



The Constitutional Functions of the Caribbean Court of Justice

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The Caribbean Court of Justice (CCJ) is a pivotal CARICOM institution, effectively representing the attempts to integrate the various economic and cultural realities of the region. The article tackles this central aspect by focusing on its constitutional role. After a historical introduction, the author addresses the original and appellate jurisdiction of the CCJ. Further on, the article touches upon institutional issues that might affect its functioning, such as costs for litigants and the influence of the CCJ on the legal profession. Finally, the conclusion highlights important challenges, among which stems the need for the development of a Community law directly applicable to all member States.

La Cour caribéenne de justice (CCJ) est une institution centrale de la CARICOM représentant de façon éloquente une tentative d'intégration des différentes réalités économiques et culturelles de la région. L'article se penche sur le rôle central de cette cour en soulignant sa fonction constitutionnelle. Suite à une mise en contexte et un aperçu historique, l'auteur se concentre sur la compétence en première et deuxième instance de la CCJ. Plusieurs difficultés institutionnelles, tel que les coûts d'accès à la justice et l'influence de la CCJ sur la profession d'avocat, sont ensuite examinées. La conclusion souligne les prochains défis à relever, notamment le développement d'un véritable droit communautaire directement applicable dans les pays membres.

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I. INTRODUCTION

The Caribbean Court of Justice (CCJ) is a complex organisation, which occupies a pivotal place in the structure of the Caribbean Common Market (CARICOM), which, in turn, must be seen in the context of the long and sometimes tortured process of regional integration in the Caribbean. Long subject to colonial rule by the United Kingdom, France, Spain, the Netherlands and various other aspirants, the small islands of the Caribbean and the related adjacent former colonies on the coast of South America have taken different paths since decolonisation. Some have become legally part of the metropolitan territories, a few still retain colonial status or special status such as Puerto Rico, but the majority have acceded to full sovereignty and joined the international community as sovereign states.¹ This process originally began with the Haitian revolt against France and subsequently the revolt against Spain and the ensuing independence of Venezuela and later Mexico and Cuba, but the bulk of the island and small continental states did not become independent until the 1950s.² Since that point, these states have struggled with the sometimes conflicting imperatives of building viable nation states and viable economies. The former objective generally leads to particularism and the strong assertion of local identity, while the latter objective is usually seen as requiring the creation and adhesion to larger transnational entities. This struggle is well illustrated in the development of CARICOM and the CCJ.³

This paper focuses on the status and role of the CCJ, a judicial organ of a regional trade agreement which has been given additional functions and whose significance exceeds the judicial realm to embrace the process of regional economic integration itself. The CCJ is thus performing vital constitutional functions of various kinds in the Member States of the CARICOM.⁴ Part II of this paper explores the history of CARICOM and the formation of the CCJ. Part III of this paper looks at the treaty framework around the original and appellate jurisdiction of the CCJ and considers a number of key cases decided by the CCJ. Parts IV and V examine the institutional issues faced by the CCJ, as well as the CCJ's appraisal of its own role in CARICOM. Finally, Part VI reflects on some of the major challenges faced by the CCJ in the future, namely the issue of supranationality and direct effect.

II. HISTORY OF THE CCJ AND CARICOM

The origins of the CCJ go back to the attempts to found a Federation of the West Indies by

1 See "The World Factbook", online: Central Intelligence Agency <<https://www.cia.gov/library/publications/the-world-factbook/>> (Guadeloupe and Martinique are overseas departments of France. St. Barthélemy and Saint Martin are French overseas collectivities. Aruba, Curaçao and Saint Maarten are self-governing, autonomous countries that form a part of the Royal Dutch Kingdom, along with the Netherlands. Anguilla, Bermuda, the British Virgin Islands, Cayman Islands, Montserrat, and Turks and Caicos remain British overseas territories. Puerto Rico and the U.S. Virgin Islands are insular areas of the United States and are administered by the Office of Insular Affairs within the United States Department of the Interior.).

2 B W Higman, *A Concise History of the Caribbean* (New York: Cambridge University Press, 2010).

3 Karen E Bravo, "CARICOM, the Myth of Sovereignty and Aspirational Economic Integration" (2005) 31 NCJ Intl Com Reg 145.

4 Simeon C R McIntosh, "West Indian Constitutional Authorship: The Role of the Caribbean Court of Justice" in *Read Text Polity Essays Hermeneutics Const Theory* (Kingston, Jamaica: Ian Randle Publishers, 2008).

a number of Commonwealth Caribbean states in 1958,⁵ although it may even date as far back as 1901, where the idea of a final indigenous court for the Commonwealth Caribbean was supposedly raised in an editorial in a Jamaican newspaper.⁶ The Federation of the West Indies would have been subject to the jurisdiction of various local and federal courts, as well as the Imperial Privy Council in London.⁷ The Standing Closer Association Committee, which assembled the first official draft for a federal constitution, proposed a Federal Supreme Court and this was eventually included in the final Act.⁸ But the Federation did not survive the pressures of local nationalism and nation building in the recently decolonized states of the West Indies, and it collapsed within four years of its creation.⁹ Despite this setback, Caribbean leaders and jurists continued to seek a formula for renewed cooperation and gradually found it in the form of a regional trade agreement.¹⁰ The future CARICOM was debated among largely English-speaking Caribbean Commonwealth leaders, but when the original agreement was reached in 1973¹¹ the net was cast further to embrace some states on the South American mainland as well as some former colonies of the Netherlands.¹² French speaking former colonies moved towards metropolitan status rather than joining CARICOM.¹³ Haiti, long an independent francophone state, was an original CARICOM signatory but has never been a functional part of the Community. An even greater challenge in the long term would be the eventual participation of Cuba and the Dominican Republic.¹⁴

The original CARICOM took some time to have any real effect on the economies of its member states and it was not until 1997 that negotiations recommenced with a view to strengthening the existing arrangement and expanding its reach.¹⁵ These discussions culminated in the conclusion of the *Revised Treaty of Chaguaramas* (RTC) in 2001.¹⁶ The objective of the RTC was to give new and significant impulsion to the process of building a regional economic

5 Jesse Harris Proctor Jr., “The Framing of the West Indian Federal Constitution: An Adventure in National Self-Determination” (1965) 57 *Revista de Historica de América* 51 at 51.

6 David Simmons, “The Caribbean Court of Justice: A Unique Institution of Caribbean Creativity” (2004) 30 *Nov L Rev* 171 at 174.

7 Proctor Jr., *supra* note 5 at 108.

8 *Ibid* at 105; See *British Caribbean Federation Act, 1956* (UK), 4 & 5 Eliz II, c 63, s 2.

9 The Federation eventually collapsed in 1962. Simmons, *supra* note 6 at 177.

10 Derek O’Brien & Sonia Morano-Foadi, “CARICOM and Its Court of Justice” (2008) 37 *Common Law World Rev* 334. Mr. Justice Simmons also provides a brief summary of the debates specifically around the formation of the CCJ. Simmons, *supra* note 6.

11 *Treaty Establishing the Caribbean Community*, 4 July 1973 (entered into force 1 August 1973) online: CARICOM <www.caricom.org/jsp/community/original_treaty-text.pdf> (The original Treaty of Chaguaramas was signed on July 4, 1973 and included Barbados, Guyana, Jamaica, and Trinidad and Tobago.).

12 *Ibid* (Belize, Guyana, and Suriname are all part of the mainland. Suriname is a former Dutch colony).

13 Guadeloupe and Martinique, which are overseas departments of France, and St. Barthélemy and Saint Martin, which are French overseas collectivities, are not members of CARICOM.

14 *The Caribbean Community (CARICOM) Dominican Republic Free Trade Act, 2001*, 22 August 1998 (entered into force 1 December 2001) (For now, the Dominican-Republic participates in CARICOM through the CARICOM-Dominican Republic Free Trade Agreement, which entered into force in 2001.).

15 In 1997, the Caribbean Regional Negotiating Machinery was established to organize and execute external negotiations in which the Caribbean was involved. Anthony J Payne, *The Political History of CARICOM* (Jamaica: Ian Randle Publishers, 2008).

16 *Revised Treaty of Chaguaramas Establishing the Caribbean Community (CARICOM) Single Market and Economy*, 5 July 2001, 2259 UNTS 303 (entered into force 4 February 2002) [CARICOM 2001].

space. Although jealous of their sovereignty and subject to many conflicting political pressures, Caribbean leaders were conscious of the fragility and weaknesses of their respective economies and they sought to alleviate these difficulties by creating a much larger single economic space and by opening up their economies to the forces of competition.¹⁷ In doing so, they had, in 2001, many more extensive and successful models of regional economic integration than had been the case in 1973.¹⁸ The success of the European Union (EU) as a model was not unfamiliar to the leaders and was well understood by a number of senior Caribbean policy advisers and academics.¹⁹ In particular they understood the need to secure not only the free movement of goods, but also to ensure the free movement of services, capital and persons, including the right of establishment of persons and enterprises, together with a commitment to conditions of open competition. Also well understood, albeit a matter of considerable political delicacy, was the need to create a strong institutional framework to ensure the effective enforcement of the rules to be enshrined in the RTC.²⁰ It is in this context that the CCJ was conceived.

Institution building was a central part of the discussions leading to the adoption of the RTC. The model of the European Union was uppermost in the minds of negotiators, but there was great reluctance to go as far as the creation of full-fledged supranational institutions such as the European Commission, the ‘conscience of the community’ or even the European Council, representing the member states and vested with genuine legislative powers. Most leaders instinctively preferred the less onerous institutional commitments inherent in many free trade agreement models such as NAFTA. However there was a sentiment that the NAFTA approach would not be sufficient to carry their future association forward and to bind them to respect their obligations. The result was an agreement, which uses EU treaty concepts in many places, and which commits the CARICOM states to deep economic integration in principle, but which held back from creating a number of genuinely supranational institutions.²¹ It does contain a number of far-reaching rules and principles but refrains from establishing an autonomous CARICOM legislative process. The most significant exception to this approach is found in the structure and powers of the CCJ, which is in many respects a genuinely supranational judicial institution.

Like the negotiators of Uruguay Round of Multilateral Trade Negotiations who chose a powerful dispute settlement mechanism over supranational institutions to guarantee respect for their new agreement in 1994, the negotiators of the CARICOM looked to dispute settlement as the means of protecting their commitments in the RTC. There can be no doubt as to the importance given to the CCJ, which is constituted by not one, but two, treaties. RTC articles 187-223²² establish the CCJ and define its jurisdiction over all trade commitments. But, to emphasize the present and future significance of the CCJ, the Court is the object of a separate treaty titled the

17 Derek O’Brien, “CARICOM: Regional Integration in a Post-Colonial World” (2011) 17:5 Eur Law J 630.

18 For example, the European Union, the European Free Trade Association, the South African Development Community, the East African Community and other African models, the Association of Southeast Asian Nations, and the Central America Free Trade Agreement, among many others.

19 Duke E Pollard, *The Caribbean Court of Justice: Closing the Circle of Independence* (Kingston: The Caribbean Law Publishing Company Ltd., 2004).

20 Simmons, *supra* note 6 at 180-181.

21 O’Brien & Morano-Foadi, CARICOM, *supra* note 10 at 339-340.

22 CARICOM 2001, *supra* note 16 arts 187-223.

*Agreement Establishing the Caribbean Court of Justice*²³ (AECCJ), which was also signed in 2001 and was inaugurated in 2005 when all the requisite administrative arrangements had been concluded. This second treaty restates the rules and principles of the RTC over trade matters and fleshes out the institutional framework of the Court and guarantees its independence.²⁴ This second treaty expands the CCJ's potential jurisdiction beyond its "original jurisdiction" over trade matters under the RTC to create an "appellate jurisdiction" in civil and criminal matters for all those CARICOM states that desire to have a common regional final court of appeal.²⁵

The CCJ is thus, in certain respects, a supranational tribunal having compulsory jurisdiction over many important matters arising under a regional trade treaty, as well as a final regional court of appeal for those CARICOM states that choose to submit themselves to this function. For these reasons, it stands as a uniquely important experiment in supranational and international constitution making. This constitutional function can be seen as twofold. First, it is designed to reinforce and guarantee the common economic space of the CARICOM for all member states and in some cases for individuals as well. Second, the CCJ is empowered to act as a final court of appeal with authority to decide civil and criminal cases arising under the laws of the member states accepting this jurisdiction. The latter function potentially leads the CCJ to consider claims based on international human rights standards arising under international law and common to all CARICOM member states. The two functions are formally quite distinct, but the commitment to the rule of law and general principles of law, as the Court of Justice of the European Union (CJEU) has shown,²⁶ inevitably lead to a point in public law where different strands of economic law and human rights law under the various forms of jurisdiction intersect and feed each other. This appears to be happening with the CCJ.

