Bringing Justice Home

The Road to Final Appellate and Regional Court Establishment

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Commonwealth Secretariat
Marlborough House
Pall Mall
London SW1Y 5HX
United Kingdom

Published by the Commonwealth Secretariat
Edited by Jane Lanigan, Editors4Change Ltd
Designed by kc gan designs
Cover design by Tattersall, Hammarling and Silk
Printed by Hobbs the Printers Ltd, Totton, Hampshire

Wherever possible, the Commonwealth Secretariat uses paper sourced from sustainable forests or from sources that minimise a destructive impact on the environment.

Copies of this publication may be obtained from

The Publications Section
Commonwealth Secretariat
Marlborough House
Pall Mall
London SW1Y 5HX
United Kingdom

Tel: +44 (0)20 7747 6534
Fax: +44 (0)20 7839 9081
Email: publications@commonwealth.int
Web: www.thecommonwealth.org/publications

A catalogue record for this publication is available from the British Library.

ISBN: 978-0-85092-882-2 (paperback)
ISBN: 978-1-84859-015-1 (downloadable e-book))

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Acknowledgments

I owe a deep gratitude to the distinguished attorneys-general, ministers of justice, justices and registrars and senior court officials who participated in the meetings on final appellate and regional courts, spanning a period of four years. Their composite expertise and belief in the project of the Commonwealth Secretariat infused the discussions and findings with the utmost level of expertise and insight available. This is indeed most commendable. To all, I give my outmost thanks. In particular, I wish to acknowledge the delegations of the regional courts of the Caribbean Court of Justice (CCJ); the Common Market of Eastern and Southern Africa (COMESA); the Economic Community of West African States (ECOWAS); the Supreme Courts of Canada, New Zealand, the Eastern Caribbean, Barbados and Jamaica; the High Court of Australia; and the Court of Appeal of Guyana. The use of the work emanating from the several meetings has made this text possible, along with the generous use of papers presented by these judges, registrars and senior officials.

The Commonwealth member states, national, regional and international courts, their chief justices and presidents respectively, who hosted the author and her colleagues during these years of meetings – we appreciated your unconditional hospitality and appetite for sharing in the quest for refinement of jurisprudence.

For the support granted at the Commonwealth Secretariat, heartfelt thanks to researchers of the Law Development Section, Ms Sardia Cenac, for the three years of invaluable assistance and to Ms Yelena Hewitt, whose summer help was timely. To the editor of the Commonwealth Law Bulletin, Dr Zammit-Borda, who took time to re-read this script; and many thanks as well for the reinforcement given by the consultant to the project, Justice Austin Davies (Ret.).

Finally to my children and supportive colleagues who always helped and encouraged me in my endeavours. God Bless.

Contents

List of acronyms

ADR	Alternative dispute resolution
CARICOM	Caribbean Community
CCJ	Caribbean Court of Justice
CCJ	Community Court of Justice (of ECOWAS)
CSME	CARICOM Single Market and Economy
COMESA	Common Market of Eastern and Southern Africa
CJEC	Court of Justice of the European Communities
ECSC	Eastern Caribbean Supreme Court
ECOWAS	Economic Community of West African States
ICCPR	International Covenant on Civil and Political Rights (United Nations)
ICJ	International Court of Justice
JCPC	Judicial Committee of the Privy Council
JCPC-HMC	Judicial Committee of the Privy Council, Her Majesty in Council
LDS	Law Development Section (Commonwealth Secretariat)
LCAD	Legal and Constitutional Affairs Division (Commonwealth Secretariat)
OCCBA	Organisation of Commonwealth Caribbean Bar Associations
OECS	Organisation of Eastern Caribbean States
RJLSC	Regional Judicial and Legal Services Commission
SADC	Southern African Development Community

Introduction

The examination that this book seeks to undertake relates to the manner in which the judicial evolution throughout various parts of the Commonwealth has been occurring over time. It will investigate the concomitant political independence of former British colonies and, in particular, the imperatives that were given expression through the establishment of a final appellate court on their own soil. Further, along with independence, there emerged the awareness of these states to look beyond colonial associations as component entities of regions – regions that often have the legacies of not just the British, but other colonial imperialists as well. Global trends had added to the dictates of seeking regional integration to enable countries to, at the very least, exert more leverage and, at the extreme, survive. This regionalism has heralded the formation of regional court establishment, yet another expression – and a more advanced one – of political and judicial independence.

From 2003 through to 2007, the Commonwealth Secretariat hosted a series of meetings. These meetings emanated from a 2002 mandate of the Commonwealth Law Ministers, which requested that the Secretariat:

- examine the manner in which Commonwealth jurisdictions proposing to sever relations with the Judicial Committee of the Privy Council (JCPC) could effect a smooth transition from the jurisdiction of that court;
- ensure that the high standards set by the JCPC were maintained after severance by such other courts as might replace the Privy Council; and
- make such recommendations as are deemed appropriate and report thereon to the law ministers.

Commencing in 2002, the Commonwealth Secretariat's Law Development Section (LDS), pioneered by its head and adviser, Cheryl Thompson-Barrow of the Legal and Constitutional Affairs Division (LCAD) and the author of this book, pursued a set of activities, synchronising these with the fortuitous and significant developments which were occurring to the jurisprudential landscape in member countries. These activities were as follows:

- In June 2003, an expert group was convened at the Secretariat offices at Marlborough House in London, which culminated in a report setting out detailed conclusions and recommendations. These included:
  - The continuation of information sharing amongst final appellate courts as they removed jurisdiction from the JCPC;
  - That the exchange of information with 'older courts' of the Commonwealth, such as the Supreme Court of Canada and the High Court of Australia, and by newly-established final appellate courts, was perceived as beneficial.
  - The utilisation of LCAD's good offices to arrange and co-ordinate visits of court officials and judges to learn and observe at first hand the practices and procedures of newly-established courts. Court visits also included visits to regional and international courts, such as the Court of Justice of the Common Market for

Eastern and Southern Africa (COMESA) and the International Court of Justice (ICJ), as this was deemed beneficial for regional courts such as the Caribbean Court of Justice (CCJ) and the Court of Justice of the Economic Community of West African States (ECOWAS).

- In 2003-2004, LDS/LCAD established consultative arrangements with the ICJ and the Court of Justice of COMESA. In 2005, it established such arrangements with the Supreme Court of Canada and the Court of Justice of ECOWAS.
- In July 2004, New Zealand, which was represented in the 2003 expert group meeting, removed appellate jurisdiction from the JCPC when the Supreme Court of New Zealand began operation. The court was visited by LDS later that year.
- In April 2005, the CCJ was inaugurated as a court of original jurisdiction with judicial application of the regional arrangements under the (Revised) Treaty of Chaguaramas creating CARICOM (Caribbean Community) as well as a court of final appellate jurisdiction replacing the JCPC.
- In February 2006, meetings were convened in Wellington, New Zealand, and Canberra, Australia, with the newly-established New Zealand Supreme Court and the older High Court of Australia. Visiting delegates included the presidents, justices and registrars of the Courts of Justice of ECOWAS and COMESA, the CCJ and the Supreme Court of Canada.
- The meetings moved to the Caribbean in January-February 2007. They took place in Jamaica – as a country which has signed on to the original jurisdiction of the CCJ and was trying to remove appeals to the JCPC; in Barbados, a party to both original and appellate jurisdictions of the CCJ; and finally in Trinidad, as the seat of the court. The delegation was of a similar composition to that of the 2006 meetings, but now included visiting justices and registrars from the Supreme Court of New Zealand and Australia.
- Both the Pacific and Caribbean meetings, appreciating the enormity of the information gleaned through their taking place, reiterated that the completion of the mandates of law ministers was deemed necessary through collaborative visits and interaction with the Court of Justice of the European Communities (CJEC), the ICJ and the JCPC. Consequently, In July 2007, meetings were held with visits to the courts abovementioned. As before, the regional courts of COMESA, ECOWAS and the CCJ participated. Joining the meeting for the first time was the newly-established Tribunal for the Southern African Development Community (SADC), which came into being in 2006. In order to also grant a 'wholesomeness' to the final meeting in terms of arriving at best practices for courts that would be immediately affected by the project, participation in this project included: the Eastern Caribbean Supreme Court (ECSC), a sub-regional court of CARICOM, as well as the Supreme Courts of Barbados and the Court of Appeal of Guyana, countries which had removed jurisdiction from the Privy Council and had acceded to the appellate jurisdiction of the CCJ. New Zealand, which had been actively participating in the series of meetings since 2003, was represented, as were the 'older' courts, such as the Supreme Court of Canada and the High Court of Australia. The meetings culminated in an intense session at the headquarters of the Commonwealth Secretariat at Marlborough House in London. All of these sessions enabled the distinguished delegates and the LDS to arrive at suitable recommendations.

What began as a concept, articulated through a project, has evolved into a most meaningful and unique contribution to the debate on removing appellate jurisdiction from the JCPC and the establishment of new final appellate courts. This is particularly because of the level and expertise of the participants, being senior justices and registrars of great and acknowledged repute throughout the Commonwealth. The outcome of these meetings has proved to be beneficial beyond expectations, as the justices and registrars themselves have asserted that this has been the first instance of such a forum – one that facilitates sharing and allows for the continued examination and improvement of best practices – being established.

The purpose of this book is to assist those states and regions that are in the process of, or have in fact already completed, final appellate formations or regional tribunals. It examines the lessons learnt and best practices that emerged from the meetings, which will be further explored below.

1 History of Appeals to the Judicial Committee of the Privy Council in London

Location of the Judicial Committee of the Privy Council

The history of the British Empire is well documented and its revision is not within the scope of this book. That Empire's global expanse could often be grasped when explained in terms of the sun never setting on it. Of course like any parent, the British Empire left its indelible genetic marks in critical areas of the legislative, executive and judicial arms of doing business in its former colonies.

The judicial branch of its legacy has enjoyed the greatest longevity in the form of appeals to the Judicial Committee of the Privy Council (or Her Majesty in Council) as a court of final jurisdiction for former colonies of the British Empire.

The Judicial Committee of the Privy Council (JCPC) sits at number nine Downing Street in London, although this does not have to be the case. In *Ibralebbe v The Queen [1964] AC 900 at 922*, it was reported that Lord Haldane *in Alex Hull & Co. v M'Kenna [1926] IR 402, 404*, stated, in relation to the Privy Council that it is *'not a body, strictly speaking, with any location'.*

In the latter part of 2006, the Judicial Committee of the Privy Council went to hear matters in the Bahamas, a member of the Caribbean Community that has indicated that it will not be embracing the appellate jurisdiction of the Caribbean Court of Justice. Thus it will not be replacing the Judicial Committee of the Privy Council, as will be discussed below. This has raised questions of whether, with the decline of the Judicial Committee of Privy Council on the horizon, this itinerant move may have been intended to reduce the potential for such demise.

Jurisdiction of the Privy Council

The statutory authority of the Privy Council derives from the 1833 Judicial Committee Act, which lays the basis for its constitution and court procedure. The Privy Council used to be the final appeal court for several independent Commonwealth countries in exercise of its overseas jurisdiction, and it continues to be so for several others. It maintains this position also for dependencies, as a part of its domestic jurisdiction[1].

The Privy Council's overseas jurisdiction is at the heart of the examination of this book. The table below indicates the present status of appeals to the Judicial Committee of the Privy Council or to the Judicial Committee of the Privy Council, Her Majesty in Council (JCPC-HMC) as it obtains today.

1 The JCPC has domestic jurisdiction over the Crown Dependency islands of Jersey and Guernsey, as well as appeals on staff matters from the Isle of Man. It also exercises some jurisdiction in matters of devolution in relation to certain 1998 Acts, viz: The Scotland Act; The Government of Wales Act and The Northern Ireland Act. Various other aspects of appeal arrive at the Privy Council, such as those arising from the Royal College of Veterinary Surgeons and the General Medical Council; the Church Commissioners of the Church of England; Ecclesiastical Courts; the Prize Courts; and the Courts of Admiralty. However, these will not be examined here.

Table 1.1: The present status of appeals to the Judicial Committee of the Privy Council (JCPC) or to the Judicial Committee of the Privy Council, Her Majesty in Council (JCPC-HMC)

Territories / States	JCPC	JCPC-HMC
United Kingdom Overseas Territories and Crown Dependencies		Anguilla; Bermuda; British Virgin Islands; Cayman Islands; Falklands Islands; Gibraltar; Jersey; Guernsey; Isle of Man; Montserrat; St Helena and dependencies; Turks and Caicos Islands; Pitcairn Islands; South Georgia and South Sandwich Islands; British Antarctic Territory; and British Indian Ocean Territory
United Kingdom's Sovereign Base Areas		Akrotiri and Dhekelia in Cyprus
Associated States of New Zealand		Cook Islands and Niue
Independent Republican States	Dominica; Mauritius; and Trinidad and Tobago Kiribati if the case involves matters of constitutional rights; Brunei where the Sultan and the Queen agree that the JCPC hears the case and reports to the Sultan	
Independent Monarchical States		Antigua and Barbuda; Bahamas; Belize; Grenada; Jamaica; Saint Kitts and Nevis; Saint Lucia; Saint Vincent and the Grenadines; and Tuvalu

At this point it is appropriate to note that while many use the term 'the Judicial Committee of the Privy Council', there must be awareness of the precise nomenclature. The Judicial Committee of the Privy Council may sit, in certain circumstances, as 'Her Majesty in Council'. While overseas dependencies always submit to 'Her Majesty', independent states may also have to submit to 'Her Majesty', depending on whether these states chose the republican or monarchical streams of government.

The effect of monarchical and republican streams of independent states

The 1833 Judicial Committee Act provides in Section 3:

'All appeals… which either by virtue of this Act, or of any law, statute or custom, may be brought before His Majesty or His Majesty in Council from… the determination,

sentence, rule or order of any Court… shall… be referred by His Majesty to the said Judicial Committee of his Privy Council, and that such appeals… shall be heard by the said Judicial Committee, and a report or recommendation thereon shall be made to His Majesty in Council for his decision thereon as heretofore… (the nature of such report or recommendation being always stated in open court)'.

The relevance of *'… [Her] Majesty in Council'* in the post-colonial era, relates to those independent former territories that chose to retain the British Monarchy as the 'Head of State'. This monarchical retention may be exemplified by several constitutional provisions of these states.

The Antigua and Barbuda Constitutional Order 1981 declares, for example:

'27 There shall be a Parliament in and for Antigua and Barbuda which shall consist of Her Majesty, a Senate and a House of Representatives.'

It should be noted that Antigua and Barbuda, in common with several others, became independent many years after several of its Caribbean siblings, but replicated those existing constitutional provisions from them. In addition to the legal implications of this retention, there are the political residual aspects, whereby the governors-general in these states are the titular heads of state, representing Her Majesty.

The Antigua and Barbuda Constitutional Order affirms that:

'68(2) Subject to the provisions of this Constitution, the executive authority of Antigua and Barbuda may be exercised on behalf of Her Majesty by the Governor-General either directly or through officers subordinate to him.'

As earlier observed, the provisions of the Constitution of Antigua and Barbuda were echoing those that had preceded it throughout the various Caribbean Constitutions, as illustrated by the samples below:

The Jamaica (Constitution) Order in Council 1962:

'27 There shall be a Governor-General of Jamaica who shall be appointed by Her Majesty and shall hold office during Her Majesty's pleasure and who shall be Her Majesty's representative in Jamaica.'

The Saint Lucia Constitutional Order of 1978:

'59(1) The executive authority of Saint Lucia is vested in Her Majesty.'

In the Pacific, the same retention of the monarchy was a pattern.

The Constitution of Tuvalu:

'48(1) Her Majesty Queen Elizabeth 11… is the Sovereign of Tuvalu and, in accordance with the Constitution, the Head of State.'

That executive provision thus constructed the judicial basis for final appeals to Downing Street. Chapter V of the Antigua and Barbuda Constitution, in Section 122 (1), (2) and (3), states that:

'An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council…'

The effect therefore of applying the monarchical retention to the appeal process of the Privy Council relates to the manner in which such appeals have to be in conformity with Section 3 of the Judicial Committee Act. In such instances, a judgment from a monarchical state will have a statement such as the following:

> *'Their Lordships will humbly advise Her Majesty that the appeal should be [allowed] [dismissed].'*

For those ex-colonies that chose the republican route, it thus follows that their appeals to the overseas jurisdiction lie to the Judicial Committee of the Privy Council, and not to Her Majesty in Council. In comparison, the citation for a republican state would read:

> *'Their Lordships accordingly [dismiss] [allow] the appeal.'*

Unlike those samples of constitutions quoted earlier for the monarchical states designating the head of state, those of the republican nations would state in varying degrees as in the examples below:

> The Constitution of Mauritius:
>
> *'28(1) There shall be a President who shall be the Head of State and Commander-in-Chief of the Republic of Mauritius…*
>
> *8.1(1) An appeal shall lie from decisions of the Court of Appeal or the Supreme Court to the Judicial Committee…'*
>
> The Constitution of Trinidad and Tobago:
>
> *'22 There shall be a President of Trinidad and Tobago elected in accordance with the provisions of this Chapter who shall be the Head of State and Commander-in-Chief of the armed forces…*
>
> *109-1 An appeal shall lie from decisions from the Court of Appeal to the Judicial Committee…'*

There is really no substantial difference in the appeals process between the monarchical and republican streams of former British colonies. At the end of the day, appeals would still lie to Downing Street, and not to any final indigenous court, until these countries, monarchical or republican, seek to commence and finish the journey of repatriating a final court. As will be shown further, this passage was often a tiresome one for those countries that undertook it, but they were inevitably bolstered by the respective resolve to cut the umbilical cord from Downing Street and to continue with the process of nurturing into maturity on home soil, final appellate courts.

2 Judicial Independence – Final Appellate Court Establishment

The decline of appeals to the Privy Council

As has been demonstrated above, the Commonwealth of British nation states thus preserved their right to appeal to the Privy Council. Over time, however, as these states came to believe in the need to assert their own judicial path, such appeals proceeded along an inexorable road of decline. This decline was expressed through the varying routes taken towards judicial independence by these Commonwealth countries.

