

CONSTITUTING THE CARIBBEAN COMMUNITY
The Role of the Caribbean Court of Justice

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Introduction

In the Commonwealth Caribbean, indeed, in the Caribbean Community (CARICOM), whether or not we are mindful of it, we stand in the tradition of written constitutionalism: the central idea forged in the American founding; the idea of a polity constituted and regulated on the model of a written Fundamental Law, established by the sovereign people themselves, and entrenching a catalogue of basic, fundamental rights and freedoms of the citizenry, thereby defining the boundaries of the legitimate exercise of all governmental powers of the State. In essence, a democratic polity established on the model of a written Fundamental Law is a manifestation of collective speech; and this idea, so central to the American founding, had been prefigured thousands of years ago in Plato's words in the *Republic* to his fellow Athenians: 'Come now ... let us make a city [a community] in speech [together] from the beginning'.¹

But written constitutionalism is premised on the idea of a free and democratic people living out, and over time, commitments of their own authorship. 'Speech', as Professor Jed Rubenfeld reminds us, 'is the linguistic medium of choice for a self that would live by its own present will'.² Thus, given the evanescence of speech, the very possibility of a self-governing people living out their political commitments across several generations requires the memorialization of their collective speech. 'For over two hundred years', says Professor Paul Kahn, 'Americans have been discussing this city in speech'.³ What is however unmistakable is that the American legal-political order, like that of the Commonwealth Caribbean, is a community built on words; words inscribed in a Fundamental Law.

Caricom, the Caribbean Community, of which the Commonwealth Caribbean States are a constituent part, is a political community constituted by the Revised Treaty of Chaguaramas and its precedent Texts. This political community is also constituted by the political Constitutions of its Member-States. In a word, the Constitutions and the Revised Treaty are the central political texts constituting and defining the Caribbean political community, establishing its various institutions of governance and commerce. They are, therefore, the foundational instruments of governance. Through the Constitutions, we have established democratic polities structured on the principle of separation of powers, with an independent judiciary; and through the Revised Treaty, we affect to establish a Caribbean Single Market and Economy. In sum, the Caribbean political community is an association of Member-States; a mixture of parliamentary and presidential republics.

By agreement, the Caribbean Community has established the Caribbean Court of Justice, ‘with original and exclusive jurisdiction in all matters arising under the Revised Treaty of Chaguaramas, including authority to issue orders enforcing the implementation of CARICOM decisions; and with appellate jurisdiction in respect of the interpretation of the Constitutions and laws of the Member-States’.⁴ However, I make bold to say that the true value of the Caribbean Court of Justice, as one of the principal institutions of democratic governance of the Caribbean Community and for our regional economic development, would only be realised when the Court is ultimately accepted as the final appellate tribunal of the entire Caribbean Community.

The central claim of my paper, then, is that the final appellate court in any constitutional democracy functions, first and foremost, as one of the principal institutions of democratic governance, in that, the overarching function of its office is the legal enforcement of the

democratic constitution in the name of the sovereign people. In the discharge of this critical function, the final appellate court is inevitably engaged in the construction of the constitution and in the writing of the people's fundamental law. The Caribbean Court of Justice, as the final appellate tribunal of the Caribbean Community, with exclusive jurisdiction in the interpretation of the Revised Treaty, would play this seminal role in the authoritative articulation and elaboration of the fundamental political texts of the Caribbean Community: the Revised Treaty and the Constitutions of the Member-States.

For this reason, I have argued in my book, **Caribbean Constitutional Reform**, that the question of the establishment of a final court of appeal for the Commonwealth Caribbean has to be one of the most critical issues in constitutional reform: It is simply a matter of completing the process of constitutional founding and of defining the sovereignty of our sovereign States, left unconcluded at the moment of political independence. The establishment of our regional supreme court is an act of self-realization and the fulfillment of our sovereign will. It is an act of self-definition and an inscription of our nationality and, therefore, of our Caribbean nationhood.

