The Arc of the Moral Universe is Long, but it Bends Towards Justice

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

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The Jamaican Bar Association (JAMBAR) was incorporated as a Company Limited by Guarantee on Tuesday, January 16th 1973. JAMBAR is a voluntary organisation for attorneys-at-law in Jamaica. For forty years the important mandates and objectives of JAMBAR have been undertaken with the intent of remaining relevant and impactful. The Association is administered by a Council comprising a President, Vice- President, Immediate Past President (where appropriate) and twenty (20) Council members. The Executive of Council comprises the President, The Vice-President, The Hon. Treasurer, The Hon. Secretary, The Assistant Treasurer and the Assistant Secretary. The three (3) Regional Bar Associations may have one observer each on Council.

Remarks
by
The Honourable Mr Justice Adrian Saunders, President of the Caribbean Court of Justice
on the occasion of the
Jamaican Bar Association Annual Retreat
on
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ABSTRACT

Ordinarily, one would expect that in this the 21st century, the idea of a Caribbean Court of Justice, replacing His Majesty's Privy Council as a final Court of Appeal, would be free from controversy … if Caribbean governments could get right a suitable funding model for the court and an appropriate framework for the judicial appointments and the tenure of the judges; in other words if the architectural design of the court rendered it independent.

Thanks in no small measure to the efforts of the Jamaica Bar Association, not only did Caribbean governments get those elements right, but the institutional architecture of the CCJ has been properly hailed throughout the world as a model for international courts to emulate. And yet, seventeen years later, of 10 eligible states, only four have acceded to the appellate jurisdiction of the court, with another one on the way, hopefully early in the new year. More importantly, the two most populous states (and the states that made the greatest contribution to the funding of the CCJ), Trinidad and Tobago and Jamaica, have not yet acceded. How do we explain this?

This brief Address suggests that any intelligent discussion on whether a State should accede to the appellate jurisdiction of the Court should focus on the actual performance of the CCJ, the experience of those states that have acceded to that jurisdiction, and an honest comparison with the court it seeks to replace. Such a discussion should take into account the following questions:

1) *Is the Court appropriately independent?*

2) *What is the court's track record? In other words, What can objectively be said about the quality of its judicial procedures, its jurisprudence, its technological and administrative efficiency?*

3) *How has accession to the appellate jurisdiction benefited those countries that have taken the plunge?*

4) *How does accession promote our Caribbean jurisprudence? Put differently, how does non accession undermine Caribbean jurisprudence?*

The Address provides answers especially to the third and fourth questions (given that other speakers will address the first two in a fulsome manner) and suggests that in light of those

answers and also the published objectives of JAMBAR, the Association must consider whether there are any further measures it can take to support of Jamaica's accession to the CCJ.

The arc of the moral universe is long, but it bends towards justice. That beautiful metaphor was coined by Dr Martin Luther King Jr, who was then referencing the struggles of black people in the United States for basic civil rights. I don't mean to compare that ongoing struggle with the endeavour to have Jamaica and those States that have not yet done so to make good on their treaty commitment to join the CCJ, but something about Dr King's moving words spurred me to begin this short Address with it. The arc of the moral universe is long, but it bends towards justice.

Ordinarily, one would expect that in the 21st century, the idea of a Caribbean Court of Justice, replacing His Majesty's Privy Council as a final Court of Appeal, would be uncontroversial, that is, as long as Caribbean governments could get right the funding model for the court and put in place an appropriate framework for the necessary judicial appointments and the tenure of the judges; in other words, if the architectural design of the court rendered it impartial and independent.

Thanks in no small measure to the efforts of the Jamaica Bar Association, not only did Caribbean governments get right those elements that guarantee the court's independence, but the institutional architecture of the CCJ has been properly hailed throughout the world as a model for international courts to emulate. And yet, seventeen years later, of 10 eligible states, only four have acceded to the appellate jurisdiction of the court, with another one on the way, hopefully early in the new year. More importantly, the two most populous states (and the states that made the greatest contribution to the funding of the court), Trinidad and Tobago and Jamaica, have not yet acceded.