The 1931 Statute of Westminster[2] gave enablement to the discontinuance of appeals to the Privy Council. That legislation applied to the *'Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland'*[3]. The removal of the application of the 1865 Colonial Laws Validity Act to the laws *'made after the commencement [the Colonial Laws Validity Act] by the Parliament of a Dominion'*[4] set the stage. Canada was the first to make de-linking movements, commencing in 1933 and ending by 1949. Upon gaining independence, India ceased appeals to the Privy Council in 1947, and this was followed by the gradual withdrawal of Ceylon, now Sri Lanka, and Africa. Malaysia abolished appeals in 1984 and Australia in 1986. In 1989, Singapore only reserved appeals to the Privy Council for death penalty cases, and by 1994 had fully ceased all appeals. The Gambia finally removed this jurisdiction with its 1997 Constitution, which provided for its Supreme Court to replace the Privy Council.

This book will examine the pioneering efforts of Canada and will investigate the crossing made by Australia from Downing Street to its own High Court in Canberra. The new millennium has also brought actions in New Zealand and the Caribbean to the fore, and these too will be analysed. Particularly for the Caribbean, this text comes at a time when the focus on best practices, coupled with the indigenous needs of a final court, has operated to produce the ultimate product deemed appropriate for the region's citizenry.

There have been strenuous arguments in the respective countries and regions, both for and against the removal of appeals to the Privy Council. At the time of writing, these arguments are particularly focussed in the new establishments of New Zealand and the Caribbean. However, similar sentiments have been consistently put forward over the decades. Former Registrar of the Privy Council, DHO Owen[5] writing as Registrar in 1994

2 (UK) 22 Geo. V, c.4.

3 Section 1.

4 Section 2(1). Section 2(2) further provided that *'No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the round that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion'.*

5 Extracted from his 1994 article 'The Judicial Committee of the Privy Council'. DHO Owen was Registrar from 1983–1998.

examined two contrasting arguments. He quoted the statement in 1937 of former Australian Prime Minister Sir Robert Menzies:

> *'The appeal to the Privy Council is one of the few remaining formal links between the various parts of the British Commonwealth of Nations … appeal to the Privy Council means that we preserve some broad uniformity of legal decision on matters of law which are common to the whole Empire, such as the Common Law and the general principles of Equity…'*

He equally presented the position of the Chief Justice of India in 1965:

> *'Since India won freedom, Indian legislatures have been ceaselessly working to bring about social and economic justice in the country, and in the attempt by the legislatures to make laws with a view to solving the problems of poverty and unemployment they are always trespassing on fundamental rights… Every time we in India are called upon to consider the various constitutional effects of legislative enactments… we ask ourselves is it a reasonable invasion required for the public good. These are issues which would be alien in English court, but they are particular to the written Constitution of India.'*

The opposing positions continue to inform the actions of interest groups in those countries and regions seeking to consolidate their final court establishment. The political arguments and the constitutional amendments that some countries are required to undertake also form part of the equation, the solution to which depends on political will being in tandem with the desire for judicial determination at an indigenous level.

The case of Canada

Canada attended the Commonwealth meetings, which lent greater understanding to the first route taken by a Commonwealth 'Dominion' in its final court establishment[6]. Canada as a Dominion was created in 1867 by the British North America Act. By Section 92(14), legislative jurisdiction lay with the provincial governments regarding the constitution, maintenance and organisation of the civil and criminal courts, including civil procedure. The central government, on the other hand, had responsibility for the judiciary. Utilising Section 92 of the British North America Act, in 1875 Canada established its Supreme Court:

> *'The Parliament of Canada, may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.'*

This move, it was envisaged, was to seek uniformity in the jurisprudence and law[7].

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6 The 2006 Commonwealth meetings were attended by Madame Anne Roland, Registrar of the Supreme Court of Canada. She submitted her paper to inform this text: 'A Canadian Perspective: The Birth of a Court of Final Appeal and Its Current Operations'.

7 An Act to Establish a Supreme Court and a Court of Exchequer, for the Dominion of Canada, SC 1875, c.11.

The Supreme Court was composed of five puisne judges, including two from the province of Quebec. Civil appeals would lie from the highest courts of the provinces.

The ensuing stage was for Canada to secure the Supreme Court as a final appellate one, thus abolishing appeals to the Privy Council. This attempt was made by amendments to the 1875 Act. A first amendment to this effect, preventing appeals from the provinces reaching the Privy Council, was defeated. A second amendment was introduced in Section 47 of the Act as follows:

> *'47. The judgment of the Supreme Court shall in all cases be final and conclusive, and no appeal shall be brought from any judgment or order of the Supreme Court to any Court of Appeal established by the Parliament of Great Britain and Ireland, by which appeals or petitions to Her Majesty in Council may be ordered to be heard. Saving any right which Her Majesty may be graciously pleased to exercise by virtue of Her Royal Prerogative.'*

The argument used to frustrate this proposed amendment when sent to England for royal sanction, was that the Judicial Committee of the Privy Council was not a 'Court of Appeal', but a court of prerogative. In 1887, the Canadian Parliament passed An Act to Further Amend the Law Respecting Procedure in Criminal Cases[8], altering the Criminal Code and giving the Supreme Court of Canada final say in all criminal matters. However, the Criminal Code amendment was tested in the case of *Nadan v The King [1926] AC 482 (PC)*. Nadan's case held that the Criminal Code was *ultra vires* in its attempt to remove the right of appeal to His Majesty in Council in exercise of the royal prerogative. This had the effect of nullifying the amendment to the Criminal Code, since it was determined by the Privy Council that His Majesty's right was retained to secure justice of his colonial subjects. The Judicial Committee Act of 1884, granting prerogative appeals, coupled with the Colonial Laws Validity Act of 1865[9], essentially stopped colonies from legislating any laws deemed repugnant to imperial legislation.

At the 1926 Imperial Conference, discussions ensued regarding the independence of dominions and the ability to determine their own constitutional arrangements. This culminated in the Balfour Declaration, with the recognition that judicial appeals should be determined by parts of the 'Empire' thus affected. This sentiment, as it was interpreted by Canada, was possibly given statutory confirmation in essence in the 1931 Statute of Westminster. Section 2 of that law removed the application of the Colonial Laws Validity Act of 1865 to any law made after its entry into force. It equally provided that no law shall be void or inoperative on the basis that it is repugnant to the law of England.

In 1933, Canada removed criminal appeals to the Privy Council by an Act[10]. When tested in British Coal Corp. v R [1935] AC 500, unlike Nadan v The King[11], the Privy Council affirmed the removal of this bar in criminal matters.

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8 1886, 51 VICT., c.43, s.1.

9 Ibid, p.11.

10 23 & 24 GOE. V, c.53 & 17.

11 *Supra.*

Abolition of civil appeals took more time, particularly as the provinces of Canada were in charge of their civil law and procedure fortunes (as has already been noted). In an advisory opinion of the Supreme Court of Canada in 1940, it was *held* that Canada had the right to bar all appeals to the Privy Council[12]. The war distracted the appeal of this decision to the Privy Council itself, but growing arguments for Canada to assert its independence brought the debate to the fore. In the Senate it was argued:

> *'It is abundantly clear from the results achieved that our nation was in a position to promote her own interests and to attain her full development under the impetus of her own decisions. If our statesmen excite the admiration of the whole world, and are listened to with attention in the Council of Nations, it is equally true that the progress brought about by their internal policies are a source of astonishment to the world… We are taking today a further step towards the autonomy necessary to present political status to Canada. The independence of our judiciary of our country is as necessary as her legislative and executive independence. It would be childish to believe that we could not find in our own country Canadians qualified to assume the responsibility of judging and deciding our own issues finally, definitely and exclusively'*[13].

There were differing views occasioned by such fundamental change. Writing in 1950, it was observed[14]:

> *'…Many Canadians felt that the objectivity and disinterestedness of the distant Privy Council assured an impartiality of constitutional interpretation that might not be secured in Canada. Moreover, many of those who were most jealous of provincial rights were pleased with the increase of provincial powers that had resulted from Privy Council decisions and were fearful that a Canadian court of final jurisdiction might reverse this trend.'*

However, the 1949 Supreme Court Act[15], amending its 1875 legislation, implemented the abolition of all appeals to the Privy Council:

> *'54. (1) The Supreme Court of Canada shall have, hold and exercise exclusive ultimate appellate civil and criminal jurisdiction within and for Canada; and the judgment of the Court shall, in all cases, be final and conclusive…*
>
> *(3) The Judicial Committee Act, 1833, chapter forty-one of the statutes of the United Kingdom of Great Britain and Ireland, 1833, and The Judicial Committee Act, 1844, chapter sixty-nine of the statutes of the United Kingdom of Great Britain and Ireland, 1844, and all other orders, rules or regulations made under the said acts are hereby repealed in so far as the same are part of the law of Canada.'*

Cases which were being heard prior to this legislation were still allowed to proceed to appeal, with the last case submitted to the Privy Council being *Ponoka-Calmar Oils v Wakefield [1960] AC 18.* With somewhat of a protracted struggle, Canada, as a 'Dominion', completed its road to judicial independence.

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12 See *Re Privy Council Appeals [1940] 1 D.L.R. 289* (Canada Supreme Court).

13 Canada Senate (1949) *Official Report of Debates*, 18 October 1949, at 130 (Hon. Paul Henri Bouffard).

14 See William Livingston, assistant professor, University of Texas, *64 Harvard Law Review*, p.109.

15 13 GEO. VI c. 37.

Australia's abolition

Australia's participation at the various Commonwealth meetings allowed sharing and insight into the country's route to Privy Council abolition[16]. The Commonwealth of Australia commenced its existence in 1901 under a federal written constitution. Section 71 of the constitution vests judicial power in a federal supreme court to be called the High Court of Australia. The Australian Constitution infused its Commonwealth Parliament with the power to abolish appeals to the Privy Council from all Australian courts in matters of federal jurisdiction. Australia executed this mandate in 1903, 1968 and 1975.

In 1903, the Judiciary Act was passed, pursuant to Section 77 of the Constitution to limit appeals directly from state courts to the Privy Council in which federal jurisdiction was involved, and that such cases should be submitted to the High Court instead. By 1968, with the passage of the Privy Council (Limitation of Appeals) Act, appeals regarding federal and constitutional matters were abolished. This legislation also terminated any appeals to the Privy Council emanating from a federal court (other than the High Court) and from a territory supreme court. This 1968 legislation was contested in the Privy Council in *Kitano v Commonwealth [1976] AC 99,* where it was *held* that the legislation validly exercised the power of limiting appeals under Section 74 of the Constitution.

The 1975 Privy Council (Appeals from the High Court) Act effectively abolished all remaining appeals to the Privy Council. That was not without some dispute, as this law was challenged in the High Court where it was dismissed. In *Viro v The Queen [1978] 52 ALJR 418,* the High Court *held* unanimously that it was no longer bound by decisions from the Privy Council and *'was free, while according due respect to those decisions, not to follow them, more especially in matters of Australia law and Australian conditions'.* [17] Appeals from the supreme courts of the federal states in non-federal matters were still allowed[18]. In an *inter se* matter, the High Court could grant a certificate allowing the appeal and this effectively retained the Privy Council and the High Court as two final courts.

The position by 1986, which offered a dualism of appeal possibilities regarding non-constitutional matters, was captured in the following statement:

> *'[The] eleven years between 1975 and 1986… saw a bizarre situation of dualism – and potential conflict – at the apex of the Australian hierarchy of courts. Unsuccessful litigants in the state Supreme Courts could choose to appeal either to the High Court or to the Privy Council, each an ultimate court of appeal: thus, in different cases, both ultimate courts might decide the same issue, potentially with opposite results. This gave rise to delicate problems of precedent and judicial comity… [L]ogically… the dilemma was insoluble'*[19].

16 The Commonwealth meetings were attended by Australian delegates who submitted papers to inform this book. They were as follows: 2003 meeting attended by Ms Sandra Power, Assistant Secretary, Attorney-General's Department, Australia – 'Australia's Experience in Abolishing Privy Council Appeals'; and 2006 meeting attended by Mr Christopher Doogan, Chief Executive and Registrar of the High Court of Australia – 'Reflections On The History And Operations Of The High Court of Australia'. The High Court of Australia also hosted meetings in 2005.

17 H Renfree (1984).

18 See *Southern Centre of Philosophy Inc v South Australia [1979] 54 ALJR 43.*

19 Blackshield, Coper and Goldring (2001), p.560.

To this end, a suite of legislation by Australia, in conjunction with the United Kingdom, secured the High Court of Australia as that country's final court by 1986. This involved the enactment of the Australia Acts by six state parliaments, the Commonwealth Parliament and the United Kingdom Parliament. The six state parliaments enacted legislation to request and consent to the 1986 Australia Act (UK). For its part, the Commonwealth of Australia equally enacted the Australia (Request and Consent) Act 1985, entreating the United Kingdom to pass the 1986 Australia Act (UK). The legislation was in essence a 'request' to Her Majesty for the appropriate legislation to be passed by the United Kingdom Parliament to give effect to the Australian Acts. The United Kingdom passed the desired legislation. There exists a provision in the Australian Constitution requiring leave of the High Court for appeals to the Privy Council in certain matters. This leaves a theoretical residual right, which the High Court has said it will not exercise. As a consequence, the final appeal to the Privy Council was submitted from Australia in 1987.

Ultimately, Australia believed that it was inimical to the assertion of independence that appeals should lie outside its territory. Its road to the establishment and assertion of its High Court replacing the Privy Council, though gradual, was decisive. Further, the Constitution of the Commonwealth of Australia was sufficiently enabling in its ability to allow its parliament to enact the requisite laws to secure its High Court as the ultimate tribunal for the country. This was, then, a fairly straightforward path and passage.

New court in New Zealand

New Zealand's examination of its road to an indigenous final appellate court is interesting, as was amplified by its participation in the Commonwealth meetings[20]. As a 'Dominion', several decades ensued between its ultimate removal from the Privy Council and that of its sister 'Dominion', Australia. It is perhaps this thinking that was expressed by the Hon. Margaret Wilson, Attorney-General of New Zealand, at the opening of the Supreme Court of New Zealand on Thursday, 1 July 2004 in Wellington:

> *'Australia and Canada may, of course, lay claim to beating us to the post. In fact we are about the last to leave the Privy Council. Australia and Canada were not only the first to adopt the Statute of Westminster but also the first to abolish appeals to the Privy Council'* [21].

20 Commonwealth meetings were attended by New Zealand delegates who submitted papers to inform this text. They were as follows: the 2003 meeting was attended by Hon. Margaret Wilson, Attorney-General, Associate Minister of Justice, Associate Minister for Courts – 'Preparatory Steps to be Taken so as to Achieve a Smooth Transition in Removing The Jurisdiction of the Judicial Committee of the Privy Council'; and the 2006 meeting was attended by Rt Hon. Justice Peter Blanchard, a Judge of the New Zealand Supreme Court – 'Challenges Faced by the Judiciary in Establishment of the New Zealand Supreme Court'; Justice Noel Anderson, a Judge of the Supreme Court of New Zealand – 'The Challenges Facing New Courts'; Mr Andrew Hampton, General Manager, Higher Courts, Ministry of Justice of New Zealand – 'The Supreme Court of New Zealand: The First Three Years'. The Supreme Court of New Zealand hosted meetings in February 2006 and papers were presented by: Mr Patrick McCabe, Principal Policy Adviser, Ministry of Justice of New Zealand – 'Developing the Supreme Court Policy'; Rt Hon. Justice Blanchard – 'A Commentary on the Supreme Court Rules'; Mr Gordon Thatcher, Registrar of the New Zealand Supreme Court – 'Implementation of the Supreme Court Act, 2003 – Business Requirements'; Mr Terence Arnold QC, Solicitor-General of New Zealand, Ms Cheryl Gwyn, Deputy Solicitor-General and Ms Tania Warburton, Associate Crown Counsel – 'Judicial Appointments and Other Issues'.

21 *The New Zealand Law Journal*, August 2004, p.290.

Being the 'last to leave the Privy Council' must apply to those countries defined earlier as being 'Dominions'. Of course, as will be discussed later in this book, the struggle is not yet over for the Caribbean countries (the West Indies) their not being Dominions, but ex-colonies, which still to varying degrees submit appeals to the Privy Council.

The advantage of leaving the Privy Council later rather than sooner was further articulated by the Hon. Margaret Wilson:

> *'However, in the development of legal systems, sometimes being second or even almost last does have some advantages. In the development of the Supreme Court, we have been fortunate in being able to draw on the different models of final appellate courts in a range of Commonwealth countries'* [22].

The challenges faced by New Zealand in the initial years revolved around the number of judges to effectively staff the court of a colony. New Zealand was settled relatively late by the British. Though a vast land mass of two islands, its geographical distance militated against robust population growth in the early years. New Zealand achieved self-governing status in the 1850s, and in 1907 it became an independent Dominion. By 1947, the country achieved full independence when the 1931 Statute of Westminster was ratified.

Hon. Justice Noel Anderson explains that New Zealand's first judges were English lawyers, and until the 1860s there were too few judges to form an appellate court[23]. By the 1860s there were then adequate court judges to form a divisional appellate court, and in 1862 a Court of Appeal came into being. The judges were from what was the Supreme Court, which was renamed the High Court in 1980.

This structure continued with intermittent possibilities of a permanent court being raised in 1907, 1913 and in the 1940s. It is thought that during those years, the establishment of such a court was not supported by the judges. However, the major law societies gave their support by the late 1940s, as did by then some judges. By 1957, the Judicature Amendment Act established the permanent court. The judicial structure was also revised. In 1980, the Magistrates' Court was renamed the District Court, with an enhanced civil jurisdiction, as well as acquiring an indictable jurisdiction. This resulted in a swelling of criminal appeals, with a consequential restructuring of the Court of Appeal. The Court of Appeal was thus reorganised by statute on a divisional system. Appeals were heard by a three-judge division, comprised of one or two High Court judges, nominated by the Chief Justice after consultation with the President of the Court of Appeal, and currently now, with the Chief High Court Judge. Therefore, prior to New Zealand's departure from the Privy, its court hierarchy existed as illustrated in the diagram below[24]. The diagram indicates that appeals from the Court of Appeal were final with regard to appeals from the Employment Court, Youth Court, Environment Court and most family law proceedings.

