AGAINST THE CARICOM COURT OF APPEAL
BY DELROY CHUCK

I strongly oppose the creation of a Caribbean Supreme Court or Court of Appeal (CCA). I oppose it as a replacement for the Judicial Committee of the Privy Council (JCPC), or as an institution in its own rights. I too am against the continuation of the JCPC as the final court of appeal for Jamaica and, at the right time, we should remove it and create a more appropriate final court for Jamaica. But, I do not think that that final court should be another institution which demands the consent, agreement, acquiescence, consensus or support of West Indian politicians. I will further contend that virtually all the arguments against the JCPC are equally true against the CCA.

COMMITMENT TO JUSTICE

I oppose the CCA on the broad ground that the West Indian governments have not demonstrated an unwavering commitment to justice. The dignity, freedom and right of the individual must stand above political considerations, and even though the pursuit of justice is not political rewarding and a means to win elections, it surely must be a primary objective of political ends. Caribbean governments have repeatedly demonstrated their intolerance to persons who act against their political interests and this intolerance has often been shown against judges, intellectuals, journalists and others.

There are numerous examples of judges whose tenure was not extended, who were hassled at airports, who had difficulty with civil servants and who were treated in an unfair manner because

it was thought that they did not succour to the whims and fancies of the government. It is difficult to elaborate on examples since most have been dealt with under cover. However, we can give the example of one of our learned judges, Mr. Justice Ira Rowe, who retired from our bench and took up an appointment in the Bahamas. As I understand it, the treatment meted to him made it quite plain that he was not welcome in the Bahamas, and he duly resigned before his contract was completed. Is there any reason to believe that judges appointed to a CCA will not be treated in a similar manner?

Our Caribbean politicians have, openly and beyond dispute, demonstrated that they do not take opposing views lightly and frequently use the full weight of the state to get their own way. It is at least arguable that one of the reasons for eagerly pushing for a CCA now is the audacity of the JCPC to rule in the case of PRATT and MORGAN that hanging can only be allowed if justice was expeditiously pursued by the state. It is quite plain that Caribbean governments were, and are, not happy with that decision.

A SEPARATE ARM OF GOVERNMENT

In truth, we are not ready for our final court of appeal until we can demonstrate that we have given full and complete support to the justice system as a separate, equal and independent arm of government. The judiciaries in the Caribbean have not been treated as an equal arm of government. They have simply been treated as another arm of the civil service - in every respect. They are not seen as the equal in civil status,

constitutional responsibility and political governance as the Executive and Parliament. Who would dare to argue that the judicial systems in the Caribbean enjoy the same status, reverence and respect as the Cabinet or Parliament? In truth, our judges are seen as glorified civil servants.

It seems to me that until we dare to put our judicial system on an equal, separate and independent foundation, then we are not ready for a final appellate court which must have the effrontery to confront governments, ministers and institutions of state with confidence and assurance. How many of our judges in the Caribbean would be willing to state as a matter of policy that if cases cannot be expediously dealt with then as a matter of law and practice they must be thrown out or a sanction imposed against the Executive? I feel fairly sure no panel of our present Caribbean judges would be bold and confident enough to come to a decision like PRATT and MORGAN to force the administrative arm of the judicial system to complete murder appeal cases within five years. And, the real problem is that our judges have grown under a system of compliance and understanding of the limitations of government and temper their judgements and rulings to accommodate the limited resources of their governments. That should not be the case.

Our judges cannot be the defenders of the status quo or of the Executive, but must be at the forefront to protect and jealously guard their separate and distinctive status, to stand steadfast to promote and enhance the rights and freedoms of the individual, to be there in an evenhanded and open manner to balance the scale of justice for those who seek redress within

the corridors of justice. How many of our Jamaican judges even considered throwing out the infamous Suppression of Crime Act which has thoroughly corrupted the police force and denied citizens protection under the Constitution. Indeed, we need our judges to understand that they are a natural part of the political process, guardians of the rights and freedoms under the Constitution, architects of the legal process and not merely legal technicians determining what the law is and whether or not it has been properly applied.