III. THE CCJ TREATY FRAMEWORK

A. Introduction

The framework as set out above is rather complex: it is divided between two quite different forms of jurisdiction and two separate treaties. The *original jurisdiction* over economic matters is organized under several different recourses while the *appellate jurisdiction* is fundamentally grounded in the national law of each state that chooses the CCJ to be its final court of appeal.²⁷ The former jurisdiction is strictly economic in nature while the latter jurisdiction deals with any form

²³ *Agreement Establishing the Caribbean Court of Justice*, 14 February 2001, 2324 UNTS 41658 (entered into force 23 July 2002) [AECCJ].

²⁴ Judicial Independence in the International Courts: Lessons from the Caribbean" (2009) 3:58 ICLQ 671 at 677-682 [Malleon] (Institutional features guaranteeing independence include a funding system independent from Member States and the independent selection of judges, which is done by the Regional Judicial and Legal Services Commission.). See also Pollard, *supra* note 19.

²⁵ Leonard Birdsong, "The Formation of the Caribbean Court of Justice: The Sunset of the British Colonial Rule in the English Speaking Caribbean" (2004) 36 U Miami Inter-Am Rev 197; Désirée Bernard, "The Caribbean Court of Justice: A New Judicial Experience" (2009) 37:2 Int J Leg Inf 219.

²⁶ See Elizabeth F Defeis, "Human Rights and the European Court of Justice: An Appraisal" (2007) 31:5 Fordham Intl LJ 1104 (Human rights protection grew out of CJEU jurisprudence and was later formalized in the Charter of Fundamental Rights of the European Union in 2000).

²⁷ At the time of writing, the CCJ was the final court of appeal for Barbados, Guyana and Belize.

of appeal allowed under the law of the member state accepting it. The CCJ and those who plead before it have been feeling their way, developing their understanding of the various procedures under the treaties and making important decisions as to their reach in specific cases. This initial process is not finished. The first President of the CCJ, Justice de la Bastide, and many of the original judges of the court have only recently stepped down, making way for new judges. For most advocates and their public and private clients, a case before the CCJ has often been their first. But, in the space of eight short years the judges of the CCJ and those who plead before it have accomplished a great deal.

B. Original Jurisdiction

i. Treaty Structure

The original jurisdiction of the CCJ is governed by a number of parallel provisions of the RTC and the AECCJ. The latter is devoted entirely to the establishment of the CCJ and the definition of its jurisdiction, but the former is a complex instrument dealing with many issues pertaining to the creation of the CARICOM Community and Single Market. The provisions of the RTC dealing explicitly with the CCJ²⁸ are themselves set in the context of a broader framework dealing with the settlement of disputes between Member States, the Community, and in some instances their nationals.²⁹

Chapter 9 on Disputes Settlement envisages the resolution of disputes by a variety of non-binding and binding procedures and forms of dispute settlement ranging from negotiation and conciliation to alternative dispute resolution.³⁰ There is no explicit, general principle that all disputes under the treaty are to be resolved by a compulsory and binding procedure. However, the arbitral procedures envisaged by the Treaty are compulsory once the arbitrators are named, and provide for compulsory nominations when a party fails to nominate an arbitrator. Arbitral Panel decisions are said to be “final and binding” upon the parties.³¹ With respect to the decisions of the CCJ the treaty contains even less ambiguity. Articles 188, 211, and 216 of the RTC speak of the “compulsory and exclusive jurisdiction” of the CCJ to hear various categories of claims.³² Article 215 states that:

The Member States, Organs, Bodies of the Community, entities or persons to whom a judgment of the Court applies, shall comply with that judgment promptly.³³

Article 216 is also explicit as to the jurisdiction of the CCJ:

1. The Member States agree that they recognise as compulsory, ipso facto and without special agreement, the original jurisdiction of the Court referred to in

²⁸ CARICOM 2001, *supra* note 16 arts 211-224.

²⁹ *Ibid* at Chapter 9.

³⁰ *Ibid* at arts 187 to 224.

³¹ *Ibid* at art 204 (Some confusion results from the fact that RTC art 204 states: “A Member State party to a dispute may, *with the consent* of the other party, refer the matter to an arbitral tribunal constituted in accordance with the provisions of this Chapter” [*emphasis added*]).

³² *Ibid* at arts 188, 211, 216.

³³ *Ibid* at art 215.

Article 211.

2. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be determined by decision of the Court.³⁴

The jurisdiction of the CCJ under the RTC is not universal and does not cover all matters arising under the treaty. Rather, very much like the CJEU, the jurisdiction of the CCJ is cast in function of various types of disputes and various parties. Article 211 of the RTC defines the original jurisdiction of the CCJ in the following way:

1. Subject to this Treaty, the Court shall have compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the Treaty, including:

(a) disputes between the Member States parties to the Agreement;

(b) disputes between the Member States parties to the Agreement and the Community;

(c) referrals from national courts of the Member States parties to the Agreement;

(d) applications by persons in accordance with Article 222, concerning the interpretation and application of this Treaty.

2. For the purpose of this Chapter, “national courts” includes the Eastern Caribbean Supreme Court.³⁵

Article 212 extends the scope of the CCJ’s original jurisdiction by permitting Member States parties to a dispute and the Community to request advisory opinions:

1. The Court shall have exclusive jurisdiction to deliver advisory opinions concerning the interpretation and application of the Treaty.

2. Advisory opinions shall be delivered only at the request of the Member States parties to a dispute or the Community.³⁶

The right of a national court to refer matters to the CCJ mentioned in Article 211.1(c) is covered by Article 214:

Where a national court or tribunal of a Member State is seised of an issue whose resolution involves a question concerning the interpretation or application of this Treaty, the court or tribunal concerned shall, if it considers that a decision on the question is necessary to enable it to deliver judgment,

34 CARICOM 2001, *supra* note 16 at art 216.

35 *Ibid* at art 211.

36 *Ibid* at art 212.

refer the question to the Court for determination before delivering judgment.³⁷

Article 222 defines the categories of natural or juridical persons who may be entitled to appear as parties before the court:

Persons, natural or juridical, of a Contracting Party may, with the special leave of the Court, be allowed to appear as parties in proceedings before the Court where:

(a) the Court has determined in any particular case that this Treaty intended that a right or benefit conferred by or under this Treaty on a Contracting Party shall enure to the benefit of such persons directly; and

(b) the persons concerned have established that such persons have been prejudiced in respect of the enjoyment of the right or benefit mentioned in paragraph (a) of this Article; and

(c) the Contracting Party entitled to espouse the claim in proceedings before the Court has:

(i) omitted or declined to espouse the claim, or

(ii) expressly agreed that the persons concerned may espouse the claim instead of the Contracting Party so entitled; and

(d) the Court has found that the interest of justice requires that the persons be allowed to espouse the claim.³⁸

Article 175, which deals with the powers of the Competition Commission, provides that the Commission can seize the CCJ and that private parties can resist the decisions of the Commission:

11. If the enterprise cannot comply within the time period specified and fails to inform the Commission, the Commission may apply to the Court for an order.

12. A party which is aggrieved by a determination of the Commission under paragraph 4 of Article 174 in any matter may apply to the Court for a review of that determination.³⁹

Articles of 207, 211, 212, 214, 215, 216 and 222 of the RTA are mirrored by Articles XII – XVI and XXIV of the AECCJ, although the jurisdiction is not cast in exactly the same words.

The law to be applied by the CCJ in the exercise of its original jurisdiction is governed by Article 217, and mirrored by Article XXVII of the AECCJ as follows:

1. The Court, in exercising its original jurisdiction under Article 211, shall apply such rules of international law as may be applicable.

2. The Court may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law.

3. The provisions of paragraphs 1 and 2 shall not prejudice the power of the

³⁷ CARICOM 2001, *supra* note 16 at art 214.

³⁸ *Ibid* at art 222.

³⁹ *Ibid* at art 175.

Court to decide a dispute *ex aequo et bono* if the parties so agree.⁴⁰

Finally, RTC Article 224, mirrored in slightly different words by AECCJ Article XXVII contains a general undertaking to implement the provisions of the treaty concerning the CCJ:

Each Member State undertakes to employ its best endeavours to complete the constitutional and legislative procedures required for its participation in the regime establishing the Court as soon as possible.⁴¹

This provision applies equally to the original and the appellate jurisdiction of the CCJ.

These Articles leave open as many questions as they solve. Some of the questions can be answered by a careful reading of the context of the RTC, which is essentially a treaty establishing a regional economic community. CARICOM is a work in progress and the jurisdiction of the CCJ is likely to mirror or follow and sometimes even lead this progress. The original jurisdiction of the CCJ and the provided for remedies are the result of the objectives of the economic community and reflect the limits to which negotiators of the member states were prepared to go to achieve these objectives. In their negotiations, negotiators had models to draw from and refer to, particularly the treaties establishing the European Union. However, on a number of issues, negotiators were unwilling to go as far along the road to integration as the steps taken in the EU treaties.⁴² The original jurisdiction of the CCJ must therefore be analyzed on its own terms following the logic of the RTC and the political compromises that led to its adoption, but conscious of where appropriate references can be and are made to CJEU cases.

The CARICOM internal market reflects a free trade agreement, albeit one that goes a considerable way beyond many bilateral regional free trade agreements towards economic integration. The RTC commits Member States to a broad program of economic integration involving duties to promote this principle in many areas or to refrain from restricting integration.⁴³ If this road is followed, it could come close to becoming a customs union, although it is not there yet. The CARICOM entails freedoms of movement in a number of respects, especially those pertaining to persons that are more characteristic of a customs union than a free trade agreement. The commitment to maintaining conditions of competition in the internal market and the institutional structure adopted to protect competition also reflects a commitment to a high degree of integration. The cooperative arrangements and institutions made by the RTC under the Conference of Heads of Government and the Community Council of Ministers⁴⁴ are impressive. In most cases the extent of the duties of Member States to take steps to promote integration are framed by the RTC itself and involve joint consultation, cooperation and the adoption of measures

40 CARICOM 2001, *supra* note 16 at art 217.

41 *Ibid* at art 224.

42 For a summary of key differences between CARICOM/the CCJ and the EC see Derek O'Brien & Sonia Morano-Foadi, "The Caribbean Court of Justice and Legal Integration within CARICOM: Some Lessons from the European Community" (2009) 8 *Law Pract Int Courts Trib* 399.

43 CARICOM 2001, *supra* note 16 art 32 (For example, Article 32 of the RTC prohibits the enactment of new restrictions on the right of establishment of nationals of other Member States other than as provided by Treaty. Article 78 introduces the objectives of the Community's trade policy (addressed under Chapter 5), namely "full integration of the national markets of all Member States of the Community into a single unified and open market area.")

44 *Ibid* at Chapter 2.

by individual states to give effect to these decisions and recommendations.⁴⁵ Should Member States fail to respect these decisions and recommendations they are in violation of the RTC and subject themselves to legal consequences. In some cases, such as the implementation of the common customs tariff, the avoidance of subsidies and dumping of goods, the CARICOM Council for Trade and Economic Development (COTED)⁴⁶ is empowered to receive complaints from governments and private parties. COTED can subsequently make recommendations to resolve disputes on these matters and, if the state in question does not follow the recommendations, the complaining state or the state whose nationals are suffering from a breach of these treaty rules may be authorized to take trade related countermeasures.⁴⁷ The Competition Commission is empowered to investigate and rule on complaints of violations of the competition provisions of the RTC coming both from states and private parties.⁴⁸

While membership in CARICOM commits member States to a wide range of duties, the breach of which can give rise to complaints of treaty violation, the negotiators of the RTC refrained from creating a full-fledged supranational institution like the European Commission to promote the internal market.⁴⁹ Ultimate responsibility to oversee the implementation of the treaty is left to a Committee of Heads of State. Nor is there any suggestion of a common Parliament comparable to that of the EU. There are limited rule-making powers vested in the CARICOM institutions,⁵⁰ particularly the Competition Commission, and the COTED does exercise limited powers of investigation, reporting, recommendation and sanction.⁵¹ However, CARICOM falls short of giving its institutions the collective power to adopt supranational legislation like that enjoyed by the European Council and the possible direct effect of CARICOM rules in the domestic legal orders, on the model of EU law⁵² is still a matter of debate.⁵³

Given this picture of an ambitious desire to promote economic integration through a broad program set out in the RTC, but an unwillingness to adopt more than very limited supranational rules and institutions, the role of the CCJ must be deemed crucial to the achievement of the CARICOM internal market. The CCJ itself is certainly evidence of the desire to guarantee respect for the freedoms of movement and competitive conditions in the CARICOM internal market.