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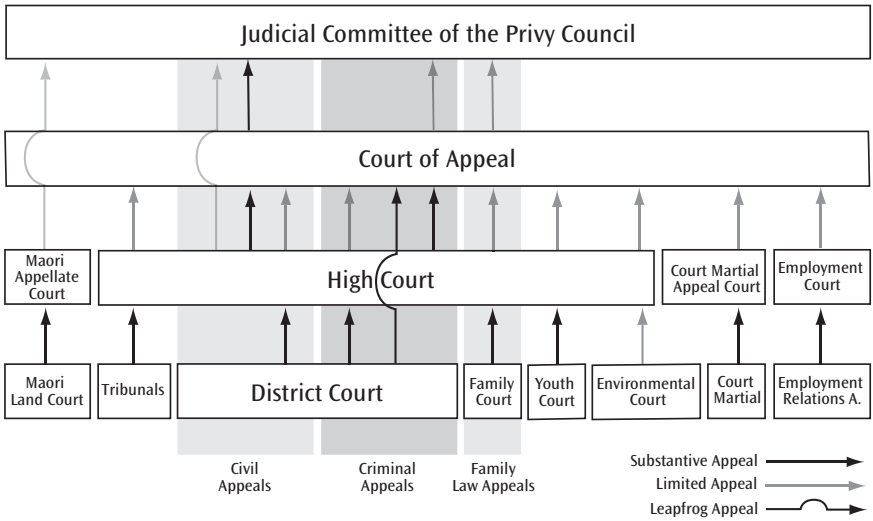
22 Ibid.

23 'The Challenges Facing New Courts', Op cit. Hon. Justice Noel Anderson DCNZM was President of the Court of Appeal of New Zealand and at the time of writing is a Judge of the Supreme Court of New Zealand.

24 Presented at the 2003 Commonwealth meeting.

Figure 2.1: Overview of New Zealand appellate structure



This chart represents principal routes of appeal only. It does not reflect the present hierarchy of New Zealand Courts, nor is it a substitute to reference on relevant statutes

Criminal appeals to the Privy Council from New Zealand were limited, since the Privy Council historically only heard criminal cases in matters where criminal jurisprudence would be threatened[25].

The position regarding criminal appeals from the West Indies will be discussed later. With respect to civil appeals from New Zealand, these used to lie to the Judicial Committee of the Privy Council where the consideration involved was at least 5,000 New Zealand dollars (NZ$), and only a small number of appeals were made to the Privy Council at any rate[26]. Statistics show that between 1990 and 1994, the Privy Council heard 33 appeals, 17 of which were successful. By 1995-1999, out of 48 appeals submitted to the Privy Council, only 11 were successful. In 1999, while the Court of Appeal was hearing 508 appeals, only ten went to the Privy Council, of which eight were dismissed.

The diagram also illustrates that included in the courts are the Māori Land Court and the Māori Appellate Court, from which appeals, though rare, may find their way to the Privy Council. The importance of this relates to the role of the Māori people in New Zealand's history. When Captain James Cooke re-discovered New Zealand in 1769, the first New Zealand settlers had already been established there between 800 and 1300 AD. In the ensuing centuries, these first inhabitants, mostly migrants from Eastern Polynesia, developed their culture – known as Māori. The Treaty of Waitangi was signed on 6 February

25 By 2003, only nine out of more than 280 New Zealand appeals to the Judicial Committee had been criminal appeals.

26 Hon. Margaret Wilson, Attorney-General, 'Reshaping New Zealand's Appeal Structure Discussion Paper', available at: www.beehive.govt.nz [accessed 16 June 2008].

1840, and is regarded by the Māori as a guarantee of their rights. The Māori Land Court, which initially came into being by virtue of the Māori Affairs Act of 1953, is a court of record pursuant to the Māori Land Act of 1993, and has jurisdiction in terms of Māori land issues. Appeals from the Māori Land Court lie to the Māori Appellate Court. The High Court is enabled to review decisions from both courts and, on rare occasion, appeals would lie to the Privy Council.

Understandably, therefore, the Māori expressed their concerns with the removal of the Privy Council. They have been granted assurances:[27]

> *'During previous discussions on this issue Māori have raised concerns about the effect that ending appeals to the Privy Council may have on the relationship established between the Crown and Māori under the Treaty of Waitangi. This Government is committed to working with Māori to ensure that any change to the appeal structure of the courts will not change the protection of Māori interests under the Treaty of Waitangi.'*

It is the great attention to detail paid by New Zealand as it prepared to establish its indigenous final appellate court that indeed indicates the examination of earlier courts as models. In addition to drawing on other experiences, however, New Zealand was also sensitive to its cultural and racial history to prepare a court that would be representative of all. The legal and political processes are equally reflective of these steps.

The maturation of New Zealand's judiciary over time would lead to the inevitable examination and emotional desire for the pursuit of judicial independence from the Privy Council. Justice Anderson explains:

> *'It is inevitable that as a nation learns to stand on its own feet it will become curious about, then inclined towards and then determined to achieve, independence in all aspects of its governance. But in New Zealand the pace was slow in respect of judicial governance. The limited professional resources of a recently-settled and under-populated nation made it inevitable that New Zealand would look to the Privy Council in order to invoke the notional royal intercession. The practical and fiscal implications for litigants of appealing to a body sitting 20,000 kilometres away scarcely need elaboration'*[28].

Indeed, it has been noted that the idea for New Zealand to abolish appeals to the Privy Council has been around for more than 100 years when then Chief Justice, Sir Robert Stout mooted it[29]. By 1903, dissatisfaction was articulated in *Wallis v Solicitor-General, Protests of Bench and Bar [1903] NZPCC 730; 1 NZLRCC 84*, when the Chief Justice declared that the Privy Council was not knowledgeable of the statutes, conveyancing terms or history of New Zealand.

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27 'Report of the Advisory Group Replacing the Privy Council – A Report to Hon. Margaret Wilson, Attorney-General and Associate Minister of Justice', *Op cit.*

28 Anderson (2006) 'The Challenges Facing New Courts', *Op cit.*

29 See: 'The History of the Supreme Court', available at: www.courtsofnz.govt.nz/about/supreme/history.html [accessed 17 June 2008]

Apart from judicial disenchantment with the Privy Council, political input towards the move of abolition became increasingly vocal. Between the 1980s and the 1990s, successive government administrations echoed the call for the removal of appeals to the Privy Council. However, members of the bar and law societies held differing views, which had to be taken into account.

By 1994, the New Zealand Cabinet requested the Solicitor-General to report to a committee of cabinet on issues of the constitution, history and jurisprudence, among others, relating to the availability of appeals to the Privy Council. Arguments in support of and against Privy Council abolition were canvassed in the report. Further, consultations ensued between the Solicitor-General, the presidents of the law societies and bar associations of New Zealand, along with the Chief Justice and President of the Court of Appeal. Following the submission of the Solicitor-General's report in 1995, the New Zealand Courts Structures Bill was introduced into parliament in 1996 to remove the jurisdiction of the Privy Council. This move was not successful due to a 1996 Coalition Agreement between the political parties at the time.

The final thrust was given a new life in 2000 when the Labour/Alliance government resolved to re-visit the existence of the Privy Council in the jurisprudential life of New Zealand under the guidance of then Attorney-General, Hon. Margaret Wilson. As she reported at the 2003 Commonwealth Expert Group meeting:

> *'I sought to broaden the issue to examine the future shape of New Zealand's appeal structure, by asking: 'what is appropriate for New Zealand's appeal requirements in the 21st century?'*

At the 2003 Commonwealth meeting, Hon. Margaret Wilson outlined the considerations for New Zealand's search for a suitable alternative to the Privy Council. Contemplation was given to the implications of such a change for the appellate structure as whole, ensuring that transitional arrangements would provide for a smooth transition. In examining the form for a suitable alternative, the experiences of Australia, Canada, India, Hong Kong and the Caribbean were referred to. In the case of India and Hong Kong, new courts were established, as was proposed for the Caribbean. Australia and Canada's passage had utilised the existing highest court as the final appellate court. To this end, New Zealand proceeded in its investigation. The steps that followed involved the release of a discussion paper in 2000, which explored three options for final appellate court establishment as follows:

- Remove all rights of appeal to the Privy Council and replace it with the Court of Appeal as New Zealand's final appeal court;
- Provide two levels of appeals within the Court of Appeal, the second level being a full Court of Appeal bench; or
- Create an appeal division from within the High Court, with appeals to the Court of Appeal by way of leave only.

The feedback from the discussion paper indicated the desire for both an intermediate and a final appellate court. This thus gave the go ahead to proceed to de-link from the Privy Council. Included in these endeavours were discussions with the Māori, whose importance has been discussed earlier, as well as taking into account expressions from business communities.

By 2001, an advisory group had been appointed. The group was chaired by the Solicitor-General, Mr Terrence Arnold QC, and included senior legal practitioners and leaders of the Māori community. Sir Ivor Richardson, then President of the Court of Appeal, was a special adviser. The terms of reference included advising government on the purpose, structure, composition and role of a final appeal court and how that court would reflect *Te Ao Māori* (the Māori World). It should be noted that the group was not requested to advise on the desirability of removing appeals to the Privy Council, but to comment on how a court of final appeal above an intermediate appellate court might be[30].

The advisory group concluded that replacing the Privy Council with a Supreme Court of New Zealand would improve accessibility to New Zealand's highest Court; increase the spectrum of matters to be considered by that new court; and would enhance understanding of local conditions by judges of the new court.

On 14 October 2003, the Supreme Court Act[31] was passed. It came into force on 1 January 2004, and thus created the Supreme Court of New Zealand. Its stated purpose makes reference to New Zealand as a nation with its unique ingredients to be observed through a judiciary of its own making:

'3 (1) The purpose of this Act is –

(a) to establish within New Zealand a new court of final appeal comprising New Zealand judges –

- *to recognise that New Zealand is an independent nation with its own history and traditions; and*
- *to enable important legal matters, including legal matters relating to the Treaty of Waitangi, to be resolved with an understanding of New Zealand conditions, history and traditions; and*
- *to improve access to justice'.*

Subsection (c) of the Act then ended *'appeals to the Judicial Committee of the Privy Council from decisions of New Zealand courts.'*

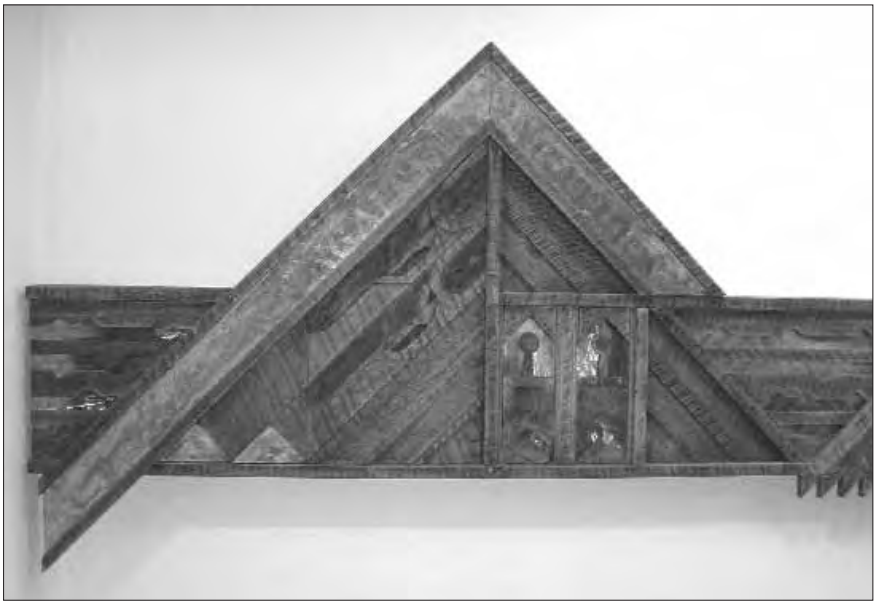
The appointments for the Supreme Court's first composition of judges were taken from the senior members of the Court of Appeal. There is no equivalent of a Judicial Services Commission to make these appointments, but instead rests in the nation's confidence in promoting its judges through the hierarchy.

At the opening ceremony of the Court, its first Chief Justice, the Rt Hon. Dame Sian Elias, GNZM remarked that New Zealand's aspiration for justice were expressed in February 1840 at Waitangi and that the Supreme Court furthered those very aspirations[32].

30 See 'Report of the Advisory Group Replacing the Privy Council' (2002). Available at: http://www.crownlaw.govt.nz [accessed 24 June 2008]

31 2003 No.53.

32 See 'Opening of the Supreme Court of New Zealand'. The New Zealand Law Journal, August 2004.



Plaques on the walls of the Supreme Court of New Zealand reflecting Te Ao Māori

New Zealand's journey to its new court was complete. It was not passage of many twists and turns. Its unitary statehood gave it a relatively easy transition when compared to those of its siblings Canada and Australia, which had to accommodate the provincial and federal jurisdictions respectively. New Zealand had to initially contend with a small population and the need to foster belief in the ability of its judges to do the job. Further, the fundamental interests of the Māori and the reservations of the law societies and bar associations were integral in reaching some consensus. Infused in this was the country's political will, which while wavering in the 1990s, positively reasserted itself in the millennium. Importantly, New Zealand was not fettered by a constitution or pre-1931 Statue of Westminster to cause eruptions of any obstacles along its way.

Although spoken in 1987, the words of Lord Cooke of Thorndon would have still transmitted the resonance of self-belief as the Supreme Court of New Zealand came into being:

> *'…New Zealand law has now evolved into a truly distinctive body of principles and practices, reflecting a truly distinctive outlook. Commonsense dictates the inevitable result. The differences have reached the stage where the last say in the decisions of our case law… cannot sensibly be left to a remote body with little connection with New Zealand or touch for New Zealand issues… We must accept responsibility for our own national legal destiny and recognise that the Privy Council appeal has outlived its time. Not to take the obvious decisions now would be to renounce part of our nationhood'* [33].

33 Sir Robin Cooke (1987), pp.182-83.

The Caribbean's court challenge

Writing in 1994, former Registrar of the Privy Council, DHO Owen[34], expressed that the Privy Council was no longer the force it used to be, but predicted that appeals would last until the 21st century and would *'…then come mainly from the West Indies'* [35].

Decline of appeals and petitions to the Privy Council

Statistics indicate that there has been a steadying decline in appeals and petitions finding themselves before the Privy Council, as indicated from the tables below[36].

There has been an overall decrease in the total number of petitions for special leave to appeal heard in the Caribbean. By 2005, this number had fallen by 47 heard cases as compared with the number of cases heard in 1998. Of the 38 cases heard at the Judicial Committee of the Privy Council in 2005, 13 were criminal cases whereas 25 were civil. Some countries, for instance Jamaica and Trinidad and Tobago, have experienced significant declines in the total number of petitions heard before the Privy Council. Jamaica's decrease went from 13 cases in 1998 to 6 in 2005. Trinidad and Tobago has experienced a drastic decrease from 44 to 7 cases heard in the Privy Council during that same period (see Tables 2.3 and 2.4, respectively).

Table 2.1: Judicial Committee of the Privy Council – appeals entered and disposed of, showing results, 1998

	Appeals disposed of after a hearing						
Courts from which appeals were brought	**Number of appeals entered**	**Judgement dismissed**	**Varied**	**Allowed**	**Without a hearing**	**Total**	**Appeals pending at the end of the year**
Antigua and Barbuda	1	1	-	1	-	2	1
The Bahamas	4	4	-	-	-	4	2
Barbados	2	-	-	-	-	-	3
Belize	3	-	-	3	1	4	2
Bermuda	2	-	-	1	-	1	2
Brunei	1	1	-	1	-	2	-
Cayman Islands	2	1	-	1	-	2	2
Gambia	-	-	-	1	1	2	-
Gibraltar	1	1	-	-	-	1	1
Grenada	-	1	-	1	-	2	-
Jamaica	11	1	-	8	-	9	11
Jersey	-	-	-	1	-	1	1
Mauritius	4	1	-	2	-	3	3
New Zealand	8	4	-	1	1	6	5
St. Christopher and Nevis	1	-	-	-	-	-	1
St Lucia	3	-	-	-	-	-	3

34 Owen (1994) *Op cit.*

35 *Supra.*

36 Taken from www.privy-council.org.uk [accessed 17 June 2008].

The Caribbean is in the throes of removing jurisdiction from the Privy Council, taking a road fraught with many obstacles. This, in fact, might arguably be the toughest battle yet for final appellate court establishment.

Table 2.2: Judicial Committee of the Privy Council – appeals entered and disposed of, showing results, 2005

Country or jurisdiction of origin	Number of appeals entered	Appeals disposed of after hearing			Without a hearing*		
		Dismissed	Varied or allowed in part	Allowed		Total	Appeals pending at end of year
Antigua and Barbuda	2	0	0	2	0	2	2
The Bahamas	11	0	1	1	1	3	16
Barbados	0	1	0	0	1	2	0
Belize	0	2	0	0	0	2	2
Dominica	0	0	0	1	0	1	0
Grenada	2	0	0	0	0	0	2
Jamaica	15	5	0	3	0	8	16
Mauritius	9	1	0	1	0	2	10
New Zealand	3	4	0	2	2	8	3
St. Christopher and Nevis	0	1	0	0	0	1	0
St Lucia	1	0	0	0	0	0	3
St Vincent and the Grenadines	1	0	0	0	0	0	1
Trinidad andTobago	7	9	2	7	0	18	11

*Dismissed for non-prosecution or withdrawn

Table 2.3: Petitions for special leave to appeal – heard, granted and refused, 1998

Commonwealth or other territory	Granted	Refused	Total number heard
Antigua and Barbuda	1	1	2
The Bahamas	-	4	4
Barbados	1	-	1
Belize	4	-	4
Cayman Islands	-	1	1
Grenada	-	1	1
Isle of Man	-	3	3
Jamaica	6	7	13
Jersey	-	3	3
Mauritius	-	1	1
New Zealand	1	2	3
St Lucia	-	1	1
Trinidad andTobago	17	27	44
Total	**32**	**53**	**85**

Table 2.4: Judicial Committee of the Privy Council – petitions for special leave to appeal disposed of during 2005

Country or jurisdiction of origin	Granted	Refused	Total
The Bahamas	3	1	4
Belize	0	2	2
British Virgin Islands	2	0	2
Cayman Islands	0	2	2
Gibraltar	1	0	1
Grenada	0	2	2
Guernsey	1	1	2
Isle of Man	1	0	1
Jamaica	3	3	6
Jersey	0	1	1
Mauritius	3	1	4
New Zealand	2	0	2
Pitcairn Islands	0	1	1
St Vincent and the Grenadines	0	1	1
Trinidad and Tobago	2	5	7
Total	**18**	**20**	**38**

The road to being

The idea of a court to replace the Judicial Committee of the Privy Council for the West Indies has been mooted at varying levels for a considerable period of time. How prolonged a period this has been may be evidenced where *'Researchers have unearthed information which suggests that the idea of a final indigenous court for the Commonwealth Caribbean had its origins as long ago as 1901, in an editorial in the* Daily Gleaner *newspaper of Jamaica'* [37].

