

**The Role of the Court of Appeal in Developing
and Preserving an Independent and Just Society**

Salutations

Introduction

I thought I should begin with an amusing story of an appellate tribunal. We have all heard the expression as sober as a judge. How many of us know its origin? I was intrigued to learn that the expression dates back to King Philip of Macedon, the father of Alexander the Great. Philip exercised supreme appellate authority over his people. This monarch required no Privy Council to advise him. He advised himself. One day, as he was holding court, one of his female subjects petitioned him for justice after she had been unfairly found guilty. She stood before Philip who had been drinking heavily. To be blunt, Philip was drunk. In short order he dismissed the petition. “I will appeal this judgment”, the woman exclaimed defiantly. “To whom”, Philip indignantly roared. Without losing a beat, the woman responded, “I will appeal to Philip, sober”. Now, according to the Roman historian Valerius Maximus, the worthy appeal was indeed re-submitted. And it succeeded. The moral of the story? Clearly, if first instance judges may get away with it, the first obligation of the court of appeal is for its judges to be sober.

I must say that it is a profound honour to have been invited to deliver the second address in this extraordinary series and I salute the Trinidad and Tobago Judicial Education Institute for the excellent work it has been doing over the years. Here is a body that I have seen grow steadily over the years, from strength to strength. The impact of the training the JEI facilitates is not restricted to Trinidad and Tobago. It extends to and is felt and deeply appreciated throughout the region.

As I consider the work of the Institute and its development literally from scratch I can’t help but remember and reflect on my friendship with a dear friend and colleague, a true pioneer of post independence judicial education in the region, a judge well known to all of us here. I first met Justice of Appeal Kangaloo in 1998 in Halifax when we both participated in the Commonwealth

Judicial Education Institute's summer program. Wendell and I became instant friends. During the three weeks in Canada we were inseparable. We had much in common. We were both then baby judges, not just because we had not been very long appointed to the trial Bench of our respective judiciaries but also, because each of us was, on that appointment, the youngest judge of our respective courts. We shared the same deep commitment to and passion for the law and that program in Canada had a similar effect on us. It fired us up. We returned to the Caribbean and kept in close touch, encouraging each other in our respective careers which followed similar paths. Unsurprisingly, not long after his return to Trinidad he was appointed to chair the Trinidad and Tobago JEI. About the same time I too was appointed to chair the JEI of the Eastern Caribbean Supreme Court. He was appointed to the Trinidad and Tobago Court of Appeal. And I too was appointed to the Court of Appeal of the OECS. When I was invited to deliver this lecture, he and I had a preliminary exchange on the topic. He sent me some materials. We agreed to have further discussions. We were never able to do so. I know that like me you will all keep Wendell in your thoughts and prayers.

Approach to the topic

This evening I propose to focus not so much on cases decided by the court of appeal over time, but instead on the institutional role of that court. I wish to look at the court of appeal as a body having a responsibility to society that goes beyond merely deciding cases, a body that must meet the needs of the social order.¹ I would like to touch on various aspects of this institutional role courts of appeal enjoy in an independent society.

The colonial courts of appeal did not function in the same way. Their role lay in simply hearing and deciding cases. Interestingly, these pre-independence courts of appeal were regional courts. There was, for example, the West Indian Court of Appeal created as a result of a law passed in 1919.² That statute established a West Indian Court of Appeal whose members were the Chief Justices of the colonies of Trinidad and Tobago, British Guiana, Barbados, the Leeward Islands, Grenada, St. Lucia and St. Vincent. The Chief Justice of Trinidad and Tobago was the President of that court. The court heard appeals from the courts of the colonies just mentioned. Its process

¹ See Wooding, as quoted by Selwyn Ryan in *THE PURSUIT OF HONOUR*, The life and Times of H.O.B Wooding, Paria Publishing Company, 1990 at p.156

² West Indian Court of Appeal Act, 1919

ran throughout these colonies. A judgment of the court had full force and effect in each of them. Any such judgment could be enforced in the same manner as if it were an original judgment from the colony from which the appeal was brought. In 1958 that court gave way to the very highly respected Federal Supreme Court which had jurisdiction to interpret and apply the Federal Constitution and to hear appeals from the countries that made up the federation and also British Guiana and the British Virgin Islands. Thanks to the West Indian Reports it is still possible for all to see and admire the very high quality of judgments rendered by the Federal Supreme Court. Upon the dissolution of the West Indian federation, exactly fifty years ago, we had indigenous courts of appeal being established, with the Windward and Leeward Islands opting to create for themselves not just a regional court of appeal but an entire court system. These indigenous courts of appeal have responsibilities that are additional to those carried out by their predecessor bodies and this evening it is these additional responsibilities I would like to discuss.

