



The Caribbean Court of Justice and the Development of Caribbean Jurisprudence: Theoretical and Practical Dimensions

The Honourable Mr Justice Winston
Anderson, Judge of the Caribbean Court

The Norman Manley Law School Distinguished Lecture

Norman Manley Law School
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The Norman Manley Law School is named after the famed politician and lawyer, the late Hon. Norman Washington Manley Q.C. The Norman Manley Law School opened its doors to its first students in September 1973. Like its sibling schools, the Hugh Wooding Law School in Trinidad and Tobago which was also established in 1973, and the Eugene Dupuch Law School - the third law school of the Council of Legal Education established in 1998 - it prepares students for admission to practice in the Commonwealth Caribbean territories. Ms. O. A. Carol Aina was appointed as Principal on November 1, 2012.

Distinguished Lecture

By

The Honourable Mr Justice Winston Anderson, Judge of the Caribbean Court of Justice,

at the

Norman Manley Law School

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This Lecture examines the relationship between the Caribbean Court of Justice and the development of Caribbean Jurisprudence. It interrogates the meaning to be attached to “Caribbean jurisprudence” and exCourt position it to contribute to that jurisprudence. Empirical plains how the structures and processes of the impact on Caribbean law, not only in relation to the three countries evidence is marshaled to show that the Court is having a profound that have accepted its appellate jurisdiction (i.e., Barbados, Guyana, and Belize) but in all other Caribbean countries, including Jamaica. The Lecture concludes by identifying some of the impediments that continue to hamper the Court in its quest to develop Caribbean jurisprudence and suggests possible solutions to these obstacles.

PRELUDE AND PROTOCOLS

Earlier today, the Chief Justice of Jamaica graciously facilitated the visit by three of my CCJ colleagues and me to the Tower Street Adult Correctional Facility, a.k.a., “General Penitentiary”.

Due to a prior engagement she was not able to accompany us. I can just see the headlines in tomorrow’s newspapers: “*Chief Justice sends four CCJ Judges to Prison!*”

We visited with both staff and guests at the Facility. I note that the reservations for many of these guests were made by members of this audience, so I should report that your charges appear to be usefully and suitably employed....

Hon. Ministers

Hon. Chief Justice of Belize

Hon. Judges of the High Court and the Court of Appeal of the Supreme Court of Jamaica

Attorneys-at-Law

Distinguished Ladies and Gentlemen

INTRODUCTION

It is a very great honor for me to have been invited to give this Distinguished Lecture and I am suitably humbled. Such an invitation was simply inconceivable during the rustic upbringing of my childhood years in a rural community in St. Ann; or in 1977, when I graduated from the St. Andrew Technical High School nestled between two of the most troubled inner city communities in greater Kingston. It would have remained beyond the reach of even a creative imagination in 1980, when I matriculated into the UWI Faculty of Law and walked from home in August Town to begin my legal studies on this Campus.

But with *belief*, all things are possible.

And today, we do need, desperately, to lay hold on the belief that we can continue and strengthen the tradition of a Caribbean jurisprudence which was the vision of the founding fathers of our Caribbean civilization. For make no mistake, in place of the illfated West Indian Federation, our founding fathers did, unanimously, prefer the more modest goal of regional integration, and they chartered a regional system of legal education and, ultimately, of law, to support it. The original tripartite Caribbean Free Trade Association (CARIFTA) signed at Dickenson Bay, Antigua, on December 15, 1965,¹ was expanded into a region-wide free trade area by a supplementary

¹ The Dickenson Bay Agreement Establishing The Caribbean Free Trade Association

agreement to the original CARIFTA accord, signed in Georgetown, Guyana, on March 15, 1968.² CARIFTA ripened into, and was replaced by, a full-fledged customs union and common market in the original Treaty of Chaguaramas of 1973; a treaty which also created the Caribbean Community (CARICOM).

It was therefore not by accident or happenstance that the Agreement Establishing the Council of Legal Education (CLE Agreement) was adopted in 1970. The Contracting Parties expressed themselves as:³

“SHARING a common determination to establish without delay a scheme for legal education and training that is suited to the needs of the Caribbean;

AWARE that the objectives of such a scheme of education and training should be to provide teaching in legal skills and techniques as well as to pay due regard to the impact of law as an instrument of orderly social and economic change; and

CONVINCED that such a scheme of education and training can best be achieved by:-

Firstly, a University course of academic training in a Faculty of Law designed to give not only a background of general legal principles and techniques but an appreciation of relevant social science subjects including Caribbean history and contemporary Caribbean affairs;

Secondly, a period of further institutional training directed towards the study of legal subjects, having a practical content and emphasis, and the acquisition of the skills and techniques required for the practice of law.”

² As stated on www.caricom.org

³ Preamble, Agreement Establishing the Council for Legal Education

Notable, among these aspirations, was the notion of a *single* Faculty of Law that would be the nursery for the comingling of the future members of the legal profession, schooled in legal skills and techniques in the crucible of the Caribbean experience, who would necessarily contribute to the architecture of a law and legal reasoning, common to our diverse countries.

Today, that idealized system of a regional legal education is under the most severe challenge of its 40-plus-year-old history. It is a challenge to maintain the regional content and characteristics of our legal education whilst accommodating the enormous demand for a legal education from our citizens from all walks of life, many of whom are financially unable to pursue that education beyond the shores of their native nation. It is a challenge to maintain that regional character even as we seek to integrate, each year, the hundreds of Caribbean nationals who have pursued their legal training outside the region but who wish to return to practice law and make their contribution inside the region.

