

COMMUNITY LAW AND SUPRA-NATIONALITY IN REGIONAL INTEGRATION:
THE ROLE OF REGIONAL TRIBUNALS

By

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INTRODUCTION

For various reasons, including political and legislative inertia, as well as national parochialism, the application of Community law may be hampered or frustrated by the action or inaction of Member States or even the Community legislator. One of the greatest challenges to the regional integration process, therefore, is to insinuate and make pre-eminent Community law in the national legal systems of Member States. In short, the challenge has been to ensure some form of supra-nationality of Community law.

THE EUROPEAN COMMUNITY

From the earliest days of the premier regional integration arrangement, the European Community, individuals were drawn into the process of making the common market a reality in their own states when the European Court of Justice (the ‘ECJ’) developed the fundamental principles of direct effect¹ and supremacy of Community law.² These judicial assertions became

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¹ See Case 26/62 *van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1.

² See Case 6/64 *Costa v ENEL* [1964] ECR 585.

the quintessential characteristics of supra-nationality associated with European integration. This was done quietly by the Court of Justice. As Stein puts it in an article published in 1981,

Tucked away in the fairyland Duchy of Luxembourg and blessed, until recently, with benign neglect by the powers that be and the mass media, the Court of Justice has fashioned a constitutional framework for a federal-type structure in Europe.³

In *Costa v ENEL*, the ECJ in response to the ‘legal vagrancy’ of its Member States carved out the principle of supremacy of Community law and declared that:

By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply. By creating a Community of unlimited duration, having ... powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves.⁴

The ECJ was assisted in fashioning the supra-nationality of European Community law by a plethora of powerful institutions created by the founding treaties.⁵ Legislative acts in the form of regulations, directives or decisions may be adopted by the European Parliament and the European Council on proposal by the European Commission.⁶ The Commission is tasked with overseeing the execution of Community policies and can be regarded as the Executive of the European Union.

³ E Stein, ‘Lawyers, Judges and the Making of a Transnational Constitution’ (1981) 75 *American Journal of International Law* 1.

⁴ *Costa v E.N.E.L.*, Case 6/64, [1964] ECR 585, [1964] 1 C.M.L.R. 425. It should be noted that although the Member States have limited their own sovereign rights, they have done so within stipulated fields. The process has now reached the stage of political union.

⁵ The most prominent institutions are: the European Parliament; the European Council; the European Commission (usually called simply ‘the Commission’); the Court of Justice of the European Union; the European Central Bank; the Court of Auditors. Three important political posts are: the President of the European Council; the President of the Commission; the High Representative of the Union for Foreign Affairs and Security Policy: see TC Hartley, *The Foundations of European Community Law* (7th ed., OUP 2010).

⁶ In specific cases provided in the Treaty of Lisbon, no proposal by the Commission is required. See Hartley *ibid.*

THE CARIBBEAN COMMUNITY

The notion of supra-nationality has long been anathema to many Caribbean policy-makers. The West Indian Federation of ten English-speaking Caribbean territories, established in 1958, had been intended to create a political unit that would become independent from Britain as a single state. But the federation collapsed in 1962 because of internal political conflicts that centred on the preference for individual self-government. A national referendum in Jamaica showed majority support in favour of withdrawing from the federation in preference for national independence from Britain. Jamaica withdrew from the federation and became the first of the countries to gain independence. This led to the famous statement of Eric Williams, the then Premier of Trinidad and Tobago, that, ‘one from ten leaves nought’.

Today, the independent sovereign states of the Caribbean Community (‘CARICOM’)⁷ have sought to walk the tight-rope between asserting their individual sovereignty and at the same time recognizing the imperative that regional integration requires the effectiveness of Community law within their national legal orders. The Revised Treaty of Chaguaramas (‘RTC’) establishing the Caribbean Community including the CARICOM Single Market and Economy (‘CSME’) makes important institutional arrangements in order to, *inter alia*, ‘... enhance the effectiveness of decision-making and implementation processes of the Community’.⁸ Community decisions are legally binding and are made by the Organs of the Community, principally the Conference of Heads of Government which takes decisions by an affirmative vote of all its members but parties to a dispute or against which sanctions are being considered have no right to vote on the relevant issue.⁹ Recommendations may be made by a two-thirds majority of Member States but are not legally binding.

