

# THE CARIBBEAN COURT OF JUSTICE AND THE LEGAL PROFESSION

## Promoting our Caribbrisprudence

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St. George's, Grenada

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*Greetings*

*Caribbean Jurisprudence*

In the CCJ's judgment in *Boyce and Joseph*, President de la Bastide and I stated in our joint opinion that the main purpose in establishing the CCJ is to promote the development of a Caribbean jurisprudence. It is possible that this statement requires some explanation<sup>1</sup>. I therefore welcome this opportunity to set out some personal views on how I conceive of our Caribbean Jurisprudence and what role I see for both the Bench and the Bar in assisting in its promotion.

The broad platform on which this jurisprudence rests is of course the Commonwealth Caribbean's common historic, political, economic and cultural experiences; our mutual history of slavery, indenture, displacement, resistance and struggle. On top of this, colonialism has bequeathed us a legacy of democratic structures and traditions premised on those that exist in the United Kingdom. With few exceptions, we boast the same imitations of the Westminster parliamentary system, a comparable body of pre-

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Judge of the Caribbean Court of Justice

<sup>1</sup> In his Article on the Court published in the first issue of CARIBBEAN RIGHTS David Batts frowned on the statement, regarding it as a repetition of "self righteous platitudes and high sounding phrases which politicians introduce[d] by way of recital to the [CCJ] Agreement". For him, establishment of the CCJ has apparently meant or should mean no more than "the provision of a more affordable and hence accessible forum than the JCPC for the provision of justice at the highest appellate level".

independence law and written Constitutions modelled along the same lines. These Constitutions all proclaim themselves to be the supreme law. They contain fundamental rights and freedoms, borrowed from the European Convention on Human Rights, which the courts are bound to enforce. Up until 2005, in the Judicial Committee of the Privy Council (“JCPC”), we all had the same final appellate court and, in the absence of any material difference in the written law, a JCPC decision in an appeal from one country is as binding for the other States as it is for the country from which the appeal emanates<sup>2</sup>.

In a real sense, therefore, so far as the judicial power is concerned, we have been practically united. It is on this solid edifice that there has been and is being constructed a shared body of law and judicial decision-making. Let me stress that this jurisprudence is not new. It has not commenced with the establishment of the CCJ. It is an authentic jurisprudence that exists and that has contributed and continues to contribute to an enrichment of common law. I can think of no more fitting description than to label that jurisprudence “Caribbean” and, in the promotion of it, there is no better suited entity to sit at the apex than a Caribbean Court of Justice.

At the level of the CCJ, as it is with the JCPC, the judges must often determine important questions of policy that touch and concern the daily lives of the general populace. Judges of final courts do not simply reveal the law. The law they proclaim is not like gold in a mine for which the Judges merely need to have the right tools and technique, dig in the

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<sup>2</sup> See: *Bradshaw v The Attorney General, Appeals Nos. 31 and 36 of 1992 (Barbados) and (1995) 46 WIR 62 (PC)*

right place and expect to discover nuggets of shining truths that lie there waiting to be discovered. It is never like that.

The Judges of final courts are invariably involved not so much in the *discovery* of the law but in its *creation*. Whether we like it or not, that is the nature of the common law. Judges of final courts often have choices before them. Each different choice may be perfectly capable of being defended as being rational, reasonable and consistent with “the law”. The choices that are eventually made invariably reflect the personal philosophical outlook of the judges who made them. The judge’s life experiences, socialisation, attitude to wealth creation, to gender and family life, to the authority of the State, to individual rights, to the role of religion ... all these things play a fundamental role in determining the choices that ultimately are made. This is why it is so important to have a diverse Bench, to have Judges from different backgrounds.

