Waiting to Exhale: Commonwealth Caribbean Law and Legal Systems

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WAITING TO EXHALE: COMMONWEALTH CARIBBEAN LAW AND LEGAL SYSTEMS

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I. INTRODUCTION: THE ANATOMY AND CONTEXT OF COMMONWEALTH CARIBBEAN LAW AND LEGAL SYSTEMS

This is an exciting and appropriate time to be discussing Commonwealth Caribbean legal systems. We stand at the very crossroads of a Caribbean revolution in legal development. At this juncture, we have several important choices to make, and our future will be determined by the wisdom of those choices as we attempt to define our place in the world. I suggest that we have never had a more opportune time to create an independent legal philosophy, whilst at the same time, steaming ahead to forge a unified Caribbean identity. Caribbean legal systems can be said to be at the boiling point. Perhaps there has been no other time in our history when every Caribbean man and woman is aware of, and has a stake in, the directions in which our laws and legal policies are going. Whether we are speaking about the retention of the death penalty, or the abolition of appeals to the English Privy Council, or the Caribbean Single Market and Economy (CSME), or changes in our official financial system brought about by blacklisting attempts of the world community, the latter which impacts directly on employment opportunities, we all relate intimately with and participate directly in these developments.

And at this crossroad—whilst we stand, waiting to exhale—the relationships which we have with the rest of the international community, through our practices and our legal system, are very much swinging in the balance. It is appropriate, therefore, that I should be addressing my remarks to an external audience, in a country and state with which the Caribbean has had many links, and with which there are many similarities, not just in hurricane impacts, but in our very legal history, in some of the judicial patterns which we may in the future emulate and, unfortunately, some of the problems which we face.

While this is a huge topic, I will contain my discussion to four main areas: 1) the turning away from the Privy Council to an indigenous final Caribbean Court of Appeal and jurisprudence; 2) Constitutional Reform arising from the death penalty and other social problems, such as gender; 3) the impact of the offshore financial sector and its contribution to our legal development; and 4) initiatives toward political and economic unity which necessitate law reform and possible harmonization of laws in the region.

What we find is that there are common denominators in all four of these main areas. They are issues of political sovereignty, economic problems, and even questions of economic survival. These underline the vulnerable status and place of small developing countries in the world. It should also be
noted that some of our main discussion areas are closely intertwined. I sug-
ggest that an important thread running through our analyses is the extent to
which small, poor, developing nations such as ours have the freedom and the
flexibility to fully define the legal systems therein. This may, at first blush,
seem to be an alarmist, rather extreme position, but upon closer examination,
we shall see that there are important truths and realities to be ascertained.

When we speak of difficulties in defining and shaping the legal systems
in the region, we are not, of course, speaking of the kind of legal displace-
ment that can occur when one country invades or intervenes into another
smaller, weaker country. That brings its own dynamics and is certainly
something which occurred very early in our legal history, although the exis-
tence of the legal and political systems of the original peoples is hardly even
acknowledged.\footnote{Nor did the legal systems of early European conquerors like the Spanish, French,
Portuguese, or Dutch endure except in isolated cases, such as in St. Lucia and Guyana.}
Here, legal displacement may be far more subtle and may
even be welcomed with open arms; in some cases, it is self-perpetuating.
First, however, a brief description of Commonwealth Caribbean legal sys-
tems and legal infrastructure is outlined.

II. DESCRIPTION OF COMMONWEALTH CARIBBEAN LEGAL SYSTEMS

The Commonwealth Caribbean region is made up of a number of small
democratic states, over fourteen of them having formed themselves into a
loose political community, called the Caribbean Community (CARICOM).\footnote{See Caribbean Community Secretariat, The History of CARICOM, at http://www.caricom.org/archives/carcicom–history.htm (last visited Dec. 14, 2004) [hereinafter History of CARICOM]. Originally, CARICOM was made up of only English speaking states which are part of the Commonwealth, but more recently, non-English speaking states, such as Suriname and Haiti, have become members. Id.}
Only a few countries in the region are still dependent territories of the United
Kingdom, among them Anguilla, the British Virgin Islands, the Cayman Is-
lands, and Montserrat. These are associated members of CARICOM, with
the exception of Montserrat, which is a full member.\footnote{Caribbean Community Secretariat, Caricom Members & Associate Members, at http://www.caricom.org/members.htm (last visited Dec. 14, 2004).} There are current ini-
tiatives toward formal economic integration and more formal political ties,
but the principle of autonomous self-government for each one of these states
is likely to be retained. The governmental system, the Westminster Parlia-
ment system, including its traditions of political and legal conventions, fol-
The region can boast of enviably high levels of literacy and often quality education, particularly at the primary and secondary school levels, also inherited from the British. Although the Caribbean has a relatively small population, there have been three Nobel Prize winners. Incredibly, two come from the same country, the tiny nation of St. Lucia (150,000 people), for Economics and Literature, and recently a third, for literature, from Trinidad and Tobago.

Commonwealth Caribbean legal systems, like United States’ legal systems, were born out of our English colonial heritage, ensuring that the shape and flavour of our law is largely the common law legal tradition. I say largely because the history of conquest in the region was a very colourful one, with many of our countries changing hands between the French, Spanish, and English. This means that not only English law was received but, at least initially, so was the civil law. Only Guyana and St. Lucia have retained aspects of the civil law. In the case of St. Lucia, the country (called the Helen of Troy of the West) changed hands between the English and French fourteen times, resulting in a hybrid legal tradition. This may be described as a unique mixture of the English common law, French civil law, and indigenous law, facilitated by a bond with all things French and the development of a French Kweyol language.

The experiences of slavery, also a feature of United States historical development, have perhaps had a more direct impact on our legal systems than those of the United States. This is because the ancestors of African slaves form a larger percentage of our population than in the United States. Thus, they are not the minority but the majority, a consequence which arguably has very positive consequences, but which, understandably, make the negative experiences of slavery more enduring.

4. See History of CARICOM, supra note 2. While there are now two non-English speaking CARICOM members, this paper confines itself to a discussion of the legal systems of the Commonwealth Caribbean.

5. Ironically, a recent trend is that some British parents have been sending their children to the Caribbean to obtain their grounding in education because of concerns that the education system at that level in the United Kingdom is inadequate. See Gareth Rubin, Passport to Better Learning, THE INDEPENDENT, July 1, 2004, at http://education.independent.co.uk/schools/story.jsp?story=536879.

