



The Fear of Cutting the Umbilical Cord...the Relevance of the Privy Council in Post Independent West Indian Nations

The Honourable Mr Justice Adrian
Saunders, Judge of the Caribbean Court of

2nd Annual Eugene Dupuch Distinguished Lecture

Nassau, The Bahamas
28 January 2010

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Distinguished Lecture

By

The Honourable Mr Justice Adrian Saunders, Judge of the Caribbean Court of Justice,

on the occasion of

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It is with some trepidation that I embark, in The Bahamas, upon a lecture titled *the fear of cutting the umbilical cord.....the relevance of the Privy Council in Post Independent West Indian Nation States*. The bonds that tie The Bahamas to the United Kingdom are long standing and substantial. This is the only nation in the Commonwealth that has the distinction of having had as its colonial Governor no less than a former King of England. More recently and to the point, The Bahamas created history when their Lordships of the Judicial Committee of the Privy Council heard appeals here in December 2006 - the first time ever that august body had sat outside of London. And I have noticed that the editors of the just published “The Judicial House of Lords 1876 – 2009” have asserted that The Bahamas “has consistently said that it will not replace appeals to the [Judicial] Committee with appeals to the Caribbean Court of Justice”.¹

It is clearly up to the Government and people of the Bahamas to determine for themselves whether or not they wish to retain the Judicial Committee as a court of final appellate jurisdiction and so I have not come here as a salesman. The question of retention is, however, one that stirs considerable

¹ See Louis Blom-Cooper, Brice Dickson and Gavin Drewry, *The Judicial House of Lords 1876-2009* (New York: Oxford University Press, 2009), p. 321.

debate in the region and perhaps that debate is being carried on in some quarters in The Bahamas as well. After all, notwithstanding the linkages with the United Kingdom, this family of beautiful islands is a proud nation that revels in its independence and it has been stated that abolition of appeals to the Judicial Committee and accession to the Caribbean Court of Justice completes the circle of our independence². Hopefully, my anxieties about rushing in where others might fear to tread may perhaps be misplaced.

I begin by emphasizing the obvious. This is a subject in which I have an interest. One cannot today meaningfully speak about the relevance of the Judicial Committee outside of the context of the establishment of the CCJ and as you have been told, I am a judge of the CCJ. As such my interest in the subject of this evening's lecture extends even beyond the volume and nature of my present work load which will obviously be affected if more States cease channeling their final appeals to the Judicial Committee of the Privy Council and instead commence sending them to the CCJ. Given the nature of my interest, it would be quite in order for you to treat with skepticism some of the positions I express. But I trust that, even as you did so, you will support and defend my right to express them.

There are many different aspects to a discussion about the continued relevance of the Judicial Committee. We can for example speak at length about the constraints on access to justice inherent in retaining the Judicial Committee as a final court of appeal. These constraints – the huge expense, visa requirements to enter the UK, and so forth - are real and very serious. But, precisely because they are so obvious, I have opted not to dwell on them in this lecture. Instead I will say a little about the history of the Judicial Committee and comment on the role it has played in serving as

² See Duke E. Pollard, *The Caribbean Court of Justice- Closing the Circle of Independence*, (Kingston: The Caribbean Law Publishing Company Ltd, 2004), p. 204.

our final appellate court. And I wish to speak about the incongruity in continuing to accept the Judicial Committee as a final court of appeal for Caribbean States in the face of the establishment of the CCJ. I also wish to say a few words about the death penalty debate because I believe that debate has impacted on this entire subject in important ways.

The website of the Privy Council³ tells us a little of the history of that body. The jurisdiction of the Privy Council originated at the Norman Conquest with the premise that “The King is the fountain of all justice throughout his Dominions, and exercises jurisdiction in his Council, which act in an advisory capacity to the Crown.” This council or court was the Curia Regis from which sprung the entire British judicial system. Subjects who had grievances could submit their petitions to the King who appears to have exercised supreme appellate jurisdiction. With the discovery of the new world and the emergence and growth of the British empire, the appellate business of the King’s Council increased dramatically and the Judicial Committee emerged as the highest court of civil and criminal appeal for the British Empire. Many of the earliest cases came from the West Indies and the basement vaults of the Judicial Committee’s old premises at Downing Street are replete with court records of the time that contain a great deal of historical information, including the value of slaves on sugar plantations: from £70 to £75 each.⁴

In 1833 when Lord Brougham was Lord Chancellor the Judicial Committee Act placed the Committee on its modern footing as a judicial arm. That Act defined the Membership of the Judicial Committee and regulated its jurisdiction and procedure. Under a further Act, the Appellate Jurisdiction Act of 1876, the Law Lords (Britain’s top judges) became the permanent judges of

³ See The Judicial Committee of the Privy Council, “History”, <http://www.jcpc.gov.uk/about/history.html> (accessed February 2, 2010).