Yet, with the variety of choices that can be made, there are common goals to which the Judges aspire. I think Aharon Barak, President of the Israeli Supreme Court, puts it best when he observed that,

“the primary concern of the supreme court in a democracy is not to correct individual mistakes in lower court judgments. That is the job of courts of appeal. The supreme court's primary concern is broader, system-wide corrective action. This corrective action should focus on two main issues: bridging the gap between law and society, and protecting democracy”<sup>3</sup>.

These are ongoing imperatives and the manner in which judges give expression to them must change over time. As society is forever on a forward march, so too the law, if it is to

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<sup>3</sup> 116 Harv. L. Rev. 16

be relevant, if it is to win the respect of the citizenry, the law must also go forth and adapt. Yes, the law must be stable, but it cannot be static.

The field of human rights, for example, nicely illustrates how the Judges of the JCPC, in response to new social and political realities, have adapted their thinking on and approach to our fundamental rights and freedoms.

In the immediate post-independence period, the 60's and 70's, the general approach taken to our fundamental rights was a very conservative, "austere" one. The citizen's rights were, by today's standards, construed somewhat restrictively. In keeping with English common law current at the time, the State was given a wide margin of discretion. It was a rare thing for the judges to rely on foreign precedents in their decision-making in construing our fundamental rights.

With the end of the Cold War, with the heightened attention paid to the observance of human rights internationally following the holocaust, with the citizen expecting scrupulous fairness on the part of the State, interpretation of the rights has not remained the same. The State is now being held to strict standards of accountability and individual rights are given greater prominence. Human rights have become globalised. International jurisprudence and the reasoning of judges in other jurisdictions now play a decisive role in influencing interpretation of our rights on the domestic plane. The written expression of our rights has not changed, but our understanding of the written statement has evolved.

The human rights cases decided by the JCPC over the last 10-15 years provide a concrete illustration of this new approach. The cases have been dominated by, but not by any means restricted to, cases on capital punishment. In the latter category, the judgments are typified by decisions such as those in *Pratt & Morgan*<sup>4</sup> which required executions to be carried out within five years of the pronouncement of a death sentence, *Reyes v. R*<sup>5</sup> which held that the mandatory death penalty constituted inhuman treatment and *Lewis v. The Attorney-General*<sup>6</sup> which decided, inter alia, that it was unlawful to execute a prisoner while the prisoner's petition was pending the Inter-American Human Rights process.

In each of these decisions there was significant reliance on international jurisprudence. Such reliance has by no means been confined to capital punishment cases. It is also, for example, very evident in freedom of expression cases like *Benjamin v The AG of Anguilla*<sup>7</sup>, and *Observer Publications Ltd. v. Matthew*<sup>8</sup>.

What is remarkable about this evolution is that these judgments re-shaping this area of the law have been rendered by British judges, sitting and residing in England, on the basis of submissions often made by English Queen's Counsel also resident in the United Kingdom. It is remarkable because if the law is to retain its legitimacy, if the judges who interpret our laws are properly to bridge the gap between the law and Caribbean society, the judges, like Odysseus, must avoid two dangers. On the one hand, a judge can be so absorbed in the society's internal dynamics, so impervious to international developments

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<sup>4</sup> (1994) 2 AC 1

<sup>5</sup> (2002) 2 AC 235

<sup>6</sup> (2001) 2 AC 50

<sup>7</sup> [2001] 1 WLR 1040

<sup>8</sup> 58 WIR 188

and emerging trends, so focused on the past and on maintaining stability that the judge is un-responsive to the need for the law to grow and evolve. On the other hand, the judge may be so remote from society, so consumed with international trends, so dismissive or ignorant of what is actually unfolding in the society, that the judge becomes out of touch and prescribes solutions that the society as a whole finds difficulty accepting. In either case, the legitimacy of the judicial function is placed at risk.

For judges to come close to steering the right course, they must have an understanding of the society that gives rise to the legal disputes. They must be grounded in that society. Ideally, if the judge is not a product of the society, the judge should live in it or else be in a position to feel its pulse. But equally, the judge must maintain a sense of detachment and be open to new and diverse influences, some of which may come from outside the society. The judge must be able and prepared to weigh and appropriately meld the new with that which exists.

