I think I had better begin by explaining the title I have given to my lecture “Putting Things Right and the Caribbean Court of Justice”. It is simply intended as short-hand for my thesis that there are some things radically wrong in the Commonwealth Caribbean which the Caribbean Court of Justice can be used to put right. The first and most fundamental of these ‘wrong’ things is the failure of the former colonies of Britain in this region (with two notable exceptions) to achieve full nationhood even in some cases after 40 years of Independence by providing, either singly or collectively, their own final court of appeal and ending their reliance on the Judicial Committee to decide their cases finally for them. These former colonies all gained their Independence between 1962 when Jamaica and Trinidad and Tobago were the first to do so, and 1983 when St.Kitts-Nevis was the last.

THE JUDICIAL COMMITTEE: ITS HISTORY AND COMPOSITION:

The jurisdiction of the Privy Council is rooted in the prerogative of the King to receive appeals for justice from his subjects. From an early date these appeals were received from ‘the plantations’ and colonies of Great Britain, were referred by the Sovereign to his Privy Council for its advice. Normally the Board of the Judicial Committee consists exclusively of Law Lords, but it sometimes includes a Judge of the English Court of Appeal or more rarely, an overseas Judge who in the past was usually from New Zealand. Prior to New Zealand terminating appeals to the Privy Council in 2004, every year a Judge from that country would spend a month or two in London sitting in the Judicial Committee. The costs involved were borne by the New Zealand Government. No such arrangement has ever existed in relation to Judges from the Caribbean. Caribbean Judges who have been made Privy Councilors, have only rarely sat on a Board of the Judicial Committee. There is at least one reported judgment of the Judicial Committee that was delivered by Sir Vincent Floissac who was Chief Justice of the Eastern Caribbean Supreme Court, and more recently, Sir Edward Zacca, formerly Chief Justice of Jamaica, sat as a member of a nine-man Board which overruled a decision of another Board given only a few months before in an important constitutional case concerning the mandatory death penalty.

It might be expected that having served as Chief Justice of Trinidad and Tobago and having been made a Privy Councillor nearly two years ago, I might be in a position to shed some light on what possibilities exist for a Caribbean member of the Judicial Committee to participate in the hearing of appeals, but I am afraid that I am unable to do so as I have not received any communication from the Judicial Committee since my appointment as a Privy Councillor. This is not a complaint, but simply a statement of fact.

THE RIGHT OF APPEAL TO THE PRIVY COUNCIL IN INDEPENDENCE CONSTITUTIONS:

When Britain started granting Independence to its colonies in the late 1950’s, it was standard for the Independence constitutions of the new countries to maintain the right of final appeal to the Privy Council which had existed when they were colonies or protectorates. But in Africa what happened thereafter followed a certain pattern which was that Independence was swiftly followed by a change to Republican status and more or less simultaneously with that, appeals to the Privy Council were abolished. There was no such pattern, however, in the Commonwealth Caribbean. Prior to the arrival on the scene of the Caribbean Court of Justice (‘the CCJ’) the only Commonwealth Caribbean country to abolish appeals to the Privy Council was Guyana, which became independent in 1966 and on converting to a republic in 1970, abolished appeals to the Privy Council in civil and criminal cases. Appeals in constitutional matters were terminated in 1973.
In fact, all Commonwealth Caribbean countries with one exception, entrenched the right of appeal to the Privy Council in their Independence constitutions. This meant that any law which sought to alter or repeal that right, had to be passed in accordance with a special procedure which did not apply to ordinary legislation.

It is perhaps understandable that with the passage of time Governments tend to regret these fetters placed on constitutional change at the time when the offer of Independence was accepted, not without some fears and misgivings on the part of the more conservative in the society, while Opposition parties tend to use to their advantage the political leverage which these restrictions give them.

The one exception I mentioned to the pattern of entrenching the right of appeal to the Privy Council, is of course Jamaica. In a very striking departure from the norm, section 110 of the Constitution of Jamaica, which provides for appeals to the Privy Council, was not included among either the deeply entrenched or the entrenched sections of the Constitution. It can therefore be altered by an Act of Parliament passed by a simple majority of the members of each House. It has been held by the Judicial Committee, however, in a judgment which I propose to examine shortly, that the failure to entrench this section means that a simple majority of the Jamaican Parliament can abolish the right of appeal to the Privy Council but cannot substitute for it a right of appeal to the CCJ.

