Promoting the Caribbean Court of Justice as the Final Court of Appeal for States of the Caribbean Community

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Michael Anthony Lilla
Court Protocol & Information Officer
Caribbean Court of Justice
Port of Spain
Trinidad & Tobago

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TABLE OF CONTENTS

LIST OF ILLUSTRATIONS

LIST OF TABLES

LIST OF APPENDICES

MAP OF THE CARIBBEAN REGION

ABSTRACT

Why on earth should we compel the British to maintain the Privy Council when the British have said to us time and time again to take your bundle and go?

Dr. Kenny Anthony[1]

The background context for this research is the attempt by the Anglophone states of the Caribbean Community (CARICOM) to replace as their final court of appeal the Judicial Committee of the British Privy Council (JCPC) by the newborn (but long in gestation) Caribbean Court of Justice (CCJ). The first step to terminating the judicial colonial link was taken when the ten Anglophone CARICOM states of Antigua & Barbuda, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, St. Kitts & Nevis, St. Lucia, St. Vincent & The Grenadines and Trinidad & Tobago (along with Francophone Haiti and Dutch-speaking Suriname) signed the Agreement Establishing the Caribbean Court of Justice between 2001 and 2003. In spite of this historic step, as of April 2008, only two states, Barbados and Guyana, have enacted legislation necessary to replace the JCPC with the CCJ, though the court was inaugurated on 16 April 2005. Even the state which is the Seat of the court, Trinidad & Tobago, has not yet passed legislation to make the CCJ its final court of appeal.

Research focused on identifying the rationale behind the apparent general hesitation to take the final steps needed to sever the enduring colonial link with the JCPC. Of note was that the court had been fully funded by the CARICOM states themselves, but they are not yet, with the exceptions of Barbados and Guyana, reaping any dividends from their investment. Of course, only few courts in any jurisdictions have had to overcome such a high hurdle of legitimacy. Most new courts (like the CCJ) are created to respond to a societal need, and benefit from prior public endorsement when they throw their doors open (unlike the CCJ).

[1] Leader of the Opposition and former Prime Minister of St. Lucia (1997-2006)

The research revealed how essential it is for courts, societies' Grand Arbiters, to win the trust and confidence of the public they serve. This proved to be especially significant in an area such as the Caribbean, where many regard the administration of justice askance.

To identify the causes of the apparent resistance to terminating the link to the JCPC by all but two of the CARICOM states, three research methods were employed: (1) analysis of a variety of material (addresses, statements, newspaper and scholarly articles) published on the Caribbean Court of Justice; (2) random telephone survey and (3) interviews of CCJ stakeholders inclusive of government and legal officials, to determine and corner their sentiments on the court. The goal of these methods was, respectively, to (1) obtain as comprehensive a grasp as possible of all the elements informing the creation, nature and operations of the Court; (2) poll general opinion on the court and the degree to which this was *informed* opinion; and (3) provide insight into the ratiocination especially of the movers and shakers in Caribbean policy, whose decisions will ultimately decide the lot of the Caribbean Court of Justice. This final step proved to be extremely rewarding.

The results of data collection revealed that where it is known at all, the Caribbean Court of Justice is viewed with a measurable degree of scepticism by many, including by holders of high office, to whom the court's bona fides are well known. Ironically, the data showed that often, those content to permit the domination of Caribbean jurisprudence by an European court were well-placed to help terminate this domination themselves. Most significantly, the data revealed that the prevailing element affecting public opinion of the CCJ is ignorance. People simply *do not know* the court or its nature or mission sufficiently. Though they aver fervent adherence to well-travelled notions of independence and autonomy and so on,

people are chary about swearing allegiance to an entity about which they are both *mis*informed and *un*informed.

The data gleaned through research has led the writer to the following conclusions:

- because of ignorance and uncertainty about it, to gain a higher degree of acceptance, the Caribbean Court of Justice needs to "market" itself aggressively in the Caribbean region, and even beyond it;
- the promotional strategy implemented must be manifold in nature;
- in spite of disinformation put about on the court, there is a tier of unplumbed public good will towards the court that can, and must be nurtured.

The writer recommends:

- the dedication by the court of a significant portion of financial resources towards a Public Information and Education (PEIP) programme of high quality;
- a PEIP highly diverse in nature, utilising all the media: audio, visual and print, and ubiquitous in frequency: everywhere, all the time, on posters, in classrooms, on the television and in the newspapers;
- the media campaign be supplemented and buttressed by a proactive approach to spreading the gospel of the Caribbean Court of Justice throughout the Caribbean, characterised by periodic and systematic visits of CCJ personnel, both legal and administrative, to member states. These visits should include well-designed and persuasive seminars and educational tours, with strong emphasis on the full involvement and participation of local state, legal and civil society representatives.

INTRODUCTION

> *It is offensive to the sovereignty of independent nations and therefore, politically unacceptable, to have a foreign tribunal permanently entrenched in their [C]onstitutions as their final court…*
>
> *Sir Isaac Hyatali*[2]

In the aftermath of the collapse of the Federation of the West Indies, which had lasted a mere four years, from 1958 to 1962, the Anglophone continental and insular Caribbean states formed CARIFTA, the Caribbean Free Trade Association, with a view to maintaining an economic link among the various former and continuing colonies of the United Kingdom after the collapse of the political bond. On 1 August 1973, the successor to CARIFTA, the Caribbean Community, better known by its acronym, CARICOM, came into being. The founding document of CARICOM, the Treaty of Chaguaramas[3], was signed by the so-called "Big Four" states: Barbados, Jamaica, Guyana and Trinidad & Tobago, all of which had gained their political independence from the UK during the 1960s. This signing was the starter's signal for a more mature, though at times slow and halting process of regional integration among the states of the Commonwealth Caribbean.

In 2001, the Conference of Heads of Government of the Caribbean Community, at their XXII meeting in Nassau, The Bahamas, signed the Revised Treaty of Chaguaramas, rebranding the Caribbean Community to include the proposed CARICOM Single Market and Economy (CSME). Originally an Anglophone club, the admission of Dutch-speaking Suriname in 1995, and Créole-speaking Haiti (where French is the official language) in 2002

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[2] Chief Justice of Trinidad & Tobago, 1972-1983.

[3] Chaguaramas is a community north-west of Port of Spain, the capital of Trinidad & Tobago. It was the site of a US military base during World War II, and the focus of irredentist nationalist claims during the 1950s. It has therefore become a symbol of Caribbean resistance to colonialism, and ideal as the signing site for a document purportedly entrenching Caribbean independence, solidarity and integration.

has somewhat modified the cultural and jurisprudential mix of the community. As of April 2008, the membership of the Caribbean Community is as follows:

15 FULL MEMBERS

 **Antigua and Barbuda**
 **The Bahamas**
 **Barbados**
 **Belize**
 **Dominica**
 **Grenada**
 **Guyana**
 **Haïti**
 **Jamaica**
 **Montserrat**
 **Saint Kitts and Nevis**
 **Saint Lucia**
 **Saint Vincent and The Grenadines**
 **Suriname**
 **Trinidad and Tobago**

5 ASSOCIATE MEMBERS

All associate members are United Kingdom Overseas Territories (colonies) as is Montserrat.

 **Anguilla**
 **Bermuda**
 **British Virgin Islands**
 **Cayman Islands**
 **Turks and Caicos Islands**

Within CARICOM, there exists a further sub-grouping called the Organisation of Eastern Caribbean States (OECS). This grouping includes Antigua & Barbuda, Dominica, Grenada, Montserrat, St. Kitts & Nevis, St. Lucia and St. Vincent & The Grenadines. Anguilla and the British Virgin Islands are associate members of the OECS. The organisation was created on 18 June 1981, with the signing of the Treaty of Basseterre, named for the capital of St. Kitts & Nevis. The ethos of the OECS is characterised by a high degree of integration and functional cooperation.

Under the revised Treaty of Chaguaramas, and typical of similar international integrationist movements, CARICOM has restructured itself to include such elements as are characteristic of the modern democratic state, viz, executive, legislative and judicial arms. At this stage, attention is given to the Judiciary for expository purposes, the other two arms to be considered subsequently.

The Caribbean Court of Justice (CCJ) is the Caribbean regional judicial tribunal established on 14 February 2001 by the Agreement Establishing the Caribbean Court of Justice. The agreement was signed on that date by the CARICOM states of: Antigua & Barbuda; Barbados; Belize; Grenada; Guyana; Jamaica; St. Kitts & Nevis; St. Lucia; Suriname; and Trinidad & Tobago. Two further states, Dominica and St. Vincent & The Grenadines, signed the agreement on 15 February 2003, bringing the total number of signatories to 12. The Bahamas and Haiti, though full members of CARICOM, are not yet signatories, and because of its status as a British colony, Montserrat must await Instruments of Entrustment from the UK in order to ratify[4]. The Agreement Establishing the Caribbean Court of Justice came into force on 23 July 2003, and the CCJ was inaugurated on 16 April 2005 in Port of Spain, Trinidad & Tobago, the Seat of the Court.

The CCJ is intended to be a hybrid institution: an international court with compulsory and exclusive jurisdiction in respect of the interpretation and application of the Treaty of Chaguaramas and a municipal court of last resort. On the one hand, it is vested with an original and compulsory jurisdiction with respect to the interpretation and application of the

[4] The UK has reportedly barred Montserrat from accessing the appellate jurisdiction of the CCJ. The Chief Minister of Montserrat has however asserted his intention to have the island accede to the original jurisdiction to settle CSME matters. See "Britain bars Montserrat from Caribbean Court of Justice", in *Sunday Express*, Sunday 18 July 1999, p. 25.

Treaty of Chaguaramas. In the exercise of this jurisdiction, the CCJ discharges the functions of an international tribunal, applying rules of international law in respect of the interpretation and application of the treaty. As the centrepiece in the regulation of the CSME, the CCJ thus be performs functions like those of the European Court of Justice, the Andean Court of Justice and the International Court of Justice. On the other hand, it exercises an appellate jurisdiction, as a final court of appeal for CARICOM member states, replacing the Judicial Committee of the Privy Council for Anglophone states. In the exercise of its appellate jurisdiction, the CCJ hears appeals from common law courts within the jurisdictions of parties to the Agreement Establishing the CCJ, and will be eventually the highest municipal court in the region.

There is significant controversy surrounding the appellate jurisdiction of the court, engendered by a great deal of apprehension over cutting the enduring colonial link with the JCPC. Whereas all states signatory to the treaty are compulsorily subject to the court's original jurisdiction, the replacement of the JCPC by the CCJ as the final court of appeal requires an act of parliament in each state, where each citizen's right of appeal to "Her Majesty's Judicial Board meeting in Council" is constitutionally guaranteed. Further, this constitutional provision is of the type deemed "entrenched", which means that it cannot be repealed through a simple parliamentary majority vote. A government intending to do away with the JCPC must be assured of a two-thirds majority vote in both houses of Parliament, implying bipartisan parliamentary support. Some states need to hold referenda before they can even consider any parliamentary action.

As of May 2008, the court been able to attract no more than two states – Barbados and Guyana - out of its twelve signatories, to its appellate jurisdiction. Official attitudes are characterised by inertia, and in some instances, hostility toward the court. For example, before his party's electoral defeat in 2006, St. Lucia's former Prime Minister, Dr. Kenny Anthony, was the CARICOM head responsible for the Administration of Justice. His support for the court has been unwavering. His successor, the present prime minister, has claimed to be "anxious" to have the CCJ replace the JCPC. Yet seven years after St. Lucia signed the Agreement Establishing the CCJ, nothing has been done toward that end. The present Leader of the Opposition[5] of Trinidad & Tobago, a former Prime Minister who signed the Agreement, and who lobbied for the court to be based in Trinidad, now says things like "Thank God for the Privy Council." The court thus finds itself in the bizarre situation of being staffed, solvent and pre-eminently equipped, but with a dearth of clients.

Interestingly, research has shown that many final courts of appeal in their early years hear relatively few matters. For example, in 1988-89, its first year of activity, the Federal Court of Appeal of Canada, a country with a population of 25 million, heard all of two matters. In 1994, the year of the inauguration of the Constitutional Court of South Africa, a country with a then population of some 42 million people, that court heard a grand total of 8 matters. As of April 2008, the CCJ has heard 5 substantive matters, and has also heard and determined five applications for special leave to appeal, bring the total to 10 matters. By comparison with its predecessors, therefore, the CCJ has performed creditably, speaking from the point of view of matters heard, particularly if one considers that the combined populations of Barbados and Guyana number just about one million souls.

[5] More or less the equivalent of the US House Minority Leader.

The rub is that these matters reached the CCJ exclusively from the courts of appeal of a mere two territories. Even assuming that non-British Haiti and Suriname may take some time to accede to the appellate jurisdiction of the court because of the dissimilarity of legal systems, and that Montserrat is legally barred, what of the seven other Caribbean Community states? In September 2005, just a few months after the Court's inauguration, Prime Minister Baldwin Spencer of Antigua & Barbuda cited constitutional barriers to jettisoning the JCPC preventing members of the Organisation of Eastern Caribbean States (OECS) from acceding to the CCJ's appellate jurisdiction. Mr. Spencer is quoted by his interviewer as saying, "In our case we have to go to a referendum. Our view is that we have to take it to the people at some point, looking at a possible target date of November [2006]."[6] A year and a half after that date, no such referendum has been held.

Prime Minister Spencer is further quoted as opining that, "Trinidad and Tobago seems to be indifferent where they are, despite the fact that the court is in Trinidad and Tobago." He did, however, go on to express confidence that "eventually", all CARICOM member-states would accept the court's appellate jurisdiction.[7] All well and good - but when is "eventually"? This pervasive hesitation to take the political and legislative steps necessary to replace the JCPC by the CCJ is at the heart of the research conducted. There seems to be a psychological incapacity, both among leaders and the led, to commit. What this creates is a miasma of uncertainty that incestuously feeds upon itself. Leaders are unwilling to commit because the led are distrustful of the court; the led are unwilling to commit because the leaders show no enthusiasm about committing to the court.

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[6] Tony Best, "OECS won't be joining CCJ soon," *The Nation*, 29 September 2005. Online version: http://www.nationnews.com/story/332240099046966.php

[7] *Ibid.*

Already in the Anglophone Caribbean, there is much myth and mystification attached to judges, courts and the administration of justice. The controversy surrounding the Caribbean Court of Justice has provided further grist for the mill of the detractors of the Caribbean judiciaries. Conversely, those who already have no confidence in, or distrust, or are befuddled by the workings of these judiciaries transform their suspicions onto the CCJ, spanking new though it is. Solomon E. Asch expresses it succinctly when he avers "that social influences shape every person's practices, judgments and beliefs is a truism to which anyone will readily assent".[8] This unfavourable perception of the judiciary is no doubt a result of its workings being traditionally shrouded in ceremony, dark robes and forbidding courtrooms, infusing the ordinary user with a sense of personal insecurity. This is not new. As long ago as 1906, Roscoe Pound intimated, "Dissatisfaction with the administration of justice is as old as the law. (…) Discontent has an ancient and unbroken pedigree".[9]

A major contributory factor to this notion of vulnerability on the part of the man in the street is the judiciaries' own slowness to promote themselves, some convinced, of course, that the rule of law needs no marketing. Reaction to the CCJ shows this to be false, a lesson that ought to be learnt even by established judiciaries in the Caribbean. Thus, it was this matter of "marketing" or promoting the CCJ that one's research specifically addressed. If both high officials and ordinary citizens were hesitant to commit to the most technologically advanced court in the region, already paid for, functional, presided over by judges of impeccable integrity and acumen, then the twofold problem which asserted itself was (1) finding out what precisely lay behind these fears and (2) determining how to allay them. The

[8] Solomon E. Asch, "Opinions and Social Pressure," in *Small Groups: Studies in Social Interaction*, ed. A. Paul Hare, Edgar F. Borgatta and Robert F. Bales (New York, 1965), p. 318

[9] Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice", reprinted from 29 ABA Reports, p. 395 (1906)

significance of the problem goes beyond simply the oft-quoted need to "complete our independence", though that itself is not an unworthy goal.

The deeper significance lies in what the late French President François Mitterrand called "*responsabilisation*" in 1981 when he engineered reforms to devolve power from the centralised French state to its *départements d'outre-mer* in the Caribbean. The import of the problem is, in a few words, that societies must eventually take responsibility for themselves. The late Lloyd Best, the quintessential Caribbean intellectual, often averred that our Caribbean societies are pervasively not IRresponsible, but UNresponsible, in that we have an instinct to shy away from taking control of that which affects us most crucially. The overriding significance of the problem is most eloquently expressed by Trinidadian attorney-at-law Gregory Delzin, earlier an opponent of the CCJ, but more recently a convert to the cause of its proponents:

> The challenge of the CCJ is not rooted in the reality of its independent status […], but in its capacity to assure a leadership role in the development of jurisprudence based on the timely delivery of meaningful and relevant decisions that impact on the lives of the Caribbean people. The CCJ must make a difference or at the very least, be perceived to make a difference.[10]

Delzin accurately perceives the role of the CCJ in the modern Caribbean polity as one of developing, clarifying and unifying the law – which conforms, of course, to Standard 1.2 of the Appellate Court Performance Standards and Measures.[11] The Mission of the CCJ says in part that "as the final court of appeal for member states of the Caribbean Community, it fosters the development of an indigenous Caribbean jurisprudence". Ergo, the significance

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[10] Gregory Delzin, "The Impact and Possibilities of the Caribbean Court of Justice with Special Reference to the Student Attorney-at-Law", paper presented at CCJ Day, Hugh Wooding Law School, University of the West Indies, St. Augustine, Trinidad & Tobago, 17 November 2007. No pagination.

[11] Appellate Court Performance Standards Commission and the National Center for State Courts, *Appellate Court Performance Standards and Measures* (1999), p. 2.

of the problem is that by solving it, or at the very least, by understanding it, the court may not only find the means to attract the trust and confidence of its pan-Caribbean constituency – and possibly beyond. It may also find the means to take a leadership role in engendering greater faith in the insular judiciaries which are the CCJ's tributaries.

The bottom-line goal of this CEDP Phase III project, for one who is a Court Public Information Officer, is to gather sufficient objective data to:

- discover the underlying causes of misgivings about the court;
- detect the weaknesses and strengths in the court's promotional strategy and outreach activity;
- in conformity with Appellate Court Performance Standard 3.3, that appellate court systems "should inform the public of their operations and activities",[12] ultimately fashion a sharp, well-designed Public Education and Information Programme to allay fears and win and preserve public trust and confidence, thus making the CCJ better positioned to fulfil its mandate to protect and promote the rule of law.

Proceeding further, the report embarks upon a literature review and analysis of the history and antecedents of the court. This sections delves into the nitty-gritty of the debate surrounding the court, paying special attention to the four principal arguments against it: (1) the supposed 'Olympian aloofness' and superior objectivity of the Law Lords of the JCPC; (2) the alleged inferior quality of Caribbean jurisprudence; (3) the possibility of political interference in the operations of the court; (4) fears by death-penalty abolitionists that the CCJ would be a "hanging court", reversing the precedents set by JCPC rulings almost

[12]Appellate Court Performance Standards Commission and the National Center for State Courts, *op. cit.*, p. 11.

systematically preventing capital punishment from being carried out in the CARICOM region. This section also examines the legal and psychological setback for Jamaica created by the JCPC when it ruled Jamaica's attempt to replace it by the CCJ as unconstitutional.

Section V, "Methods", delineates those employed in the data collection process for this project. Naturally, since the creation of the Caribbean Court of Justice has spawned such a high level of debate and controversy, much use was made of archival data. Given the static nature of such material however, it was deemed advantageous to also make use of a telephone survey and one-on-one interviews. Section VI, "Findings", deals with the analysis of the data collected. The findings encountered through the literature review, already stated under the section assigned to it, will not be reiterated here, save for illustrative or explicatory purposes. To simplify and accelerate comprehension, some findings are presented graphically, though accompanied nonetheless by prose explanation to clarify findings or dispel ambiguity where such may occur.

Section VII, dealing with conclusions and recommendations, completes the compositional part of the project. Whereas the previous section deals with the hard, objective data of the findings, this section allows for some modicum of projection or speculation based upon the findings. Section VII illustrates how, having interpreted the findings, one would proceed to plumb them for solutions to the problem of closing the credibility gap hampering the court's more widespread acceptance. One having already advocated the implementation of a wide-ranging Public Education & Implementation Plan, this section looks at the nitty-gritty of making such a plan into reality: scope, costs, time-frame, personnel. Since, as well, the writer subscribes to the notion of the leadership role of the CCJ, this section will consider the implications of this study for other Caribbean courts.

FAÇADE OF THE CARIBBEAN COURT OF JUSTICE

The main entrance of the Caribbean Court of Justice, at 134 Henry Street in Port of Spain, the capital city of Trinidad & Tobago

LITERATURE REVIEW

To alienate men from their own decision-making is to change them into objects.

Paulo Freire[13]

Having considered the judicial arm of CARICOM in Section III, it is useful at this stage to consider the other administrative branches of the Caribbean integration movement, in order that the reader obtain a comprehensive understanding of the contemporary Caribbean polity.

The Executive

This executive arm of CARICOM comprises of an annually rotating prime ministerial Chair; the CARICOM Secretary General, who is the Chief Executive Officer and the head of the CARICOM Secretariat and a *faux* Cabinet of individual Heads of Government who are given specific responsibility for portfolios, each of which relates to an area considered important for overall regional development and integration.

The Legislative

The ostensibly legislative arm of CARICOM is made up of: (1) The Community Council, itself consisting of ministers responsible for community affairs, to which may be nominated any other minister designated by member states in their absolute discretion. The council is one of the principal CARICOM organs (the other being the Conference of the Heads of Government which meets yearly) and is supported by four other organs and three bodies.

Supporting Organs

- The Council for Finance and Planning (COFAP)
- The Council for Trade and Economic Development (COTED)

[13] Paulo Freire, *Pedagogy of the Oppressed* (Harmondsworth, 1972), p. 58

- The Council for Foreign and Community Relations (COFCOR)
- The Council for Human and Social Development (COHSOD)

Supporting Bodies

- The Legal Affairs Committee: provides legal advice to the organs and bodies of the Community.
- The Budget Committee: examines the draft budget and work programme of the secretariat and submits recommendations to the Community Council; and,
- The Committee of Central Bank Governors: provides recommendations to the COFAP on monetary and financial matters[14]

All of these institutions are resolutely Caribbean in essence and function and have become more and more so, inexorably, since the first heady days of independence in the early 1960s. As has been outlined above, not so with regard to the highest court in the land. In order to understand the lasting link between the Caribbean and the JCPC, some brief review and analysis of the history, nature and function of this body seems imperative.

The Judicial Committee of the Privy Council

Since the eleventh century, after the Norman conquest of England, the British Crown was advised by a royal court, consisting of "magnates, ecclesiastics and high officials". The body's original remit was advising the sovereign on legislation, administration and justice. As time progressed, the court evolved into various sub-bodies, each concerning itself with distinct functions. For example, the courts of law and Parliament, both facets of the royal court, eventually assumed respective responsibility for dispensing justice, and acting as the supreme legislature of the kingdom. However, and significantly, the council as a body

[14] More detailed information on the organisational structure of CARICOM is available on its website at http://www.caricom.org.

retained the power to hear legal disputes, either in the first instance or on appeal. The power of this advisory body was further demonstrated by the fact that the sovereign could legislate on the advice of the Council, rather than on the advice of Parliament, and any laws so drafted were accepted as fully valid by all and sundry.

A powerful monarch could manipulate the council towards his own ends. During his reign, Henry VIII for example, enacted laws by mere proclamation, on the "advice" of the council, thus pre-empting the legislative authority of Parliament. With the passage of time, however, the council evolved into a mostly administrative organ, comprising a fairly large number of officials. Various monarchs, such as James I and Charles I, subscribed to the principle of absolute monarchy, and sidelined the council. Its fate see-sawed during and after the abolition and restoration of the British monarchy in the 17th century. After restoration in the post-Cromwell era, the monarch progressively drilled down council numbers into a smaller advisory body, which eventually morphed into the Cabinet of modern times. The larger body, the Privy Council per se, lost its pre-eminence as the monarch's chief advisory council, assuming the function of a court of appeal for the overseas territories of the British Empire.

