A CRITIQUE OF THE

CARIBBEAN COURT OF JUSTICE

With special reference to the
European Court of Justice

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INTRODUCTION

The true power of any court lies in the confidence that the prospective users have in the fairness of its decisions. The people in the region must at least structure an international court, such as the Caribbean Court of Justice (CCJ) that hopes to be the arbiter of a wide range of disputes in the Caribbean regions, in a way that will elicit confidence. In addition to resolving disputes surrounding the application and interpretation of the CARICOM treaty between member nations, a CCJ that is perceived as fair will have the potential to resolve other disputes, including that between Guyana and Surname or even Guyana and Venezuela. The current structure of the CCJ suggests that the designers lacked the foresight to see that Haiti and Suriname would become full members of CARICOM and also foresee the possibility that in the distant future Venezuela may also become a member of CARICOM. As these events come to pass, the CCJ as it is currently structured will be shown to be obsolete.

As currently structured, the court is designed for a purely Anglophone CARICOM, making provisions for all the peculiarities of the Anglophone region. Fundamentally, the CCJ is incongruous with the legal systems of Suriname and Haiti. Also, because of the way that judges are selected, there is not enough randomness in the selection of judges, which is important to give the appearance of fairness. All these shortcomings require a quick restructuring of the court in time for 2005, the date of the commencement of the FTAA. Given the record of success of the European Court of Justice (ECJ), it is not unreasonable to use this court as a standard when critiquing the CCJ. In fact, the use of the ECJ as a standard could serves as a useful guide to the restructuring of the CCJ.

THE HISTORY OF THE CCJ

The CCJ is the first proposed court of final jurisdiction for the Anglophone Caribbean, all other courts had to answer to the English court. The supremacy of the English courts was laid down in the Colonial Laws Validity Act of 1865, which formally conferred the power to make laws on colonial legislatures, but at the same time it declared that colonial laws inconsistent with an Act of the British Parliament would be void to the extent of its inconsistency.[1] As presently structure, the CCJ is two courts in one. It is a trade court, in the sense that it has the role or resolving disputes between members of the CARICOM treaty and it is also a court of final appeal for the Anglophone Caribbean. In the past there was no court that had any role to resolve trade disputes between the islands of the West Indies because trade between the islands was never seriously contemplated. As a court of final appeal for other matters, all previous courts were always subject to the decisions of the English courts. A recommendation of the Royal Commission of 1897 led to the creation of the West Indian Court of Appeal in 1919. region.[2]

The British Caribbean Federation Act of 1956, which provided for the Federation, which was officially established from 1958 to 1962, also created a federal court system to replace the

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[1]. Ann Spackman, Constitutional Development of the West Indies 1922-1968: a selection from the major documents, Barbados: Caribbean University Press, 1976, pp. 63-64.

[2]. Anthony Payne, The Politics of the Caribbean Community, 1961-79, New York: St. Martin's Press, 1980, p. 9.

West Indian Court of Appeal.[3] Of all previous regional courts in the Anglophone Caribbean, the Federal Supreme Court seems most similar to the CCJ. The Federal Supreme Court had original jurisdiction to interpret and apply the Federal Constitution. It also had original jurisdiction to resolve disputes involving member 'states' of the West Indian Federation. But unlike the CCJ, the Federal Supreme Court was not a final court of appeal, instead the Federal Constitution provided for the retention of the Privy Council as the region's court of final appeal. The region's tie to the Privy Council continued even after many of the countries in the region were granted independence by the United Kingdom.

Pursuant to the Colonial Laws Validity Act, appeals from Britain's colonial empire was heard by the Committee for Trade and Foreign Plantation, which was later transformed into the Judicial Committee of the Privy Council.[4] Clearly, the Privy Council evolved as a mechanism from protecting the interest of the oversea planter class and, of course, to safeguard the interest of the Crown. In a sense colonial laws have always been used as a means of protecting the property interests of British citizens overseas. In that, the planter was always certain that he could appeal any decision of any colonial government to his own courts in England.