Noted Caribbean jurists and intellectuals have repeatedly traced this path, particularly in more recent times as the Caribbean Court of Justice progressed from an idea to reality.

In his seminal work, 'The Caribbean Court of Justice – Closing the Circle of Independence'[38], Duke Pollard, now a Judge of the Caribbean Court of Justice, marks as pivotal, the decision made in 1972 at the Representative Committee of the Organisation of Commonwealth Caribbean Bar Associations (OCCBA) to examine and report on the establishment of a Caribbean Court of Appeal to replace the Privy Council[39]. Sir David Simmons, Chief Justice and President of the Supreme Court of Barbados[40], examines the historical imperatives, as laid down by the prevailing and evolving political, economic and jurisprudential overtones, affecting the islands of the Caribbean, as they transitioned from colonies to independent nations, seeking to regionalise their judicial independence[41]. Hugh Rawlins[42], has equally made his contribution to the assessment of the debate towards a final court.

What is evident is that, like other former colonies, the islands of the Caribbean have held similar aspirations to see an end of the Privy Council as the final court for the region. However, this aspiration has not been without controversy, and becomes a contentious issue that, as has been shown with the situations of the aforementioned countries, presents itself as an inherent feature of any such fundamental move away from the Privy Council.

The chronological events leading to the court may be most effectively credited to its conception of sorts in 1947, at a meeting of British Governors in Barbados. There the establishment of a West Indian regional court as a final appellate court was encouraged. In 1958, with the formation of the West Indian Federation, the Federal Appeal Court was established as one of its constituent institutions. The Hon. David Coore, former Attorney-General of Jamaica[43], opined that though the Federal Court was not final court, and was still subject to the Privy Council, it earned an excellent reputation during its existence. This

37 Simmons (2005).

38 Pollard (2004). Duke Pollard attended the 2003 Commonwealth meeting prior to his becoming a Judge on the Caribbean Court of Justice.

39 Ibid, p.2.

40 Sir David Simmons (at the time Attorney-General of Barbados) chaired the 2003 Commonwealth meeting.

41 *Supra.*

42 Rawlins (2000).

43 Hon. David Coore participated in the 2006 Commonwealth meeting and presented his paper: 'The Caribbean Court of Justice'.

existence was short-lived, however, when the West Indian Federation terminated in 1960 as a result of Jamaica's withdrawal. While, the larger territories of Jamaica, Trinidad and Tobago, Barbados, Belize and Guyana established their own courts of appeal once they attained independence[44], the smaller islands of the Eastern Caribbean (now the Organisation of Eastern Caribbean States – OECS) formed a sub-regional appellate court; this latter court is still subject to the Privy Council[45].

It is at this point that the role of OCCBA becomes important. By 1970, this body had called for proposals to develop a regional court. In a 1972 report justifying this move, the submitted reasons of the OCCBA were:

'1. The removal of this vestigial colonial link is an essential part of the development of an independent Caribbean region;

2. The high cost of pursuing litigation in London inhibited access by the vast majority of citizens to the highest court of their respective countries;

3. While the technical legal expertise of Privy Council Court was of the highest calibre, the unfamiliarity of the judges with the Caribbean life and culture was a factor that would militate against the development of a relevant body of Caribbean jurisprudence; and

4. The experience of the West Indian Court of Appeal justified confidence in the ability of the region to produce jurists of the highest quality' [46].

It should be mentioned that during this period in the Caribbean there must have been some enlightenment to repatriate the judicial arm from the coloniser, since independence had granted to these islands their sovereign legislative and executive branches. It is intriguing that, in line with the sentiments of OCCBA, Guyana made the first move. By Section 8 of the Republic Act, 1970, Guyana abolished the right of appeal to the Privy Council in ordinary civil matters not involving constitutional questions. This move was followed by the Judicial Committee of the Privy Council (Termination of Appeals) Act, 1970, which removed the right of appeal to the Privy Council by special leave. Finally, by the Constitutional (Amendment) Act No.19 of 1973, the right of appeal in constitutional matters was at an end. The Court of Appeal of Guyana then became the country's final court of appeal.

Also concomitant with these developments was the establishment of the Faculty of Law of the University of the West Indies. This institution could only have added to the momentum for a final court, as the recognition of a regional jurisprudence would emerge. This was indeed a period of assessment, which witnessed the advent of constitutional examination and revision. Notably, the Commission on Constitutional Reform, chaired by legendary Caribbean jurist, Sir Hugh Wooding, in Trinidad and Tobago in 1974, recommended that appeals to the Privy Council should cease.

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44 Jamaica and Trinidad and Tobago gained independence in 1962; Barbados and Guyana in 1966 and those of the OECS in the 1970s and 1980s.

45 Justice Adrian Saunders attended the 2003 Commonwealth meeting. At that time he was a Judge of the Eastern Caribbean Supreme Court; at the time of writing he is a Judge of the Caribbean Court of Justice. His paper, reported from the 2003 meeting, explains the OECS court well: 'Strengths and Weaknesses of a Regional Appellate Court and Recommendations for Enhancing Such Court's Effectiveness'.

46 Ibid.

On 4 July 1973, the treaty establishing the Caribbean Community and Common Market (CARICOM) was signed at Chaguaramas, Trinidad and Tobago. This created a regional association of 13 territories of the West Indies[47], which sought to economically integrate and enhance co-operation. Its governing body, the CARICOM Heads of Government, now weighed in on the debate of a regional court establishment, and by 1988 had infused this process with the most dramatic political declarations since the idea was first mooted. At its ninth meeting in Dickenson Bay, Antigua, in July 1988, the Heads, taking the advice of their CARICOM meeting of attorneys-general[48], supported the decision to replace the Judicial Committee of the Privy Council. By 1989, in Grande Anse, Grenada, the Heads mandated the formation of the West Indian Commission, chaired by Sir Shridath Ramphal, former Secretary-General of the Commonwealth Secretariat. *Inter alia,* the terms stated that the Commission:

> *'… should formulate proposals for advancing the goals of the Treaty of Chaguaramas which established the Caribbean Community and Common Market (CARICOM) in 1973'*[49].

At the same time, the members of CARICOM had been recognising the increasing approach of globalisation and the need for a region of small states to be competitive. The widening and deepening of the regional integration movement then resulted in the CARICOM Single Market and Economy (CSME). When it submitted its report, the West Indian Commission, in addressing the matter of the adjudication on the Treaty of Chaguaramas, also viewed the need for withdrawal from the Privy Council and to provide for the CSME and the regional integration that had progressively emerged. To this end, the report concluded:

> *'… we believe that the time is at hand for establishing the Caribbean Court of Appeal – what in an integration context we would prefer to call the CARICOM Supreme Court… the CARICOM Supreme Court with both a general appellate jurisdiction and an original regional one… is fundamental to the process of integration itself'*[50].

The report went on to elaborate on the 'Privy Council Dimension'[51], 'The Integration Need' and 'Developing Community Law'[52] aspects. The West Indian Commission believed that the Privy Council made access to justice difficult and hindered the development of indigenous case law in the region. The report further affirmed the belief that a court staffed by distinguished West Indian jurists would foster confidence. Moreover, the report also emphasised the integration process and the role that a regional court had to play. Referring to the CSME, the West Indian Commission proposed that the CARICOM Supreme Court be integral to the interpretation of the Treaty of Chaguaramas, underpinning community law. In this respect, it was viewed that for these purposes the Court should enjoy an original jurisdiction.

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47 The members were the independent countries of Antigua and Barbuda; The Bahamas; Barbados; Belize; Dominica; Grenada; Guyana; Jamaica; St Kitts and Nevis; St Lucia; St Vincent and the Grenadines; Trinidad and Tobago; and the British territory of Montserrat.

48 That meeting was held in April 1988, in Dominica. The attorneys-general agreed unanimously to abolish Privy Council appeals and establish a Caribbean Court of Appeal.

49 *The Press*, University of the West Indies (1993), p.4.

50 Ibid, p.498

51 'Report of the West Indian Commission: Time For Action'. Op cit, pp.498-500.

52 Ibid, pp.500-501.

Thus commenced the kernel for the ultimate establishment of what would become the Caribbean Court of Justice (CCJ), as member governments adopted the report of the West Indian Commission and took steps to activate its recommendations. This would be a unique court, *sui generis,* with both appellate jurisdictions, replacing the Privy Council, and an original one, addressing regional integration matters.

The Treaty of Chaguaramas was revised, culminating in nine protocols to amend it. Simultaneously, the Legal Affairs Committee of CARICOM, which was composed of CARICOM's attorneys-general and ministers with responsibility for legal affairs, started the drafting of the constituent instruments to create the Caribbean Court of Justice (CCJ).

In 1999, a CARICOM Preparatory Committee for the establishment of the Caribbean Court of Justice was appointed. On 14 February 2001, the Agreement Establishing The Caribbean Court of Justice in its original jurisdiction was signed by ten Caribbean countries – Antigua and Barbuda; Barbados; Belize; Grenada; Guyana; Jamaica; St Kitts and Nevis; St Lucia; Suriname; and Trinidad and Tobago. St Vincent and the Grenadines, along with Dominica, signed on 15 February 2003. Suriname, not a former British colony, had become a member of CARICOM on 4 July 1995. This was in keeping with the intention to deepen and widen the integration movement. Haiti soon followed as a member of CARICOM; the country attained provisional membership on 4 July 1998 and full membership on 2 July 2002. The Agreement entered into force on 23 July 2002, when the required number of signatories was received. In April 2005, the CCJ began its life and heralded a new age of Caribbean jurisprudence.

Arguments of resistance

The road to this point was fraught with arguments, as some reasoned that the Caribbean was not yet ready for its own court. The usual slate of arguments, as had been experienced by Canada, Australia and New Zealand, swirled, giving a sense of *déja vu*. It was felt that there was an inadequate pool of indigenous justices to service the court effectively; that there must be absolute protection from any political intrusion; and that the present backlog in the national courts and inadequate systems should be addressed prior to establishing a final court. These concerns had been aired consistently and addressed by the CARICOM Preparatory Committee. In a statement to the Senate, Attorney-General of Jamaica, Hon AJ Nicholson felt that:

> *'Perhaps, the primary question that has been raised in this discourse, in Jamaica and elsewhere, is whether a Caribbean Court will function with the independence and erudition of the Judicial Committee of the Privy Council'* [53].

The most virulent argument, possibly, was that the CCJ would be a 'hanging court' since the retention of the death penalty was unanimous in all Caribbean countries. Polls have consistently shown that the population of the region insists that the death penalty is warranted. Consequently, this punishment had to be kept on the statute books as recognition of the will of the people. In addressing a meeting in June 2003, then Prime Minister of St Lucia, Dr Kenny Anthony, said:

53 Extracted from the *Jamaica Sunday Gleaner*, 29 November 1998, p.8A.

> *'A simple fact is often forgotten. Courts in our legal system do not hang people. It is our parliaments which choose to retain the death penalty as punishment for the crime of murder, not our courts'* [54].

This has been an ongoing debate, one which gathered heat in a series of death-penalty cases determined by the Privy Council. Notable was the Jamaican case of *Pratt and Another v Attorney-General for Jamaica and Another [1994] 4 All ER 769; [1993] 43 WIR 340* and the Barbadian case of *Bradshaw v Attorney-General and Others; Roberts v Attorney-General and Others [1995] 1 LC 260.* These two cases involved applicants who were convicted of murder and sentenced to death. The applicants petitioned to both the Inter-American Commission and the Human Rights Committee, complaining about procedural errors and simply that their human rights were being infringed. Due to the abundant time taken by these tribunals to address the issues, the applicants successfully won an appeal in the Privy Council; this adjudged that it was an inhuman or degrading punishment or treatment to have convicted individuals being held in detention for a period exceeding five years on death row. According to the Privy Council:

> *'if the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not the prisoner who takes advantage of it'* [55].

The decisions made by the Privy Council have notably impacted the Caribbean both socially and legally. Socially, government officials, local judges and some legal elites became disillusioned by the Privy Council's decision, which was viewed as a 'revolutionary' break from past jurisprudence due to its usurpation of Caribbean legislative powers and the 'great dislocation' it engendered in the *'system of the administration of justice*'. This disenchantment was also fuelled by popular opinion, which perceived the Privy Council's decision as an attempt to insert policy, pursuant to European directives, through the vehicle of the law [56].

Legally, the impact of these two Privy Council decisions was significant, giving effect to 105 prisoners in Jamaica; 53 prisoners in Trinidad and Tobago; and nine prisoners in Barbados, all already detained on death row for more than five years, to a prompt commutation to life imprisonment[57]. Furthermore, the Privy Council was also affected by its own decision, since it had devoted a considerable portion of its docket to death-row appeals from Caribbean courts between 1994 and 2000[58]. To address the inordinate delays occasioned by the appeals to the various international organisations, Jamaica and Trinidad and Tobago revised some of their treaty obligations. For instance, Jamaica

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54 Extracted from *The Jamaica Observer*, Monday 30 June 2003, p.1. Available at: www.jamaicaobserver.com [accessed 17 June 2008].

55 *Pratt [1994] 2 AC at 30-33* (discussing decisions from Canada, European Court of Human Rights, India, the United States and Zimbabwe).

56 Simmons, supra (Attorney-General of Barbados asserting that Pratt *'frustrated the desires of Governments in this region to carry out the death penalty' and 'infuriated populations who see their Governments rendered virtually powerless by decisions of legal policy set… by judges sitting in London and applying British and European notions').*

57 Simmons (1998) [hereinafter Simmons (1998), Death Penalty].

58 See Bob Howard and Anne Westcott (2000) reporting statement by the Privy Council judge that 25 per cent of the court's docket is devoted to death-row appeals from the Commonwealth.

withdrew from the First Optional Protocol of the United Nation's International Covenant on Civil and Political Rights (ICCPR), which eliminated the right of individuals to petition the Human Rights Committee[59]. However, Jamaica maintained its membership of the Organization of American States' Inter-American Convention on Human Rights, thereby preserving the right of aggrieved individuals to file complaints with that body. Trinidad and Tobago denounced both the Inter-American Convention on 26 May 1998 and the First Optional Protocol in its entirety on 27 March 2000. Although Guyana had eliminated appeals to the Privy Council in 1970 and thus was not bound by the Pratt case, the country still denounced the Optional Protocol on 5 January 1999. However Guyana re-acceded to the ICCPR's Optional Protocol, with a death penalty reservation identical to the one previously filed by Trinidad and Tobago[60].

As a consequence to the Pratt ruling, the governments requested that:

> *'either the periods of the time relating to applications to the human rights bodies should be excluded from the computation of delay or the period of five years should be increased to accommodate delays normally involved in the disposal of such complaints'*[61].

The Privy Council rejected this request. Accordingly, the governor-generals of Jamaica and Trinidad and Tobago transmitted instructions to the human rights tribunals in an attempt to *'co-operate with the international human rights institutions',* while at the same time retaining the right to impose capital sentences within the time limits set in Pratt. The tribunals refused such instructions[62] because they were perceived to be threats to their authority, and the Privy Council later invalidated them on constitutional grounds[63].

It has been the opinion of many for some time that the Privy Council viewed the retention of the death penalty by Caribbean countries as making their transition from the JCPC that much more difficult. This position is also held by human rights activists in the region. However, the position taken should be weighed against the overwhelming will of the population of the CARICOM states, which is to maintain capital punishment.

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59 Optional Protocol Ratifications Chart, *supra 138*, at 226 n.1. Pursuant to Article 12 of the Optional Protocol, *supra 29*, art. 12. Jamaica's denunciation became effective on 23 January 1998, three months after it was filed.

60 Optional Protocol Ratification Chart, supra 138, at 231 n.2. After the Human Rights Committee's decision in Kennedy v. Trinidad & Tobago, Communication No.845/1999, UN GAOR, Hum. Rts Comm., 55th Sess., Supp. No.40 vol.2, at 265–66, UN Doc. A/55/40 (1999), declaring Trinidad's death penalty reservation invalid, Guyana did not denounce the Optional Protocol entirely. Thus, all aggrieved individuals, including those on death row, may continue to file petitions with the Human Rights Committee. As of July 2002, seven petitions were pending against Guyana, although the allegations are not publicly known. See Office High Comm'n Hum. Rts, UN, Statistical Survey of Individual Complaints Dealt with by the Human Rights Committee Under the Optional Protocol to the ICCPR (2002), available at: http://www.unhchr.ch/html/menu2/8/stat2.htm [accessed 17 June 2008] (on file with the Columbia Law Review).

61 Bradshaw v Attorney-General of Barbados [1995] 1 WLR 936, 941 (PC 1995).

62 See, for example, United Nations, Human Rights Committee (1997) Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: Jamaica, UN Doc. CCPR/C/79/Add.83 (refusing to follow Jamaica's attempt to 'unilaterally impos[e] timetables' for review of petitions).

63 Lewis v. Attorney-General of Jamaica [2001] 2 AC 50, 85 (PC 2000) (appeal taken from Jamaica); *Thomas,* [2000] 2 AC at 21.

In addressing the January-February 2007 Commonwealth meeting, Professor Albert Fiadjoe[64] said in reference to the Pratt case:

> *'But the truth be said, the Privy Council has also been responsible for some retrograde decisions simply for failing to appreciate Caribbean conditions, history and traditions. I count among such retrograde decisions Pratt v Morgan and the cases of similar reasoning in which the Privy Council offered no philosophical justification for the five-year rule'.*

Indeed, these sentiments, as with others expressed by the various countries overtime, have remained constant – that is, the need for a final court to be fully immersed in the norms and traditions of a country and region. Similar assessments, as shown earlier, were made by Canada, Australia and New Zealand.

The CCJ was in fact granted the opportunity to adjudicate on a matter relating to the death penalty in the case of *AG of Barbados v Joseph & Boyce [CCJ Appeal No. CV.2 of 2005],* which will be examined later.