As an element of the reorganisation of the council into various autonomous committees, the Judicial Committee of the Privy Council was established by the Judicial Committee Act of 1833. It remains one of the highest courts in the United Kingdom, and is also the highest court of appeal (or court of last resort) for several independent Commonwealth states, the UK overseas territories, and British Crown dependencies. Though it is simply referred to as "the Privy Council", appeals are in fact made to Her Majesty in Council who then refers the case to the Judicial Committee for "advice". In Commonwealth republics, appeals are made

directly to the Judicial Committee. As it declares on its website, the Judicial Committee of the Privy Council is the "court of final appeal for the UK overseas territories and Crown dependencies, and for those Commonwealth countries that have retained the appeal to Her Majesty in Council or, in the case of Republics, to the Judicial Committee". [15]

Five judges normally sit in the Privy Council Chamber in Downing Street, London, to hear Commonwealth appeals. These members are the Lords of Appeal in Ordinary, "who do most of the judicial work of the Privy Council (these are the same Law Lords who sit in the appellate committees of the House of Lords), [as well as] other Lords of Appeal, including former Lords of Appeal in Ordinary".[16] Apart from privy councillors who are or were judges of the Court of Appeal of England, the Inner House of the Court of Session in Scotland or the Court of Appeal in Northern Ireland, privy councillors who are judges of certain superior courts in Commonwealth nations – including CARICOM states – may also sit. These overseas judges may not sit when certain domestic matters are being heard, but will often sit when appeals from their own countries are being heard.

The JCPC's Commonwealth Caribbean jurisdiction is exercised as follows:

A. Appeals to Her Majesty in Council

> An appeal lies from the undermentioned countries of which the Queen is Head of State and from UK overseas territories as follows.
>
> (1) By leave of the local Court of Appeal. The circumstances in which leave can be granted will depend on the law of the country or territory concerned. Leave can usually be obtained as of right from final judgments in civil disputes where the value of the dispute is more than a stated amount and in cases which involve issues of constitutional interpretation. Most Courts of Appeal also have discretion to grant leave in other civil cases.

[15] http://www.privy-council.org.uk
[16] *Ibid.*

> (2) By special leave of Her Majesty in Council. The Judicial Committee has complete discretion whether to grant special leave. It is mostly granted in criminal cases (where leave cannot usually be granted by the Court of Appeal) but it is sometimes granted in civil cases where the local Court of Appeal has for any reason refused leave.[17]

In CARICOM, these conditions apply to: Antigua & Barbuda; The Bahamas; Belize; Grenada; Jamaica; St. Christopher & Nevis; Saint Lucia; Saint Vincent & The Grenadines, all of which, though politically independent, are constitutional monarchies with the British monarch as Head of State. Equally subject to these conditions are the non-independent Caribbean United Kingdom Overseas Territories, inclusive of Anguilla; Bermuda; British Virgin Islands; Cayman Islands; Montserrat and the Turks & Caicos Islands.

B Appeals to the Judicial Committee

An appeal lies to the Judicial Committee of the Privy Council itself from the independent republics within CARICOM, namely: the Commonwealth of Dominica and The Republic of Trinidad and Tobago. The Republic of Guyana, one of the two states subscribing to the appellate jurisdiction of the CCJ, jettisoned appeals to the PC shortly after gaining independence from the UK in 1966.

Historically, all Commonwealth territories enjoyed a right of appeal to the Privy Council. With the expansion of the British Empire, charters granting the right of settlement in the various territories contained as a matter of course provisions establishing colonial courts of law with a right of appeal to the Privy Council. As yet obtains in CARICOM, even states that eventually became republics or independent constitutional monarchies retained the Privy Council's jurisdiction in their new independent or republican constitutions. With the passage of time, however, several larger states began to perceive the Privy Council as being

[17] *Ibid.*

dissonant with their local ethos, and an anachronistic impediment to full judicial independence and national sovereignty. One Trinidadian lawyer, who has himself appeared on occasion before the Judicial Committee, describes the experience.

The dichotomy of perspectives between the tropical Caribbean and temperate England becomes pellucidly apparent when one considers the historical context of the Privy Council and its procedures. The JCPC sits in Chambers, not in open court. The judges are neither robed nor wigged, but wear business suits. Counsel, however, must be robed and wigged. Attorneys are obliged to address the seated judges (in Chambers), who do *not* enter the court in the presence of attorneys. All persons present are asked to vacate the chamber, the doors shut, and the judges enter unseen. Once they are seated, counsel is invited to enter, stand and bow to the seated judges and proceed to take his place at the Bar. The attorney concludes: "This is a procedure entirely different from an open Appellate Court hearing in the Caribbean. It is obviously based on and is consistent with the status of the Privy Council as an advisory Council to the Queen".[18]

As can be seen from a perusal of Table 1, between the inauguration of the CCJ in 2005 and 31 December 2007, the Judicial Committee of the Privy Council heard a grand total of 63 appeals from 8 CARICOM states signatories to the Agreement Establishing the CCJ. The lion's share, of course, came from the larger populations of Jamaica (26) and Trinidad & Tobago (23), representing a whopping 77% of all appeals. Outside of these two, the other CARICOM states' appeals are in single digits. Given the small number of appeals coming from these latter, therefore, one may fairly affirm that the local courts of appeal are in fact the courts of last resort for the majority of CARICOM litigants. True, there is no cost to the

[18] Delzin, *op. cit.* No pagination.

states for access to the JCPC, but this access is not free for the individual. A litigant who cannot afford the costs attendant upon taking his appeal to London from the Caribbean can do aught else but be satisfied with the judgment of his local court of appeal.

Table 1

APPEALS FROM CARICOM STATES TO THE PRIVY COUNCIL AS OF THE INAUGURATION OF THE CCJ TO 31 DECEMBER 2007

STATE	**NATURE**	**OF**	**APPEAL**	
	CIVIL	**CRIMINAL**	**OTHER**	**TOTAL**
Antigua & Barbuda	4	0	0	4
Belize	1	0	0	1
Grenada	0	1	1 (Employment)	2
Jamaica	14	11	1 (Employment)	26
St. Kitts & Nevis	0	0	1 (Extradition)	1
St. Lucia	1	2	0	3
St. Vincent & The Grenadines	1	1	0	2
Trinidad & Tobago	7	13	3 (Employment)	23
	29	28	6	63

Some attorneys posit that one of the reasons that accession to the appellate jurisdiction of the CCJ has not been hotly pursued by OECS states is because such infrequent use is made of appeals to the JCPC that the CCJ in its stead may appear to be just as remote as the London-based court. At the same time however, the corollary might prove to be true: that there are so few appeals to the JCPC *because* the court is so remote. Were the OECS' final court of appeal to be based in nearby Port of Spain, the significant reduction in costs attendant upon pursuing litigation all the way to the court of last resort may well result in a major increase in the quantum of matters reaching the region's final court. Of course, the only way to test this would be for the Eastern Caribbean states to actually *have* access to the appellate jurisdiction of the court!

Table 2

TABLE OF JUDICIAL COMMITTEE OF THE PRIVY COUNCIL: COMMONWEALTH CARIBBEAN APPEALS ENTERED AND DISPOSED OF SHOWING RESULTS, 2005

Country or Jurisdiction of origin.	Number of appeals entered	Appeals disposed of after hearing			Without a hearing *	Total	Appeals pending at end of year
		Dismissed	Varied or allowed in part	Allowed			
Antigua and Barbuda	2	0	0	2	0	2	2
The Bahamas	11	0	1	1	1	3	16
Barbados	0	1	0	0	1	2	0
Belize	0	2	0	0	0	2	2
British Virgin Islands	3	0	0	0	1	1	3
Cayman Islands	4	1	0	0	0	1	4
Dominica	0	0	0	1	0	1	0
Grenada	2	0	0	0	0	0	2
Jamaica	15	5	0	3	0	8	16
Montserrat	0	0	1	0	0	1	0
St. Christopher and Nevis	0	1	0	0	0	1	0
St Lucia	1	0	0	0	0	0	3
St Vincent and The Grenadines	1	0	0	0	0	0	1
Trinidad and Tobago	7	9	2	7	0	18	11
Total	**71**	**24**	**4**	**23**	**6**	**57**	**83**

*Dismissed for non-prosecution or withdrawn

Source: Privy Council website: http://www.privy-council.org.uk

Table 3

TABLE OF JUDICIAL COMMITTEE OF THE PRIVY COUNCIL: COMMONWEALTH CARIBBEAN APPEALS ENTERED AND DISPOSED OF SHOWING RESULTS, 2006

Country or Jurisdiction of origin.	Number of appeals entered	Appeals disposed of after hearing			Without a hearing *	Total	Appeals pending at end of year
		Dismissed	Varied or allowed in part	Allowed			
Anguilla	1	0	0	0	0	0	1
Antigua and Barbuda	0	0	0	1	0	1	0
The Bahamas	14	3	0	10	0	13	7
Barbados	3	0	0	0	0	0	3
Belize	3	1	0	0	0	1	2
Bermuda	2	0	0	0	1	1	1
British Virgin Islands	5	1	0	1	0	2	3
Cayman Islands	6	2	0	2	0	4	6
Dominica	1	0	0	0	0	0	1
Grenada	3	0	0	2	0	2	1
Jamaica	19	4	0	6	0	10	12
St Christopher & Nevis	0	0	0	0	0	0	1
St Lucia	3	0	0	0	0	0	6
St Vincent and the Grenadines	3	1	0	0	0	1	3
Trinidad and Tobago	19	9	2	7	0	18	20
Total	**105**	**30**	**2**	**37**	**1**	**70**	**87**

*Dismissed for non-prosecution or withdrawn

Source: Privy Council website: http://www.privy-council.org.uk

Attorney Mark James Morgan, in an analysis of appeals from Trinidad & Tobago to the JCPC in 2006 as recorded above, opines that the main obstacle to the individual pursuing appeals at the level of the JCPC is the cost of litigation. Noting that criminal and public law appeals were heard without charge (except to the British taxpayer, who pays the Law Lords), Morgan cites the unfairness of having "the highest court in the land unavailable to the general litigant". He prescribes two remedies to rectify this unjust situation: either convince the JCPC to sit in Trinidad & Tobago (as it did in The Bahamas in December 2006, for the first time in history), or "reopen the debate on the Caribbean Court of Justice which appears to have gone cold". Morgan is convinced that the Caribbean setting of the CCJ would provide greater access for Trinidad & Tobago litigants than afforded by the JCPC.[19]

The matter of the cost of appealing to the Privy Council bears examination here. Her Majesty, in her largesse, allows free access to states to the Judicial Committee, but the above statistics and other evidence demonstrates that only few litigants possess the wherewithal to access the JCPC. The ordinary Trinidad & Tobago litigant therefore, like many of his CARICOM brethren, lives in a twilight zone where on the one hand, his court of last resort is available but not accessible because of high costs, and on the other, a court for which his country has already paid is not accessible because there is no legislative authority allowing him access. Condemning the present situation as a "no-man's land", Morgan indicates that the "laudable objective of justice for all litigants" would be unattainable as long as "practical access" to the islands' highest court was unavailable to the vast majority of litigants.[20]

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[19] Mark James Morgan, "T&T and the Privy Council," *Trinidad Guardian*, 6 September 2007, p. 24.
[20] *Ibid.*

Canada created its Supreme Court in 1875. Criminal appeals to the Privy Council were abolished in 1933, followed by civil appeals in 1949, although appeals filed with the PC before that date were allowed to stand until resolution, the last such case being concluded only in 1959. Australia passed the Privy Council (Limitation of Appeals) Act 1968, the Privy Council (Appeals from the High Court) Act 1975, and the Australia Act 1986, all of which effectively abolished the right of appeal from Australian courts to the PC. In theory, the High Court of Australia may still grant leave to appeal to the PC on certain matters, since the Australian Constitution still has a provision requiring the leave of the High Court of Australia for appeal to the council on such issues. The likelihood of such leave being granted, however, is "purely theoretical", since the High Court has made it clear that it will not give such permission if petitioned.

In October 2003, amid considerable controversy (the government having decided to forgo calling a referendum on the issue) New Zealand abolished appeals to the Privy Council in respect of all cases heard by the Court of Appeal of New Zealand after the end of 2003, in favour of a Supreme Court of New Zealand. (This development does not affect the New Zealand associated states of the Cook Islands and Niue, which retain the right of appeal to the PC.) Malaysia abolished such appeals in criminal and constitutional matters in 1978 and in civil matters in 1985. Singapore abolished Privy Council appeals in all cases save capital matters or in civil cases where the parties had agreed to such a right of appeal in 1989. The remaining rights of appeal were abolished in 1994. Outside of Commonwealth Caribbean states and crown dependencies of the United Kingdom, only Kiribati, Tuvalu and Mauritius still retain "Her Majesty's Most Honourable Privy Council" as their court of last resort.

Attempts by the governments of CARICOM states to follow the example set by their Commonwealth brethren have met with less than tremendous success. Ironically, as indicated at the inauguration of the CCJ, it was as far back as 1828 that the issue of removing colonies from Privy Council jurisdiction was first mooted, by, of all people, Lord Brougham, Lord Chancellor of England between 1830 and 1834, and the man responsible for remodelling the Judicial Committee of the Privy Council, effected by Act of Parliament (the aforementioned Judicial Committee Act) in 1833. Quoth he:

> It is obvious that, from the mere distance of those colonies and the immense variety of matters arising in them, foreign to our habits and beyond the scope of our knowledge, any judicial tribunal in this country must of necessity be an extremely inadequate court of redress.[21]

That this institutional notion of the inadequacy of the Privy Council to advisedly adjudicate on colonial matters did not evaporate with the passage of time seems to be evident in remarks made in 2003, some 175 years after the above pronouncement, by Lord Hoffman, then a former privy councillor and feature speaker at the annual dinner of the Law Association of Trinidad & Tobago on the 10th October, 2003:

> Although the Privy Council has done its best to serve the Caribbean and, I venture to think, has done much to improve the administration of justice in parallel with improvements in the United Kingdom, our remoteness from the community has been a handicap. […] My own view is that a court of your own is necessary if you are going to have the full benefit of what a final court can do to transform society in partnership with the other two branches of government.[22]

Other developments imbued such words with great significance. On 21 March 2005, the British Parliament established in law the Supreme Court of the United Kingdom via Part III of the Constitutional Reform Act 2005. On 14 June 2007, the Lord Chancellor announced

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[21] Cited in Rt. Hon. Mr. Justice Michael de la Bastide, "President's Address", at the Inauguration of the Caribbean Court of Justice, Queen's Hall, Port of Spain, 16 April 2005, p. 4

[22] *Ibid.*

that the new court would start hearing matters in October 2009. The court will be located in Middlesex Guildhall in Parliament Square, Westminster. Of particular relevance to the Commonwealth Caribbean, this new court will assume the judicial functions of the Law Lords in the House of Lords and some functions of the JCPC.

Hearing appeals from courts in the United Kingdom's three legal systems (i.e., England and Wales, Northern Ireland, and Scotland) will be the main role of the UK Supreme Court. Its focus will be on cases raising points of law of general public importance. It will also determine "devolution issues", which are currently heard by the JCPC. Whereas the Appellate Committee of the House of Lords will cease to exist after October 2009, the JCPC will however be retained, located within the new Supreme Court building, continuing, until otherwise determined, as the final court of appeal for various states, inclusive of those in the Commonwealth Caribbean. It is important not to confuse this new UK Supreme Court with the Supreme Court of England and Wales, created in the 1870s under the Judicature Acts.

This court consists of a Court of Appeal, High Court of Justice and a Crown Court. When the provisions of the Constitutional Reform Act 2005 come into force, creating the Supreme Court of the United Kingdom, the present Supreme Court will be restyled as the Senior Court of England and Wales. Like the CCJ itself, the introduction of the British Constitutional Reform Act by the government of then British Prime Minister Tony Blair in 2003 engendered great controversy, and just like the Jamaican Government's later attempts to have that state accede to the appellate jurisdiction of the CCJ sans prior referendum, the introduction of the act was not preceded by much consultation. Its final form reflected amendments wrought by the House of Lords.

Artist Ptolemy Dean's rendition of the Privy Council Chamber

Source: Privy Council website, at http://www.privy-council.org.uk

Prime Minister Tony Blair's announcement of his intention to overhaul the British court system and to eliminate the concept of the Law Lords was perceived by several Caribbean leaders as an opportune signal to the region to get its act together. Then Barbadian Attorney-General Mia Mottley, stating her preference for controlling "her own destiny", said the choice for CARICOM was to establish its own final court or "wait and loiter on colonial premises". Ms. Mottley's Jamaican counterpart, then Attorney-General A. J. Nicholson, echoed her sentiments, interpreting Tony Blair's statement as a "wake-up call" for the Caribbean. He went on to note that "in any event, even if we wanted to remain with the [Privy Council] forever, it was not within our gift for us to access its services in perpetuity".[23]

As well as discredited by Law Lords themselves, the notion of the permanence of the JCPC as CARICOM states' court of last resort has been criticised by Caribbean leaders. P. J. Patterson, then Prime Minister of Jamaica, queried of the Jamaica Bar Association, at that time hotly opposed to the replacement of the JCPC by the CCJ: "Does the Bar now contend that the Privy Council is a court to which we are entitled access in perpetuity having regard to the fact that its creation, existence and our access thereto are not determined by us?" Referring to the JCPC as a "vestigial colonial institution", he stressed to the Independent Jamaican Council for Human Rights that the Privy Council, a British institution, was not guaranteed permanence in the Jamaican Constitution. Patterson asked: "Has it occurred to you that since the Privy Council is not established by Jamaica but the United Kingdom, it does not and cannot enjoy any permanence in our Constitution?"[24]

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[23] "Blair's reform plans spark debate on CCJ", *Jamaica Gleaner*, 23 June 2003.
[24] *Ibid.*

Whatever the example or advice of the JCPC itself, Caribbean people as a whole have not leapt at the opportunity to have their own home-grown court. The birth of the CCJ has come after a long, arduous gestation. Almost 40 years ago, in March 1970, the Organisation of Commonwealth Caribbean Bar Associations (OCCBA) first raised the issue of the need to replace the Judicial Committee of the Privy Council as the court of last resort for the Commonwealth Caribbean by a regional court of appeal. Again in Jamaica, just a month later, at the VI Commonwealth Caribbean Heads of Government, the heads agreed to take action on relinquishing the Privy Council as the Anglophone Caribbean's last appeal court and mandated a committee of CARICOM attorneys-general to further explore the question of the establishment of what was then being called a "Caribbean Court of Appeal".

Further to the perceived need for an indigenous court as tribunal of last resort in criminal and civil matters in the Caribbean, other considerations eventually weighed heavily in favour of the creation of the judicial arm of CARICOM. As Duke Pollard, then Director of the Caricom Legislative Drafting Facility[25] wrote in 2000:

> 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.[26]

[25] The former director took the oath of office as a Judge of the Caribbean Court of Justice in February 2005.
[26] CPID, CCJ, *About the Caribbean Court of Justice* (Port of Spain), 2006, p.9.

In the conjuncture, therefore, arrived at over almost four decades, there were are two discretely but complimentary judicial imperatives perceived by the CARICOM leadership: one for a regional court to adjudicate disputes among members of the Caribbean Single Market and Economy, such as there exist for economic blocs the world over. The other, for a final court of appeal with its genesis, ethos and pedigree firmly rooted in Caribbean soil and nourished by the brilliant Caribbean sun.

Shortly after independence from the UK in 1966, Guyana abolished appeals to the Privy Council. Barbados, maliciously known as "Little England" in the Caribbean, passed legislation to replace the JCPC by the CCJ in 2005. Grenada, after the coup d'état of 1979 bringing the People's Revolutionary Government of Maurice Bishop to power, cut its links with the PC by the 1979 The Privy Council (Abolition of Appeals) Law. This was confirmed by Act No. 1 of 1985. That this legislation was valid was upheld by the PC itself in 1986. Grenada, however, reinstated PC jurisdiction as its final court of appeal in 1991, by the Constitutional Judicature (Restoration) Act and the West Indies Associated States Supreme Court (Grenada) Act (Re-enactment) Act of 1991. Thus far, apart from Barbados and Guyana, only Jamaica, currently debating its status as constitutional monarchy with Queen Elizabeth II as its Head of State, has taken firm steps to replace the JCPC by the CCJ.

Jamaica has been less successful than revolutionary Grenada in its attempts. Like New Zealand, she attempted to abolish appeals to the PC without canvassing popular opinion by way of a plebiscite. The tale of Jamaica's failed attempt to accede to the appellate jurisdiction of the CCJ is best told by the territory's final judicial arbiter, the JCPC itself:

> On 30 September 2004 the Governor-General of Jamaica, acting under section 60 of the Constitution, gave his assent to three bills,

> the broad effect of which was to abolish the right of appeal to Her Majesty in Council and to substitute a right of appeal to a new regional court of final appeal, the Caribbean Court of Justice ("the CCJ").[27]

These bills had been passed by a simple majority vote in the bicameral Jamaican Parliament. The constitutionality of the legislative procedure adopted by the Government of Jamaica under the People's National Party (PNP) government of then Prime Minister P. J. Patterson was challenged in court by the Independent Jamaica Council for Human Rights. Its challenge, rejected by the Jamaica High Court and the Jamaican Court of Appeal, eventually made its way to the Downing Street Chambers of Their Lordships of the Judicial Committee of the Privy Council, who wrote:

> First, Dr Lloyd Barnett, speaking for all the appellants, roundly accepted that there could have been no objection to legislation supported by a majority of members of each House of Parliament which simply abolished the right of appeal to Her Majesty in Council and no more. He also accepted that the Parliament of Jamaica could validly have provided, in effect, for the CCJ to take the place of the Privy Council as the ultimate court of appeal from the courts of Jamaica. But this latter object, he submitted, could not, consistently with the Constitution, be achieved by ordinary legislation since it undermined certain provisions of the Constitution which were accorded special protection and could thus be altered only by employing the procedure appropriate for altering such provisions. Thus the argument is not whether the Parliament of Jamaica had power to achieve the object it sought to achieve but *whether the procedural means of achieving it followed the procedure required by the Constitution*.[28]

The judgment, delivered by Lord Bingham of Cornhill, was prefixed by the observation that

> […] it must be understood that the Board, sitting as the final court of appeal of Jamaica, has no interest of its own in the outcome of this appeal. The Board exists in this capacity to serve the interests of the

[27] "Independent Jamaica Council for Human Rights (1998) Limited and Others v (1) Hon. Syringa Marshall-Burnett and (2) the Attorney General of Jamaica," Privy Council Appeal No. 41 of 2004, p. 1.
[28] Privy Council Appeal No. 41 of 2004, p. 2. Emphasis added. Dr. Barnett is a member of the Regional Judicial and Legal Services Commission, the body responsible for appointing the President, Judges and personnel of the CCJ.