The recession in the late 1960s precipitated a rethinking of the colonial ties that the countries in the region maintained with certain metropolitan countries. In 1970, at the Sixth Meeting of the Heads of Government of the Caribbean Community, this new mood in the region led to a resolution for the establishment of a committee of Attorney-General to consider the question of establishing a final court of appeal in the Caribbean. Then in 1989, the CARICOM Heads of Government took a firm decision to establish a Caribbean Court of final appellate jurisdiction. This was followed by the report of the West Indian Commission, A *Time for Action,* which recommended the creation of a Caribbean Court of Justice that would not only be a final court of appeal for the region but also have original jurisdiction over the interpretation and application of the *Treaty of Chaguaramas.*

Amid controversies and uncertainties, the Framework Agreement establishing the CCJ was formally signed on February 14, 2001 in Barbados by the Heads of Government of Jamaica, Grenada, St. Lucia, Barbados, Belize, Antigua, Suriname, St. Kitts, Nevis, and Trinidad and Tobago. St. Vincent and Dominica did not sign. In Jamaica, the opposition party headed by Edward Seaga opposed the establishment of the Court as a replacement for the Privy Council. Many human rights activists opposed the creation of the CCJ because they believe that the Court will be used as a means to expedite executions without due regard to protecting the fundamental human rights of those sentenced to death. Big businesses oppose the creation of the Court because they believe that the Privy Council is a better guarantee against 'expropriation' than a CCJ.

A more fundamental obstacle to the adoption of the CCJ to replace the Privy Council as the court of final appeal for the Anglophone region is the fact that any such change would require constitutional amendments in the respective countries.[5] In all of these countries a

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[3]. Ann Spackman, Constitutional Development of the West Indies 1922-1968: a selection from the major documents, Barbados: Caribbean University Press, 1976, pp. 334; 341.

[4]. Hugh Rawlins, The Caribbean Court of Justice: The History and Analysis of the Debate, Commissioned by The Preparatory Committee on the Caribbean Court of Justice, Georgetown, Guyana: Caribbean Community Secretariat, 2000, pp. 9-15.

[5]. Selwyn Ryan, The Judiciary and Governance in the Caribbean, St. Augustine, Trinidad and

constitution amendment requires a special majority in their parliaments and in others, a constitutional amendments also requires a referendum. Such a process could take years to be completed in all the countries involved and would require a constitutional amendment for all the countries concerned. Although the Regional Judicial and Legal Service Commission (RJLSC) was appointed on August 20, 2003 and St. Lucia, Guyana and Barbados have ratified the instruments for the setting up of the court[6], as of this date, only Barbados and Suriname enacted domestic legislation in 2003. The ramifications of the court has given it a legal identity, but the absence of Jamaica and Trinidad and Tobago, the major players in CARICOM, will not make the court operational. And, given the nature of opposition politics in thee two countries securing the special majority necessary for ratification is not likely.

THE SELECTION OF JUDGES

The key to understanding the selection of the judges of the CCJ is of course the Regional Judicial and Legal Service Commission. The composition of this Commission is outlined in Article V of the *Agreement Establishing The Caribbean Court of Justice* as follows:

ARTICLE V
ESTABLISHMENT OF THE REGIONAL JUDICIAL AND LEGAL SERVICES COMMISSION

1. There is hereby established a Regional Judicial and Legal Service Commission, which shall consist of the following persons:

(a) the President who shall be the Chairman of the Commission;

(b) the nominee of the regional body which, in the opinion of the President, is representative of the legal profession;

(c) two Chairmen of the Judicial Service Commissions of the Contracting Parties selected in rotation by the President as members of the Commission for a period of three years;

(d) the Chairman of a Public Service Commission of a Contracting Party designated in rotation by the President as members of the Commission of a period of three years;

Tobago: Multimedia Production Centre, 2001.

[6]. 'Morean Defends Caribbean Court', *Express,* Wednesday, July 24, 2002, p. 9.

(e) the Secretary-General or the Deputy Secretary-General as his alternate;

(f) a distinguished Caribbean jurist appointed by the President, after consultation with the Dean of the Faculty of Law of the University of the West Indies, the Dean of the Faculty of Law of the university of any Contracting Party, and the Council of Legal Education; and

(g) two persons nominated jointly by the Bar or Law Association of the Contacting Parties.

An examination of the composition of the Regional Legal Service Commission (RJLSC) reveals that most of the people who will select the judges for the CCJ will come from the legal profession. We should recall that the group that was most vociferous in their criticism of the replacement of the Privy Council by a Caribbean court was the various Bar Associations. Of the nine members of the RJLSC, seven will be members of the legal profession. It should be noted that having the legal profession select the judges is in sharp contrast to the normal practice in the rest of the world for selecting judges to the highest court, where the political directorate usually selects the judges. The justification for having the political directorate select the judge is the fact that they are thought to be most in attuned with the will of the people, since they have to face them on election day. The use of the RJLSC to select all of the judges for the CCJ will make the Caribbean and an exception to this general rule.

