

# “The crossroads of decision-making”

Time to replace the JCPC

JC2016

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# The JCPC in Antigua & Barbuda

- o *Constitution; s. 122 (1)(a)–*
- o *An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council as of right in the following cases–*
  - o *final decisions in any civil proceedings where the matter in dispute on the appeal to Her Majesty in Council is of the prescribed value or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the prescribed value or upwards;*

# The Constitution (i)

- o S. 122, cont'd- (1)(b); (c); (d)
- o *Final decisions in proceedings for dissolution or nullity of marriage;*
- o *final decisions in any civil or criminal proceedings which involve a question as to the interpretation of this Constitution; and*
- o *such other cases as may be prescribed by Parliament.*



# The Constitution (ii)

- o S. 122 cont'd- (2)(a); (b)
- o *Subject to the provision of section 44(8) of this Constitution, an appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council with the leave of the Court of Appeal in the following cases-*
- o *a. decisions in any civil proceedings where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council; and*
- o *b. such other cases as may be prescribed by Parliament.*
- o

# The Constitution (iii)

- o S. 122, cont'd- (3); (4)
- o . *An appeal shall lie to Her Majesty in Council with the special leave of Her Majesty from any decision of the Court of Appeal in any civil or criminal matter.*
- o *Reference in this section to decisions of the Court of Appeal shall be construed as references to decisions of the Court of Appeal in exercise of the jurisdiction conferred upon that court by this Constitution or any other law for the time being in force.*



# The Constitution (iv)

- o S. 122, cont'd- (5)
- o *In this section the prescribed value means the value of fifteen hundred dollars or such other value as may be prescribed by Parliament.*

# The Constitution (v)

- o S. 47(5)-
- o *A bill to alter this section, schedule 1 to this constitution or any of the provisions of this Constitution specified in Part I of that schedule or any of the provisions of the Supreme Court Order specified in Part II of that schedule shall not be submitted to the Governor-General for his assent unless-*
  - o *there has been an interval of not less than ninety days between the introduction of the bill in the House and the beginning of the proceedings in the House on the second reading of the bill in that House;*



# The Constitution (vi)

- o S. 47 (5) cont'd-
- o *After it has been passed by both Houses of Parliament or, in the case of a bill to which section 55 of this Constitution applies, after its rejection by the Senate for the second time; and*
- o *the bill has been approved on a referendum, held in accordance with such provisions as may be made in that behalf by Parliament, by not less than two-thirds of all the votes validly cast on that referendum.*

# The Constitution (vii)

- o S. 47 (6)–

- o *Every person who, at the time when the referendum is held, would be entitled to vote in elections of members of the House shall be entitled to vote on (a) referendum held for the purposes of this section in accordance with such procedures as may be prescribed by parliament for the purposes of the referendum and no other person shall be entitled so to vote.*



# The Constitution (viii)

- o S. 47 (7)-
- o *The conduct of any referendum for the purposes of subsection (5) of this section shall be under the general supervision of the Supervisor of Elections and shall be in accordance with such provisions as may be made in that behalf by Parliament.*

# The Constitution (ix)

- o SCHEDULE 1 TO THE CONSTITUTION
- o PART 1
- o THE PROVISIONS OF THE CONSTITUTION REFERRED TO IN SECTION 47(5)
- o Chapter II;
- o Chapter VI;
- o Sections 22, 23, 68 and 80;
- o Sections 27, 28, 36, 40, 44, 46, 52, 54, 57, 58, 59, 60, 61, 62, 63, 64 and 65.
- o Chapter VII (except sections 106, 107 and 108);
- o Chapter VIII;
- o **\*Chapter IX;\***
- o Section 123;
- o Section 127 in its application to any of the provisions mentioned in the foregoing items of this part.



# The Referendum

- o An expression of direct democracy in which an entire electorate is asked to vote on a particular proposal
- o *"A referendum ... is basically a consultative process, a device for the gathering of opinions. Voting in a referendum differs significantly from voting in an election" per L'Heureux-Dubé J. in **Haig v Canada [1993]**.*

# The argument for the CCJ...

- o (i) SOVEREIGNTY

- o “ ...offensive to sovereignty of a nation and politically unacceptable to have a foreign tribunal...as [its] final court...” - “Towards a West Indian jurisprudence” -Sir Isaac Hyatali (1987)



# The argument for the CCJ...

- o “...the continued subordination of our judges to British judges must embarrass our zeal for localizing other areas of decision making...” -**“The case against West Indian Appeals to the Privy Council”** -Dr Francis Alexis (1975)

# The argument for the CCJ...

- *The necessity of having to resort to a tribunal outside of the region's jurisdiction is considered to be an infringement of our national sovereignty and an appendage of colonialism...* -**"The Establishment of a Caribbean Court of Appeal..."** -Harriett Seenath (1990)



# The argument for the CCJ...

- o *“We cannot help contrasting this timorousness and sense of insecurity with the urgency to be independent...to replace the monarchy...to control our economy...to be in authority in Church and State, to determine our own destiny...” –***Jettison the Judicial Committee, you t’ink it easy?”**-  
Dorcas White