The jurisdiction of the CCJ, like that of the CJEU, is exercised over various categories of litigants in different situations as defined in the two treaties. Thus *Member States* can seize

45 CARICOM 2001, *supra* note 16 at arts 33 to 100.

46 *Ibid* at art 15 (COTED was established under Article 15 of the RTC).

47 *Ibid* at arts 182-183 (For example, COTED receives complaints on prohibited subsidies from Member States, investigates such allegations and can authorize the use of countermeasures. *Ibid* at arts 102, 103, 108, 109, and 114. COTED is also empowered to develop and establish appropriate policies and competition rules).

48 *Ibid* at arts 171 to 176.

49 *Ibid* at arts 23, 24 and 25 (The Secretariat has extensive authority to propose and implement decisions).

50 *Ibid* at art 12.7.

51 *Ibid* at art 182.

52 For an explanation of “direct effect”, see “The direct effect of European law”, (2010), online: Europa <http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/114547_en.htm>.

53 Adrian D Saunders, “A Commentary on the Early Decisions of the Caribbean Court of Justice in its Original Jurisdiction” (2010) 59:3 ICLQ 761; Mr. Justice Winston Anderson, *Free Movement Within CARICOM: Deconstructing Myrie v. Barbados* (St. Georges, Grenada, 2013); O’Brien & Morano-Foadi, CARICOM, *supra* note 10; O’Brien & Morano-Foadi, European Community, *supra* note 42.

the tribunal alleging violation of the RTC by another state⁵⁴ or by certain RTC organs.⁵⁵ *Member States* parties to a dispute and the *Community* are also empowered to request *advisory opinions* from the Court. The CARICOM as an institution does not have general authority to enforce the RTC against Member States or individuals, but certain organs do have limited and specific powers to seize the CCJ in order to enforce decisions. Thus, the *COTED* and the *Competition Commission* are specifically empowered to do so.⁵⁶ *Individuals* are also given standing on a limited and discretionary basis to take actions before the CCJ. This right has been exercised with considerable effect in a number of cases⁵⁷ and has given rise to some of the most interesting decisions of the Court. Finally, *domestic courts* are authorized to refer questions of FTA law to the CCJ when they consider that the resolution of such questions are “necessary to enable it to deliver judgment.”⁵⁸

Another way of examining the jurisdiction of the CCJ is to consider the types of actions that may be taken before the Court. The essential action, as with many treaties, is an action by one state party against another alleging violation of the Treaty. This was doubtlessly thought by negotiators to be the fundamental right of action before the CCJ. However, just as states have been reluctant to exercise their right of action against each other in the EU,⁵⁹ and for that matter in international law generally, CARICOM states have been slow to throw the first stone under the RTC and no action has yet been taken.

Member States are also empowered to take action before the CCJ against the Community. The latter may also be in essence an action by one state against others when they object to collective action of states through the Community. However, it may also involve challenges to the decisions of organs of the Community. For example, a Member State can challenge a decision by the Competition Commission or by COTED.⁶⁰ It should be noted that, unlike the EU Commission,⁶¹ the Community is not itself empowered to take enforcement actions against Member States. This is a serious limitation on the enforcement of the RTC and cuts off a significant potential source of cases before the CCJ. The capacity of Member States party to a dispute and the Community to seek an advisory opinion from the CCJ is potentially an important source of litigation, which has yet to be invoked.⁶² Litigation flowing from COTED and Competition Commission decisions may well prove to be an important source of litigation. So far, there have been few cases.⁶³ Given the

54 CARICOM 2001, *supra* note 16 art 211.

55 *Ibid.*

56 *Ibid* at art 175.

57 *Ibid* at art 222.

58 *Ibid* at art 214.

59 Paul Craig & Gráinne de Búrca, *EU Law: Texts, Cases and Materials*, 5th Ed. (Oxford: Oxford University Press, 2011) at 433.

60 See *Trinidad Cement Limited v the Competition Commission*, [2012] CCJ 4 at paras 1–2, online: < www.carib-beancourtofjustice.org/wp-content/uploads/2012/12/2012-CCJ-4-OJ.pdf> [2012 CCJ 4]. In this case, the Claimant alleged that the Commission’s decision to initiate an investigation of anti-competitive business conduct into the Trinidad Cement Limited Group was void and that the decision to hold an enquiry, ensuing from the investigation, was also void. This case was particularly important in so far as it addressed judicial review of Commission actions.

61 See EC, *Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union*, [2008] OJ, C 115/1 at art 17(1) [TFEU].

62 *AECCJ*, *supra* note 23 at art XIII. (The Court has not yet issued an advisory opinion).

63 2012 CCJ 4, *supra* note 60; 2009 CCJ 4, *supra* note 60; 2012 CCJ 1, *supra* note 60.

extraordinary explosion of cases under the reference procedure to the CJEU,⁶⁴ one might expect the capacity of domestic courts to refer questions of RTA law to the CCJ to be a significant source of business. So far this has not happened – perhaps because the issue of direct effect remains a matter of hypothesis and has yet to be decided by the CCJ.⁶⁵ While, to date, there have been no cases ruling on the issue of direct effect, the *Shanique Myrie v The State of Barbados and the State of Jamaica* decision, as discussed below, may have opened the door for this discussion to take place in the future.

By far the greatest source of litigation before the CCJ to date has been the actions initiated by private persons and corporations under article 214 of the RTC. The Court has been pressed by corporations allegedly suffering economic harm from actions by states and the Community arguably taken in violation of the RTC. This has forced the Court to face delicate and sometimes controversial questions as to the nature and extent of its discretion to allow litigants to come before it.⁶⁶ The Court has also had to decide whether it will allow actions to be taken in the face of objections of Member States in circumstances where the Member States allege that private actions impinge upon their discretion to take actions directly in their own name.⁶⁷ In answering claims by private parties on standing⁶⁸ and on substantive issues,⁶⁹ the CCJ has been forced to discuss the nature of the economic union under the FTA⁷⁰ as well as the inherent legal protections enjoyed by individuals and corporations under the Treaty.⁷¹

64 See *TFEU*, *supra* note 61 at art 265.

65 Derek O'Brien, "Accessing the Original Jurisdiction of the Caribbean Court of Justice" (2009) 36:4 *Leg Issues Econ Integr* 339 at 341.

66 *Trinidad Cement Limited v. Republic of Guyana*, [2009] CCJ 5, online: < <http://www.caribbeancourtjustice.org/wp-content/uploads/2012/12/2009-CCJ-5-OJ.pdf>>; *Trinidad Cement Limited v. Caribbean Community*, 2009 CCJ 2 (available on http://www.caribbeancourtjustice.org/judgments/ar3_2008/ar32008.pdf). For a summary of these issues see O'Brien, *supra* note 65.

67 In *Trinidad Cement Limited v. Republic of Guyana*, [2008] CCJ 1 at para 17, online: < <http://www.caribbeancourtjustice.org/wp-content/uploads/2012/02/ar120081.pdf>>, the Republic of Guyana argued that the right to institute proceedings before the Court was a right "peculiarly vested in States Parties." They reasoned that "the bringing of proceedings by one State against another under the Treaty may have serious political implications" for the Community. The Court rejected this argument, holding that the interpretation favoured by the Republic of Guyana "would place an unduly restrictive limitation on the category of persons entitled to complain about the conduct of a Contracting Party or of the Community" and concluded that "it was not the intention of the Member States to prohibit a private entity from bringing proceedings against its own State." *Trinidad Cement Limited v. Republic of Guyana*, 2009 CCJ 1 at paras 39-40 (available on http://www.caribbeancourtjustice.org/wp-content/uploads/2012/02/ar12008_judgement.pdf).

68 *Shanique Myrie v. the State of Barbados*, [2012] CCJ 3, online: < http://www.caribbeancourtjustice.org/judgments/oa2_2012/oa2_2012.pdf>; *2012 CCJ 4*, *supra* note 60; *Hummingbird Rice Mills Ltd. v Suriname, Caribbean Community*, 2011 CCJ 1 (available on <http://www.caribbeancourtjustice.org/wp-content/uploads/2011/06/Judgment-in-HUMMINGBIRD-RICE-MILLS-2.pdf>); *2009 CCJ 1*, *supra* note 67; *2009 CCJ 2*, *supra* note 66; *Doreen Johnson v Caribbean Centre for Development Administration*, [2009] CCJ 3, online: < http://www.caribbeancourtjustice.org/wp-content/uploads/2012/02/ar2_2008.pdf>.

69 *Shanique Myrie v. the State of Barbados and the State of Jamaica*, [2013] CCJ 3, online: < <http://www.caribbeancourtjustice.org/wp-content/uploads/2013/10/2013-CCJ-3-OJ.pdf>>; *2012 CCJ 4*, *supra* note 60; *2012 CCJ 1*, *supra* note 66; *2009 CCJ 5*, *supra* note 66; *2009 CCJ 4*, *supra* note 60; *2009 CCJ 3*, *supra* note 68.

70 *2009 CCJ 1*, *supra* note 67; *2011 CCJ 1*, *supra* note 68.

71 For example, in *Myrie*, the Court considered the right to free movement. *2013 CCJ 3*, *supra* note 69. In *Trinidad Cement Limited v. Caribbean Community*, the Court discussed judicial review and the notion of "rule of law" in the context of the Community. *2009 CCJ 4*, *supra* note 60. In *Trinidad Cement Limited v Republic of Guyana*,

ii. Decisions pursuant to the original jurisdiction of the CCJ

The Court has not been called upon to render many decisions pursuant to its original jurisdiction; in fact only six major judgments (addressing four different factual scenarios, since three judgments were instituted by the same company, Trinidad Cement Limited)⁷² have been rendered to date. This number may seem low for eight years. It may in part reflect the reluctance of Member States of CARICOM to sue each other, but all of these decisions are significant and involve multiple and complex procedures that have given rise to rulings on important issues of principle. In particular, the CCJ has been called upon to make important rulings on the right of private parties to come before it and the extent of their right to take legal action against decisions of States and the Community as a rule-making organization.

In the first set of cases under original jurisdiction, the CCJ has struggled with determining its own jurisdiction. This issue has been discussed in various proceedings involving a company called Trinidad Cement Limited, which sued the Republic of Guyana, the Competition Commission and the Caribbean Community,⁷³ as well as in another case instituted by another company, Hummingbird Rice Mills, against the Caribbean Community and Suriname.⁷⁴ These cases arose out of complaints that the companies had suffered economic loss as a result of the failure of a CARICOM Member State, in one case with the acquiescence of the Community, to enforce the highly protective CARICOM customs duty on cement and rice respectively. The companies in question sued the two governments and various authorities of the Community for their economic losses. In another more recent and very significant case a young woman sued the Government of Barbados for ill treatment in violation of the RTC.⁷⁵ In the fourth case, an employee of a CARICOM institution sued the Community following the termination of her employment.⁷⁶

In deciding the application for leave in *Trinidad Cement Limited v Republic of Guyana*, the CCJ addressed a number of key issues.⁷⁷ First, the CCJ considered the scope of standing under Article 222 of the RTC in light of the requirement that the applicant be “persons, natural or juridical, of a Contracting Party.” Guyana had argued that, in order to have standing under Article 222 of the RTC, a party had to satisfy that it was a “national” within the meaning of Article 32(5) (a) of the RTC.⁷⁸ The CCJ concluded that the definition of a “national” under that Article did not

the Court partially justified its decision on the basis that “access to justice” was a “fundamental principle of law subscribed to by all the Contracting Parties.” 2009 CCJ 1, *supra* note 67 at para 42.

72 2012 CCJ 1, *supra* note 60; 2013 CCJ 3, *supra* note 69; 2012 CCJ 4, *supra* note 60; 2009 CCJ 5, *supra* note 66; 2009 CCJ 4, *supra* note 60; 2009 CCJ 3, *supra* note 68.

73 Judgments on the merits were issued in 2009 CCJ 5, *supra* note 66; 2009 CCJ 4, *supra* note 60; 2012 CCJ 4, *supra* note 60. Judgments on jurisdictional issues raised by Trinidad Cement Limited’s complaints were discussed in decisions on application for leave in 2009 CCJ 2, *supra* note 66 and 2009 CCJ 1, *supra* note 67 and in 2012 CCJ 4, *supra* note 60.

74 2012 CCJ 1, *supra* note 60.

75 2013 CCJ 3, *supra* note 69.

76 2009 CCJ 3, *supra* note 68.

77 2009 CCJ 1, *supra* note 67 at paras 23-30. Also see Justice Saunders, *supra* note 53 at 768.