> people of Jamaica. If and when the people of Jamaica judge that it no longer does so, they are fully entitled to take appropriate steps to bring its role to an end. The question is whether the steps taken in this case were, constitutionally, appropriate.[29]

This having been established, the committee observed:

> As already recorded, Dr Barnett for the appellants accepted in argument that section 110 of the Constitution, providing for appeal to the Privy Council, could have been repealed by the votes of a majority of all the members of each House, since section 110 is not entrenched. The result would have been to constitute the Court of Appeal as the ultimate appellate tribunal in and for Jamaica. Supreme judicial authority would then rest with a body whose constitutional position is buttressed by safeguards carefully designed to protect the process of appointment to the court and the exercise by the court of its jurisdiction against the possibility of executive pressure or interference. Thus repeal of section 110, without more, would not weaken the protection which the Constitution set out to guarantee for the benefit not of the courts themselves, but of the people of Jamaica. What was constitutionally objectionable, Dr Barnett submitted, was to establish a new court to which appeals from the Court of Appeal would lie when the new court would enjoy none of the entrenched protection afforded by the Constitution to the Supreme Court and the Court of Appeal and when the parliamentary procedure followed was not that mandated by the Constitution for amendment of an entrenched provision. […][30]
>
> The three Acts do not, singly or cumulatively, weaken the constitutional protection enjoyed by the higher judiciary of Jamaica. The question is whether, consistently with the constitutional regime just described, a power to review the decisions of the higher courts of Jamaica may properly be entrusted, without adopting the procedure mandated by the Constitution for the amendment of entrenched provisions, to a new court which, whatever its other merits, does not enjoy the protection accorded by the Constitution to the higher judiciary of Jamaica. In answering this question the test is not whether the protection provided by the CCJ Agreement is stronger or weaker than that which existed before but whether, in substance, it is different, for if it is different the effect of the legislation is to alter, within the all-embracing definition in section 49(9)(b), the regime established by Chapter VII. The Board has no difficulty in accepting, and does not doubt, that the CCJ Agreement represents a serious and conscientious endeavour to create a new regional court of high quality and complete independence, enjoying all the advantages

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[29] *Ibid.*
[30] *Ibid.*, pp.10-11

> which a regional court could hope to enjoy. But Dr Barnett is correct to point out that the Agreement may be amended, and such amendment ratified, by the governments of the contracting states, and such amendment could take effect in the domestic law of Jamaica by affirmative resolution. The risk that the governments of the contracting states might amend the CCJ Agreement so as to weaken its independence is, it may be hoped, fanciful. But an important function of a constitution is to give protection against governmental misbehaviour, and the three Acts give rise to a risk which did not exist in the same way before. The Board is driven to conclude that the three Acts, taken together, do have the effect of undermining the protection given to the people of Jamaica by entrenched provisions of Chapter VII of the Constitution. From this it follows that the procedure appropriate for amendment of an entrenched provision should have been followed.[31]

The committee thus concluded:

> In the present instance Parliament legislated not simply to revoke the right of appeal to the Privy Council but to replace it with a right of appeal to the CCJ. From statements made to the Senate by the Attorney-General on 1 and 2 July 2004, and by the Prime Minister and the Minister for Foreign Affairs to the House of Representatives on 27 and 28 July, it is clear that the three measures were seen as "connected" "companion measures" intended to be part of a single, interdependent scheme. The bills were presented as a package. On the material now before the Board it would not appear to have been the intention of Parliament to revoke the right of appeal to the Privy Council without putting anything in its place, and this provision cannot therefore be severed.
>
> […] In the result, the Board will humbly advise Her Majesty that the appeal should be allowed and a declaration made that the Judicature (Appellate Jurisdiction) (Amendment) Act 2004, the Caribbean Court of Justice (Constitutional Amendment) Act 2004 and the Caribbean Court of Justice Act 2004 were not passed in accordance with the procedure required by the Constitution and are accordingly void.[32]

This ruling thus gave the Jamaican government the choice of winning the support of a special majority in both houses of Parliament, or calling a national referendum on the issue. On 10 August 2007, it was reported in the *Jamaica Observer* that on the previous evening, at the launching of the PNP's 2007 general election manifesto, then Prime Minister Portia

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[31] *Ibid*, pp.13-14.
[32] *Ibid*, p. 15.

Simpson Miller had signalled her party's "about-turn in its position on the Caribbean Court of Justice", promising to put the issue to a national referendum within the next five years. This indeed represented a new tactic for the PNP, for the government, under P. J. Patterson, had stoutly resisted calls by the Opposition Jamaica Labour Party (JLP) and rights groups for the CCJ to be put to a referendum.[33.] Under the first rubric of its manifesto, "Constitutional Reform", the PNP manifesto declared:

> We commit to a Constitution that is truly grounded in the will of the Jamaican people; one that creates the Jamaican Republic, establishes the Caribbean Court of Justice as Jamaica's final court, and an updated Charter of Rights to reflect current thinking on human rights.[34]

Ms. Simpson-Miller's PNP lost the Jamaican general elections of 3 September 2007, after 18 years of unbroken power. The victorious JLP had, prior to the elections and ever since the signing of the Agreement Establishing the CCJ, insisted that any Jamaican accession to the CCJ should only come after a referendum and vowed to withdraw from the court if Jamaica had acceded to the appellate jurisdiction under the PNP. Proponents of the CCJ viewed with gloom the accession of the JLP to the corridors of power, given the traditional conservative orthodoxy of the party's leaders, their expressed hostility to the replacement of the Privy Council by the CCJ and the well-advertised support of a majority of the Jamaican Bar in this latter regard. Speaking at a summit in Trinidad on 16 September 2007, new Prime Minister Bruce Golding advised as regards the CCJ:

> We have maintained that we would have to go to the people in a referendum; we feel very strongly about it. [The referendum process] is one of the three pillars on which our society rests and we argue that no matter how strong our mandate […] no group of 60 parliamentarians [has] the right to go and replace one of the three fundamental pillars of our society without consulting the people. [35]

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[33] Erica Virtue, "Now PNP says it will put CCJ to referendum", *Jamaica Observer,* Friday 10 August 2007.
[34] "Highlights of the PNP manifesto", *Jamaica Observer*, Sunday 12 August 2007
[35] "CCJ to get yea or nay", *Barbados Nation*, 16 September 2007.

Since the highly controversial judgment, delivered on 3 February 2005, no other state has taken any steps to replace the JCPC by the CCJ. Worse, as indicated by former Prime Minister of St. Lucia, Dr. Kenny Anthony, what the judgment effectively did was to "strengthen the position of the opponents of the court in Trinidad and Tobago and other pockets of resistance in other parts of the region."[36] What was widely perceived was not the fine point that it was not wrong for Jamaica to replace the JCPC by the CCJ, but it was the *method* of doing it that was ruled wrong. What many retained was that the Privy Council had said that what Jamaica had done was wrong, with little attention being paid to the niceties of legal nuances. Plus, the finality of a Privy Council judgment made it appear to all those tottering on the brink of supporting the court that the matter was permanently closed.

Quite ironically, a Caribbean regional court would hardly be a novelty. So far, there have been: the West Indian Court of Appeal, an itinerant court of the colonial period; the Federal Supreme Court, the judicial organ of the abortive Federation of the West Indies of 1958 to 1962; the Eastern Caribbean Supreme Court, currently comprising a High Court in each member state of the OECS and a single, itinerant Court of Appeal. It would seem that whatever its current general reluctance to embrace the CCJ in its appellate incarnation, the Caribbean region has historically lived quite comfortably under the jurisdiction of regional courts. Admittedly, the ultimate court of appeal for these bodies has always been the Judicial Committee of the Privy Council.

The principal objections to the CCJ cited by jurists, academics, ordinary folk and politicians opposed to the court are: (1) supposed greater objectivity by the British Law Lords in

[36] Kenny Anthony Interview, 7 April 2008

determining matters, this objectivity created by distance and being removed from the Caribbean scene (never mind Lord Brougham and Lord Hoffman's musings); (2) supposed poor quality of Caribbean jurisprudence; this notwithstanding several Caribbean jurists being themselves privy councillors, including the incumbent President of the CCJ; (3) the possibility of political interference in the operations of the court, though there can be few courts globally which enjoy superior statutory insulation from political directorates; (4) that the CCJ was being created to ensure the execution of condemned murderers and would be a "hanging court", this based on no evidence whatsoever.

On the matter of greater objectivity of the Law Lords of the Privy Council in determining matters, there is a widespread belief that both geographical distance and sociological and psychological "removal" from the Caribbean endow the JCPC with a high degree of impartiality which would be compromised were their functions to be exercised by judges from the Caribbean. This does not appear to be a consideration of British privy councillors themselves. Privy Councillor Lord Wilberforce in 1990[37] and Queen's Counsel Lord Anthony Gifford in 1992[38] both exhorted the Commonwealth Caribbean to establish its own final court of appeal. More saliently, in an article appearing in Caribbean newspapers in May 1999, Lord Browne-Wilkinson, then President of the Privy Council, spoke forcefully in favour of an end to appeals from the Caribbean to the Privy Council.

Describing as burdensome the quantum of appeals in capital matters from the Caribbean to the PC, occupying then some 25% of the council's time, His Lordship, according to his

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[37] "WI Appeal court a good idea, says Wilberforce" in *Trinidad Guardian*, 9 March 1990, p. 6, cited in Hugh Rawlins, *The Caribbean Court of Justice: The History and Analysis of the Debate*, paper produced by the Preparatory Committee on the Caribbean Court of Justice: CARICOM Secretariat, 2000, p. 50.
[38] "British QC urges WI Court," in *Trinidad Guardian*, 19 April 1992, p. 1 cited in Rawlins, *ibid.*

interviewer, felt that it was time that the JCPC were relieved of Caribbean cases, so that the region would accede to its "full legal independence". Lord Browne-Wilkinson advocated the establishment of a Caribbean court of last resort on the rationale that

> the ultimate court of appellate jurisdiction of a state, which has to make important policy decisions on legal principles, should be in the state, staffed by citizens of that state and not by outsiders.[39]

It thus seems that in their Downing Street Chambers, Their Lordships of the Privy Council are far more concerned with Caribbean business being taken care of by Caribbean people than Caribbean people largely are themselves. Distance, both geographical and psychological, seems to represent for Their Lordships a non-issue by comparison with the need for the Caribbean to take charge of its own business. Indeed, it has been noted by some writers that the PC has often enough willingly accepted findings by Caribbean courts on local matters, recognising the greater familiarity of such courts with matters properly Caribbean. There is, of course, also the simple, ineluctable truth that the vast majority of states the world over have their courts of last resort firmly implanted on their own soil. No Venezuelan protests that distance would equip a Spanish Privy Council with greater competence to try Venezuelan matters than the Venezuelan Supreme Court!

Trinidadian attorney Gregory Delzin, commenting on the "curious tradition" of the JCPC being the ultimate arbiter of Caribbean law, notes that:

> Local lawyers began to look, nay, depend on the Privy Council to develop our Constitutional Law, where in England there was no written constitution. In the field of human rights, the Privy Council led the way even though, in England, prior to the Human Rights Act 1998, people were still subjects of the Queen and not citizens. English Law Lords schooled in an unwritten constitution where

[39] "Final Court of Appeal", in the (Barbados) *Daily Nation*, 22 June 1999, p. 6A cited in Rawlins, *op. cit.*, p.51.

> parliament was supreme, were entrusted with the development of our written Constitution where parliament was not supreme.[40]

Unfavourable comparisons are made not only between the institutions of the CCJ and PC themselves, but also with the personnel staffing both bodies. Apart from the purported "Olympian aloofness" of the Law Lords, there is also the matter of professional competence. Opponents of the CCJ claim that the Caribbean does not possess jurists of the calibre of the JCPC. The seven judges currently comprising the Bench of the CCJ include four former Chief Justices[41] and an internationally-recognised British legal luminary whose book on his area of expertise has been for many years considered the standard.[42] Ironically, the current President of the CCJ is a privy councillor. Since it has been the tradition of the PC to have overseas councillors sit on matters pertaining to their countries, presumably it would be acceptable to the CCJ's detractors for the President to sit on Caribbean matters in Downing Street, but a source of concern were he to do so in Port of Spain.

Delzin's analysis of the differences in Caribbean and British procedure posits that subconsciously, such dissimilarity "can reinforce the insecurity common in our society based on the erroneous perception that our appeals warrant less formal treatment than our own appellate courts". Further exacerbating this insecurity, he continues, is the belief that Privy Council judges were more enlightened than their Caribbean brothers, "not because they were better, but because their distance engendered an assurance of independence, an assurance informed by self-doubt". Not interpreting this self-doubt as a criticism of Caribbean judges, he sees it rather as "the reality of small island nations confirmed by decades of experience". His conclusion on this Caribbean attitudinal posture is instructive:

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[40] Delzin, *op.cit.*
[41] One of whom is also a former Chancellor of the Judiciary of Guyana.
[42] Underhill and Hayton, *Law of Trusts and Trustees* (London), 1995.

> The emphasis is on assurance, not the fact of independence. Assurance is the positive development from initial self-doubt. Importantly, perception creates the assurance which in turn creates the legitimacy. In order to develop that assurance, we must first take steps *sometimes in the dark* and with each step we become more assured.[43]

The notion that justice is better and more wisely dispensed outside of the Caribbean is largely based on the accurate perception, as expressed by Guyanese attorney Sir Fenton Ramsahoye, that the Privy Council is one of the "strongest tribunals" in the Anglophone world, and this so because "it is composed of persons of outstanding legal scholarship and intellectual ability, of proven legal experience and moral soundness, outstanding legal careers and many years of legal experience." Sir Fenton is cited as opining that there is a Caribbean perception that regional judges "cannot be compared favourably with members of the Privy Council." Manifestly, however, the Privy Council itself does not agree with this assessment, since it has not hesitated to absorb into its ranks Caribbean jurists of outstanding ability, nor indeed to uphold their judgments upon appeal more often than it overturns them. [44]

Commenting on the purported superiority of the British Law Lord over the Caribbean judge, attorney Mark James Morgan asks a pertinent question:

> […] If "good" means experienced, though undoubtedly the Privy Council judges are more experienced at interpreting English and European Community law in accordance with English conditions and customs, local judges are more experienced in interpreting Caribbean law in accordance with Caribbean conditions and customs. Which is the more important?[45]

This argument would not impress Sir Fenton, a former Attorney-General of Guyana, who holds the double record for the greatest number of appearances before the JCPC from the

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[43] Delzin, *op. cit.* No pagination. Emphasis added.
[44] Sir Fenton cited by Rawlins in *op. cit.*, p. 38.
[45] Morgan, *op .cit.*

Caribbean and the highest number of successfully argued appeals from the Caribbean before the JCPC. According to him, all Caribbean advances in constitutional law have been made in the Privy Council, "advances made by reversing judgments which *these* judges have been giving in the West Indies". Essentially saying that Caribbean judges were too incompetent to differentiate among dissimilar legal systems, Sir Fenton is quoted as averring that because legislative systems of Caribbean states were different some from the others, "you cannot have judges sitting there who do not know anything about Roman law in Guyana or the French law in St. Lucia, saying that they are trying cases when these legal systems are active and they regulate people's rights from day to day."[46]

This submission seems to ignore the presence of many Caribbean jurists on international tribunals, whose competence has not been questioned. Recognising that there are legal elements among the various states that would have to be harmonised "ultimately", AG Mottley counters that the CCJ would have to determine a matter coming before it according to the national law of the appellant's country, "because it is sitting as the final court of appeal in that particular jurisdiction". She then makes the telling point that the widely diverse historical, judicial and cultural backgrounds of member states of the European Union have not impeded the European Court of Justice from being an eminently successful and internationally respected court.[47] Manifestly, Sir Fenton seems to believe that whatever talent or skill allows European judges to sit competently in international tribunals, it is not possessed by their Caribbean counterparts, whatever their qualifications or experience.

Closely linked to misgivings about the insufficiency of Caribbean judges' legal acumen and intellect is the charge that CCJ judges would be vulnerable to manipulation by politicians.

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[46] Cited in "Blair's reform plans spark debate on CCJ", *op. cit.*
[47] *Ibid.*

James Madison's point is well taken, of course: "Were the […] judges not independent of the legislature […] their independence […] would be merely nominal".[48] In 1994, Lloyd Noel, then President of the Grenada Association of Lawyers, qualified his objection to a regional court of last resort by stating that political interference in Caribbean judicial appointments had compromised judicial independence. He counselled that "until politicians are sufficiently mature and responsible in their attitude to justice, […] we cannot take the risk of having a final Court of Appeal".[49] The cynic would aver that if every country were to await the supervention of this development, there would be no local courts of appeal anywhere! The intervening years since have done nothing to dispel such distrust.

In fact, Mr. Noel, who eventually served as Attorney-General of Grenada, as late as August 2006, in an article likening the situation in the Middle East to one that was likely to develop in the Caribbean if appeals to the JCPC were removed, prayerfully wished:

> May the good Lord above continue to lend a helping hand to preserve the services of the Law Lords here on earth for some time to come. And in so doing, to keep the chaos, and confusion, and mayhem of the Middle East, as far away from our relatively peaceful region.[50]

Indeed, as recently as 17 March 2008, Radio Jamaica on its website was capable of announcing that Mr. Arnhim Eustace, Leader of the Opposition in the unicameral, 15-seat St. Vincent & The Grenadines parliament, had announced the withdrawal of his party's support for the CCJ. Mr. Eustace was reported as saying that his New Democratic Party had

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[48] James Madison, "(The Meaning of the Maxim, Which Requires a Separation of the Departments of Power, Examined and Ascertained) Continued with the Same View and Concluded, in *The Federalist Papers*, Number 51, 1787.

[49] Cited in Rawlins, *op. cit*., p. 29.

[50] Lloyd Noel, "The lessons we are learning have a price", on Caribbean Net News, 9 August 2006, at http://www.caribbeannetnews.com/cgi-script/csArticles/articles/000027/002701.htm. Interestingly, as a former attorney general, Mr Noel himself will have served in a political office working closely with the Judiciary of his own territory.

withdrawn its support for the court because he wished to see "more reform to remove political interference in the administration of justice in the region". "I think I want to see some further movement in relation to the issue of political involvement and what role the political directive can play," Mr. Eustace is quoted as saying.[51] No word appeared to be forthcoming from Mr. Eustace on what evidence he could adduce to demonstrate political interference in the administration of justice by the CCJ.

Interestingly enough, no attention appears to be paid to the fact that although the British sovereign may appoint anyone a privy councillor, in practice appointments are made only on the advice of the government, led, of course, by the Prime Minister of the United Kingdom, a politician. In 1996 Oliver Jackman, then a Judge of the Inter-American Court of Human Rights and a supporter of the establishment of a Caribbean Court of Appeal, responded to aspersions cast upon the integrity of Caribbean Benches by making reference to the way in which judges are appointed to the JCPC and opining that "lawyers […] have more confidence in the British Prime Minister than the judges appointed in various ways in the West Indies".[52] To neutralise these persistent fears, the founders of the CCJ have entrenched the appointment and work of its judges well beyond the reach of politicians.

In response to the question, "Are the Judges of the CCJ vulnerable to political manipulation?", Pollard writes:

> 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

[51] "SVG Opposition withdraws support for CCJ", Radio Jamaica website, at http://www.radiojamaica.com/content/view/6464/88/
[52] *Ibid*., p. 31.

> provisions have been elaborated in the Agreement Establishing the CCJ to provide for credible institutional arrangements.
>
> First, unlike the situation with the European Court of Justice, where Judges are appointed by the Ministers of Government, Judges of the CCJ are appointed by a Regional Judicial and Legal Services Commission, whose composition should offer a reasonable degree of comfort to the Court's detractors. Its eleven members include:
>
> - the Court President, who is the Chairman of the Commission;
> - two persons appointed jointly by the Organisation of the Commonwealth Bar Association and the Organisation of Eastern Caribbean States Bar Association;
> - one chairman of the Judicial & Legal Service Commission of a Contracting Party;
> - one chairman of the Public Service Commission of a Contracting Party;
> - two persons from civil society nominated jointly by the Secretary General of the Community and the Director-General of the OECS;
> - two distinguished jurists nominated jointly by the Dean of the Faculty of Law of the University of the West Indies, the Deans of the Faculty of Law of any of the Contracting Parties and the Chairman of the Council of Legal Education; and
> - two persons nominated jointly by the Bar or Law Associations of the Contracting Parties.
>
> Provisions of the 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 […] 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![53]

Attorney Delzin argues that it is these "procedural safeguards and mechanisms for the appointment and maintenance of its judges" described above that assure the independence

[53] CPID, CCJ, *op. cit.*, p. Emphasis added.

of the judges of the CCJ. Noting that international experts consider the CCJ to be in the vanguard in providing "clear and detailed requirements on qualifications of judges", he signals that the pertinent articles of the Agreement Establishing the CCJ are "more detailed than the qualifications requirement for the International Court of Justice and the European Court of Justice". The creation of the RJLSC, he continues, is deemed by the international community as "innovative", designed as it is to "exclude appointments by national governments from the nomination and election process". His to-the-point conclusion is that "institutionally the CCJ is more insulated from political interference than any of our national courts and international courts".[54]

None of this impresses those determined to undermine the court's credibility. In its editorial of 29 May 2006, under the title "Elitist Secrecy", the *Trinidad & Tobago Newsday* unabashedly cast aspersions on the character and competence of persons who had been or might be appointed judges of the CCJ. The editorialist opined that "becoming a CCJ judge is a political process, even if politicians aren't directly involved. This is because the persons appointed may not be chosen on the basis of professional excellence only, but on their ability to network". The editorial went on to associate "bias and favouritism" and a lack of "transparency" with the appointing procedures of the CCJ. In fact, the editorial – of what is usually considered a responsible newspaper - made no mention at all of how the RJLSC had in fact selected the 7 judges of the Court, contenting itself with innuendo and insinuation.[55]

It is worthy of note that the process of selection and terms and conditions of employment of the judges of the CCJ fit hand in glove with those advocated by the American Bar

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[54] Delzin, *op. cit.* No pagination. See *Agreement Establishing the Caribbean Court of Justice*, Article IV (10) and (11).
[55] "Elitist secrecy" in *Trinidad & Tobago Newsday*, 29 May 2006.

Association. Indicating that one objective of the court system is to "maintain itself as an independent and respected branch of government", the ABA recommends:

> All judges should be selected on the basis of professional competence and experience […] through a merit system of appointment. They should have substantially secure tenure in office, subject to removal for cause and to a requirement of compulsory retirement at a designated age.[56]

There are connected to the misgivings concerning the integrity of the appointment process of judges kindred reservations about financing the court in a region not known for effective accumulation of capital. There are also fears that not only could the court fail because of under-funding, but governments could squeeze compliance with their wishes out of judges by withholding funds to pay their salaries. In reply to these legitimate fears, Pollard replies:

> 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 has been established and capitalised in the sum of US$100 million, so as to enable the recurrent expenditure of the Court to be financed by income from the fund. The fund is administered by the Caribbean Development Bank. In this way, the recurrent expenditure of the Court, including the remuneration of the Judges is not 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 will 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[57]

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[56] American Bar Association on Standards of Judicial Administration, "Standards Relating to Court Organization", (1974) p. 2. The age of compulsory retirement for judges of the CCJ is 75 (revised upward from 72).

[57] CPID, CCJ*, op. cit.*

Admittedly, the history of the sometimes uneasy relationship between Caribbean judiciaries and political directorates provides fodder for the mills of the cynics. It is well known that many a judiciary has had its budgetary allocations from the state Exchequer routinely slashed or its requests ignored altogether, especially if there are competing demands on the state's resources for more politically rewarding expenditure than on judges and courts. The history of the parlous state of dilapidated, long-suffering Magistrates' Courts all across the Caribbean, some of these buildings more than 80 years old, is well known. These sit cheek by jowl next to spanking new, flashy megabuck prestige projects whose contribution to social transformation and development and the rule of law are less important than to a government's or prime minister's legacy of ostentatious architecture.

Similarly, pervasive rumours of pressure brought upon judges by political leaders colour almost all discussion on Caribbean judiciaries. A very bitter taste has been left in the mouth of practically all observers by the case of Sir Brian Alleyne, appointed Acting Chief Justice of the Eastern Caribbean Supreme Court in 2005. Appointment to the post of the Chief Justice of the ECSC is made following a unanimous vote by the 9 prime ministers of the OECS. It is credibly alleged that several of Sir Brian's rulings as a High Court judge profoundly displeased one of the OECS prime ministers, who vowed that he would never consent to Sir Brian's confirmation as Chief Justice. As a result, Sir Brian will soon demit office, having come to the end of his tenure, without ever having been confirmed as Chief Justice. Such manifest vindictiveness by politicians in dealing with the judiciary does little but add ammunition to the arsenal of those opposed to the creation of the CCJ.[58]

[58] Sir Brian Alleyne spent 42 years in the legal profession, including 12 years in private practice, 6 years as Attorney General and Minister of Legal Affairs of Dominica, 7 years as a High Court Judge, and 5 years as a Justice of Appeal from which he spent 3 years as Acting Chief Justice of the ECSC.

PROCESSION OF CARIBBEAN CHIEF JUSTICES

Caribbean Chief Justices process at the Inauguration of the Caribbean Court of Justice. L to R: Eastern Caribbean Supreme Court, Jamaica, Guyana, Suriname, Bermuda, Trinidad & Tobago, Turks & Caicos Islands

Finally, the most emotionally-charged issue surrounding the establishment of the CCJ has been the death penalty. In its infamous editorial, the *Newsday* also declared that "the overriding rationale offered by several Prime Ministers for the need of a CCJ [was] not regional unity or self-determination, but the desire to execute convicted criminals".[59] In the wake of the movement in the western world in favour of the abolition of capital punishment in the late 1980s and early 1990s, many Commonwealth Caribbean states had, formally or otherwise, adopted moratoria in executing persons convicted of a capital crime. A plethora of heinous, monstrous murders in the region, however, motivated several states to oil their disused gallows and execute the condemned, more, it can be argued, to score political points for being seen as "tough" on crime than for carrying out the due process of law. Thus it was that Jamaica in 1991 moved to execute Earl Pratt and Ivan Morgan, sentenced to death in 1979 and in prison awaiting their execution since.