As befitting a member of a Caribbean court I wish to look at the role of the court of appeal more from a regional or Commonwealth Caribbean perspective than from a purely Trinidadian one. In any event a regional focus would hardly deprive this audience of any insights that might otherwise have been provided if I were specifically to confine myself to the Trinidad and Tobago Court of Appeal. Among the English speaking Caribbean States there is a degree of integration, convergence, cooperation in the field of law, justice and jurisprudence that is unmatched in other fields. The establishment of both the Council of Legal Education and the Faculty of Law of the University of the West Indies has paved the way for institutionalizing such integration. And of course, the seminal decision by CARICOM States to subscribe a regional treaty to establish and maintain a common final Court of Appeal for the region has put the icing on the cake. The creation of the CCJ has far reaching implications for the future of regional and regionalized justice and it rekindles and realizes at least a part of the dream that was shattered fifty years ago.

The justification for and role of appellate courts

Why do we allow litigants to launch an appeal? What is the justification for a system of appeals? With reference to *civil* appeals in the United Kingdom, Messrs Drewry, Blom-Cooper and Blake³

³ THE COURT OF APPEAL, Hart Publishing, 2007

cite seven reasons justifying a facility to cater for an appeal. Some of these reasons overlap, but it is interesting to consider each of them:

- 1 Firstly, appellate courts enable aggrieved litigants to have their decisions reviewed for mistake by a multi-judge bench. Having been a trial judge myself I know only too well that in delivering justice, honest mistakes may be made during the course of a trial. The first instance judge (and throughout this lecture when I speak of a trial or first instance judge I refer to every conceivable first instance judicial officer imaginable, including magistrates), the first instance judge, sits alone. When trying a case, she may not desire or may not even be able to discuss with a colleague the weighty issues with which she is grappling. Quite apart from normal human fallibility, it is obvious that on this lonesome sojourn not infrequently errors are made. An appeal allows the aggrieved litigant an opportunity to correct the mistake.
- 2 Secondly, appellate courts promote public trust and confidence in the justice system. They do so by, among other things, ensuring that the errors that are made in individual cases do not remain uncorrected. Like the stock market, the justice system thrives on public confidence. If obvious mistakes go uncorrected the public loses faith in the system of justice as a whole and this opens the way for extra-judicial resolution of disputes. The need to engender public trust and confidence resonates particularly strongly in the Caribbean and so in due course I wish to say more on this issue;
- 3 Thirdly, appeal courts seek to achieve a fair and correct decision in the particular case that comes before them. Well, this is quite obvious. Quite apart from affording to the losing side before the trial judge a second bite at the cherry, appellate courts and the public at large have an interest in making sure that the justice system produces the right result.
- 4 Fourthly, courts of appeal enhance judicial accountability. We hear a lot about judicial independence but that independence must naturally be balanced with accountability. Exposing decisions made by first instance judges to the scrutiny of a panel of more experienced judges is one aspect of judicial accountability. An appeal affords the opportunity to test first instance decisions.
- 5 Fifthly, an appeal enables the judiciary to develop and refine legal doctrine. This is facilitated in several ways. We have already alluded to the circumstance that appeals

are heard normally by a panel of judges, usually three. In the Commonwealth Caribbean these three are invariably more experienced judges, judges who are senior to the trial judges. One gets promoted to the court of appeal. As a case is appealed the issues in dispute become clearer and sharper. A court of appeal is therefore better able to concentrate attention on the essential facets of the dispute. This enables the appellate court to apply the law to narrower, more focused questions and in this way legal principles are refined and developed;

- 6 Sixthly, through the doctrine of precedent, courts of appeal help to promote consistency of decision making among the courts below and so contribute to maintaining the rule of law. A few weeks ago I was involved in the use of *The Merchant of Venice* in a judicial education exercise. Those of you who remember this Shakespeare classic may recall the trial to determine whether, for Antonio's failure to pay a debt of which time was of the essence, Shylock should be permitted to forfeit the bond that was secured by a pound of Antonio's flesh. During the trial, Antonio's counsel sought to persuade the judge that, in lieu of forfeiture of the bond, Shylock could accept as much as ten times the amount of the debt. The judge rejected out of hand this belated attempt to repay the debt. According to the judge:

“There is no power in Venice,
Can alter a decree established.
'Twill be recorded for a precedent,
And many an error by the same example
Will rush into the state.”

