Slightly edited version of a speech by Judge Patrick Robinson* at the UWI in March 2015

Reasons for the Caribbean Court of Justice

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If the U.K. is to be the benchmark for excellence in the dispensation of justice here are some reassuring facts. The lawyers and judges in Jamaica and the Caribbean are well equipped to serve in a final appellate body. In the research done the discovery that would perhaps most startle those who berate Jamaican judges is something that I have instinctively known all along: in terms of reversals of their decisions Jamaican judges compare favourably to their UK counterparts. The percentage of appeals allowed by the Privy Council from decisions of the Jamaican Court of Appeal is roughly the same as it is for appeals allowed by the House of Lords – replaced in 2009 by the UK Supreme Court - from decisions of the UK Court of Appeal – between 30% and 40%. Jamaican judges would therefore seem to be as good, or if you wish, as bad as the UK judges. The comparison is apt since the Privy Council is comprised of judges drawn from the UK Supreme Court – formerly the Law Lords in the House of Lords.

Moreover, the Privy Council is not accessible to the vast majority of Jamaicans. The right to appeal to the Privy Council is illusory since Jamaicans cannot afford the 5000 mile trek for justice. Consequently, only a few persons utilise that court; in effect, only those who are relatively well off and those accused of murder who receive *pro bono* help from English lawyers. As one commentator has put it: it is only the wealthy and the wicked who go to the Privy Council.

There is another cogent reason for leaving the Privy Council. Like the tardy guest, Jamaica has overstayed its welcome. It is clear that Jamaica and the other countries still tied to the Privy Council are not wanted and if they had any pride and self-respect they would leave. In 2009, Lord Phillips, President of the UK Supreme Court, complained that his judges had to spend too much time on cases from the Commonwealth – 40% of their working hours. He said that

Caribbean countries should utilize the CCJ and that "in an ideal world" former Commonwealth countries would stop using the Privy Council and set up their own final courts of appeal. After that classic put down, you would have to wonder why any self-respecting Caribbean country, why any country with ancestors such as National Hero Marcus Garvey, who preached self-reliance for the upliftment of the black race, would not have immediately set in motion the process to sever ties with the Privy Council and have its own final appellate body.

In the light of Lord Philipps' complaint in 2009 about his judges being obliged to spend as much as 40% of their time on Commonwealth cases, it is more than passing strange that, with no increase in the membership of the Privy Council, we were informed a few weeks ago that the Council was always an itinerant court, ready to travel to the Caribbean to hear cases, provided their expenses are met. Why is the Council giving us this assurance at this time? We can only hope and pray that the Council does not intend to implement an earlier suggestion of Lord Philipps that, in order to cope with the Council's heavy workload resulting from Commonwealth cases, he was considering using Judges from the U.K. Court of Appeal, as he saw no reason why some Privy Council cases had to be heard by five of the U.K.'s most senior Judges. You see what a low pass we have come to when the Privy Council can contemplate appeals from our Court of Appeal being heard by U.K. Court of Appeal Judges when the Jamaican Constitution clearly does not envisage such a possibility. But as we know in Jamaica, people will continue to tek step with you when you don't assert yourself and as Peter Tosh said "stand up for your rights".

Moreover, the outsourcing by a country of what is after all a major segment of its sovereignty i.e. its final judicial function, is inconsistent with modern trends. Even in times of turmoil and conflict countries seek to hold on to and resist the parcelling out of their judicial functions to an external or foreign body. The best example of this is the Rome Statute of the International Criminal Court. The 122 States Parties insist on the principle that the only circumstance in which their national judicial functions are to be taken over by the Court is when they are unable or unwilling to exercise jurisdiction. The question, then, is why do we in Jamaica cede such an important aspect of our sovereignty to a foreign body, the U.K. Privy Council when we have our own Caribbean Court of Justice, perfectly willing and able to perform the final appellate

functions for us: And in anticipation of the argument that the Privy Council, is not a foreign court, let me say that both on the basis of principle as well as for all practical purposes, the Privy Council is a foreign body. It was established by an Act of Parliament of the U.K. Parliament which can at any time (even today) repeal that Act and leave Jamaica without a final appellate body. And, it remains a foreign body notwithstanding the occasional, tokenistic inclusion of a Commonwealth Judge on its Bench.

Let me say a little about the court that I have identified to replace the Privy Council. The Caribbean Court of Justice was established by an Agreement between countries in the Caribbean Community (CARICOM) in 2001. The CCJ has two jurisdictions. In its original jurisdiction it hears cases that arise from the interpretation and application of the CARICOM Treaty – these are mainly trade disputes. The original jurisdiction binds all CARICOM states. In its appellate jurisdiction it hears appeals from decisions of the courts of appeal of CARICOM states. The Agreement allows a state to enter a reservation in respect of this jurisdiction which will replace appeals to the Privy Council. So far three countries, Barbados, Guyana and Belize have accepted the CCJ's appellate jurisdiction. These countries will soon be joined by the Commonwealth of Dominica.

