

The CSME: Is this a rebirth of Federation?
Norman Manley Lecture
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It was your esteemed Queen's Counsel, Mr. Dennis Morrison, who first approached me to deliver this address. I have known him since we overlapped at Cave Hill during my first year there in 1972 and 1973. Mr. Morrison of course knows better than most that I rarely ever pass on an opportunity to visit wonderful Jamaica. And so, when he spoke to me by telephone about doing a lecture here, I was thrilled... that is until he casually mentioned that the theme was: "The CSME: Is this a rebirth of federation?" I have to tell you that the topic fazed me. Here am I, a CCJ Judge, Jamaica, federation? I protested that for such a theme I was not qualified. I seriously meant that. I said to him that I considered the theme a really interesting one but that it required, to do it justice, a political economist and not a person trained in the law. My friend at the other end of the line gave one of his delightfully benign chuckles. But Adrian, he said gently, the students say that they want You! I frowned. This was an ambush, I thought to myself, something our new Procedural Rules have utterly, completely stamped out. I calmed myself and figured, Dennis was either fibbing or worse, these students had evidently learned already one of the base tricks of advocacy i. e., that artful flattery of the judge can get you everywhere! I firmly persuaded Mr. Morrison to take back to those who had retained him my honest view that they would be better off hearing from one of the many distinguished economists or political experts that abound in the region. The next I heard was I had received a formal letter from the students informing me of my travel arrangements. So, here I am! Summoned by you to address you.

Well, I am not going to attempt to cover in detail a lot of ground that might otherwise be covered by someone schooled in political economy. My expertise is law and jurisprudence. With your permission, what I wish to do therefore is to take a broad look at what the CSME represents and briefly why it ought not to be equated with a federation. But more importantly I wish to look at the role of the CCJ in the context of the CSME and to raise some questions on how CSME treaty law might impact upon the domestic law of CARICOM countries.

A useful point of departure in any discourse on the CSME is an appreciation of ourselves as a Caribbean people. We occupy a region that embraces states on the continental mainlands of South and Central America as well as islands, small and not so small, scattered throughout the Caribbean Sea. These are states inhabited by indigenous native populations along with peoples whose ancestors have journeyed here from Africa, from Asia and from Europe. Despite this rich diversity of origins, we are undeniably one people, with our own unique way of life, forged in the crucible of a shared experience of slavery, indentureship, displacement, colonialism and relentless struggle to overcome the odds. In the course of that struggle we have justifiably earned the admiration of the international community in fields of endeavour ranging from international diplomacy and governance to literature, sports and music. Yes, we represent a discrete, authentic civilization, recognizable to ourselves and to others, worthy of the respect of all the nations of the world.

From an economic standpoint, the historical pattern of our development has been one of dependency; dependence on non-reciprocal preferences in metropolitan markets and dependence on external financial assistance. But the regime of preferences is rapidly collapsing about us in the wake of the tendency towards liberalization of international trade in goods and services. Traditional sources of assistance are drying up. The Caribbean does not currently assume for the USA the same level of geo-political importance it did during the Cold War. The European Union has undergone such considerable expansion that Caribbean concerns have been rendered of diminishing if not marginal significance. EU membership now stands at 25 and as recently noted by David Jessop, executive director of the Caribbean Council for Europe, many representatives of EU member states

“...point to figures that show that the GDP per capita of the Bahamas, Antigua, Trinidad & Tobago and St. Kitts, is not hugely dissimilar to that of Poland, Estonia, Lithuania, Latvia and Hungary. They speak about their own financial problems and their concerns about the EU budget and the fact that for the most part they are recipients of European funds to support their development... Up to 19 of the 25 EU member states have little if any interest in the [Caribbean] region..”¹

Of course we will have to continue vigorously engaging and challenging Europe on the basis that European states are largely responsible for our present under-development

¹ *The Caribbean needs to re-position itself with Europe – David Jessop, January 27th, 2006*

and so have historic and deeply moral obligations they must not be permitted to shirk. But the truth is that, as small fragile states, we have no alternative to integrating and developing our own Caribbean Community.

These are some of the realities that have impelled revision of the treaty of Chaguaramas in order to create a CSME, a single economic space where people, goods, services and capital can move freely and where greater self-reliance and a Caribbean identity can be fostered.