Undoubtedly, the death penalty decisions given by the JCPC were intended to humanize our capital punishment jurisprudence; to limit executions; to advance human rights in that area of the law; to promote good governance and to encourage high standards of public administration. Many of us will regard these as noble goals to be pursued. But it is undeniable that those decisions also produced other consequences.

In the period after *Pratt & Morgan* was decided, Government officials frequently engaged in public, forceful condemnations of their own final court. States in the region

denounced human rights treaties they had previously ratified. The pro-death penalty lobby in the region has become vigorously re-energised. At least one parliament has seen it fit to amend its Independence Constitution specifically to nullify the major death penalty decisions of the JCPC and legitimise treatment declared inhumane by both the JCPC and Caribbean courts alike. A poisonous and divisive atmosphere was created for the establishment of the CCJ. Many persons were encouraged to believe that our court would, willy-nilly, engage in rolling back all the human rights advances made by the JCPC in recent times. In short, the pursuit of noble goals seems to have been completely offset by a sharp erosion of confidence, by a deterioration in the human rights climate and by an unwholesome exacerbation of the natural and easy tensions that one might expect to find between the different branches of Government. Sustained and violent confrontation between judicial power on the one hand and executive and legislative power on the other cannot produce fertile conditions for democracy and human rights to flourish.

It is absurd to believe that establishment of the CCJ was intended to usher in an approach to legal interpretation that is insular or anti-international or illiberal. Nor will the CCJ consign itself passively to reflect values that have been discredited or that are inconsistent with the advanced Bills of Rights that our Constitutions have all adopted. Change in the law sometimes precedes societal change and is even intended to stimulate it<sup>9</sup>. However, because the CCJ judges have their fingers on the Caribbean pulse they are in a much better position to pursue the goals of a final court in a more nuanced manner; to avoid both Scylla and Charybdis when they make the necessary choices to which I have earlier

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<sup>9</sup> See Barak, *op.cit.*

referred. Personally, it saddens me that there are still so many who seem yet to be convinced that Caribbean jurisprudence *must* advance in a more wholesome manner, it must be better suited to our needs, if responsibility for its development is placed primarily in the hands of judges and lawyers grounded in the Caribbean. That has certainly been the experience of other Commonwealth States and I am yet to hear a valid reason why our experience might be different.

*The original jurisdiction*

Caribbean jurisprudence and its promotion are not just about civil and criminal matters. There is also the original jurisdiction of the CCJ to consider. There is no Privy Council or other international precedents here to adopt, discard or massage. Our CSME jurisprudence starts with a blank slate. There is of course a considerable body of case law of the ECJ. It is also true that many of the provisions of the Revised Treaty of Chaguaramas derive from the European Union treaties. Here is the interesting part. Some of you were present in Barbados a year ago when Professor Alina Kaczorowska presented her excellent paper on the European Community experience with respect to the role of the ECJ. The professor identified then six fundamental principles that she regarded as the present bedrock of the European Community. She listed them as:

- 1) The Supremacy of Community law;
- 2) The direct effect of Community law;
- 3) The direct applicability of Community law;
- 4) State liability for breach of Community law;
- 5) The recognition of, and incorporation of, fundamental human rights, and finally,

## 6) Common principles of administrative law.

As she noted, none of these principles was contained in or provided for in the founding Treaty of Rome in 1957. These principles were all “progressively created by the ECJ, and each of them provided impetus that appeared, at different times, to be lacking on the part of different Member States”. The reality is that the judges of the ECJ in many ways made the European Community what it is today.