No doubt these are severe problems, as the Deans of Law, Principals of the Law Schools, and the Chairman of the Council for Legal Education will readily attest. In some ways many of us wish that these challenging times had not come to us. But, in the wise words of Gandalf to Frodo Baggins,

*“So do all who live to see such times: But the times in which we live are not for us to decide... All we have to decide is what to do with the time that is given to us.”*⁴

And it is the case that our challenges are the other side of the coin on which is emblazoned, “opportunity”:- The opportunity to empower the Office of University Dean of Law to coordinate with the Campus Deans in the acceptance of common standards of matriculation, curriculum, and

⁴ Gandalf - Lord of the Rings - Fellowship of the Ring, Chap. 2 - J.R.R. Tolkien

examination for our students who will all, after all, be receiving the *UWI* Law Degree; The opportunity for Faculty and students to interact across the region electronically, supplemented by personal interaction at the academic or professional stages of their legal training, albeit for a more limited time than envisaged in the CLE Agreement of 1970; And, above the others, these times *seed* the opportunity to show ourselves worthy adversaries to the challenges that confront us.

Nowhere is that opportunity more evident than in the challenge, not just to maintain and enhance our regional system of legal education, but to go beyond this, and create a Caribbean jurisprudence; and this inevitably leads to the mention of the Caribbean Court of Justice.

Indeed, the conjoining of the “*Caribbean Court of Justice*” with “*Caribbean Jurisprudence*” in the title of this Distinguished Lecture should hardly come as a surprise to any student of Caribbean law. The creation of a Caribbean jurisprudence was the central *raison d’être* for the founding of the Caribbean Court of Justice in 2001, in the first place. As much is asserted in the opening lines of the Agreement Establishing the Court, where the Contracting Parties – that is, the Heads of Government of fourteen Caribbean nations – expressed themselves as, “*CONVINCED that the Caribbean Court of Justice ... will have a determinative role in the further development of Caribbean jurisprudence....*” The homepage of CCJ reinforces this mandate and, arguably, goes beyond it by positing that a primary activity of the Court is, “*Fostering the development of an indigenous Caribbean jurisprudence.*” And that elder Statesman of Caribbean integration and distinguished jurist, Sir Shridath Ramphal, recently asserted that, “creating a regional jurisprudence is inseparable from the issue of the Caribbean Court of Justice.”⁵ Stated most

⁵ “Creating A Regional Jurisprudence: The Inaugural Distinguished Jurist Lecture Series, Trinidad and Tobago Judicial Education Institute, 29 September, 2011, at p. 10.

simply, the process of constructing a Caribbean jurisprudence is at the very core of the existence and activity of the CCJ.

OUTLINE

Now, notwithstanding this fairly lengthy preamble, I intend to be suitably brief, or, as perhaps better put, to be as brief as possible. Or there might yet be the best way of expressing my intentions, particularly for the male members of the audience who tend to think in pictures: like the latest female fashion in clothing, I intend to be long enough to cover the subject-matter, but still short enough to be interesting.

For the sake of clarity, I have sought to organize the lecture on the CCJ and the development of Caribbean jurisprudence into three broad parts. First, I will discuss how the institutions of the Court are structured in such a way as to give it great *potential* to foster Caribbean jurisprudence. For reasons to which I will come to later, I do not propose to spend much time on these issues, but I do want to emphasize how the Court is organized and staffed so as to position it to purposefully prosecute its mandate. The second part of the lecture will address the *actual* contribution that the CCJ has *already* made to the body of Caribbean jurisprudence. The Court is no longer a theory to be hypothesized but a reality that is being lived. And there is tangible evidence that the influence of the Court is already being felt throughout the region and far beyond it. Third and finally, I will end by mentioning some factors that could be seen as *impediments* to the Court's vision and mission. Rather than permanent obstacles that doom the success of the Court, I present these as "areas for improvement" that require the efforts of various parties throughout the region.

First, however, a discourse on the CCJ and Caribbean jurisprudence naturally gives rise to the question: what *is* Caribbean jurisprudence?

DEFINING CARIBBEAN JURISPRUDENCE

The concept of “Caribbean jurisprudence” far less an “*indigenous*” Caribbean jurisprudence is nowhere defined in the constituent treaties establishing the Court⁶ or, indeed, the Caribbean Community;⁷ nor, as far as I can tell, has the terrain covered by the concept been authoritatively mapped in the legal reflections of those who write on the subject. I sincerely doubt that this omission, or lack of consensus, is the consequence of oversight or academic rivalry. There is a real sense in which it becomes difficult or next to impossible to identify the substantive elements of an *indigenous* jurisprudence in our increasingly globalized world based on *universal norms* of fundamental human rights.⁸

Caribbean jurisdictions stand in the tradition of the Common Law inherited from Imperial England but there are obvious dangers in any suggestion that the creation of an *indigenous* jurisprudence requires freedom from the colonial shackles of English law and the development of legal concepts uniquely reflective of contemporary Caribbean social reality. Although the Common Law was birthed in England, midwifed by Magna Carta, it has been bred in what is called today, “the modern Commonwealth” i.e., the Commonwealth beyond Empire. The genius of the Common Law has seamlessly accommodated the seeming contradiction of revolutionary political independence of the Commonwealth nations alongside an unbroken continuity and evolutionary

⁶ The Agreement establishing the Caribbean Court of Justice – 14th February, 2001

⁷ The Treaty of Chaguaramas (4th July, 1973); The Revised Treaty of Chaguaramas (2001)

⁸ U.N. Declaration of Human Rights

progress of public and private law within the newly emancipated states. Small wonder then, that the CCJ has, in the same judicial paragraph recognizing its obligation to promote the development of a Caribbean jurisprudence, also accepted that legal precedents made before its founding continue to be binding on Caribbean states unless and until they are overruled by the CCJ.⁹

But there is a deeper reason still that cautions discipline in the meaning to be attributed to an “*indigenous*” Caribbean jurisprudence. To a large extent, law is concerned with the regulation of human nature, and human nature is, in its *essence*, common from place to place. In the words of the great American psychiatrist, Harry Sullivan, “We are all much more simply human than otherwise”.¹⁰ In dealing with these common features of human nature, therefore, it would be hardly surprising if the law, properly applied, produces the same solution everywhere.