Their journey through the system of appeals culminated in the Downing Street Chambers of the Judicial Committee of the Privy Council, whose landmark decision, now known in all Commonwealth jurisdictions simply as *Pratt and Morgan*, began with wording that must have chilled Caribbean death-penalty retentionists:

> The appellants, Earl Pratt and Ivan Morgan, were arrested 16 years ago for a murder committed on 6th October 1977 and have been held in custody ever since. On 15th January 1979 they were convicted of murder and sentenced to death. Since that date they have been in prison in that part of Saint Catherine's prison set aside to hold prisoners under sentence of death and commonly known as death row. On three occasions the death warrant has been read to them and they have been removed to the condemned cells immediately adjacent to the gallows. The last occasion was in February 1991 for execution on 7th March; a stay was granted on 6th March consequent upon the commencement of these proceedings. The statement of these bare facts is sufficient to bring home to the mind of any person of normal sensitivity and compassion the agony

[59] "Elitist Secrecy", *op .cit.*

> of mind that these men must have suffered as they have alternated between hope and despair in the 14 years that they have been in prison facing the gallows. It is unnecessary to refer to the evidence describing the restrictive conditions of imprisonment and the emotional and psychological impact of this experience, for it only reveals that which it is to be expected. These men are not alone in their suffering for there are now 23 prisoners in death row who have been awaiting execution for more than ten years and 82 prisoners who have been awaiting execution for more than five years. It is against this disturbing background that their Lordships must now determine this constitutional appeal.[60]

The effect of the famous judgment was so cataclysmic, not only in the Caribbean, but in every territory coming under the jurisdiction of the Judicial Committee of the Privy Council, that it deserves to be cited at length here.

> In their Lordships' view a State that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve. It is part of the human condition that a condemned man will take every opportunity to save his life through use of the appellate procedure. If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it. Appellate procedures that echo down the years are not compatible with capital punishment. The death row phenomenon must not become established as a part of our jurisprudence.
>
> The application of the appellants to appeal to the Judicial Committee of the Privy Council and their petitions to the two human rights bodies do not fall within the category of frivolous procedures disentitling them to ask the Board to look at the whole period of delay in this case. The total period of delay is shocking and now amounts to almost fourteen years. It is double the time that the European Court of Human Rights considered would be an infringement of Article 3 of the European Convention and their Lordships can have no doubt that an execution would now be an infringement of section 17(1) of the Jamaican Constitution.
>
> To execute these men now after holding them in custody in an agony of suspense for so many years would be inhuman

[60] Earl Pratt and Ivor Morgan v the Attorney General for Jamaica and the Superintendent of Prisons, St. Catherine's, Jamaica; Privy Council Appeal No. 10 of 1993, pp. 1-2.

punishment within the meaning of section 17(1). In the last resort the courts have to accept the responsibility of saying whether the threshold has been passed in any given case and there may be difficult borderline decisions to be made. This, however, is not a borderline case. The delay in this case is wholly unacceptable and this appeal must be allowed.[…]

Their Lordships are very conscious that many other prisoners under sentence of death are awaiting the outcome of this appeal. In an attempt to assist the Jamaican authorities who may be faced with a large number of appeals their Lordships wish to make some general observations. […]

Their Lordships are very conscious that the Jamaican government faces great difficulties with a disturbing murder rate and limited financial resources at their disposal to administer the legal system. Nevertheless, if capital punishment is to be retained it must be carried out with all possible expedition. Capital appeals must be expedited and legal aid allocated to an appellant at an early stage. The aim should be to hear a capital appeal within twelve months of conviction. […] Their Lordships do not purport to set down any rigid timetable but to indicate what appear to them to be realistic targets which, if achieved, would entail very much shorter delay than has occurred in recent cases and could not be considered to involve inhuman or degrading punishment or other treatment. […]

These considerations lead their Lordships to the conclusion that in any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute "inhuman or degrading punishment or other treatment". If, therefore, rather than waiting for all those prisoners who have been in death row under sentence of death for five years or more to commence proceedings pursuant to section 25 of the Constitution, the Governor-General now refers all such cases to the JPC[61] who, in accordance with the guidance contained in this advice, recommend commutation to life imprisonment, substantial justice will be achieved swiftly and without provoking a flood of applications to the Supreme Court for constitutional relief pursuant to section 17(1).

Their Lordships will accordingly humbly advise Her Majesty that this appeal ought to be allowed, and the sentences of the appellants be commuted to life imprisonment.[62]

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[61] The Jamaican Privy Council, which, like its Barbadian namesake, functions as a type of Mercy Committee.
[62] Privy Council Appeal No. 10 of 1993, pp.23-27.

The immediate effect of *Pratt and Morgan* is to commute the death sentences of hundreds of condemned murderers languishing in prisons all over the Caribbean to life imprisonment, and to raise bile to the gorge of politicians and the ordinary folk, the ones miffed that their executive will has been thwarted by foreigners, the others enraged by having been denied revenge. It is in the heady, emotion-filled aftermath of *Pratt and Morgan* that the debate over the replacement of the Privy Council by a Caribbean court of final appeal is reignited, unfortunately, and terminally, so it seems, making a connection between hanging condemned murderers and the establishment of a regional final appellate court. Subsequent rulings on similar matters by the JCPC do nothing to mollify the outraged Caribbean public or political leaders, who, in denouncing especially PC death penalty rulings, provide grist for the mills of those who fear that a regional court would embark upon a hanging spree.

Another oft-cited JCPC ruling as regards condemned murderers, that of *Guerra and Wallen*, deserves mention here. This ruling was preceded by the execution, in Trinidad & Tobago, of Glen Ashby, a condemned murderer, who was hanged in 1994, at the very moment that his appeal against the refusal of the High Court to grant him a stay of execution was being heard by the Court of Appeal. Subsequent investigations revealed that Ashby had swung from the gallows as a result of Executive zeal, and that the Court of Appeal was quite properly considering his appeal, as due process required. What made his execution even more shocking was that he was hanged apparently mere moments before the Privy Council handed down an order staying his execution. This order itself had come as a result of a "pre-emptive" application to the PC, even before the Court of Appeal had had a chance to hear the matter, let alone rule on it.

Thence to Lincoln Guerra and Brian Wallen, two murderers who had been found guilty of reprehensible crimes. They had ambushed a young couple and their 7-month old baby picnicking in a secluded area. They raped and bludgeoned the wife to death, decapitated the baby (reportedly because its cries were distracting during the rape) and slashed the husband's throat. He however survived and was the star witness at the two murderers' trial. They were convicted of murder and sentenced to hang in 1989; their execution was eventually set for 25 March 1994. On 24 March, they brought a constitutional motion before the High Court that to execute them would violate their constitutional rights. The motion was dismissed by the High Court and the murderers appealed to the Court of Appeal. Two days before this court ruled, the Privy Council pre-empted its ruling by handing down a conservatory order staying the execution of the condemned until the JCPC itself had heard the matter.

The Privy Council rationalised its action thus:

> On 25th July, following the execution of Glen Ashby during the hearing by the Court of Appeal of his appeal from the dismissal of a constitutional motion, no stay of execution being then in place, the Privy Council, in order to preserve its jurisdiction as the final Court of Appeal for Trinidad and Tobago, granted a stay of execution of the appellant and Brian Wallen in the event of the Court of Appeal dismissing their appeal from the decision of Jones J. On 27th July 1994 the Court of Appeal dismissed their appeal from Jones J. but, since the stay granted by the Privy Council then took effect, they themselves found it unnecessary to order a stay.

This peremptory action by the JCPC incensed Caribbean people everywhere, not the least of whom was the then Chief Justice of Trinidad & Tobago, who had sat on the appeal. The PC's order had the effect of eviscerating any ruling the Court of Appeal could have made, even if it had turned out to be the same as the Privy Council's. In the end, Brian Wallen died in prison of AIDS, and Guerra's death sentence was commuted. His fate added insult to the injury felt by Caribbean people because of the JCPC's pre-emptive order. It would be

however disingenuous not to view the Judicial Committee's action against the background of Glen Ashby's fate. However logical the PC's action may have seemed to the dispassionate, it ignited a conflagration of protest against the continued intervention of the British Law Lords in the lives of Caribbean people, especially to mitigate the punishment of two such reprobates as Guerra and Wallen, held in abhorrence by decent folk.[63]

Many who favour the death penalty, or subscribe to the belief that local sovereignty must always be paramount, view the JCPC's seeming determination to thwart all attempts to execute condemned murderers as effectively legislating via the court to abolish capital punishment, a matter they consider the sole and exclusive province of the independent state. The most unfortunate aspect of these developments is that in each instance the renewed interest they aroused in the creation of a Caribbean final appellate court was inextricably bound up with a desire to see condemned criminals executed. Human rights advocates and others thus denounced the establishment of a putative court, the foundation of whose edifice would sit upon a bank of scaffolds. Indeed, not a few commentators advise that the Privy Council's zeal in protecting the constitutional rights of Caribbean citizens in these cases ought to be taken as the definitive argument in favour of the retention of the council.

Misgivings about a Caribbean final court of appeal respecting capital punishment precedents set by the JCPC were even expressed by bodies as influential as Amnesty International (AI). In an article appearing in *The New West Indian* in March 2001, the CARICOM decision to establish the Caribbean Court of Justice was described by AI as "a development that may be motivated by a desire to increase the number of executions." The human rights body

[63] On *Guerra and Wallen*, see Rawlins, *op. cit.*, pp. 16-17.

expressed its fears that "this court is being created to make it easier for these states to put people to death. Judicial precedents that protect the rights of death row inmates may be threatened." The article claimed that the creation of the new court followed "years of attacks by Caribbean politicians on Privy Council rulings designed to safeguard the legal rights of detainees on death row", and cited as proof animus expressed by the Prime Minister of Jamaica and the Attorney General of Barbados over adverse PC rulings.[64]

Naturally declaring that it recognized "the right of sovereign countries to decide which court should be their final arbiter in legal matters", AI proceeded to tender a list of questions for answering by Caribbean governments as regards the proposed court, which could easily have been dictated by any of the Caribbean Privy Council retentionists who had been advocating a postponement *ad infinitem* of the court's creation. Averring that the new regional court might be susceptible to political pressure, which could "impact on its ability to uphold international judicial standards in contentious cases," Amnesty International asked:

> - what measures are being taken to ensure the court is free from political interference?
> - what measures are being taken to ensure the judges who administer justice are willing to uphold internationally accepted standards of jurisprudence and are trained and aware of such standards?
> - is there adequate provisions of legal aid for indigent defendants to appeal to the court?
> - what body will appoint judges to the court and will the judges have tenure of office, thereby protecting them from political inference to some degree?
> - will the court uphold the legal precedents, established by Privy Council rulings, safeguarding the rights of those appealing?[65]

Despite the misgivings of naysayers, the CCJ was duly established and inaugurated and in due course, heard its first murder appeal in June 2006. On 2 February 2001, Jeffrey Joseph

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[64] "Is Caribbean Court of Justice a hanging court?" in *The New West Indian*, No. 5, March 2001
[65] *Ibid.*

and Lennox Boyce are convicted of murder in the High Court of Barbados and sentenced to death. In March 2002, the Court of Appeal of Barbados dismisses their appeals against conviction and sentence. On 7 July 2004, the Judicial Committee of the Privy Council dismisses their appeals and their execution is set for 21 September 2004. The condemned then petition the Inter-American Commission for Human Rights (IACHR), alleging that Barbados had violated its obligations under the American Convention on Human Rights. On 17 Sept 2004, stays of execution are granted to permit the convicted to seek redress via a constitutional motion. On 22 December 2004, this motion is dismissed in the Barbados High Court. The convicted appeal to the Barbados Court of Appeal.

On 31 May 2005, the appeal from the decision of the High Court dismissing the constitutional motion is allowed by the Court of Appeal, which commutes the death sentences to that of life imprisonment. The Attorney-General of Barbados appeals this decision to the Caribbean Court of Justice, which in the interim has replaced the Privy Council as the final Court of Appeal for Barbados. Over 20 and 21 June 2006, the full Court of the CCJ – the President and six judges - hears the appeal, and delivers its judgment on 8 November 2006, dismissing the attorney-general's appeal and confirming the sentence of life imprisonment on Boyce and Joseph. Aware of the sensitivity of the matter, the great significance of their judgment and the microscopic scrutiny to which their reasoning would be put, the seven judges of the CCJ Bench take the unusual step of writing six separate judgments so that their rationale may be fully ventilated.

In its overall summary of the judgments, the CCJ stated that for the State of Barbados to have moved to execute Joseph and Boyce while their petitions were pending before the

IACHR was "a contravention of the respondents' rights to the protection of the law". The summary, significantly, asserted that in its consideration of the appeal, the Barbados Court of Appeal was "bound to follow the decisions of the Privy Council" which in previous similar matters had established that "the State is under a duty to await the outcome of the process before human rights bodies, at least for a reasonable period." The respondents, it was felt, "had a legitimate expectation that they would be allowed a reasonable time to complete the process before the [IACHR] and that to frustrate that expectation was to deny them the protection of the law". The court ordered that the appeal be dismissed with costs.[66] Reactions to the ruling were interesting.

In an article appearing in the *Jamaica Observer* on 10 December 2006, Lord Anthony Gifford, Queen's Counsel, opined that "the judgments give a fascinating insight into the legal and humanitarian attitudes of the six men and one woman who comprise what may one day become our final court of appeal." The Queen's Counsel waxed enthusiastically:

> The judgments are imbued with scholarship and learning. […] Issues of great complexity were grappled with, including a number of contradictory judgments from the Privy Council. […] The judges showed an impressive understanding of the international human rights culture in which we now live, but supported it by a deeper intellectual analysis than the Privy Council has sometimes shown. […] This judgment gives us hope that the CCJ has made a good start on that advance, and that Jamaicans may have nothing to fear if our political parties agree to entrench this new and vibrant court in the Jamaican constitution.[67]

The court upheld the decision of the Barbados Court of Appeal and commuted the appellants' sentence to life imprisonment. The judges of the CCJ, however, made it quite

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[66] Summary of the Judgments of the Caribbean Court of Justice delivered on November 8th 2006 in The Attorney General, Superintendent of Prisons, Chief Marshal of Barbados v Jeffrey Joseph and Lennox Ricardo Boyce, CCJ Appeal no CV 2 of 2005, p. 3.

[67] Lord Anthony Gifford, "The CCJ: A new and vibrant court", in the *Jamaica Observer*, Sunday 10 December 2006.

clear in their judgment that, "We recognise that the death penalty is a constitutionally sanctioned punishment for murder and falls within internationally accepted conduct on the part of civilised States."[68] Nonetheless, the CCJ's decision will have given no comfort to many who would have been very pleased to see Joseph and Boyce swing. Subsequent JCPC decisions which have continued to spare the necks of killers convicted of abominable and reprehensible murders have done little to cool the ardour of death-penalty retentionists who continue to hitch their wagons of expectancy to the CCJ star.

Honourable Steadroy Benjamin, Leader of the Opposition of Antigua & Barbuda, an attorney-at-law, interviewed by the writer in April 2008, said of *Joseph and Boyce:*

> We don't live in a world all by ourselves and as we all know, law in developed countries carries a persuasive sort of authority. We've got to remember that the whole world is now a village. There is a movement away from hanging. It is deemed in some cases to be cruel and inhumane. Do you really, honestly think that the CCJ, knowing the global trend towards this capital offence would not bear it in mind? […] The CCJ was completely correct. Even if the court had indicated that they must be hanged, as the final court with appellate jurisdiction it must bear all factors in mind, not only of the local situation within the territories, but the thinking worldwide with respect to certain matters. The CCJ was completely correct in my view in upholding the decision and having the sentence be commuted to life imprisonment. We do not live alone. We live in a village, a global village and the trend happens in economics, it happens in every other aspect of life. Why not in law and order? […] What therefore is wrong with the CCJ? In that situation we are influenced by the relationship we established with the international community, and that's normal and natural.[69]

Indeed, not everyone was as starry-eyed as the goodly Lord Gifford. One letter to the editor, describing China and Saudi Arabia as "progressive societies", expressed many people's sentiments:

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[68] CCJ Appeal no CV 2 of 2005, p. 9.
[69] Steadroy Benjamin Interview, 9 April 2008.

> I was very heartened by the public response to the poll on the death penalty. It is clear that the public overwhelmingly supports the carrying out of the death penalty.
>
> It is time that we join China, Saudi Arabia, Thailand and other progressive societies. The Government must not continue to shirk its responsibility.
>
> I read with some consternation that the President of the Caribbean Court of Justice has said that "the CCJ is not a hanging Court" after our Prime Minister has said that the primary reason for establishing the CCJ and making it the final Court was that the Privy Council has set up too many obstacles in the way of the Government.
>
> If the CCJ is not a hanging Court and intends to follow the Privy Council as evidenced by its judgement in the Barbados case of Boyce then the money expended on the Court is entirely wasted.
>
> If the Caribbean Court does not buck up then it is better that we scrap the Court and put the money into the development of West Indies Cricket.[70]

This anonymous correspondent was not to only one to hold an opinion of this type. The Leader of the Opposition of Dominica, an attorney-at-law, also interviewed in April 2008, felt that *Joseph and Boyce* was a betrayal of the Barbadian people. His interpretation of the CCJ's decision to uphold the Barbados Court of Appeal's judgment was that "the CCJ is not prepared to uphold its laws and is not prepared to develop its own jurisprudence". Comparing the decisions of Caribbean courts with those of their US counterparts, Mr. Williams opined that "nobody interprets their law and tells them they cannot do it", asking,

> Why should somebody interpret our law and tell us we cannot do it? So we see crime rising and we have the law and because England tells us we cannot do it - I don't care what they say. [People] were accusing the CCJ of being a hanging court and I defended it because it is much more than a hanging court. But I'm saying that hanging is one of [the court's options]. That was my argument: the hanging thing is one that should prompt us to have our own court because they're disrespecting our own laws. See what they did with *Pratt and Morgan*? When they want they going left. When they want they going

[70] Dexter Halfhide, "CCJ must shape up", *Trinidad & Tobago Newsday*, 5 June 2007. On the CCJ President's reported statement, see p. 121.

> right. Different decisions, different situations, no respect for our law. […] The Privy Council is influenced by what is happening in England. I was shocked to see the CCJ follow the footsteps of the Privy Council, because I was one of those supporting the CCJ.[71]

Asked by the writer if he was shocked that the CCJ had upheld the decision of the Barbados Court of Appeal, Mr. Williams replied that he didn't care "too much" about the decision on appeal. He simply saw the CCJ decision as aping the Privy Council, about which he "felt bad", because the court had an obligation to forge a Caribbean jurisprudence and jettison Privy Council precedents. The CCJ, according to Mr. Williams, had to be "bold and brave to develop our jurisprudence and interpret our law as it is because our law makes [capital punishment] mandatory". He was uncompromising as regards the court's obligations, averring that "as far as the law of Trinidad and Tobago is concerned, or the law of Barbados is concerned, it is written in black and white […] that the punishment for murder is death and that's the bottom line".[72]

A final death penalty judgment of the JCPC is deserving of mention here. The facts of the matter are truly horrific. On 31 December 2000, at about 7 a.m., Francis Phillip and Kim John, two Rastafarians, entered the Minor Basilica of the Immaculate Conception, the principal Roman Catholic church in Castries, the capital of St. Lucia, while Mass was in progress. They were carrying gasoline-filled containers and makeshift wooden torches tied with blazing gasoline-soaked cloths. Phillip and John proceeded to attack the congregation, sprinkling individuals and the interior of the church with gasoline.

> Fr. [Charles] Gaillard intervened, whereupon John threw gasoline over him and set him on fire. Sister [Theresa] Egan approached the

[71] Interview with Mr. Earl Williams, 8 April 2008
[72] *Ibid.*

> appellants, remonstrating with them, and John struck her three heavy blows on the head with the timber post which he was carrying. […] Sister Egan died the same day from brain damage caused by the blows to her head. Father Gaillard was seriously burned and sustained in consequence a pulmonary embolism on 19 April 2001, from which he died that day.[73]

The perpetrators of these deeds, carried out in full view of the congregation, fled the cathedral, but were apprehended shortly thereafter. Each gave a written statement to the police, allowed into evidence subsequently in court without objection from the defence. In both statements, the two men freely admitted, without artifice or prevarication, having committed the acts of which they were accused. Phillip's statement famously ended with the line, "What happen in the church just had to happen and that was the time." In their statements, the accused attributed the motivation for their acts to a quest for "equal rights and justice and for the Freedom of my nation" (John) and the fight "for the freedom of my nation; for black people where we have taken away from Africa and living in desolate places in tenement yard" (Phillip). John in particular submitted a prolonged diatribe, outlining in detail his reasons for attacking Fr. Gaillard and Sr. Theresa.[74]

In court, the accused pleaded insanity. Medical expert witnesses accepted that Rastafarians are generally quite antagonistic to the Roman Catholic Church. They could not however, agree that the views of the accused, "hostile in the extreme to Roman Catholicism, diverged so far from mainstream Rastafarian philosophy as to constitute delusions." On 16 April 2003, Phillip and John were convicted of the murder of Fr. Gaillard and Sr. Theresa. They were both sentenced to death on 30 April 2003, and their appeals against conviction and sentence dismissed by the Court of Appeal on 28 May 2004. They appealed as poor persons

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[73] Francis Phillip and Kim John v the Queen. Privy Council Appeal no. 110 of 2005, p. 2.
[74] *Ibid.* pp. 4-7.

to the Privy Council by special leave given on 13 March 2006. Their appeals centred on the safety of their convictions, given their mental state on 31 December 2000, and the directions given by the judge to the jury at the High Court level.

On 27 January 2007, the Privy Council allowed the appeals, setting aside the convictions, handing down its reasons on 2 May 2007. The JCPC reasoned as follows:

> Their Lordships are unable to agree with the Court of Appeal that the judge's summing-up, taken as a whole, provided appropriate and correct guidance to the jury and directions on the law. At some points […] she differentiated between the requirements of section 21(a) and delusions under section 21(b). In other places, however, she posed the issue of insanity solely in terms applicable to section 21(a), referring to disease of the mind and the requirement that the appellants did not know the nature or consequences or unlawfulness of their acts […]. Paragraphs 91-2 in particular were capable of misleading or confusing the jury. The judge directed the jury correctly in paragraph 92 that the defence case was that the appellants suffered either from a disease of the mind or delusions making them unfit subjects for punishment. Just before that, however, in paragraph 91 she had said that proof was required
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> "that they were ignorant of the nature or consequences or unlawfulness of their act and that such ignorance was caused by a disease affecting the mind or a delusion …"
>
> Their Lordships do not consider that the jury could have comprehended with sufficient clarity the difference between subsections (a) and (b) of section 21 and the separate requirements of each. Rather more explanation of the nature of delusions and examination of the episodes relied upon as constituting delusions was required, to allow the jury to make proper findings about the existence of delusions in the case of each appellant. Moreover, the jury in such a case should receive a full and accurate direction about the circumstances in which a defendant might be found an unfit subject for punishment, preferably with some reference to the fact that this finding would then lead to an order being made for suitable treatment. The judge's summing-up, though careful and detailed, did not cover these matters in a sufficient fashion. One may add to this the fact that she said in paragraph 86 that a high degree of delusion was required, which was capable of misleading the jury into adopting an inappropriate standard.