Now, of course, the Caribbean is not Europe. The Revised Treaty of Chaguaramas is not the Maastricht Treaty. The precise course that has been taken by Europe need not be the course that invariably we in the Caribbean must follow. What is clear is that in embarking on the process of the CSME we are in many respects in uncharted territory and the manner in which the CCJ fills the interstices of the Revised Treaty may well have a decisive influence on the shape and direction of the Community and the pace at which integration proceeds. Here too, the CCJ will, I am sure, be called upon to make tough decisions, to determine critical policy issues.

### *The role of the Bar as defender of the integrity of the Court and the Justice System*

The difficulty that courts experience when they must determine important matters of policy is that they are called upon to do so without the conventional political resources that are so readily available to the other branches of government. We have no party apparatus to call on for guidance and encouragement, no political organisation ready and equipped to go out and drum up support for the decisions that we must make, no party

machine that can be activated to defend the court from unjustified attacks. Yet, no institution in a democratic society could become and remain potent unless it can count on a solid block of public opinion that would rally to its side at a pinch<sup>10</sup>. If the integrity of the CCJ is to be maintained at a high level, the court should be able, at all times, to command support and receive encouragement from what should comprise its natural constituency.

That natural constituency is of course, the legal profession. It is you, the legal fraternity, upon whom the CCJ must rely to stand up for the right of the court to make the choices we are called upon to make. I anticipate your full support because truly, the CCJ and the Caribbean Bar have a special relationship. It is a relationship that other Bar Associations do not enjoy with their final courts. Our relationship began long before the Court was actually inaugurated. The call for a final Court of Appeal to replace the Privy Council was championed by the regional Bar many decades ago. When, in more recent times, CARICOM Governments signified their desire to press ahead with the process of establishing the CCJ, it was the Bar that best highlighted the absolute necessity for the court to be independent. I need hardly remind you that initially the CARICOM Governments had proposed that the Judges should be selected by a political process. For a final Court, this would not have been unusual. It is certainly the case with other final appellate courts. But the regional Bar, and the Jamaica Bar in particular, were dissatisfied. The political process was not good enough for them. And the steadfastness of their opposition, the reasonableness of the points they made, led to such innovative, internationally acclaimed measures as the Regional Judicial and Legal Services

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<sup>10</sup> McCloskey, THE AMERICAN SUPREME COURT, p. 71-76

Commission and the Trust Fund, both of which serve as guarantors of the court's independence.

So, even before the inauguration of the Court, the regional Bar has been championing its best interests. In every sense of the word, this is your Court. The judges and all the senior staff of the Court have been selected by a commission on which the legal profession and representatives of the Bar predominate. By comparison, a few years ago, George W. Bush went out of his way to curtail the very limited consultative role the American Bar Association used to enjoy as an official part of the nomination process of US Supreme Court Judges<sup>11</sup>.

I have every confidence that the regional Bar will take justifiable pride in the CCJ and play an even more active role advocating for the court, encouraging regional governments to subscribe to its appellate jurisdiction, informing and educating the general public of the advantages in having a Caribbean court hear their final appeals. In this, the 21<sup>st</sup> Century, it is an affront to the dignity of our people that, as a hang over from the colonial period, we should continue to entrust the task of protecting our democracy to the judges of another civilization when we have demonstrated the ability and forged the requisite institutions with which to do so for ourselves.

We need to place the same trust in ourselves and in our institutions that others so readily are prepared to place in us. Apart from the International Criminal Court, the UN has two special international tribunals currently trying war criminals. These are courts of the

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<sup>11</sup> See Sandra O'Connor, THE MAJESTY OF THE LAW, Random House, page 21

highest distinction internationally. One sits in Arusha, the other in the Hague. Our own Sir Dennis Byron is President of the one in Arusha and Jamaica's Patrick Robinson is one of the most senior judges of the ICTY in the Hague. Caribbean people are quite good at identifying and appreciating excellence, when we see it demonstrated outside the region. We need to apply the same standards as we look within. When we recognise and applaud judicial excellence within the region we provide encouragement to the local judges and we enhance the public's confidence in them.

