SYMPOSIUM

Replacing Appeals to the Privy Council:
Whither Trinidad & Tobago?

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I record my acknowledgment to the Law Association of Trinidad & Tobago for requesting of, and conferring on me this privilege that I should represent it at this very important and significant discussion. On behalf of the Law Association I express commendations to the hosts and co-hosts of this timely Symposium.

Given that the theme of this Panel ‘The experience of other Commonwealth countries which have replaced the Privy Council and, the effect on their respective justice systems’, is strictly inapplicable to Trinidad & Tobago which has not replaced the Privy Council with the Caribbean Court of Justice as its final appellate court, I make my contribution in the context of the Symposium theme with what some may say is a rhetorical question, that is, ‘Whither Trinidad & Tobago?’ I pose the rhetorical question deliberately, given that Trinidad & Tobago is uniquely positioned as a Member of the Revised Treaty of Chaguaramas and, as a signatory to the Agreement establishing the Caribbean Court of Justice. This Republic is, after all: (i) the seat of the Caribbean Court of Justice; (ii) the seat of the Caribbean Court of Justice Trust Fund; and (iii) has contributed the first President of that Court, namely The Right Honourable Mr. Justice Michael de la Bastide, TC, QC.
In final acknowledgment of my debt to those sources and persons to whom I have turned in my research, I hope you will forgive me when I say that, given the rich vein of material on the subject of the Court, I have truly wondered what more can I possibly add, except by copious repetition.

A relevant historical footnote from which to begin this discussion, from the platform of this independent Republic of Trinidad and Tobago, is to remind ourselves that the Privy Council derives from what has been referred to as the ‘residuary jurisdiction’ which the Sovereign Head of the United Kingdom possessed over all British subjects: It was an important instrument of English government which conducted its work through Committees, one of which was the Committee for Trade and Foreign Plantations, to which petitions went from within the British Empire. The Judicial arm of Her Majesty’s Empire, called the Judicial Committee of the Privy Council was eventually formally constituted by legislation in 1833. We have, indeed, come a very long way.

In an early speech, Mr. Michael de la Bastide, QC, at the time one of the foremost practicing members of the Inner Bar of Trinidad & Tobago, made out a compelling case why the decisions of the Privy Council in relation to many of the appeals from the Court of Appeal (and in one case directly from the High Court) of Trinidad & Tobago demonstrated that the Privy Council was at odds with the imperatives of a small developing independent nation concerned to script the path to self-government. I do not dwell on the actual cases, some of which I was involved in, but simply introduce from a Trinidad and Tobago perspective the continuing relevance today of the recommending and prescient conclusion of that paper, delivered in 1995 and which I endorse entirely for today’s discussion in Trinidad & Tobago. The main thesis of Mr. de la Bastide was stated in these terms:

I do not recommend that we retain or abolish appeals to the Privy Council depending on whether we like or dislike the decisions which their Lordships have been handing down. Given the level of expertise on the Judicial Committee, it is unlikely that any of their decisions will be open to criticism on what may be described as purely technical grounds. What I do think we should look at is the nature of the issues which a final Court of Appeal, whose jurisdiction is virtually unlimited, is called upon from time to time to decide, as illustrated by these recent cases. When we do that, we see that a number of these cases which have extremely important consequences for the whole community are really policy decisions,
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involving the weighing of competing interests and considerations. The competition is typically between the interest of the individual, whether it is to humaneness or fairness or some such consideration, and the interest of the rest of the society to be protected and to have the law of the land enforced.

Neither the common law, which consists really of the principles derived from decided cases, nor statute law, can provide a clear and certain answer to every question, and the decisions which a final Court of Appeal is called upon to make in order to fill the interstices are sometimes not very different from those made by a democratically elected Parliament.

The cases which I have reviewed are examples of decisions of that type. In making such decisions one is not unearthing some universal verity but is determining what is best for a particular society in the circumstances existing at a certain point in its history. I would have thought that it was essential for the decision-makers in such cases to have an intimate knowledge acquired at first hand of the society for whom the decision is made. Another aspect of the matter is that while no one suggests that judges should make their decisions by reference to public opinion, it is a salutary form of accountability (if not the only one in practice) for a judge to live in, or at least close to, the society for whom he makes decisions of this kind.'5 (emphasis supplied).

