and the **MEDIA** the raft which floats us to it.

Implicit in Justice McLLachlin's reference to the intransigence of constitutional governments is the recognition that governments often behave as though they have the untrammelled power of absolute monarchs, and have failed to admit and acknowledge the restrictions and limitations imposed upon their authority by the Constitutions which serve the protection of the citizen's rights and human dignity.

Our governments have failed to make the transition to constitutional government because our courts have been ambivalent in the discharge of their constitutional role of keeping governments in check and reining them in when they have made incursions in the rights of citizens beyond that allowed to them under our Constitutions. Our Courts have not kept our Governments' feet to the fire.

The constitutional age demands **ACCOUNTABILITY** from the Judiciary no less that it demands it from the Legislature or the Executive.

Cyrus Das covers the various mechanisms of judicial accountability advocated by Professor Cappilletti in his concept of "Judicial Responsibility" and Professor Shetreet in his article "Judicial Accountability: A Comparative Analysis of the Models and Recent Trends." Common to both mechanisms of accountability are: (1) Societal accountability, which is the informal social control exercised over judges by colleagues and the profession; (2) Legal accountability which relates to discipline over judges, the appeal review process and the civil and criminal liability of judges; and (3) Public accountability which is exercised by Parliament, the press and the society at large.

While I have encountered at least one instance where civil legal accountability of the judge ought to have been available for deliberate, unfair, non-foundational observations made by a judge secure in the cloak of his judicial-making authority, I think that we should focus on societal or public accountability at this point in time.

Indeed, The **LATIMER HOUSE GUIDELINES** formulated in June, 1998 contains detailed guidelines for securing Judicial Accountability as well as Parliamentary and Executive Accountability. These guidelines place the Media at the heart of the mechanisms for securing accountability from our courts.

### **Article VI (b) Public Criticism**

- i) Legitimate public criticism of judicial performance is a means of ensuring accountability
- ii) The criminal law and contempt proceedings are not appropriate mechanisms for restricting legitimate criticism of the courts.

### **The MEDIA**

Earlier, I spoke of the Media as the **FOURTH ESTATE** of government in a constitutional democracy.

The role which the Media must play in the security and furtherance of constitutional government and judicial accountability is not a matter of privilege, but rather, that role is a matter of right exercisable by you, as well as a matter of obligation owed by you to society.

While your role may not be expressly constitutionalized in the same way as the other three estates of government, yet, it springs from the fundamental right to Freedom of Expression and the place which that right enjoys as the core value of an open, honest and just democratic society which guards and cherishes the **DIGNITY OF MAN**. Given the breadth of that right and its core value, the constitutionalization of the right in effect constitutionalises the Media.

The Caribbean Media needs to re-evaluate its function as a public agency charged with securing Judicial Accountability to the peoples of the region. It is through your effective scrutiny of the Courts that public confidence will be both created and expressed if justified. It is by holding

judges publicly accountable that they will act in a responsible, reliable and independent manner. When your scrutiny reflects adherence to those three judicial requisites, then justice would have met the test of confidence.

What is required is a Media committed to its role in a democratic society, conscious of the primacy of its constitutional rights and obligations, honed to a high degree of professionalism, fearless in its investigative and reporting processes, but above all, honest, fair, and like the judges whom you are called upon to scrutinize, independent in the discharge of your assignments.

No doubt, the development of that role has been inhibited by the retention of the Common Law rules designed for the protection of the administration of justice in a Common Law climate. The licensing requirements carry their own inhibitions, as they tend to vitiate editorial independence, and straight-jacket by-liners, just as annual licensing of lawyers would inhibit them in the advice to clients locked into battle with the State, and so upbraid the right to Freedom of Expression both of the lawyer and that of the client.

But the courts enjoy their own regime, Common Law in origin and in scope, for precluding the full gaze of the media lenses from being turned upon them.

### **The sub iudice rule**

### **The rule against scandalizing the Court**

### **The exercise of the Courts' Injunctive Powers**

### **The rigours of Contempt Proceedings**

Breaches of any one or more of those rules carry sanctions of imprisonment for contempt of Court. It is time for us to realize that those archaic prohibitions collide with and undercut the fundamental rights to

freedom of expression, the right to personal liberty and sometimes, even the right to enjoyment of property.