> For the reasons which they have given their Lordships do not consider that the conviction of the appellants for murder can stand. They will therefore humbly advise Her Majesty that the appeals should be allowed and that the matter should be remitted to the Court of Appeal, which should be invited to quash the convictions and sentences.[75]

The effect of this judgment is to electrify and outrage Caribbean people everywhere, who have no truck with the nuances of subsections (a) and (b) of Section 21, and to whom Phillip's and John's assassination of the priest and the nun in the middle of Mass was the end result of methodical planning and preparation by two murderers completely *compos mentis* not one whit insane. In the aftermath of the JCPC's decision, the Prime Minister of Trinidad & Tobago announces at a public meeting on crime his government's intention to seek the abolition of appeals by citizens of Trinidad & Tobago to the Privy Council and "its replacement by the CCJ in order to facilitate the resumption of hangings". Commenting upon this announcement, Hamid Ghany concludes: "The bottom line of this logic is that the CCJ is being viewed as the hanging court, whereas the Privy Council is not".[76]

Trinidadian Senator Dana Seetahal, an attorney-at-law, commenting on *Phillip and John*, noted that the JCPC appeared to be saying that the appellants' subscription to Rastafarianism seemed to make them likelier than others to be delusional. Noting the killers' identifying themselves as freedom fighters, their reference to the 400-year history of their slave antecedents, and their conviction that the Vatican is evil as "common rhetoric here in the Caribbean", Seetahal describes such statements as "hardly delusional". Linking this unfamiliarity with Caribbean reality to others noted in cases in which she had appeared

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[75] *Ibid.*, pp. 16-17.
[76] Hamid Ghany, "Hanging too much on the death penalty", *Trinidad Guardian*, 13 May 2007. Dr. Ghany is the Dean of the Faculty of Social Sciences of the University of the West Indies (St. Augustine).

before the JCPC, and interpreting them as a handicap for the Judicial Committee in adjudicating Caribbean matters, Seetahal posits that

> We have outgrown the PC. The PC judges even with the best will in the world cannot give the best decisions even as they apply the law, since they do not understand the culture of our people as they would that of England. […] We must also put an end to the last vestiges of colonialism. These and for no other reasons are why we must have our final court of appeal in the region.[77]

Seetahal's commentary does not stop with highlighting the JCPC's inadequacy as the Caribbean's final court of appeal. She concedes that one might find "balanced and reasonable" the prime minister's opinion that the Privy Council supported British and European abolitionist positions; that the JCPC was deliberately rendering it difficult for Caribbean governments to execute condemned murderers; that determining the retention or not of the death penalty was the business of the people of Trinidad & Tobago and not of the Privy Council or the European Union. Seetahal judges as "cause for concern", however, the prime minister's exhortation to an election crowd to return his party to power with an enlarged majority to enable him to implement the constitutional changes required to substitute the CCJ of the JCPC.

The prime minister was therefore making a direct link between CCJ appellate jurisdiction over Trinidad & Tobago and the execution of convicted murderers. Seetahal agrees that CCJ judges were likely to be "less emotional" than PC Law Lords about the death penalty for "cultural reasons more than any other". She notes the abolition of the death penalty for murder in England over 40 years ago, that the UK is part of the European Union, "all of whose members are opposed to and have abolished the death penalty." Prejudice against the

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[77] Dana Seetahal, "Privy Council outgrown", *Trinidad Guardian*, 13 May 2007.

death penalty has even led some Law Lords to accuse their brother judges of promoting their doctrinal positions in their judgments. The senator observes:

> In the Caribbean we do not have that background of anti-death penalty sentiments among the governments or people of the region and the penalty remains on the statute books. […] No doubt the CCJ would bear in that in mind in the recognition that it is the business of the governments to abolish the death penalty if they so desire. Nonetheless I am certain that the CCJ judges would ensure that the observance of human rights in any attempt to enforce the death penalty.[78]

Seetahal criticises as "unfortunate" the prime minister's inference that the government is pro-CCJ because it assumes the local court will unblock the path to the gallows for convicted murderers, currently being jammed by the PC. Ghany comes to a similar conclusion: the basis of the prime minister's thesis is that the CCJ will abandon obstructionist JCPC judgments, instituting is own, which will be diametrically opposed to the older courts'.[79] Seetahal condemns this facile equation as diminishing "the importance and significance for Caribbean nations in having their final court of appeal in the region"[80]. Thus, as welcome as the prime minister's fervour over the CCJ may be, his systematic linking it to execution of convicted murderers may well cost him – and the court - the support of death penalty abolitionists, through no fault of the CCJ's.

Gregory Delzin is one of a highly visible, vociferous lobby of Caribbean lawyers who favour the abolition of the death penalty, and who had been an opponent of the CCJ. Addressing a group of law students of the University of the West Indies (UWI) in 2007, Delzin, tracing his own experience from a raw UWI law student himself to the creation of the CCJ, suggests

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[78] *Ibid.*
[79] Ghany, *op. cit.*
[80] Seetahal, *op. cit*

that "in a sense, the CCJ must represent, and is, the necessary end product of the UWI beginning." He also posed some thought-provoking questions to his youthful audience:

> What is the "reasonable man" test in the Caribbean? Acts of provocation in England and the Caribbean may not be the same. Is there a danger that English judges in the Privy Council may decide murder appeals using different criteria? In the Caribbean, even express words may have different connotations. These are the types of questions that need to be discussed by an indigenous tribunal reflecting, in a sense, the same bases, processes and aspirations as defined in the UWI model.[81]

Ultimately, the inexorable fact with which the court has had to contend, is that in spite of being structured and manned in such a way as to satisfy all the demands of its critics, litigants are not flocking in droves to its portals. Four years after the coming into force of the Agreement Establishing the Caribbean Court of Justice, the tribunal remains underused – not that this is in itself unusual for appellate courts in their earlier years. What makes the court's situation perplexing is that, on the one hand, to date only a single matter has been filed under its original jurisdiction, though trade roars along among CARICOM states. On the other, fully ten of the 12 signatories to the agreement, who have paid for the court, have still put in place no measures to make use of its appellate jurisdiction. Coupled with what has been described as inertia and the fear of change, there are also the flip-flops of the Caribbean political and legal leadership in the matter of the court to consider.

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[81] Delzin, *op. cit.* No pagination. Established in 1948 as the University College of the West Indies, in special relationship with the University of London, the University of the West Indies is an autonomous Caribbean regional institution supported by and serving all 16 Commonwealth Caribbean territories. There are three major campuses: in Jamaica, Trinidad & Tobago, and Barbados, together with a Centre for Hotel and Tourism Management in The Bahamas. UWI is often cited as an outstanding example of regional integration.

THE SECRETARY-GENERAL'S ADDRESS

The Secretary General of the Caribbean Community (CARICOM), His Excellency Dr. Edwin Carrington, addresses the gathering at the Inauguration of the Caribbean Court of Justice. He is flanked by the first seven judges of the court. The judges on the two extremes are unrobed because they had not yet taken their oaths of office.

METHODS

> *If the Privy Council could do it in England, what is it that is beyond the capacity of Caribbean or Commonwealth judges to do it for the Caribbean?*
>
> *Mia Mottley*[82]

The research design for this project was threefold, making use of venerable methods whose proven reliability has recommended them to many a researcher. Briefly, the first step in data collection was examining papers, statements and archival documents related to the creation of the Caribbean Court of Justice. This was followed by a survey conducted via telephone among a random selection of residents of Trinidad & Tobago on the most fundamental aspects of the court. All esoteric notions about the Caribbean Court of Justice were eschewed and the questions kept as simple as possible so as to ensure as complete an understanding of the questions and the related issues as possible. Finally, interviews were conducted with some of the movers and shakers on the CARICOM scene. One had perceived in reviewing the literature on the court, a certain reluctance to act on the part of national leaders, and this seemed to invite some closer scrutiny.

Archival data collection

The very notion of a Caribbean Court of Justice has for so long engendered such a high level of polemic and controversy, that there exists quite a stock of archival data. The task here was not just accessing such data (which did not prove particularly difficult), but sifting through them for statements, declarations or narratives which truly captured and encapsulated the debate surrounding the court. One felt that it was of critical importance to present not only the bald facts about the court as it currently exists, but very importantly as well, the history leading up to the creation of the court. Given that the data collected

[82] Former Attorney-General of Barbados

subsequently would be almost hollow without the narrative of the court itself as background to lend them meaning and purpose, an attempt was made to anchor the beginnings of the present juridical system in the Caribbean in the earliest origins of the Judicial Committee of the Privy Council and to explore from there its present form and function.

Fortunately, there exist several excellently written and clearly presented statements by articulate writers/speakers, both for and against the creation of the court. Indeed, a number of these documents were both so precise and comprehensive in their character, that the essential arguments for and against the court were easy to locate and isolate in relatively few titles, thus making it less complicated for the writer to seize upon refined and polished gemstones of thought and expressions on the court. Archival research of this kind is sometimes difficult, as the researcher has often has to hunt to find precisely what he needs. This turned out to be not the case in this instance. One must particularly mention Hugh Rawlins' monograph, *The Caribbean Court of Justice: The History and Analysis of the Debate,* a paper produced by the CARICOM Secretariat in the run-up to the signing of the Agreement Establishing the CCJ, which effectively and dispassionately ventilates just about every element informing the thinking on the court.[83]

Survey

The second level of data collection involved a survey of public opinion through a telephone survey. The objective of the survey was to determine the level of public awareness of matters pertaining to the CCJ, and the general attitude towards the court. 10 questions were formulated, dealing in a straightforward way with the signal CCJ issues identified in the course of the literature review. These questions were asked via telephone of 500 random

[83] The Honourable Mr. Justice Rawlins is now a judge of the Eastern Caribbean Supreme Court.

respondents in Trinidad & Tobago, the Seat of the Court. The survey was kept to its simplest level, so as to ensure the cooperation of respondents. No personal information was asked, such as job status, civil status, race, religion, and so on. The only personal data gleaned was inadvertent: the gender of the respondent. One had been warned that persons would be hesitant to give any personal data to an anonymous telephone caller, and that the best way to win respondents' trust was by not asking any questions of a personal nature.

The survey data in Trinidad & Tobago were collected from all over the territory, including the capital, the second city, rural areas and the smaller island of Tobago. The rationale which influenced the choice of a telephone survey over the distribution of a printed questionnaire is the fact that even in a society like Trinidad & Tobago's, where there is a relatively high degree of reading competence, willingness to read and answer a printed questionnaire is low, even among the better educated. People are unwilling to lend sustained attention to printed material which does not bring them pleasure or excite their appetites, as simply written and as easily comprehensible as such material may be. Ironically, the pre-test of the instrument, the questionnaire, was conducted by the writer, standing not far from the main entrance to the court, soberly attired, and addressing passerby politely.

This modus operandi was adopted following the advice of a social psychologist, who warned of persons' natural apprehension at being addressed by a stranger. The writer thus remained close to the court building, this proximity lending apparent legitimacy to his activities; dressed conservatively so as to exploit prejudice favourable to a good appearance, and spoke gently and clearly to as to overcome suspicion at being addressed by a stranger. Of the 25 persons (of a variety of races and apparent social backgrounds) approached and to whom a

questionnaire was handed, the writer observed more than half discard the sheet into a dustbin which he had deliberately placed nearby. It was near enough to be convenient for the passerby, but far enough away from the writer for the user to assume he was not being observed. Two persons volunteered to answer the questions orally, and three others (students at an adjacent tertiary learning institution, as it turned out) filled out the questionnaire on their way down the street to purchase lunch and returned it to the writer on their way back. There were no other responses received.

This pre-test, which never really got off the ground, convinced the writer that a large-scale survey via written questionnaire would be unlikely to provide returns of a kind that would permit well-informed extrapolation from the findings. Thus, a telephone poll was decided upon, after test-calling a similar number of respondents (25) and being able to hold 19 of them on the line long enough to answer all 10 of the questions. It was discovered to be very useful to advise respondents beforehand of the number of questions to be answered, so that they were prepared. In every instance where the respondent rang off, it was because the caller had neglected to say how many questions there were in all, and the respondents did not wish to be detained on the 'phone beyond a point which they could foresee. The telephone poll was conducted by the writer and two associates not related to the court over a period of three weeks, during 10 to 29 January 2008, inclusive of Saturdays and Sundays.

It is to be noted that the scope of this survey was severely reduced from what it was intended to be. Jamaica and St. Kitts & Nevis, the largest and smallest non-CCJ appellate jurisdiction CARICOM states respectively, were also to be surveyed. The logistical problems of administering such a survey by long distance caused one to abandon the venture (at least

temporarily) . The primary difficulty was finding an agent or agents who would be willing to administer the survey (either telephone or printed), monitor it and despatch the raw data to the writer for assessing. Searches among the "usual suspects" proved futile. Though much good will and approval of the project was expressed, no one was willing to undertake the responsibility of the survey. Of course, professional polling and survey agencies were recommended as solutions, but funding such an undertaking proved not to be in the court's budget for the nonce.

In the specific case of Jamaica, a former university colleague of the writer's, Professor Neville Duncan, Director of the Sir Arthur Lewis Institute of Social and Economic Studies (SALISES) of the University of the West Indies (Mona), was approached to conduct the survey on his behalf. His sobering response was that SALISES' experience of e-mailed questionnaires was one of disappointment caused by a low response rate and with inadequate responses to several questions. Quite fortuitously, however, SALISES had itself in 2003 conducted a nationwide poll in Jamaica, reported as "Jamaican Perceptions of Regional Integration", in which several CCJ-specific questions were asked, just at the moment when the court was a very hot topic. One is very much indebted to Prof. Duncan for his authorisation to use the data gleaned in that survey.

Interviews

Finally, it was judged judicious to interview certain leaders in the Caribbean, both political and legal. It was deemed necessary to gauge the sentiments of prime ministers on the court because in the final analysis, it is their political decisions in individual CARICOM territories which will decide whether or not these will accede to the appellate jurisdiction of the CCJ. Of course, this ostensible supremacy is not monolithic – witness P. J. Patterson, then Prime

Minister of Jamaica, unhorsed by the JCPC when he attempted to assail its ramparts and replace it as his island's court of last resort. An attorney-general, is of course, a political officer, who makes laws for the government, according to a political party's manifesto, but his legalistic "take" on issues often permits a perspective somewhat modified from that of a political leader's. Regrettably, the writer managed to interview only one PM and one attorney-general's representative.

The leader of the opposition in the two-party Westminster-style parliamentary system existing in the Commonwealth Caribbean is considered a "prime minister-in-waiting". Several current opposition leaders are in fact former prime ministers, such as Ms. Portia Simpson-Miller in Jamaica, Dr. Kenny Anthony in St. Lucia and Mr. Basdeo Panday in Trinidad & Tobago. There is nothing to indicate that these individuals will not one day regain the reins of power. It was judged sensible to interview such office-holders as well, to take the rhythm, as it were, of the opposition heartbeat insofar as the CCJ is concerned. The asymmetry of their perspectives recommended them as ideal candidates for interview. Both Dr. Anthony and Mr. Panday, as prime ministers, signed the Agreement Establishing the Court. Dr. Anthony continues to defend the CCJ, recommending its Bench recruitment procedure be adapted to the Eastern Caribbean Supreme Court, whereas Mr Panday now gives praise to the Almighty for the Privy Council.

Finally, it was decided to interview the presidents of bar associations. There is a generally well-founded perception that attorneys, conservative by nature, exercise great influence in their societies on exactly such issues as the acceptance or rejection of the Privy Council. Indeed, the former Chief Justice of the Eastern Caribbean Supreme Court, Sir Dennis

Byron, a prime advocate and proponent of the court, derived much of the moral wherewithal needed to fly the CCJ flag across the region from the substantial and significant support received from Eastern Caribbean attorneys. It is no doubt worthy of note that in their design of the composition of the RJLSC, which appoints judges to the court, no fewer than 6 of the 11 commissioners must be jurists, with the possibility of a seventh. The writer felt that the thinking of the region's attorneys, as articulated though their bar associations, was crucial to the outcome of this project, and for any new PEIP emerging from it.

MME. JUSTICE BERNARD TAKES THE OATH OF OFFICE

The Honourable Mme. Justice Désirée Bernard, the first female Chief Justice of Guyana and in the Commonwealth Caribbean and the first female Chancellor of the Judiciary of Guyana and in the Commonwealth Caribbean, takes the Oath of Office as a Judge of the Caribbean Court of Justice at the Inauguration of the Court. Mme. Justice Bernard is flanked by (L) His Excellency the President of Trinidad & Tobago and the President of the Caribbean Court of Justice.

FINDINGS

> *If we are to develop as a CARICOM region [based] on our own customs and resources, then our judicial matters also have to be concluded right here.*
>
> *Duane Austin*[84]

Survey

The findings of the telephone survey at least in part explained the generally tepid reception the court "enjoys", even in the country of its Seat. Giving overall more negative than positive responses, respondents left the researcher in no doubt as to their general level of ignorance of the court. Many, in fact, did an aural double take when asked to identify the CCJ. "The what?" was the most frequent reply, teaching the surveyors that even the court's easily pronounceable abbreviated title was not familiar to many respondents. Most of the literature reviewed dealt with the opinions of the "informed": professionals, social activists and so on. Popular opinion was only encountered in man-in-the-street interviews reported in the newspapers, or on television usually giving the opinions of five or six people on the instant topic. Interviews about the court had been encountered, but not deemed representative enough, when five out of five persons interviewed supported the replacement of the JCPC by the CCJ for Trinidad & Tobago.

The data gleaned revealed several salient characteristics of the popular perception of the Caribbean Court of Justice in Trinidad & Tobago. As evidenced on the following pages, some 73.2 percent, or 366 out of 500 respondents knew what the Caribbean Court of Justice is. Many persons' memories had to be jogged, however, and they did not recognise immediately upon being asked, the institution being discussed. Several persons thought the caller had said "CCC", the Caribbean Conference of Churches, which, not surprisingly,

[84] Financial Strategist, in a 2007 man-in-the-street interview.

seemed to enjoy a high level of name recognition. Though almost three-quarters of respondents knew about the court, its exact nature remained shrouded in mystery to many, many persons. A thin majority of individuals identified it as strictly a court of appeal, several thought it was a parallel court to the Supreme Court, and a few thought it was a CARICOM court as such, its business to handle purely CARICOM trade and commercial matters.

Even though some were not quite sure what it does, a high number of respondents appeared to know where the Seat of the court is – in Trinidad, their own territory. Only a very small number of respondents knew the physical location of the court, a majority guessing correctly perhaps that it was situated "in town" (shorthand for Port of Spain). When asked if they could direct a foreigner to find the court, very few respondents admitted to being able to do so.[85] A few thought it was located in Chaguaramas, where the CARICOM Treaty had been signed, and indeed mentioned in early discussions as a likely site for the court's permanent headquarters. Some persons actually objected to the court being located in Trinidad, citing "more expense for taxpayers" and the fact that Trinidad & Tobago was not under the CCJ's appellate jurisdiction as reasons for their umbrage. Interestingly, a larger number of persons knew where the court was than what it did.

Table 4

Do you know about the Caribbean Court of Justice?

	Frequency	**Percentage**	**Positive/ Negative**
Yes	366	73.2	
No	134	26.8	
Total	500	100	**Positive**

[85] How true this was was subsequently revealed when a Trinidad & Tobago Defence Force soldier, driving a delegation of Jamaicans to visit the court on 21 April 2008, arrived an hour late with his charges after driving around Port of Spain for an hour, because he did not know where the court was.

Table 5

Do you know the location of the headquarters of the CCJ?

	Frequency	Percentage	Positive/Negative
Yes	387	77.4	
No	113	22.6	
Total	500	100	**Positive**

Only a very small minority of respondents, 18.4%, was able to name two CCJ judges. The President of the court is a former Chief Justice of Trinidad & Tobago. He had had a very high-profile tenure as Chief Justice, crossing swords very publicly with the then attorney-general. Unsurprisingly, those persons who knew the name of any CCJ judge knew his. A few others, with Guyanese connections, knew that there were two Guyanese judges on the CCJ Bench, but could not identify them by name. Some (correctly) identified "the lady judge" as being Guyanese, but did not know her name. It is safe to say that the judges of the CCJ remain largely unknown to the majority of respondents, and that further, most people were unaware that two of the judges were European nationals, believing membership on the CCJ Bench to be restricted to Caribbean jurists.

Table 6

Can you name two judges of the CCJ?

	Frequency	Percentage	Positive/Negative
Yes	092	18.4	
No	408	81.6	
Total	500	100	**Negative**

The President of the court is ex officio the Chair of the Regional Judicial and Legal Services Commission. He is thus the CCJ's principal spokesman, as president, on legal and jurisprudential matters and as chair, on administrative and budgetary matters. His level of exposure is therefore high. Media requesting interviews with a CCJ figure invariably wish to speak to him. There is a second Trinidad & Tobago judge on the CCJ Bench whose name was mentioned by a few respondents. Again, this judge had had a highly successful legal

career in the financial sector before being elevated to the Bench of the Supreme Court of Trinidad & Tobago, and had made history of a sort by being elevated directly to the Court of Appeal, thus bypassing the High Court of Justice. The reputations and local citizenship of these two judges therefore served to make them the only easily named members of the CCJ Bench, the impressive credentials of their brother judges notwithstanding.

The dual nature of the CCJ, with its original and appellate Jurisdictions, was largely unknown to respondents. Less than a quarter (22%) of the persons spoken to knew of the "two courts in one" aspect of the court, and the few who did know of it could not identify the dual functions by their official titles of "original" and "appellate" jurisdictions. In some exceptional cases, very well-informed respondents could actually identify the court's two jurisdictions. These persons proved systematically to be attorneys-at-law or businessmen. It was disheartening that even several persons who identified themselves as high-school teachers could not respond to the question positively. Very interestingly, a number of persons of working class backgrounds correctly identified the CCJ as the arbiter of CARICOM trade disputes, they themselves being inter-island workers. They were unaware that this was a separate function of the court's as opposed to it being a court of appeal.

Table 7

Do you know that the CCJ is two courts in one?

	Frequency	**Percentage**	**Positive/Negative**
Yes	108	22	
No	392	78	
Total	500	100	**Negative**

The most controversial question of all elicited a better overall response than the writer had anticipated, though it was not as gratifying as one would have liked. By a slim majority, of

52.6% to 47.4%, respondents approved the replacement of the Judicial Committee of the Privy Council by the CCJ. A large number of respondents who approved the change spoke in terms of "completing our independence" and "handling our own affairs". Somewhat disconcertingly, even more expressed their hope and belief that the CCJ would be a hanging court and expressed the desire to see "some necks pop" the sooner rather than the later. To them, the matter of an indigenous court laying the bases for a Caribbean jurisprudence was either not really important, or merely icing on the cake, but at any rate, completely secondary to the resumption of hangings in Trinidad & Tobago.

The large majority of respondents wishing to retain the JCPC as Trinidad & Tobago's final court of appeal did so because they felt it would be a "safeguard". When pressed to be specific – "safeguard against what?" – most said "the government" or "politicians". Some had highly subjective reasons for wanting to retain the JCPC – their race, their social position, their unfamiliarity with the CCJ judges. When invited to name, in that case, some JCPC Law Lords, they could not, but claimed they felt their ultimate judgment safer in the hands of anonymous British jurists rather than in those of Caribbean judges. Several well-spoken individuals cited pure tradition as the reason for their choice. One person, who accurately dated the Privy Council as centuries old, felt that Trinidad & Tobago "had always" appealed to the JCPC and he saw no reason to tamper with that arrangement.

Table 8

Should T&T replace the Privy Council by the CCJ?

	Frequency	**Percentage**	**Positive/Negative**
Yes	263	52.6	
No	237	47.4	
Total	500	100	**Positive**

Paradoxically, it would seem, many more persons than would support the replacement of the JCPC by the CCJ expressed some degree of confidence in the professional integrity and competence of the latter court. This notion seemed to follow on from the "safeguard" clause cited by many respondents. They were confident that the judges of the CCJ Bench were well chosen and highly competent. Many people (erroneously), but in a positive way, thought that to qualify to be a CCJ judge, one had to have been a Chief Justice before. This misapprehension led them to believe that CCJ judges were highly qualified individuals with impeccable credentials. Thus, though they were not prepared to grant them Caribbean jurisprudential supremacy, these respondents expressed a modicum of confidence in the ability and integrity of the CCJ Bench. Some felt that the pedigree of CCJ judgments had been established by there not having been any public outcry after the court had handed down any of its decisions, save of course, for *Joseph and Boyce.*

Table 9

Would you trust the CCJ to give good decisions?