Thus, the psychological impact and longevity of brutal slave societies has led to what can be described as feelings of insecurity and dependency in our societies today. Perhaps this is the reason why today, we still send our final appeals to the Privy Council located in England and why so many Caribbean people doubt that we can adjudicate final appeals for ourselves in a just manner. Interestingly, this belief that we could not be trusted to do things right for ourselves was one of the reasons why, upon independence, we ended up with written constitutions which secured rights and created obligations, instead of continuing with the pure Westminster model of unwritten constitutions. Independence was attained for most states during the 1960s and 1970s, making the countries in question exceedingly young nations.

Our ex-slave societies may also be described as apathetic, as a result of the enduring alienation that Caribbean peoples, the governed, feel with those who govern. There is a sense of disconnect, a feeling that we do not and cannot control our own destiny and that our voices are not heard. I would suggest that although this may be changing in relation to models of government, it is being substituted for the growing feelings of helplessness that so called Third World countries feel in relation to international economics and politics. In those paradigms, small developing countries have little voice and little control over their destinies. We see this, for example, in the negative way in which free trade law constructs have impacted upon our banana industries, our sugar industries, and even our international financial services sector.

These human traits in our societies perhaps best explains the failure to “strike out . . . and mould” the common law to “suit [our] needs” and development.7 We remain today, largely “mimic men”8 in terms of our legal development, an unhappy stance which is much lamented but which is changing too slowly. Few proactive initiatives, from either our judges or our practitioners, are taken to rectify this situation. Unlike the United States, which took the English common law and created vibrant, sometimes radically new legal concepts, interpretations, and precedents, Commonwealth Caribbean courts and jurists still rely heavily, almost totally, on English precedent. More recently, we have sometimes substituted English law with European Law and U.S. law, particularly in relation to human rights issues.

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8. V.S. NAIPAUL, THE MIMIC MEN (1967). The term “mimic men,” as used to describe West-Indians, was made famous by Sir V.S. Naipul, who is also the Nobel Prize Winner for literature from Trinidad and Tobago.
It appears that we are successful legal civilisations if we judge ourselves by how admirably we have retained and maintained the English justice that we inherited or, more accurately, was thrust upon us. However, we are failures by our inability to put our own stamp, our own face, on our justice. Ultimately, law is meant to reflect society and to engineer society. Yet, our law still looks very alien and foreign to many.

III. THE ABOLITION OF FINAL APPEALS TO THE PRIVY COUNCIL AND THE INSTITUTION OF A CARIBBEAN COURT OF JUSTICE

I will touch only briefly on this topic, as I am aware that other speakers in the Goodwin Seminar will speak exclusively on it. Suffice it to say that after decades of talking, we are at the doorstep of a new era in adjudication as it appears that the Caribbean Court of Justice (CCJ) will now become a reality in March 2005. However, not all of the countries of the region have joined the momentum toward sovereign and independent justice by putting an end to final appeals to the Privy Council. Some, like The Commonwealth of The Bahamas, have refused flatly, at least at this juncture, to participate in the appellate jurisdiction of the CCJ. Others, like Jamaica, while their governments have supported the idea, have been plagued with much opposition to the cutting of ties with the apparent fountain of justice that is England. It should be noted, however, that all of the independent Commonwealth Caribbean countries will participate in the original jurisdiction of the CCJ, discussed further below.

This topic has perhaps been the one which has engendered the most emotive responses from Caribbean peoples, particularly attorneys. At the top of the list are fears that the CCJ will not dispense impartial justice, that it will be too costly, that the region will not be able to choose judges based on merit, that those judges will not be competent enough to make right deci-
sions, and that the larger countries in the region will dominate the court.\footnote{14} We can observe the preponderance of the reasons that seem connected to my earlier points about insecurity and dependency which plague us as a people in our moves toward development.

While the driving forces behind the CCJ deny that it is a direct response to unpopular Privy Council judgments which prevented the implementation of the death penalty,\footnote{15} there is little doubt that the Privy Council's high-handed approach to constitutional interpretation with regard to the death penalty, and its failure to appreciate the principles by which Caribbean peoples wish to live, have acted as catalysts to the institution of the CCJ. This is but another example of the way in which international forces have plunged us along a path which some maintain that we are not yet ready for.

Yet the CCJ represents so much to Caribbean peoples. Its advocates argue, correctly, that independence should not have a price tag.\footnote{16} We also have the positive example of an integrated court in the Organization of Eastern Caribbean States (OECS) Court of Appeal, and a Guyana final court of appeal since that country abolished appeals to the Privy Council many years ago.\footnote{17} These existing courts should serve as assurances to Caribbean peoples since they have operated efficiently, and largely without stains of bias or incompetence. Further, an independent Legal Commission has been established to ensure impartiality in judicial selection for the CCJ.\footnote{18}

\section*{A. Cost of Justice}

The question of cost is not limited to the funding of the CCJ. A grave defect in our legal system is the relatively poor access to justice. Justice is expensive at every level, mainly because of the absence of contingency fees as found in the United States and the glaring absence of adequate legal aid for many matters. This is compounded, of course, by the relatively high lev-

\footnote{14} Id.

\footnote{15} This began with the landmark decision of Pratt v. A-G, [1993] 43 W.I.R. 340 (P.C.), which held that undue delay on death row constituted cruel and inhuman punishment which violated Commonwealth Caribbean constitutions. Id. at 359–60.

\footnote{16} See, e.g., Dorcas White, Jettison the Judicial Committee? You T'ink It Easy? (1975) (unpublished paper, on file with the Reserve Collection, Faculty of Law Library, University of the West Indies). However, it should be noted that the CCJ will be funded by external monies, at least initially, which is another instance of our dependence on external factors.

\footnote{17} See RAWLINS, supra note 11, at 5. Information about the OECS Court of Appeal can be found at the Eastern Caribbean Supreme Court website, http://www.ecsupremecourts.org.lc/ (last visited Feb. 9, 2005).

\footnote{18} About the Caribbean Court of Justice, supra note 13.
els of poverty in the region, where litigation is perhaps viewed as a luxury.\textsuperscript{19} It is particularly costly where appeals have to be brought to the Privy Council, not the least because the rules of the court dictate that British counsel must be retained.

\section*{B. Indigenous Jurisprudence and the Declaratory Theory}

My own view is that the CCJ has been too long in coming. Its existence is imperative for the embodiment of independence and sovereignty which every society must display and live by. It is also the most viable tool for the encouragement and development of an indigenous Caribbean jurisprudence. Yet, it is the latter which is the most problematic. The crux of the issue is not simply a court located in the region, but a jurisprudence located in the region. I have argued elsewhere that, unless Caribbean jurists mend their ways, in particular, their restrictive approach to precedent and their over-reliance on English law, what we are in danger of seeing is only a change in the complexion of our judges and not of our law.\textsuperscript{20}

This thinking comes from an approach that views the reception of the common law in the most restricted way, holding onto a belief that it is only the House of Lords of England that can legitimately declare the correct principles of the common law. Such a view, which is often expressed by our judges,\textsuperscript{21} results in a very limited opportunity for change and for an evolving jurisprudence. It is in direct contrast to the United State's approach to reception and the evolution of the common law. Caribbean judgments are rarely seen as authoritative. Indeed, they are seldom cited.

