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TOWARD THE DEVELOPMENT OF A CARIBBEAN JURISPRUDENCE: THE CASE FOR ESTABLISHING A CARIBBEAN COURT OF APPEAL

ROGET V. BRYAN*

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I. INTRODUCTION

> Anomalous is the situation in which, in the Commonwealth Caribbean, amidst the passion for economic and political independence, there continues that puzzling subservience to British jurisprudence, as if law were divorced from social, economic and political reality, which is certainly not the case.[1]

For over two decades, the idea of establishing a final regional court of appeal for the Commonwealth Caribbean[2] has been treated as "either an intellectual debate for academic gratification or as a political or administrative exercise for the agenda of regional meetings."[3] However, over the last two years, the region has taken real steps toward the creation of such a court. In the tradition of British colonialism, most of the Caribbean territories retained the Judicial Committee of the Privy Council in England as their final court of appeal after independence. It is this retention of ties to the colonial power that has created several problems for independent

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1. Francis Alexis, *The Case Against West Indian Appeals to the UK Privy Council*, BULL. E. CARIBBEAN AFF., Vol. 1, No. 4, 1975, at 1.

2. The words "Commonwealth Caribbean" and "Caribbean" are used interchangeably herein. The reference is to the territories of the Caribbean which were former colonies of the United Kingdom and have attained independence. All are members of the Commonwealth.

3. Hugh A. Rawlins, *The Privy Council or a Caribbean Final Court of Appeal?*, 6 CARIBBEAN L. REV. 235, 236 (1996).

Caribbean countries, from both a legal and political perspective. After demonstrating fervent passion for economic and political independence from England, these nations all elected to remain subordinate to British jurisprudence. This decision has seemed rather unsound in recent years, as a number of decisions handed down by the Judicial Committee of the Privy Council have not been well-received by the countries of the region. Consequently, the issue of abolishing appeals to the Privy Council has resurfaced and is currently being hotly debated. The proposal is to establish a Caribbean Court of Appeal to replace the Privy Council as the final level of appeal for the region and remove the last remnants of colonial dependency on England.

Despite some twenty years of inaction, there now appears to be a sense of urgency for many countries in the region to establish a Caribbean Court of Appeal. Yet there has been disagreement among countries with respect to total or partial abolition of appeals to the Privy Council in certain areas.[4] With respect to appeals of convicted killers, Caribbean judicial systems are apparently fed up with the "soft" position of the Privy Council and are supporting the establishment of a Caribbean appellate court.[5] However, there is less unanimity with respect to appeals in civil matters.[6] Yet, despite disagreement on several issues, the region seems poised to take the final step towards completing its independence.

The objective of this Comment is twofold. It presents a comprehensive analysis of both sides of the debate for the abolition of appeals to the Privy Council by examining four cases and discussing the legal and political impacts of those decisions. These four decisions, which have extremely important consequences for the region, are ultimately policy decisions, involving the balancing of competing interests and considerations. The conflict in these cases is typically between the interests of the individual and the interests of society to be protected and have its law enforced. The decisions of the Privy Council reviewed in this Comment have the impact of determining what is best for a particular society in the circumstances existing at a certain point in its history. A careful analysis of these Privy Council decisions will help assess the propriety of sending decisions of courts of independent countries to London for review.

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4. *See* Ramesh Lawrence Maharaj, *1996 Year in Review*, REP. OF MINISTRY OF THE ATT'Y GEN. OF TRIN. & TOBAGO, Jan. 1997, at 28-29.

5. *See* Bernard Babb, *Fresh Move Towards Caribbean Court of Appeal*, CARIBBEAN WK., Oct. 26, 1996, at 2.

6. *See Summit to Discuss Public Hearings for Regional Judges*, INDEPENDENT (Trin. & Tobago), Feb. 4, 1997, at 6.

The study will then focus on the advantages and disadvantages of a Caribbean Court of Appeal, the potential problems such a court may encounter, and whether such a court is a viable and practical alternative to the Judicial Committee of the Privy Council. This section attempts to analyze the key elements on both sides of the institutional and jurisprudential debate and makes a strong case for the establishment of a Caribbean Court of Appeal. Finally, this Comment will discuss the recent progress made in the establishment of the Court of Appeal, and speculate as to the success of the region's effort to promote regional unity and cooperation.

II. THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Before attempting to analyze the case for a Caribbean Court of Appeal, it would be prudent to consider briefly the history of the Privy Council[7] which now serves as the highest appellate body for all Commonwealth Caribbean jurisdictions except Guyana.[8] Grenada briefly abolished appeals to the Privy Council following the 1979 coup d'etat which displaced the Constitution and the Government, but has recently reinstated the jurisdiction of the Privy Council.[9] A brief look at the historical background of the Privy Council will help put the considerations of establishing a Caribbean Court of Appeal into the proper perspective.

A. History

The Privy Council is derived from the residuary jurisdiction which the Sovereign possessed over all British subjects.[10] For nearly three hundred years, the Privy Council has been "the link between the legal systems of the Commonwealth countries and Empire and of the United Kingdom itself."[11] In its earlier years, the Privy Council played an important role in English government. Judicial disputes

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7. The words "Judicial Committee of the Privy Council" and "Privy Council" are used interchangeably herein. The reference is to the council of prominent jurists who settle judicial disputes from the current and former British empire as well as from former colonies which still retain a right of final appeal to the Privy Council.

8. Guyana abolished the Privy Council as its final appellate court when it became a Republic in 1970. In Guyana, the local court of appeal is final. *See* Rickey Singh, *Caribbean Supreme Court This Year*, SUNDAY GUARDIAN (Trin. & Tobago), Jan. 26, 1997, at 11.

9. The Privy Council itself upheld the validity of the Grenada legislation abolishing the Council as the final court of appeal in the case of *Mitchell v. Director of Pub. Prosecutions*, 1986 App. Cas. 73.

10. *See* LLOYD BARNETT, THE CONSTITUTIONAL LAW OF JAMAICA 31 (1977).

11. Dr. Fenton Ramsahoye, A Caribbean Court of Appeal for Caribbean Peoples 2 (unpublished manuscript, on file with the University of the West Indies Law Library at Cave Hill, Barbados).

from the overseas empire were referred to the Sovereign, which, in turn, referred them to the Privy Council.[12] During the Civil War in England in 1640, the Privy Council's judicial function was confined to "determining petitions from the overseas possessions of the Crown."[13] However, as the British Empire expanded and courts were established in various colonies, it became common practice for these local courts to have the right of appeal to the Privy Council.[14]

The Judicial Committee of the Privy Council was formally established by legislation in 1833.[15] This legislative act effectively transferred judicial powers from the Privy Council proper to its judicial branch, the Judicial Committee.[16] The Judicial Committee has since operated as an independent court of law, separate from the rest of the Council.[17] The Judicial Committee Acts of 1833, 1844, and 1871 delineate the composition of the Privy Council.[18] Pursuant to these Acts, the Privy Council is to be comprised of selected members of the higher judiciary in England,[19] as well as senior members of the judiciary of other Commonwealth countries.[20]

B. Jurisdiction

The greatest part "of the jurisdiction of the Privy Council lies in the area of appeals from overseas territories."[21] The Privy Council has historically dealt with most of the world's legal systems. In the Caribbean, it administers primarily English law, but it has administered French law in St. Lucia, Spanish law in Trinidad, and, until 1970, Roman Dutch law in Guyana.[22] The 1844 Act's most important

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12. *See id.*

13. Rawlins, *supra* note 3, at 237-38.

14. *See id.* at 238.

15. *See* The Judicial Committee Act, 1833, ch. 41, (Eng.).

16. *See* REPORT OF THE CARIBBEAN TASK FORCE, ch. 30, at 101 (1974).

17. This body will hereinafter be referred to as "the Privy Council."

18. *See* The Judicial Committee Act, 1833, ch. 41 (Eng.); The Judicial Committee Act, 1844, ch. 69 (Eng.); The Judicial Committee Act, 1871, ch. 91 (Eng.).

19. These members include the Lord Chancellor, Ex-Lord Chancellors, and Lords of Appeal in Ordinary. *See* Ramasahoye, *supra* note 11, at 3.

20. This category includes, but is not limited to, other persons who have held high judicial office, and such retired judges of "superior" Commonwealth Courts according to the Queen's discretion. Noted Caribbean Commonwealth jurists who have served on the Privy Council and delivered judgment on cases include: Sir Hugh Wooding, the late Chief Justice of Trinidad and Tobago, Sir William Douglas, the former Chief Justice of Barbados, and Sir Vincent Floissac, the Chief Justice of the Organization of Eastern Caribbean States (OECS) Supreme Court. *See* Rawlins, *supra* note 3, at 239 n.14.

21. Rawlins, *supra* note 3, at 239. The jurisdiction of the Privy Council was determined by the Judicial Committee Acts of 1833 and 1844. *See supra* note 18.