The scope of those rules is no longer relevant to a Constitutional environment which places human liberties at its centre. This has been recognized by the **LATIMER HOUSE GUIDELINES** and the Commonwealth Statement on Freedom of Expression annexed to them. That Annex sets out principles which constitute a basis for the recognition of freedom of expression in a democratic legal system. I commend it to you. But some of those principles need to be highlighted:

- 1) A distinction is drawn between the electronic media and print media with respect to licensing requirements. It advocates the retention of licences for the electronic media administered by an autonomous body independent of government control. However, the licensing of newspapers, journals and magazines by the State is unacceptable.
- 2) Principle 3 deals with Judicial Proceedings and Contempt of Court.

#### Openness

Constitutional guarantees of rights should expressly recognize that, as a matter of principle, judicial proceedings are open to the public and to the mass media.

- 3) Contempt of Court.

The law of contempt of court should be set out in statutory form in order to preclude arbitrariness and excessive use of judicial discretion.

- 4) In a democracy there is a need for robust criticism of judicial proceedings. The trend towards abandoning or narrowing the offence of scandalizing the court is sound. Nevertheless, in extreme cases malicious and deliberate attacks on the judicial institution or on judges as members of that institution may be

punished by the State.

- ] 5) It is also legitimate for the State to impose sanctions on media interference with the due administration of justice. Anyone accused of the offence of interference with the administration of justice must be accorded all the rights normally associated with criminal prosecutions.

**FURTHERMORE, BEFORE ANYONE MAY BE CONVICTED OF THIS OFFENCE, THE PROSECUTOR MUST PROVE THAT THE ACCUSED CREATED A REAL AND SUBSTANTIAL RISK OF PREJUDICE TO THE OUTCOME OF A PROCEEDING ACTUALLY BEFORE THE COURT.**

In the discharge of your obligations to society you are called upon to recognize:-

- a) That Freedom of expression is not a Licence to say and do whatever you may please;
- b) That in the exercise of Freedom of Expression you are under a duty to act responsibly, and in a manner consistent with established professional standards and ethical notions.
- c) That you are called to shine the spotlight of your professional and investigative processes into the deepest recesses of the institutions of government and the Judiciary. BUT you must do so honestly, motivated by the highest ideals that fair, honest and accurate dissemination of ideas and information is the nourishment of a democratic society.

I would expect a Law Page to appear in your publications where the full implications of decided cases can be probed and assessed, and the performance of the judiciary commented upon. When judges in their performance have fallen off the tracks, and your investigative

processes buttressed by more than one independent and reliable corroborative source disclose that they have fallen off the tracks, judicial accountability vests in the public a right to know.

So too, when your scrutiny affirms that judicial performance is meritorious and their reasoning sound, the maintenance of public confidence vests in the public a right to know.

- d) The professionalism, adherence to high standards of integrity, honesty and accuracy and independence in reporting may even require revamping of publications, and certainly will require raising the levels of skills.
- e) I expect that you will have to sensitize the society to the reality that the old Common Law rules which interlock with the contempt proceedings can no longer survive a constitutional climate without very severe modification, if the democratic way of life is to survive.

The confluence of jurisprudence pervading the Commonwealth abhors the retention of the archaic law of criminal libel. Per George Verghese, ‘What is now required is a revised defamation law that would make this a purely civil offence, rather than a civil and criminal offence’. Per the Commonwealth Statement on Freedom of Expression: “The law of criminal libel, if not already repealed, should only be used to protect public order; it should not be used to control expression.”

**FAIR, FEARLESS, FOCUSED.** That should be your Motto.

The due discharge of such a function by you at the standards required of you will measure as well as create the sufficiency of our confidence in Judicial Accountability, and signal our readiness to retreat behind our regional boundaries with our final appellate court.

If you are going to discharge your role in the manner prescribed by the **LATIMER HOUSE GUIDELINES** you are in need of access to a Final

Court which recognizes the breadth of your right, is alert to any form of governmental ambush, and is responsive to unjustifiable intrusion on the rights of the Media. So far our Courts have not come to that point of ready responsiveness so far as Freedom of Expression is concerned.

In short, you must have confidence in the appeals process as a mechanism of accountability. In the period 2000 to 2001 out of the eighteen (18) appeals considered by the Privy Council from the Eastern Caribbean Court of Appeal fourteen (14) were reversed and only four (4) upheld. All of those concerned with Freedom of Expression were reversed.