It is, perhaps, for this reason, that there are many modern states whose present day law is based – as far as the *conceptual* structure of that law is concerned – on the law of ancient Rome. The system of law in Scotland, Quebec, and France, today, has a basic conceptual structure which was taken from the law whose development culminated in the Fifth Century after Christ, during the reign of the Emperor Justinian. This Roman law still affects Caribbean law today. The great Scottish case of *Donoghue v Stephenson*¹¹ is basic law for Caribbean law students; even a law student who fails handsomely in all of his law papers will know the case of the snail in the bottle of ginger ale. This was a case decided on the law of Scotland, but the interesting point is that the action was based on the development of the *Lex Aquila*, and the *Lex Aquila* was a Roman Statute which was enacted in the Third Century Before Christ.

⁹ Attorney-General v Boyce (2006) 69 WIR 104 (paragraph)18

¹⁰ Harry Stack Sullivan (1892 -1949)

¹¹ [1932] UKHL 100 ; [1932] A.C. 562

The quest for indigenous law must, then, recognize that law is, in some respects, a special field of human endeavor. Above all other disciplines the law allows society to treat dispassionately with the nature of the human condition without losing the thread of continuity that integrates us over time and imparts a sense of our wholeness in history.¹² Whether in the field of family law, where Caribbean societies have fairly unique features; or in modern constitutional law bedeviled with the conundrum of the ‘savings law clause’; or in the intercourse between international and Caribbean law - the challenge is surely the same here as it would be in any society: it is the challenge of ensuring common and coherent justice. And that justice is determined, not by the accident of geography and sociology, but by the dispassionate application of the philosophy of law. It is the calling to this High Office that makes of jurists a special and preferred tribe among the peoples of the Earth.

But if the fashioning of a Caribbean jurisprudence is not to be brokered on discontinuity with our colonial past, or even our peculiar social realities, what then remains? I believe, in common with others,¹³ that what remains is the single most compelling argument for a Caribbean Court of Justice to foster the development of a Caribbean jurisprudence: the argument that proceeds from *sovereignty*; albeit a notion of sovereignty that is broader than that presented by Kelsen or Austin. It is an argument, philosophical in its ontology, for the taking into our own hands of the responsibility for defining, shaping, writing, and ultimately re-writing the forensic relationships between Caribbean citizens and their states, and between members of the Caribbean citizenry.¹⁴

¹² Paraphrasing Laurence Tribe, “Ways Not To Think about Plastic Trees,” Yale Law Journal, 83/7 (1974) 1315-46.

¹³ Such as Mr Justice Hyatali of Trinidad and Tobago; Former Chief Justice of Barbados, Sir David Simmons; and Professor Simeon McIntosh: *Caribbean Constitutional Reform: Rethinking the West Indian Polity* (2002) at p. 265 et seq.

¹⁴ This approach is necessarily at odds with the Austin’s equation of sovereignty with the State and is premised on the notion that commonality of ancestries, history, geography, culture shared by the inhabitants of the countries of the Caribbean. As Professor McIntosh as said: “[Caribbean philosophy of law] is predicated on the notion of our sovereignty as a people of a particular geographic region, sharing a similitude of circumstances that, without doing violence to the idea of the rich cultural diversities of our people, still allows us to speak of our shared historical, social and political experiences, a common consciousness that binds us together into a single whole...” *Caribbean Constitutional Reform* (supra) at pp. 269-270.

The fostering of a Caribbean jurisprudence might not be more than this: the exercise of the right to self-definition; but it is assuredly no less. For we err, and we err greatly, if we underestimate the power bestowed upon the custodians of adjudication. Alluding to the fact that the interpretation of a Constitution and, by extension, the interpretation of a country's laws more generally, is an unending dialectic in which citizens continually seek to give expression to their collective identity, our own Professor McIntosh identifies adjudication as one of the principal modalities of collective decision making in a democratic society. As he puts it:

*“...it is in adjudication that a court apprehends the basic terms of the image of the people's political identity in order to make it real. The instrument of the Court's expression is the judicial opinion, itself an authoritative political text, which supplements the constitution”.*¹⁵

These words echo those of the great American jurist of the last century, Oliver Wendell Holmes. Impatient with the weight of the cliché that describes law as “the government of the living by the dead”, Holmes asserted that,

“The present has a right to govern itself so far as it can; and it ought always to be remembered that historic continuity with the past is not a duty, it is only a necessity.”

¹⁵ *Caribbean Constitutional Reform* (supra) at p. 273.

Thus, the Caribbean Court of Justice may be said to have been instituted to ensure that we do not make a virtue of necessity; that as ultimate custodian of Caribbean adjudication there is balance between the basic need of society for stability and the imperative of living jurisprudential change. That, in the words of the CLE Agreement of 1970: we pay due regard to, “the impact of law as an instrument of orderly social and economic change”. In sum, therefore, the CCJ fosters Caribbean jurisprudence by the exercise of its privileged position of the being the ultimate interpreter and change agent of Caribbean law.

POTENTIAL FOR CREATING CARIBBEAN JURISPRUDENCE

I believe the CCJ is well equipped to perform the task of interpreter of our countries’ laws and constitutions. The architects of the Court’s design created an institution of governance of our own making, quite unlike the other major institutions of governance, such as our parliaments, which were inherited from our colonial past. There is no need, in my view, to tarry on the unique foundational structures of the Court, that go much further than those underpinning any other Court in the region, in securing independence from political influence, far less control.