Constitutional reform, I have argued, with the possible exceptions of Guyana and Trinidad and Tobago, has a special urgency for us in the Commonwealth Caribbean: It must engage the sovereign people in an inscriptive act of **re-writing** their own fundamental political texts and in reconstituting themselves a sovereign people, so that our Constitutions would, once and for all, be apprehended as the authoritative expressions of our collective **voice**, rather than as legislative expressions of the British Imperial Parliament. For it is now beyond challenge that the democratic ideal of constitutional founding or refounding is that of a people writing for

themselves, ‘in some nonfictively attributable sense’, the fundamental laws that constitute their polity; ‘the laws, that is, that fix their country’s’ “constitutional essentials”- charter its popular-governmental and representative-governmental institutions and offices, define and limit their respective powers and jurisdictions, and thereby express a certain political conception [of themselves]’.⁵ In a word, a people writing for themselves the fundamental laws by which they are to be governed is the ultimate expression of their sovereignty and an inscription of their nationality and political identity.

But a people’s authorship of their fundamental law is not completed *punctum temporis* in the framing of the constitution. For the constitution, as the fundamental law, must be given meaning and be put to work in the life of the polity. And one of the principal ways that this is accomplished is in the act of adjudication; that is to say, in the interpretation and application of the constitution in the determination of cases. Indeed, it is in the act of adjudication and in the writing of the judicial opinion that the process of *completion* of the constitution is advanced and the polity defined; that a people’s authorship of their own fundamental law and the inscription of their sovereignty are signified.⁶ For it bears emphasis that the process of framing a constitution – *la politique politisante* – continues long after the founding moment, in the judicial, political and cultural discourse through which a political community continuously reassesses and reshapes itself.⁷

Democratic constitutionalism therefore anticipates the elaboration of the constitutional text in the judicial and political discourse that marks the adjudication of cases.⁸ And it is a fundamental understanding in modern political theory that adjudication is an integral and an inextricable

aspect of sovereignty, one of the essential competences of the sovereign State. And, further, it is by a nation's supreme court that ultimate authoritative interpretation of a people's fundamental law is given and the authoritative political texts supplementing the constitution are written. My thesis, then, is that the CCJ, as our final appellate court, has this essential role, in the exercise of its adjudicative office, of serving as one of the *authors* of our fundamental laws and as constitutional architect of the *Caribbean polity*. In addition, as the institution with exclusive jurisdiction to interpret and enforce the Revised Treaty of Chaguaramas, the primary law of the Caribbean Community, the CCJ will inevitably play a critical role in the construction of the Caribbean political community. To repeat, then, the Revised Treaty and the Constitutions of the respective States of the Caribbean Community are the central political texts constituting the Caribbean political community; and the CCJ, like the supreme court in any democratic society, will play a central role in framing the legal-political order of the Caribbean Community in the interpretation and application of these central political texts in the determination of cases.

Constitutional Interpretation

As I have earlier intimated, the narration of a polity in words is an inscription of a people's nationality and political identity. A people's authorship of their own fundamental law is an inscriptive act by which they purport to define themselves in a certain way.⁹ But the constitution as a fundamental political text, it must be emphasised, is notoriously '*incomplete*'; and it is not self-interpreting. It is rather always in the process of being **completed** in the act of adjudication, and supplemented by the judicial opinions, the authoritative political texts issued by a nation's supreme court.¹⁰ It therefore means that the power to interpret the Fundamental Law of a people

is, equally, of seminal importance as the power to make that law. Bishop Benjamin Hoadly of Bangor, Wales, had grasped the essence of that power to interpret the *Laws*, when he surmised, speaking mainly in a theological context, in a sermon preached before King George I in 1717 on ‘The Nature of the Kingdom’, that: ‘[W]hoever has an *absolute Authority* to *interpret* any written or spoken *Laws*; it is *He*, who is truly the Law-giver, to all Intents and Purposes; and not the Person who first wrote, or spoke them.’¹¹

Professor Keith Whittington of Princeton University suggests that Hoadly’s immediate point was a warning to the King against giving the church hierarchy a privileged role in saying what the Scripture meant.¹² Hoadly thought that if Bishops were to assume unchallenged authority to interpret the divine law and judge the ‘Consciences or Religion of [the] People,’ then the ‘*Kingdom of Christ*’ would become ‘the *Kingdom* of those Men, vested with such Authority.’ In essence, given that the author of the Scriptures was not available to correct *ex cathedra* any misinterpretations, then the interpreters of the law could effectively become the sovereign, unless the original lawmaker was available to quell ‘the various and contradictory Opinions of Men.’¹³