\section*{C. Turn Toward United States Law?}

There is another possibility for the direction of CARICOM jurisprudence and legal infrastructure. While we may turn away from an incestuous English jurisprudence, we may seek to find solutions, not so much out of our own creativity and experience, but in the increasingly accessible United States and North American models. This is by no means far-fetched. Cur-

\textsuperscript{19} A recent view expressed by the Chief Magistrate of St. Vincent and its Magistrate for the Family Court is that legal aid should be available even for family court and divorce matters, as many couples stay together simply because they cannot afford a divorce. First OECS Law Fair, September 17, 2004, Kingstown, St. Vincent. Legal aid, where granted, such as in murder cases, has largely been viewed as inadequate.


\textsuperscript{21} \textit{See}, e.g., Jamaica Carpet Mills, Ltd. v. First Valley Bank, [1986] 45 W.I.R. 278 (Jam. C.A.).
rently, our constitutional law is heavily informed by United States constitutional law, largely because of the absence of a written United Kingdom constitution upon which to lean.

The convergence toward North American models of legal systems is also seen in the recent adoption of case-management, court practices, and rules borrowed from Canada and which aims to make court adjudication more efficient. Further, we have already seen a high degree of Americanization of the region, aided, no doubt, by our geographical closeness and the dominance of American television and pop culture. That same television is a medium for transmitting models of justice, such as televised trials, racially constructed juries, new rules of evidence, and changing the locations of juries to avoid bias. These may challenge long-held assumptions about the correct (English) way of doing things. Perhaps the day is not too far away when we will be electing judges! There is anecdotal evidence to suggest that the Caribbean layperson has been seduced into believing that the American way is the more relevant and accurate face of justice.

Some options which may be borrowed from the American legal system seem more attractive than others. Contingency fees, for example, may be suitable in societies such as ours where many citizens find the cost of justice to be prohibitive, and where, as noted earlier, legal aid is scarce. It may also have the effect of speeding up the process by encouraging legal counsel to be more time-efficient. In addition, it has been argued that multicultural societies such as ours should be reflected in the composition of our juries, a position which has been resisted under the traditional English jury system, but adopted in the United States.

Similarly, access to court trials on television, a medium which is wholeheartedly embraced in the region, may encourage more inclusion in the adjudication system, in societies whose peoples have traditionally felt that formal channels of justice were closed to them or alienated from them. This is not to suggest, however, that the American model of justice is a panacea for all of the evils of the law and legal systems of the Commonwealth Caribbean. Its relevance and suitability to the region should be carefully scrutinized. Television trials, for example, have great potential to distort truth or sensationalize litigation.

Further, while the doctrine of judicial precedent should fit appropriately into the changing values of a society, the English model of precedent offers more certainty than its U.S. counterpart. Change is necessary in a legal system but it is to be approached rationally and cautiously. Ironically, the Pratt and Morgan controversy arose out of the unusual step to deviate from certain
routes of punishment as laid down by well-established precedent. More recently, some Privy Council judges have found it appropriate to speak out against such radical change in favour of a return to a more conservative approach to precedent.

D. Our Unrecognised Contribution to the Privy Council's Jurisprudence

A point which is seldom made is one that is positive for Caribbean jurisprudence, and this is that Caribbean legal practitioners and Caribbean judges are often those who create the defining precedents in our jurisprudence, although they seldom get the credit. Statistics show that a large percentage of Caribbean Court of Appeal decisions are actually approved by the Privy Council and the reasoning therein merely adopted. Yet it is the Privy Council judgments that we cite approvingly and the justices of that court which get the credit for these outstanding jurisprudential creations. This is particularly the case with constitutional jurisprudence. Arguably, England has a relatively undeveloped constitutional jurisprudence because of the absence of a written constitution. Consequently, English judicial personnel may be less au fait with constitutional matters than in other areas. Indeed, English jurisprudence has often been at loggerheads with European human rights jurisprudence and the trend is only now changing with the incorporation of the European Convention on Human Rights into English law. The fear that our judicial personnel is incapable of forming intellectually adequate arguments is, therefore, grossly inaccurate.

E. Political Interference

There is a growing cynicism in our region, which I believe is also reflected in the United States and elsewhere in the world, that politicians cannot be trusted and that they are able to overreach well beyond the boundaries

of what is acceptable and interfere with the judicial process. Little mention is made of the potential for the reverse, where it is the judges who intervene in the political process. It is perhaps an area with which American jurists are more familiar. However, that is a topic beyond the scope of this paper.

In the case of the Commonwealth Caribbean, the fears of political intervention are even less well-founded, as politicians do not even have a stake in the appointment of the judiciary,\textsuperscript{26} except in rare instances such as at the Chief Justice level in the OECS. The processes are implemented and supervised by independent legal commissions,\textsuperscript{27} and judges enjoy enviable security of tenure.\textsuperscript{28} Yet, there is an entrenched and, I believe, largely irrational belief that judges “dance to the bidding” of politicians. Such fears endanger the integrity of the judicial process if we accept the adage that “justice must not only be done but it must be seen to be done.”

Nonetheless, fears that judges are contaminated by the political process are rooted largely in the immaturity of our democracies, which are offshoots of the insecurities discussed earlier. As the democracies and legal systems of the region mature, it is to be expected that the people will have more faith in them. This is yet another argument for the existence of the CCJ: to enable a demonstration of growth in both democracy and the legal infrastructure.

