

# The Caribbean Court of Justice and Appealing to Accession

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The debate surrounding the accession to a final appellate court for the Caribbean Region rather than to the Judicial Committee of the Privy Council ("Privy Council" or "JCPC") has evolved over the last five (or more) decades. Arguments for and against embracing the Caribbean Court of Justice ("CCJ") have transformed over time. In the early 1970s, 1980s, and 1990s, uncertainty about a then-embryonic concept of a final appellate court for the Region resulted in debates about questions of nationalism and sovereignty, but also whether such a West Indian court could remain independent, and free from political influence.<sup>[1]</sup> Naysayers questioned the financial realities of establishing the CCJ: would it depend on annual financial assistance from local governments,<sup>[2]</sup> or would its judges be beholden to politicians who paid for the Court? Non-believers also questioned whether there was sufficient judicial talent in the Region to handle its needs.

Now that the CCJ has celebrated its 14<sup>th</sup> anniversary,<sup>[3]</sup> certain of these concerns have fallen away. However, one thing persists: the root of the debate remains independence.

The CCJ is the creation of a group of *independent* Caribbean states. The bench is comprised of judges who are appointed by an *independent* Commission.<sup>[4]</sup> The CCJ is "financially *independent*", so-to-speak, in that it is funded through an *independent* CCJ Trust Fund,<sup>[5]</sup> which does not depend on annual financial support from regional governments. Evidently, a debate about the CCJ cannot be had without exploring issues related to independence.

This article examines independence as the core feature of the ongoing discussion about the CCJ, namely, whether it should receive the Caribbean Region's full embrace. In the author's view, the debate begins at the top, with a discussion of nationalism and using the CCJ to affirmatively establish the independence of the Caribbean Region. A debate about the CCJ would not be complete without addressing concerns about judicial independence and ensuring that the "machinery for the appointment and removal of judges"<sup>[6]</sup> remains non-partisan. Finally, jurisprudential independence remains an important consideration in any examination of the Region's propensity to fully embrace the CCJ and its judges.

## A. Independence, Nationalism and Sovereignty

*"Is it not time... to complete our independence?"*

– Hon. Mr. Justice Michael de la Bastide<sup>[1]</sup>

The JCPC v CCJ debate cannot be had without discussing nationalism and sovereignty, and what their intersection means for independent Commonwealth states. Both concepts touch on the emotional *and* rational reactions of Caribbean people to the concept of independence.<sup>[8]</sup>

A popular opinion is that the CCJ is a symbol of efforts by the Commonwealth Caribbean to assert its independence and form a Caribbean unity that is distinct and separate from the United Kingdom. Acceding to the CCJ as the final court of appeal allows the Commonwealth Caribbean states to finally break free from the chains of colonialism, by creating and managing all three arms of government, including the judiciary. A regional judiciary with representation from across the independent Caribbean could serve as a stronger check and balance on the executive and legislative branches of government, and provide a more meaningful protection of the Rule of Law.

It remains to be seen whether issues of independence, nationalism and sovereignty will compel more countries in the Region to abolish appeals to the Privy Council in favour of the CCJ. What is clear from the discussion herein is that accepting the CCJ for not only its original jurisdiction, but also its appellate jurisdiction, will deepen the regional integration that the Caribbean Community (CARICOM) has always valued.

## B. Judicial Independence

*“[J]udicial independence] is written on the heart and springs only from strength of character, exemplified by a burning desire to be impartial and to do justice to all under all circumstances.”*

– Sir Hugh Rawlins<sup>[9]</sup>

An independent judiciary is the cornerstone of a free and democratic society.<sup>[10]</sup> Concerns about political partisanship and the interference of local, social and political forces on both the composition of the CCJ and the decisions that it makes have been raised in debates about acceding to the CCJ for decades. Indeed, they are important concerns and should not be taken lightly.