*Role of the Bar in enhancing the quality of our judgments*

The special relationship between the Bar and the Court goes beyond the need to support and defend the integrity of the Court. Article XXIX of the Agreement establishing the Court confers an automatic right of audience to attorneys-at-law, legal practitioners or advocates duly admitted to practise law in the courts of a contracting party but the Court is not precluded from giving that right to others. In the appellate jurisdiction, the Court sees no need to grant a discretionary right to practise to other practitioners. In the original jurisdiction, apart from those who have an automatic right of audience, the right of audience is conferred upon an agent appearing on behalf of a member State and additionally, the court has the discretion to give a right of audience to a) persons admitted to practice and who have a current right to practise in the country of which they are citizens or in which they are ordinarily resident or b) persons with recognized expertise in international law and experience of litigation before international tribunals.

What this means is that, certainly in the appellate jurisdiction, we are likely to see mostly Caribbean lawyers appearing before the CCJ. It would be regrettable if this circumstance resulted in a diminution of the quality of the legal submissions made to our final court. If Privy Council judgments are of a superior standard, it is generally because the calibre of the submissions placed before their Lordships is usually higher than those made before the judges of the courts below. The quality of any judgment is necessarily dependent upon the nature of the submissions of counsel. The establishment of the CCJ therefore places a great onus on counsel from the Caribbean to sharpen their skills. When we seek to make the choices we must make in developing our jurisprudence, speaking for myself, I would like to know the views of other judges and academics, regionally and internationally, who have something to say about the relevant choices that can be made. I would like to see the Bar engage in meticulous research in order to afford us the widest possible range of views.

We are not bound by the determinations of the Judicial Committee. But this does not mean that we intend to disregard their precedents. We have made it clear that in the promotion of our Caribbean jurisprudence, we shall naturally consider very carefully and respectfully the opinions of the final courts of other Commonwealth countries and particularly, the judgments of the JCPC which determine the law for those Caribbean states that accept the Judicial Committee as their final appellate court. In *Boyce & Joseph* we determined the issues before us only after an exhaustive examination of decisions of the courts throughout the common law world. Each of us wanted to arrive at a determination that we conceived to be best suited for advancing our Caribbean

jurisprudence. Ultimately, our reasoning was in some respects similar to but not identical with that of judges of the JCPC and I believe the State of Barbados accepted our decision with much more grace than they accepted some of the JCPC judgments our decision endorsed.

*Promoting Caribbean materials*

We are open to opinions from every conceivable source as long as they are relevant and of assistance. In *Boyce & Joseph*, on a point having to do with legitimate expectations, the President and I were faced with a choice between the views of an English High Court judge and those of the English Court of Appeal that had overruled the judge. The Court of Appeal had actually labelled as “heresy” the reasoning of the High Court judge. We unhesitatingly preferred the opinions of the heretic to the views of his illustrious Appellate tribunal<sup>12</sup>. Where a decision of the JCPC is put forward for our consideration I would like to know what, if any, opinions on the matter were advanced by the local court of appeal. It is a sad fact that many truly outstanding judgments of Caribbean judges do not receive the recognition they should because, if there is an appeal, they become almost automatically buried beneath the judgments of the higher court.

For our Caribbean jurisprudence truly to thrive we cannot afford so casually to ignore the opinions of our judges. Take for example, the recent case of *Toussaint v The Attorney General of St. Vincent and the Grenadines*<sup>13</sup>. This is a case decided by the JCPC a few

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<sup>12</sup> See: *Regina v Ministry of Agriculture, Fisheries and Food ex parte Hamble Fisheries (Offshore)* [1995] 2 A.E.R. 714 per Sedley, J. and the appellate decision found at [1997] 1 WLR 906 where Sedley, J.’s views were described as “heresy”.