Until our judges have demonstrated that they will defend justice and the Constitution against infringement from the Executive and Parliament then we are not ready for a final appellate court. In truth, our system of government must make it clear that it is the Constitution which is the fundamental law and that Parliament cannot be used as a rubber stamp for executive action. For example, retroactive taxation should be deemed unlawful. Consider further the case in the USA, President Bush, his Cabinet, the Senate and the Congress held that flag burning was a crime and passed a law to that effect. A Texan man decided to challenge the law, and duly burned an American flag openly on the streets. When the matter reached the Supreme Court of the USA, the judges there held that the law was unconstitutional as it infringed the right of free speech and declared it null and void. Would our judges have the CHEEK to overturn a similar law in the Caribbean?

WHO IS ATTRACTED TO THE BENCH

The present state of the judicial system did not come about by accident. Caribbean governments have deliberately kept the judiciary in check, and condescendingly acquiesce to their wishes as if they were common servants. The courts and its personnel are in fact treated as a branch of the Ministry of Justice and in many ways the Minister and the permanent secretary are seen as persons to whom demands and requests must be addressed. The terms and conditions of service mean that the judicial bench has failed to attract, and is failing to attract, the best legal minds. That is a matter of some concern and brings into question whether we will have the best minds available for the CCA. Indeed, it is a fact that many bright and well qualified attorneys are not offering themselves for, and are refusing, judicial appointments throughout the Caribbean. Many smaller states have to rely on the retired and serving judges of some jurisdictions to operate a first tier Court of Appeal. Most Caribbean jurisdictions have difficulty finding nationals to serve on the bench. Few, if any, members of the private bar have any interest to serve. It is not simply a matter of money. The demands and restraint of judicial appointments are not matched by improvement and elevation of status and reputation.

In most countries, judicial appointments are much sought after and eagerly desired. They are considered to be the pinnacle of one's legal career. The average advocate of the bar in England, Canada, the USA, Australia, etc. dream of being a judge one day and hope that their legal career will come to the notice of the relevant authorities so that a judicial appointment can be

offered. Outside the Caribbean government departments, any good and successful advocate who dream of being a judge would be having a nightmare. It is that bad. The perquisites, secretarial assistance, office facilities, journals, books and so on are just not available in the courts. Judges are not given the status, respect and reverence which should accompany their office and make it alluring to seasoned attorneys. Judicial appointment is not attractive and fails to carry the dignity, decorum and satisfaction that it does elsewhere. Accordingly, very few advocates at the private bar in the Caribbean yearn to be a judge. Why is it that so many outstanding advocates have refused judicial appointment? Until the answer to that question can be answered satisfactorily then we are not ready for a final appellate court.

THE ISSUE OF SOVEREIGNTY

I reject the argument that our sovereignty is being compromised by retaining the JCPC. Choosing a final appellate court is a question of choice and therefore an assertion of sovereignty. Indeed, the trend nowadays is to open and transparent government and many countries are now accepting the rulings of international courts. Even the House of Lords, from whence the judges of the JCPC are chosen, has accepted that the rulings of the European Court is binding on it. Can it be said that Britain or the European Countries have yielded their sovereignty to another authority? It is indeed a foolish argument. In any event, would the same argument applies to the

CCA? Consider that no judges were appointed from Jamaica to the CCA, then would Jamaica's sovereignty be compromised? If the argument is that Jamaica is capable of governing and ruling itself then let the final court be Jamaican rather than Caribbean.

THE COST OF ADJUDICATION

It is a fact that it is costly to go to the JCPC. That is a good argument to remove it. But, I would argue that if we create a Caribbean judicial secretariat in Trinidad and argue cases there then the cost of final appeals would still be expensive. Indeed, at the highest court of the land, it will always be costly whether it is heard in England, Trinidad or here. Once again, if costs is the criterion then we might as well abandon second tier appeals.