If by now, some of us have not been sufficiently impressed with the product of our own ingenuity, then, perhaps, solace may be found in fact that the Court was created in a manner that has won the respect and admiration of the common law world. The unique processes that we have created for selecting our judges and for financing the Court have been commended by practitioners, scholars, and institutions beyond these shores.¹⁶ In fact, the British Academy funded a research

¹⁶ See, for example, Ruth MacKenzie, Kate Malleson, Penny Martin, and Philippe Sands, *Selecting International Judges: Principles, Process and Politics*, (Oxford University Press, 2010), at p. 148.

project in 2008 conducted by Kate Malleson which found that the selection process of Judges of the CCJ should be used as an international model for identifying judicial candidates.¹⁷

Let us also take comfort in two oft-overlooked qualities of the CCJ that make it fundamentally and indivisibly *regional*, in a way that practically guarantees that what comes out of the Court will be, indeed, *must be*, truly Caribbean in nature. Far from being a courtroom operating on its own, the CCJ also includes a substantial infrastructure and support system that has a capillary reach into the entire region. The Trust Fund; the Regional and Judicial Legal Services Commission; the sub-registries within each CARICOM country; the various Committees within the Court, such as the Internship Committee, the International Law Mooting Competition Committee, and the Website Committee; and affiliated associations, like the Caribbean Association of Judicial Officers (CAJO), the Caribbean Academy for Law and Court Administration (CALCA), and the Caribbean Association of Court Technology Users (CACTUS), by the very nature of their mere existence, underscore the “regional-ness” of the jurisprudence emanating from the Court.

Take, for instance, the Court’s Internship Committee, which is dedicated to attracting young legal talent from throughout the region and providing them with a regional perspective of the CCJ; or the International Mooting Committee, which provides an exciting and competitive opportunity to the regions’ Law Faculties and Law Schools; or the Website Committee, that creates a user-friendly information hub highlighting current and trending developments in the Court. These Committees – along with others I have not mentioned here - all headed by Judges, work in unison

¹⁷ Kate Malleson, “Promoting Judicial Independence in the International Courts: Lessons from the Caribbean”, (July 2009) Volume 58 (3) *International Comparative Law Quarterly*, 671, esp. at p. 678.

to build a platform upon which a truly regional Caribbean jurisprudence can be developed. They also contribute to the dialectic discourse on the nature and meaning of law applicable in the region.

To highlight another organizational component of the Court, I draw your attention to the affiliated associations of the Court. CAJO, CALCA, and CACTUS each hosts conferences and meetings across the region bringing together Caribbean legal practitioners, court personnel, and judiciary in what might be described as moments of

‘collective effervescence’ of Caribbean bonding. At the recent CALCA conference hosted in Trinidad and Tobago in September 2012, attendees came from Trinidad, Barbados, St. Lucia, Curacao, Jamaica, Suriname, Guyana, and other further-flung countries. While the conference itself focused on international trade law, lunchtime conversations amongst speakers and attendees often revolved around profoundly Caribbean issues: CARICOM questions, CSME concerns, regional trade and economics, and, of course, our delicious Caribbean food. At the upcoming CAJO conference to be hosted in Barbados in September 2013, we expect attendance to be similarly widely representative of the Caribbean and beyond, and we hope and expect that fraternal Caribbean conversations and friendships will continue. By bringing the region together through such conferences, these associations, as organizational components of the CCJ, help to build and maintain a regional framework upon which a Caribbean jurisprudence can be structured.

A final aspect of the CCJ’s structure – or, rather, its structural position – worthy of mention is its position at the apex of the appellate ladder. It is in this envisaged role, as the highest court of appeal for each CARICOM state, that the CCJ has great potential to foster a jurisprudence that is reflective of Caribbean issues. I say ‘envisaged’ because this role of the Court is largely unrealized – only three states have acceded to the Court’s appellate jurisdiction, but I will say more on that later. What I am interested in here, is the mandate of the Court, the same as that of

any final appellate court, in deciding disputes that raise a significant legal point or matter of general and public importance.

Courts of this stature are usually very careful in selecting particular cases for review – or ‘granting certiorari’ or simply ‘granting cert’ – as the process is known in the United States Supreme Court. That Court currently grants cert to about **1-percent** of the cases for which a petition for writ of certiorari had been filed. The US Supreme Court, in other words, is extremely selective about the cases and issues it will review and, thus, can address what it considers to be the most important public interest matters of the day. Its decisions, therefore, tend to have substantial import and impact: from the seminal *Marbury v Madison*¹⁸ in 1803 (albeit brought in the original jurisdiction); to the recent *Bush v Gore*¹⁹ in 2000; and *The Patient Protection and Affordable Care Act* (or ‘Obamacare’) in 2012.²⁰

But, the US Supreme Court did not always operate this way. Indeed, when the Supreme Court first started, it – much like the CCJ today – heard every appeal that came before it, some of which might have touched on matters of public interest and many others that were of little general significance. As time passed and the country grew and the caseload increased the Supreme Court was finally able to dedicate its energy and intellect toward matters of public interest and thereby to contribute profoundly to the building of an American jurisprudence. This is the potential I see in the CCJ as a final court of appeal.

¹⁸ 5 U.S. 137 (1803).

¹⁹ 531 U.S. 98 (2000).

²⁰ The Patient Protection and Affordable Care Act (PPACA) - Pub.L. 111–148.

As I mentioned earlier, though, it is not only the Court's organization and architecture; or its position on the appellate ladder that provide it with great potential to foster a Caribbean jurisprudence. There is also another aspect about which I would like to say a few words: the composition of the CCJ judiciary. The Court's panel of judges is similarly regional; not only (and not always) in the nationality of the judges, but particularly and especially in their backgrounds, experiences, and commitments they bring to the CCJ Bench. They have trained within the region and without. They have practiced internationally and regionally. And, most importantly, they have all – without exception - lived the Caribbean experience and have served the Caribbean people in various capacities for significant portions of their lives.

To take just one example, the President of the Court, the Right Honourable Sir Dennis Byron, is the quintessential Caribbean Man. Born in St. Kitts, his legal practice took him throughout the Leeward Islands, with Chambers in St. Kitts, Nevis, and Anguilla. As a High Court Judge and later as Chief Justice at the Eastern Caribbean Supreme Court, Sir Dennis continued to serve the broader Caribbean in an expanded capacity. Later appointments took him to Africa, where he served a number of roles, most notably and most recently as the President of the United Nations International Criminal Tribunal for Rwanda. But, as of 2011, he returned to the Caribbean to assume the office of the President of the Caribbean Court of Justice. As he himself had occasion to remark only last week here in Kingston, he is a readily recognizable figure throughout the length and breadth of the region, making bad behavior on his part, even if it were an ambition, impossible of attainment.