⁴ See The Judicial Committee of the Privy Council, “The Judicial Committee”, <http://www.jcpc.gov.uk/about/the-judicialcommitte.htm> (accessed February 2, 2010).

the Judicial Committee. Today, all Privy Councillors who hold or have held high judicial office in the United Kingdom, or who have been judges of superior courts of certain Commonwealth countries, are eligible to sit on the Judicial Committee if they are under 75 years of age.⁵

Although for all intents and purposes, it is really a court the Judicial Committee still exists in form as an advisory body to the Crown. Thus, it was only in 1966 that dissenting opinions were permitted; the prevailing view prior to 1966 being that it was inappropriate to give to the Crown conflicting bits of advice.

At the height of British imperial power the Judicial Committee's caseload was extremely heavy. The Committee used to sit in up to three divisions at a time.⁶ After the Second World War, however, with the emergence of independent States out of the crumbling empire almost all the countries which used the Judicial Committee as a final appellate body naturally opted to establish their own final court of appeal. Today, only thirteen independent States still send their final appeals to the Judicial Committee for determination. Save for Tuvalu, Kiribati and Mauritius these countries are all Commonwealth Caribbean States.

Notwithstanding its important role as a body determining the content and direction of the jurisprudence of these States, the Judicial Committee is still a quintessentially British institution. Caribbean officialdom have no say in determining the composition of the judges or their tenure or the rules of procedure of the Court or indeed, the future of the Court itself. A remarkable homogeneity has existed among the Law Lords. Save for Baroness Hale who was appointed in 2003 they have all been white and male and appointed in their 50s or early 60s. They have all been

⁵ See The Judicial Committee of the Privy Council, "History", <http://www.jcpc.gov.uk/about/history.html> (accessed February 2, 2010).

⁶ See Peter Jepson, "The Judicial Committee of the Privy Council", http://www.peterjepson.com/law/privy_council.htm (accessed February 2, 2010).

raised in comfortable middle or upper middle class backgrounds, all educated privately and the great majority of them would have spent their working lives as members of the Bar in London before joining the Bench.⁷

Notwithstanding these factors, there is no gainsaying that the Law Lords have been judges of the highest calibre⁸ and throughout the centuries, the Judicial Committee has served the region well. In the process, it has justifiably earned for itself the confidence of the public attributable in part to the competence, learning and experience of the judges who have historically sat on its Bench. That public confidence did not just spring from the quality of the judges. It is also in part due to the fact that throughout the region, much more can be done by regional governments by way of enhancing the independence of the territorial judiciaries and in affording them suitable court buildings, adequate staff, modern facilities and opportunities to further ongoing judicial education. Expenditure on the judiciary does not readily attract votes and in the face of demands being made on national budgets to fulfill pressing needs in fields such as health, education, security and poverty alleviation, the justice sector often falls way down on the priority list.

When regard is paid to the fact that Caribbean States contribute absolutely nothing to the maintenance of the Judicial Committee, the woeful shortcomings in providing adequate infrastructure at the domestic level, tend to sap confidence in the local administration of justice. I would quickly add here though that to the extent that one is discussing the relevance of the Judicial Committee in the context of embracing the CCJ, a comparison between the operations of the British court and the local courts is a specious one as like is not being compared with like. The real

⁷ Louis Blom-Cooper, Brice Dickson and Gavin Drewry, *The Judicial House of Lords 1876-2009* (New York: Oxford University Press, 2009), p. 114.

⁸ *Ibid* @ p. 117.

comparison that should be made must be between the Judicial Committee, its independence, its facilities, its staffing and the level of efficiency of its caseload with those of the CCJ which in every sense is its counterpart. I would venture the view that the people of the Caribbean have absolutely no reason to be embarrassed if such a comparison is made.

Public satisfaction with a court of law is something that is earned and that takes time to build. It cannot be demanded or implanted. It is won over many years. The Judicial Committee has existed for centuries. When Lord Hewart boasted at the Lord Mayor's banquet in 1936 that "His Majesty's judges are satisfied with the almost universal admiration in which they are held"⁹, it is hardly likely that Caribbean people then would have entertained notions to the contrary.