It will be seen that the legislative acts in the Caribbean Community are more limited than those available in the European Community. There is no power to adopt regulations or directives in the CARICOM. Also, there is no Caribbean parliament to lend legislative legitimacy to decision-

⁷ Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, St. Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago. See Article 3 Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy, signed on 5th July 2001, entered into force on 1st January 2006 (the “RTC”). Haiti became a full Member of CARICOM on 3rd July 2002.

⁸ RTC Preamble.

⁹ RTC Article 28.

making. Again, unlike in Europe, the CARICOM has no Commission with executive power to enforce Community Law. These weaknesses in the institutional arrangements have led to an implementation deficit in CARICOM integration law and consequentially chronic frustration and disillusionment among significant segments of the Caribbean population.

The implementation deficit undermines confidence in the regional integration project and has long been the subject of comment by Caribbean scholars.¹⁰ In the seminal work, *Time for Action*,¹¹ a group of highly respected Caribbean intellectuals chaired by Sir Shridath Ramphal concluded that the governance structure of the Community was in dire need of reform. They recommended,

...the creation of an executive authority – the CARICOM Commission – with competence to initiate proposals, update consensus, mobilise action and secure the implementation of CARICOM decisions in an expeditious and informed manner...¹²

The idea of the Commission was accepted in the Rose Hall Declaration of the Heads of Government in 2003¹³ but the Heads of Government also reaffirmed that CARICOM was a Community of Sovereign States and that the deepening of regional integration ‘would proceed in that political and juridical context’. The Declaration stressed that policy decisions of the Community taken by the Heads of Government or by other Organs of the Community would have the force of law throughout the Region as a result of the operation of domestic legislation, and the decisions of the Caribbean Court of Justice in its original jurisdiction, ‘taking into account the constitutional provisions of member states’. In fact, the proposed CARICOM Commission has never become operationalized.

There is, of course, no inconsistency between the concept that a regional integration grouping is a Community of sovereign states and the establishment of executive mechanisms for implementation of regional law. Acknowledgement of the ultimate sovereignty of the Member

¹⁰ See Kenneth O Hall (ed) *Integrate or Perish: Perspectives of the Heads of Government of the Caribbean Community and Commonwealth Caribbean Countries* (2nd edn, Ian Randle Publishers 2003).

¹¹ *Time for Action: Report of the West Indian Commission* (2nd edn, The Press–University of the West Indies 1993).

¹² *ibid* 507.

¹³ The Rose Hall Declaration on ‘Regional Governance and Integrated Development’, Adopted on the Occasion of the Thirtieth Anniversary of the Caribbean Community (CARICOM) at the Twenty-Fourth Meeting of the Conference of Heads of Government of CARICOM, 2-5 July 2003, Montego Bay, Jamaica.

States of a Community does not preclude them, in the exercise of that sovereignty, from pursuing collective action to deepen and perfect the integration process.¹⁴ In fact, it is precisely that sovereignty which empowers them to agree on collective action within their domestic systems.

THE CARIBBEAN COURT OF JUSTICE

The collective exercise of national sovereignty in the governance of CARICOM is perhaps best illustrated by the establishment in February 2001 of the Caribbean Court of Justice (the 'CCJ').¹⁵ The CCJ is the institutional centrepiece of regional integration. Whilst the Court does not have the companionship of the many powerful institutions enjoyed by the ECJ, it might be going too far to say it has no supranational competences.¹⁶ In fact the CCJ does have several of the basic treaty features and competences which supported the ECJ's declaration of supra-nationality.

