THE CCJ DEVELOPING CARIBBEAN JURISTS AND JURISPRUDENCE*

by

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Protocols:

Dear Colleagues, I stand before you with mixed feelings. I am grateful to the OECS Bar Association for inviting me to present at this the 8th Regional Law Fair. I find it a distinct honour and privilege to share in this initiative which has been the major activity for providing opportunities for continuing legal education to the legal profession, the judges and the public in the region. It is a tremendous achievement to have maintained this function every year, and to make it grow from strength to strength. The continued support of the regional profession speaks volumes. So I congratulate the organizers, in particular the President of the Association Mr. Tapley Seaton Q.C. and the Chairperson of the OECS Bar Regional Law Fair Committee Ms. Nicole Sylvester.

On the other hand like many others, I am saddened by the passing of our most distinguished colleague Dame Bernice Lake Q.C. who has made a tremendous contribution to the development of the legal profession, the constitutional advancement and the rights of citizens in their quest for justice during her excellent practice of the law for over four decades. I express my condolences to her family, friends, well wishers, and to you the regional law profession and all who are bereaved and mourn her loss.

This is my first public function since my inauguration as President of the CCJ and I feel that it is poetic justice that it should be among you, many of whom have helped to nurture my development as a lawyer, a judge and a human being.

At this time the most topical issue facing the Court is the need for Member States to accept it as the court of final appellate jurisdiction. From my perspective, I would say that the Court has
been successfully established. Our governments have fulfilled the first part of the covenant, because the Court exists, it is funded, by all the governments and the legal treaty and other modalities necessary for its operation exist. Some six years have passed since it started to function in 2005.

During that period the Court has been hearing matters. I discuss this as a Privy Councilor. As a member of the Privy Council, I do not come to criticize it. After all over its three hundred year history it has won respect. I can only hope that as the CCJ gets more opportunity to serve the region it will earn at least as good a reputation if not surpass that of the Privy Council. It is common to lament the sloth with which our constituent governments have decided to access the final appellate jurisdiction, but I think that we could place a more positive spin if we recall that the European Court of Human Rights was established in 1959. During its first 10 years it only had 10 cases. But today it has 130,000 cases filed before it. It is very common with new courts that it takes time for litigants to bring cases before it. Now by comparison, despite the difficulties that surround the CCJ, in its first 6 years it has had 74 matters filed.

At this time when the OECS Bar has already gone on record and declared its support for the CCJ to be the final appellate court of the region I thought that it would be appropriate to discuss the CCJ as an institution which has been developing Caribbean Jurists and Caribbean Jurisprudence and to show some benefits the legal profession and ordinary folk have been enjoying in those countries who have come on board.

**The Legal Profession:**

I do not think that there can be any doubt that it is a distinct honour, privilege and distinction for any lawyer to appear before the final appellate court of his country. It provides an opportunity to contribute to the advancement of the jurisprudence. It allows the lawyer to give his client the opportunity to access the final court of appeal when he has a deserving case. Some statistical studies reveal that very few appeals go to the Privy Council. I have some statistics for Jamaica and for St. Kitts-Nevis. I trust that my learned friend Judge Patrick Robinson would not mind me relying on his address to the Cornwall Bar Association to indicate that very few cases go on
appeal to the Privy Council from Jamaica each year. He attributed this to the high costs involved in bringing a case to the Privy Council. He indicated that on average the Jamaica Court of Appeal hears about 270 cases per year, and only three percent or just over eight are appealed to the Privy Council. In St. Kitts and Nevis, over the last fifteen years, nine appeals went to the Privy Council. I suspect that this trend is common throughout the region.

There are two possible reasons for this: If it is that the unsuccessful litigants were satisfied with the way in which the Court of Appeal managed their appeals, this would give the lie to those who consider that there is a lack of public confidence in Caribbean jurists and courts. On the other hand, it may instead mean that there is a problem with access to justice at the level of the Privy Council. If this is so, it would be important to rectify it. One of the more inspirational speeches I heard came from the former President of the World Bank, James D. Wolfensohn when he described his most rewarding project. He said that he commissioned 60,000 researchers to question poor people around the world about what they wanted most. The answer was not money, it was justice. It informed his decision that to fight poverty and crime, it was important to improve access to justice. So access to justice is critical in our region for issues of social stability and economic development.