THE ESTABLISHMENT OF THE CCJ

The Agreement Establishing the Caribbean Court of Justice was signed in Bridgetown on the 14th February, 2001 by twelve countries, including Suriname but not including the Bahamas. The Agreement was subsequently ratified by all the signatories. The Court which it established, is unique in that it really combines two courts in one. The Court has two separate and distinct jurisdictions. It has an original jurisdiction in which it adjudicates on disputes arising with respect to the interpretation and application of the Revised Treaty of Chaguaramas. Secondly, it has an appellate jurisdiction, that is, to determine finally appeals from the national courts of the Contracting Parties. This appellate jurisdiction, however, is only accessible by those countries which amend their Constitutions so as to accommodate it. The only two countries to have done so thus far, are Guyana and Barbados. The Court has already heard, determined and delivered written judgments in two applications for leave to appeal, one from Barbados and the other from Guyana, and in a substantive appeal from Barbados. Another appeal from Barbados which raises important constitutional issues, is fixed for hearing next month and there are four other matters filed with the Court at present.

In Barbados the legislation to substitute the CCJ for the Privy Council was passed by the requisite two-thirds majority in each House. In Guyana, as already mentioned, appeals to the Privy Council had been abolished since 1973 when the Court of Appeal became the final court in all cases. There was therefore no constitutional hurdle to overcome in order to create a right of appeal from the Guyana Court of Appeal to the CCJ. In Jamaica, the Government, perhaps understandably, believed that as the right of appeal to the Privy Council was not entrenched, no special procedure was required in order to replace the Privy Council with the CCJ and it attempted to do so by three Acts which were passed by a simple majority in each House. The constitutionality of these Acts was challenged by proceedings launched by the Independent Jamaica Council for Human Rights (1998) Limited and certain other parties. The Court of Appeal of Jamaica unanimously ruled the amending legislation constitutional, but that decision was reversed and the legislation struck down by a judgment of the Judicial Committee delivered by Lord Bingham on the 3rd February, 2005. (Independent Jamaica Council for Human (1998) & Ors v. Marshall-Burnett and Anor. [2005] U.K. P.C. 3). There is no question but that this decision impacted very negatively on the development of the CCJ’s appellate jurisdiction. The lead given by Jamaica in accepting the appellate jurisdiction of the Court would have provided a powerful incentive for other smaller countries to follow suit. Moreover, appeals from Jamaica would have provided the Court with an opportunity to increase its visibility and to dispel the fears and reservations of the doubting Thomases in the region. Furthermore, the Privy Council decision has clearly induced a reluctance in the Jamaican Government to risk another setback by including in the Act which was subsequently passed to give effect in Jamaican law to those provisions of the Agreement Establishing the CCJ (‘the Agreement’) which relate to the original jurisdiction of the Court, any provision which could possibly provide a basis for constitutional challenge. This has resulted unfortunately in some differences between some provisions of the Agreement and the Jamaican legislation which is intended to give effect to them. I may be forgiven, therefore, if I direct some critical attention to this judgment of the Judicial Committee.
THE PRIVY COUNCIL JUDGMENT IN THE INDEPENDENT JAMAICA COUNCIL CASE

Lord Bingham identified the key question in the appeal as whether the procedure adopted in enacting the amending Acts complied with the requirements laid down in the Constitution. The Board held that it did not, because the three Acts in substance amended, at least impliedly, entrenched provisions of the Jamaican Constitution contained in Chapter VII, but were not passed in accordance with the procedure prescribed for amending entrenched provisions. The entrenched provisions in question were those which protect the ‘higher Judges of any court which hears appeals from the Court of Appeal must be similarly protected, for the simple substitution of a right of appeal to the CCJ for the right of appeal to the Privy Council did not involve the on its imperviousness to influence from the Jamaican Parliament and Executive and the virtual irremovability of

The point on which I respectfully take issue with the judgment is simple but fundamental. It is that the substitution of a right of appeal to the CCJ for the right of appeal to the Privy Council did not involve the alteration of any entrenched provision of the Constitution.