22. *See* Ramasahoye, *supra* note 11, at 7. Many former English colonies were once colonies of another empire that were appropriated by either war or treaty. In the Caribbean, many islands have changed hands multiple times and been possessed by several different powers. For example, Guyana still retains a system of conveyancing and a law of real property with its

feature was its provision for appeals to be brought to the Privy Council from any court in any colony even if the court was not a court of appeal.[23] This was the position of all British colonies until the constitutional changes associated with the grant of independence were implemented.[24] Upon the grant of independence, appeals to the Privy Council were either disallowed or provisions were made for the abolition of such appeals at the request of the independent country.[25] "In the Caribbean, the independence constitutions provide for appeals from Caribbean Courts of Appeal to the Privy Council."[26] Appeals can be made as a matter of right, with the leave of the Court of Appeal, or with the special leave of the Privy Council.[27]

The number of independent countries who retain appeals to the Privy Council has been greatly reduced in recent years. Excluding the Commonwealth Caribbean, only four independent countries currently retain appeals to the Privy Council: Brunei, Mauritius, New Zealand, and Zambia.[28] Furthermore, appeals from Brunei are now limited to civil cases, and New Zealand is currently in the process of considering whether to abolish the right of appeal to the Privy Council.[29] Within the last decade, appeals to the Privy Council from Fiji, Malaysia, and Singapore have been discontinued.[30] With the exception of the nonindependent English territories in the Caribbean, there are only two nonindependent members of the Commonwealth who still retain the right of appeal to the Privy Council—Hong Kong and the Channel Islands—and appeals from Hong Kong ceased in 1997.[31] Soon, the Commonwealth Caribbean may find itself the only

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roots deep in the Roman law administered by the Dutch in Holland, Sri Lanka, and South Africa. *See id.*

23. *See* Ramsahoye, *supra* note 11, at 2.

24. *See id.*

25. *See id.*

26. Rawlins, *supra* note 3, at 239.

27. *See id.* Since the Privy Council is a council of the Queen's government, the decisions of the Council take the form of "advice" to Her Majesty. The advice is then accepted and implemented by Orders in Council, which gives the advice the effect of a binding judgment. "Appeals with the special leave of the Privy Council" is a reference to appeals to Her Majesty in Council. This right to appeal with the leave of the local Court of Appeal, or with the special leave of the Privy Council is found in the majority of the Caribbean constitutions. *See id.*

28. *See* The Hon. Mr. Justice M.A. De La Bastide, *The Case for a Caribbean Court of Appeal*, 5 CARIBBEAN L. REV. 401, 402 (1995).

29. *See id.*

30. *See id.* Fiji discontinued its appeals to the Privy Council when it left the Commonwealth, while Singapore very recently discontinued appeals to the Privy Council following strict curtailments in 1989. *See id.*

31. *See id.* Hong Kong reverted back to Chinese control in 1997, thus severing the right to appeal to the Privy Council.

country, with the exception of the Channel Islands, who retains appeals to the Privy Council.

C. *Nature of Caribbean Appeals to the Privy Council*

A statistical review of Caribbean appeals to the Privy Council illustrates the nature of its use as the final court of appeal for the region. The following data examines the number of cases from the region which have gone to the Privy Council during the ten-year period from 1985 to 1994, inclusive. The data includes all the Commonwealth Caribbean countries including the Bahamas and Belize, as well as those islands which are still English colonies, such as Bermuda.[32] From 1985 to 1994, the total number of appeals to the Privy Council was 214.[33] The number of appeals decided after a hearing was 163, while sixty-eight appeals were dismissed without a hearing.[34] Of the 163 appeals decided after a hearing, the decision of the local Court of Appeal was upheld in 102 cases, while in sixty-one cases the decision was reversed.[35] During the same ten-year period, there were 292 petitions for special leave to appeal to the Council.[36] Of those 292 petitions for special leave to appeal, only eighty-seven were granted.[37]

The greatest number of appeals, eighty-nine, came from Jamaica.[38] Trinidad & Tobago had fifty-one appeals, followed by the Bahamas with sixteen.[39] There were only eleven appeals from Barbados during the ten-year period, yet eight of those appeals were granted.[40] The success rate for appeals to the Privy Council was fairly consistent among these countries. In its eight decided appeals, the Barbados Court of Appeal was upheld six times and reversed only twice.[41] Jamaica had sixty-nine appeals decided with thirty-nine dismissed and thirty granted.[42] Trinidad & Tobago had forty-four appeals decided, twenty-six dismissed and eighteen allowed,[43]

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32. Data compiled and excerpted from De La Bastide, *supra* note 28, at 402-03.
33. *See id.* at 402.
34. *See id.* at 403.
35. *See id.* The percentages are as follows: the local Court of Appeal was upheld 63% of the time, and reversed 37%. Percentages reference the 163 cases determined after a hearing by the Privy Council.
36. *See id.* The reference is to appeals with the special leave of the Privy Council, also referred to as appeals to Her Majesty in Council. *See* Rawlins, *supra* note 3, at 239 n.17.
37. *See* De La Bastide, *supra* note 28, at 403. The percentage of petitions for special leave to appeal granted was roughly 30%.
38. *See id.* The majority of petitions for special leave to appeal were death cases.
39. *See id.*
40. *See id.*
41. *See id.*
42. *See id.*
43. *See id.*

while the Bahamas had fifteen appeals decided, nine dismissed, and six allowed.[44] Thus, the data reveals that the success rate for Jamaica, Trinidad and Tobago, and the Bahamas was roughly 41%, while the success rate of Barbados was only 25%.[45]

At the end of 1994, the number of appeals pending were twelve from Jamaica, three from the Bahamas, three from Barbados, and one from Trinidad & Tobago.[46] Several observations can be drawn from the above data. First, there was a relatively low number of appeals to the Council from the region over the ten-year period. In addition, there has been very little backlog of cases once they get to the Privy Council, which sharply contrasts some local Courts of Appeal in the region.[47] In most of the Caribbean constitutions, there exists a right to appeal in civil matters whenever the amount in dispute exceeds a minimal figure.[48] It would seem that this low standard would result in more appeals to the Privy Council. However, the high cost of pursuing appeals all the way to the Privy Council in faraway England has proven an effective barrier to a flood of appeals.[49] The overwhelming majority of petitions for special leave to appeal are on behalf of persons sentenced to death.[50] As one local barrister pointed out, "the abolition of capital punishment in the Caribbean would likely result in the virtual disappearance of petitions of special right to appeal."[51] If anything is clear from the data, it is that criminal appeals to the Privy Council, especially capital appeals, represent the biggest concern for the local judiciary in the region.

III. THE CASE FOR THE ABOLITION OF CARIBBEAN APPEALS TO THE PRIVY COUNCIL

Throughout the Commonwealth Caribbean, a familiar argument is that to allow a Court outside of the region to sit in judgment and adjudicate matters which arise in, and solely concern, the region is inconsistent with political self-determination.[52] A further concern is that members of the Judicial Committee of the Privy Council "are

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44. *See id.*
45. *See id.*
46. *See id.*
47. *See id.*
48. *See id.* In Trinidad & Tobago, there exists a right to appeal in civil matters whenever the amount exceeds TT$ 1,500.00 (approximately $US 245.00). At the time of this writing the rate of exchange was approximately $TT 6.10 to $US 1.00.
49. *See id.*
50. *See id.*
51. Taped Interview with Henley Wooding, Barrister-at-Law, in Port-of-Spain, Trinidad (Feb. 12, 1997) (on file with author).
52. *See* REPORT OF CARIBBEAN TASK FORCE, *supra* note 16, at 102.

unfamiliar with the interplay of social and political forces in the Caribbean" which influence the "customs, psychology and indeed the total personality of the people of the region."[53] Consequently, members of the Privy Council "cannot bring to their deliberations the knowledge and experience which people of the region can and should so bring."[54] These assertions never seem more accurate than on those occasions when the Privy Council hands down a controversial and unpopular decision. To better understand these and other assertions, a few of the more important cases decided by the Council need to be examined.

A. Decisions of the Privy Council

Pratt and Morgan

The decision of the Privy Council in the Jamaican case of *Pratt and Morgan v. Attorney General of Jamaica*[55] ranks as one of the most notable and controversial recent decisions of the Privy Council. In *Pratt and Morgan*, the Privy Council granted the appeal of two Jamaicans, Earl Pratt and Ivan Morgan, who had been on death row for almost fourteen years after being convicted of murder in 1979.[56] The appellants' appeal was dismissed by the Jamaican Court of Appeal in December 1980, and their petition for special leave to appeal to the Privy Council was refused in July 1986.[57] Their execution was scheduled to take place on March 7, 1991.[58] In applications filed on their behalf, the appellants contended that their death by hanging after a fourteen-year delay during which they were held in subhuman conditions on death row would constitute a violation of Section 17(1) of the Constitution of Jamaica.[59] Appellants argued that waiting for fourteen years in such conditions, knowing that they faced a horrible death, constituted torture and inhuman punishment in violation of the Jamaican Constitution.[60]

Following their convictions, appellants had death warrants read to them on at least three occasions and were moved to the "dead man cells" closest to the gallows.[61] The delay in this case was due in

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53. *Id.*
54. *Id.*
55. 43 W.I.R. 340 (1993).
56. *See id.* at 342.
57. *See id.* at 340.
58. *See* Rawlins, *supra* note 3, at 240.
59. *See* JAM. CONST. § 17(1). Section 17(1) stipulates: "No person shall be subjected to torture or to inhuman or degrading punishment or other treatment." *Id.*
60. 43 W.I.R. at 341.
61. *See id.* at 343.

part to the efforts of appellants who were pursuing appeals and petitions through all avenues, including the United Nations Human Rights Committee and the Inter-American Commission on Human Rights.[62] To compound the issue, the Jamaican Court of Appeal, through an omission on its part, had failed for almost four years to justify its dismissal of appellants' appeal.[63] The United Nations Human Rights Committee held that the failure of the Jamaican Court of Appeal to do so was a breach of the International Covenant on Civil and Political Rights.[64] The Privy Council finally heard the appeal in 1993 and held that an unconscionable delay in carrying out a death sentence would constitute a contravention of section 17(1) to the extent that it could amount to "inhuman and degrading punishment."[65] The Privy Council found this delay unconscionable and described the situation as follows:

> The statement of these bare facts is sufficient to bring home to the mind of any person of normal sensitivity and compassion the agony of mind that these men must have suffered as they have alternated between hope and despair in the 14 years they have been in prison facing the gallows.[66]

The Privy Council commuted the death sentences of both Pratt and Morgan to life imprisonment.[67] The Privy Council further stated: "Their Lordships are very conscious that the Jamaican Government faces great difficulties with a disturbing murder rate and limited financial resources at their disposal to administer the legal system. Nevertheless, if capital punishment is to be retained, it must be carried out with all possible expedition."[68]

The Privy Council then established targets of twelve months within which to hear a capital appeal after conviction, and an additional twelve months for the determination of the appeal to the Privy Council, with the aim of completing the entire domestic appeal process within two years.[69]

The second controversial ruling made by the Privy Council, which must be read in conjunction with the first, prescribed a five-year deadline between sentence and execution, and stated that in any

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62. *See* Rawlins, *supra* note 3, at 241.

