Chapter Nine

The Judicial Branch

The West Indies Associated States Supreme Court was established on February 27th, 1967 simultaneously with the grant of Associated Statehood to St. Kitts-Nevis-Anguilla. Its jurisdiction covered Antigua, Dominica, Grenada, St. Kitts-Nevis-Anguilla, St. Lucia and St. Vincent. The jurisdiction was extended to the colonies of Montserrat and the British Virgin Islands and (after its separation from St. Kitts in 1980) Anguilla.

The court was created with two divisions. The High Court sits on an ongoing basis in each island with one or more resident judges. The Court of Appeal, based in St. Lucia, exercises an appellate jurisdiction and sits in each country at fixed times in each year and otherwise virtually. As the Associated States gained independence the name of the court was changed to the Eastern Caribbean Supreme Court which remains today as the court of first instance and the first appellate court. The final appellate court for St. Kitts and Nevis has remained the Privy Council in London despite the establishment of the Caribbean Court of Justice (CCJ), more on which will be said later.

Because of the overlapping nature of the legislature and the executive, the courts play an even more significant role in our system. Their independence is critical to our democracy. The courts function as the guardian of the constitution and the fundamental rights of the citizen and as the arbiter of legal disputes. Their power is intended to deter abuse by and keep the powerful executive in compliance with the constitution and the laws. Thankfully the British saw the wisdom of creating a regional court rather than a separate court system for each island. I hate to think what would have happened in 1967 or in 2012-15 if St. Kitts and Nevis had a separate court with the Government exercising influence on the appointment of judges.

The first real test of the new West Indies Associated States Supreme Court came in St. Kitts within six months of its establishment. The test came in the form of the legal objections to the detention in prison of opponents of the Government under the state of emergency and the trials of those charged with offences arising out of the events of the June 10th, 1967.

Applications were made by way of habeas corpus by Dr William Herbert, Leader of the Peoples Action Movement (detained on June 10th, 1967) and Mr Henry Charles (detained on June 14th, 1967) for their release from detention under the state of emergency on the ground that their detention was a breach of their fundamental right to personal freedom and therefore unlawful. The High Court judge dismissed the applications, but on August 10th, 1967 the Court of Appeal found their detention to be unconstitutional and ordered their release.

Then came the criminal trials in October and November. The accused in the first and second cases, charged with shooting at police officers, were acquitted by the jury. The third case, known as the treason case, involved seven persons accused of conspiracy to overthrow the lawful government of the State. The accused included Dr. Herbert and Michael Powell who was to become in 1983 the first Deputy Prime Minister of independent St. Kitts and Nevis.

On November 14th, 1967, following the acquittal in the second trial and just before the commencement of the treason case, the House of Assembly unanimously passed a resolution as follows:

Be it resolved that this House expresses its complete lack of confidence in the administration of justice as applied to this Associated State under the present Constitution and supports such action as Government may take to…….inquire carefully into ways and means by which the existing Supreme Court Order, including the Agreement, can be amended to ensure that the rule of law is impartially observed.

Bradshaw wanted to change the Court system within a year of the beginning of self rule. The Labour Spokesman, newspaper mouthpiece of the Bradshaw-led ruling Labour Party, on the following day, referred to the resolution as historic.

In a hugely significant step, on November 20th, 1967 before the treason trial began the Chief Justice Sir Allen Lewis convened the Court in Basseterre and made a statement the first part of which is reproduced in full:

> *The attention of the Court has been drawn to a resolution passed in the House of Assembly expressing lack of confidence in the administration of justice in this State, and also to the debate which took place on that resolution and was broadcast over the St. Kitts radio station.*
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> *The Court recognizes the right of the Legislature to entertain and debate resolutions, but deplores the fact that Government should have introduced this resolution into the House in the midst of a series of trials of persons accused upon charges alleged to be concerned with an attempt to overthrow the existing Government and immediately before the commencement of the trial of the most important of the charges, namely, conspiracy to overthrow the Government.*
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> *The Court must take note of the fact that these trials are in sense political trials, a leading member of the Opposition Party being the central figure, and that the introduction of the resolution and the debate in the House follow immediately upon verdicts of acquittal by the jury in the first two of the trials.*
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> *The Court deprecates the fact that in these circumstances the debate was used by Ministers of Government for the purpose of criticizing the conduct of the two trials by the trial judge and of impeaching his integrity, no other reason being stated but that of the Government's dissatisfaction with certain rulings made by the trial judge and comments by him in the course of his summings up.*