The SM&E is indispensable to helping CARICOM countries in achieving economies of scale and critical mass in many economic and non-economic activities; in facilitating extra-regional exports and efficient regional import substitution; in promoting functional cooperation and common services in a wide range of fields; in achieving greater bargaining power vis-à-vis the outside world, and in rationalising and harmonising our economic systems and social institutions. This is particularly important in light of the trend towards globalization and a proposed hemispheric trade association. As Prime Minister Arthur has said, the CSME will provide an effective means by which our individual economies can be successfully integrated into these larger economic systems on terms that will minimise the dislocations that ensue from such integration, while maximizing the potential benefit.

Does the CSME represent a rebirth of the federation? We certainly cannot have in mind the ill-conceived federation that lasted from 1958 to 1962. That experiment had a weak central government with limited powers. Each constituent territory functioned as an entirely separate economy. There was not even a customs union among the constituent territories. Complete freedom of movement within the federation was never implemented. The federation was a colony of Britain lacking local popular support and can be said to have been imposed upon territories desperately yearning for full sovereignty.

The level of integration inherent in the CSME is more meaningful than obtained under the federation, although the CSME does not seek to deprive any nation of its sovereignty and would operate as a unit of sovereign states, a condition insisted upon as long ago as the commencement of the original Treaty of Chaguaramas which gave rise to CARICOM.

The single market and economy is not an event. Neither the CARICOM Secretariat nor current CARICOM Heads of Government can throw a switch and ordain a single market and economy tomorrow. The CSME is a process, an arduous, effortful evolutionary process whose ultimate goal, as Prime Minister P.J. Patterson recently stated, is not even the final horizon for the region, but rather an effective platform on which to expand the trade and economic capacity of the Caribbean and promote meaningful integration and functional cooperation. It would be foolish, however, to underestimate the very serious challenges that lie ahead in taking this road, particularly so as it is a path being taken by states that are skittish about dilution of their sovereignty.

In its original jurisdiction, the Caribbean Court of Justice (CCJ) is the centre-piece of the CSME. The CCJ has been established as the sole tribunal tasked with interpreting and applying the treaty thereby ensuring uniformity and consistency. The compulsory and exclusive jurisdiction granted to the CCJ to hear and determine disputes concerning interpretation and application of the treaty derives not from domestic law but from the revised treaty of Chaguaramas. The Court's role is not one that should be taken for granted. The revised treaty is a long and complex document. It fills a whole book. Like every other elaborate legal instrument, it is bound to contain within it lacunae, grey areas, interstices which must be filled in order to operationalise the treaty and render it effective. Such gaps often loom large in importance when a critical dispute arises. Until such time as the treaty is amended to fill any such holes, can each state unilaterally close the gaps? Should the Jamaican parliament or the Jamaican government or the Jamaican judiciary take it upon itself unilaterally to determine how those gaps should be filled? That would certainly be a recipe for chaos because each state could then interpret the treaty in its own fashion invariably resulting in conflicting and inconsistent interpretation.

As with every intricate document that falls for interpretation, the CCJ will be called upon to approach its interpretive role in a manner that is purposive and in order to do this, an appreciation of the noble goals of the governments and people who agreed the treaty is invaluable. As President of the Court, Rt. Hon. Michael de la Bastide, recently stated,

“A treaty, like a Constitution, may be interpreted in a variety of ways, austere or liberally, literally or purposively, and the way in which it is interpreted will often determine whether the objectives of those

responsible for bringing the document into being and giving it legal force are achieved.”²

Although the parties to the revised treaty are states and so the rights and obligations contained in the treaty accrue in the first place to member states, not only the contracting states but also the nationals within each state will enjoy the benefits of the rights conferred. And so, the treaty has very sensibly accorded to nationals direct access to the CCJ in order to vindicate any rights which they might enjoy under the treaty. With the special leave of the Court, a person, whether natural or legal, will be allowed to appear as a party in proceedings before the court. Such persons will first have to cross a number of hurdles. Firstly, they must satisfy the Court that the state they intend to proceed against has deprived them of the full enjoyment of a benefit which, though conferred on their state, is such that it was really conferred for their own enjoyment and secondly, that their member state, though entitled to proceed against the delinquent state, has omitted or declined so to do, or has expressly agreed that the national should litigate instead. After such a person has overcome these hurdles, the Court may allow the person to launch the proceedings if it is in the interest of justice so to do.

There are also provisions in the Revised Treaty that allow individuals and companies to apply to intervene in proceedings before the Court, provided that the proposed intervener has a substantial interest of a legal nature which may be affected by a decision of the Court.