63. *See id.* The Jamaican Court of Appeal failed to give reasons for its dismissal of appellants' application for special leave of appeal to the Privy Council. This inadvertence on the part of the Jamaican Court of Appeal proved costly in the long run. *See id.*

64. *See* 43 W.I.R. at 351.

65. *See id.* at 360.

66. *Id.* at 343.

67. *See id.* at 360.

68. *Id.* at 361.

69. *See* 43 W.I.R. at 361.

case in which execution is to take place more than five years after sentence, there will be sufficient grounds for believing that the delay is such to constitute "inhuman or degrading punishment or other treatment."[70]

The effect of these rulings was immediate and far-reaching. In Trinidad and Tobago, fifty-three death row inmates had their sentences commuted to life imprisonment because more than five years had elapsed since the sentence was imposed.[71] Further, the Court of Appeal has had to put aside other cases to concentrate almost exclusively on the hearing of appeals in capital murder cases.[72] The likely result is that other appellants, apart from convicted murderers, will have to accept even more delay to the already bogged-down appeal process. In Barbados, the effect of the *Pratt and Morgan* decision hit home when the Privy Council applied the decision and commuted two death sentences on the grounds of unconscionable delay in carrying out the sentence.[73]

One of the major concerns with the Privy Council's ruling in *Pratt and Morgan* is that it threatens to intrude on the traditional domain of the legislature by achieving a partial abolition of the death penalty.[74] This is not to say that the judiciary is not entitled to and obliged to fulfill the role of constitutional protector. However, the question is whether these are the sort of decisions that should be made in London by judges who have no personal contact with the societies to which the decisions apply. The question is not so much whether the Privy Council gave the right answer to these questions, but whether they should be answering them at all.

Guerra and Wallen

The case of *Guerra and Wallen v. State*[75] presented a similar situation to that in the *Pratt and Morgan* case. Appellants Lincoln Guerra and Brian Wallen were convicted of two brutal murders in May 1989 and sentenced to death by hanging on March 25, 1994.[76] By early 1994, the two men had exhausted all of their appeals and on March 24 of that same year their petitions for special leave to appeal to the Privy Council were dismissed.[77] Death warrants were read to

70. *Id.* at 362.
71. *See* De La Bastide, *supra* note 28, at 407.
72. *See id.*
73. *See* Bradshaw and Roberts v. R., 1 W.L.R. 936 (1995).
74. *See* De La Bastide, *supra* note 28, at 407.
75. 45 W.I.R. 400 (1994).
76. *See id.* at 401.
77. *See id.*

the two men on March 24, 1994, and the executions were scheduled for March 25, 1994, just two months short of the five-year limit delineated by the Privy Council in *Pratt and Morgan*.[78] On March 24, the day before their scheduled executions, appellants petitioned the High Court for a constitutional declaration that carrying out the executions after the delay would infringe upon their rights under sections 4(a) and (b) of the Constitution of Trinidad and Tobago.[79] The appellants also filed an application for an order preventing their execution pending the hearing of the constitutional motions.[80] The High Court of Trinidad and Tobago dismissed appellants' petition, but gave leave to appeal to the Privy Council.[81] Within a few hours of the High Court decision, the Privy Council issued an order postponing execution of the appellants for four days.[82] On March 28, the Privy Council agreed to hear appellants' application for appeal on April 25 and extended the conservatory period until after the determination of their appeal on that date.[83]

On April 25, the Privy Council's conservatory order lapsed. In the meantime, the Attorney General declared that no execution would take place until the hearing of an appeal to the local Court of Appeal for a stay of execution.[84] Before that judgment was given, however, appellants petitioned the Privy Council again for a conservatory order preventing their execution pending the determination of an appeal from the Court of Appeal, in the event that the Court of Appeal dismissed their appeal and did not grant a conservatory order.[85] On July 25, just two days before the Court of Appeal gave its decision; the Privy Council issued a remarkable order. The Privy Council ordered that if the Court of Appeal dismissed the appellants' appeal and did not immediately issue a conservatory order, the execution of the death sentence should be deferred until after the determination of an appeal to the Privy

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78. *See id.*

79. *See* TRIN. & TOBAGO CONST. Ch. I, §§ 4(a), (b). Chapter I of the Constitution is concerned with the recognition of Fundamental Rights and Freedoms. Sections 4 (a) and (b) provide: "It is hereby recognized and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, color, religion or sex, the following fundamental human rights and freedoms, namely: (a) the right of the individual to life, liberty, security, of the person and enjoyment of property and the right not to be deprived therof except by due process of law; (b) the right of the individual to equality before the law and the protection of the law. *See id.*

80. *See* 45 W.I.R. at 401.

81. *See id.* at 402. The High Court of Trinidad & Tobago lies below the Court of Appeal in the judicial hierarchy.

82. *See id.*

83. *See id.*

84. *See id.*

85. *See id.*

Council.[86] The ultimate effect of this order by the Privy Council was to defer the execution of the appellants until the determination of the matter by the Privy Council. Yet this order was issued before the Court of Appeal was even able to consider the granting of a conservatory order on its own decision. The practical effect of the Privy Council's order was the manifestation of an unflattering lack of confidence in the local Court of Appeal and encroachment on the local Court's exercise of discretion through a blatantly inappropriate assumption of jurisdiction. That action by the Privy Council produced an embarrassing confrontation between the Judicial Committee and the Trinidad and Tobago Court of Appeal.[87]

The reasons upon which the Privy Council based its order only compounded matters. The Council pointed out that if Guerra and Wallen were executed before they had exhausted their right of appeal to the Privy Council, it would plainly constitute the gravest breach of constitutional rights and would frustrate the Privy Council's exercise of its appellate jurisdiction.[88] From this perspective, one may argue that the Privy Council's decision in this case was proper and just. As the highest Court of Appeal for Trinidad and Tobago, the Privy Council has the moral obligation to take extraordinary steps to protect the fundamental rights of citizens, even those of convicted killers, and to ensure due process of law in all such cases. The Privy Council also inferred that it was not normal practice for the Court in Trinidad and Tobago to grant a stay of execution pending an appeal to a higher court, even where the appellant was under a sentence of death.[89] However, there is no record of any case in which the Court of Appeal of Trinidad and Tobago decided that a death sentence should be carried out when the condemned person wished to exercise a right to appeal, or to appeal to the Privy Council for a reversal or commutation of the sentence.[90] Thus, arguably the Privy Council's decision was really based on a lack of respect for and confidence in the judiciary of Trinidad and Tobago.

The Jammat Al Muslimeen Case I[91]

The so-called "Muslimeen" cases are two decisions of the Privy Council arising out of the attempted coup by the Jammat al Muslimeen in Trinidad on July 27, 1990. The 114 insurrectionists were part

86. *See* 43 W.I.R. at 404.
87. *See* De La Bastide, *supra* note 28, at 412.
88. *See* 45 W.I.R. at 403.
89. *See id.*
90. *See* De La Bastide, *supra* note 28, at 415.
91. *See* Phillips v. Director of Pub. Prosecutions, 1 App. Cas. 545 (P. C. 1992).

of a religious sect who took part in a coup d'etat in Trinidad and Tobago between July 27, 1990, and August 1, 1990, with the aim of overthrowing the lawful government.[92] During the insurrection, the Muslimeen held the Prime Minister, certain Members of Parliament, and other persons captive.[93] To secure their release, the Acting President granted a pardon of general amnesty to all those involved in the acts of insurrection.[94] The captives were eventually released and the Muslimeen surrendered.[95] They were arrested, detained, and charged for their crimes.[96]

The first case, *Phillips v. Director of Public Prosecutions*,[97] involves a procedural issue. The question in that case was whether the 114 persons who were charged with murder, treason, and other offenses arising out of their participation in the attempted coup were entitled to challenge the legality of their detention and prosecution on the grounds that they had received a valid pardon with respect to the offenses with which they were charged.[98] If they were not so entitled, then they would be compelled to wait until they were arraigned before raising a plea based on their pardon.[99]

The local court in Trinidad held that the Muslimeen were obliged to wait until their arraignment before raising their plea.[100] However, the Privy Council held, quite to the contrary, that they did not have to wait until the indictment, but were entitled to have the validity of the pardon determined in the two proceedings that they had initiated for that purpose.[101] This was likely a very just determination by the Privy Council, however the Privy Council clearly expressed in its written judgment that the State would have little chance of successfully overturning the pardon granted to the Muslimeen.[102] According to the judgment, the Privy Council saw a pretrial pardon as an invaluable instrument in dealing with the type of situation

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92. *See id.*

93. *See id.*

94. *See id.* It is important to note that the Prime Minister and the Attorney General were seriously injured in the attempt by the insurgents to extract that pardon from the Acting President.