Well before the court was established, a perspective on it was publicly shared by a British Privy Councillor. In October 2003, Lord Leonard Hoffmann was invited by the Law Society of Trinidad and Tobago to deliver a lecture in Port of Spain. It is useful to reflect on what was said by him on the subject. Forgive me for citing him at some length, but his comments must be seen as coming, so to speak, "from the horse's mouth".

The JAMAICA OBSERVER pulling from the Trinidad Express, carried a fair and accurate report that can still be accessed online at https://www.jamaicaobserver.com/news/author-calls-for-recognition-of-the-colon-man/?q=FULTON%20WILSON%2C%20Trinidad%20Express%20reporter

The headline of the Observer report was "Privy Council judge supports CCJ". The article stated that "LAW Lord Leonard Hoffmann, a judge in the Privy Council, is in favour of abolishing appeals from the Caribbean to the London-based court and supports the establishment of a final Court of Appeal in the Caribbean".

Lord Hoffmann told attorneys in Trinidad and Tobago: "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." He went on, "It is an extraordinary fact that for nearly nine years, I have been a member of the final court of appeal for the independent Republic of Trinidad and Tobago, a confident democracy with its own culture and national values, and this is the first time that I have set foot upon the islands."

Lord Hoffmann admitted that although the Privy Council had done its best to serve the Caribbean and had done much to improve the administration of justice, the Privy Council's remoteness from the community had been a handicap. He said, "We have been necessarily cautious in doing anything which might be seen as inappropriate in local conditions, and although this caution might have occasionally saved us from doing the wrong thing, I am sure it has also sometimes inhibited us from doing the right thing".
He noted that the ability of a final court to function as a third branch of government depended not only upon its legitimacy but upon the sensitivity of its members to what was both necessary and possible.

Lord Hoffmann went on to give practical examples of instances where it would be difficult for the Privy Council to adjudicate especially constitutional matters in an effective manner. He stated, for example, that if a case came up to the Privy Council on the question of whether the resources devoted to legal aid by a Caribbean state were sufficient to satisfy the minimum requirement of a fair trial, then it would be difficult for the Privy Council all the way in London to express a view. "They would have no knowledge of the consequences of their decision one

way or the other. It is only a local court which would have the necessary knowledge and legitimacy to say whether the Constitution required more to be done," he said.

Lord Hoffmann said he did not underestimate the difficulty of creating a final court for the various Caribbean communities, but he noted, "I think that states which have so much in common in their history and values, which can even play cricket together, should be able to do so".

These were fundamental truths and remarkable admissions that were made by Lord Hoffmann. As lawyers, we are trained to give such statements a high value because they are, in a sense, inconsistent with the maker's own self-interest as a senior member of the Privy Council.

Lord Hoffmann's present-day colleagues do not today publicly utter similar opinions. Instead, the publicly declared and often repeated mantra of British officialdom is "we're happy for states to leave the JCPC if they wish, and if they do, we wish them all the very best, and we're equally happy for them to remain and have us try their appeals if they wish us to do this."

I think the forthrightness of Lord Hoffmann evinced integrity, logic, truth and wisdom, and if such statements were made today, it would resonate fulsomely in the region. But, regretfully, there appears to be a disinclination to take that approach. In any event, it is ultimately for us in the region and not for others to resolve our issues ourselves.

Lord Hoffman offered his opinions in October of 2003, almost 20 years ago; two years before the CCJ heard its first appeal in 2005. At the time he gave those views, some regional leaders, lacking in faith, were unsure about what the mettle of this new court would be like. Would it be worthy? Do we have the talent? Are Caribbean judges good enough? Will they kow-tow to the political directorate or succumb to other external pressures? Someone said we should give the court ten years before making an assessment.

The CCJ has been operating now for 17 years. It has not been idle. It has built up a modest but sufficient body of jurisprudence for experts to assess. It now behoves us all to make that assessment. And we must make it honestly on the basis of objective facts. First, we need to identify rational indicators and measures for the making of the assessment.

I have heard intelligent people make the assessment and, with great respect, I think the indicators and measures they utilise leave much to be desired. Many of the justifications I have heard for not supporting the CCJ seem to compare apples with oranges, or are replete with patent misinformation, or are founded on premises that simply do not stand scrutiny or simply reveal a bias against anything Caribbean.