Another observation is that the selection process will make it very easy for the vast majority of the members of the RJLSC to come from the Anglophone countries in the Caribbean, to the exclusion Suriname and Haiti. This is the case because most of the members of the RJLSC are selected from regional legal institutions, which, for the most part, are dominated, by Barbados, Jamaica and Trinidad and Tobago. It is also very likely for this same reason that a significant percentage of the members of the Commission will came from the same three More Developed Countries (MDCs) of CARICOM, to the exclusion of the Less Developed countries. Since this Commission will be charged with the selection of judges for the CCJ it is very likely that most of the judges on the CCJ will come from the Barbados, Jamaica and Trinidad and Tobago.

The method chosen to select judges for the CCJ is in sharp contrast to the mechanism used for the selection of judges for the European Court of Justice (ECJ). The Treaties provide that the judges must be chosen 'from persons whose independence is beyond doubt and who possess the qualifications required for the appointment to the highest judicial offices in their respective countries or are jurisconsults of recognized competence, in practice the ECJ has been made up of a mixture of professors of law, judges, lawyers in private practice, and government legal advisors. (Lasok, p. 289) Although Article 165 of the European Economic Community (EEC) [the former name of the European Union (EU)] does not specify the nationality of judges on the ECJ, the practice has been to select one judge from each member state of the EU. This is an important democratic practice because it means that a member of the EU would have no reason not to respect the judgment of the ECJ since its own judge participated and influenced the final judgment. Unlike a national court, the ECJ has no police force to enforce its judgement. Although today the ECJ can impose penalties on member states for willful violation of the

treaties, when the Court was first established all it could do was to find that the Member state has failed to fulfill its obligations under the EEC Treaty. Thus, before penalties were available to the Court, the Member state was under no police threat to terminate the violation found by the ECJ. In the final analysis, when the ECJ was first established, the only power that it had is the confidence that the member states have in the composition of the Court and the fairness of the judicial process, which the Court follows.

This democratic practice of selecting judges for the ECJ also translates into the selection of the President of the ECJ. Whereas Article IV(5) requires that the President of the CCJ be appointed by a qualified majority of the contracting parties upon the recommendation of the RJLSC, in the case of the ECJ, the President of the ECJ is elected by a majority vote of his brother judges. Giving the Court the power to select its own president further adds to the credibility and respect that member states will have for the judgement of the Court.

It has been said that the reason for the creation of the Regional Judicial and Legal Service Commission is to make the CCJ independent of political influence. However, it is unclear if this independence is achieved since the selection of judges for the CCJ, for the most part, is conducted by regional entities, which are themselves creatures of political influence.

In the case of the ECJ, the most important protection that judges have against political pressure is the fact that there is only one "judgement of the Court", without any concurring or dissenting judgments.[7] Since judges swear to uphold the secrecy of their deliberations, it is never known how individual judges voted. Therefore, it is not possible for a government of bring pressure on a judge because it would not know what position a particular judge took.

In conclusion, the selection of judges for the CCJ may not be entirely insulated from political influence because the judges themselves are selected by institutions, which are themselves creatures of political influence. Also, because all CARICOM members will not have a representative on the CCJ, as is the case with the ECJ, it is possible that some CARICOM members may not respect the judgement of the Court since they did not take part in its deliberations. A member state is more likely to respect and enforce a judgement of a regional court, if its representative took part in the court's deliberations.

THE CCJ AS TWO COURTS IN ONE

Almost as soon as CARIFTA/CARICOM was formed weaknesses were observed in its depute resolution mechanisms. It has been observed that the settlement of disputes between member states, as articulated in Articles 11 and 12 of the Annex to the Treaty, is cumbersome and ineffectual.[8] In fact, it has only been used once and even then the process was not brought to completion. A significant weakness in the process as outlined in the Treaty is that it puts the burden on a member state to bring a complaint against another state. For political or because their experience with the working of the dispute resolution mechanism, CARICOM governments have found it difficult to bring formal charges against each other. As a result, member states violate the Treaty without correction or any retribution.

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[7]. T. C. Hartley, The Foundation of European Community Law, Oxford: Clarendon Press, 1988, p. 51.