95. *See id.*

96. *See id.*

97. 1 A.C. 545.

98. *See id.* The Muslimeen employed the use of both a constitutional motion and a petition for habeus corpus to challenge the legality of their detention by the State. *See id.* at 546.

99. *See* 1 A.C. at 546.

100. *See* De La Bastide, *supra* note 28, at 418.

101. *See id.* The Muslimeen had filed a habeus corpus petition and a constitutional motion to determine the validity of the presidential pardon given to them. The Privy Council found that both of these proceedings were appropriate forums to determine the validity of the pardon rather than wait for the Muslimeen to be indicted. *See id.*

102. *See id.* at 559.

created by the insurgents in their attempted coup d'etat.[103] In the view of the Privy Council, the storming of the television station, the car bombing of police headquarters, and the storming and occupation of the Parliament building while killing and taking several members hostage was exactly the situation that a pretrial pardon was created for.[104] The Privy Council cited a statement made by Alexander Hamilton in 1788 in the Federalist No. 74 regarding the power of the President to grant a pardon:

> The principal argument for reposing the power of pardoning•[in] the Chief Magistrate is this: in seasons of insurrection or rebellion, there are often critical moments, when a well-timed offer of pardon to the insurgents or rebels may restore the tranquillity of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall.[105]

For the Privy Council, the pardon granted to the Muslimeen served exactly this purpose by providing for the release of the remaining hostages and resolving an extremely volatile situation. The pardon, which was held to have been given to the Muslimeen by the Acting President under the authority of the Constitution of Trinidad and Tobago,[106] may very well have saved the lives of the hostages on this occasion, but it may also have set a very dangerous precedent in the process. Does the policy behind this law encourage making deals with terrorists who choose not to abide by the law of the nation? Should the law serve to encourage those who might take similar action in the future that if their plans failed, any pardon which they could manage to extract for themselves by bartering the lives of others will be valid and binding?[107] These questions reflect the notion that law is indeed not divorced from social, economic, and political reality. These questions involve policy, and it is up to the

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103. *See id.*

104. *See id.* at 418; *see also* Attorney Gen. of Trin. & Tobago v. Phillips, 1 A.E.R. 93, 98 (1995).

105. *Id.* at 551; *see also* Murphy v. Ford, 390 F. Supp. 1372 (1975). This case, decided in the United States District Court of Michigan, involved a challenge to the validity of a pardon granted by President Ford to former President Nixon. The District Court quoted this same statement by Alexander Hamilton about why the Founding Fathers gave the President a discretionary power to pardon.

106. When the Acting President granted a pardon in the form of a general amnesty to the members of the Jammat al Muslimeen, he was exercising the power of the President under Section 87(1) of the Constitution of Trinidad and Tobago, Act 4 of 1976. The section provides that the President may grant to any person a pardon, either free or subject to certain conditions, respecting any offenses that he may have committed. The President may exercise this power either before or after the person is charged with any offense and before he is convicted of such an offense. *See* TRIN. & TOBAGO CONST. § 87(1).

107. *See* De La Bastide, *supra* note 28, at 419.

state to determine what policy the law should adopt with regard to pardons given in such volatile circumstances.

By hinting that the state would have little chance of overturning the pardon and discussing the political propriety of making such a challenge, the Privy Council embarked on an unsolicited venture into policymaking, a realm traditionally reserved for the state.[108] The Privy Council remanded the case to the Court of Appeal of Trinidad and Tobago to determine the validity of the presidential pardon, having already given their opinion that it was indeed valid and would be extremely difficult for the State to successfully challenge its validity.[109] This position resonated in the ominous words of Lord Ackner: "Their Lordships therefore envisage no great difficulty in Blackman, J. or whoever has the task of deciding the issue, determining whether or not the pardon was a valid one."[110]

This first judgment was no doubt encouraging to the Muslimeen and their counsel, yet it proved devastating to the morale of the people of Trinidad and Tobago, who had suffered through an assault on the democratic process of their country and wanted a different result. In effect, this judgment operated almost as an "advisory opinion" to the Court of Appeal of Trinidad and Tobago. It clearly delineated the Privy Council's view of this case and set the stage for round two.

The Jammat al Muslimeen Case II[111]

The case returned to the Court of Appeal of Trinidad and Tobago for a determination as to whether the pardon was valid. The Court of Appeal held, in accordance with the opinion given by the Privy Council, that the pardon was indeed valid.[112] As a result, the Muslimeen were not only immune from any prosecution for their acts during the attempted coup (including murder and various terrorist acts), but they were entitled to be freed immediately. In addition, the state was found liable for wrongfully incarcerating the Muslimeen for over two years and was required to pay them damages, including their legal fees, for the period of wrongful incarceration.[113] This result was horrendous for the people of Trinidad and Tobago. It sent a clear message that lawlessness and anarchy

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108. *See id* at 420; *see also* 1 A.C. at 559.

109. *See* De La Bastide, *supra* note 28, at 421.

110. *Id.*

111. *See* Attorney General of Trinidad and Tobago and Another v. Phillip and others, 1 A.E.R. 93 (1995).

112. *See id.* at 95.

113. *See id.*

can prevail and go unpunished, while the state pays the costs incurred by those who disregard the democratic process and revert to the actions of a feudal society.

The state appealed first to the Court of Appeal and then to the Privy Council on the grounds that the pardon was obtained under duress and was thus invalid.[114] The Court of Appeal dismissed the appeal, holding that the pardon was not invalidated by duress, and the State carried the appeal to the Privy Council.[115] In the case of *Attorney General of Trinidad & Tobago v. Phillip*,[116] the Privy Council upheld the decision of the Court of Appeal, finding that the pardon was not invalidated by duress because a pardon could only be invalidated by duress in the most exceptional of circumstances.[117] For a pardon to be invalidated, the duress must consist of direct physical violence or pressure or actual imprisonment to the person who issued the pardon.[118] The Privy Council agreed with the Court of Appeal that no such direct action took place in this case.[119] The Acting President, who actually issued the pardon, was not in Parliament and was not held captive or subjected to physical violence or pressure by the insurgents.[120] Thus, the element of duress relied upon by the State was insufficient to warrant the pardon.

The State also appealed on the grounds that the pardon related to offenses not yet committed at the time of issuance, and that the Muslimeen did not comply with the condition to which it was subject, namely that the Muslimeen would immediately release the Members of Parliament held hostage.[121] The state alleged that the Muslimeen did not end the insurrection promptly after the receipt of the pardon but instead, continued negotiating for compliance with other objectives.[122] The Privy Council held that the pardon did involve a condition that the Muslimeen bring the coup to an end promptly after they received the pardon.[123] However, because the Muslimeen failed to comply with the terms of the pardon by promptly ending the coup, the Privy Council found that the pardon

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114. *See id.* at 94. There is no right of appeal in habeus corpus matters in Trinidad and Tobago, but the State appealed on the constitutional motion, first to the Court of Appeal and then to the Privy Council. *See id.* at 96.

115. *See id.* at 94.

116. 1 A.E.R. 93 (1995).

117. *See id.* at 104.

118. *See id.*

119. *See id.*

120. *See id.* at 98.

121. *See id.* at 105.

122. *See* 1 A.E.R. at 105.

123. *See id.*

was invalidated.[124] In addition, the Privy Council found that although the pardon was invalid, it would be an abuse of process to prosecute the Muslimeen further due to the granting of a habeas corpus petition.[125] Most importantly, the Privy Council set aside the award of damages and relieved the state from paying any financial compensation to the Muslimeen for their wrongful detention.[126]

Although the Muslimeen were free from prosecution for their crimes during the insurrection, the judgment of the Privy Council relieved the people of Trinidad and Tobago, mostly because there would be no payment of damages or costs to the insurgents.[127] However, it is hard to characterize this as a victory for the people of Trinidad and Tobago. While the State may have won its battle for financial liability, the 114 insurrectionists today walk the streets free from prosecution for their crimes against the society and their assault on the democratic process of the nation. In this light, was the judgment of the Privy Council an equitable and just decision?

B. Regional Reaction to Privy Council Decisions

The cases chronicled in this Comment reflect only a small number of instances in the recent past which have sparked renewed calls for the establishment of a Caribbean Court of Appeal to replace the Privy Council. These cases have sparked some emotion in the inhabitants of the region and urged a call for an alternative to the far away Privy Council, which at times seems to portray a lack of knowledge and understanding of the issues that confront the region.[128] It is at these times, when controversy surrounds unpopular decisions of the Privy Council, that the calls for the creation of a regional court sound the loudest. For many, the decisions of the Privy Council reflect a lack of sensitivity and inability to understand the workings of Caribbean society.[129] Antiguan High court judge Albert Redhead has said that the decision of the Privy Council in *Pratt and Morgan* did not conform to the judicial reality of the

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124. *See id.* at 108.

125. *See id.* The Privy Council found that to allow prosecution of the Muslimeen on the grounds that pardon was invalid would be inconsistent with the decision of the Court of Appeal that the Muslimeen were entitled to a writ of habeus corpus. Under the Constitution of Trinidad & Tobago, there is no right of appeal from an order of habeus corpus, and thus, it would constitute an abuse of process to circumvent the Constitution and allow a further prosecution relying on the outcome of a Constitutional appeal. *See id.* at 108-09.

126. *See id.* at 109.

127. *See* De La Bastide, *supra* note 28, at 423.

128. *See* Taped Interview with Henley Wooding, *supra* note 51.

129. Taped Interview with Justice Zainool Hosein, Court of Appeals Judge for Trinidad and Tobago, in Port-of-Spain, Trinidad (Feb. 12, 1997) (on file with author).

