PROMOTING JUDICIAL INDEPENDENCE IN THE INTERNATIONAL COURTS: LESSONS FROM THE CARIBBEAN*

I. INTRODUCTION

The rapid expansion in the size and role of the international courts raises important questions about the nature and extent of judicial independence in these relatively little-known judicial institutions.[1] To address these questions we need first to ask whether the analytical framework used in the study of judicial independence at national level can be transplanted wholesale to the international courts or whether a different approach is needed. Historically, these supranational judicial bodies have often been regarded as sui generis institutions only very distantly related to their domestic cousins. Given the differences in origin, jurisdiction and role between the national and international courts, there is some justification for this view. Yet these differences and their implications for our understanding of judicial independence can be overstated. In many respects the differences between national and international courts is no greater than those within the two jurisdictions. Both encompass a very diverse range of judicial forms and functions which demand the construction of a concept of judicial independence which is general enough to apply across the judicial spectrum yet specific enough to capture the very different requirements of each particular court and tier of the judiciary. The problem of how to define and measure judicial independence and where to strike the balance between independence and accountability is equally contested at both national and international level and many of the same approaches are needed to address these challenges.[2]

A key to creating a viable generalizable framework of judicial independence which can be applied at both national and international level is to understand judicial independence as essentially relational rather than behavioural. That is, it primarily concerns the relationships between the judges and external bodies—the political branches of government, the media, the public or interest groups—as well as the internal relationships between judges within the judicial hierarchy.[3] These relationships operate through institutional arrangements, such as the mechanisms for funding the courts and decision-making in areas such as judicial appointments and dismissal, as well as through the political and legal culture within which the courts operate. Thus, identifying and analysing the nature and source of potential threats to judicial independence requires a highly specific consideration of the particular context in which any one court operates vis-à-vis other governmental bodies and institutions of power. Such an analysis will inform the question of what institutional arrangements and political

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[1] See D Terris, C Romans and L Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (Oxford University Press, Oxford, 2007).

[2] See, for example, P Russell and D O'Brien (eds), *Judicial Independence in the age of Democracy: Critical Perspectives from Around the World* (University Press of Virginia, Charlottesville, 2001); C Guarnieri and P Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy* (Oxford University Press, Oxford, 2002).

[3] Russell (n 2) 8.

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culture need to be fostered in order to protect judicial independence. By assessing the specific nature of the institutional and political relationships which affect a particular judiciary at any one time it is possible to draw some conclusions about the nature of judicial independence in that particular context.

Equally important is an understanding of how these relationships are viewed both by the judges and those outside the judiciary since perceptions about judicial independence can be vital in determining how judges behave and how others behave towards them. Because public confidence in the courts in turn strengthens judicial confidence in the security of their position in the political system it is a vital component of judicial independence. Once established such confidence mediates the relationship between the judges and external bodies, restraining the degree to which the executive, the media and others are willing to attack the judges and bolstering the ability of the judges to speak out against such attacks. But equally, once public confidence in the judiciary is lost, it is extremely hard to regain.

An approach to judicial independence which seeks to understand the functioning and perceptions of the internal and external relationships involving the judiciary, provides a generalizable framework equally applicable at both the national and international court level. While the specific relationships and perceptions affecting each international court will be different, just as they often different in relation to the various forms and levels of national court, nevertheless, they also reflect back and feed into our understanding of the general principles. The challenge is to distinguish between those elements which are specific in relation to both time and place, from those which can be extrapolated to inform the wider debate on judicial independence. This task is particularly problematic at international level because there is, as yet, only a very limited research literature scrutinising the internal and external relationships which affect the international judiciary.[4] As this body of research grows, it will become possible to produce a more nuanced understanding of the nature of judicial independence in the international courts.

This relational and attitudinal approach to judicial independence is adopted here to shed light on the nature of judicial independence in one of the latest additions to the community of international courts—the Caribbean Court of Justice (CCJ). Drawing on interviews with the judges of the CCJ, members of the Legal and Regional Judicial and Legal Services Commission (RJLSC) which selects them, as well as academics and policy-makers from the region, this article examines the institutional arrangements and political context which have shaped the early years of the court and explores the lessons which can be learnt from the very particular experience of the CCJ for the wider international court community.[5] Just as some recently created national courts, such as the South African Constitutional Court, offer important comparative insights into their counterpart courts in other national jurisdictions, so new international judicial bodies such as the CCJ tell us something about trends at international level. While many of the features of the CCJ are rooted in the particular political and legal context of the Caribbean, its experiences and arrangements also reflect developments in thinking about the nature of international courts more generally. The creation of a court from scratch necessitates a re-evaluation of the appropriate roles of an

[4] The work of Terris et al (n 1) above is the first rigorous empirical study of the international judiciary.

[5] Interviews were carried out in Barbados and Trinidad and Tobago in 2007 and 2008.

international court and what judicial independence means in relation to such a body. It also allows for the exploration of innovative ways of promoting that independence. In the case of the CCJ, the debate about the form and function of the Court was highly contentious and hard-fought over many years. Two particular features which were ultimately adopted—the methods devised for funding the court and for selecting the judges—are unique at international level. These new institutional arrangements also arose in a very particular political context which has shaped the court. As well as being interesting in its own right, an understanding of the origin and working of these novel arrangements also tells us something about the development of judicial independence in the international courts and the relationship between political culture and institutional arrangements in the promotion of judicial independence; and equally importantly, the public perception of independence.