So, even in the 16th century judges were mindful of the corrosive effect of bad precedents. To have a bad precedent remain uncorrected will encourage similar errors to “rush into the State” and thereby damage the rule of law and open the door to a corruption of the entire legal process. It is appellate courts that have this function of eradicating bad precedents, of maintaining consistency and upholding the rule of law. This too, is an issue which I would like briefly to explore a little later.

- 7 Finally, appellate courts provide for trial judges a means of assessing their mettle. Conscientious and ambitious trial judges welcome appeals from their judgments. It

guarantees that their work is brought to the attention of the senior judges and it affords them an opportunity to obtain in a formal way extremely valuable and informed feedback.

The United States National Center for State Courts, after much consultation and deliberation, has published⁴ an excellent reference point for their state appellate court systems. That publication identifies the central goals of state appellate courts. Those goals are divided into four performance standards, namely: (1) protecting the rule of law, (2) promoting the rule of law, (3) preserving the public trust, and (4) using public resources efficiently. These performance areas are further broken down into 15 standards of performance which provide broad statements of what objectives appellate courts should pursue.⁵ I would suggest that courts of appeal in the region could benefit from a study of this publication which is available online.

These justifications for having an appeals process in civil cases and the statement of performance standards for appellate court systems give us more than a sense of what is the role of courts of appeal in the Caribbean. The output of such courts should be geared at correcting errors, unifying and clarifying the law, developing the law in a sound and coherent manner, and furnishing guidance to judges, attorneys, and the public in the application of the law⁶.

I found it interesting that one of the four performance areas cited by the National Center for States Courts lay in the efficient use of public resources. I think this strikes a chord in our region. The cases tried by our courts of appeal may come from a wide variety of sources. In Trinidad and Tobago, for example, appeals may reach the court from the High Court, the Magistrates' Courts, the Family Court, the Industrial Court, the Environmental court, the Tax Appeal Board, the Equal Opportunities Commission and, if more specialized courts are created in the future, appeals may also reach the Court of Appeal from those specialized courts as well. Increases in the volume of cases decided by these lower courts will almost certainly lead to a concomitant rise in the number of cases filed in the court of appeal especially as, for the most part, losing litigants at first instance have an almost automatic right of access to the court of appeal. In the

⁴ http://www.ncsconline.org/WC/Publications/Res_AppPer_PerformanceStandardsPub.pdf accessed 30th June, 2012

⁵ *ibid*

⁶ See Appellate Court Performance Standards, *ibid*

Eastern Caribbean, as many as 387 appeals were filed in 2009 and in 2010, in Trinidad and Tobago, 482 cases were filed in the Court of Appeal.

I think there is a danger that our courts of appeal can become overburdened if they are not already so. Appellate courts may therefore have to devise measures to balance generous rights of access to them against the desire to hear annually only so many cases as can fairly and reasonably be dealt with by the appellate judges. In particular, it is important to guard against a disproportionate amount of the court's precious resources being consumed by clearly unmeritorious appeals. All this points, perhaps, to the need for greater pro-activity by appellate judges. Strategies that may be considered in this context could include tighter control of the court's processes, the employment of methods of Alternate Dispute Resolution, perhaps more proceedings being done purely on paper and even rule changes to require permission to appeal in certain cases.

Factors conditioning the role of Courts of appeal in the Caribbean

What are some of the factors conditioning the role of our courts of appeal? In the first case, Caribbean Courts of Appeal are all intermediate courts in the sense that in the hierarchy of courts they are positioned between the apex court and trial courts. But this formally intermediate position is to some extent artificial, given that Caribbean judicial systems outsource their final appeals. Those States that still send their final appeals to the Privy Council must confront a situation where the role of the apex court is relegated to deciding the extremely small number of cases that manage to reach it. And even when we consider the limited adjudicatory role of the final court, where cases do reach that court the view earlier taken by the court of appeal may be decisive because of the Court of Appeal's greater familiarity with local conditions.

The case of *Panday v Gordon*⁷ provides an excellent illustration. Mr Panday had been successfully sued for labeling Mr Gordon a "pseudo-racist". Mr Panday appealed all the way up to the Privy Council the finding that those words were defamatory and, if they were, the amount

⁷ (2005) UKPC 36; (2006) 2 WLR 39

of damages awarded to Mr Gordon. In affirming the Court of Appeal, their Lordships took the view that the court of appeal was so much better placed than they were to decide each of those two questions that in effect it was pointless for them to review the court of appeal's determination of them.