As Professor Whittington points out, Hoadly’s sermon enjoyed renewed prominence in American legal circles in the twentieth century. For example, Harvard Law School professor, John Chipman Gray, cited Hoadly favourably in his treatise on *The Nature and Sources of the Law*, and interpreted him to mean that, for all intents and purposes, judges, not legislators, were the true lawmakers. Hence his conclusion that the *Law* of a community is not the body of laws enacted by a legislature; but, rather, the rules laid down by courts in their determination of cases.¹⁴ For it was unavoidable, Gray thought, that courts ‘put life into the dead words of the statute;’ and ‘all Law is judge-made law.’ For, though the legislature may be present in this

world, its ‘statutes do not interpret themselves; their meaning is declared by the courts.’¹⁵ This, however, it bears emphasis, is not a call for judicial lawmaking. Rather, it is to underscore the hermeneutic nature of adjudication; the discursive practice by which meaning is given to legal texts, starting with the constitution.

In more recent years, Professor Akhil Reed Amar of Yale University Law School has given us some rather perceptive words on the matter, complementing, in certain respects, what Bishop Hoadley had to say. Amar writes:

The document that emerges at the end of a constitution-making process is just that – a piece of paper. It cannot guarantee liberty and security unless it is first designed with a keen awareness of the likely threats to these two aims, and then executed and enforced over a period of many years by individuals who scrupulously respect its architecture and purposes.... Geography and history forge constitutions every bit as much as the framers who put pen to paper and the ratifiers who formally turn words into law.¹⁶

Although Professor Amar’s words do not speak directly to the interpretation of the constitution, it is now widely understood, since *Marbury v. Madison*,¹⁷ that the supreme court of any nation plays a central role in the execution and enforcement of the constitution. It does this largely through the application and interpretation of the constitution in the determination of cases. In this process of adjudication, the constitution is given meaning; it is *completed* in the act of interpretation. Thus, to Professor Amar’s words we may add that constitutions are forged every

bit as much in adjudication by the judges of a nation's highest court, as they are by the people who first wrote them and by those who have ratified them. In sum, then, the words of Bishop Hoadly and Professor Amar signal for me a point of departure in addressing this fundamental question of Caribbean constitutional authorship and the inscription of our nationality; for they would suggest the central role that a nation's supreme court plays in the construction of constitutional meaning and, therefore, in the *inscription* of that nation's constitutional law and political identity.

It is therefore submitted that, a democratic constitution, democratically made, may, to a certain degree, settle the question of constitutional authorship. But the constitutional text and the polity that it defines must be given expression and be constantly defined and refined. The constitution must be interpreted and be put into force in the lives of the citizenry. And one of the principal instruments by which all this is accomplished is the nation's highest appellate court, in the practice of constitutional adjudication and in the writing of the judicial opinion. The judicial opinions of a nation's highest court are the authoritative readings of a people's constitution; they are, therefore, themselves, authoritative political texts supplementing the constitution itself. It means, then, that the judges of a nation's highest court are numbered among the *authors* of a people's Fundamental Law. For these authoritative judicial opinions, supplementing the constitutional text, in fact become part of the canon of constitutional law, thereby defining both text and polity.

If, therefore, it is true to say that the judges of a nation's highest court are numbered among those titled individuals who write a people's Fundamental Law, then for us in the Commonwealth Caribbean, some of those titled individuals who currently write our authoritative political texts,

and thereby give expression to our political identity as a sovereign people, are the judges of Her Majesty's Judicial Committee of the Privy Council. Witness, for example, the fact that the Privy Council's decision in *Pratt and Morgan* is now part of the canon of West Indian constitutional law. When, therefore, we have come to grasp the full import of this, we would realize that a critical aspect of our sovereignty, that of our constitutional authorship, is left in the hands of the judges of a foreign tribunal. Thus, even with our best intentions of re-writing our Constitutional Texts in a way that would make them the authoritative expressions of our *collective voice*, we would still have fallen far short of the mark if we were to leave this critical aspect of our sovereignty in the hands of the judges of a foreign tribunal.