The court in existence

While all countries have signed on the original jurisdiction of the court, this was still not the end of appeals to the Privy Council for many member states.

As observed earlier, Guyana removed its appeals to the Privy Council beginning in 1970, completing this act in 1973. Guyana, therefore, could move most smoothly on to the appellate jurisdiction of the Privy Council. This was achieved through the enactment of the Caribbean Court of Justice Act 2004. There are constitutional requirements in many of the member states that need to be addressed. For most of the states of the OECS, it is likely that referenda will be required, in addition to a qualified majority vote in parliament, to end appeals to the Privy Council. While Barbados and Jamaica need only a simple majority in parliament, Barbados has, with full government and opposition collaboration, been able to reach this point smoothly, thus signing on to the appellate jurisdiction of the court and removing the Privy Council. This was achieved by The Constitution Amendment Act 2003 – 10; The Caribbean Court of Justice (Amendment) Act 2005; The Constitution (Amendment) Act 2005; and The Caribbean Community (Amendment) Act 2005.

However, such matters have not been so easy for Jamaica. The process of public debate leading to the establishment of the CCJ has often witnessed diverging views. The opposition and government were able to come to agreement as the date for the court's inauguration approached. The opposition party was in support of the CCJ when it was the government of the day, particularly through those pivotal years of 1970 and 1988. Included in this mix were the concerns of members of, amongst others, the Bar Association of Jamaica, who contested Jamaica's attempt to remove Privy Council jurisdiction through the passage of Bills by simple majority.

64 Professor Albert K Fiadjoe is a Professor of Public Law at the Faculty of Law, University of the West Indies, Cave Hill Campus, Barbados. He delivered a paper entitled: 'Analysis of the CCJ's First 18 Months'.

In the 2006 Commonwealth meeting, the Hon. Michael Hylton, Solicitor-General of Jamaica at the time,[65] explained that unlike in the other countries of the region, Section 110 of the Constitution of Jamaica, dealing with appeals to Her Majesty in Council, is not entrenched. In attempting to incorporate the CCJ in its judicial system, Jamaica laid three Bills before parliament in 2003, one of which was to amend the Constitution. The Bills would in effect abolish appeals to the Privy Council; establish the CCJ as Jamaica's final appellate court through a non-entrenching provision; and establish the CCJ in its original jurisdiction. Since these Bills were seeking to amend an non-entrenched section of the Constitution, they were passed by a simple majority in parliament. However, the Leader of the Opposition, and others in the case *Independent Jamaica Council For Human Rights Ltd v S Marshall-Burnett and the Attorney General of Jamaica [2005] 65 WIR* were successful in their appeal to the Privy Council when it was *held* by the Board that the procedure followed by the Government of Jamaica was unconstitutional. Further, the Privy Council ruled that parliament could establish a new final court that is not entrenched, but that the constitutional process to do so must follow the procedure for amending the entrenched provisions of the Constitution. The reasoning of the Privy Council was that if an non-entrenched court was created by parliament that could overrule the decisions of the Supreme Court and the Court of Appeal, and that court was not similarly entrenched, it would undermine the entrenching provisions and effectively amend them. Although it was pointed out to the Privy Council that the Privy Council itself was not an entrenched court in Jamaica's Constitution, the Privy Council returned that *'the independence of the Privy Council and its imperviousness to local pressure had never been in doubt…'*[66].

The three Bills were deemed non-severable and they were thus all struck down. However, the original jurisdiction Bill was revived, since it was not deemed unconstitutional and Jamaica enacted the legislation to participate in the CCJ's original jurisdiction. The way forward to accede to the appellate jurisdiction in Jamaica will require full co-operation between the opposition and the government. Further, in preparation for a referendum, public awareness has to be enhanced. These are both political challenges, but it is hoped that these differences can be bridged. As a large nation of the region, Jamaica's participation in the Caribbean Court of Justice is imperative to ensure the court's viability and encourage its smaller siblings of the OECS to proceed to do likewise. The decision of the Privy Council has retarded the CCJ, as expressed by Sir David Simmons:

> *'The decision of the JCPC has greatly setback the CCJ, which, in the ordinary course, could realistically have looked to Jamaica for a steady supply of appeals'*[67].

65 Contained in the 2006 report is the paper the Hon. Michael Hylton presented, which has informed this text: 'Delinking From The Judicial Committee of the Privy Council: Jamaica's Challenges'.

66 At paragraph 16.

67 Judicial Legislation for the Commonwealth Caribbean: The Death Penalty, Delay and the Judicial Committee of the Privy Council, Op cit, p.89.

Access to justice – the Caribbean Court of Justice vs the Privy Council

The question of lack of access to justice by the citizenry of the Caribbean can no longer be underestimated or conveniently be put aside in arguments for and against the CCJ to replace the JCPC. The decline of appeals to the JCPC may be seen as a measure of the ability to gain access to what is a final court of appeal. The distance of London from the Caribbean capitals and the associated costs of retaining counsel, paying the costs of travel, accommodation and incidentals between a Caribbean capital and London are alone hurdle enough to frustrate access. The wealth-seeking audience before the JCPC will have little difficulty. However, for much of the population, where financial difficulties constitute the daily challenge of survival, the distance of the court acts as a real barrier to access to justice. This is ironically an injustice in and of itself, meted out by the location of the court. Additionally, for a country such as Jamaica, whose citizens require a visa to enter the United Kingdom to attend the JCPC, yet another obstacle to justice is present. The present situation, therefore, is in need of improvement. Should an analogy be given of a citizen needing immediate medical attention and being denied this readily, surely an outrage would ensue. This situation was forcibly brought home to the Jamaican reality in October 2006, as the newspaper excerpt in the text box below explains.

‘Former teacher gets help to appeal case in UK …

Attorney-General and Minister of Justice, AJ Nicholson, has intervened in the case involving Easton Grant, a Jamaican man, who is attempting to represent himself before the London-based Privy Council, but has been refused a visa to enter England. Mr Nicholson yesterday wrote to the British High Commissioner, Jeremy Creswell, seeking a reversal of the decision. Mr Grant, a former teacher at the Montego Bay Community College in St James, is seeking to have his termination of employment deemed illegal. He has so far been unsuccessful, having exhausted the local courts and has been granted leave by the Court of Appeal to take his case to the London Law Lords.

Turned down

His case hearing is set for October 30 and 31, but the English High Commission turned down his visa application saying he had not demonstrated that he will return to Jamaica. In his letter to Mr Creswell yesterday, Mr. Nicholson noted that the Judicial Committee of the Privy Council remains Jamaica’s final court of appeal.

‘This, I believe, clearly implies that litigants will have access to their final court without impediment, and should not be denied the right to pursue their appeals to the highest level. To date, Mr Grant has opted to argue his case without legal representation, as is his right: he should be permitted to continue to do so especially before our highest court,’ Mr Nicholson said.’

Source: See the Jamaica Gleaner, 19 October 2006, available at: http://www.jamaica-gleaner.com/gleaner/20061019/news/news6.html [accessed 18 June 2008]

While the above instance has so vividly accentuated the seeming impracticality of being subjected to a final appeal court that is thousands of miles away and for which physical access is determinant upon the issuance of a visa, The Bahamas has moved in another direction for access. Since that country, though a member of the (Caribbean) Community, is not a member of the common market, its attachment to the CCJ is not yet defined. In an unprecedented move, the Privy Council became an itinerant court at The Bahamas's request in 2006, thus consolidating the country's continued attachment to the Privy Council and some may argue and conclude its emphatic rejection of the CCJ. How the Bahamas will seek to specifically clarify or underscore its posture – CCJ or JCPC? – will be an interesting study for the region over time.

The features of the CCJ are particularly designed to grant access to justice across the region. One such major feature is the creation of 'sub-registry' in each contracting member state. Article XXVII.2 of the Agreement Establishing The CCJ provides:

> *'With the concurrence of the "competent authority" of a Contracting Party, the Commission may appoint the Registrar of a superior court in the territory of that Contracting Party to be a Deputy Registrar of the Court'.*

This provision is given expression in the individual legislation of member states enabling the CCJ nationally. The CCJ Appellate Rules, 2005, of Barbados define 'sub-registry' to mean *'The Registry of court office designated by the President or an enactment, as a sub-registry of the Court'.* Further, the Barbados 2003 CCJ Act declares that *'the Registry of the Supreme Court shall be designated a sub-Registry of the Court pursuant to the Rules of the Court'.*

The role of this sub-registry in member states would therefore mean that litigants have access on home soil in terms of filing matters with the CCJ, as their supreme court registries would act as the registry for the CCJ. The deputy registrars in the CARICOM member states therefore assist the registrar of the CCJ in performing the duties and responsibilities of that position.

In February 2007, the Registrar of the CCJ, Ms Paula Pierre, advised of the arrangements of the CCJ in its registry services[68]. She has prioritised the need for the same standards and services in each sub-registry to be consistent with those that obtain at the Seat of the Court. To this end, new rules of court have been put in place in most member states.

Since the inauguration of the Caribbean Court of Justice, and in terms of the appellate jurisdiction of that court, Barbados, one of the two CARICOM countries acceded to that jurisdiction of the CCJ, is in a position to give an assessment on the working of this novel arrangement of a sub-registry.

Statistics[69] from Barbados indicate that since 2005:

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68 Extracted from Ms Pierre's presentation in February 2007 at the CCJ for the Commonwealth meeting.

69 Extracted from presentation of Mrs Maureen Crane-Scott QC, Registrar of the Supreme Court of Barbados and Deputy Registrar of the Caribbean Court of Justice, at the January-February 2007 Commonwealth meetings.

- A total of nine matters have been filed pursuant to the CCJ Appellate Jurisdiction Rules ;
- In 2005, two civil appeals were filed and one application for specific leave was filed; and
- In 2006, two applications for special leave to appeal; one application for leave to appeal as a poor person; one matrimonial appeal; and two criminal appeals were filed.

When compared with the statistics presented earlier to those relating to the JCPC, it will be recalled that in 1998 there was only one (1) grant of special leave to appeal from Barbados.

Independence and security of the Caribbean Court of Justice

Mention was made earlier of the fears of a CCJ being non-independent and subject to political influence. It is with this in mind that Article V of The Agreement Establishing the Caribbean Court of Justice establishes a Regional Judicial and Legal Services Commission (RJLSC). The RJLSC has the following constituent members:

- the president, who chairs the RJLSC;
- two persons nominated from the regional bar association – OCCBA and the Organisation of Eastern Caribbean States (OECS);
- one chair of the Judicial Services Commission of a Contracting Party selected in rotation in the English alphabetical order for a period of three years;
- one chair of a Public Service Commission of a Contracting Party selected in rotation in the reverse English alphabetical order for a period of three years;
- two persons from civil society nominated jointly by the Secretary-General of the Caribbean Community and the Director-General of the OECS for a period of three years following consultations with regional non-governmental organizations;
- two distinguished Caribbean jurists nominated jointly by the dean of the Faculty of Law of the University of the West Indies, the deans of the Faculties of Law of any of the Contracting Parties and the chair of the Council of Legal Education; and
- two persons nominated jointly by the Bar or Law Associations of the Contracting Parties.

The intention of Article V is clear – to subject the appointment of any judges and judicial officers of the CCJ to an independent and fair selection, with as minimal political interference as possible. Duke Pollard[70] states:

> *'In order to buttress the independence of the judges from political control or influence, it was agreed that, unlike procedures in similar institutions, the judges of the Court would not be appointed on the recommendation of Governments*[71] *but on the basis of open competition'.*

70 Pollard and Saunders (2007), *Op cit*, p.223.

71 Article IV(7) of the Agreement Establishing the CCJ.

Several other features secure the tenure of the judges, which include the non-abolition of an office of a judge while there is a substantive holder of the post and their removal from office only to be exercised by the RJLSC on the basis of misbehaviour or inability to perform the functions of the office. The removal of the president will only occur where the Heads of Government of the Caribbean Community execute this action, after recommendations of the RJLSC. Additional examination of the structure of the RJLSC also indicates that inclusion of the private bar was deemed instrumental, yet this is balanced by the role civil society would play.

The role that the Bar Association of Jamaica has played in challenging the method by which accession to the appellate jurisdiction of the CCJ was sought has already been discussed. Given the representation of the regional bar associations (OCCBA) on the RJLSC, one may question how this role will work in practice.

It was seen that the Hon. Dr Lloyd Barnett, Order of Jamaica (OJ), was one of the first members of the RJLSC nominated by OCCBA. Given the voiced opposition to the CCJ at the time, this nomination elicited some attention in the local media:

> *'Despite demanding a referendum on the …CCJ, the Jamaican Bar Association has nevertheless decided to participate in the nomination of persons to the body that will appoint persons to the controversial court'* [72].

In defence of this position, then President of the Jamaica Bar Association, Hilary Phillips, QC, explained that there was no conflict in the positions taken and that:

> *'If there is going to be a court, it is important who is going to sit on that court…'*

This posture was given more ventilation at the January-February 2007 Commonwealth meeting to which the Jamaican Bar Association was invited. Represented by the former President Hilary Phillips, QC, and the current President Mr John Leiba, the meeting was advised that the official position of the Jamaican Bar Association was in support of the CCJ, but that it should be placed before the citizenry in the form of a referendum[73]. As prior discussions have already revealed, this position was based on the outcome of the legal challenges to Jamaica's accession of the appellate jurisdiction of the CCJ.

Dr Barnett in addressing the same meeting in 2007 re-emphasised his position that:

> *'...the appointment process and the constitutional guarantees of security of tenure emphasise judicial independence, but judicial accountability should be developed in a manner which is consistent with the principle of independence'.*

The security of the CCJ's continued existence is concomitant with the independence of the judges. Justices Pollard and Saunders[74], emphasising the uniqueness of the CCJ, addressed the innovative arrangements to secure the court's operations on a financially sustainable

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72 Extracted from The Jamaica Gleaner, Friday 18July 2003, p.1. Available at: www.jamaica-gleaner.com/ [accessed 18 June 2008].

73 See page 7 of the Commonwealth Report on Final Regional Appellate Courts, January-February 2007.

74 Pollard and Saunders (2007), *Op cit.*

Features of the Caribbean Court of Justice courtroom

basis. In this structure, the architects of the CCJ designed its financing to be impervious to any political decision making. This was achieved through arrangements with the Caribbean Development Bank (CBD), a solid institution that negotiated a loan of approximately $US100,000,000 on international capital markets. These funds were then lent to member states to be repaid, attracting interest corresponding to their contributions to the court's budget. It is anticipated that this novel approach will see the CCJ funded beyond the foreseeable future.

Some features of the Caribbean Court of Justice

When in January-February 2007 the Commonwealth meeting visited with the CCJ in Port of Spain, Trinidad and Tobago, the features of the court were brought out in a more palpable manner, being observed on the spot.

At that 2007 meeting, the cutting-edge use of technology by the CCJ was demonstrated. The vision of the court, as has been discussed, is to guarantee access to justice by the citizenry throughout the region. In this context, the role of technology plays an important part. For instance, it is envisaged that some hearings could be heard by satellite, on television screens. Additionally, features to ensure the timely delivery of judgements and access to documents filed, see the use of computers, recording facilities and the use of equipment to facilitate persons who are disabled or with poor vision.

3 Regional Court Establishment

Regional developing trends

The association of the practice of law across international borders with that of traditional international tribunals such as the International Court of Justice (ICJ) is now undergoing change with the emergence of regional courts. This is as a result of the thrust of globalisation, which has changed not only the financial landscape of the planet, but has increasingly modified the legal parameters of the traditional forms of justice at the international level and access thereto. At the regional level, the challenges are indeed assuming an energy of their own, and in some respects are in the process of developing regional jurisprudence as a hybrid form of international law within the general body of international law itself [75].

The forerunner of a regional court without doubt has been the Court of Justice of the European Communities, established pursuant to Article 177 of the Treaty of Rome, *viz:*

'The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- *the interpretation of this Treaty;*
- *the validity and interpretation of the acts of the institutions of the Community;*
- *the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide'.*

In the southern hemisphere, the need for the creation of a regional court to adjudicate on matters deemed particular to the dictates of that region was evidenced in the Agreement Creating the Court of Justice of the Cartagena Agreement, which was signed in 1979 and came into effect in 1983. It will be recalled that the constituent members of the Andean Community – Bolivia, Colombia, Ecuador, Peru and Venezuela – are associated through the Andean system of integration, as they deem it necessary to co-exist on the mutuality of shared regional interests.

Since the formation of these regional courts, there has been heightened interest as the world is increasingly described as 'a global village'. At the same time, advances in technology now enlighten the manner in which multilateral conventions are to be elaborated for the trans-border movement of goods and services and the attendant institutional framework to let all that come together.

Communities in their regions have felt the need to, in some instances, deepen their traditional form of regional camaraderie so as to present a unified front to the challenges of globalisation. Weighing in the balance of all this are the justifiable concerns of developing and less-developed countries to maintain a posture of competitiveness on an uneven playing field. The need to associate not only becomes more compelling, but also evolves at a heightened level. It is at this stage that regional communities recognise the need to formalise the development of their communal law.

75 Extracted from previous writing of Cheryl Thompson-Barrow (2003).

In order to provide a legal framework for the operation of the regional system, pursuant to the particular treaty of association, a regional court will be established. In the instance of the Court of Justice of the European Communities, that institution assumes the characteristic of a court of supra-national status, effectively being the final instance of appeal from courts of national jurisdiction in the countries of the European member states themselves. A similar situation arises in the Court of Justice of the Cartagena Agreement: that agreement has expressed that the creation of a tribunal at the highest level shall have the authority to define 'communitarian' law.

Regional courts and their community law

In an examination of the regional activities of the Commonwealth family, the following judicial arrangements are of note:

- The Caribbean Court of Justice (CCJ) for the Caribbean Community (CARICOM)
- The Court of Justice of the Common Market For Eastern and Southern Africa (COMESA)
- The Court of Justice of the Economic Community of West African States (ECOWAS)

The various treaties of association of these regional groups and/or the instruments creating the courts are consistently thematic in their purposes.