THE COST OF THE CARIBBEAN COURT OF APPEAL

At the present time, it costs the governments literally nothing for the JCPC as the final appellate court. They do not pay administrative staff, judges or maintain the Registry and the court. A CCA would be costly. Buildings would have to be found to accommodate administrative staff, five or six judges, and courts to hear cases. The annual salaries, perquisites, allowances, pensions, etc. will amount to a tidy sum which our governments must find and pay. In the present economic decline and crisis, can we take on another unnecessary bureaucracy and court costs?

Indeed, simply look at the court system which has been on the decline since independence, but for the goodwill and money from the USA AID the whole system would be in chaos and falling apart. Still, we cannot effectively maintain the buildings, pay staff properly and provide a court system of which we can be proud. I would urge, as the Jamaica Bar Association did in 1991, and repeated in May, 1998, that we use our resources, energy and creativity to improve our present court system rather than to take on another responsibility with the real likelihood that it would fall into a similar state of disrepair and inefficiency.

A CAREER PATH FOR JUDGES

One of the strongest argument for removing the JCPC is that it denies our judges a longer career path. There is much merit in the argument. Bright and ambitious judges hope one day that they can sit on a final appellate court as their counterparts do in the House of Lords in England or the Supreme Courts in Canada or the USA. In the Caribbean, judges can only hope to end up at the Court of Appeal level. A final appellate court would offer another tier to which judicial appointment could be conferred and may make the judiciary more attractive.

THE APPOINTMENT OF JUDGES

The real danger of the CCA is the manner in which judges will be appointed. However careful, independent and objective a Caribbean Judicial Commission may be, it would still be forced to

take political and national interests into consideration. Can we imagine if a Jamaican, Trinidadian, Bajan or Guyana judge were not on the court? So even when the best judges may be from St. Lucia or some other territory, judicial appointments may be denied to accommodate national interests. In truth, a CCA would suffer the same criticism and insularity as the West Indies Cricket team, but whereas performance can be easily measured on the cricket field it is not so easily done on on court judgments.

A SEPARATE LEGAL SYSTEM

The JCPC was indeed the final appellate court when countries of the Commonwealth were colonies and it is true that it is an anachronism within the context of an independent Jamaica. The continuation of the JCPC is based on the premise that countries are still colonies and dependents of Britain. I suspect that Cayman Islands, Montserrat and other dependents whose political interests are intertwined with Britain will still want to continue with the JCPC. However, where a country has a separate political system it is unusual to have any court outside its legal system. But, again, the argument is equally true for the CCA. Courts, generally, are part of a country's political system unless they represent international tribunals or regional interest such as regional human rights courts. Which political system does the CCA represent? To be sure, when there was a Federation, the Federal court was most appropriate, but without a federation or a regional political system why should we have a regional legal system.

My clear and distinctive position therefore is that I am against both the JCPC and the CCA. I want a final appellate Jamaican court sitting and hearing cases here. In the beginning, it would consist of five judges, chosen from judges who now sit in the JCPC, Canadian Supreme Court, outstanding Caribbean judges and our own Jamaican judges. Initially, we should try to have a majority of non-Jamaicans but in time the majority should be Jamaican. However, I strongly urge the retention of some judges of international stature on the panel to bring a wider arena of experience and knowledge to bear on our local cases. The panel would not be a permanent one and could operate in a similar manner as the itinerant Court of Appeal that now operates in Belize, Bahamas, Cayman Island and Bermuda. In essence, we could have a panel of distinquished judges sitting for a couple weeks or months to hear the few cases which go beyond the first appeal.

This proposal would also avoid the loss of distinquished judges from the first tier court of appeal. In small territories, short of good judges, it would deprive their bench of the service of outstanding minds when a system to utilise them at both tiers of appeal could easily be devised. It seems to me that until the JCPC makes it clear that it will not entertain us then we should use all our creativity and resources to make our judicial systems better, separate and independent from the other two branches of government, and prepare for the right time when we will have to operate our own final court.

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