The inauguration of the Caribbean Court of Justice (CCJ) by the Caribbean Community (CARICOM) therefore marks a critical step in our attempt to complete the process of political founding begun at the moment of political independence; taking that to be the watershed event that marks us as a sovereign people. The CCJ, legitimated as a creature of our own making, carries a political and cultural authenticity and the legitimacy that the British Privy Council could never claim, no matter how long it serves as the final appellate court for the Commonwealth Caribbean. As I have written in an essay in the *Caribbean Law Review*, the Caribbean Court, in the exercise of its appellate and original jurisdictions, interpreting and implementing our Constitutions, our laws, and the Revised Treaty of Chaguaramas establishing the Caribbean Single Market and Economy (CSME), carries a cultural and political identity that the British court could never claim: the CCJ is a genuine, representative institution of the People of the Caribbean Community, with the authority to speak in their name. That is to say, its judicial voice, whether in the interpretation of the Treaty of Chaguaramus, to give 'texture and life' to the words of the Treaty, or in interpreting our Constitutions and laws, would appear as

the *voice* of the Caribbean People. In this respect, the Court functions as a central institution of regional governance and integration, its judicial opinions constituting the core of the political narratives of the People of the Caribbean Community in their attempt to define and maintain themselves as a single political subject.

Put differently, my thesis is, that in adjudicating, whether under its original or appellate jurisdiction, the Caribbean Court would be engaged in the performative act of reading and narrating the *Caribbean Polity* and inscribing our Caribbean nationhood. And, therefore, unlike the Judicial Committee of Her Majesty's Privy Council in England, the Caribbean Court of Justice, legitimated as a *creature* of the Caribbean Community, would inevitably be engaged in performing narrative acts of self-definition.¹⁸

The Caribbean Court of Justice, constituted as the highest appellate court of the Commonwealth Caribbean, would therefore be that institution of singular importance for carrying forward in our name that unending task of construing, constructing, and *completing* our Fundamental Laws. For the Justices of the CCJ, in the discharge of the official duties of their office – interpreting, enforcing, implementing our Constitutions, our Treaties and our laws in the determination of cases - would be very much like their counterparts in the United States, Canada, France *et al*, engaged in performative acts of self-definition. They would be engaged in constructing and defining the *Caribbean Polity*, saying what it is like, what it is not. Thus, as I have stated in other places, the single most compelling justification for the Caribbean Court of Justice is the argument from sovereignty: our right of self-definition; our right of authorship of our own Fundamental Laws and of the *Polity* they recommend and define continuously.¹⁹

And for us in the Commonwealth Caribbean, who have literally *inherited* our Constitutions from Britain, the importance of this right of authorship, that is, the power to interpret for ourselves our own Fundamental Laws and to write our own authoritative political texts, can never be overstated. For, as Professor Anne Norton makes the point ever so beautifully,

It is interpretation that is the constitutive activity for those who inherit a Constitution, and [it is] from interpretation that they derive their authority. This authority is, as all authority must be, both political and semeiotic. In interpretation one acquires power not only over the present and future in the rendering of judgments or in the design and workings of bureaucratic institutions, but over these and the past in the determination of meaning. In extending the meaning of nationality those who interpret alter the significance of the past: what it was, what was done, what came of it. They become authors, of themselves, their past and their posterity.²⁰

Constitutional Adjudication in the Republic of Law and Letters :

Completing the Constitutional Text

As was earlier intimated, to write a constitution is to make a polity: ‘a structured public world, a second text, where people live and act together’.²¹ A regime of written constitutionalism is therefore a two-text polity: the constitutional document itself and the polity or the constitutional order it narrates into existence. In other words, the constitutional document denotes by its own

textual composition another structure, an analogous referent, the polity that it purports to bring into being and define continuously.²² ‘On this homology’, reasons Professor William Harris, ‘is based the very plausibility of constitutional interpretation, as a form of discourse articulating the connection between the written text and the polity the text signifies.’ In other words, ‘the resulting structure of constitutive signification ... compels reading both the document and the polity that it has signalled into existence – the republic that in turn gives the words their political meaning’.²³

Authoritative constitutional interpretation is therefore a necessary correlate of written constitutionalism.²⁴ That is to say, for a political order to be a constitutional polity and thus to be bound by a set of fundamental principles, there must be a systematic practice of constitutional review – a scrutiny of ongoing practices and policies to determine their compatibility with the constitutive values that define the character of the political order.²⁵ This authoritative constitutional interpretation, as the central feature of the adjudicative institutional practice of a nation’s supreme court, constitutes an ongoing process of defining and refining the character of the constitution itself and of the political order that it recommends. Constitutional adjudication and interpretation therefore has the educative office of *explaining* the people to themselves; of reconnecting them to their *story*.²⁶ This therefore means that a nation’s supreme court’s adjudicative office – the application of the law of the constitution in concrete cases – has profound implications for the definition of community and political identity.