The Caribbean Court of Justice

The Treaty of Chaguaramas, which formed the Caribbean Community/Common Market (CARICOM) was signed on 4 July 1973, in the Republic of Trinidad and Tobago. The revisions of the treaty were completed in 2001, which also heralded the CARICOM Single Market and Economy (CSME). Discussions on the Caribbean Court of Justice hitherto have essentially focused on its appellate jurisdiction to replace the Judicial Committee of the Privy Council as the highest appellate municipal court of the member states. However, the CCJ is also a regional tribunal with the consequent attention to the rules of international law, particularly as they relate to the interpretation of the Caribbean Community's (CARICOM) treaty of association. As eloquently expressed by the Hon. Messieurs Justices Duke Pollard and Adrian Saunders[76]:

> *'The …CCJ is a unique judicial institution in terms of its jurisdiction, composition, financing*[77] *and as a catalyst for regional economic integration. The uniqueness of the CCJ is not a function of its status as a multinational municipal court of appeal;… Nor is the uniqueness of the CCJ based on the fact that it combines in its composite remit an appellate and original jurisdiction… The uniqueness of the CCJ is to be found in the fact that it combines in its remit a municipal appellate jurisdiction of last resort and an original jurisdiction in the exercise if which it is mandated to employ rules of*

76 Hon. Messieurs Pollard and Saunders, Judges of the CCJ, attended the July 2007 Commonwealth meetings. This quotation is extracted from their joint paper, which was presented to the judges of the International Court of Justice – 'The Caribbean Court of Justice in Judicial Institutional Development'.

77 The CCJ also enjoys an enviable measure of administrative autonomy, since its operations are funded by the proceeds of a trust fund administered by independent trustees. The initial capitalisation of the trust fund is US$100 million.

international law in interpreting and applying the constituent instrument of the Caribbean Community'.

This latter function will see the CCJ rule, in original jurisdiction mode, on matters relating to the operation of the CARICOM Single Market and Economy (CSME), as well as determining matters of community law.

It should also be noted that the original jurisdiction of the CCJ regarding the CSME ensures that any questions relating to its operation and interpretation of rules relating thereto, are accorded consistent elucidation since these will be removed from national jurisdictions. Equally, the CCJ's appellate chambers will also adjudicate as an appellate body for the CSME.

The implications of this will not only afford the level of respectable assurances necessary for investment and development in the region, but will nurture the true development of a regional Caribbean jurisprudence, thereby constituting another area of meaningful regional maturity. Justice Pollard further explains:

'Article IV of the Agreement determines the constitution of the Court which may consist of ten judges, including the President. Judges of the Court, except the President, are appointed by an independent apolitical Regional Judicial and Legal Services Commission ('the Commission'), which must be constituted in accordance with Article V of the Agreement.

The President is appointed by a qualified three-quarters majority vote of the Contracting Parties on the recommendation of the Commission (Article IV(6)) and may be removed by Heads of Government on the recommendation of a Special Tribunal established to investigate a charge of misconduct. Judges other than the President may be removed by the Commission on the recommendation of a Special Tribunal established to investigate a charge of misconduct'.

Administration

The Caribbean Court of Justice is administered by a Department of Court Administration, which is headed by a court executive administrator who reports in turn to the president of the CCJ. The court executive administrator is responsible to the president of the CCJ for the overall development and management of the court and provides the leadership necessary for the effective functioning of the organisation.

The court and its place in community law

The CCJ is the only regional court of the Caribbean Community. Unlike those of Eastern and Southern Africa, there are not and will not be any conflicting community law challenges. The CCJ, then, is the sole vessel for developing community law and should discharge that function honourably and responsibility with the sobriety and dedication required.

Landmark rulings thus far in the CCJ, while in the appellate jurisdiction of the CCJ, are already indicative of the essence of a development of community law unique to the CARICOM region. These will be discussed later in the book. It remains to be seen when cases are submitted in the original jurisdiction, how those will be argued and reasoned. In all, the future presents a canvas to be painted with Caribbean jurisprudence, hitherto unseen.

The COMESA Court of Justice

The Common Market for Eastern and Southern Africa (COMESA) has objectives that echo those of an association seeking to increase levels of integration. Of particular note is the creation of a free trade area and promotion of trade through the provisions of its treaty, which came into being on 8 December 1994 at Lilongwe, Republic of Malawi. In endowing its association with the requisite infrastructure, COMESA is seeking to create the necessary legal framework to encourage growth of the private sector, the establishment of a secure investment environment and the adoption of a common set of standards. There are presently 19 member states of COMESA – Burundi, Comoros, Democratic Republic of the Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.

The Court of Justice of the Common Market of COMESA was created by the 1994 treaty as an independent organ of that the association. It is charged with the responsibility of realising these legal objectives and is established under Article 7 of the COMESA Treaty as one of its organs. The court has power to hear:

- matters referred to it over legal and natural persons resident in a member state;
- disputes between COMSESA and its employees;
- matters relating to arbitration and special agreements; and
- any matter arising from an arbitration clause contained in a contract which confers such jurisdiction to which COMESA or any of its institutions is a party, and to determine any dispute between the member states regarding the treaty if the dispute is submitted under a special agreement between the member states concerned.

The Court of Justice will then foster the development of the regional body of laws, and this is additionally consolidated by the fact that decisions of the court on the interpretation of the provisions of the treaty will have precedence over decisions of national courts or tribunals.

Composition

The COMESA Court of Justice consists of the First Instance Division with seven judges and an Appellate Division with five judges. The First Instance Division is headed by a principal judge, while the Appellate Division is headed by the president of the court, who is also in charge of the overall supervision of the court. The First Instance Division hears all references on both the facts and the law. A party aggrieved by a decision of the First Instance Division is free to appeal to the Appellate Division on points of law, lack of jurisdiction or procedural irregularity[78].

Justice Samuel Rugege sees that the judicial independence of the COMESA court is assured by in Article 8 of the treaty, where it recognises the Authority as the Supreme Policy Organ of the Common Market, but goes on to state in Article 8(3):

> *'Subject to the provisions of this Treaty, the directions and decisions of the Authority taken or given in pursuance of the provisions of this Treaty, shall as the case may be,*

78 Justice Sam Rugege, Judge of the COMESA Court of Justice, describes his court.

be binding on the Member States and on all the other organs of the Common Market other than the Court in the exercise of its jurisdiction…'.

Independence is additionally protected by Article 9(2) (c), *viz:*

'2. It shall be the responsibility of the Council to:

(c) give directions to all other subordinate organs of the Common Market, other than the Court in the exercise of its jurisdiction'.

Regarding the personal independence of the judges, the treaty in Article 20.2 states:

'The judges of Court shall be chosen from among persons of impartiality and independence who fulfil the conditions required for the holding of a high judicial office in their respective countries of domicile or who are jurists of recognised competence.'

It must be noted that the judges are not permanently appointed, but are in fact able to serve an initial period of five years, with the eligibility for a second term of five years. However, Justice Rugege points out that while appointed judges do enjoy security of the tenure, as provided in Article 22:

'the President, the Principal Judge or a Judge shall not be removed from office except by the Authority for stated misbehaviour or for inability to perform the functions of his office due to infirmity of mind or body or due to any other specified cause'.

COMESA's judges are appointed differently from those of the CCJ, who are faced with the rigours of the Regional and Judicial Services Commission in a transparent effort to eschew political input. Not so with the COMESA court, where this process is fundamentally held by the various Heads of Government of that association. Judges are appointed after election by the Meeting of the Ministers of Justice and Attorneys-General. Candidates need not be sitting judges, as long as they fulfil the conditions required for the holding of high judicial office in their respective countries, or are jurists of recognised competence. The first president of the court was a professor of law and jurist, while the current president is a senior counsel with long experience in private practice. The other judges of the COMESA court include a chief justice, a former chief justice, a current deputy chief justice and other senior judges from member states.

The budget

The court also has a budget that is separate and independent from that of the General Secretariat. This should augment its independence and efficiency. The budget is borne by the member states under the same formula used for determining contributions by the members states to the budget of the Secretariat[79]. However, a major challenge is ensuring that member states pay their contributions on time. The interaction over the years by these Commonwealth courts has encouraged some courts to adopt financing arrangements akin to that of the Caribbean Court of Justice.

79 Contributions to the budget correspond to the relative strength of the economy and ability to pay of the member state concerned, as well as the benefits accruing to that state, its market size and fairness and equity.

Jurisdiction

The COMESA Court of Justice has jurisdiction to hear references from member states, the Secretary-General and natural or legal persons challenging decisions of member states. National courts may seek preliminary rulings on aspects of the treaty in cases pending before them, and the COMESA Council may approach the court for advisory opinion. The staff of COMESA and its institutions, as well as third parties, may file claims for damages against COMESA. Finally, the court may exercise jurisdiction under arbitration clauses and special agreements.

Relationship between COMESA court and national courts

National courts are not excluded from hearing matters to which COMESA is a party. However, Article 29.2 of the treaty provides that:

> *'decisions of the COMESA Court on the interpretation of the provisions of the Treaty have precedence over decisions of the national courts'.*

The intention of this provision is to ensure uniformity in the interpretation of provisions of the Treaty by national courts of different member states. In addition, where a matter arises in a national court and there is no remedy under the national law, the court is obliged to stay proceedings and refer the matter to the COMESA court for determination.

The court and its place in community law

The place of the COMESA court has to be rationalised in terms of other regional courts in Southern and Eastern Africa. In this context and of note is the East African Community's Court of Justice and the recently inaugurated Tribunal for the Southern African Development Community (SADC). All three groupings have some overlapping of member states, but the judicial decisions of the East African Court and that of COMESA (SADC still has yet to hear cases), have given rise to a growing body of community law in the region.

The Community Court of Justice of ECOWAS

The Economic Community of West African States (ECOWAS) is a union of 15 West African States integrating towards a single community – the Republics of Benin, Burkina Faso, Cape Verde, Cote d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria (Federal Republic), Senegal, Sierra Leone and Togo. The aims of ECOWAS are stated in its founding treaty of association at Article 3:

> *'to promote cooperation and integration, leading to the establishment of an Economic Union in West Africa in order to raise the living standards of its peoples, and to maintain and enhance economic stability, foster relations among Member States and contribute to the progress and development of the African continent'.*

The raison d'être of the court

The treaty also envisaged *'…the establishment of an enabling legal environment'*. This 'enabling legal environment' was given effect in Articles 6 and 15 of the Revised Treaty of ECOWAS, through the decision of the 'Court of Justice of the Community'. The rationale

for the establishment and existence of the ECOWAS Community Court of Justice (the CCJ as it is also now referred to), was articulated by its then president in 2006, Hon. Justice HN Donli [80]. She opined that while the objectives of the treaty (as stated above) were noble, she deduced that other regional economic communities, such as the European Union, have through experience indicated that the process of integration and the establishment of a regional community can only be achieved where there is a virile court of justice. The preamble to the ECOWAS Protocol A/P/1/7/91 expresses this juridical intention thus:

> *'The essential role of the [ECOWAS] Community Court of Justice is to ensure the observance of law and justice in the interpretation and application of the Treaty and Protocols and conventions annexed thereto and to be seized with responsibility for settling such disputes as may be referred to it in accordance with the provisions of Article 76(2) of the Treaty and disputes between States and the institutions of the Court'.*

The court is deemed to therefore be an organ for jurisdictional control, and has the added roles of assessing the extent to which states fulfil their obligations and verifying the legality of acts adopted by the institutions of ECOWAS.

However, it took several years from the adoption of the protocol in 1991, for the court to become a reality. At its 24th session, held in Bamako, Mali, 15-16 December 2000, the ECOWAS Authority of the Heads of State and Government, by its decision A/D.1/12/00, appointed the seven judges of the court. The swearing in was held approximately ten years after the 1991 Protocol, on 30 January 2001. Its 25th session, ECOWAS Authority of the Heads of State and Government in Dakar, Senegal, via decision A/DEC.23/12/01, established the seat of the court to be fixed in Abuja, the Federal Capital Territory of Nigeria.

The structure

The 1991 Protocol and the Rules of Court address the court's structure. The bureau of the court consists of the president and the vice president. Further, Article 3(2) of the Protocol establishes seven members of the court, of which no two should hold the same nationality. The members of the court are selected and appointed by the Authority of the Heads of State and Government. These members are required to elect a president and a vice president from amongst them, to each hold a term of office of three years. The president is the administrative head of the court and presides at hearings and deliberations.

The court is thus staffed with the Offices of the President; the Offices of the Judges; the Office of the Chief Registrar; and the Court Registry Department. There are also divisions for the functional arrangements of the court which include protocol, finance, language services, library, internal audit, and research and information.

The court and its place in community law

In the 1991 Protocol, the competence of the court was limited to actions brought before it by its member states and institutions of ECOWAS. Individuals therefore had no direct

80 Hon. Justice Donli participated in the February-March 2006 Commonwealth meetings and presented her Paper: 'The ECOWAS Court of Justice: Its Developments, Structure and Jurisdiction'.

access, but could only seek audience through representation by their member states. This was expressed as a cause of concern, as noted by the principal legal/research officer of the court [81]:

> *'The lack of direct access to the Court by individuals was of great concern to the Court because it had an adverse effect on its operations as no Member State or Institution of ECOWAS filed any action either on its behalf or for its citizen before the Court. Between 2001 and January 19th 2005 when Protocol A/P/7/91 was finally amended only two cases were filed before the Court and having been filed by individuals directly were struck out for want of jurisdiction. It was therefore obvious that individuals must be granted direct access to the Court for it to become fully operational'.*

The amendment to enlarge the court's jurisdiction was achieved through the January 2005 Supplementary Protocol A/SP.1/01/05, by Article 9 granting individuals and corporate bodies direct access to the court in respect of certain causes of action. Additionally, the court developed a jurisdiction to hear human rights cases, and there was the innovation of an arbitral jurisdiction. However, cases relating to the legality of the ECOWAS text could only be instituted by member states and the executive secretary.

In addition to the changes mentioned above, the right of access to the court of member states and the executive secretary in relation to failure to fulfil an obligation was reaffirmed, as was the right of access of member states, the Council of Ministers and the executive secretary regarding the determination of the legality of an action in relation to any ECOWAS text. Staff of any ECOWAS institution could also have recourse to the court after they had exhausted all appeal processes under the ECOWAS Staff Rules and Regulations.

The 15 member states of ECOWAS have legal systems that cross between common law and civil law jurisdictions. This has not been a challenge to the effective functioning of application of the court's jurisdictions, since its essential purpose is to address matters relating to its constituent treaty of association. Article 19(1) of the 1991 Protocol calls upon the body of law from the International Court of Justice as a source of law in the court's determination of its community law.

81 Ms Franca Ofor participated in the January-February 2007 Commonwealth meetings and presented her Paper: 'The Role of Regional Courts in the Treaty Adjudication Process'.

4 Some Results So Far

The advent of the final appellate and regional courts have brought in their wake the beginnings of what is expected to be a mother lode of jurisprudential development for the particular countries and regions concerned.

New Zealand Supreme Court

In the experience of New Zealand, Justice Blanchard[82] has assessed that for many years there were no more than six cases each year making their way to the Privy Council. Most civil cases, he advised, were commercial in nature, involved substantial sums of money and had no interest to anyone other than the parties involved in the litigation.

The conclusion to be drawn from this state of affairs was that the jurisprudence at the highest level had atrophied, and in some instances had become non-existent. Conversely, following the establishment of the Supreme Court of New Zealand in 2004, a number of cases have been brought for determination before the said court, breathing new life into the system. Writing in February 2006, Justice Blanchard itemised some of them as described below.

Criminal

R v Timoti [2006] 1 NZLR 323 – The role of the provocation defence in murder.

R v Sunguwan [2006] 1NZLR 730 – Error of defence counsel requiring setting aside guilty verdict.

R v Siloata [2005] 2 NZLR 145 – Requirement for jury unanimity.

R v Condon [2007] 1 NZLR 300 – When the denial or absence of defence counsel requires the ordering of a new trial.

R v Walsh [2006] NZSC 111 – The law of forgery and its relationship to electronically transmitted documents, particularly whether an electronically copy of a forged document is itself a forgery.

Property (land)

Bahramitash v Kumar [2006] 1 NZLR 577 – When the tender of money by a purchaser is required on completion of a land sale contract.

Otago Station Estates Ltd v Parker [2005] 2 NZLR 734 – The question of a deposit being paid by a personal cheque of the purchaser.

Family law

Secretary for Justice v HJ [2006] NZSC 97 – Interpretation of the Hague Convention where the application for a child's return is made, as an exception to the general rule, a year beyond the abduction.

82 Blanchard (2006a), *Op cit.*

Human rights

Morgan v Superintendent, Rimutaka Prison [2005] 3 NZLR 1 – The question of whether a retrospective change by statute to parole conditions, after the commission of the crime but before conviction, is a prohibited change to the maximum term to which the convicted person can be sentenced.

Equity

Chirnside v Fay [2006] NZSC 68 – The fiduciary obligations of joint ventures and the calculation of damages for breach of duty.

Eastern Services Ltd v No 68 Ltd [2006] 3 NZLR 335 – The question of the application of laches for mere delay, but in an extended situation.

Environmental law

Discount Brands Ltd v Westfield (NZ) Ltd [2005] 2 NZLR 597 – Situations in which a developer can have an application for planning consent proceed without notification to potential objectors, thereby denying them participation in the process.

Civil procedure – appeal rights

Mafart v Television New Zealand Ltd [2006] 3 NZLR 18 – The question of whether an appeal lies from a decision of a judge to allow media access to a court file.

Taylor v Jones; Skelton v Jones [2006] NZSC 113 – Whether the Habeas Corpus Act 2001 allows for an appeal by someone against whom a writ of habeas corpus has been issued requiring delivery to the court of an abducted child.

Torts

Chamberlains v Lai [2006] NZSC 70 – A consideration of whether barristers have immunity from suit for negligence in connection with work undertaken in court. This case presented an opportunity to the Supreme Court of New Zealand to choose between answers given to this question by the House of Lords and the Australian High Court. This choice would not have been present in practical terms, if the appeal had found its way to the JCPC.

Justice Blanchard concluded that less than a third of such matters would have arrived before the Privy Council. The analysis is thus evident – the advent of the Supreme Court of New Zealand has brought in its wake not just an enhanced access to justice, but a growth – long overdue – in its jurisprudence[83].

This sampling over the first years of the court's existence can assuredly grant to New Zealanders a positive sense that the actualisation of their distinctive and broad jurisprudential development is well underway.