II. RATIONALE FOR THE CREATION OF THE CARIBBEAN COURT OF JUSTICE

In common with the creation of many other international courts around the world, the Caribbean Court of Justice had a long gestation. The proposal for a regional Caribbean Court was first mooted as long ago as 1901 and raised at governmental level in 1947.[6] The debate as to the pros and cons of such a court ebbed and flowed over the next forty years.[7] Until the 1960s when the first Caribbean states obtained their independence, this debate was inevitably more academic than practical but as the nations one by one broke their links to the former colonial powers and established independent constitutions, the desirability of an autonomous court to 'complete the circle of independence' became more pressing.[8] In common with most of the commonwealth countries, the continuing role of the Judicial Committee of the Privy Council (PC) in the UK had become increasingly difficult to reconcile with the growing self-confidence, identity and self-governance of the region. The arguments for and against the creation of the court involved two separate but connected issues. First, whether the final appellate jurisdiction of the newly independent states should be repatriated from the PC, and secondly, whether an original jurisdiction along the lines of the European Court of Justice was needed to provide the judicial branch of the emerging regional economic and political structures.

Pressure to remove the final appellate jurisdiction from the PC grew in strength from the 1960s. Guyana became the first country to abolish such appeals as early as 1970. By the late 1980s the continued role of the PC in the region was increasingly viewed as incongruous.[9] In 1988, the arguments in favour of replacing the PC finally prevailed and the Heads of Government of the Caribbean Community meeting in Antigua agreed to establish an independent court to hear both civil and criminal appeals. On a practical level, it was also argued that the physical distance from the PC

[6] See D Simmons CJ, 'The Caribbean Court of Justice: A Unique Institution of Caribbean Creativity' (2004–2005) 31 Commonwealth Law Bulletin 1 72–73.

[7] For a fuller review see D Pollard, *The Caribbean Court of Justice: Closing the Circle of Independence*, (The Caribbean Law Publishing Company Ltd, Kingston, Jamaica, 2004) H Rawlins, *The Caribbean Court of Justice: The History and Analysis of the Debate* (CARICOM, Georgetown, 2000); S McDonald *The Caribbean Court of Justice: Enhancing the Law of International Organizations* (The Caribbean Law Publishing Company Ltd, Kingston, Jamaica, 2005).

[8] See Pollard (n 7) above.

[9] See Simmons (n 6) above 76–78.

in London undermined access to justice and that establishing the final court in the Caribbean would make it easier for citizens to pursue an appeal.[10] At the same time, a strong driver of change was the growing awareness of the need and desire to develop a distinctly Caribbean jurisprudence in keeping with the particular societal conditions and values of the jurisdiction in the way that other former colonial powers such as Canada had done.

Beyond the general and common post-colonial desire to establish a regional court which could develop the indigenous law, the Caribbean experience was shaped by a very particular conflict with the PC over the constitutionality of the death penalty. In a series of cases between 1993 and 2000 in which defendants who had been sentenced to death appealed to the PC, the court restricted or reduced the scope of the death penalty.[11] Reaction against this perceived interference in the judicial and political autonomy of the region was widespread. The former chief justice of Barbados, David Simmons commented that:

> Broadly the effect of these cases has been to prevent the use of the death penalty in the region. Caribbean people and their governments became frustrated and angry that the reasoning of the judges of the JCPC in case after case went beyond acceptable judicial activism and was clearly judicial legislation on an issue of social policy.[12]

At the same time, the movement towards the establishment of a single market in the Caribbean moved ahead. The increasing wealth of the region through oil, trade and tourism strengthened the drive to greater integration and the move from a politically based to a rule based system. The need for a court to settle disputes in the CARICOM block and the obvious analogy of the role of the EJC within the EU became increasingly clear. By the early 1990s, calls for a regional court were growing stronger. Most notably the influential Ramphal Commission in 1992 argued forcefully for the creation of a regional court as a vital element of the regional integration process.[13] The Commission reflected a widespread feeling that the absence of a court process for settling disputes in the original Treaty of Chaguaramas in 1973 was instrumental in the relative failure of the earlier attempts at economic integration. In the Revised Treaty of Chaguaramas signed in 2001 the building blocks for a judicial dispute mechanism for the single market were finally put in place. Under the terms of the Treaty, the signatory states agreed to recognise the compulsory jurisdiction of the CCJ in resolving disputes between community members.

These twin drivers of change explain the mixed appellate and original jurisdiction of the Court; a combination which is unique amongst international tribunals. The particular historical circumstances mean that the CCJ is both the highest municipal court in the region and an international court with compulsory and exclusive jurisdiction in respect of the interpretation and application of the Treaty of Chaguaramas. In its appellate jurisdiction the Court hears appeals in both civil and criminal matters from common law and civil law courts within the jurisdictions of member States. In broad terms the appellate jurisdiction of the Court has been modelled on a common law

[10] ibid.
[11] Most notably *Pratt and Morgan v Attorney General of Jamaica* (1993) 43 WIR 340.
[12] Simmons (n 6) 80.
[13] S Ramphal, *Time for Action: The Report of the West Indian Commission*, (University of West Indies Press, Jamaica, 1994).

system; the majority of the States being common law. The exceptions to this are Suriname and Haiti both of which have civil law systems.[14]

In respect of its original jurisdiction the Court has exclusive jurisdiction to hear and deliver judgment on disputes between contracting parties to the Treaty as well as disputes between any contracting parties and the Community. It also has jurisdiction under Article IX(c) of the Treaty to hear referrals from national courts or tribunals of contracting parties. This article allows a superior court of a contracting party which is resolving a question concerning the interpretation or application of the Treaty to refer the question to the CCJ for determination if it considers that a decision on the question is necessary to enable it to deliver judgment. The experience of the ECJ in relation to its equivalent referral jurisdiction suggests that this Article may ultimately come to play a particularly important role in the jurisdiction of the CCJ since it may provide a relatively accessible and straightforward means to address conflicts in community law issues as they arise and so to promote certainty and stability within Caricom.