Time will tell precisely what demands will be made on the CCJ in its original jurisdiction as it seeks to interpret and apply the treaty. The European Court of Justice was at times regarded by some as a political court interfering in national sovereignty. But comparison between the role of the ECJ and the CCJ is inappropriate. The European Union has centralised political institutions such as the European Commission and the European Parliament so that what emerged very early in Europe was the "doctrine of primacy" – the notion that EU law took precedence over national law. CARICOM does not have similar organs of supranationality.

There are bound nevertheless to be a number of troublesome questions which will have to be resolved by the courts in due course. Take, for example, an area such as free

² Rt. Hon. Michael de la Bastide, *Address to 15th Annual Conference of the CAIC, 4th June, 2005*

movement of skills. This is an area that brings with it a host of attendant issues relating to the rights of dependants to reside and to work or to be schooled. What would be the scope of rights accorded for the direct enjoyment of nationals under the treaty? And to what extent will local courts accommodate those rights especially if there is a perception of some inconsistency between any of them on the one hand and rights or obligations found under domestic law on the other hand? In other words, will CSME law impact upon municipal rights and obligations? And if so, how might it? Would it be for the CCJ or for the municipal courts to resolve any such inconsistencies? CARICOM states have been enacting domestic legislation in compliance with their obligations under the revised treaty of Chaguaramas. If such legislation does not exactly mirror what has been agreed by the treaty, what, if any, recourse does an aggrieved citizen have? These are all interesting matters which might well arise for determination in due course. Naturally, it would not be appropriate for me even to begin contemplating how any of them should be resolved. I throw them out merely to make the point that there is a fertile field here for exploration.

In this regard, one of the very interesting things about the CCJ is that, apart from interpreting and applying the revised treaty, the Court has the capacity to be also the final domestic court of states parties to the treaty. It is potentially therefore in an excellent position, where this is possible, to reconcile any conflict between interpretation of a country's international obligations under the treaty and the manner in which that country gives effect to its own domestic law. This is a rare advantage that is not available to other regional and international trade associations. It would be extremely disappointing if states fail to make use of this advantage, quite apart of course from the many other reasons that can be given in support of a state's acceptance of the CCJ's appellate jurisdiction.

This brings me to the scepticism I have discerned among some about the CCJ in its appellate jurisdiction. There are well-meaning persons, many of them lawyers with a sincere devotion to the rule of law, who are rightly concerned about the integrity and quality of our appellate process. These persons genuinely, passionately, believe that it is important to retain the Privy Council as our final court of appeal. They note that successive regional governments have sometimes failed to distinguish themselves with the level of their support for their respective judiciaries and justice systems. They

observe that poor conditions of service for judicial officers have been a disincentive to quality candidates from the private Bar willing to accept judicial appointment. They hear judges lament the fact that generally speaking, funds are scarce for judicial officers to undergo appropriate judicial education and other programmes that could enhance judicial skills and effectiveness. They point to run-down court buildings as symptomatic of the lack of esteem in which the judiciary is held by the powers that be.

It seems to me that essentially, scepticism about the Court boils down to a lack of confidence, a lack of faith. Some people are just plain nervous about relinquishing appeals to a body that has served us from time immemorial and whose judges, it must be said, are invariably as technically competent as the best judges one can find anywhere. This lack of confidence has been fortified, among other things, by the inadequate funding accorded the justice sector regionally, by inefficiencies in regional justice systems and by the unsatisfactory conditions in which some of our judicial officers function. The Privy Council is seen as an independent, efficient, adequately funded court, removed from the regional body politic and therefore entirely impartial. To delink from it in favour of an untried, untested Caribbean court is simply too great a leap of faith, for some pessimists.

We cannot advance as a people if we have no faith in ourselves and in our ability to fashion and maintain appropriate institutions. This lack of faith is therefore regrettable. It is also in my view misplaced because after all, we do not lack the required human or material resources. We have in the past produced outstanding jurists acclaimed throughout the Commonwealth and indeed, there are several Caribbean judges (including the current President of the CCJ) who today are themselves members of the Judicial Committee of the Privy Council.

Certainly, so far as the CCJ is concerned, the region's governments have been given insufficient credit for the very careful arrangements that have been formulated to guarantee the institutional independence of the court and its judges. The final CCJ instruments were not imposed upon the region. Constructive criticism by regional Bar Associations and the Jamaica bar in particular, played a substantial role in the shaping of the novel, unique mechanisms that underpin the CCJ's institutional independence.