Firstly, the Preamble to the Agreement Establishing the Court expressly recognizes the sovereignty of Members States of the Community but equally it recognizes that the Court will have a determinative role in the further development of Caribbean jurisprudence through the judicial process. The Preamble to the RTC goes further and affirms that the original jurisdiction of the Court is 'essential for the successful operation' of the CARICOM Single Market and Economy (the 'CSME').

Secondly, the treaty which establishes CARICOM affirms that in its original jurisdiction the Court has 'compulsory and exclusive jurisdiction' to interpret and apply the treaty establishing the CARICOM Single Market and Economy.¹⁷ Member States are obligated to accept the competence of the Court and national institutions, including national courts, are proscribed from competing with the CCJ as the forum for determining the rights and obligations arising under the regional treaty arrangements. The competence thus given to the CCJ to interpret and apply the

¹⁴ Sir Shridath Ramphal et al., 'Regional Integration: Carrying the Process Forward – Report on the Establishment of a CARICOM Commission or other Executive Mechanism' (November 2013).

¹⁵ See Agreement Establishing the Caribbean Court of Justice signed 14th February 2001.

¹⁶ See Duke EE Pollard, 'The CSME and the CCJ' (paper presented at the CSME Business Forum, St. John's, Antigua, 24th May, 2006). This paper is largely based on Justice Pollard's article 'The CSME, CCJ and the Private Sector' in Kenneth Hall and Myrtle Chuck-A-Sang (eds) *The Caribbean Integration Process: A People Centred Approach* (Ian Randle Publishers 2007) 24-47.

¹⁷ RTC Article 211.

treaty provisions arguably goes beyond the equivalent power granted to the ECJ in Article 234 of the Maastricht Treaty which provides only for interpretation of European treaty arrangements. As in Europe, this judicial guardianship function is capable of engendering juridical cohesion and foreign investment leading to economic development in the Caribbean by allowing the CCJ to insinuate itself into the domestic law of participating states and thereby establish a uniform legal infrastructure in CARICOM.

Thirdly, the obligation of national courts and tribunals to refer disputes over treaty interpretation to the CCJ for authoritative determination is stated in more mandatory terms than in Europe. Article 214 of the RTC provides that a court or tribunal of a Member State seised of an issue involving the interpretation or application of the RTC shall refer the question to the CCJ for determination; under Article 234 of the Maastricht Treaty national a court or tribunal similarly placed with regard to interpretation of that Treaty may request the ECJ to give a ruling thereon. Under Article 234 it is only where there is a case pending before a national court of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal is obliged to make the reference to the European Court of Justice.

Fourthly, the regime governing the judgments of the CCJ merits special mention. The judgments are binding on the Member States, the Community as well as other persons to whom the judgment applies, and must be complied with promptly. Furthermore, the judgments form legally binding precedents for Member States that were not parties in proceedings before the Court. To make the point in words used by the treaty, the judgments constitute *stare decisis*.¹⁸ Accordingly the Court has been scrupulous in ensuring that all Member States and the Community have the opportunity to participate in the original jurisdiction proceedings even if they are not formally parties to the particular dispute. The Court routinely extends an invitation to Member States and the Community to make submissions on the relevant law or the material facts in cases where they are not parties.

A further step was taken in the recent case of *Myrie v Barbados*.¹⁹ As a rule, intervention by a non-party to proceedings is permitted by both the founding treaties²⁰ and the Rules of Court.²¹

¹⁸ RTC Articles 215 and 221.

¹⁹[2013] CCJ 3 (OJ).

²⁰ See RTC Article 208; Agreement Establishing the Caribbean Court of Justice Article XVIII.

But in *Myrie*, one Member State, Jamaica, was allowed to intervene in proceedings which it had previously permitted its national to initiate against Barbados, another Member State. The Court justified allowing Jamaica to intervene on the ground that Jamaica had substantial legal interests beyond outcome of the dispute for its national. This was because the decisions the Court reached in the original jurisdiction were capable of providing an authoritative and binding precedent to guide the conduct of *all* Member States. The Court would also benefit in resolving the dispute from the possible assistance the Intervener could provide whether by way of adducing relevant evidence or making legal submissions.