The entrenched provisions of Chapter VII relate to the High Court and the Court of Appeal of Jamaica. The only section in that Chapter which refers to the Privy Council, is section 110 which grants the right of appeal to the Privy Council. That section is not entrenched and it was conceded for the appellants that it could have been repealed by an ordinary Act of Parliament. The three Acts which were under challenge did not touch the High Court or the Court of Appeal, their jurisdiction or the regime which governs them. In paragraph 19 of his judgment Lord Bingham refers to the definition of “alter” in the Constitution. One of the meanings assigned to it is “make different provision in lieu of”. What the amending Acts did was to make different provision in lieu of that made by section 110 (the Privy Council section) and therefore it altered section 110. It did not do that in respect of any other section in Chapter VII. Nor can it be implied from the fact that the Judges of the Supreme Court and the Court of Appeal in Jamaica have their independence protected by entrenched provisions that the Judges of any court which hears appeals from the Court of Appeal must be similarly protected, for the simple reason that the Jamaican Constitution provided for a final Court of Appeal in the form of the Privy Council which was not so protected. The only comparison therefore that might be relevant was a comparison of the protection which the CCJ has with that of the Judicial Committee, not with that of the Court of Appeal or the High Court.

The Board dismissed the objection that the Judges of the Judicial Committee were totally unprotected by the Jamaican Constitution (or for that matter any Jamaican law) in one sentence: “From these Jamaican Courts an appeal lay to this Board which, although enjoying no entrenched protection in the Constitution, was known to be wholly immune from Executive or Parliamentary power in any jurisdiction from which appeals lay and whose members were all but irremovable”. The Board appears to be claiming a unique status for itself, based on its imperviousness to influence from the Jamaican Parliament and Executive and the virtual irremovability of its members. At least, this was a status which it was not prepared to concede to the CCJ. While the Board acknowledged “that the CCJ Agreement represents a serious and conscientious endeavour to create a new regional court of high quality and complete independence”, there was the risk that the Governments of all the Contracting Parties might combine to amend the Agreement so as to weaken the Court’s independence. Lord Bingham was not prepared to describe this risk simply as fanciful, but said more guardedly that it was a risk which it was to be hoped, was fanciful.

It is ironic that in 2005, the same year in which this judgment was given, the U.K. Parliament passed the Constitutional Reform Act, the effect of which (when it comes fully into force) will be to transfer the whole of the jurisdiction of the Appeal Committee of the House of Lords and the jurisdiction of the Judicial Committee in devolution matters to a new final court of appeal called the Supreme Court of the United Kingdom whose
Judges will no longer be members of the House of Lords. One of the main purposes of this Act is to remove any doubts the public may harbour about the independence of the Law Lords from the Parliament and the Executive given their dual role as members of the second house of Parliament and Judges of the highest court in the land. One accepts that the Jamaican Government is not in a position to exercise any influence or pressure on members of the Judicial Committee but to make this point is to raise two questions. The first is whether it is all right to ignore the possibility of influence or pressure being exerted on the Judicial Committee by politicians provided the politicians are British and not Jamaican? Assume for instance that an appeal to the Privy Council involves the extradition from Jamaica of a Jamaican citizen who is accused of a terrorist act in England. Or what if the dispute is between a Jamaican company and a major British interest? Could it be said in either case that a perception by the Jamaican public that the members of the Judicial Committee might be subject to influence by the U.K. Government, was a matter of no concern?

The other question raised is whether the risk of the CCJ being, or becoming by virtue of an amendment of the Agreement, vulnerable to influence by the Executive of Jamaica should be assessed as unreservedly “fanciful”. Are the chances of this happening not in fact so close to zero that (as suggested in the case of the Privy Council) they can be discounted? I submit the answer to these questions is clearly “yes”. In answering them it is important to bear in mind the dual function of the CCJ. The same Court which hears appeals also adjudicates disputes arising between Contracting Parties in relation to the Revised Treaty of Chaguaramas. In those circumstances, can one conceive of the other Contracting Parties agreeing to change the regime governing the Court so as to make its Judges more amenable to the influence of the Jamaican Government? Bear in mind that for an amendment of the Agreement to be effective, it must be accepted and ratified by all the signatories to the Agreement. Bear in mind also the lengths to which the Contracting Parties have gone to protect the Judges of the Court from political influence by establishing a Trust Fund to finance the Court in perpetuity and setting up an independent body, the Regional Judicial and Legal Services Commission, in which is vested power to select, appoint and remove the Judges of the Court.