	Frequency	**Percentage**	**Positive/Negative**
Yes	318	63.6	
No	182	36.4	
Total	500	100.0	**Positive**

When asked to reconcile the seeming disparity between wanting to retain the JCPC as the territory's final court, but expressing confidence in the CCJ judges, respondents found no difficulty. They were prepared to accept the CCJ as an *intermediate* court between the Court of Appeal and the JCPC, and felt confident that the CCJ could competently handle such a role, and would "give good decisions". They did however feel that it was necessary to keep the JCPC in place, as many said, "just in case". Startlingly, many respondents didn't see this as a slur upon the competence of the court, or as an indictment of themselves for not

believing that their own judges were as good as judges elsewhere. Respondents who assessed CCJ judges negatively felt that their judgments would be contaminated by political interference, old school-tie networking or the economic status of litigants.

The belief in the innate superiority of the British court pervaded the majority of responses to this question. Essentially, this belief was founded upon the venerable status of the Privy Council, and the supposed greater experience and higher qualifications of the Law Lords. When it was pointed out that the President of the CCJ and other Caribbean jurists were themselves privy councillors, respondents replied that they were too few to make that crucial difference. Again, interestingly, many persons who rated the Law Lords as deserving of higher esteem than CCJ judges felt that this was not the "fault" per se of the latter, simply that circumstances had placed the Law Lords in a more advantageous position. In filigree throughout these responses was that the Anglophone Caribbean, in spite of being independent for almost 50 years, was not yet "ready" to assume the responsibilities hitherto shouldered by Her Majesty's Judicial Board meeting in Council.

Table 10

Do you think the Privy Council Law Lords are better judges than Caribbean Judges ?

	Frequency	**Percentage**	**Positive/Negative**
Yes	342	68.4	
No	158	31.6	
Total	500	100.0	**Negative**

The unavoidable "hanging court" enquiry provoked many passionate replies among respondents. More than three-quarters of those polled – 76.4% - replied in the affirmative, though there existed no justification in fact for this. The majority of answers were fuelled by the respondents' *wish* or *fear*, rather than evidence. Many respondents felt that *Joseph and*

Boyce, in which the appellants' sentence of death was commuted to life imprisonment, was: an aberration, and not an indication of the way the CCJ would proceed; a deliberate soft sentence, meant to lure death-penalty abolitionists into a false sense of security, or simply an error on the court's part. As reasoned by many a respondent, given the high level of criminal activity, especially murders, rampant in the region, the CCJ will have *no choice* but to become a hanging court PDQ. Some submitted that replacing the JCPC by the CCJ would be a waste of time if the CCJ didn't start hanging convicted murderers as soon as possible.

Death-penalty abolitionists were convinced that circumstances would force the CCJ into becoming a hanging court, its *Joseph and Boyce* judgment notwithstanding. As their opponents', these views were influenced by much cynicism. The prime ministerial mantra that makes the replacement of the JCPC by the CCJ a prelude to the resumption of hangings in the Caribbean was interpreted by both proponents and opponents of the death penalty alike as proof positive of where the court was headed. Interestingly, this further revealed that for all the public education on the court's insulation from political pressure, many, many persons believed that it could not be completely independent and would have to take cognizance, at one point or another, of prime ministers' burning desire to resume the execution of persons lawfully sentenced to death.

Table 11

Do you think the CCJ will be a hanging court?

	Frequency	**Percentage**	**Positive/Negative**
Yes	382	76.4	
No	118	23.6	
Total	500	100.0	**Negative**

Less that 50% of respondents had any idea about the CSME, and even less of a notion of its connection to the CCJ and its original jurisdiction. As mentioned earlier, persons who were directly affected by the CSME's freedom of movement provisions were far likelier to be aware of it. Several people mentioned having seen or heard the abbreviation and related advertisements in the media, but had not retained its significance. A number of respondents mistakenly identified the CSME as a political-integration type of instrument, whose aim was to produce a federal type of Caribbean state. This was a disappointing response, not only because the CSME's link to the CCJ was unknown to the vast majority. There has been much state expenditure on public education programmes on the CSME in all the media, yet only a minority of respondents were conversant with it. This seemed to suggest that the road ahead for the CCJ and its own PEIP would not be an easy one.

Table 12

Do you know what the CSME is?

	Frequency	**Percentage**	**Positive/Negative**
Yes	201	40.2	
No	299	59.8	
Total	500	100.0	**Negative**

Finally, when asked if they wished to know more about the court, most respondents replied in the affirmative. Though it would have been difficult to imagine respondents declining to be further informed on the court, there appeared to be a genuinely high level of curiosity about it. Respondents were quick to point out that they wanted information on the court to come to them (as in public meetings, seminars and outreach activities), rather than having to visit the court themselves to find out what it's all about. While one sought responses under this rubric, a fair quantum of good will towards the court emerged, leading one to believe that respondents would perhaps be better disposed towards the CCJ if they simply knew

more about it. A noteworthy finding was that many respondents felt that it was the task of the government to educate the public on the court, more than that of the court itself.

The majority of the respondents who said they wished to know more about the court were persons who expressed their support for it. Others wanted to know more because they were opposed to the court (in its appellate jurisdiction) and averred that they would not change their minds unless they knew more. Some persons said that although they wished to know more, it didn't matter how much more they knew since they were permanently opposed to the removal of the JCPC and would never support its replacement by the CCJ. Curiously, there were those who, although admitting not to know much about the CCJ, supported it on anti-colonial principle and claimed they needed to know no more beyond that it was a Caribbean court staffed by Caribbean judges.

Table 13

Do you want to know more about the CCJ?

	Frequency	**Percentage**	**Positive/Negative**
Yes	393	78.6	
No	107	21.4	
Total	500	100.0	**Positive**

The broad objectives of the SALISES survey conducted in Jamaica were twofold: to (1) determine the level of awareness of Jamaicans 18 years and over, regarding several aspects of regional integration, and (2) determine attitudes of Jamaicans towards a more overtly political integration process. With regard to general awareness among Jamaicans vis-à-vis "the flagship institutions of the regional integration process of regional integration", the survey asked respondents which Caribbean organizations they associated with regional integration. No more than 10% spontaneously identified any of the Caribbean organizations, except for CARICOM (a mere 14.2%), as being associated with regional integration. Upon

being prompted, however, "the majority of respondents associated the West Indies Cricket Team (78.1%), the University of the West Indies (73.8%), CARICOM (60.5%), and, to a lesser extent the Caribbean Court of Justice (CCJ) (57.7%), and CARIFESTA (52.3%) with regional integration."[86]

The survey found that in general, the Jamaican level of association between well-known Caribbean institutions with regional integration was low. Regionalism tended to be linked to institutions characterised by wide social appeal, such as the West Indies cricket team, "with which they identify", and the University of the West Indies, "to which many aspire to send their children". According to the findings of the survey, "the results suggest that proponents of regional integration have been doing an extremely poor job of promoting its key bureaucratic institutions, despite their central role in the integration process."[87] The survey also noted that, significantly for this report:

> In spite of the high level of awareness of the existence of CARICOM (79%), knowledge of its role appeared limited. Some 27 percent admitted not knowing/not remembering what it does, while 43 percent stated that it dealt with free trade among its members. *Fewer than 20 percent recognized that it cooperated on issues other than trade.* This represents a serious failure of public education and promotion of CARICOM.[88]

With specific reference to the CCJ, the survey found a relatively higher level of awareness among respondents by comparison with other entities. Some 77.8 % of respondents were aware of the court. The survey attributed this to "considerable publicity and public debate in

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[86] Neville Duncan, Kristin Fox et al, "Jamaican Perceptions of Regional Integration", survey conducted by the Sir Arthur Lewis Institute of Social and Economic Studies (SALISES) of the University of the West Indies (Mona), 2008. CARIFESTA is the biennially-held pan-Caribbean creative and performing arts festival. Participation is open to all Caribbean territories, and is not exclusive to CARICOM. Emphasis added.
[87] *Ibid.*, p. 13.
[88] *Ibid.*

Jamaica regarding the issue", pointing out that the *role* of the court was less clear to the public. In giving their notion of what the thought the court did, respondents replied:

a regional Court of Justice:	39.5 %
a court of appeal	30.4%
a court to settle disputes arising from the CSME	10.5%
to replace national courts altogether	6.6%

52 persons said that the CCJ was to replace the Privy Council, and/or that it was about human rights and equal rights and justice. The relevant findings follow in tabular form.

Table 14

Have you heard of the Caribbean Court of Justice (CCJ)?

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	yes	1227	77.6	77.8	77.8
	no	350	22.1	22.2	100.0
	Total	1577	99.7	100.0	
Missing	System	4	.3		
Total		1581	100.0		

Table 15

Do you think the CCJ is a regional court of justice?

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	yes	484	30.6	39.5	39.5
	no	741	46.9	60.5	100.0
	Total	1225	77.5	100.0	
Missing	System	356	22.5		
Total		1581	100.0		

Table 16

Do you think the CCJ is a court to replace national courts?

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	yes	81	5.1	6.6	6.6
	no	1143	72.3	93.4	100.0
	Total	1224	77.4	100.0	
Missing	System	357	22.6		
Total		1581	100.0		

Table 17

'ou think the CCJ is a court to settle disputes arising from the Caribb single market and econmy?

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	yes	129	8.2	10.5	10.5
	no	1095	69.3	89.5	100.0
	Total	1224	77.4	100.0	
Missing	System	357	22.6		
Total		1581	100.0		

Table 18

Do you think the CCJ is a final court of appeal for CARICOM countries?

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	yes	372	23.5	30.4	30.4
	no	853	54.0	69.6	100.0
	Total	1225	77.5	100.0	
Missing	System	356	22.5		
Total		1581	100.0		

Table 19

Others - Do you think the CCJ is?

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	replace Privy Council	52	3.3	19.2	19.2
	don't know	129	8.2	47.6	66.8
	Human Rights / equal rights & justice	25	1.6	9.2	76.0
	combination of countries and their law	2	.1	.7	76.8
	others	50	3.2	18.5	95.2
	a partial court	6	.4	2.2	97.4
	A court to hang guilty persons	1	.1	.4	97.8
	A high court	4	.3	1.5	99.3
	new court	2	.1	.7	100.0
	Total	271	17.1	100.0	
Missing	System	1310	82.9		
Total		1581	100.0		

In its analysis of responses on the court, the survey opined that the CCJ had been a source of controversy in Jamaica – as elsewhere in the Caribbean - attracting hostility from the (then) opposition Jamaica Labour Party, with some support from the bar association, representing the school of thought that a referendum was compulsory before Jamaica should take any steps to replace the JCPC by the CCJ. The survey states that "in this context, it was considered important to include questions that pointedly address this issue and provide some firm basis for establishing Jamaicans' perceptions, in the absence of genuine public debate." Interviewees were asked, first, whether Jamaica should abolish appeals to the Privy Council, then, if appeals were abolished, which court should be Jamaica's final court of appeal. Given a list of choices,

> a majority of Jamaicans (59.6) wanted the Privy Council to remain as Jamaica's final court of appeal, with only 40% in favour of its abolition. Their preference was for the CCJ to function primarily as a court to address regional disputes. However, in the event that appeal to the Privy Council were to be abolished, the 41.8 percent of the sample who answered preferred the CCJ as the final court of appeal, to a Jamaican court of appeal.

Table 20

Opinions regarding the CCJ and Privy Council as final court of Appeal

Jamaica should abolish appeals to the Privy Council in England	yes	Nos.	629
		%	40.3
If Jamaica abolishes appeals to the Privy Council, the final court of appeal should be which one of the following?	Caribbean Court of Justice	Nos.	432
		%	65.4
	Jamaica Supreme Court	Nos.	210
		%	31.8
	Other	Nos.	19
		%	2.9
CCJ should be final court of appeal only for regional disputes?	yes	Nos.	1,064
		%	70.5

The conclusion of the writers of the survey is instructive. Acknowledging that there existed generally an awareness of the debate swirling around the CCJ, "public communication and

education remain at an extremely low level and new methodologies have to be adopted in promoting the CCJ"[89]. This conclusion was of great import for this study.

Naturally, one cannot avoid comparing the findings of both surveys. The writer's included only 500 Trinidad & Tobago respondents, less than a third of the 1,620 households polled in the Jamaican survey. The two CARICOM societies, though both Anglo Caribbean, have different earmarks and social characteristics. Jamaica boasts an area of 10,991 square kilometres with a population of 2.7 million, as opposed to Trinidad & Tobago's 5,128 square kilometres, inhabited by a population of 1.3 million. The ethnic mix in both territories is quite different one from the other. Whereas Afro-Jamaicans number more than 90% of that island's population; in Trinidad & Tobago, Indo-Trinidadians are in the majority, representing 47% of the population. Jamaica's priorities, with a per capita GDP of US$4,300, are light years away from Trinidad & Tobago's, its per capita GDP at US$19,700.

It is however manifestly clear from both surveys, conducted very differently one from the other, that though in both territories there is more than just a modicum of awareness about the Caribbean Court of Justice, this awareness is characterised by uncertainty, mistrust and misconception. A "Street Talk" man-in-the-street quickie poll run by the *Trinidad Guardian* on 24 April 2008 asking the question, "Do you think the Caribbean Court of Justice is fulfilling its purpose?" drew this response, among others: "No. Because they are not solving simple problems like crime, food and shelter. They can't solve basic things."[90] How crime, food and shelter can be classified as "simple problems" escapes the writer. More

[89] *Ibid.*, p. 21
[90] "Support for the Privy Council", *Trinidad Guardian*, 24 April 2008

importantly for the purposes of this paper, the respondent's reply shows to what degree the role, function and responsibilities of the court are simply not understood.

Interviews

Because it was felt that obtaining information directly from persons whose attitudes and actions were likely to have the greatest impact upon the fate of the Caribbean Court of Justice, in April 2008, the writer undertook, with the support and blessing of the court, a lightning trip from Trinidad & Tobago to four other CARICOM states: Antigua & Barbuda, Dominica, St. Lucia and Jamaica. One was fortunate enough to interview first hand the Solicitor-General of St. Lucia, representing the attorney-general; the leader of the opposition of all states save Jamaica, as well as the president of the Bar Association of all four states. These meetings supplemented earlier interviews conducted with the Prime Minister and the Leader of the Opposition of Trinidad & Tobago, this latter a former prime minister himself, in fact the one who signed the Agreement Establishing the Court.

In the interest of brevity and conciseness, one has had to forgo reproducing in detail the findings of interviews conducted by the bar presidents, judging it more useful to explore the more controversial pronouncements of opposition parliamentarians. A rapid look at the opinions of the four bar presidents may however prove instructive:

Mr. Hugh Marshall (Antigua & Barbuda):

> We look towards moving away from the Privy Council and towards truly resolving our own disputes and we consider that to be a necessary ingredient of independence, a necessary characteristic of independence. And I think all Antiguans and Barbudans, not just lawyers, would desire that.[91]

[91] Hugh Marshall Interview, 9 April 2008

Mr. Michael E. Bruney (Dominica):

> Personally, I believe it is a move which completes our whole movement towards independence. I think it is inevitable that we should get there one day and the sooner the better.[92]

Mr. John Leiba (Jamaica):

> As a Caribbean man, I feel passionate about it. Its unfortunate that there are so many issues or so many challenges that we face both legal and otherwise that perhaps prevent us from focusing on it, but personally I think that the methodology used in selecting the judges is certainly better than one can ask. The funding is excellent and I really think its an underutilized court, underutilized potential that we have in the Caribbean, so personally I fully support and endorse it.[93]

Mr. Andie George (St. Lucia):

> I support the Caribbean Court of Justice wholeheartedly, and I truly believe that we should render ourselves to the appellate jurisdiction of the Caribbean Court of [Justice], because I truly believe we have sufficient intellect and a number of our own jurists have sat on the Privy Council.[94]

In each instance, these gentlemen were careful to point out that their personal sentiments were not necessarily reflective of every member of their respective Bars. However, they were all optimistic – some less cautiously than others – that there was solid support for the Caribbean Court of Justice among attorneys in their states, and in at least two cases, a majority of such support as opposed to those who would prefer to retain the JCPC as their state's court of last resort. The full transcripts of all interviews are available for consultation, save for the interview of Prime Minister Patrick Manning, which was inadvertently erased before being transcribed.

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[92] Michael E. Bruney Interview, 9 April 2008
[93] John Leiba Interview, 10 April 2008
[94] Andie George Interview, 7 April 2008

Prime Minister

Interviewed on 22 January 2008, the Prime Minister of Trinidad & Tobago, Mr. Patrick Manning, asked if his opinion had changed with regard to Trinidad & Tobago accessing the appellate jurisdiction of the CCJ, replied that it had not, that he remained an unequivocally firm supporter of the court in both its jurisdictions. The prime minister: expressed his complete satisfaction with the method of appointment of judges to the court and wished for no modification to it; believed that no states other than Barbados and Guyana had attempted to accede to the CCJ's appellate jurisdiction because of "internal difficulties", and not because they did not support the court; suggested that while, as the Seat of the court, Trinidad & Tobago would not seek to pressure other states into signing on to the appellate jurisdiction, his government would certainly use its good offices to enlighten other CARICOM states as to the benefits likely to be reaped from supporting the CCJ.

Mr. Manning advised that he remained committed to creating the legislative framework necessary to have Trinidad & Tobago come under the court's appellate jurisdiction. He was reminded that the JCPC had struck down as unconstitutional the bills which Jamaica's PNP government had passed by simple majorities to institute the CCJ as that island's final court of appeal. His government would require a special parliamentary majority to remove the JCPC from the constitution and entrench the CCJ in its stead. The opposition had repeatedly vowed its objection to the CCJ and that it would *never* provide the indispensable bipartisan support. Mr. Manning eschewed a plebiscite as a prerequisite before moving to have Trinidad & Tobago jettison the JCPC, citing the negative history of referenda in Commonwealth Caribbean states. A government that loses a referendum often loses power in elections thereafter. Mr. Manning did not say that, but it was not difficult to infer.

Stating his certainty that Trinidad & Tobago would have an executive president, as opposed to the current ceremonial one, "in his lifetime", Mr. Manning did not volunteer how his government would manage to garner the necessary special parliamentary majority to pass laws to remove the JCPC. One can only speculate that outside of a mandate gained through a referendum, already forsworn, Mr. Manning hopes/expects to achieve the special parliamentary majority through his party controlling sufficient seats in parliament on its own, so as to neutralise Opposition obstructionism. General elections are not constitutionally due in Trinidad & Tobago until 2012. That would be a long time to wait to accede to the court's appellate jurisdiction. One can only imagine that Mr. Manning anticipates that the configuration of parliamentary seats will be modified before then.

Leaders of the Opposition

One was unsuccessful in attempts to interview Ms. Portia Simpson-Miller, Leader of the Opposition of Jamaica. During her brief tenure, however, as Prime Minister of Jamaica, successor to P. J. Patterson, Mrs. Simpson-Miller's support of the CCJ was well advertised, and she committed her party, had it won the general elections of September 2007, to a referendum on the question of the court. No public statement of Ms. Simpson-Miller's since has given any indication that she has modified her opinion on Jamaica subscribing to the CCJ's appellate jurisdiction in any way. Indeed, as recently as 27 March 2008, Mrs. Simpson-Miller, who had promised to be the new Jamaican government's "worst nightmare", in an interview with the *Jamaica Gleaner*, said that her party would want the question of the CCJ to be put on the legislative agenda as soon as possible this year.

The three other leaders of the opposition interviewed held widely divergent views. Dr. Kenny Anthony, who had signed the Agreement Establishing the CCJ as Prime Minister of

St. Lucia (1997-2006), remained a firm supporter of the court. Asked how he felt about the court, Dr. Anthony stated that he was "exceedingly disappointed that we were not able to accede to the appellate jurisdiction before my tenure came to an end with the general elections of December 11, 2006." As an earnest of his continued support for the CCJ, Dr. Anthony volunteered:

> Quite recently the issue came up and I made it absolutely clear that the Opposition in St. Lucia will be willing to work with the Government of St. Lucia, that this was one issue that should not be subject to the competitive party politics that is an inevitable part of the process which [..] we have inherited and we share. It is true that the current Prime Minister had made some rather unusual statements regarding St. Lucia's future role the appellate jurisdiction of the court, but I think he quickly corrected that and [we] internally signalled our willingness to work with the Government to see whether eventually St. Lucia could accede.[95]

St. Lucia's accession to the appellate jurisdiction of the court may therefore be an easier matter than for other states. The island's Prime Minster, Stephenson King, declared in January 2008:

> I wish to inform the public both here and abroad that my government has already commenced discussion on possible ways in which […] constitutional requirements can be addressed so that the CCJ can become St. Lucia's final court of appeal in civil and criminal matters in due course. [96]

Citing the positive balance sheet of the Eastern Caribbean Supreme Court, while admitting that of course there were occasional human lapses, Dr. Anthony describes the ECSC as "hugely successful", with the record of the Court of Appeal in particular being generally "laudatory", with judgments that "have been outstanding and have even been applauded by the Privy Council".

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[95] Kenny Anthony Interview, 7 April 2008.
[96] Reported on the Caribbean Broadcasting Corporation on 25 January 2008.

Dr. Anthony felt that the larger territories of Jamaica and Trinidad & Tobago, which send the bulk of Caribbean appeals to the JCPC, were stymied in trying to accede to the appellate jurisdiction of the court. Jamaica, "exceedingly suspicious of regional initiatives" under Prime Minister Bruce Golding's JLP Government, according to Dr. Anthony, is "virtually a prisoner of its past", because Jamaican politicians have not really disowned the island's nearly half-century old "relationship, attitude and approach" to the Federation of the West Indies, its subsequent failure and collapse. Dr. Anthony felt that Jamaica's traditional chariness of engagement with wider CARICOM in general was naturally extended to the CCJ in particular. He viewed the Jamaican situation as "exceedingly unfortunate" because in his opinion, their politicians had "surrendered the leadership role that Jamaica once enjoyed" regionally, it having been historically a "cradle of anti-colonial behaviour".

The Trinidad & Tobago situation struck Dr. Anthony as different. Judging it anomalous that the country of the Seat of the Court had not acceded to its appellate jurisdiction, he felt that nonetheless, for the average citizen of Trinidad & Tobago, "the stirrings of sovereignty, of nationhood, the spirit of Eric Williams will perhaps ultimately prevail if the issue had to be tested" [97]. He felt that the "ayes" would probably have it in a putative plebiscite in Trinidad & Tobago on the question of accession to the appellate jurisdiction to the CCJ. On the extraordinary about-face by the opposition on the court, for which Mr. Panday's party had strongly lobbied all across the region, Dr. Anthony volunteers:

> It is obvious that the future of the court is caught up in internecine warfare between the two political parties and the court has become a bargaining chip for the respective political parties. In other words, when I look at the issue from a distance, I sense that in the case of Trinidad and Tobago the opposition is saying to the government,

[97] Eric Williams was the Trinidad & Tobago equivalent of George Washington, Prime Minister from 1956 until his death in 1981. He led the territory to self-government, independence and republican status.

> "well, you want the Court? You want to establish the Court? Okay, we are prepared to go along with you, provided that you give us X or Y in return. So that the Court has become a political pawn […].[98]

As regards the attitude of the legal fraternity towards the appellate jurisdiction of the CCJ, Dr. Anthony believes that many anglophile Trinidad & Tobago attorneys inclusive especially of those of a certain generation trained in the UK, feel "very wedded" to the Privy Council, but he believed them to be in the minority. Such attorneys, Dr. Anthony felt, "could be persuaded that they need to alter that position and change that view". As regards the ordinary man in the street, he conceded that the very proximity of the court in Trinidad might make citizens inclined to believe its Bench susceptible to local political interference. This attitude, the St. Lucian Leader of the Opposition perceives as proof that many Trinidadians and Tobagonians ignore the history of the region, as "there can be no doubt that the courts in Trinidad and Tobago have blazed a trail of progressive and very sound judgments in the region".