There are at least two other dimensions to this question of confidence that may be considered. Professor Simeon McIntosh notes¹⁰ that the colonial imperial process – the experience of being colonized – would have planted in the West Indian consciousness a negative perception of *self* and he quotes the very distinguished Caribbean writer, George Lamming, as stating:

“[Colonialism] was not a physical cruelty. Indeed, the colonial experience of my generation was almost wholly without violence. No torture, no concentration camp, no mysterious disappearance of hostile natives, no army encamped with orders to kill. The Caribbean endured a different kind of subjugation. It was the terror of the mind, a daily exercise in self-mutilation ... This was the breeding ground for every uncertainty of self.”

⁹ Beverley McLachlin, "The Role of Judges in Modern Commonwealth Society", (1994) 110 LQR 260-269 @ p. 260. McLachlin also indicates at page 260 that Lord Devlin is reported to have also said in 1979 that "The English judiciary is popularly treated as a national institution ... and tends to be admired to excess".

¹⁰ Simeon C.R. McIntosh, *Caribbean Constitutional Reform- Rethinking the West Indian Polity*, (Kingston: The Caribbean Law Publishing Company Ltd, 2002) pp. 36- 37.

This “uncertainty of *self*” is often reinforced by comments such as those made recently at Question Time in the House of Lords by Lord Anderson of Swansea who rendered the opinion that the credibility of the CCJ is enhanced by the fact that a British judge and a Dutch judge serve on it”¹¹

The other circumstance that may well be relevant to this question of confidence is that of the changing role of a judge. That role is today very different, far more complex, from what it was in years gone by when the Judicial Committee was in its heyday developing the reputation it has earned. In the past, it would have been easier for the judges of the Judicial Committee to perform adequately the role of a final court of appeal. For a start, the role of Judges rarely went beyond the resolution of a dispute between litigants. As McLachlin¹² summarizes, two parties find themselves in a disagreement. They cannot resolve it. They go to a court for a decision. Parliament made the laws. The judge applied them to the case. And that was it. Fundamentally, the final appellate court would then only be concerned with such questions as whether a mistake was made by the courts below. Can the findings of fact be supported having regard to the evidence? Did the court below properly apply the right law to the facts that were found? The skills set that helped to earn the judges of the Judicial Committee the confidence of the public (competence, learning, experience) was more than sufficient to meet those challenges and in addition, there was always the added advantage of their Lordships being able to bring to bear on the cases before them a detachment that was rooted in the remote vantage point they occupied.

Times have changed. And so has the role of a judge. The attributes of competence, learning and experience are not always a sufficient package of skills to ensure an informed response to the extraordinary questions that must today be answered by judges. Resolving disputes is still the

¹¹ See UK Parliament, “Publications- Lords Hansard text for 26 October 2009” <http://www.publications.parliament.uk/cgibin/newhtml> (accessed February 2, 2010).

¹² Beverley McLachlin, “The Role of Judges in Modern Commonwealth Society”, (1994) 110 LQR 260-269 @ p. 262.

primary and most fundamental task of the judiciary but today“s judges do a whole lot more. Their role has expanded to judicial lawmaking in the realm of social policy. As Beverley McLachlin points out in a 1994 article of hers:

“This expansion can be attributed to a number of factors. One is the trend to the constitutionalisation of rights. The new perspective of social policy which confronts modern courts is fuelled in large part by a heightened collective awareness of human rights ... Wherever we live, the legal dialogue increasingly centres on individual rights and liberties: the political liberties of democratic participation; liberty of religion and expression; the guarantee of equality regardless of gender, race or age. The trend to the constitutionalisation of human rights increasingly implicates the courts in a broad range of social policy issues. The bills of rights [contained in our respective Constitutions] guarantee to each person certain fundamental rights. When legislation or governmental action offend these guaranteed rights, people go to the courts for a ruling that the law or conduct is unconstitutional. And the courts, which were formerly compelled to accept Parliament's decree as the last word, now are obliged, if it violates the constitutional code of rights, to declare the law or action illegal. The nature of these guarantees, most particularly guarantees of equality, freedom of speech and freedom of religion, is such that the courts are, whether they like it or not, required to give judgments on matters of social policy.