Although therefore the two jurisdictions of the Court are quite distinct in legal terms, their common roots are clearly identifiable as originating in the growing political and economic self-confidence of the Caribbean and the emergence of a regional identity. One important effect of the Court's two jurisdictions was that power flowed in two directions. By bringing judicial decision-making 'back home' from the UK to the region in relation to the appellate jurisdiction, the nations of the region regained a degree of control of their judicial decision-making (albeit at a collective level) whereas granting the original jurisdiction to the Court involved ceding national judicial power to a regional body. Thus, whereas the debate in relation to the establishment of most international court turns on the desirability or otherwise of devolving judicial power to a transnational body, in the Caribbean the position was more complex as a result of the hybrid nature of the Court.[15]

III. POLITICAL CONTEXT OF THE CREATION OF THE COURT

This summary of the origins of the Court highlights the arguments which ultimately prevailed in favour of the creation of a new regional judicial forum. In doing so, it provides a rather misleading image of consensus around the need for and desirability of the change. Given the fact that it took over 50 years from the first serious proposal to the final establishment of the Court, it should not be any surprise that there was considerable opposition to the move and that it was, and remains, a controversial development.[16] The creation of the Court needs to be understood in the context of the high degree of politicisation of all aspects of Caribbean society. With few exceptions, politics with both a large p and a small p permeates every aspect of life in the countries of the region, and the legal systems are not immune to this. At its most benign, this politicisation takes the form of a heightened awareness of the inherent power struggles which underlie all powerful institutions and influence public decision-makers including judges and the lawyers. At its worst, it has led to intrigue and corruption at various levels of the legal system in many jurisdictions in the region. A striking and recent example involved the suspension of Chief Justice Sat Sharma of Trinidad in 2006

[14] The appointment of one judge from a civil law system (discussed below) was a recognition of the need to take account of the different legal systems of these two jurisdictions.

[15] See McDonald (n 7) above.

[16] See Simmons (n 6) above 78–81.

on allegations of corruption put forward by the Chief Magistrate. An official enquiry chaired by Lord Mustill was tasked with recommending whether or not the Chief Justice should be investigated by the Judiciary Committee with a view to impeachment. The fact that the President felt the need to appoint a UK Law Lord to chair the tribunal so as to ensure that there would be no allegations of bias in its findings is in itself indicative of the deep-seated politicisation within the legal system in Trinidad. The Tribunal's report, although concluding that the Chief Justice's behaviour was not 'without blemish', found no evidence to justify his dismissal. Nevertheless, the report revealed a murky world of alleged bribes, land deals and lies. Although the tribunal acknowledged that it could not get to the bottom of the events, it left no doubt about the political motivation behind much of the behaviour of the leading legal figures involved.[17]

These recent events in Trinidad represent a particularly high-profile example of politicisation in the legal systems of the region, but they are not unique. Unravelling the effect of the high degree of politicisation of the legal systems on the debate about the creation of the Court, is not, however, straightforward. Given the general popular support for the death penalty in the region, particularly in those countries such as Jamaica which have experienced high rates of violent crime, the PC decisions of the 1990s undermining the constitutionality of the death penalty could have been expected to produce a strong public reaction against the PC in the region and widespread support for the creation of the new court and the repatriation of these cases to the region. Interestingly, however, the outspoken reaction of politicians against the PC judgments and the consequential revitalization of the long-standing debate about the need for a Caribbean Court of Justice led, paradoxically, to public suspicion as to the political motives of those advocating the establishment of the court and concern about its prospects for achieving independence. As one current judge of the CCJ has noted:

> Tempers were allowed to run high; reaction was swift and accusatorial; emotionalism was substituted for careful reflection and rational response, with the result that the impression was created that drastic measures were being contemplated by the regional political directorate to reassert the power of the executive over the judiciary.[18]

The political outbursts against the PC in relation to the death penalty cases led many people in the region to fear that their politicians had an agenda which would seek to bring the new court under their control and so to create an obedient 'hanging court'. Thus although the creation of a Caribbean court which would uphold the legality of the death penalty in the region would undoubtedly be a popular outcome in principle, it seems that the anxiety that such a court would be liable to corruption or improper influences from the executive was, for many observers, greater than the dislike of the PC decisions in these cases. These fears of politicization of the new court need to be contrasted with the extremely high regard for the integrity of the judges of the PC; both then and now. What many observers in the Caribbean demonstrated in the debate

[17] Lord Mustill's report concludes that 'The whole subject of the Chief Magistrate's conduct is shrouded in mystery which we have been unable to dispel... the picture presented to this Tribunal almost defies belief... The air was full of rumour, innuendo and gossip, around and across deep political (and, we are forced to say, ethnic) divides.' *The Report of the Tribunal to His Excellency the President of the Republic of Trinidad and Tobago in the matter of an Enquiry under Section 137 of the Constitution of Trinidad and Tobago* paras 5 and 97.

[18] Pollard (n 7) xiii.

over the creation of the CCJ was an impressive ability to oppose the particular decisions of a court while continuing to respect the court itself. The PC's geographical and political position outside the region, combined with a widespread historical respect for the integrity of British judges, established its reputation as completely independent and objective and so immunised from the political pressures of the region. Despite both the increasing awareness of the inappropriateness of decisions being taken by a court of the former colonial power and the unpopularity of some of those decisions, the value placed on judicial independence was such that support for the new court was mooted or at least qualified amongst many in the legal and academic communities as well as amongst the wider public.

This conclusion may be problematic for the court's supporters, and continues to create stress for the court, but it is, paradoxically, encouraging to those who value both judicial independence and international justice since it demonstrates that a distant independent court reaching unpopular decisions may sometimes be valued more highly than a local court more in tune with popular opinion but which is perceived as being more susceptible to political influence. It may be that this unexpected prioritizing of judicial independence in the Caribbean is a result of the very real and daily experience of corruption in both the legal and political spheres. In contrast, the lack of awareness of the need to cherish and foster judicial independence in some other parts of the world can be seen as a complacency borne of unfamiliarity with the corrosive and destabilizing effects of the threatened or actual manipulation of the courts by corrupt politicians.