78 CARICOM 2001, *supra* note 16 art 32 (Article 32(5)(a) of the RTC provides that:

(a) a person shall be regarded as a national of a Member State if such person -

(i) is a citizen of that State;

constrain the definition of a national under the AECCJ.⁷⁹ Rather, in order to fall within the scope of “persons, natural or juridical, of a Contracting Party” under Article 222 of the RTC it was sufficient that the party be “an entity incorporated or registered in a Contracting Party.”⁸⁰

Second, the CCJ considered whether the applicant had met the requirements under Article 222 of the RTC that the Treaty intended that a right or benefit conferred on a Contracting Party endured directly to the applicant’s benefit and that the applicant had been prejudiced in respect of the enjoyment of the right or benefit.⁸¹ The CCJ concluded that it was sufficient for an applicant to “merely make out an arguable case” that each condition could or would be met.⁸²

Third, and perhaps most importantly, the CCJ considered whether a private entity was entitled to bring proceedings against a Contracting Party in light of the additional requirement under Article 222(c) of the RTC that “the Contracting Party entitled to espouse the claim in proceedings before the Court has (i) omitted or declined to espouse the claim, or (ii) expressly agreed that the persons concerned may espouse the claim instead of the Contracting Party so entitled.”⁸³ Guyana had argued that the Contracting Party “always” had to have the option of bringing the proceeding that a private entity wanted to bring and thus the provision had to be interpreted as restricting a private entity from bringing proceedings against its own State.⁸⁴ The CCJ rejected this argument finding that Guyana’s interpretation would “place an unduly restrictive limitation on the category of persons entitled to complain about the conduct of a Contracting Party or of the Community” and this was not the intention of the Member States, particularly since this would “frustrate” the goals of the RTC and that such an interpretation would undermine access to justice, a “fundamental principle of law subscribed to by all the Contracting Parties” and would be discriminatory in nature.⁸⁵

This decision has far reaching consequences. Notably, as Justice Saunders points out, even individuals not nationals of a CARICOM State, but who have sufficient connection with such a State and companies that are registered or incorporated in a CARICOM State yet are owned by CARICOM non-nationals, will have the same qualified right of access to the CCJ to complain of a breach of the Treaty, as do CARICOM nationals and companies controlled by such nationals.⁸⁶

(ii) has a connection with that State of a kind which entitles him to be regarded as belonging to or, if it be so expressed, as being a native or resident of the State for the purposes of the laws thereof relating to immigration; or (iii) is a company or other legal entity constituted in the Member State in conformity with the laws thereof and which that State regards as belonging to it, provided that such company or other legal entity has been formed for gainful purposes and has its registered office and central administration, and carries on substantial activity, within the Community and which is substantially owned and effectively controlled by persons mentioned in sub-paragraphs (i) and (ii) of this paragraph.)

79 2009 CCJ 1 *supra* note 67 at paras 25-28

80 *Ibid* at para 28.

81 *Ibid* at paras 31-35.

82 *Ibid* at para 33.

83 *Ibid* at para 36.

84 *Ibid* at para 37.

85 *Ibid* at paras 39-42. For further discussion on this decision, see O’Brien & Morano-Foadi, European Community, *supra* note 42 at 407-408 and Mr. Justice Michael de la Bastide, *Five Years of CCJ’s Contribution to Caribbean Jurisprudence* (Port of Spain, 2010) at 3.

86 CARICOM 2001, *supra* note 16 at para 28. Also see Saunders, *supra* note 53 at 768.

In *Trinidad Cement Limited v the Caribbean Community*,⁸⁷ the CCJ addressed a claim against COTED's suspension of the CARICOM tariff (CET) on cement on the grounds that this suspension was not authorised by the RTC.⁸⁸ In the application for leave, the Community opposed an action against itself. It made two arguments. First, it argued that a right or benefit under Article 82 of the RTC⁸⁹ is always subject to "alteration and suspension" and thus no right or benefit is accrued to the Applicant within the requirements of Article 222. Second, it argued that Article 222, which deals with *locus standi* of private entities, addressed only a "restricted category of cases in which rights or benefits of persons under the Revised Treaty were prejudiced" and that the Applicant's case, which alleged that a Community organ was acting *ultra vires*, was outside this scope since it was not brought by a Member State.⁹⁰ In making this point, the Community provided that Article 187 of the RTC⁹¹ had to be read with Article 211⁹² of the RTC.⁹³

The CCJ held that there were limits with regards to the Community's discretion and manner in administering the CET and that discretion could only be argued if the requirements

87 2009 CCJ 2, *supra* note 66. Also see O'Brien & Morano-Foadi, European Community, *supra* note 42 at 408 and de la Bastide, *supra* note 85.

88 In the *Hummingbird* case, the claimant alleged unsuccessfully that the Community acquiesced in Suriname's failure to enforce the CET. See 2012 CCJ 1, *supra* note 60.

89 CARICOM 2001, *supra* note 16 art 82 (Article 82 provides:

1. Subject to this Treaty, the Court shall have compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the Treaty, including:

- (a) disputes between the Member States parties to the Agreement;
- (b) disputes between the Member States parties to the Agreement and the Community;
- (c) referrals from national courts of the Member States parties to the Agreement;
- (d) applications by persons in accordance with Article 222, concerning the interpretation and application of this Treaty.

2. For the purpose of this Chapter, "national courts" includes the Eastern Caribbean Supreme Court.).

90 2009 CCJ 2, *supra* note 66 at para 27.

91 CARICOM 2001, *supra* note 16 art 187 (Article 187 provides:

The provisions of this Chapter shall apply to the settlement of disputes concerning the interpretation and application of the Treaty, including:

- (a) allegations that an actual or proposed measure of another Member State is, or would be, inconsistent with the objectives of the Community;
- (b) allegations of injury, serious prejudice suffered or likely to be suffered, nullification or impairment of benefits expected from the establishment and operation of the CSME;
- (c) allegations that an organ or body of the Community has acted ultra vires; or
- (d) allegations that the purpose or object of the Treaty is being frustrated or prejudiced 9 [*emphasis added*].).

92 *Ibid* at art 211 provides:

1. Subject to this Treaty, the Court shall have compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the Treaty, including:

- (a) disputes between the Member States parties to the Agreement;
- (b) disputes between the Member States parties to the Agreement and the Community;
- (c) referrals from national courts of the Member States parties to the Agreement;
- (d) applications by persons in accordance with Article 222, concerning the interpretation and application of this Treaty.

2. For the purpose of this Chapter, "national courts" includes the Eastern Caribbean Supreme Court.

93 2009 CCJ 2, *supra* note 66 at para 27.

of Article 83 were met. It concluded that these requirements were not met.⁹⁴ With respect to the argument around Article 187, the CCJ held that Article 187 was not an “exhaustive statement” of the types of disputes that could come before the Court and that Article 211, when read with Article 222, gave the Court the “power ... to enable private entities to appear before it in all manner of disputes concerning the interpretation and application” of the RTC.⁹⁵ The CCJ also rejected the Community’s argument that a direct challenge by a private party would “greatly hinder” the Community’s functioning and the exercise of state sovereignty.⁹⁶ The CCJ concluded that Article 211 was decisive of the Court’s jurisdiction and empowered the Court to grant special leave for individuals.⁹⁷ In adopting the RTC, Member States had “transformed” the voluntary CARICOM system into a “rule-based system, thus creating and accepting a regional system under the rule of law.”⁹⁸ Private party challenges to Community decisions, the CCJ concluded, were “a manifestation of such a system.”⁹⁹ Moreover, acceptance of the constraint of the rule of law was an exercise of state sovereignty in and of itself.¹⁰⁰

The action against the Community ultimately did not succeed since the CCJ found that COTED had acted within its discretion.¹⁰¹ The CCJ addressed the scope of judicial review in its decision. It held that the CCJ had the power to scrutinize the acts of the Member States and the Community to determine whether they were in accordance with the rule of law, a fundamental principle common to the constitutions of all Member States together with general principles of law.¹⁰² This required striking a balance between two competing issues. First, the CCJ recognized it had to be “careful not to frustrate or hinder the ability of Community organs and bodies to enjoy the necessary flexibility in their economic management of a fledging community.”¹⁰³ But equally, the Community had to be accountable. It had to “operate within the rule of law.” It could not “trample” the rights accorded to private entities by the RTC and, unless there was some overriding public interest consideration, or “the possibility of the adoption of a change in policy by the Community” that was “reasonably foreseeable,” it should not disappoint legitimate expectations that it created.¹⁰⁴ The CCJ thus struck a balance between the need to “preserve policy space” for States and their flexibility to adopt development policies on the one hand, and “the requirement for necessary and effective measures to curb the abuse of discretionary power on the other.”¹⁰⁵ Ultimately, the Court held that despite a procedural flaw in the actions of the CARICOM Secretary General, the COTED had acted within its authority in suspending the tariff at the request of a Member State and thus the actions of COTED were not held to be *ultra vires*.¹⁰⁶

94 2009 CCJ 2, *supra* note 66 at paras 28-29.

95 *Ibid* at para 30.

96 *Ibid* at para 31.

97 *Ibid* at para 32.

98 *Ibid*.

99 *Ibid*.

100 *Ibid*.

101 2009 CCJ 4, *supra* note 60 at para 81.

102 2009 CCJ 4, *supra* note 60 at para 38.

103 *Ibid* at para 39.

104 *Ibid*.

105 *Ibid* at para 40.

106 *Ibid* at para 81.

In a related proceeding, *Trinidad Cement Limited v The Competition Commission*, the same company sought to challenge the legality of an investigation by the Competition Commission into its allegedly anti-competitive activities.¹⁰⁷ The Community again responded by contesting the right of a private company to impede the actions of a Community organ without success, as the Court held that the RTC required the Community to be subject to the rule of law.¹⁰⁸ But, the Court ultimately held that the Competition Commission had acted within its authority in initiating its investigation.¹⁰⁹

The CCJ's approach to the scope of 'international law,' which the CCJ is required to apply, mirrors that taken in *Hummingbird Flour Mills*¹¹⁰ and is in many ways close to the reasoning of the CJEU in its interpretation of the scope of European Union law.¹¹¹ The following passage reflects the CCJ's concern to ensure respect for the rule of law in economic relations while ensuring conditions conducive to the development of the economic community:

The jurisdiction of this Court to engage in judicial review of the decisions and other acts of the Community was considered in *Trinidad Cement Limited v. Caribbean Community*. Based largely upon the provision of Article 187 (c) which allows for the settlement of disputes concerning allegations that an organ or body of the Community "has acted *ultra vires*" and Article 216 (1) recognizing the compulsory and exclusive jurisdiction of this Court to hear and determine disputes relating to the interpretation and application of the Revised Treaty, this Court held and now reiterates that the transformation of the CSME into a rule-based system created a regional régime under the rule of law. Accordingly this Court has power "to scrutinize the acts of the Member States and the Community to determine whether they are in accordance with the rule of law". As the Court has noted before, judicial review is a fundamental principle of law accepted by all the Member States of the Community.¹¹²

Perhaps the most noted decision of the CCJ under its original jurisdiction, *Myrie*, deals with the freedom of movement of CARICOM citizens between Member States and does so in a way that displays the CCJ's understanding of freedom of movement as both an economic and a human right.¹¹³ Myrie, a citizen of Jamaica, travelled to Barbados to meet friends and possibly to stay. On arrival at the airport she was denied access and treated in a manner that can only be described as shameful and abusive and deported the next day.¹¹⁴ As a result, she sued Barbados for denial of her freedom of movement and denial of her human rights, both of which she alleged violated the RTC.¹¹⁵ In its various decisions in the case, the CCJ overrode Barbados' strenuous objections to the jurisdiction of the Court. It also overrode Barbados' objections in ordering the

107 2012 CCJ 4, *supra* note 60.

108 *Ibid* at paras 15-16.

109 *Ibid* at para 37.

110 2012 CCJ 1, *supra* note 60.

111 See generally Craig & de Búrca, *supra* note 59 at 362-406. For further discussion on the *Trinidad Cement Limited* cases, see O'Brien, *supra* note 65.

112 2012 CCJ 1, *supra* note 60 at para 30.

113 2013 CCJ 3, *supra* note 69.

114 *Ibid* at para 2.