My basic point is that the Privy Council is entirely unconcerned with the range of judicial policy issues and judicial education and judicial reform issues that face the local judicial branch of government. Those issues must be addressed by the local judiciary of which the Court of Appeal is in effect the highest rung on the ladder. Regional courts of appeal are intermediate only so far as the adjudication of disputes is concerned. For other purposes, their role is indistinguishable from that of a final court and so for those purposes, they must function as such.

The second circumstance that affects the role of local courts relates, naturally, to the context in which they carry out their work. Courts do not carry out their functions in a vacuum. The role of our courts in the region must naturally be located in the context of the surrounding environment. Courts are dynamic institutions. To be truly effective their role must be a responsive one; responsive to the social and economic realities and to the democratic and rule of law imperatives of the day.

What is the state of the region in which we live? CARICOM States are developing countries with most of them being small islands. Excluding Haiti's 14 million, the overall population of CARICOM is only about 6 million and the average GDP per capita, again excluding Haiti whose peculiar statistics tend to skew the mean, is \$4750 US. If we include Haiti the figure drops by as much as US\$350 per capita.

Caribbean countries continue to be challenged by economic, political and social factors that have their foundation in our colonial past.⁸ According to the UNDP's Caribbean Human Development Report of 2012, the legacy of very high levels of income inequality, gender inequality, high rates of unemployment, high rates of rural and urban poverty and social exclusion, has continued after

⁸ UNDP's Caribbean Human Development Report 2012, [http://www.undp.org/content/dam/undp/library/corporate/HDR/Latin%20America%20and%20Caribbean%20HDR/C bean HD R Jan25 2012 3MB.pdf](http://www.undp.org/content/dam/undp/library/corporate/HDR/Latin%20America%20and%20Caribbean%20HDR/C%20bean%20HD%20R%20Jan25%202012%203MB.pdf) accessed 29th June, 2012

independence.⁹ While CARICOM countries show decent rankings as high-level human development countries, these advances in social standing are offset by “poor economic performance, high debt burdens, and significant rates of poverty”¹⁰.

Responding to the challenges

Fostering a dialogue with social scientists

How do courts of appeal respond to the specific challenges they face? I have often felt that, especially now that ultimate responsibility for judicial decision-making rests (or shortly will rest) with a court located in the Caribbean, it is important that opportunities be created for a continuing dialogue to take place between our social scientists on the one hand and judges on the other. I really do believe that the judicial function would be enhanced if occasionally judges were to sit around a table with political economists and sociologists and discuss informally and in broad terms the interface between justice and national development. Such a dialogue can enable judges to make linkages between their decision-making in general and national development goals. If judges are better informed by experts in the field about what is happening in the society in which the judges live and work, then judicial decision-making in general and fact-finding in particular will benefit.

I believe if courts of appeal are properly to fulfill their role the judges need to take a little time to examine our societies so as to discover appropriate reference points from which to approach their role. What exactly is implied, for example, in the expression “an independent and just society”? How do I begin to conceive of my role, however modest, in the building of such a society if I have little or indeed a poor understanding of society? Understanding of society is a critical source of the elements that inform the exercise of judicial discretion! How do we ensure, for example, that just sentences are given if judges do not see beyond the penalty clause in a criminal statute and the guilt of the offender? These are not new questions. Selwyn Ryan’s biography of Sir Hugh Wooding quotes Wooding as professing that judges must not merely administer justice, they must further it¹¹. It is perhaps for these reasons that Article 4(11) of the

⁹ *ibid*

¹⁰ *ibid*

¹¹ THE PURSUIT OF HONOUR, The life and Times of H.O.B Wooding, Paria Publishing Company, 1990 at p.155

Agreement Establishing the CCJ clearly prescribes that in making appointments to the office of CCJ Judge, among several eligibility requirements regard shall be had to the candidate's understanding of people and society.

It is of course the role of the executive and the legislature to determine national policy directed at the construction of a just society. But the manner in which judges carry out their work can advance or thwart the unfolding of that policy. It can do so in a variety of obvious ways. For example, it is not so difficult to see how the level of competence of the judges, the timeliness of judicial decision-making, the efficiency with which cases flow through the courts and the accessibility of the courts all contribute to or retard social progress. There are other, perhaps less obvious ways in which the work of judges can have a significant impact on national policy and help to shape its direction. These would include such matters as the choices judges make during adjudication when, as is invariably the case, there are policy choices before them to be made and, in making such choices, the weight given to competing interests (which in turn presupposes, I continue to stress, a full understanding of those interests).