Enforcement of the Court's judgments is the subject of specific treaty provisions. Member States are obliged to take all necessary steps, including the enactment of legislation, to ensure that decisions of the Court are enforced by national courts and authorities, 'as if it were a judgment... of a superior court' of that Member State.²² Each Member State has enacted legislation incorporating this provision into its national law and it therefore seems entirely feasible that judgments in the CCJ's original jurisdiction will carry the force of judgments given by national courts. The machinery and mechanisms available to enforce domestic judgements are the same machinery and mechanisms available to enforce the original jurisdiction judgements of the Court. This is a virtual *fait accompli* in the growing number of countries that have accepted the CCJ as their final court of appeal and therefore as their highest national court. There is no need to resort to the sometimes cumbersome process of bringing a private international law action to enforce the CCJ judgment as if it were the judgment of a foreign court.

As regards the specific issue of the award of damages, Professor Ralph Carnegie has opined²³ that the CCJ probably evidences a greater tendency towards supra-nationality than the ECJ. In *TCL and TCL Guyana Incorporated v Guyana*²⁴ the CCJ applied the principles announced in the ECJ's case of *Francovich v Italy*²⁵ and found that a Member State could be liable in damages for breach of Community law. Whereas the ECJ would normally remit such cases to the national

²¹ See Caribbean Court of Justice (Original Jurisdiction) Rules 2006 Part 14.

²² Agreement Establishing the Caribbean Court of Justice Article XXVI.

²³ See Prof AR Carnegie, 'How Exclusive is 'Exclusive' in Relation to the Original Jurisdiction of the Caribbean Court of Justice? A Consideration of Recent Developments' (Faculty Workshop Series, Faculty of Law, University of the West Indies, Cave Hill Campus, November 25, 2009) 14 -15.

²⁴ [2009] CCJ 5 (OJ).

²⁵ [1991] ECR-1 5357.

courts for determination of the quantum of damages, the CCJ indicated it would itself decide on quantum where the conditions for the award of damages were met, namely that: 1) the treaty provision breached was intended to benefit the claimant; 2) such breach was serious; 3) there was a substantial loss; and 4) there was a causal link between the breach by the State and the loss or damage to the Claimant. Adopting these criteria, the Court awarded *Myrie* damages against Barbados in a sum of over US\$35,000.00.²⁶

NATIONAL RESPONSE

The implications of the treaty provisions for asserting the supra-nationality of the CCJ has not gone unnoticed by Member States of the Community. Even before the Court became operational in 2005, Jamaica, acting under what it perceived to be the implicit requirements of a decision from the Privy Council,²⁷ made idiosyncratic changes to the wording of national legislation incorporating treaty provisions on referrals to the CCJ judgments in order to make clear that national courts and tribunals do not abrogate their jurisdiction in favour of the CCJ but could in their discretion seek an advisory opinion on interpretation of the RTC.²⁸ Whether this legislation is consistent Jamaica's treaty obligations may well turn upon the interpretation to be given to a 2005 Protocol to the RTC which provides that the original jurisdiction does not require a Contracting Party to enact legislation that is inconsistent with its constitutional structure or the nature of its legal system.²⁹ This is a matter yet to come before the Court. It is the case, however, that with the actual operation of the Court, Member States have accepted the role of the Court without demur and have complied with or otherwise given effect to its judgments. The concern by the Claimants in *TCL and TCL Guyana Incorporated* that Guyana had not 'promptly' re-imposed the common external tariff on extra-regional cement as required under the CCJ

²⁶ A possible explanation for the different attitude towards assessing damages may be that most of the relevant cases come up to the ECJ through the referral process and it is therefore natural for the case to be remitted to the national courts for final determination whereas all the cases heard thus far in the CCJ's original jurisdiction have started in the regional court.