The other Members of the Bench are Mr Justice Rolston Nelson, a citizen of Trinidad and Tobago; Mr. Justice Adrian Saunders a native of St. Vincent; Mme Justice Désirée Bernard a citizen of Guyana; Mr. Justice Jacob Wit, born in the Netherlands, but with decades of judicial service in

the Caribbean parishes of Netherlands Antilles and Aruba; and Mr Justice David Hayton, a citizen of the United Kingdom who served in the judiciary of The Bahamas for nearly two decades prior to his elevation to the CCJ. And as the Chairman indicated, the Bench also has a Jamaican presence. In short, for the sitting panel of judges at the CCJ, the Caribbean is home and the pronouncements of that panel, therefore, necessarily carries an authenticity which a Court based in London can never have, no matter how long that Court may serve as the final Court of Appeal for CARICOM countries.

It should be said that it is not only the CCJ bench that shares this background and potential. Distinguished Caribbean jurists crisscross the region, making their own unique contributions in various Caribbean countries. What they say, what they do, what they argue, and what they decide similarly contribute to the potential to create the ethos of Caribbean law. The make-up of the Court of Appeal of Belize provides an excellent example here; its judges come from all parts of the Caribbean, and it is only now, for the first time, headed by a Belizean national. The previous president was from Barbados and the one before that from Jamaica. Other members of the Belizean Court of Appeal have come from Trinidad and Tobago, Guyana, and Jamaica and have brought with them an expansive knowledge of the Caribbean. It is this type of Caribbean interconnectivity, of which the Court of Appeal of Belize is only one example; that is the precursor and template for the fostering a rich, nuanced, thoughtful, and truly Caribbean jurisprudence.

ACTUAL CONTRIBUTION TO CARIBBEAN JURISPRUDENCE

I would like to move on now from the CCJ's *potential* to contribute to a Caribbean jurisprudence to a conversation about the Court's *actual* contributions to Caribbean jurisprudence. As I intimated

at the outset, the Court is no longer a dream devoutly to be wished but a reality being lived and which has tangible and measurable effects.

As with any new Court, it always takes time for litigants to bring cases before it. Compared to other international tribunals, however, the CCJ has been doing well. During its first ten years, the European Court of Human Rights, which then drew from a catchment area of eighteen (18) states, only heard ten (10) cases. By comparison, in the under eight (8) years of the existence of the CCJ, (drawing from a catchment area of twelve (12) states in the original jurisdiction, only three (3) of which have accepted the appellate jurisdiction), a total of one hundred and seventeen (117) cases have been filed. Of these, eight (8) were filed in the original jurisdiction and one hundred and nine (109) were filed in the appellate jurisdiction. Of the 109 in the appellate jurisdiction: fifty-two (52) were applications for leave to appeal; fifty-one (51) of which have been determined with one (1) pending. Fifty-seven (57) appeals have been heard, forty-eight (48) determined, three (3) currently being heard, and there are five (5) judgments pending. There was one (1) case where leave was granted but the case was never filed. A breakdown by nationality shows: thirty-five (35) cases from Barbados; fifty-five (55) from Guyana; and nineteen (19) from Belize.

These numbers represent a spectacular increase in the use of the final court and hence in the access to justice. Take, for example, the case of Barbados. As just indicated, in the under ten (10) years since Barbados joined the appellate jurisdiction of the CCJ, there have been thirty-five (35) appeals. Compare this with the thirteen (13) appeals from Barbados to the Privy Council in the last ten (10) years before Barbados abolished appeals to the Privy Council. In other words, there has been an increase of **269.23%** in the number of citizens gaining the benefit of a second or final appeal. Ordinary folk have additional scope and opportunity to be heard and to obtain justice. An interesting trend is the fact that the number of civil cases filed, exceeds the combined total of

criminal and constitutional cases. In other words, there are more cases filed in which the State is not a party than cases in which the State is. This is an important fact and change from the pattern in the countries which do not have access to the CCJ.

As regards the original jurisdiction 8 applications have been made for leave to commence proceedings - 7 of these have been determined, and 1 is listed. 5 substantive actions have been pursued: 4 have been determined, and 1 is currently being heard. In terms of breakdown by nationality: 5 of the 8 cases were filed by Trinidad and Tobago nationals; and 1 each by nationals of Barbados, Suriname, and Jamaica.

In 2010, at the Fifth Anniversary of the CCJ's inauguration, the former President of the Court, the Right Honourable Mr. Justice Michael de la Bastide, gave a speech in which he discussed what he viewed as the CCJ's contribution to Caribbean jurisprudence, up to that point.²¹ Regarding the Court's original jurisdiction, the former President commented that in the series of cases brought by Trinidad Cement Limited, the primary question to be determined by the Court in considering the applications for leave was, quoting de la Bastide:

„Who can sue whom and for what?“ In other words,” the President continued, “the Court had to start pretty well from scratch in determining the limits of its original jurisdiction.”

The Court has also addressed the question more directly of who can be sued in the Court's original jurisdiction in the case *Johnson v CARICAD*.²² The Court's answered: only CARICOM or

²¹ Five years of Caribbean Court of Justice's contribution to Caribbean jurisprudence – M.A de la Bastide, Former President of the Caribbean Court of Justice on the occasion of the colloquium to mark the 5th anniversary of the CCJ, Hyatt Regency Trinidad, April 16th 2010.

²² 2011 CCJ 1; 79 WIR 448.

member-states can be sued. And, through these early cases, and others such as *Hummingbird v Suriname*²³ the Court has also defined the *types* of damages that may be requested and awarded, as well as the mechanisms of enforcement available to the Court and expected of Community members. Whatever the actual outcome in the *Myrie* case, presently before the Court, it seems agreed on all sides that there will be an authoritative decision concerning the nature and extent of the rights of Caribbean nationals, if any, to move freely within the Member States of CARICOM.