Caribbean region.[130] The Privy Council and the United Kingdom in general have shown a strong push toward the abolition of capital punishment in the Caribbean, a trend not reflected among Caribbean governments.[131] Nearly all of the Caribbean territories have retained the death penalty in their constitutions,[132] a strong testimony to the region's backing of capital punishment. Further, many judges throughout the Commonwealth Caribbean have revived the use of floggings as a deterrent to rising crime.[133]

Crime rates throughout the Caribbean have skyrocketed in recent years: "Trinidad has experienced a wave of violent crimes, seventy percent of which are drug related. Crime in Jamaica is at an all-time high, with a record 918 murders committed in 1996. Crime rates shot up twenty-three percent in the US Virgin Islands between 1995 and 1996."[134] In response to the crime surge, Antigua and Barbuda re-instated floggings in 1990, and the Bahamas followed suit in 1991.[135] Barbados and Trinidad revived floggings in 1993 with Jamaica joining the trend in 1994.[136] Many human rights activists throughout the region have criticized the reintroduction of floggings as violating international standards on human rights.[137] Yet for others, the real issue is whether the legal system has served the needs of the nation.[138]

While the *Pratt and Morgan* decision set important guidelines for ensuring specific human rights standards, there is a strong perception that the only winners in the entire scenario are the attorneys who can keep a convicted killer away from the gallows for a very long time. The decision of the Privy Council in *Guerra and Wallen*[139] serves as a prime example. Guerra and Wallen were found guilty of raping and killing a young woman, decapitating her one-year old baby, and slitting her husband's throat and leaving him for dead.[140] Wallen died from AIDS while on Death Row and Guerra escaped

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130. *See* Babb, *supra* note 5, at 2.

131. *See* Taped Interview with Justice Zainool Hosein, *supra* note 129.

132. *See* Babb, *supra* note 5, at 2.

133. *See* Shelley Emling, *Caribbean Revives Floggings as Deterrent to Crime*, NEWSDAY (Trin. & Tobago), Feb. 6, 1997, at 15. Governments in many Caribbean countries unofficially stopped hangings and floggings in the 1980's in response to protests from international human rights organizations. However, many judges have started to impose the punishment again in recent years as a deterrent to rising crime. *See id.*

134. *Id.*

135. *See id.*

136. *See id.*

137. *See id.*

138. *Carey Reviews Justice System*, JAMAICA GLEANER, March 17, 1997, at 18.

139. 45 W.I.R. 400 (P.C. 1994).

140. *See* Wallen v. Babtiste, 45 W.I.R. 405, 415 (Ct. App. Trin. & Tobago 1994).

custody during trial, but was subsequently recaptured.[141] Guerra appealed to the Privy Council which commuted his sentence to life. Under the current system in Trinidad and Tobago, he could be released by 2004. It is cases such as this that have helped swing public sentiment in favor of the death penalty over the last decade. However, Privy Council decisions such as *Pratt and Morgan* and *Guerra and Wallen* seem to lack sensitivity to and understanding of the issues in the society which the decision impacts. It is such decisions that help renew the call for the establishment of a regional Court of Appeal to replace the Privy Council, one that can better address the issues and concerns of the region.

IV. A CARIBBEAN COURT OF APPEAL: THE INSTITUTIONAL AND JURISPRUDENTIAL DEBATE

In July 1971, the government of Trinidad and Tobago appointed the Caribbean Task Force to reexamine the question of closer relations among Caribbean nations.[142] In February 1974, the Task Force recommended the establishment of a Caribbean Court of Appeal as a necessary institution for the promotion of greater cohesiveness among Caribbean nations.[143] For over three decades, the idea of establishing such a Court has circulated throughout the region as a purely intellectual debate for academics and politicians alike. However, the region now stands on the brink of making this intellectual exercise a reality.[144] The key motivation for the establishment of a Caribbean Court of Appeal has been the abolition of appeals to the Privy Council, such that the Caribbean Court of Appeal replaces the Privy Council as the final administrator of justice in the region. However, while there is certainly enough enthusiasm for the establishment of such a court, it remains a stiff point of debate whether such a court presents a viable and practical alternative to the Privy Council. In consideration of this issue, it will be useful to examine critical areas in the case for and against such a court. This section attempts to analyze the key elements on both sides of the institutional and jurisprudential debate and makes a strong case for the establishment of a Caribbean Court of Appeal.

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141. *See id.*

142. *See* Report of the Caribbean Task Force, *supra* note 16, at 3.

143. *See id.* at 33-34.

144. *Caribbean Court of Appeal Coming to TT*, NEWSDAY (Trin. & Tobago), Sept. 15, 1997, at 3. At a recent meeting of Caribbean Attorneys General in Jamaica, it was decided that the new Court of Appeal will be established in Trinidad and Tobago. This meeting also established some of the criteria for appointment of judges to the Court of Appeal. *See id.*

A. Positive Law vs. Law as a Product of Society

The debate over the establishment of the Caribbean Court of Appeal can best be characterized as Positive Law vs. Law as a product of society. The question is posed by one noted Trinidadian judge: "Why do people want a Caribbean Court of Appeal? It is certainly not because they are dissatisfied with the caliber of people who sit on the Privy Council or the competence of the judges who render these decisions."[145] One response to this question is that the Privy Council does not sufficiently understand social conditions in the Caribbean and is too far removed from the social impact of its decisions.[146] Positivist jurisprudence opposes the above assertion. Positivism generally defines law not as the product of natural reason or moral dictates but merely as a command issued by a sovereign and backed by a sanction.[147] In the West, positivism is the prevailing mode for conceptualizing legal systems,[148] yet there is great tension with competing explanations.[149] Professor H.L.A. Hart, the Oxford Positivist, defines a legal system as a system which is composed of a union of primary and secondary rules.[150] Primary rules are those which determine disputes and guide citizen conduct.[151] It is fundamental to Hart's positivism that the rules that govern society be derived from the official norm structure.[152] Law is to be separated from custom and morality. Officially derived rules are to be applied by decision-makers because they are the rules of society, not necessarily because of their inherent fairness.[153]

In the context of our current debate, a positivist would reject the proposition that the Privy Council is no longer desirable because of the lack of sensitivity to and understanding of social conditions in the Caribbean. Law is law. Does it matter whether it is decided in London or Jamaica or Trinidad and Tobago? Justice Hosein challenged those who reject this positivist perspective:

> Go through all the reports of Privy Council decisions affecting the Caribbean. Find and select those cases which would have been decided differently had the judges of the Privy Council been more familiar with the social conditions of the region. In all those cases,

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145. Taped interview with Justice Zainool Hosein, *supra* note 129.

146. *See* Taped Interview with Henley Wooding, *supra* note 51.

147. BAILEY KUKLIN & JEFFREY W. STEMPEL, FOUNDATIONS OF THE LAW 143 (1994).

148. See John W. Van Doren, *Positivism and the Rule of Law, Formal Systems or Concealed Values: A Case Study of the Ethiopian Legal System*, 3 J. TRANSNAT'L. L. & POL'Y 165, 189 (1994).

149. See id.

150. *See* H.L.A. HART, THE CONCEPT OF LAW 96 (1961).

151. *See id.* at 78.

152. *See* Van Doren, *supra* note 148, at 191.

153. *See id.*

> the Privy Council acted clearly in the interests of justice, following the rule of law, and a Caribbean Court of Appeal would have been compelled to act in the same manner and reach the same conclusion.[154]

Despite the compelling positivist perspective, there are equally compelling arguments for the abolition of appeals to the Privy Council. This perspective can be explained by examining law as a product of society. Proponents of this perspective argue that law would be better off it if were developing inside the Caribbean as opposed to other jurisdictions.[155] The rationale for this perspective was explained over a century ago by Oliver Wendell Holmes when he stated:

> The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have a good deal more to do than the syllogism in determining the rules by which men should be governed.[156]

The genius of the common law is experience.[157] The common law can be described as a common sense response of the people and judges to practical problems. Hence, if the law being decided is far removed from the societies on which it impacts, then the law lacks that connection to the social reality of the people. The result of cases such as *Pratt and Morgan* loudly echo this point. The Privy Council's decision in *Pratt and Morgan* had the effect of legislating for the Caribbean region.[158] Further, the ruling did not conform to the judicial reality of the Caribbean.[159] The dramatic increase in criminal activity, which is responsible to some extent for the clogging of the judicial systems, has resulted in delays in processing criminal trials and appeals.[160] Now with the five-year time limit imposed by the Privy Council, the likely result is that all other appellants apart from convicted murderers will have to accept even more delay to the already bogged down appellate process.

The language used in the *Pratt and Morgan* decision seems to reflect distaste for the use of capital punishment generally.[161] In light

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154. Taped interview with Justice Zainool Hosein, *supra* note 129.
155. *See* Taped Interview with Henley Wooding, *supra* note 51.
156. OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881).
157. *See id.*
158. *See* Babb, *supra* note 5.
159. *See id.*
160. *See* De La Bastide, *supra* note 28, at 415.
161. *See* 43 W.I.R. at 356.

of the fact that England abolished the death penalty a number of years ago, this is not immediately surprising. However, nearly all Caribbean territories have retained the death penalty in their constitutions as a deterrent to the high levels of violent crime.[162] Neither common law nor statutory law can provide a clear and certain answer to every question. However, in making its decisions, the Privy Council has been determining what is best for a particular society at a certain point in its history. In this light, it seems highly appropriate for the decision-makers in such cases to have an intimate firsthand knowledge of the society for which the decision is made. Further, it can only lend credence for the judge to live in or close to the society for which he makes such decisions. The cases discussed herein show a divergence of policy taking place, at least with respect to the death penalty. The Privy Council appears to be moving in line with the rest of Europe regarding the abolition of capital punishment, while the Caribbean countries are still very much in favor of retaining the death penalty.[163] Now is the time for Caribbean nations to establish their own final appellate system before they find themselves obligated by a policy which does not fit the current needs of their societies.