F. \textit{Does the Privy Council Dispense Impartial Justice?}

The question whether the Privy Council can truly be impartial is often raised. Some Caribbean peoples appear fearful about the potential bias of our Caribbean judges but believe unquestionably in Privy Council judges. Nevertheless, we should inquire whether, at least in issues which impinge on sensitive areas, such as international trade, neo-colonialism and even independence, British judges (like all judges) are coloured by their own ideologies. For example, it was the British Privy Council which had to determine whether Rhodesia, now Zimbabwe, could legitimately seize its independence from the United Kingdom.\textsuperscript{29} Closer to home is the \textit{Mitchell} case, in which the question for the courts was whether the Grenadian revolution had created a state that had political and legal legitimacy.\textsuperscript{30}

\begin{itemize}
\item \textsuperscript{26} See CCJ Agreement, \textit{supra} note 12, art. V(3).
\item \textsuperscript{27} \textit{Id.}
\item \textsuperscript{28} \textit{Id.} art. IX.
\item \textsuperscript{29} See Alison Grabell, \textit{New Northern Neighbor? An Independent Quebec, the United States, and the NAFTA}, 2 SW. J. L. & TRADE AM. 265, 276 n.68 (1995) (citing In Re: Resolution to Amend the Constitution, [1981] 1 S.C.R. 753, 755 (Can.)).
\item \textsuperscript{30} Mitchell v R, [1985] L.R.C. (Const.) 127.
\end{itemize}
The United States invasion of Grenada never reached the courts, but had it done so, how would the Privy Council have judged it? Reportedly, the Queen of England frowned upon the United States initiative, particularly upon the fact that Grenada was still part of the Empire, which meant that she was the Head of State. The view was that the United States should have sought permission from the United Kingdom first.

These are legal decisions which directly involve or impact political issues. It is not to be expected that judges who decide such issues be devoid of ideological influences. Indeed, it may be a valid expectation that judges who decide such questions should be grounded in an ideological position. Hence, it is even more important for such ideological positions to emanate from within the society upon which the decisions impact, and not from some external societal reality. It is where there are ideological disconnects that legal decisions which are violently opposed by the majority in society occur, as appeared to be the case in the *Pratt and Morgan* decision.  

**IV. CONSTITUTIONAL REFORM AND THE DEATH PENALTY**

The issue of constitutional reform and, in particular, the jurisprudential wrangling over the constitutionality of the death penalty and its execution, is a controversial one in the region. An underlying theme here is the extent to which international norms and pressures have been weighing in on the constitutional development of the Commonwealth Caribbean.

Here, I am concerned not with the substantive issue of the death penalty and its constitutionality, but with its impact on Caribbean legal systems and Caribbean justice. The issue came into focus with the landmark ruling of the Privy Council in *Pratt and Morgan*, which found that the delay that prisoners experienced in having their sentences of death executed was sufficient to constitute cruel and inhuman punishment and thereby violated the constitution.  

This was despite the constitutionality of the death penalty itself and irrespective of the fact that the delay was caused substantially by the appeal processes which the convicted were pursuing. Thereafter, in a line of cases, the Privy Council went further and held that it was unconstitutional to construe the death penalty as a mandatory penalty.  

These judgments were hugely unpopular in the region, by governments and peoples alike who, by and large, supported the death penalty. Many...
believed that the Privy Council was attempting to force its own belief that the death penalty should be outlawed (which is the position in the United Kingdom) onto Commonwealth Caribbean legal systems. Notwithstanding cries of judicial imperialism made by the general public, it is clear from precedents from the European Court of Human Rights and the United Nations Human Rights Committee that the position on undue delay was one grounded in international law.\textsuperscript{34} Yet, the judgments displayed a serious disregard for the intent and spirit of the constitutions in question and the will of the Caribbean peoples.

Another telling point is that the judgments also betrayed the dollars and cents implications of Caribbean justice which held such cases to ransom. The slowness of the judicial process is due mainly to a lack of resources which can expedite appeals and, in some cases, the paucity of adequate legal representation. This underscores my earlier point about the impact of problems, that are really about development, on the legal system.

Thereafter, Barbados attempted to amend its constitution to make it more difficult to find the death penalty unconstitutional in any form. Some countries, such as Jamaica and Trinidad and Tobago, also initiated moves to remove themselves from the Optional Protocol to the United Nations Convention on Human Rights and the relevant protocol under the Inter-American System.\textsuperscript{35} This was to avoid the judicial jurisdiction of these bodies and eliminate the possibility of them finding that the death penalty or its process is often unconstitutional.

A. \textit{Static Construction Through Saving Law Clauses Versus Purposive Construction}

Despite the controversy over Pratt and Morgan and its progeny, these decisions are not really anomalies. We have witnessed many liberal constitutional interpretations by the Privy Council. These cement their oft-quoted sentiments that constitutions are to be given purposive and generous interpretations. They are, therefore, living instruments. Often, these decisions have followed the European Court on Human Rights, so that we can legitimately claim that our focus, at least in constitutional jurisprudence, is international.


\textsuperscript{35} Sharfstein, \textit{supra} note 34, at 742 n.77 (citing Natalia Schiffirin, \textit{Jamaica Withdraws the Right of International Petition Under the International Covenant on Civil and Political Rights}, 92 \textit{Am. J. Int'l L.} 563 (1998)).
These purposive constructions are far cries and a welcome relief from earlier constitutional jurisprudence, which interpreted our constitutions as static through the use of saving law or existing law clauses. These are provisions inserted into some of the independence constitutions in order to preserve the English law which existed before independence. The narrow interpretation of these clauses was that they did not create new rights or law but merely preserved existing law. The very existence of such clauses and their interpretation is perhaps evidence of the fear of self-determination inherent in Commonwealth Caribbean legal systems. This was why in Collymore v. Attorney General, a case which emerged just after Trinidad and Tobago's independence, the court looked at the right to associate and, in examining whether it embodied within it a right to strike, determined that there could be no right to strike since there had been no such right under the common law. In this respect, the critique of the decision relates to the method employed and not necessarily to the result obtained.

B. Internationalism and the Evolution of Constitutional Jurisprudence

As noted earlier, the seemingly radical decisions on the death penalty were in line with human rights jurisprudence from international courts and bodies. Increasingly, Commonwealth Caribbean courts, whether local courts or the Privy Council sitting as a Caribbean court, are being influenced by normative standards laid down by notions of international consensus of what are human rights and democratic ideals. Commonwealth Caribbean legal systems conform to the common law approach to international law that international law does not supersede domestic law unless incorporated. However, the courts are more and more adopting, unilaterally, of treaty obligations and values, without benefit of the legislative process.

One lesson we have learned, therefore, is that constitutional jurisprudence and reform can be influenced, not so much by the social ethos—the ground norms of the society, but by external sources and pressures. Once again, Caribbean societies are being shaped by an internationalist, and even metropolitan, point of view of what is right and appropriate for Caribbean peoples. It can happen, of course, because we are not yet completely in control of our own political and economic destinies, and far less of our legal destinies.

37. Id.
39. Id. at 15.
This is not necessarily a bad thing, as the Commonwealth Caribbean region, as elsewhere, subscribes to the view that there should be basic standards of decency which all nations should share. Yet, locating the threshold for these standards can sometimes produce jurisprudential tensions. This is particularly the case where the constitution is silent or unclear on a particular matter.