As for the Court's decisions in its appellate jurisdiction, there have been more of them and their contributions to Caribbean jurisprudence more varied. I shall point out only a handful of these contributions here (and even then only briefly), this time using a speech given by the current President of the Court as a starting point. Sir Dennis identified six appellate cases that, in his words, "point out the way in which ordinary citizens have benefited from the development of Caribbean jurisprudence".

The first of these cases is *Florencio Marin and Jose Cove v The Attorney General of Belize*.²⁴ We were asked to address a question with no legal precedence across the Caribbean or elsewhere, an occurrence that is certainly rare these days and a quality that gave this case instant importance within the Caribbean and across the world. The question was this: could the current Attorney-General of Belize, acting on behalf of the State, bring a *civil* action against two former Ministers of Government in the tort of misfeasance for acts committed whilst they were in public office? We answered „yes“, albeit by the narrowest of majority of 3-2, with the two most senior Judges in the minority.

²³ 78 WIR 51; LRC 2011 (3) 731

²⁴ 76 WIR 328.

The second case was: *Ramkishun v Fung-Kee-Fung and Others*.²⁵ Here the Court clarified that Roman Dutch land law in Guyana did *not* recognize an “equitable interest in land” as understood in English law, but nonetheless the Court gave effect to broader equitable principles at least to the extent of binding the estate of the vendor to a contract made by the vendor before his death in respect of his land. *Persaud Ltd. v. Andrew James Investments Ltd. and others*,²⁶ allowed the Court to clarify another aspect of Guyana’s land law – specifically, that the State *could* acquire land by adverse possession; a precedent obviously of significant public interest, not just for Guyana, but for the broader Caribbean region.

The President rounded out his discussion by examination of three appellate cases from Barbados: *Attorney General and Others v Joseph and Boyce*,²⁷ *Gibson v the Attorney General*²⁸ and *Romeo Da Costa Hall v The Queen*.²⁹ Each of these cases provided an opportunity for the Court to make notable precedents. In *Joseph and Boyce*, perhaps the most widely known CCJ decision thus far, the Court’s lead judgment, in basing the effect of the Inter-American Convention on Human Rights within Barbadian law upon the “legitimate expectation” of the applicants, disagreed with two decisions previously issued by the Privy Council. The Court thereby redefined the nature of the interaction between, on the one hand, international treaties and foreign dispute forums, and on the one hand, not just Barbadian law, but based on evidence I shall come to presently, on Commonwealth Caribbean States generally. In *Gibson*, the Court held that the gross disparity between the resource capacity of the State as prosecutor and the indigent defendant was such that

²⁵ 76 WIR 328.

²⁶ [2008] CCJ 5 (AJ)

²⁷ (2006) 69 WIR 104

²⁸ 76 WIR 137; LRC [2010]5 486

²⁹ 77 WIR 66; LRC 2011 (3) 731

the concept of “equality of arms” necessitated that the Barbadian Constitution be construed to require that the State provide the defendant with the resources to procure the requisite medical expert so as to ensure fairness in the criminal proceedings. And in *Romeo Da Costa Hall*, whose title hints at a romanticism not be looked for in the facts, the Court offered clear guidelines as to the exercise of judicial discretion when granting credit to an accused for time already served: essentially time spend on remand should be deducted from any sentence for a term of years.

In short, in each of these six cases, as well as in other appellate cases not discussed here, the Court has already taken tangible and quantifiable steps forward in fostering a jurisprudence that influences the region.

And it is this “region-wide nature” of the jurisprudence to which I alluded a moment ago when I spoke of the evidence of reach of the CCJ beyond the country from which the appeal actually emanates. To shed some light on this issue, I have attempted to compile a complete-as-possible database of judgments from throughout the region and beyond that have cited decisions by the CCJ. I present this material with the caveat that I cannot guarantee its comprehensiveness; simply, there is no way to know where, how, and when each country around the world publishes its judgments. But, I do not think that such a guarantee is necessary to make my point, which is that the CCJ does have a real and measurable impact on the jurisprudence of the Caribbean and beyond. I will provide some numbers and examples to assist in making this argument.

In total, we have been able to identify *thirty-two* (32) cases that have cited CCJ decisions. As might be expected, those countries that have acceded to the CCJ’s appellate jurisdiction – Barbados, Guyana, and Belize – cite CCJ judgments most frequently. Nine (9) of the thirty-two cases with CCJ citations come from Barbados, five (5) from Belize, and three (3) from Guyana. Interestingly, they are not just citing appellate cases that originated in their own countries.

Belizean courts, for instance, cite CCJ cases that came from both Barbados and Guyana. What is more, the Belizean courts cite these decisions in judgments, not just in the application of Belize land law, or the duties of vendors and purchasers to each other; but also in the interpretation of the Belize Constitution.

Indeed, the impact of CCJ decisions goes well beyond that of the three member-states that have acceded to Court's appellate jurisdiction. At least seven (7) judgments from Trinidad & Tobago courts and four (4) from Jamaican courts cite CCJ decisions of appeals that came from either Barbados or Guyana. And at least one (1) decision each from Antigua & Barbuda, The Bahamas, St. Kitts & Nevis, Grenada and Singapore cites a CCJ appellate decision. If these courts are citing CCJ opinions, it suggests to me – and, indeed, some of the written decisions say as much – that the attorneys before these courts are utilizing these decisions in their arguments; thinking about these judgments in their day-to-day practice of law; and, critical to the building of a Caribbean jurisprudence, absorbing these cases and the principles they espouse into their repertoires of legal reasoning and problem solving.

I think it is important to point out, too, that the citations made to CCJ judgments are not merely made in passing; though some, admittedly, are only quick mentions. Rather, they often involve thorough discussion, substantial quotation, and commendations. I will take a couple of examples from the Jamaican decisions that have cited CCJ judgments. In his 2008 decision in *Evanscourt Estate Company Limited v National Commercial Bank Jamaica Limited*, Justice Smith from the Court of Appeal of Jamaica cited favorably the Caribbean Court of Justice's decision in *Barbados Rediffusion Service Ltd.*, a case from 2006 arising out of Barbados. Justice Smith quoted extensively the CCJ's standard for the exercise of judicial discretion in making a costs sanction order where the consequence of failure to comply would be the striking out of the claim or defense.