Another factor in the new social policy role of judges cited by scholars is the perceived inability or unwillingness of legislative bodies to deal with pressing social issues. ... [S]ome issues ... are too controversial for Parliament to take on. The result has been that the courts are asked to resolve these issues. Whatever the reasons, it seems clear that ... the agenda of

courts ... is going to take on an increasingly social face. Gone are the days when judges could spend their days musing on the principles of contract, tort and criminal law. Their field includes these, but much more as well.”¹³

Justice McLachlin’s article addressed the role of judges generally. Her views are even more apt in relation to judges of final courts who play a pivotal role in defining and shaping a nation’s jurisprudence. The point is that irrespective of how technically competent they may be, if the judges who comprise a nation’s final court are entirely detached from an intimate understanding of that nation’s realities, there will always be present a risk, a danger of a disconnect between the jurisprudence they fashion and the needs and aspirations and goals and values of the people for whom the jurisprudence is fashioned. This is not just true for the Caribbean. It holds good for any other civilization. It is now essential that judges possess deep sensitivity to a broad range of social concerns.

As McLachlin states, “[J]udges ... must possess a keen appreciation of the importance of individual and group interests and rights. And they must be in touch with the society in which they work, understanding its values and its tensions.”¹⁴

The Judicial Committee’s self-acknowledged “imperviousness to local pressure”¹⁵ is often characterized as one of its great virtues. Judicial independence is of course not just a prized asset; it is an indispensable condition for the rule of law. But, as with detachment, judicial independence also has its own Siamese twin. Just as detachment without sensitivity to local concerns may impair the judicial function, so too may judicial independence in the absence of judicial accountability.

¹³ Beverley McLachlin, “The Role of Judges in Modern Commonwealth Society”, (1994) 110 LQR 260-269 @ p. 264.

¹⁴ Beverley McLachlin, “The Role of Judges in Modern Commonwealth Society”, (1994) 110 LQR 260-269 @ p. 266.

¹⁵ Independent Jamaica Council for Human Rights (1998) Ltd & Others v Marshall-Burnett & the AG of Jamaica [2005] UKPC 3 @ para.16.

Now, judges are not accountable in the same manner as are the members of the other branches of government. Our judges don't face the polls. Nor do they account directly to the political directorate; certainly not in the normal manner in which one usually thinks of the accountability of public officials. Judicial accountability is more nuanced. But the fact is that judges are accountable to the public whom they serve. The question is whether, and if so to what extent, judicial accountability is compromised by the existence of a final municipal court that functions thousands of miles across the seas, whose judges do not live and have never lived in the municipality they serve and therefore whose experience of the consequences of the decisions they make is not shared by the people of the municipality?

To be fair, the sensitivity deficit of the judges of the Judicial Committee historically always has been recognized and acknowledged by their Lordships themselves, both extra-judicially and otherwise. Here are two extra judicial comments, one in the 19th century, the other in the 21st.

The very Lord Brougham whose efforts went a long way in placing the Judicial Committee on its modern footing is reported to have stated in 1828:

“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”¹⁶.

¹⁶ See CARICOM, “Speech by the Rt. Hon. Mr. Justice Michael de la Bastide, President of the Caribbean Court of Justice, at the Inauguration of the Court, 16 April 2005, Port of Spain Trinidad & Tobago” http://www.caricom.org/jsp/speeches/ccj_inauguration_delabastide.jsp (accessed February 2, 2010).

And at the annual dinner of the Trinidad & Tobago Law Association in 2003, Lord Hoffman startled some of his hosts by informing them 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”.¹⁷

In their written judgments the judges of the Judicial Committee not infrequently demonstrate *their* confidence in the local courts to give a better judgment (or should I say a more informed opinion) on matters of local concern than they can themselves. I can share a few examples with you:

Take *Johnson v Johnson*¹⁸, a case from the Cayman Islands involving the distribution of matrimonial assets. Lord Griffiths noted that, “The local courts with their knowledge of local conditions are far better equipped to embark on the analysis of fact and the evaluation of the needs of the parties and their children which are essential to arriving at a fair decision. These matters must be left to the local courts working under the guidance of the local Court of Appeal”.¹⁹

The assessment of damages is another area where the JCPC often defers to the judgment and experience of the local courts. Notwithstanding the curious decision in *Seepersad v Persad and Capital Insurance Limited*²⁰, decided in 2002, their Lordships usually opt not to interfere with awards of damages made by local courts. *Seepersad* is curious because in that case, a case purely on the quantum of damages, the Judicial Committee increased by almost 100% the amount of damages ordered by a unanimous Trinidad & Tobago Court of Appeal. But this must have been an aberration because in *Subiah v The AG of Trinidad & Tobago*²¹ Lord Bingham went out of his

¹⁷ Ibid.

¹⁸ [1992] 41 WIR 91.

¹⁹ Ibid @ p. 93

²⁰ [2004] UKPC 19.