Apart from the death penalty, some Commonwealth Caribbean courts have also rejected corporal punishment, grounding their reasoning in the universal norms shared by civilised nations. In *Hobbs v. The Queen*, for example, the Court of Appeal of Barbados looked to international norms and the evolving standards of civilisation in making its decision that the cat o' nine tails was unlawful. The court said:

Punishments which are incompatible with the evolving standards of decency that mark the progress of a maturing society... Are repugnant... What might not have been regarded as inhuman or degrading decades ago may be revolting to the new sensitivities which emerge as civilisation advances.

Similarly, notions of gender equality, absent or weak in domestic legislation and even in constitutions, have benefited from the courts' awareness of international ideals and their willingness to adopt them. This was the case, for example, in a case on sexual harassment from Trinidad and Tobago. The Industrial Court looked toward ILO Conventions and international standards of appropriate conduct at the workplace to come to its decision that a co-worker who had sexually harassed another should have been dismissed, as his actions went against good industrial relations practice.

C. Trend Towards Legislative Supremacy

Yet more recently, courts, particularly the Privy Council, appear to be re-directing their decisions away from perhaps more abstract ideas of international law and practice to more concrete expressions of legislative will. They are thus turning away from the internationalist trend, preferring instead to give effect to the intent of the legislature, even where that intent seemingly

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41. *Id*.
42. *Id*.
43. *Id*.
45. *See id.*
violates accepted international values about human rights. This allows domestic law to once again trump over international law, and allows constitutional jurisprudence to be more predictable, albeit more conservative. This is not an undesirable approach as it allows constitutional change to be what it is supposed to be: the rational, reflective expressions of the ideals of the peoples in any particular society as laid down by their representative legislature. In contrast, ignoring the legislative will creates the danger of making law the unpredictable “plaything” of judges influenced by norms which do not always represent that society.

On the question of corporal punishment, for example, in *Pinder v. R* 46 the Privy Council upheld a judgment of the Court of Appeal of The Bahamas in finding that a law which reintroduced corporal punishment into The Bahamas was constitutional.47 This was despite the fact that the courts clearly viewed corporal punishment as inhuman and degrading punishment, 48 when assessed from the perspective of civilised societies as recognised in the international sphere. Whilst agreeing that constitutions should be interpreted purposively, the Privy Council stated:

If the Court indulges itself by straining the language of the constitution to accord with its own subjective moral values then, as Holmes J. said almost a century ago in his first opinion for the Supreme Court of the United States (*Otis v. Parker*, [187 U.S. 606, 609 (1903))):

“a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions.”

A constitution is an exercise in balancing the rights of the individual against the democratic rights of the majority. On the one hand, the fundamental rights and freedoms of the individual must be entrenched against future legislative action if they are to be properly protected; on the other hand, the powers of the legislature must not be unduly circumscribed if the democratic process is to be allowed its proper scope. The balance is drawn by the Constitution. The judicial task is to interpret the Constitution in order to determine where the balance is drawn; not to substitute the judges’ views where it should be drawn.49

More important perhaps, is the Privy Council’s apparent reversal of its position on the mandatory nature of the death penalty in *Boyce v. The
The court found that a law decreeing the mandatory death penalty for murder in Barbados was an “existing law,” and remained constitutional whether or not it was inhuman or degrading punishment. The law was also constitutional despite the fact that it was inconsistent to various human rights treaties to which Barbados was a party. Surprisingly, the Privy Council in Boyce also expressly stated that its earlier decision in the case of Roodal v. State, which had declared the mandatory death penalty unconstitutional, had been wrongly decided and should not be followed.

D. Law Enforcement Versus Civil Liberties

But the need for constitutional reform and reflection also conjures up the pressing modern needs of law enforcement and the consequent balancing of individual rights. This is another reference to the United States, whether we are speaking about crime prevention or terrorism. How much of our civil liberties must hang in the balance? Is the death penalty itself a desirable objective in evolved, modern, civilisations? As in the United States, in an increasingly dangerous world “John Q. Public” is often enthusiastic about law enforcement, even harsh methods such as the death penalty.

V. Contribution of the Offshore Financial Sector to Legal Development

It is perhaps to the controversial offshore financial sector that we must turn in order to see our most dramatic legal development. The offshore sector, a hugely important one to the economies of CARICOM, also makes a significant contribution to our legal system. It does this by introducing many new legal concepts and by clarifying and correcting several gaps in the legal framework, not just of our domestic legal system, but internationally.

There is an irony here. Caribbean legal systems have long been criticized as lacking an indigenous jurisprudence and as too eager to copy from the United Kingdom. However, the remarkably successful legislative and
judicial creations in the area of offshore law\(^{57}\) have either gone relatively unnoticed, are not placed in context, or have been severely attacked by powerful onshore nations fearful of the huge financial losses resulting from their citizens investing offshore, and because of the success of offshore jurisdictions at filtering moneys from onshore to offshore. Indeed, many of these innovative legal concepts are in danger because of the concerted efforts by onshore nations and international organizations manned by these nations to discredit and dismantle the offshore industry. This means that these important jurisprudential contributions and their impact on the legal system have not been adequately acknowledged.

A. The Context of Offshore Legal Infrastructure

It is suggested here that offshore law, apart from being indigenous, may be seen as a subset of the entire legal system. It is, in a sense, an alternative legal system and one that has been created entirely for foreign investors.\(^{58}\) This is a legal infrastructure created purely for commercial reasons. And herein lies the dilemma: it is the very success of the offshore sector in attracting business and income from foreign, wealthier shores that has made it a magnet for confrontation.

I have consistently argued that much of the challenges and attacks made by some developed countries and international organizations, such as the United States, France, and the Organisation for Economic Co-ordination and Development (OECD), on the offshore sector about alleged money laundering, secrecy, unfair tax competition, and so on, has less to do with legal principle and more to do with dollars and cents.\(^{59}\) Undoubtedly, some financial impropriety exists within the offshore sector. However, financial impropriety exists in all financial sectors. There is sufficient proof that most impropriety (money laundering, financial transactions that benefit terrorism, etc.) occurs most frequently in the large, metropolitan financial centres of the world, such as New York, London, and Russia, and in the domestic financial sector.\(^{60}\) Yet, we have seen a barrage of financial regulations and attacks requiring offshore financial centres, particularly in small developing coun-

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\(^{57}\) We may define offshore law as a body of law concerned with investment, financial arrangements, and entities, created by non-residents of a particular jurisdiction primarily for non-residents but structured within that jurisdiction.