Accountability by the process of appeals is working even if the mechanism is applied only to a small percentage of cases brought into the legal system. It is better to keep hope alive through small numbers as a beacon of light than to have no hope at all.

Ironically, our governments peg their case for the CCJ as the pinnacle and crowning expression of nationalism and sovereignty in an age which has witnessed the advent of digital communications; the rise of transnational organized crime be it in drugs, money laundering, and pornography which demands a harmonized legislative scheme for its combat (The Criminal Justice International Co-operation Legislation, and The Mutual Legal Assistance Treaties); the economics of bilateral trade is underpinned by the principle of reciprocal access; an interdependent economic system is in vogue. We are so enmeshed and enveloped in the world's global order, that our very tax regimes and our own financial services industries and, therefore, the broad base of our economic structure, have become subject to the dictates of the O.E.C.D., the World Trade Organization and the IMF. Ultimately, the principles of globalization and harmonization have driven us into the bosom and membership of the world's largest social-political-economic club, the FTAA.

At the very moment that the Privy Council affirmed the ruling of our own Court of Appeal on the unconstitutionality of mandatory death sentences (though on somewhat different grounds) there was sparked a

renewed call from Attorney General Mia Mottley of Barbados (as well as others) for the hastening of the institution of the CCJ. But in that very moment, our governments of the region were staking out a position that they needed to interface with and have their interests represented and protected by other friendly governments in international organizations and forums from which we are excluded by reason of our lack of funding capacities and other relevant considerations.

This initiative for international alliances had been heralded by the **ECCB Governor SIR K. DWIGHT VENNER** since 1996:

“We need to form strategic alliances in the international community which can advance our interests and in this regard we need to start with long-standing and traditional allies with whom we have relationships. The United Kingdom and Canada are two states which fit this description and can play, in the case of the region, the role of interlocutor nations for the Caribbean. The concept of an interlocutor state is one which can present the views of another state in important councils to which the latter does not have direct access.”

We are emitting mixed signals and demonstrating that we are swimming in cross-currents.

The governments’ response to the Privy Council’s decision in **SPENCE, HUGHES** and **REYES** confirming the unconstitutionality of the mandatory death penalty reflects a conviction on their part that the CCJ as the final appellate court would reflect the thinking of governments. They failed to appreciate that the unconstitutionality of the mandatory death penalty was first pronounced by a regional court. What is clear is that responses such as that emanating from the government of Barbados only serve to erode public confidence in the CCJ which is branded before birth as the instrument and agent of the political directorate.

Such a conflicting approach to a globalized market economy and a non-compromising bent towards the indigenization of our Final Court of Appeal

underscores the **CRISIS OF CONFIDENCE** in our concept of constitutional governance and in the institutions of government in which we are caught. We need to find ourselves on firmer ground, less shifting sand, before we push off in new and uncharted directions.

One of our greatest philosophers has sung:

“Only when **JUSTICE** overlays the land  
When men are free from fear and free from want  
When the fundamental rights of the People are not abridged  
When injustice shall cease and liberty shall reign  
And the language of truth falls down like rain  
**THERE IS NOTHING TO FEAR.**”

The present disposition of litigants to fight their matters all the way to the Privy Council if they can, demonstrates that the product of justice in our regional courts has not survived market scrutiny. Regional Judicial responsibility and independence need to be tested not only by the narrow mechanism of legal accountability demanded by the appeals process. On the broader plane, such responsibility and independence must be tested by the conscious and articulated confidence of the public at large. In our cultural setting the Media is the primary agent which can secure such public accountability from the Judiciary.

When we have made the transition from Absolute Personal Sovereignty, from feudal kingship, to true Constitutional Governance, and the Banner of **JUDICIAL ACCOUNTABILITY** and **INDEPENDENCE** waves over our shores and we have created a climate of **PUBLIC CONFIDENCE** in the regional judiciary **THERE WILL BE NOTHING TO FEAR.**

Then and only then will the indegenization of the Judiciary be justified.

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BERNICE V. LAKE Q.C., B.A. (HONS.) LL.B. (LOND.)  
Dated the 16<sup>th</sup> May, 2002.

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