Put more directly, constitutionalism on the model of writing cannot exist without judicial review.²⁷ This is so because constitutionalism, which begins with the memorialization of the

foundational commitments of a democratic people, requires interpretation as an ongoing project in order that the Constitution may achieve a deep inscription into the life of the nation.²⁸ And this is accomplished significantly through the writing of the judicial opinion which, as we have noted, is an authoritative political text supplementing the constitution. In other words, constitutional adjudication involves the way or ways of reading and criticizing our fundamental political texts, and also of composing other authoritative political texts: the judicial opinions. Constitutional adjudication therefore involves the *making* of the constitution, and the definition of a civilized polity operating under the rule of law and protecting the deepest values of the culture.²⁹ It is in adjudication and in the writing of the judicial opinion that the subject matter of the text would come to light. Thus, to repeat the words of Professor James Boyd White:

In every opinion a court not only resolves a particular dispute one way or another, but validates or authorizes one kind of reasoning, one kind of response to argument, one way of looking at the world and its own authority. ... Whether the process is conscious or not, the judge seeks to persuade the reader not only of the rightness of the result reached and the propriety of the analysis used, but of his or her understanding of what the judge, the law, the lawyer and the citizen are and should be – in short, of his or her conception of the kind of conversation that does and should constitute us.³⁰

Marbury v. Madison

It is submitted that the judicial opinion *par excellence* of this genre remains that of Chief Justice John Marshall in the 1803 decision in *Marbury v. Madison*.³¹ In this opinion Marshall has used his exemplary literary and rhetorical skills to construct an opinion that is nothing less than a *construction* of the *meaning* of the American Republic itself.³² For, far beyond its doctrinal articulation of the principle of judicial review – for which the case is most famously known in American and Western jurisprudence – Marshall’s opinion stands as one of the most outstanding examples in modern history of how the highest appellate court of a nation functions critically in the *construction* of that political community; how it functions as one of the defining agents of a people’s nationality and political identity.

The success of the opinion rests largely on Marshall’s insightfulness in apprehending the American Republic as a two-text polity: the Constitutional document established by the people of the United States, and the political order the Constitution has brought into being. To interpret one is to interpret the other. To give proper construction to one is to give proper construction to the other. In this regard, the opinion is made to seem *as if* it is the opinion of the American people; that is to say, an opinion uttered in their name. In the final analysis, *Marbury* stands as a judicial contestation of the meaning of the American polity.³³

Marshall has redacted the story of constitutional *origin* as the authoritative ground for constitutional interpretation: the Constitution derives from the people as a whole. In essence, he reaffirms the fundamental principle of republican government which admits of the original and supreme right of the people to frame their political constitution. Thus, he writes: ‘That the people have an original right to establish, for their future government, such principles as, in their

opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected.’³⁴ These ‘principles’, in fact, are constitutive of the American political community; they establish the order of, and thus give shape to, the American polity. In the Court’s view, the (the word) ‘principles’ here refers literally to the Constitution as a legal instrument to be given force and effect in judicial proceedings; and, ultimately, in the people’s collective *life*.

In exercising their supreme and original right to establish the principles for their future government, the sovereign ‘people’ have chosen to organize their government into its various departments. One of these departments is the Judiciary – the Court itself. The Court therefore derives the authority to address the people *created* by the Constitution from that very instrument they themselves have uttered into existence in the exercise of their sovereign will. The Court is therefore a representative institution of the sovereign people – a necessary condition of political authority in a democratic polity.³⁵ The Congress’s or the President’s claim to represent the people may be more immediate – after all, they are elected institutions – but immediacy does not translate automatically into a stronger claim of representative authority.³⁶ The authority of the judicial opinion therefore rests on its appearance as a representation of the opinion of the American people.³⁷ It means, then, that the Court’s enunciation of the doctrine of judicial review – the power of the Court to pass on ‘an exposition of the Constitution, deliberately established by legislative acts ...,’ must be seen as the opinion of the people. This is the meaning of the American political order: a polity under the Rule of Law – a *law* established by the people of the United States.³⁸ As Professor Paul Kahn remarks, at its most profound level, ‘*Marbury* is a self-conscious effort to constitute an American political order characterized by the rule of law’.³⁹ It

is a particular construction of American political meaning, a competing vision of American political identity that clashed directly with that of then President Jefferson.⁴⁰