IV. INSTITUTIONAL ARRANGEMENTS OF THE COURT

In the light of the deep-seated suspicion of political influences in the region's legal systems, it is not surprising that a key issue in the debate over the new court was how to ensure its independence. To this end, the long gestation of the court, while frustrating for supporters of its creation, had the advantage of allowing time to develop some unusually imaginative and well thought-through arrangements for protecting and promoting that independence. In two critical areas—the funding arrangements and judicial selection process—novel solutions were developed to entrench the independence of the court.

A. Funding

The CCJ is unique amongst major courts around the world, both national and international, in being completely independent of government for its funding. During the debates over the establishment of the Court a recurrent concern was whether it would be possible to ensure sufficient and reliable funding to maintain the necessary quality and independence of the Court.[19] Past experience of governments in the region defaulting on their contributions to regional institutions had given rise to a widespread scepticism about their willingness to contribute to the budget of the court on a reliable basis.[20] In response to these anxieties, a new funding arrangement was proposed involving the creation of a trust fund which would take away the need for ongoing

[19] See Rawlins (n 7) 39–41.

[20] Pollard (n 7) 38.

contributions to the running costs of the Court. The idea was first mooted by Justice Duke Pollard and supported by Sir David Simmons, the Chief Justice of Barbados. On their suggestion it was taken forward by the Preparatory Committee established in 1999 to supervise the work leading to the inauguration of the Court. The Preparatory Committee proposed that a trust fund of $100 million should be established to provide the running costs of the court including the salaries of the judges and the expenses of the Regional and Judicial Legal Services Commission.[21] The Trust funds were raised on the international money markets by the Caribbean Development Bank on behalf of the governments which contracted to repay the funds to the Bank. The trustees of the fund, a group of respected leading citizens independent of the political system of each country, are responsible for overseeing the investment and management of the fund.[22]

This novel arrangement for securing the funding of the Court appears to have worked well and, to date, the primary concern expressed about its future is whether the original sum raised will be sufficient, given the effects of inflation and increased salary costs, to ensure that the costs of the court are covered in perpetuity without having to use capital. If this proves not to be the case then a decision may have to be made amongst the Heads of Government of the Caribbean Community to raise further funds using the same method as before. This issue aside, the overall model is one which has been widely praised both in the region and the international court community more widely.[23] Although such a relatively extreme means of insulating the funding of the Court from the vagaries of political fluctuations may be less obviously applicable and necessary for more established international courts such as the International Court of Justice and the European Court of Justice, for newly created courts and for those which are set up in the future which may be more vulnerable to political pressure or financial insecurity, this funding model is one which could be bring important benefits in securing the long-term independence of the courts. Moreover, although the older international courts are unlikely to find that their funding is withdrawn or cut as a crude response to politically unpopular decisions, more subtle attempts to curb the reach and activism of certain international courts through tightening of funds is quite possible. Such attempts to check the expansive role of the courts through the control of the purse-strings has been seen many times at national level. Likewise, many instances can be cited of less politically motivated budget cuts driven rather by simple neglect or undervaluing of the work of the courts. The effect of such cuts is no less damaging on the quality and effectiveness of the court. For these reasons the funding arrangements of the CCJ warrant serious consideration for wider adoption by the community of international courts.

B. Selection of Judges

The second feature of the CCJ which makes it unique among the international courts is its use of a Regional Judicial and Legal Services Commission (RJLSC) to appoint its

[21] See Simmons (n 6) 87 and Rawlins (n 7) 42–43.

[22] Details of the trust fund and the trustees can be found at: http://www.caribbeancourtofjustice.org/trustees/annual_report07/pg_2.pdf

[23] The creation of the Trust Fund was cited by interviewees as one of the greatest strengths of the Court.

judges.[24] Although judicial appointments commissions of one form or another have become an increasingly popular method of judicial selection in national courts around the world, the normal method for selecting judges to regional and international courts to date has been a process of governmental nomination and/or election.[25] The decision to break with this tradition in the CCJ was, as with the establishment of the Trust Fund, driven by a desire to insulate the appointments process from political influence. The creation of some sort of independent appointments commission had been proposed in discussions about the new court as early as the 1960s but the exact mechanism and composition of the body had not been thought through. Later proposals for the selection process instead reverted to a more conventional system of nominations from the national governments. However strong opposition to this arrangement came from the Bar Associations of the region; most particularly from the Jamaican Bar Association which campaigned vigorously in the 1990s for the creation of a system which was less exposed to political influence.

Given that the risk of politicization was such a central theme in the debate over the establishment of the CCJ, it should be no surprise that the question of how and by whom the judges of the new court were to be chosen was a highly sensitive one. The long history of government interference in the appointment of judges at domestic level in many of the Caribbean countries meant that 'there was a legitimate and justifiable suspicion of the executive in the appointments process'.[26] Moreover, the proposal to create some form of commission was less radical than it might seem in that commissions have been widely adopted for selecting judges to the national courts in the Caribbean and to the Eastern Caribbean Supreme Court. This was therefore a model which many participants in the debate had some direct experience of and so the proposal to create a commission did not constitute a dramatic shift in thinking. Nevertheless, despite these local precedents, the attempt to remove political influence from the process for selecting judges to a fully-fledged international court was highly unusual given the long history of governmental involvement in the selection of international judges.[27] Nor was there widespread confidence that depoliticization would, in practice, be possible to achieve given the particular history or the relationship between law and politics in the region. The decision to create an appointments commission for the CCJ was therefore a controversial one and was accompanied by considerable scepticism.[28]

These fears were compounded by the fact that the CCJ was to consist of fewer judges than member states, giving rise to competition between states for a place on the Court. In international courts where each state is allocated a seat on the court, as in the ECtHR and ECJ, such competition is removed and so a source of potential politicization is defused. In contrast, where countries must compete for the election or appointment of a judge, there is inevitably more scope for governmental pressure and political horse-trading. Although very little research has yet been carried out on

[24] The RJLSC appoints all the judges except the President of the CCJ who is selected by the Heads of Government. Some interviewees suggested that this post too should be brought within the remit of the Commission to reduce the scope for the politicisation of future appointments.