The CCJ sceptics demonstrate an unfortunate leap in logic by extrapolating to the CCJ weaknesses that they allege exist locally. I think that such reasoning is flawed. It does not at all follow that if (and I stress “if”) a particular local justice system has serious problems, that the CCJ will automatically inherit or must perforce exhibit the same weaknesses. The CCJ cannot properly be measured by the same yardstick as the local judiciary. Why? Because the judges of the CCJ enjoy a measure of institutional independence that in substance is superior to that currently enjoyed by any municipal judge in the region. The funding arrangements that support the CCJ are unparalleled and the envy of courts throughout the world. The CCJ’s Regional Judicial and Legal Services Commission as well as its Board of Trustees are independent bodies that provide a solid, unique buffer between the court and regional executive branches. The very regional character of the court ensures that no one state’s executive or legislative arm can attempt with impunity to interfere in the court’s operations. The method of selection of a CCJ judge is demonstrably merit-based and surpasses in its transparency anything that obtains elsewhere in the region. For all these reasons I am not sure of the basis on which it can properly be inferred that the Privy Council’s self-acknowledged imperviousness to local pressure is not a trait similarly shared by the judges of the CCJ.

It falls to final courts to fashion judicial policy; to bridge the gap between law and society; to illuminate by definitive pronouncement the grey areas in the law; to protect democratic rights and lay down in an authoritative manner where the line should be drawn in the continual contest between the interests of the individual and those of the collective. Such a role can only be fulfilled by judges who are near to and aware and sensitive of the values, traditions, customs and norms of the subjects of the litigation and their fellow citizens. My point is that a judge may be impartial, efficient and technically competent, but a municipal court judge cannot be fully effective if the judge has no personal insights into the broad values of the relevant society and does not understand, appreciate and personally experience the consequences of the judgments the judge delivers. One only has to read the puzzling reasoning of the majority of their Lordships in *Evon Smith v. The Queen*³ to underscore the point. It is simply unfair both to them and to us alike to expect that judges from another civilisation should continue in effect to make law for the people of our civilization⁴.

³ Privy Council Appeal No. 44 of 2005

⁴ There are several circumstances in which courts, especially final courts, must make law. The Hon Justice M H McHugh AC of the High Court of Australia has identified five such circumstances. Firstly, it may be that the relevant interests might be accommodated by

I came to Jamaica first in the 70s. The country was then in ferment. You visit a country for the first time and sometimes you instantly pick up a vibe, an aura about the way of life there that makes an indelible impression on your senses. I did then. I saw a proud people who looked deep into themselves, into their own roots, for their culture, their way of life, their sustenance, and in doing so there was exhibited a dynamism, a creativity, an energy that has held me enthralled down to this day.

If indeed, as posited by no less a person than William Demas, that towering icon of regional integration, the options before us in the region are either to become entirely marginalized, absorbed into one or more much bigger and more powerful country or group of countries, or alternatively to integrate and develop our own Caribbean Community, I believe that the CSME route offers an opportunity of enriching and expanding that side of us that looks to our own roots, that believes in ourselves. But let us be clear. It does not follow that just because the alternative route is unthinkable that the CSME road is necessarily smooth and easy. The CSME path poses challenges that will require several elements if its success is to be guaranteed. I list for your consideration three of these elements. Firstly, an unshakeable commitment to regionalism on the part of Caribbean states, which must be prepared to continue carrying out domestic social and economic transformation programmes to compliment those being pursued at the regional level. Secondly, a principled approach to regional issues on the part of alternative governments i. e., opposition parties who are often in a position unduly to retard the process or derail it altogether especially if they feel ignored. And thirdly, a Caribbean people that is kept abreast, fully informed and educated at every turn along the way on all aspects of the process and more importantly on just how the unfolding movement will benefit them. If we can get these things right then I dare say, questions as to whether the CSME does or does not represent a rebirth of federation may well become academic.

existing law, but the court on policy grounds may disagree with the consequences of this accommodation. Secondly, the relevant interests may have been historically accommodated by existing law, but political and ethical ideas locally and internationally might have changed. The cases of Hughes and Spence fall into this category. Thirdly, it is possible that interests similar to those involved in the case might be accommodated by existing principles but the court may feel that it is appropriate to extend the principles so as to cover the particular case at hand. Hedley Byrne v. Heller, the extension of the tort of negligence to mis-statements is a case in point. Fourthly, it might be necessary to fill gaps in the law because no similar interests are accommodated by the existing principles. And fifthly a court might find the need to rationalise existing principles with a view to bringing more unity and symmetry to the general law