B. Legitimacy

The issue of legitimacy is closely tied into the debate over the establishment of a Caribbean Court of Appeal. In this context, legitimacy refers to the ability of the people to accept controversial decisions. Would it be easier to accept controversial decisions such as *Pratt and Morgan* if a Caribbean court made the decision rather than a court in London? Answering this question requires a separation of emotional and rational responses. Those with legal training may be able to look at the decisions in the cases discussed herein and objectively assess their impact on the case for a Caribbean Court of Appeal. For others however, the decision comes down to raw emotion.

Most likely, the majority of people in the Caribbean find it easy to associate this debate with emotional factors.[164] When the Privy Council hands down an unpopular or controversial decision, such as *Guerra and Wallen* or *Pratt and Morgan*, the media is flooded with calls for the abolition of appeals to the Privy Council.[165] Yet charged

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162. *See* Babb, *supra* note 5.
163. *See id.; see also* Taped Interview with Henley Wooding, *supra* note 51.
164. *See* Rawlins, *supra* note 3, at 240
165. *See id.*

emotion is neither a stable nor sufficient ground on which to rest the establishment of a Caribbean Court of Appeal.[166] Careful consideration should be given to the view that establishing a Caribbean Court of Appeal is too crucial a decision to made on the basis of unpopular decisions that can be repeated all too easily by the body that replaces the Privy Council.[167] The issue of abolishing the Privy Council as the final court of appeal for the region surfaced with great intensity after the Privy Council granted a stay of execution for convicted murderers Guerra and Wallen. The Government of Trinidad and Tobago, after the sting of the Privy Council's decisions in the *Jammat al Muslimeen* cases, has been pushing strongly to have the Privy Council replaced by a Caribbean Court of Appeal.[168] However, the establishment of a Caribbean Court of Appeal should not be justified on the grounds that such a court would have, or should have, acted differently than the Privy Council did in the *Muslimeen* cases. Justice Hosein of Trinidad notes that in that case, the Privy Council acted clearly in the interests of justice, following the rule of law, and a Caribbean Court of Appeal would have been compelled to act in the same manner and reach the same conclusion.[169] In the Caribbean, it will prove difficult to separate emotion from other considerations relating to the establishment of a Caribbean Court of Appeal. Yet with this realization in mind, one can attempt an analysis based on reason, considering those factors which favor the establishment of such a court, as well as those that do not.

Rationally speaking, the key element of legitimacy is the notion of judicial integrity. One of the most convincing arguments set forth in favor of retention of the Privy Council in its present capacity is the impartiality that it provides in the judicial process.[170] This is seen largely as a result of its geographic distance from the Caribbean region, far removed from the reach of regional politics.[171] The Privy Council is portrayed as an unbiased, impartial bystander, untainted by the local pressures of politics and patronage.[172] Thus, in times of acute political controversy, the Caribbean has often seen the geographic and social distance of the Privy Council as a calming and stabilizing influence.[173] Those who favor the retention of the Privy Council rather than a Caribbean Court of Appeal state that members

166. *See id.* at 245.
167. *See id.* at 245-46.
168. *See* Singh, *supra* note 8.
169. *See* Taped interview with Justice Zainool Hosein, *supra* note 129.
170. *See* Rawlins, *supra* note 3, at 255.
171. *See id.*
172. *See id.*
173. *See id.* at 256.

of the Privy Council are more experienced than any jurist in the region and are immune to influence from political and other pressures.[174] Conversely, jurists from the region, despite their integrity and independence, may find it difficult if not impossible to be uninfluenced, due to the small size of the region and the fact that it proves almost impossible to keep the business of one person private from that of another.[175] This concern is part of the reason that there is some division as to whether the Caribbean Court of Appeal should handle only criminal appeals.[176]

Despite the fact that the institutional framework of judicial independence serves to maintain the independence of the judiciary in the Caribbean, Hugh Rawlins submits that the institutional framework alone cannot guarantee judicial independence.[177] True independence of mind and spirit cannot be dictated from any document; it must come from within and represent strength of character, as well as a burning desire to be impartial and seek justice under all circumstances.[178] Ramsahoye contends that Caribbean judges have been less vigilant at times than members of the Privy Council when it comes to taking firm stands in constitutional matters against the State.[179] When Caribbean judges have failed or refused to enforce fundamental rights granted under Caribbean Constitutions, the Privy Council has proven an astute guardian of the fundamental rights of Caribbean people.[180]

In contrast, Rawlins asserts that in several cases Caribbean judges have shown vigilance and have balanced individual and state interests admirably.[181] In the final analysis, any idea of judicial independence must include far greater considerations than the taking of a firm stand against the state or strict adherence to constitutional

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174. *See* REPORT OF THE CARIBBEAN TASK FORCE, *supra* note 16, at 103.

175. *See id.* at 102-03.

176. *See Summit to Discuss Public Hearings for Regional Judges*, INDEPENDENT, *supra* note 6. There is some concern that in civil appeals, money and property are at stake and there is the perception that in such small societies, the potential for improper influence on the judiciary is high. *See id.; see also* Taped Interview with Justice Zainool Hosein, *supra* note 129.

177. *See* Rawlins, *supra* note 3, at 257. There exists in several Caribbean Constitutions several entrenched clauses which are designed to guarantee judicial independence. Such provisions refer to the appointment of judges, the security of tenure and their remuneration. Yet, while reasonably adequate for the purposes for which they were designed, they provisions alone cannot guarantee judicial independence. *See id.* at 256.

178. *See id.* at 257.

179. *See* Ramsahoye, *supra* note 11, at 9.

180. *See id.* Ramsahoye cites several cases in support of this assertion as evidence that the Privy Council would be prepared to enforce the guarantees of fundamental freedoms when Caribbean judges would not. *See id.*

181. *See* Rawlins, *supra* note 3, at 258 (citing several leading cases from the region supporting this point).

provisions. It must also balance the interests of the state and the individual, seeking justice for all persons, while managing to stay above influence and patronage from any source whatsoever without living in complete isolation from society.[182] Thus, I submit that it is the character of the persons entrusted with the judicial power that is the most important factor in securing judicial independence. Hence, the process by which judges are selected at all levels throughout the Caribbean will prove a critical component in the case for a Caribbean Court of Appeal, for it is that process which will determine the level of respect and confidence that the Court will inspire and promote in itself.[183] If such a Court is to succeed, all sections of the community should want to hold the confidence of the population and not be manipulated by politicians in the Caribbean or any other group of individuals.[184] This will be the foundation upon which the legitimacy of a Caribbean Court of Appeal will rest.

C. Nationalism and Sovereignty

The disinclination of Caribbean states to surrender any of their judicial sovereignty is cited as one of the reasons for the failure to introduce a Caribbean Court of Appeal as a cooperative venture.[185] The surrender of sovereignty in any form for the benefit of integration has been an enduring problem in the Caribbean. It was responsible for the collapse of the West Indies Federation in 1961,[186] and it continues to plague the operation of several regional institutions. This has proven detrimental to the region, as even the industrialized countries of the world are surrendering aspects of their sovereignty in favor of the advantages which may be gained from cooperation.[187]

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182. *See id.* at 259.

183. *See generally, Summit to Discuss Public Hearings for Regional Judges*, INDEPENDENT, *supra* note 6.

184. *See id.*

185. *See* Keith Patchett, *Legal Problems of the Mini-State: The Caribbean Experience*, CAMBRIAN L. REV. 57, 66 (1974).

186. The West Indies Federation was established in 1958. It was composed of ten entities, Antigua, Dominica, St. Lucia, St. Kitts-Nevis-Anguilla, Montserrat, St. Vincent, Barbados, Grenada, Jamaica, and Trinidad-Tobago, all of which were governed by Great Britain. The Federation was spawned under the auspices of Great Britain which had agreed on steering its colonial territories around the world to independence through economic, social and political development. The Federation was to be internally self -governing for a four-year period, with Great Britain remaining responsible for foreign affairs and defense. After the four-year period, the Federation was to be given complete independence as a single, sovereign, federal state. In 1962, the most developed entities, Jamaica and Trinidad and Tobago, decided to secede from the Federation in favor of separate independence, and the Federation was dissolved.

187. Globalization of the world economy and the almost simultaneous division of the world into regional economic trading blocs have had serious implications for Caribbean

Issues of nationalism and sovereignty are at the forefront of the case for a Caribbean Court of Appeal. In this view, first expressed by the Caribbean Task Force in 1974, the Caribbean Court of Appeal represents the effort to assert independence from the Colonial power and forge a Caribbean unity.[188] The assertion here is that independence imposes an obligation on sovereign nations to be the architects of their own destiny.[189] To fulfill this obligation, the people must in turn create their own institutions. Dr. Fenton Ramsohoye states that "[i]n the history of the Caribbean people there must be a time when they ought to manage completely their own judicial institutions. This is because nationalism and real independence require it."[190] In Dr. Ramsohoye's opinion, human aspirations and dignity are best achieved and satisfied by the development of institutions that are created and managed by the people themselves.[191] In his view, Caribbean people now need a judiciary that is an entirely local institution with the highest court being a Caribbean Court of Appeal to replace the Privy Council.[192] In the words of the Caribbean Task Force: "[I]t is inconsistent with political self-determination to allow a Court outside of the region to sit in judgment and adjudicate on matters which arise in, and solely concern, the region."[193]

Another key component of independence in this context manifests itself in the form of decisions from the Privy Council. Rarely in Courts of Appeal throughout the region will one see lawyers citing or quoting an appellate case from another Caribbean country unless that case was decided before the Privy Council.[194] The result of this reliance on the judgments of the Privy Council is a notable absence of precedents in the region. Caribbean lawyers commonly rely on cases from another Commonwealth jurisdiction such as New Zealand rather than on a more persuasive case from a Caribbean country because of the stigma of inferiority that comes with cases decided by Caribbean jurists.[195] As noted earlier, the Privy Council has accepted only a small number of appeals from the Caribbean.[196] Thus, one of the best ways to exercise independence is to develop a Caribbean jurisprudence to enable the countries of the region to take control of

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economies. In light of the changing dynamics of the global community, the idea of regional integration and cooperation has sparked renewed interest.