Contrary to Jamaica and Trinidad & Tobago, Dr. Anthony views the situation in the Eastern Caribbean states as not necessarily a question of political will. For him, because in nearly every territory (save possibly for Dominica), the Privy Council is deeply entrenched in the Constitution, the impediment to the OECS' accession to the appellate jurisdiction is constitutional. He summarises the parameters of this situation thus:

> For many islands it's a little intimidating to go through that process. There is a fear about it, since there is no precedent on the issue and they've never gone through the process of a referendum to alter any provisions of any constitution. Effectively the constitution is virtually like a noose around the necks of the governments of the region. I think […] that the history of a shared regional court predisposed them. […] They know the value of cooperation in

[98] Kenny Anthony Interview, *op. cit.*

> judicial matters, but on the other hand, their constitutions present very complex issues and very complex problems.[99]

Dr. Anthony expressed the belief that joint, simultaneous accession by the seven OECS territories would calm general fears, given that they all faced largely identical constitutional problems and issues: special parliamentary majorities and referenda requirements. A collective approach to him would calm political fears make the people in the region feel "part of this judicial enterprise". He further recommends a bipartisan approach, because removal of the JCPC is an issue to be pursued jointly by governing parties as well as by opposition parties. A government deciding to accede to the appellate jurisdiction of the CCJ should embrace the opposition from the outset, because "the worst thing that can happen is for the position to be polarized on political grounds". The situation in Jamaica and Trinidad & Tobago, of course, are significantly illustrative of Dr. Anthony's analysis, and the degree to which this polarisation existed in the latter state would become very visible shortly after this interview was conducted.

Referring to Caribbean referenda which had preceded the collapse of governments in Jamaica and The Bahamas, Dr. Anthony advised that the timing of any plebiscite on a matter so emotion-charged as the CCJ has to be "superb". Identifying the need for "consensus across the board", he counsels the OECS governments to embrace not only their oppositions, but also the bar associations in a tripartite coalition, for the calming of anxieties that would ensue after such a move. Dr. Anthony is also sanguine that as a result of the OECS' "shared history of managing a regional court and because we have done such a great job of it, in a sense that history provides us with a unique opportunity. It is almost a logical

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[99] *Ibid.*

step because of that shared history that we work in unison, we work in tandem because we have jointly managed a court and overall managed that court successfully"[100].

Dr. Anthony intimates that he may understand the causes underlying the hesitancy among Eastern Caribbean leaders. Citing his personal contacts with several among them, he identifies political discrimination or victimisation in their respective countries as giving shape to attitudes favourable to the retention of the Privy Council. A negative local judgment overruled by a more pleasing one from the JCPC may have inevitably led such leaders to invest "entire trust and confidence in the Privy Council because of that isolated experience". Dr. Anthony believes this belief in the supremacy (and inevitability) of the Privy Council to be misplaced, and significantly for this study, advises that "education over time, exposure over time", focussing on the demystification of the judicial process and how it works, can go some way to neutralising negative impressions about the CCJ. In a nutshell, for him, joint accession by the OECS to the CCJ's appellate jurisdiction is "the logical way to go".[101]

Largely similar sentiments were expressed by the Leader of the Opposition of Antigua & Barbuda, Mr. Steadroy Benjamin, who had been a minister in the government of Prime Minister Lester Bird. Mr. Bird lost his seat and his Antigua Labour Party (ALP) lost its majority in the general election of 24 March 2004. In subsequent ALP elections, Mr. Benjamin was elected to head his party and became the Leader of Her Majesty's Loyal Opposition in the Antigua & Barbuda House of Representatives. Himself an attorney-at-law, Mr. Benjamin, like his St. Lucian counterpart, fully supports the CCJ. In his own words:

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[100] *Ibid.*
[101] Kenny Anthony Interview, *op. cit.*

> I've got full faith and confidence in the learning, in the experience, in the knowledge of our own jurists and I think it's about time that we in the Caribbean begin to recognize that we must appreciate what we've got and we must develop our system as they did theirs. We are very young. We are in our embryonic state but we must start somewhere. I believe that our jurists have proven by decisions before the Privy Council that they are as competent and learned as those persons over there in Britain.[102]

Echoing Dr. Anthony, Mr. Benjamin acknowledges that the most important prerequisite to the OECS territories acceding to the CCJ's appellate jurisdiction is building confidence. He also indicates that a negative experience with an ECSC judgment may well sour the litigant as regards regional jurisprudence and lead him to believe that the proximity of a Caribbean court may make it vulnerable to manipulation by political directorates. On these objections, Mr. Benjamin was matter-of-fact and straightforward.

> We've got our three law schools here.[103] […] We've got our West Indian Law Reports being printed. We in the OECS have started our own procedures. You tell me: is this what we ought not to continue? The foundation is being laid and I am of the firm opinion, very, very firm opinion, that its about time that the barristers and lawyers who are trained in England divorce their thinking from the English way of doing things. Our Caribbean jurists, they live here, they understand our societies, they know exactly what to expect. The Caribbean Court of Justice is […] something that we must promote and let me tell you if the time ever arrives when I am in a position to express my opinion on the CCJ, I will completely and totally give it my fullest support. […] I have read judgments delivered by the OECS Court of Appeal and read judgments delivered by the courts in England and the law is extremely well interpreted and applied in our jurisdiction. It's about time that we in the Caribbean get away from that English [tradition]. I'm speaking, not because I'm a West Indian and because of historical developments, but I've been able to read the decisions and appreciate them as a lawyer. I've got full faith and trust in the development of our own system in the Caribbean.[104]

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[102] Steadroy Benjamin Interview, *op. cit.*

[103] There are three law schools serving the Commonwealth Caribbean: The Norman Manley Law School in Jamaica, the Sir Hugh Wooding Law School in Trinidad & Tobago, and the Eugene Dupuch Law School in The Bahamas.

[104] Steadroy Benjamin Interview, *op. cit.*

Like Dr. Anthony, Mr. Benjamin was convinced that public education was the key to successfully replacing the JCPC by the CCJ, and he felt that the most effective education campaign would be one that marshalled all the forces of the state: the government, the opposition and attorneys under their bar association. Mr. Benjamin felt these latter to be virtually indispensable to the education and accession process. Advocating open discussion with bar associations to get their membership on board, he felt that Caribbean-trained attorneys "understand and appreciate what we are trying to achieve by this process". He strongly recommends that bar associations and governments cooperate as "catalysts" to engender understanding and acceptance of the Caribbean Court of Justice.

Mr. Benjamin insisted on the notion of the movement towards the CCJ and away from the JCPC as a national endeavour. He counselled collaboration among the various social leaders to "develop a common basis, common programmes designed to properly educate". Recognising that not all education programmes achieve their objectives (a position with which the writer could empathise), Mr. Benjamin noted that the Government of Antigua & Barbuda had just passed the Legal Professions Act, whose aim was to regulate the conduct of attorneys. The government had brought in the bar association for consultation, and, given Mr. Benjamin's enthusiasm, had also presumably consulted with the opposition. Citing the great importance of the CCJ, he opined that the task of bringing Antigua & Barbuda under the appellate jurisdiction of the court must not be driven by the government alone or by the bar association alone.

> It must be a conjoined effort. Don't underestimate the interest in the Bar Association of Antigua and Barbuda. People look up to lawyers as being leaders in the community, and when you have the bar association as leaders working in conjunction with the government, [and other] elected officials then it would be more acceptable and

> more appreciated as to what objectives we are trying to achieve. It has to be a conjoined effort. Let me tell you, I know the opposition party that I represent and the government who opposed us, that we are all with the CCJ.[105]

Giving his full endorsement to the method of appointment of judges to the Bench of the court, Mr. Benjamin nonetheless declared he could understand why the public was so hesitant to place its faith in the insulation of CCJ judges from political hurly-burly. The incumbent Acting Chief Justice of the Eastern Caribbean Supreme Court was about to retire, having served as Chief Justice of the ECSC since 2005. He would retire without ever having been confirmed in office because one OECS prime minister was reportedly opposed to his appointment, having objected to some of the judgments handed down by the judge. Since unanimity among prime ministers is a prerequisite for the appointment of the ECSC Chief Justice, the incumbent's candidacy remained dead in the water. This was a circumstance that was lamented over by every individual the writer interviewed, without any prompting.

On the matter of the appointment of the CCJ Bench, Mr. Benjamin was categorical:

> I believe the Judges those who sit in the CCJ will be divorced from any marriage [to politicians] and that's the whole purpose of the mechanism by which the court is being financed, etc. That is why I am a firm believer, because I believe that the whole concept of the court, the way it's established, how its being financed, will give it the independence which we so desire. That is the best system. […] I will tell you further that's the whole reason why I'm a firm believer in the whole concept, the whole ideal, the whole [new] way of appointing Judges. We must get away from political interference at all levels and that is why this is iron clad. It is admirable. […] The methodology of the appointment of judges to the CCJ is one of the main reasons that an education programme […] must be established and elaborated upon, because the people will know that, look, these people are insulated, they are appointed not by politicians but by a commission of professional people who deal solely with qualifications.[106]

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[105] *Ibid.*
[106] *Ibid.*

Describing himself as a firm believer in, preacher for, and advocate of the Caribbean Court of Justice, Mr. Benjamin regrets that more regional leaders and legal practitioners "cannot understand and appreciate the significance of the CCJ". Acknowledging the shared British antecedents of the Anglo Caribbean, he advises that this must not be an impediment to progress. Referring to the evolution of the present-day tri-campus University of the West Indies from its origins as the University College of the West Indies in the 1950s, Mr. Benjamin dubs this development "natural progression", and asserts that having accomplished this as far as our education is concerned, it is incumbent upon us to repeat this in our legal system. "We must be the masters of our own destiny meaningfully in every activity of life in these parts," he counsels.

As regards the effect of the Jamaican setback on other states' efforts to accede to the appellate jurisdiction of the CCJ, Mr. Benjamin felt that the traditional modus operandi in the region had always been for the smaller states to follow the larger. Jamaica having stumbled, as it were, on the threshold of this great enterprise, the smaller islands of the OECS were biding their time. He opined that such a way of thinking was counterproductive, and that the smaller states needed to abandon this practice and "make decisions which are in the interest of each small micro state". If the Eastern Caribbean territories continued to do otherwise, "then we'll never be really able to ever fully achieve our maximum potential".

Of special significance to the findings of this report, and to the action that will have to follow it, Mr. Benjamin was convinced that any movement of CARICOM states towards acceding to the appellate jurisdiction of the CCJ would necessarily have to involve a well-

designed public education programme. He understands the view of many who still view the court with apprehension like "some strange institution" by which no one wishes to be "smitten". Mr. Benjamin quite accurately perceives that public education must be so designed as to present the CCJ as only "part and parcel of an entire system", as a protector of civil liberties, protector of persons against crime. He was concerned that the court not be perceived as "a big brother with a strap to spank", but rather "like an understanding, loving father and parent who is there to hold society together".

Mr. Benjamin stressed that it was imperative that the law and order aspect of the court's work needed to be highlighted for the Caribbean people. Once this was accomplished, and the real purpose and function of the court, became clear, he was confident that popular hesitancy would vanish. The ordinary folk, he said, needed to understand that "the court is there just to protect them, with equity. It's a shield and not a sword. The people have got to understand that the court is a protector".[107] Finally, given the choice between separate or joint accession to the appellate jurisdiction of the CCJ for the OECS territories, Mr. Benjamin, like his St. Lucian counterpart, favoured joint accession. He realistically admitted that unanimous decisions among all nine states were not easy to come by,

> […] But when it comes to something as fundamental and essential as law and the CCJ, this is one area where I'm of the firm opinion we should have a common joining of this appellate jurisdiction together. What should happen really is that each of the states should strive to put its house in order, whether by way of referendum or whatever, otherwise the countries should get together to set a specific time limit. […] This is too important a step in West Indian development to be prolonged, to be dragged on without any specific decision being made. Some things are more important than others! Law and order in my book ranks at the head of the priorities. We all must set a date and join it together, not incrementally. It would make a mockery of the entire system. We've got to make definitive decisions and take

[107] *Ibid.*

> positive steps to bring this thing into reality. it's only a normal natural developing trend that this ought to happen at this particular point in time. I hope that the new brand of leaders in these nine small states will appreciate and understand the significance of the development of our own jurisprudence. It can only augur well for the entire West Indian community.[108]

The generally positive and upbeat notions expressed by Dr. Kenny Anthony and Mr. Steadroy Benjamin were very much at odds with those voiced by their Dominican counterpart. Interviewed the day before Mr. Benjamin, Honourable Earl Williams, attorney-at-law, Leader of the Opposition of the Commonwealth of Dominica, was, at 26 years of age, the youngest ever person to be elected to the Parliament of Dominica in 1990. He was a minister in the 1995-2000 Government of Prime Minister Edison James. Consequent upon general election losses by his party in 2000 and 2005, Mr. James stood down as party leader and Mr. Williams was eventually elected as his replacement, becoming *ex officio* leader of the opposition in 2007. According to Mr. Williams, he had been a diehard supporter of the CCJ until certain developments had led him to change his mind.

> Well, first of all let me say I was one of its main proponents. I was supporting the CCJ fully, 100%. I was just 100% CCJ, and when I emerged as leader of the party in 2005, by far the majority of the members of my party were not supporting the CCJ. […] They were quite fearful that I would impose my personal opinion on the party in accepting […] the appellate jurisdiction to replace the Privy Council. The problem is events that followed 2005 have shifted me, given me a lot of doubts, so that from since that time I am so ashamed and embarrassed, I have made no public statement about the CCJ, because any public statement I made would have contradicted my previous statements and sentiments. As a matter of fact, I even asked the government at the time that if they gave me the job as a Member to go about and market the CCJ that would help to see both sides of the fence, about the CCJ[109].

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[108] *Ibid.*

[109] Earl Williams Interview, *op. cit.*

Mr. Williams traced his disenchantment with the Caribbean Court of Justice, of which he had been a fervent supporter, to a number of developments, not the least of which was the court's *Joseph and Boyce* judgment, already discussed earlier. For him, the CCJ's ruling that the Barbados Court of Appeal was "bound to follow the decisions of the Privy Council", and its refusal to allow Jeffrey Joseph and Lennox Boyce to be executed, represented backward steps in Caribbean jurisprudence. Mr. Williams' resentment of JCPC "meddling" in Caribbean affairs is palpable. He is thus profoundly disillusioned by what he interprets as not only the CCJ toeing the Privy Council line instead of breaking with it, but its upholding the commuting of Joseph's and Boyce's death sentences to life imprisonment as a violation of both the letter and the spirit of Barbadian law on capital offences.

Notwithstanding Mr. Williams' disappointment with the court, his views on the need for it are passionately felt and expressed. Asserting that it's time "we developed our own jurisprudence", he rhetorically asks who knows the history, the culture of the Caribbean better than ourselves? He believes that one must take into consideration the culture, the history and everything of the people in interpreting laws and constitutions, "otherwise you wouldn't understand". According to him, many laws must be interpreted based on Caribbean history, Caribbean culture, Caribbean society, because, plainly, the law is not that of the British Privy Council. For him, the agency that must uphold, propagate and develop Caribbean jurisprudence is ineluctably a Caribbean Court of Justice.

Beyond what Mr. Williams interprets as missteps by the CCJ, like other Eastern Caribbean personalities, he makes reference to the non-appointment of the Chief Justice of the ECSC because of the veto of one Caribbean prime minister. Though, of course, there is no

comparison between appointments to the ECSC and the CCJ, Mr. Williams sees in the one situation the likely forerunner of similar developments affecting the Bench of the CCJ. The proud centrepiece of the court's structure – the appointment of its Bench by an apolitical commission of expert jurists and other professionals – fails to impress Mr. Williams. Saying that "he used to praise it too", he describes the RJLSC as "brilliant on paper", but essentially no guarantor either of its members' own impartiality or of that of the judges it will appoint. Although he concedes that among Caribbean judges there are "brilliant" and "well qualified" individuals, this is not satisfactory for Mr. Williams. He questions their integrity and posits that motivated by an instinct for survival, survival which he links to pleasing prime ministers, judges would be unwilling to rule against governments.

> I think it's their mere survival because judges realize, "Boy, in order to survive, I need the blessing of the prime ministers," they're going to be reluctant to go against any government, because at the bottom line everybody is a human being and they think of their own survival and their family. That is the bottom line for every human being. No matter what position you hold, the bottom line is your survival for you and your family, and judges have the same survival instinct like everybody else in office. Everybody [is] the same and if they feel upsetting one prime minister means they can't hold a post in the future they will respond to that.[110]

Mr Williams was then asked how he viewed the *Joseph and Boyce* judgment, in which the court ruled against the Attorney-General of Barbados, effectively the representative of the government of that island. Was this not evidence of the CCJ's independence and proof that it was not intimidated by the prospect of ruling against the state?

> No! That tells me one thing: that the CCJ is not prepared to uphold its laws. The CCJ is not developing its own jurisprudence - that is all it tells me. The CCJ is not prepared to develop its own

[110] *Ibid.*

> jurisprudence. […] They still want to go ahead with the Privy Council on jurisprudence.[111]

Unlike Mr. Steadroy Benjamin of Antigua & Barbuda, who felt that the CCJ was bound to be influenced by international trends in jurisprudence, Mr. Williams asserted that he did not "care about the world". His sole concern was that as far as "the law of Trinidad & Tobago is concerned, or the law of Barbados is concerned, it is written in black and white in our Constitution that the punishment for murder is death and that's the bottom line."

Pressed to explain how he would modify the RJLSC to make it a more trustworthy body, Mr. Williams described it as "excellent" and "one of the best models in the world," adding that he would do nothing to change it. His principal apprehension about the RJLSC and the CCJ was owing to his lack of confidence that either body would be truly independent and not feel beholden to any prime minister or government that had been instrumental in their appointment. Mr. Williams did, interestingly enough, claim that he had "no problems" with politicians appointing judges, saying that "as a matter of fact, that is how our model should be", expressing his hatred for "the model that says we don't trust our politicians". The problem, for Mr. Williams, is not politicians appointing judges, but that "they're supposed to do their work within their limitations and within the law".[112]

The Leader of the Opposition, and potential Prime Minister of Dominica, opined that the failure of Jamaica to accede to the appellate jurisdiction of the court had not had a dampening effect on the OECS. The culprit was "the bad approach of the individual governments in moving forward". Mr. Williams acknowledges that the Government of Dominica holds a 2-seat majority in parliament. He nevertheless believes that its

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[111] *Ibid.*
[112] *Ibid.*

unsuccessful attempt at a constitutional amendment in 2002 (with the president refusing to sign the final act), together with the influence upon public perceptions of the circumstances surrounding the non-appointment of the Chief Justice of the Eastern Caribbean Supreme Court would combine to defeat any referendum the government attempted to hold on the matter of replacing the JCPC by the CCJ.

Finally, when asked to peer into "his crystal ball", and predict where the CCJ would be five years hence, Mr. Williams was unsparing: "The same place". He gave this answer three times, convinced as he was that the majority of the Dominican Bar would not support their island's accession to the appellate jurisdiction of the court, because they "have no confidence in these guys". He did say that his feelings toward the court would be unchanged, and that were he to have the final say, he would wish to see Dominica come fully aboard the CCJ, but that would be against the wishes of the majority of his colleagues. Before, he would have "bulldozed the CCJ down the people's throats", now, he says, "I'm kind of quiet. I don't talk about it publicly. I don't talk about it publicly. When they ask for my comments, I tell them I will call them back".[113]

Honourable Basdeo Panday, Leader of the Opposition of Trinidad & Tobago, like Dr. Kenny Anthony, was, as prime minister, his territory's representative at the signing of the Agreement Establishing the Caribbean Court of Justice. Like Mr. Williams, Mr. Panday is now opposed to the court for whose creation and for whose siting in Trinidad & Tobago he lobbied strongly. He bases his objection to the court on the grounds that "the people of Trinidad and Tobago don't accept it and have no confidence in the CCJ as a final court of

[113] *Ibid.*

appeal. They hold the view that Caribbean courts can be tampered with". Mr. Panday claims that since the public is "convinced" that Trinidad & Tobago courts are being interfered with, they may have extrapolated that belief onto the CCJ, and do not view it with confidence. According to him, this is why "the Law Association, everybody, and you go to the public and so on, nobody wants an abolition of the Privy Council".[114]

Essentially predicating his argument against the court in whose foundation he played a fundamental role on a lack of public confidence, Mr. Panday claimed that the public not only believed the CCJ Bench to be subject to outside manipulation, but that its judgments were likely to be unsound, given "the fact that we have been to the Privy Council and have so many of the decisions of our own people here overturned". Mr. Panday agreed that he would only support the replacement of the JCPC by the CCJ when the public of Trinidad & Tobago expresses "confidence" in the latter court, presumably through a referendum or other form of plebiscite. Since, as the reader would recall, Prime Minister Patrick Manning categorically ruled out any referendum on the question of the CCJ, it would seem that Mr. Panday will not soon have an opportunity to put his money where his mouth is.

Asked directly what accounted for his change of heart as regards the court, considering the role he had played in bringing the court into being, Mr. Panday replied:

> Because when I did make my speech in Parliament, I said that this would be subject to the approval of the people, that we would take the matter to the people, that we would talk to them about it, we would educate them as best we can. We did that and after we had done it the people rejected it.[115]

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[114] Basdeo Panday Interview, 15 February 2008
[115] *Ibid.*

Mr. Panday acknowledged that this rejection was not manifested in a formal way, but that formal ways were not the only ones to determine public opinion: "Most of the institutions we spoke to, the Law Association, a lot of the NGO's, everyone we spoke to rejected it". He then advocated the installation of a three-tiered system, with the CCJ as an intermediate court between the local Court of Appeal and the JCPC. This could be a transitional stage during which the public would have the opportunity to compare the performance of the CCJ as an appellate court against that of the Judicial Committee of the Privy Council.

And, according to Mr. Panday, "after a time […] people would notice whether the CCJ is acting in [such] a manner that they can rely on it to be fair and impartial." On the issue of appointments to the court Bench, Mr. Panday referred favourably to the US system of judicial appointments under which nominees to the Supreme Court "are subject to examination by the representatives of the people", adding that whatever the system employed, "the object must be to choose the best people you can; the object has got to be to engender confidence, to have your best people, and so whatever the system is, that is what it must achieve, and a system similar to that of the United States might certainly help in engendering this kind of confidence." Mr. Panday thus seemed to be finding the current system of appointment to the CCJ through the RJLSC less attractive than the US system.

Invited to speculate on reasons why only three states had so far attempted accession to the appellate jurisdiction of the court, Mr. Panday reiterated that it had to be as a result of a lack of confidence. In his perception, the court had no credibility for the other states, hence their lack of action. Surprisingly, for someone who was so intimately involved in the setting up of the court, Mr. Panday seemed to be unaware that the court had already been fully capitalised,

since he volunteered that states were steering clear of the court perhaps because its cost was a deterrent. Mr. Panday underscored that his party, occupying 15 seats in the 41-seat Trinidad & Tobago House of Representatives, would not provide Mr. Manning's government with the two-thirds parliamentary majority it would need to modify the Constitution, at least, "not until the people feel confident in abolishing the Privy Council".

Invited to suggest how such confidence may be built, Mr. Panday suggested that what is necessary is education. One needs to educate the people, to build their confidence. The education process will be reinforced by the people's own experience of the court, so they must be encouraged to access the court. Asked how this was to be accomplished, he again advocated the three-tiered system:

> How are you going to get them to access the court when you are telling them if you access this court this is the final court of appeal? But if you tell them, if you access the court this is not the final court of appeal, there is still the question of the Privy Council, you may get them to try the court, so that the confidence may build up. But if they don't go to the court at all how the confidence going to be built?[116]

Reminded that certain of the Privy Council's Law Lords had been advising the Caribbean to establish its own court of last resort, and that over an extended period, Mr. Panday owned, without difficulty, that the UK been trying to de-colonize for a long time because of the expense involved. "They don't care what happens to us," replied Mr. Panday. Asked to speculate what would happen if the British Government opted to abrogate Commonwealth Caribbean appeals to the Privy Council, Mr. Panday replied:

> Well then, we have no choice do we? But as long as we have a choice we must exercise it. We may have no choice if they do that. Maybe that's one of the things you can do. You asked my advice on what

[116] *Ibid.*

> you can do. Maybe that's one of the things you can do: get the Privy Council to jettison the Caribbean.

This response seemed not to take into account that in such circumstances, Trinidad & Tobago would be left with its Court of Appeal as its de facto court of last resort, or it would be forced to accede – one way or another – to the appellate jurisdiction of the Caribbean Court of Justice, neither of which outcomes seemed, from his earlier propos, to be one that would please Mr. Panday.