²¹ [2008] UKPC 47.

way to make the point that “the Board has always deferred to the superior knowledge and experience of local courts in assessing levels of damages”²².

This policy was adopted in *Panday v Gordon*²³ when the Judicial Committee paid such deference to the views of two thirds of the members sitting on the Trinidad & Tobago Court of Appeal and *their* superior knowledge of local conditions that Mr. Panday was entirely deprived of the appellate review he was expecting and entitled to receive²⁴ as the Judicial Committee declined to review the decision of the local court on the basis that the latter was better positioned to answer the questions raised by the appeal.

More recently in addressing the issue as to whether the Chief Justice of Bermuda was correct in dismissing an application for an interlocutory order preventing the publication of material by the media pertaining to certain documents concerning a police inquiry into the affairs of the Housing Corporation, Lord Scott of Foscote resolved that:

. . . if the Chief Justice was right in attempting to strike the balance between the public interest in maintaining the confidentiality of the police’s . . . investigation files and the public interest in the freedom of the Bermudian media to inform the Bermudian public of the matters disclosed . . ., or of similar matters arising from the documents in those files, and their Lordships have no doubt that he was, the local courts with their intimate knowledge of the state of public affairs in Bermuda are far better placed than their Lordships to strike that balance.²⁵

²² Ibid.

²³ [2005] UKPC 36.

²⁴ See also *Reid v Reid* [1982] 3 All ER 328 and *Invercargill CC v Hamlin* [1996] AC 624 where similarly the appellants before the JCPC were effectively denied appellate review because of their Lordships deference to the superior knowledge of the New Zealand courts.

²⁵ *Commissioner of Police and Another v Bermuda Broadcasting Co Ltd and others* [2008] UKPC 5 at para. 13.

I have cited these cases, which are by no means exhaustive of the point, in order to illustrate two things. Firstly, the judges of the Privy Council understand and appreciate that they are not as well equipped to make certain judgments as are the local courts and secondly, their Lordships themselves have sufficient confidence in the local courts to trust them to make those judgments. The difficulty that some of us have is that there appears to be no clearly articulated and consistently followed principle on all the circumstances in which will be demonstrated such deference to the superior vantage point of the local courts. On occasion, some of the judges of the Privy Council are wont to express themselves with confidence precisely on the type of matters that now Chief Justice McLachlin cautioned above requires sensitivity to local concerns. Such was the case for example in *Surratt v A.G. of Trinidad & Tobago*²⁶ where Lord Bingham on that occasion was quite unable to persuade his colleagues that (in his words):

“To the extent that the answer to the present problem is doubtful, weight should be given to the judgment of the Trinidad and Tobago courts. A judge sitting in a local constitutional environment, in which he has grown up and with which he is familiar, is likely to have a surer sense of what falls within the purview of the Constitution and what falls beyond than a court sitting many miles away. For this reason alone, in the absence of manifest error, the Board should be slow to disturb the unanimous conclusion of the local courts on a question of this kind, involving as it does a question of judgment and degree.”²⁷

The admonition that the judges of the Judicial Committee should be slow to intervene in the absence of manifest error, especially in constitutional matters, is by no means new. A Canadian,

²⁶ [2008] 1 AC 655.

²⁷ [2008] 1 AC 655 at para. 28.

one, F.R. Scott, who was clearly extremely upset about rulings of the Judicial Committee on federal/provincial aspects of Canada's Constitution, positively fulminated at the Judicial Committee in the 1937 Canadian Bar Review.

He said, *inter alia*:

“...The Privy Council is our final court of appeal. Its interpretations of the Canadian constitution vitally affect the political, social and economic destinies of eleven million Canadians. Such a court should be staffed with men fully qualified to understand the spirit which infuses the British North America Act, and the environment in which it must be made to work. Unfortunately it is only too evident that judges of this type rarely sit upon the Judicial Committee [and here he commented upon the unstable and unpredictable composition of the Judicial Committee's Bench and he continued:]

... To imagine that we shall ever get consistent and reasonable judgments from such a casually selected and untrained court is merely silly. To continue using it under the circumstances is costly sentimentality. The Privy Council is and always will be a thoroughly unsatisfactory court of appeal for Canada in constitutional matters; its members are too remote, too little trained in our law, too casually selected, and have too short a tenure”²⁸.