²⁷ See *Independent Jamaica Council for Human Rights v Marshall-Burnett* [2005] UKPC 3, [2005] 2 AC 356, (2005) 65 WIR 268.

²⁸ See The Caribbean Court of Justice (Original Jurisdiction) Act 2005 (Jamaica) s 7 (1).

²⁹ See Protocol to the Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market and Economy regarding the Relationship between Provisions on the Original Jurisdiction of the Caribbean Court of Justice and the Constitutions of States Parties Article 1.

judgment³⁰ prompted them to bring contempt proceedings against the Attorney-General³¹ but those proceedings were in relatively short time overtaken by the compliance with the Court's judgment.

OBSTACLES TO SUPRA-NATIONALITY

There are two main obstacles to the assertion of supra-nationality in CARICOM. First and foremost the Constitutions of Member States announce *ex cathedra* their superiority over all other law which by definition includes regional integration law. Such other law are void to the extent they are inconsistent with the Constitution and must to that extent be struck down by the national courts. In the words of Section 1 of the Barbados Constitution, for example:

This Constitution is the supreme law of Barbados and, subject to the provisions of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.

Insofar as the English-speaking Member States of CARICOM are concerned the rule of constitutional supremacy over regional integration law is but another application of the dualist tradition inherited from the common law of England which affirms that international and domestic law are separate and independent systems of law with each supreme in its own sphere of operation. This stands in sharp contrast with the monist doctrine adopted in the civil law members of the Community such as Suriname which posits that the two systems are integrated and that international law prevails over national law in the event of a conflict. For Suriname, then, the possibility of the penetration of CARICOM law remains a real possibility although the peculiar distinctive provisions of that legal system must be considered before a definitive verdict can be rendered on the point. Even in the common law jurisdictions of the Community, the supremacy of the Constitution is subject to other provisions in the Constitution. Such other provisions may therefore provide for the application, or at least enable the non-obstruction, of Community law.

³⁰ See *TCL v Guyana* [2009] CCJ 5 (OJ).

³¹ See *TCL v Guyana* [2010] CCJ 1 (OJ).

Secondly, the CARICOM Treaty itself appears to subject Community law to the dictates of the national legal systems. Legally binding rights and obligations are not created until the relevant constitutional procedures of Member States are satisfied. Thus Article 240 of the Revised Treaty of Chaguaramas states, as a ‘saving’ provision, that:

Decisions of competent Organs taken under this Treaty shall be subject to the relevant constitutional procedures of the Member States before creating legally binding rights and obligations for nationals of such States.

This is a difficult provision to interpret from several perspectives. The prima facie subjection of Community law to national law is not inevitable because ‘the relevant constitutional procedures’ could conceivably provide or be interpreted as permitting the direct application of Community Law, as is likely to be the case in Suriname. Even in the common law jurisdictions it may be possible for Community law to apply directly where there are no contrary provisions in the Constitution or (perhaps) in legislative law, a point taken up in the *Myrie* decision. This follows from the provision in the ‘supreme law clause’ which makes the supremacy of the Constitution subject to other provisions in the Constitution.

But more generally, it is not obvious that the framers of the foundational treaty intended to subject CARICOM Law to the national legal system because Article 240 RTC speaks only in terms of ‘decisions’ of the competent Community Organs. A more important source of Community law is the actual treaty provisions themselves of the RTC. In Europe much of the discussion of direct effect and supremacy of Community law centred around provisions in the foundation treaties;³² the efficacy of the equivalent provisions in the CARICOM treaty does not seem limited by Article 240.