Bearing in mind that up to 2010 there were only two countries that had accepted the CCJ's appellate jurisdiction, one would have to say that it has done very well in terms of the number of cases filed and disposed of; ; there have been a total of 160 cases filed in its appellate jurisdiction, of which 140 have been adjudicated. 10 cases have been filed under the Court's original jurisdiction, and 9 disposed of. Compared to those figures, the European Court of Human Rights only heard 10 cases in its first 10 years, but it now has over 130,000 cases filed. All new courts take time to build up a volume of work. My own Tribunal was established in 1993, but did not hear its first case until 1995.

But why a Caribbean court and not a Jamaican court, as our final appellate body? There is no denying that Jamaica shares with CARICOM members a common history of colonialism, enslavement, slavery, struggle, freedom and independence; and that common history makes them part of us, and us part of them. Moreover, the path to the CCJ and a Caribbean jurisprudence has

been prepared by the common legal training provided to Caribbean students over the past 45 years under the auspices of the Council of Legal Education. This training is superior to the training received by Jamaicans who studied law in the UK. It is a training that has produced lawyers of the highest quality as well as eminent judges, many of whom have become Chief Justices. As good as a final Jamaican appellate body would be, a final appellate body with judges from our sister Caribbean countries and Jamaica, would, by reason of the deeper pool to draw from, be better and stronger, and better serve Jamaica's national interests. The CCJ has in its relatively short life, earned a reputation for its excellent judgements, its accessibility, transparency and efficiency in the delivering of justice.

Both the method of selecting the Court's Judges and its funding have come in for praise from a group of scholars who examined the process for selecting international judges. They found that the Regional Judicial and Legal Services Commission (RJLSC) was the only non-State election body at the international level. The independence of the CCJ's Judges is better preserved through selection by such a body than by governments.[1]

They also found unique the Court's funding by a Trust Fund based on funds originally borrowed on the international market by the Caribbean Development Bank, to be repaid by the governments. "This means", the authors say, "that neither the court nor the R.J.L.S.C. is dependent on contributions from the member states and this has contributed significantly to the perceived and actual independence of the court and its selection procedures". Their toast/compliment to the Caribbean is completed with the thought that other election based courts would benefit from this funding procedure.[2] Jamaica has already invested $20 Million (US) in the Court and can ill afford not to derive the benefits of this expenditure.

It is surprising that in light of this objectively rendered and unsolicited praise of the CCJ's selection process, some of my compatriots have found it possible to criticize the court in relation to its selection and non selection of Jamaicans and Judges. There is a Jamaican on the Court in

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[1] Selecting International Judges; Principle, Process and Politics, Ruth Mackenzie, Kate Malleson, Penny Martin and Philippe Sands – Oxford University Press p 147.

[2] Ibid, p 148.

the person of Professor Winston Anderson. An academic with a PhD in International Law from Cambridge University and a former Legal Advisor to CARICOM, Dr. Anderson is a highly qualified international lawyer who fills one of two places on the Court, reserved by the Agreement establishing the CCJ, for persons with expertise in international law (the other place has not been filled). But even if there were no Jamaican on the Court, we need to be very careful about complaints of bias against Jamaicans. At any particular time, in the CCJ's life there will be unequal representation from CARICOM countries. We can comfort ourselves with the thought that eminent commentators have found the CCJ's selection system to be uniquely commendable in the universe of international courts for the safeguards it offers in ensuring that the judges elected are independent. It is noteworthy that the RJLSC has as its Vice-Chairman, Dr. Lloyd Barnett, a Jamaican and a well-known and very distinguished constitutional lawyer.

Fifty three years after independence, the best gift to Jamaica would be a categoric and unequivocal decision to sever ties with those two symbols that are inappropriate for the country: the replacement of the Monarchy with a republican system of government – ironically, the system that prevailed in England in the first period of its relationship with our country – and the replacement of the Privy Council with the CCJ as well as making the claim for reparations. The best way to use and reflect our sovereignty and identity is to adopt these two measures. In adopting those measures we will be following the example of another island state: Singapore (the country that is most frequently cited by Jamaicans as worthy of emulation for its growth and development) was a colony of the UK for about a century and a half, became an independent republic within the Commonwealth in 1965 and abolished all appeals to the Privy Council in 1994.

We are of course pleased that the Court delivers excellent judgements, works speedily, is fair in its dispensation of justice and more accessible than the Privy Council. However, the main basis for replacing the Privy Council with the CCJ is that it represents the best way to express our sovereignty and identity.

The law to replace the Privy Council with the CCJ must be passed by a two-thirds majority of both Houses of Parliament – the House of Representatives and the Senate; anything further is not only supererogatory, but may even be dangerous.