\(^{58}\) ROSE-MARIE BELLE ANTOINE, CONFIDENTIALITY IN OFFSHORE FINANCIAL LAW 3 (2002).

\(^{59}\) Id. at 41.

tries, to do much more in the way of self-regulation than these large centres even contemplate.

The unfair tax competition charge emanating from the OECD is well-known.61 Offshore financial centres were condemned for offering tax incentives to non-residents,62 a phenomenon still practised in many "onshore" countries. My explanation is that these large-scale attacks have really had to do with politics and not legal wrongs. Often, there have been objections to legal rules that are well established and which onshore countries themselves follow. One small example is the traditional rule on the non-enforcement of foreign fiscal law.63 Another is the Westminster rule on the legitimacy of tax avoidance, as opposed to tax evasion,64 now severely undermined by onshore tax authorities determined to do something about thinning revenue coffers, largely as a result of offshore opportunities. It is also curious that onshore countries have often promoted confidentiality in financial affairs in litigation with other onshore countries and in their own self-interest, but have frowned upon it when utilised by developing offshore jurisdictions.65 Similarly, unilateral extraterritorial jurisdiction to reach assets appears to be asserted mainly over offshore jurisdictions, while onshore nations are given the benefit of comity (the respect which one nation gives to the laws of another).

There is, therefore, a constant pressure for offshore centres to change their modus operandi. The required change is really to destroy the legal mutations that have occurred in offshore law and which permit more flexibility in commerce. These mutations, of course, permit some businesses to save on taxes because of more generous tax régimes, which give incentives to non-resident business. The result is that today there have been many changes in the onshore tax régime, and the offshore tax function has weakened.

Nevertheless, flexibility and creativity continue to be the hallmarks of offshore legal régimes, often going much further than onshore laws in accommodating the perceived needs of international business. This is a proactive approach that relies on market demands and does not view law as merely responses to problems after they have arisen. Instead, it is an approach which seeks to create new business opportunities.

We have seen an evolution of current legal principles or radically new ones. Many of these creations speak to true commercial concerns. However,
the fact that their *raison d'être* is business and commercial enterprise is no indictment. It is a rationale for lawmaking which is found in several other areas of law. Offshore law is thus no less legitimate because it embodies such a rationale. Indeed, trust law was created to assist wealthy persons from saving their property during war and, later, for tax revenues owed to a needy state. This was the experience of the landed poor in the United Kingdom. Similarly, the creation of the limited liability company in company law was first thought to be unethical and unconscionable, but has now become a staple. Indeed, it may be credited as having elevated company law, since the limited liability company may be viewed as a bastion of capitalism and free enterprise. It has helped to make company law more viable and more relevant.

In the same vein, offshore laws seek to uphold principles and needs of commerce and international business. Thus, they are not out of sync with other areas of commercial law and should be similarly judged. Fortunately, it is being recognised by judges, jurists, and lawmakers elsewhere that offshore law, such as offshore trust law, can elevate more traditional areas of law found onshore.

B. Transplanting Offshore Law: If You Can't Beat Them, Join Them

The fruits of the legal evolution, or revolution, created by offshore law are slowly but steadily emerging. Indeed, many of the offshore legal innovations are now being embraced onshore, particularly in trust law. These modifications of traditional onshore law are entering the mainstream because of the existence of offshore legal precepts. The offshore legal solution and its developmental approach has proven so effective and so attractive, that today, even states in the United States have sought to emulate offshore jurisdictions, introducing trust, banking, and tax laws which borrow heavily from offshore legal paradigms. These U.S. developments include asset protection, and trust and tax planning features in six main states: Alaska, Delaware, Montana, Nevada, Rhode Island, and Colorado. Offshore-type features now also exist to a lesser extent in several other states including: Idaho, Illinois, Maine, Maryland, Arizona, Missouri, New Jersey, Ohio, South Dakota, Virginia, and Wisconsin. This latter group, for example, instituted “dy-


67. *Id.* at 1314–15. “Dynasty trust” is a term typically defined as “a trust set up primarily to perpetuate the trust estate for as long a period as possible,” commonly by way “of a chain of life interests.” Lawrence M. Friedman, *The Dynastic Trust*, 73 YALE L.J. 547, 547–48 (1964).
"nasty trusts" by abolishing the rule against perpetuities and allowing estate taxes to be deferred indefinitely. 68 Familiar offshore asset protection features against creditors, challenging forced heirship régimes, and so on, are evident. 69 Self-settled, protective trusts are now allowed in some of these states solely for non-resident trusts, despite long standing rules in United States courts that such trusts are against U.S. public policy. This, of course, creates a dichotomy under U.S. law. While the rest of the United States adheres to the rule that it is against U.S. policy, it is allowed for non-residents. It begs the question whether it can remain a rule of U.S. public policy.

While these new offshore-onshore states create competition for offshore jurisdictions, they should be welcomed because they demonstrate the credibility, legitimacy, and intelligence of the offshore law approach. Surely, offshore law cannot be effectively challenged if onshore states are now redefining their own legal systems so as to incorporate so-called offshore type laws, which were previously frowned upon. It is evident that these onshore jurisdictions have recognised the success of offshore legal innovations and, in the name of profitability, have decided to join them instead of challenging the legal precepts upon which they are based.

C. Some Specific Examples of Offshore Law

Perhaps the most adventurous area of offshore law is the law on trusts. Offshore trusts are more closely aligned to business and companies than their onshore counterparts. Offshore law allows for a host of things that a traditional trust either cannot do, or cannot do effectively. One example is that offshore trust law allows persons from civil law jurisdictions to take advantage of a structure that was traditionally reserved for persons in common law countries. 70 Apart from simply benefitting from the trust's three-tiered structure, settlors from civil law jurisdictions may avoid forced heirship or mandatory succession régimes. 71

The trust under offshore law has now become a more viable commercial entity. For example, it permits the abolition or liberalisation of perpetuity


70. See Antoine, supra note 58, at 179.

71. Id.
and accumulation periods, thereby enabling the creation of dynasty trusts. It further allows the creation of purpose trusts, thus abolishing the traditional common law rule that a trust must have identifiable beneficiaries. This rule has often been criticised as being without real justification in a modern commercial environment, and there have been proposals in both Canada and the United Kingdom to change the rule so that it conforms with offshore law.\textsuperscript{72}

These examples of new legal ideas, emanating from the offshore sector and being transplanted to onshore jurisdictions, are evidence of legal development and new directions in Commonwealth Caribbean legal systems. The challenges faced by offshore financial centres in the region also represent tensions evident in these legal systems at the current time.