The Court takes note of the fact that during the debate statements relating to the subject matter of the pending conspiracy charge were read out. This conduct tends to prejudice the fair trial of the accused and constitutes a contempt of court. This course of action was pursued notwithstanding a written request from the Chief Justice to the Premier that while the trials were pending the radio station should abstain from broadcasts which might tend to prejudice the fair trial of the accused.

The Court is not concerned with the opinions expressed during the debate as to the status of the House except to say that they were very misleading and display a complete misunderstanding of the respective status of the House and of the Supreme Court under the Constitution of this State.

The Chief Justice then went on to relate the facts including

- *some five hours after the verdict of acquittal in the first trial was returned, an illegal demonstration of disorderly persons was staged outside the hotel at which the trial judge (Mr. Justice St. Bernard) was residing, protesting that the judge was biased;*
- *the Chief Justice immediately visited St. Kitts and inquired from the Government whether it had any information suggesting that the trial judge might have a special interest in leaning in favour of the accused or against the Crown and was informed that Government had none and was not impeaching the personal integrity of the trial judge;*
- *between the first and second trials the judge was threatened by telephone and by letter;*
- *during the second trial two jurors received threatening letters which included a threat on the life of the judge;*

- *two requests by the Chief Justice that an official appeal should be made to the public over the St. Kitts radio station not to interfere with the trials went unheeded;*
- *immediately after the accused in the second trial were acquitted Premier Bradshaw telephoned the Chief Justice and requested the immediate removal from the State of the trial judge;*
- *Mr. Justice St. Bernard asked to be relieved of presiding over the remaining trials for personal reasons and was replaced by Mr. Justice Bishop.*

The statement of the Chief Justice ended as follows:

While the Supreme Court is an essential part of the structure of Government established by the Constitution of this State, it is constitutionally independent of the Executive and the Legislature. Its judges take no side in disputes, political, personal or otherwise. They will continue to administer justice according to law to all persons, fearlessly and with impartiality, and in accordance with the oaths which they have taken.

This Statement is made with the approval of all the judges of the High Court and of the Court of Appeal.

The treason trial began the same day. A week later the prosecution informed the court that it was offering no further evidence against any of the accused who were then acquitted. The fourth and fifth cases against Herbert and Powell respectively were likewise disposed of.

The Government then publicly circulated a '*handbill'* in which, attempting to justify the decision of the prosecution to discontinue the prosecution, it said that it was clear that the jury would not acquit any of the accused. It said that the trials were being used for political propaganda and outside lawyers had come in and used the court to launch vicious political

attacks on the government. The Government said it would establish a Commission of Inquiry into the events of June 10th, 1967.

It is worthy of note that lawyers came to St. Kitts from all over the Caribbean to join local lawyers in representing the detainees and the accused in the trials. The lawyers who came in included Lloyd Luckoo QC of Guyana, Malcolm Butt QC and Karl Hudson Phillips of Trinidad, Dudley Thompson and Lloyd Barnett of Jamaica, Bernard St. John and Jack Dear of Barbados and Jenner Armour of Dominica. Local lawyers included Sir Maurice Davis, later QC and Chief Justice of the Eastern Caribbean Supreme Court, Frank Henville QC and Fred Kelsick, later QC. These lawyers all had or went on to distinguished careers in the law and were recognized for such in the region.