Moreover, the CCJ like the Privy Council is an extra-territorial court. It is not a Jamaican institution. It was not created by a Jamaican law, nor is it governed by Jamaican law. It is not dependent on the Jamaican Government for its funding or for the filling of any of its needs. The creation of the Trust Fund, subject only to its proving adequate for its intended purpose, avoids any financial dependence of the Court on the Contracting Parties, either singly or collectively. This precludes any possibility of leverage being exercised over the Court by the withholding of funds needed to meet the Court’s expenses. As I have had cause to point out in the past, this is one of the most potent ways in which pressure can be exerted on a court by the political directorate. It will not be available to the politicians in the case of the CCJ.

But strictly speaking, it is beside the point whether the CCJ can compare with the Judicial Committee in terms of its imperviousness to the influence of the Jamaican Government or the irremovability of its Judges. Because section 110 of the Constitution is not entrenched, the Parliament of Jamaica was left free not only to repeal that section by a simple majority but also by a similar majority to alter it by making some other provision in its place. Obviously the designation of another court to which the appeals which previously went to the Privy Council, should go, is making “some other provision”. The question whether that new court is one that is sufficiently protected from political or other extraneous influence, is therefore one to be decided by a simple majority of the Jamaican Parliament. There was no valid ground on which the decision which the Jamaican Parliament made in this case could be deemed unconstitutional.

This case was clearly distinguishable from the gun-court case (Hinds) (to which Lord Bingham made reference) since there was here no transfer of any part of the jurisdiction of the High Court or Court of Appeal to the new court. The regime established in Chapter VII for “the higher Jamaican judiciary” did not apply to the Privy Council and there was no basis for holding that it must apply to any court that replaced the Privy Council.

Finally, there are two points to note about this judgment. One is that nowhere in it is there any suggestion that in order to adopt the CCJ as the final Court of Appeal for Jamaica, the Jamaican Parliament would have to entrench in the Constitution either the right of appeal to the CCJ or the regime governing the appointment, tenure, removal etc. of its Judges. All that it decided was that in order to adopt an unentrenched CCJ, it was necessary to pass the necessary legislation in the manner prescribed for the amendment of entrenched provisions. Secondly, it is worth noting that the judgment is confined strictly to the question of what was the appropriate procedure for adopting the appellate jurisdiction of the CCJ and does not suggest the existence of any constitutional difficulty in the way of incorporating provisions relating to the original jurisdiction of the CCJ in the domestic law of Jamaica.

There has been a good deal of criticism of this decision by Caribbean commentators. But the decision is final and binding and there is no real prospect of the Judicial Committee reversing it, if only because the same issue
is unlikely to arise again in any other case. The way therefore for Jamaica to replace the Privy Council with the CCJ as its final court, is by legislation passed in accordance with the requirements for amending an entrenched provision i.e. support by a two-thirds majority in each House and a delay of six months between the introduction and passage of the Bill.

THE IMPORTANCE OF JUDICIAL AUTONOMY

When I see how complacent we are in this region about leaving the power to decide with finality issues which affect us, in the hands of a foreign judiciary, remote not only geographically but culturally, socially and historically, it occurs to me that we do not appreciate how important that power of final disposition is. Do we realize that the power which the Law Lords exercise when sitting in the Privy Council and hearing appeals from the Caribbean, is much greater than the power they exercise when sitting in the House of Lords and determining appeals from the courts of their own country? The reason is that in the United Kingdom Parliament is supreme, whereas in all Commonwealth Caribbean countries it is not Parliament, but the Constitution that is supreme, and the body which is vested with the responsibility for interpreting and applying the Constitution, the body which has the power to strike down statutes as well as executive action that offend against the Constitution, is the Judiciary. That is a power which judges in the U.K. have never had and which even with the establishment of their new Supreme Court, they will not enjoy.

In addition to the power to overturn legislation, there is a power given to the courts by our Constitutions to modify legislation so as to bring it into conformity with the Constitution. It was disagreement between members of the Judicial Committee over the scope of that power that produced two conflicting decisions of the Privy Council, within a matter of months of each other, on the question whether a law providing for the mandatory death penalty in Trinidad and Tobago should be modified so as to make that penalty discretionary, or was rendered immune from modification by a clause in the Constitution which protected existing laws from challenge on the ground that they infringed fundamental human rights.