# The argument for the CCJ...

- o Arms of national government -state powers
- o (i) Legislative -
- o (ii) Executive -
- o (iii) Judicial -
- o (iv) Administrative -



# The argument for the CCJ...

- o (ii) UNFAMILIARITY
- o *...ponderous, sonorous sermons delivered by English vicars whose language was not the language of our miseries and could not determine nor define what was contained in our hearts. They did not even know our sins...* – “A passage back home” –Austin Clarke [1994]

# The argument for the CCJ...

- o (iii) PHILOSOPHY

- o “...the JCPC, which consists of judges who are imbued with English notions of sovereignty, who are relatively unfamiliar with the interpretation of written constitutions containing limitations on the power of legislatures...” – **“The JCPC as Appellate Court”** -Claire Palley (1967)



# The argument for the CCJ...

*“Frequently, the court avoids giving a decision on a difficult point of law by declining to interfere with the decision appealed from in view of the “advantage” bestowed (on the colonial court) by the knowledge of local conditions...” –Palley, loc. cit. (1967)*

# The argument for the CCJ...

- o (iv) **EXPENSE, DELAY, LESS EASE OF ACCESS**
- o *“...that the Privy Council is located across the Atlantic Ocean and is therefore not easily accessible provides some considerable disadvantages. The expenses incurred by individuals due to travel alone, not to mention legal costs can be a prohibitive factor..” -Seenath, loc. cit.*



# The argument for the CCJ...

- o (v) INFERIORITY-DEPENDENCY COMPLEX ?
- o “...arguments have one common underlying factor: a dependency rooted in slavery and indenture...” -Dorcas White, loc. cit.
- o “...manufactured societies...dependent on empires for law, language, institutions, culture, even officials. Nothing is manufactured locally, dependency has become a habit...” -V S Naipaul

# The argument for the CCJ...

- o A judicial view from Britain...
- o Lord Phillips, formerly UK Chief Justice, has questioned whether some Privy Council cases really needed to be heard by a panel of five of Britain's most senior judges.
- o In an interview in the UK's Financial Times newspaper, he stated that that *"in an ideal world" Commonwealth countries - including those in the Caribbean - would stop using the Privy Council and set up their own final courts of appeal instead*". - BBC - September 24, 2009.



# The argument for the CCJ...

- o And another view...
- o One commentator said it was a "minor public scandal" that judges in the country's top court spent almost half their time on business "of no interest to anyone in the UK"  
-BBC -September 24, 2009.
- o *Do they want us?*

# The argument for the JCPC...

- o (i) **COMPETENCE AND EXPERIENCE**

- o “...the judges of the Privy Council have been of the highest calibre, unrivalled in terms of excellence and ability...” – Seenath, *loc. cit.*



# The argument for the JCPC...

- o BUT...

- o *“There are regional members of the legal profession both on the Bench and at the Bar who have distinguished themselves...” - Seenath, loc. cit.*

# The argument for the JCPC...

- o (ii) ECONOMY
- o Some have doubted whether *“...there could arise in the region a sufficient quantity or variety of litigation to justify the expenses...to keep the judges busy...”* –The Wooding Commission (minority)
- o AND
- o JCPC costs the region nothing...



o BUT

o Does “independence become meaningless when we are offered dependence without charge?” –Dorcas White, *loc. cit.*

# The argument for the JCPC...

- o (iii) NEUTRALITY AND OBJECTIVITY
- o Fears have been expressed that a regional court might lack impartiality and that political considerations would enter into the selection of judges to staff a...final court



# The argument for the JCPC...

**BUT**

*“It must be the supreme paradox that the alien nature of those judges is transformed into their very qualification in this, the heyday of Caribbeanization...” –Alexis, loc. cit.*

# The argument for the JCPC...

- o Selection of judges-
- o 6. *The President shall be appointed or removed by the qualified majority vote of three-quarters of the Contracting Parties on the recommendation of the Commission.*
- o 7. *The Judges of the Court, other than the President, shall be appointed or removed by a majority vote of all of the members of the [RJLS] Commission. –Agreement Establishing the CCJ; Art. IV*

# The argument for the JCPC...

- o **11.** In making appointments to the office of Judge, regard shall be had to the following criteria: high moral character, intellectual and analytical ability, sound judgment, integrity, and understanding of people and society. –**Agreement Establishing the CCJ; Art. IV**



# The argument for the JCPC...

- o **12.** The Commission may, prior to appointing a Judge of the Court, consult with associations representative of the legal profession and with other bodies and individuals that it considers appropriate in selecting a Judge of the Court. –**Agreement Establishing the CCJ; Art. IV**

# Conclusions

- o *"It has to do with (the question),"... "do the Caribbean people feel that they have enough confidence in their own institutions?"*
- o -Sir Probyn Innis (2009) -BBC interview

# Conclusions

- o Objectively speaking, the arguments are overwhelmingly in favour of acceding to the appellate jurisdiction of our CCJ.

o **THANK YOU**