In most nations the design of the structure of the judiciary is trial, appeal, second or final appeal. It is clear from the nature of the discussions that, in the Caribbean region this is the structure that is wanted. But it is not usual for ordinary folk to be able to afford the second or final appeal to the Privy Council. It is therefore logical to assume that many important issues relevant for the ordinary man and woman in the street do not get the benefit of a second or final appeal. The indisputable fact is that the CCJ will give ordinary folk with cases that raise fundamental points of law and legal policy, a much greater opportunity to explore a second level of appeal than at present. In more technical terms, the CCJ will improve access to justice in the region in the sense that it is very likely that many more people will bring cases before the CCJ because it will be accessible to ordinary citizens with matters of public importance which are necessary to be aired in order to develop Caribbean Jurisprudence.

More importantly from an access to justice perspective is the fact that there is already a discernible trend in the variety of matters that come before the Court.
Impact on the lawyer:

I had some research done for me, and the results show:

Forty-one appeals and thirty-six applications have already been filed between August 2005 and July 2011. Thirty-eight appeals and thirty-four applications have been determined:

Between August 2005 and July 2011:
- From Barbados there have been fifteen appeals: nine civil, six criminal. There have also been thirteen applications.
- From Guyana there have been twenty-five appeals: twenty-four civil and one criminal. There have also been nineteen applications.

Between August 2010 and July 2011:
- From Belize there have been two civil appeals and five applications.

The number of senior counsel appearing before the CCJ in these matters has been 27 and the number of junior counsel 102. I do not compare these figures with the Eastern Caribbean because I doubt whether in the entire history of appeals to the Privy Council, a similar number of attorneys from the OECS have appeared before it as have appeared in those countries in the last 6 years.

My researcher conducted a survey and although the numbers were too small to be representative of the participating counsel, (due to time constraints) it allows the suggestion at least that there has been a positive impact on the legal practice of the attorneys appearing before the CCJ in the following ways:

- their personal and professional development have been heightened; and
- their existing clients have expressed increased confidence in them.
It is also the fervent belief of the attorneys who practise before the CCJ that the experience contributes to attracting new clients.

**Impact on ordinary folk:**

The number of appeals indicates beyond doubt that there has been an increase in appeals to the final court. This indicates that ordinary folk now 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. The fact is also clear that the civil litigants at the level of the CCJ are not limited to corporate or wealthy people because a number of civil appeals have been heard *in forma pauperis* showing that the ordinary citizen has been benefitting from the existence of the CCJ. Take for example the case of *Elizabeth Ross v Coreen Sinclair* [2008] CCJ 4 (AJ). Two very poor ladies (one quite aged) from Guyana had a dispute between them about the right to occupy a condominium. It was a matter very important to them. They could never previously have had that matter litigated by a second tier appellate court. The CCJ heard it *in forma pauperis* (even in civil matters, the CCJ will hear matters *in forma pauperis*). Two members of the Guyanese Bar agreed to represent both ladies *pro bono*. The ladies were able to have most hearings done by teleconferencing. With videoconferencing which the CCJ has now installed in the courts of Member States which did not already have the facility, even more can be done. As a result of the CCJ’s intervention, on occasion, Bar Associations have had attorneys provide *pro bono* services so that important matters could be ventilated for persons who could not afford to have their own legal representation. Attorneys have expressed pride in appearing before their own final appellate court and in providing charitable services for indigent clients with deserving cases.

Accessibility of the CCJ is further enhanced by the technology that is used especially in interlocutory proceedings where the lawyers can make submissions from their offices and receive decisions and judgments without leaving their offices. The Court has improved its audio
conferencing facilities and has been hearing interlocutory matters via audio, and more recently, by video. I would imagine that if necessary and desirable, the Court may even be disposed to hear full appeals by way of video conference. To help cope with the access to justice issue, currently an audio of the day's proceedings of an appeal heard at the Seat of the Court is on the Court's website within four hours and a video of the day's proceedings is usually available on the website within twelve hours. Both are also available to individuals at a minimal cost.