He then utilized this standard in deciding the primary issue before him. And, Justice Sykes from the Supreme Court of Jamaica, though providing less of a discussion, also cites favorably *Barbados Rediffusion Service Ltd.*, using it to bolster his ruling in *Reid and Abdalla v Pinchas* in 2009.

In *Wyllie et al v West et al.* (2008), Justice Morrison from the Court of Appeal of Jamaica discusses a different CCJ appellate case, again using it as the guiding principle in deciding the case before him. In fact, it was the Respondent in *Wyllie* who included the CCJ's judgment from *Watson v Fernandez* as part of his own argument, and the Supreme Court justice adopted this argument, specifically citing the CCJ's decision. Justice Morrison followed suit, writing that the trial court judge,

“cited with approval the recent observation of the Caribbean Court of Justice in Watson v Fernandez that „Justice is not served by depriving parties of the ability to have their cases decided on the merits because of a purely technical procedural breach committed by their attorneys.“ I entirely agree.”

What I hope to have illustrated here is that the impact of the CCJ on the development of a broadly Caribbean jurisprudence is real and is relevant to us, here in Jamaica. ***Despite the fact*** that Jamaica has yet to accede to the appellate jurisdiction of the CCJ, the appellate decisions of the Court continue to matter to Jamaica. To paraphrase the words of a former Attorney General of Jamaica, expressing aptly the legal melding of the countries of the common law world: ***“We in Jamaica***

*are like honey bees in the Caribbean legal garden; we flit from flower to flower, drinking nectar where we find it”.*³⁰

IMPEDIMENTS OR AREAS FOR IMPROVEMENT

This, then, brings me to the final part of this lecture: the impediments to the CCJ’s ability to foster a Caribbean legal reasoning. As I stated at the outset, I want to present these impediments not as obstacles that are fatal to the ultimate success of the CCJ, but as “areas for improvement” that, with region-wide effort, can greatly enhance and ensure the creation of a body of law that is widely representative of the entire Caribbean Community and the variety and vitality of the issues that the region faces. There are three such impediments that I’d like to mention.

The first relate to the appeals that are brought before the CCJ or, stated more accurately, the appeals that are *not* brought before the CCJ. The CCJ’s appellate jurisdiction is mirrored on the systems of appeals to the Judicial Committee of the Privy Council after the Colonial Conference of 1907. The general doctrine laid down was that appeals would normally be contemplated only from the highest court of each of Her Majesty’s territories. From such courts appeals would lie either (1) as of right when certain conditions were fulfilled; or (2) with leave of the local court when the appeal involved a question of great general or public interest; or (3) by special leave obtained from the Privy Council itself.

³⁰ Creating a Regional Jurisprudence - The Inaugural Distinguished Jurist Lecture of the Trinidad and Tobago Judicial Education Institute by Sir Shridath Ramphal - 29 September, 2011, Port of Spain, Trinidad (Pg. 11)

The principles upon which the Privy Council would grant special leave were quite indeterminate, but it chose *not* to grant special leave in several well established categories of cases, of which the most important was appeals in election petition cases.³¹ Several reasons were given for this self-imposed embargo, such as that there were pressing reasons of convenience; primarily, that the jurisdiction was one which should be exercised so that it should as soon as possible become conclusive. It was also felt that a referral of these issues to courts was really a surrender of the right of the Legislator to determine such issues itself and was therefore of a special character to which the ordinary rules of appeals should not apply.³²

Over time, the exclusion of election appeals from the appellate jurisdiction of the Privy Council became crystallized in colonial laws and eventually the constitutions of newly independent Commonwealth States. When Barbados, Guyana, and Belize delinked from the Privy Council and joined the CCJ appellate jurisdiction, the systems of appeals were simply transferred to the new final court, including the exclusion of appeals in election petitions. Yet there are important questions to be asked in this connection, particularly, as election petitions are being increasingly used to determine the governments of our Caribbean nations.³³ These questions include: are the factors of convenience, (including length of litigation) the same, when taking appeals to a Caribbean Court as they would be taking those appeals to London? Is the reasoning based on the power of the Legislature to determine its own composition still of relevance? In the event that the matter comes to adjudication, should the holders of the highest political offices in the land not be determined by the highest judicial body of the land?

³¹ *Théberge v Laudry*, (1876) 2 App.Cas. 102. See further, Arthur Berriedale Keith, *The Constitutional Law of the British Dominions*, (1933), at 266-269; Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (Stevens & Sons, 1966), at pp. 458-460. Other areas include: special land court; habeas corpus; martial law courts.

³² Arthur, Berriedale Keith, (*supra*) at pp. 267-268.

³³ *Quinn-Leandro v Jonas, Maginley v Fernandez, Spencer v St Clair Simon* (2010) 78 WIR 216

If issues cannot be appealed to the CCJ, the CCJ cannot consider them, and if the CCJ cannot consider them, then they cannot be included in the building blocks of the Court's jurisprudence. It is that simple. What we end up with is a jurisprudence that is limited in scope. But there is very little, if anything, that the CCJ can do to change this situation; constitutional challenges, for example, can be mounted to election laws, but not, it appears, if such a challenge could have a collateral effect of determining a prior election and thereby the composition of the Legislature.³⁴ Second, I believe, the continued failure of the majority of CARICOM Member-States to accede to the Court's appellate jurisdiction remains a major obstacle to the Court's work. There are two aspects to this. First, the distinguished legal author, Roberts-Wray chronicles that a criticism of the Privy Council was that "the number of cases coming before it was so small that it could not hope to build a body of jurisprudence."³⁵ The parallel to the CCJ is clear. Although the throughput numbers, as I have given them, are impressive for a new court, yet in its infancy, the relative diversity of matters coming for adjudication could certainly be more representative of issues of concern to the region.