D. \textit{Conflict of Laws Under Offshore Law}

There have also been dramatic legal accommodations in offshore legal régimes in the area of private international law. The offshore sector has sought to clarify and even create conflict of laws rules. This is particularly the case in relation to trusts, where, traditionally, few such rules existed. These new rules serve a dual purpose. First, appropriate rules of private international law must be clearly identified, so as to avoid confusion in the law. Second, in order for innovative trust law principles to survive, it is imperative that the offshore trust falls under the offshore law régime and not under that of the onshore law. Simply put, the law must be configured so that offshore entities are created and adjudicated by offshore laws which are supportive of the aims of offshore financial régimes.

This, in turn, means that other jurisdictions are able to consider these legislative solutions to gaps in the law as credible legal solutions for onshore trusts also. This is particularly the case as the offshore sector has sought to be in line with the Convention on The Law Applicable to Trusts and on their Recognition as far as possible.\textsuperscript{73}

For example, offshore jurisdictions promote the settlors’ choice of law as the proper law of the trust and encourage the insertion of exclusive jurisdiction or forum selection clauses. These are in keeping with the modern position as gleaned from the Hague Convention on the Recognition of

\textsuperscript{72} See, e.g., David Hayton, \textit{Developing the Obligation Characteristic of the Trust}, 117 Q. REV. 96 (2001); LAW REFORM COMM’N OF B. C., \textit{REPORT ON NON-CHARITABLE PURPOSE TRUSTS} (1992).

Trusts.\(^{74}\) It also gives priority to the autonomy of the settlor and the owner of property. Conveniently, it allows the settlor to choose the more user-friendly offshore trust law as the proper law. As this is an emerging issue, few courts have advised on it, but the evidence suggests that it is an appropriate approach.\(^{75}\)

Similarly, courts, even those outside of the region, are beginning to pay respect to offshore law practice. They have begun to accept that the courts of offshore jurisdiction have exclusive jurisdiction over the trust, and that the offshore trust law chosen by the settlor is the proper law. For example, in *Green v. Jernigan*,\(^{76}\) a Canadian company made such a choice of law with respect to an offshore trust set up in Nevis, and chose Nevis as the exclusive forum for purposes of jurisdiction.\(^{77}\) The court found that there must be a "strong cause" to displace such exclusive jurisdiction clauses.\(^{78}\) Such decisions are helpful for the viability of offshore legal régimes, which often hinge on jurisdiction and proper law issues.

E. Recognition and Capacity Under Offshore Trust Law

Issues on the recognition of the trust in civil law countries, and the capacity of settlors from civil law countries where there is no trust law to establish trusts are also resolved. Settlors are granted the capacity to create trusts, and legislative mechanisms exist which seek to ensure the recognition of trusts established in this manner. It is perhaps in this area that offshore trusts have made the most impact. The legislative approach of stating clearly that the offshore trust is to be recognized and to be governed by offshore law is now an accepted one validated under the Hague Convention on the Recognition of Trusts.\(^{79}\)

Thus, offshore trusts are to be recognized under offshore law, whether or not the settlor originates from a civil law jurisdiction. This is traditionally a difficult issue under onshore law. Often, trusts were not recognized or were transformed into some other similar entity, such as the foundation or a type of contract, to enable dealings with civil law settlors. This was the defect that the Hague Convention on the Recognition of Trusts sought to cure.\(^{80}\)

\(^{74}\) See id.


\(^{77}\) Id. at 336–37.

\(^{78}\) Id. at 339.

\(^{79}\) See Casani, 1 I.T.E.L.R. at 943, 945; see also Re an Isle of Man Trust, (1998/99) 1 I.T.E.L.R. 103 (Swed. Tax Panel).

\(^{80}\) See The Hague Convention on the Recognition of Trusts, supra note 73.
In Casani, the trust was recognized in Italy although it sought to defeat forced heirship rights, or mandatory rights of succession granted to heirs, typically found in civil law countries. The decision thereby answered a question which had long been asked in relation to the survivability of anti-forced heirship provisions, such as are found in offshore trusts, when addressed by civil law courts. The Italian court found that such a trust did not violate public policy, and was not, and could not be invalid on that ground, as the trust was essentially a recognizable entity. Other means could have been found to satisfy disappointed heirs.

These legislative changes and their interpretation make significant contributions to trust jurisprudence. What we are witnessing, therefore, is a virtual revolution in the financial legal infrastructure. In this revolution, Caribbean legal sub-systems are being both challenged and emulated around the world. Undoubtedly, these are important advances in our legal development. Yet, once again, as with the CCJ, the future direction of the offshore legal paradigm seems heavily dependent on the extent to which we can conduct ourselves in the international sphere, and the degree to which we can uphold notions of sovereignty and independence in our law and legal systems.

VI. IMPACT OF POLITICAL AND ECONOMIC UNITY ON LAW REFORM

The attempts toward political and economic unity in the region are fuelled by the need for economic survival in what is perceived as an increasingly hostile world. There is a growing realisation that small states such as ours cannot make it on their own. The advent of the CSME, which will bring economic unity, and other such initiatives clearly necessitates changes in the respective laws of the countries in the region. Perhaps the most obvious would be in the labour laws.

Already, Caribbean governments have begun the process of the “Free Movement of Skilled Workers” throughout the region, and changes to domestic law are slowly being made. There is, however, considerable opposition to this, particularly from the countries which are currently more eco-

81. Casani, 1 I.T.E.L.R. at 946–47.
82. Id. at 948.
83. See id. at 947.
nomically successful. Trinidad and Tobago, for example, is an oil-rich economy and will naturally attract many workers.

As yet, however, the other necessary reforms such as the harmonisation of labour laws, particularly with respect to workers’ rights, have been slow in coming. As a result of the Harmonisation of CARICOM Labour Laws Project, an in-depth report\(^ {85}\) paving the way forward for harmonisation was produced. However, the political connotations of labour law reform and the customary unilateral approach of the region’s governments have not produced uniform results. These are small states jealous of their political autonomy. Nonetheless, the Report is used as a blueprint for labour law reform and has acted as a catalyst in several areas of labour law. Notwithstanding, the levels of protection for workers, the obligations of employers, and the conditions of business are variable throughout the region. Other areas relevant to the free movement of workers and which have yet to even be discussed, are the portability of benefit schemes from one country to another, and the availability of benefits for transplanted workers.