[8]. Gladstone E Mills, et al., Report on Review of Regional Programmes and Organisation of the Caribbean Community, *Georgetown, Caribbean Community Secretariat,* 1990, p. 33.

The Mills Report was the first to recommend the creation of a regional court to resolve disputes emanating from the CARICOM Treaty. The West Indian Commission also made this recommendation in its report *A Time for Action.* However, a major weakness of these recommendations was to also make the CCJ the final court of appeal for the Anglophone Caribbean, replacing the Judicial Committee of the Privy Council. In 2000, the CARICOM heads of government finally agreed to establish the court in 2000 and commenced the construction of the Court in Port of Spain, Trinidad and Tobago. As will be shown below, controversies surrounding the CCJ replacing the Privy Council led to the failure of the Court to come into operation.

Pursuant to the recommendation of the West Indian Commission to create the CCJ, CARICOM has undergone a major overhaul and adopted a battery of protocols amending the original Treaty of Chaguaramas.[9] In particular, Protocol IX introduces the Caribbean Court of Justice and the Arbitral Tribunal, which is available under the Common Market Annex. The new system gives binding force to decisions of the CCJ and the Arbitral Tribunal about the nature of CARICOM Treaty obligations on Member States to which it is directed. The Agreement establishing the CCJ also permits nationals or private entities to bring claims against a CARICOM government or institution to force the adoption of the CARICOM Treaty and other Community laws. The amendments to the CARICOM Treaty and Annex, creating the CCJ and other dispute settlement processes provide an important building block for a strong regional integration effort which will serve to deepen the integration movement.

Unfortunately, the concern that member states had about the CCJ replacing the Privy Council led to an indefinite delay in the setting up of the Court. Many states were worried about the perception of the CCJ as a "hanging court," the financing of the Court and others could not conclusively support the establishment of the court because their constitution required a referendum before the CCJ could replace the Privy Council. In hindsight, the West Indian Commission clearly did not anticipate the political controversy surrounding the CCJ replacing the Privy Council for all appeals from the Anglophone Caribbean. It also seems clear that the Court should be reformulated and it should only be given jurisdiction over matters emanating from the Treaty of Chaguaramas and its Protocols, hence making the Court less controversial and not requiring an amendment to the constitution of any member state for its establishment.

The CCJ should, like the ECJ court from which it is modeled, have jurisdiction only over matters arising from the CARICOM Treaty. The Andean Community has a similar court also modeled after the ECJ and that court only handles matters emanating from its common market treaty. It seems reasonable to expect that if the jurisdiction of the CCJ is limited to matters arising from the CARICOM Treaty, there will be less controversy over its establishment. Besides, if CARICOM widens and includes the Latin countries on the Caribbean Basin there will be no controversy over the Latin Countries helping to finance a court that performs functions which they do not require, since most Latin countries have their own court of final appeal and would not need to use the court for non-treaty related matters.

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[9]. David S. Berry, "Nested Communities: The Implications of a Changing CARICOM for St. Kitts and Nevis." Presented at the UWI School of Continuing Studies *Beyond Walls: Multi-Disciplinary Perspectives St. Kitts & Nevis Conference*, Basseterre, St Kitts, April 30 - May 3, 2000.

CONCLUSION

A proper structuring of the CCJ would have benefits to the region that go well beyond just the interpretation and application of the CARICOM Treaty. If the Court has the trust and confidence of the countries in the region, it could be given jurisdiction to resolve border deputes between, Trinidad and Tobago and Barbados, Surname and Guyana or even territorial disputes between Venezuela and Guyana or Venezuela and the Eastern Caribbean over Aves Island. A resolution of these border disputes would foster the economic development of the regions by laying the basis for the exploitation of the mineral resources in their respective Exclusive Economic Zone.[10]

There is little doubt that the CCJ as it is requires some amendment if it is to be saved. If the region hopes to benefit from the soon-to-be-FTAA, it must work quickly to remove the jurisdiction that the CCJ currently has as a court of final appeal for the Anglophone Caribbean. Instead the sole purpose of the court must be to resolve issues surrounding the interpretation and application of the CARICOM Treaty. Also, to make sure that all CARICOM states will have a stake and therefore respect for the judgments issued by the Court, the method of selecting judges must be changed to allow each member state to select a judge of its choice, with the proviso that the other members do not object to the selection. The sooner that this is done the sooner CARICOM will have a mechanism in place to further integrate the region which will serve as a protective shield against the tide of unbridled globalization.

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