83 Decisions can be accessed at www.courtsofnz.govt.nz [accessed 18 June 2008].

The Caribbean Court of Justice

As has been discussed, the CCJ is facing challenges as member states of CARICOM have to find ways, through referenda or otherwise, to accede to the appellate jurisdiction of the court. In the interim, its two active members of the appellate jurisdiction, Barbados and Guyana, have been seeking the audience of the court. At the time of writing, the original jurisdiction of the court had not yet issued any judgments, though the appellate jurisdiction has been considerably active. The analysis of work undertaken by the CCJ thus far is commendable[84].

Leave to appeal, administrative law – damages

Barbados Rediffusion Service Ltd v Merchandani [CCJ Application No 1 of 2005] – The first case to be presented to the CCJ was in fact heard twice by the court. The initial hearing was on application for leave to appeal, and thereafter, the hearing of the appeal itself. The case established that the respective legislation passed in Barbados entitled the substitution of the right of appeal to the JCPC to be supplanted by that to the CCJ. The case also boldly applied the doctrine of proportionality, which though well established in European law, is only finding its way in some judgments of the common law. In this context, it was reiterated that an administrative measure should not be any more severe than or disproportionate to the mischief it is intended to cure.

Griffith v Guyana Revenue Authority et al [CCJ Application No 1 of 2006] – Questions as to whether the CCJ had jurisdiction to hear the matter, since it was neither civil nor criminal; if there was sufficient merit to warrant leave; and if the applicant was entitled to special leave to appeal as a poor person – *in forma pauperis*. The CCJ granted leave cautioning that such was an act of grace. The areas of public and private law were examined.

Cadogan v The Queen [CCJ Application No 6 of 2006] – The question of leave to appeal against a decision of the Court of Appeal was refused on the ground that it lacked merit.

Nauth v The Attorney-General of Guyana et al [CCJ Application No 7 of 2006] – An application for special leave pursuant to the Constitution of Guyana was refused by the CCJ. The applicant had failed to appeal within the prescribed time, alleging ignorance of the inauguration of the CCJ. The appeal was distinguished from *Griffith v Guyana Revenue Authority et al*.

Property (land)

Watson v Fernandes [CCJ Application No 2 of 2006] – Questions whether an attorney-at-law who is not 'on the record' is entitled to sign a notice of appeal on behalf of his client.

Criminal law

Boyce v Joseph [CCJ Application No 2 of 2005] – A landmark ruling thus far in the work of the CCJ. It reviewed the prerogative of mercy of the Barbados Privy Council, the effect of international human rights instruments. The CCJ ruled that the prerogative of mercy was reviewable, and that the failure of the Barbados Privy Council to await the conclusion of

84 See the CCJ cases at www.caribbeancourtofjustice.org [accessed 18 June 2008].

the proceedings in the Inter-American system was in contravention of the respondents' right to protection under the law. Therefore the order, which was issued by the Barbados Privy Council for the execution of the respondents after they had sought proceedings before the Inter-American system, was deemed to be a contravention of the law by the CCJ. The CCJ was assertive in expressing its departure from reasonings of the JCPC in the prior case of *Lewis v The Attorney-General of Jamaica,* which the CCJ viewed as flawed and preferably focused on the doctrine of legitimate expectation.

The case also sent the message that presumptions in certain quarters of the *raison d'être* of the CCJ being a 'hanging court' to ensure the application of the death penalty are now to be rebutted.

R v Lewis [CCJ Application No 1 of 2006] – A respondent convicted of murder had his conviction quashed by the Court of Appeal of Barbados. The Court of Appeal of Barbados in turn raises questions as to whether the Crown has an appeal as of right to the CCJ and if such a right exists, can the Crown obtain relief, including the restoration of the conviction of the respondent.

Thomas v The State [CCJ Application No 3 of 2006] – An appeal from convictions of buggery and sentence to ten years imprisonment. Appeal being allowed and conviction in turn quashed. Focus was placed on the misdirection of the Judge of the Court of Appeal to the jury.

As has been seen earlier in this book, the types of appeals that found their way to the JCPC were essentially limited to criminal matters, or civil matters invariably involving wealthy sums. Further, it has been explained that the number of appeals has been declining over the years. Since the inauguration of the CCJ, it is most impressive that even with just two members states sending appeals, there is such activity. The stage is thus set for community law to be enriched as a broader spectrum of matters is presented to the CCJ, thus fuelling the steady growth of regional jurisprudence.

The challenges for the CCJ now will not only be for the other members to accede to its appellate jurisdiction, but for the original jurisdiction to be truly activated in order to reach its potential of fostering an area of special and unique Caribbean international/regional legal identity.

The COMESA Court of Justice

The COMESA Court of Justice seeks to establish itself as the tribunal for matters relating to the regional treaty of association and its relevant organs. Its place in community law thus requires opportunities to cement this role, as illustrated by the case below.

Eastern and Southern African Trade and Development Bank (PTA Bank) v The Republic of Burundi Represented by the Minister of Justice of the Republic of Burundi [Application Nos 1 and 2 of 2006] – This matter exemplified the jurisdiction of the regional court to adjudicate on relations between institutions of individual partner states, *vis à vis* institutions of the regional association. The Eastern and Southern African Trade and Development (PTA) Bank, an organ of COMESA, was set up in Burundi; it was moved when civil war broke out in that country in 1994, and relocated to Nairobi, Kenya. In 2001, when

a truce was called between the warring factions in Burundi, that government called for the reinstatement of the bank to its country. The bank has resisted such a move on the grounds that peace has not been effectively restored, and its conducive investment climate would in fact be undermined should it relocate to Burundi. In the interim, while the debate continued for the bank's return to Burundi, the bank proceeded to lease a building, which formerly housed its headquarters in Burundi's capital Bunjumbura, to the United Nations Development Programme (UNDP). By 2004, suspicious that this act strengthened the bank's reluctance to return to Burundi, the Government of Burundi forbade the lease to proceed and the bank considered this interference in its business. In 2006, the bank sought the COMESA Court to have the actions of the Burundi government declared illegal, while simultaneously asking for an injunction to stop that government from interfering in the management and control of the building. The court dismissed the application, citing *inter alia,* the non-exhaustion of local remedies mandated by the COMESA treaty.

5 Recommended Best Practices

Reference has been made throughout this book to the Commonwealth meetings that occurred between 2003 and 2007. The considered outcomes have, therefore, been the culmination of these meetings and visits, as well as interaction and exchanges among delegates. The final delivery of recommendations occurred at the July 2007 Commonwealth meetings. It is believed that given the wealth of experience and seniority of the delegates, these outcomes of determination for best practices are invaluable.

Appellate jurisdiction[85]

The role of the appellate jurisdiction in the provision of justice has to be recognised and respected. This jurisdiction is at the end of the road of appeals for justice undertaken by litigants. Recommendations for specific and general best practices are provided on reaching a position to provide as best an appellate jurisdiction as possible.

General recommendations

Judicial appointments

There should be ad hoc judicial appointments from the Judicial Committee of the Privy Council (JCPC) and other common law/Commonwealth jurisdictions by courts within the Commonwealth. This approach enhances exchanges and allows for comparative assessments of the development of jurisprudence.

Library and research facilities

A fundamental tool for granting assurance to maintain standards and equipping the judiciary with appropriate instruments, is the provision of adequate funding for instituting and maintaining library resources, including technological innovations in such libraries. Working with law schools to secure assistance from students will also bolster research facilities, while simultaneously granting future members of the legal profession an opportunity to make a contribution and become familiar with processes.

Amicus curiae

Arrangements should be made with bar associations and the courts to be able to create a list of potential *amicus curiae* (advisers to the court).

85 The members of the July 2007 Commonwealth meeting who determined recommendations for the 'appellate jurisdiction' comprised: Judge R Silberman Abella, Judge of the Supreme Court of Canada; Judge B Alleyne, Acting Chief Justice of the Eastern Caribbean Supreme Court; Judge S Crennan, Judge of the High Court of Australia; and Judge C Singh, Chief Justice of the Court of Appeal of Guyana. For the unedited and unmodified text of the recommendations, the report of the July 2007 meeting may be obtained upon request from the Commonwealth Secretariat.

Translation and interpretation services

Where courts have to work in different languages, qualified translators and interpreters are necessary. Their training in legal language is appropriate to ensure that the translations and interpretations produce, as accurately as possible, the proceedings and statements of the court. This aspect is also further canvassed in the recommendations from the registry.

Adequate security

Judges, members of the court and witnesses need to be able to function in a physical situation devoid of fear and intimidation. Consequently, there should be the necessary measures in place to ensure that there is adequate security for all.

Specific recommendations

Public confidence/appointment and independence of judges

The fostering of public confidence in the appeals process will give the life blood to the court to ensure its functioning and, in particular for newly-established courts, will provide the wherewithal for its very existence.

Recommendations:

- The continued independence of the judiciary from the legislative and executive arms of government must be safeguarded at all times.
- Dissents at all appellate levels should be permitted.
- The code of conduct of the judiciary must be adhered to and respected.
- Administrative independence for the court's functioning should be a priority.
- An independent mechanism for regular review of judicial remuneration should be established.
- A judicial services commission or similarly established body indicates the approach of transparency and fairness in appointments of the judiciary.
- Where and as far as possible, gender balance must be a consideration in the guiding then selection processes for judges.

Backlog and modernisation

An instrumental approach towards an efficient functioning appellate jurisdiction of a court has to factor in both its approach to eliminate backlog while simultaneously seeking to effect modernisation and innovation to meet that court's needs.

Recommendations:

- Computers for all judges along with support services are deemed to assist the ability to reduce the causes of backlog and delay. The judiciary is encouraged to become highly conversant with the use and consequent advantages of a computer and technology more generally.

- Computers for research in libraries are imperative, as this again reduces delay and allows for internet sources to satisfy research demand with alacrity. Courts are also encouraged to subscribe to credible providers of online cases and other associated legal research sources.
- The foregoing will be made possible if there is, in tandem, the provision of independent and adequate legal, clerical and administrative assistance for judges.
- Time limits need to be set and respected for procedural steps and timetables for hearings. Time limits again have to be maintained for:
  - filing and responding to written submissions;
  - filing intervenor applications and responses; and
  - oral argument.
- In equal measure, written submissions need to be of limited length and that length adhered to.
- With regard to applications for leave, this should be carried out in writing. Leave, in particular, is to be granted on issues of fundamental importance, to settle inconsistent jurisprudence, or if a miscarriage of justice is involved.
- The delivery of judgments in a timely manner is paramount. To ensure that judges honour this approach, measures should be employed to achieve this end. These methods may include circulation of a periodic list of outstanding judgments, and/or naming the judge responsible. Regular meetings of judges are to be maintained in order to monitor the progress of judgment writing.

Continuing judicial education

To be able to deliver a consistently-updated judiciary, one that is familiar with the evolving judicial demands of the various courts, education for the judiciary has to be continuous.

Recommendations:

- Judgment-writing courses need to be factored into the budgets and activities of the courts on a regular basis.
- The judiciary should pursue substantive and comparative law courses.
- Creation of a judicial institute for educating judges at all levels may be a long-term approach within a regional arrangement and is noteworthy. It may also be approached from the point of view of inter-action and collaboration with other regions and jurisdictions. Further, this approach may involve existing bodies and associations.

The regional and international law jurisdiction[86]

For recommendations of best practices in a regional court, observing the principles of international law, increasing the judiciary's knowledge and appreciation of same in the evolution of jurisprudence, along with ensuring that the citizenry can avail itself of the court, the suggested approaches are examined under the following arrangements:

- General recommendations;
- Specific recommendations relating to:
  - Scope of Jurisdiction
  - Access or *locus standi*
  - Development of jurisprudence
  - Training and continuing legal education

General recommendations

Library facilities

Having stressed the importance of research to the development of regional community law, the improvement of library facilities and equipment, as well as materials such as periodicals, textbooks and access to legal databases, should be addressed as a matter of immediate priority. The publication of the law reports of regional courts must be done in a timely manner. It is also necessary for the courts to update their websites in order to provide the public with relevant information.

Infrastructure

It is crucial for the proper functioning of any court that appropriate infrastructure should be made available. The designated host country should ensure that adequate infrastructure provision is made in accordance with standard international practice.

Funding

Member sates must ensure regular and adequate funding of the courts to guarantee their smooth functioning and independence. Regional courts should not be made to continually beg for funds from member states. Member states of various regions should be encouraged to adopt the CARICOM trust fund model, which is both sustainable and ensures the autonomy of the CCJ. In this case, the Heads of State and Government of the Caribbean Community authorised the Caribbean Development Bank (CDB) to negotiate a loan of one hundred million United States dollars ($100,000,000) on the international capital markets. This amount was then lent to the member states of the Caribbean Community in amounts corresponding to their liability to contribute to the budget of the CCJ. The loan was repayable to the CDB over ten years. This amount was, however, not

86 Delegates of the July 2007 Commonwealth meeting who produced these considered recommendations for 'regional and international law jurisdiction' comprised: Judge N Kitonga, President of the COMESA Court of Justice; Judge L Mondlane, President of the SADC Tribunal; Judge A Benin, Vice President of the ECOWAS Court of Justice; Judge D Pollard, Judge of the CCJ; and Judge S Rugege, Judge of the COMESA Court of Justice. For the unedited and unmodified text of the recommendations, the report of the July 2007 meeting may be obtained upon request from the Commonwealth Secretariat.

handed over to the member states, but was deposited with trustees who were mandated to administer the fund on behalf of the member states pursuant to a trust fund agreement concluded by the member states. Income accruing from the trust fund is employed to defray the expenses of the CCJ on a sustainable basis.

Periodic meetings

Periodic meetings of regional courts should be arranged to enable them to share experiences on the operation of their courts and how to improve them.

Specific recommendations

Jurisdiction

The usual question asked in terms of a regional court's jurisdiction revolves around a determination of its appropriate role and the extent of its jurisdiction. The answer would be that the court's primary purpose is the resolution of disputes arising between member states of the community, member states and individuals, legal persons and institutions in respect of the interpretation and/or application of the community treaty and other legal instruments relating to the community.

Recommendation:
In the exercise of this core function, the regional courts should set out principles through case law that guide the member states and other actors in their interaction and furtherance of the integration project. In order to achieve this, there should be one authoritative voice as to what is the proper interpretation of any provision of community law, and that voice should be the regional court.

Jurisdiction of interpretation

However, it is also recognised that in some regional arrangements the community law does not grant exclusive jurisdiction to the regional court, but rather allows the national courts to have concurrent jurisdiction with the regional court on the interpretation of the treaty. On this basis, different domestic courts may give different interpretations to the same provision of the treaty, leading to uncertainty as to the meaning of a particular provision. One example is Article 10(f) of the Protocol establishing the ECOWAS Community Court of Justice, as amended, which enables the domestic courts to decide, in their discretion, whether to refer any issue of interpretation to the regional court. A similar provision is found in Article 16 of the Protocol on the SADC Tribunal. On the other hand, Article 30 of the COMESA Treaty states that:

> *'Where a question is raised before any Court or tribunal of a Member State concerning the application or interpretation of this treaty or validity of the regulations, directives and decisions of the Common Market, such Court or tribunal shall, if it considers that a ruling on the question is necessary to enable it give judgment, request the Court to give a preliminary ruling thereon.'*

Recommendation
This provision makes it obligatory for domestic or national courts, in specified circumstances, to refer the question of interpretation of a treaty provision to the regional

court for a preliminary ruling. A similar provision exists in the CARICOM Treaty. This is also the practice in the EU court system. This practice should be followed by other regional courts in order to ensure consistency and certainty in community law.

Access or *locus standi*

Regional courts should serve not only member states of the communities, but also those who reside in them – whether individuals or legal persons. However, some community instruments permit individuals and legal persons to submit their disputes involving integration matters to the regional court only after exhausting domestic remedies in the national courts. This is usually a long process that discourages litigants, since the disputes have to follow the queue as all other domestic cases.

Recommendation:
Given that for development to take place there is the need to fast track commercial and especially foreign investment disputes, the relevant instruments have to be amended to allow private individuals and other legal persons to access the regional courts without first having to exhaust local remedies.

Jurisprudence and exchange among regional courts

Since the constituent instruments of the communities are treaties between states, their interpretation should primarily be based on principles of international law in accordance with the 1969 Vienna Convention on the Law of Treaties. In equal measure, regard has to be given to the development of comparative jurisprudence of international and regional tribunals and the general principles of law to buttress such interpretation.

Recommendations:
Judges of regional courts should keep themselves updated with international law and comparative jurisprudence developments. As a means towards this end, and in the realm of development of jurisprudence of community law of regions, regional courts should continually exchange judicial decisions by them.

Jurisprudence and research facilities and support

The fundamental role of appropriate research and library facilities and support has been addressed in another context. This constitutes a recurring theme, underlining its crucial contribution to jurisprudence as well as the ability of a court to stand in confidence on the quality of its judgments, based on sound reasoning gained from proper research.

Recommendations:
The courts should establish research departments, where none exist, whose duty it will be to help judges conduct research into aspects of international and community laws. These measures should improve the quality of judgments produced by regional courts and enhance the uniformity of applicable laws, and inspire the confidence of investors, both local and international in the common markets. The research departments will also help in harmonising different aspects of law that are common to the community and which are necessary in the integration process, for example, laws on taxation and customs.

Training and continuing legal education

It is recognised that the development of a regional body of jurisprudence has to have a contribution at all levels of stakeholders in the jurisprudential landscape. This has an even greater urgency within new regional arrangements, where the practice of international law and community law is in somewhat of an infancy stage. To move the process forward, creating informed legal discourse and representation, training and updating is recommended as outlined above.

Recommendations:
In order to further develop regional community laws and the harmonisation of national laws for greater integration in the common market, there is need for inclusion of regional community law in the curricula of universities and especially law schools. This should be in addition to the usual international law courses. The study of regional community law should be made obligatory at law schools for would-be legal practitioners. Judges and lawyers already in practice should undergo continuous legal education in international, and more particularly, regional community law.

Law students should be given attachments to regional courts to encourage the practice and popularisation of community law, a practice already being undertaken by the ECOWAS Court of Justice.

The registry

It must be remembered that the registry is at the heart of any court's operations, yet is so often overlooked in the court's functioning. The blend of distinguished delegates who gave contemplation to the recommendations herein, hailed both from final courts of appeal as well as regional courts[87]. Further, while obviously final courts of appeal, the Supreme Court of Canada and the High Court of Australia, by virtue of their provincial and federal span, do share some features that may apply to any regional arrangement. These reflections indicate perhaps the most comprehensive determinations of registry functions and guides.