The Agreement Establishing the Caribbean Supreme Court (“Agreement”) contemplates and attempts to address these concerns. For example, the Agreement establishes the Regional Judicial and Legal Services Commission (“Commission”), which is chaired by the President of the CCJ. The balance of the Commission is comprised of a diverse group of individuals who are nominated by their peers and have varying legal and public service backgrounds.<sup>[11]</sup> In addition to appointing judges,<sup>[12]</sup> the Commission exercises disciplinary control over them, save and except for the President.<sup>[13]</sup>

It is only the appointment of the President of the CCJ that has any influence from political leaders. Pursuant to Article IV of the Agreement, the President is appointed (or removed) by the qualified majority vote of ¾ of the Contracting Parties, and *on the recommendation of the Commission*,<sup>[14]</sup> which acts as a check on the political aspect of the process.

Of course, institutional frameworks will not guarantee judicial independence. Sir Hugh Rawlins has commented that “judicial independence is determined on the basis of an inclination on the part of judges to take firm stands in matters against the State.”<sup>[15]</sup> How have the CCJ judges’ inclinations developed? In an op-ed published in November 2018, Sir Ronald Sanders noted that decisions by the CCJ have “been more against governments than for them”<sup>[16]</sup> Though the existence of the Commission and the CCJ’s track record will not always guarantee judicial independence, they provide some level of comfort to those who are concerned about political interference.

## C. Jurisprudential Independence

*“[T]he establishment of the [CCJ] will mark the culmination of initiatives to create our own regional institutions to facilitate and promote the development of an indigenous jurisprudence reflective of the moral, political, social and economic imperatives of our region...”*

– Hon. Mr. Justice Duke Pollard<sup>[17]</sup>

In 2019, the Commonwealth Caribbean is a sophisticated society with a need for its own common law. Relying on jurisprudence that has developed and continues to develop in the United Kingdom and through the JCPC is short-sighted, and does not do justice to the Caribbean population, or its unique geographic, political and cultural position in the world. Certainly, and as discussed above, independent Commonwealth Caribbean states cannot truly attain “independence” if they remain reliant on the jurisprudence and legal regimes of the United Kingdom and the British Empire.

As Sir C.M. Dennis Byron, former President of the CCJ has explained, “[t]he promise of the CCJ is often described in terms of creating Caribbean jurisprudence”.<sup>[18]</sup> The CCJ has presented the Commonwealth Caribbean with an opportunity to build its own body of legal precedent, through both the CCJ’s original and appellate jurisdiction, which is based on and in accordance with common historic, political, societal, economic and cultural experiences.

The jurisprudence developed with respect to the Commonwealth Caribbean has to be responsive to its needs and its diverse communities. In order to be responsive, the bench needs to be familiar with the Caribbean experience. As Justice Saunders (as he then was) has said, a judge’s “life experiences, socialisation attitude to wealth-creation, to gender and family life, to the authority of the State, to individual rights, to the role of religion” all play a part in determining the decisions that are made.<sup>[19]</sup>

Since its inauguration in 2005, the CCJ has delivered 182<sup>[20]</sup> decisions under its appellate jurisdiction, and 31<sup>[21]</sup> decisions under its original jurisdiction.<sup>[22]</sup> Evidently, the development of a truly Caribbean body of jurisprudence is well underway, particularly when one considers that only four jurisdictions – Belize, Guyana, Dominica and Barbados – have acceded to the CCJ’s appellate jurisdiction. This jurisprudential progression will, without a doubt, assist the CCJ in bridging the gap between the law and Caribbean society when deciding cases before it, something that the JCPC is less able to do.

#### D. Conclusion

Evidently, the existential “to CCJ, or not to CCJ” question continues to revolve around issues of independence, even if the debate over its answer has evolved over time. Importantly, the CCJ has the potential to accomplish – and has already accomplished – a great deal. As a court of last resort, it alleviates access to justice issues that prevent the vast majority of CARICOM residents from appealing to the JCPC in London, both for financial and mobility reasons. Its well-trained staff, modern technology, and e-filing system are all designed to ensure that the people of the Region are the recipients of high-quality and efficient justice.<sup>[23]</sup> The CCJ’s well-respected and independent judges have begun to develop a persuasive and high-quality body of jurisprudence that reflects the societal, cultural and economic norms and characteristics of the Region. Perhaps most importantly, the CCJ is a source of regional pride, and gives the independent states that use it (for *both* its original and appellate jurisdiction) “true” sovereignty over their judiciary.