115 *Ibid* at para 3.

production of evidence concerning the actions of immigration officers at the airport.¹¹⁶

Myrie alleged that she had been denied access to Barbados in violation of her right under Articles 7 and 8 of the RTC to non-discrimination on the ground of nationality.¹¹⁷ The CCJ held that as a citizen of Jamaica she was a person entitled to bring an action under Article 222 of the RTC. A central issue in this case was the plaintiff's argument that her freedom of movement under the RTC had been guaranteed by the Conference Decision of 2007.¹¹⁸ The Court, in a decision reminiscent of decisions by the CJEU on the binding force of secondary EU law¹¹⁹ noted that Article 9 of the RTC required that Member States undertake to carry out "obligations arising out of this Treaty or resulting from decisions taken by the Organs and Bodies of the Community."¹²⁰ This implied that the various forms of secondary legislation authorized by the RTC "are in principle part and parcel of Community law the content of which encompasses the provisions of the RTC."¹²¹ By this decision, the CCJ held that it was authorized to exercise jurisdiction over the claim. Myrie also sought a declaration that her treatment had violated her human rights under various universal instruments.¹²² The CCJ agreed with Barbados that it was not empowered to adjudicate under these international instruments but nevertheless took the following position of principle pursuant to its duty to rule on the basis of international law that:

It stands to reason therefore that, in the resolution of a claim properly brought in its original jurisdiction, the Court can and must take into account principles of international human rights law when seeking to shape and develop relevant Community law.¹²³

The accuracy of the plaintiff's evidence was strongly contested by Barbados, but, after extensive examination, the CCJ concluded that it was indeed credible and that she had in fact been abusively treated.¹²⁴ The CCJ considered at some length Barbados' contention that the Conference Decision of 2007 was not a binding instrument.¹²⁵ It noted that a three quarters majority has duly taken the Decision and that the reservation of Barbuda and Antigua did not have the legal effect

116 *Shanique Myrie v the State of Barbados and the State of Jamaica*, [2013] CCJ 1, online: <<http://www.caribbeancourtofjustice.org/wp-content/uploads/2013/03/2013-CCJ-1-OJ-R.pdf>>.

117 2013 CCJ 3, *supra* note 69 at para 3.

118 *Ibid* at para 4. A decision taken at a conference of Heads of State supported by all except Barbados and Antigua which lodged a reservation.

119 Craig & de Búrca, *supra* note 59 at 105-106.

120 2013 CCJ 3, *supra* note 69 at para 8 [emphasis in original].

121 *Ibid* at para 8.

122 *Ibid* at para 9.

123 2013 CCJ 3, *supra* note 69 at para 10. Mr. Justice Anderson cautioned that the CCJ "in its original jurisdiction is not to be understood as constituting a tribunal within the scheme of international human rights law." Anderson, Myrie decision, *supra* note 53 at 15.

124 *Ibid* at para 42.

125 *Ibid* at paras 45-55. According to the Draft Report of the Twenty-Eighth Meeting of the Conference of Heads of the Caribbean Community, at that Meeting the:

"THE CONFERENCE AGREED that all CARICOM nationals should be entitled to an automatic stay of six months upon arrival in order to enhance their sense that they belong to, and can move in the Caribbean Community, subject to the rights of Member States to refuse undesirable persons entry and to prevent persons from becoming a charge on public funds." *Ibid* at para 43.

of a veto.¹²⁶

Equally important was the CCJ's finding that the failure of Barbados, a dualist jurisdiction with respect to international law, to incorporate the Decision into its domestic law could not have the effect of diminishing its obligations under the RTC or of diminishing the CCJ's jurisdiction as a matter of Community law.¹²⁷ For this reason, the Court stated that:

In light of the above, it is clear that the 2007 Conference Decision is just another step in furthering a fundamental Community goal of free movement that is not only envisioned by the RTC but in some instances already achieved by it. The Decision takes this goal beyond the defined group of Community nationals who are seeking economic enhancement in one way or the other and broadens it to Community nationals in general.¹²⁸

Thus, the CCJ established that the right of free movement was a right which all CARICOM citizens enjoyed and which had to be respected by all national officials. In response to Barbados' assertion that it must be empowered to determine its own national security, the CCJ, while agreeing with Barbados, cited ECJ rulings holding that this authority was seriously circumscribed and limited by European Union law.¹²⁹ Furthermore, according to the CCJ, Community law required that any restriction on this right be subject to a right to effective judicial review¹³⁰ and that Barbadian courts should take care to exercise their power of judicial review in a manner sensitive to and harmonised with the Community right of free movement.¹³¹ The CCJ also noted that if related issues arose in domestic proceedings concerning the extent of this right, domestic courts were "required by Article 214 RTC to refer" the matter to it for a ruling on Community law.¹³² Finally, the Court held that, while there might be *prima facie* evidence of discrimination based on national treatment, it had not been given sufficient evidence to make such a finding.¹³³ On the matter of damages, the Court held that it was empowered to award compensatory damages, but that it could not award exemplary or punitive damages as such damages were unknown in the civil law tradition, which also formed part of the law of the RTC. Compensatory damages could however include moral damages for humiliation suffered by the complainant. Myrie was awarded Bds\$75,000.¹³⁴

The year 2014 saw two further decisions¹³⁵ which relied heavily on the approach taken in *Myrie*. In *Rudysa*, the Court granted standing to private companies and proceeded to hold that customs legislation of Belize setting an import levy on all imported drink containers violated article 87 of the RTC, which guarantees free movement of goods between CARICOM states. The

126 2013 CCJ 3, *supra* note 69 at para 47.

127 *Ibid* at para 52.

128 *Ibid* at para 62.

129 *Ibid* at paras 66-67.

130 *Ibid* at paras 80-81.

131 2013 CCJ 3, *supra* note 69 at para 82

132 *Ibid* at para 82.

133 *Ibid* at para 92.

134 *Ibid* at para 100.

135 *Rudisa Beverages & juices n.v. Caribbean International Distributors Inc Claimants and the State of Guyana Defendant* [2014] CCJ 2 (OJ) (*Rudisa*) and *Maurice Tomilson Applicant and the State of Belize Proposed Respondent and the State of Trinidad and Tobago Proposed Respondent* [2014] CCJ 2 (OJ) (*Tomlinson*).

levy, which applied only to imports, could not be saved by its alleged environmental protection purpose or by the fact that the Government had tried but failed to have remedial legislation passed. The Court ordered removal of the law and, citing ECJ jurisprudence, ordered Belize to pay compensation equivalent to the monies levied and interest on this sum as of the date of judgment. In its preliminary order in *Tomlinson* the Court agreed to hear the complaint by Tomlinson, a gay man, that he suffered prejudice by the mere existence of legislation in Belize and Trinidad and Tobago barring the entry of gay persons. In granting leave to Tomlinson to proceed, the Court cited decisions by the European Court of Justice on the potential for prejudice to be caused by laws even if they were not regularly enforced.

In these important decisions the Court clearly established its availability to individuals.¹³⁶ However, the CCJ approach remains very different from that of the CJEU, which allows an individual to seek enforcement of those rights which are “directly effective” under Community Law. The judge-made concept of direct effect of EU law shifted responsibility for applying rules under the *Treaty Establishing the European Community* to national courts, thus offering a positive incentive for individuals to hold governments of member states accountable and has provided a steady supply of cases to the interpretation of both primary and secondary EU law.¹³⁷

While CCJ rulings may have more impact than the CARICOM states originally thought, CCJ rulings do not yet allow a significant role for individuals to make use of the RTC in national courts. This is because of the CCJ’s compulsory and exclusive nature with respect to the RTC. There is also no supranational commission like the EU to bring cases to court. Furthermore, the fact that most Member States’ constitutions announce their superiority over all other law could serve to undermine a more powerful role for Community law. There is also a concern that the dualist tradition will interfere with the application of Community law. Finally, Article 240 of the RTC could present a problem by requiring that the “decisions of competent Organs” taken under the Treaty are “subject to the relevant constitutional procedures of Member States before creating legally binding rights and obligations.”¹³⁸ For all these reasons, one might continue to speculate as to whether the CCJ will ultimately have the same impact on integration as the CJEU.¹³⁹

But, in eight short years the Court has done much and its contribution to the process of integration should not be underestimated. While there are a number of divergences between the European system and CARICOM, which Justice Anderson has acknowledged as potentially leading to an “implementation deficit,”¹⁴⁰ the construction of the RTC referral procedure suggests

136 Saunders, *supra* note 53 at 768; O’Brien, *supra* note 65 at 350-351; O’Brien & Foadi, CARICOM, *supra* note 10 at 348; O’Brien & Morano-Foadi, European Community, *supra* note 42 at 407-410.

137 O’Brien & Morano-Foadi, European Community, *supra* note 42 at 410-413.

138 Mr. Justice Winston Anderson, *Community Law and Supra-Nationality in Regional Integration: The Role of Regional Tribunals* (Granada, Nicaragua, 2014) at 10.

139 See O’Brien & Morano-Foadi, European Community, *supra* note 42 and Joris Kocken & Gerda van Roozendaal, “Constructing the Caribbean Court of Justice: How Ideas Inform Institutional Choices” (2012) 93 *Eur Rev Lat Am Caribb Stud* 95.

140 Mr. Justice Anderson recognized these divergences in a recent speech. He noted that the legislative acts of the Caribbean community were “more limited than those available in the European Community,” there was no authority to “adopt regulations or directives in the CARICOM,” and there was no Caribbean Parliament to “lend legislative legitimacy to decision-making.” Furthermore, there was no Commission to enforce Community Law. He noted that this led to an “implementation deficit” and “chronic frustration and disillusionment” among the Caribbean popula-

that the RTC has the potential of being a powerful supranational instrument. This is reflected in the fact that article 214 of the RTC provides that a national court “shall” refer a question dealing with treaty interpretation to the CCJ. This is in comparison to art 234 of the *Treaty on the Functioning of the European Union* (TFEU), which provides that where a question on the interpretation of treaties is raised, any court or tribunal of the Member State “may” request the ECJ to give a ruling.¹⁴¹ Moreover, the RTC “arguably goes beyond” Article 234 of the TFEU in providing that Member States have to “accept the competence of the Court and national institutions” and are “proscribed from competing with the CCJ as a forum for determining the rights and obligations arising under the regional treaty arrangements.”¹⁴² Additionally, judgments issued by the CCJ interpreting Community law are “binding,” must be “complied with promptly” and constitute *stare decisis* on parties not present at the proceeding.¹⁴³ Finally, Article 240 of the RTC might not be as problematic as the analysis above suggests. As Justice Anderson notes, “it is not obvious that the framers of the foundational treaty intended to subject CARICOM law to the national legal system because Article 240 speaks only in terms of ‘decisions’ of the competent Community Organs.” The more important source of Community law is the treaty provisions.¹⁴⁴ Moreover, Article 240 – if interpreted too broadly – could run counter to the requirement that Member States “carry out their treaty obligations ‘promptly’ and to ‘take all necessary steps’ to do so,” which the CCJ has interpreted as binding obligations.¹⁴⁵

It remains unclear whether the CCJ thinks that Article XIV of the CCJ/Article 214 RTC provides justification to follow the ECJ direct effect approach.¹⁴⁶ The CCJ has restricted itself to responding to allegations of violation of the RTC in the limited situations where it has discretion to open its doors to private parties. The structure of the RTC suggests at first blush that either individuals or States have to bring proceedings to the CCJ. While Article 214 permits State courts to make referrals of questions of RTC interpretation to the CCJ, this does not resolve the hypothetical question of the possible direct effect of RTC law in national legal systems.¹⁴⁷

That being said, the *Myrie* case has been acknowledged as possibly re-opening the debate around direct effect and the issue of incorporation. As Justice Anderson noted in a recent speech about this decision, the CCJ has “signaled that incorporation [of a law] is not a condition precedent to the *creation* of Community law,” which is done through the machinery established by the RTC, and thus the fact that certain obligations arising under Community law are not incorporated in domestic law arguably does not undermine the existence and effectiveness of the Community.¹⁴⁸

tion. Anderson, *Supra-Nationality*, *supra* note 138 at 4.

141 Anderson, *Supra-Nationality*, *supra* note 138 at 5.

142 *Ibid* at 5.

143 *Ibid* at 6.

144 *Ibid* at 10.

145 *Ibid* at 11.

146 O’Brien & Morano-Foadi, *European Community*, *supra* note 42 at 416-417.

147 *Ibid* at 417.

148 Anderson, *Myrie* decision, *supra* note 53 at 13-14. As Justice Anderson notes, Article 240 RTC provides that “Member States undertake to act expeditiously to give effect to decisions of competent Organs and Bodies in their municipal law” and is to be understood as “requiring Member States to give domestic *effect* to the decisions of the Community subject to their constitutional procedures, not as a requirement for the creation of any rights and obligations which follow naturally from Community law.”