As must be quite obvious by now, I see courts, and the court of appeal in particular, as institutions that do a whole lot more than simply decide cases. In light of the court of appeal's position, in effect, as the highest indigenous court, there is a heavy responsibility on that court to interest itself in and to assist the Chief Justice with the entire range of matters that are ancillary to the adjudication of disputes, such as for example, formulating and guiding appropriate judicial policy, structuring relevant judicial education, identifying and executing much needed judicial reform and ensuring that the interests of the judicial branch is not encroached upon by the other branches of government.

Interpretation and Application of the law

Courts of appeal also play a critical role in interpreting and applying the law. Interpretation and application of the law can also promote or retard the building of a just society. Interpretation of law is never "neutral". The law serves interests, and judges must seek to discover precisely what those interests are in order to inform themselves better about the manner in which effect should

be given to the law. The interpretive function should always consider the history of the law, the purposes it served when it was made and the interests it currently serves.

This is especially the case with us in the Caribbean in light of our fractured past of slavery, indentureship and colonialism. Just as in those days it was in the interests of the State that the law be used as a tool for advancing the goals of the colonizer, so now, in constructing an independent and just society it is in the interest of the people that the law be used as an instrument for expanding democracy and human rights, for promoting better governance, for stimulating social and economic development and for securing the welfare of the citizenry. The social order that existed during colonialism has not entirely been dismantled and re-fashioned to serve an independent people. Practices and prejudices developed during those days have lingered on. In the construction of an independent and just society, courts and law enforcement agencies alike must be mindful of this and be careful to focus their energies on safeguarding the interests of the citizenry as a whole.

Criminal justice reform

Sandwiched as we are between the major producers and consumers of illegal drugs, the Caribbean is a significant transit point in the drug trade. This is a major determinant in spiraling homicide rates involving gang-related violence.¹² My understanding is that crime in the region reveals an interesting pattern. A relative decline in petty and property crime is accompanied by alarming increases in homicides. This marks a change from high rates of property crime and low rates of violent crime that characterized the colonial era¹³. The increase in violent crime has reached the point where, in many CARICOM States, it poses a very serious threat to national security and heightens to intolerable levels the citizen's sense of insecurity.

These indicators point to the critical need for Criminal justice reform designed to address, *inter alia*, low conviction rates, inordinate delays and backlogs, inefficient caseflow, sentencing anomalies and low levels of public confidence in the criminal justice system. Since low crime rates and respect for the rule of law will attract investments and lead to increased productivity,

¹² *ibid*

¹³ *ibid*

the gains to be realized from addressing these problems extend as well to economic development.

It is essential that, along with the other branches of government, the judiciary should play a leadership role in guiding a holistic approach to criminal justice reform; an approach that integrates programs that simultaneously improve and coordinate the functioning of the various actors and institutions within the criminal justice system.¹⁴ Such reforms cannot simply be left to the other branches of government because judges are too busy trying cases. If the judiciary is not fully involved in conceptualizing and overseeing at least those aspects of the reforms that affect the work of the courts, the reforms will fail or else they will never realize their full potential. It must be said that from all indications, the Trinidad and Tobago judiciary is very conscious of this role and one sees and hears of active steps being taken to accept and fulfill it.

The Court of Appeal and the lower courts

As we saw earlier, a principal role of courts of appeal is to supervise and review the decisions of lower courts. The efficiency and workload of the court of appeal are, to some extent, contingent upon trial court performance.¹⁵ The relationship between courts of appeal and trial courts is pivotal to the way in which each level performs its judicial function. The manner in which this relationship is publicly expressed may bolster or damage the confidence of trial judges and severely affect their work.

Appellate and trial judges alike are colleagues engaged in a joint, a collaborative search for justice. Appellate court decisions that overturn trial judgments should clearly advise the lower court, the litigants and the public of the nature of the perceived error made by the first instance court and the reasons why the judgment of the court below is being reversed. The appellate judgment is a judicial education tool. The first instance judge should receive sufficient guidance such that the same mistake is not repeated.