**Impact on Jurisprudence:**

Now I will take a brief look at just six of the cases that came before the CCJ to point out the way in which ordinary citizens have benefitted from the development of Caribbean Jurisprudence:


This was one of the more recent cases from Belize which addressed a very interesting issue, *viz* can the Attorney-General acting on behalf of the State bring an action in tort for misfeasance in public office?

The factual background was that two former ministers of government were alleged to have transferred fifty-six parcels of land to a company beneficially owned by one of them for consideration well below the market value. The case was in the preliminary stages and the CCJ ruled that the case could proceed.

There are many things which made this case interesting. One is that in the presentation of the case it appeared that no one could find that this question had ever been raised before. Counsel on both sides submitted that there were no judicial precedents. It appeared that throughout the history of litigation there was only one reported case where the State had been a claimant for tortious misfeasance: *Southern Developers Ltd. et al v the Attorney-General of Antigua and Barbuda*, Civil Appeal, HCVAP 2006/0020A, unreported. Traditionally, in cases where the State suffered losses from abuses in public office the remedies relied upon were, dismissal from office, disciplinary regimes,
criminal prosecution, the use of integrity and anti-corruption legislation or litigation for breach of trust or fiduciary litigation.

Thus, already in its short lifetime, the CCJ had an opportunity to be a world leader on a subject that is troubling every nation as it grapples with the issue of public integrity and corruption.


Guyana has a mixed system of land law. It is based on the Roman Dutch Law. Since it has accessed the CCJ there have been developments in the land law of Guyana. These developments impact not only the litigants but the economic development of the Community. There have been several cases where the CCJ has helped to bring the ancient principles that have been applied in line with modern legal developments and international standards. A case which provides a detailed analysis of the development and application of land law in Guyana is that of *Jassoda Ramkishun v Conrad Ashford Fung-Kee-Fung and Others*. The Court clarified a number of contentious issues. One of the issues that has consistently provided difficulty in the administration of land has been the question of the extent to which equitable interests in immovable property could be recognised in Guyana, and the prevailing wisdom had been that they could not be recognised. In this case, however, the Court had to consider whether the equitable relief of specific performance was available as a remedy against a volunteer. The CCJ was able to demonstrate that Roman Dutch Law was able to provide the remedy without relying on the doctrine of equity.

3. *Attorney General and Others v Joseph and Boyce [2006] 69 WIR 104*

The CCJ has addressed an important issue of International and Constitutional Law in a manner which has emphasised the human rights of the citizen. As lawyers we know that the relationship between international law and domestic law varies between different legal systems. Although this is regarded as a technical issue, I can briefly say that there
are two general systems: the monist system applied by civil law jurisdictions and the dualist system applied by the common law. It therefore follows that the Commonwealth Caribbean is or is mostly dualist. Monists assume that the internal and international legal systems form a unity. International law does not need to be translated into national law. The act of ratifying the international law immediately incorporates the law into national law. International law can be directly applied by a national judge, and can be directly invoked by citizens, just as if it were national law. A judge can declare a national rule invalid if it contradicts international rules because, in some states, the latter have priority. Dualists emphasise the difference between national and international law, and require the translation of the latter into the former. Without this translation, international law does not exist as law. International law has to be national law as well, or it is no law at all. If a state accepts a treaty but does not adapt its national law in order to conform to the treaty or does not create a national law explicitly incorporating the treaty, then it violates international law. But one cannot claim that the treaty has become part of national law. Citizens cannot rely on it and judges cannot apply it. National laws that contradict it remain in force. According to dualists, national judges never apply international law, only international law that has been translated into national law. This troubling issue came before the CCJ in the case of: Attorney General and Others v Joseph and Boyce. I know that this case is usually cited in connection with capital punishment, but it is my intention to draw attention to the impact of increased access to final courts of appeal, that is to the CCJ decisions on the rights of the citizen to justice. In this case, Barbados had become a party to and had ratified a treaty, the Inter American Convention on Human Rights, but had not incorporated it into domestic law. As a dualist country, that had implications on the rights of the citizen to benefit from its provisions. The Court considered that although individual citizens derived no rights under treaties concluded between States, the promotion of universal standards of human rights showed a tendency towards a confluence of domestic and international jurisprudence and consequently a ratified but unincorporated treaty could give rise to certain legitimate expectations. In this case the Court rationalised that in balancing the competing interests of the individual convicted of murder and sentenced to death to pursue a petition to the Inter American
Human Rights Commission, and that of the State to refuse to await the completion of the process, the principle of legitimate expectation prevailed.