A headline on the front page of The Labour Spokesman of October 7th, 1967 said '*Why are they bringing in 20 Lawyers from Abroad? An effort to influence the court.'*

The litigation arising from the events of 1967 continued until 1979. John Reynolds, one of the detainees, sued the Government in 1968 for damages for his wrongful detention. In July 1967 the Government lawyers had told the tribunal appointed to consider the evidence against the detainees that the Government had no evidence against Mr Reynolds. Despite this, the Government kept him detained until August 10th,1967 when he was released with the other detainees following the judgment of the Court of Appeal referred to above. Mr Reynolds continued his suit into the 1970s and was awarded exemplary damages by the Court of Appeal although the total sum awarded him of $18,000 was surprisingly miniscule.

The Government had tried to avoid any liability for the wrongful detention of the detainees by passing an Indemnity Act. That contemptuous piece of legislation was given short thrift and struck down as unconstitutional by the High Court, the Court of Appeal and the Privy Council which ended the matter when the Government appealed against the

damages awarded to Mr Reynolds. In 1979 The Privy Council upheld the damages awarded to him by the Court of Appeal.

The abuse of the fundamental rights of Mr Reynolds, the disrespect for and attack on the court and the attempt to cover their unlawful deeds by the diabolical Indemnity Act show that in times of political tension politicians, who might in normal times respect the separation of powers and the independence of the judiciary, can easily lose that respect. All the more reason why we need strong courts.

The St. Kitts and Nevis constitution contemplates in section 38 the move from the Privy Council to a regional court as the country's final court of appeal. The establishment of a final regional court was debated over many years. In 2001 the Caribbean Court of Justice (CCJ) was established by agreement between Caricom countries who agreed to fund it by capital contributions up front to a trust fund via the Caribbean Development Bank. This method of funding made sense as the governments did not trust each other (and very few people would have trusted them) to fund the court by periodic contributions. The way that successive governments of Trinidad and Tobago have changed position justifies the trust deficit.

The CCJ has an original jurisdiction to hear disputes under the Caricom Treaty. All Caricom members are subject to this jurisdiction. The CCJ also has an appellate jurisdiction, the intention of the founders being that all English speaking Caricom member countries would make the court their final court of appeal to replace the Privy Council in London. This step was seen as the final act of independence of the countries and as completing the repatriation from Britain of their sovereignty. However, despite all founder countries contributing financially to the Court, only five members of Caricom – Barbados, Guyana, Belize, Dominica and St. Lucia - have, as at May 31st, 2024, acceded to its appellate jurisdiction. The other English speaking member countries continue to cling to the British

apron strings. Even Trinidad and Tobago which provides the headquarters of the court has not acceded to its appellate jurisdiction.

National referenda held in St. Vincent (2009) and in Antigua and Barbuda and Grenada (both in 2018) resulted in the electorate rejecting the move from Privy Council to the CCJ. A notable fact is that the Government in each of those countries had a strong majority in Parliament and went on to win the next General Election but did not convince a majority of the electorate to support the move proposed by the referendum. It is worth of note that St. Kitts and Nevis does not require a referendum to make the move. As the last of the OECS territories to gain independence the British made it easier for the move requiring only a two thirds majority in the National Assembly.

The British Government has told the regional governments nicely that it would be happy if they would complete the repatriation of their sovereignty and it will not continue indefinitely to fund the Privy Council as their final court. Why then you might ask would governments so hooked on sovereignty not accept their own court for which they (or more correctly their taxpayers) pay? The immediate stimulus for the establishment of the CCJ to replace the Privy Council was said to be that the Privy Council opposes and was making it difficult for enforcement of the death penalty. Another good reason to establish our own court. Why then the delay?

Various reasons have been put forward but the real reason in my opinion is that the reticent governments wanted before joining to see how strong the CCJ would be in holding governments to proper governance. They were worried that the Privy Council was becoming too intrusive as in the Barbados case of Williams v Blackman where the Privy Council held in 1994 that the court could review a Cabinet decision to award a large government contract made under a statutory power. They were also concerned by the 2001 decision of the Privy Council in the Gairy case in Grenada. The Privy Council held in that case that the Minister of

Finance of Grenada was obliged to pay monies found due for the unlawful acquisition of Gairy's property. The Privy Council also held that, under our constitution, government officials can be subject to orders of mandamus to protect fundamental rights. Breach of an order of mandamus can lead to imprisonment of the official responsible for making the payment.