There is also the other aspect, as discussed above, that the CCJ's judgments -- whether or not a specific Member-State has acceded to the appellate jurisdiction -- are being utilized by local courts. Jamaican courts, I tried to point out, are citing and following CCJ judgments on appeals that originated in Barbados and Guyana. In other words, lawyers, litigants, judges, and legislation from Barbados and Guyana are in some sense shaping regional -- and therefore Jamaican -- law. Yet, Jamaican lawyers, litigants, judges, and legislation do not have the same opportunity to offer input into the path that Caribbean jurisprudence takes. The Caribbean body of law and legal

³⁴ *Peters and Chaitan v. The Attorney General of T&T and another* [2002] 3 LRC 32Chi

³⁵ Roberts-Wray (*supra*) at p. 461

reasoning that the CCJ is able to craft, after all, can only reflect those cases that are brought before the Court, and if Jamaica is not able to appeal cases to the CCJ, then these cases, the issues they address, the laws that they consider, and the Jamaican values, histories and customs that they involve, will not be part of the Caribbean jurisprudence that the CCJ creates. Why wouldn't Jamaica want a voice in shaping the laws and precedent that its courts are already using? By acceding to the CCJ's appellate jurisdiction, Jamaica and other Member-States will not only enhance the Court's ability to build a more balanced and representative regional jurisprudence, but will also guarantee their own ability to stake a claim in what this jurisprudence will look like. The third and final impediment to the Court's ability to develop Caribbean jurisprudence is the relative lackluster response its judgments have received by the region's academics. A disappointing amount of *time* (in terms of classroom time and academic debates) and *space* (in terms of page numbers and article counts) has been devoted to discussing and critically engaging judgments made by the CCJ. For instance, a group of second year law students who recently toured the Court had to think very long and hard about whether they had read a single CCJ decision during the course of their studies. After some debate amongst themselves, they still could not be certain whether they had discussed any CCJ judgments in any of their classes. **I ask: why?** I cannot think of an excuse for this absence, and it would be difficult to convince me that the Caribbean Court of Justice is simply irrelevant to their future legal careers. I can only hope that this group was more of the *Donoghue v Stephenson* type and not truly representative of our Caribbean undergraduate law students.

The lacuna in regional legal education is disturbing, and is a symptom of a deeper problem of lack of critical engagement by scholars in the academic articles they publish. It was quite an undertaking, in fact, to identify *any* articles that had been written by regional scholars that

critically discuss, analyze, or criticize CCJ decisions. We were able to find seven (7) that specifically discussed – though to varying degrees – actual CCJ judgments. Of the articles we found, two (2) of the papers, by the late Professor Ralph Carnegie and the current dean of the Cave Hill Faculty of Law Dr. David Berry, were presented at a Cave Hill Faculty Workshop Series and were not published. This is a shame, since they thoughtfully and critically discuss the Court’s original jurisdiction as it has been shaped through the various original jurisdiction cases decided by the Court.

Another article by David Berry that discusses the Court’s decisions in *Trinidad Cement Limited v the Caribbean Community* and *Johnson v CARICAD* was published in the American Journal of International Law. Notably, only three of the articles were published in a Caribbean journal, the West Indian Law Journal, specifically – two of which discussed the *Joseph & Boyce* decision, and the third of which was a more general discussion about the CCJ. The last of the seven articles discussed the *Joseph & Boyce* decision and was published in a commonwealth journal entitled *Public Law*. There have also been a couple of relevant articles by Justice David Batts (as he now is) and Nancy Anderson in Caribbean Rights: an Online Publication of the *Independent Jamaica Council for Human Rights* (IJCHR).

As I hope I’ve made evident, the state of academic engagement with CCJ decisions is by no means optimal. This, I submit to you, is a problem and an impediment to the Court’s ability to execute its mandate. To be clear, I am not arguing that academia must embrace and agree with the CCJ’s decisions. Instead, I want to draw a parallel between the Court’s relationship to academia and the artist’s relationship to his critic. It is the critic’s honest response to the work of the artist that can push the artist to improve, to produce greater works of art, and to perfect his skill. It is by reading and reacting to the thoughtful inputs of the academics – pleasant, harsh, complimentary, or critical,

though they may be – that the Court will improve, that our judgments will be perfected. We have, then, a productive, positive, and mutually reinforcing relationship that rebounds to the benefit of the Caribbean people.

CONCLUSION

With all of that said, I would once again like to express my gratitude to the organizers of this event, and in particular, the Principal of the Norman Manley Law School for having done me the signal honor of inviting me to give this lecture.

I would also like to thank the library and the legal research staff at the CCJ, and in particular Mrs Lee Cabatingan, a PhD intern with us at the Court, for assisting me enthusiastically in preparing this paper.

EPILOGUE

Forty-three years ago, our Founding Fathers envisioned the region’s potential to create a durable system of Caribbean legal education and ultimately of Caribbean jurisprudence. They crafted the vehicles to help us achieve those objectives. We have clearly embarked on that journey and can declare some progress under our watch. But that progress has been uneven and incomplete, and significant challenges remain. It is arguable that we should, by now, have been much further along on our Fathers’ business.

But the longest journey in the world begins with the first step. And we have already taken many steps. I may be the incurable optimist but in recent times I sense in the Caribbean people a turning away from indifference and cynicism about the Court to a willingness to confront and embrace of its possibilities. That feeling was palpable in the Jamaica Conference Centre, downtown Kingston, this week.

The following scene from *The Matrix* may be prescient in this regard:

Trinity exits just before Agent Smith cuts off the exit.

Neo turns to face Smith.

Agent Smith: Mr. Anderson.

Trinity: Run, Neo. Run.

(And when Neo doesn't run but rather confronts Smith and the enormous challenge that Smith represents):

Trinity: (in bewilderment): What is he doing?

Morpheus: He's beginning to believe.

Thank you all very much.

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*Any views expressed in this paper represent my own provisional views and do not comprise my judicial views, nor do they represent the views of the Caribbean Court of Justice.