[25] K Malleson and P Russell (eds), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (Toronto University Press, Toronto, 2006).

[26] Comment by Justice of the CCJ in interview. See also R Antoine 'Waiting to Exhale' (2005) 29 2 Nova Law Review 148–9.

[27] See Terris et al (n 1) 24–25.

[28] Pollard (n 7) 11.

judicial nomination and election processes at international level, anecdotal evidence indicates that they are often highly politicised affairs.[29] The combined effect, therefore, of the relatively limited number of judges on the CCJ and the highly politicized regional context posed a very real challenge to the aim of creating a depoliticized judicial appointments process.

The formal independence of the Commission was established in the 2001 Agreement which states that in the exercise of their functions: 'the members of the Commission shall neither seek nor receive instructions from any body or person external to the Commission'.[30] A key to achieving this goal, in practice, was the recognition that the composition of the RJLSC needed to be drawn from a relatively wide range of constituencies so as to resist 'capture' by any one interest group or another. In the debate about its membership, a consensus emerged amongst the Heads of Government of the Caribbean Community that the commission should be neither a politically nor legal dominated institution and that stakeholders from other sections of the community needed to be included.[31] To achieve this aim it was agreed that the eleven members should be composed of the President of the CCJ as Chair; two lawyers; two lay people; two academics, two regional Bar representatives and two chairs of the public service commissions and judicial services commissions of the Member States.[32]

This make-up corresponds broadly with the membership of a number of well-established and successful commissions around the world. Experience from these bodies indicates that there is no one ideal model of commission which fits all jurisdictions but that a key common factor in those which are most successful is a diversity of membership. A make-up which is balanced between members from different backgrounds and institutions ensures that the commission is not subject to the control of any particular interest group and so has the best chance of resisting external pressure and maintaining a strong commitment to a system free from political patronage.[33] A broadly drawn membership is most likely to prevent domination by any one interest group and to promote the creation of a collective identification of the members with the aims and purposes of the commission itself rather than seeing themselves as representatives of the institution or group from which they have been drawn. Equally important to the prospects of promoting a primary commitment to the Commission amongst its members is the question of how the commission members themselves are selected. Effective and independent commissions tend to be those where the scope for groups and institutions (political or legal) to select commissioners who are perceived (as perceive themselves) as being there to represent a particular interest. Here too the systems devised for appointing the RJLSC members reduced this danger through the inclusion of ex officio appointments of the Chair and the two chairs of the national

[29] See M Wood, 'The Selection of Candidates for International Judicial Office: Recent Practice' in Ndiaye and Wolrum (eds), *Law of the Sea, Environment and Settlement of Disputes* (Brill Publishing, Koniknlijke, 2007) 357–368. The effect of political influences in the selection of judges to the international courts is currently being examined in a research project being undertaken by the author and the Project for International Courts and Tribunals, University College London. [30] Article V(12). [31] Pollard (n 7) 11.

[32] Full details of the membership of the RJLSC can be found at: http://www.caribbeancourtofjustice.org/about_rjlsc.html

[33] K Malleson, 'Creating a Judicial Appointments Commission: Which Model Works Best?' (2004) 102–121 PL; K Malleson *The Use of Judicial Appointments Commissions: A Review of the US and Canadian Models* (1997) Lord Chancellor's Department Research Series No 6/97.

services commissions (appointed by rotation in name alphabetical order). The result appears to be a widespread view that the diversity in the membership of the commission had helped it to develop a strong independent identity and to distance it from the political process.[34] Indeed where criticisms have been expressed these have tended to argue that the membership might be too heavily weighted in favour of the legal community and the judiciary. This concern is therefore of potentially too close a link between the legal profession, the court and the commission rather than any danger or executive pressure or interference.[35]

One potential source of external influence which might, however, give cause for concern, is the danger that politicians could exert influence indirectly through the media, which has a history of being used for political purposes. It was noted by some of those interviewed for this research that press coverage of the candidates, initiated or fed by politicians, had the potential to exert pressure on commissioners when decide between a politically 'favoured' candidate and others. While there was no suggestion that this had occurred in practice in relation to the appointments made to date some anxiety was expressed that this might become a concern in the future if and when the appointments to the CCJ become more politically controversial. Past experience from judicial appointments commissions at the national level has shown that where press coverage is intense or critical, commissions are more likely to be able to resist inappropriate external pressures where they apply professional and rigorous selection procedures with transparent selection criteria and decision-making processes. The nature of the selection process is therefore of considerable indirect importance in helping the Commission to maintain its independence and withstand political pressure.

In the application round used to appoint the first cohort of judges, the RJLSC sent out an open call for candidates with advertisements for the posts being placed throughout the region and internationally. Approximately 90 applications were received and a shortlist of 30 was drawn up from which 12 were interviewed and seven were chosen. The absence of any form of lobbying for or against candidates was a particularly striking feature of the system in contrast to the selection process for most international courts and was identified by many of those interviewed for this research as a very positive feature of the system which encouraged good quality candidates to come forward and reduced any danger of political interference. Of the seven judges appointed at least one candidate applied after seeing an advertisement with no prior knowledge of the new court and a number of candidates who were encouraged to apply by colleagues were 'outsiders' in the sense that they were not personally known to those involved in establishing the court. Bearing in mind the relatively small and close-knit legal elites in the region, this is a strong indicator of the openness and independence of the selection process.