It is also the function of the Judiciary to hold the ring between the three branches of Government i.e. Legislature, Executive and Judiciary, and to identify and correct any trespass by one branch into the preserve of another. This important aspect of the Judiciary’s role is eloquently described in a passage from a judgment of Bhagwati J., (at one time Chief Justice of India) which was recently quoted by Lord Bingham in an appeal from Trinidad and Tobago (Florence Bobb and Girle Moses v. Patrick Manning). The passage reads in part: “This Court is the ultimate interpreter of the Constitution and to this Court is assigned the delicate task of determining what is the power conferred on each branch of Government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits. It is for the Court to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the rule of law. … Where there is manifestly unauthorised exercise of power under the Constitution, it is the duty of the Court to intervene. Let it not be forgotten, that to this Court as much as to other branches of Government, is committed the conservation and furtherance of democratic values. The Court’s task is to identify these values in the constitutional plan and to work them into life in the cases that reach the Court … the Court cannot and should not shirk this responsibility, because it has sworn the oath of allegiance to the Constitution and is also accountable to the people of this country …”

In a foreword to the U.K. Government’s consultation paper on the establishment of a Supreme Court, the Lord Chancellor of England wrote of the Law Lords “[They] have conducted themselves with the utmost integrity and independence, they are widely and rightly admired nationally and internationally”. I would respectfully endorse this encomium. For all of that, however, they have not sworn allegiance to the Constitution of any of our countries and they are certainly not accountable to any of the peoples of this region. Modern jurisprudence tells us that a Constitution is a “living instrument”. Life implies growth, development and change. The interpretation of a Constitution therefore, involves an ongoing responsibility on the court of last resort to make decisions, guided as much by policy as by precedent, as to the shape which this living instrument that is the Constitution, is to take in the light of changing values and conditions. In the same judgment in which he quoted from Bhagwati J., Lord Bingham said:

“The Board would similarly accept with little or no reservation, the role assigned to the Trinidad Courts and this Board as the ultimate guardians of constitutional compliance, recognising the Constitution (section 2) as the supreme law of Trinidad and Tobago.”

There is no doubt that the Trinidad, or more correctly the Trinidad and Tobago, courts do have a role to play in guarding the Constitution of that country, but contrary to what Lord Bingham said, they are not the ‘ultimate
guardians’. The ultimate guardian of constitutional compliance is the court which has the final say, and that still is the Privy Council. It is better that this fact be not clouded.

To my mind, it is an incongruous situation for a country which claims to be sovereign and independent to continue to accept for more than 40 years an arrangement, part of a colonial heritage, under which responsibility for interpreting and guarding its Constitution is left in the hands of a foreign court, located thousands of miles away and staffed by Judges who are totally unfamiliar with the people whose interests the Constitution is supposed to protect and promote.

Some of the English Judges who are members of the Judicial Committee, have admitted, both privately and publicly, that they are handicapped when dealing with appeals from Caribbean countries by their lack of familiarity with those countries. In a speech which Lord Hoffman gave at the Law Association dinner in Port-of-Spain, in 2003, he said: “Our remoteness from the community has been a handicap” and expressed the view that: “A court of your own is necessary if you are going to have the full benefit of what a final court can do to transform society in partnership with the other two branches of Government”.

This lack of familiarity does have practical consequences. Not infrequently the Judicial Committee finds itself unable to assess the value of the opinion of local courts on certain issues because of its lack of familiarity with local conditions. Recently in a libel action brought against a former Prime Minister of Trinidad and Tobago, the defendant appealed to the Judicial Committee the judgment of the Court of Appeal awarding substantial damages against him. In its judgment the Judicial Committee confessed that for the purpose of deciding how the words complained of would be understood and what effect the words would have on the people who heard them, it was not as well placed as the local courts. Their Lordships also stated that Judges with knowledge of local conditions were much better placed than they were to determine the seriousness of a libel and the quantum of damages. The net result was that on these three important issues the appellant might have felt that he was denied the full benefit of a second tier appeal.