188. *See* Report of the Caribbean Task Force, *supra* note 16, at 103.

189. *See* Rawlins, *supra* note 3, at 250.

190. Ramsahoye, *supra* note 11, at 12.

191. *See id.* at 1.

192. *See id.*

193. REPORT OF THE CARIBBEAN TASK FORCE, *supra* note 16, at 102.

194. *See* Taped Interview with Justice Hosein, *supra* note 129.

195. *See id.*

196. *See supra*, text accompanying notes 32-51.

their jurisprudential destiny. The establishment of a Caribbean Court of Appeal presents a magnificent opportunity to initiate that process.

D. Access to Justice

The issue of access to justice can also be termed proximity to justice. The reference to proximity here is twofold: it refers to both geographic and social proximity. Geographically, the Privy Council is so far removed from the Caribbean that access to its services proves excessively expensive for potential litigants from the Caribbean. One compelling argument for a Caribbean Court of Appeal is that it will be much less expensive for Caribbean litigants, and thus much more accessible than the Privy Council.[197] The cost of access to a Caribbean Court of Appeal will hinge largely on whether that Court is itinerant or stationary. If the Court is located permanently in one Caribbean territory, the cost of access to litigants from other Caribbean nations might prove to be an obstacle to access as well. However, an itinerant Court that sits in a jurisdiction to hear a certain number of cases from that jurisdiction can significantly diminish the costs of access to justice.[198]

The issue of social proximity is much more complex. One assertion regarding social proximity is that justice cannot be separated from the local circumstances under which a case arises.[199] Under this assertion it is argued that judges should themselves be familiar with the circumstances of the litigants, and should themselves come from similar backgrounds.[200] When courts make a decision, particularly those involving policy, they are determining what is best for a particular society.[201] This requires the decisionmaker to have an intimate, firsthand knowledge of the society for whom the decision is made.[202] Yet, even after decades of independence, the Caribbean is still sending the policy decisions of its local courts to England, to be decided by judges who have virtually no experience or understanding of the region and its people. Closely linked to this assertion is the point that the Privy Council lacks a sensitivity to and appreciation for local circumstances. In *Guerra and Wallen* and the *Jammat al*

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197. This assertion is not based on any concrete assessment of anticipated costs for a Caribbean Court of Appeal, but is based merely on logic.

198. The Caribbean Task Force addressed this issue and determined that the Court should be itinerant with a headquarters in either Trinidad and Tobago or Jamaica. *See* REPORT OF THE CARIBBEAN TASK FORCE, *supra* note 16, at 104.

199. *See* Rawlins, *supra* note 3, at 253.

200. *See id.*

201. *See* De La Bastide, *supra* note 28, at 429.

202. *See id.*

Muslimeen cases, the decisions of the Privy Council seemed insensitive to the unique circumstances and their impact on local society. Perhaps a Caribbean Court of Appeal would be better able to reflect a knowledge and understanding of, as well as sensitivity to, the circumstances, and thus be better suited to address the needs of the region.

However, proponents of the Privy Council point out that the Council is comprised of persons with outstanding legal scholarship and intellectual ability who have had outstanding legal careers and many years of proven experience.[203] Conversely, in the Caribbean, the caliber of some judicial personnel does not compare favorably to that of members of the Privy Council.[204] Historically, this claim had little merit because the Caribbean region gave birth to some jurists of outstanding caliber, some of whom have actually served on the Privy Council.[205] However, today there is a concern that the judicial selection process in the Caribbean leaves much to be desired.[206] In the long run, "the critical consideration for the selection of Caribbean judges for a Caribbean Court of Appeal . . . must be whether a particular candidate satisfies known criteria based on intellectual ability, integrity, capacity for hard work, character, moral soundness and independence of mind."[207] These principles are of the highest importance because a Caribbean Court of Appeal will be responsible for the application and creation of new legal principles. These people will be responsible for the development of a Caribbean jurisprudence. It is therefore imperative that they be selected through a process that leaves no doubt as to the integrity of the process or the qualification of the jurists.

E. The Cost Factor

The above factors may not fully justify the urgent and pressing need for the establishment of a Caribbean Court of Appeal, and may even prove insufficient to gain widespread support for the cause.

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203. *See* Ramsahoye, *supra* note 11, at 7-8.

204. *See id.* at 15.

205. Some outstanding Caribbean Commonwealth jurists have served on the Privy Council and delivered judgment on cases. They include: Sir Hugh Wooding, the late Chief Justice of Trinidad and Tobago, Sir William Douglas, the former Chief Justice of Barbados, and Sir Vincent Floissac, the Chief Justice of the Organization of Eastern Caribbean States (OECS) Supreme Court.

206. *See* Rawlins, *supra* note 3, at 260. Rawlins discusses at length the judicial selection process in the Caribbean region and makes some important recommendations for the improvement of the process. *See id.*

207. *Id.* at 261. There is certainly no absence of qualified persons to serve on a Caribbean Court of Appeal, but they must be appointed by a strict process according to criteria of the highest order.

Ultimately, it could be a factor external to the region that determines whether and when the Caribbean Court of Appeal becomes a reality. The Privy Council is funded by the government of the United Kingdom which may choose to discontinue its funding at any time, especially in light of the substantial decrease in the number of jurisdictions that currently retain appeals to that body.[208] Over time, there may be so few jurisdictions that require the services of the Privy Council that it becomes wholly unnecessary and uneconomical to continue to fund its operation.[209]

"The cost factor has featured prominently in the deliberations of the Heads of Caribbean governments at Caribbean Community (CARICOM)[210] meetings in recent years."[211] The scarce financial resources of most Caribbean governments is likely to pose a major obstacle to the establishment and maintenance of a Caribbean Court of Appeal due to the substantial cost.[212] CARICOM projections indicate that a six-judge Caribbean Court of Appeal would cost around $EC 4 million[213] annually to operate and regional territories would have to contribute to its continual upkeep.[214] At a recent meeting of regional Attorneys General,[215] several options for funding the Court of Appeal were discussed.[216] One option proposed the following distributions: Jamaica 35.7 percent ($EC 1.5 million), Guyana 10.6 percent ($EC 444,000), Barbados 15.6 percent ($EC

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208. *See* De La Bastide, *supra* note 28, at 402.

209. The likelihood of this event occurring increases over time. Anthony Smart, the former Attorney General of Trinidad and Tobago, noted that the time for the establishment of the Court of Appeal is now. If the UK abolishes the Privy Council, and the region has not got a Court of Appeal of its own, the various territories would be left solely with their own national Court to provide the final judicial recourse. *See* Taped Interview with Anthony Smart, Former Attorney General of Trinidad and Tobago, in Port-of-Spain, Trinidad (Feb. 15, 1997) (on file with author).

210. CARICOM comprises 13 English-speaking member countries, with a total population of 5.5 million people, an aggregate land area of 271, 601 sq. km., and a combined GDP of US $12.6 billion. The recent inclusion of French speaking Haiti (with a population of 17.3 million, land area of 27,149 sq. km and GDP of US $748 million) and Dutch-speaking Surinam (with a population of 411,000, land area of 163,820 sq. km, and GDP of US $348 million) has more than doubled the size of the Community. The 15 members are: Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Surinam, and Trinidad and Tobago.

211. Rawlins, *supra* note 3, at 271.

212. *See id.*

213. *See id.* At the time of this writing, the rate of exchange was roughly $EC 2.70 to $US 1.00. Thus the approximate cost of establishing a Caribbean Court of Appeal is $US 1.4 million.

214. *See* Babb, *supra* note 5.

215. Regional Attorneys General met on the island of St. Kitts from October 28-31 1996 to discuss the issue of breaking with the Privy Council and establishing the Caribbean Court of Appeal. *See id.*

216. *See id.*

660,000),Trinidad and Tobago 38 percent ($EC 1.58 million) and other smaller territories less than 2 percent.[217]

Given the huge startup costs, it appears that whoever is chosen to sit on the Court of Appeal may have to do so at some financial sacrifice to themselves.[218] The cost issue has featured prominently in most cooperative ventures in the region and will likely play a similar role with the proposed Court of Appeal. Undoubtedly, Caribbean governments will be hard pressed to meet the financial burden of sustaining the Court of Appeal on an annual basis. However, it may be well worth the sacrifice.[219] Ultimately, it will be the cost factor that decides whether the Caribbean Court of Appeal will become a reality or just another intellectual exercise for leaders of the region.