By contrast, it is interesting to observe how the House of Lord treats with Scottish appeals. According to a 2007 article in the Law Quarterly Reports, it is highly unlikely that the UK Supreme Court (formerly the House of Lords) would today contemplate hearing a Scottish appeal without

²⁸ F.R Scott, “The Consequences of the Privy Council Decisions”, (1937) 15 (6) Can. Bar R. 485 @ p. 494.

having at least one Scottish judge sitting on the adjudicating panel. In the last 10 years there are no examples of Scottish appeals where no Scottish judge has sat.²⁹

The death penalty debate

The outbursts of F. R. Scott lead me to digress in order to consider briefly certain issues surrounding capital punishment jurisprudence in the region because I think this has impacted on the debate concerning the retention or otherwise of the Judicial Committee.

Whatever might be said about the efficacy or desirability of hanging as a form of punishment, regional governments could not be faulted for being concerned that at the level of the Judicial Committee, instability, unpredictability and, in the words of Lord Hoffman, a “doctrinal disposition to come out differently”³⁰ characterized the Judicial Committee’s death penalty jurisprudence in the years immediately following the decision in *Pratt & Morgan*³¹ in 1993.

As I noted in my judgment in the case of *R v Hughes (Peter)*³²: “Important decisions on crucial issues of life or death are departed from, or expressly reversed, with an unsettling frequency”.³³

In **Pratt v Attorney General of Jamaica** [1994] 2 A.C. 1, the majority view earlier expressed in **Riley v Attorney General of Jamaica** [1983] A.C. 719 was unanimously rejected and thus overturned. In **Fisher v Minister of Public Safety and Immigration (No. 2)** [1999] 2 W.L.R. 349

²⁹ Brice Dickson, “The Processing of Appeals in the House of Lords”, (2007) 123 LQR 571-601 @ p. 590.

³⁰ *Lewis and Others v The AG of Jamaica* [2001] 2 AC 50 @ p. 90.

³¹ [1994] 2 AC 1.

³² [2001] 60 WIR 156.

³³ [2001] 60 WIR 156 @ p. 196.

and **Thomas v Baptiste** [1999] 3 W.L.R. 249, differently constituted Boards, faced with basically the same legal question, arrived at opposite conclusions. A year later, in **Higgs v Minister of National Security** [2000] 2 W.L.R. 1368, when the same question again arose for consideration, the Judicial Committee understandably had some difficulty in reconciling those two earlier decisions. Ultimately, so as not to throw the law into even greater confusion, their Lordships felt obliged reluctantly to uphold the dubious justification advanced in **Thomas** for not following **Fisher**. But that was not the end of that matter. In **Lewis and Others v Attorney General of Jamaica** [2001] 2 AC 50 the majority overruled **Fisher** and **Higgs** and confirmed the correctness of **Thomas v Baptiste**. In the process, the Board also departed from its own decision in **Reckley v Minister of Public Safety and Immigration (No. 2)** [1996] A.C. 527.

In the future, legal historians will, I believe, consider the extent to which the accountability deficit to which I earlier alluded may have contributed to the decision-making that produced such uncertainties. It is certainly difficult to conceive of England's final court or any other municipal final court reversing itself with such breath-taking rapidity over such a short period of time. Be that as it may, the reasonably held perception that judgments at the highest level appeared to be result-driven naturally yielded unfortunate consequences. Such a perception, even in fields where the decision-makers presume to a morally superior high ground, could only produce a serious backlash. And it did precisely that in the region. In the period after *Pratt* was decided in 1993, Caribbean people witnessed open and ugly condemnations by their respective governments of decisions of their own final court. Some Caribbean judges also found it difficult to restrain themselves. This was never a feature of life prior to the 1990s. Regional governments not only publicly and forcefully railed against the death penalty judgments of the Judicial Committee, but

they denounced human rights treaties they had ratified and enacted constitutional amendments that precluded challenges to judicially determined inhumane treatment.

This state of affairs contributed to a further undermining of public confidence in the local administration of justice and it created a poisonous and divisive atmosphere for the inauguration of the CCJ which had been talked about for decades before the decision in *Pratt* was given. Some human rights and anti-death penalty activists assumed that the establishment of the CCJ was intended to facilitate executions.

The CCJ was described as “a hanging court”. Implicit in this of course was the veiled suggestion that Caribbean judges and the judges of the CCJ in particular are ignorant of constitutional and human rights law or are prepared to close their eyes to the impact of international treaties or are puppets of a regional Executive that was determined to hang its nationals who committed murder or are simply incompetent.