The interview process itself, although undertaken by the full commission, was relatively informal and undemanding when measured against comparable procedures such as the interviews for South African judges before the Judicial Services

[34] A strong degree of approval of the make-up of the membership of the RJLSC was expressed by almost all interviewees.

[35] A number of interviewees proposed that this should be countered by increasing the proportion of representatives of civil society on the Commission.

Commission.[36] Nor were they held in public as they are in South Africa. Candidates were asked about such matters as their past legal experience, their publications and academic work as well as their general opinions of Caribbean society. The commission was careful to avoid potential controversial questions such as the candidates' views on the death penalty. For most of the candidates, this was their first interview for many years and some found the idea of being interviewed, if not the actually experience, stressful. This has given rise to a debate about whether there is a danger that some eminent lawyers might not be willing to apply for a judicial post which involved an interview of this kind. Some commentators have seen this as a problem while others consider that this is unlikely to deter serious candidates.[37] Although it is still early days in the working of the RJLSC and it will, no doubt, adapt and improve its procedures as it learns from past experience, the evidence to date suggests that it has established essentially sound processes for an independent, rigorous and fair appointments system. In so doing the CCJ has provided a very useful model of an alternative approach to selecting judges to an international court at a time when more established courts are rethinking their selection methods. The ECJ and ECHR are both, for example, exploring reform of the process and considering whether there is a role for some sort of commission.[38] The ICC has a provision in the Statute of Rome allowing for the creation of an advisory committee. Although this has not, to date, been set up there is clearly scope to revisit the provision in the future in the light of the experience of other courts. Similarly as new courts are created, the experience of the CCJ provides an important example of a different approach from the traditional national nomination and election process of the earlier courts.

V. COMPOSITION OF THE FIRST COURT

In common with most other international courts, the selection criteria for the judges of the CCJ set out in the 2001 agreement are very general. Candidates must be distinguished judges of at least five years standing or practitioners or teachers or law of at least 15 years standing. They must also demonstrate '. . .high moral character, intellectual and analytical ability, sound judgment, integrity, and understanding of people and society'.[39] In addition to these general qualifications, the range of desirable personal and professional characteristics of the judges was a subject of considerable debate as the first judges were selected. Just as diversity in the composition of the appointing commission is an important factor in establishing both its independence and public confidence in that independence, so the composition of the Court itself was seen as being critical to its credibility and functionality. In common with all international courts which have fewer seats than states, the geographical spread of the judges selected is always a key factor in shaping its own and the public perception of its

[36] K Malleson, 'Assessing the Performance of the South African Judicial Service Commission' (1999) South African Law Journal, 116, part 1.

[37] The prevailing view expressed by interviewees was that strong candidates were unlikely to be deterred from applying by the prospect of an interview provided the questions and process was handled professionally and appropriately.

[38] See C Chope, *Nomination of Candidates and Election of Judges to the European Court of Human Rights*, Draft Report, AS/Jur (2008) 343, Committee on Legal Affairs and Human Rights, European Assembly, Strasbourg.

[39] *Agreement Establishing the Caribbean Court of Justice* of 2001. Article IV(11).

identity. Likewise, the composition in terms of ethnicity, gender, career background and legal expertise of the judges is significant. The Commission therefore faced a considerable challenge in the first selection round in 2005 in identifying judges of the highest calibre from an appropriate range of backgrounds. The first seven judges appointed were drawn from Trinidad and Tobago, the UK, the Netherlands Antilles, St Vincent and Guyana. Five were black, two white and one is a woman. All but one, an international scholar and practitioner, came from the bench. One was drawn from a civil law system, the rest from the common law tradition.[40]

Inevitably, the exact balance and range of backgrounds has led to some criticisms. These tend to focus around those who have *not* been appointed rather than those who have. For example, the absence of a judge of Indian origin, the fact that only one of the seven judges is female and the presence of only one international lawyer.[41] Some commentators, while expressing these sorts of criticisms, also note that the particular make-up indicates the independence of the commission in selecting those it regarded as best qualified rather than politically expedient. The lack of a Jamaican judge, for example, was considered by some as problematic given the size and importance of Jamaica in the region, but by others as evidence that the Commission was not willing to appoint a less than highly qualified candidate in order to ensure the political approval of one of the most powerful states. In general, therefore, the first judges appointed appear to be well-regarded both in terms of individual abilities and in terms of the collective make-up of the court. The presence of a civil law expert, for example, seems to be viewed by lawyers and by the other judges on the bench as important in strengthening the scope of the Court's understanding. Vitally, none of those interviewed for this research indicated that there was any suggestion of politicization in the selection process. In particular, the fears that the Court might be a 'hanging court' ready to do the political bidding of the regional governments was firmly rejected as noted by the following interview comment: 'Frankly, if you know the judges on a one to one basis and know their philosophical views on the issue of the death penalty, you would wonder, well, if this is a court established to hang people, how did this person get selected?'

VI. THE EARLY YEARS—PROBLEMS OF PERCEPTION

In April 2005 the Court was inaugurated in Port-of-Spain, Trinidad. To date, its workload has been limited. In its first two years the CCJ heard only nine cases, all under its appellate jurisdiction. The number of cases heard in 2008 increased somewhat so that by March 2009 it had heard a total of 24 cases including its first two original jurisdiction applications.[42] The remaining 22 cases were made up of five appeals from

[40] For full details of the current judges see http://www.caribbeancourtofjustice.org/judges.html

[41] The agreement stipulated the appointment of three candidates with expertise in international law. The appointment of only one such candidate, Justice Duke Pollard, led to the unsatisfactory situation that the judicial retirement age was extended from 70 to 75 when Justice Pollard reached retirement age in 2006 to allow him to continue sitting and avoid the court being left without an international lawyer.