V. RECENT DEVELOPMENTS

Events in the last few months have brought the idea of a Caribbean Court of Appeal even more into the spotlight. Barbados recently appointed a Constitutional Commission to consider replacing Queen Elizabeth II as the Head of State,[220] partly because she appoints the judges who sit on the Privy Council.[221] This bold step toward cutting centuries-old ties with England reflects a new focus on nationalism and sovereignty. In the words of a former Attorney General from Barbados: "The newer generation in Barbados has moved away from the monarchy. They do not really recognize the Queen. There is more pride in [our] own."[222] Four years after the controversial *Pratt and Morgan* decision, some Caribbean countries have sped up hangings to beat the five-year deadline imposed by the Privy Council.[223] The Privy Council's decision forced St. Vincent and the Grenadines to commute two life sentences because the prisoners were on death row for more than five years.[224] Consequently, the country ordered a triple hanging in February of 1995, the first hanging in four years.[225] In the Bahamas, at least six people were hanged in 1996.[226]

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217. *See id.* When converted to U.S. currency, the amounts work out as follows: Jamaica ($555,550); Guyana ($164,444); Barbados ($244,444); Trinidad and Tobago ($585,185).

218. *See* Taped Interview with Justice Zainool Hosein, *supra* note 129.

219. *See* Taped Interview with Anthony Smart, *supra* note 209.

220. *Islands Consider Independence*, MIAMI HERALD, May 6, 1997, at 6A. Barbados retained the Queen as the official Head of State after independence. *See id.*

221. *See id.*

222. *Id.*

223. *See id.*

224. *See id.*

225. *See id.*

226. *See id.*

Recent events in St. Vincent and the Grenadines have also brought attention to the issue of Caribbean appeals to the Privy Council. Two Americans, Jim and Penny Fletcher of Key Largo, Florida, were recently on trial for murder in St. Vincent.[227] A murder conviction in this case carried a mandatory sentence of death by hanging.[228] The Fletcher case became a hot topic not only throughout the Caribbean and England, but also in the United States. Soon after the arrest of the Fletchers, there was an onslaught by the American media making allegations of extortion and an inferior judicial system.[229] The case became so high profile that it was raised by President Clinton, who indicated his concern to Prime Minister James Mitchell of St. Vincent in a meeting in May 1997.[230] Only a unanimous jury verdict can lead to a murder conviction in St. Vincent.[231] A guilty verdict can be appealed to the Eastern Caribbean Court of Appeals,[232] but the court of final appeal is the Privy Council. Ironically, this high-profile case came to an anticlimactic end when Justice Dunbar Cenac of the Eastern Caribbean High Court threw out the case on a defense motion to dismiss.[233]

This case drew international attention to the issue of abolishing Caribbean appeals to the Privy Council. Vincentian lawyer Ralph Gonzalves, who represented the Fletchers, strongly opposes the idea of a Caribbean Court of Appeal and favors retaining the Privy Council as the final level of appeal for the region.[234] From his perspective, the Privy Council has the distance to look at cases dispassionately, while the small size of island societies increases the prospects for manipulating justice.[235] The notion that judicial independence will be threatened if a Caribbean Court of Appeal were to replace the Privy Council is one of the most prominent in this debate.

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227. *See* Juan O. Tamayo, *A Killing, a Rich Couple, and a Scandalized Nation*, MIAMI HERALD, July 24, 1997, at 1A.

228. *See id.*

229. Francis Joseph, *Regional Justice System on Trial*, TRIN. GUARDIAN, July 21, 1997.

230. Shelley Emling, *Paradise Lost*, AUSTIN AM.-STATESMAN, June 7, 1997, at A13.

231. *See id.*

232. *See id.* The Organization of Eastern Caribbean States is comprised of Antigua and Barbuda, Dominica, Grenada, Montserrat, St. Kitts-Nevis, St. Lucia, and St. Vincent and the Grenadines, with the British Virgin Islands as an associate member. They have a combined population of 550,000. Due to their small size, they share an appellate court rather than having one within each nation. The final level of appeal for the OECS Court of Appeal is the Privy Council.

233. *See* James Anderson, *Island Murder Charge Against Couple is Dropped*, MIAMI HERALD, August 9, 1997, at 13A. "Acting on a defense motion to dismiss the case, [the judge] ruled that the prosecution's circumstantial evidence failed to prove that the Fletchers killed Jolly Joseph." *Id.*

234. *See Islands Consider Independence, supra* note 220.

235. *See id.*

If those who would utilize the Court of Appeal have no confidence in it as an institution of justice, then the Court is destined to fail.

In September 1997, Caribbean Attorneys General voted to place the proposed Caribbean Court of Appeal in Trinidad and Tobago as a stationary court.[236] Clearly, the decision as to where the proposed court should be is an important step towards its eventual formation. Hopefully, this agreement signals a speeding up of the measures necessary to fully implement such a body. Of greater significance however, is the decision of some regional governments to withdraw from international human rights commissions in order to carry out the death sentence on convicted killers. In an effort to deal with an increasing death row population, Jamaica announced in October 1997 that it was withdrawing from the United Nations Committee on Human Rights to expedite the execution of convicted death row inmates.[237] Trinidad and Tobago is also considering withdrawing from the UN Committee as well as the Inter-American Commission on Human Rights.[238]

The efforts of regional Governments to hang convicted killers have been frustrated to a large extent by applications to these two international commissions.[239] Applications to these two international bodies by convicted death row killers attempting to delay their executions effectively carries the length of their appeal process beyond the two-year guideline laid down by the Privy Council in the 1993 *Pratt and Morgan* decision.[240] In *Pratt and Morgan*, the Privy Council declared that all domestic appeals should be completed within one year of conviction.[241] The other year was set aside for appeal to the Privy Council, with the aim of completing the entire domestic process within two years.[242] If the international commissions cannot hear applications within that time then it would mean that Caribbean states will not be able to carry out the death sentence. Clearly, the move by regional governments to consider abandoning their membership in these human rights organizations is not without

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236. *On With the Court*, TRIN. GUARDIAN, Sept. 15, 1997, at 8.

237. *State Moves on Killers: Plan to Quit Human Rights Bodies*, TRIN. GUARDIAN, Dec. 29, 1997, at 1.

238. *See id.*

239. *See id.* As of December 1997, there were 14 applications from Trinidad and Tobago pending before the Inter-American Commission and 2 before the UN Committee. Perhaps if there were no such applications before the human rights bodies, Trinidad and Tobago would have been able to execute six convicted killers between November and December 1997. *See id.*

240. It should be recalled that in the Pratt and Morgan matter, the two appellants had in fact delayed their execution for a number of years by applications to these same two bodies, the United Nations Committee and the Inter-American Commission on Human Rights.

241. *See* 43 W.I.R. at 341.

242. *See id.* at 361.

legal and political consequences.[243] However, the fact that such a step is being seriously considered, and in the case of Jamaica already carried out, is a testament to the effect of the Privy Council's rulings on the region. It becomes increasingly clear that decisions such as *Pratt and Morgan* are legislating policy for the Caribbean region. These recent developments illustrate that the time is ripe for the creation of a Caribbean Court of Appeal to adjudicate on those matters which arise in and solely concern the region.

VI. CONCLUSION

The reservations of those who oppose the creation of a Caribbean Court of Appeal are grounded in a lack of confidence, which is based in turn on a lingering, subconscious, colonial dependency.[244] On the other hand, abolishing appeals to the Privy Council results from the need to assert national sovereignty and maturity by removing the last vestiges of colonial dependency on England:

> Dr. Francis Alexis has contended that the continued subordination of Caribbean judges to British judges should be seen as an embarrassment to our zeal for localizing other areas of decisionmaking, since we are mature enough to settle among ourselves the conflicts thrown up by our given circumstances. [I]f we are not yet so mature, given that we must inevitably so become, all the more pressing is the urgency to desist from sending our disputes abroad so that by dint of hard experience we must fashion a way to bring this maturity.[245]

It is also equally important to look at the type of cases that the Privy Council as the final Court of Appeal is called upon to decide. The decisions discussed herein, which all have extremely important consequences for the region, are really policy decisions, involving the balancing of competing interests and considerations. The competition in these cases is typically between the interests of the individual and the society to be protected and to have the law of the land enforced. The decisions of the Privy Council reviewed here determine what is best for a particular society in the circumstances existing at a certain point in its history. Is it appropriate for the Privy Council in England to determine the policy of sovereign states? In the words of the Chief Justice of Trinidad and Tobago: "Is it not time

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243. Both Trinidad and Tobago and Jamaica were long standing signatories to both the UN Committee and the Inter-American Commission. Abandoning affiliations with these bodies is sure to carry some consequences for both nations in the global community.

244. *See* Rawlins, *supra* note 3, at 262-63.

245. *Id.* at 264 (quoting Alexis, *supra* note 1).

that we . . . give our own judges the opportunity to fulfill more effectively the obligation they assumed when they took their oath of office? Is it not time in other words, to complete our independence?"[246] There is some valid reasoning in these assertions; however, as Rawlins noted people are comfortable with what they know, especially if its has served them well.[247] It can scarcely be contested that the Privy Council has served the region with distinction during its tenure. This "comfort level" must be considered when analyzing the reluctance of persons opposed to the abolition of appeals to the Privy Council. From this perspective, the Privy Council has functioned admirably as the final level of appeal for the region and has instilled a sense of comfort and confidence in its decisions. The notion of removing this "comfort level" and replacing it with an experimental body which may have problems establishing jurisdiction is clearly unappealing to many. For such retentionists, the question is clear: Is it worth taking the chance on an institution that might be of a lesser quality, on the basis that self-government is more important than good overseas government in the development of the dignity and self-determination of the Caribbean people?[248] The establishment of the new Court of Appeal may indeed rest on this foundation.[249]

246. De La Bastide, *supra* note 28, at 431.
247. *See* Rawlins, *supra* note 3, at 264.
248. *See* Ramsahoye, *supra* note 11, at 12.
249. *See id.*