Another structural weakness of the Judicial Committee is its floating population. By this I mean that the composition of the Board varies from one case to another and of late there has been a very marked difference in the approach adopted by members of the Judicial Committee to constitutional interpretation, particularly when the human rights provisions, and more particularly, the death penalty, are involved. I have already referred to the conflicting decisions of different Boards on the question of the constitutionality of the mandatory death penalty in Trinidad and Tobago. It has reached the stage that when a case of that type comes to the Board, one can almost predict from the composition of the Board what the outcome will be. Any notion of the infallibility of the Judicial Committee would be shattered by reading what some of its members have had to say about the views of others with which they disagree. In the case of Boyce (an appeal in which the same issue with regard to the mandatory death penalty was raised in the context of the Barbados Constitution) Lord Hoffman in giving the majority judgment, satirised the argument of the minority in this way:

“The living instrument” principle has its reasons, its logic and its limitations. It is not a magic ingredient which can be stirred into a jurisprudential pot together with “international obligations”, “generous construction” and other such phrases, sprinkled with a cherished aphorism or two and brewed up into a portion which will make the Constitution mean something which it obviously does not. If that provokes accusations of literalism, originalism and similar heresies, their Lordships must bear them as best they can”.

Earlier in the same judgment Lord Hoffman described the interpretation which the minority put on the relevant constitutional provisions as “unreasonable to the point of being perverse”. The minority in its judgment in the Matthew case, the appeal from Trinidad and Tobago which raised the same issue as Boyce, responded by describing the majority’s approach as legalistic, and over-literally and evidencing “the austerity of tabulated legalism”.

In the earlier case of Lewis v. The Attorney-General of Jamaica [2001] 2 A.C. 50, another death penalty case in which the Judicial Committee overruled two earlier decisions of its own, Lord Hoffman was the lone dissenting voice. He in effect accused his colleagues of departing from the earlier decision simply because they had a “doctrinal disposition to come out differently” and warned that such an approach would damage the rule of law and destroy stability in the administration of justice in the Caribbean.

In an article which appeared in the Law Quarterly Review a year ago, a former Judge of the Court of Appeal of New Zealand, Mr. E.W. Thomas, was highly critical of the situation now existing in the Judicial Committee where the outcome of cases depends on the composition of the Board. He described people in jeopardy of death
and the fundamental rights which they invoke as “the playthings – the ping pong balls – of judicial doctrinal competition”.

WHAT IS WRONG WITH US?

Frankly, I am puzzled and disappointed by the failure of the Governments and peoples of the Commonwealth Caribbean to recognize the urgent need to claim from the mother country the missing portion of Independence, that is, judicial autonomy. I have suggested that it can only be explained by a failure to appreciate the importance and extent of the power which under the existing arrangement has been left behind in London. Virtually all the countries of the Commonwealth have claimed that power back. What is wrong with us? Is it that our Judges and lawyers are so incompetent or so vulnerable to influence that we cannot find among their ranks persons to whom the responsibilities of making final decisions in cases can be entrusted? Or has our colonial past induced in us a dependency syndrome which renders us incapable of taking full responsibility for interpreting and administering our own laws? The debate on whether or not we should de-link from the Privy Council has gone on for far too long, and I have lost the appetite to continue it. I would like to adopt the words of the West Indian Commission when in its report “Time For Action”, it wrote:

“First of all, we believe that the time is at hand for establishing the Caribbean Court of Appeal – what in an integration context we would prefer to call the CARICOM Supreme Court. We do not wish to minimise the issues which have characterised the discussion; indeed, we shall address some of them, but we are strongly of the view that we cannot, like characters in a Chekhov play, go on sitting around tables forever discussing the pros and cons of action and in the process forever deferring it. We believe the CARICOM decision was the right one, even in the context of an appellate jurisdiction alone; but the case for the CARICOM Supreme Court, with both a general appellate jurisdiction and a regional one, is now overwhelming – indeed it is fundamental to the process of integration itself”.