More importantly, he notes that this has created a “fundamental shift” in the Community’s “legal landscape” and “has opened the door for the old dichotomy between incorporation and direct effect ... to be revisited.”¹⁴⁹

Another question that arises among the jurisdictional issues of the CCJ is who can be sued. In *Johnson v CARICAD*,¹⁵⁰ the CCJ held that only Member States or the Caribbean Community, which is composed of organs and bodies of the Community and that of the Secretary General, could be sued. Thus, institutions of the Community, like CARIDAD, were exempt.¹⁵¹ This decision also suggests that Original Jurisdiction defendants could only be Member States or the Community and not other individuals, although this was not decisively determined.¹⁵² The Court also held that claims of wrongful dismissal, breach of contract and breach of constitution/labour laws were not justiciable under the RTC.¹⁵³

One author, Macdonald, argues that the referral process will provide the greatest scope for natural or legal persons to access the tribunal. Cases involving whether a tribunal erred in referring (or not referring) can begin at the lowest level municipally and end up at the final instance (the CCJ’s Appellate Jurisdiction) and then be referred by that national court or tribunal to the judicial organ of the community (the CCJ’s Original Jurisdiction) for the questions to be answered. The CCJ would not address the merits of the overall case; that should be done by a court referring the CARICOM question to the CCJ.¹⁵⁴ There remain two other procedures to enforce the referral of a question of RTC law: 1) the litigant may request another court in the same or another Member State to consult the CCJ on the point of community law, and 2) the Commission can bring an action for failure to fulfill its obligations against the Member State whose court has shown ignorance of Community Law.¹⁵⁵ McDonald argues this is possible in the CCJ context, as it is in the ECJ context.¹⁵⁶

C. Appellate Jurisdiction

i. Treaty Structure

The second and equally interesting form of jurisdiction of the CCJ is its appellate jurisdiction. This jurisdiction is entirely governed by the AECCJ and is quite distinct from its original jurisdiction. The latter flows from the trade law functions of the Court under the RTC, while the former is designed to provide a final court of appeal based entirely in the Caribbean region and governed by judges and procedures chosen by the CARICOM governments. The formation of CARICOM and the creation of a trade law court undoubtedly facilitated the emergence of a parallel appellate jurisdiction. However, the appellate jurisdiction reflects the process of accession

149 Anderson, Myrie decision, *supra* note 53 at 13-14.

150 *2009 CCJ 3*, *supra* note 68.

151 *Ibid* at para 15. Also see Saunders, *supra* note 53 at 772 and de la Bastide, *supra* note 85 at 3.

152 Saunders, *supra* note 53 at 773.

153 *2009 CCJ 3*, *supra* note 68 at para 19. Also see de la Bastide, *supra* note 85 at 4.

154 Sheldon A McDonald, “The Caribbean Court of Justice: Enhancing the Law of International Organizations” (2003) 27:4 *Fordham Int Law J* 930 at 982-985.

155 *Ibid* at 993.

156 *Ibid*.

to self-government in the Caribbean and the concomitant desire to be governed by an indigenous court of appeal rather than the Privy Council in London, which had long served as the final court of appeal for Caribbean Commonwealth States.

There has been a longstanding political desire to replace the Privy Council with a local court. This desire was voiced by a number of Caribbean leaders over the years¹⁵⁷ and supporters in various countries sought to use the creation of the CCJ under CARICOM as the moment to break with the Privy Council, as well as to have a convenient framework for a court of appeal which would be closer to the concerns and aspirations of the people of the Caribbean. In the context of decolonization and nation building this is a very understandable objective on the part of national leaders, but somewhat surprisingly the objective has proven much harder to realise than its supporters ever expected. At this point in time only three CARICOM States - Barbados, Belize and Guyana - have ratified and implemented the AECCJ.¹⁵⁸ Even such jurisdictions as Trinidad and Tobago, where the court is headquartered, have found it politically inexpedient to adhere. The other major economy which originally strongly supported the creation of the CCJ, Jamaica, has been caught up in litigation before the Privy Council, which found that the implementing legislation designed to allow Jamaica to submit to the Court violated the entrenched provisions of the Constitution of Jamaica guaranteeing the independence of the judiciary in general and the place of the Privy Council in particular.¹⁵⁹ As a result, Jamaica faces the necessity of following complex legislative procedures to adopt the appropriate legislation and this is compounded by the distrust of the CCJ felt by some major political actors.¹⁶⁰ A further complicating factor is the existence of the Court of Justice of the Region of the Eastern Caribbean, which serves as a court of appeal of that region.¹⁶¹ The Court of Justice of the Region of the Eastern Caribbean can in fact receive appeals from Antigua and Barbuda, the Commonwealth of Dominica,¹⁶² Grenada, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, as well as three British Overseas Territories (Anguilla, the British Virgin Islands and Montserrat).¹⁶³

If the politics of adhesion to the CCJ's appellate jurisdiction has proven much more

157 See generally Pollard, *supra* note 19. For a history of the Privy Council and the Caribbean, see Mr. Justice Saunders, *Challenges of the Independence Experience in Small Developing Countries (The Case for the Appellate Jurisdiction of the CCJ)* (Kingston, Jamaica, 2011).

158 "Frequently Asked Questions", online: *Caribb Court Justice* <<http://www.caribbeancourtjustice.org/about-the-ccj/faqs>>. On March 15, 2014, the Government of Dominica announced its intention to introduce legislation to replace the Privy Council with the CCJ as its final court of appeal. "Dominica parliamentarians to debate Caribbean Court of Justice legislation", (15 March 2014), online: *Caribb Elections* <<http://www.caribbeanelections.com/blog/?p=3959>>.

159 Oliver Jones & Chantal Ononaiwu, "Smoothing the Way: The Privy Council and Jamaica's Accession to the Caribbean Court of Justice" (2010) 16 *Caribb Law Rev* 183 at 186-196.

160 *Ibid.*

161 *AECCJ*, *supra* note 23 art 12 (Article XII of the AECCJ provides that referrals from national courts are within the jurisdiction of the CCJ and that national courts include the "Eastern Caribbean Supreme Court." There is no similar clarification under Article XXV of the AECCJ, which spells out the appellate jurisdiction of the court. Thus, it would appear that there would be no right to appeal from the Eastern Caribbean Supreme Court, or a national jurisdiction in that region, until the requisite legislative and constitutional amendments are made to allow for such an appeal.)

162 This may change soon if Dominica adopts legislation to substitute the CCJ as its final court of appeal.

163 *Dominica*, *supra* note 158.

disappointing than originally expected, the performance of the Court in the exercise of its appellate jurisdiction appears to have been a success. Even though the CCJ only acts for three states¹⁶⁴, at the time of writing it has issued a total of 81 decisions¹⁶⁵ and no less than 21 cases are currently pending.¹⁶⁶ The Court has also shown itself to be capable of fulfilling its functions in more than one legal system. Most CARICOM states adopt British common law, but some, like Belize and Suriname, are subject to Dutch law. Both these legal systems have been pleaded before the court. The CCJ also has to be ready to receive appeals under French-inspired civil law¹⁶⁷ and, at some point, there could be appeals from countries governed by Spanish-inspired civil law should Cuba and the Dominican Republic ever join CARICOM. The multiplicity of legal systems is mirrored by a number of official languages since the Court must be ready to hear appeals in English, Dutch, French and eventually Spanish. Even under its original jurisdiction, the Court has had to be conscious of several legal systems and its appellate function makes it all the more so. Judgments have been rendered on a range of questions from Roman Dutch land law and equitable interests,¹⁶⁸ to criminal law¹⁶⁹ and contracts law,¹⁷⁰ among other issues. This, together with its original jurisdiction, makes the Court one of the most interesting multijurisdictional tribunals in the world today.¹⁷¹

Unlike original jurisdiction, which flows directly from the RTC, appellate jurisdiction can only be invoked within the three countries that have taken the requisite steps to ratify the AECCJ and to implement this treaty into their domestic law.¹⁷² This process has involved two

164 In 2015 St Lucia and Suriname had agreed to accept the Appellate Jurisdiction and Jamaica had begun the complex legislative process necessary to amend its constitution for the same purpose.

165 Caribbean Court of Justice, “Appellate Jurisdiction Judgments”, online: <<http://www.caribbeancourtofjustice.org/judgments-proceedings/appellate-jurisdiction-judgments>>.

166 “Appellate Jurisdiction: Pending Cases”, online: *Caribb Court Justice* <<http://www.caribbeancourtofjustice.org/judgments-proceedings/pending-cases>>. See the official website of the court for complete statistics: <http://www.caribbeancourtofjustice.org/judgments-proceedings/appellate-jurisdiction-judgments>

167 These appeals would originate in St. Lucia and Haiti.

168 *Harrinauth Ramdass v. Salim Jairam and Others*, [2008] CCJ 6 AJ, online: <<http://www.caribbeancourtofjustice.org/wp-content/uploads/2013/01/2008-CCJ-6-AJ.pdf>>; *Jassoda Ramkishun v. Conrad Ashford Fung-Kee-Fung*, [2010] CCJ 2 AJ, online: <<http://www.caribbeancourtofjustice.org/wp-content/uploads/2012/02/Final-Judgment-Consolidation-CV-14-of-2007.pdf>>.

169 *The AG General Superintendent of Prisons Chief Marshal v. Jeffrey Joseph and Lennox Ricardo Boyce (Overall Summary)*, [2006] CCJ 3 AJ, online: <<http://www.caribbeancourtofjustice.org/wp-content/uploads/2012/02/1.-Overall-Summary.pdf>>.

170 *Elizabeth Ross v Coreen Sinclair*, [2008] CCJ 4, online: <<http://www.caribbeancourtofjustice.org/wp-content/uploads/2013/03/2008-CCJ-4-AJ.pdf>>.

171 It should be noted that Mr. Justice Wit studied law in the Netherlands. He was appointed Deputy Judge of the Rotterdam District Court in 1984 and later Judge of the Joint Court of Justice of the Netherlands Antilles and Aruba in 1986. In addition to acting as a Judge with the CCJ, he is the President of the Constitutional Court of St. Maarten. He is the lone Civil Law judge on the CCJ bench. Caribbean Court of Justice, “The Honourable Mr. Justice Jacob Wit”, online: <<http://www.caribbeancourtofjustice.org/about-the-ccj/judges/wit>>.

172 “The Constitution of Barbados”, online: WIPO <http://www.wipo.int/wipolex/en/text.jsp?file_id=191402#LinkTarget_2953> (Section 79D(1)(c) of the Constitution provides that the Caribbean Court of Justice “shall be the final Court of Appeal from any decision given by the Court of Appeal); “The Constitution of Guyana”, online: OAS <http://www.oas.org/juridico/mla/en/guy/en_guy-int-text-const.pdf> (Section 123(4) provides that “Parliament may make such provision as it deems fit authorising any court of appeal for the Caribbean to be the final court of appeal for Guyana”); “The Constitution of Belize”, online: Natl Assem Belize <

steps: cutting off the jurisdiction of the Privy Council, a process which, as in Jamaica, may have considerable constitutional delicacy and the amendment of existing laws governing the appellate process in civil, criminal and constitutional matters.

The right to appeal to the court is governed by Article XXV of the AECCJ. Article XXV(2) sets out the situations in which an appeal is possible.¹⁷³ There is an appeal as of right for:

- Final decisions in civil proceedings where the value at issue is more than \$25,000EC;
- Final decisions in proceedings for dissolution or nullity of marriage;
- Final decisions in any civil or other proceeding which involve a question as to the interpretation of the Constitution of the Contracting Party;
- Final decisions given in the exercise of the jurisdiction conferred upon a Superior Court of a Contracting Party relating to redress for fundamental human rights violations in the Constitution of the Contracting Party and;
- Final decisions where a right of access is prescribed in the Constitution of the Contracting Party, and any other case prescribed by law of Contracting Party.¹⁷⁴

Article XXV(3) provides that an appeal with leave is allowed in final decisions in any civil proceeding where, in the opinion of the Court of Appeal, the question involved is one of great general or public importance and ought to be submitted to the Court, or where prescribed by law of Contracting Party.¹⁷⁵ Article XXV(4) provides that an appeal lies to the Court with special leave from any decisions of the Court of Appeal of a Contracting Party in a civil or criminal matter, subject to paragraph (2).¹⁷⁶ The result of these provisions is that a broad right of appeal exists often as of right and that the Court itself is granted considerable discretionary authority to allow other appeals.

ii. Decisions pursuant to the Appellate Jurisdiction of the CCJ

A review of the cases reveals that litigants have been ready to invoke their right to appeal and also to request the Court to exercise its appellate jurisdiction discretion in their favour.¹⁷⁷ The cases have covered a multitude of situations raising complex issues of civil, criminal and constitutional law. The first reported decision¹⁷⁸ involved an appeal from a decision of the courts of Barbados condemning the defendants to damages for playing three allegedly defamatory calypsos on their radio station. A very recent decision involved a challenge to the constitutional validity of a Belize statute criminalising contempt of court findings and imposing minimum penalties of a \$50,000 fine or five years imprisonment against defendants who might be subject to injunctions against seeking arbitration outside the jurisdiction.¹⁷⁹ The Court upheld the right of the Belize

alassembly.gov.bz/index.php/constitution-belize> (Section 104 stipulates when an appeal can lie to the Caribbean Court of Justice, and this includes civil and criminal matters).

¹⁷³ *AECCJ*, *supra* note 23 at art XXV(2).

¹⁷⁴ *Ibid*.