¹⁴ Crime, Violence, and Development: Trends, Costs, Policy Options in the Caribbean, Report No. 37820, March 2007, <http://siteresources.worldbank.org/INTLACREGTOPGENDER/Resources/Crimeandviolenceinthecaribbeanfullreport.pdf> accessed 28th June, 2012

¹⁵ Appellate Court Performance Standards, http://www.ncsconline.org/WC/Publications/Res_AppPer_PerformanceStandardsPub.pdf accessed 30th June, 2012

The overturning by the Court of Appeal of a judgment at first instance is sometimes considered an admonishment of the trial judge. Where a decision at first instance is overturned, I see no reason why the mere reversal of the decision ought not to be regarded by itself as a sufficient rebuke to the court below,¹⁶ if indeed it is even reasonable or necessary for one to conceive of the reversal as a reproach as distinct from a difference in point of view. No good purpose is served if and when a reversal is accompanied by incivility towards the trial judge. In some States outside the region, at the very highest level, there have been occasions where an appellate judge has characterised a colleague's opinion as "foolish"¹⁷ and "irrational".¹⁸ But I trust that we shall never get to the stage where, as was lamented by a judge in Texas, judges lose the ability to disagree without being disagreeable¹⁹.

Incivility, especially in our small societies, erodes the court's legitimacy, lowers the dignity of the court, diminishes the esteem in which the courts are held, demoralizes lower court judges and "confuses the law by interjecting a high level of contentiousness and verbosity into judicial opinions which should be designed to provide guidance".²⁰ Intemperate language cuts across the objective of the appellate judgment being used as a satisfactory teaching tool for lower court judges.

There is much value in regarding an appeal, not as being separate and distinct from the trial process, but as a complementary process; a continuation of the litigant's claim or defence that was advanced in the court below. The judges at both the trial and appellate levels are part and parcel of a single justice system in which those at the appellate level have tremendous advantages that trial judges do not and cannot enjoy. Appellate judges can discuss the case among themselves before, during and after oral argument. They have the luxury of approaching the evidence and legal submissions uninfluenced by the drama of the trial process. By the time the case reaches the appellate court the lawyers have a better grasp of the essence of the dispute. Not infrequently points are taken on appeal that were not canvassed in the court below. For all

¹⁶ See CIVILITY AMONG JUDGES by William G. Ross (1999) 51 Fla. L. Rev 957

¹⁷ See: *Int. Union v. Johnson Controls, Inc* (1991) 499 US 187, 219

¹⁸ See: *Webster v Reproductive Health Services* 492 US 490, 532 and 536

¹⁹ *ibid*

²⁰ See CIVILITY AMONG JUDGES by William G. Ross (1999) 51 Fla. L. Rev 957

these reasons it is often entirely unfair that an appellate judgment should be cast in the vein that a trial judge who is reversed was less than competent. It is part of the role of appellate courts to nurture trial judges, to boost their confidence and to defend and promote their right to exercise discretion within the permitted parameters. This is one of the reasons why due deference is usually accorded to trial judges in their role as finders of fact.

Judicial education programs assist in discharging some of these responsibilities of the court of appeal but I believe that, in addition to formal judicial education exercises, more contact, both formally and especially informally, should be encouraged between judicial officers of different tiers. I was surprised not long ago to discover that in one State there still seemed to have been a view taken that, for judicial education purposes, magistrates should be segregated from judges where both sets of judicial officers had more or less the same interest in the subject matter of the training. I think the court of appeal has a role to play in breaking down these barriers. Regular contact between the court of appeal and subordinate judicial officers helps to eliminate mutual mis-understanding and contributes to the forging of a common judicial ethos. The court of appeal may be at the top rung of the local ladder but there is only one ladder and public attitudes towards the judiciary focus on the ladder as a whole, without any regard to an individual assessment of its various rungs.

The responsibility of the Court of Appeal to build public confidence in the justice system

One of the very serious challenges courts of appeal in the region face is how to build public trust and confidence. As we saw earlier, this is one of their key performance areas. It is not an easy task, not least because in the region public confidence in the judiciary is often lumped together with confidence in all facets of law enforcement including those for which the judiciary is not responsible.

In the Caribbean a noticeable gap exists between on the one hand, judicial performance - even where the same is characterized by excellence - and on the other hand, public trust. The Caribbean public exhibits an appalling lack of trust in their judges. Does this lack of public trust extend as well to officialdom occupying other organs of the State? Is this attitude perhaps a

hangover from a people's instinctive cynicism towards the institutions of the colonial state? Does it reflect a mentality that suggests that judicial office is too sacred for occupancy by those with whom we went to school? I don't know. Perhaps our social anthropologists can help us here; which is another reason why we need to dialogue with the latter. What is apparent, however, is that, sadly, across the English speaking Caribbean, people, even those whom you think should know better, are quick to voice a lack of confidence not so much in a particular judge but in the judiciary as a whole. Significantly, this is not something that occurs among the people of the non-English speaking Caribbean, Suriname for example.