The Court the West Indian Commission was advocating is now a reality, though called by a different name. What is disappointing is that more Contracting Parties have not yet committed to the appellate jurisdiction of the Court. One result of their failure to do so is that they are not getting full value for the contribution which they have made, either in cash advanced or in financial obligations assumed, to the Court’s Trust Fund. It would certainly make financial sense for Contracting Parties to make the fullest possible use of the CCJ since they are already committed to paying for it. The fact that this commitment has already been made, seems to have escaped the notice of those who argue that the establishment of a regional court of appeal should be deferred until deficiencies in the local court systems have been addressed and remedied. What the Judges and officers of the CCJ are looking forward to, is the opportunity to justify to the Contracting Parties the financial commitment which they have already made.

THE NEW ZEALAND EXPERIENCE

Some comfort may be obtained from the knowledge that other Commonwealth countries have encountered the same sort of difficulties in separating from the Privy Council as we are experiencing in the Caribbean. The last significant defection from the Privy Council was that of New Zealand, which set up its own Supreme Court by Act of Parliament in 2003, and terminated appeals to the Privy Council as from the 1st January, 2004. But separation from the Privy Council was not achieved without difficulty in New Zealand.

The arguments which were raised in New Zealand against terminating appeals to the Privy Council, have a familiar ring. At the top of the list was the high quality of the Privy Council Judges and the doubt that a court of comparable quality could be recruited in New Zealand. Next was the argument which makes the remoteness of the Privy Council a virtue rather than a handicap, since it is seen as rendering judges impervious to local bias based on political, social or economic grounds. It is difficult to maintain this argument in the case of a regional court which will always contain a majority of members who combine familiarity with the region with a measure of detachment based on the fact that they are neither residents nor citizens of the particular country from which the appeal comes.

In New Zealand, there was a demand by the Opposition for a referendum on the issue of separation from the Privy Council but none was held. Eventually the Bill was passed by a narrow majority of 63 to 53 in the New Zealand Parliament. The Opposition were so incensed by the passage of the Bill that they promised that when they captured the government, they would repeal the Act. One of the concerns which was expressed was that the Attorney-General would make appointments to the new Court on a partisan basis. The Attorney-General
countered by appointing the Chief Justice and the most senior members of the Court of Appeal to be the first Judges of the new court.

Having had occasion to visit New Zealand recently and seen for myself the new court in action and listened to members of the legal profession, I have come away with the impression that the Court is performing to the satisfaction of all stake-holders, and it is extremely unlikely to say the least that anyone would contemplate dismantling the new court and reverting to appeals to the Privy Council. It would appear that the doubting Thomases in New Zealand, if they have not been converted, at least have been largely silenced.

Section 3(1)(a) of the Supreme Court of New Zealand Act, states the purposes for establishing the Supreme Court. They are: “To recognise that New Zealand is an independent nation with its own history and traditions”, “to enable important legal matters … to be resolved with an understanding of New Zealand conditions, history and traditions” and “to improve, access to justice”. These are purposes which mutatis mutandis could appropriately be adopted by any Commonwealth Caribbean country accepting the appellate jurisdiction of the CCJ.

THE CANADIAN EXPERIENCE

In Canada attempts to abolish appeals to the Privy Council were thwarted over a much longer period. I will not at this time trace the history of those attempts. However, despite the objections an Act was finally passed in 1949 abolishing all civil appeals to the Privy Council. But the new Act applied only to actions commenced after the date of its commencement; as a result the last Canadian appeal to the Privy Council was not decided until 1959.

The reason why an independent country would want to have its own final Court of Appeal was expressed by Chief Justice Anglin of Canada when he wrote to Prime Minister King as follows: “My ‘Canadianism’ leads me to the opinion that we should finally settle our litigation in this country. If we are competent to make our own laws, we are or should be capable of interpreting and administering them.”

END OF THE ROAD?

The experience of New Zealand and Canada demonstrate that the way home from the Privy Council can be long and torturous, full of wrong turns and dead ends. We in the Commonwealth Caribbean have been on that road for a long time now but with the establishment of the CCJ we have an opportunity of choosing a destination which will bring our journey to an end. The CCJ offers us the option of finally ending our dependence on a foreign tribunal which has been deemed anachronistic even in the country of its birth. I would describe that as an opportunity to put things right.

FILLING ANOTHER GAP

It was one of the weaknesses of the regional arrangements which preceded the CARICOM Single Market and Economy (‘the CSME’), that is CARIFTA established in 1968 and CARICOM established by the original Treaty of Chaguaramas in 1973, that there was no entity entitled to adjudicate disputes arising between participants with regard to the international agreements into which they had entered. The establishment of the CCJ as an international court with an original jurisdiction was the way that was chosen to put this particular matter right.