[42] *Trinidad Cement Limited-TCL Guyana Incorporated v The Co-operative Republic of Guyana* [2008] CCJ 1 (OJ) and *Doreen Johnson v Caribbean Centre for Development Administration* [2009] CCJ 3 (OJ). The former case involved an allegation by a cement company of a breach by Guyana of the provisions of Article 82 of the Treaty which oblige Guyana to

Barbados and 17 appeals from Guyana. Of the 12 countries which are contracting parties to the Agreement, only six have accepted the appellate jurisdiction of the Court and of these only Guyana and Barbados have completed the domestic requirements to accept the appellate jurisdiction and thereby replace the Privy Council. The reasons for this non-participation lie partly in the political opposition to breaking links with the PC discussed above and partly in the constitutional difficulties caused by the 2004 decision of the PC in *Marshall-Barnett v AG of Jamaica*.[43] In that case the PC upheld a challenge to the constitutional legitimacy of the statutes passed by the Jamaican Parliament transferring the final appellate jurisdiction from the PC to the CCJ. The PC held that under the Jamaican constitution, such a structural revision of the court system needed to be constitutionally entrenched and could not be undertaken in an ordinary statute. Critics have, inevitably, questioned the legitimacy of the PC determining whether or not its own jurisdiction should be removed. No doubt the claim made in the judgment that 'the Board has no interest of its own in the outcome of the appeal' is a genuine reflection of the individual views of the judges but it cannot be an accurate reflection of the institutional interests of the PC. Given the very strict definition of judicial bias applied by the House of Lords in the case of *Pinochet (No 2)* as requiring both actual and perceived impartiality, this failure to acknowledge the highly problematic nature of the decision is questionable.[44] Leaving aside these legitimacy issues, the practical effect of the decision in *Marshall-Barnett v AG of Jamaica* has been, effectively, to hinder the start of the Court's work and to push the question of the relative merits of a regional court versus the PC back into the party political arena. Although it seems likely that the Court's appellate jurisdiction will, eventually, be adopted by most of the signatory countries, there is no immediate prospect of the constitutional entrenchment required being achieved in Jamaica.

The explanation for the slow start of the Court's original jurisdiction has rather different origins. While there are no legal or constitutional barriers to the states bringing disputes under the Treaty to the CCJ, it appears that there is a general reluctance amongst politicians in the region to move conflicts from the political to the legal arena. To date, disputes over trade, services and regional migration have generally been negotiated behind closed doors in the political corridors and there is a reticence about transferring these negotiations to the more public and formal sphere of the CCJ. In many ways this experience mirrors that of the ECJ in the early years of its existence when its case load was limited and there remained considerable residual suspicion of the role and position of the Court before it established itself with both the legal and political communities as a normal forum for community dispute resolute.

Whether or to what extent the slow beginning of the CCJ matters is an important question. One clear benefit of the delay has been that the judges have had time to determine their rules of procedure without the pressure of a heavy caseload. For the first year or so it was undoubtedly beneficial for the court to be able to bed down without being under pressure from a heavy workload and public scrutiny. It has also

establish and maintain a Common External Tariff on cement imported into that State from countries outside the Caribbean Community. The latter was an application by an employee of CARICAD for, inter alia, wrongful dismissal. The Court held that it did not have jurisdiction to hear the case.

[43] PC Appeal no 41 of 2004.

[44] See K Malleson, 'Judicial Bias and Disqualification after *Pinochet (No 2)*' (Spring 2000) Modern Law Review 63.

meant that the judges have been able to give plenty of time and attention to the preparation of the few cases which came before them in the Court's first few years so allowing it to establish a reputation for high quality and careful judgments. Nevertheless, these early advantages will clearly become more marginal as time goes on. Despite the imaginative funding structure of the Court, the financial burden of its running is still, ultimately, borne by the Caribbean taxpayers. The CCJ currently costs around ten million dollars a year; a considerable sum in a developing region. The longer it continues without a full docket, the harder it will become to justify this cost. In addition, the lack of high profile engaging work is problematic for the judges themselves. All seven are highly qualified and experienced lawyers who joined the CCJ to hear challenging cases and to contribute to the development of the law in the region. Unless the court workload grows quickly, persuading equally dynamic and well-qualified judges to apply to apply to fill future vacancies on the Court will be difficult if it is seen as a judicial backwater.

Ultimately, for the workload of the Court to increase considerably, it must persuade the politicians and the public of the region that it is a fully independent body. The judges and lawyers interviewed for this research described the challenge of getting this message across as frustrating and problematic. One interviewee talked of a 'guarded optimism' that attitudes towards the Court were changing, but another commented that 'there is a long way to go because there is still that feeling that . . . the members of the Court could be tampered with politically'.

This apparent lack of public confidence in the Court is striking given the high degree of independence in the funding arrangements and the judicial appointments process. In the light of the history of politicization of courts in the region it may be that it will only be through the Court's judgments itself that it can be judged. One early decision in 2005, in which the Court upheld a challenge to the death penalty, may have gone some way to dispelling the notion that the judges are subject to the political will of the executive.[45] The Court held that the decision of the Barbados Privy Council (BPC) not to recommend commutation of the appellants' sentences was reviewable. It also held that the BPC had contravened the respondents' right to the protection of the law by not awaiting the outcome of the proceedings instituted by the respondents in the Inter-American Court system. One judge in interview commenting on the effects of the case noted that:

> [the judgment] stunned the anti-death penalty lobby. Because they thought the court would do what governments would expect it to do, and they were in for a shock. And I think it went a long way to convincing that lobby, that group of people that it really seems to be an independent court.