One Caribbean judge recounts how shocked he was when a lawyer in a Caribbean State told him, even as he was then appointed as a judge of that State, that all the judges in that State took bribes.²¹ Justice Telford Georges records that after he had delivered judgment for the Prime Minister in one Caribbean country, it was reported to him that there was a rumour being spread that he was building a grand mansion in the most glamorous housing development of that country.²² Now, as many of us here know, even while he was alive and more so since his death, Telford Georges, a judge of the highest rectitude, was rightly regarded throughout the entire Commonwealth as one of the icons of the judiciary. But not even he could escape the slander that is often heaped on judges in the region.

This lack of trust is frustrating. And it must be confronted. It is one thing to hold judges to high standards. It is quite another to cast unfair and malicious imputations on honest hard working judicial officers. Courts must do everything possible to disprove such characterizations of judges, most of whom accept judicial appointment at considerable personal sacrifice. Courts of appeal have a duty to strive to re-build trust and confidence. This can be approached in a variety of ways. Obviously, care must be taken to ensure that judicial officers conform to the highest standards of conduct and that ethical infractions among judicial officers are immediately and adequately addressed. Beyond these measures, courts must engage with the public in meaningful ways. A comprehensive communication and public education outreach would help to inform the public better about the methods of work of the courts. Court staff must demonstrate the highest

²¹ TELFORD GEORGES, A LEGAL ODYSSEY by Fiadjoe and Kodilinye, 2008, Caribbean Law Publishing Co.

²² TELFORD GEORGES, A LEGAL ODYSSEY, *ibid*

levels of courtesy and efficiency. Court processes should be user friendly and court of appeal decisions should be readily accessible. Courts can periodically survey their stakeholders to discover so as to address promptly those areas in which the latter wish to see improvement. In their dealings with the other branches of government, courts must insist on treatment which respects the judiciary as a co-equal branch of government. The first Chief Justice in an independent Trinidad and Tobago understood well the importance of this. CJ Wooding and his judges did not hesitate to stay away from all official functions until the appropriate protocol arrangements were established for the office of the Chief Justice and the judges of an independent Trinidad and Tobago. If the public is to respect the judiciary it is important that they see respect being demonstrated by the other branches of the State.

The responsibility of the Court of Appeal to protect democracy and advance the rule of law

In each of the States in the region there is a Constitution that represents the supreme law. Every institution of the State must comply with the Constitution. As this country's Court of Appeal instructs us in *Collymore*, the courts are the guardians of the Constitution. This guardianship role is central to the broad role of the court of appeal in protecting democracy and advancing the rule of law. The rule of law in this context means a lot more than guaranteeing simple adherence to the law. It implies as well legal accountability, fairness, respect for minorities, the observance of human rights, judicial independence, the separation of the powers, equality before the law, the absence of arbitrariness. Ultimately, the final court sets the standard in these matters but it does so only if and when appropriate cases reach it. And even before those cases get there they must first be dealt with by the court of appeal.

The advancing of good governance and the rule of law is central to the role of Courts of Appeal in our developing democracies. It creates the conditions for the optimal social and economic development of our societies quite apart from producing justice for the citizenry. In multi-ethnic and multi-cultural societies in particular courts have a special responsibility to ensure equality of treatment.

Black letter law, the printed words of the law on a sheet of paper proclaiming, for example, the human rights of the individual, those words, irrespective of how flowery or comforting the language in which they are written, would not by themselves guarantee the full measure of those rights. Each generation of judges must examine and re-examine those printed words to ensure that their interpretation is in sync with evolving standards of humanity and with internationally accepted norms. Law must be certain and predictable, but it must also be just and evolve with the times. It is the ongoing role of courts to resolve this delicate tension.

Take for example the law that states “Whosoever shall be convicted of murder shall suffer death as a felon”. For centuries, spanning the period both before and after those words were placed in the 19th century Offences Against the Persons Act, it was accepted by all that the punishment of death for murder was automatic, lawful and just. Lord Diplock said so repeatedly. In 1977, a Court of Appeal in the region expressed genuine puzzlement that a prisoner sentenced to death could seek a declaration that it could be unconstitutional to enforce the death penalty.²³ But by 2001 Courts of Appeal in the region were declaring the mandatory death penalty to be inhumane, unconstitutional, unjust. A point had been reached where the courts were satisfied that the virtue of stability stood in the way of meeting the ends of justice in the 21st century.