The Caribbean Court of Justice is now a reality. We have embarked on what the Right Honourable Prime Minister Dr. Kenny Anthony described in his Feature Address at the Inauguration Ceremony of the CCJ in 2005, ‘a Leap to Enlightenment.’6 That pedigree is self-evident from its carefully and wisely crafted institutional structure, its judgments and the many extra judicial pronouncements of its current President, the Right Honourable Sir Denis Byron7 and his immediate predecessor, the Right Honourable Mr. Justice Michael de la Bastide as well as of other judges of the Court. By carefully and wisely crafted institutional structure, I refer not just to the Constituting Instruments of the Court itself but equally to its supporting pillars, the Regional Judicial & Legal Services Commission and the Caribbean Court of Justice Trust Fund, which together provide an unique and enviable structure of independent underpinnings and sustainability in the selection and recruitment of the Court’s Judges and, very importantly, its well-insulated and independent funding, in perpetuity.

The Court is now established with a distinction and character which emphatically moves the discussion away from the earlier
concerns about replacing the Privy Council. An understanding of the Court’s gestation, including some of those earlier concerns are well chronicled in 2000 by Mr. Hugh Rawlins, later to become Sir Hugh Rawlins and Chief Justice of the Eastern Caribbean Supreme Court in his paper chronicling the history of the movement toward the CCJ and the equally erudite work of our own and renowned Professor Selwyn Ryan of Trinidad and Tobago in his book The Judiciary and Governance in the Caribbean. We look forward to the second edition of his book with his reflections on the progress which we have made with a now established Court.

In its original jurisdiction the Court has begun to define and to develop the concept of Caribbean jurisprudence at its very core, by breathing life into the Revised Treaty of Chaguaramas and into Conference Decisions of Member States in meaningful terms; terms which immediately resonate within and throughout the Caribbean Community. I use the word ‘resonance’ for its evocative simplicity, to maintain and to concentrate on the theme with which I commenced this review. We began by invoking Michael de La Bastide, ORTT, QC; we end by invoking Sir Hugh Wooding, TC, QC. Resonance refers, throughout, to the Caribbean Continuum of those voices which speak to self-validation. The Court’s decisions concerning these constituting Instruments are being discussed and debated by Caribbean peoples in their daily lives, in a manner in which those Instruments had never before been addressed, far less discussed in the validating streets of our publics, from Kingston in the North, through Bridgetown, to Port of Spain in the South and to Belmopan.

In the Trinidad Cement Ltd Case (of a series of cases brought before it in its original jurisdiction by that Trinidad based company against the State of Guyana involving issues arising in the application of a Common External Tariff) the Court has commenced the walk of that ‘very fine line’ of the supra-national impact of the interpretative and mandatory powers of its decision making. The Honourable Mr. Justice Winston Anderson, JCCJ has produced an opposite and erudite dissertation on the role of regional Courts within the context of Caribbean Community Law and Supra-Nationality. With reference to, among others, the Revised Treaty of Chaguaramas, he posits that the Court possesses the attributes of supra national competence and discusses ‘the tight-rope’ which ‘independent sovereign states of the Caribbean Community . . . have sought to walk . . . between asserting their individual sovereignty and at the same time recognizing the imperative that regional
integration requires the effectiveness of Community Law within their national legal orders.\textsuperscript{13}

In \textit{Trinidad Cement v CARICOM},\textsuperscript{14} the Court pronounced that:

By signing and ratifying the revised Treaty and thereby conferring on this Court ipso facto a compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the Revised Treaty, the member states transformed the erstwhile voluntary arrangements in CARICOM into a rule-based system, thus creating and accepting a regional system under the rule of law . . . The rule of law brings with it legal certainty and protection of the rights of states and individuals alike, but at the same time of necessity it creates legal accountability. Even if such accountability imposes some constraint upon the exercise of sovereign rights of states, the very acceptance of such constraint in a treaty is in itself an act of sovereignty.\textsuperscript{15}

In its more recent decision of 2013, that jurisprudence affirmed a core fundamental of Caribbean people, that is to say, freedom of movement within the Caribbean Community. In \textit{Shanique Myrie v The State of Barbados & The State of Jamaica (Intervenor)},\textsuperscript{16} involving a young Jamaican national who had been detained in Barbados by immigration officials, on entry, subjected to invasive searches and deported to Jamaica, the Court granted her declaratory relief and damages. In its reasoning the Court stated:

The basic presumption of the Barbados Immigration Act is that persons who are not citizens or permanent residents of Barbados have no legal right whatsoever to enter the territory. As a general proposition this is a correct reflection of international law regarding immigration, although there are a few exceptions to this rule. The RTC, however, and more particularly the 2007 Conference Decision brought about a fundamental change in the legal landscape of immigration throughout the Community. In contradistinction to foreigners in general, Community nationals now do have a right to enter the territory of Barbados and that of other Member States unless they qualify for refusal under . . . [specified exceptions] . . . \textit{It is the obligation of each State, having consented to the creation of a Community obligation, to ensure that its domestic law, at least in its application, reflects and supports Community law.}\textsuperscript{17}