While this decision may have helped to bolstering the reputation of the Court for independence, there is clearly some way to go to persuade the governments and the people of the Caribbean to trust the high quality body they have created and to use it fully.[46] As another judge in interview acknowledged, 'the court has to earn its stripes. We'll have to demonstrate that people are entitled to place their confidence in us'.

[45] *The Attorney General Superintendent of Prisons Chief Marshal v Jeffrey Joseph Lennox and Ricardo Boyce*, CCJ Appeal No CV 2 of 2005.

[46] In March 2008, the leader of the opposition in St Vincent and the Grenadines announced the withdrawal of his support for the Caribbean Court of Justice citing fears of politicization of the court: 'I want to see further movement in relation to the issue of political involvement and what

Given that the judges have been appointed to the Court through a depoliticized selection system for their legal and judicial rather than political skills, the task of lobbying to persuade outsiders of their credibility may not be one which they are individually and collectively best suited given that self-publicity is not a role that judges are, by definition, generally comfortable with. Although the Court has embarked upon a 'public education programme' including judicial lectures and seminars designed to inform people about the role of the new court, progress will be slow unless there is a greater commitment on the part of governments and the media in the region actively to support the Court. Once again, it is relationships between the Court and external civil and political institutions which are instrumental in determining the nature of the Court's independence and in public perceptions about that independence. In the meantime the Court is in something of a Catch 22 position; it needs to win public confidence in order to gain support for the transfer of the appellate jurisdiction throughout the region but can only ultimately demonstrate that it is worthy of that confidence through its sound and independent judgments.

A further paradox is that while enthusiasm for the Court may be only very slowly building in the Caribbean, the desire amongst UK judges and government to see the transfer of the appellate jurisdiction to the region completed has undoubtedly increased in recent years. Despite the PC ruling in *Marshall-Barnett v AG of Jamaica*, there is less appetite for the Court to retain anything more than a persuasive authority through their decisions in London. The desire to see the last jurisdictions of the former colonies transferred has grown stronger with the creation of the new UK Supreme Court which will hear its first cases in 2009. Although the PC jurisdiction has by necessity been retained, it is increasingly anomalous in the context of a modernised UK final appellate structure. Given the detailed and careful discussion about the role of the UK Supreme Court vis-à-vis the new devolved jurisdictions of Scotland and Wales, the retention of a colonial hangover feels increasingly anachronistic. The pressure for change may, therefore increasingly come from the UK as much as from the Caribbean as the UK government seeks to encourage the signatory states to pass the necessary constitutional changes to allow the PC's jurisdiction to be transferred to the CCJ.

VII. CONCLUSION

The origin and early years of the CCJ can only be fully understood in the context of the particularly high level of politicization in the legal systems of the region and the resulting general mistrust of courts. This background explains why those involved in the establishment of the CCJ worked so hard to create unique and impressive safeguards for promoting the independence of the court. Measured against the institutional and economic arrangements of other international and domestic courts, the judges of the CCJ enjoy high levels of individual and collective independence.

While the context in which the CCJ was created may be particular to its time and place, it nevertheless offers an important comparative model to other international courts when considering possible methods for strengthening the institutional protection of judicial independence. Traditionally, the funding for international courts has been provided, directly or indirectly, by the signatory governments and the judges have been

role the political directorate can play.' http://www.bbc.co.uk/caribbean/news/story/2008/03/080317_newsbriefspm2.shtml

chosen through nomination and election processes which are often highly politicized affairs. The appropriateness of these funding and judicial selection arrangements and the options for reform are currently the subject of debate in a number of international courts. While allegations of crude corruption and interference in judicial decision-making at international level is very rare (though not unknown) there is a growing sense of discomfort about the vulnerability of these courts to budget cuts and the degree of horse-trading involved in the selection of international judges with the resulting danger that political considerations may sometimes override the principle of appointment on merit.

In addition to the contribution it makes to the debate on the practical arrangements for promoting judicial independence, the CCJ also offers an important insight into the vital role of public perception in the promotion of judicial independence. While the evidence to date indicates that the CCJ consists of independent-minded and highly competent judges, it is clear that it will take time for the Court to overcome the pre-existing legal and political culture of scepticism and suspicion. The experience of the CCJ suggests that once a cycle of public mistrust has developed, even a court with impeccable institutional arrangements may struggle to build public confidence. Conversely, once public confidence in the independence of a court is embedded, its judges are able to draw on a relatively deep well of support irrespective of the institutional arrangements or indeed the popularity of their decisions, as is shown by the ongoing support for the Privy Council in the region.

Given that the international courts are relatively new institutions, having all been created in the 20th or 21st century, many of them have not yet established that bedrock of public confidence in their independence which is often enjoyed by domestic courts and they must work to establish it. Failure to address public concerns over the independence of the courts in their early years may make this much harder to achieve once doubts have set in. Moreover, international courts often face the added challenge of overcoming the suspicion in some member states that the judicial decision-making is undermined by the presence of judges from jurisdictions with a weaker tradition of judicial independence who will dilute the independence of the court. Public confidence in the courts at international level therefore cannot be assumed and must be actively championed.

To date the international courts have, paradoxically, been shielded from significant public criticism by the widespread lack of knowledge about what the international courts do, who the judges are and how they are chosen. However, as the number of courts increase and their role continues to expand, public interest in their work inevitably and rightly will increase and difficult questions will be asked about the competence, legitimacy and independence of the international courts. If those who support the development of international law seek to foster a long-term vision of the international judiciary as a global model of integrity, intellectual ability and independence which can rise above the political pressures to which many domestic courts are subject, then working to enhance public confidence in the institutional arrangements of the international courts should be a high priority.

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