But the full import of Marshall's opinion lies not so much in the correctness of the decision reached, but rather in his interpretation of the Constitution to discern the character of the Federal Republic constituted by that text; and, equally important, to offer his reflective judgment on the institutional position of the Supreme Court in that political order, as the *Ideal Reader* and authoritative expositor of the Constitutional Text, in the determination of 'cases and controversies', consonant with his understanding of the character of the Constitution and of the political order it has brought into being. In essence, *Marbury* has staked a claim for the Court as being supreme in the exposition of the law of the Constitution, and this principle has prevailed for over 200 years as an indispensable feature of the American constitutional order; and, indeed, the case now stands for the proposition that the supreme court of any nation is the authoritative expositor of the law of its constitution.

In sum, the very expansive reading Marshall was prepared to give to the Constitution stems, in large measure, from his apprehension of that text as emanating from the People of the United States as a constituent whole, and imbued with some overarching sense of fundamental purpose. The Constitution purports to constitute a political community and a culture of a certain kind. But despite the imperious authority with which it speaks, the Constitution, standing alone, can do nothing. Thus, this sense of fundamental purpose of the Constitution and of the nature of the political order it aims to constitute would find authoritative expression in the discursive practice of adjudication; that is to say, in the interpretation and application of the Constitution in the

determination of cases. The Supreme Court therefore plays a seminal role in the cultivation of that community and culture the Constitution has deigned to constitute, by offering the nation, through its judicial opinions, ‘a self-reflective and self-corrective body of discourse that will bind its audience together by engaging them in a common language and a common set of practices.’⁴¹

In a word, Marshall was engaged in the framing of the American Republic.

Constitutional Adjudication and the Inscription of the Caribbean Community

The task of the CCJ is of similar vein; and it matters not that *Marbury* may not have been taken under the Supreme Court’s appellate jurisdiction. *Marbury* was nonetheless the utterance of the authoritative *voice* of the Supreme Court of the United States. Thus, the strength of the analogy between the CCJ and the US Supreme Court rests on the fact that, whether it be in the exercise of its original jurisdiction to interpret and enforce the Revised Treaty of Chaguaramas, or in the exercise of its appellate jurisdiction interpreting the Constitutions and laws of the Member-States of the Caribbean Community, the CCJ would none the less be engaged in the construction of the *meaning* of the *law* of the Community, and all its judicial opinions would necessarily constitute an essential part of the political narratives of the Caribbean people. It therefore bears emphasis that there can be no radical disjunction between the Court’s exercise of its original jurisdiction interpreting the Revised Treaty, and the Court’s exercise of its appellate jurisdiction interpreting our Constitutions and laws. In either respect, the Caribbean Court carries the urgent and profound responsibility for the inscription of Caribbean nationhood. For the Revised Treaty and our Constitutions are constituent acts of a special kind: they are equally engaged in the *constitution* of the Caribbean political community. In that regard, they are both inscriptions of

our nationality: the Revised Treaty, establishing the Single Market and Economy, is our attempt at defining ourselves as a single political subject within a single economic space; and it bears some comparison with the Acts of Union of 1707 ratifying the Treaty of Union between England and Scotland, the constituent Acts that brought into being the State of Great Britain; and, of course, it bears strong comparison with the ‘primary law’ – the Treaties – establishing the European Community. And, with the enactment of our Constitutions, we have constituted ourselves as democratic polities in the tradition of written constitutionalism; thus underscoring the idea of our commonality as a single political subject.