It is said, for example, that states should not accede because we must first "fix" the local courts because they are wanting. It is true that many court users of the domestic justice system are frustrated with serious delays and inefficiencies. It is also true that attention must be paid to addressing these deficiencies. But even when that criticism of local justice is justified, the notion that one must first "fix" those issues does not take into account that, firstly, remaining with the Privy Council does nothing to assist in that regard, and so you can never be worse off by moving to the CCJ. More significantly, however, it is not entirely logical to lump together the local courts with the CCJ because the CCJ is not resourced and organised, and its judges are appointed in the same way as the domestic courts. If one wishes to make comparisons, the only valid one is to compare the CCJ as a stand alone court with the JCPC, and we are happy for that comparison to be made. Moreover, it is the CCJ, not the Privy Council, that actually lends its organisational and other resources to assist in improving the regional justice systems, whether through training initiatives for judges or otherwise.

In my view, a reasoned discussion on whether a State should accede to the appellate jurisdiction of the CCJ should take into account at least the following four indicators:

1) Is the Court appropriately independent?

2) What is the court's track record? In other words, What can objectively be said about the quality of its judicial procedures, its jurisprudence, and its technological and administrative efficiency?

3) How has accession to the appellate jurisdiction benefited those countries that send their appeals to the CCJ?

4) How does accession promote our Caribbean jurisprudence? Put differently, how does non accession undermine Caribbean jurisprudence?

To an audience of Caribbean Attorneys, I do not believe that I need to dwell on the issue of the independence of the Court. Earlier I alluded to the exemplary manner in which Caricom ensured that the Court would be institutionally independent, and I know that my fellow panellists will speak to the mechanisms that assure this. If not, during the Q and A, I can answer any questions asked in this regard.

As to an assessment of the court's track record, as the current President of the Court I would prefer to leave it to others to express opinions on that question. During the Q and A, I am prepared to provide statistics to help you form your own opinions. I would only say that regionally and internationally, the assessments and reviews have all been very positive. Our jurisprudence is cited with approval both in courts of the United Kingdom and elsewhere throughout the Commonwealth and, of course throughout the region. A German Foundation, GIZ, did a full professional independent audit of the CCJ's processes, and it gave the CCJ a very positive scorecard. Finally, earlier this year, the court was inducted as an implementing member of the International Consortium of Court Excellence. We were exceedingly pleased about this huge honour because it signified a recognition that the Court conducts itself in a manner that objectively strives for excellence as we are committed to a continuous cycle of assessment, planning, implementation and monitoring and evaluation of our output.

I wish to zero in briefly on the third and fourth indicators. How has accession to the appellate jurisdiction of the CCJ benefited Barbados, Guyana, Belize and Dominica? I dealt with this in an address that I gave to mark the 60th Anniversary of the establishment of the Court of Appeal of this country. I pointed out then that:

Four countries currently send their appeals to us – Barbados, Guyana, Belize and Dominica. In each of these countries, as compared with what occurred prior to their accession, there has been a dramatic escalation in the volume of cases being adjudicated at the level of a second appellate tier. For the ten-year period before and after accession to the CCJ for Barbados and Belize, the increase was in the magnitude of approximately 320% and 144%, respectively…

Jamaica has a population that is approximately ten times that of Barbados, seven times that of Belize and slightly less than four times that of Guyana. During the period from 2016 to 2021, a mere 20 second-tier appellate judgments were delivered by Jamaica's highest court. During the

same period, the CCJ delivered 43 judgments from Barbados, 28 from Belize and 52 from Guyana. If we zeroed in on Barbados, it is apparent that a country with 10% of Jamaica's population has had more than twice the number of cases heard and resolved at the level of a second appellate tier. As compared with Jamaica, Guyana had more than two and a half times the number of cases heard and resolved at the level of a second appellate tier.

The reality is that comparatively few Jamaican cases are being decided by this country's final court. The Jamaica Court of Appeal would usually render over 250 appellate decisions each year. Only about 3 or 4 of most of these cases are appealed further to the Privy Council. What is the reason for such a paucity of cases going up to London? Surprisingly, there are some people who still express the view that the Privy Council is "free" and that this is a good reason why we should continue to use it. Such reasoning about freeness is not borne out by the facts. The filing fees at the London court, coupled with the significant fees which must be paid to English solicitors, deter all but the well-heeled and legally aided from taking a case to London. The fundamental reason for the few Jamaican cases reaching London has to do with the crippling expense. People of ordinary means are deprived of the ability to avail themselves of a level of access to justice that they could and should enjoy.