The CCJ has shown very clearly from its inception that it will be similarly strong in the face of malfeasance by governments and government Ministers. The reticent governments feel caught between a rock and a hard place. They will eventually move but for now they prefer what a senior St. Kitts and Nevis King's Counsel, who frequently represents the government, says – '*to take their chances with the white people.'*

I have not the slightest doubt of the capacity of the judges of the CCJ to provide top quality justice and of the structural and actual independence of that court from the governments of the region. I doubt however that if formally tested in St. Kitts and Nevis that view would prevail and particularly not at this time.

The decisions of the three levels of our courts in the 2015 Boundaries case have reinforced the unfortunate but widely held perception that the regionally based courts are not as strong as the Privy Council in protecting the fundamental rights of the people. Many people believe that some of our regionally based judges will not be able to resist the subtle and not so subtle pressures which they know Caribbean Prime Ministers will put on them. The facts do not bear this out but perception and confidence often prevail over actuality. It is partly and sadly a lack of self confidence in the people that facilitates that perception. But there is also an understandable lack of confidence in the leadership of the region and serious doubt as to the commitment of Caribbean leaders to the rule of law and to democracy.

The perception of which I speak was graphically described in an editorial in the influential Jamaica Observer newspaper shortly after the 2015 St. Kitts and Nevis election. The editor wrote:

> *We have, in the past, leaned towards supporting the idea of the CCJ, based on our very solid commitment to regionalism. But given developments, such as that in St. Kitts and Nevis, we are increasingly worried about dispensing with the UK Privy Council at this point in time.*
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> *Until we are certain that we will have in place a legal superstructure that mirrors the confidence inspired by the Privy Council, untouchable by local politics, it would be foolhardy to make the CCJ our final appellate court.*
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> *Our wise ancestors used to say 'tek sleep mark death'. The inexplicable rush to jettison the Privy Council in favour of a Caribbean court which is, at best, still a work in progress, could unravel what legal gains we have made in the region. This clearly is a case in which we must make haste slowly.*

As to the future, the move to the CCJ will eventually come for all the islands but that move has been severely set back by the events of 2015 in St. Kitts and Nevis. In any event there is an immediate need for a constitutional and administrative law division of the Eastern Caribbean Supreme Court staffed by experienced judges and with the infrastructure to respond quickly on a regular basis to urgent applications. That will require additional funding from the governments. Providing such funding would be one way for the governments to allay the lack of trust of their people for their commitment to the rule of law.

Also, there are serious constraints, including low salaries, in recruiting judges in the OECS. As we are a multi country jurisdiction we also suffer because the Eastern Caribbean Supreme Court has to rely on financing from the nine member countries and territories all of whom are not always as forthcoming as they should be. We need a review of Judges' terms

and conditions. We need a similar funding arrangement to that of the Caribbean Court of Justice to allow the court to achieve full financial independence.

The value of the true separation of our court system from the rest of the government can be seen when we observe reports from the USA on legal matters. You always hear the political allegiance of the prosecutor and the lower court judges and in the case of the Supreme Court whether the judge was appointed by a Democrat or Republican President. Despite the entrenched positions of the Federal judges their political allegiance is the first thing mentioned and often demonstrated in their judgments. As I have said before our democracy would be stone dead if our judges were political appointees.

The appointment of magistrates on contract by the Executive is a major blemish on the system of justice and should be corrected by amendment of our constitution to take the appointment of Magistrates out of the hands of politicians. That would complete the separation of powers between the Executive and the Judiciary.

However the country is blessed to have courts which have upheld the rule of law and not capitulated to those who prefer the rule of man.