It is therefore submitted that this intimate connection between the Court’s original and appellate jurisdictions would deny the emphasis placed on the conceptualisation of the Court as a court of international law in its original jurisdiction, and a court of domestic law in its appellate jurisdiction. For, like the US Supreme Court in its interpretation and enforcement of the Financial and Economic Clauses of the US Constitution, the Caribbean Court, in the exercise of its appellate jurisdiction, interpreting and enforcing our Constitutions and laws, would similarly prove to be indispensable to the success of the CSME and, therefore, to our social and economic development, by ensuring stable democratic governance and the rule of law; the indispensable requisites for the successful operation of a market economy.

It means, then, that the CCJ, established as the final court of appeal for the Caribbean Community, with exclusive and compelling jurisdiction to interpret the Revised Treaty, and with final appellate jurisdiction to interpret and enforce our democratic Constitutions, inevitably becomes one of the central institutions of governance of the Caribbean Community, charged with

the task of articulating and advancing our vision of ourselves inscribed in our fundamental political texts: our Constitutions and the Revised Treaty. In this regard, we have said, the establishment of our regional supreme court is an act of self-realization and the fulfillment of our sovereign will; an act of self-definition and the inscription of our Caribbean nationhood.

Conclusion

In conclusion, it bears repeating that, for us in the Commonwealth Caribbean, some of those titled individuals who currently write some of our most important authoritative political texts that supplement our Constitutions and by which we are governed, are the judges of Her Majesty's Privy Council. They are, in a very real sense, *authors* of our *Fundamental Law* and of our political identity. The truth of this claim is readily established with a moment's reflection on the political significance and authoritativeness of the Privy Council's decision in *Pratt and Morgan*, which was nothing less than a foundational constitutional interpretation: an interpretation that determined the meaning of a foundational constitutional provision for the entire Commonwealth Caribbean. As a result of this decision, and to get around its strictures, countries like Jamaica, Trinidad and Tobago, and Barbados have either opted out of the Optional Protocols on Civil and Political Rights of which they were a part, or they have passed sweeping constitutional amendments.

In sum, then, the Court is one of the principal instruments by which we would write our Fundamental Laws, our jurisprudence, our nationality and our political identity. It is also one of the principal agencies of regional integration, through the harmonization of the meanings of the fundamental rights provisions articulated in our Constitutional Texts. The Court therefore has the

critical educative office of schooling the Caribbean nation on constitutional meaning. And it discharges this most important educative task through the interpretation of our Constitutions and in the inscription of some of our most important authoritative political texts, supplementing our constitutional law. Constitutional adjudication, to repeat, is therefore a public hermeneutics by which we give meaning to our Constitutions and, possibly, rewrite the jurisprudence that has been, and is being, scripted for us by the Privy Council. The Barbados case of *Boyce and Joseph*,⁴² for example, which was recently decided by the Court, presents us with an auspicious opportunity to explore in greater detail the central importance of the Caribbean Court of Justice in the governance of the Region.

Therefore, in the sense of our taking full control of our Constitutions and making them *truly* our own, the work of the Caribbean Court of Justice assumes compelling significance. For it is through the establishment of the Court that we assert our sovereignty to interpret our own Fundamental Laws as the constitutive activity by which we would make these Laws our own. On this view, it would inevitably redound to the Court to *re-write* the constitutional jurisprudence that would have been scripted for us by the Judicial Committee. That is to say, in elaborating the meanings of our Fundamental Laws, the Court must be ever mindful of its responsibility to put our constitutional jurisprudence on a sounder philosophical and intellectual footing than it has received thus far from the Judicial Committee. The Court must be bold enough to confront some of the most sensitive and complex issues in Caribbean constitutional law with a view to schooling the Region to a more coherent and philosophically defensible constitutional jurisprudence. Thus, the Court must interpret the Constitutions' provisions in a way that best

advances their essential purpose as instruments of justice and democratic governance throughout the Commonwealth Caribbean.

This is, indeed, the overarching challenge facing the Court; and it would not suffice that the Court interprets our Constitutions and laws in a manner consistent with the work of the Privy Council. No, the Court must do better than that. Moreover, the Court may one day find itself to be the final appellate tribunal for the Republic of Suriname. This only makes the challenge more interesting, since the Court must now begin with a deeper philosophical understanding of the concept of republican government now evident throughout the Commonwealth Caribbean, in order to establish the common conceptual ground with Suriname. For, notwithstanding the different approaches in civil law countries to constitutional review of legislative actions and executive decrees, a deeper philosophical inquiry into the nature of republican democratic government may well reveal our common ground with respect to the interpretive authority of the Court, particularly in the protection of the fundamental constitutional rights of the citizens of the Caribbean Community. This can only redound to the good of the Community since we would have a richer body of constitutional discourse that would bind us together as a political community.