¹⁷⁵ *Ibid* at art XXV(3).

¹⁷⁶ *Ibid* at art XXV(4).

¹⁷⁷ Caribbean Court of Justice, *supra* note 165.

¹⁷⁸ *Barbados Rediffusion Service Limited v. Asha Mirchandani, Ram Mirchandani, McDonald Farms Ltd.*, [2005] CCJ 1 AJ, online: < <http://www.caribbeancourtsofjustice.org/judgments/Mirchandani%20judgment.pdf>>.

¹⁷⁹ *BCB Holdings Limited and the Belize Bank Limited v. Attorney General of Belize*, [2013] 5 CCJ AJ, online: <

National Assembly to adopt contempt of court measures, but found the minimum penalties to be unconstitutional because they were both disproportionate and in violation of the authority of the courts.¹⁸⁰

Perhaps the case that first attracted the attention of the wider legal public to the decisions of the CCJ was that of *The AG Jamaica et al v Joseph and Boyce*.¹⁸¹ This was an appeal from a decision of the Court of Appeal of Barbados raising two constitutional issues: First, was the exercise of the prerogative of mercy following a condemnation to death subject to judicial review? Second, was the failure of the Barbados Privy Council to await the outcome of the proceedings against their death sentence instituted by the respondents in the Inter-American Convention on Human Rights a contravention of the respondents' right to their constitutional protection of the law?

In a complex set of opinions, the Court upheld the decision of the Court of Appeal of Barbados granting the relief sought by both defendants. The CCJ ruled that the prerogative of mercy must be subject to judicial review in order to ensure respect for the constitutional protection of the law which all enjoyed in Barbados.¹⁸² The Court also wrestled with the vexed concept of the legal force of a ratified, but legislatively unincorporated international human rights treaty in a dualist jurisdiction – in this case the Inter-American Convention on Human Rights.¹⁸³ President of the CCJ, Mr. Justice de la Bastide, and Mr. Justice Saunders reviewed the complex comparative case law on the subject and concluded that the constitutional protection of the law gave the defendants, both condemned to death, a legitimate expectation that the process of appeal to the Inter-American Committee on Human Rights would be respected by the state.¹⁸⁴ The rigour of their analysis, as well as that of other judges of the Court, the decisions of the Privy Council and the many other jurisdictions considered, make their approach highly persuasive and has done much to clarify the law in this area.¹⁸⁵

In an early review of the case law of the CCJ, Mr. Justice Dennis Byron, currently President of the CCJ, commented on the contributions of the CCJ to a number of fields of law.¹⁸⁶ He contended that a trilogy of CCJ decisions on appeals from Barbados had expounded the law on the sale of land and had used the occasion to urge the development of standard form contracts in this area.¹⁸⁷

<http://www.caribbeancourtjustice.org/wp-content/uploads/2013/11/2013-CCJ-5-AJ.pdf>>. [BCB Holdings]

180 BCB Holdings *supra* note 179 at paras 56-62.

181 2006 CCJ 3 (AJ) (Overall Summary), *supra* note 169.

182 *Ibid* at 1-2.

183 *Ibid* at 3.

184 *The AG General Superintendent of Prisons Chief Marshal v. Jeffrey Joseph and Lennox Ricardo Boyce (Overall Summary) (President de la Bastide and Justice Saunders)*, 2006 CCJ 3 AJ at paras 103-132 (available on http://www.caribbeancourtjustice.org/wp-content/uploads/2012/02/3.-Judgment_-President_Hon_Justice_Saunders.pdf).

185 Former President Mr. Justice de la Bastide and Mr. Justice Saunders provide a summary of how other jurisdictions have dealt with unincorporated treaties. *Ibid* at paras 78-102. Other Justices of the CCJ wrote separate opinions on this issue. See Caribbean Court of Justice, *supra* note 165, specifically Mr. Justice Nelson at paras 25-32, Mr. Justice Pollard at paras 17-74 and Mr. Justice de Wit at paras 26-50.

186 Mr. Justice Dennis Byron, President, *The CCJ and Its Integral Role in Development of Caribbean Jurisprudence* (Barbados, 2011).

187 *Vernon O'Connell Hope v. Shaka Wayne Rodney, Portfolio Investments Limited*, [2009] CCJ 12 AJ, online: <

In a case from Belize,¹⁸⁸ President Byron argued that the Court had struck a blow in support of the universal desire for good governance by recognising the existence – theretofore contested – of a tort for “misfeasance in public office.”¹⁸⁹ Further, two remarkable decisions have done much to clarify the complex interplay of common and Dutch law in the legal system of Guyana. In *Ramdas v Jairam*, the Court confirmed that under Dutch law equitable interests in immovable property are not recognized and cannot be acquired in Guyana, a decision which weakens the situation of volunteers seeking to acquire interests in the land at a later date.¹⁹⁰ In a subsequent decision, the court had to deal with a situation where volunteers, in this case a purchaser, sought to enforce a contract of sale against the heirs of the original owner.¹⁹¹ As volunteers, the heirs were not subject to an order of specific performance, but after lengthy and learned analysis of old Roman-Dutch law precedents under the law of South Africa¹⁹² the Court was able to rule that volunteers acquiring a real right were bound by obligations undertaken by the predecessor owner of that real right regardless of whether the volunteers had knowledge of this prior undertaking. Thus, in Guyana, a purchaser for value of land can obtain an order for specific performance against a volunteer who is not a party to a contract.¹⁹³ In another remarkable land law case from Guyana, which displayed the legal imagination of the Court, the law of adverse possession of land was greatly clarified.¹⁹⁴

Finally, in this same speech, President Byron pointed out the significance of the *Joseph and Boyce* decision in clarifying and strengthening the protection of human rights in the Caribbean.¹⁹⁵ In another decision touching upon human rights, the Court required that the full period of detention be counted in the calculation of time to be accorded a convicted criminal at the point of sentencing.¹⁹⁶ Finally, President Byron pointed out that the CCJ had strengthened the constitutional guarantee of a fair trial in criminal matters in the case of *Frank Errol Gibson v the Attorney General of Barbados*¹⁹⁷ when it required that the accused have the same opportunity to assess complex forensic evidence as the state.¹⁹⁸ In arriving at this conclusion, the CCJ also held that an order from the Court requiring the Executive to spend public funds did not violate the

<http://www.caribbeancourtofjustice.org/wp-content/uploads/2013/01/2009-CCJ-12-AJ.pdf>>; *Delys O’Leen Colby Dec’d by D.V.B. Colby, Executor v. Felix Enterprises Ltd., Felix Broome Incorporated*, 2011 CCJ 10 AJ (available on [http://www.caribbeancourtofjustice.org/judgments/cv7_2010/JUDGMENTColby%20v%20Felix%20Enterprisesc%20\(2\).pdf](http://www.caribbeancourtofjustice.org/judgments/cv7_2010/JUDGMENTColby%20v%20Felix%20Enterprisesc%20(2).pdf)); *Sea Havens Inc. v. John Dyrud*, 2011 CCJ 13 AJ (available on <http://www.caribbeancourtofjustice.org/wp-content/uploads/2012/02/Sea-Haven-Inc-v-Dyrud-FINAL-02-11-111.pdf>).

188 *Florencio Marin and Jose Coye v. The Attorney General of Belize*, [2011] CCJ 9 AJ, online: < <http://www.caribbeancourtofjustice.org/wp-content/uploads/2011/06/CONSOLIDATED-Judgment-CV-5-of-2010-2.pdf>>.

189 Mr. Justice Dennis Byron, President, *supra* note 186 at 9.

190 *2008 CCJ 6 (AJ)*, *supra* note 168.

191 *2010 CCJ 2 (AJ)*, *supra* note 168.

192 This research would have been very difficult without the presence of Mr. Justice Wit, who is experienced in Dutch law.

193 Mr. Justice Dennis Byron, President, *supra* note 186 at 10.

194 *Toolsie Persaud Limited v. Andrew James Investments Limited and Others*, [2008] CCJ 5 AJ, online: < http://www.caribbeancourtofjustice.org/wp-content/uploads/2012/02/cv1_2007_J.pdf>.

195 Mr. Justice Dennis Byron, President, *supra* note 186 at 11-12.

196 *Romeo da Costa Hall v. The Queen*, [2011] CCJ 6 AJ, online: < <http://www.caribbeancourtofjustice.org/wp-content/uploads/2011/06/JUDGMENT-OF-DA-COSTA-HALL-v-THE-QUEEN-CONSOLIDATED.pdf>>.

197 *Frank Errol Gibson v. Attorney General*, [2010] CCJ 3, online: < http://www.caribbeancourtofjustice.org/judgments/cv1_2010/cv1_2010_judgment.pdf>.

198 Mr. Justice Dennis Byron, President, *supra* note 186 at 12-13.

separation of powers, suggesting that the CCJ will not be deterred by arguments that a judicial decision would affect the budgetary decisions made by a Member State.¹⁹⁹

It should be noted that the issue of the death penalty raises questions of great political sensitivity in the Caribbean, which continue to affect the decision to adopt the CCJ as the final court of appeal. In the years leading to the creation of the CCJ, the decisions of the Privy Council had been criticised as being out of touch and too lenient on the death penalty.²⁰⁰ On the other hand, contrary fears had been and continue to be expressed that the CCJ might prove to be too rigid in support of the death penalty.²⁰¹ Thus, the Court has been under the watchful eye of a number of governments and considerable public opinion often supporting the death penalty as the only possible response to the continuation of violent crime in the Caribbean. The Court has thus had to walk a fine line between strengthening respect of human rights in the administration of criminal justice while respecting the sovereign decision of states to maintain the death penalty.²⁰²

D. Conclusions on the Decisions of the CCJ

Analysis of the many other decisions of the CCJ under its appellate jurisdiction reveals that the Court is indeed making a highly constructive contribution not only to the law of the three countries that have accepted its appellate jurisdiction, but also to the Caribbean region as a whole. The impact of its appellate jurisdiction will surely be felt even more as it is gradually adopted by other CARICOM states. Sadly, this process appears to be moving slowly although efforts continue to be made in the major jurisdictions of Jamaica²⁰³ and Trinidad and Tobago²⁰⁴ and with respect to the Court of Appeal of the Eastern Caribbean region.²⁰⁵ Dominica is also moving closer to abolishing appeals to the Privy Council in favour of the CCJ.²⁰⁶

IV. CONTRIBUTIONS OF THE CCJ ON PROCEDURAL AND INSTITUTIONAL ISSUES

A question of legitimate concern has been access to justice and the availability of an appellate court to litigants. Fears have been expressed that only wealthy corporations might be

¹⁹⁹ 2010 CCJ 3, *supra* note 197 at para 42.

²⁰⁰ Dr. Rose-Marie B Antoine, "Waiting to Exhale: Commonwealth Caribbean Law and Legal Systems" (2005) 29 Nova Law Rev 141 at 150.

²⁰¹ Bernard, *supra* note 25 at 229 (The fear was at least partially motivated by a concern that the Court would become a "hanging court" under political pressure from Member States who had been dissatisfied with the Privy Council.)

²⁰² Mr. Justice Saunders, *Capital Punishment Jurisprudence in the Caribbean* (2012).

²⁰³ Jamaican news outlets continue to report on the political process of eradicating appeals to the Privy Council in favour of the CCJ. For example, see "Sloley on Fire! Government Senator Shoots Down Opposition Proposal on CCJ", (30 March 2014), online: *Jam Glean* <<http://jamaica-gleaner.com/gleaner/20140330/lead/lead6.html>> and "JLP Clarifies Position on Caribbean Court of Justice", (13 January 2014), online: <<http://jamaica-gleaner.com/latest/article.php?id=50513>>.

²⁰⁴ Anna Ramdass, "Goodbye Privy Council", (25 April 2012), online: <http://www.trinidadexpress.com/news/GOODBYE_PRIVY_COUNCIL-148989575.html>.

²⁰⁵ One question that remains unresolved is what type of amendment is required for appeals to go from the Court of Appeal for the Eastern Caribbean region to the CCJ. If Dominica adopted the CCJ as its final court of appeal, would this be sufficient to allow appeals from the Eastern Caribbean court to the CCJ?