A. Discrimination in Employment and HIV

There are two sub-topics in this area that I believe need to be urgently addressed. One is the appalling lack of legal protection for discrimination in employment issues in many of the CARICOM states and the almost non-existent legal framework for HIV/AIDS sufferers.\(^ {86}\) The latter is particularly remarkable considering that the region has been documented as having one of the highest levels of HIV/AIDS in the world. The deficiencies in ordinary legislation are not cured by our constitutions which seek to protect rights, as those rights apply only to citizens viz-a-viz the State, and private employers are thereby excluded from the requisite obligations. Further, our constitutions have been construed quite narrowly where issues of discrimination have arisen. This is particularly the case in relation to issues of gender, a term absent from the various constitutions. On the one hand, the protections have often only been mentioned in the preambles of the constitutions and

\(^{85}\) See generally Website of the Caribbean Community Secretariat, at http://www.caricom.org (last visited Feb. 21, 2005).

\(^{86}\) Countries which have appropriate laws against discrimination are Guyana and St. Lucia. Trinidad and Tobago drafted such laws but they were not brought into force, the main reasons being the controversy over whether sexual orientation should be included and the non-existence of enforcement mechanisms and institutions. Only the Bahamas has laws protecting against discrimination because of HIV/AIDS, and the protections are sparse.
have therefore been construed as unjusticiable. On the other, some courts have inserted high thresholds for finding discrimination, such as malice, making it exceedingly difficult to ground an offence.

In addition to restrictive constitutional interpretation, litigation has been sparse. This is in part due to the lack of awareness of the rights of the citizenry. More likely, however, it is due to cultural attitudes which do not perceive certain types of conduct as discriminatory, unlawful, or even inappropriate. Such attitudes spill over into the interpretation of the law. One example relates to sexual harassment. In a case which was brought under a summary dismissal heading, a male employee who was dismissed for fondling and ogling female employees at the workplace challenged the dismissal, and a female magistrate viewed it as merely "ungentlemanly conduct" insufficient to warrant dismissal. Currently, a non-governmental group attempting to introduce sexual harassment legislation in Barbados is facing much opposition from a male-based lobbying group.

The gaps and inconsistencies between the laws of various Commonwealth Caribbean countries, in particular, labour laws, make it difficult to envisage a smooth integration process either economically or politically. It also makes nonsense of projected goals of investment on a regional basis as opposed to an individual country basis as ascertaining the varying laws and obligations is a nightmare for any investor.

Recently, more conscious Caribbean firms have rushed to implement reasonable standards against discrimination in employment as a response to international trade requirements for business. This however, is an externally driven, fragmented, and rushed "stop-gap" approach to the problem. Such individualistic approaches are probably unsuited to the real needs and sensitivities of the workplaces in question, as they are uninformed by coherent planning. In some cases, for example, enterprises have merely adopted the codes of ethics of companies based overseas. That such laws and policies are necessary is indisputable, but they should be part of national and regional initiatives which reflect well-researched and relevant legal policy.


B. Economic and Political Sovereignty

The region's economic and political sovereignty is clearly not untouched, even directly, by the dictates of larger states. Recently, for example, the United States responded to CARICOM's refusal to vote to excuse the United States from the jurisdiction of the International Criminal Court by withholding aid. Washington was also not amused by the region's lack of enthusiasm over the Iraq War, although the region was hardly alone in this stance. The position taken by some leaders that Haiti's democratically elected leader should not have been summarily disposed was similarly disapproved of. The threat that international aid will be withheld if we do not toe the line is ever present.

These political realities may have implications for the kinds of laws which we put into place. For example, politics has had practical impact in the urgency with which the region has had to implement laws against terrorism, which is perhaps not a pressing need in these lands of sun and sea, albeit laudable. Such initiatives also have hefty economical implications. Millions of badly needed monies have been spent to make our ports safer for American tourists and to upgrade our financial reporting systems to ensure that terrorists do not exploit them. While these are not undesirable objectives in themselves, they do demonstrate the extent to which legal changes in policy may be dictated from outside of the region, and the often low priority given to pressing issues of law reform in favour of external priorities. Often, these are not choices, but imperatives.

Incidentally, it is not only foreign governments which have the ability to influence regional governments. The powerful multinational cruise industry has succeeded in preventing the region from implementing laws to install a paltry five U.S. dollars head tax on passengers, a tax needed to upkeep the ports and protect the reefs and other aspects of the environment. They have done this by threatening to take their business elsewhere if the tax is implemented. It is possible that "John and Jane Public, USA" would happily pay the tax if they were aware of the problem and the significant and sorely needed revenue it could create for struggling CARICOM economies.


C. The CCJ’s Original Jurisdiction for Trade Disputes

Economic unification and regional integration also make it imperative that there be a clear and credible means of adjudicating the inevitable disputes that emerge with trade regimes and inter-governmental policies. Hitherto, this has been lacking in CARICOM, despite the Revised Treaty of Chaguaramas, which attempted to define trade regimes for the region.93 The CCJ, with its original jurisdiction to interpret the treaty and related trade issues,94 will fill this glaring gap in Caribbean jurisprudence. All of the independent Commonwealth Caribbean countries will participate in this original jurisdiction.95

Increasingly, matters related to both trade and competition are emerging. They too, have impacted significantly on the minds of the man and woman on the Caribbean street. The most recent, and perhaps the most volatile example, is the fishing impasse between Trinidad and Tobago and Barbados. In that scenario, Barbados fisher-folk illegally entered Tobagonian waters on a consistent basis, following migratory flying fish which had left Barbadian waters for more favourable Tobagonian waters. The issue expanded when Barbados, rather belatedly, claimed that the waters themselves were in dispute. Consequently, a maritime boundary matter is currently in issue.

D. Funding Justice

Finally, we should note that issues of law reform and legal development, whether we are speaking about jurisprudence or justice generally, cannot come to fruition without adequate physical infrastructure. Our courts need to be adequately funded and supported. This is as true for criminal trials as it is for civil trials, and for juvenile justice. For example, often juveniles spend nights in jail with hardened adult criminals because of a lack of facilities to house them. The Pratt and Morgan doctrine on undue delay,96 discussed earlier, is significantly fuelled by the lack of resources. It highlighted the need to make the administration of justice more efficient and

94. CCJ Agreement, supra note 12, art. XIII; Revised Treaty, supra note 93, art. 211.
95. CCJ Agreement, supra note 12, art. II.
speedy, thereby ensuring that prisoners do not spend long periods on Death Row.97 In other words, hang them quickly or not at all.

Funding is just as important for finding the legal principles which inform the court. This necessitates, for example, adequate and efficient law reporting. All of these things are lacking in the region because of our fragile and needy economies, economies which are further vulnerable to the forces of nature and to international market forces. If Commonwealth Caribbean law and legal systems are to realise their true potential—if they are to “exhale”—these difficulties must be overcome.

97. Id. at 359.