The four opposition parliamentarians interviewed seemed all to believe, whether for or against their states acceding to the appellate jurisdiction of the court, that a great deal more public education on every aspect of the court was necessary. This advice fit hand in glove with the findings of both the survey executed by SALISES in Jamaica and the writer's own efforts in Trinidad & Tobago. The compelling evidence is that there is much, much more work to be done in marketing the Caribbean Court of Justice as a worthy and natural replacement for and successor to the Judicial Committee of the Privy Council. It is also apparent from these findings that even though the court would be wise to engage the collaboration of other agencies in its campaign of public education and information, it dare not lose sight of the fact that the ultimate responsibility for winning over the support of a sceptical and hostile constituency is the court's itself.

THE SEAL OF THE CARIBBEAN COURT OF JUSTICE

The Court Seal, displayed at the Inauguration of the court by the Right Honourable Mr. Justice Michael de la Bastide, TC, President of the Court

CONCLUSIONS AND RECOMMENDATIONS

> *If old Britain can amend its constitution so as to provide for a more transparent and independent supreme court, maybe it is time for the Caribbean to do away with its own anachronism, namely the appeals to the Judicial Committee of the Privy Council.*
>
> *Lord Anthony Gifford, QC*[117]

As adumbrated earlier, the data collected through literature review, survey and interview has led the writer to a number of interrelated conclusions. The reader knows that the Caribbean Court of Justice was inaugurated in April 2005, after a prolonged period of gestation, to be, in its appellate jurisdiction, the final court of appeal for the Commonwealth Caribbean states, replacing the Judicial Committee of the Privy Council. The court is currently staffed by a Bench of eminent international jurists, including four former Chief Justices; it is managed by a cadre of highly-trained and qualified professionals. The recruitment process for both judges and managerial personnel, through an international commission developed for the purpose, is so structured as to neutralise Executive interference, thus making it impossible for conniving politicians to stack the court Bench according to their fancy.

Moreover, it has of course been the experience of many a Caribbean Judiciary that their priorities do not necessarily chime in unison with those of the purse-controlling Executives. Prestige projects and programmes likely to attract votes usually are candidates enjoying far higher priority on government expenditure lists than repairing broken-down antediluvian magistrates' courts. Judges and magistrates and court employees don't represent all that many votes. Thus, many ambitious Judiciary plans come to nought because Executives choose to expend national resources elsewhere. The Caribbean Court of Justice is insulated

[117] Former member of the House of Lords.

against the vagaries of state whim by having its operations financed in perpetuity by the income from a trust fund capitalised in the sum of US$100 million, raised by the Caribbean Development Bank, and managed by a Board of Trustees, none of whose officials is appointed by politicians.

Nonetheless, in spite of these guarantees, the court, in its appellate jurisdiction is still regarded askance, not only by the Caribbean public, but also by their leaders, in some instances, the very leaders whose signatures are recorded forever for posterity at the bottom of the Agreement Establishing the Caribbean Court of Justice. The research indicates several matters which have adversely affected the court's ability to "sell" itself and win supporters over, some of which are obvious, such as colonials' reluctance to relinquish the institutions of their former colonial masters, and the high degree of low self-esteem that accompanies emerging from the colonial cocoon and taking charge of one's own affairs. All of these are natural and normal and manifest themselves under one form or another in newly independent societies.

What is unique in the CCJ's situation is the way that the court has been jilted by its formerly ardent suitors, even though, as it exists, it conforms admirably to all of the ideals its creators and supporters would have wished to see it incarnate. Moreover, none of the decisions handed down by the court in its three and a half years of sittings so far has provoked any greatly adverse reactions or negative publicity. (Unless one wishes to include the protest of the individual who, in a letter to the editor, complained that the six *Joseph and Boyce* judgments written by the seven judges showed they had nothing to do – as though a light docket were the fault of the judges.) One understands, of course, that the basis of all these

misgivings is a tremendous lack of confidence, not in itself surprising (though not desirable) when considering that the court is a new entity entrusted with huge responsibility.

Conclusion 1: The CCJ is largely unknown to Caribbean citizens.

In spite of all the publicity surrounding the signing of the Agreement, the fanfare attendant upon its inauguration, and the controversy of its very existence, the court remains largely unknown to it core constituency. The belief that by its very existence it would become known and understood and be welcomed by the public at large has proven to be unfounded.

Conclusion 2: The CCJ is widely distrusted.

As so often occurs, what man does not know, man fears. Not being certain of the nature of the court, there is concomitant apprehension about it. Unfavourable comparisons are made between it and the JCPC, in spite of all the pellucid evidence in favour of the CCJ's institutional and professional integrity. Public uncertainty is exploited by certain political leaders and others for their own ends. There is a pervasive fear that the court will be vulnerable to political interference and manipulation.

Conclusion 3: No man is an island, even in the Caribbean.

In analysing the data encountered in the research, it is apparent that the about-face, sudden coolness, procrastination or overt hostility by political leaders and attorneys-at-law have seriously affected the fortunes of the CCJ. It is instructive in modern Caribbean society (as one imagines, elsewhere in the world) that simply being good is just not enough. The absence of a seal of approval from other, important sectors in the society severely undermines the court's credibility.

Conclusion 4: The CCJ's has not promoted itself convincingly enough.

The court and its parameters are simply not known, and where they are known, are not known well enough. Since its inauguration, the court has been operating normally, communicating with the public when there are sittings, seminars, important events and so on. This is not enough to disarm continuing scepticism. The CCJ has produced brochures, an inauguration commemoration volume, a Code of Ethics for judges, invited the media in and regularly conducts tours for visitors on request. This is insufficient. There has been a belief that people will "naturally' become used to the court and will "take to it". This has proven to be an erroneous assumption.

In the conclusions to its survey of "Jamaican Perceptions on Regional Integration", SALISES indicates that:

> A major finding was a failure of communication, advocacy, and public education on regional institutions and matters and the ways in which they have been contributing to general well-being throughout the Caribbean. The findings about how people learn what is happening in Jamaica and in the Caribbean need to be utilized in adopting an urgent and pervasive strategy to meet this severe deficiency. Satellite-based communication for television, radio and telephones may become the technological base for such a change leading to instant access to these services in all member states of the region.[118]

Since its inauguration, the court's Protocol and Information Division (CPID) has embarked on a Public Education and Information Programme, intended to make the CCJ better known to its public. This PEIP has been expressed mostly through printed matter – glossy, attractive informational brochures replete with photographs, Inauguration memorabilia, and

[118] Duncan et al, *op. cit.*, p.32

so on. A programme of visits by court delegations to the non-appellate territories began in 2006 with the 'jewel in the crown', Jamaica. The agenda during that visit included interfacing not only with the political and judicial directorate of that island, but also with labour, law school and other academic leaders and the man in the street in settings from ministerial offices to town meeting-halls. The obvious purpose of these actions is to convince sceptics to "buy in" to the CCJ, for whatever the altruism of the Court's ethos, there is still a significant hurdle of inspiring trust and confidence in the public to surmount. Margot Lindsay's dictum about effective PEIP is instructive:

> Effective public outreach strategies are purposeful, targeted, and ongoing. Purposeful in that they are directed at a specific issue; targeted, in that they are aimed at specific publics; and ongoing, in that they essentially represent continuing associations.[119]

Subscribing to Lindsay's cogent truism, the writer proposes the following:

Recommendation 1: A purposeful PEIP for the CCJ

The CPID's mission should now be, compulsorily, to construct a PEIP purposefully directed at the specific issue of the court's bona fides and credibility. Hitherto, information put out by the court about itself took certain elements as given. It is an international tribunal, its Bench is well-respected among their peers, it is in the business of dispensing justice and ergo is a serious, professional organisation. The research calls into question this assumption. The specific issue of *legitimising* the court in the Caribbean mind has not been addressed as such, and this must now be made to assume the great importance the research shows it to merit. The revamped PEIP must not only say and show what the court does, and who does it and so on. It must show what the court wants to get done, how it wants to do it and above all, *why* the court is the best instrument to get done what it proposes to do.

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[119] Margot Lindsay, "Improving courts' public outreach", in *Judicature*, Vol. 85, No. 4, Jan-Feb 2002, p. 173.

Proponents of the CCJ as the final court of appeal for the Caribbean frequently cite the fact that outside of the region, only the independent states of Kiribati and Tuvalu in the Pacific Ocean and Mauritius in the Indian Ocean still use the JCPC as their final appellate court.[120] The assumption is that the Caribbean should abandon the company of such (fellow) micro-states and accede to its own regional court of appeal. The legitimacy of the CCJ, however, is assumed to be accepted and understood by all its potential stakeholders. It clearly is not, when even officials who created the court and designed its method for recruitment of judges, for example, can afterward disown these processes because it is politically expedient. The court's re-imagined PEIP must focus on the specific issue of its legitimacy, as autonomous and self-sustaining, independent of the vagaries of other Caribbean leaders.

Recommendation 2: A targeted PEIP for the CCJ

Ordinary individuals and social leaders alike harbour strong misgivings about the court. Reaching out to targeted groups, it is advised, "permits development of a more direct line of communication with the public", allowing a court to communicate its refined message to its target audience exactly in the manner it needs to. So true. In May 2007, the Prime Minister of Trinidad & Tobago made familiar noises about that republic accessing the appellate jurisdiction of the CCJ. He expressed this within the framework of his conviction that the JCPC had been purposely blocking execution of criminals sentenced to death after due process of law. The President of the Court delivered an address shortly thereafter, at which he invited persons who wanted to know whether the CCJ was a 'hanging court' or not, to

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[120] Tuvalu, formerly the Ellice Islands, is a Polynesian island nation, with a gross land area of just 10 square miles. It is the third-least populated independent country in the world (pop. 12,000), the second-smallest member by population of the UN and in terms of physical land size, the fourth smallest country in the world.

ignore rumour and hearsay and themselves read what the Court's judges had had to say in *Joseph and Boyce*.[121] The following day, a newspaper headline blared: "CCJ no hanging court!" – proving by its almost wilful inaccuracy the complete validity of the President's advice.[122]

Naturally, the CCJ's preferred target group for its PEIP must be those elements of society which resist change in general and the advent of the court in particular. The court must expend much energy to convince all and sundry of its superior credentials and the rightfulness of its claims to the throne of Caribbean jurisprudence. Its outreach must be dual, because, while it will be important to target and seduce the doubters, it must also ensure not to lose its attractiveness to those who already support it but whose ardour may be in danger of cooling, as occurred with the Leader of the Opposition of Dominica. Along with these two groups, the court must also step up its outreach to that social area always bearing so much potential for revolution: schools. Students must compulsorily be part of the court's "specific publics". Caribbean students must come to know and accept as normal and logical the existence and authority of the CCJ, and it is the court itself that must do this.

The schools outreach component of the court's PEIP has hitherto confined itself to inviting and welcoming students to the court, and there, displaying the charms of the CCJ. It must now move into pro-active mode, taking its message to the schools across the region, making of course, proxy use of institutions and individuals in the various territories who support the CCJ and are willing to be agents in the spread of its message. Naturally, while one mentions here specifically schools because of their tremendous potential, there are other important social groupings whom the court would be well advised to target, among them and extremely

[121] Rt. Hon. Mr. Justice Michael de la Bastide, "Links between Business and the Caribbean Court of Justice", unpublished address to the Southern Chamber of Commerce, Port of Spain, 16 May 2007, p. 7.
[122] André Bagoo, "CCJ no hanging court", *Newsday*, Thursday 17 May 2007, pp. 1, 3.

importantly, trade unions and workers' cooperatives. The CSME proposes freedom of movement for some categories of workers across the region. The CCJ, with its exclusive and compulsory jurisdiction as arbiter of the Treaty of Chaguaramas in CSME matters, must *itself* ensure that its role is understood and appreciated.

Recommendation 3: An ongoing and continuous PEIP for the CCJ

The CCJ's revamped PEIP must be a continual and almost ubiquitous presence buttressing and vivifying the bona fides of this court. The writer appreciates that in modern society, where the media are so influential, their potential for spreading the court's message is unsurpassed. Their use, however, must be on the court's terms, in order to minimise the possibility of distortion, involuntary or otherwise. The polemic attendant upon the court, quieter at times than at others but nonetheless not abated since its inauguration, makes it necessary for the CCJ to educate the Caribbean public, for example, about the Appellate Court Performance Standards to which it subscribes. It must demonstrate empirically through, ideally, television programmes of its own design, how the Court is trying to fulfil its mandate and make good its obligation to the peoples of the Caribbean.

The court should take to heart Lindsay's assertion that public outreach which is clearly recognisable as such by the public has every likelihood of striking a responsive chord. Paraphrasing de Toqueville, she suggests:

> A democracy can survive with a poor Congress and/or a poor president […] but a democracy cannot survive with a judiciary in whom the people do not have confidence. […] Public education will help the public better understand the courts. Public outreach will gain the courts respect *for just creating the process* and it can begin to build that outside constituency the courts so badly need.[123]

[123] Lindsay, *op. cit.*, p. 174.

By its constancy, by its frequent and easily accessible provision of information on the nature, purpose and function of the court, the PEIP can hope to develop in the public perception the notion of the CCJ as a permanent, living part of their daily Caribbean existence. It is important to engage the media in this enterprise, for, as Lindsay acknowledges, most people derive their notions and information about the courts from the media.[124] This is particularly true of the Caribbean, where the electronic media especially enjoy a high degree of popularity and credibility. The media must be a partner in the CCJ's PEIP, but their different agenda from the Court's must be borne in mind. What the court does will naturally be used by the media to make news. The court must also ensure that it makes its own news, and that it is promulgated far and wide.

Kevin Esterling accurately notes that because the public gets the majority of its information about courts through the mass media, "courts can find themselves vulnerable to the representations these outsiders give to the public".[125] Citing a *Justice System Journal* article which had stated that fair, responsive and competent judgments by judges would attract respect and good will to the courts, Esterling notes that this take overlooks "the vulnerability of courts to media sensationalism, political campaigns against judges and issue-oriented attacks on the outcomes of judicial decisions", all of which can produce a very negative impact on public perception of the courts and even of individual judges.[126] The veracity of this analysis is borne out by the fate of the CCJ where the acumen, experience and integrity of its Bench are small defence against a rabble-rousing newspaper editorial or a malicious political statement made under the cover of parliamentary privilege.

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[124] *Ibid.*
[125] Kevin M. Esterling, "The cornerstone of judicial independence," in Judicature, 82, no. 3 (Nov-Dec 1998): 113
[126] *Ibid.*

Esterling further observes that judges (and courts by extension) are constrained by rules of ethics, for example, from responding to public criticism, even of the most outrageous type. Consequently, the public "often has no countervailing information to evaluate" the truth of media or political statements. In such circumstances, Esterling counsels that "organized public outreach efforts […] represent the best institutional response to issue-oriented attacks on judicial decisions, inaccurate or incomplete media reporting, and citizen disenchantment, frustration, or scepticism". Given the degree of repetition among persons polled and interviewed for this project of the need for greater "education", it is heartening to note that among the potential benefits to a court of public educational programmes, is their ability to help citizens to evaluate courts' role and heft criticism about judges.

There are video production companies offering one-stop production packages: they shoot, produce and market the video for the client all across the Caribbean, themselves taking responsibility for television and in some instances in the smaller territories, even cinema airing. This type of feature would ensure that the aspects of the court reaching the public would be those selected by the court itself, and intended to show off the CCJ under its most flattering light. This is not to say that video productions have not already been made of the court. They have, but have tended to focus on smaller, eclectic users, for example, IS specialists. The court must ensure that video productions under the new PEIP must have wider, universal appeal, and it must contract for such video productions to be constantly featured somewhere in the Caribbean at any given time.

A poster series, patterned on the excellent "Free to be Fair" poster series developed by the National Center for State Courts "to educate the public about the courts and to raise the

image of the justice system" would be an excellent venture in the Caribbean. There is no limit to the kind of text and subtext that such a series could bear. Such posters could be displayed in a multiplicity of places: parish halls, community centres, mayor's offices, attorneys' offices, public hoardings and display boards. They must be designed to conform to Lindsay's injunction that court promotional material should be "clear, brief, free of jargon and full of examples".[127] The poster series would complement the already existing documentation distributed by the court to visitors and users, but would have the great benefit and difference of going out in and among the societies, instead of waiting for their members to come calling in search of information.

Whether therefore on the television, the radio, in the newspapers or on walls and billboards, the image and message of the Caribbean Court of Justice must be ubiquitous, constant and unflagging. Ideally, the court could engage the services of a media consultant or other professional familiar with public education to provide guidelines, as Lindsay suggests, for the court to select the most relevant channels of communication for the target communities, and most importantly, to formulate ways of remaining in constant, ongoing contact with the segments of the society key for sensitising to the CCJ's message. One is not making these recommendations starry-eyed. The writer is well aware that designing a new, proactive PEIP strategy for the court will require time, effort, personnel and finance.

It is developments in this last aspect of the court's activities that makes the writer optimistic about the possibilities. On Friday 17 August 2007, the European Commission (EC) and the Caribbean Forum of ACP States (CARIFORUM) signed a financing agreement, according to

[127] Margot C Lindsay, *Demystifying Community Corrections: Educating the Public* (Washington), 2000

which the EC will make available to the CCJ the sum of 1.3 million euros to support the institutional capacity building of the CCJ. The support package will focus on four key areas crucial to the court's continued development. These areas are: strengthening the capacities of the Law Library, enhancing the ICT development, building the public awareness capacity of the CCJ and facilitating cooperation with the European Court of Justice. Of this third area, the court's media release on the occasion declared: "With an improved public awareness programme, and an improved communication strategy that reaches all peoples of the region, the CCJ will be known, thus encouraging the participation and effective representation of the citizens of the region".

Of course, the 1.3 million euros will have to be shared, but at any rate, this comes to complement the court's pre-existing budgetary allocations for PEIP. Further, though a court is essentially a non-profit organisation, still it can seek to sell DVDs of its video programmes to libraries, schools and other institutions, thus recouping at least part of its expenditure, and keeping such institutions as the EC and the Caribbean Development Bank happy. One does not wish to invite perception of this proposed PEIP as a money-making venture, but rather as one that encourages and engenders new strategies, provided they are conceived and implemented according to professionally-counselled parameters and regularly monitored for yawing and drifting to be sure the programme stays on course.

A great deal hangs on the type of Public Education and Information Programme that the court devises. The hard truth is that what it has done so far has not been effective, or more accurately, has not been as effective as one had presumed it would be. The latent goodwill toward the court revealed by the research for this paper means that there is fertile soil that

can produce greater trust and confidence in the Caribbean Court of Justice, provided that it is properly sowed. Let it not be underestimated: the task of the CCJ is historic, and it must be prepared to dedicate the time, effort, resources and hire the requisite personnel to market itself vigorously across the CARICOM region. A less dynamic, judicially aloof approach, would continue to leave the court exposed and vulnerable to the slings and arrows of reactionary and self-interested opponents.

What does this research imply for future study? Of course, the CCJ is a unique court in a unique position, faced with an unusual task: to convince people after it has come into existence that it is a good thing. There are, however, similarities between public perception of the court and of other judicial entities in the region. The oft-repeated perception of political interference in the administration of justice (even by a former attorney-general) makes the public very sceptical of judiciaries. Any decision that is even remotely unusual is habitually condemned as being corruptly arrived at. The lessons drawn as a result of the investigations carried out by this paper could demonstrate to court administrators across the region how they may usefully (1) gauge public perception of their operations (2) identify weaknesses in their message or image and (3) formulate strategies to build on existing strengths in order to better fulfil their mission of ensuring the integrity of the law, that "skeleton of social order".

COURTROOM 1 OF THE CARIBBEAN COURT OF JUSTICE

The Court heard its first matter in this courtroom at its new headquarters, on 20 June 2006.

APPENDIX I

Questions asked of the Honourable Patrick Manning, Prime Minister of Trinidad & Tobago, on 20 December 2007

(Based on the Prime Minister's recorded public support for Trinidad & Tobago acceding to the Appellate Jurisdiction of the Court)

- Has your opinion changed with regard to Trinidad & Tobago accessing the Appellate Jurisdiction of the Caribbean Court of Justice?

- Given the failure of the (then) PNP Government of Jamaica to bring that country under the Appellate Jurisdiction through a simple parliamentary majority vote, by what process do you envisage bringing Trinidad & Tobago under the CCJ's Appellate Jurisdiction?

- Would your government envisage any constitutional measure taken to bring Trinidad & Tobago under the CCJ's Appellate Jurisdiction as a stand-alone procedure, or would it include that in a package of other constitutional reform measures?

- Would you wish to see any modification in the regulations for the appointment of Judges to the CCJ?

- Why do you believe that no states other than Barbados and Guyana and Jamaica (unsuccessfully) have tried to accede to the Appellate Jurisdiction of the CCJ?

- Given your declared support for the Court, would your government use its regional influence to try to persuade other states to accede to the Appellate Jurisdiction of the CCJ?

APPENDIX II

Questions asked of:

Ms. Georgis Taylor-Alexander, Solicitor-General of St. Lucia, representing Senator the Honourable Dr. Nicholas Frederick, Attorney-General of St. Lucia, on 7 April 2008

The Honourable Steadroy Benjamin, the Honourable Earl Williams, Dr. the Honourable Kenny Anthony, Members of Parliament and Leaders of the Opposition, respectively, of Antigua & Barbuda, Dominica and St. Lucia, during the week of 7 to 11 April 2008.

Mr. Hugh Marshall, Mr. Michael E. Bruney and Mr. Andie George, respectively Presidents of the Bar Associations of Antigua & Barbuda, Dominica and St. Lucia, during the week of 7 to 11 April 2008.

- What are your sentiments with regard to **name of island** accessing the Appellate Jurisdiction of the Caribbean Court of Justice?

- Given the failure of the (then) PNP Government of Jamaica to bring that country under the Appellate Jurisdiction through a simple parliamentary majority vote, by what process do you envisage eventually bringing **name of island** under the CCJ's Appellate Jurisdiction?

- Are you satisfied with the method of appointment of judges to the CCJ? If not what modification would you wish to see any in the process? If you are satisfied, what is it about the method that satisfies you?

- Why do you believe that no states other than Barbados and Guyana and Jamaica (unsuccessfully) have tried to accede to the appellate jurisdiction of the CCJ?

- A view has been expressed that given the close level of integration among members of the OECS, that they should all accede to the appellate jurisdiction of the CCJ simultaneously. Are you of this view, or do you believe that the OECS states can join incrementally, each according to its state of readiness?

APPENDIX III

Questions asked of the Honourable Basdeo Panday, Member of Parliament and Leader of the Opposition of Trinidad & Tobago, on 15 February 2008

(Based on his recorded opposition to Trinidad & Tobago acceding to the Appellate Jurisdiction of the Court.)

- Has your opinion changed with regard to Trinidad & Tobago accessing the Appellate Jurisdiction of the Caribbean Court of Justice?

- Given that you are one of the signatories to the Agreement Establishing the Caribbean Court of Justice, how do you account for your change of heart?

- Under what circumstances would you support bringing Trinidad & Tobago under the CCJ's Appellate Jurisdiction?

- Would you wish to see any modification in the regulations for the appointment of Judges to the CCJ?

- What other specific changes would you wish to see in the structure and/or nature of the CCJ?

- Why do you believe that no states other than Barbados and Guyana and Jamaica (unsuccessfully) have tried to accede to the Appellate Jurisdiction of the CCJ?

- Given your declared opposition to the Court, would you use your influence among regional leaders to try to persuade other states to stay out of the Appellate Jurisdiction of the CCJ?

APPENDIX IV

Questions asked of Mr. John Leiba, President of the Bar Association of Jamaica, on 10 April 2008.

- What are your personal sentiments with regard to Jamaica accessing the Appellate Jurisdiction of the Caribbean Court of Justice?

- What is the general feeling of the Jamaica Bar as regards the island accessing the Appellate Jurisdiction of the Caribbean Court of Justice?

- Do you think that the failure of the last Government of Jamaica to bring the country under the Appellate Jurisdiction has dampened enthusiasm for the CCJ among attorneys across the Caribbean?

- Are you satisfied with input of Bar Associations re the method of appointment of judges to the CCJ? If not, what modification would you wish to see any in the process? If you are satisfied, what is it about the method that satisfies you?

- Why do you believe that no states other than Barbados and Guyana and Jamaica (unsuccessfully) have tried to accede to the appellate jurisdiction of the CCJ?

- What aspect of the Court's composition or functions would you recommend need to be highlighted to make it more attractive to the Caribbean public and their leaders?

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