²⁰⁶ *Dominica*, *supra* note 158.

able to avail themselves of the possibility of taking an appeal to Port of Spain with the attendant costs of time, travel and preparation needed for advocates before the CCJ. Cognizant of this, the CCJ has taken a number of measures to facilitate access to justice. The cost of an appeal will always remain a consideration, but the Court has the capacity to hear appeals *in forma pauperis* under Rule 10.17 of the *Caribbean Court of Justice (Appellate Jurisdiction) Rules*.²⁰⁷ The CCJ has in fact exercised this authority on a number of occasions.²⁰⁸ Moreover, the CCJ is making efforts to use technology in a way that will reduce costs to plaintiffs, such as hearing interlocutory matters by video and audio conference.²⁰⁹ The CCJ's easy to navigate website also facilitates legal research and public access to information. Finally, it would be hard to argue that the possibility of recourse under the appellate jurisdiction of the CCJ has not increased access to justice in some measure. After all, parties in jurisdictions accepting the appellate jurisdiction no longer need to travel to Europe to plead their case. Further, as Simmons highlights, should the CCJ decide to become an itinerant court, it will "immeasurably" increase access to justice.²¹⁰

The Court has also generally taken an expansive position of matters of intervention in appellate cases, as it has on the right of intervention of individuals in original jurisdiction cases. For example, in *Trinidad Cement Limited v Republic of Guyana*, the CCJ noted that the scope of *locus standi* of persons was an important issue that would be binding on all parties coming before the CCJ and thus decided it was reasonable to extend an invitation to third parties to intervene.²¹¹ Similarly, it allowed the State of Jamaica to intervene to defend its own interests in the *Myrie* case even though Jamaica had previously accepted that Myrie might proceed on her own.²¹² As in *Trinidad Cement Limited v Republic of Guyana*, this was justified on the ground that the decision reached by the CCJ would bind all other jurisdictions, and the Court would benefit from the assistance of the Interveners in resolving the issue.²¹³ More generally, these decisions show that the CCJ has taken an expansive interpretation of its jurisdiction with a view to ensuring respect for the rule of law.

A further source of interest is the impact of the existence of the CCJ on the members of the Bars of the various CARICOM states,²¹⁴ as well as the impact upon the standard and methods of judicial administration of the courts of the same states and of other regional and international courts.²¹⁵

As suggested by Mr. Justice Saunders, the CCJ will likely serve to further the regionalization of the legal profession in the Caribbean. In this respect, Justice Saunders highlights four ways

207 "The Caribbean Court of Justice (Appellate Jurisdiction) (Amendment) Rules 2008", online: *Caribb Court Justice* <<http://www.caribbeancourtsofjustice.org/court-instruments/rules-of-the-court>> at Rule 10.17.

208 See Mr. Justice Dennis Byron, President, *supra* note 186 at 6-7.

209 *Ibid* at 7.

210 Simmons, *supra* note 6 at 179.

211 *2009 CCJ 1*, *supra* note 67 at para 6.

212 *2012 CCJ 3*, *supra* note 68.

213 Anderson, *Supra-Nationality*, *supra* note 138 at 7.

214 Mr. Justice Saunders, *CCJ, Integration and the Legal Profession* (2006) at 18.

215 See generally Malleson, *supra* note 24. Also see Mr. Justice Anderson's lecture on Caribbean jurisprudence, where he also discusses the need to maintain and enhance a regional system of legal education. Mr. Justice Winston Anderson, *The Caribbean Court of Justice and the Development of Caribbean Jurisprudence* (2013) at 4.

Bar Associations will play a role in the future success of the CCJ: by becoming advocates for the Court, by informing the public of their rights and how these are captured by the original jurisdiction of the Court, by strengthening and supporting legal aid schemes and by continuing to work on justice and law reform programs.²¹⁶

On the organization and administration of a court, as discussed by Malleson, the CCJ has provided unique solutions to the issue of judicial independence in the context of a regional court through its funding scheme²¹⁷ and the process of judicial appointments.²¹⁸ The CCJ's approach to judicial selection is particularly important considering the range of diverse legal systems and languages that the Court has to deal with on a daily basis. President Byron has commented on the tension between merit and diversity in judicial appointments and the challenges faced by the CCJ.²¹⁹ While the CCJ's mandate is particularly complex, these challenges are not unique to the CCJ and other regional and international courts will undoubtedly learn from the CCJ's management of these tensions.

V. THE *RAISON D'ÊTRE* OF THE CCJ

The CCJ has also on several occasions commented on the *raison d'être* of its creation. Perhaps most notable is the statement by former President de la Bastide and Mr. Justice Saunders in the *Joseph* case that:

The main purpose in establishing this court is to promote the development of a Caribbean jurisprudence, a goal which Caribbean courts are best equipped to pursue. In the promotion of such a jurisprudence, we shall naturally consider very carefully and respectfully the opinions of the final courts of other Commonwealth countries and particularly, the judgments of the JCPC which determine the law for those Caribbean states that accept the Judicial Committee as their final appellate court.²²⁰

This statement makes a strong claim to be the voice of indigenous legal thinking and decision-making in the Caribbean and it is difficult to contradict in the light of the success of the first years of the CCJ. Why would one deny to the Caribbean what Canada, Australia, New Zealand, South Africa, and many other Commonwealth States did some time ago? The process of self-affirmation and the ending of appeals to the Imperial Privy Council is something that even the Privy Council has completely accepted.²²¹ However, it is interesting to note that the decisions

216 Mr. Justice Saunders, *supra* note 214 at 19-21.

217 For an explanation of the funding scheme, see Mr. Justice Byron, *Funding for the Court* (Arusha, Tanzania, 2014). Mme. Justice Bernard, *The CCJ: Its Institutional Underpinnings* (Port of Spain, Republic of Trinidad and Tobago, 2010) at 2.

218 Malleson, *supra* note 24 at 678-680. Also see Mme. Justice Bernard, *ibid* at 3-4.

219 Mr. Justice Dennis Byron, President, *Considering Diversity: The Judicial Process for the Caribbean Court of Justice and Beyond* (Boston, USA, 2013).

220 *2006 CCJ 3 (AJ) (de la Bastide and Saunders)*, *supra* note 184 at para 18. On the issue of the development of an indigenous jurisprudence, see the illuminating lecture by Mr. Justice Anderson. Anderson, Caribbean Jurisprudence, *supra* note 215. Also see the lecture by President of the Court Mr. Justice Dennis Byron, *supra* note at 186.

221 Simmons, *supra* note 6.

of the Court display a great willingness to look to cases in other jurisdictions for inspiration or confirmation of the wisdom of the choices that it is making.²²² Thus, the process of regional self-affirmation has been anything but an inward looking exercise.

VI. CONCLUSION

The CCJ is a complex organization with a complex mission. After a scant eight years it may well be too early to attempt to draw any definitive conclusions. Interestingly several judges of the Court, including its Presidents, have sought to evaluate the role that the Court is playing in the process of regional integration in the Caribbean.²²³ These judges have seen it as part of their mission to explain the working of the CCJ to the legal community in particular, but also to the broader public. They have been at pains to explain the various recourses before the CCJ which are made available under both treaties. They have also made a considerable effort to show how the Court is serving to further the rule of law through the strengthening of legal institutions and by supporting the process of regional economic integration. They have not been shy to address the point that regional integration is ultimately a goal towards which the people of the Caribbean have been tending – often with considerable difficulty – since colonial days and their aftermath in the form of the Caribbean Federation and then the successive iterations of the *Treaty of Chaguaramas*. In short, the Members of the CCJ have been very conscious of the role that they have been called on to play.

Members of the CCJ are very conscious of the place of the Court in the broader context of Caribbean integration, as well as of the past ambivalence of political leaders and their constituents in the face of proposals tending towards federalism or even supranational economic institutions. The West Indies Federation fell apart and attempts to reconstruct a single economic space have had to advance prudently. As discussed earlier in the context of the *Myrie* decision, the RTC and the AECCJ bear the marks of what Mr. Justice Anderson has termed “nuanced supranationality.”²²⁴ Yet, it is impossible to neglect that the constitutions of CARICOM States are virtually all premised on the supremacy of their constitutions and that, when given the choice, national political leaders did not endow the RTC with full legislative powers, an EU type of Commission or a Parliament. Even the call of the Commission chaired by Sir Shridath Ramphal on CARICOM governance structures in 2005 to set up a strong CARICOM Commission has gone unheeded to date.²²⁵ So, the Court is aware that if it must be bold it must remain on the solid ground provided by the treaties.

If caution must be the watchword of the CCJ, the treaties still provide it with justification of a significant role in contributing to regional economic integration. In this regard, as discussed earlier, Mr. Justice Anderson makes several trenchant points justifying the role of the CCJ. The Preamble to the RTC recognizes the role of the Court in developing a Caribbean jurisprudence.

²²² For example, see 2006 CCJ 3 (*AJ*) (*de la Bastide and Saunders*), *supra* note 182 and *Dean Boyce v Attorney General of Belize and the Minister of Public Utilities*, 2013 CCJ 1 (available on http://www.caribbeancourtofjustice.org/judgments/cv4&6_2011/TELEMEDIA%20JUDGMENT.pdf).

²²³ For example, see *Saunders*, *supra* note 53; Mr. Justice Dennis Byron, President, *supra* note 184; Anderson, *Caribbean Jurisprudence*, *supra* note 213; Anderson, *Supra-Nationality*, *supra* note 138; *Bastide*, *supra* note 85.

²²⁴ Anderson, *Supra-Nationality*, *supra* note 138 at 12.

²²⁵ *Ibid* at 4.

The RTC affirms the “compulsory and exclusive” jurisdiction of the Court to “interpret and apply” the RTC, arguably a stronger mandate than Article 234 of the TFEU.²²⁶ The obligation of CARICOM national courts to refer questions of RTC law to the Court under RTC article 214 is arguably stronger than that under the TFEU Article 234.²²⁷ Under the RTC Articles 215 and 221, original jurisdiction judgments of the Court constitute *stare decisis* for all CARICOM states, something that has only emerged slowly and partially under the jurisprudence of the CJEU.²²⁸ Judgments of the Court must be enforced in the domestic legal order of CARICOM States,²²⁹ and, finally, the Court has held that CARICOM States are liable to pay damages for breaches of Community law.²³⁰

Given these developments it is certainly appropriate to ask whether one can speak of the supremacy and direct effect of Community law. It seems likely that the Members of the Court are asking themselves the same questions and, as one might expect, they are responding with considerable caution. Without openly borrowing EU law or making any soaring declarations of supremacy or direct effect, Justice Anderson notes that:

[T]he CCJ *has* used the CARICOM treaty provisions which empower it in the original jurisdiction, emphasizing that the Community has entered a new ‘rules-based’ phase of its evolution. The Court has affirmed the concept of ‘Community law’, its power to pronounce upon breaches of Community law, make coercive orders against Member States, and award damages in favour of individuals against Member States.²³¹

Mr. Justice Anderson also sets considerable store by the implications of the *Myrie* decision where the court, under its original jurisdiction, enforced a binding Community rule adopted by the Heads of State guaranteeing a right of mobility of CARICOM citizens and rejecting the assertion of Barbados that *Myrie*’s right was not enforceable as it had not been formally adopted by statute in Barbados. To admit this proposition, according to the Court, would be to allow Member States to frustrate the exercise of rights created for citizens by the Treaty and already binding on all CARICOM States. Perhaps this is not direct effect in the EU sense, but, in the words of Justice Anderson this “diffident assertion” may be seen as something akin to the principle.²³² It is important to note that the cases under the original jurisdiction and under the appellate jurisdiction of the Court appear to be feeding each other. The different heads of jurisdiction, while formally separate, in fact come together when the Court draws upon fundamental principles such as the rule of law, fundamental principles of law, and various concepts drawn from common sources of international human rights law.

226 Anderson, *Supra-Nationality*, *supra* note 138 at 5-6.

227 Article 214 of the RTC provides that a Court or Tribunal of a Member State seised of an issue involving the interpretation and/or application of the RTC *shall* refer the question to the CCJ. Article 234 of the TFEU provides that, in similar situations, the Tribunal *may* request the ECJ to give a ruling. *Ibid* at 6.

228 Marc A Jacob, *Precedents and Case-Based Reasoning in the European Court of Justice* (Cambridge: Cambridge University Press, 2014) at 243.

229 Anderson, *Supra-Nationality*, *supra* note 138 at 5-7.

230 *Ibid* at 7-8.

231 *Ibid* at 12.

232 *Ibid* at 12-13.

Finally, as professor Karen Alter has described in her recent book,²³³building on the work of the iCourts project at the University of Copenhagen,²³⁴the CCJ is one of some twenty-five other regional courts which have been established in recent years to deal with trade, human rights or IHL issues. These courts have been set up as independent and usually permanent institutions, with authority to rule on the basis of international law. They exercise judicial powers and interpret the law as they understand it on the basis of compulsory jurisdiction. As professor Alter argues these courts constitute a significant addition to public international law from both a procedural and a substantive perspective. The CCJ should be seen in this perspective and its importance as a regional body will almost certainly increase with the passing of time.

233 Karen Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton: Princeton University Press, 2013).

234 Karen Alter, iCourts Danish National Research Foundation, Center of Excellence, Copenhagen University Faculty of Law, online: The Danish National Research Foundation <<http://jura.ku.dk/icourts/>>.