Communication between registries in regional/federal arrangements – sub-registries

The sub-registry system is a useful means of providing access to justice in situations where potential users of the court reside in locations which are geographically distant from the seat of the court. However, where a sub-registry system is employed, communication and transfer of information and documentation between the registry and the sub-registries assumes vital importance. The registrars examined among other things:

- The agency system that operates in the Supreme Court of Canada, where there are no sub-registries and applications and appeals are filed in the registry with parties employing an agent for these purposes.
- The High Court of Australia, where the work of the central registry is facilitated by a series of sub-registries throughout the country. Offices of the registry have access to the centralised computer system.
- The system employed by the Eastern Caribbean Supreme Court, where the work of the Court of Appeal Registry in Saint Lucia is facilitated through filing of applications and appeals at sub-registries located in each of the nine member states and territories, and where there is no formal agency system in use nor a centralised database.
- The system employed by the Caribbean Court of Justice, where documents may be filed in the sub-registries or at the CCJ Registry; however, there is no requirement for agents to act on behalf of attorneys nor a centralised computer system;
- The ECOWAS Community Court of Justice, where there is a centralised registry only located at the seat of the court in Abuja, Nigeria. However, it is noted that member states have been clamouring for the introduction of sub-registries to facilitate access to the court in their countries.

87 Delegates of the 2007 Commonwealth meeting in July who submitted these considered recommendations for the 'registry' comprised: Mr C Doogan, Chief Executive and Principal Registrar of the High Court of Australia; Ms A Roland, Registrar of the Supreme Court of Canada; Mr T Anene-Maidoh, Chief Registrar of the Court of Justice of ECOWAS; Ms P Pierre, Registrar of the CCJ; Justice MCC Mkandawire, Registrar, SADC Tribunal; Mrs K Cenac-Phulgence, Chief Registrar, Eastern Caribbean Supreme Court; Ms S Ramlal, Deputy Registrar of the CCJ and Registrar of the Court of Appeal of Guyana; and Mrs M Crane-Scott, Deputy Registrar of the CCJ and Registrar of the Supreme Court of Barbados. For the unedited and unmodified text of the recommendations, the report of the July 2007 meetings may be obtained upon request from the Commonwealth Secretariat.

- The SADC Tribunal, which at the time of writing is in the process of establishing its registry. It will initially utilise a centralised registry located at the seat of the court in Windhoek, Namibia, as is provided for in the Protocol establishing the Rules of Procedure.
- The COMESA Court of Justice, where there is a centralised registry only located at the seat of the court in Lusaka, Zambia.

Recommendations:

- Wherever appropriate, a system of sub-registries with a centralised computer database should be adopted with the ability for each sub-registry to access and input data.
- Each sub-registry should, in addition to the sub-registrar, have an officer dedicated to deal with applications and appeals to the final appellate/regional courts.
- Feedback mechanisms should be introduced to ensure that sub-registries are officially notified by the registrar of the court of the outcome of any applications or appeals before the court.
- Quarterly status reports on pending matters should be generated by the registry of final appellate/regional courts for each sub-registry.

Interaction with judges, legal profession, the general public and among registrars

Interaction between the court's registrar and other key actors is thus critical for the efficient administration of a court. Different practices prevail in the various jurisdictions of the Commonwealth, for example: Agent/Registrar Committee and Court/Bar Liaison Committee at the Supreme Court of Canada; rules committee meetings in Trinidad and Tobago, Barbados and Guyana; meetings with bar associations, continuing judicial education programmes and court user committees.

Recommendations – judges and the legal profession

- Judges and registrars should collaborate on a common approach to the application of the rules in relation to time limits, filing requirements and so forth.
- Committees comprising representatives of the judges, registrars, bar associations and civil society groups should be convened on a periodic basis to discuss administration of the registry.
- All courts, and in particular newly-established courts, should have sensitisation missions in member states/territories/provinces with attorneys on the role and function of the court.
- There should be a bi-annual survey/evaluation of the performance of the registry conducted by an independent survey consultant.
- Intended changes to administrative practices in the registry should be communicated to the bar associations and feedback invited before implementation.

- In recognition of the pivotal role that registrars play in the administration of justice, registrars should be included as participants in meetings of judicial officers nationally, regionally and internationally.

Recommendations – interaction with the general public

- There should be the development of informative and user-friendly websites, flow charts and pamphlets for the use of the public and, in particular, for self-represented applicants.
- All courts, and in particular newly-established courts, should have sensitisation missions in member states/territories/provinces with the public and law faculties on the role and function of the court.

Recommendations – interaction amongst registrars

- A permanent international forum should be established for registrars of final appellate/regional courts in Commonwealth countries to discuss issues and exchange information about best practices in the registries.

Case management systems, statistics and electronic filing

In the thrust to modernise the court, as well as maintain the ability to deliver services in as timely a manner as possible, the use of case management systems statistics and electronic filing has become increasingly valuable.

Recommendations – case management systems

- Courts need to consider the implementation of an electronic case management system tailored to the specific needs of courts so as to facilitate the effective management of cases.
- In choosing an electronic system, courts should draw from the experiences of and systems used by other registries, including the Supreme Court of Canada, the ECSC and the High Court of Australia.
- The electronic system adopted should have features that assist in the following:
  - identification of the status of cases;
  - identification of various categories of matters;
  - generation of reports such as statistics and reasons for adjournments;
  - generation of standard forms, such as letters, orders and notices;
  - identification and tracking of reserved judgments;
  - minimising of multiple entries;
  - posting of case notes for internal use only; and
  - allowing lawyers and the general public to access case information via the internet.

Recommendations – statistics

- Statistics should be generated periodically for the internal use of the court to ensure the efficient and timely disposition of cases in keeping with applicable standards.
- Statistics should be used to identify caseload trends, time lines, revenue collection, and financial and human resource needs.
- General statistics should be made available to the public annually.

Recommendations – electronic filing

- Electronic filing needs to be recognised as the way of the future, but should be introduced as the last step in the modernisation of courts. In particular, caution should be exercised to ensure that the introduction of electronic filing does not cause a transfer of workload and cost from the litigants to the court.
- Electronic filing should only be considered after the courts below have been fully computerised (thereby allowing documents to be electronically transferred between courts and/or lawyers/litigants).

Dealing with frivolous, vexatious and abuse of process procedures

Registrars believe that with the growth of self-represented litigants, so there has also been an increase in the number of attempts to file documents involving an abuse of process of the court or which constitutes frivolous or vexatious proceedings.

Recommendations – specific rules

- Every court should have a rule that provides for the registrar to seek directions from a judge not to allow process to issue on the basis that the proposed litigation is frivolous, vexatious or an abuse of process.
- Every court should have a rule that provides for nominated persons (for example, a registrar, attorney-general or solicitor-general, as the case may be) to apply to have particular persons declared vexatious and thereby requiring leave to commence proceedings.

Rules of Court

Recommendations – user friendly rules

- Rules of Court should be user-friendly, written in plain language and easily understood by all users.
- Flow charts have to be made available by the registry showing the court processes and filing deadlines.

Recommendation – exercise of discretion by registrars in giving directions

- The Rules of Court should be designed to provide for registrars to have discretion to issue directions as they see fit in order to ensure that the requirements of the rules are met.

Recommendations – time limits for hearing within a reasonable time and the 'deemed abandoned' rule

- The Rules of Court should provide time limits from filing to the point where the case is ready for hearing (preferably a maximum of three months or, if this is considered to be too short a period, six months).
- There should consequently be a 'deemed abandoned' rule to give effect to the above.

Translation

Final appellate/regional courts that operate in more than one working language are encountering problems in translating documents due the difficulty in recruiting qualified translators with adequate legal knowledge. This causes delay in the administration of justice.

Recommendations – networking

- Multi-lingual courts are encouraged to seek assistance among themselves and with older jurisdictions to access the required translation and interpretation services of legally-trained persons.
- Multi-lingual courts should, in conjunction with relevant institutions including the Commonwealth Secretariat, develop an appropriate training module, which will assist in overcoming the problems identified above.
- Multi-lingual courts should seek technical assistance in facilitating short-term attachments of translators to relevant established organisations.

Public awareness and access to justice[88]

Public awareness

Courts have a responsibility to promote accountability and transparency in their functions. Since courts exist in the interests of the public, it is appropriate that the public should be aware of the work they do and their methods of work.

Historically, the attitude of the judiciary has been one of reticence, keeping its distance from the press and avoiding entanglement in controversial issues. This attitude has changed in the last 15 years. It is now recognised and accepted in many courts of the Commonwealth that the judiciary should be pro-active in providing accurate information to the public and in facilitating accountability.

Recommendations:

Public Relations Unit

- As far as practicable, a unit specifically responsible for providing information to the public should be established. The objective of the unit should be the development of appropriate strategies to ensure that the public is provided with relevant information. The head of the judiciary and the head of the unit should work in close harmony to provide programmes and a methodology for building public awareness.

Use of Existing Facilities

- In some Commonwealth states, a government information service or similar department already exists. Use should be made of these facilities, for example, by requesting that an officer of the service be assigned to the judiciary. There should be regular meetings between the head of the judiciary, so that the latter may be properly briefed.

Annual Press Conferences

- The head of judiciary should hold an annual press conference to inform the public of the work of the courts, and to respond appropriately to concerns that the press may wish to raise on aspects of the court's operations.

Publication of Reports

- Whether required by legislation or not, the judiciary, including its institutional organs, should publish an annual report of the work of the court and its departments to enable the public to assess the efficiency and effectiveness of the courts.

88 Delegates of the July 2007 Commonwealth meeting who submitted these considered recommendations for 'public awareness and access to justice' comprised: Sir D Simmons, President and Chief Justice of the Supreme Court of Barbados; Judge N Anderson, Judge of the Supreme Court of New Zealand; Judge A Saunders, Judge of the CCJ; Mrs Z McCalla, Chief Justice of the Supreme Court of Jamaica; and Mr A Davis, Retired Judge. For the unedited and unmodified text of the recommendations, the report of the July 2007 meetings may be obtained upon request from the Commonwealth Secretariat.

Promoting Open Justice

- It would reduce some of the mystique surrounding courts if, for example, there were an annual open day when members of the public would be encouraged to visit the courts and interact with judicial officers and court staff.

Participation by the Judiciary in Public Discussion

- Whereas it is acknowledged that judges should not engage in discussion of matters of public controversy or about cases, save in an academic context, nevertheless, support should be given to the participation of the judiciary in public discussion relevant to the business of the court and on legal issues.

Use of Modern Technology

- Courts should make the best possible use of modern information technology to build public awareness of the business of the courts. There should be a website on which relevant information about the court is posted. The public should be invited to read the full judgments of courts to ensure that they are not given a jaundiced view of a judgment because of inept reporting. However, courts should seek also to create and publish executive summaries of all important judgments with an appropriate disclaimer that these summaries are not and form no part of the relevant judgment. There is much public value in the creation, sale and distribution of DVDs on the courts and the administration of justice.

The Caribbean Court of Justice

- With specific reference to the CCJ, the following is recommended:

  Publication of reports

  The court, the Regional Judicial and Legal Services Commission and the trust fund should publish annual reports and ensure that they have the widest possible regional distribution. The heads of these respective institutions should consider holding a joint press conference annually to provide the setting for the release of the reports.

  Special attention to Jamaica and Trinidad and Tobago

  Jamaica and Trinidad and Tobago are potentially the major contributors of litigation to the CCJ. They are also the major contributors to the fund of the court, but neither state has acceded to the jurisdiction of the CCJ. It is understood that both political parties in Jamaica have committed themselves to holding a referendum on the issue of joining the CCJ after the next general elections. The position in Trinidad and Tobago is unclear at the time of writing. It is important that accurate information about the court be made available to the public throughout the Caribbean and, in these countries in particular, in order to ensure that the public are in a position to make an informed and considered judgment on the matter. In particular, these efforts could be directed at the business community, the bar associations and the wider public. Emphasis could properly be placed on:

  - the fact that Jamaica and Trinidad and Tobago are making annual financial contributions to the court, but are receiving no services from the court in return;
  - the fact that some previous opponents of the court have come to understand and

appreciate its role and worth;

- the speed in having a case heard in the CCJ compared with the JCPC and the great savings in costs achieved in pursuing an appeal before the CCJ; and
- the fact that, unlike the case with England, no visa is required for a CARICOM national to travel to Trinidad & Tobago to access the CCJ.

The Supreme Court of New Zealand

- New Zealand, which recently severed ties with the Privy Council, has demonstrated that its jurisprudence has developed significantly in several areas of the law as a direct result of the greater accessibility than was possible with appeals to the Privy Council. That jurisdiction's jurisprudence has developed significantly, because cases raising interesting and novel issues of law that would have stopped at the Court of Appeal level are now argued before the new Supreme Court. The decisions of that court have advanced the common law significantly.

Access to justice

Access to justice is a human right. However, the historical experience of the common law has been that, in reality, too many barriers have continued to deny citizens access to the courts. These barriers have been systemic, procedural, financial, physical and cultural. They include the related problems of delay and backlog, antiquated court facilities, outdated approaches to litigation by judges and lawyers, and an insufficiency of funding.

It has to be said that the judiciary, as the third arm of government, has generally been under-resourced. It is the view that access to justice can be enhanced and public confidence in the integrity of an indigenous court bolstered by the adoption of the following recommendations:

Change of Culture of Practice

- Courts should adopt those practices that are being used in many Commonwealth countries to ensure that litigation is more judge-driven and less party-driven. This change in culture requires adequate training for all those involved in the administration of justice, *viz.* judges, court staff, lawyers and administrators. Courts should specifically earmark funds for continuing training and education.

Legal Aid

- In many countries, the categories of persons entitled to legal aid are very narrow. They need to be expanded in criminal cases as well as civil actions. In particular, there should be liberal access to legal aid in family law matters. It is recognised that increases in legal aid benefits are related to countries' fiscal capabilities, but expansion of legal aid should be seen as a crucial access-to-justice issue to which all states should be committed.

Improving Physical Access

- The traditional under-resourcing of the administration of justice has resulted in court buildings being inadequate, dilapidated and unsuitable for the dispensation of justice

in contemporary times. The courts are liable to be seen in negative and derogatory terms, because of the environment in which judicial officers function. There should be planned, systemic and sustained programmes for the modernisation of court infrastructure over a defined period. The infusion of resources should have as its objective the improvement of existing facilities and the creation of new ones. Such facilities should ensure adequate security for all court users and make provision for persons with disabilities. It requires no amplification to say that courts should be equipped with public address systems to improve audibility in the courtrooms.

Procedural Improvements

- Rules of procedure in the 20th century have had a negative impact on access to justice. They have allowed lawyers to manipulate the administration of justice to the disadvantage of the parties. Their language has not been readily intelligible to the non-lawyer. Courts should therefore adopt rules of procedure that are written in simple English and are readily intelligible to the ordinary citizen. They should provide for case management by judges, to ensure that the process of litigation is driven judicially in an efficient and expeditious manner.

Use of Information Technology (IT)

- New rules of procedure and the new culture of litigation require adequate support by appropriate information technology. It is important to appreciate that relevant IT is essential for effective functioning of new rules of procedure. As far as possible, courts should seek to integrate the software they use with software being used by ancillary government agencies such as the prisons, probations, police and immigration departments, so that efficiency in the entire justice sector is maximised. Similarly, national courts within a region and regional and appellate courts should seek to harmonise technology with a view to streamlining practice and procedure and creating efficiencies. The ultimate objective of the installation of modern IT should be the maximising of the efficiency of the courts and the enhancement of access to justice.

- Video systems should be installed to facilitate appearance from long-distance for special leave applications or directions.

Alternative Dispute Resolution ('ADR')

- Rules of procedure should make ample provision for non-litigious methods of resolving disputes. The parties should be encouraged to utilise the most appropriate method of resolving disputes including, in particular, mediation. However, having regard to the natural scepticism of litigants when advised to settle litigation, it is recommended that intensive outreach programmes be undertaken to sensitise the public to ADR. It is also recommended that bar associations be intimately involved in programmes promoting ADR, not only as conduits for litigants but also to be better informed in their own right.

Information Centres and Customer Service Charters

- Courts should be encouraged to be more customer-friendly. Some jurisdictions have developed customer service charters in which the public are given information as to the manner and time in which the various departments of the court will deliver various

services. Other jurisdictions publish and disseminate brochures and leaflets that indicate the services that are offered by the court and how they can be accessed. This is of particular use in the registries of courts. Another useful innovation would be the establishment of a help desk or information centre to which court users could go for information about the services provided by the court.

Department of Court Administration

- Historically, the administration of courts has been the function of legally-trained persons employed on the basis of their legal training. However, modern best practice is for the administration of courts to be run by specialised departments and by persons specifically trained in court administration, but under the control of the judiciary. The author and delegates to the July 2007 Commonwealth meeting recommend that courts seek to create departments of court administration, preferably headed by a lawyer trained in the area. The hiving-off of administrative functions into a separate department would allow the registrar and the head of judiciary to devote their energies to other areas.

Codes of Conduct

- Many courts throughout the world have developed and published codes of judicial conduct or guidelines for such conduct. These are useful tools. They assist judges in understanding the constraints of judicial office and serve to inform the public of the standards to which judges should be held accountable. Equally, they give the public an appreciation of the nature and responsibilities of judicial office. Codes or guidelines should be made easily available to the public at places in which the public often has access, for example, post offices.

Complaints Procedure

- It is recognised that in some jurisdictions there exist mechanisms for dealing with complaints against the judiciary. Where such mechanisms do not exist, their establishment is recommended. Crucial to any such system is public awareness of its existence and its procedures. Publication of these, including on the court's website, is necessary. Such measures encourage judicial accountability and enhance public confidence in the administration of justice.

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Until recent times many smaller Commonwealth jurisdictions have turned to the Judicial Committee of the Privy Council in London as their final court of appeal. Now more and more countries have amended their constitutional arrangements to bring the final court of appeal closer to home.

Cheryl Thompson-Barrow charts the experience of a number of countries and looks at the different ways in which alternative appeals processes have been set up, comparing the approach taken by countries like Australia and New Zealand with that taken in parts of the Caribbean. She makes recommendations for future good practice in the establishment and administration of final courts of appeal, based on discussions by Commonwealth law ministers and senior officials over the period 2003 to 2007.

ISBN 978-0-85092-882-2

Commonwealth Secretariat