The Revised Treaty of Chaguaramas, which establishes the CSME, is a longer and more complex document than its predecessors. The rights and obligations which it creates in relation to such matters as the free movement of persons, capital and goods are much more extensive and substantial than under the previous regimes. As a result the potential for disputes between Members States with regard to the interpretation and application of the Revised Treaty is much greater than previously, and so is the need for an adjudicatory body. This need was recognised by the West Indian Commission which in its Report wrote:

“A CARICOM Supreme Court interpreting the Treaty of Chaguaramas, resolving disputes arising under it, including disputes between Governments Parties to the Treaty, declaring and enforcing Community law … is absolutely essential to the integration process. It represents in our recommendations one of the pillars of the CARICOM structures of unity.”
There are three important aspects of the role which the CCJ is required to play as the institutional centerpiece of the CSME. Firstly, it must interpret and apply the Revised Treaty. It will do so as an international court applying international law. The result of its decisions over time will be to build up a coherent body of Community law. This is not a result which can be achieved by referring disputes on an ‘ad hoc’ basis to the decision of an arbitrator or an arbitral tribunal. There is nothing to ensure, and no reason to believe, that different arbitrators will not interpret and apply the Revised Treaty differently. It was to prevent the chaos which conflicting decisions would create, that the Member States undertook that their national courts would refer to the CCJ for decision any question relating to the interpretation or application of the Revised Treaty that might arise in proceedings before them. It is an important feature of the Court’s jurisdiction, therefore, that it is exclusive, as that is essential to ensure a uniform interpretation and application of the Revised Treaty.

The second purpose served by the Court’s original jurisdiction is the enforcement of rights and obligations conferred and imposed on Member States by the Revised Treaty. It is obviously vital to the credibility and even survival of the CSME that there should be available a process whereby parties who are affected by a failure of a Member State to comply with the rules of the CSME, can get effective redress. That process is the pursuit of a claim before the CCJ. The Court therefore becomes the guarantor of the rights created by the Revised Treaty, the instrument by which wrongs are put right. To enable it to perform this role, the Court has been clothed with a jurisdiction that is both compulsory and binding. In order to ensure that the judgments of the Court are not ignored, Member States undertook to enact the necessary legislation to make them enforceable in the same way as the judgments of local courts.

The third function of the Court in its original jurisdiction is to settle disputes between members finally and conclusively. There is no appeal from decisions of the Court. The Revised Treaty does not encourage Member States who are in dispute to rush to the Court. Far from it. The Revised Treaty in fact proposes the successive use of a variety of procedures intended to achieve an agreed settlement of the dispute before the parties resort to the Court. But it is obvious that provision must be made for these cases in which none of these procedures produces the desired result.

A feature of the Court’s original jurisdiction which is of particular interest to business and labour is the extent to which it is accessible to them. Treaties are made between States and only States are capable of acquiring rights and obligations under treaties. The Revised Treaty is no exception. Provision, however, has been made in both the Agreement and the Revised Treaty for persons, both natural and legal, to institute proceedings in the Court, but they may only do so to complain of the breach of a right which though vested in a Member State, was intended to ensure to that person’s benefit directly and provided that the State in which the right is vested, is not interested in pursuing a claim of its own. The right to intervene in proceedings has also been made available to persons, natural or legal.

The Member States of CARICOM in establishing a Court for the purpose of interpreting and applying the treaty, are following a pattern which has been adopted by many other similar groupings of countries throughout the world. The European Union is an obvious and familiar example. More recently regional courts similar to the CCJ, have been established in Africa by the Economic Community of West African States (ECOWAS) and by the Common Market for Eastern and Southern Africa (COMESA).

As President of the CCJ, I have recently made in consultation with my fellow Judges, and issued, the Rules of Court which will govern proceedings in which the original jurisdiction of the Court is invoked. These Rules are in the process of being translated into Dutch to facilitate the Government and people of Suriname. The Court is therefore in a position to receive and process cases falling within its original jurisdiction. It has not to date received any, but that is likely to be a temporary situation which the coming into operation of the CSME, now imminent, will soon put right.

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President
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