I do not agree that humanizing the law in this fashion is a task that should always be left to the legislature. Elected Representatives in a democracy are not often best placed to make some of the tough calls and policy decisions that must be made on issues of social justice. If you owe your place in the legislature to the electorate to whom you are accountable, if you have been sent to parliament to represent the interests of your constituents, then it is understandable that you will always be very sensitive to popular views. But the rule of law will not flourish if the judiciary also embraced majoritarianism as a fundamental principle. On deeply divisive and emotive social questions that impact on the enjoyment of human rights, on those issues that are fed by prejudice but which appear to have popular support, it is to the courts that society often must turn for fair, just and decisive answers.

²³ *Kitson Branche vs The A.G Civil Appeal No 63 of 1977*

Courts of appeal are uniquely equipped to perform this role. The independence of the judges is constitutionally protected and their fidelity to the law and the Constitution is not compromised by any need to please a particular constituency as their tenure is not dependent upon votes obtained at an election. Judges must be sober, cautious, deliberate, but they must also be self-confident, courageous, strong, willing to go where no judge has gone before if after mature consideration that is the path one thinks is right.

The common law provides us with a legal heritage that is hailed throughout the world, but the law is a living instrument. In the building of a just and independent society I think our judges have an obligation to interrogate the common law to discover those features of it that have been constructed for a different time and a different society. Appellate courts should subject the common law to a rigorous analysis to ensure that, in being faithful to precedent, we are not inadvertently retarding the progress of our societies.

The treaty establishing the Caribbean Court of Justice states in its preamble that the member States of CARICOM are convinced that the CCJ would play a determinative role in the further development of Caribbean Jurisprudence. Undoubtedly, part of the role of the Court of Appeal is to partner with the CCJ in discharging this responsibility. Caribbean jurisprudence has never been precisely defined but it must naturally embrace the alignment of judicial decision-making, and the entire culture that supports the work of the judicial branch, with the aspirations and goals of our society. This does not mean that in reflecting local values Caribbean judges are free to ignore international norms and standards. That would be a serious error. The very independence of Caribbean mini-States and the fundamental law that governs these States, the national Constitution, draw their life blood from international law. It is international legal norms that helped us to win our independence and that continue to guarantee that independence and give us a voice in the world community. The rights we take for granted derive from and are rooted in values contained in such international instruments as The Universal Declaration of Human Rights, the International Covenant on Civil and political Rights, the European Convention on Human Rights and the American Convention on Human Rights. In the promotion of Caribbean jurisprudence judges must therefore pay close regard to the judgments of the courts established by the international community.

Final words

The Caribbean is an extraordinary, a unique place. George Lamming writes in *Coming, Coming Home*²⁴:

“I do not think there has been anything in human history quite like the meeting of Africa, Asia, and Europe in this American archipelago we call the Caribbean. But it is so recent since we assumed responsibility for our own destiny, that the antagonistic weight of the past is felt as an inhibiting menace. And that is the most urgent task and the greatest intellectual challenge: How to control the burden of this history and incorporate it into our collective sense of the future”.

I am convinced that the Caribbean can and will meet this enormous challenge. Our lack of self-belief and self-worth has not hindered us from producing for the world community the very best in the fields of literature, poetry, music, sports. The Caribbean judiciary too has met and will continue to meet the challenge. The region continues to produce judges of great distinction. The cream of the judiciary of this region can stand shoulder to shoulder with the finest judges anywhere, a fact readily recognized by people *outside* the region. As when, for example, the Privy Council in one case²⁵ said of a judgment from one of our Courts of Appeal,

“...the arguments and the authorities have been so fully and so meticulously rehearsed in the careful and instructive judgment of the Court of Appeal ... that it would be a work of supererogation for their Lordships to repeat what was there said in different and probably less felicitous language. They are content to accept and adopt the reasoning ... *in toto*”.

The author of that Court of Appeal judgment was Justice Telford Georges. One can cite many, many other commendations about our Court of Appeal judgments over the years by the final court, by academics and by observers. The problem that we face in the Caribbean is the herculean one of closing the gap between this demonstration of excellence and our people’s recognition and affirmation of it. But I am confident that, as the courts of appeal in the region continue to demonstrate excellence, in time that gap will be closed.

²⁴George Lamming, *Coming, Coming Home: Conversations II*. Philipsburg, St. Martin: House of Nehesi Publishers, 1995

²⁵ *Bertoli et al v. Malone* [1991] UKPC 17