In *Joseph and Boyce*³⁴ the CCJ felt impelled to set the record straight. We noted that in the Caribbean the death penalty is a constitutionally sanctioned punishment for murder. This punishment still falls within internationally accepted conduct on the part of civilized States. We recognized however that a death sentence should not be carried out without scrupulous care being taken to ensure that in its execution there is utmost procedural propriety and that, in the process, fundamental human rights are not violated. We acknowledged that since the decision in *Pratt and Morgan*, much has been done by the Judicial Committee and by Caribbean Courts whose decisions have been upheld by that body, to humanise the law and to improve the administration of justice in this area and we reminded ourselves that courts have an obligation to respect municipal

³⁴ The AG of Barbados & Others v Joseph & Boyce [2006] 69 WIR 104.

constitutions that require capital punishment. In particular, we cautioned that, if a judge were so uncomfortable with imposing or sanctioning the imposition of the death sentence that the judge could not be dispassionate in resolving legal issues on the subject that arise, then the judicial function was compromised and public confidence in the administration of justice would be undermined. For its part, we stated, the CCJ would try to ensure that if it has to be applied, the death penalty will be applied in keeping with the utmost respect for the Constitution and in particular the individual human rights enshrined therein but, it is to Parliament and the people that one must turn if we wish to abolish altogether that form of punishment.

This brings me on to the final part of this lecture. Why should we abolish appeals to the Judicial Committee? To my mind, the more appropriate question that should be asked, now that the CCJ is up and running, is: What is precluding the independent Commonwealth Caribbean States from immediately taking the necessary steps to send their final appeals to the CCJ?

I once posed this question to a Queen's Counsel friend of mine and he replied with a single four letter word. Fear! It is my humble opinion that this is truly a case where there is nothing to fear but fear itself. The government and people of Barbados certainly did not demonstrate any such fear when they embraced the court from its inception. The Co-operative Republic of Guyana, which had abolished appeals to the Judicial Committee a long time ago, has also been sending their appeals to the CCJ since the inauguration of the CCJ. And, as I understand it, within the next few months Belize would be doing so as well.

I would grant that prior to its establishment, concerns over the independence of the CCJ and its judges and its financing were powerful matters that could give rise to anxieties about the establishment of a Caribbean court of final appeal. But the extraordinary measures that have been taken to insulate the CCJ from political pressure, to ensure a method of appointing its judges that

is fair, transparent and based on merit and the unique steps taken to guarantee the court financial viability for the foreseeable future have adequately addressed these concerns.

Ignoring the fact that the funds to operate the CCJ have already been sourced, obtained and turned over to a Group of Trustees for the benefit of the Court, some Privy Council retentionists continue to complain that, given that we pay nothing for the services of the Judicial Committee, money spent on the CCJ should instead be spent or should have been spent on improving the courts at the lower domestic levels. The Rt. Hon. Telford Georges gave a fitting response to this suggestion when he noted how naïve it was to believe that there would be any connection between the two things i.e. money spent (or not spent) on a final court and money spent on domestic courts. For years, he noted, money has been “saved” by not spending on a final Court of Appeal, and none of it found its way into improving local systems”³⁵

Almost five years of operations may not be sufficient to make a comprehensive assessment of the CCJ. But it ought to be enough to give one more than a fleeting impression of its suitability to serve as a replacement of the Judicial Committee. Yet, I still hear too many persons in the region continue to speak of the CCJ as if it were merely an idea, an idea that may not perhaps be a bad one *if* certain things are first put in place. The reality is that the CCJ has long since ceased to be an idea. It is an institution that exists. One can visit the court, observe its proceedings, peruse its website, listen online to the arguments made before it, listen online to the interventions of the judges during argument and scrutinize its judgments. The court has delivered dozens of them in

³⁵ See Hugh Rawlins, *The Caribbean Court of Justice: The History & Analysis of the Debate*, (Guyana: The CARICOM Secretariat, 2000) p. 41.

its appellate jurisdiction. Many of them can be found in the West Indian Reports right alongside those of the Judicial Committee.

In the absence of any serious concerns that can properly be entertained about the independence of the CCJ or its continued financial viability all that really remains is doubt about the ability of the people of the Caribbean to find from among their ranks sufficiently well qualified judges to sit on a court of final appellate jurisdiction. Such doubts may or may not relate to the opinions of Professor McIntosh and George Lamming about what colonialism has done to our perception of ourselves and of our own abilities. The international community does not share the same doubts about the quality of Caribbean judges. Currently, Kittitian, Dennis Byron and Jamaican, Patrick Robinson respectively head the two specialized United Nations tribunals for Rwanda and the former Yugoslavia respectively. This is remarkable only because it comes precisely at a time when some still dare to question the calibre of judges we in the region can produce.