The evolution and successes of the CCJ and its ability to adapt to the Region’s needs seem to be at odds with the continued debate regarding accession. Dispelling reservations held by the masses about the CCJ is critical to completing the progression from colonialism, to federation, to true independence across the Commonwealth Caribbean.

[1] Hugh Rawlins, *The Caribbean Court of Justice: the History and Analysis of the Debate* at 11, online: <[https://www.carib-export.com/obic/documents/ccj\\_rawlins.pdf](https://www.carib-export.com/obic/documents/ccj_rawlins.pdf)>. [Rawlins]

[2] Rawlins, *ibid* at 40.

[3] Caribbean Court of Justice, “CCJ Celebrates 14 Years”, online: <<https://www.ccj.org/nine-teams-expected-for-ccjs-11th-annual-law-moot-2-2/>>.

[4] The Regional Judicial and Legal Services Commission. See Tracy Robinson, Arif Bulkan, Adrian Saunders, *Fundamentals of Caribbean Constitutional Law* (London: Sweet & Maxwell, 2015) at 8-036.

[5] Rose-Marie Belle Antoine, *Commonwealth Caribbean Law and Legal Systems*, 2nd ed (Abingdon: Routledge-Cavendish Publishing Ltd, 2008) at 333. [**Belle Antoine**]

[6] Rawlins, *supra* note 1 at 29.

[7] Rawlins, *ibid* at 44.

[8] Rawlins, *ibid* at 43.

[9] Rawlins, *supra* note 1 at 36.

[10] Belle Antoine, *supra* note 5 at 299.

[11] Agreement Establishing the Caribbean Supreme Court, Article V1. [**Agreement**]

[12] Agreement, *ibid*, at Article IV.

[13] Agreement, *ibid*, at Article V3.

[14] Agreement, *ibid*, at Article IV.

[15] Rawlins, *supra* note 1 at 36.

[16] Sir Ronald Sanders, "Identity and dignity lost with the CCJ" (11 November 2018), online: <[http://www.jamaicaobserver.com/the-agenda/identity-and-dignity-lost-with-the-ccj\\_149228?profile=1096](http://www.jamaicaobserver.com/the-agenda/identity-and-dignity-lost-with-the-ccj_149228?profile=1096)>.

[17] Sir David Simmons, *The Caribbean Court of Justice: A Unique Institution of Caribbean Creativity*, 31 Commw. L. Bull. 71 (2005) at 72.

[18] Rt. Hon. Sir C.M. Dennis Byron, "The Caribbean Court of Justice and the Evolution of Caribbean Development" (23 April 2014), online: <<https://sta.uwi.edu/uwitoday/pdfs/CCJ%20President%20Speech%20-%20The%20CCJ%20and%20the%20Evolution%20of%20Caribbean%20Development.pdf>>. [**Byron**]

See also *Attorney General of Barbados v Joseph & Boyce* [2006] CCJ 3 at para. 18.

[19] Adrian Saunders, *The Caribbean Court of Justice and the Legal Profession: Promoting a Caribbean Jurisprudence*, Commonwealth Law Bulletin, Vol 33, No 4 (December 2007) at 682.

[20] As of 12 December 2019.

[21] As of 28 November 2019.

[22] Caribbean Court of Justice, "Appellate Jurisdiction Judgments", online: <<http://caribbeancourtofjustice.org/judgments->>

proceedings/appellate-jurisdiction-judgments>; Caribbean Court of Justice, "Original Jurisdiction Judgments", online: <<http://www.ccj.org/judgments-proceedings/original-jurisdiction-judgments>>.

[23] Byron, *supra* note 18 at p. 14.

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