The Court would adequately meet the challenge before it if it were to begin with the mandate that it must establish some regulative or interpretive principle by which our Constitutions can be read as being coherent in their meanings, so that the States' use of their coercive powers against their citizens may be seen as principled, consistent and fair. Put differently, this can be done in terms of a carefully articulated political theory that defends our Constitutions and our legal and

political practices as being reasonably just and fair. This is the only way that the Court would lead the Caribbean Community in resolving such issues as the mandatory death penalty law, hanging and the savings law clauses in West Indian Constitutions; and the criminalization of homosexual conduct among consenting adults in private, among others.

END NOTES

- ¹ Quoted in Paul W. Khan, *Legitimacy and History: Self-Government in American Constitutional Theory* 216 (1992).
- ² Ted Rubenfeld, *Freedom and Time: A Theory of Constitutional Self-Government* 47 (2001).
- ³ Paul W. Khan, *supra* note 1.
- ⁴ Justice Rolston Nelson, “Contextualizing the Caribbean Community and the Caricom Single Market and Economy: Design and Architecture” (unpublished: a paper delivered at the CLIC Conference on Developments in Caricom Law, November 26, 2009, at the Hyatt Regency, Port-of-Spain, Trinidad).
- ⁵ Frank Michelman, ‘Constitutional Authorship’, in *Constitutionalism: Philosophical Foundations* 64 (Larry Alexander ed. 1998).
- ⁶ William F. Harris II, *The Interpretable Constitution* 201 (2001).
- ⁷ *Id.*
- ⁸ *Id.*
- ⁹ See Jed Rubenfeld, *supra* note 2.
- ¹⁰ James Boyd White, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character and Community* 251 (1985).
- ¹¹ Keith E. Whittington, Judicial Review and Interpretation: Have the Courts Become Sovereign When Interpreting the Constitution?’ in *The Judicial Branch* 116 (Kermit L. Hall and Kevin T. McGuire eds. 2005).
- ¹² *Id.*
- ¹³ *Id.*
- ¹⁴ *Id.* at 117.
- ¹⁵ *Id.*
- ¹⁶ Akhil Reed Amar, ‘Some New World Lessons for the Old War’, 58 *U. of Chicago L. Rev.* 483 (1991).
- ¹⁷ *Marbury v. Madison* 5 U.S. (1 Cranch) 137 (1803).
- ¹⁸ See Simeon C. R. McIntosh, “The CCJ; Instrument of Democratic Governance and Agency for Regional Integration”, 15 *Carib. L. Rev.* 147 (2005).
- ¹⁹ See Simon C. R. McIntosh, *Caribbean Constitutional Reform: Rethinking the West Indian Polity*, Chapter Three (2003).
- ²⁰ Anne Norton, ‘Transubstantiation: The Dialectic of Constitutional Authority’, 55 *University of Chicago L. Rev.* 458 (1988).
- ²¹ William F. Harris II, *The Interpretable Constitution* 201 (1993).
- ²² *Id.*
- ²³ *Id.*
- ²⁴ *Id.*
- ²⁵ *Id.*
- ²⁶ Jed Rubenfeld, *supra* note 2, at 169.
- ²⁷ *Id.*
- ²⁸ *Id.*
- ²⁹ James Boyd White, *supra* note 10.
- ³⁰ *Id.*
- ³¹ See Paul W. Khan, *The Reign of Law: Marbury v. Madison and the Construction of America* (1997)
- ³² *Id.* at 207.
- ³³ *Id.*
- ³⁴ *Id.*
- ³⁵ *Id.*
- ³⁶ *Id.*
- ³⁷ *Id.* at 11.
- ³⁸ *Id.*
- ³⁹ *Id.*
- ⁴⁰ James Boyd White, *supra* note 29.
- ⁴¹ Anne Norton, *supra* note 20.
- ⁴² *The Attorney General of Barbados et al v. Jeffrey Joseph and Lennox Boyce*, CCJ Appeal No. CV2 of 2005 (Judgement delivered November 8, 2006).