4. **Toolsie Persaud Ltd v Andrew James Investments Ltd and Others [2008] 72 WIR 292**

Lest it be thought that the State has not benefited from the legal developments I refer to the case of: **Toolsie Persaud Ltd v Andrew James Investments Ltd and Others**. In this case, from Guyana the central issue before the Court was whether the State could acquire land by adverse possession. The question was linked to another question which made this an interesting development in the law. That other question was whether the State, or for that matter any claimant, could have the necessary intention for its possession to be adverse when its possession was based on the belief that it was the lawful owner under title documents which were later declared to be invalid. The Court answered both questions affirmatively. After explaining that the major role of adverse possession was to remove uncertainties by making legal title coincide with actual possession, titles are put in order by confirming the entitlement of someone in lengthy undisturbed enjoyment to land who happens, for various commonly recurring reasons to have no paper title. It then asked the rhetorical question: “*Why should the State be denied the benefit of this longstop in the conveyancing system, which is so crucial for regularising the titles of its own citizens and making their land more cheaply and expeditiously marketable?*”

5. **Frank Errol Gibson v the Attorney General of Barbados [2010] CCJ 3(AJ); 76 WIR 137**

I think that I must refer to at least a couple of criminal cases. A very interesting matter came from Barbados and in a form which again shows that having the final court close to home and more easily accessible goes a long way in providing the ordinary citizen with additional opportunities for justice. In the case of **Frank Errol Gibson v the Attorney General of Barbados**, Mr. Gibson was accused of murder. It seemed that the case against him was entirely circumstantial and the prosecution was relying heavily on the evidence of a dentist who had concluded that a bite mark on the victim had been made by
the accused. The accused had pleaded not guilty and wanted to provide expert evidence which would contest that of the prosecution’s dentist. The field of expertise was forensic odontology and the accused could not afford to retain an expert. Among the issues that came before the CCJ was whether the obligation in the Constitution to provide adequate facilities for the right of the accused to a fair trial required the State to fund the instruction of the expert, and if so whether the accused was obliged to disclose any report obtained from the expert. On these questions the Court ruled that the inequality of arms was so serious that failure to provide the expert investigator could adversely affect the fairness of the trial. The defence then argued that any report obtained by it from the State funded forensic odontologist was not disclosable to the Prosecution but the Court held that although an accused did not have any general duty to disclose, if the defence proposed to call the expert to give evidence then they would be obliged to share the report with the Crown.


One of the topical human rights issues throughout the world today is the excessive duration of pre-trial detention. This matter was addressed by the CCJ in *Romeo Da Costa Hall v The Queen*. The point came up when the State accepted a plea of guilty of causing serious harm with intent and withdrew the indictment for murder. The sentencing court calculated the sentence by starting with the lower range for manslaughter, then making discounts for the guilty plea, and for mitigating factors, and for two of the years spent on remand, although it was acknowledged that the appellant had spent four years and five months. The CCJ emphasised that although a court does have discretion, the primary rule is that full credit should be granted for time spent on remand, and pointed out some of the elements which would influence the discretion to apply exceptions including, where the court concluded that the defendant deliberately contrived to expand the time on remand, and the entire or part of the pretrial custody was unconnected with the offence for which he was being sentenced, and where the custody or part of it was also caused by other offences for which he had been convicted or was awaiting trial.
Conclusion

I hope that I have convinced you that the CCJ in its six years of existence has had a positive impact on the development of Caribbean Jurists and Jurisprudence.

Thank you.