On the contrary, in Barbados, Guyana, Belize and Dominica, a healthy ratio of concluded Court of Appeal cases make their way to the CCJ.

Quite apart from the difficulties with access to justice, there are more fundamental consequences at play. The role of a final court of appeal is very different from that of an intermediate appellate court. Intermediate courts of appeal have huge dockets. Their appeals are aimed at examining the trial record to discover whether any errors were made by the hearing judge that needs to be corrected. The Court of Appeal corrects the error, and usually, that is the end of the litigation.

There would invariably be, however, instances where an appeal from the Court of Appeal's judgment to a second appellate tier is warranted. The lawyers involved would have recognised this as a hard case, a case where the law is uncertain and is in need of clarification, or a case where interpretation of the law might admit two or more equally rational answers. In our common law countries, where a significant body of the law is judge made law, a hard case might be one where the prevailing interpretation of the law appears to be way out of step with the ongoing march of an advancing society. In each of these cases, resort is usually had to the

second-tier appellate court. Then, the obligation of the final court is to consider and, if necessary to engage in a course reset. Final appellate or apex courts do not so much correct errors as they clarify the law and develop the common law.

An apex court is a reflective body with more judges sitting on it, dealing with far fewer cases. The decisions of a final court go beyond the litigants in the specific case. Those decisions are aimed at the judicial system as a whole. Apex courts engage in system-wide correction. Apex courts make judicial policy decisions, as Lord Hoffmann points out. For this reason, apex courts should be diverse and comprised of persons with an understanding of Caribbean people and society. Any deficit in that quality will have a deleterious impact on the manner in which the court goes about making fundamental policy choices.

My colleague, Justice Peter Jamadar, a few weeks ago, did a presentation on the value of diversity and its possible impact on decision-making. I asked his permission to share with you the following slides he had prepared.

For the rule of law to operate in the dynamic manner it should, not only must there be a diverse court that understands people and society, but it is also vital that a final court should be accessible to all who have hard cases. It ought not to be available only to those with substantial means or those who can obtain legal assistance. Also, as Lord Hoffmann points out, the judges of a final court should ideally experience the consequences of the decisions they make.

When appeals to a final appellate court are few, as is the case currently in Jamaica, a dearth of hard cases actually bubbles up, and the country's jurisprudence is negatively affected. On the contrary, in Guyana, Barbados, in Belize, as my fellow panellists will indicate, the cases are legion where the CCJ has heard hard cases that, in all likelihood, never would have reached the Privy Council because the litigants were people of ordinary means. These were cases that made a profound contribution to the development of the law of the respective States.

So, where do we go from here? The objectives of the Jamaican Bar Association are, *inter alia*, to strive for the maintenance and strengthening of the Rule of Law and Human Rights and to work towards the improvement of our legal system. JAMBAR has done an excellent job in this regard, and I would like to congratulate this Association for the great strides it has made. It is a

fact that the legal profession is better governed in this country than anywhere else in the English-speaking Caribbean.

Today, we are at a crossroads where the critical question as to how best to strengthen the rule of law at the level of an apex court must be answered in a decisive manner. That is naturally a question, the answer to which will ricochet down through the ages.

As I told the judicial fraternity of this country last August, whether Jamaica accedes to the appellate jurisdiction or not, the CCJ will continue to be just as much a Jamaican court as it is a court of Guyana or Barbados or Belize or any other Caricom State. Jamaica will always be a part of the Caribbean, and within its means and possibilities, the Caribbean Court of Justice will always provide support for the judiciary and judicial officers of this country. Jamaican judges will always, I am sure, be citing judgments of the CCJ. One Jamaican judge currently sits on the court, and I have no doubt that in the future, there will be others.

As Jamaica contemplates how it answers that critical question, Dr King's elegant prose provides a little comfort. *The arc of the moral universe is long, but it bends towards justice*.