For living examples of relevant and purposive Caribbean jurisprudence, no student of the law and no citizen of the Caribbean Community could ask for much more of a Court still in its infancy.
These pronouncements are of undeniable relevance in defining CARICOM. They also represent internationally acceptable statements of law in the jurisprudential fields of public law and Community law, indeed statements of unquestionable pedigree. I daresay that the concerns expressed by Mr. Justice Anderson of the Court in his personal capacity, in an article entitled ‘The Caribbean Court of Justice and the Development of Caribbean Jurisprudence’ on the challenge to carry this resonance forward will now find the Universities and Academics sitting up and taking notice! I pause to pay tribute to that address, itself a tour de force indeed, in its examination and development of the thesis on developing a Caribbean jurisprudence defined by aspiration, relevance and intellectual rigour.

Equally stamped with pedigree are the decisions of the Court in its appellate jurisdiction, not least the decision coming out of Belize of Marin. I can happily record that I was able, not too long ago, to cite that decision in argument, favourably received, before the Eastern Caribbean Supreme Court in Antigua & Barbuda, in an application by its Attorney General to bring former Cabinet Ministers to justice for misfeasance in public office. Such is the rich vein of the jurisprudence being afforded us by the Court. (The case however failed at first instance on the evidence and is unlikely to be appealed with the change of government). I do not detain you to examine these decisions, but we cannot pass on without acknowledging that other appellate decision of Boyce out of Barbados, also discussed by other speakers. This decision not only underlined the misunderstanding of the Privy Council of our written constitutions but, notably applied judicial review principles of legitimate expectation and, I daresay, may have confounded those who might have thought that the Caribbean Court of Justice would eschew international principles of public law to be simply a ‘hanging court’.

I use the word resonance in referring to this indigenous jurisprudence of the Court quite deliberately, in asking that rhetorical question: Whither Trinidad & Tobago?

In an era in which we are witness to a potentially fragmenting world order and when the challenge is upon us to embrace community, Trinidad and Tobago must take its rightful place in acceding completely to the jurisdiction of the Court. In giving meaning to that resonance I go to the prescient words of one of the founding fathers of Trinbagonian and Caribbean jurisprudence who needs no introduction: Sir Hugh Wooding, the first Chief
Justice of independent Trinidad & Tobago. In an address accepting the honorary doctorate being conferred on him, delivered in 1967 entitled 'The Rule of Law in our West Indian Society' we return to and should take as our call to arms, now in 2015, his stirring entreaty and declaration:

The call ... is for community effort... to proclaim my faith that our community is the community of the West Indies...no democracy can survive, let alone triumph, which is not a cohesive community under Law, a society of men and brethren working together with common purpose and seeking the common good. That is what I choose to call relatedness. And when relatedness is applied regionally, hemispherically and in our rapidly shrinking world universally, just as dependence gave way to independence, so independence will yield to interdependence....It is this relatedness which alone will make us accept the Rule of Law as forever established. It is this relatedness which alone can achieve the social justice that we seek. It is this relatedness which alone can bring among men goodwill and to the world, peace.

The auspices are yet positive. As recently as the 25th April 2012 in her Statement to Parliament signaling her Government’s intention, then, to bring legislation to secure the limited abolition of ‘appeals to the Privy Council in all criminal matters so that this jurisdiction would then be ceded to the Caribbean Court of Justice’, the Honourable Prime Minister Mrs. Kamla Persad-Bissessar S.C declared:

[I]t ... may have always been in the contemplation of the founding fathers that as our democracy grew from strength to strength and our Judiciary developed its confidence and expertise that the time would come when we would have to take responsibility ourselves for the final adjudication of our disputes consonant with the pristine principles of justice and fair play and say goodbye to the Judicial Committee of the Privy Council as our final Court of Appeal.

The CCJ is this year 10 years of age, with an exemplary record. There can therefore no longer be any doubt over the strength of the Court, nor of the supporting pillars of its foundation, that is, the Regional Judicial and Legal Services Commission and the Caribbean Court of Justice Trust Fund.