Finally, an expansive view of Article 240 RTC could run counter to the general thrust of the integration project under which Member States are required to carry out their treaty obligations ‘promptly’ and to ‘take all necessary steps’ to do so, including, where necessary, the enactment

³² See Treaty Establishing the European Economic Community Articles 12, 37, 53, 93, 102.

of legislation. The Court has on several occasions emphasized that these are binding obligations for CARICOM Member States with the clear implication that there exists liability under Community Law in the case of breach. As yet there has been no occasion for the Court to pronounce upon the implication of such breaches for domestic law but supra-nationality in Europe has meant that the offending national law or practice may be disregarded or ignored,³³ and in some instances European Community law has been deemed operative after the elapse of a reasonable time for the national state to act.³⁴

CONCLUSION

The CCJ may not have gone as far as the premier regional integrationist court, the ECJ, in responding to ‘legal vagrancy’ on the part of the Member States by declaring the direct effect and supremacy of Caribbean Community law. However, the 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.³⁵ The Court has affirmed the concept of ‘Community law’,³⁶ its power to pronounce upon breaches of Community law,³⁷ make coercive orders against Member States,³⁸ and award damages in favour of individuals against Member States.³⁹ In *Myrie v Barbados* the Court asserted that a young Jamaica woman had the right, given her in accordance with a 2007 decision of the Conference of Heads of Government, to travel freely to Barbados and awarded her damages when she was questioned, detained and searched at Grantley Adams International Airport in Barbados before being deported to Jamaica. The Court was not impressed with the argument that Barbados had not yet adopted legislation to implement the Conference decision and that until then, in accordance with the Barbados

³³ See Case 231/78 *Commission v United Kingdom* [1979] ECR 1447.

³⁴ In Case 148/78 *Criminal proceedings against Tullio Ratti* [1979] ECR 1629 the ECJ ruled that after a time period stipulated in a directive expires, the national law was ineffective and so Community law, the directive, was in force in the national legal system.

³⁵ See *TCL v The Caribbean Community* [2009] CCJ 2 (OJ) [32].

³⁶ See *Myrie v Barbados* [2013] CCJ 3 (OJ) [8].

³⁷ *ibid* [52].

³⁸ See *TCL v Guyana* [2009] CCJ 5 (OJ) [43].

³⁹ *ibid* [33]; *Myrie v Barbados* [2013] CCJ 3 (OJ) [93] – [94].

Constitution, Miss Myrie could not claim any right under regional law. The Court declared that the Community treaty:

...does not require that Member States enact a binding Community decision into domestic law in order to create at the Community level legally binding rights and obligations. The States are merely required to give domestic effect to such a decision subject to their own relevant constitutional procedures. If these constitutional procedures require domestic legislation, then the State's legislature must be involved in order to give municipal courts the authority to adjudicate those rights and obligations at the municipal level. But in lieu of enacting new or amending old legislation *this objective may in some cases also be accomplished administratively or even judicially in cases where the Constitution or the existing domestic legislation leaves room for so doing*. In such cases domestic effect to the State's treaty obligations can and ... *must*, if possible, be given by the executive or judicial branches of that State.⁴⁰

These observations may not have the grandiose or soaring affirmations of supra-nationality evident in the passage quoted earlier from *Costa v ENEL* but they do mark a clear recognition that in cases where there is no conflict with the Constitution or legislation, Community law may have a direct effect in national legal systems of Caribbean States. Where there is such conflict the Member State is under an obligation to bring local law into conformity with Community law, whether that law be legislation or the Constitution.

The nuanced supra-nationality that has been hinted at by the CCJ helps to ensure promptitude of implementation and enforcement of Community law, as well as clarity and uniformity in the interpretation of regional rights and obligations especially in the context of multiple states with varying ideas and application of law. Direct effect, though seemingly affirmed albeit in the limited terms of *Myrie*, can assist in halting and reversing the corrosion of confidence of the Caribbean public in the regional integration project. Even this modest advance in the jurisprudence suggests that we have come a long way since the demise of the ideals of the West Indian Federation and that the integration process is heading in the direction of greater effectiveness in the domestic law of Member States. The diffident assertion of the direct effect

⁴⁰ Ibid *Myrie* [54](emphasis added).

doctrine may be a small step for the Caribbean Court of Justice but in hindsight may well come to represent one giant leap for the Caribbean Community.