<sup>13</sup> Privy Council Appeal No. 28 of 2006

months ago. According to media reports, the judgment of Lord Mance has been hailed as breaking “new ground” and the case is being regarded as a “seminal” one on the relationship between parliamentary privilege and the enforcement of the Bill of Rights contained in the Constitution. Regrettably, few persons appreciate that these same issues had been the subject of a masterly analysis in *Boodram v The Attorney General*<sup>14</sup> by then Justice Roger Hamel-Smith of the Trinidad & Tobago High Court as long ago as 1989. *Boodram* is un-reported and was not cited in argument in *Toussaint* even though a Trinidad & Tobago Senior Counsel took *Toussaint* to the Privy Council.

This brings us to the question of access to local judgments, especially those that are not contained in the West Indian Reports. This has been a serious problem in the past. It is becoming less so now because most judiciaries have websites on which they place their judgments. However, there is great value in being able to access a single source from which one can get all unreported Caribbean judgments. CARILAW, an online facility of the Faculty of Law, comes closest to filling this vital need. I don’t know how many of you subscribe to CARILAW, but it is a reservoir of Caribbean materials and judgments and we should all do everything we can to support it. Hundreds of man hours have gone into its creation. I use it regularly and have sourced material there that I would never have been able to find elsewhere.

Easy access to Caribbean judgments and other legal materials is essential if we are to advance our jurisprudence. In this connection, the Caribbean Association of Law

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<sup>14</sup> Trinidad & Tobago High Court Action No. 6874 of 1987

Librarians (CARALL) has a critical role to play and I would hope that this Association can be strengthened in order to play its part in this regard.

We have truly outstanding Caribbean legal texts that are a wonderful source of Caribbean material. Lloyd Barnett, Dana Seetahal, Rose-Marie Antoine, Albert Fiadjoe, Margaret Demerieux, and many others have all written excellent legal texts. In addition there are many scholarly pieces by Caribbean Professors such as Professor Emeritus A.R. Carnegie. Their works were not written simply to enable students to pass an examination. They all make a profound contribution to the development of our Caribbean jurisprudence. I would love to see counsel incorporating the use of these materials in their legal submissions. If you cite them then judges will refer to them in their judgments. The authors will then derive greater satisfaction and be further encouraged by the recognition. So it is that our jurisprudence will develop nicely if we feed from each other: academia, the Bar, the Bench, the law reporters and librarians. Each has a role to play if we are to advance our jurisprudence and imbue our people with a greater sense of confidence in themselves and their judicial institutions. These are small but important steps in the strengthening of our justice system and our democracy in general.

### *Conclusion*

Mr. Justice Pollard and I, along with other Commonwealth judges, a few months ago visited and held discussions with judges from the ECJ and the ICJ. It surprised me that our counterparts in Europe were well informed about the CCJ and they exhibited a keen interest in our court and, in particular, the singular institutional arrangements that

guarantee our judicial independence. They were especially intrigued by the fact that the CCJ can be both the final domestic appellate court for a country and, at the same time, the court that interprets and applies a treaty promoting regional economic integration of which the country is a member. It is a circumstance that we should not take for granted, as it creates enormous possibilities and at the same time imposes tremendous responsibilities. In Europe, the advancement and harmonization of community and national law may be the subject of a continuing dialogue between the ECJ and the final domestic court of each European State. That dialogue is mutually enriching. We do not have that luxury. That is all the more reason why we need all the assistance we can get from counsel as we go about our task. I know that the regional Bar will rise to this challenge and I wish you every success as you do so.

I want to end by extending an open invitation, whenever any of you happens to be in Port of Spain, to come and visit the premises of the CCJ. We welcome such visits. I don't believe it is an exaggeration to say that our court room is superbly appointed and it is complemented by a splendid, friendly and knowledgeable staff. I certainly hope that it will not be too long before all the independent States of the Commonwealth Caribbean put the appropriate measures in place to channel their final appeals where they rightly belong.