The Law Association declares itself ready to lead or to join in any collaboration which will enable Trinidad & Tobago to take its rightful place of leadership at the Head Table of the full
membership of the Court. It is apposite then that we take this occasion, also, to congratulate the Honourable Madam Justice Maureen Rajnauth-Lee of the Court of Appeal of Trinidad and Tobago and a graduate of the Faculty of Law of the University of the West Indies and of the Sir Hugh Wooding Law School on her recent elevation to the Caribbean Court of Justice

NOTES ON CONTRIBUTOR

Mr. Reginald T. A. Armour is a member of the Inner Bar of Trinidad & Tobago and a practicing Attorney in the areas of commercial law, constitutional and public law (including election law) and labour relations. Mr. Armour has a wide Caribbean legal practice and, has represented his clients before the Judicial Committee of the Privy Council. He is the Head of his own Port of Spain Chambers, Marie de Vere Chambers, a practice of eight independent practicing Attorneys. In addition to his law practice as an Advocate, he has served as an acting High Court Judge of the Supreme Court of Trinidad & Tobago and, as a senior member of the Council of the Law Association and the Law Reform Commission, among others. He has been appointed by the President of the Republic of Trinidad & Tobago to serve as Tribunal Counsel to the 2007 Mustill Tribunal and, more recently (2012) by the Chief Justice of the Eastern Caribbean Supreme Court as Tribunal Counsel to the Stollmeyer Tribunal, both being constitutional Tribunals established to investigate and report on judicial misbehavior. He has co-authored with the late Professor Ralph Carnegie a Report & Recommendations, commissioned by the Organisation of Eastern Caribbean States Secretariat and entitled National Constitutional Issues of an OECS Economic Union and, has written in the areas of public law and labour relations. NB: Mr. Armour delivered his presentation shortly before being elected as President but spoke as a formal representative of the Law Association.

NOTES

2 ‘The Case for a Caribbean Court of Appeal’; delivered on the occasion of the Anthony J.Bland Memorial Lecture, Cave Hill Campus, UWI, Barbados, 23rd March 1995
3 Ashby v AG of Trinidad and Tobago.
4 Cases such as Pratt v Morgan (Jamaica); Jurisingh v AG (Trinidad & Tobago); Bradshaw v Roberts (Barbados); Wallen & Guerra v Baptiste (Trinidad & Tobago); Ashby v AG (Trinidad & Tobago); Lennox Philip & Ors v DPP No.1 and No.2 (Trinidad & Tobago); Rees v Crane (Trinidad & Tobago).
5 Address to the Trinidad and Tobago Bar Association entitled ‘The Case for a Caribbean Court of Appeal’, 1995, Trinidad and Tobago. He was later to become Chief Justice de la Bastide (May 1995) and then the first President of the
Caribbean Court of Justice (August 2004), the Right Honourable Mr. Justice Michael de la Bastide, TC.

6 Dr. The Hon Kenny D. Anthony, Prime Minister of Saint Lucia, was the Lead Prime Minister responsible for the ushering in of the CCJ in CARICOM. See Address by Dr The Hon Kenny D Anthony Prime Minister of St. Lucia and Lead Prime Minister on the Establishment of the CCJ at the Inauguration of the Caribbean Court of Justice', POS, Trinidad and Tobago, April 16, 2005, p7.

7 The Role of the Caribbean Court of Justice and Importance to Caribbean Judicial and Economic Development; 26th February 2013. Distinguished Lecture Series, CARIMAC; presented by The Right Honourable Sir Dennis Byron, President, Caribbean Court of Justice.

8 Hugh Rawlins, The Caribbean Court of Justice: The History and Analysis of the Debate', CARICOM, CARICOM Secretariat, 2000. At the time Rawlins was a Temporary Lecturer, Faculty of Law, The University of the West Indies.

9 The Judiciary and Governance in the Caribbean Professor Selwyn Ryan; 2001 Sir Arthur Lewis Institute of Social and Economic Studies; University of the West Indies, St. Augustine Trinidad & Tobago. Paragraph 2

10 Replacing the Privy Council with a Regional Court; An address by Chief Justice Michael de la Bastide of Trinidad & Tobago On the occasion of the Convocation of the Caribbean Court of Justice, Kingston, Jamaica, 9th April, 2002, Paragraph 13

11 The Rule of Law in our West Indian Society. Sir Hugh Wooding, Delivered at the Graduation Ceremony of the UWI, Mona Campus, Jamaica, on the occasion of his accepting the Honorary Degree of Doctor of Laws, 18th February 1967.


13 'The CCJ in its Original Jurisdiction', Sir Arthur Lewis Institute of Social and Economic Studies; University of the West Indies, St. Augustine, Trinidad & Tobago, 2001.


15 'Community law and Supra-Nationality in Regional Integration: The Role of Regional Tribunals' [2014] by The Honourable Mr. Justice Winston Anderson, JCCJ


17 Ibid.

18 'The Caribbean Court of Justice and the Development of Caribbean Jurisprudence (Theoretical and Practical Dimensions)’ 7, March 2013, Trinidad and Tobago.

19 Florencio Marin and Jose Coye v AG of Belize [2011] CCJ 9 (AJ)


21 Delivered at the Graduation Ceremony of the UWI, Mona Campus, Jamaica, on the occasion of his accepting the Honorary Degree of Doctor of Laws, 18th February 1967.

22 Ibid.