International jurists who have visited the CCJ and read its judgments generally have a high opinion of the CCJ. Writing in *The Journal of International Economic Law* in 2008, Francis Jacobs, an Englishman and a Privy Councillor and former Advocate General of the European Court of Justice, had this to say:

“A supreme court of high calibre has been established in the Caribbean which would be able to take account of local values and develop a modern Caribbean jurisprudence in an international context. It is regrettable that political difficulties have obstructed acceptance of its [appellate] jurisdiction and that the outdated jurisdiction of the Judicial Committee of the Privy Council survives ... for many of those States. All possible steps should be

taken to encourage the Caribbean States to accept the [appellate] jurisdiction of their own supreme court...”³⁶

The late Rt. Hon. Telford Georges weighed in vigorously on the CCJ debate before his death. He regarded it as “a compromise of sovereignty” for us to remain wedded “to a court which is part of the former colonial hierarchy, a court in the appointment of whose members we have absolutely no say”³⁷. According to Douglas Mendes, “you cannot as an independent nation, call yourself independent if you must go to a foreign court as your final Court of Appeal”³⁸. The same views were expressed by then Attorney General of Grenada Dr. Francis Alexis who noted, long before the CCJ’s establishment, that the CCJ “would promote our sense of self confidence and self respect and would be a fitting complement to the political independence for which we have fought. Any man who keeps saying that we have to go to London to get justice is saying that he does not have respect for himself and his people and that is a very, very sad state of affairs indeed”.³⁹

Commonwealth Caribbean States who wish to continue enjoying a second appellate review (and that to my mind is ideal although Guyana existed without any for a long time) but who neglect to subscribe to the appellate jurisdiction of a Caribbean Court of their own are running a risk because whether we face up to it or not, we are now an unnecessary and ever growing burden to their Lordships. When Lord Phillips complains, as he did last September, that a disproportionate

³⁶ Francis G. Jacobs, “The State of International Economic Law: Re-Thinking Sovereignty in Europe” (2008) 11 (1) J. Int’l Econ. L. 5-41 @ p.39

³⁷ See Hugh Rawlins, *The Caribbean Court of Justice: The History & Analysis of the Debate*, (Guyana: The CARICOM Secretariat, 2000) p. 44.

³⁸ *Ibid* @ p. 45.

³⁹ See Hugh Rawlins, *The Caribbean Court of Justice: The History & Analysis of the Debate*, (Guyana: The CARICOM Secretariat, 2000) p. 28.

amount of the time of his judges, more than one third, is spent on matters in the Judicial Committee⁴⁰ and he politely nudges Caribbean States to go to their own Court, he is reflecting a viewpoint which is gaining currency in the United Kingdom. The efficiency of the operations at the highest rung of the British judicial ladder is being compromised by the inordinate time Britain's best judges are constrained to devote to the hearing of appeals from countries that have been independent for decades.⁴¹ This complaint is severely aggravated by the fact that the Judicial Committee does not set its own docket. It does not determine the number and nature of the matters that come before it. In constitutional cases there is an automatic right of appeal to that court and in civil cases the right of appeal is virtually automatic if the dispute involves property valued in excess of a relatively small amount.

I would also not in the least bit be surprised if in time public pressure also mounts in the UK regarding the expense involved in up-keeping an institution for the benefit of States that have established and financed their own institution which, without good reason, they neglect fully to utilise. Privy Council judges and members of the British government have repeatedly stated that the use of the Judicial Committee is a facility which will always be at the disposal of Caribbean States as long as they wanted. But this is not something that any Caribbean State is in a position to guarantee. The question that arises is this: Are we going to wait until the doors of the Privy Council are slammed shut in our faces or will we content ourselves with the notion that lesser or lesser quality British judges should hear our final appeals?

⁴⁰ See BBC Caribbean, "Privy Council's complaint" 24 September 2009, http://www.bbc.co.uk/caribbean/news/story/2009/09/090922_privyccjphillips.shtml (accessed February 2, 2010).

⁴¹ See Paul Carmichael & Brice Dickson, *The House of Lords- Its Parliamentary & Judicial Roles* (Oxford: Hart Publishing, 1999) p. 153 and Brice Dickson, "The Processing of Appeals in the House of Lords" (2007) 123 LQR 571-601 where Professor Dickson questions whether their Lordships should be so preoccupied with cases from small Commonwealth jurisdictions.

I indicated at the outset that on this topic there are several other matters about which one can speak but time is against me and I had been asked to make myself available to field questions. I would therefore stop at this point and entertain your questions and comments. I thank you for your patience.